MINUTES OF SPECIAL CONVOCATION

Thursday, 29th April, 1999
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Aaron, Adams, Angeles, Arnup, Backhouse, Banack, Carey, Carpenter-Gunn, Chahbar, Cole, Copeland, Cronk, Crowe, DelZotto, Elliott, Feinstein, Gottlieb, Keenan, Lawrence, MacKenzie, Millar, Murphy, Puccini, Robins, Ross, Stomp, Swaye, Topp, Wardlaw, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

.....

DISCIPLINE

Ms. Lesley Cameron, Senior Counsel-Discipline introduced Mr. Roy Stephenson who acted as Duty Counsel.

RE: Mitchell Lynn HOUZER - Toronto

The Secretary placed the matter before Convocation.

Ms. Elliott and Messrs. Adams and Murphy withdrew for this matter.

Mr. Jonathan Batty appeared on behalf of the Law Society. No one appeared for the solicitor nor was the solicitor present.

Mr. Batty requested an adjournment on consent to the Discipline Convocation on June 24th, 1999.

The adjournment was granted.

Re: Gerald Bernie YASSKIN - Toronto

The Secretary placed the matter before Convocation.

Messrs. Topp, Chahbar and Carey and Ms. Cronk withdrew for this matter.

Mr. Batty appeared on behalf of the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 26th March, 1999, together with an Affidavit of Service sworn 30th March, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 26th March, 1999 (marked Exhibit I), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 9th April, 1999 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Philip M. Epstein, Q.C., Chair
Thomas J. P. Carey
Abdul A. Chahbar

In the matter of The Law Society Act and in the matter of	Hugh Corbett For the Society
GERALD BERNIE YASSKIN of the City of Toronto a barrister and solicitor	Not Represented For the solicitor Heard: July 29, 1998 and March 18, 1999

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

Complaint D46/98 was issued on April 8, 1998 against Gerald Bernie Yasskin alleging that he was guilty of professional misconduct.

The matter was heard in public on July 29, 1998 and March 18, 1999 before this Committee comprised of Philip M. Epstein, Q.C., Chair, Thomas J. P. Carey and Abdul A. Chahbar. The Solicitor attended the hearing and represented himself. The Law Society was represented by Jonathan Batty on July 29, 1998 and by Hugh Corbett on March 18, 1999.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D46/98

1. a) The Solicitor failed to produce books, records, accounts, and papers in connection with his practice to the Law Society in breach of section 18(1) of Regulation 708 under the *Law Society Act*; and

a) The Solicitor breached his Undertaking to the Law Society dated May 23, 1996 to reply to written communications from the Law Society within three weeks and to reply to telephone communications within two business days.

Evidence

There is an Agreed Statement of Facts in this matter and because of the lengthy history of this matter, it is necessary to set them out in detail.

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D46/98 and is prepared to proceed with a hearing of this matter on a date to be fixed by the Hearings Management Tribunal.

II. IN PUBLIC / IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act.*

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D46/98 and this agreed statement of facts and admits the particulars and facts contained therein. The Solicitor also admits that the particulars alleged in the Complaint supported by the facts as hereinafter stated constitute professional misconduct and represents the entirety of the evidence which will be entered with respect to professional misconduct.

IV. FACTS

A. Background

4. The Solicitor was called to the Bar in 1975. He is a sole practitioner.

B. Complaint D46/98

Particular 2(a) The Solicitor failed to produce books, records, accounts, and papers in connection with his practice to the Law Society in breach of section 18(1) of Regulation 708 under the Law Society Act; and

Particular 2(b) The Solicitor breached his Undertaking to the Law Society dated May 23, 1996 to reply to written communications from the Law Society within three weeks and to reply to telephone communications within two business days.

5. An investigation was authorized under sections 9 and 18 of Regulation 708 under the *Law Society Act* (Document Book, Tab 1).

6. Anita McCann, an Examiner with the Law Society's Audit and Investigation Department, (the "Examiner") attended the Member's office address at 204- 4580 Dufferin Street, Toronto on September 29, 1997 to conduct the authorized investigation.

7. Prior to the Examiner's September 29, 1997 visit at the Solicitor's office, the Examiner received and reviewed the Complaint Department's file (Document Book, Tab 2) with respect to Girolamo Gucciardi ("Gucciardi"). Gucciardi complained to the Law Society in a letter dated January 16, 1997 that he provided the Solicitor with a $5,000 retainer in November 1993 and a further $7,000 over the next two years, for a total of $12,000. Gucciardi claimed, among other things, that the Solicitor failed to properly account to him with respect to his services and billings. The Solicitor replied to the Law Society regarding Gucciardi's complaint by letter dated April 16, 1997. The Solicitor did not reply to the billing concerns expressed by Gucciardi; the Solicitor did, however, state : "If I can be of further assistance, please feel free to contact the writer." The Law Society called the Solicitor on August 20, 1997 to obtain further explanation and information with respect to the Solicitor's Gucciardi file.

8. The Solicitor wrote to the Law Society on August 22, 1997 (Document Book, Tab 2) with respect to Gucciardi's complaint. The Solicitor wrote:

> We had the file when we first responded to your first letter but in the interim this file and four to five other files have gone missing. We will continue our search and contact you as soon as the file is located.

9. On October 14, 1997 the Law Society wrote to the Solicitor (Document Book, Tab 3). In this letter the Examiner requested the Solicitor to provide the following for her review:

1) Girolamo Gucciardi client ledger;
2) Trust and general receipts and disbursements journals for the period November 1, 1993 through to December 31, 1995, including trust and general deposit books; and
3) Fees journal for the period November 1, 1993 to December 31, 1995 and Gucciardi fee billings with respect to this matter.

The Solicitor was requested to deliver these records to the Law Society for review by November 4, 1997.

10. On November 7, 1997, the Solicitor wrote to the Society (Document Book, Tab 5). The Solicitor stated that: Mr. Gucciardi never made any payments in advance. In fact, Mr. Gucciardi's payments were always made by his wife and always after the work was done or on the day of the hearing. As a result, there were never any trust deposits.

Even if there had not been any trust deposits, Gucciardi's payments to the Solicitor should have been recorded in the Solicitor's general receipts and disbursements journals, deposit books, and fees journal.

11. The Solicitor maintains that upon receipt of each payment from, or on behalf of, Gucciardi, a statement of account was mailed to his home address prior to the cheque being deposited. The Solicitor, to date, has not provided copies of these statements of account to the Law Society.

12. On November 18, 1997, the Law Society wrote to the Solicitor (Document Book, Tab 6). The Solicitor was advised that the responses in his November 7, 1997 letter and November 10, 1997 telephone call (Document Book Tab 4) to the Law Society was not satisfactory to the Law Society's Audit and Investigation Department. The replies were not satisfactory because the Solicitor was requested to produce, apart from his trust records, general receipts and disbursements journals, deposit books, and his fees journal. The Solicitor was specifically requested, in writing, to produce all these books and records which were first requested by the Law Society on October 14, 1997. The Solicitor should have replied to this letter by December 9, 1997; he did not, and thereby breached his undertaking to the Law Society (Document Book, Tab 17).

13. On December 10, 1997, the Law Society telephoned the Solicitor with respect to the production of these books and records (Document Book, Tab 7). The Solicitor did not return this telephone call from the Examiner. The Solicitor should have replied to this telephone call by December 12, 1997; he did not, and thereby breached his undertaking to the Law Society.

14. On December 12, 1997, the Law Society wrote to the Solicitor with respect to the Solicitor's failure to respond to the Society's letter of October 14, 1997 and November 18, 1997 as well as the telephone message from December 10, 1997 (Document Book, Tab 8). The Law Society requested that the Solicitor respond to these requests in writing by December 19, 1997.

15. On December 18, 1997, the Solicitor called the Law Society (Document Book, Tab 9). He stated that he had received the Law Society's letter of December 12, 1997 and that he would contact the Examiner in "a week's time" once he had had a chance to review this file.

16. On December 22, 1997, the Solicitor again called the Law Society (Document Book, Tab 10). The Solicitor left a message for the Examiner that he would respond to the Law Society by January 5, 1998.

17. On January 28, 1998, the Law Society called the Solicitor as no response had been received from him apart from telephone messages on December 18 and 22, 1997 (Document Book, Tabs 11 and 12). In addition to breaking his self-imposed deadline for response to the Law Society by January 5, 1998, the Solicitor also stood in breach of his undertaking to the Law Society; he did not reply in writing to the Law Society's letters of November 18 or December 12, 1997. The Solicitor advised the Examiner that he would provide a written response to the Law Society's letters by January 29 or 30, 1998.

18. On February 2, 1998, the Solicitor wrote to the Law Society (Document Book, Tab 13). The Solicitor stated "I have the material from January 31, 1995 to December 31, 1995." The Solicitor produced his trust and general receipts and disbursements journals, including trust and general deposit books, and his fees journal for the period after January 31, 1995. This production, however, did not comply with the request from the Law Society to have the Solicitor produce these books and records for the period which included November 1, 1993 to January 31, 1995. The Gucciardi client ledger was also not produced.

19. The Solicitor's February 2, 1998 letter further stated:

> I have changed bookkeepers and accountants as of January 1996 and have been unable to obtain the material prior to January 31, 1995. My previous accountant indicates that he no longer has any of the files and my former bookkeeper is seriously ill with cancer and is not dealing with bookkeeping any longer.

20. On February 3, 1998, the Law Society once again called the Solicitor (Document Book, Tab 14). The Solicitor advised the Society that no client ledger for Gucciardi had been kept because the Solicitor had never received any trust money on behalf of this client (Document Book, Tab 15). The Solicitor was asked how he proposed to deal with the records from November 1, 1993 to January 31, 1995. The Solicitor indicated that he would write to his former bookkeeper and request her to locate his books and records for 1993 and 1994. The Solicitor provided the Law Society with a copy of the letter he sent to his former bookkeeper (Document Book, Tab 16).

21. To date, the following items have still not been produced to the Law Society despite written requests and follow-up telephone calls:

1) Girolamo Gucciardi client ledger;
2) Trust and general receipts and disbursements journals for the period November 1, 1993 through to January 31, 1995, including trust and general deposit books; and
3) Fees journal for the period November 1, 1993 to January 31, 1995 and Gucciardi fee billings with respect to this matter.

The Solicitor was first requested to deliver these records to the Law Society for review by November 4, 1997.

22. In the Solicitor's communications with the Law Society he has failed to substantively respond to the Law Society's communications. In the course of the investigation of this matter, the Solicitor has breached his undertaking to the Law Society to respond in writing within three weeks to its letters of November 18 and December 12, 1997 and to respond within two days to its telephone call of December 10, 1997.

V. DISCIPLINE HISTORY

23. The Solicitor does not have a discipline history.

DATED at Toronto, Ontario, this 25th day of June, 1998."

REASONS FOR FINDING

The Complaint was sworn on the 8th of April, and the matter has taken a relatively leisurely pace until finally being disposed of before this Discipline Committee. In particular, in July of 1998, the Solicitor was granted a lengthy adjournment in order to get his books and records up to date to the satisfaction of the Society. He was required to do that on or before October 2nd, 1998. The matter came on again before the Discipline Panel on December 18th, 1998 and as a result of a lack of quorum the matter did not proceed at that time. Nevertheless, the remaining panel members were again advised that the Solicitor's books and records were still not up to date, although the Solicitor was endeavouring to accomplish that task.

We were told at the hearing on March 18th that the relevant files and records are lost and are being reconstructed. We were told further that it will take approximately three more weeks for the reconstruction to be complete at which time the Solicitor intends to deliver the reconstructed files to the Society for them to review.

The Solicitor does not have a discipline history, but in 1996, a similar complaint was withdrawn by the Society in return for the Solicitor's undertaking to reply to written communications from the Law Society within three weeks and to reply to telephone communications within two business days.

As the Agreed Statement of Facts has made clear, the Solicitor did not comply with that undertaking and also failed to produce the books, records, accounts and papers in connection with his practice to the Society in breach of section 18 (1) of Regulation 708 of the *Law Society Act*.

The Solicitor was found guilty of professional misconduct on consent and in accordance with the Agreed Statement of Facts.

RECOMMENDATIONS AS TO PENALTY

The Committee recommends that Gerald Bernie Yasskin be reprimanded in Convocation if the following books and records are either produced, or reconstructed, to the satisfaction of the Law Society:

1. Girolamo Gucciardi client ledger;
2. Trust and general receipts and disbursements journals for the period November 1, 1993 through January 31, 1995, including trust and general deposit books; and
3. Fees journal for the period November 1, 1993 to January 31, 1995 and Gucciardi fee billings with respect to this matter.

If these books and records are not produced, or reconstructed, to the satisfaction of the Law Society by the time the matter is heard by Convocation, then the Committee recommends that the Solicitor be suspended for one month and indefinitely thereafter until the books and records are produced or reconstructed to the satisfaction of the Law Society.

The Committee further recommends that the Solicitor pay costs in the amount of $500 to be paid within sixty days of the date the matter is heard by Convocation.

REASONS FOR RECOMMENDATION

It has taken far too long for the Solicitor to comply with the request of the Society to bring his books and records up to date. That is a matter of serious concern to this Committee. It is clear that the Solicitor should have responded positively and much more expeditiously. This is particularly so in light of the undertaking given by the Solicitor to the Society in May of 1996.

After lengthy discussions between the Society and the Solicitor, there was a joint submission. In accordance with long standing practice, the discipline panel is loath to depart from a joint submission unless there is very good reason to do so. Although we are concerned about the delay by the Solicitor and the fact that the books and records are still as of this date outstanding, we are satisfied that the Solicitor intends to get these books and records in order by the time of Convocation and he understands that the matter is peremptory to him and that he will be suspended for one month and indefinitely thereafter if the books and records are not ready at the time this matter is dealt with in Convocation.

Accordingly, we accept the joint submission as to penalty which is that the Solicitor be reprimanded in Convocation if the following books and records are either produced, or reconstructed, to the satisfaction of the Society:

1. Girolamo Gucciardi client ledger;
2. Trust and general receipts and disbursements journals for the period November 1, 1993 through January 31, 1995, including trust and general deposit books; and
3. Fees journal for the period November 1, 1993 to January 31, 1995 and Gucciardi fee billings with respect to this matter.

If these books and records are not produced, or reconstructed, to the satisfaction of the Law Society by the time the matter is heard by Convocation, then the Committee recommends that the Solicitor be suspended for one month and indefinitely thereafter until the books and records are produced or reconstructed to the satisfaction of the Law Society.

Although the joint submission indicates that the parties will make their own submissions as to costs, this matter too was resolved on consent and the Solicitor will pay costs to the Society in the sum of $500, to be paid within sixty days of the date that Convocation disposes of this matter.

Gerald Bernie Yasskin was called to the Bar on March 21, 1975.

ALL OF WHICH is respectfully submitted

DATED this 26th day of March, 1999

Philip M. Epstein, Q.C., Chair

There were no submissions on the finding of professional misconduct.

It was moved by Ms. Ross, seconded by Mr. MacKenzie that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if his books and records are produced or reconstructed to the satisfaction of the Society failing which the solicitor be suspended for 1 month and indefinitely thereafter until the books and records were produced and further that the solicitor pay costs in the amount of $500 to be paid within 60 days of the date the matter is heard by Convocation.

Mr. Batty advised that the solicitor had provided his books and records to the satisfaction of the Law Society and made submissions in support of the joint submissions made at the hearing that the solicitor be reprimanded in Convocation and pay the Society's costs of $500.

The solicitor concurred.

It was moved by Mr. MacKenzie, seconded by Mr. Wilson that the solicitor be reprimanded in Convocation and pay costs in the amount of $500 within 60 days.

Carried

The Treasurer administered the reprimand.

Re: William Ernest DUCE - Burlington

The Secretary placed the matter before Convocation.

Messrs. Topp, Adams, DelZotto and Swaye and Ms. Cronk withdrew for this matter.

Mr. Glenn Stuart appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 25th March, 1999, together with an Affidavit of Service sworn 30th March, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 26th March, 1999 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

W. Michael Adams, Chair
Elvio L. DelZotto, Q.C.
Jane Harvey

In the matter of The Law Society Act and in the matter of	Glenn Stuart For the Society
WILLIAM ERNEST DUCE of the City of Burlington a barrister and solicitor	Not Represented For the solicitor
	Heard: January 27, 1999

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 30, 1998 Complaint D102/98 was issued against William Ernest Duce alleging that he was guilty of professional misconduct.

The matter was heard in public on January 27, 1999 before this Committee composed of W. Michael Adams, Chair, Elvio L. DelZotto, Q.C. and Jane Harvey. The Solicitor did not attend the hearing. He was represented during the proceedings by Martin M. Herman, although Mr. Herman did not attend the hearing. Glenn Stuart appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D102/98

2. a) During the period from August 1995 to July 1997, he misappropriated a total sum of $280,962.47, more or less, from the funds which he held in his mixed trust account on behalf of all of his clients;

c) during the period from August 1995 to July 1997, he misapplied the sum of $261,279.19 from the funds which he held in his mixed trust account on behalf of all of his clients, to the benefit of clients who did not have funds in that amount on deposit in the trust account;

d) throughout the period from August 1995 to July 1997, the Member failed to maintain sufficient balances on deposit in his mixed trust bank accounts to meet all his obligations with respect to monies held in trust for clients, thereby breaching subsection 14(12) of Regulation 708 made pursuant to the Law Society Act;

e) in or about December 19, 1996, he breached Rule 7 of the Rules of Professional Conduct by borrowing the sum of $75,000.00 more or less, from his client Robert Foa; and,

f) on or about June 1, 1980, he breached Rule 18 as it then was, of the Rules of Professional Conduct, by borrowing the sum of $10,000.00 from his clients Hugh and Joyce Merritt without ensuring that his clients' interests were fully protected by the nature of the case and by independent legal representation.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Member admits service of Complaint D102/98 and is prepared to proceed with a hearing of this matter on January 26-27, 1999.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act.*

III. ADMISSIONS

3. The Member has reviewed Complaint D102/98 and this Agreed Statement of Facts with his counsel, Martin Herman, and he admits particulars 2 (a), (c) and (d) and the facts contained therein. The Member admits that the said particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Member was called to the Bar on March 21, 1969. During the period which is the subject of this Complaint, he practised as a sole practitioner in the Brantford area. On July 1, 1997, he undertook to the Law Society not to engage in the practice of law until the completion of these proceedings. Since October 1, 1997, he has been administratively suspended for non-payment of his Errors and Omissions Insurance levy.

Particular 2 (a) during the period from August 1995 to July 1997, he misappropriated a total sum of $280,962.47, more or less, from the funds which he held in his mixed trust account on behalf of all of his clients;

(b) in the alternative to particular 2(a), during the period from August 1995 to July 1997

(i) he misappropriated a total sum of $214,455.86, more or less, from the funds which he held in his mixed trust account on behalf of all of his clients; and

(ii) he misapplied, in addition to the sum identified in particular 2(c), the sum of $66,506.61 from the funds which he held in his mixed trust account on behalf of all of his clients, to the benefit of clients who did not have funds in that amount on deposit in the trust account.

(c) during the period from August 1995 to July 1997, he misapplied the sum of $261,279.19 from the funds which he held in his mixed trust account on behalf of all of his clients, to the benefit of clients who did not have funds in that amount on deposit in the trust account;

5. The Law Society first commenced an audit of the Member's practice on May 14, 1997, as a result of the Member's failure to make his annual filings for the fiscal year ending December 31, 1995. The Law Society examiner and the Member were unable to schedule an appointment in May or June; however, the audit was accelerated when the conduct which is the subject of this Complaint was first brought to the Law Society's attention by a complaint from one of the Member's clients on July 4, 1997.

6 As of July 8, 1997, the Member did not have sufficient funds in his trust account to meet his obligations to his clients. As of that date, the shortage in the Member's trust account totalled $368,483.95, based on trust liabilities of $373,867.73, less a balance in the account of $5,383.78. As he did not have up-to-date records, the Member provided the Law Society with a handwritten listing of his trust liabilities as at July 1997 (Document Book, Tab 1).

7. As detailed in the following paragraphs, the Solicitor either misapplied or misappropriated the amount of the trust shortage, as well as certain additional amounts which he injected into his trust account to cover the initial shortage.

8. As a result of the shortage in the Member's mixed trust account, co-signing controls were placed on the account on July 8, 1997. Subsequently, on July 18, 1997, the Member also provided to the Law Society, at the Society's request, a written undertaking not to practise law until the conclusion of any discipline proceedings arising from the audit.

9. The Member did not maintain adequate records for his trust account during this period and, in particular, he failed to maintain client trust ledger cards or monthly trust comparisons. The principal books maintained by the Solicitor were monthly trust journals. Copies of the Member's trust journals for the period from August 1995 to May 1997, inclusive, are contained at Tabs 2 to 24 of the Document Book. As a result of the inadequacy of the Member's books and records, certain information regarding specific deposits and withdrawals cannot be obtained.

10. From August 1995 to May 1996 the Member maintained his trust account at the Toronto-Dominion Bank in Brantford; the available bank statements for this account for this period are contained at Tabs 25 to 30 of the Document Book. From May 1996 to February 1998, he maintained his trust account at the Bank of Montreal in Brantford; the bank statements for this account for this period are contained at Tabs 31 to 45 of the Document Book.

11. The Member had, at least, the following trust liabilities to clients as at July 1997:

Date funds received	Client	Amount
August 22, 1995	Joyce Merritt	$ 6,840.00
July 15, 1996	Sidney Wraight	$ 54,619.43
January 31, 1997	Karen Ashley/Bank of Montreal	$ 109,369.94
February 19, 1997	John R. Arnold	$ 42,444.06
June 11, 1997	Lillart Limited	$ 92,211.99
June 11, 1997	Albertus Noort	$ 48,382.31
June 24, 1997	James D. Boyd	$ 20,000.00
	TOTAL	$ 373,867.73

The specifics of these liabilities are detailed in the following paragraphs.

Joyce Merritt: $8,000

12. The Member had acted for Joyce and Hugh Merritt on various matters since approximately 1974. Hugh Merritt died in 1993. Joyce Merritt is 75 years old. On September 8, 1992, Joyce Merritt retained the Member with respect to injuries she sustained falling on a sidewalk in the City of Brantford on September 3, 1992.

13. On the same date, September 8, 1992, the Member put the Corporation of the City of Brantford on notice that Mrs. Merritt would be claiming damages against the City. The Member then prepared a Statement of Claim on behalf of Mrs. Merritt against the City of Brantford and Ennio Cupoli, the owner of the property in front of which Mrs. Merritt fell (Document Book, Tab 46). This Claim was subsequently issued, pleadings were exchanged and discoveries were held.

14. The action was settled in October 1995. On October 19, 1995, Mrs. Merritt executed a Full and Final Release (Document Book, Tab 47) in settlement of her claim upon payment of the amount of $8,000.00, inclusive of costs.

15. By letter dated October 31, 1995 (Document Book, Tab 48), counsel for the Defendants forwarded to the Member a cheque in the amount of $8,000.00, payable to William E. Duce, in trust, in full settlement of Mrs. Merritt's claim. The following day, the Member forwarded to the Defendant's counsel an executed full and final release and an Order dismissing the action without costs.

16. The Member deposited the $8,000.00 cheque, into his trust account, account #0314 0485449, at the Toronto-Dominion Bank on November 1, 1995, as reflected on the bank statement for that account for November 1995 (Document Book, Tab 28). These funds were to be held in trust to the credit of Mrs. Merritt.

17. The Member's Trust Journal for November 1995 (Document Book, Tab 5) indicates that the only money received into trust on November 1, 1995, was a deposit of $8,000, being the funds received on behalf of Mrs. Merritt. However, the Member misapplied these funds in his Trust Journal to the benefit of his client Leonard Kesik, who had no relationship with Mrs. Merritt, and not to the benefit of Mrs. Merritt.

18. As reflected in the trust journal (Document Book, Tab 5), the Member then issued two cheques on that same day, November 1, 1995, one in the amount of $7,500.00 to Re/Max Erie S. on behalf of his client "Kesik"(Document Book, Tab 49) and the other in the amount of $500.00 payable to himself on behalf of his client "Kesik". There were no funds in the trust account to the credit of Kesik at the time. The Member thereby used the $8,000 held for Mrs. Merritt either for the benefit of Kesik or himself.

19. By letter dated May 7, 1996 (Document Book, Tab 50), the Member advised Mrs. Merritt that he had now resolved her matter and that he would meet with her upon his return in the latter part of May, 1996. The Member has not met with Mrs. Merritt since writing that letter.

20. In the handwritten trust listing (Document Book, Tab 1) which the Member prepared and provided to the Law Society in July 1997, identifying clients whose money he should have been holding in trust, the Member indicated that he owed Mrs. Merritt $6,840.00. The Member states that the figure of $6,840 represents the $8,000.00 in settlement funds, less his fees to Mrs. Merritt. Although the Law Society does not dispute that these fees may have been earned, the Member never rendered an account to Mrs. Merritt for this, or any other, amount of fees.

21. By letter dated October 6, 1997 (Document Book, Tab 51) , Andrew Loucks, a Hamilton solicitor, wrote to Mrs. Merritt and advised her that he acted for a group of the Member's friends who wanted to assist the Member in making restitution to the Member's clients who were owed money, including herself. Mrs. Merritt did not respond to this letter and has heard nothing further regarding the matter since that time.

22. To date, the Member has not paid Mrs. Merritt any portion of the $8,000 which he received in trust for her.

Sidney Wraight

23. Sidney Wraight ("Wraight") is an elderly gentleman who had been a friend of the Member's father. The Member acted for Wraight from time to time for many years. In or about July 1996, Wraight retained the Member to represent him with respect to the sale of his home at 110 Chestnut Street, Brantford. Wraight was selling his home as he had been admitted to the Leisureworld Nursing Home in Brantford in April 1996.

24. At the same time as he entered the nursing home, Wraight granted a power of attorney to his friend J. Edmund Foster ("Foster") (Document Book, Tab 52). Foster used this power of attorney to pay the required fees to Leisureworld for Wraight's care, as well as various incidental expenses such as newspapers and church givings from Wraight's bank account. Wraight's sources of income were deposited to this account.

25. Upon closing of the house transaction on July 15, 1996, the Member received the sum of $65,194.37, in trust for Wraight, as shown in his trust journal for July 1996 (Document Book, Tab 14). The Member deposited this amount to his trust account on the same date, as shown by the deposit slip (Document Book, Tab 53) and the bank statement for the trust account for July 1996 (Document Book, Tab 33). The Member did not report to Wraight or Foster on this transaction, although Foster was aware of the approximate amount held by the Member.

26. After the closing of the house transaction, Foster would need to approach the Member each month to ask him to forward funds to Foster from the amount which the Member held in trust for Wraight to cover some of the expenses which Foster was paying on Wraight's behalf. The Member would pay these sums to Foster when requested. Based on discussions with the Member, Foster understood that the funds held by the Member were invested in three different mortgages, although no other particulars were provided to Foster.

27. The following chart summarizes the legitimate receipts and disbursements of funds by the Member from his trust account on behalf of Mr. Wraight, beginning in July 1996:

Date	Item	Receipts	Disbursements	Tabs
July 15, 1996	Sale of property	$65,194.37		53 / 14 / 33
July 15, 1996	Prof. Group Realty		$ 383.39	54 / 14 / 33
July 15, 1996	Minister of Finance		$ 50.00	14 / 33
July 15, 1996	Duce Law Firm		$ 717.68	55 / 14 / 33
July 15, 1996	Duce Law Firm		$ 226.84	56 / 14 / 33
July 15, 1996	Koster Caswell		$ 200.00	57 / 14 / 33
July 15, 1996	Beckett Glaves		$ 5.00	14 / 33
July 17, 1996	Laurie Arsenault		$ 80.00	58 / 14 / 33
July 19, 1996	Minister of Finance		$ 55.91	59 / 14/ 33
July 19, 1996	J. Edmund Foster		$ 681.00	60 / 14 / 33
July 19, 1996	J. Edmund Foster		$2,500.00	61 / 14 / 33
Aug. 14, 1996	Sydney Wraight		$1,000.00	62 / 15 / 34
January 9, 1997	Sydney Wraight		$ 900.00	63 / 20 / 39
January 9, 1997	Sydney Wraight		$ 300.00	64 / 20 / 39
April 16, 1997	Sydney Wraight		$1,300.00	65 / 23 / 42
June 19, 1997	Winlwei Zhao		$3,000.00	65a
	Interest	$380.66		
	Total	$65,574.93	$11,399.82	
	Balance	$54,175.11		

28. During the same period, the Member misappropriated to his own benefit the following sums from his mixed trust account which he allocated to the name of Wraight, although these payments did not represent payment for any work done by the Member and the Member was not otherwise entitled to them.

Date	Item	Receipts	Disbursements	Tabs
July 29, 1996	Duce Law Office		$2,100.00	66 / 14 / 33
Aug. 14, 1996	Duce Law Office		$3,000.00	67 / 15 / 34
Jan. 10, 1997	Duce Law Offices		$ 600.00	68 / 20 / 39

29. After deducting the misappropriations, totalling $5,700, which the Member specifically charged against his client Wraight, a total of $48,475.11 ought to have remained in the Solicitor's trust account to the credit of Wraight. This sum was otherwise misappropriated and misapplied by the Member as described below.

30. In or about March 1997, Foster became concerned that he did not have more information about the monies held by the Member in trust for Wraight and approached another solicitor, Marvin Daboll ("Daboll"), to contact the Member on his behalf. Daboll attempted to contact the Member in March, May and late June or early July to advise him of Foster's concerns and to request more details of the alleged mortgages. Although the Member assured Daboll that a list of the mortgages would be provided, none was delivered.

31. By letter dated July 25, 1997 (Document Book, Tab 69), Daboll advised the Law Society he had been retained by Foster to investigate the status of certain trust assets being administered by the Member.

32. Beginning in August 1997, friends of the Member contacted Foster with proposals for making restitution to Wraight. On January 20,1998, the Member's friends provided Foster with a statement confirming their calculation of the amount due Wraight to be $54,205.10, and indicating that payment would be made by the end of the week. On Friday, January 23, 1998, the Member visited Foster to advise that the financing had fallen through, but that his friends were renewing their efforts to raise funds; he also encouraged Foster to make a claim to the Lawyers' Fund for Client Compensation.

33. The proceeds from the sale of his home are Wraight's only asset. His monthly board at Leisureworld requires contribution from these funds, and following the misappropriation and misapplication of these funds by the Member, there was no available source for this contribution.

34. The Member has not repaid Wraight the amount which he ought to have been holding in trust for Wraight. Wraight has been substantially compensated through the Lawyers' Fund for Client Compensation.

Karen Ashley/Bank of Montreal

35. Karen Ashley ("Ashley") retained the Member in December 1996 to act for her in the discharge of an existing first mortgage with the Bank of Nova Scotia and the registration of a new first mortgage with the Bank of Montreal on her home, the property known municipally as 12 Madison Avenue, Brantford. The Bank of Montreal retained the Member in January 1997 to act for it on the same transaction. The transaction was scheduled to close on January 30, 1997.

36. On January 20, 1997, the Bank of Montreal forwarded to the Member a mortgage commitment letter and a statement of disclosure, both dated January 20, 1997 (Document Book, Tabs 70 and 71).

37. On January 21, 1997, the Bank of Montreal forwarded to the Member a cheque, dated January 21, 1997, payable to William E. Duce, in trust, in the amount of $107,690.92, and an Instruction to Solicitor form (Document Book, Tabs 72 and 73). The Member was instructed to ensure that the mortgagor, Ashley, had good title to the property and then prepare and register a first mortgage against the property. The Instructions to Solicitor confirmed that he was "not to negotiate the enclosed cheque prior to the scheduled closing date".

38. The mortgage transaction did not close on January 30, 1997, nor at any time subsequently. The Member did not forward, and has not forwarded, any funds to the Bank of Nova Scotia. As a result, the existing Bank of Nova Scotia mortgage was not discharged and the new mortgage in favour of the Bank of Montreal was not registered. None of the funds were ever paid to Ashley, and the Member never had her attend at his office or elsewhere to sign mortgage documentation in favour of the Bank of Montreal.

39. The Member deposited the cheque into his trust account on January 31, 1997, as reflected in the bank statement for the account that month (Document Book, Tab 39) and the deposit slip (Document Book, Tab 74).

40. The Member indicated in his Trust Journal for January 1997 (Document Book, Tab 20) and February 1997 (Document Book, Tab 21), that a series of cheques was written from his trust account on behalf of Ashley during that period. As outlined on the following chart, the Member did not forward the cheques to the payees but, in all but one case, obtained bank drafts for the amounts of the cheques. The Member then either did not cash the drafts or deposited the drafts back into his trust account, without correcting the original entry in the trust journal or making a further entry to show the deposit.

Date	Amount	Chq. # (Tab)	Payee	Date of Bank Draft	Bank Draft # (Tab)	Result
Jan. 31, 1997	$ 50.00	0448 (75)	Ministry of Finance	February 5, 1997	261825 (76)	This draft was not cashed.
Jan. 31, 1997	$ 77.00	0449 (77)	Ministry of Finance	February 5, 1997	261824 (78 + 79)	This draft was not cashed
Jan. 31, 1997	$ 50.00	0451 (80)	Ministry of Finance	February 5, 1997	261823 (81 + 82)	This draft was not cashed
Jan. 31, 1997	$ 50.00	0452 (83)	Ministry of Finance	February 5, 1997	261826 (84)	This draft was not cashed.
Feb. 3, 1997	$1,000.00	0215 (85)	Pignotta Realties	February 3, 1997	261900 (86 + 87)	This draft was not cashed.
Feb. 5, 1997	$5,200.94	0473 (88)	City of Brantford	February 5, 1997	261833 (89)	This draft was endorsed by the Member and deposited into the same trust account on June 24, 1997 (Tab 90), along with draft # 261827 (below) as a total deposit of $15,416.97 (Tab 91).
Feb. 5, 1997	$ 783.97	0474 (92)	John Ford	February 5, 1997	261828 (93)	This draft was endorsed by the Member (Tab 94) and deposited back into this trust account, although the exact date of this deposit cannot be identified, given the inadequacy.
Feb. 5, 1997	$10,216.03	0475 (95)	Constance Christine Sanci	February 5, 1997	261827 (96)	This draft was endorsed by the Member and deposited into the same trust account on June 24, 1997 (Tab 97), along with draft # 261833 (below) as a total deposit of $15,416.97 (Tab 91).

41. In the other instance, the Member wrote a cheque, dated February 5, 1997, in the amount of $91,328.93, in favour of the Scotia Mortgage Corporation, as shown by the cheque stub (Document Book, Tab 98). The Member entered this item into his trust journal for February 1997 (Document Book, Tab 21); however, he did not deliver the cheque to Scotia Mortgage Corporation or otherwise cause the cheque to be negotiated in favour of Scotia Mortgage Corporation. No correction was made to the trust journal, creating the impression that the cheque had been negotiated. The cheque cannot now be located by the Member.

42. The handwritten trust listing which the Member prepared and provided to the Law Society on July 8, 1997 (Document Book, Tab 1) identified a trust liability in favour of K. Ashley in the amount of $42,444.07. The Member has been unable to explain the discrepancy between this figure and the $107,690.92 deposited into his trust account in January 1997. The Member admits that although the funds from the Bank of Montreal were deposited into his trust account, the funds were misapplied to make up the shortage in his trust account or otherwise misapplied or misappropriated.

43. As a result of the Solicitor's actions, the Bank of Nova Scotia mortgage was not discharged; however, the Bank of Nova Scotia permitted Ashley to carry on with her mortgage. The loss of the mortgage funds has been borne by the Bank of Montreal.

John Robert Arnold

44. On April 15, 1996, Mr. John Robert Arnold ("Arnold"), then a 73 year old retired gentleman, loaned $20,000.00 to Debra Lynn & Daniel George Willson. This loan was secured by a second mortgage (Document Book, Tab 99) registered that day against the property municipally known as 16 Cowan Street, Brantford.

45. On February 10, 1997, Arnold, as second mortgagee, was served with a Notice of Sale under a first mortgage held by the Royal Bank of Canada against this Cowan Street property. The Royal Bank mortgage (Document Book, Tab 100) was registered on September 1, 1989.

46. Subsequently, Arnold retained the Member to assist in discharging the Royal Bank first mortgage. The first mortgage was to be discharged with Arnold's funds.

47. On February 19, 1997, Arnold provided the Member with a cheque for $42,444.06, (Document Book, Tab 101) to be used to discharge the first mortgage in favour of the Royal Bank. This cheque was deposited into the Member's trust account at the Bank of Montreal, account number 1057-207 (Document Book, Tabs 40 and 102) on February 21, 1997, and is recorded as a receipt in the February 1997 trust journal (Document Book, Tab 21).

48. The Member did not forward any portion of Arnold's funds to the Royal Bank of Canada; instead, he misapplied these funds to make up the shortage which existed in his trust account at that time as a result of the misappropriations and misapplications from trust. Consequently, the Royal Bank's first mortgage on the property was not discharged.

49. The Willsons remained in arrears on both the first mortgage, which Arnold understood at the time that he had purchased, and the second mortgage in favour of Arnold. On April 11, 1997, Arnold and the Willsons entered into an Agreement whereby the Willsons would execute a quit-claim deed in favour of Arnold in respect of their interest in the Cowan Street property and they agreed to vacate the property on April 13, 1997 (Document Book, Tab 103). The Member prepared this Agreement and was also retained by the Willsons' to prepare the quit-claim deed.

50. The Willsons vacated the property on April 13, 1997, and Arnold took possession of the property, as per the terms of the Agreement, as his residence. The Quit Claim Deed was registered on September 24, 1997, by the solicitors retained by Arnold after he terminated his retainer with the Member.

51. The first mortgage not having been discharged, the Royal Bank continued enforcement proceedings with respect to their mortgage on the property. By letter, dated July 21, 1997 (Document Book, Tab 104), the Royal Bank advised Arnold that, as Arnold had not vacated the premises, they were proceeding to obtain and enforce a writ of possession on the property. Prior to this time, Arnold was unaware that the Royal Bank mortgage had not in fact been discharged by the Member in February of that year. After receiving the letter from the Royal Bank, Arnold terminated his retainer of the Member and retained other solicitors to review the situation, make appropriate inquiries of the Member, and otherwise protect his interests.

52. By letter, dated July 29, 1997 (Document Book, Tab 105), the Member advised Arnold's new solicitors that he had mingled the funds which he had received from Arnold to discharge the Royal Bank mortgage with other funds in his trust account and used them to pay out an unrelated mortgage subsequently. In fact, the funds were not used specifically to discharge an unrelated mortgage, but they were applied to cover the ongoing shortage in his trust account which had been caused by his misappropriations and misapplications from the trust account.

53. Notwithstanding being advised of Arnold's inability to pay out the first mortgage without the funds he had entrusted to the Member, the Royal Bank continued its enforcement proceedings. On August 20, 1997, Arnold secured alternate financing and paid the Royal Bank the sum of $46,046.78, which amount was $3,602.72 higher than the original discharge figure of $42,444.06, which he paid to the Member in February 1997 to obtain the discharge.

54. The handwritten trust listing which the Member prepared and provided to the Law Society on July 8, 1997 (Document Book, Tab 1) identified a trust liability in favour of Arnold in the amount of $42,444.06.

55. To date, the Member has not repaid Arnold the sum of $42,444.06, which Arnold paid to the Member, in trust, on February 19, 1997. Arnold has been compensated for the amount which he entrusted to the Member by the Lawyers' Fund for Client Compensation.

Petofi Mortgage: Lillart Limited / Albertus Noort

56. Lillian Kelly, now 69 years old, is the president and sole shareholder of Lillart Limited ("Lillart"). Lillart was incorporated to be a lending company, specializing in residential and commercial mortgages. In 1993, George Lawrence, a solicitor in Brantford, had arranged a loan to the Petofi Hungarian Cultural Club of Brantford. The loan was not completed prior to Mr. Lawrence's death in 1993, and the Member was retained to complete the mortgage transaction on behalf of Lillart and five other lenders. The Member had not acted for Mrs. Kelly or Lillart previously.

57. This loan to the Petofi Hungarian Cultural Club involved a total advance of $400,000.00, of which Lillart provided $100,000, or 25% of the total. In addition, a company known as Clearice Limited also advanced $100,000 or 25% of the loan. The remaining $200,000 was provided through equal contributions (12.5% or $50,000) from Albertus Noort, Margaret Nagy, Lawrence Child, and Jean Graham.

58. This loan was secured by a second mortgage registered against Part Lot 37, Concession 2, being Parts 1 and 2 on Plan 2R-2381, Brantford, a property owned by the Petofi Hungarian Cultural Club (Document Book, Tab 106) ("Petofi mortgage"). The funds were advanced and the mortgage registered on February 15, 1993. On August 11, 1993, the first mortgagees agreed to postpone their first mortgage in favour of the Petofi mortgage.

59. The interest payments under the mortgage were made directly to the individual investors by way of post-dated cheques under the terms of the mortgage.

60. In 1997, the Petofi Hungarian Cultural Club was refinancing and wanted to repay the loan and discharge the Petofi mortgage. It was agreed by the borrower and the lenders that the Member could act on the collection and disbursement of the repayment funds.

61. Consequently, the Petofi Hungarian Cultural Club advanced $387,058.51 to the Member in June 1997, which amount represented the outstanding principal and interest on the mortgage. In return, the Member had the lenders, including Lillart, execute a discharge of the mortgage securing the Petofi loan and registered that discharge June 10, 1997 as Instrument #484138 (Document Book, Tab 107).

62. On June 11, 1997, the Member deposited the sum of $387,058.51 into his trust account. The trust deposit slip is contained at Tab 108 of the Document Book. From this deposit, the Member wrote the following cheques, which removed all of these funds from the trust account:

Payee	Date	Amount	Cheque Location
Margaret Nagy	June 11, 1997	$ 48,382.31	Tab 109
Jean Graham	June 11, 1997	$ 48,382.31	Tab 110
Clearice Ltd (discussed further below)	June 23, 1997	$198,716.86	Tab 111
Lawrence Child (discussed further below)	June 11, 1997	$ 68,059.91	Tab 112

Clearice Ltd.

63. In December 1995, there had been discussions with respect to the possibility of Lillart selling its 25% share in the Petofi mortgage. At that time, Clearice Limited ("Clearice"), another of the Member's clients, who already held a 25% interest in the mortgage, expressed an interest in purchasing Lillart's 25% share. No agreement was ever reached between Lillart and Clearice. However, on December 21, 1995, Clearice provided the Member with a cheque for $97,800.16. Based on discussions with the Member, Clearice provided this payment in order to purchase Lillart's interest in the Petofi mortgage. As shown in the bank statement for that period (Document Book, Tab 29), the Member deposited this cheque into his trust account at the Toronto-Dominion Bank on December 22, 1995. The deposit was reflected in the Member's trust journal for December 1995 (Document Book, Tab 6) as a deposit of $97,000; the discrepancy has not been explained.

64. The Member never paid the funds provided by Clearice to Lillart, as no agreement to sell Lillart's interest in the Petofi mortgage had been reached. However, the funds were also never returned to Clearice by the Member, so that Clearice was led to believe that it had a 50% interest in the Petofi mortgage. In fact, the funds provided by Clearice in December 1995 formed part of the pool of funds which the Member misappropriated and misapplied from his trust account.

65. When the mortgage funds were paid out, Clearice's principal demanded payment of a full 50% interest. As a result, the Member paid Clearice an amount equal to a 50% interest in the mortgage ($198,716.86), although, in fact, Clearice only held a 25% interest in the mortgage.

Lawrence Child

66. Lawrence Child ("Child") was one of the original investors in the Petofi mortgage, at which point he invested $50,000 and held a 12.5% interest in that mortgage. In November 1995, Child provided an additional $20,000 to the Member to invest in this mortgage. This $20,000 was deposited into the Member's trust account on November 10, 1995, as shown by the bank statement (Document Book, Tab 28) and Member's trust journal (Document Book, Tab 5) for that month. The entry in the trust journal incorrectly identifies this deposit as being in relation to the Winter purchase, although that transaction had been completed three months beforehand.

67. At the time Child advanced these funds to the Member, there was no interest in the Petofi mortgage available for purchase. The Member did not advise Child of this fact. These funds were never paid to the mortgagor or another investor whose interest may have been purchased since no interest was for sale. Instead, the Member deposited these funds to his trust account where they formed part of the pool of funds which he then misappropriated and misapplied from his trust account. The Member did not advise Child that his funds had been misused in this way.

68. Thereafter, the Member paid Child an amount equal to the amount which would be due monthly in interest if Child had, in fact, invested a further $20,000 in the Petofi mortgage. The Member thereby avoided having to disclose to Child that he had not invested these additional funds in the Petofi mortgage. The Member drew these funds from his mixed trust account, thereby misapplying the funds in that account since there were no funds held in trust for this purpose. The details of these misapplications are described below.

69. When the mortgage was discharged in June 1997, instead of advising Child that his additional funds had not been invested in the Petofi mortgage, the Member paid Child the sum which would be due to him if he held an interest equal to his original $50,000 investment, plus a subsequent $20,000, namely $68,059.91. Child died shortly after this transaction.

Noort

70. Although Albertus Noort held a 12.5% interest in the Petofi mortgage, the Member did not have sufficient funds in his trust account to repay Mr. Noort's share of the loan ($48,382.31) as a result of some of those funds being applied to cover the shortage in the Member's trust account at that time. This shortage had been caused by the Member's misappropriation and misapplication of the funds in his trust account, and, in particular, by the misapplication of the mortgage funds to Child and Clearice.

71. The handwritten trust listing which the Member prepared and provided to the Law Society on July 8, 1997 (Document Book, Tab 1) identified a trust liability in favour of Mr. Noort in the amount of $48,382.31. The Member states that, with the assistance of his friends, he has made full restitution to Mr. Noort. Mr. Noort's representative has declined to either confirm or deny this statement to the Law Society; however, no claim has been made to the Lawyers' Fund for Client Compensation on behalf of Noort to date.

Lillart Limited

72. The Member had agreed to advise Lillart's corporate solicitor, William D. Harrow ("Harrow") of the Brantford firm of Ballachey, Moore, Beyer & Harrow, when the funds were available for distribution to repay Lillart's interest in the Petofi mortgage. The Member did not contact Harrow. After several requests from Harrow's firm for payment of the amount due to Lillart, the Member forwarded a cheque, #0591, dated June 25, 1997, in the sum of $97,211.99 (Document Book, Tab 113) to Harrow. This amount represented a repayment of Lillart's principal plus interest due. This cheque was returned by Lillart's bank on June 30, 1997, due to there being insufficient funds in the Member's trust account. This shortage had been caused by the Member's misappropriation and misapplication of the funds in his trust account, and, in particular, by the misapplication of the funds from the Petofi mortgage to Child and Clearice.

73. The handwritten trust listing which the Member prepared and provided to the Law Society on July 8, 1997 (Document Book, Tab 1) identified a trust liability in favour of Lillart in the amount of $92,211.99. It is now agreed that this amount was incorrect and that the amount properly owed to Lillart by the Member is $97,211.99.

74. To date, the Member has not repaid either Mrs. Kelly or Lillart any funds which were due to Lillart on the discharge of this mortgage. On January 12, 1998, Lillart did obtain a consent judgment against the Member for the full amount due to Lillart. Lillart has been compensated by the Lawyers' Fund for Client Compensation for the full amount it entrusted to the Member.

James Boyd

75. By the terms of an agreement of purchase and sale, dated June 17, 1997 (Document Book, Tab 114), James Boyd ("Boyd") agreed to sell his home, located at 205 Oakhill Drive, Brantford, to John and Carolyn Stratford ("Stratfords"), for a purchase price of $290,000. The transaction was a private sale and did not involve a real estate agent. Boyd retained the Member to act for him in closing the transaction.

76. At the time of signing the agreement, the Stratfords provided Boyd with a cheque in the amount of $20,000, payable to the Member, in trust. Boyd understood that these funds, being the deposit under the agreement of purchase and sale, were appropriately paid in trust to the Member, as his solicitor. On the same day, June 17, 1997, Boyd delivered the cheque and the executed agreement of purchase and sale to the Member's office.

77. On June 24, 1997, the Member deposited the funds from the Stratfords into his trust account, as shown by the deposit slip (Document Book, Tab 115), and recorded the deposit on his client trust ledger card for Boyd (Document Book, Tab 116).

78. At the time the Member deposited these funds into his trust account, the trust account was in a deficit position as shown on the June 1997 bank statement for the trust account (Document Book, Tab 44). Consequently, these funds, which were to be held in trust for Boyd, were, in fact, applied by the Member to cover the shortage in his trust account which had been created by his misappropriation of funds by way of a cheque written the previous day (described further below under "Clearice").

79. The handwritten trust listing which the Member prepared and provided to the Law Society on July 8, 1997 (Document Book, Tab 1) identified a trust liability in favour of Boyd in the amount of $20,000.

80. Approximately one week before the scheduled closing of the transaction on August 1, 1997, the Stratfords contacted Boyd to advise him that the Member had withdrawn from practice and to suggest that Boyd retain another lawyer to close the transaction. Boyd immediately contacted Mr. Jack Purcell ("Purcell"), a Brantford solicitor, to complete the transaction. Purcell subsequently obtained Boyd's file from the Member; however, the $20,000 was not provided to Purcell.

81. The purchase and sale transaction was completed on August 1, 1997, pursuant to the terms of the agreement of purchase and sale. Boyd subsequently met with the Member on several occasions regarding the missing funds. The Member assured Boyd that he would see that Boyd got his money, and even offered Boyd a mortgage on the house of the Member's mother as security. These assurances were repeated in an undated fax to Purcell in the fall of 1997 (Document Book, Tab 117). However, to date, the Member has not repaid the $20,000 to Boyd or provided him with any type of security for that repayment.

82. The Lawyers' Fund for Client Compensation has paid Boyd the $20,000 which was misappropriated and/or misapplied by the Member.

Misappropriation and Misapplication of Trust Funds

83. Over the period from August 1995 to July 1997, the Member either misapplied or misappropriated the funds which produced his trust shortfall of $368,483.95 as of July 1997. However, in some instances funds were misapplied or misappropriated from one client by the Member, and then either repaid by the Member or replaced by other funds misapplied from another client, and then misapplied or misappropriated again. As a result, the amount of the ultimate shortage in the mixed trust account (plus the loan from the Member's client, Robert Foa, described below) is less than the total of the amounts misappropriated and misapplied.

84. During the course of the audit, the Member reviewed his trust journals with the Law Society's examiner and identified those payments which constituted misappropriations, having been paid to his own benefit, and those payments which constituted misapplications, having been paid to the benefit of a client other than the client entitled to the funds.

85. Over this period of time, the Member misappropriated to his own benefit a total of $280,962.47, from the funds which he held in his mixed trust account for the benefit of all of his clients, consisting of the following sums:

Reference	Amount
Misappropriation from trust account # 0314 0485449 at the Toronto-Dominion Bank, paid directly to the Member (see Appendix A)	$86, 323.00
Misappropriation from trust account # 0314 0485449 at the Toronto-Dominion Bank, paid to the benefit of the Member in that the payments satisfied obligations of the Member to third parties (see Appendix B)	$ 9,693.43
Misappropriation from trust account # 1057-207 at the Bank of Montreal, paid directly to the Member (see Appendix C)	$ 128,132.86
Misappropriation from trust account # 1057-207 at the Bank of Montreal, paid to the benefit of the Member in that the payments satisfied obligations of the Member to third parties (see Appendix D)	$ 56,813.18
TOTAL	$280,962.47

86. Some of the misappropriated sums are attributed in the Member's records to particular clients. However, these allocations were not done in any organized manner by the Member; rather, they reflect the Member's periodic efforts to allocate the sums he was misappropriating to those clients for whom he believed he held funds in his mixed trust account.

Clearice Limited

87. In May 1996, Clearice, one of the Member's clients, agreed to loan the sum of $45,000 to Mr. Henry Wilmot ("Wilmot"), another client of the Member's clients. This loan was to be secured by a mortgage against a property in the Brantford area owned by Wilmot. The mortgage was to have a one year term with interest payable at the rate of 15% per year.

88. Clearice thereafter advanced $45,000 to the Member, in trust for Wilmot. On May 10, 1996, the Member deposited these funds into his trust account at the Bank of Montreal as shown by the bank statement (Document book, Tab 31) and the Member's trust journal (Document Book, Tab 12) for this period. However, the Member prepared the mortgage which was to secure this loan (Document Book, Tab 118), but did not register it against title to the property.

89. Prior to the deposit of the funds from the Clearice loan into his trust account, the Member had already advanced two cheques totalling $7,300 to Wilmot, although the Member held no funds in trust for Wilmot at that time. Consequently, the Member misapplied other funds held in his mixed trust account to the benefit of Wilmot to make these payments, until such time as the Clearice loan was deposited.

90. In addition to covering these earlier misapplications, the $45,000 loan was applied to the following disbursements by the Member for the benefit of Wilmot:

Date	Item	Amount Disbursed/ *Received*	Tab Location of Cheque (if any)
March 23, 1996	Cheque to Wilmot	$1,000.00	Chq. #1475 (n/a)
April 4, 1996	Cheque to Wilmot	$6,300.00	Chq. # 1502 (n/a)
May 8, 1996	Received from Clearice	*$45,000.00*	Tab 119
May 10, 1996	Cheque to Royal Bank	$11,000.00	Cheque #006 Tab 120
May 10, 1996	Cheque to Revenue Canada	$ 5,000.00	Cheque #007 Tab 121
May 15, 1996	Karoline Teifenbrunner	$13,000.00	Cheque #008 (n/a)
May 27, 1996	Ministry of Finance	$ 6,500.00	Cheque #0014 Tab 122

91. Following the foregoing disbursements, the Member held, or ought to have held, $2,200.00 in trust for Wilmot. However, on June 21, 1996, the Member misappropriated this sum from his trust account by cheque #042, payable to himself, as reflected in the bank statement for that period (Document Book, Tab 32). The Member did not include any description of this item on his trust journal (Document Book, Tab 13). This amount forms part of the misappropriations summarized in Appendix "C" below.

92. In May 1997, when the mortgage came due, Wilmot was unable to re-finance, or otherwise repay the loan. Consequently, the Member advised his lender client, Clearice, that he would commence power of sale proceedings on the mortgaged property. However, this was not possible as the Member had not registered a mortgage against the property, and Clearice was left without a legal avenue to recover its principal and interest.

93. At May 10, 1997, the principal and interest (which had not been paid during the term of the loan) due to Clearice from Wilmot totalled $51,750.00.

94. On June 23, 1997, the Member paid the sum of $52,685.75 to Clearice, as repayment of the Wilmot loan, by cheque #590 from the Member's trust account (Document Book, Tab 123). As the Member did not hold any funds in his trust account at that time on behalf of Wilmot, the Member misappropriated this amount from the pool of funds in, or to be in, his mixed trust account to repay Clearice. The Member did not have sufficient funds in his trust account as of June 23, 1997, to cover this cheque (Document Book Tab 44), so that this cheque caused the account to be overdrawn. This overdraft remained until funds from two other clients (one of them being Boyd, referred to above) were deposited to the account.

95. In addition, the Member misapplied a total of $261,279.19, over this same period of time, to the benefit of clients for whom he did not have funds in trust, consisting of the following amounts:

Reference	Amount
Misapplication from pool of client funds held generally in trust account # 0314 0485449 at the Toronto-Dominion Bank to various clients (see Appendix E)	$21,924.55
Misapplication from pool of client funds held generally in trust account # 1057-207 at the Bank of Montreal to various clients (see Appendix F)	$ 13,432.75
Funds misapplied from Merritt to Kesik (see above)	$ 6,840.00
Funds misapplied from Lillart to Child/Clearice (see above)	$ 97,211.99
Funds misapplied from Noort to Child/Clearice (see above)	$ 48,382.31
Funds misapplied from Boyd to trust overdraft (see above)	$ 20,000.00
Funds misapplied from trust account generally in favour of Kesik (see below)	$ 53,487.59
TOTAL	$261,279.19

Misapplication - $53,487.59 in favour of Kesik

96. In May 1995, the Member acted for his friend and client, Leonard Kesik ("Kesik"), on the placement of a private mortgage in the amount of $45,000. In late 1996, Kesik advised the Member that he wished to call his mortgage and use the funds to purchase another property for $85,000 (less adjustments). The purchase was to require the mortgage funds as well as some additional cash from Kesik. However, the Member was unable to cause the mortgagor to pay out either the interest or principal on the $45,000 mortgage.

97. On December 13, 1996, the closing date for the purchase, Kesik provided the Member with the sum of $30,587.95, which, together with the principal and interest from the $45,000 mortgage, was to be applied to the purchase price of the new property. This sum was deposited into the Member's trust account that day, as shown by the deposit slip (Document Book, Tab 124) and the bank statement for that period (Document Book, Tab 38).

98. The Member had insufficient funds in his trust account to the credit of his client Kesik to cover the purchase price to be paid by Kesik, due to the non-payment of the mortgage funds. Nonetheless, that same day, the Member paid two certified cheques to the law firm of Trepanier Hagey Kneale & Wiacek, trust cheque #0372 for $30,587.95 (Document Book, Tab 125), and trust cheque #0388 for $53,487.59 (Document Book, Tab 126) on account of the purchase of the property.

99. Two cheques were prepared as the Member was aware that he had inadequate funds in his trust account at the time to pay the entire purchase price. Consequently, trust cheque #0372 was certified and paid on December 13, 1996, but trust cheque #0388 was not certified and paid until December 18, 1996, by which time more money had been injected into the trust account.

100. Due to the inadequacy of the Member's books and records at the time, it cannot be determined which client, or clients, was the beneficial owner of the $53,487.59 amount which was applied in favour of Kesik. Even apart from the Kesik transaction, there were insufficient funds in the Member's trust account at that time to meet his obligations to his clients. Thus, it is clear that this amount did not belong to Kesik and was misapplied when paid to Trepanier Hagey Kneale & Wiacek for his benefit.

Particular 2 (e) in or about December 19, 1996, he breached Rule 7 of the Rules of Professional Conduct by borrowing the sum of $75,000.00 more or less, from his client Robert Foa

101. As of December 18, 1996, the Solicitor had inadequate funds in his trust account to satisfy his obligations to and on behalf of clients, including the outstanding cheque to Trepanier Hagey Kneal & Wiacek identified in the preceding paragraphs. To cover this deficiency in the immediate short-term, the Member borrowed the sum of $45,000, as a short-term loan, from his friend, Bateson, and deposited this sum into his trust account (Document Book, Tab 38).

102. The deposit of these funds into the Member's trust account allowed the cheque on behalf of Kesik to clear the trust account. A balance of only $819.18 remained in the trust account at that time.

103. Robert Foa ("Foa") is a 70 year old client of the Member. The Member has acted for Foa on various real estate transactions since Foa first came to Canada in 1976. In December 1996, Foa asked the Member if he was having financial problems. In the ensuing discussion, the Member asked Foa if he could borrow $75,000.00.

104. To enable him to repay the short-term loan from Bateson, the Member borrowed the sum of $75,000 from his client Foa on December 19, 1996. No security for the loan was provided, except for a promissory note in the amount of $75,000, dated December 19, 1996, in favour of Foa's numbered company, 398842 Ontario Ltd.("398842") (Document Book, Tab 127). The loan was to pay interest at the rate of 5% annually and was due on January 18, 1997. The Member never suggested to Foa that he should seek independent legal advice, and Foa did not obtain same .

105. The Member deposited the sum of $75,000 into his trust account on December 19, 1996 (Document Book, Tab 128). The Member did not indicate the source of these funds on either his trust journal or the deposit slip.

106. The Member then repaid the $45,000 to Bateson on December 19, 1996, by way of certified trust cheque # 0397 (Document Book, Tab 129), payable to the Royal Bank.

107. The Member states that, in January 1997, he believed he had received the sum of $75,000 into his general account from his client Van Kristan in relation to a land transaction in Vietnam. In fact, no such funds were ever received by the Member around that time.

108. As the promissory note to Foa was due, with interest, on January 18, 1997, the Member sent his general account cheque #384, in the amount of $75,350.00 and payable to Foa's company, 398842, on or about that date. On January 20, 1997, cheque #384 was returned due to insufficient funds. The bank statement for the Member's general account for January 1997 is contained at Tab 200 of the Document Book.

109. On February 25, 1997, the sum of $18,052.00 was deposited into the Member's general account. The bank statement for the Member's general account for February 1997 is contained at Tab 201 of the Document Book. The Member states that these funds were received from his client Van Kristan as the payment of earned and billed fees; however, no account in support of these fees has been located by the Member.

110. On February 26, 1997, the Member misappropriated the sum of $8,000.00 from his trust account; the bank statement for his trust account for February 1997 is located at Tab 40 of the Document Book. These funds were deposited into the Member's general account on the same date.

111. On the same day, February 26, 1997, the Member wrote cheque #423 from his general account, in the amount of $25,719.18, payable to 398842 (Document Book, Tab 130), and delivered it to Foa as a partial repayment of the loan.

112. To date, the Member still owes the principal sum of $50,000, plus interest, to Foa.

Particular 2 (f) on or about June 1, 1980, he breached Rule 18 as it then was, of the Rules of Professional Conduct, by borrowing the sum of $10,000.00 from his clients Hugh and Joyce Merritt without ensuring that his clients' interests were fully protected by the nature of the case and by independent legal representation.

113. As indicated previously, the Member had acted for Joyce and Hugh Merritt since approximately 1974. In 1980, the Member approached the Joyce and Hugh Merritt to ask whether they would consider making a loan to him. The Member did not indicate why he needed the money or how he intended to use it.

114. On June 1, 1980, the Merritts loaned the Member the sum of $10,000.00. The loan was to pay interest at a rate of 18% annually and was due on demand. The only security provided by the Member was a promissory note, dated June 1, 1980 (Document Book, Tab 131). The Member did not advise the Merritts to seek independent legal advice, and they did not obtain same.

115. The only payment which the Member forwarded to the Merritts on account of this loan was the sum of $140.00 on January 18, 1986 (Document Book, Tab 132). This cheque was returned for insufficient funds. The Merritts sought the advice of another lawyer in Brantford regarding this cheque, but he advised them he could not assist them as the Member had been his partner. The Merritts have taken no further action regarding the loan since that time.

116. The Member wrote to the Merritts, in a handwritten letter dated July 27, 1992 (Document Book, Tab 133), and advised them that he was again practising in Brantford and wanted to visit to "straighten things out." The Member had no further contact with the Merritts.

117. The Member has made no valid payments on the loan to date. The full principal amount of $10,000, plus interest, remains outstanding.

Complaint D102/98

Particular 2(d) throughout the period from August 1995 to July 1997, the Member failed to maintain sufficient balances on deposit in his mixed trust bank accounts to meet all his obligations with respect to monies held in trust for clients, thereby breaching subsection 14(12) of Regulation 708 made pursuant to the *Law Society Act*

118. As a result of the Member's misappropriation and misapplication of funds from his mixed trust account from August 1995 until the account was frozen in July 1997, the Member failed to maintain sufficient balances on deposit in that account to meet his obligations to his clients throughout that period.

V. DISCIPLINE HISTORY

119. On May 8, 1984, the Member was found guilty of professional misconduct for misapplying $4,000, more or less, of client funds. Although a majority of the Discipline Committee recommended that the Member be reprimanded in Convocation, on May 24, 1984, Convocation decided that the Member should be reprimanded in Committee and referred the matter back to the Discipline Committee accordingly. A copy of the Report and Decision of the Discipline Committee, dated May 15, 1984, is contained at Tab 134 of the Document Book.

DATED at Richmond Hill, Ontario this 26th day of November, 1998."

APPENDIX A - Misappropriation of $86,323.00 Toronto-Dominion Bank

Date	Amount	Cheque # (and location)*	Allocated to Client in Trust Journal
August 1 1995	$1,990.00	1128 (Tab 135)	Winter
August 3 1995	1,556.00	1131 (Tab 136)	Winter
September 29 1995	787.00	1219 (Tab 137)	655710 Ont. Inc.
September 29 1995	897.00	1223 (Tab 138)	655710 Ont. Inc.
October 2 1995	489.00	1160 (Tab 139)	655710 Ont. Inc.
November 10 1995	4,122.00	1274 (Tab 140)	655710 Ont. Inc.
November 14 1995	3,197.00	1282 (Tab 141)	655710 Ont. Inc.
December 4 1995	1,070.00	1323	Simpson Estate
December 5 1995	2,300.00	1325	Clearice
December 6 1995	1,256.00	1273	Clearice.
December 7 1995	1,498.00	1324	Clearice
December 8 1995	4,500.00	1327	Simpson Estate
December 11 1995	600.00	1333	Clearice
December 15 1995	$ 975.00	1335	Clearice
December 15 1995	2,100.00	1347	Simpson Estate
December 22 1995	1,122.00	1349	Simpson Estate
December 19 1995	9,400.00	1342	Clearice
December 20 1995	8,659.00	1358	Clearice
December 1 1995	1,198.00	1344	Clearice
December 28 1995	6,000.00	1352	Simpson Estate
December 29 1995	6,000.00	1357	Clearice
January 2 1996	1,177.00	1369	Simpson Estate

Date	Amount	Cheque # (and location)*	Allocated to Client in Trust Journal
January 9 1996	742.00	1371	Simpson Estate
January 12 1996	2,500.00	1373	Simpson Estate
January 19 1996	1,664.00	1379	No client reference
January 31 1996	$3,430.00	1380	No client reference
February 7 1996	4,155.00	1415	No client reference
February 26 1996	2,110.00	1432	No client reference
March 1 1996	3,000.00	1439	No client reference
March 1 1996	1,100.00	1440	No client reference
March 11 1996	992.00	1446	No client reference
March 20 1996	692.00	1469	No client reference
March 21 1996	742.00	1473	No client reference
March 21 1996	193.00	1474	No client reference
April 8 1996	463.00	1503	No client reference
April 8 1996	922.00	1504	No client reference
April 10 1996	729.00	1507	No client reference
April 12 1996	$1,996.00	1509	No client reference
TOTAL	$86,323.00		

* The Member has been unable to produce copies of some of the cheques which he identified as misappropriations to the Law Society's auditors. Many of these misappropriations were deposited directly into the Member's general account. General account bank statements with the Toronto-Dominion Bank in Brantford from December 1995 to April 1996 are contained at Tabs 142 to 146 of the Document Book.

APPENDIX B - Misappropriation (Paid to benefit of Member)
- $9,693.43 Toronto-Dominion Bank

Date	Amount	Cheque #	Payee	Explanation
November 10 1995	$ 7,222.22	1271	Trepanier Hagey	Member was acting as agent for a Solicitor in North York to issue a defence in a lien action. The Member did not issue the defence, and judgment was awarded on failure to file a defence. The Member paid the funds from his mixed trust account although he had no funds in trust for this particular matter.
December 1 1995	$ 652.10	1341	L. Child	This was an additional interest payment as detailed in paragraph 68.
January 12 1996	$ 1,200.00	1374	Morris Rose Ledgett in Trust	The Member states this was in settlement of a judgment with which he had not dealt for his client Mourin. This is on a list prepared by the Member showing disbursements that should not have been made from his trust account in January 1996 (Document Book Tab 147).
January 17 1996	$ 183.10	1375	L. Child	This was an additional interest payment as detailed in paragraphs . This also is on a list prepared by the Member for January 1996 listing disbursements that should not have paid from trust (Document Book Tab 147).
March 14 1996	$ 229.64	1450	L. Child	As above. This amount is also on the list prepared by the Member for March 1996 listing disbursements that should not have been paid from trust (Document Book, Tab 148).
April 15 1996	$ 206.37	1510	L. Child	As above. This amount is on the list prepared by the Member for April 1996 listing disbursements that should not have been paid from trust (Document Book, Tab 149).
TOTAL	$9,693.43			

APPENDIX C - Misappropriation of $128,132.86 Bank of Montreal

Date	Amount	Cheque # (and location*)	Allocated to Client
June 14 1996	$ 6,300.00	0036	No client reference
June 20 1996	$ 7,000.00	0041	No client reference
June 21 1996	$ 2,200.00	0042 (Tab 150)	No client reference
July 10 1996	$13,179.00	0082 (Tab 151)	The Member withdrew these funds from his trust account and deposited them to his general account. Using these funds, he then paid Revenue Canada $13,551.78 in payment of GST he owed. The general cheque #0085 is at **Tab 152** of the Document Book.
July 19 1996	$14,000.00	0115 (Tab 153)	The Member withdrew these funds from his trust account and deposited them to his general account. Using these funds, he paid Gowling Strathy & Henderson the sum of $13,853.93 in settlement of a judgment which was awarded against the Member's friend/client. The Member states that as he had assured his client that the case would not be lost he felt he could not approach the friend/client for the money to satisfy the judgment. The general cheque #0117 is at Tab 154 of the Document Book.
July 29 1996	$ 2,100.00	0146 (Tab 66)	Wraight
August 1 1996	$ 3,100.00	0157 (Tab 155)	No client reference
August 14 1996	$ 3,000.00	0180 (Tab 67)	Wraight
August 15 1996	$ 1,986.22	0183 (Tab 156)	Simpson Estate
August 171996	$ 400.00	0187 (Tab 157)	No client reference
August 171996	$ 700.00	0188 (Tab 158)	No client reference

Date	Amount	Cheque # (and location*)	Allocated to Client
August 20 1996	$ 900.00	0189 (Tab 159)	Simpson Estate
August 21 1996	$ 600.00	0192 (Tab 160)	No client reference
August 23 1996	$ 1,600.00	0194 (Tab 161)	No client reference
August 291996	$ 1,561.00	0195 (Tab 162)	No client reference
September 3 1996	$ 2,000.00	0196 (Tab 163)	No client reference
September 6 1996	$ 2,000.00	0207 (Tab 164)	No client reference
October 3 1996	$ 1,500.00	0245 (Tab 165)	No client reference
October 3 1996	$ 157.00	0246 (Tab 166)	No client reference
October 11 1996	$ 1,100.00	0249 (Tab 167)	No client reference
October 22 1996	$ 6,000.00	0280	Svensson
October 24 1996	$ 1,100.00	0282 (Tab 168)	No client reference
November 1 1996	$ 2,500.00	0285 (Tab 169)	No client reference
November 8 1996	$ 2,700.00	0288 (Tab 170)	No client reference
November 7 1996	$ 300.00	0289 (Tab 171)	No client reference
December 2 1996	$ 3,000.00	0347 (Tab 172)	No client reference
December 23 1996	$ 1,200.00	0411 (Tab 173)	No client reference
December 26 1996	$ 1,127.00	0412 (Tab 174)	No client reference

Date	Amount	Cheque # (and location*)	Allocated to Client
December 27 1996	$ 1,127.00	0413 (Tab 175)	No client reference
January 2 1997	$ 2,700.00	0348 (Tab 176)	No client reference
January 10 1997	$ 600.00	0437 (Tab 68)	Wraight
January 17 1997	$ 600.00	0443 (Tab 177)	No client reference
January 31 1997	$ 3,000.00	0464 (Tab 178)	No client reference
February 1997	$ 3,500.00	0469 (Tab 179)	No client reference
February 14 1997	$ 2,200.00	0477 (Tab 180)	No client reference
February 18 1997	$ 2,100.00	0481 (Tab 181)	No client reference
February 20 1997	$ 2,100.00	0484 (Tab 182)	No client reference
February 26 1997	$ 8,000.00	0486 (Tab 183)	No client reference
March 3 1997	$ 2,000.00	0497	No client reference
April 25, 1997	$ 1,500.00	0542	No client reference
May 1 1997	$ 1,500.00	0546 (Tab 184)	No client reference
May 2 1997	$ 1,600.00	0216 (Tab 185)	No client reference
May 9 1997	$ 500.00	0550 (Tab 186)	No client reference
May 13 1997	$ 4,000.00	0552 (Tab 187)	No client reference
May 23 1997	$ 2,119.32	0561 (Tab 188)	No client reference

Date	Amount	Cheque # (and location*)	Allocated to Client
May 23 1997	$ 2,119.32	0562 (Tab 189)	No client reference
May 26 1997	$ 1,600.00	0565 (Tab 190)	No client reference
May 26 1997	$ 780.00	0566 (Tab 191)	No client reference
May 30 1997	$ 1,177.00	0573 (Tab 192)	No client reference
Total	$128,132,86		

* The Member has been unable to produce copies of some of the cheques which he identified as misappropriations to the Law Society's auditors. Each of these misappropriations from the Member's trust account at the Bank of Montreal were deposited directly into the Member's general account at the same institution. General account bank statements with the Bank of Montreal in Brantford for the period May 1996 to May 1997, except September 1996, are contained at Tabs 193 to 204 of the Document Book.

APPENDIX D - Misappropriation (Paid to benefit of Member) - $56,813.18 Bank of Montreal

Date	Amount	Cheque #	Payee	Explanation
November 26 1996	$ 206.37	0321 (Tab 205)	L. Child	This was an additional interest payment as detailed in paragraph 68.
December 13 1996	$ 206.37	0364 (Tab 206)	L. Child	As above.
January 16 1997	$ 206.37	0442 (Tab 207)	L. Child	As above.
February 14 1997	$ 206.37	0478 (Tab 208)	L. Child	As above.
March 14 1997	$ 206.37	0503 (Tab 209)	L. Child	As above.
March 26 1997	$ 3,095.58	0520 (Tab 210)	Clearice	Although the Member did not invest the sum of $97,800.16 provided by this client in the Petofi mortgage, as the client understood would happen, the amount of $3,095.58 represents an interest payment from the trust account. Details are in paragraphs 63 to 65.
Total	$56,813.18			

[At the Hearing Counsel for the Law Society indicated that the payment of $52,685.75 to Clearice- see paragraph 94 - had been inadvertently left out of the above table.]

APPENDIX E - Misapplication of $21,924.55 Toronto-Dominion Bank

Date	Amount	Cheque #	Payee	Explanation
September 21 1995	$ 620.44	1207	Avco	Member was acting for client Boast. Extra amount was required by Avco (opposing party) to resolve matter. Member did not request funds from his client but paid amount from pool of funds in mixed trust account, although no funds there for Boast.
January 9 1996	$ 620.44	1372	Avco	As above. The Member prepared for the Law Society a list of disbursements that should not have been made from his trust account for the month of January 1996 (Document Book, Tab 147).
January 19 1996	$ 3,842.67	1378	Health One	As indicated in a note to the Law Society, dated July 28, 1997 (Document Book, Tab 211), the Member stated this payment was to a client for a Small Claims action, with which he was supposed to proceed but did not. This amount is on the list prepared by the Member for January 1996 listing disbursements that should not have been paid from trust.
March 4 1996	$ 4,891.00	1440	Health One	As above. This amount is on the list prepared by the Member for March 1996 listing disbursements that should not have been paid from trust (Document Book, Tab 148).
March 23 1996	$ 1,000.00	1475	H. Wilmot	The payments to Wilmot were discussed in paragraphs 86 to 89. This amount is on the list prepared by the Member for March 1996 listing disbursements that should not have been paid from trust.

Date	Amount	Cheque #	Payee	Explanation
April 4 1996	$ 1,050.00	1501	F. Malik	This amount is on the list prepared by the Member for April 1996 listing disbursements that should not have been paid from trust (Document Book Tab 149).
April 4 1996	$ 6,300.00	1502	H. Wilmot	The payments to Wilmot were discussed in paragraphs 86 to 89. This amount is on the list prepared by the Member for April 1996 listing disbursements that should not have been paid from trust.
April 9 1996	$ 3,600.00	1506	708179 Ont Inc	This amount is included on the list prepared by the Member for April 1996 listing disbursements that should not have been paid from trust.
TOTAL	$21,924.55			

APPENDIX F - Misapplication of $ 13,432.75 Bank of Montreal

Date	Amount	Cheque #	Payee	Explanation
November 8 1996	$ 4,318.53 (Part of cheque for $20,318.53)	0287 (Tab 212)	Revenue Canada	Member received $16,000.00 from his client, the Estate of Harry Bolton to pay Revenue Canada. He did not pay the amount immediately and interest accrued in the sum of $4,318.53. The Member paid this interest from trust together with the $16,000.00.
November 27 1996	$ 1,397.39	0319 (Tab 213)	John Oosterveldt	This amount was a rebate owing to the Member's client, Oosterveldt, from Farm Credit, but no indication that funds in trust.
May 23 1997	$ 7,716.83	0560 (Tab 214)	1029012 Ontario Inc.	The Member did not have sufficient funds in his trust account at that time for his client.
Total	$13,432.75			

RECOMMENDATION AS TO PENALTY

The Committee recommends that William Ernest Duce be disbarred.

REASONS FOR RECOMMENDATION

The Committee recommends that the member be disbarred. During the period from August , 1995 to July 1997, he misappropriated $280,962.47 and misapplied $261,279.19. He has been convicted for these offences.

In several cases his victims were elderly and vulnerable. Although we recognize some mitigation in the form of his cooperation with the Society investigation and in some restitution to Mrs. Merritt and Mr. Wraight, there is nothing on the facts that enables us to depart from the usual rule that disbarment is the only appropriate penalty for misappropriation. This member's situation is aggravated by a previous discipline history in which he was Reprimanded in Committee for misapplication of funds.

William Ernest Duce was called to the Bar on March 21, 1969.

ALL OF WHICH is respectfully submitted

DATED this 25th day of March, 1999

W. Michael Adams, Chair

Mr. Stuart asked that the following corrections be made to the Report:

(1) page 12, 7th line of the Table under the heading "Result" - that after the word "inadequacy", the words " of his books" be added.

(2) page 23, paragraph 87 - that the word "client" be deleted in the 2nd line so the phrase would then read:

".....Mr. Henry Wilmot ("Wilmot"), another of the Member's clients."

It was moved by Ms. Ross, seconded by Mr. MacKenzie that the Report as amended and the recommended penalty that the solicitor be disbarred, be adopted.

Carried

It was noted that there has been no restitution made to either Mrs. Merritt or Mr. Wraight.

Re: Larry George FROLICK - Toronto

The Secretary placed the matter before Convocation.

Mr. Topp and Ms. Stomp and Ms. Cronk withdrew for this matter.

Ms. Janet Brooks appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 18th December, 1998, together with an Affidavit of Service sworn 18th January, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 8th January, 1999 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th March, 1999 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Philip M. Epstein, Q.C., Chair
Tamara K. Stomp
Shirley O'Connor

In the matter of The Law Society Act and in the matter of	Janet Brooks For the Society
LARRY GEORGE FROLICK of the City of Toronto a barrister and solicitor	Not Represented For the solicitor
	Heard: October 27 & 28 and November 27, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

Complaint D9/98 was issued against Larry George Frolick on April 17, 1998 alleging that he was guilty of professional misconduct.

The matter was heard in public on October 27 and 28, and November 27, 1998 before this Committee composed of Philip M. Epstein, Q.C., Chair, Tamara K. Stomp and Shirley O'Connor. The Solicitor attended the hearing and represented himself. Janet Brooks appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D9/98

2. a) In respect of a $10,000 loan from his lender client Katharina Wirth in or about June, 1993:

i. he acted in a conflict of interest by acting for Ms. Wirth as well as the borrowers Walter Da Ponte and Mr. Da Ponte's company without disclosing his conflict of interest to Ms. Wirth and advising her to seek independent legal advice; and

ii. he preferred the interests of his borrower clients Walter Da Ponte and Mr. Da Ponte's company as well as his own interests by failing to make disclosure to Ms. Wirth of relevant information regarding his borrower clients.

b) In respect of a $45, 000 loan from his lender client Wes Cooper in or about November, 1993:

i. he acted in a conflict of interest by acting for Mr. Cooper as well as the borrowers Walter Da Ponte and Mr. Da Ponte's company without disclosing his conflict of interest to Mr. Cooper and advising him to seek independent legal advice; and

ii. he preferred the interests of his borrower clients, Walter Da Ponte and Mr. Da Ponte's company as well as his own interests, to the interests of his client, Wes Cooper, by failing to make full disclosure to Mr. Cooper of relevant information regarding his borrower client(s).

c) In respect of a $75,000 loan from his lender clients Ross Bilek and Susan Bilek in or about June, 1994:

i. he made false representations to Ross Bilek and Susan Bilek in order to induce them to loan $75,000 to Walter Da Ponte's business, 521783 Ontario Limited operating as Tasty Bagel;

ii. he acted in a conflict of interest by acting for Mr. and Mrs. Bilek as well as the borrower, 521783 Ontario Limited, without disclosing his conflict of interest to Mr. and Mrs. Bilek and advising them to seek independent legal advice; and

iii. he preferred the interests of his clients, Walter Da Ponte and 521783 Ontario Limited as well as his own interests, to the interests of his clients Ross Bilek and Susan Bilek by failing to make disclosure to them of relevant information regarding his borrower clients.

d) In respect of a $25,000 loan from his lender client Ross Bilek in or about September, 1994:

i. he made false representations to Ross Bilek in order to induce him to loan an additional $25,000 to Walter Da Ponte's company, 521783 Ontario Limited operating as Tasty Bagel;

ii. he acted in a conflict of interest by acting for Mr. Bilek as well as the borrower, 521783 Ontario Limited, without disclosing his conflict of interest to Mr. Bilek and advising him to seek independent legal advice; and

iii. he preferred the interests of his clients, Walter Da Ponte and Mr. Da Ponte's company as well as his own interests, to the interests of his client, Ross Bilek

by failing to make disclosure to him of relevant information regarding his borrower clients.

e) In respect of a $25,000 loan from his lender client Katharina Wirth in or about September, 1994:

i. he acted in a conflict of interest by acting for Ms. Wirth as well as the borrowers Walter Da Ponte and Clifton Pelley without disclosing his conflict of interest to Ms. Wirth and advising her to seek independent legal advice; and

ii. he preferred the interests of his clients' Walter Da Ponte, Clifton Pelley and his own interests, to the interests of his client, Katharina Wirth by failing to make disclosure to her of relevant information regarding his borrower clients.

g) In respect of a $17,000 loan from his lender client Robert Beard in or about December, 1994:

ii. he falsely represented to his client Robert Beard that he would not be acting for the borrower on the loan transaction when, in fact he did act in a conflict of interest; and

iii. he preferred the interests of his client, Clifton Pelley, to the interests of his client, Robert Beard by failing to make disclosure to him of relevant information regarding his borrower client.

h) In respect of a $31,900 loan from his lender client Robert Beard in or about February, 1995:

ii. he falsely represented to his client Robert Beard that he would not be acting for the borrower on the loan transaction when, in fact, he did act in a conflict of interest; and

iii. he preferred the interests of his client Walter Da Ponte and his own interests, to the interests of his client, Robert Beard by failing to make disclosure to him of relevant information regarding his borrower client.

Particular 2(f) was withdrawn at the hearing.
The Committee found that particulars 2 (g) (i) and 2 (h) (i) were not established.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D9/98 and is prepared to proceed with a hearing of the Complaint on October 27 and 28, 1998.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act.*

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D9/98 and admits particulars 2(a)(i), 2(a)(ii), 2(b)(i), 2(b)(ii), 2(c)(ii), 2c(iii), 2(d)(ii), 2(d)(iii), 2(e)(i) and 2(e)(ii) therein and that they constitute professional misconduct as supported by the facts as hereinafter set out. The parties jointly submit that particular 2(f) of Complaint D9/98 should be withdrawn. The Solicitor does not admit particulars 2(c)(i), 2 (d)(i), 2(g) or 2(h) of the Complaint.

IV. FACTS

4. The Solicitor was called to the Bar in 1975. He practised with his father, Stanley William Frolick, until his father's death in 1988. At times relevant to this Complaint, the Solicitor practised as a sole practitioner. In May 1995, his rights and privileges were suspended for the non-payment of his errors and omissions levy.

BACKGROUND AND SUMMARY

5. The Solicitor acted for several clients including Walter Da Ponte and Clifton Pelley who were involved in business ventures and who required access to private sources of funds.

6. The Solicitor also acted for several clients including, Katharina Wirth, Wes Cooper, Ross Bilek and Robert Beard who had funds available for investment purposes and, as described herein, made loans to Walter DaPonte and his companies or Clifford Pelley and his companies on the advice and representations of the Solicitor. The Solicitor benefitted financially from these loans to the extent that he used some of the funds to pay off the debts of the borrowers to him and he maintained Mr. Da Ponte and Mr. Pelley and their companies as his clients.

7. The Solicitor advised the Law Society that he first acted for Mr. Da Ponte in the summer of 1992. At that time, Mr. Da Ponte through Kornell Investments Limited owned a one third interest in 521783 Ontario Limited which operated a business known as "Tasty Bagel". Mr. Frolick understood that this interest had been purchased for $300,000.00. There were two other owners of Tasty Bagel, David Levenstadt and Isaac Peck each holding a one-third interest through a corporation. A copy of the company's financial statements at April 30, 1991 are at Tab 1 of the Document Book.

8. In December 1992, the Solicitor acted for Mr. Da Ponte on the purchase of a one third interest in Tasty Bagel from David Levenstadt's company. Copies of the Solicitor's fee billing and reporting letter to Mr. Da Ponte's company 1001318 Ontario Inc. are at Tabs 2 and 3 of the Document Book. Part of the consideration was a promissory note from Mr. Da Ponte to the vendor.

9. In January 1993, the Solicitor acted for Mr. Da Ponte in his negotiations to purchase the remaining one third interest in the company owned by Isaac Peck' s company. By letter dated January 19, 1993 to Mr. Peck (Document Book - Tab 4), the Solicitor listed outstanding accounts totalling $403,000.00 owed by Tasty Bagel to various creditors.

10. In February 1993, the Solicitor acted for Mr. Da Ponte on the closing of the purchase of Mr. Peck's one third interest in the company. Copies of the Solicitor's fee billing and his draft reporting letter to Mr. Da Ponte's company are at Tabs 5 and 6 of the Document Book. The purchase price was $70,000.00. Part of the consideration was provided by way of a $40,000.00 second mortgage on Mr. Da Ponte's parents home at 3359 Lehigh Crescent, Mississauga. The property had an appraised value of $225,000.00 as of September 4, 1992 (Document Book - Tab 7) and the amount owing on the first mortgage to the CIBC as at January 20, 1993 was $147,674.35 (Document Book - Tab 8).

11. An execution search conducted by the Solicitor on April 1, 1993 (Document Book - Tab 9) showed four outstanding executions against 521783 Ontario or Tasty Bagel totalling $155,901.98. These executions were:

a. Execution obtained by Robin Hood Multifoods Inc. in October 1992 in the amount of $56,971.33 (Document Book - Tab 10), which Tasty Bagel was able to discharge by November 1, 1993 (Document Book - Tab 11).

b. Execution obtained by Maple Leaf Mills Inc. in February 1993 in the amount of $74,483.98 (Document Book - Tab 12).

c. Execution obtained by the Workers' Compensation Board on October 9, 1992 in the amount of $17,315.00 (Document Book - Tab 14).

d. Execution obtained by the Ontario Government for Corporations Tax Branch on March 17, 1993 in the amount of $7,131.67 (Document Book - Tab 15).

12. The Solicitor was actively involved in negotiating settlements with these creditors on behalf of Tasty Bagel as shown by his letter of July 23, 1993 (Document Book - Tab 13).

13. In March through June 1993, the Solicitor acted for Mr. Da Ponte and his companies in respect of their financial difficulties, including arranging loans from a Robert Dziuryn secured by chattel mortgages (Document Book - Tab 16) . He also acted for Tasty Bagel and Mr. Da Ponte in relation to criminal charges arising from Tasty Bagel's use of Weston Bakery trays in delivering its product (Document Book - Tab 17).

14. On June 2, 1993, the Solicitor arranged a $10,000.00 loan for Mr. Da Ponte from his client, Katharina Wirth. Details of this loan transaction are set out at paragraphs 40 to 62 of this Agreed Statement. This loan is the subject of particular 2 (a) of the Complaint.

15. By letter dated September 9, 1993 (Document Book - Tab 18), the Solicitor forwarded to Mr. Da Ponte a schedule listing all his fee billings to Mr. Da Ponte and his companies for the various services performed in the period September 4, 1992 to September 1, 1993. He had billed a total of $28,228.40 in that period and the balance owing to him was $5,044.25.

16. In October 1993, the Solicitor acted for Mr. Da Ponte's company Tasty Bagel, as defendant, in an action brought by Galaxy Bakery Ltd. for the payment of approximately $63,000.00 in respect of supplies of Tasty Bagel. William Andrews Q.C. acted for Galaxy Bakery Ltd. Copies of the Solicitor's October 18, 1993 letter to Mr. Da Ponte, October 18, 1993 fee billing to Mr. Da Ponte and his November 5, 1993 fee billing to Mr. Da Ponte are at Tabs 19, 20 and 21 respectively of the Document Book.

17. On November 3, 1993, the Solicitor arranged a $45,000.00 loan for Mr. Da Ponte from his client, Wes Cooper. Details of this loan are set out at paragraphs 75 to 89 of this Agreed Statement. This loan is the subject of particular 2 (b) of the Complaint.

18. In November 1993, the Solicitor attempted to settle Galaxy Bakery Ltd.'s civil action against Tasty Bagel (Document Book - Tab 22).

19. On January 10, 1994, on the Solicitor's recommendation, Ms. Wirth renewed her $10,000.00 loan to Mr. Da Ponte and his company as set out in paragraph 52.

20. On January 19, 1994, Galaxy Bakery Ltd. obtained a Judgment against Tasty Bagel for $64,770.75 (Document Book - Tab 23).

21. On January 25, 1994, Mr. Andrews, counsel for Galaxy Bakery Ltd., advised the Solicitor (Document Book - Tab 24) that he had issued a Writ of Seizure and Sale against Tasty Bagel and confirmed that he would not file or act upon it if Tasty Bagel made certain payments. The first payment was to be $15,000.00 on January 28, 1994; weekly payments of $1,000.00 were to be made commencing February 14, 1994.

22. The Solicitor paid $15,000.00 to Mr. Andrews in trust on February 8, 1994 (Document Book - Tab 25). The source of these funds was a loan from Mrs. Wirth. Details of this loan are set out at paragraph 57 of this Agreed Statement.

23. Tasty Bagel defaulted on the other payments to Galaxy Bakery Ltd. and on February 28, 1994, Mr. Andrews issued a Notice of Seizure of Bank Account (Document Book - Tab 26) against Tasty Bagel's bank account.

24. By letter dated March 7, 1994 (Document Book - Tab 27) the Solicitor forwarded post-dated cheques to Mr. Andrews in order to have the Notice of Seizure lifted.

25. At around the same period of time, Tasty Bagel was having difficulty making payments to Maple Leaf Mills Inc. to satisfy a judgment it had obtained against Tasty Bagel in March 1993 (Document Book - Tab 12). By letters dated January 13, 1994 (Document Book - Tab 28), January 20, 1994 (Document Book - Tab 29), February 28, 1994 (Document Book - Tab 30) counsel for Maple Leaf Mills Inc. wrote to the Solicitor demanding payment. By letter dated March 2, 1994 (Document Book - Tab 31), the Solicitor forwarded funds to counsel for Maple Leaf Mills Inc. in satisfaction of the judgment.

26. On June 8, 1994, the Solicitor arranged a $75,000.00 loan for Mr. Da Ponte from his clients, Ross Bilek and Susan Bilek. Details of this loan are set out at paragraphs 90 to 106 of this Agreed Statement. This loan is the subject of particular 2 (c) of the Complaint.

27. The Bileks' loan was applied to fees owing by Mr. Da Ponte or his companies to the Solicitor and other debts of Mr. Da Ponte and his company, as shown by the Solicitor's statement of account to Mr. Da Ponte dated June 9, 1994 (Document Book - Tab 32). At around the same time the Solicitor had acted for Mr. Da Ponte and registered a fourth mortgage on 3359 Lehigh Crescent, Mississauga in favour of Robert Dziuryn.

28. On July 11, 1994, on the Solicitor's recommendation, Ms. Wirth renewed her $10,000.00 loan to Mr. Da Ponte and his company, as set out in paragraph 61.

29. In September 1994, the Solicitor arranged an additional $25,000 loan for Mr. Da Ponte from Ross Bilek. Details of this loan are set out at paragraphs 107 to 125 of this Agreed Statement. This loan is the subject of particular 2(d) of the Complaint.

30. In September 1994, the Solicitor arranged a $25,000 loan for Mr. Da Ponte and Mr. Pelley from Ms. Wirth. Details of this loan are set out at paragraphs 63 to 74 of this Agreed Statement. This loan is the subject of particular 2(e) of the Complaint.

31. In December 1994, Mr. Da Ponte borrowed funds from another client of the Solicitor, Magdi Tawadros, secured by a fifth mortgage for $29,000.00 on 3359 Lehigh Crescent, Mississauga (Document Book - Tab 33).

32. In December 1994, the Solicitor prepared documents with respect to a loan from Robert Beard to Clifton Pelley, which is the subject of particular 2(g) of the Complaint.

33. By January 10, 1995, the Solicitor was aware that Tasty Bagel owed Revenue Canada over $200,000.00 for source deductions but not remitted to Revenue Canada. On January 10, 1995, the Solicitor received a copy of a letter dated January 4, 1995 from Revenue Canada advising of the debt (Document Book - Tab 34). On the same day, he wrote to Revenue Canada on behalf of Tasty Bagel (Document Book - Tab 35).

34. In about the same time, the Solicitor states that he was advised by Mr. Da Ponte that the bank manager at the CIBC, where Tasty Bagel's line of credit was maintained, had extorted $100,000.00 from Mr. Da Ponte over a one year period following Mr. Da Ponte's purchase of 100% of Tasty Bagel. Mr. Da Ponte advised him that the bank manager was facing criminal charges. The Solicitor was also advised that the bank manager had threatened to call Mr. Da Ponte's $80,000 operating line of credit if he was not paid "under the table". Mr. Da Ponte subsequently sued the CIBC for $500,000.

35. On or about February 9, 1995, the Solicitor acted for Mr. Da Ponte's parents on the refinancing of their property at 3359 Lehigh Crescent, Mississauga. A new first mortgage loan for $207,050.00 was obtained from the Royal Bank (Document Book - Tabs 36 and 37).

36. After the existing first, second, third and fourth mortgages had been paid off the property at 3359 Lehigh Crescent, there were no funds left to discharge the fifth mortgage to Magdi Tawadros. In order to discharge this mortgage, the Solicitor paid $20,600.00 from his trust account to Magdi Tawadros. In February 1995, the Solicitor arranged a loan between Robert Beard and Mr. Da Ponte's company, which is the subject of particular 2(h).

37. Mr. Da Ponte through another lawyer, John F. O'Donnell, attempted to raise new shareholder equity for Tasty Bagel. A draft Information Circular dated April 26, 1995, was prepared for the company (Document Book - Tab 38). On page 2 of the Circular under the title "Risk Factors", the Circular states:

> The corporation is insolvent. There are outstanding liabilities in excess of $1,900,000. There is serious and substantial doubt about the corporation's ability to continue as a going concern. ... The shares are speculative. Subscribers may not be able to sell the shares. Subscribers should be prepared to accept the risks inherent in the bakery business and the risk of losing all or part of their investment or to face the possibility of no return thereon.

38. In or about May 1995, Mr. Da Ponte and his companies ceased making payments to the Solicitor's clients, Ms. Wirth, Mr. Bilek and Mr. Cooper. In or about February 1995 Mr. Pelley and his companies ceased making payments to Ms. Wirth. Ms. Wirth, Mr. Cooper and Mr. Bilek advise that they have lost the entire principal of their investments as follows:

LENDER CLIENT	DA PONTE LOANS	PELLEY/ DA PONTE LOANS	TOTAL LOANS
Katharina Wirth	$10,000.00	$25,000.00	$35,000.00
Wes Cooper	45,000.00		45,000.00
Ross Bilek	100,000.00		100,000.00
TOTAL	$155,000.00	$25,000.00	$180,000.00

39. It appears that Tasty Bagel was out of business by November 1995 (Document Book - Tab 39).

2 a) In respect of a $10,000 loan from his lender client Katharina Wirth in or about June, 1993:

i. he acted in a conflict of interest by acting for Ms Wirth as well as the borrowers Walter Da Ponte and Mr. Da Ponte's company without disclosing his conflict of interest to Ms Wirth and advising her to seek independent legal advice; and

ii. he preferred the interests of his borrower clients Walter Da Ponte and Mr. Da Ponte's company as well as his own interests by failing to make disclosure to Ms Wirth of relevant information regarding his borrower clients.

40. Katharina Wirth is retired senior citizen. Prior to her retirement, she worked at the meat counter of a Steinberg's Grocery Store, later Miracle Food Mart. The Solicitor's father, Stanley William Frolick, had acted for her until his death in the late 1980s. Stanley Frolick never acted for her on any loans.

41. In January 1993, the Solicitor acted for Ms. Wirth on the sale of her house at 110 Margueretta Street in Toronto. On closing, she received net sale proceeds of the sale from the Solicitor in the amount of $190,903.78 (Document Book - Tab 40).

42. In February 1993, Ms. Wirth contacted the Solicitor and asked if he could invest her funds at a rate higher than that offered by the banks.

43. In February 1993, Ms. Wirth agreed to invest $18,000.00 through the Solicitor and, in April 1993, she invested a further $37,000.00 (Document Book - Tab 40). She had no complaint regarding these loans. Neither are the subject of these proceedings. Ms. Wirth estimates that in total she made eight investments with the Solicitor including the ones which are the subject of the Complaint.

44. On or about June 2, 1993, the Solicitor recommended that Ms. Wirth invest $10,000 in Tasty Bagel and its principal, William Da Ponte. On his representations and advice, she provided him with funds in this amount (Document Book - Tab 41).

45. In making the loan, Ms. Wirth relied entirely on the Solicitor's representations that the loan was a safe investment. She trusted the Solicitor. The Solicitor never disclosed to her the risks associated with the loan or the purpose of the borrowing. Ms. Wirth would not have made the loan had the Solicitor made this disclosure to her.

46. The Solicitor never told Ms. Wirth that he was also acting for the actual borrower, Mr. Da Ponte's company DPX-Press Distributors Ltd. (DPX) and Mr. Da Ponte on this transaction. He never complied with the requirements of Rule 5 of the *Rules of Professional Conduct:*

a. He did not advise Ms. Wirth that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

b. He did not reveal that had a continuing relationship with Mr. Da Ponte and his companies and acted regularly for them and did not advise Mrs. Wirth to obtain independent legal advice; and

c. He did not obtain Mrs. Wirth's consent to act or record it in a letter to her.

Ms. Wirth would have sought independent legal advice if it had been recommended to her.

47. At the time that the loan was made, the Solicitor was aware that Mr. Da Ponte and Tasty Bagel were experiencing financial problems. These problems extended to DPX, the delivery arm of that business. The Solicitor never disclosed these financial concerns with Mrs. Wirth.

48. The Solicitor told Ms. Wirth that Mr. Da Ponte operated a bakery. There was no negotiation of the terms of the loan. The Solicitor told her the interest rate was 18% and the loan was for a term of six months. She signed a Direction setting out these terms and conditions (Document Book - Tab 42). Walter Da Ponte and, his brother, Helder Da Ponte also signed this Direction as well as a Direction re: funds (Document Book - Tab 43).

49. The security for the loan of $10,000 was a chattel mortgage for $15,000.00 over four vehicles listed as assets of DPX (Document Book - Tab 44). The loan was also guaranteed by Walter Da Ponte and Helder Da Ponte. Ms. Wirth did not advance the additional $5,000.00.

50. Ms. Wirth's funds were amalgamated with funds the Solicitor received from another client, Robert Dziuryn, and were disbursed as set on the Solicitor's trust ledger, reproduced below (Document Book -Tab 45):

DATE	SOURCE/PAYEE	RECEIPTS	PAYMENTS
May 27/93	Robert Dziuryn	16,000.00	
June 2/93	Katherine Wirth	10,000.00	
June 7/93	Frolick & Frolick		3,684.40
June 9/93	Walter Da Ponte		21,815.60
June 9/93	Robert Dziuryn		500.00
	TOTAL	26,000.00	26,000.00

The Solicitor received $3,684.40 towards his fees and disbursements. Copies of the trust cheques are at Tab 46 of the Document Book.

51. The Solicitor reported to Ms. Wirth by letter dated June 9, 1993 (Document Book - Tab 47).

52. On or about January 10, 1994, on the Solicitor's recommendation, Mrs. Wirth agreed to renew the DPX loan for six months at 18% interest (Document Book - Tab 48). At this time, the Solicitor did not advise Mrs. Wirth of his conflict of interest and explain the consequences of it; he did not disclose the risks associated with the loan, the purpose of the borrowing or the financial situation of DPX and Mr. Da Ponte. Ms. Wirth would not have renewed the loan if the Solicitor had made disclosure of these facts to her.

53. On February 16, 1994, the Solicitor sent Ms. Wirth a reporting letter on the renewal of the loan (Document Book - Tab 49).

54. On or about February 1, 1994, the Solicitor recommended that Ms. Wirth invest $24,250.00 in a third mortgage for $25,000.00 at 14% for three months on Walter Da Ponte's parents house at 3359 Lehigh Crescent in Mississauga. She provided him with funds in this amount (Document Book - Tab 50). The Solicitor acted for the borrowers but did not disclose his conflict of interest to Ms. Wirth. He never complied with the requirements of Rule 5 of the *Rules of Professional Conduct:*

a. He did not advise Ms. Wirth that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

b. He did not reveal that had a continuing relationship with Mr. Da Ponte and his companies and acted regularly for them and did not advise Mrs. Wirth to obtain independent legal advice; and

c. He did not obtain Mrs. Wirth's consent to act or record it in a letter to her.

Ms. Wirth would have sought independent legal advice if it had been recommended to her.

55. On June 27, 1994, the Solicitor reported to Ms. Wirth on this loan transaction (Document Book - Tab 51).

56. The Solicitor disbursed Ms. Wirth's funds as follows, as indicated on his trust ledger account (Document Book -Tab 52):

William Andrews	$15,000.00
Minister of Finance	50.00
Martin Zaretsky	527.65
Frolick & Frolick - fees & disb.	4,627.35
Frolick & Frolick - fees & disb.	2,703.94
Walter Da Ponte	1,296.06
TOTAL	$24,358.00

57. As indicated in paragraph 22 above, the $15,000.00 paid to Mr. Andrews (Document Book - Tab 25) was the first instalment payable by Mr. Da Ponte to satisfy a judgment for $64,770.75 that Galaxy Bakery had obtained against Tasty Bagel on January 19, 1994 (see Document Book - Tab 23). A total of $7,331.29 was paid to the Solicitor in respect of fees and disbursements owing to him by Mr. Da Ponte or his companies. The trust cheques are at Tab 53 of the Document Book.

58. The Solicitor never disclosed to Mrs. Wirth that Mr. Da Ponte needed to borrow these funds because of ongoing financial problems with his business, Tasty Bagel, and to pay his own legal fees.

59. By letter dated June 27, 1994, the Solicitor reported to Mr. Da Ponte on this transaction (Document Book - Tab 54). He confirmed that the proceeds of the loan were re-directed to Walter Da Ponte and that funds were disbursed as indicated on the Solicitor's trust ledger.

60. Mrs. Wirth advised the Law Society that she did not suffer a loss in relation to the third mortgage on 3359 Lehigh Crescent (Document Book - Tabs 36 and 37).

61. On or about July 11, 1994, on the Solicitor's recommendation, Ms. Wirth agreed to renew the $10,000.00 loan to DPX for further six months at 18% interest. A copy of the Direction signed by both Mrs. Wirth and Walter Da Ponte setting out the terms of the chattel mortgage renewal is attached (Document Book - Tab 55). A new chattel mortgage for $9,659.77 was signed (Document Book - Tab 56). The security was reduced from four vehicles to two vehicles. The Solicitor's reporting letter on the transaction is at Tab 57 of the Document Book.

62. Again, the Solicitor never disclosed to Ms. Wirth the risks associated with the loan, or impact of the decrease in security, or why DPX was borrowing the funds. He never disclosed to her that he was also acting for DPX and Mr. Da Ponte on this transaction. He did not comply with Rule 5 of the Rules of Professional Conduct by explaining the consequences of the conflict, recommending that she obtain independent legal advice or obtain a waiver of such advice. He never disclosed his knowledge of the financial problems of Tasty Bagel, DPX and Mr. Da Ponte. Had the Solicitor advised her of the risks involved in the loan and the financial circumstances of the borrower, Ms. Wirth would not have made the loan. Had the Solicitor advised her to obtain independent legal advice, Ms. Wirth would have sought such advice.

2 e) In respect of a $25,000 loan from his lender client Katharina Wirth in or about September, 1994:

i. he acted in a conflict of interest by acting for Ms Wirth as well as the borrowers Walter Da Ponte and Clifton Pelley without disclosing his conflict of interest to Ms Wirth and advising her to seek independent legal advice; and

ii. he preferred the interests of his clients' Walter Da Ponte, Clifton Pelley and his own interests, to the interests of his client, Katharina Wirth by failing to make disclosure to her of relevant information regarding his borrower clients.

63. On September 7, 1994, on the Solicitor's recommendation, Mrs. Wirth provided the Solicitor with $25,000.00 (Document Book - Tab 58) for investment in a loan to 1081998 Ontario Inc. and Clifton Pelley. The loan was for one year at an interest rate of 16%. Ms. Wirth signed a Direction setting out the terms and conditions (Document Book - Tab 59). Clifton Pelley also signed this Direction as well as a Direction re: funds (Document Book - Tab 60).

64. Mrs. Wirth relied entirely on the Solicitor in giving the loan and trusted him. The Solicitor never disclosed to Ms. Wirth the risks associated with the loan or why the company was borrowing the funds. Ms. Wirth would not have made the loan had the Solicitor made this disclosure to her.

65. The Solicitor never disclosed to Ms. Wirth that he was also acting for Mr. Pelley and his company on this transaction. He never recommended that she obtain independent legal advice. He never complied with the requirements of Rule 5 of the *Rules of Professional Conduct:*

a. He did not advise Ms. Wirth that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

b. He did not reveal that had a continuing relationship with Mr. Da Ponte and his companies and acted regularly for them and did not advise Mrs. Wirth to obtain independent legal advice; and

c. He did not obtain Mrs. Wirth's consent to act or record it in a letter to her.

Ms. Wirth would have sought independent legal advice if it had been recommended to her.

66. The security that Mrs. Wirth was given for her loan was a General Security Agreement (Document Book - Tab 61) and a promissory note signed by Mr. Pelley (Document Book - Tab 62). Ms. Wirth did not know what a General Security Agreement was, nor did the Solicitor explain it to her. There was no negotiation of the terms or security of the loan.

67. Mr. Pelley signed a Direction (Document Book - Tab 63) authorizing the payment of the $25,000.00 as follows:

Walter Da Ponte	$18,232.39
Frolick & Frolick	5,039.47
Frolick & Frolick	1,728.14
TOTAL	$25,000.00

The Solicitor received $6,767.61 from the funds in respect of outstanding fees and disbursements. Copies of the trust cheques for the payments from trust are at Tab 64 of the Document Book.

68. At the time that he recommended the loan to Ms. Wirth, the Solicitor was aware the Mr. Pelley's company was experiencing financial difficulties, as he had acted for the company in relation to its creditors (Document Book - Tab 65). The Solicitor never disclosed this information to Ms. Wirth.

69. As part of the security, a promissory note was also signed by Walter Da Ponte (Document Book - Tab 66).

70. The Solicitor advised the Law Society that Mr. Pelley and Mr. Da Ponte wanted to start up a cleaning business in Toronto. At the time of the loan, the Solicitor did not disclose to Ms. Wirth that Mr. Da Ponte was also involved in the company and had also agreed to guarantee the loan.

71. The Solicitor never disclosed to Ms. Wirth that he was acting for 1081998 Ontario Inc., Mr. Pelley and Mr. Da Ponte on this transaction. The Solicitor never advised her to obtain independent legal advice or obtain a waiver of such advice.

72. By letter dated December 29, 1998, the Solicitor reported to Ms. Wirth (Document Book - Tab 67).

73. By letter dated December 29, 1994, the Solicitor reported to 1081998 Ontario Inc (Document Book - Tab 68).

74. Mrs. Wirth has advised that she has not received any interest payments on either the DPX loan or the 1081998 Ontario Ltd. loan since about April 1995 and she has not recovered the principal of either loan. She has submitted a claim to the Lawyers Fund for Client Compensation in respect of each loan.

2 b) In respect of a $45,000 loan from his lender client Wes Cooper in or about November, 1993:

i. he acted in a conflict of interest by acting for Mr. Cooper as well as the borrowers Walter Da Ponte and Mr. Da Ponte's company without disclosing his conflict of interest to Mr. Cooper and advising him to seek independent legal advice; and

ii. he preferred the interests of his borrower clients, Walter Da Ponte and Mr. Da Ponte's company as well as his own interests, to the interests of his client, Wes Cooper, by failing to make full disclosure to Mr. Cooper of relevant information regarding his borrower client(s).

75. Wes Cooper is a retired senior citizen. Prior to his retirement, he worked for Camp Robin Hood for approximately 30 years where he was responsible primarily for maintenance of equipment and grounds. Prior to that he was self-employed as a bus driver. He was not experienced in making investments. He was first introduced to the Solicitor by his friend, Katharina Wirth. Mr. Cooper made at least four investments through the Solicitor including the one which is the subject of this Complaint.

76. On or about November 3, 1993, Mr. Cooper approached the Solicitor to advise that he had some funds to invest. The Solicitor advised him that a bakery business, Tasty Bagel, would be willing to pay him 18% interest and that DPX was the delivery arm of business. Mr. Cooper stressed to the Solicitor that the investment had to be secure as it was his life savings. The Solicitor advised Mr. Cooper that it would be secure and added that he would not "do him any harm". The Solicitor told him he would have the borrower prepare post dated cheques.

77. On November 3, 1993, Mr. Cooper paid to Frolick & Frolick, in trust, two cheques totalling $69,500.00 (Document Book - Tab 69). Mr. Cooper signed a Direction setting out the terms and conditions for the investment of $45,000 of the $75,000 loan to DPX (Document Book - Tab 70). Walter Da Ponte and Helder Da Ponte also signed this Direction.

78. The Solicitor did not disclose to Mr. Cooper that he was also acting for DPX and Mr. Da Ponte on this transaction. He never complied with the requirements of Rule 5 of the *Rules of Professional Conduct:*

a. He did not advise Mr. Cooper that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

b. He did not reveal that had a continuing relationship with Mr. Da Ponte and his companies and acted regularly for them and did not advise Mr. Cooper to obtain independent legal advice; and

c. He did not obtain Mr. Cooper's consent to act or record it in a letter to him.

Mr. Cooper would have obtained independent legal advice had it been recommended to him.

79. The Solicitor was aware, prior to this loan being advanced, that Mr. Da Ponte's Tasty Bagel business was experiencing ongoing financial problems. DPX was the delivery arm of the business. At the same time, the Solicitor was arranging this loan with Mr. Cooper, he was defending Tasty Bagel on a lawsuit from Galaxy Bakery over unpaid bills for suppliers and loaning monies to Mr. Da Ponte his own funds. The Solicitor never disclosed to Mr. Cooper that Tasty Bagel was experiencing financial problems. Mr. Cooper would not have made the loan had the Solicitor made this disclosure to him.

80. The security Mr. Cooper received for his loan was a First General Security Agreement (Document Book - Tab 71) and a promissory note signed by Walter Da Ponte and Helder Da Ponte (Document Book - Tab 72). Mr. Cooper did not know what a First General Security Agreement was and the Solicitor did not explain it to him. Mr. Cooper knew was that the loan was for one year and that he was getting monthly interest payments.

81. The General Security Agreement was signed by Walter Da Ponte on behalf of both DPX-Press Distributors Ltd and 521783 Ontario Limited (Tasty Bagel). The agreement did not list any specific assets of either company and did not provide any information that would enable an investor to judge the financial condition of either company.

82. On November 4, 1993, the Solicitor disbursed the funds in accordance with a Direction signed by Walter and Helder Da Ponte (Document Book - Tab 73), as follows:

Walter Da Ponte	$30,000.00
Larry Frolick	10,000.00
Larry Frolick	5,000.00
TOTAL	$45,000.00

Copies of the trust ledger account and the cheques are at Tabs 74 and 75 respectively of the Document Book.

83. On November 4, 1994, the Solicitor redeposited to his trust account the two cheques that were payable to him from Mr. Cooper's funds (Document Book - Tab 76). The receipts were posted to a trust ledger account in the Solicitor's name (Document Book - Tab 77) which he was using for personal transactions and from which he had personally loaned $10,000 to Mr. Da Ponte on November 2, 1993 by cheque dated T6313 (Document Book - Tab 78). Accordingly, the Solicitor used $10,000.00 of Mr. Cooper's funds to replace his personal loan to Mr. Da Ponte. The balance of the funds were transferred to the Solicitor's general account for fees and disbursements (Document Book - Tab 79)

84. By letter dated November 16, 1993, the Solicitor reported to Mr. Cooper on the transaction (Document Book - Tab 80).

85. The Solicitor issued an account dated November 3, 1993 to Mr. Da Ponte on the transaction (Document Book - Tab 81).

86. Of the balance of the above funds, $20,000.00 were invested in a second mortgage at 18% on a house in Tottenham and $4,500 was disbursed to the Solicitor. Mr. Cooper did not suffer a loss on that investment.

87. On April 18, 1994, Mr. Cooper took all his DPX loan papers back to the Solicitor's office at the Solicitor's request. The Solicitor had advised him that Mr. Da Ponte would be paying off the loan. The Solicitor had him sign a discharge statement re: the DPX General Security Agreement.

88. In May 1994, Mr. Cooper re-invested through the Solicitor the monies that had originally been invested in the second mortgage on the Tottenham property. The funds were invested in a clothing factory owned by Qaim Hasan. Again Mr. Cooper relied entirely on the Solicitor in making the investment.

89. On June 14, 1994, the Solicitor sent a letter to Mr. Cooper (Document Book - Tab 82) as the DPX loan had not been paid off. In the letter, the Solicitor returned the DPX interest cheques for $675.00 dated June 1, 1994 to November 1, 1994. The DPX loan was not paid off when it matured and the monthly payments continued until about April 1995. Since then Mr. Cooper has not been able to recover any funds and has submitted a claim to the Lawyers Fund for Client Compensation.

2 c) In respect of a $75,000 loan from his lender clients Ross Bilek and Susan Bilek in or about June, 1994:

ii. he acted in a conflict of interest by acting for Mr and Mrs. Bilek as well as the borrower, 521783 Ontario Limited, without disclosing his conflict of interest to Mr. and Mrs. Bilek and advising them to seek independent legal advice; and

iii. he preferred the interests of his clients, Walter Da Ponte and 521783 Ontario Limited as well as his own interests, to the interests of his clients Ross Bilek and Susan Bilek by failing to make disclosure to them of relevant information regarding his borrower clients.

90. Ross Bilek first met the Solicitor on April 19, 1994, soon after Mr. Bilek's father had died. Ross Bilek went to see the Solicitor who had been his father's lawyer for fifteen years. Mr. Bilek was 28 years of age at the time and was employed by Black Creek Pioneer Village where he was responsible for the care of livestock. His spouse at the time, Susan Bilek, was unemployed but had previously been employed by Black Creek Pioneer Village.

91. Ross Bilek was the executor of his father's estate and he retained the Solicitor to act for him on the estate. Ross Bilek was also the sole beneficiary of the estate. Neither Ross nor Susan Bilek had experience investing funds.

92. Mr. Bilek provided his father's documents to the Solicitor. Probate was obtained in or about June 1994. The amount of the assets for Probate purposes was between $280,000.00 to $300,000.00.

93. Around the end of May 1994, after the Solicitor had become aware of the size of the estate, the Solicitor suggested to Mr. Bilek that he invest some of the funds in "Tasty Bagel". At first, the Solicitor said that Mr. Bilek would be investing in a debenture, he then referred to the security as a General Security Agreement or "GSA".

94. The Solicitor told Mr. Bilek that GSAs were common forms of security. The Solicitor explained that Mr. Bilek could recover against the assets to realize funds if there was any problems. The interest rate would be 14 or 15%. Mr. Bilek had no experience investing funds and relied on the Solicitor's advice in making the loan. The inheritance was special to Mr. Bilek who considered the funds as being his father's. The Solicitor acted for Mr. Bilek in respect of four investments, the investments in Tasty Bagel as set out herein, an investment in a restaurant in Yorkville, an investment in another restaurant in Toronto and an investment in Amalgamated Bakeries.

95. The Solicitor also told Mr. and Mrs. Bilek that the numbered company was owned by Walter and Helder Da Ponte and it operated a bagel business. He advised them that Walter Da Ponte was well off that the numbered company had $800,000.00 worth of assets.

96. Mr. and Mrs. Bilek agreed to invest in the GSA in the company on the basis of the Solicitor's representations. The Solicitor never disclosed the risks associated with the loan or why Tasty Bagel was borrowing the funds. Had the Solicitor made this disclosure to them, Mr. and Mrs. Bilek would not have made the loans.

97. The Solicitor never disclosed that he was also acting for Tasty Bagel and Mr. Da Ponte on this transaction. He never complied with the requirements of Rule 5 of the *Rules of Professional Conduct:*

a. He did not advise Mr. or Mrs. Bilek that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

b. He did not reveal that had a continuing relationship with Mr. Da Ponte and his companies and acted regularly for them and did not advise Mr. Bilek or Mrs. Bilek to obtain independent legal advice; and

c. He did not obtain Mr. and Mrs. Bilek's consent to act or record it in a letter to them.

Mr. and Mrs. Bilek would have obtained independent legal advice if it had been recommended to them.

98. Prior to this loan being advanced, the Solicitor was aware that Mr. Da Ponte's Tasty Bagel business had been experiencing ongoing financial problems. The Solicitor never disclosed this information to the Bileks.

99. On June 8, 1994, Mr. and Mrs. Bilek paid $75,000.00 to the Solicitor in trust (Document Book - Tab 83) from their joint bank account for the investment. Mr. and Mrs. Bilek signed a Direction setting out the terms and conditions of the loan (Document Book - Tab 84). Walter and Helder Da Ponte also signed this Direction. The loan was to be for one year and the interest rate was 15%.

100. The security Mr. and Mrs. Bilek received for their loan was a General Security Agreement (Document Book - Tab 85) over the assets of 521783 Ontario Limited (Tasty Bagel), a promissory note signed by Walter and Helder Da Ponte (Document Book - Tab 86) and an Endorsement signed by Walter Da Ponte pledging all the outstanding shares in 521783 Ontario Limited to Ross Bilek and Susan Bilek (Document Book - Tab 87).

101. The General Security Agreement was signed by Walter Da Ponte and Helder Da Ponte on behalf of 521783 Ontario Limited. The agreement did not list any specific assets of the company and did not provide any information that would enable an investor to judge the financial condition of the company and therefore the security afforded by the agreement.

102. On page 2, paragraph 3(a), the GSA states that : "[T]he Collateral is genuine and owned by Debtor free of all other security interests, mortgages, liens, claims, charges or other encumbrances ... save for the Security Interest and Encumbrances shown on Schedule "A". Schedule "A" stated under the heading "Encumbrances Affecting Collateral" the word "None". However, the Solicitor knew that Wes Cooper's $45,000.00 loan was still outstanding at that time (Document Book - Tab 82). While Mr. Cooper had executed a discharge of his security over the assets of the company in April 1994 in anticipation of being paid off, he had not received his funds.

103. The Solicitor disbursed the funds as follows (Document Book - Tab 52):

Robert Dziuryn	$31,758.80
Rick Choi	30,000.00
Walter Da Ponte	4,519.86
Frolick & Frolick	8,613.34
TOTAL	$74,892.00

Copies of the cheques are at Tab 88 of the Document Book. These payments were set out in a Direction signed by Mr. Da Ponte (Document Book - Tab 89).

104. The Solicitor provided a statement of account for these funds to Mr. Da Ponte dated June 9, 1994 (Document Book - Tab 32).

105. The main purpose of the loan was to make payments on existing loans from Mr. Dziuryn and Mr. Choi to Mr. Da Ponte or his companies.

106. Mr. and Mrs. Bilek received a reporting letter dated June 29, 1994 from the Solicitor on the transaction (Document Book - Tab 90). It stated, among other things, that the "usual searches" had been performed and that Mr. Bilek had a "good and valid interest as a secured creditor in the assets of the borrower" under the GSA. The Solicitor received a Verfication Statement from the Ministry of Consumer and Commercial Relations with respect to the registration of the GSA.

2 d) In respect of a $25,000 loan from his lender client Ross Bilek in or about September, 1994:

ii. he acted in a conflict of interest by acting for Mr. Bilek as well as the borrower, 521783 Ontario Limited, without disclosing his conflict of interest to Mr. Bilek and advising him to seek independent legal advice; and

iii. he preferred the interests of his clients, Walter Da Ponte and Mr. Da Ponte's company as well as his own interests, to the interests of his client, Ross Bilek by failing to make disclosure to him of relevant information regarding his borrower clients.

107. In late August 1994, Mr. Bilek went to see the Solicitor about a separation and divorce from his wife. The Solicitor advised him that if he loaned an additional $25,000.00 to 521783 Ontario Limited (Tasty Bagel) and Walter Da Ponte, the initial loan would be replaced with a loan in Mr. Bilek's name. The Solicitor advised Mr. Bilek that in light of his divorce this would be a way to protect his financial interests.

108. The Solicitor never told Mr. Bilek that at that time, Tasty Bagel and Walter Da Ponte required a loan of $25,000.00.

109. On September 2, 1994, Mr. Bilek paid $15,000.00 (Document Book - Tab 91) to The Solicitor in trust as a partial payment for the additional $25,000.00 loan. He was not able to pay the balance until later. Mr. Bilek signed a Direction setting out the terms and conditions of the loan (Document Book - Tab 92). Walter and Helder Da Ponte also signed this Direction. The loan was to be for one year and the interest rate was 15%. Again, the Solicitor did not advise Mr. Bilek that he was also acting for Mr. Da Ponte and his company. He never complied with the requirements of Rule 5 of the *Rules of Professional Conduct:*

a. He did not advise Mr. Bilek that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

b. He did not reveal that had a continuing relationship with Mr. Da Ponte and his companies and acted regularly for them and did not advise Mr. Bilek to obtain independent legal advice; and

c. He did not obtain Mr. Bilek's consent to act or record it in a letter to him.

Mr. Bilek would have obtained independent legal advice if it had been recommended.

110. The security Mr. Bilek received for his loan was essentially the same as he had been provided with in June 1994. The principal of the loan was increased to $100,000.00 and was in Mr. Bilek's name only and not on joint account. The interest rate for the loan was also 15% but the maturity date for the loan was now September 1,1995. There was a General Security Agreement (Document Book - Tab 93), a promissory note signed by Walter and Helder Da Ponte (Document Book - Tab 94) and an Endorsement signed by Walter Da Ponte pledging all the outstanding shares in 521783 Ontario Limited to Ross Bilek (Document Book - Tab 95). The Solicitor received a Verfication Statement for the registration of the GSA from the Ministry of Consumer and Commercial Relations; however the name of the corporate debtor was listed as "5217" only.

111. The Solicitor's disbursed the funds as follows, as shown on his trust ledger (Document Book - Tab 52):

Walter Da Ponte	$11,688.26
Frolick & Frolick	3,311.73
TOTAL	$15,000.00

Copies of the trust cheques are at Tab 96 of the Document Book.

112. The Solicitor sent a statement of account for these funds to Mr. Da Ponte dated September 2, 1994 (Document Book - Tab 97).

113. The Solicitor sent a reporting letter to Mr. Bilek dated September 9, 1994 from the Solicitor on the transaction (Document Book - Tab 98). It stated, among other things, that the "usual searches" had been performed and that Mr. Bilek had a "good and valid interest as a secured creditor in the assets of the borrower" under the GSA.

114. Again, the Solicitor never advised Mr. Bilek that he was also acting for Walter Da Ponte and Tasty Bagel on this transaction. The Solicitor never disclosed to Mr. Bilek, Tasty Bagel's financial problems, or the fact that the Wes Cooper loan was still outstanding. Had the Solicitor made this disclosure, Mr. Bilek would not have made the loan.

115. Mr. Bilek paid the balance of $10,000.00 of the loan to the Solicitor in trust by way of two cheques: one in the amount of $10,000 dated December 16, 1994 (Document Book - Tab 100) and another in the amount of $5,000 in January 1995 (Document Book - Tabs 101 and 104)

116. The Solicitor's trust ledger for the other Bilek/Da Ponte transactions showed the December 16, 1994 deposit of $5,000.00 but not the October 26, 1994 deposit (Document Book - Tab 52) .

117. The Solicitor prepared an accounting statement for Mr. Da Ponte, accounting for all of the funds received from Mr. Bilek totalling $100,000.00 (Document Book -Tab 101).

118. On January 26, 1995, the Solicitor deposited $5,000.00 to his trust account with the reference "Ross Bilek/Da Ponte" (Document Book - Tab 104).

119. Mr. Bilek became concerned when, in the fall and winter of 1994 some of Mr. Da Ponte's cheques were returned NSF and after the Solicitor replaced at least two of the NSF cheques with his own cheques.

120. In the spring of 1995, Mr. Bilek received a conference call from Walter Da Ponte, a lawyer John F. O'Donnell and one Seamus Keown. They advised him that there was a problem with his loan to Tasty Bagel and that his help was required to help take the company public.

121. When Mr. Bilek advised them he had a first GSA securing his loan, they informed him that in fact his security was in 4th or 5th place.

122. In April 1995, Mr. Bilek retained Asher Breatross in respect of this matter. On May 10, 1995, Mr. Bilek wrote to the Solicitor and Mr. Breatross sent a letter of complaint to the Law Society (Document Book - Tab 105). Mr. Breatross attached PPSA searches on 521783 Ontario Limited (Tasty Bagel), Walter Da Ponte and Helder Da Ponte (Document Book - Tab 106); an April 19, 1995 letter from Mr. Breatross to Mr. Bilek providing his opinion on his security (Document Book - Tab 107); and a May 8, 1995 letter from Susan Bilek to Mr. Breatross setting out her recollections of her dealings with the Solicitor (Document Book - Tab 108).

123. The investigation revealed that Mr. Bilek never had a first charge on the assets of Tasty Bagel. The CIBC had a registration on November 2, 1990 (which was renewed on October 19, 1993) followed by Wes Cooper on November 4, 1993, followed by the CIBC on January 20, 1994 and finally by Wes Cooper on September 16, 1994.

124. Mr. Bilek spoke with the Solicitor about the matter but was not able to get an explanation satisfactory to him regarding the status of the security and his loan.

125. Mr. Bilek was not able to recover his funds from Tasty Bagel. He submitted a claim to the Lawyers Fund for Client Compensation and received a grant from the Fund in the amount of $78,000, including counsel fees of $1,000.

V. DISCIPLINE HISTORY

126. In November 7, 1994, Complaint D300/94 was issued against the Solicitor alleging that he was guilty of professional misconduct. The following particulars of misconduct were established:

b. In the alternative, on or about October 19, 1990, he acted in a conflict of interest when he invested $11,000.00 belonging to his client, Marion Turner, in a third mortgage from another client of his law practice;

c. On or about October 19, 1990, he acted in a conflict of interest when he invested $95,000.00 belonging to his client, Vicki Poworznyk, in second and third mortgages from another client of his law practice.

By Order of Convocation dated September 28, 1995, the Solicitor was suspended for a period of three months and ordered to pay Law Society costs in the amount of $1,500.00.

127. On February 14, 1996, Complaint D19/96 was issued against the Solicitor alleging that he was guilty of professional misconduct for failure to file the required forms for his fiscal year ending March 31, 1995. On September 12, 1996. the Committee found the Solicitor guilty of professional misconduct and recommended that he be reprimanded in Convocation if his filings were completed to the satisfaction of the Law Society by the time the matter was heard by Convocation, failing which he be suspended from month to month and from month from month thereafter until his filings were completed, which suspension was to commence at the conclusion of his administrative suspension. The Committee also recommended that the Solicitor pay costs of $500.00. On October 24, 1996, Convocation ordered that the Solicitor be suspended for a period of one month and indefinitely thereafter until his filings have been completed, such suspension to commence at the conclusion of his administrative suspension.

128. The Solicitor has failed to file for the fiscal years ended March 31, 1995, March 31, 1996, March 31, 1997, and March 31, 1998 and remains administratively suspended.

DATED at Toronto, this 26th day of October, 1998."

REASONS FOR FINDING

The Solicitor has been charged with professional misconduct arising out of a series of transactions in which he acted for various clients on different loan transactions. The essence of the complaint against the Solicitor was that he acted in a serious conflict of interest on a number of transactions, the result of which was that his clients lost very significant amounts of monies.

The Committee had the opportunity to hear the viva voce evidence of Mr. and Mrs. Bilek and Mr. Beard. We also heard the evidence of Mr. Frolick. After reviewing that evidence and the documents, the Committee is satisfied that the Society has proved the allegations set out in paragraphs (a), (b), (c), (d), (e), (g) (ii) and (g) (iii), h (ii) and h(iii). The complaints set out in (f) were withdrawn by the Society. That leaves particulars (g) (i) and (h) (i). The Committee is not satisfied that the Society has proved those elements of the Complaint with the requisite degree of proof. Both of those particulars relate to loans made by Mr. Beard to Mr. Pelley and Mr. Da Ponte. We find that Mr. Beard is a sophisticated investor and has a Bachelor of Commerce degree and a Certificate for General Accountancy. He loans money on a very short term basis for very high interest rates. He is careful to keep just within the boundaries set by the Criminal Code for criminal interest rates and he was obviously aware of the criminal rate of interest being sixty percent. Mr. Beard loans in the fifty-nine percent range.

We are not satisfied on the evidence that Mr. Frolick made false representations to Mr. Beard, either to induce him to make the loan to Clifton Pelley, or to induce him to make the loan to Walter Da Ponte. We are, however, satisfied that Mr. Frolick was in a serious conflict of interest when acting for Mr. Beard and his other clients and that he clearly preferred the interests of his other clients over that of Mr. Beard.

Mr. Frolick testified and subsequently admitted all of the particulars of the complaint, save and except (c) (i) and (d) (i). On those two particulars we have made findings adverse to Mr. Frolick. Accordingly, the complaints of professional misconduct with respect to all of the other charges are admitted and we therefore find the Solicitor guilty of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Larry George Frolick be given permission to resign if he has complied with the following by the time the matter reaches Convocation:

1. Removes his client files from the offices of Tyrone Crawford and confirms same in writing to the Society;
2. Delivers to the Law Society any and all original client wills in his possession; and
3. Delivers to the Law Society a complete listing of all client files, including the location of the files along with the name and current telephone number of the custodian of the files to whom the Law Society can direct future enquiries.

If the Solicitor has not complied with the above by the time the matter reaches Convocation the Committee recommends that he be disbarred.

REASONS FOR RECOMMENDATION

Mr. Frolick has a previous discipline record and on two prior occasions was suspended, once for a period of one month, and on another occasion for a period of three months.

On one of the previous occasions it was noted by the committee that Mr. Frolick suffered from clinical depression. We had put before us four very brief and to some extent, unsatisfactory, medical reports. Notwithstanding their brevity, however, it is crystal clear that Mr. Frolick suffers from clinical depression and suffered from same at the time of the subject transactions. Mr. Frolick, at the committee hearing, declined counsel on the basis that he could not afford same, but really did not appear seriously interested in defending himself. He appeared to all members of the Committee to be labile and depressed. We are not in a position to judge Mr. Frolick's medical condition, but we cannot leave this matter without noting his general demeanour and approach to the situation. While he seemed concerned and remorseful that his clients had suffered serious losses, he seemed incapable of addressing the matter appropriately.

The Society is not satisfied with the medical evidence and seeks the Solicitor's disbarment. The Society points out that through the conflict of interest, the Solicitor did achieve some personal gain. That is, through the loan transactions, the Solicitor was able to have some of his fees paid, perhaps amounting to about $15,000 and he was able to preserve his solicitor and client relationship with the clients who were the recipients of the loan.

Frankly, the Committee has grave doubt that the Solicitor did anything to personally help himself. He seems to have completely lost his way. We do not think that Mr. Frolick was deliberately dishonest, but we think that he was reckless in the extreme. He completely ignored his professional responsibilities to his clients and acted as though the Rules of Professional Conduct with respect to conflicts did not exist.

Nevertheless, it appears to us that Mr. Frolick was ill throughout most of the period in which the transactions occurred. He has been on various medications from time to time, including Prozac and other anti-depressants. He does not like the effect that Prozac has on him and has turned to homeopathic remedies. Although he drifts in and out of treatment, he seems incapable of really helping himself. He is a danger to the profession and cannot be permitted to practise.

The question therefore left for the Committee is whether he should be removed from practice by being permitted to resign or by being disbarred. Having given this matter careful consideration and having reviewed the medical evidence, as brief as it may be, and the Solicitor's history, and given our view that the Solicitor did not engage in this conduct for personal benefit, we think that the Solicitor ought to be permitted to resign and that disbarment should saved for more harsher cases.

There are outstanding matters that the Solicitor must clear up with the Society before he is permitted to resign; and in particular, the Solicitor must take the steps necessary to wind up his practice and protect his clients' interests by 1) removing his client files from the offices of Tyrone Crawford and confirming same in writing to the Society; 2) he must deliver to the Law Society any and all original client wills in his possession; and 3) he must deliver to the Society a complete listing of all client files, including the location of the files along with the name and current telephone number of the custodian of the files to whom the Law Society can direct future enquiries. The Solicitor will be given a short amount of time to take care of these three items. If the Solicitor has not done so by the time this matter comes before Convocation, we recommend that permission to resign be withdrawn and that the Solicitor be disbarred. In the event that the Solicitor properly carries out the three directives, then we recommend to Convocation that the Solicitor be given permission to resign.

Larry George Frolick was called to the Bar on March 20, 1975.

ALL OF WHICH is respectfully submitted

DATED this 18th day of December, 1998

Philip M. Epstein, Q.C., Chair

Ms. Brooks asked that the following corrections be made to the Report:

(1) page 20, paragraph 79, 3rd last line - that the word "from" be inserted before the words "his own funds"

(2) page 32, last paragraph - that particulars "g(i) and h(i)" be added at the end of the first sentence.

It was moved by Mr. MacKenzie, seconded by Ms. Ross that the Report as amended be adopted.

Carried

Ms. Brooks advised that the solicitor had complied with the conditions concerning his client files and made submissions in support of the solicitor being given permission to resign.

No submissions were made by the solicitor.

It was moved by Ms. Ross, seconded by Mr. MacKenzie that the solicitor be granted permission to resign.

Carried

RULE 20 APPLICATION

Ms. Cameron presented the Rule 20 Application.

Counsel, the reporter and the public withdrew while Convocation went in camera to consider whether the matter be heard in public excluding the Schedules.

The consensus was that the Application be heard in public and that counsel be informed that Convocation planned to proceed in public.

Counsel, the reporter and the public were recalled.

The Treasurer informed Ms. Cameron that Convocation was prepared to deal with the matter in public and advised her to communicate with Mr. Brian Chan, the Applicant.

The matter was stood down.

Convocation took a brief recess.

REPORT OF THE TASK FORCE ON REVIEW OF THE RULES OF PROFESSIONAL CONDUCT

PROPOSED DRAFT RULES OF PROFESSIONAL CONDUCT

There was a discussion on the new Rules of Professional Conduct.

RESUMPTION OF THE RULE 20 APPLICATION BY BRIAN CHAN

Ms. Cameron advised Convocation that she had communicated with Messrs. Chan and Byrnes who were not opposed to the matter being heard in public.

RULE 20 APPLICATION

DATE: April 27, 1999

TO: Convocation *(in camera)*

FROM: A. Hershel Gross
Investigation Counsel

RE: Applicant: TAK HING BRIAN CHAN
Suspended Member: RODERICK JOHN BYRNES

INTRODUCTION

Brian Chan is applying under Rule 20 of the *Rules of Professional Conduct*[1] to employ his partner Roderick J. Byrnes as a paralegal. Mr. Byrnes was suspended by the Hearing Panel on February 16, 1999 for nine months beginning on May 1, 1999. He was suspended on a finding that he committed professional misconduct by misappropriating approximately $63,000 from a client and excessively billing another client.

Staff do not object to Mr. Chan acting as a supervising lawyer. Staff have no concerns about Mr. Byrnes ability to be supervised. In fact, the February 16, 1999 Order includes conditions which effectively provide that Mr. Chan *will supervise* Mr. Byrnes *after* he is reinstated. Mr. Chan has already successfully supervised Mr. Byrnes for over two years pursuant to an undertaking dated January 27, 1997.

However, staff are concerned about:

1. the public perception of a Rule 20 order and

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[1] Rule 20 of the Rules of Professional Conduct provides:

> No lawyer shall, without the express approval of Convocation, retain, occupy office space with, use the services of or employ in any capacity having to do with the practice of law any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, or suspended, or who has been involved in disciplinary action and been permitted to resign as a result thereof, and has not been reinstated or yet been readmitted.

2. the deterrent value of a suspension followed by a Rule 20 order which would permit Mr. Byrnes to work as a paralegal during his suspension in the same practice in which he was and will again be a partner, especially since the misconduct involved misappropriation.

Forms 1 through 5, as regularly submitted with a Rule 20 application, and supplementary documents are attached to this memorandum. This memorandum comments on the application and includes recommended conditions if Convocation decides to approve this application.

ATTACHMENTS

1) Mr. Chan's general information (Form 1) (Tab 1)
2) Mr. Byrnes's general information (Form 2) (Tab 2)
3) LSUC staff review of Mr. Chan (Form (Tab 3)
4) LSUC staff review of Mr. Byrnes (Form 4) (Tab 4)
5) Mr. Byrnes's proposed Plan of Supervision (Form 5) (Tab 5)
6. Letter from the applicant dated April 19, 1999 setting out his submissions (Tab 6)

CURRENT AND PRIOR DISCIPLINE

On February 16, 1999 the Hearing Panel made a finding of professional misconduct against Mr. Byrnes, that is, that:

> Between January 1, 1996 and June 30, 1996, the Member misappropriated $62,991.75, more or less, from trust funds held for his client, Rosita Leung; and
>
> The Member issued excessive billings to his client, Yuk Ting Mok.

Mr. Byrnes was suspended for nine months to commence May 1, 1999, subject to the following conditions:

1. Following the Solicitor's reinstatement, and subject to any application to the Law Society by the Solicitor following his reinstatement for an amendment to this term, he will only practice as a partner of the law firm, Byrnes, Chan & Associates, or, in the event that the partnership is dissolved, as an employee or employed associate.

2. For the first 12 months after his reinstatement, the Solicitor shall only practice under the supervision of a solicitor (the "Principal") who is in good standing with the Law Society and is acceptable to the Secretary to the Law Society.

> The Secretary may unilaterally refuse to accept any proposed Principal if he or she does not believe that the proposed Principal would be a suitable supervisor.
>
> The Principal must sign an Acknowledgement in which he or she
>
> (a) confirms awareness of the misconduct established and the terms of the Solicitor's reinstatement; and
>
> (b) accepts the responsibility of supervising the Solicitor and agrees to report any concerns regarding the Solicitor's ability to practice to the Law Society.

3. For the first 12 months of practice following his reinstatement, the Solicitor

   (a) will have no authority over or involvement in any solicitor's trust account, including the trust account of his existing partnership, Byrnes, Chan & Associates;

   (b) will not sign fee billings to clients. He can prepare the fee billing, but it is to be reviewed and executed by the Principal.

4. For the second 12 months of practice following his reinstatement, the Solicitor will operate only one trust account over which a person, who is satisfactory to the Secretary to the Law Society, shall have co-signing authority.

   The Secretary may unilaterally refuse to accept any proposed co-signer if he or she does not believe that the proposed co-signer would be suitable.

COMMENTS

Mr. Chan and Mr. Byrnes have practised as partners since they were called to the Bar in 1987. Mr. Chan practises primarily real estate law and Mr. Byrnes practises primarily litigation. They operate two offices, one in Toronto and one in Mississauga. In the Toronto office they employ two full-time secretaries, a bookkeeper, a receptionist and a number of part-time staff. In the Mississauga office they employ a lawyer Barry Reese, a full-time secretary and a part-time secretary.

The Plan of Supervision proposes that Mr. Chan will supervise Mr. Byrnes while he works as a paralegal out of the Mississauga office. Mr. Byrnes has usually worked in the Toronto office. The Plan of Supervision proposes that Mr. Byrnes will not have any contact with clients or other lawyers.

The letter from the applicant dated April 19, 1999 (Tab 6) sets out his submissions in support of this Rule 20 application.

There is no staff recommendation as to whether this Rule 20 application should be approved by Convocation.

RECOMMENDED CONDITIONS IF APPROVED

If Convocation approves this application, staff recommends the following conditions:

1. Approval until January 31, 2000.

2. Mr. Chan will follow the Plan of Supervision submitted to the Law Society with this application. All tasks assigned to Mr. Byrnes will be directed to him through and under the supervision of Mr. Chan.

3. Mr. Chan will supervise Mr. Byrnes so that he has no direct contact or communication with clients or lawyers by telephone (including answering the firm's telephone calls), correspondence or other means, except to witness wills or other documents prepared by Mr. Chan or Barry Reese and in the presence of Mr. Chan or Mr. Reese.

4. Mr. Chan is not to permit Mr. Byrnes to appear in any court for any purpose related to Mr. Chan's practice.

5. Mr. Byrnes is not to have access to client funds.

6. Mr. Chan is not to permit Mr. Byrnes to have access to any bookkeeping records, particularly trust account records, and is not to give Mr. Byrnes signing authority on any practice related bank account.

7. Mr. Chan will inform his staff and Mr. Reese about the terms of the Rule 20 approval. Mr. Chan will ask these individuals to report to him any concerns they may have about Mr. Byrnes.

8. Mr. Chan will promptly report to the Law Society all complaints about Mr. Byrnes received by him or any person working in his office.

9. No lawyers other than Mr. Chan and Mr. Reese may use the services of Mr. Byrnes.

10. Mr. Chan will remove or cover Mr. Byrnes's name on all of the firm's signage and will remove or cross his name off all firm stationery, letterhead and business cards and will remove any reference to Mr. Byrnes's name from the firm's telephone answering message.

11. Mr. Chan will submit a report to the Law Society on the status and implementation of the Plan of Supervision within two weeks of the end of each three month period during his supervision of Mr. Byrnes and within two weeks of the end of the period of supervision.

There were questions from the Bench.

Counsel, the reporter and the public withdrew and Convocation deliberated in camera.

It was moved by Mr. Topp, seconded by Mr. Adams that the Application be denied.

Carried

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the application be denied.

RESUMPTION OF THE PROPOSED DRAFT RULES OF PROFESSIONAL CONDUCT

Mr. MacKenzie presented the Report of the Task Force and outlined the major changes in the Rules.

Report to Convocation
April 29, 1999

Report of the Task Force on
Review of the Rules of Professional Conduct

Purpose of Report: Decision

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EXECUTIVE SUMMARY

In June, 1998, Convocation established a Task Force to review the Law Society's Rules of Professional Conduct. The Task Force's mandate was to examine the rules and, if necessary, redraft them in a way that would continue to provide guidance to lawyers and reflect a level of regulation that will protect the public but will also facilitate the creative practice of law and assist the profession in remaining competitive. The members of the Task Force are Gavin MacKenzie and Derry Millar (Co-Chairs), Justice John I. Laskin, and Heather Ross. Jim Varro served as Secretary to the Task Force, which was also assisted by Stephen Traviss. Paul Perell of Weir & Foulds was engaged to do the redrafting.

The Task Force held 15 meetings and in the course of its study, received a number of useful and thoughtful responses from members of the profession, legal organizations and Law Society staff, largely in response to a call for input published in the fall of 1998.

The Task Force re-organized the rules to specify lawyers' professional obligations in the context of relationships between lawyers and others (clients, other lawyers and the administration of justice). The re-organization enabled the Task Force to group rules dealing with similar subjects, to establish a more rational distinction between rules (which are mandatory) and commentaries (which are explanatory and advisory), and to eliminate redundancies.

The Task Force also considered numerous policy issues identified by the Task Force, members of the profession, and other committees, task forces and staff. This led to substantive changes in the text of some of the rules, including the deletion of some existing rules, amendments to current language, and the addition of new rules.

The most significant substantive changes recommended by the Task Force may be summarized as follows:

1. Citation and Interpretation (Rule 1)

   Various terms, including "independent legal advice", "professional misconduct", and "conduct unbecoming a barrister and solicitor" are defined (rule 1.02). Rule 1.03 provides that the rules shall be interpreted in accordance with certain fundamental principles, including for example lawyers' special responsibility to recognize the diversity of the Ontario community.

2. Competence and Quality of Service (rule 2.01)

The definition of the "competent lawyer" (as developed by the first Competence Task Force), which since 1998 has been included in the Foreword to the *Rules of Professional Conduct*, has now been incorporated into rule 2.01. The list of conduct evidencing "unsatisfactory professional practice" has been deleted, as it has effectively been superseded by the definition of the "competent lawyer". More generally, the redrafted rule reflects an approach to competence that is consistent with the Law Society's overall direction on the subject.

3. Particulars of Quality Service (rule 2.02)

This rule incorporates provisions from existing rules on advising clients and rules dealing with specific subjects (eg. title insurance). A new rule has been added dealing with a lawyer's obligations to clients with disabilities.

4. Conflict of interest (rules 2.04, 2.05)

The rule and commentary dealing with joint retainers (rule 2.04 (5) and (6), and commentary following rule 2.04 (6)) have been re-worded to make it clear that even if all parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise where their interests, rights or obligations will diverge as the matter progresses. The rule and commentaries also specify when the lawyer must or should advise clients to obtain independent legal advice about a joint retainer.

The Task Force also seeks Convocation's decision on whether the rule should be further amended to permit law firms to represent multiple parties in a transaction on the basis that confidential information will not be divulged to other parties in the transaction who are represented by the same law firm. This proposal would require parties to the transaction to obtain independent legal advice, and would require law firms to utilize screening mechanisms in the nature of those contemplated in rule 2.05, which deals with conflicts of interest arising as a result of the transfer of lawyers between law firms.

5. Doing business with clients — prohibition against acting for mortgagor and mortgagee (rule 2.06(7) and (8), and guarantees by lawyer (rule 2.06 (11) and (12))

A new rule has been added prohibiting a lawyer or law firm acting for both a mortgagor and mortgagee in a real estate transaction except in limited defined circumstances (for example, where the mortgage is part of the purchase price of the property, where the lender is a large financial institution or where the transaction occurs in remote locations making it inconvenient for the clients to obtain separate representation).

The absolute prohibition against lawyers guaranteeing indebtedness in cases in which clients are either borrowers or lenders has been qualified. Under proposed new rule 2.06 (12) lawyers would be permitted to give personal guarantees, for example, where the lawyer has entered into a business venture with a client and the lender requires personal guarantees from all participants in the venture as a matter of course, provided that the lawyer has complied with the rules governing avoidance of conflicts of interest and doing business with a client, and the lender and the participants in the venture who are or were clients of the lawyer have received independent legal representation.

6. Fees and disbursements (rule 2.08)

The proposed new rule would permit referral fees between lawyers if the fee is reasonable and the client is informed of the referral fee and consents to it.

7. Advertising and making legal services available (rules 3.01 - 3.06)

The Task Force is proposing the following amendments to the present rule:

(a) The requirement that any factual information in an advertisement must be verifiable has been deleted.

(b) The requirement that advertising must be "in good taste" has been deleted.

(c) The prohibition against comparing services or charges with those of other lawyer has been deleted.

(d) The prohibition against indicating that a price is a discount or reduction or special rate has been deleted.

(e) The prohibition against indicating that a lawyer has a "preferred area of practice" has been deleted.

(f) A new rule governing "Seeking Professional Employment" (rule 3.06) replaces the prohibitions against solicitation. Under the new rule, lawyers would be permitted to seek professional employment from a prospective client provided that the means adopted are not false or misleading; do not involve coercion, duress or harassment; do not take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover; do not interfere with an existing relationship between another lawyer and client for the purpose of obtaining the client's retainer, unless the change of retainer is initiated by the client; or that otherwise are such as to bring the profession or the administration of justice into disrepute.

8. Advocacy (rule 4.01)

A new rule (rule 4.01(4)) on lawyers' discovery obligations has been added. Existing commentary on the prosecutor's duty of disclosure has been revised and made a rule.

New rules have been added to deal with the circumstances in which a lawyer may interview employees of a corporate party that is represented by a lawyer (rule 4.03 (3) and a new paragraph of commentary), on lawyers' duties respecting communications with a complainant in criminal proceedings (rule 4.04), and on lawyers' duties respecting relations with jurors (rule 4.06).

Amendments have been made to the rule on agreements on guilty pleas, to provide that such agreements may be made in certain defined circumstances and that before or at any time after a charge is laid, the defence lawyer and prosecutor may discuss disposition of the case with the client's consent.

9. Non-discrimination (rule 5.04)

Extensive commentary, based on bulletins published by the Law Society for the profession respecting existing Rule 28, was added to the rule, in an effort to particularize within the rules and provide guidance to the profession on the essence of discrimination. The impetus for this change was the efforts of the Law Society's equity officer, Charles Smith, and consultations he arranged on the rules through the Treasurer's Equity Advisory Group.

10. Public appearances and public statements (rule 6.06)

A list of examples of extra-judicial statements that are and are not likely to materially prejudice a party's right to a fair trial or hearing has been added to the commentary to this rule.

11. Preventing unauthorized practice (rule 6.07)

The process by which a lawyer seeks Convocation's approval to hire disbarred or suspended lawyers or lawyers who have been granted permission to resign through the hearing process has been restructured. Lawyers may now seek permission to hire administratively suspended lawyers from a panel of benchers rather than Convocation.

12. Responsibility in Multi-Discipline Practices (rule 6.10)

A new rule has been added requiring lawyers to ensure that non-lawyer partners and associates in multi-discipline practices comply with the rules of conduct and ethical principles governing a lawyer.

TERMS OF REFERENCE

Background to the Review of the Rules

1. In June 1998, Convocation struck the Task Force to Review the Rules of Professional Conduct ("the Task Force") in response to a need, as discussed in the terms of reference, to address a broad spectrum of issues related to the rules, emanating from the standing committees of Convocation, other task forces and Convocation itself. Although it is accepted that the rules are a necessary part of the fabric of a regulatory scheme established to govern lawyers in the public interest, there were expressions of concern about the current rules related to:
   - The perceived competitive disadvantages some rules create for lawyers, particularly in light of incursions by other service providers into traditional areas of legal practice;
   - The relevance of some rules in the current marketplace; and
   - The possible inhibiting effect of some rules on access to justice for people in need of legal advice and representation.

2. The Task Force members are Gavin MacKenzie and Derry Millar, co-chairs, Justice John I. Laskin and Heather Ross. Paul Perell of Weir & Foulds, was engaged as a drafter. Jim Varro served as Secretary to the Task Force, which was also assisted by Stephen Traviss.

APPROACH TO THE REVIEW

Information and Initiatives Considered by the Task Force

3. In framing the policy agenda for the rules review, the Task Force was guided by a number of rule-related issues that had been considered by committees or Convocation within the past few years. This was used as a resource in defining some of the key issues relevant to the structure and content of the rules.

4. The Task Force was also mindful of other initiatives at the Law Society that impinged on its review of the rules. These included a number of reviews of individual rules through the Professional Regulation Committee, and the work of the Competence Task Force, the Futures Task Force Working Group on Multi-Discipline Partnerships and the Treasurer's Equity Advisory Group.

5. While the Task Force favoured an approach to the review of the current rules free of any preconceived notions of what a revised set of rules should contain or how it should look, it was mindful of work done in the past respecting the rules, most notably through a special committee struck in 1992, chaired by Marc Somerville. The Task Force reviewed the work produced by the Somerville committee on a rule by rule basis and where appropriate, borrowed from the concepts identified by that committee in structuring the revised rules.

6. The primary sources of written information accessed by the Task Force and in some instances adapted in reformulating the rules were the rules of conduct of other jurisdictions, including Alberta, British Columbia, and the American Bar Association. The Task Force also reviewed and in some instances adapted the American College of Trial Lawyers' draft Canadian Code of Trial Conduct.

Call for Input/Requests for Input

7. The Task Force decided that the profession should have an opportunity to provide input on the rules. To that end a notice was published in the *Ontario Reports*, the *Ontario Lawyers Gazette* and on the Law Society's website inviting submissions from the profession on issues of concern relating to the rules of conduct. A copy of the notice is attached as Appendix A.

8. The Task Force also sent letters to various groups representing different constituencies within the legal profession asking for input on issues they felt should be addressed in a review of the rules of conduct. Similar letters were also sent to the chief justices of the Court of Appeal for Ontario and the Ontario Court (General Division) asking for input from the judiciary. Key regulatory and advisory staff within the Law Society were also asked for input and views on the current rules and issues or concerns arising from their application in the Law Society's processes. Consultations were also arranged through the Treasurer's Equity Advisory Group with lawyers representing equity-seeking groups within the profession and from various organizations that focus on equity issues in the profession.

9. The responses to the call for input were generally well-articulated and thoughtful suggestions for improvements to the rules. While the responses covered a broad range of issues, a few common themes emerged, and they focussed on:

- the need to reorganize the rules in a more cohesive, "common sense" format
- elimination of certain marketing and advertising restrictions
- clarification of certain obligations in the area of advocacy
- the need for increased flexibility in the application of the conflicts rules in certain circumstances
- improved communication by the Law Society of what is included in the rules, to both the profession and the public.

10. The Task Force was encouraged by the fact that some of the respondents' suggestions were already the subject of discussion and action by the Task Force. In some instances, the proposals raised new and important substantive issues that led the Task Force to recommend changes to the rules. A few comments received were beyond the scope of what could be accomplished through a review of the rules.

11. The Task Force wishes to publicly thank all those who contributed to this phase of the review. Included as Appendix B is a summary of the responses received to the call for input and through the above-noted consultations.

Engagement of Drafter

12. The Task Force concluded that while it would have responsibility for making policy decisions about revisions to rules of conduct, a drafter, external to the Law Society and preferably a lawyer, should be selected to assist in drafting amended or new rules. Paul M. Perell, a partner and research director at Weir & Foulds, was engaged for this task.

OVERVIEW

Problems with the Current Rules

13. The Task Force and a number of members of the profession who responded to the Task Force's call for input, recognized that the existing format of the rules was problematic. Over the course of years, rules have been added without appropriate integration in the existing text. This lack of cohesion led the Task Force to conclude that a reorganization of the rules into a more user-friendly and intelligible format was warranted.

Reorganization

14. The Task Force is grateful to Paul Perell for his outstanding work in reformatting the rules. The reformatted rules alone in a number of instances give fresh meaning to the language of the existing rules.

Rule *versus* Commentary

15. The Task Force decided to continue with the division between rules and commentaries, but was concerned about possible confusion about the characterization of rules and commentaries in the enforcement of the *Rules of Professional Conduct.*

16. Thus a significant part of the process of reorganizing the rules was determining what should be rules and what should be commentary. The Task Force found that a number of duties appeared in commentary, and that some of the rules made broad statements about what a lawyer "should" do, rather than "shall" do.

17. The Task Force concluded that rules should be expressed in mandatory language, and that explanatory and advisory language should appear in the commentaries.

Scheme of the Reorganized Rules

18. The reorganized rules focus on relationships within which ethical principles are required to be observed. The Task Force saw this as preferable to an iteration of ethical concepts which are not contextualized within particular relationships. The redraft of the rules orders the ethical principles in a way that effectively tells the "story" of the lawyer's relationships with and duties to, for example, the client, the courts and other lawyers.

19. In reorganizing the rules, the Task Force attempted to fulfill two main functions for the rules suggested by the Somerville Committee, namely, a hortative or inspirational function and a regulatory function setting out "black letter" rules.

20. Structurally, the redraft is based on the *Rules of Civil Procedure*. Commentaries have been placed in "boxed" text in close proximity to the rule to which they relate. Footnotes in the current rules were either deleted or transformed in the redraft into either a rule or commentary, as appropriate.

21. A "top to bottom" integration was completed with respect to some concepts or aspects running through the rules, an example being independent legal advice, which appears in the context of the conflicts rules and lawyers' business transactions with clients, but may also apply in proceedings in a family law or real estate setting. The redrafting process enabled the Task Force to achieve a consistency of language that is lacking in the existing *Rules.*

22. As discussed above, the word "duty", appearing in a number of rules and commentaries, caused the Task Force to question whether other language should be used, for example, by changing the nature of the duty to a statement that a lawyer "shall" do something, whether the language of "duty" is intended to be in the form of a commandment (and whether that is appropriate), and whether the word "duty" should appear in commentary. In light of these issues, a rule-by-rule analysis was undertaken to determine the propriety of the language and whether duties expressed in commentary should be recast as rules. In a number of instances, commentaries were elevated to rules, and on occasion, the opposite occurred. Accordingly, in the redraft, the rules, with the exception of those in the interpretive section in new Rule 1, use the mandatory "shall" and the commentaries use the conditional or subjunctive "should".

23. The result was a redraft which includes the following major headings:

Rule 1		Citation and Interpretation
	1.01	Citation
	1.02	Definitions
	1.03	Interpretation
Rule 2		Relationship to Clients
	2.01	Competence and Quality of Service
	2.02	Particulars of Quality Service
	2.03	Confidentiality
	2.04	Avoidance of Conflicts of Interest
	2.05	Conflicts from Transfer Between Law Firms
	2.06	Doing Business With a Client
	2.07	Preservation of Client's Property
	2.08	Fees and Disbursements
	2.09	Withdrawal From Employment
Rule 3		The Practice of Law
	3.01	Making Legal Services Available
	3.02	Law Firm Name
	3.03	Letterhead
	3.04	Advertising
	3.05	Advertising Nature of Practice
	3.06	Seeking Professional Employment
	3.07	Interprovincial Law Firms
Rule 4		Relationship to the Administration of Justice
	4.01	The Lawyer as Advocate
	4.02	The Lawyer as Witness
	4.03	Interviewing Witnesses
	4.04	Communication with Complainant
	4.05	Communication with Witness Giving Evidence
	4.06	Relations with Jurors
	4.06	The Lawyer and the Administration of Justice
	4.08	Lawyers as Mediators
Rule 5		Relationship to Associates, Students, and Employees
	5.01	Supervision
	5.02	Students
	5.03	Sexual Harassment
	5.04	Discrimination
Rule 6		Relationship to the Society and Other Lawyers
	6.01	Responsibility to the Profession Generally
	6.02	Responsibility to the Society
	6.03	Responsibility to Other Lawyers
	6.04	Outside Interests and the Practice of Law
	6.05	The Lawyer in Public Office
	6.06	Public Appearances and Public Statements
	6.07	Preventing Unauthorized Practice
	6.08	Retired Judges Returning to Practice

6.09 Errors and Omissions
6.10 Responsibility in Multi-Discipline Practices
6.11 Discipline

24. The redraft also includes an extensive bibliography.

CHANGES TO THE RULES

Rules Identified for Policy Review

25. The Task Force identified rules requiring specific attention in its policy review. The Task Force was guided by information arising from initiatives already underway through other Law Society committees or task forces, and discussions within the Task Force on the rules which in its view were in need of a major overhaul. The review of the reorganized rules assisted in identifying areas where the rules required amendment. As the work progressed, the policy review was augmented by information received through the call for input and from other sources, as discussed below.

26. As a result, the Task Force recommends changes of substance to the following rules:

Rule 2 - Competence and Quality of Service
Rule 3 - Advising Clients
Rule 4 - Confidentiality of Information
Rule 5 - Conflict of Interest
Rule 7 - Borrowing from Clients
Rule 9 - Fees and Disbursements
Rule 10 - The Lawyer as Advocate
Rule 12 - Advertising and Making Legal Services Available
Rule 13 - Responsibility to the Profession Generally
Rule 14 - Responsibility to Lawyers Individually
Rule 16 - Delegation to Non-Lawyers
Rule 18 - The Lawyer in Public Office
Rule 20 - Disbarred Persons
Rule 21 - Lawyers in their Public Appearances and Public Statements
Rule 23 - Lawyers in Mortgage Transactions
Rule 28 - Non-Discrimination
Rule 29 - Conflicts Arising as a Result of Transfer Between Law Firms

27. The proposed new rules are presented in a separate document, together with the existing rules for comparison purposes. The concordance to the rules included at the end of the proposed new rules shows where text of the existing rules has been incorporated in the redraft and where new rules have been added.

Discussion of Individual Rules

Rule 1 - Citation and Interpretation

28. The Task Force determined that as an aid in the interpretation and application of the rules, a number of definitions should be included in the introductory section of the rules. New rule 1.02 includes those terms that the Task Force believes should be defined for the purposes of the rules. "Professional misconduct" and "conduct unbecoming a barrister or solicitor" will become defined terms.

29. Rule 1.03, entitled "Interpretation", expands considerably on the existing interpretation section which precedes the text of the current rules. It iterates several overarching principles or guides for interpretation. For example, lawyers as members of the profession are reminded of their obligations respecting equity and human rights. In the Task Force's view, the new rule establishes a sound basis on which the profession and public may interpret the rules, with a focus on the professionalism, ethics and integrity of lawyers.

Rule 2.01 - Competence and Quality of Service

30. The work of the first Competence Task Force, which led in 1998 to the inclusion of the definition of competence in the Foreword to the current rules, and the work of the current Competence Task Force with respect to the move towards articulating standards were considered by the Task Force in reviewing the text of existing Rule 2.

31. Of additional importance to the review were the provisions in the *Law Society Amendment Act, 1998* for mandatory practice reviews and the authority to authorize proceedings against lawyers for failure to meet standards of professional competence.

32. The Task Force closely followed the work of the current Competence Task Force, and considered its report to November 1998 Convocation, which proposed for a framework for a comprehensive competence initiative at the Law Society. The report was adopted and the first of a series of guidelines is being drafted. By-laws on certain aspects of the competence scheme were adopted at the March 26, 1999 Convocation.

33. The Task Force agreed that significant revision to existing Rule 2 was required. The form of the revision was dictated largely by the incorporation of the definition of competence in the various sections of the rule. Much of the existing commentary remains, but placed in a logical fashion in proximity to the relevant rule. However, existing commentary 8 listing conduct evidencing "unsatisfactory professional practice" was deleted, as it has effectively been superceded by the broader scope and detail of the incorporated definition of competence.

34. A substantive change to existing commentary 9 was made, to mirror the legislative scheme for competence found in the *Law Society Act* as amended.

35. An addition to the commentary appearing under rule 2.01(1) was made to mirror the existing obligation of a lawyer, included in the last paragraph of that commentary, in a multi-discipline practice environment, where non-lawyers may be in a position to provide advice within their sphere of expertise outside of the retainer of the firm as a multi-discipline practice.

36. The redrafted rule 2.01, in the Task Force's view, reflects an approach to competence consistent with the Law Society's overall direction on competence.

Rule 2.02 - Particulars of Quality Service

37. This rule incorporates most of the text of existing Rule 3. The last commentary to the existing rule was removed from this rule and combined with the text from existing Rule 5, commentary 15 in a separate rule on reporting requirements with respect to errors and omissions, rule 6.09.

38. New text appears in rule 2.02(7) and (8) in the section entitled "Client Under a Disability", based on rule 1.16 of the ABA Model Code. The current rules are silent on this issue, and it was thought appropriate to provide direction to lawyers on how to deal with clients suffering from disabilities which affect their ability to instruct lawyers.

39. Rule 2.02 also incorporates the texts of others existing rules that focus on advice or services in a particular area of law, including Rule 26 on Medical-Legal Reports and Rule 30 on Title Insurance in Real Estate Conveyancing.

40. In the Task Force's view, rule 2.02 contains a logical grouping of provisions appearing throughout the existing rules which focus on qualitative service.

Rule 2.03 - Confidentiality

41. The Task Force agreed that virtually all of existing Rule 4 and its commentaries should be incorporated in the new rules. The policy discussion focussed on the sufficiency and efficacy of the existing commentary on justified disclosure.

42. In reviewing this commentary, consideration was given to expanding the areas where disclosure of otherwise confidential or privileged information by a lawyer is justified, and to the possibility of making disclosure mandatory in certain cases. The Task Force reviewed the Alberta rule which *requires* disclosure in cases of future crimes involving imminent personal harm or death and *permits* disclosure in cases of other future crimes.

43. The Task Force consulted on the issue, and wrote to the Advocates' Society, the Canadian Bar Association - Ontario, the Family Lawyers' Association, the Middlesex Family Lawyers' Association and the Criminal Lawyers' Association.

44. It was apparent from the formal and informal responses received by the Task Force that the bar generally is opposed to expanding the circumstances in which lawyers may (or must) disclose confidential information. The redrafted commentary, which is now stated as a rule in rule 2.03(4) on disclosure of confidential information about likely criminal offences, adapts wording from the American College of Trial Lawyers' Code of Conduct. It makes it clear that in cases in which disclosure is justified, the lawyer must not disclose more information than is required.

45. Changes were also made to existing commentary 12 on disclosure where the lawyer's conduct is in issue. The redraft has made these provisions a rule - rule 2.03(5) - which lists the allegations about a lawyer, the lawyer's associates or employees to which the permitted disclosure applies. The Task Force recognized that this rule is not necessarily confined to allegations emanating from a client and that the issue of disclosure becomes more acute when a third party raises allegations about the lawyer which he or she wishes to defend. In all situations, however, the lawyer would have to be guided by the limiting language of the last phrase of the rule. Again, the amendments were based on material from the American College of Trial Lawyers' Code.

Rules 2.04 - Avoidance of Conflicts of Interest and 2.05 - Conflicts Arising from Transfer Between Law Firms

46. As noted earlier in this report, the reorganized format of the rules was driven largely by the need to place rules and commentaries dealing with similar issues and concepts in one grouping. The new conflicts rules are a good example of how this feature of the new rules works.

47. Although significantly reformatted, the conflicts rule has largely been incorporated in the new rules, with appropriate grammatical and clarifying language changes, in rule 2.04. A companion rule, rule 2.05, includes the text of existing Rule 29 on conflicts arising when lawyers transfer between law firms.

48. A number of changes, however, of a substantive nature have been made to the text of these two rules.

49. The first was prompted by information received from bencher Clayton Ruby who raised issues about the joint retainer provisions of the rule, and confusion about the application of a particular commentary to the rule. Based on these concerns, the Task Force considered it appropriate to amend the last sentence of existing commentary 5, now appearing as commentary to rule 2.04(6), so that it is clear that in the context of this particular rule on joint retainers, the focus is on acting for more than one party rather than on acting for both sides, as the commentary currently reads.

50. Mr. Ruby also raised with the Task Force in the context of joint retainers a suggestion that in all such cases, the lawyer ensure that the clients receive independent legal advice about the retainer and that in cases where one of the clients is a continuing client, the lawyer ensure that the other client receive independent legal advice about the retainer. The Task Force engaged in considerable discussion on this issue and determined that the following would be the most practical approach that is consistent with providing adequate protection for the clients:

- commentary should be added to the rule to reflect that, in addition to advising clients as set out in subrule (5), it may be desirable in certain circumstances (eg. where one of the clients is less sophisticated than the other) for the lawyer to recommend that clients obtain independent legal advice about the joint retainer;
- with respect to joint retainers where one of the clients is a continuing client of the firm, the rule should be amended to reflect that the lawyer must recommend that the other client receive independent legal advice about the joint retainer.

51. The Task Force considered adding new commentary following subrule (6) to the effect that in some circumstances, for example, where the client is unsophisticated or vulnerable, it may be desirable for the lawyer to recommend that the other client receive independent legal representation for the transaction. However, given the definition of "independent legal advice" in rule 1.02, which includes the requirement that the lawyer giving the advice advise the client that he or she has the right to independent legal representation, it was decided that the commentary was not necessary.

52. The changes discussed above are now reflected in rules 2.04(5) and (6) and the commentary.

53. A further change is the addition of a new rule, in rule 2.04(10), to advise lawyers of their obligation to ensure compliance by non-lawyer partners and associates in a multi-discipline practice environment with the Law Society's conflicts regime, both in connection with work within the practice and with respect to common clients of the practice and any work that the non-lawyers may do separate from the multi-discipline practice. A similar change was made to the text from existing Rule 29, now found in new rule 2.05(9), to oblige lawyers to ensure that non-lawyers in a multi-discipline practice environment comply with the rule and do not disclose confidences as set out in the rule.

54. Another change is the addition of commentary following rule 2.04(11) to provide additional guidance to lawyers when dealing on a client's behalf with unrepresented persons. This is derived from the Alberta rules.

55. A change was also made to rule 2.05(8) with respect to compliance with the rule on transfers. Paragraph 8 of the existing rule, in giving the option of applying to the Law Society or the courts for a determination of compliance with the rule, in the view of the Task Force, overstates the Society's ability to resolve disputes under this rule and does not address the question of whether the court may override the Society's determination. Accordingly, the Task Force felt it appropriate to delete the reference to the Society in the rule and delete the companion commentary.

56. The Task Force also considered an issue raised by a member responding to the call for input on whether it was necessary for firms in representing multiple parties in a transaction to advise them that no information as between the clients could be kept confidential. The member advocated for a more flexible approach, based on the scheme outlined in existing Rule 29 (rule 2.05 in the redraft) for lawyers transferring between law firms. This issue was the subject of extensive discussion within the Task Force, which went as far as reviewing a draft of a new rule prepared by Mr. Perell, set out below. The draft includes a requirement for an independent lawyer to give the client(s) legal advice on the firm acting for the parties. Accordingly, a range of options is provided - the client can choose separate representation, have the firm act where all information must be shared, or, in the context of the draft below, have the firm act jointly but with the requirement for independent legal advice and institutionalized screening measures. Presumably, the lawyer providing independent legal advice would also have to advise on the adequacy of the screening measures within the firm.

> Despite paragraph (b) of subrule 2.04(5), where a law firm accepts employment for more than one client in a matter or transaction, the law firm may treat information received from one client as confidential and not disclose it to the other clients, if
>
> 1. each client, after having received advice from a lawyer independent of the law firm about the risks of this arrangement, consents to it in writing, and
> 2. each client is represented by a different lawyer at the law firm and the firm institutes satisfactory screening measures.

57. While the Task Force acknowledged the compelling arguments in favor of a change, focusing on the issues of choice of counsel and market realities, and the benefits in particular for smaller firms, the concern is that there will be those cases where the lawyer does not disclose relevant information and at the end of the day it is apparent that one of the clients would have received better representation if he or she had had separate counsel. There is a risk that permitting lawyers to act on both sides of transactions, even with these protections, will be perceived as an unacceptable dilution of the conflicts of interest rule.

58. Ultimately, the Task Force decided that rather than proposing a change to the rule, this proposal should be highlighted for Convocation's review as a thoughtful recommendation for a suggested policy change. Accordingly, the Task Force is requesting that Convocation specifically address this issue.

Rule 2.06(4)- Doing Business with a Client-Borrowing from Clients

59. As the title indicates, the focus of new rule 2.06 and its various subrules is on those aspects of a lawyer's business relationship with a client that require ethical guidance.

60. One of the subrules, 2.06(4), includes the provisions of existing Rule 7, with the exception of the last half of existing commentary 2. This deletion flows from the suggestion of a Law Society staff member that discussing investments by lawyers of clients funds as "the normal and traditional function of the lawyer" is neither accurate nor desirable for inclusion in the rules. The Task Force also felt that this passage is really about professional negligence, and the inclusion of these words diverts attention from the real focus of the rule, that of borrowing from clients. Accordingly, the Task Force deleted the portion of the existing commentary 2 beginning with the words "This practice...".

Rules 2.06(7) and (8) - Doing Business with a Client-Prohibition Against Acting for Mortgagor and Mortgagee

61. The Task Force reviewed material prepared by the Lawyers Fund for Client Compensation Committee ("the Compensation Fund Committee") in March 1999, which recommended that a rule be added prohibiting a lawyer from acting for both a mortgagor and mortgagee. This issue originated some years ago in the form a motion of bencher James Wardlaw (which was subsequently tabled), who proposed what became known as the "two lawyer" rule for real estate transactions.

62. The following are excerpts from the memorandum received from the Compensation Fund Committee:

> Investment type claims have always had a significant impact on the Fund, both in terms of the resources required to administer the large number of claims and the money needed to pay legitimate claims. The most common form of investment claim occurs when a client utilizes the services of a lawyer in order to invest in mortgages registered against real property.
>
> Investment type claims have traditionally represented about 70% to 75% of all claims received by the Fund. Clients typically submit investment claims when the investment turns out to be a partial or total failure and it is learned the lawyer's dishonest acts were largely responsible for the loss.
>
> The Lawyers Fund for Client Compensation Committee believes that a rule which requires both borrowers and lenders to have separate and independent representation in private mortgage transactions would be a valuable tool to prevent and curb investment related claims to the Fund.
>
> ...
>
> Private lenders often lack the necessary level of sophistication to make such decisions. Many of these individuals are primarily motivated by the potential for attractive rates of return and the desire to avoid paying legal fees. In such a state of mind, they become easy prey for dishonest lawyers who either avoid explaining the potential for conflict or abuse the inherent power imbalance that often exists between lawyers and their clients.
>
> Private mortgages frequently involve brokering fees as well, thus making the lawyer a third 'client' and introducing another level of conflict into the transaction.
>
> The adoption of a two lawyer rule would require an amendment to Rule 23...to prohibit lawyers from acting for both lenders and borrowers other than in limited circumstances. Similar rules in other jurisdictions permit acting for both sides if the lender is an institutional lender, in vendor take back situations, in remote areas where no other lawyer is available, when the mortgage loan is being made on a non-arm's length basis (i.e. from a parent to a child) or when consideration for the mortgage is relatively small.
>
> The Law Society of British Columbia has had a two lawyer rule in effect for over ten years. The rule was first introduced in response to an early 1980's discipline case involving an unrepresented vendor, and what British Columbia perceived as a major problem in Ontario with the losses that occurred following the recession of the early 1980's. Since the introduction of the rule, they have had only two incidents of mortgage fraud which is a substantial improvement over their pre-rule experience.
>
> The British Columbia rule is broader than the proposed Ontario rule as it also prohibits lawyers from acting for both vendor and purchaser in real estate transactions.

The Law Society (England and Wales) has also had a two lawyer rule in effect for many years. It feels very strongly there are fundamental conflicts of interest inherent in the transfer of title to real estate or in private mortgage transactions that can not be addressed when a single lawyer represents both clients notwithstanding warnings and obtaining consent to act. In fact, England and Wales are considering expanding the rule to prohibit lawyers acting for both sides in institutional lending situations.

The experience in England and Wales has been very positive.

The England and Wales rule has been in effect since the early 1970's and is now so established, breaches of the rule are not a major problem.

...

The Committee recommends that the Rules of Professional Conduct be amended to provide that no lawyer shall act or continue to act for both lender and borrower in a mortgage transaction unless:

- it is a remote area of Ontario and it is not practical for the lender or the borrower to retain another lawyer.
- the mortgage is a vendor take back mortgage incidental to the transfer of title to real property.
- the lender is a financial institution.
- the face value of the mortgage does not exceed $15,000.
- the lender and the borrower are not at arm's length.

POSSIBLE 'ESTABLISHED CLIENT' EXEMPTION TO APPLICATION OF TWO LAWYER RULE

When bencher James Wardlaw tabled his motion for the introduction of a Two Lawyer Rule in June of 1994, one of the most common complaints from the profession was that such a rule would interfere with long standing solicitor/client relationships, particularly in smaller centres. Some members of the profession objected to having to send one of two long standing clients to another lawyer for independent representation. The Two Lawyer Rule used in England addresses this concern but does open up the Rule to potential abuse.

England exempts from the operation of its rule situations where both parties can be considered "established" clients. Commentary 3 to the Rule expands on the concept of what an established client is.

> "The test of whether a person is an 'established client' is an objective one. That is, whether the ordinary, reasonable and fair minded solicitor would regard a person as an established client. An existing client is not the same as an established client. Thus, if a purchaser instructs a solicitor for the first time and, after those instructions are received, it is discovered that the vendor is an established client, the exception in Rule 6(2) would not apply and consequently the solicitor could not act for both parties."

If an objective 'established client' test is established, it is always open for the dishonest lawyer to convince others that the clients are both 'established' and therefore may benefit from the exception. While it would be preferable not to have this exception, it is acknowledged that it may make the difference between limited and widespread opposition to a Two Lawyer Rule. Also, once introduced, the exception can always be eliminated in future if it proves to be open to widespread abuse.

63. The Task Force agreed with the recommended action (including the recommendation that there be no "established client exception"). New rules 2.06(7) and (8) include the prohibition and limited exceptions, respectively, reflected in the Compensation Fund Committee's material.

Rules 2.06(11) and (12) - Doing Business with a Client-Guarantees by a Lawyer

64. The Task Force reviewed material received from the Professional Regulation Committee in late 1998 arising from a review by one of its working groups on issues relating to existing Rule 23. The review was prompted by concerns about the scope of the rule. Rule 23 generally prohibits members from guaranteeing indebtedness where a client is either the lender or borrower. This rule was implemented in order to prevent lawyers from inducing clients to enter into loan transactions based on a perception of creditworthiness of lawyers. However, it is permissible for members to enter into joint business ventures with clients provided that there is compliance with the conflicts of interest and borrowing from clients rules. Typically, when raising capital for the joint business venture, all participants in the venture are called upon to provide joint and several personal guarantees for any loans. This is a business requirement regardless of whether the participant in the venture is a lawyer or not. There is no concern of undue influence or unfair inducement arising from the lawyer's status in such cases. Notwithstanding this, Rule 23 (6) appears to prohibit a lawyer from providing a guarantee in these circumstances, a prohibition which effectively prevents a member from participating in an otherwise permissible activity.

65. The proposals of the Professional Regulation Committee for changes to the rule, with which the Task Force agreed, would permit a lawyer's guarantee in prescribed circumstances, in a manner that ensures clients' rights and interests are protected.

66. Accordingly, new rule 2.06 focusing on business relationships with clients includes these provisions in rule 2.06(11) on guarantees. Rule 2.06 also includes the text of existing Rule 7 on borrowing from clients and those portions of existing Rule 5 on conflicts that deal with investment by a client where the lawyer has an interest.

Rule 2.08 - Fees And Disbursements

67. While virtually all of existing Rule 9 has been incorporated in new rule 2.08, a significant change is an amendment to permit referral fees between lawyers if the fee is reasonable and the client is informed and consents. The new text is found in the commentary following rule 2.08(9). A companion change in rule 2.08(9) makes it clear that the prohibition against referral fees applies only to payments made to non-lawyers.

68. The review of the referral fee issue was prompted by bencher Elvio DelZotto's motion before Convocation in September 1998, to permit these arrangements.[1] Referral fees between lawyers have been permitted in other jurisdictions in Canada without issue. The availability of referral fees between lawyers may encourage lawyers who lack experience or expertise in particular fields to refer matters to lawyers who are better qualified to serve clients in those fields.

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[1]The motion also included other proposals for changes to the advertising and marketing rules, discussed later in this report.

69. The Task Force amended rule 2.08(10) by adding language that would except the application of the prohibition on fee-splitting or division of fees with non-lawyers in a multi-discipline partnership, where the sharing of fees and profits will occur between non-lawyers and lawyers by virtue of the structure.

70. A small amendment to existing Rule 9(a) was made, now appearing in rule 2.08(1), to simplify the language respecting charging fair and reasonable fees and disbursements.

71. The Task Force discussed whether there should be a requirement that lawyers provide *pro bono* services. The Task Force considered whether:

- lawyers would be disciplined for a breach of a *pro bono* requirement;
- language encouraging the provision of such services is preferable to an obligation;
- whether lawyers should be forced to take a case for no fee or represent a cause that they do not believe in.

The Task Force concluded that a change of this significance should be effected, if at all, only after a focussed consultation process that the Task Force could not effectively undertake in the time available.

72. Within the scope of the *pro bono* issue, however, the Task Force decided that it would be appropriate to add language to the last paragraph of the commentary under rule 2.08(2) to the effect that it is in the best traditions of the legal profession to provide *pro bono* services, in cases of hardship or poverty or where the client would otherwise be deprived of adequate legal advice or representation.

Rules 3.01 - Making Legal Services Available, 3.02 - Law Firm Name, 3.03 - Letterhead, 3.04 - Advertising, 3.05 - Advertising Nature of Practice, 3.06 - Seeking Professional Employment

73. Significant reformatting of and substantive changes to certain provisions within the existing advertising/marketing rules have been made in the redraft. Similar to the approach to the advocacy rule, the redraft reorganizes the existing text into a series of rules, each with relevant commentary attached to the rule.

74. The following are the significant changes to the text of the rule:

- 3.04(1)(a) Because the words "false and misleading" which appear in existing Rule 12 paragraph 2(a) encompass what would be included by virtue of the phrase "and any factual information in the advertisement is verifiable", also appearing in 2(a), this latter phrase was deleted in the redraft;
- 3.04(1)(b) The words "in good taste" in existing Rule 12 paragraph 2(b) were deleted, given the very subjective nature of that test, the lack of any history of breaches of the rule, and the fact that the last part of (b) encompasses what would in any event be a breach of a good taste provision;
- 3.04(2) Existing Rule 12 paragraph 2(c) prohibits lawyers from comparing services or charges with other lawyers. In discussing whether this provision should be kept in the rules, the Task Force concluded that the concern may not be that this type of activity occurs but the *way* in which it happens. The Task Force decided that this type of conduct would be covered under the general commentary drawn from existing commentary 4 to Rule 12, now incorporated as commentary following rule 3.04(3). A change was made to this commentary to drop the language describing promotional advertising as not being in the public's or profession's interest, which appeared to the Task Force to be inappropriate, given that essentially the allowable conduct discussed in the rule is consistently within the realm of promotional advertising;

- 3.04(2)(c) This rule is taken from existing Rule 12 paragraph 3(c). In debating whether this rule was too restrictive, the Task Force recognized that privately, lawyers or law firms and clients may routinely enter into arrangements for discounted or special-rate fees, and the question is whether what is done privately should be reflected publicly in a permissively-stated rule (or permitted by the absence of prohibiting language). The Task Force's view is that this part of the rule, being the words "nor shall advertisements indicate that a price is a discount or reduction or special rate", should be deleted;
- 3.04(3)(b) Although there was some discussion about the need for this rule, which currently appears in Rule 12 paragraph 5(b), the Task Force agreed that it was a necessary provision given the potential for misleading information and abuse by corporations, for example, in using the name of a lawyer to add credibility to a corporation. The key words are "while in private practice". To "tidy up" the language, the word "firm" in the second line was deleted, and the committee reference at the end of the rule was changed to read "standing committee of Convocation responsible for professional conduct";
- 3.05(3) The Task Force reviewed the current prohibition against indicating preferred areas of practice, in existing Rule 12 paragraph 8(a). Although it appears that the primary reason for including the phrase was to avoid confusion with language indicating specialization, the Task Force felt that the prohibition is anachronistic, given that it in fact may be the case that a lawyer could be a specialist, restrict his or her practice to an area, or state a preferred area. As there does not appear to be a good policy reason to maintain the prohibition, the words "but may not indicate that the lawyer has a preferred area of areas of practice" were deleted.

75. With respect to form, the sub-titles within rule 3.04 reflect the particular topic within advertising being addressed in each subrule.

76. Issues arising from bencher Elvio DelZotto's motion before September 1998 Convocation and earlier at the Professional Regulation Committee level, encompassed two issues dealing with existing Rule 12, namely, steering and referral arrangements found in Rule 12(5)(f) and (g) respectively and the prohibition on solicitation found in Rule 12(4).

77. The Task Force concluded that substantive revisions should be made to the solicitation rule, now rule 3.06, and the paragraphs which followed it on prohibited marketing activities, found in existing Rule 12, paragraph 5(c) through (g). The revisions remove the prohibitions on solicitation, steering and referral arrangements, and involve as a first step the deletion of Rule 12, paragraphs 4 and 5(c) through (g) . The new rule accordingly replaces the solicitation rule. The rule is now entitled "Seeking Professional Employment", a change the Task Force believes is appropriate given the pejorative connotation of the noun "solicitation".

78. The new rule addresses specific but narrow solicitation situations and protections for certain individuals from solicitation activities. The Task Force noted that the Alberta rules, while not prohibiting solicitation generally, include a commentary that appears to prohibit solicitation of persons in a "vulnerable position". The new rule was drafted in the format of the new advertising rule, beginning with "Subject to subrule (2), a lawyer may..." This is followed by restrictions set in (2), such as ensuring that the profession is not brought into disrepute by solicitation, and obliging lawyers not to solicit from vulnerable persons or those whom the lawyer knows have counsel in a particular matter. A basket clause concludes the list, intended to be applied in the context of the narrowly structured restrictions.

79. With these amendments, the Task Force believes that one of the aims of the rules revision will be accomplished — that of increasing access to legal services through fewer restrictions while ensuring that adequate protections are in place.

80. Other changes were made to the text incorporated from existing Rule 12 with respect to firm names, letterhead and advertising the nature of a practice. Rule 3.02(8) was added to reflect requirements in the amended *Partnerships Act* for firms carrying on the practice of law as limited liability partnerships. If a law firm is a limited liability partnership, the phrase "limited liability partnership" or the letters "LLP" must be included as the last words or letters in the firm name. Similarly, rule 3.03(1)(f) indicates that these words or letters are to appear on the letterhead and other identifying signs of the law firm, where applicable. New rule 3.03(3), drawn from existing Rule 12(7)(a) and (b), includes additional language permitting the identification on letterhead of a multi-discipline practice of non-lawyer partners and their designations if any. A change, also as a result of the implementation of the multi-discipline practice model, has been made in new rule 3.05(6), which adds to the text in existing Rule 12(8)(b), providing that the services provided by non-lawyers in a restricted practice multi-discipline firm may be indicated.

Rules 4.01 - The Lawyer as Advocate, 4.02 - The Lawyer as Witness, 4.03 - Interviewing Witnesses, 4.04 - Communication with Complainant, 4.05 - Communications with Witness Giving Evidence, 4.06 - Relations With Jurors

81. The rule on advocacy was substantially reorganized to more clearly indicate the individuals or entities to whom the lawyer as advocate owes various obligations. The proposed new rules elevate certain text formerly appearing in commentaries to existing Rule 10 to the status of rules, with appropriate commentary either reorganized or added.

82. The Task Force reviewed material prepared by the American College of Trial Lawyers, from its draft Canadian Code of Trial Conduct, and used some of the material in that document in structuring the revised rules in the advocacy area.

83. The changes include the following:

- the sub-title "Abuse of Process" appearing before existing Commentary 2 was deleted, as the concepts discussed in that portion of the rule are broader and the subject matter is described under the more general title of rule 4.01, "The Lawyer as Advocate";
- the last phrase of existing commentary 2(g), now rule 4.01(2)(g), was amended to clarify and simplify the prohibition against asserting facts for which there is no reasonable basis in evidence;
- the duty of the prosecutor to disclose all relevant information as required by law was drawn from existing commentary and made a rule (rule 4.01(3);
- a new rule on "discovery obligations" found at rule 4.01(4) was drafted to bring home to lawyers their professional obligations in this area;
- a new rule was added, appearing at rule 4.03(3), dealing with the circumstances in which it is permissible for counsel to interview witnesses who are employees of a corporate party that is represented by a lawyer. In the Task Force's view, this fills a gap in the rule and provides valuable guidance on the issue. The rule provides that a person acting for a corporation cannot claim to professionally represent an employee as a witness unless he or she is in fact acting for that employee, and commentary is added to the effect that this is designed to prevent corporate counsel from sheltering factual information from another party;
- further treatment was given to the relationship of the lawyer and unrepresented parties in the context of criminal proceedings. The Task Force added a new rule on the responsibility of lawyers to complainants in criminal cases (rule 4.04). The treatment given to this subject by Alberta in particular was noted;

- a new provision on advocates' duties respecting relations with jurors was added (rule 4.06), after input was received from the Criminal Lawyers' Association on this topic. Again, the American College of Trial Lawyers' Draft Canadian Code of Trial Conduct was used as a prototype;
- although not new text in the context of the rules, commentary under existing Rule 21 (now rule 6.06) dealing with a lawyer's personal opinions on the merits of a client's case has been moved to the advocacy rule, and now appears at the fourth paragraph in the commentary under rule 4.01(1).

Rule 5.01 - Supervision

84. The Task Force incorporated the current text of existing Rule 16 in the new rule on supervision but made the following changes:

- In reviewing existing commentary 2(d) of Rule 16 dealing with delegated tasks in litigation, the Task Force reasoned that the rationale for the existing narrow permissible delegation for full time employees of one lawyer or law firm was that a full time employee would be expected to be more closely supervised. The Task Force felt that the same rationale, however, would apply to a law clerk, for example, employed by two lawyers who were not partners or associates, but shared office space and other facilities in the manner of an association. With respect to other arrangements, the Task Force concluded that the fact remained that any clerk employed by one or a number of lawyers must be adequately supervised by the lawyer(s), given the lawyers' responsibilities to the client for the actions of all employees in the law office. Accordingly, the phrase "employed by only one lawyer or law firm" was deleted from the last sentence of the first paragraph of commentary 2(d), now appearing as the last part of the commentary under rule 5.01(3);
- The Task Force discussed the language in existing commentary 3(b) to Rule 16, as it relates to "fee schedules". In light of the history of discussions concerning fee schedules and issues of law concerning anti-competitive practices which have caused some law organizations to come under the scrutiny of combines investigators, the Task Force felt it appropriate to delete reference to "fee schedules" in this rule, noting that the change does not affect the essence of the commentary. Accordingly, the commentary has been incorporated as new rule 5.01(4)(b) and now simply reads "set fees".

Rule 5.02 (1) - Students-Recruitment Procedures

85. The Task Force, in keeping with its focus on eliminating unnecessary or redundant language in the rules, amended and reduced the language in commentary 7 to existing Rule 13 respecting the lawyer's duty to observe procedures (formerly described as "guidelines") respecting the hiring of summer or articling students.

86. The commentary was changed to a rule within the new rule on students, rule 5.02. The rule was then amended to change the word "guidelines" to "procedures" to be consistent with the procedures, so titled, approved by Convocation for the recruitment of summer and articling students. Lastly, the last sentence of the existing commentary was deleted, and has the effect, in the Task Force's view, of clarifying that it is not simply deliberate circumvention of the restrictions in the procedures that may lead to disciplinable conduct (reference is made to rules 1.02 and 6.11(2) to the fact that a breach of the rules may be considered evidence of professional misconduct).

Rule 5.04 - Discrimination

87. As a result of input received from Charles Smith, the Society's equity officer, and from the consultations through the Treasurer's Equity Advisory Group, the Task Force decided that it was necessary to expand the commentary to existing Rule 28 to more fully explain the nature of discrimination and how it may manifest itself. The text of the new commentary was drawn from a number of bulletins published by the Society at the time that Rule 28 was adopted, which discussed in detail matters related to discrimination.

88. In an effort to highlight the importance of lawyers' observance of the principles of equity and diversity in the profession, the Task Force, as noted earlier in this report, included a statement to this effect in the Interpretation rule and has included in the bibliography to the rules references to a number of articles and studies focusing on equity issues.

Rule 6.01(3) - Responsibility to the Profession Generally-Duty to Report Misconduct

89. A new commentary was added to this rule to address the unique position of the Society's new discrimination/harassment ombudsperson in the context of the duty to report the misconduct of lawyers.

90. Benchers will recall that in the fall of 1998, Convocation approved the report of the ADR Systems Design Team which included a scheme for the provision of ADR services in the Society's regulatory operations. The design was approved as a one year pilot project. Part of the design was establishing the position of the Discrimination/Harassment Ombudsperson, who, in the words of the report, "is to ensure that members of the public and members of the legal profession who experience harassment or discrimination either in their workplace or as a result of contact with lawyers...have access to the assistance of a knowledgeable resource person who can offer information and advice, and...act to resolve the complaint in an informal way".

91. The recruitment and selection of the ombudsperson was assigned to Charles Smith as equity officer, and that process is underway. Mr. Smith, after discussions at the Treasurer's Equity Advisory Group, raised with the Task Force the issue of the confidentiality of information received by the ombudsperson from individuals in the context of the reporting requirements in existing Rule 13, in the event that the ombudsperson is a lawyer.

92. The Task Force acknowledged that without some guarantee of confidentiality, the efficacy of the ombudsperson's role may be affected, but that there was a compelling argument relating to the serious consequences that could arise from failure of a lawyer to report serious present or future misconduct.

93. The Task Force noted that this was an issue similar to that discussed when the Ontario Bar Assistance Program ("OBAP") requested a carve out for lawyer counsellors who may become aware of lawyer misconduct during counselling. It was decided that the OBAP commentary (now the second paragraph of the commentary under rule 6.01(3)) should be used as a precedent for a new commentary on confidentiality and reporting requirements for the ombudsperson. Accordingly, the new commentary, appearing as the third paragraph in the commentary following rule 6.01(3), reflects these principles.

Rule 6.03 - Responsibility to Other Lawyers

94. Commentary 4 in existing Rule 13 deals with the proper tone of professional communications. The Task Force concluded that this provision is best placed in the context of the lawyer's professional relationship to other lawyers, and should be elevated to a rule. It now appears as rule 6.03(5).

95. The amendment to the rule is to add the words "or otherwise communicate" to broaden the scope of the rule, and state the obvious in that all types of communications, not only written communications as currently covered by the rule, are subject to the rule.

Rule 6.05 - The Lawyer in Public Office

96. The Task Force reviewed material referred to it from the Professional Regulation Committee, which had begun a review of this rule based on a matter referred to the Committee from the proceedings authorization committee. Discussion centred on whether the rule should be kept or deleted, with a particular focus on the appropriate definition of "public office" and "official body" and what a lawyer is expected to do when his or her duties as a lawyer and as an individual in public office conflict.

97. The Task Force decided that the rule should remain, and should exist as a free-standing rule dealing with a discrete relational issue, in keeping with the general thrust of the re-organized rules. It was felt that users of the rules would look to this type of heading first to review any ethical guidelines for the lawyer in public office, rather than an offshoot of the conflicts rules, for example.

98. The Task Force considered whether the rule should more specifically define what is meant by "public office". It was agreed that it would be difficult to place too fine a definition in the rule on what would be caught and that the current language should be kept.

Rule 6.06 - Public Appearances and Public Statements

99. The primary focus for the Task Force's review of existing Rule 21, now rule 6.06 in the redraft, was material received from The Honourable Charles L. Dubin in a letter to the Treasurer in June 1998, which included draft guidelines included in a protocol regarding public statements in criminal proceedings, and a suggestion that the Society may wish to incorporate the guidelines in its rule on public statements by lawyers. The protocol has been developed in consultation with representatives of the Criminal Lawyers Association and the Crown, together with other interested organizations. The Task Force determined that the guidelines provided helpful guidance for lawyers and that they should be incorporated within the commentary to rule 6.06 in an adapted version.

100. This led to a broader amendment to the current rule, to address in clear terms the issue of the competing interests of freedom of speech to assist in public dissemination of information and preserving the right to a fair trial, both relevant to a lawyer's decision to make public statements about proceedings before the courts or a tribunal. As the rule deals with public appearances and statements, and not with what may be, for example, indiscreet talk by a lawyer in a less public setting, the focus is on what could be disseminated in the media.

Rule 6.07(2) - Disbarred Persons, Suspended Lawyers, and Others

101. The Task Force reviewed a report issued in late 1998 by the Professional Regulation Committee, a working group of which studied a number of issues relating to existing Rule 20. In particular, the working group proposed, and the Professional Regulation Committee agreed, that the name of the rule should be changed to reflect the broader scope of the rule and that the status list should include those members who have undertaken not to practice.

102. The Professional Regulation Committee also proposed that for administrative suspensions, now dealt with through the summary order provisions in the amended *Law Society Act*, these matters need not be reviewed by Convocation, but by a committee of benchers. The Proceedings Authorization Committee was suggested as the most appropriate body, and its use would permit a more responsive and timely process for these types of applications. The Professional Regulation Committee concluded that if a lawyer's membership in the Society has been revoked as a result of the continuation of a summary order for suspension, applications under rule 6.07 (2) involving those former members should be referred to Convocation.

103. The Task Force endorses these proposals. In particular, it agrees with the Professional Regulation Committee's reasoning that a simplified procedure for administrative suspensions is appropriate, providing greater accommodation for the practising bar while ensuring that public interest protections through review by benchers remains intact. Accordingly, the Task Force redrafted this rule to reflect these decisions.

104. A further amendment to the rule was made by adding the words "partner or associate with" in the list of associations described in the rule requiring approval, to cover those situations where a multi-discipline practice or partnership may wish to include in the firm a non-lawyer who is a disbarred lawyer or one who resigned through the disciplinary process.

Rule 6.10 - Responsibility in Multi-Discipline Practices

105. A new rule has been added to emphasize the responsibility of lawyers in a multi-discipline practice to ensure that non-lawyer partners or associates comply with the rules and all ethical principles governing the lawyer. This mirrors concepts in the multi-discipline practice by-law, which Convocation will be considering imminently, where members accept responsibility for the professional conduct and competence of non-lawyers in this type of firm.

DECISION FOR CONVOCATION

106. Convocation is requested to review the redrafted Rules of Professional Conduct and make one of more of the following decisions:

1. Approve the new rules as drafted, or as amended by Convocation;
2. Direct the existing Task Force to continue, as much as is necessary, with the implementation of the new rules, or constitute another task force to deal with implementation issues;
3. Advise on changes which Convocation considers necessary to the redrafted rules, with specific direction as it deems appropriate, to be brought back to Convocation for further review.

APPENDIX A

Notice to the Profession

TASK FORCE ON REVIEW OF THE RULES OF PROFESSIONAL CONDUCT
Call for Input

In June, 1998, Convocation established a Task Force to review the Law Society's Rules of Professional Conduct. The Task Force's mandate is to examine the rules and, if necessary, redraft them in a way that will continue to provide guidance to lawyers and reflect a level of regulation which protects the public but also facilitate the creative practice of law and assist the profession to remain competitive.

As the rules bear on the activity of all members of the profession, the Task Force is inviting submissions from the profession on the current rules and how they could be improved or enhanced. The Task Force is particularly interested in receiving input on:

- whether the rules provide sufficient guidance to the profession on ethical issues and what is expected of lawyers in terms of professional conduct
- whether the code of conduct is sufficiently certain and transparent
- whether there are any issues relating to professional conduct that are *not* addressed in the current rules that should be
- whether there are any issues relating to professional conduct that are addressed in the current rules that should *not* be
- whether the rules unduly or unnecessarily restrict lawyers in competing for legal services
- the relevance of the rules in today's legal practices and business environment.

Written submissions should be delivered to the Law Society no later than November 30, 1998, and may be faxed to the Law Society at (416) 947-7623, e-mailed to jvarro@lsuc.on.ca or sent to the following address:

Task Force on Review of the Rules of Professional Conduct
Policy Secretariat
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For more information about the study, please contact Jim Varro, Secretary to the Task Force, at the Law Society at (416)947-3434.

APPENDIX B

SUMMARIES OF RESPONSES TO CALL FOR INPUT
(January 1999)

GENERAL COMMENTS

The rules are good, in terms of communicating what is expected of lawyers and highlighting that law is a profession and not a business. But the Law Society should adopt a "mission statement" that underscores both the honour and duty that goes with the calling.

Many people are unaware of their rights as clients, and their lawyers' responsibilities to them. The Law Society should make public information available on the nature and content of the solicitor/client relationship, not through publication of the entire rules but in a booklet in published and Internet form on the basics. The role of the Law Society as the guardian of the public interest should also be explained.

New rules or updates of existing rules should automatically be sent to the profession by the Law Society. In light of the policies adopted by Convocation in past years respecting prepaid legal services plans, there should be reference to legal services plans in the rules and commentaries.

Law students as caseworkers in community legal clinics frequently deal with lawyers and articling students representing other parties, and are often presented with issues of professional conduct. The rules ought to provide more explicit guidance regarding such situations to student caseworkers and the other members of the legal profession with whom they are in contact. Commentaries on the integration of social workers and other professionals into a law practice would be a helpful addition to the rules (in the context of the work on multi-discipline partnerships). An example is the use of students in undergraduate and graduate social work programmes in placements at the clinic to provide clients with services needed to improve their access to justice, such as diversion programmes for the withdrawal of criminal charges.

Rules should be clear, but the current rules are too vague or too broad to offer definite guidelines on acceptable conduct. The gap allows lawyers to engage in conduct that adversely impinges on the profession as a whole and places the entire system of justice in disrepute.

The rules do little to provide lawyers with guidance when they are dealing with family matters. There should be a code of conduct for lawyers dealing with family law. The rules do not take into account the numerous, unforeseeable problems that can be encountered when practising family law. Standards by which unethical practice tactics are measured must be a stricter one, and lawyers must be sanctioned for any indiscretions that are clearly improper. The Society must tailor the rules to include protection for children and family law practitioners must assume the additional responsibility of ensuring that the client adheres to court orders aimed at providing for children such as the granting of court ordered access to the other parent and payment of child support.

Public input must be sought and reviewed on an ongoing basis because unless the people who are being represented have a voice in the process, it will be difficult to gain public confidence in the legal system. Only a lay person can offer information from the client's viewpoint and the Society should be directing the membership toward consumer driven practice.

As the rules appear to have evolved on a piecemeal basis, the current rules reflect this patchwork of different "backgrounds" (protection of the public interest, protection of clients and competition within the profession). The rules have also been written and amended many times of practitioners more experienced in the common-law [than code-writing] and as such have a disconcerting mix of broad general principles and specific rules. This is not of assistance in trying to develop in new lawyers an understanding or feel for the principles underlying the rules.

Consider reorganizing or rewriting the rules along the principles used in the drafting of the code such as a civil code. This would organize the rules into sections in a logical order depending on the general public interest or specific client interest being protected.

The code should not descend too far into specific prohibitions, because a predominance of them would encourage the reading of the code in a black letter manner. If the profession ignored the spirit of the code, the public interest will not be fully protected and public confidence in the profession will be lessened.

The rules should continue to be the backbone of lawyers' ethical standards, but what is need is a reworking of the rules into a cohesive set that makes more sense. For example, Rules 5, 7, 23 and 29 should be placed together in close proximity. The LPIC provisions in Rules 3 and 5 should be together.

The distinction between the rules as a directory model and as a mandatory code should be continued but it should be clearer as to which rules will be treated as *prima facie* professional misconduct.

The rules should be made as "user friendly" as possible. There shouldn't be two rules for reporting errors (Rule 3, commentary 10 and Rule 5, Commentary 15) - create a separate rule.

Consolidate the undertaking rule into one rule - presently found at Rule 10, Commentary 8, Rule 13, Commentary 6 and Rule 14 Commentary 6.

The revised rules should be tested with a "focus group" of lawyers representing a cross-section of the bar (he would volunteer).

There should be a separate rule on lawyers' duties to the Law Society, emphasizing professionalism as the large ideal, beyond simply a requirement as members of the Society to observe appropriate behaviour and fulfill certain responsibilities.

Many of the rules are wordy, vague and open to interpretation and misrepresentation. With increased numbers in the profession there must be "a level playing field". Everyone should know what is and is not acceptable practice and what is expected of them, with as little ambiguity as possible, and with greater certainty of interpretation (many rules are too convoluted, verbose and open to too much interpretation).

Paralegals must know their limits which must be precisely defined both by the rules and the governing statute law. Real estate is an area - with electronic registration etc. - where new lawyers have serious concerns about what will remain the exclusive domain of lawyers and what encroachment will be tolerated thereon by non-lawyers. The Task Force must define with particularity the allowable areas of responsibility and of permissibility of non-lawyers. The line delineating areas of law in which non-lawyers may practice and those which still are exclusively members of the profession is in a shambles.

The rules could be improved if they more realistically represented the reality of the marketplace. If the rules do not reflect the real, more complex, market (many of the examples under the rules do not), lawyers are unfairly set up to liability exposure because they have not complied with the rules or the examples, notwithstanding that their practices have been fair.

In a claim against a lawyer by a former client, the writer argued that the rules are part of and underlie every contract of retainer. Other arguments are that the rules only pertain to a lawyer's relationship with the Society and are a *res inter alios acta* respecting the client. In the belief that the law and the intention of the rules is that they underlie and by implication form part of every contract of retainer and govern the conduct of the solicitor *vis a vis* the client, an additional rule should be passed to clarify this.

The rules should be published in a looseleaf service with updates to rules and commentaries sent to subscribers. The current system, where lawyers receive updates through various sources, is cumbersome and runs the risk of lawyers not acting in accordance with the most current version.

INTERPRETATION

The rules should state explicitly that, except for Rule 16, law student caseworkers at student legal clinics associated with faculties of law in Ontario are bound by the rules and are owed the same duties by other members of the profession. The rules should also state that under the regulation to the *Legal Aid Act*, student caseworkers are required to submit to the control and supervision of their Dean and that this may impose additional requirements on student caseworkers.

Because clients and counsel cannot know in advance if their interpretations of the rules will be correct (which leads to uncertainty and potential violations of the rules), there should be a service describing issues arising under the rules, not unlike Revenue Canada income tax opinions, where opinions could be published for the public and the profession. Responses should be timely and binding (unlike the practice advisory opinions) on the Society (a suggestion is use of the Society's website for this information).

THE RULES

RULE 1

The rule is too vague. Commentary 3, which says the Society will not be concerned with the purely private activity of lawyer unless integrity or competence is in issue, appears to contradict Commentary 2 which says that dishonourable conduct in either private life or professional practice will reflect adversely on the integrity of the profession. If a lawyer's private activities are not regarded as having an effect on his or her professional practice, it is almost futile to mention them. It is highly unlikely that a person who lacks personal integrity will be morally competent in his professional dealings. The suggestion is adding to Commentary 2 (deleting Commentary 3 entirely) as follows:

> Since personal and professional integrity are inextricably connected, any dishonourable or questionable conduct on the part of the lawyer...

RULE 2

There are no guidelines for maintaining the competence the rule requires. Lawyers should be mandated to keep up with changes in their area of expertise and they should be required to submit to the Society annually a detailed account of how they did this, including any professional development activities of which there should be a minimum requirement. Accordingly, add to the rule:

> The lawyer must submit to the Law Society on a yearly basis a completed form outlining hours spent on professional development and the maintenance of professional competence.

Add to Commentary 5 after "engaging in" the words "professional development activities such as" and add another section to this commentary as follows:

> In order to maintain standards of professional practice, the lawyer must submit documentation to support the continuance of his or her professional development in accordance with the third branch of the rule.

Counsel designated as specialists should have an obligation to confirm same to clients and they should be subject to a greater level of scrutiny than a lawyer who is not so designated.

Respecting Commentary 7, references to promptness should be bolstered - impress upon counsel that they should make contact with clients as quickly as they can even if to say they are touching base and will get to their substantive issue later in the day or week. This approach would alleviate many client concerns.

Respecting Commentary 8, some guidance from the Law Society on how to deal with the conflicting pressures of limiting the cost of services (for example, where so few hours are allotted under a legal aid certificate that the lawyers don't want to spend a lot of time on the phone, although this may lead to client dissatisfaction) while maintaining appropriate client contact would be helpful.

RULE 3

Rule 3 is very broad and could be improved by requiring the lawyer to review with the client decisions from recent relevant case law applicable to the client's case. Therefore, add after Commentary 1 the following:

> In order to facilitate a positive and trusting relationship with the client, the lawyer should include the client in the decision-making process by reviewing with him or her outcomes from recent relevant case law.

Add to Commentary 5:

> The lawyer must refrain from representing the client in the commencement of frivolous legal proceedings.

Amend Commentary 9 by changing the words after "should" (2nd last line) to read:

> emphasize that this advice is a matter of opinion only and is not to be construed in any way as legal advice.

RULE 4

Include commentary dealing with issues arising out the abuse of children and the lawyer's obligation to deal fairly with the client but at the same time observe the obligation to the child. Some direction should be given as to when a lawyer is obligated to report abuse.

[In the context of commenting on multi-discipline practice (MDP) arrangements] While favouring business or professional arrangements that permit informed consumers to access legal services in a cost-effective manner, the key is that the consumer must be fully informed of any departures from the standard solicitor/client relationships - such as waiver of privilege and the limits of confidentiality. It is essential in MDPs that lawyers be aware of their professional responsibilities as lawyers and clients be informed of the limitations of the legal services available through the MDP. The Law Society should be setting standards to which all new forms or novel organizations for practice must adhere.

Although there is nothing wrong with Rule 4, the Practice Advisory Service should monitor developments which require disclosure of confidential client information by solicitors, and make practical advice available for consultation purposes, through updated advisory bulletins on important practical developments in the disclosure area, for example.

Where social work services for placement at a community legal clinic supports the delivery of legal services, students are aware of their responsibility to maintain confidentiality at the Rule 4 standard. But it would be helpful to have this rule clearly state that the obligation of confidentiality extends to other professionals or service providers in law offices in order to maintain solicitor-client privilege and provide the necessary basis for a relationship of trust with the client.

Respecting Commentary 11, it permits disclosure when a lawyer has reasonable grounds for believing that a crime is likely to be committed but not requiring it. Some think it requires disclosure. This should be clarified.

Lawyers can be put in the invidious position of being forced to choose between the maintenance of privilege and confidentiality and the maintenance of their insurance coverage. This can arise when a potential claim is reported to LPIC (a requirement of the policy, failing which coverage may be denied) even before any claim is advanced, and even if the client expresses the current intention not to advance a claim, or to wait to decide whether to advance a claim. When a claim is advanced, privilege and confidentiality are impliedly waived - but there is no waiver unless and until the allegation is actually made. However, LPIC insists on disclosure, even of privileged or confidential information, when a potential claim is reported. LPIC has suggested that any resistance to these demands for disclosure on the privileged basis may be taken to imply that the lawyer has "something to hide" and may constitute a breach of the policy requirement to co-operate. The rules have an important bearing on these issues, and should make clear that the mere reporting of a potential claim to the insurer does not affect the lawyer's duty to maintain both solicitor-client privilege and confidentiality of information.

RULE 5

Respecting Commentary 14, there should be specific reference to family law. There should be some indication of how to handle discussions and encounters with unrepresented clients i.e. perhaps all communication should be in writing between counsel and the unrepresented party so as to avoid any confusion and difficulty over what was said, offered or accepted.

A difficult concern is where a lawyer represents more than one interest, particularly on a relatively simple transaction. For example, the writer's children may buy houses, get a mortgage from the bank, get a second mortgage from the writer and one spouse may put up more money than the other. They are not prepared to fund a fee to each of three or four different lawyers, and yet in a perfect world each of those separate interests should be separately represented. The client, in the real world, may be willing to pay the equivalent of two hours of time to see that three or four interests are fully protected to complete the transaction. The Task Force is urged to consider language which obligates a lawyer to divest himself of a retainer where a real and meaningful conflict of interest is known to the lawyer. Otherwise, the language should recognize the discretion that exists in the marketplace.

The rule permits multiple representation of clients on condition that, among other things, there be full sharing of information. Thus, the rule appears to preclude multiple representation accompanied by the use of screens to prevent the sharing of confidential information, which Convocation appears to have confirmed in 1988 when it accepted that the rule not be amended to permit the use of 'Chinese Walls'. This appears to apply regardless of the sophistication or preferences of the clients. This contrasts sharply with the conflicts rule on transfers of lawyers between firms (Rule 29). The writer's opinion is that Rule 5 is unnecessarily restrictive and may prevent clients from obtaining their choice of counsel, and this runs counter to one of the underlying objectives of the rules. A number of other codes have recognized the desirability of permitting law firms to act in a situation of conflict or potential conflict without requiring the sharing the information between clients, including Alberta, the ABA, California and New South Wales. The current position in the Law Society' rules is not sufficiently responsive to clients' interest, and the writer submits that the rules should be changed to permit multiple representation, with informed client consent, without the sharing of information.

A law firm's participation in a request for proposal (RFP) from a prospective client for legal services, or response to an inquiry about a possible retainer, opens up the possibility that, should the firm not succeed in securing the retainer, the prospective client will rely on its provision of information to the firm in the RFP process or the discussion of a retainer in seeking to "ice" the firm, or prevent it from acting for anyone else in the transaction or matter on the basis of an alleged conflict (reference is to the recent case of *Ainsworth Electric Co. v. Alcatel Wire Inc.*). Master Sandler who heard the case suggested that law firms might lay down ground rules with potential clients to try to limit the problem and that the Law Society consider the issue. Accordingly, the Society should take the opportunity in this rules review to address the issue so that the rules attempt to ensure that firms can participate in RFPs and respond to other types of inquiries from prospective clients without concern that their doing so will result in disqualification from acting for anyone else in the transaction or matter if the firm is not retained. Possibilities include expressly providing that participation in an RFP does not by itself preclude a firm from acting in the transaction or matter for another party, or the rules might contain default ground rules for RFPs or prospective client inquiries, under which no confidential information imparted during the RFP process or other inquiry may be used by the lawyer or firm if not retainer results, but the firm is not prevented from acting for another party.

RULE 6
no comments

RULE 7

The rule is confusing in that it says a lawyer cannot borrow from a client but seems to allow the lawyer's corporation to borrow provided certain requirements are met. Why should borrowing from a corporate entity be treated differently?

Commentary 2 should be amended to eliminate the language "distinguished from the normal and traditional function of the lawyer in placing funds left with the lawyer on trust to be invested on behalf of the client". Arranging investments for clients is not normal or traditional any more. Further, it isn't covered by LPIC if it is considered brokering, and it is superfluous in the context of the borrowing rule. This language is at times used by claimants in Compensation Fund claims when the Society is saying that it is the investor's responsibility to investigate the merits of the investment and not the lawyer's function - the claimants say the rule says it is the normal and traditional role to invest. This language should be deleted.

RULE 8
no comments

RULE 9

Respecting Commentary 7, in discussions among partners and colleagues, there is a commonly held belief that this particular commentary and rule is inherently unfair to both sole practitioners and smaller firms. Work is referred back and forth between departments in a large firm and credit given in the determination of the overall compensation to a lawyer at the end of the year. Many large firms have a built in referral system which keeps track of the number of clients and amount of billable work referred as between counsel. Sole practitioners and small firm lawyers cannot do this under the current rule and are left out of the financial benefit as a result of referring a client to a different firm or practitioner.

Respecting Commentary 10, a contingent fee arrangement would of great assistance to smaller to medium sized firms. These firms, unlike the large firms, cannot shoulder a loss in court where they have had to take on the burden of all disbursements in a personal injury action, for example. A contingent arrangement would allow smaller/medium sized firm counsel to take on this type of work with the possibility that they would be reimbursed for the results based on a contingent fee arrangement. Checks and balances can be built into this system and contingency fee agreements can be reviewable as in other jurisdictions to protect the client. Lack of such arrangements is also unfair to the client who cannot pay for legal action in any other way.

Contingency fees should be permitted, that is, percentage fees contingent upon the successful result of litigation, to fill the gap in the availability of legal services to low or modest income individuals, in areas of law where legal aid is not available, legal aid clinics do not offer services and legal agents do not have standing before the courts. It will free lawyers from having to design complex arrangements of waiving retainers, postponing billings and waiting for the result to bill the client. It will give clients greater certainty in know up front what the fee arrangement is. Caps could be set or a requirement instituted that the final bill be reviewed by the court after judgement or settlement. Clients will know the financial basis on which the litigation is founded, access to the courts will be improved and it will operate as a disincentive for lawyers to make frivolous claims.

Lawyers should be mandated to put fee quotes in writing, signed by the lawyer and the client, to eliminate misunderstandings as to the charges.

If a lawyer is hired for a case, that lawyer should be dealing with the case - it is not ethical for a lawyer to charge his or her hourly rate, when someone without the experience is doing all the work.
Accordingly, add the follow concepts to the rule:

> The fee must be fair and reasonable, and consistent with what a lawyer in similar circumstances would charge.
> The lawyer shall put in writing any quoted amounts followed by the signatures of both the lawyer and client.
> If the lawyer's fee is a fixed amount, the lawyer must adhere to this guarantee. When charges are likely to vary, the client must be notified at the time of the initial quotation and it must be stipulated in writing.
> When a lawyer is retained by a client, and the fee that has been quoted is for the services of that particular lawyer, he or she is obligated to represent that client in all legal matters which require the personal appearance of a lawyer, unless the client expressly consents to another arrangement.

In Commentary 5, add the following:

> The lawyer's quotation must be put in writing, and when the lawyer is assured that the client is fully informed of the potential costs, the lawyer must place his signature under the quote and then obtain the signature of the client. If the lawyer is charging a fixed amount or block fee, the amount quoted must be the only amount charged.

In the commentary (7 and following) on division of fees, add:

> In the act of retaining a lawyer, a client enters into a contract with this lawyer whereby both parties explicitly agree that the client will pay a fee for the services of the lawyer. Therefore, the lawyer must make a personal representation on behalf of the client whenever court appearances are necessary or meetings are held involving other parties, such as other lawyers or the Crown. To allow another lawyer to make a representation without the express knowledge or consent of the client amounts to unethical practice and the Society will be justified in taking the appropriate disciplinary action if this occurs.

Clear up the concept of champerty and contingent fees.

The rule should be modified to reflect the current business realities facing the legal profession. Contingency fees should be allowed and should not be regulated. Legal aid funding for wrongful dismissal cases has been eliminated and many dismissed employees cannot fund litigation. Many clients request that the cases be taken on a contingency fee basis.

The prohibition on division of fees and referral fees should be eliminated. The Society allows paralegals to practice in the labour and employment law area completely unregulated - they are at a competitive advantage, which means increased business for them, decreased business for lawyers and an overall lowering of the standards of professional representation. Unfettered by this commentary, lawyers would be able to compete on a level playing field and allow their services to be more readily available to the public.

RULE 10

The Law Society's concern for protection of the public from incompetent legal representation and predatory practices, and its commitment to the administration of justice, should motivate it to call for and assist the government in the development of practice standards, licensing and methods of complaint resolution for paralegals.

Respecting Commentary 14, it would be helpful if it included student legal clinic caseworkers and witnesses who are not necessarily parties but are represented, as in the case of some complainants (i.e. women who are witnesses in sexual assault and spousal assault cases and concerns that arise when defence counsel speak directly to these people even though in the knowledge that the caseworker is representing them). Also, the commentary might include the text of a section of the June 1996 *Advisor* dealing with communication with victim/witnesses.

Add to the rule the following, to ensure some protection for families involved in custody disputes:

> While interim orders are in effect, the lawyer, in his or her role as advocate must ensure that the client has full knowledge of the meaning and correct interpretation of the order.

Add to Commentary 6:

> The lawyer has a duty to the client to take into consideration the long-term effects of any immediate actions. The lawyer should encourage settlement by means other than those offered in a litigious format. Where family disputes are involved, the lawyer must assist the client in understanding the importance of complying with court orders and the potential consequences of breaching a court order.

Add to Commentary 6A after "ADR options":

> and what each alternative involves. The lawyer must ascertain that the client understands the potential financial benefits that may result from choosing ADR.

[The following comments were in the context of examples cited by the writer where his clients were contacted by represented clients on the other side in litigation, where the latter proposed negotiations on the condition that the writer not be involved and in some cases criticized the writer as lawyer for his clients in the matter. Letters received by his clients from the clients on the other side in these situations in his view had legal input]. Although nothing prevents clients from contacting each other, when rules are stretched and counsel cannot control their clients, the integrity of the profession is affected. Consider whether the rules should be amended or clarified to cover actions by clients involved in litigation with the emphasis on lawyers controlling their clients.

RULE 11

[In the context of comments on activist lawyers' partnership with community-based reformers in seeking social justice goals] The concern, in counselling and participating in civil disobedience, is that the rules of conduct may be used a weapon for stifling legitimate social activism. While the rules in the context of activism for social change impose a uniform obligation on all lawyers to support the rule of law and its institutions, what would happen, for example, to a criminal lawyer who publicly announced that a First Nations client cannot get a fair trial because of institutionalized racism in the criminal courts and on the bench and who called upon the court to refer the charges to the exclusive jurisdiction of the elders of the client's First Nation, or went on to stage parallel proceedings by the designated elders and presented the findings to court as a finding of a court of competent jurisdiction? This may lead to punishment by the courts and the Law Society, but serves as an illustration of an issue which may lead to actions provoking a response that "kills the messenger".

The spirit of the rule on lawyers and the administration of justice should be enhanced by urging the bar to report instances of judicial misconduct despite apprehensions of personal reprisal, highlighting that there is a responsibility on the part of judges to uphold respect for the administration of justice which invites fair comments when it is not discharged.

RULE 12

Misuse of the word "specialist" runs rampant throughout advertising by lawyers, in the media and in advertising by suppliers of legal education. While the specialist program could investigate a more effective type of designation for the certified specialist, the purpose of the advertising rule was to make it as clear as possible to the public but it doesn't seem to be working and much of it is still quite misleading.

It is not the place of the Society to protect its members from competition in the marketplace, except in limited circumstances where sharp competition would probably result in harm to the public. Otherwise, the Society would be in conflict with its role as a regulator of the profession in the interests of the public. For example, Rule 12 says lawyers should make legal services available to the public but then prohibits false and misleading advertising, something already covered in the *Competition Act*. Paragraph 4 of the rule states that a lawyer may not solicit professional employment - while this rule may have some merit in some areas of practice with the general public, if applied strictly it can be an impediment to commercial law practices trying to offer competitive services in the global market place.

Items limiting competition should have as their major policy justification the correction of specific market place problems, such as informational imbalances. Setting out official barriers to market forces may result in a lack of effectiveness and respect for the rules.

Rule 12(3)(c) prohibits advertisements indicating a price discount, reduction or special rate. This has been a source of contention with prepaid legal service plan marketers. Access to affordable legal services would be enhanced if plans are allowed to promote lower fees to prospective subscribers (in the spirit of Rule 9, Commentary 2).

Paragraphs 4 and 5(f) and (g) should be amended or have an appropriate commentary to reflect the fact that legal service plans are excepted.

Paragraph 4 is honoured more in the breach than the observance, particularly so in the writer's practice in cases under the *Special Import Measure Act* before the Canadian International Trade Tribunal. Non-lawyer "trade consultants" are allowed to appear and act for clients accused of dumping goods into Canada causing material injury to the production in Canada of like goods. When Revenue Canada announces an investigation into the offending countries, the trade consultants solicit the business from companies located in the offending countries, putting those lawyers adhering to Rule 12 at a disadvantage. One of the writer's competitors in the legal profession actively solicited the general counsel of his client in the US for its work in connection with a pending anti-dumping case - the US lawyer said that both the Montreal and Toronto offices were soliciting him for his work.
The reason for the [solicitation] rule should be investigated and the harm determined from soliciting work from prospective clients in a particular case.

The rule is a muddle and should be rewritten - does it reflect today's reality?

RULE 13

Respecting Commentary 7, these "guidelines" for students are really procedures and in the revision, the principal's responsibilities should not be lost. The compliance responsibility must be maintained.

There is an increasing abuse of the rules. It is almost commonplace that complaints to the Society by other counsel either directly or on occasion in the name of the client are made for tactical reasons. They must be dealt with by the Society and can cause expense, trouble and mental anguish. Generally groundless or highly technical in nature, they also take up limited resources of the Society. One solution is to include a stronger prohibition on raising complaints for purely tactical reasons. Commentary 1 is an insufficient check on tactical complaints. A revised provision would obviously have to provide for good faith complaints made on reasonable grounds.

RULE 14

In light of recent developments, it might be helpful to provide a commentary dealing with interaction between counsel and paralegals.

The responsibility to act with courtesy and good faith ought to extend to, at least, law student caseworkers at student legal aid clinics, community legal workers at community legal clinics and others in comparable positions working under the supervision of a lawyer.

When the expectation of appropriate conduct is clearly articulated and a complaint is registered against a lawyer, the Society often disregards the complaint as insignificant or trivial and there is little or no discipline meted out. This contributes to the lack of public confidence in the legal system. The rule should be amended, at the end of Commentary 2, as follows:

> The Law Society will not tolerate such conduct and is committed to taking appropriate disciplinary action against any lawyer found to have engaged in abusive or unethical conduct towards any other lawyer, or party with whom they have or have had legal dealings.

This rule, respecting courtesy and good faith towards other, ought to be strengthened. [Comments of the writer are in the context of an example where his "without prejudice" settlement offers are submitted by defence counsel to administrative bodies without qualms as a tactic to portray the plaintiff or plaintiff's counsel as a "shake down artist" in the hopes of injuring his client's claim]. An explicit amendment to the rules should be made prohibiting the disclosure of settlement documents in any court or tribunal until such time as litigation has come to a close and the issue of costs is being addressed by the court or tribunal. [This could be cross-referenced to Rule 10]

RULE 15
no comments

RULE 16

Consider the suggestion that "clinic funding committee" in paragraph 2 be replaced by "Ontario Legal Aid Plan" and "community clinic" changed to "community legal clinic or student legal aid society" (currently, student legal aid clinics are not funded by the Clinic Funding Committee).

Respecting Commentary 3, given that many law students in clinics have little or no legal experience at the start, a non-lawyer under this rule and commentary ought to include student caseworkers, except in the following areas:

g) accepting cases on behalf of clients - allow this if done in accordance with established case criteria; during evening work, students cannot advise potential clients during the initial consultation whether or not a file can be opened even though all students have a copy of the specific criteria for accepting cases; having to call the client later and sign a retainer adds an unnecessary step

c) and l) providing legal opinions - all caseworker work is reviewed and approved by one of the supervising lawyers; accordingly students should be allowed to give legal opinions; consider adding the following sentence: "student caseworkers at student legal aid clinics may give legal opinions/sign correspondence providing a legal opinion if it has been reviewed and approved by their supervising lawyer"

k) taking instructions - student are instructed to take instructions on certain points as the case progresses; the supervisors are generally not in direct contact with clients on routine matters because of time pressures; consider adding to the sentence: " unless directed to do so by the supervising lawyer"

Respecting Commentary 4, student legal aid clinic caseworkers should not be included in the blanket exemption provided for students-at-law since caseworkers generally do not need most of the supervision currently required by this rule - the exemptions above are sufficient to protect the client while allowing the co-directors in the clinic to use their time more efficiently.

Rewrite this rule to improve its clarity, purpose and relevance.

RULE 17
no comments

RULE 18
no comments

RULE 19
no comments

RULE 20

Applications under the rule are becoming more and more quasi-readmission applications. Rule 20 has been reduced to another hurdle in the already impossible readmission process. The public interest is not served. Sectoral, exclusionary, turf-preservation, tyling of the lodge objectives prevail.

RULE 21
no comments

RULE 22
no comments

RULE 23
no comments

RULE 24

Add more discussion as to what is expected of a lawyer/law firm on what an articling student should be exposed to. Students complain that they thought they would be exposed to a variety of different practice areas but that this doesn't happen. Lawyers should be given notice that they have a duty and obligation to the student to do their best to assist the student.

RULES 25 TO 30
no comments

SUMMARY OF DISCUSSIONS AT
TREASURER'S EQUITY ADVISORY GROUP ("TEAG") CONSULTATION

MARCH 3, 1999

Charles Smith, the Society's Equity Officer, facilitated the discussion.

References to the rules discussed in this summary are to the existing text of the rules.

Discussion was prompted by the general questions (appended hereto) provided to participants in advance of the session focussing on equity and diversity issues in the context of the Rules of Professional Conduct.

COMMENTS

1. It is necessary to expand the commentary to Rule 28 to provide a better understanding of what non-discrimination is. The "need to know" information to the profession which accompanied the implementation of Rule 28 was of assistance in this respect. People's actions with respect to observance of human rights dictates is counter-intuitive, and more explanation in the commentary of how discrimination manifests itself would be helpful.

2. Accommodation guidelines (respecting disabilities) of the Human Rights Commission should be added to the commentary to Rule 28. They are not well understood. This is admittedly a lengthy document but it could perhaps be shortened for the purposes of the commentary to make the necessary points.

3. The example of the non-discrimination concept used in a claim that affirmative action programs were discriminatory was cited in the course of raising a concern that Rule 28 could be used in the same way.

4. Some rules are worded positively, others negatively in terms of a prohibition. The discrimination policy falls into the latter category - could it be changed to the former?

5. There is an argument that law firms should provide an environment where education about equity issues and discrimination can take place freely, and that law firms should be obliged to do something to promote these values. Flowing from this idea, there should be a more onerous obligation on firms, to the extent of requiring firms to have an equity policy applicable to the partners, associates, employees, etc. Rule 28 provides the instruction - why not make it an obligation? It could be promoted as a standard practice in a firm. The Society previously published a communiqué about recruitment and equity, and policies which firms could adopt on a volunteer basis.

6. A concern was raised about how an equity policy could apply in a sole practice - it may be "ludicrous" to have such policies in such a small environment. In response, the idea is that the policy be drafted by the lawyer with and for everyone in the office, and applicable to clients as well, and whether there is 1 or 100 lawyers, a policy should exist.

7. There is a sense that these issues are Toronto-centred. But some statistical analysis should be done to see what the scope of the issue is and convey why it's important for all lawyers in Ontario.

8. The rules - and Rules 27 and 28 are examples - are not "full" enough for the purpose of telling lawyers what they should be doing. A suggestion is that a paper or some directive on what is required of lawyers in these areas accompany the rules. Many people don't know what sexual harassment is.

9. It does not appear that Rules 27 and 28 are enforced very often. There are few cases in the discipline digest that deal with these issues.[2]

10. The Society should look at where these issues can be discussed throughout the rules and use as many examples as possible, to show how discrimination is taking place. The profession must understand what is happening at ground level. There must be a circular "feeding" of information on how the rules are interpreted, which can feed into the office of the new ombudsperson and enhance the scheme as it develops. Examples of equity issues should be placed throughout in the context of particular practices. For example, pointing out the relationship of the Ontario Commission on Racism in the Criminal Justice System to applicable rules or the relationship of domestic violence to family law. There is a need to make the rules reflect equality issues in practice. Periodic bulletins on new developments in practice can help to keep the rules alive in the thoughts of the profession.

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[2] In response, it was pointed out that enforcement, eg. based on provable misconduct at a hearing level , must be differentiated from the frequency of complaints the Society receives and investigates on these issues, without reaching the hearing level.

11. If there is an argument that all the rules should be subject to the test of equity, how will this be dealt with throughout the Society? For example, will the professional standards people be knowledgeable about the equity issues and be able to pick them out in a given situation? How much interest will the new bench have in these issues? The concern is that things may regress.

12. There is an educational component to recognizing when discrimination, for example, respecting disabilities, is happening. It takes someone who is informed to know when the situations occur.

13. Access to legal services for those who may not be attractive clients - those with mental disabilities are one group - is a problem. It should be a matter of professional responsibility that these individuals when they need legal services can get them. Should there be something in the rules to address this? The rules need to look at the interaction of lawyer and client. Equity must be maintained with clients too. The rules which address this need to have some commentary on equity and diversity, eg., providing services to those who do not speak English or are deaf. Lawyers need to be able to accommodate these individuals.

14. Mandatory pro bono could be pursued, and be defined broadly to include situations where individuals cannot find legal help.

15. There are three areas where human rights issues should infuse the rules:
    - Rule 11 - criticizing the judge - it is useful even if at a rhetorical level to emphasise in the manner of fearlessly raising every issue that the lawyer has an obligation to say that he or she doesn't like this particular treatment of the case because of (whatever the prohibited ground might be);
    - declining a client - there may be a way to recognize in the that rules at the front end, or when issues in the retainer arise, lawyers have a responsibility in this respect to ensure the client is adequately represented, in dealing with the client with mental disabilities, for example
    - referral arrangements - although prohibited in the current rules, many lawyers receive business through "referral" arrangements with community groups and ethnic organizations, and this benefits these groups; this prohibition should be looked at carefully.

16. Lawyers need to understand the equity issues their clients have. To do this, lawyers must be competent in the area of equality rights and able to support clients in stating equity issues relevant to their cases. This may in fact be an element of competence, in terms of a competent lawyer being one who recognizes and addresses equity and discrimination issues in the course of a practice. This doesn't mean all lawyers have to be expert in this area. But if a lawyer does not know how to deal with a difficult or troubled client, rather than give poor service, or absent the development of a capacity to deal with the client, given the diversity of our community, the lawyer should know enough at least to make a good referral.

17. There is a financial cost to a lawyer when attempting to assist a difficult client. If the client is beyond the scope of a clinic and does not qualify for legal aid, a lawyer may have to write off hours in fees. There is a balance to be struck - being helpful but also vigilant.

18. This is really an accommodation issue, and some clients require more a lawyer's time before it can be determined if they have a case. It is a matter of professional responsibility and may not be a money-making venture.

19. There is a problem at the Law Society in making rules and applying them deferentially. It is an attitude where because of the gender or race of an individual, more severe treatment is given, at both the investigation and hearing level. Statistical analysis should be done of discipline results. The sense, as indicated above, is that lawyers from equity seeking groups receive tougher treatment. The analysis may dispel the myth.

20. The Society has to be proactive in discussing equity issues. It has to educate and change the mind set of older lawyers and also deal with younger lawyers at the bar admission level, so that these issues can be identified.

21. The Society also has to educate the public - this is an element of its responsibility. Many clients don't know what lawyers' obligations are, or that they can make a complaint. It may be necessary to have individuals from those clients' cultural backgrounds saying to the clients, this issue with your lawyer is a problem. This type of service may have to be provided to different groups so that they understand what the rules mean, they have assistance and someone who can speak the language.

22. The Law Society needs to educate the public regarding lawyers obligations as detailed in the rules. What are the obligations of the profession to the public? How can a client raise an issue about a lawyer and to whom?

23. The Law Society should provide clients with a bill of rights so that they are aware of how they can be protected in the event they feel they are being taken by a member of the profession. Lawyers should be required to hand out this information upon initial contact with a client.

24. An example of discrimination should be added to Rule 28 - when a large firm has no lawyers from minorities, this is discrimination.

25. There should be a quick reference tool for complainants who want to file complaints with the Society. Many people view the Society as unapproachable, and the Society should do some work to clean up its act. Also, there is a question about the complement of staff, management, benchers. The Society should set aside positions for individuals from equity-seeking groups. Right now, it is only the establishment that is reflected at the Society.

26. Why could it not be a matter of professional responsibility for there to be employment equity in law firms, as a matter of ethical responsibility? The Law Society could be in advance of other groups in this respect. The core of employment equity should be reflected in the rules of conduct.

TREASURER'S EQUITY ADVISORY GROUP
and
TASK FORCE ON REVIEW OF THE RULES OF PROFESSIONAL CONDUCT

Consultations on Equity Issues and the Rules of Professional Conduct

Introduction

The Task Force to Review the Rules of Professional Conduct ("the Task Force") was struck by the Law Society in June 1998 to examine the rules and, if necessary, redraft them in a way that will continue to provide guidance to lawyers and reflect a level of regulation which protects the public, but also facilitate the creative practice of law and assist the profession to remain competitive.

In this respect, the Task Force is mindful of:

- the changing face and "globalization" of the practice of law, and incursions into the "field" of law by other service providers;
- the purpose of rules, as guidance, instruction, education, notice of expectations, and the basis for complaints of professional misconduct and conduct unbecoming a lawyer;
- the certainty or transparency required to meet the purpose of a code and the reliance placed on the language by the profession, the public and the Law Society.

Through an initiative of the Treasurer's Equity Advisory Group ("TEAG"), a focus is being brought to equity and diversity issues relevant to the legal profession. Mindful of the need to ensure that the rules are reflective of lawyers' obligations to the principles of equity and diversity, TEAG has arranged this consultation to obtain input on appropriate inclusions in the rules in these areas.

Issues for Discussion

As an aid to discussion, the following general issues have been identified. Where appropriate, more specific issues are identified by way of explanation or example. Participants are encouraged to use this list as an outline and a "springboard" to other issues related to the topic of this consultation.

1. What are the primary issues, for the purpose of rules of conduct, upon which the legal profession should focus in the areas of equity and diversity? For example, are there specific obligations which should be articulated in terms of lawyers' obligations to clients, other lawyers or the public at large?

2. There are some rules which deal specifically with equity/diversity issues - examples are Rules 27 and 28 on sexual harassment and discrimination respectively. Do you view these rules as sufficient for the purposes for which they were intended? If not, how could they be improved?

3. Are there other rules in the current rules of conduct which, in your view, require specific treatment in terms of equity/diversity provisions? If so, what are they and what are the issues relevant to those rules?

4. Access to justice is a key issue in discussions relating to the public, equity and the legal profession. While some of the rules include commentary on lawyers' obligations to ensure, in a broad sense, access to legal services, is there a need, as a result of any of your experiences, to particularize the profession's duty in this respect as a matter of ethical principle?

5. Part of the Task Force's work involves reorganizing the rules to make them a more cohesive and understandable collection of ethical guidelines and prescriptions. Do you have any suggestions as to how lawyers' obligations to equity and diversity should be presented in the rules as a matter of form? For example, should there be a general rule on these subjects or should mention be made, where applicable, in individual rules about the obligations of the profession?

Proposed Draft Rules of Professional Conduct

Task Force on Review of the

Rules of Professional Conduct

Draft
March 31, 1999

RULES OF PROFESSIONAL CONDUCT

RULE 1 - CITATION AND INTERPRETATION

1.01 CITATION

1.01 These rules may be cited as the *Rules of Professional Conduct.*

1.02 DEFINITIONS

1.02 In these rules, unless the context requires otherwise,

"client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work,

"conduct unbecoming a barrister or solicitor" means conduct in a lawyer's personal or private capacity that tends to bring discredit upon the legal profession including:

(a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer;

(b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another; or

(c) engaging in conduct involving dishonesty.

Commentary:

Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer as a professional consultant, the Society may be justified in taking disciplinary action.

Generally speaking, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

"independent legal advice" means a retainer where:

(a) the retained lawyer has no conflicting interest with respect to the client's transaction;

(b) the client's transaction involves doing business with

(i) another lawyer,

(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or with,

(iii) a client of the other lawyer;

(c) the retained lawyer has advised the client that the client has the right to independent legal representation;

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer;

(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given; and

(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view.

Commentary:

Where a client elects to waive independent legal representation but rely on independent legal advice only, the retained lawyer has a responsibility that should not be to be lightly assumed or merely perfunctorily discharged.

"independent legal representation" means a retainer where

(a) the retained lawyer has no conflicting interest with respect to the client's transaction; and

(b) the retained lawyer will act in the normal course for the client.

" interprovincial law firm" means a law firm that carries on the practice of law in more than one province or territory of Canada;

"law firm" includes one or more members practising,

(a) in a sole proprietorship,

(b) in a partnership,

(c) in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners,

(d) as a professional law corporation,

(e) in a government, a Crown corporation or any other public body, and

(f) in a corporation or other body;

"lawyer" means a member of the Society, and includes a law student registered in the Society's pre-call training program;

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

"professional misconduct" means conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession including:

(a) violating or attempting to violate the *Rules of Professional Conduct, the Law Society Act, or the regulations or rules thereto*;

(b) knowingly assisting or inducing another lawyer to violate or attempt to violate the *Rules of Professional Conduct, the Law Society Act, or the regulations or rules thereto*;

(c) misappropriating or dealing dishonestly with a client's money or another's property;

(d) engaging in conduct that is prejudicial to the administration of justice;

(e) stating or implying an ability to influence improperly a government agency or official, or

(f) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

"Society" means The Law Society of Upper Canada.

1.03 INTERPRETATION

Standards of the Legal Profession

1.03 (1) These Rules shall be interpreted in a way that recognizes that:

(a) a lawyer should carry on the practice of law and discharge all duties owed to clients, the court, the public and other members of the profession honourably and with integrity;

(b) a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario;

(c) a lawyer should uphold the standards and reputation of the legal profession and assist in the advancement of its goals, organizations, and institutions;

(d) the Rules are intended, in part, to express to the profession and to the public the high ethical ideals of the legal profession;

(e) the Rules are intended, in part, to specify the bases on which lawyers may be disciplined; and

(f) rules of professional conduct cannot address every situation, and a lawyer should observe the Rules in the spirit as well as in the letter.

Commentary:

Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client is in any doubt as to his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If personal integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

General Principles

(2) In these rules, words importing the singular number include more than one person, party, or thing of the same kind and a word interpreted in the singular number has a corresponding meaning when used in the plural.

RULE 2 - RELATIONSHIP TO CLIENTS

2.01 COMPETENCE AND QUALITY OF SERVICE

Definitions

2.01 (1) In this rule,

"competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including:

(a) knowing general legal principles and procedures, and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client as to appropriate course(s) of action;

Commentary:

A lawyer should clearly specify the facts, circumstances and assumptions upon which an opinion is based,. Unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. If the circumstances do not justify an exhaustive investigation with consequent expense to the client, the lawyer should so state in the opinion.

A lawyer should be wary of bold and confident assurances to the client, especially when the lawyer's employment may depend upon advising in a particular way.

In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy or social implications involved in the question, or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field, and should clearly distinguish legal advice from other advice.

In a multi-discipline practice, a lawyer must be particularly alert to ensure that the client understands that he or she is receiving legal advice from a lawyer supplemented by the services of a non-lawyer. If advice or service is sought from non-lawyer members of the firm, it must be sought and provided independently of and outside the scope of the retainer for the provision of legal services and the advice will be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices. In particular, the lawyer must ensure that such services of non-lawyers are provided from a separate location from the premises of the multi-discipline practice.

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills including:

(i) legal research,
(ii) analysis,
(iii) application of the law to the relevant facts,
(iv) writing and drafting,
(v) negotiation,
(vi) alternative dispute resolution
(vii) advocacy, and
(viii) problem solving ability;

Commentary:

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with legal matters to be undertaken on the client's behalf.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession, and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's associates or dependants.

(d) communicating in a timely and effective manner at all stages of the matter;

Commentary:

Whenever it becomes apparent that the client has misunderstood or misconceived the position or what is really involved, the lawyer should explain as well as advise, so that the client is apprised of the true position and fairly advised with respect to the real issues or questions involved.

(e) performing all functions, conscientiously, diligently, and in a timely and cost effective manner;

Commentary:

The requirement of conscientious, diligent and efficient service means that a lawyer must make every effort to provide service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

(f) applying intellectual capacity, judgment, and deliberation to all functions;

(g) complying in letter and in spirit with the *Rules of Professional Conduct*;

(h) recognizing limitations in one's ability to handle a matter, or some aspect of it, and taking steps accordingly to ensure the client is appropriately served;

Commentary:

A lawyer should not undertake a matter without honestly feeling competent to handle it, or able to become competent without undue delay, risk or expense to the client. This is an ethical consideration, and is to be distinguished from the standard of care that a court would invoke for purposes of determining negligence.

A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent in that field. The lawyer may also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and in such a situation the lawyer should not hesitate to seek the client's instructions to consult experts.

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) adapting to changing professional requirements, standards, techniques, and practices.

Competence

(2) A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Quality of Service

(3) A lawyer shall serve the client in a conscientious, diligent and efficient manner and shall provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.

Commentary:

This Rule does not require a standard of perfection. A mistake, even though it might be actionable for damages in negligence, would not necessarily constitute a failure to maintain the standard of professional competence described by the Rule.

Incompetent professional practice may give rise to disciplinary action under this Rule.

In addition to this Rule, the Law Society Act provides that the Society may conduct a review of a member's practice for the purposes of determining if the member is meeting standards of professional competence. A review will be conducted in circumstances defined in by-laws. Following a review, a member may be subject to a hearing at which it will be determined whether the member is failing or has failed to meet standards of professional competence.

The Act provides that a member fails to meet standards of professional competence if there are deficiencies in (1) the member's knowledge, skill or judgment, (2) the member's attention to the interests of clients, (3) the records, systems or procedures of the member's practice, or (4) other aspects of the members practice, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

2.02 PARTICULARS OF QUALITY SERVICE

Honesty and Candour

(1) When advising clients, a lawyer shall be honest and candid.

Commentary:

The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise. The advice must be open and undisguised, and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

Informing Client of Error

(2) When in connection with a matter for which a lawyer is responsible, the lawyer discovers a mistake that is or may be damaging to the client and that cannot be rectified, the lawyer shall:

(a) promptly inform the client of the mistake being careful not to prejudice any rights of indemnity that either of them may have under any insurance, client's protection or indemnity plan, or otherwise; and

(b) recommend that the client obtain legal advice elsewhere as to any rights the client may have arising from the mistake.

Encouraging Compromise or Settlement

(3) A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis, and shall discourage the client from commencing useless legal proceedings.

(4) The lawyer shall consider the appropriateness of alternative dispute resolution (ADR) to the resolution of issues in every case and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal Proceedings

(5) A lawyer shall not advise, threaten or bring a criminal or quasi-criminal prosecution in order to secure some civil advantage for the client.

Dishonesty or Fraud by Client

(6) When advising a client, a lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

Commentary:

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client.

A bona fide test case is not necessarily precluded by rule 2.02 (6) and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.

Client Under a Disability

(7) When a client's ability to make decisions is impaired because of minority, mental disability or for some other reason, the lawyer shall as far as reasonably possible maintain a normal lawyer and client relationship.

(8) A lawyer may seek the appointment of a guardian or take other protective action when the lawyer reasonably believes that a client's ability to make a decision has become impaired to the degree that the client cannot adequately act in his or her own interest, and is accordingly unable to provide instructions to the lawyer.

Medical-Legal Reports

(9) A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

Commentary:

The lawyer can avoid some of the problems anticipated by the Rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical-legal report, which exchange will serve to inform the physician of the lawyer's obligation respecting disclosure of medical-legal reports to the client.

(10) A lawyer who receives a medical-legal report from a physician containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report but, if the client insists, the lawyer shall produce the report.

(11) Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in subrule (12), the lawyer shall suggest that the client attend at the office of the physician to see the report in order that the client will have the benefit of the expertise of the physician in understanding the significance of the conclusion contained in the medical-legal report.

Title Insurance in Real Estate Conveyancing

(12) A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary:

A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

The lawyer should be knowledgeable about title insurance and discuss the advantages, conditions and limitations of the various options and coverages generally available to the client through title insurance with the client. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

(13) A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to his or her client.

(14) A lawyer shall disclose that no commission or fee is being furnished by any insurer, agent or intermediary to the lawyer with respect to any title insurance coverage.

Commentary:

The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer including the lawyer's law firm, any employee or associate of the firm or any related entity of any hidden fees.

(15) If discussing TitlePlus insurance with the client, a lawyer shall fully disclose the relationship between the legal profession, the Society, and the Lawyers' Professional Indemnity Corporation (LPIC).

2.03 CONFIDENTIALITY

Information Confidential

2.03 (1) A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

Commentary:

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time the client must feel completely secure and entitled to proceed on the basis that without any express request or stipulation on the client's part matters disclosed to or discussed with the lawyer will be held secret and confidential.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of secrecy to every client without exception, and whether it be a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences may have arisen between them.

Generally speaking, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.

A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client, and should decline employment which might require such disclosure.

A lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Likewise, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.

Although the Rule may not apply to facts which are public knowledge, nevertheless the lawyer should guard against participating in or commenting upon speculation concerning the client's affairs or business.

Justified or Permitted Disclosure

(2) Confidential information may be divulged with the express or implied authority of the client.

Commentary:

In some situations, the authority of the client to divulge may be implied. For example, some disclosure may be necessary in court proceedings in a pleading or other court document. Further, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non-legal staff such as secretaries and filing clerks. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees and students the importance of non-disclosure (both during their employment and thereafter) and requires the lawyer to take reasonable care to prevent their disclosing or using any information which the lawyer is bound to keep in confidence.

(3) When required by law or by order of a court of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

(4) Where a lawyer has reasonable grounds for believing a crime that may cause death or serious bodily harm is likely to be committed, he or she may disclose confidential information, but the lawyer shall not disclose more information than is required.

(5) Where it is alleged that a lawyer or the lawyer's associates or employees are:

(a) guilty of a criminal offence involving a client's affairs;

(b) civilly liable with respect to a matter involving a client's affairs; or

(c) guilty of malpractice or misconduct,

a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.

Literary Works

(6) If a lawyer engages in literary works such as an autobiography, memoirs and the like, the lawyer shall avoid disclosure of confidential information.

Commentary:

The fiduciary relationship between lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person, or to the disadvantage of the client.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule,

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

(a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

(b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary:

Conflicting interests include but are not limited to the financial interest of a lawyer or an associate of a lawyer, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there would be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client.

Avoidance of Conflicts of Interest

(2) A lawyer shall not advise or represent both sides of a dispute.

(3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest, unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary:

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

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

Acting against Client

(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter:

(a) in the same matter,

(b) in any related matter, or

(c) in any new matter, if the lawyer has obtained from the other retainer relevant confidential information.

Commentary:

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person, and where previously obtained confidential information is irrelevant to that matter.

Joint Retainer

(5) Before a lawyer accepts employment for more than one client in a matter or transaction, the lawyer shall advise the clients:

(a) that the lawyer has been asked to act for both or all of them,

(b) that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) that, if a conflict develops which cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary:

While this subrule does not require that a lawyer before accepting a joint retainer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, it is desirable that the lawyer recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

(6) Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other clients of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Commentary:

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights or obligations will diverge as the matter progresses.

(7) Where a lawyer has advised the clients as provided under subrules (5) and (6) and the parties are content that the lawyer act, the lawyer shall obtain their written consent, or record their consent in a separate letter to each.

(8) Save as provided by subrule (9), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, their lawyer, shall:

(a) not advise them on the contentious issue, and

(b) shall refer the clients to another lawyer, unless the issue is

(i) one that involves little or no legal advice, and

(ii) the clients are sophisticated,

in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary:

The Rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are sui juris and who wish to submit the dispute to the lawyer.

Where after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(9) Where clients consent to a joint retainer and also agree that in the event of a contentious issue arising their lawyer may continue to advise one of the them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Multi-Discipline Practice

(10) A lawyer in a multi-discipline practice shall ensure that non-lawyer partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

Unrepresented Persons

(11) A lawyer shall not advise an unrepresented person, but shall urge such a person to obtain independent legal representation and, if the unrepresented person does not do so, the lawyer shall take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer.

Commentary:

When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer should make it clear that he or she is acting exclusively in the interests of the client and accordingly his or her comments or information may be partisan.

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

2.05 CONFLICTS FROM TRANSFER BETWEEN LAW FIRMS

Definitions

2.05 (1) In this Rule:

"client" includes anyone to whom a member owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them;

"confidential information" means information obtained from a client which is not generally known to the public;

Commentary:

In this Rule, "confidential information" refers to information obtained from a client that is not generally known to the public. It should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case;

Application of Rule

(2) This Rule applies where a member transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring member or the new law firm is aware at the time of the transfer or later discovers that,

(a) the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring member actually possesses relevant information respecting that matter.

(3) Subrules (4) to (7) do not apply to a member employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by that Attorney General or Department of Justice.

Commentary:

The purpose of the Rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

Lawyers and support staff - This Rule is intended to regulate members of the Society and articled law students who transfer between law firms. It also imposes a general duty on members to exercise due diligence in the supervision of non-lawyer staff, to ensure that they comply with the Rule and with the duty not to disclose, confidences of clients of the member's firm; and confidences of clients of other law firms in which the person has worked.

Government employees and in-house counsel - The definition of "law firm" includes one or more members of the Society practising in a government, a Crown corporation, any other public body and a corporation. Thus, the Rule applies to members transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same. [NOT YET IN EFFECT]

Law firms with multiple offices - The Rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous that each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

Practising in association - The definition of "law firm" (rule 1.02) includes one or more members practising in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners. This recognizes the risk that lawyers practising in association, like partners in a law firm, will share client confidences while discussing their files with one another.

Law Firm Disqualification

(4) Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless,

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm establishes, in accordance with subrule (8), that,

(i) it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including,

(A) the adequacy of the measures taken under (ii),
(B) the extent of prejudice to any party,
(C) the good faith of the parties,
(D) the availability of alternative suitable counsel, and
(E) issues affecting the national or public interest,

(ii) it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur.

Commentary:

The circumstances enumerated in subrule (4)(b)(i) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (B) to (D) are self-explanatory, clause (E) addresses governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

Transferring Lawyer Disqualification

(5) Where the transferring member actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client,

(a) the member shall execute an affidavit or solemn declaration to that effect, and

(b) the new law firm shall,

(i) notify its client and the former client, or if the former client is represented in that matter by a member, notify that member, of the relevant circumstances and its intended action under this Rule, and

(ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

(6) A transferring member described in the opening clause of subrule (4) or (5) shall not, unless the former client consents,

(a) participate in any manner in the new law firm's representation of its client in that matter; or

(b) disclose any confidential information respecting the former client.

(7) No member of the new law firm shall, unless the former client consents, discuss with a transferring member described in the opening clause of subrule (4) or (5) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

Determination of Compliance

(8) Anyone who has an interest in, or who represents a party in, a matter referred to in this Rule may apply to a court of competent jurisdiction for a determination of any aspect of this Rule.

Due Diligence

(9) A member shall exercise due diligence in ensuring that each member and employee of the member's law firm, each non-member partner and associate and each other person whose services the member has retained,

(a) complies with this Rule; and

(b) does not disclose,

(i) confidences of clients of the firm, and

(ii) confidences of clients of another law firm in which the person has worked.

Commentary: Matters to consider when interviewing a potential transferee

When a law firm considers hiring a lawyer or articled law student ("transferring member") from another law firm, the transferring member and the new law firm need to determine, before transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring member is leaving, and with respect to clients of a firm in which the transferring member worked at some earlier time. During the interview process, the transferring member and the new law firm need to identify, firstly, all cases in which,

(a) the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client;

(b) the interests of these clients in that matter conflict; and

(c) the transferring member actually possesses relevant information respecting that matter.

When these three elements exist, the transferring member is personally disqualified from representing the new client, unless the former client consents.

Second, they must determine whether, with respect to each such case, the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client. If this element exists, then the transferring member is disqualified unless the former client consents, and the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the public interest.

In determining whether the transferring member possesses confidential information, both the transferring member and the new law firm need to be very careful to ensure that they do not, during the interview process itself, disclose client confidences.

Commentary: Matters to consider before hiring a potential transferee

After completing the interview process and before hiring the transferring member, the new law firm should determine whether a conflict exists.

A. WHERE A CONFLICT DOES EXIST:

If the new law firm concludes that the transferring member does actually possess relevant information respecting a former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, then the new law firm will be prohibited, if the transferring member is hired, from continuing to represent its client in the matter unless,

> *(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter; or*
>
> *(b) the new law firm complies with subrule (4)(b), and in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.*

If the new law firm seeks the former client's consent to the new law firm continuing to act it will, in all likelihood, be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring member is hired.

Alternatively, if the new law firm applies under subrule (8) for a determination that it may continue to act, it bears the onus of establishing the matters referred to in subrule (4)(b). Again, this process must be completed before the transferring person is hired.

B. WHERE NO CONFLICT EXISTS:

If the new law firm concludes that the transferring member actually possesses relevant information respecting a former client, but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client, then,

> *(a) the transferring member should execute an affidavit or solemn declaration to that effect; and*
>
> *(b) the new law firm must notify its client and the former client/former law firm "of the relevant circumstances and its intended action under the Rule", and deliver to them a copy of any affidavit or solemn declaration executed by the transferring member.*

Although the Rule does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring member acting for the new law firm's client in the matter because, absent such consent, the transferring member may not act.

If the former client does not consent to the transferring member acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring member did in fact possess confidential information which, if disclosed, may prejudice the former client.

A transferring member who possesses no such confidential information, by executing an affidavit or solemn declaration and delivering it to the former client, puts the former client on notice. A former client who disputes the allegation of no such confidential information may apply under subrule (8) for a determination of that issue.

C WHERE THE NEW LAW FIRM IS NOT SURE WHETHER A CONFLICT EXISTS

There may be some cases where the new law firm is not sure whether the transferring member actually possesses confidential information respecting a former client which, if disclosed to a member of the new law firm, may prejudice the former client. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring member.

Commentary: Reasonable measures to ensure non-disclosure of confidential information

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur:

2. *where the transferring member actually possesses confidential information respecting a former client which, if disclosed to a member of the new law firm, may prejudice the former client; and*

3. *where the new law firm is not sure whether the transferring member actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring member did in fact possess such confidential information. It is not possible to offer a set of "reasonable measures" which will be appropriate or adequate in every case. Rather, the new law firm which seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur."*

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures". For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm or a legal aid program may be able to argue that, because of its institutional structure, reporting relationships, function, nature of work and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled: Conflict of Interest Disqualification: Martin v. Gray and Screening Methods (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

In cases where a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client which, if disclosed to a member of the new "law firm", may prejudice the former client, the interests of the new client (i.e., Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of subrule (4)(b), particularly clause (E).

GUIDELINES

1. The screened member should have no involvement in the new law firm's representation of its client.

2. The screened member should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the prior representation with the screened member.

4. The current client matter should be discussed only within the limited group which is working on the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened member any documents relating to the current representation.

7. The measures taken by the new law firm to screen the transferring member should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Affidavits should be provided by the appropriate law firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a member, that member, should be advised,

> *(a) that the screened member is now with the new law firm, which represents the current client, and*
>
> *2. of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.*

10. The screened member's office or work station and that of the member's secretary should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened member should use associates and support staff different from those working on the current client matter.

2.06 DOING BUSINESS WITH A CLIENT

Definitions

2.06 (1) In this rule,

"related persons" means related persons as defined in the *Income Tax Act (Canada)* and "related person" has a corresponding meaning; and

"syndicated mortgage" means a mortgage having more than one investor.

Investment by Client where Lawyer has an Interest

(2) Where a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, the lawyer, before accepting any retainer,

(a) shall disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) shall recommend independent legal representation and shall insist that the client receive independent legal advice, and

(c) where the client requests the lawyer to act, the lawyer shall obtain the client's written consent or record such consent in a letter to the client.

Commentary:

If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching a confidence, the lawyer must decline the retainer.

The lawyer should not uncritically accept the client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally speaking, in disciplinary proceedings under this Rule the burden will rest upon the lawyer of showing good faith and that adequate disclosure was made in the matter and the client's consent was obtained.

If the investment is by way of borrowing from the client, the transaction may fall within the requirements of subrule 2.06 (4).

Certificate of Independent Legal Advice

(3) A lawyer retained to give independent legal advice shall, before any advance of funds has been made by the client,

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

Borrowing from Clients

(4) A lawyer shall not borrow money from a client unless:

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or

(b) the client is a related person as defined by the *Income Tax Act (Canada)* and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice or independent legal representation.

Commentary:

The relationship existing between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted to exist.

It is a matter of grave concern to Convocation that some instances of professional misconduct by lawyers relating to the misuse of trust funds or the improper obtaining of monies have involved the borrowing of money by lawyers from their clients. Sometimes the monies have been borrowed from the client without security other than the promissory note of the lawyer. Usually the money was borrowed from the client for the purpose of being reinvested by the lawyer for the lawyer's own profit.

Whether a person lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is to be considered a client within this rule is to be determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan or investment, then the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

(5) In any transaction in which money is borrowed from a client by a lawyer's spouse or by a corporation, syndicate or partnership in which either the lawyer or the lawyer's spouse has, or both of them together have, directly or indirectly, a substantial interest, the lawyer shall ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Mortgage Transactions

(6) A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities,

(a) hold a syndicated mortgage in trust for investor clients unless each investor client receives;

(i) a complete reporting letter on the transaction;

(ii) a trust declaration signed by the person in whose name the mortgage is registered; and

(iii) a copy of the duplicate registered mortgage;

(b) arrange or recommend the participation of a client as an investor in a syndicated mortgage where the solicitor is an investor unless the solicitor can demonstrate that the client had competent independent legal advice in making the investment or that the client is a knowledgeable investor; or

(c) sell mortgages to, or arrange mortgages for, clients or other persons except in accordance with the skill, competence and integrity usually expected of a lawyer in dealing with clients.

Commentary - Acceptable Mortgage Transactions:

A lawyer may engage in the following mortgage transactions in connection with the practice of law:

(a) a lawyer may invest in mortgages personally or on behalf of a related person or a combination thereof;

(b) a lawyer may deal in mortgages in the capacity of an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage investment or pursuant to a power of attorney given for purposes other than exclusively for mortgage investment; and

(c) a lawyer may collect, on behalf of clients, mortgage payments that are made payable in the name of the lawyer pursuant to a written direction to that effect given by the client to the mortgagor provided that such payments are deposited into the lawyer's trust account.

Prohibition Against Acting for Mortgagor and Mortgagee

(7) Subject to subrule (8), a lawyer or two or more lawyers practising in partnership or association shall not act for nor otherwise represent both lender and borrower in a mortgage transaction.

(8) Provided that there is no violation of the provisions of rules 2.04 (Avoidance of Conflicts of Interest), a lawyer may act for or otherwise represent both lender and borrower in a mortgage transaction if:

(a) the lawyer practices in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage transaction;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lender is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, provincial savings office, credit union or a league to which the *Credit Unions and Caisses Populaires Act, 1994* or any other institution that lends money in the ordinary course of its business;

(d) the consideration for the mortgage does not exceed $15,000; or

(e) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

Disclosure

(9) Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

(10) A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients, or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

Guarantees by a Lawyer

(11) Except as provided by subrule (10), a lawyer shall not guarantee personally any mortgage, or other document securing indebtedness, in which a client is involved as a borrower or lender.

(12) Notwithstanding subrule (9), a lawyer may give a personal guarantee in the following or similar circumstances:

(a) the borrower in the loan transaction is not a client and the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public and that is providing funds directly or indirectly to the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution where the lawyer as a member or supporter of such institution is asked, either individually or together with other members or supporters of the institution, to provide a guarantee; or

(c) the lawyer has entered into a business venture with a client and the lender requires personal guarantees from all participants in the venture as a matter of course and

(i) the lawyer has complied with rules 2.04 (Avoidance of Conflicts of Interest) and 2.06 (Doing Business with a Client), and

(ii) the lender and participants in the venture who are or were clients of the member have received independent legal representation.

2.07 PRESERVATION OF CLIENT'S PROPERTY

Preservation of Clients' Property

2.07 (1) A lawyer shall care for a client's property as a careful and prudent owner would when dealing with like property and shall observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary:

The duties with respect to safekeeping, preserving and accounting for clients' monies and other property are set out in the Regulation made pursuant to the Law Society Act.

The duties here expressed are closely related to those regarding confidential information. The lawyer should keep the clients' papers and other property out of sight as well as out of reach of those not entitled to see them and should, subject to any rights of lien, promptly return them to the client upon request or at the conclusion of the lawyer's mandate.

Notification of Receipt of Property

(2) A lawyer shall promptly notify the client of the receipt of any monies or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Client's Property

(3) A lawyer shall clearly label and identify the client's property and place it in safekeeping distinguishable from the lawyer's own property.

(4) A lawyer shall maintain such records as necessary to identify a client's property that is in the lawyer's custody.

Accounting and Delivery

(5) A lawyer shall account promptly for a client's property that is in the lawyer's custody and shall upon request deliver it to the order of the client.

(6) Where a lawyer is unsure as to the proper person to receive a client's property, the lawyer shall apply to a court of competent jurisdiction for direction.

Commentary:

The lawyer should be alert to claim on behalf of clients any privilege in respect of their property seized or attempted to be seized by an external authority. In this regard, the lawyer should be familiar with the nature of the client's privilege and with such relevant statutory provisions as are found in the Income Tax Act (Canada).

2.08 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

2.08 (1) A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

(2) A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

Commentary:

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

(a) the time and effort required and spent;

(b) the difficulty and importance of the matter;

(c) whether special skill or service has been required and provided;

(d) the amount involved or the value of the subject matter;

(e) the results obtained;

(f) fees authorized by statute or regulation;

(g) such special circumstances as loss of other employment, uncertainty of reward or urgency.

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

Breach of this Rule and misunderstandings about fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice. A lawyer should try to avoid controversy with a client about fees and should be ready to explain the basis for the charges (especially if the client is unsophisticated or uninformed as to the proper basis and measurements for fees).

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

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

Champerty and Contingent Fees

(3) A lawyer shall not, except as by law expressly permitted, acquire by purchase or otherwise any interest in the subject matter of litigation being conducted by the lawyer.

(4) A lawyer shall not enter into an arrangement with the client for a contingent fee except in accordance with the provisions of the *Solicitors Act* or in accordance with the *Class Proceedings Act, 1992.*

Statement of Account

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

Joint Retainer

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

Division of Fees

(7) A lawyer shall not divide a fee with another lawyer who is not a partner or associate unless,

(a) the client consents either expressly or impliedly to the employment of the other lawyer, and

(b) the fees are divided in proportion to the work done and responsibilities assumed.

(8) A lawyer shall not directly or indirectly share, split or divide fees with conveyancers, notaries public, students, clerks or other persons who bring or refer business to the lawyer's office.

(9) A lawyer shall not give any financial or other reward for referring business to conveyancers, notaries public, students, clerks or other persons who are not lawyers and who bring or refer business to the lawyer's office.

Commentary:

An arrangement between a lawyer and a conveyancer to divide fees on applications for probate or administration is improper whether both participate in the work or not.

It is improper for a lawyer, in return for a fee, to permit the lawyer's name to be placed on applications that have been prepared by the conveyancer.

A lawyer may give or accept a referral fee to or from another lawyer with respect to the referral of a client provided that the fee is reasonable and the client is informed and consents.

The rules about division of fees do not prohibit an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold.

Exception for Multi-discipline Partnerships

(10) Subrules (8) and (9) doe not apply to multi-discipline partnerships of lawyer and non-lawyer partners where the partnership agreement provides for the sharing of fees and profits.

Appropriation of Funds

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

2.09 WITHDRAWAL FROM EMPLOYMENT

Withdrawal from Employment

2.09 (1) A lawyer shall not withdraw from employment except for good cause and upon notice to the client appropriate in the circumstances.

Commentary:

Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having accepted professional employment, a lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

No hard and fast rules can be laid down as to what will constitute reasonable notice before withdrawal. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

Optional Withdrawal

(2) Subject to the rules about criminal proceedings and the direction of the court, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw from employment.

Commentary:

A lawyer who is deceived by the client will have justifiable cause for withdrawal, and the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate a loss of confidence justifying withdrawal. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-Payment of Fees

(3) Subject to the rules about criminal proceedings and the direction of the court, where the client fails after reasonable notice to provide funds on account of disbursements or fees, a lawyer may withdraw, unless serious prejudice to the client would result.

Withdrawal from Criminal Proceedings

(4) Where a lawyer has agreed to act in a criminal case and where the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

(a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown Counsel in writing that the lawyer is no longer acting;

(d) notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting in a case when the lawyer's name appears on the records of the court as acting for the accused.

Commentary:

A lawyer who has withdrawn because of conflict with the client should not under any circumstances indicate in the notice addressed to the court or Crown Counsel the cause of the conflict, or make reference to any matter which would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

(5) Where a lawyer has agreed to act in a criminal case and where the date set for trial is not sufficiently far removed to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial, the lawyer who agreed to act may not withdraw because of non-payment of fees.

(6) Where the lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date when the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

Commentary:

Where circumstances arise which in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown Counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Mandatory Withdrawal

(7) Subject to the rules about criminal proceedings and the direction of the court, a lawyer shall withdraw:

(a) if discharged by the client;

(b) if the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the court and, following explanation, the client persists in such instructions;

(c) if the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another;

(d) if it becomes clear that the lawyer's continued employment will lead to a breach of these Rules; or

(e) if the lawyer is not competent to handle the matter.

Commentary:

When a law firm is dissolved it will usually result in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business prior to the dissolution. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles here set out, and in particular so as to minimize expense and avoid prejudice to the client.

Manner of Withdrawal

(8) When a lawyer withdraws from employment, the lawyer shall act so as to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

(9) Upon discharge or withdrawal, a lawyer shall:

(a) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(b) give the client all information which may be required in connection with the case or matter;

(c) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the employment;

(d) promptly render an account for outstanding fees and disbursements; and

(e) co-operate with the successor lawyer so as to minimize expense and avoid prejudice to the client.

Commentary:

The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

A lawyer acting for several clients in a case or matter who ceases to act for one or more of them, should co-operate with the successor lawyer or lawyers to the extent required by the Rules, and should seek to avoid any unseemly rivalry, whether real or apparent.

Where upon the discharge or withdrawal of the lawyer the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.

Duty of Successor Lawyer

(9) Before accepting employment, a successor lawyer shall be satisfied that the former lawyer approves, or has withdrawn or been discharged by the client.

Commentary:

It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

RULE 3 - THE PRACTICE OF LAW

3.01 MAKING LEGAL SERVICES AVAILABLE

General

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

Commentary:

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

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

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

Referrals

(2) A lawyer who is consulted by a prospective client but who is unable to act shall assist the client in finding another lawyer who is qualified and able to act.

Commentary:

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

When a lawyer offers a client or prospective client assistance in finding another lawyer, the assistance should be given willingly and, except in very special circumstances, without charge.

3.02 LAW FIRM NAME

General

3.02 (1) A law firm name may include only the names of persons who, if living, are qualified to practise in Ontario or in any other province or territory of Canada where the law firm carries on its practice, or who, if dead, were qualified to practise in Ontario or in any other province or territory of Canada where the firm carries on its practice.

(2) A law firm name may consist of or include the names of deceased or retired members of the firm.

(3) A lawyer who purchases a practice may, for a reasonable length of time, use the words "Successor to _____" in small print under the lawyer's own name.

Restrictions

(4) The name of a law firm shall not include a trade name, a commercial name, or a figure of speech.

(5) The name of a law firm shall not include the use of phrases such as "John Doe and Associates", or "John Doe and Company" and "John Doe and Partners" unless there are in fact, respectively, two or more other lawyers associated with John Doe in practice or two or more partners of John Doe in the firm.

(6) When a lawyer retires from a law firm to take up an appointment as a judge or master, or to fill any office incompatible with the practice of law, the lawyer's name shall be deleted from the firm name.

(7) A lawyer or law firm may not acquire and use a firm name unless the name was acquired along with the practice of a deceased or retiring member who conducted a practice under the name.

Limited Liability Partnership

(8) If a law firm practices as a limited liability partnership, the phrase "limited liability partnership" or the letters "LLP" shall be included as the last words or letters in the firm name.

3.03 LETTERHEAD

General

3.03 (1) Subject to subrules (2) and (3) and Rule 3.05, a lawyer's letterhead and the signs identifying the office may only include:

(a) the name of the lawyer or law firm;

(b) a list of the members of any law firm including counsel practising with the firm;

(c) the words "barrister-at-law", "barrister and solicitor", "lawyer", "law office", or the plural where applicable;

(d) the words "notary" or "commissioner for oaths" or both, and their plural where applicable;

(e) the words "patent and trade mark agent" in proper cases and its plural where applicable;

(f) the phrase "limited liability partnership" or the letters "LLP" where applicable;

(g) the addresses, telephone numbers and office hours and the languages in which the lawyer or law firm is competent and capable of conducting a practice; and

(h) a logo.

(2) A lawyer or law firm that practises in the industrial property field may show the names of patent and trademark agents registered in Canada who are identified as such but who are not lawyers.

(3) A lawyer or law firm may place after the names on its letterhead degrees from bona fide universities and post secondary institutions including honorary degrees; professional qualifications such as the designations of P.Eng., C.A., and M.D.; and recognized civil and military decorations and awards and where the firm is a multi-discipline practice, a list or partners and associates who are non-lawyers identified as such and their designations, if any.

3.04 ADVERTISING

Advertising Services Permitted

3.04 (1) Subject to subrule (3), a lawyer or a law firm may advertise their services or fees in any medium including the use of brochures and similar documents provided the advertising:

(a) is not false or misleading; and

(b) is not such as to bring the profession or the administration of justice into disrepute.

Advertising of Fees

(2) Subject to subrule (3), a lawyer or a law firm may advertise fees charged for their services subject to the following conditions:

(a) advertisement of fees for consultation or for specific services shall contain an accurate statement of the services provided for the fee and the circumstances if any in which higher fees may be charged;

(b) if fees are advertised, the fact that disbursements are an additional cost shall be made clear in the advertisement;

(c) advertisements shall not use words or expressions such as "from . . .", "minimum" or " . . . and up" or the like in referring to the fees to be charged;

(d) services covered by advertised fees shall be provided at the advertised rate to all clients who retain the advertising lawyer or law firm during the 30-day period following upon the last publication of the fee unless there are special circumstances which could not reasonably have been foreseen, the burden of proving which rests upon the lawyer.

Restrictions on Advertising

(3) A lawyer shall not:

(a) permit the lawyer's name to appear as solicitor, counsel or Queen's Counsel on any advertising material offering goods (other than securities or legal publications) or services to the public; and

(b) while in private practice permit the lawyer's name to appear on the letterhead of a company as being its solicitor or counsel of a business, or corporation, other than the designation of honorary counsel or honorary lawyer on the letterhead of a non-profit or philanthropic organization that has been approved for such purpose by the standing committee of Convocation responsible for professional conduct.

Commentary:

The means by which it is sought to make legal services more readily available to the public must be consistent with the public interest and must not detract from the integrity, independence or effectiveness of the legal profession.

3.05 ADVERTISING NATURE OF PRACTICE

General Practice

3.05 (1) A lawyer or law firm may state that the lawyer or law firm is in general practice if such is the case.

Restricted Practice

(2) A lawyer may state that the lawyer is a specialist in a particular area of the law only if the lawyer has been so certified by the Society.

(3) A lawyer may state that the lawyer's practice is restricted to a particular area or areas of the law or may state that the lawyer practises in a certain area or areas of the law if such is the case.

(4) A law firm may state that it practises in certain areas of the law or that it has a restricted practice if such is the case.

(5) A law firm may specify the area or areas of law in which particular members practise or to which they restrict their practice.

Multi-discipline Practice

(6) A lawyer of a multi-discipline practice may state the services or the nature of the services provided by non-lawyer partners or associates in the practice.

3.06 SEEKING PROFESSIONAL EMPLOYMENT

General

3.06 (1) Subject to subrule (2), a lawyer may seek professional employment from a prospective client by any means.

Restrictions

(2) In seeking professional employment, a lawyer shall not use means:

(a) that are false or misleading;

(b) that amount to coercion, duress or harassment;

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover; or

(d) that interfere with an existing relationship between another lawyer and his or her client for the purpose of obtaining the client's retainer, unless the change of retainer is initiated by the client; or,

(e) that otherwise are such as to bring the profession or the administration of justice into disrepute.

3.07 INTERPROVINCIAL LAW FIRMS

General

3.07 (1) Lawyers may enter into agreements with lawyers in other Canadian jurisdictions to form an interprovincial law firm, provided they comply with the requirements of this Rule.

Requirements

(2) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall comply with all the requirements of the Society.

(3) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that the books, records and accounts pertaining to their practice in Ontario are available in Ontario on demand by the Society's auditors or their designated agents.

(4) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that his or her partners, associates, or employees who are not qualified to practise in Ontario are not held out as and do not represent themselves as qualified to practise in Ontario.

RULE 4 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

4.01 THE LAWYER AS ADVOCATE

Advocacy

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary:

This Rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties right to a fair hearing where justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because unless order is maintained, constitutional and other rights cannot be protected.

Role in Adversary Proceedings - In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save as required by law or under these Rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters derogatory to the client's case.

A lawyer should when, acting as an advocate, refrain from expressing the lawyer's personal opinions as to the merits of a client's case.

When opposing interests are not represented, for example in ex parte or uncontested matters, or in other situations where the full proof and argument inherent in the adversary system cannot obtain, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the court is not misled.

Duty as Prosecutor - When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial upon the merits. The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately. The prosecutor should not do anything which might prevent the accused from being represented by counsel or communicating with counsel.

Duty as Defence Counsel - When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and not withstanding the lawyer's private opinion as to credibility or merits, a lawyer may properly rely upon any evidence or defences including so-called technicalities not known to be false or fraudulent.

Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence, or call any evidence which, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done, or in fact had not done, the act. Such admissions will also impose a limit upon the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

The lawyer should never waive or abandon the client's legal rights, for example an available defence under a statute of limitations, without the client's informed consent.

In civil matters it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections or attempts to gain advantage from slips or oversights not going to the real merits, or tactics which will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

In civil proceedings, the lawyer has a duty not to mislead the court as to the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, shall forthwith reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

(2) When acting as an advocate, a lawyer shall not:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) knowingly assist or permit the client to do anything which the lawyer considers to be dishonest or dishonourable;

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with such officer which give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of such officer;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(g) knowingly assert as true a fact for which there is no reasonable basis in evidence;

(h) deliberately refrain from informing the tribunal of any pertinent authority which the lawyer considers to be directly on point and which has not been mentioned by an opponent;

(i) dissuade a material witness from giving evidence, or advise such a witness to be absent;

(j) knowingly permit a witness to be presented in a false or misleading way, or to impersonate another;

(k) needlessly abuse, hector, or harass a witness;

(l) when representing an accused or potential accused influence or attempt to influence the complainant or potential complainant with respect to the laying, prosecution or withdrawal of criminal charges;

(m) when representing a complainant or potential complainant advise or threaten the laying of a criminal charge in an attempt to gain a benefit for the complainant;

(n) when representing a complainant or potential complainant advise, seek, or procure the withdrawal of a criminal charge in an attempt to gain a benefit for the complainant; and

(o) needlessly inconvenience a witness.

Disclosure by Prosecutor

(3) When engaged as a prosecutor, a lawyer shall disclose all relevant information to the accused as required by law.

Discovery Obligations

(4) Where the rules of a court or tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer when acting as an advocate

(a) shall explain to his or her client:

(i) the necessity of making full disclosure of all documents relating to any matter in issue; and

(ii) the duty to answer to the best of his or her knowledge, information and belief, any proper question relating to any issue in the action or made discoverable by the *Rules of Civil Procedure* or the rules of the tribunal; and

(b) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Disclosure of Error or Omission

(5) A lawyer who has unknowingly done or failed to do something which if done or omitted knowingly would have been in breach of this Rule and who discovers it, shall, subject to Rule 2.02 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary:

If the client desires that a course be taken which would involve a breach of this Rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to Rule 2.09 (Withdrawal of Employment), withdraw or seek leave to do so.

Courteousness

(6) A lawyer shall at all times the lawyer be courteous and civil to the court and to those engaged on the other side.

Commentary:

Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.

Undertakings

(7) A lawyer shall strictly and scrupulously carry out an undertaking given to the court or to another lawyer in the course of litigation.

Commentary:

Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.

Agreement on Guilty Plea

(8) Before a charge is laid or at any time after a charge is laid, a defence lawyer may discuss with the prosecutor the possible disposition of the case unless the client instructs otherwise.

(9) Where following investigation,

(a) a defence lawyer *bona fide* concludes and advises the defendant client that an acquittal of the offence charged is uncertain or unlikely,

(b) the defence lawyer advises the defendant client of the implications and possible consequences of a guilty plea and particularly of the detachment of the court,

(c) the defendant client is prepared to admit the necessary factual elements of the offence charged, and

(d) the client instructs the defence lawyer to enter into an agreement as to a guilty plea,

the defence lawyer may enter into an agreement with the prosecutor about a guilty plea.

Commentary:

The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

4.02 THE LAWYER AS WITNESS

Submission of Affidavit

4.02 (1) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.

Submission of Testimony

(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal save as may be permitted by the *Rules of Civil Procedure* or as to purely formal or uncontroverted matters.

Commentary:

A lawyer should not express personal opinions or beliefs, or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

Appeals

(3) A lawyer who is a witness in proceedings shall not appear as advocate in any appeal from the decision in those proceedings.

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 (1) Subject to subrule (2), a lawyer may seek information from any potential witness (whether under subpoena or not) but shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

(2) A lawyer shall not approach or deal with a party who is professionally represented by another lawyer save through or with the consent of that party's lawyer.

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

Commentary:

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

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

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

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances the lawyer must comply with the requirements of rule 2.04 (avoidance of conflicts of interest), and particularly subrules 2.04 (5) through (9). A lawyer must not represent that he or she acts for an employee of a client unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

4.04 COMMUNICATION WITH COMPLAINANT

Communication with Complainant

4.04 Where a lawyer is acting for a person who is a defendant in criminal proceedings, the lawyer shall not request nor attempt to persuade the complainant to withdraw the charges.

Commentary:

While a lawyer acting for a person who is a defendant in criminal proceedings may communicate with the complainant to obtain factual information, to arrange for restitution or an apology from the defendant, or to settle any civil claims between the defendant and the accused, it is not proper for the lawyer directly or indirectly to request or to attempt to persuade the complainant to withdraw the charges in return for a benefit or for any other purpose. The lawyer, however, may discuss the charges with the Crown and suggest or request that the prosecutor speak with the complainant about the possibility of withdrawal.

4.05 COMMUNICATION WITH WITNESS GIVING EVIDENCE

Communication with Witness Giving Evidence

4.05 The lawyer shall observe the following guidelines respecting communication with witnesses giving evidence:

(a) during examination-in-chief it is proper for the examining lawyer to discuss with the witness any matter that has not been covered in the examination up to that point;

(b) during examination-in-chief by another lawyer of a witness who is unsympathetic to the lawyer's cause the lawyer not conducting the examination-in-chief may discuss the evidence with the witness;

(c) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness there ought to be no discussion of the evidence given in chief or relating to any matter introduced or touched upon during the examination-in-chief;

(d) during cross-examination by an opposing lawyer: While the witness is under cross-examination the lawyer ought not to have any conversation with the witness respecting the witness's evidence or any issue in the proceeding;

(e) between completion of cross-examination and commencement of re-examination the lawyer who is going to re-examine the witness ought not to have any discussion respecting evidence that will be dealt with on re-examination;

(f) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause the lawyer may discuss the witness's evidence with the witness;

(g) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and

(h) during re-examination of a witness called by an opposing lawyer: If the witness is sympathetic to the lawyer's cause there ought to be no communication relating to the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

Commentary:

If there is any question whether the lawyer's behaviour may be in violation of the Rule, it will often be appropriate to obtain the consent of the opposing lawyer or leave of the court before engaging in conversations that may be considered improper.

4.06 RELATIONS WITH JURORS

Communications Before Trial

4.06 (1) When acting as an advocate, a lawyer shall not before the trial of a case communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for the trial of the case.

Commentary:

A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that there is no direct or indirect communication with the juror or with any member of the juror's family. But a lawyer should not conduct or cause by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

Disclosure of Information

(2) When acting as an advocate, a lawyer shall disclose to the judge and opposing counsel any information of which he or she is aware that a juror or perspective juror:

(a) has or may have an interest, direct or indirect, in the outcome of the case;

(b) is acquainted or connected in any manner with any litigant; or

(c) is acquainted or connected in any manner with any person who has appeared or who is expected to appear as a witness;

unless the judge and opposing counsel have previously been made aware of the information.

(3) A lawyer should promptly disclose to the court any information that he or she has about improper conduct by a member of a jury panel or by a juror toward another member of the jury panel, another juror, or to the members of a juror's family.

Communication During Trial

(4) Except as permitted by law, when acting as an advocate, a lawyer shall not during a trial of a case communicate with or cause another to communicate with any member of the jury.

(5) A lawyer who is not connected with a case before the courts shall not communicate with or cause another to communicate with any member of the jury about the case.

Commentary:

The restrictions upon communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.

4.07 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

4.07 (1) A lawyer shall encourage public respect for and try to improve the administration of justice.

Commentary:

The obligation outlined in the Rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer must not subvert the law by counselling or assisting in activities that are in defiance of it. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason a lawyer should not hesitate to speak out against an injustice.

The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

Criticizing Courts and Tribunals - Although proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public including lawyers, judges, and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. Firstly, a lawyer should avoid criticism which is petty, intemperate or unsupported by a bona fide belief in its real merit, bearing in mind that in the eyes of the public professional knowledge lends weight to the lawyer's judgments or criticism. Secondly, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Thirdly, where a court or tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to and should support the court or tribunal, both because its members cannot defend themselves and because the lawyer is thereby contributing to greater public understanding of and therefore respect for the legal system.

A lawyer, by training, opportunity and experience is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

(2) A lawyer who seeks legislative or administrative changes shall disclose whose interest is being advanced, whether the lawyer's interest, that of a client, or the public interest.

Commentary:

The lawyer may advocate such changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes which the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

(3) A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the local police force and give particulars.

Commentary:

Where possible the lawyer ought to suggest solutions to the anticipated problem such as: (a) the necessity for further security; and (b) that judgment ought to be reserved..

4.08 LAWYERS AS MEDIATORS

Role of Mediator

4.07 A lawyer who functions as a mediator shall at the outset ensure that the parties to the mediation process understand fully that:

(a) the function being discharged is not part of the traditional practice of law;

(b) the lawyer is not acting as a lawyer for either party but as mediator acts to assist the parties to resolve the matters in issue; and

(c) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by the solicitor-client privilege.

Commentary:

In acting in the capacity of a mediator, a lawyer as a general rule should not give legal advice as opposed to legal information to the parties during the mediation process.

As a general rule, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 2.04 and its Commentaries and the common law authorities.

As a general rule a lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.

Where in the mediation process the lawyer-mediator prepares a draft contract for the consideration of the respective parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

RULE 5 - RELATIONSHIP TO ASSOCIATES, STUDENTS, AND EMPLOYEES

5.01 SUPERVISION

Application

5.01 (1) In this rule, a non-lawyer does not include a student-at-law.

Direct Supervision Required

(2) A lawyer shall assume complete professional responsibility for all business entrusted to him or her and shall directly supervise staff and assistants to whom particular tasks and functions are delegated.

Commentary:

A lawyer who practises alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work, and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise.

Permissible Delegation

(3) Where a non-lawyer has received specialized training or education and is capable of doing independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

Commentary:

A lawyer may in appropriate circumstances render service with the assistance of non-lawyers of whose competence the lawyer is satisfied. Though legal tasks may be delegated to such persons, the lawyer remains responsible for all services rendered and for all written materials prepared by non-lawyers.

A lawyer may permit a non-lawyer to perform tasks delegated and supervised by a lawyer so long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by a Clinic Funding Committee, so long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of the Clinic Funding Committee, and assumes full professional responsibility for the work. A lawyer shall not permit a non-lawyer to perform any of the duties that only lawyers may perform, or do things that lawyers themselves may not do. Generally speaking, and subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer turns upon the distinction between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer which in the public interest must be exercised by the lawyer whenever it is required.

A lawyer may permit a non-lawyer to act only under the supervision of a member of the Society. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non-lawyer generally and with regard to the matter in question. The burden rests upon the lawyer who uses a non-lawyer to educate the latter with respect to the duties that may be assigned to the non-lawyer, and then to supervise the manner in which such duties are carried out. A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

Permissible Delegation - The following examples, which do not purport to be exhaustive, illustrate situations where it may be appropriate to delegate work to non-lawyers subject to proper supervision.

Real Estate - A lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex transactions relating to the sale, purchase, option, lease or mortgaging of land, to draft statements of account and routine documents and correspondence, and to attend to registrations, provided that the lawyer should not delegate to a non-lawyer ultimate responsibility for review of a title search report, or of documents before signing, or the review and signing of a letter of requisition, a title opinion or reporting letter to the client.

Corporate and Commercial - A lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

Wills, Trusts and Estates - A lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex matters, to collect information, draft routine documents and correspondence, prepare income tax returns, calculate such taxes, draft executors' accounts and statements of account, and attend to filings.

Litigation - A lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex matters, to collect information, draft routine pleadings, correspondence and other routine documents, research legal questions, prepare memoranda, organize documents, prepare briefs, draft statements of account and attend to filings. Generally speaking, a non-lawyer shall not attend on examinations or in court except in support of a lawyer also in attendance. Permissible exceptions include law clerks appearing on;

(i) routine adjournments in provincial courts;

(ii) appearances before tribunals where statutes or regulations permit non-lawyers to appear, e.g., Small Claims Court, Provincial Courts, Coroners' Inquests, as agent on summary conviction matters where so authorized by the Criminal Code, and administrative tribunals under the Statutory Powers Procedure Act;

(iii) attendance on routine examinations in uncontested matters such as for the purpose of obtaining routine admissions, attendance upon judgment debtor examinations and on watching briefs; however, in no circumstances shall a non-lawyer be permitted to conduct an examination for discovery in a contested matter or a cross-examination of a witness in aid of a motion;

(iv) attendance before a Master on simple ex parte matters or for a consent order;

(v) attendance on assessment of costs.

Improper Delegation

(4) A lawyer shall not permit a non-lawyer to,

(a) accept cases on behalf of the lawyer, except that such persons may receive instructions from established clients if the supervising lawyer is advised before any work commences;

(b) set fees;

(c) give legal opinions;

(d) give or accept undertakings, except with the express authorization of the supervising lawyer;

(e) act finally without reference to the lawyer in matters involving professional legal judgment;

(f) be held out as a lawyer;

Commentary:

A lawyer should insure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers, public officials or with the public generally whether within or outside the offices of the law firm of employment.

(g) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above, or in a support role to the lawyer appearing in such proceedings;

(h) be named in association with the lawyer in any pleading, written argument or other like document submitted to a court;

(i) be remunerated on a sliding scale related to the earnings of the lawyer, except where such person is an employee of the lawyer;

(j) conduct negotiations with third parties, other than routine negotiations where the client consents and the results thereof are approved by the supervising lawyer before action is taken;

(k) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose;

(l) sign correspondence containing a legal opinion, but the non-lawyer who has been specifically directed to do so by a supervising lawyer may sign correspondence of a routine administrative nature, provided that the fact such person is a non-lawyer is disclosed, and the capacity in which such person signs the correspondence is indicated; and

(m) forward to a client any documents, other than routine documents, unless they have previously been reviewed by the lawyer.

(5) A lawyer shall not permit a non-lawyer to:

(a) provide advice to the client with respect to any insurance, including title insurance without supervision;

(b) present insurance options or information regarding premiums to the client without supervision;

(c) recommend one insurance product over another without supervision; and

(d) give legal opinions regarding the insurance coverage obtained.

Collection Letters

(6) No collection letter shall be sent out over the signature of a lawyer, unless the letter is on the lawyer's letterhead, prepared under the lawyer's supervision and sent from the lawyer's office.

5.02 STUDENTS

Recruitment Procedures

5.02 (1) A lawyer shall observe the procedures of the Society about the recruitment of articling students and the engagement of summer students.

Duty as a Principal

(2) A lawyer in the capacity of a principal to a student shall provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

Duty of the Articling Student

(3) An articling student shall act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

5.03 SEXUAL HARASSMENT

Definition

5.03 (1) In this rule, sexual harassment is one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature,

(a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group; or

(b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services; or

(c) when submission to such conduct is made implicitly or explicitly a condition of employment; or

(d) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, matters of promotion, raise in salary, job security and benefits affecting the employee); or

(e) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile or offensive work environment.

Commentary:

Types of behaviour which constitute sexual harassment include, but are not limited to,

(a) sexist jokes causing embarrassment or offence, told or carried out after the joker has been advised that they are embarrassing or offensive, or that are by their nature clearly embarrassing or offensive

(b) leering

(c) the display of sexually offensive material

(d) sexually degrading words used to describe a person

(e) derogatory or degrading remarks directed towards members of one sex or one sexual orientation

(f) sexually suggestive or obscene comments or gestures

(g) unwelcome inquiries or comments about a person's sex life

(h) unwelcome sexual flirtations, advances, propositions

(i) persistent unwanted contact or attention after the end of a consensual relationship

(j) requests for sexual favours

(k) unwanted touching

(l) verbal abuse or threats

(m) sexual assault.

Sexual harassment can occur in the form of behaviour by men towards women, between men, between women or by women towards men.

Prohibition on Sexual Harassment

(2) A lawyer shall not, in a professional context, sexually harass a colleague, staff, clients, or other person.

5.04 DISCRIMINATION

Special Responsibility

(1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and specifically to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Ontario Human Rights Code*), marital status, family status or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other members of the profession or any other person.

Commentary:

The Society acknowledges the diversity of the community of Ontario in which its members serve and expects members to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

Rule 5.04 will be interpreted according to the provisions of the Ontario Human Rights Code, and related case law.

Rule 5.04 prohibits discrimination on any of the following grounds: race; place of origin, ethnic origin, creed, sexual orientation, record of offences, family status, ancestry, colour, citizenship, sex, age, marital status, and disability.

The Ontario Human Rights Code defines a number of grounds of discrimination listed in Rule 5.04. For example,

> *Age is defined as an age that is eighteen years or more, except in subsection 5(i) where age means an age that is eighteen years or more and less than sixty-five years.*
>
> *The term disability is not used in the Code, but discrimination on the ground of handicap is prohibited. Handicap is broadly defined in s. 10 of the Code to include both physical and mental disabilities.*
>
> *Family status is defined as the status of being in a parent and child relationship.*
>
> *Marital status is defined as the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.*
>
> *Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the Criminal Records Act (Canada) and not revoked), or provincial offences.*

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.

There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including:

> *Differentiation on prohibited grounds. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.*
>
> *Constructive discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by Rule 5.04, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement effectively excludes from employment persons with disabilities that prevent them from obtaining a licence. In such a case, the law firm would be required to alter or eliminate the requirement in order to accommodate the student unless the necessary accommodation would cause undue hardship.*

Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code.
In addition to prohibiting discrimination, Rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap. Harassment by superiors, colleagues and co-workers is also prohibited.

Harassment is definedas "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in Rule 5.04. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

(2) A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

(3) A lawyer shall ensure that his or her employment practices do not offend this rule.

Commentary:

Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Human rights Code, such questions may be raised at an interview. For example, an employer may ask whether an applicant has been convicted of a criminal offence for which a pardon has not been granted. An employer may ask applicants not yet called in Ontario about Canadian citizenship or permanent residency. If an employer has an anti-nepotism policy, he or she may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex, or of a particular creed, ethnicity, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches Rule 5.04 unless changing or eliminating the rule would cause undue hardship.

If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario Human Rights Code, the employer has a duty to accommodate. Only if the applicant cannot do the essential talk with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in Rule 5.04.

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case, are developing areas of human rights law. However, the following principles are well established.

If a rule, requirement or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in Rule 5.04, the following obligations arise:

> *The rule, requirement or expectation must be examined to determine whether it is "reasonable and bona fide". If the rule, requirement or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement or expectation with the operation of the business.*
>
> *If the rule, requirement or expectation is imposed in good faith and is strongly logically connected to a business necessity, the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.*
>
> *The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue", that accommodation need not be made.*

RULE 6 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

6.01 RESPONSIBILITY TO THE PROFESSION GENERALLY

General

6.01 (1) A lawyer shall assist in maintaining the integrity of the profession.

Meeting Financial Obligations

(2) A lawyer shall meet financial obligations in relation to his or her practice, including prompt payment of the deductible under the Society's Errors and Omissions Insurance Plan when properly called upon to do so.

Commentary:

In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients unless, before incurring such an obligation the lawyer clearly indicates in writing that the obligation is not to be a personal one.

Duty to Report Misconduct

(3) A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege:

(a) the misappropriation or misapplication of trust monies;

(b) the abandonment of a law practice;

(c) participation in serious criminal activity related to a lawyer's practice;

(d) the mental instability of a lawyer of such a serious nature that the lawyer's clients are likely to be severely prejudiced; and

(e) any other situation where a lawyer's clients are likely to be severely prejudiced.

Commentary:

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it be privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these Rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer). Nothing in this paragraph is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made bona fide without malice or ulterior motive.

Often instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports the Ontario Bar Assistance Program (OBAP), LINK, and other support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for OBAP and other support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer/counsellor has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

The Society also recognizes that communications with the ombudsperson appointed to assist in resolving complaints of discrimination or harassment against lawyers must generally remain confidential. Therefore, the ombudsperson will not be called by the Society or by any investigative committee to testify at any conduct, capacity or competence hearing without the consent of the person from whom the information was received. Notwithstanding the above, a lawyer serving as ombudsperson has an ethical obligation to report to the Society upon learning that a lawyer is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice.

Encouraging Client to Report Dishonest Conduct

(4) A lawyer shall attempt to persuade a client who has a claim against an apparently dishonest lawyer to report the facts to the Society before pursuing private remedies.

(5) If the client refuses to report his or her claim against an apparently dishonest lawyer to the Society, the lawyer shall inform the client of the policy of the Society's Compensation Fund and shall obtain instructions in writing to proceed with the client's claim without notice to the Society.

Commentary:

A lawyer should inform a client of the provision of the Criminal Code of Canada dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141). In the event the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141.

6.02 RESPONSIBILITY TO THE SOCIETY

Communications from the Society

6.02 A lawyer shall reply promptly to any communication from the Society.

6.03 RESPONSIBILITY TO OTHER LAWYERS

Courtesy and Good Faith

6.03 (1) A lawyer shall be courteous and act in good faith with other lawyers and lay persons lawfully representing others or themselves.

Commentary:

The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the Rule will impair the ability of lawyers to perform their function properly.

Any ill feeling which may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

(2) A lawyer shall accede to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

(3) A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

(4) A lawyer shall not use a tape recorder or other device to record a conversation between the lawyer and a client, or another lawyer, even if lawful, without first informing the other person of the intention to do so.

Communications

(5) A lawyer shall not in the course of a professional practice send correspondence or otherwise communicate, to a client, another lawyer or any other person in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

(6) A lawyer shall answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

(7) A lawyer shall not communicate with or attempt to negotiate or compromise a matter directly with any person who is represented by a lawyer except through or with the consent of that lawyer.

Undertakings

(8) A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given.

Commentary:

Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

6.04 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

6.04 (1) A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.

(2) A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary:

The term "outside interest" covers the widest possible range and includes activities which may overlap or be connected with the practice of law such as, for example, engaging in the mortgage business, acting as a director of a client corporation, or writing on legal subjects, as well as activities not so connected such as, for example, a career in business, politics, broadcasting or the performing arts. In each case the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.

Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute, or impair the lawyer's competence as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

6.05 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

6.05 (1) A lawyer who holds public office shall in the discharge of official duties adhere to standards of conduct as high as those which these Rules require of a lawyer engaged in the practice of law.

Commentary:

The Rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether or not the lawyer attained such office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by failure to observe its ethical standards.

Generally speaking, the Society will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

Conflict of Interest

(2) A lawyer who holds public office shall not allow professional or personal interests to conflict with the proper discharge of official duties.

Commentary:

The lawyer holding part-time public office must not accept any private legal business where duty to the client will, or may, conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict, but must nevertheless guard against allowing independent judgment in the discharge of official duties to be influenced either by the lawyer's own interest, that of some person closely related to or associated with the lawyer, that of former or prospective clients, or of former or prospective partners or associates.

Subject to any special rules applicable to the particular public office, the lawyer holding such office who sees that there is a possibility of a conflict of interest should declare such interest at the earliest opportunity, and not take part in any consideration, discussion or vote with respect to the matter in question.

(3) If there may be a conflict of interest, a lawyer who holds or who held public office shall not represent clients or advise them in contentious cases that the lawyer has been concerned with in an official capacity.

Appearances before Official Bodies

(4) Subject to the rules of the official body, when a lawyer or any of his or her partners or associates is a member of an official body, the lawyer shall not appear professionally before that body.

Commentary:

Subject to the rules of the official body, it would not be improper for a partner or associate to appear professionally before a committee of such body if such partner or associate is not a member of that committee, provided that in respect of matters in which such partner or associate appears, the lawyer does not sit on the committee, take part in the discussions of such committee's recommendations or vote upon them.

Conduct after Leaving Public Office

(5) A lawyer who has left public office shall not act for a client in connection with any matter for which the lawyer had substantial responsibility before leaving public office.

Commentary:

It would not be improper for the lawyer to act professionally in such a matter on behalf of the public body in question.

A lawyer who has acquired confidential information by virtue of holding public office should keep such information confidential and not divulge or use it notwithstanding that the lawyer has ceased to hold such office.

6.06 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

6.06 (1) Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary:

Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The mere fact that a lawyer's appearance is outside of a courtroom, a tribunal, or the lawyer's office does not excuse conduct that would otherwise be considered improper.

A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer's real purpose is self-promotion or self-aggrandizement.

Given the variety of cases that can arise in the legal system, particularly so far as civil, criminal, and administrative proceedings are concerned, it is impossible to set down guidelines which would anticipate every possible circumstance. There are going to be circumstances where the lawyer should have no contact with the media and other cases where the lawyer is under a specific duty to contact the media to serve properly the client - the latter situation arising more often in the context of administrative boards and tribunals where a given tribunal is an instrument of government policy and hence is susceptible to public opinion.

A lawyer is often involved in a non-legal setting where contact is made with the media with respect to publicizing such things as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations, or in acting as a spokesman for organizations which, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for the lawyer to play, in view of the obvious contribution it makes to the community.

A lawyer is often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on the effect of particular legislation or decided cases, or to offer an opinion with respect to cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

A lawyer is often involved as advocate for special interest groups whose objective it is to bring about changes in legislation, governmental policy, or even a heightened public awareness about certain issues. This is also an important role that the lawyer can be called upon to play.

Lawyers should be conscious of the fact that when a public appearance is made or a statement is given the lawyer will ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used, or under what headline it may appear.

Interference with the Right to a Fair Trial or Hearing

(2) A lawyer shall not make a statement to the media about a matter before the court or a tribunal if the lawyer knows or ought to know that the statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary:

It is important to a free and democratic society that the public including the media be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial not be impaired by inappropriate public statements made before the case has concluded. Fair trials are fundamental to a free and democratic society.

The following are examples of extrajudicial statements that are likely to materially prejudice a party's right to a fair trial or hearing:

(a) a statement about the character, credibility, reputation, or criminal record of an accused or witness;

(b) a statement about other pending charges against an accused;

(c) a statement about the existence of any confession, admission, or statement made by an accused or about the accused's failure to make a statement;

(d) a statement about the possibility of a plea of guilty to the offence charged or to a lesser offence;

(e) a statement about the performance or results of any examination or tests or the refusal or failure of an accused to submit to examinations or tests;

(f) opinions concerning the guilt or innocence of the accused, the evidence or the merits of the case; and

(g) unsubstantiated out-of-court criticisms of the competence, conduct, advice, or motivation of a lawyer, police officer, public official, or of the judge involved in the matter.

The following are examples of extrajudicial statements that are not likely to materially prejudice a party's right to a fair trial or hearing:

(a) a statement about the general nature of the claim or charge;

(b) a statement about the fact, time and place of an arrest, the charges, and the date and place of a court appearance;

(c) where the accused has not yet been arrested and a warrant has been issued, any information necessary to aid in apprehension of the accused or to warn the public of any danger posed by the accused but no more information than necessary for these purposes;

(d) a statement about the identity of the investigative agency and the length of the investigation;

(e) a statement about the general nature of the defence including the fact that the accused is presumed innocent and denies the charge or charges;

(f) a statement about the name, age, residence of a person involved except where such information would identify a victim, complainant, or young offender in violation of any judicial or statutory publication ban;

(g) a request for assistance in obtaining evidence and information necessary for the prosecution or the defence; or

(h) information already contained in the public record in the proceedings in question that is not subject to any judicial or statutory publication ban.

6.07 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

6.07 (1) A lawyer shall assist in preventing the unauthorized practice of law.

Commentary:

Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of secrecy, the professional standard of care which the law requires of lawyers, and the authority which the courts exercise over them. Other safeguards include professional liability insurance, rights with respect to the assessment of bills, rules respecting the handling of trust monies, and requirements as to the maintenance of compensation funds.

Disbarred Persons, Suspended Lawyers, and Others

(2) A lawyer shall not, without the express approval of Convocation, retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, suspended, undertaken not to practice, or who has been involved in disciplinary action and been permitted to resign as a result thereof, and has not been reinstated or yet been readmitted.

(3) Where a person has been suspended for non-payment of fees or for some reason not involving disciplinary action, the express approval referred to in subrule (2) may also be granted by a committee of Convocation appointed for this purpose.

6.08 RETIRED JUDGES RETURNING TO PRACTICE

Definitions

6.08 (1) In this rule, "retired appellate judge" means a lawyer

(a) who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario or the Federal Court of Canada, Appeal Division,

(b) who has retired, resigned, or been removed from the Bench, and

(c) who has returned to practice.

(2) In this rule, "retired judge" means a lawyer

(a) who was formerly a judge of the Federal Court of Canada, Trial Division, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Ontario Court of Justice (General Division), or the Superior Court of Justice,

(b) who has retired, resigned, or been removed from the Bench, and

(c) who has returned to practice.

Appearance as Counsel

(3) A retired appellate judge shall not appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of Convocation, which approval may only be granted in exceptional circumstances and may be restricted as Convocation sees fit.

(4) A retired judge shall not appear as counsel or advocate,

(a) before the court on which the judge served or any lesser court; and

(b) before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction;

for a period of two years from the date of his or her retirement, resignation or removal without the express approval of Convocation, which approval may only be granted in exceptional circumstances and may be restricted as Convocation sees fit.

6.09 ERRORS AND OMISSIONS

Notice of Claim

6.09 (1) A lawyer shall give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary:

The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but such obligations must not impair the relationship and duties of the lawyer to the client. The insurer's rights must be preserved. There may well be occasions when a lawyer believes that certain actions or failure to take action have made the lawyer liable for damages to the client when in reality no liability exists. Further, in every case a careful assessment will have to be made of the client's damages arising from the lawyer's negligence. Many factors will have to be taken into account in assessing the client's claim and damages. As soon as a lawyer becomes aware that an error or omission may have occurred which may reasonably be expected to involve liability to the client for professional negligence, the lawyer should take the following steps:

1 Immediately arrange an interview with the client and advise the client forthwith that an error or omission may have occurred which may form the basis of a claim by the client against the lawyer.

2. Advise the client to obtain an opinion from an independent lawyer and that in the circumstances the first lawyer might no longer be able to act for the client.

3. Inform the Lawyers Professional Indemnity Company (LPIC), of the facts of the situation.

4. Co-operate to the fullest extent and as expeditiously as possible with the Society's adjusters in the investigation and eventual settlement of the claim.

5. Make arrangements to pay that portion of the client's claim that is not covered by the insurance forthwith upon completion of the settlement of the client's claim.

Co-operation

(2) Unless the client objects, a lawyer shall assist and co-operate with the insurer or other indemnitor to the extent necessary to enable any claim that is made to be dealt with promptly.

Responding to Client's Claim

(3) If a lawyer is not indemnified for a client's errors and omissions claim, or to the extent that the indemnity may not fully cover the claim, the lawyer shall expeditiously deal with the claim and shall not, under any circumstances, take unfair advantage that would defeat or impair the client's claim.

(4) In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer is under a duty to arrange for payment of the balance.

6.10 RESPONSIBILITY IN MULTI-DISCIPLINE PRACTICES

Compliance with these Rules

6.10 A lawyer in a multi-discipline practice shall ensure that non-lawyer partners and associates comply with these Rules and all ethical principles that govern a lawyer in the discharge of his or her professional obligations.

6.11 DISCIPLINE

Disciplinary Authority

6.11 (1) A lawyer is subject to the disciplinary authority of the Society regardless of where the lawyer's conduct occurs.

Professional Misconduct

(2) The Society may discipline a lawyer for professional misconduct.

Conduct Unbecoming a Lawyer

(3) The Society may discipline a lawyer for conduct unbecoming a lawyer.

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Concordance

REVISED RULES OF PROFESSIONAL CONDUCT	RULES OF PROFESSIONAL CONDUCT	NATURE OF CHANGE
1.01		New
1.02 "client"	Rule 5, Commentary 16.	
1.02 "conduct unbecoming a lawyer"	Rule 1, Footnote 3.	New. Based on ABA Model Code, Rule 8.4
1.02 "conduct unbecoming a lawyer" Commentary	Rule 1, Commentary 2 Rule 1, Commentary 3	
1.02 "independent legal advice"		New, but see Rule 5, Commentary 9 (b)
1.02 "independent legal advice" Commentary	Rule 5, Commentary 9 (c).	
1.02 "independent legal representation"		New, but see Rule 5, Commentary 9 (a)
1.02 "interprovincial law firm"	Rule 22, para. 1	
1.02 "law firm"	Rule 29 (1) (Definition)	
1.02 "lawyer"	Interpretation and Rule 29(1)	Revised
1.02 "member"	Rule 29 (1) (Definition)	
1.02 "professional misconduct"	Rule 1, Footnote 3.	New. Based on ABA Model Code, Rule 8.4
1.02 "society"	Interpretation	
1.03 (1)	Forward and Rule 1	New. Based on: Alberta Code of Professional Conduct, Chapter 1, Statement of Principle and Chapter 3, Statement of Principle; Special Commitee to Review the Rules of Professional Conduct - Structure of the Revised Rules, para. 1.1.
1.03 (1) Commentary	Forward Rule 1, Commentary 1 Rule 1, Commentary 2 Rule 1, Commentary 3	Revised
1.03 (2)	Interpretation	

2.01 (1)	Forward	Revised Rule 2, Commentaries 1, 4, and 5 deleted.
2.01 (1) Commentary	Rule 3, Commentary 3 Rule 3, Commentary 4 Rule 3, Commentary 9 Rule 2, Commentary 2 Rule 3, Commentary 10 Rule 3, Commentary 2 Rule 2, Commentary 7 Rule 2, Commentary 3 Rule 2, Commentary 6	Revised Rule 2 (b) deleted New for Multi-Discipline Practices
2.01 (2)	Rule 2 (a)	
2.01 (3)	Rule 2 (b)	
2.01 (3) Commentary	Rule 2, Commentary 9	Revised
2.02 (1)	Rule 3	
2.02 (1) Commentary	Rule 3, Commentary 1	Revised
2.02 (2)	Rule 3, Commentary 10	Revised. See also rule 6.09
2.02 (3)	Rule 3, Commentary 5 Rule 10, Commentary 6	
2.02 (4)	Rule 10, Commentary 6A	
2.02 (5)	Rule 3, Commentary 8	Revised
2.02 (6)	Rule 3, Commentary 6	Revised
2.02 (6) Commentary	Rule 3, Commentary 6 Rule 3, Commentary 7	Revised Revised
2.02 (7)		New. Based on American Bar Association Model Code Rule 1.16
2.02 (8)		New. Based on American Bar Association Model Code Rule 1.16
2.02 (9)	Rule 26, Para. 1	Revised
2.02 (9) Commentary	Rule 26, Commentary 1	
2.02 (10)	Rule 26, Para. 2	
2.02 (11)	Rule 26, Commentary 2	

2.02 (12)	Rule 30, Para. 1	
2.02 (12) Commentary	Rule 30, Commentary 1 Rule 30, Commenary 2	
2.02 (13)	Rule 30, Para. 2	
2.02 (14)	Rule 30, Para. 2	
2.02 (14) Commentary	Rule 30, Commentary 3	Revised
2.02 (15)	Rule 30, Para. 4	
2.03 (1)	Rule 4	
2.03 (1) Commentary	Rule 4, Commentary 1 Rule 4, Commentary 2 Rule 4, Commentary 4 Rule 4, Commentary 3 Rule 4, Commentary 6 Rule 4, Commentary 7 Rule 4, Commentary 8	
2.03 (2)	Rule 4, Commentary 9	
2.03 (2) Commentary	Rule 4, Commentary 9	
2.03 (3)	Rule 4, Commentary 10	Revised
2.03 (4)	Rule 4, Commentary 11	Revised
2.03 (5)	Rule 4, Commentary 12	Revised
2.03 (6)	Rule 4, Commentary 5	
2.03 (6) Commentary	Rule 4, Commentary 5	Revised
2.04 (1)	Rule 5, Commentary 1	Rule 5, Commentary 12 deleted; but see rule 2.07 (11).
2.04 (1) Commentary	Rule 5, Commentary 3 Rule 5, Commentary 7	
2.04 (2)	Rule 5	Revised
2.04 (3)	Rule 5	Revised
2.04 (3) Commentary	Rule 5, Commentary 2 Rule 5, Commentary 4	Revised Revised
2.04 (4)	Rule 5, Commentary 13	
2.04 (4) Commentary	Rule 5, Commentary 13	
2.04 (5)	Rule 5, Commentary 5	

2.04 (5) Commentary		New
2.04 (6)	Rule 5, Commentary 5	Revised
2.04 (6) Commentary	Rule 5, Commentary 5	Revised
2.04 (7)	Rule 5, Commentary 5	
2.04 (8)	Rule 5, Commentary 6	
2.04 (8) Commentary	Rule 5, Commentary 11 Rule 5, Commentary 6	
2.04 (9)	Rule 5, Commentary 6	
2.04 (10)		New for multi-discipline practice.
2.04 (11)	Rule 5, Commentary 14	New See Alberta Rules C 1, Rule 5, Commentary
2.04 (11) Commentary	Rule 5, Commentary 14	Revised
2.05 (1)	Rule 29 (1)	Revised
2.05 (1) Commentary	Rule 29, Commentary 2	
2.05 (2)	Rule 29 (2)	
2.05 (3)	Rule 29 (3)	
2.05 (3) Commentary	Rule 29, Commentary 1	
2.05 (4)	Rule 29 (4)	
2.05 (4) Commentary	Rule 29, Commentary 3	
2.05 (5)	Rule 29 (5)	
2.05 (6)	Rule 29 (6)	
2.05 (7)	Rule 29 (7)	
2.05 (8)	Rule 29 (8)	Revised. Rule 29, Commentary 3 delted
2.05 (9)	Rule 29 (9)	Revised for multi-discipline practice.
2.05 (9) Commentary	Rule 29, Commentary 2 Rule 29, Commentary 3 Rule 29, Commentary 4	
2.06(1)	Rule 23, Para. 1	

2.06 (2)		New, but see Rule 5, Commentaries 8 and 10
2.06 (2) Commentary	Rule 5, Commentary 10 Rule 5, Commentary 17 Rule 5, Commentary 8	
2.06 (3)	Rule 5, Commentary 9 (b)	
2.06 (4)	Rule 7, Para. 1	Revised. Rule 7 Commentary 3 deleted
2.06 (4) Commentary	Rule 7, Commentary 1 Rule 7, Commentary 2 Rule 7, Para. 3	Rule 7, Commentary 4 deleted Revised
2.06 (5)	Rule 7, Para. 2	
2.06 (6)	Rule 23, Para. 5 Rule 23, Para. 2	Revised
2.06 (6) Commentary	Rule 23, Para. 7	Revised
2.06 (7)		New
2.06 (8)		New
2.06 (9)	Rule 23, Para. 3	
2.06 (10)	Rule 23, Para. 4 Rule 23, Para. 5	
2.06 (11)	Rule 23, Para. 6 (a)	Revised
2.06 (12)	Rule 23, Para. 6 (b)	Revised
2.07(1)	Rule 6	
2.07 (1) Commentary	Rule 6, Commentary 1 Rule 6, Commentary 5	
2.07 (2)	Rule 6, Commentary 2	
2.07 (3)	Rule 6, Commentary 3	
2.07 (4)	Rule 6, Commentary 4	
2.07 (5)	Rule 6, Commentary 4	
2.07 (6)	Rule 6, Commentary 4	
2.07 (6) Commentary	Rule 6, Commentary 6	
2.08 (1)	Rule 9 (a), (c)	Revised

2.08 (2)	Rule 9, Commentary 6	
2.08 (2) Commentary	Rule 9, Commentary 1 Rule 9, Commentary 8 Rule 9, Commentary 5 Rule 9, Commentary 2	Rule 9, Commentary 9 deleted Revised.
2.08 (3)	Rule 9, Commentary 10	
2.08 (4)	Rule 9, Commentary 10	
2.08 (5)	Rule 9, Commentary 4	
2.08 (6)	Rule 9, Commentary 3	
2.08 (7)	Rule 9 (b)	
2.08 (8)	Rule 9, Commentary 7	
2.08 (9)	Rule 9, Commentary 7	Revised
2.08 (10)		New for multi-discipline practice.
2.08 (10) Commentary	Rule 9, Commentary 7	Revised
2.08 (11)	Rule 9 (d)	
2.09(1)	Rule 8	
2.09 (1) Commentary	Rule 8, Commentary 1 Rule 8, Commentary 7	
2.09 (2)	Rule 8, Commentary 4	Revised
2.09 (2) Commentary	Rule 8, Commentary 4	
2.09 (3)	Rule 8, Commentary 5	Revised
2.09 (4)	Rule 8, Commentary 6	
2.09 (4) Commentary	Rule 8, Commentary 6	Revised
2.09 (5)	Rule 8, Commentary 6	
2.09 (6)	Rule 8, Commentary 6	
2.09 (6) Commentary	Rule 8, Commentary 6	
2.09 (7)	Rule 8, Commentary 3	Revised
2.09 (7) Commentary	Rule 8, Commentary 12	
2.09 (8)	Rule 8, Commentary 2	

2.09 (9)	Rule 8, Commentary 8	
2.09 (9) Commentary	Rule 8, Commentary 8 Rule 8, Commentary 9 Rule 8, Commentary 10	
2.09 (10)	Rule 8, Commentary 11	
2.09 (10) Commentary	Rule 8, Commentary 11	
3.01 (1)	Rule 12, Para. 1	
3.01 (1) Commentary	Rule 12, Commentary 1 Rule 12, Commentary 3 Rule 12, Commentary 5	Revised
3.01 (2)	Rule 12, Commentary 2	
3.01 (2) Commentary	Rule 12, Commentary 1 Rule 12, Commentary 2	
3.02 (1)	Rule 12, Para. 7 (b)	
3.02 (2)	Rule 12, Para. 7 (a)	
3.02 (3)	Rule 12, Para. 7 (e)	
3.02 (4)	Rule 12, Para. 7 (b)	
3.02 (5)	Rule 12, Para. 7 (c)	
3.02 (6)	Rule 12, Para. 7 (d)	
3.02 (7)	Rule 12 Para. 7 (f)	
3.02 (8)		New
3.03 (1)	Rule 12, Para. 7 (h)	Revised
3.03 (2)	Rule 12, Para. 7 (g)	
3.03 (3)	Rule 12, Para. 7 (i)	Revised for multi-discipline practices
3.04 (1)	Rule 12, Para. 2	Revised
3.04 (2)	Rule 12, Para. 3	Revised
3.04 (3)	Rule 12, Para. 5 (a) Rule 12, Para. 5 (b)	Revised
3.04 (3) Commentary	Rule 12, Commentary 4	Revised
3.05 (1)	Rule 12, Para. 8 (a)	Revised Rule 12, Para. 8 (b) deleted

3.05 (2)	Rule 12,Para. 8 (a)	Revised
3.05 (3)	Rule 12, Para. 8 (a)	Revised
3.05 (4)	Rule 12, Para. 8 (b)	Revised
3.05 (5)	Rule 12, Para. 8 (b)	Revised
3.05 (6)		New for multi-discipline practice.
3.06 (1)		New Rule 12, Para. 4 deleted Rule 12, Para. 6 deleted
3.06 (2)		New Rule 12, Paras. 5 (c), (d), (e), (f), and (g) replaced. See Alberta Rule 5 (Accessibility and Adverstisement of Legal Services)
3.07 (1)	Rule 22, Para. 1	
3.07 (2)	Rule 22, Para. 2	
3.07 (3)	Rule 22, Para. 3	
3.07 (4)	Rule 22, Para. 4	
4.01 (1)	Rule 10	
4.01 (1) Commentary	Rule 10, Commentary 1 Rule 10, Commentary 2 Rule 10, Commentary 13 Rule 21, Para. 3 Rule 10, Commentary 9 Rule 10, Commentary 10 Rule 10, Commentary 11 Rule 10, Commentary 5 Rule 10, Commentary 4	Revised; see para. 17 of October 15, 1998 draft *American College of Trial Lawyers Canadian Code of Trial Conduct.* The duty of prosecutor commentary has been revised in light of new subrule 4.01 (3)
4.01 (2)	Rule 10, Commentary 2	Revised para. 4.01 (2) (g)
4.01 (3)		New
4.01 (4)		New
4.01 (5)	Rule 10, Commentary 3 (a)	
4.01 (5) Commentary	Rule 10, Commentary 3 (b)	
4.01 (6)	Rule 10, Commentary 7	
4.01 (6) Commentary	Rule 10, Commentary 7	

4.01 (7)	Rule 10, Commentary 8	
4.01 (7) Commentary	Rule 10, Commentary 8	
4.01 (8)		New
4.01 (9)	Rule 10, Commentary 12	Revised.
4.01 (9) Commentary	Rule 10, Commentary 12	Revised.
4.02 (1)	Rule 10, Commentary 16 (a), (c)	
4.02 (2)	Rule 10, Commentary 16 (b), (c)	
4.02 (2) Commentary	Rule 10, Commentary 16 (b), (c)	Revised
4.02 (3)	Rule 10, Commentary 16 (b), (c)	
4.03 (1)	Rule 10, Commentary 14	
4.03 (2)	Rule 10, Commentary 14	
4.03 (3)		New
4.03 (3) Commentary		New
4.04		New, based on Alberta Rules, chap. 10, Rule 3
4.04 Commentary		New, based on Alberta Rules, chap. 10, Rule 3
4.05	Rule 10, Commentary 15	
4.05 Commentary	Rule 10, Commentary 15	Revised
4.06		New, based upon the *American College of Trial Lawyers Canadian Code of Trial Conduct*, Rule 19
4.06 (1) Commentary		New, based upon the *American College of Trial Lawyers Canadian Code of Trial Conduct*, Rule 19
4.06 (2)		New, based upon the *American College of Trial Lawyers Canadian Code of Trial Conduct*, Rule 19
4.06 (3)		New, based upon the *American College of Trial Lawyers Canadian Code of Trial Conduct*, Rule 19

4.06 (4)		New, based upon the *American College of Trial Lawyers Canadian Code of Trial Conduct*, Rule 19
4.06 (5)		New, based upon the *American College of Trial Lawyers Canadian Code of Trial Conduct*, Rule 19
4.06 (5) Commentary		New, based upon the *American College of Trial Lawyers Canadian Code of Trial Conduct*, Rule 19
4.07 (1)	Rule 11	
4.07 (1) Commentary	Rule 11, Commentary 1 Rule 11, Commentary 2 Rule 11, Commentary 5 Rule 11, Commentary 3	Revised Revised
4.07 (2)	Rule 11, Commentary 4	
4.07 (2) Commentary	Rule 11, Commentary 4	
4.07 (3)	Rule 11, Commentary 6	Revised
4.07 (3) Commentary	Rule 11, Commentary 6	
4.08	Rule 25 Rule 25, Commentary 3	Rule 25, Commentary 4 deleted Rule 25, Commentary 2 deleted
4.08 Commentary	Rule 25, Commentary 4 Rule 25, Commentary 5	 Revised
5.01 (1)	Rule 16, Commentary 4	Rule 16, Commentary 1 deleted
5.01 (2)	Rule 19, Commentary 2 Rule 16, Para. 4	
5.01 (2) Commentary	Rule 19, Commentary 2	Revised
5.01 (3)		New, but based on Rule 16, Para. 1
5.01 (3) Commentary	Rule 16, Para. 1 Rule 16, Para. 2 Rule 16, Para. 3 Rule 16, Commentary 2 Rule 16, Commentary 2 (a) Rule 16, Commentary 2 (b) Rule 16, Commentary 2 (c) Rule 16, Commentary 2 (e)	 Revised Revised
5.01 (4)	Rule 16, Commentary 3	

5.01 (4) Commentary	Rule 16, Commentary 3.	
5.01 (5)	Rule 30, Para. 3	Revised
5.01 (6)	Rule 19, Commentary 3	
5.02 (1)	Rule 13, Commentary 7	Revised
5.02 (2)	Rule 24, Para. 1	Revised
5.02 (3)	Rule 24, Para. 2	
5.03 (1)	Rule 27, Commentary 1	
5.03 (1) Commentary	Rule 27, Commentary 2 Rule 27, Commentary 3	
5.03 (2)	Rule 27	
5.04 (1)	Rule 28	
5.04 (1) Commentary	Rule 28, Commentary	Revised by the addition of commentary taken from the Law Society's five bulletins about Rule 28.
5.04 (2)	Rule 28, Commentary	
5.04 (3)	Rule 28, Commentary	Revised by the addition of commentary taken from the Law Society's five bulletins about Rule 28.
5.04 (3) Commentary	Rule 28, Commentary	
6.01 (1)	Rule 13	Revised
6.01 (2)	Rule 13, Commentary 6	
6.01 (2) Commentary	Rule 13, Commentary 6	
6.01 (3)	Rule 13, Commentary 1	Revised
6.01 (3) Commentary	Rule 13, Commentary 1 Rule 13, Commentary 1A	New commentary about ombudsperson.
6.01 (4)	Rule 13, Commentary 2	
6.01 (5)	Rule 13, Commentary 2	
6.01 (5) Commentary	Rule 13, Commentary 2	
6.02	Rule 13, Commentary 3	

6.03 (1)	Rule 14 Rule 14, Commentary 9	
6.03 (1) Commentary	Rule 14, Commentary 1 Rule 14, Commentary 2 Rule 14, Commentary 8	
6.03 (2)	Rule 14, Commentary 3	
6.03 (3)	Rule 14, Commentary 4	
6.03 (4)	Rule 14, Commentary 4	
6.03 (5)	Rule 14, Commentary 4	Revised
6.03 (6)	Rule 14, Commentary 5	Revised
6.03 (7)	Rule 14, Commentary 7	
6.03 (8)	Rule 14, Commentary 6	
6.03 (8) Commentary	Rule 14, Commentary 6	
6.04 (1)	Rule 17	
6.04 (2)	Rule 17, Commentary 2	
6.04 (2) Commentary	Rule 17, Commentary 1 Rule 17, Commentary 3	
6.05 (1)	Rule 18	
6.05 (1) Commentary	Rule 18, Commentary 1 Rule 18, Commentary 2	
6.05 (2)	Rule 18, Commentary 3	
6.05 (2) Commentary	Rule 18, Commentary 3 Rule 18, Commentary 4	
6.05 (3)	Rule 18, Commentary 5	
6.05 (4)	Rule 18, Commentary 6	Revised
6.05 (4)	Rule 18, Commentary 6	
6.05 (5)	Rule 18, Commentary 7	
6.05 (5) Commentary	Rule 18, Commentary 7 Rule 18, Commentary 8	

6.06 (1)		New, but see Rule 21, Commentary 1 Rule 21, Para. 3 moved to Rule 4.01 (1) Commentary
6.06 (1) Commentary	Rule 21, Para. 1 Rule 21, Para. 2 Rule 21, Para. 5 Rule 21, Commentary 5 Rule 21, Commentary 2 Rule 21, Commentary 3 Rule 21, Commentary 4 Rule 21, Commentary 6	 Revised Revised
6.06 (2)		New
6.06 (2) Commentary		New New New
6.07 (1)	Rule 19	
6.07 (1) Commentary	Rule 19, Commentary 1	
6.07 (2)	Rule 20	Revised.
6.07 (3)		New
6.08 (1)	Rule 15, Para. 1	
6.08 (2)	Rule 15, Para. 2	
6.08 (3)	Rule 15, Para. 1	
6.08 (4)	Rule 15, Para. 2	
6.09 (1)	Rule 3, Commentary 10	
6.09 (1) Commentary	Rule 5, Commentary 15	Revised
6.09 (2)	Rule 3, Commentary 10	
6.09 (3)	Rule 3, Commentary 10	
6.09 (4)	Rule 3, Commentary 10	
6.1		New for multi-discipline practice
6.11 (1)		New, based on ABA Model Code, Rule 8.5
6.11 (2)		New
6.11 (3)		New

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

Copy of the Professional Conduct Handbook, 1998 Edition, Second Edition - as amended to 26 June 1998.

A discussion followed with questions from the Bench.

It is expected that the proposed Rules will be considered by Convocation in October, 1999.

CONVOCATION ROSE AT 12.10 P.M.

Convocation adjourned and resumed at 7:30 p.m. in the Benchers' Dining Room.

It was moved by Susan Elliott, seconded by Heather Ross that Philip Epstein and David Scott be granted the "Freedom of the Hall" including the right to lockers in the Benchers' Locker Room for life.

The vote was carried unanimously.

Confirmed in Convocation this 28 day of May , 1999

Harvey T. Strosberg

Treasurer