MINUTES OF CONVOCATION

Monday, 27th October, 1997
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Aaron, Adams (conference call), Angeles, Armstrong, Banack, Carpenter-Gunn, R. Cass, Cole, Copeland, Cronk, Crowe, Curtis, DelZotto, Eberts, Epstein, Feinstein, Finkelstein, Gottlieb, Lamont, Lawrence, Legge, MacKenzie, Manes, Marrocco, Martin, Millar, Murphy, Murray, O'Brien, Ortved, Puccini, Ross, Ruby, Sachs, Sealy, Stomp, Swaye and Wright.

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The reporter was sworn.

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IN PUBLIC

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MOTION - REPORTS TAKEN AS READ

It was moved by Ms. Puccini, seconded by Ms. Ross that the Draft Convocation Minutes for September 11th, 25th and 26th, 1997 and the Report and Addendum of the Executive Director of Education, be adopted.

Carried

Draft Minutes of Convocation - September 11th, 25th and 26th, 1997

(see Draft Minutes in Convocation file)

THE DRAFT MINUTES WERE ADOPTED

Report of the Executive Director of Education and Addendum

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Executive Director of Education asks leave to report:

B.
ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Monday, October 27th, 1997:

Monj Gupta	38th BAC
Stewart Douglas Lewis	38th BAC
Joan Chinelo Manafa	38th BAC
Chantelle Cathy Higgins	38th BAC

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

B.1.4. The following candidates have completed successfully the Transfer Examination or Phase Three of the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Monday, October 27th, 1997:

Margriet Zwarts	Province of Quebec
Caroline Holland	Province of Quebec

ALL OF WHICH is respectfully submitted

DATED this the 27th day of October, 1997

ADDENDUM

B.
ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Monday, October 27th, 1997:

Margaret Veronica Anderson-Clarke	38th BAC
Stuart David Bloomfield	38th BAC
Charlotte Mutsumi Chiba	37th BAC
Godfried Kwasi Danquah	38th BAC
Asira Ibrahim Shukuru	38th BAC
Lawrence Anthony Gordon Shuttleworth	38th BAC

THE REPORT AND ADDENDUM WERE ADOPTED

CALL TO THE BAR

The candidates listed in the Report of the Executive Director of Education and Addendum were called to the Bar by the Treasurer and taken by Mr. Lamont before Madam Justice Frances Kiteley to sign the Rolls and take the necessary oaths.

Margaret Veronica Anderson-Clarke	38th Bar Admissions Course
Stuart David Bloomfield	38th Bar Admissions Course
Charlotte Mutsumi Chiba	37th Bar Admissions Course
Godfried Kwasi Danquah	38th Bar Admissions Course
Chantelle Cathy Higgins	38th Bar Admissions Course
Stewart Douglas Lewis	38th Bar Admissions Course
Joan Chinelo Manafa	38th Bar Admissions Course
Asira Ibrahim Shukuru	38th Bar Admissions Course
Lawrence Anthony Gordon Shuttleworth	38th Bar Admissions Course
Caroline Sophia Holland	Special, Transfer, Province of Quebec
Margriet Zwarts	Special, Transfer, Province of Quebec

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TREASURER'S REMARKS

The Treasurer advised that due to ill health Mr. Stuart Thom would likely not be attending Convocation again and remarked on Mr. Thom's long and valued service to the Law Society as Treasurer and Bencher.

REPORTS FOR INFORMATION ONLY

The following Reports were presented for information only: Admissions and Equity Committee, Legal Aid Committee and Professional Regulation Committee.

Admissions & Equity Committee Report

MEMORANDUM

TO: Convocation

FROM: The Admissions & Equity Committee

RE: Federation of Law Societies Committee on the National Committee on Accreditation

DATE: October 27, 1997

On September 26, 1997 the Admissions & Equity Committee reported to Convocation that Gavin MacKenzie's *Report on the Accreditation of Foreign-Educated and Quebec Lawyers with Non-Common Legal Education* was considered by the Federation of Law Societies at its meeting in August 1997. At that time the Federation determined that a committee would be established to examine the report. The committee will provide an interim report to the February 1998 meeting of the Federation as to process and any interim recommendations it has at that time. The committee will provide its final report to the Federation meeting in August 1998.

Convocation was advised that the chair of the committee is Brian Wallace, the Federation representative for British Columbia and the Yukon. The law societies of British Columbia, Ontario, and Quebec have each been invited to appoint a member to the committee. Any other provinces, interested in doing so, may also appoint a member to the committee. Alan Treleaven will provide staff support to the committee.

The Admissions & Equity Committee wishes to report to Convocation that Nancy Backhouse will be the Law Society of Upper Canada's appointee to the committee.

Legal Aid Committee Report

Legal Aid Committee
October 8, 1997

Report to Convocation

Nature of Report: Information

TABLE OF CONTENTS

The Legal Aid Committee met on October 8, 1997. In attendance were:

Committee members: Bob Armstrong (Chair), Heather Ross (Vice Chair), Tamara Stomp, Carole Curtis, Allan Lawrence, Hope Sealy, Marshall Crowe, Gerry Swaye, Frank Marrocco, Abe Feinstein, Rich Wilson, Tom Carey, Elvio DelZotto and Derry Millar.

Senior Management of OLAP: Robert Holden, Provincial Director, and Deputy Directors Ruth Lawson, David Porter and George Biggar.

Other OLAP Staff: Elaine Gamble, Communications Coordinator and Felice Mateljan, Executive Assistant.

Attending for the Refugee Law Consultations were: Members of the Refugee Lawyers Association Raoul Boulakia, Toronto, Rod McDowell, Fort Erie, John Rokakis, Windsor, Susan Woolner, Toronto and Warren Creates, Ottawa.

The following matters are reported on for information only:

1. McCamus Report on Legal Aid

At a special meeting of the Legal Aid Committee September 25, 1997, the Committee decided to hold consultations with various bar associations and client groups to discuss the various proposals in the McCamus report. These consultations will allow the Committee to receive input on proposed alternative delivery systems and the issue of governance of the Plan.

Plan staff will prepare a full report on proposed pilot projects for the Committee which will include full costing projections and the pros and cons of each option. The Committee members will also prepare a report for Convocation on the governance issue, based on the consultations.

The following is the list of meeting dates and consultations:

October 8 -	Consultation with the Refugee Bar and regular Legal Aid Committee meeting
October 27 -	Consultation with the Criminal Bar
October 28 -	Consultation with the Family Bar and Joana Kuras (on poverty law services)
November 10 -	Consultation with client organizations
November 11 -	Discussion concerning governance
November 12 -	regular Legal Aid Committee meeting
November 27 -	Preliminary report on alternative delivery systems to be discussed
December 10 -	Final report on alternative delivery systems to be discussed

2. Refugee Law Consultation

Members of the Refugee Lawyers Association attended part of the October 8, 1997 meeting to give their views on the McCamus report. They gave views on quality control, delivery models and governance. Their views will be included in the final report to Convocation in January 1998. They will also circulate to Legal Aid Committee members their submission to the Attorney General.

3. OLAP Financial Reports

The August 1997 Financial Reports are attached.

4. Area Committee Appointments

The Committee approved four new appointments to area committees as recommended by the Provincial Director: Dana Lindsay in Middlesex, Lois Cromarty in Northumberland, John Cosgrove and Laurence Furlonger in Thunder Bay.

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

Copy of the Ontario Legal Aid Plan Financial Reports August 1997

Professional Regulation Committee Report

Professional Regulation Committee
October 9, 1997

Report to Convocation

Purpose of Report: Information

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on October 9, 1997. In attendance were:

Eleanore Cronk (Chair)

Gavin MacKenzie (Vice-Chairs)
Niels Ortved
Harriet Sachs
Robert Topp

Marshall Crowe
Gary Gottlieb
Hope Sealy

Clayton Ruby

Staff: Lesley Cameron, Jon Fedder, Scott Kerr, David McKillop, Elliot Spears, Richard Tinsley, Jim Varro, and Jim Yakimovich

2. This report contains information on the Committee's

- review of the September 4, 1997 report to Convocation of the Lawyers Fund for Client Compensation Committee;
- plans for assessment of its prioritized issues; and
- proposal for review of policy issues arising from the Project 200 PRROGRAM Team Report on the regulatory departments' redesign.

REVIEW OF THE REPORT OF THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE

3. At Convocation on September 26, 1997, Mr. Ruby, Chair of the Lawyers Fund for Client Compensation Committee ("the Compensation Fund Committee") presented that Committee's report, which contained two proposals: the first for a substantial increase in the Compensation Fund levy, and the second, a proposal to amend Regulation 708 which would change the manner in which members are required to report to the Law Society with respect to their books and records.[1]

4. Details of the proposals are contained in the report from the Compensation Fund Committee reproduced elsewhere in the Convocation material, but in brief, the proposal for the "self reporting" model, as identified in the report, would eliminate as a requirement the report of the public accountant and replace it with a modified form that lawyers would complete themselves and file with the Law Society within three months from their fiscal year end.

5. The model also calls for establishing audit teams to conduct random or "spot" audits of the profession as a whole and "focused" audits of certain members of the profession falling within the profile of, *inter alia*, significant claims experience with the Fund and poor trust record keeping practices.

6. The proposal requires an amendment to Regulation 708.

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[1] Currently, members are required to file with the Law Society the Public Accountant's Report to Lawyer form within six months from the end of their fiscal year.

7. On September 26, Convocation agreed to defer discussion and decision on the proposals until the Professional Regulation Committee ("the Committee") had an opportunity to consider the policy questions arising from the report.

8. That discussion took place at the Committee's October 9, 1997 meeting, with Mr. Ruby, and included a review of several issues, including

- the nature of the proposed spot and focused audits of law practices to be carried out by the audit teams;
- the merits of replacing the prescribed form of accountant's report with a self-reporting system and the prospective impact on the Law Society's regulatory responsibilities;
- the Compensation Fund Committee's conclusions that, for its purposes, a proposal to examine a "two lawyer" rule was unnecessary at this time;
- the shift of the financial outlay of members from their accountants to the Law Society, in the form of an increased annual fee, for audit staff and the audit teams, and the sufficiency of funding for the spot and focused audits; and
- issues related to the draft of the proposed amendments to Regulation 708, sections 16 and 18, concerning who should have the authority to exercise the discretion to require a public accountant's report from a member and the question of employing automatic suspensions where members breach proposed new subsection 18(1.1).

9. Subject to paragraph 10, below, the Committee endorsed the report, and agreed with its philosophy and direction.

10. The Committee, however, directed the following comments to Mr. Ruby, which it requested be considered when he presents the Compensation Fund Committee report at the October 27, 1997 Convocation:

- the new audit program should be assessed two years after implementation, with a report to Convocation at that time, for its utility and effectiveness in achieving its purpose as outlined in the Compensation Fund Committee report;
- staff management and accountability for the program should be clearly established and systems should be designed to measure on an ongoing basis the progress made in achieving the goals of the program, including appropriate reports in the CEO's quarterly reports to Convocation;
- examination of the need for and merits of a "two-lawyer" rule should be referred to the working group of the Professional Regulation Committee reviewing the conflicts rules, given the necessity of a broader perspective on the efficacy of such a rule;
- the proposal in draft amended Regulation 708, subsection 18(1.1) to confer authority on discipline panels, in addition to the Secretary and the Chair and Vice-Chairs of Discipline, to direct a member to produce an accountant's report should be deleted, given concerns that, as a matter of law, discipline panels may not have the authority under the *Law Society Act* to, effectively, order a member to do so, and given concerns that such authority cannot be conferred by Regulation. These concerns are reinforced, in the Committee's view, by the fact that proposed subsection 18(1.3) would introduce summary (automatic) suspensions for a member's failure to produce a report directed under subsection (1.1).

COMMITTEE PLANNING AND PRIORITIES

11. The Committee completed its proposed schedule for review and assessment of its prioritized issues for the Committee year (to June 1998).

12. Draft bencher and working group assignments, together with a suggested staff complement, for each of the 23 issues under review by the Committee have been identified, together with timelines for submissions of policy proposals to the Committee for preparation of its reports to Convocation throughout the year.

REVIEW OF POLICY ISSUES ARISING FROM THE PROJECT 200 "PRROGRAM" TEAM REPORT

13. The Committee received from Richard Tinsley and Scott Kerr, Project Manager for implementation of the regulatory redesign report emanating from Project 200, an overview of the redesign philosophy and proposals for the regulatory departments.

14. Mr. Kerr also identified a number of policy issues arising from the redesign proposals which the Committee will be reviewing in the months ahead. Thereafter, the Committee will be submitting a report to Convocation to assist in its review of the policy issues.

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Mr. Armstrong reported orally on the issue of the enhancements to the family law tariff which were implemented on April 1st, 1997 and approved by the Legal Aid Committee but not yet approved by Convocation. Mr. Armstrong advised there would be a report before Convocation in November.

MOTION - APPOINTMENTS

It was moved by Ms. Cronk, seconded by Mr. Ruby THAT Larry Banack, Michael Adams and Gavin MacKenzie be appointed to the CBAO Council for the 1997/1998 term

AND FURTHER THAT Daniel Murphy be appointed to the CBA National Council for the 1997/1998 term.

Carried

NOTICE OF MOTION

The following Motion will be moved at the November Convocation:

Amendment of Rules made under subsection 62(1) of the Law Society Act
Rule 50: "Professional Liability Levies"

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IN CAMERA

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IN PUBLIC

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SUSPENSIONS - E & O Levy and Annual Fee

E & O Levy

It was moved by Mr. DelZotto, seconded by Ms. Puccini THAT the rights and privileges of each member who has not paid the Errors and Omissions Insurance Levy, and whose name appears on the attached list, be suspended from October 28, 1997 and until their levy is paid together with any other fee or levy owing to the Society which has then been owing for four months or longer.

Carried

(see list in Convocation file)

(This motion was set aside - see page 365 of the Minutes)

Annual Fee

It was moved by Mr. DelZotto, seconded by Ms. Puccini THAT the rights and privileges of each member who has not paid the Membership Fee, and whose name appears on the attached list, be suspended from November 3, 1997 and until their fee is paid together with any other fee or levy owing to the Society which has then been owing for four months or longer.

Carried

(see list in Convocation file)

Finance and Audit Committee Report

Meeting of October 9th, 1997

Mr. DelZotto presented for Convocation's approval the Report of the Finance and Audit Committee which included the enhanced payment options for payment of the annual membership fee and administrative suspension process for non-payment of annual fees.

Finance and Audit Committee
October 9, 1997

Report to Convocation

Purpose of Report: Decision Making

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee ("the Committee") met on October 9, 1997. In attendance were V. Krishna (Chair), T. Cole, E. DelZotto, P. Furlong, D. Lamont, C. Ruby, T. Stomp, H. Strosberg, G. Swaye, J. Wardlaw and R. Wilson. Staff members in attendance were J. Saso, W. Tysall, D. Carey, K. Corrick, L. McCreight, D. McKillop, R. White and J. Yakimovich. Also in attendance were Michelle Strom and Craig Allen.

1. The Committee has two matters that require Convocation's approval:

   - Enhanced payment options for the payment of the annual membership fee.
   - Administrative suspension process for non-payment of annual fees.

2. This report contains:

   - a memorandum from the Chief Financial Officer to the Chair and Members of the Finance and Audit Committee (pages 3 - 6). The memorandum includes discussion regarding membership classes and an annual fee assistance fund. The Committee determined that these two issues would be referred to the Admissions and Equity Committee for comment. The matter will return to the Finance and Audit Committee agenda in March 1998 once the Admissions and Equity Committee has considered the matter.

3. The Finance and Audit Committee recommends that Convocation approve the payment options as set out in the memorandum and detailed below:

   i. Single payment of total applicable fee by January 31st with a 4% discount.

      The membership fee will be grossed up by 4% to enable the Society to maintain its current revenue. It is expected that the increase will generate a revenue to ffset increased administrative expenses, the loss in interest revenue and the 2% cost of accepting payments by credit card.

   ii. Payment in full (no discount) received after January 31st, but before May lst.

      Acceptable payments would include cash, cheque, money order, credit card or wire transfer with no additional processing charges to the member.

   iii. Twelve monthly instalments of equal amounts of the applicable fee payable by preauthorized bank debit only.

      Additional administrative costs will be recovered through an "administration fee" charged to the members selecting this option.

4. The Finance and Audit Committee recommends that Convocation suspend members for non-payment of the annual fee at May Convocation.

Although the Law Society may elect to suspend members effective May 1 for non-payment of the annual fee, it is recommended that the actual suspension not take place until May Convocation. This would provide the Law Society and members with a grace period to account for payments delayed in the mail and to permit some final follow-up by the Law Society staff prior to a member being suspended. It is anticipated that this will significantly reduce the number of members suspended each year for non payment of the annual fee.

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

Copy of a Memorandum from Ms. Wendy Tysall, Chief Financial Officer to the Chair and Members of the Finance and Audit Committee dated September 30, 1997 re: Membership Classes, Payment Options, Administrative Suspensions.

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

Carried

THE REPORT WAS ADOPTED

Lawyers Fund for Client Compensation Committee Reports

Meeting of September 4th, 1997

Report re: Policy proposal concerning the expansion of protection afforded the public who suffer a financial loss due to a lawyer's dishonesty

The Lawyers Fund for Client Compensation Committee
September 4, 1997

Report to Convocation

Purpose of Report: Decision Making

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee ("the Committee") met on September 4, 1997. In attendance were:

Harvey Strosberg (Treasurer)
Clayton Ruby (Chair)
Bob Aaron
Nancy Backhouse
Ronald Cass
Paul Copeland
Gordon Farquharson
Gary Lloyd Gottlieb
Hope Sealy
Stuart Thom
Robert Topp
Richmond Wilson

Staff: Craig Allen, Duncan Gosnell, Malcolm Heins, David McKillop, Richard Tinsley and Jim Yakimovich

2. This report contains:

- a policy proposal concerning the expansion of protection afforded the public who suffer a financial loss due to a lawyer's dishonesty. The proposal would permit members of the public to make a claim to the Lawyers Fund for Client Compensation where the lawyer has negligently provided legal services but intentionally breaches the terms and conditions of the LPIC policy such that the claimant's ability to receive compensation is thwarted.

A. *ELIMINATING GAPS IN PROTECTION BETWEEN THE LPIC POLICY AND THE LAWYERS FUND FOR CLIENT COMPENSATION*

INTRODUCTION

3. In the September, 1996 report to Convocation, of the Lawyers' Professional Indemnity Company ("LPIC"), the LPIC Board of Directors indicated that representatives of LPIC and the Lawyers Fund for Client Compensation (the "Fund") had begun discussions regarding proposed changes to the compensation structure for losses sustained by the public in consequence of dishonesty on the part of any Law Society member in connection with the member's law practice or related role as trustee. This present report is in furtherance of those discussions and sets out a specific recommendation for change to the existing compensation structure.

4. This initiative has been driven by several concerns, including the need to:

- introduce greater consistency in the amount of compensation made available to members of the public as a result of this type of loss; and,
- provide more comprehensive and responsive protection to the members of the public suffering a loss of this nature.

5. With regard to the payment of grants as compensation under the Fund, it is recommended that the discretion under the Fund be expanded to include grants compensating those who have suffered a loss in certain circumstances where there is no coverage available under the Policy.

6. These circumstances would be restricted to situations in which the Lawyers Fund for Client Compensation Committee, as manager of the Fund, is satisfied that an underlying claim (as defined in the Policy) has been made against a member and the member has intentionally failed to report the matter as a claim, either at all or in a timely fashion, or has intentionally failed to co-operate with the insurer or meet other Policy terms and conditions; provided that has resulted in the insurer taking an off coverage position.

Background on the Operation of the Lawyers Fund for Client Compensation

7. The Fund, as provided for in section 51 of the *Law Society Act*, R.S.O. 1990, c. L.8., provides compensation to claimants through grants, which are provided on a discretionary basis.

8. Grants are approved by Convocation in its absolute discretion "... to relieve or mitigate loss sustained by any person in consequence of dishonesty on the part of any member in connection with such member's law practice or in connection with any trust of which the member was or is a trustee...".

9. The General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation (the "Fund Guidelines"), which are established by Convocation, require that:

- the member must have actually received the funds or property of the claimant as a lawyer; and
- the claimant's loss must have been as a result of dishonesty, on the part of the member, in connection with the member's law practice or related role as trustee.

THE CURRENT GAP IN PROTECTION

10. Presently, members of the public who have suffered a loss at the hands of a lawyer may not have recourse against either the Policy or the Fund in some situations because of differences in criteria under which claims are paid.

Situations Involving a Breach of Policy Conditions

11. There have been several cases in recent years where the lawyer has negligently provided legal services; but:

- has failed to report the claim matter to the insurer; or
- has failed to report the claim matter in a timely fashion, such that the insurer's position is prejudiced to the point that it is unable to defend the claim and relieving the insurer from its obligation to provide coverage; or
- intentionally breaches other Policy terms or conditions, such as the need to co-operate with the insurer, again prejudicing the insurer's ability to defend the matter and relieving the insurer from its obligation to provide coverage.

12. The compelling need to provide better protection for the public was explicitly addressed by the Ontario Court of Appeal in 1984 in the case of Perry et al. v. General Security Insurance Co. of Canada et al. 47 O.R. (2d).

13. That case involved a Law Society member who had caused a loss to his client by negligently failing to secure the client's loan as a second mortgage. Subsequently, the solicitor refused to report the matter as a claim under the policy or to co-operate with the insurer, which the court viewed as "... a flagrant case of the flouting of the conditions of the policy by the solicitor. His ignoring of the claim and his failure to advise his insurers of the claim and to co-operate with them was, apparently, deliberate." The client was unsuccessful in executing the judgment as against the policy insurer under the *Insurance Act (Ontario)* after suing and obtaining default judgment against the solicitor.

14. MacKinnon A.C.J.O. said:
"On the facts of this case, the result is an unhappy one. It seems also to run counter to one of the purposes for the insistence by the Law Society of Upper Canada that its members assume this insurance as a condition of being licensed to practice. Surely, one of the main reasons for such a condition was to ensure that members of the public, in the situation of the appellants, would be protected from loss caused by the negligent action or inaction of their solicitors..."

15. Arnup J.A. described the unfairness of the circumstance as follows :
"This is an unjust result. It makes no sense that the clients of a remorseful solicitor, who co-operated with the insurer and the new solicitors of his former clients, might in an appropriate case get relief from forfeiture, whereas the clients of a callous solicitor, who first botched his clients' affairs and then refused to lend them the slightest assistance in their efforts to recoup some of their loss, should find themselves helpless to secure relief from the forfeiture of his insurance, caused by him."

16. The court expressed the view that the claim could not be unique, and indicated "... that immediate action should be taken by the Law Society or the Legislature, or both, so that the present unfairness to innocent clients of insured solicitors can be ended."

17. A more recent case, which has been the subject of unfavourable commentary by the press, is that of Ziad El-amad et. al. v. Stanley D. Goldberg [1997] O.J. No.117 (Ont. Ct. Gen. Div.). That case involved an insured member who had been engaged to represent his clients regarding a motor vehicle accident. The solicitor had failed to honour his undertaking to disclose certain information to the defendants' counsel in that action which resulted in the dismissal of the action. The clients, as well as LPIC, were unaware of the dismissal of the action until some two years later. The clients sued the solicitor, naming LPIC as a third party, seeking an order requiring that LPIC defend the matter.

18. McRae J. refused to provide this order noting that:
"The solicitor/defendant not only failed as required, to immediately notify L.P.I.C., he, in fact, never informed the insurer. Perhaps more seriously, when the client's new solicitor Mr. Ira Book notified the Law Society two years later, Goldberg completely refused to in any way co-operate with the insurer's investigator in spite of great efforts made to get his cooperation by the investigator. There can be no doubt that L.P.I.C. was prejudiced by his failure to report and by his failure to cooperate. If he had reported the claim it is highly likely that in the summer of 1993 the issue would have been quickly resolved by having the orders dismissing the plaintiff's action reversed."

19. The El-amads recently filed a claim for compensation with the Fund.

20. In a third case, Bernard Lee, et al. v. The Law Society of Upper Canada et al. [1994] O.J. No.1468 (Ont. Ct. Gen. Div.), the plaintiff's wife and mother were killed in a motor vehicle accident. The Law Society member filed but failed to serve a statement of claim on behalf of his client's family, but later lead his clients to believe that the action had been settled. The member was sued by his clients four years later, but failed to report the matter to the insurer as a claim.

21. In a 1994 decision, the Ontario Court of Justice refused to provide a declaration of policy coverage. The Court found that there were no damages in that the principle action had been revived and was proceeding, and that the children's action was not statute barred. The Court indicated that regardless, there would have been no policy coverage on the basis of late reporting and the member's misconduct.

22. The Law Society did receive a letter of notice under the Compensation Fund, but did not subsequently receive a completed application/statutory declaration from the claimants as required.

THE COMMITTEE'S VIEW

23. These cases have very clearly demonstrated the compelling need for the Law Society to provide better protection to the public. In dealing with these cases, the courts have recommended that changes be made to ensure that the public is better protected in future situations of these types. These cases have also lead to complaints to the Law Society and unfavourable commentary by the press.

24. In the view of the Committee, to the extent that the breach of Policy terms and conditions is intentional in these circumstances, this breach amounts to dishonesty on the part of the member as referred to in section 51(5) of the *Law Society Act*, and should be eligible on this basis to form a legitimate claim for compensation under the Fund.

25. A legal opinion (see Appendix A) has been obtained by the Law Society which supports the view that in the circumstances, such a breach of Policy terms or conditions may be considered to be dishonesty on the part of the member for the purposes of section 51(5) of the *Law Society Act*.

Changes to the Fund Guidelines

26. Among other criteria described under the Fund Guidelines, the claimant must show that the member actually received funds or property of the claimant in the member's capacity as a lawyer, to be eligible for compensation. The Guidelines also provide guidance in determining the amount of the grants, which are also premised upon the amount of the client's funds (or property) received by the member and any amount returned or otherwise accounted for to the claimant.

27. Since this type of loss is first precipitated by the member's negligence and subsequently by the member's ensuing breach of Policy terms or conditions, there generally is no issue of unaccounted claimant's funds or property. Rather, the claimant's loss is better approximated by the measure of the direct legal damages due to the claimant which flow from the loss.

28. In these instances the amount of the grant, if any, would be set by the Fund in its sole discretion and would reflect what component of the claimant's damages, costs or expenses the Fund deems appropriate in the circumstances. The requirement under the Fund Guidelines, that the member have received funds or property from the claimant, would not apply.

29. Due to LPIC's greater expertise in assessing the loss flowing from the negligent acts of a lawyer, LPIC, if requested by the Fund, will assist in determining an appropriate grant amount for consideration by the Committee.

How Proposed Changes Benefit the Public

30. Where a lawyer has been negligent in providing legal services, there will be elimination of gaps in protection should the lawyer fail to report the claim to LPIC, either at all or in a timely fashion, or where the lawyer fails to co-operate with LPIC [i.e., the fact situation presented in the *Perry* decision will not be repeated].

How Proposed Changes Benefit the Profession

31. Enhanced coverage under the Fund improves the reputation of the profession and maintains public confidence in the ability of lawyers to govern themselves.

32. Improved public confidence by virtue of undertaking measures designed to protect the public.

Financial Implications

33. LPIC has advised that it anticipates there will only be a small number of such claims arriving at the Fund on an annual basis (potentially two or three per year). With a per claimant limit of $100,000, the maximum cost of this proposal should be $300,000. If experience demonstrates the actual number of claims is much higher, the Committee will re-examine the policy to determine whether it should be continued.

RECOMMENDATION

34. The Committee recommends that effective January 1, 1998:

- the Fund Guidelines be expanded to cover claims denied under the Policy, if in the view of Convocation (or the Committee as provided for under the Fund), the member has intentionally:
- failed to report a claim either at all or in a timely fashion, or
- has failed to co-operate with the insurer in accordance with the Policy's terms and conditions;

provided that, in the view of Convocation (or the Committee as provided for under the Fund), the member intended to prejudice the claimant's efforts to obtain compensation.

- in these circumstances described, the requirement of the Fund Guidelines that the claimant show the Law Society member actually received funds or property of the claimant in the member's capacity as a lawyer to be eligible for compensation, should not apply.
- in these circumstances described, the amount of the grant, if any, would not be determined using the general methodology set out in the Fund Guidelines, but rather would be set by the Fund in its sole discretion reflecting what portion or component of the claimant's damages, costs and/or expenses it deems appropriate in the circumstances.

Options and Alternatives for Decision by Convocation

35. Convocation must decide whether to:

a. Adopt the recommendation of the Committee and permit the General Guidelines for the Determination of Grants from the Lawyers Fund for Client Compensation to be expanded to cover claims denied under the LPIC Policy as a result of a member's intentional acts intended to prejudice the claimant's efforts to obtain compensation.

b. Whether to maintain the status quo such that there is no recourse for those whose claims are denied under the LPIC Policy due to the intentional acts of a member.
c. Whether an alternate policy and/or implementation scheme should be designed.

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

Copy of a letter from Ms. Christine H. Mauro of Dutton, Brock, MacIntyre & Collier to Mr. David McKillop dated September 3, 1997 re: Potential Amendments to Guidelines re: Compensation Fund.

(Tab A)

It was moved by Mr. Ruby, seconded by Ms. Sealy that the General Guidelines for the Determination of Grants from the Fund be expanded to cover claims denied under the LPIC Policy as a result of a member's intentional acts intended to prejudice the claimant's efforts to obtain compensation.

Carried

Report re: Self-Reporting Model of annual financial reporting

Mr. Ruby presented for Convocation's approval the Report of the Lawyers Fund for Client Compensation Committee which included the Self Reporting Model of annual financial reporting.

The Lawyers Fund for Client Compensation Committee
September 4, 1997

Report to Convocation

Purpose of Report: Decision Making, Information

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EXECUTIVE SUMMARY

1. The Committee is recommending that the 1998 levy for the Lawyers Fund for Client Compensation be set at $245 for full fee paying members. However, the Committee is not asking Convocation to make a determination on its recommendation at this time. The Committee has undertaken an extensive review of the financial health of the Fund. While the levy has been as high as $300, it has been set at the nominal rate of $1 per year since 1990 due to a surplus of money in the Fund. An actuarial review of the Fund has been undertaken and the conclusion reached that it is no longer possible to charge an artificially low levy and maintain the long term viability of the Fund. However, the Committee is of the opinion that such a levy is only justifiable if proactive measures are taken to reduce the level of future claims.

2. The report contains four options for annual financial reporting to the Law Society by the private practitioner. The Committee is recommending that Proposal D known as the `Self Reporting Model' be adopted. This model acknowledges that the vast majority of members are honest and maintain their books and records in accordance with Law Society regulations. Under the Self Reporting Model the role of the public accountant has been eliminated. Instead, members are able to make the necessary filings themselves. This will annually save the average practitioner hundreds of dollars. To ensure on-going compliance with the Regulations concerning the maintenance of books and records, focused audit teams will be formed.

   The Committee is asking Convocation to determine whether it wishes to adopt the Self Reporting Model of annual financial reporting and if so, to adopt the necessary regulation.

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee ("the Committee") met on September 4, 1997. In attendance were:

   Harvey Strosberg (Treasurer)
   Clayton Ruby (Chair)
   Bob Aaron
   Nancy Backhouse
   Ronald Cass
   Paul Copeland
   Gordon Farquharson
   Gary Lloyd Gottlieb
   Hope Sealy
   Stuart Thom
   Robert Topp
   Richmond Wilson

   Staff: Craig Allen, Duncan Gosnell, Malcolm Heins, David McKillop, Richard Tinsley and Jim Yakimovich

2. This report contains:

   - a report on the Committee's continuing work concerning the assessment of the financial status of the Lawyers Fund for Client Compensation including a recommendation for the 1998 Fund levy;

- a policy proposal concerning some alternatives to the existing model of financial reporting made by a member in private practice to the Law Society.

A. REPORT ON THE FINANCIAL STATUS OF THE COMPENSATION FUND AND 1998 LEVY RECOMMENDATION

Assessment of the Financial Status of the Fund

3. As at June 30, 1997, the Fund had outstanding gross claims of $35.4 million. The maximum grant available to claimants, as established by Convocation, is $100,000. Once this limit is applied to the gross claims inventory, the maximum potential pay out falls to $15.9 million.

4. The current balance of the Fund is just below $22 million. If the Fund were to pay each claim on file up to the appropriate limit (for a total cost of $15.9 million), the remaining balance would be approximately $6.1 million. This is the Fund's uncommitted cash balance.

5. In order for the Fund to be left with a balance of only $6.1 million, it would have to pay in full each and every claim on file up to the appropriate limit. This is not a realistic scenario in view of the fact that many claims are denied as being wholly without merit, do not fall within Convocation's guidelines for payment or are paid at less than the amount claimed even with limits applied. While an uncommitted cash balance of $6.1 million is a "worst case scenario", it is a severe decline from the situation that existed at the beginning of the year.

6. As at December 31, 1996, the balance of the Fund was $24 million (more than $2 million higher than at present). Gross claims were $26.9 million. Claims, once limits were applied, were $12.2 million. The uncommitted cash balance was approximately $12 million; $6 million higher than it is at present.

Claim Payments on the Rise

7. In addition to the balance of the Fund decreasing, claim payments are increasing. In 1996 the Fund paid grants totalling $3.3 million. In the first seven months of 1997 that figure had already been equalled. By the end of 1997, it is expected grant payments will total between $5.5 and $6 million.

8. The increase in claims as well as grant payments is not necessarily indicative of an unfavourable trend. The majority of the increase in new claims is attributed to two lawyers. The conduct of both lawyers relates to mortgage investment activity in the latter 1980's and early 1990's. One lawyer was able to conceal his activities until very recently. The conduct of the remaining lawyer has been known for several years but the claimants have been exhausting potential remedies against other sources (including LPIC) before pursuing claims to the Fund.

Investment Income Declining

9. The annual levy paid by most members of the Law Society to maintain the Fund has been $1 since 1991. The nominal levy has been made possible by the large balance in the Fund and the investment income being earned. However, the declining balance of the Fund and a prolonged period of relatively low interest rates have had a dramatic impact on the Fund's investment income.

10. In 1997 it is expected the Fund will earn $1.9 million in investment income. Between 1991 and 1994 annual income ranged from $2.4 to $3.7 million.

11. The Fund's annual administrative expenses are $1.6 million. With annual investment income figures exceeding this amount, the reduction in the Fund's balance has been less dramatic.

12. In 1998 it is estimated investment income will total $1.1 million. As a result, administrative expenses are no longer being covered by investment income and there will be further erosion of capital.

Effect on the Balance of the Fund

13. By the end of 1997 the balance of the Fund will fall below $20 million for the first time in well over a decade. By the end of 1998 the balance will fall below $15 million which is less than the maximum potential pay out and results in a negative uncommitted cash balance. The Fund has not had a negative uncommitted cash balance since June 30, 1985 when claims with limits applied were $13.2 million and the balance of the Fund was $10.5 million

14. While future claims and the resulting claim payments are difficult to predict, should current levels continue (grant payments of approximately $5 million per year) and the levy remain at $1 per year, the balance of the Fund would be exhausted at some point during 2001.

The Annual Levy

15. Unlike LPIC, the Fund is financed by the membership as a whole through the payment of an annual levy. The levy is paid by both practising and non-practising members.

16. At present, members who due to illness, economic circumstances or other reasons, cease practising or become unemployed, or are taking parental leave, pay 25% of the full annual fee in order to maintain their memberships in the Society. These members have been paying 25¢ towards the operation of the Fund.

17. Members not engaged in legal practice in respect of the law of Ontario, including those employed in education, government, corporations or any other position who do not provide legal advice, opinions or services, pay 50% of the full annual fee.

18. Due to the fact that claims for intentional acts are generally brought under the LPIC policy if the culpable lawyer practised in partnership or association with others, the vast majority of lawyers who have claims brought against them at the Fund are sole practitioners.

19. The 343 claims currently open with the Fund relate to 67 members and former members of the Law Society. Of those 67 members, all but 5 were sole practitioners at the time the alleged dishonest conduct occurred. However, it should be noted that dishonesty among sole practitioners is not a widespread problem. There are over 6,000 sole practitioners in Ontario and therefore only 1% present any type of concern for the Fund.

20. Of the 62 sole practitioners against whom claims have been filed, 3 are responsible for 55% of all 343 open claims with the Fund. 54 of the sole practitioners have 5 or fewer claims against them.

21. From a `risk assessment' perspective, arguably sole practitioners should bear a greater proportion of the cost of the operation of the Fund. This argument is only valid if the Fund is viewed as a form of insurance, which it is not. The Fund is a trust operated by the Law Society to assist clients who have suffered a financial loss due to a lawyer's dishonesty. The operation of the Fund is a statement to the public at large that the profession is concerned about lawyer dishonesty and as a self-governing profession, is willing to financially assist those clients who are victims of lawyer malfeasance.

22. When lawyers commit dishonest acts that lead to financial losses for clients, the reputation of the entire profession suffers. The operation of the Fund is a vehicle whereby all lawyers, be they sole practitioners, partners, associates, employees - practising law or otherwise; can stand behind their profession and declare their intent to help right a wrong.

23. The Lawyers Fund for Client Compensation Committee recommends that all members of the Law Society, notwithstanding their status, continue to contribute to the operation of the Fund through payment of an annual levy.

Proposal for Increased Annual Levy

24. Historically, the Fund levy has varied annually between $1 (the current levy) and $300 (the 1982 levy). The following chart lists **all** annual levies dating back to 1973 together with a sampling of levies from 1972 back to 1954 when the Fund was formed.

Lawyers Fund for Client Compensation Annual Levy (in dollars), 1954-1997

Year	Levy
1954	$ 10
1957	10
1959	20
1960	45
1964	100
1968	30
1971	30
1973	30
1974	20
1975	20
1976	30
1977	50
1978	30
1979	50
1980	90
1981	100
1982	300
1983	275
1984	275
1985	275
1986	250
1987	225
1988	245
1989	50
1990	25
1991	1
1992	1
1993	1
1994	1
1995	1
1996	1
1997	1

25. It is noted from the above table that between 1982 and 1988, Society members were assessed amounts between $225 and $300 annually in order to provide for grants and expenses paid by the Fund.

26. An accounting and actuarial analysis of the Fund's current file inventory reveals that the unpaid claims liability, as at June 30, 1997, is $10.3 million. This amount encompasses grants expected to be paid on claims for which the Fund received notification prior to June 30, 1997. It also includes a provision for future administrative expenses. In other words, it is expected that it will cost $10.3 million to completely eliminate the June 30 file inventory which , with limits applied, totals $15.9 million; pay claims that will eventually come in but for which notice of a potential claim had been received by June 30, 1997 and pay the necessary administrative expenses to undertake this task.

27. Further analysis by the actuary of the unpaid claims liability, the investment income of the Fund and its administrative expenses reveals that a substantial increase in the levy for 1998 is required to ensure the long term financial viability of the Fund. The actuary has recommended that the 1998 Compensation Fund levy be set at $245 with adjustment for members who do not pay the full Law Society fee.

28. The actuarial analysis was prepared by Craig Allen, Vice President of Actuarial Services for LPIC. Mr. Allen attended the meeting of the Committee to explain how he arrived at his recommendation. It should be noted that Mr. Allen's analysis has been reviewed by the Law Society's external auditors and they are in agreement with his conclusions. Mr. Allen's report is at Tab 1.

The Committee's View

29. Mr. Allen's actuarial analysis is the first time a levy recommendation has been made using anything other than educated guesswork. This analysis predicts that claims and grant payments will continue to rise in future and a levy of $245 is required to meet those needs. Charging a levy of less than $245 may be a sound alternative if the future level of claims decline. The evidence currently available does not support such a conclusion.

30. The Committee is of the opinion that the underlying decision to be made is whether to be conservative and adopt the actuarial analysis that predicts claims will continue to rise or take a more aggressive stance and hope levels fall.

31. The Committee also examined the issue of placing a cap on payments from the Fund as a potential means to assist in the prevention of further capital erosion from the Fund. At present, there is no per lawyer cap in place which would limit payments to clients of any one dishonest lawyer. There is, however, a per claimant limit of $100,000. No single client is entitled to a grant of more than $100,000.

32. As of January 1st 1988 the Fund eliminated a $1,000,000 per lawyer limit. The primary reason for eliminating the limit was delay in paying claims to victims. Having a limit in large dollar cases necessitated waiting until all the claims had arrived, determining the appropriate level of grant and then paying the victim a pro rata share of the available limit.

33. The delays lead to hardship for victims in many cases; upset and resentment on the part of the victims and adverse publicity for the Fund and the Law Society. Eliminating the limit resolved most of these problems.

34. The Committee reaffirms its long standing policy of not having a per lawyer cap in order to prevent artificial delay to victims of lawyer dishonesty. The Committee believes the $100,000 per claimant limit is sufficient to protect the Fund from large, unexpected losses.

35. The Committee accepted the actuarial evidence and is proposing the 1998 Compensation Fund levy be set at $245. Faced with this number, and the prospect of its continuation, the Committee is concerned that the future should not resemble the past. It feels it cannot recommend this levy and at the same time fail to recommend steps that will ensure that future dishonesty by lawyers is not more effectively controlled and more effectively prevented.

36. Failure to act would be unacceptable to the profession and unacceptable to the public. Accordingly, the Committee examined alternate models for the prevention of dishonesty by those few members of the profession who disgrace us all.

B. POLICY PROPOSAL FOR ALTERNATIVE FORMS OF ANNUAL FINANCIAL REPORTING TO THE LAW SOCIETY BY THE PRIVATE PRACTITIONER

NATURE OF THE ISSUE

37. The Committee is proposing an amendment to section 16 of Regulation 708 made pursuant to the Law Society Act. This section requires every member who engages in the private practise of law in Ontario to file with the Society, within six months of the termination of the member's fiscal year end, a report completed by a public accountant.

38. The amendment proposed by the Committee would permit members and their record keeping staff to complete a Law Society form modified to accommodate this model. The retention of a public accountant would become optional.

39. To ensure that the `self reporting model' does not reduce compliance with record keeping standards and to maintain the honesty of the profession, teams of auditors would be hired and dedicated to compliance enforcement through continuous, targeted and visible auditing programmes.

BACKGROUND

40. This section of the report discusses the existing Law Society model of annual financial reporting made by a member in private practice and proposes four alternative models in respect to member reporting on financial record keeping practices and the handling of trust money.

Existing Member Annual Filing Model

41. The existing annual filing model is in response to Regulation 708, Section 16, which reads as follows:

16 .(2) Every member who engages in the private practice of law in Ontario shall file with the Society within six months from the termination of his or her fiscal year a certificate in the form prescribed by the rules and a report duly completed by a public accountant and signed by the member in the form prescribed by the rules in respect of each practice with which he or she was associated since his or her last filing.

The certificate referred to is the Private Practitioner Form [formerly known as Form 2] and the report duly completed by a public accountant is the Public Accountant's Report to Lawyer [formerly known as Form 3].

Role of the Public Accountant

42. Under the existing model of reporting, a member in private practice must retain a public accountant to review the law firm records and to make a report which is filed with the Law Society. The nature of this accountant engagement is not an *audit* in accordance with professional accounting standards nor one in which the accountant expresses a professional opinion about the accuracy or reliability which can be placed on the trust accounting records. Rather, it is a specified procedures review engagement.

43. The engagement is restricted to one in which the public accountant confirms to the Law Society whether or not the law firm is in compliance with the books and records requirements, as stipulated by Regulation 708, and requires the accountant to perform specified review procedures developed by the Law Society, as outlined on the Public Accountant's Report to Lawyer. Examples of specified review procedures performed by the accountant are the review and reporting of dormant trust money and the test review for overdrawn trust accounts, etc.

44. This public accountant engagement is costly to the practising lawyer. The accountant fees specific to the annual Law Society reporting engagement can range from a minimum of $500.00, for the smallest solo law firm, to $25,000 for the largest law firms. The average smaller size firm pays an accountant fee in the range of $ 700-$1,000 for the completion of the Law Society accountant form review engagement and filing. This engagement does not include the detailed auditing of the handling of trust money. In addition, these fees do not relate to any tax filings or financial statement preparation.

Attributes Associated With Annual Forms Reporting

45. The attributes associated with a regulatory model which provides that lawyers file an annual report on accounting practices are:

- The annual accountant engagement visit and filing cycle provides a measure which ensures that lawyers bring the law firm records up to date at the end of each fiscal year, notwithstanding that trust accounting records should be always current.

- The annual filing cycle provides the Law Society with a status reporting on a law firm's trust accounting practices.

- The annual filing cycle provides a basis for the Law Society to identify those filings which disclose matters which are not in compliance with the Regulation.

- A lawyer's failure to file the annual accountant's report is often because trust accounting records are seriously deficient or trust money has been misused. Failure to file the accountant's report serves as a basis for striking an investigation.

Analysis of Existing Model of Forms Reporting

<u>Pro</u>

- The Private Practitioner Form is prepared by the lawyer. It reports compliance with specific Rules of Professional Conduct issues and other practice related questions and serves as an important measure in the governance of lawyers in private practice.

- The Public Accountant's Report to Lawyer serves as an independent reporting on whether the practising lawyer is meeting with record keeping requirements as provided by the Regulation.

- The attributes associated with annual reporting, discussed above, are important to maintaining the public confidence in the Law Society's governance of trust account matters.

- Annual reporting serves as an economical alternative to mandatory full scale annual audits by Law Society staff.

- Given the "non audit" nature of the engagement, the existing accountant's report model seldom discloses serious trust account matters to the Society as its specific function is not to identify fraudulent activity. This measure provides important information which serves as the basis for Law Society staff to seek authority to conduct an investigation pursuant to the Regulation. It is the Law Society's investigation which determines the scope of the member's trust accounting record keeping deficiencies or the misuse of trust money.

Con

- The public accountant engagement fee is expensive to practising lawyers.

- The current public accountant's engagement is not an audit, so the benefits derived from the current model of reporting on law firm accounting practices and compliance with the Regulation is limited, and, thereby, can be achieved by alternative approaches.

- The Law Society's compliance efforts continue to detect trust accounting and trust money problems despite a filed Public Accountant's Report to Lawyer form. Trust account shortages, misapplication of trust money and serious deficiencies in the maintenance of trust accounting records cases often originate from Law Society initiated compliance review activities derived from matters reported on forms or as a result of an investigation initiated from a client complaint or information received from numerous other sources.

- The current forms reporting model for private practitioners requires the completion of two forms in regard to private practice matters: the Private Practitioner Form and the Public Accountant's Report to Lawyer form. There are administrative and direct cost issues for all parties associated with the issuing, completion and processing of these two forms.

- The current model of accountant form reporting, and subsequent investigation, is a reactive program. A proactive spot audit program has not been in existence since the start of the recession in 1990. The Society's spot audit resources which were in existence in the 1980's were reassigned in the early 1990's to investigative activities in response to increasing client complaints and investigative activities specific to other reactive investigation programmes. Budget constraints in the 1990's did not provide for resources to meet both, investigative and spot audit programmes.

Statistics for Consideration

46. Select statistics compiled from the new model of forms indicate that:

    - Lawyers in private practice hold a total of $2 Billion in trust money at the most recent year end of law firms. Of this $2 Billion, about $450 Million is held by sole practitioners.

    - Of the $2 Billion, $½ Billion is held in mixed trust accounts and $157 Million is held in estate accounts.

- In 1996, lawyers that report acting on private mortgage investments for clients in amounts which total $2 million, or more, cumulatively report acting on private mortgage investments which exceed $ 250 million.

- 35 lawyers each report acting on between 26 - 75 private mortgage investments for clients in 1996.

- 22 lawyers each report acting on 75 or more private mortgage investments for clients in 1996.

47. These statistics indicate the amount of trust money held by the profession and the extent of mortgage investment activity made through the profession in 1996. It is respectfully suggested that to ensure adequate protection of the public, alternative compliance models be considered.

Alternative Future Models of Financial Reporting by the Practitioner

48. To create an enhanced financial reporting and compliance control model, four alternative models were considered:

Proposal A: The Full Audit Standard: A public accountant engagement which requires the accountant to perform a complete audit to enable the accountant to express a professional opinion as to the completeness of the records and the accuracy of the financial information reflected therein.

Proposal B: An Enhanced Specified Procedures Review Engagement: This model is a modification of the current specified review engagement and would require the accountant to conduct additional specific review procedures additional to those currently done respecting the law firm's accounting records. The review procedures are those reflected on the Public Accountant's Report to Lawyer form. To enhance the role of the public accountant, the questions on the form would be increased to direct the accountant to perform a more detailed review of the accounting records.

Proposal C: Current Model of Accountant Review and Form Filing Augmented by an Audit Team: This model is a modification to the current specified procedures review engagement. The accountant's role would remain unchanged and the current Public Accountants Report to Lawyer form will continue to be used. To provide an investigative focus on matters which give rise to Lawyers Fund For Client Compensation claims, auditors would be hired and given a focused mandate to auditing law firms which display characteristics common to Compensation Fund claims.

Proposal D: Self Reporting Model: This model would not require a law firm to retain a public accountant to review its records and complete a reporting form to the Law Society. The lawyer and record keeping staff of the law firm would complete a Law Society form modified to accommodate this model. To ensure that this model does not reduce compliance with record keeping standards, teams of auditors would be hired and dedicated to compliance enforcement through continuous, targeted, and visible auditing programmes.

Proposal A: The Full Audit Standard

Overview of the Full Audit Standard

49. This model of public accountant engagement would require the accountant to perform a complete audit to enable the accountant to express a professional opinion as to the completeness of the records and the accuracy of the financial information contained therein. The accountant will be required to file a report to the Law Society on the results of the audit.

Discussion

50. This model proposes that the Law Society adopt a financial reporting model which significantly enhances the role of the public accountant in the review of a law firm's accounting records. The extent of the accountant's auditing efforts will be at the discretion of the accountant to enable the expression of a professional opinion about the financial affairs of the law practice.

51. The model proposes that each year the member will be required to retain a public accountant to perform an audit to the extent required to enable the accountant to render a full professional opinion.

Pro

- As with the current model, the requirement to report on financial matters would compel law firms to ensure that record keeping and trust accounting practices are in compliance with the Regulation.
- The attributes associated with annual accounting reporting will continue to exist.
- This model does not require an amendment to the Regulation. The Rules will require amendment to give recognition to the accountant's audit report.
- The more intensive review of the law firm's financial transactions under this model will likely result in the detection of misuse of trust money because the accountant will be required to perform a detailed tracing of trust money through the law firm's accounting records and client files. This intensive review will protect trust money because the early detection of trust money problems will permit corrective and disciplinary measures to be imposed at a much early date than under the current model.
- The requirement to engage an accountant to perform a full audit of the law firm's accounting records will deter members from misuse of trust money where the member may be contemplating such an action.

Con

- The costs associated with the annual retention of the licenced public accountant will be substantially greater than with the current model of accountant engagement and reporting.
- This model is without precedent in Canada or the United States. Given the scope of the audit engagement, the cost factor associated with this model may make it one not readily accepted by the profession.

- The Institute of Chartered Accountants of Ontario has expressed reservations with an engagement of this nature detecting fraud. (See attached tab 2) As outlined in tab 2, an audit is not designed to detect fraud. Its purpose is to determine whether or not the law firm is maintaining its records in compliance with the Regulation and to test check the veracity of entries made in the accounting records. Any detection of trust money misuse would be a by product of the detailed random sampling and tracing of money in the accounting system done for purposes of the audit.

- This model places significant additional costs on the practitioner. Whether this model of accountant's engagement is justified given that only a small percentage of members in private practice misuse trust money, is a factor for consideration. The typical practitioner that has misused trust money could delay detection by continued failure to retain an accountant for purposes of the audit thereby circumventing the objectives associated with this model.

Impact On the Discipline Process

52. In 1996, 419 matters were authorized for discipline prosecution, of which 172 pertain to failure to file forms and twenty four (24) pertain to trust account issues, i.e., misappropriation or misapplication.

53. It can be expected that under this more demanding audit engagement, non filer prosecutions will increase given the substantial costs associated with an audit as members with a less substantial practice will find difficulties absorbing the costs associated with an engagement of this nature.

54. The more extensive audit engagement is likely to increase the detection of trust money misuse and record keeping inadequacies, thereby increasing the number of prosecutions of this nature.

Assessment of Risk to the Public

55. To respond to this issue, one must consider whether this model of enhanced accountant testing and reviewing will detect greater incidence of trust money misuse; whether the model will discourage members from misusing trust money; or will this model cause a member, who sets out to act in a dishonest manner, to falsify the records in such a manner as to avoid detection of trust money misuse. No empirical data exists to provide a statistically reliable answer to this question. To respond to this question, one must consider the following factors:

- The known incidence of trust money misuse is not significant in that only 24 of 419 matters authorized in 1996 pertained to trust money misuse. In 1995, 25 of 569 matters authorized pertained to trust money misuse.

  This information is instructive in that it supports the notion that misuse of trust money is not a significant proportion of the matters authorized.

  To put the numbers in context, the 1996 statistics could be restated to say that for every 1000 members engaged in private practice, only 1.4 members are the subject of a prosecution for the misuse of trust money.

  Although the more rigorous accountant engagement will likely detect greater incidence of minor trust money misrecording and record keeping inadequacies, the benefits derived from this model of accountant engagement must be weighed against the additional cost for accountant's fees.

- Practitioners may attempt to avoid detection of trust shortages by purposeful failure to retain an accountant to perform the audit, with the result that non filers of financial reports would increase.

  The increase in non filers should be met with a meaningful `failure to file' investigation program. Existing staffing levels do not provide for such an extensive program, thereby creating an environment in which the profession will not only be faced with greater accountant's fees, but would also be faced with added Law Society fees to provide an appropriate investigative response to the increase in non filers.

- The requirement to engage an accountant to perform a full audit of the law firm's accounting records will deter members from misusing trust money where the member may be contemplating such an action. However, some members may attempt to avoid detection of inappropriate use of trust money by transacting the client matter on an "off the books" basis, thereby increasing the difficulty in the Society's investigation of the public's complaints about misuse of trust money.

Costs To the Profession for a Full Audit Model

56. Information gathered from a select group of accountant's in public practice determined that the costs of a full audit engagement for a sole practitioner, in an average practice environment, and one in which record keeping practices were not problematic, could range from $2,500 to over $4,000 annually. This amount is substantially higher than existing fees related to the Law Society aspect of current accountant engagements by a sole practitioners. The substantial costs are because of the extensive scope of the engagement.

Impact of the Full Audit Model
☞ Substantial increase to annual accountant's fee.
☞ No amendment is required to the Regulation.
☞ Likelihood of greater incidence of detection of trust money misuse.
☞ The long term benefits will be a reduction in substantial trust money misuse through early detection and disciplinary action.
☞ Likely increase in non filing of accountant reports thereby *necessitating additional investigative resources to audit the trust records of members who have failed to file.*

Proposal B: Enhanced Specified Review Engagement

Overview of the Enhanced Specified Review Engagement

57. This model is a modification to the current specified review engagement and would require the accountant to conduct additional, to those currently done, specific review procedure tests of the law firm's accounting records. The review procedures are those reflected on the Public Accountant's Report to Lawyer form. To enhance the role of the public accountant, the questions on the form would be increased to direct the accountant to perform a more detailed review of the accounting records.

Discussion

58. This model proposes that the Law Society modify its current financial reporting model. The scope of the accountant's review will not be as extensive as that pertaining to the full audit standard, but will be more probing than the current model of accountant review engagement.

59. The model proposes that each year the member will continue to be required to retain a public accountant to perform a review of the practice's records, in accordance with the procedures specified on the Law Society form, and to complete the Public Accountant Report to Lawyer form.

60. As with the current model, the requirement to report on financial matters will compel law firms to ensure that record keeping and trust accounting practices are in compliance with the Regulation.

Pro

- The attributes associated with annual accounting reporting, as discussed earlier in this report, will continue under this model.

- This model does not require an amendment to the Regulation. An amended Public Accountant Report to Lawyer form would have to be prescribed by Convocation pursuant to the Rules.

- The more intensive review of the law firm's financial transactions will likely result in the detection of misuse of trust money or record keeping inadequacies. This is due to the fact that the additional questions added to the form will require the accountant to perform specific reviews of trust transactions. (See Tab 3 for questions proposed to be added to the accountant's reporting form.)

- The requirement to engage an accountant to perform an enhanced level of review of the law firm's accounting records will deter members from misuse of trust money where the member may be contemplating such an action.

Con

- The costs associated with the annual retention of the licenced public accountant will be significantly greater than with the current model for the typical small firm practitioner given the expanded review performed by the accountant.

- The costs associated with this model make it onerous for many members of the profession.

- An accountant review of this nature will be designed to test the veracity of a specific number of trust transactions. The detection of trust money misuse would be a by product of the detailed tracing of money in the accounting system if the transactions in the sample selected for review by the accountant included those which were improper. This early detection of trust money misuse will benefit the Compensation Fund because these matters will be brought before a discipline panel more quickly than under the current model.

- This model places significant additional costs on the practitioner. The costs associated with this model must be considered in relation to the benefits to be derived from the more extensive review. Practitioners may attempt to avoid detection of trust shortages by purposeful failure to retain an accountant to perform the audit, with the result that non filers of financial reports would increase.

The increase in non filers should be met with a meaningful `failure to file' investigation program. Existing staffing levels do not provide for such an extensive program, thereby creating an environment in which the profession will not only be faced with greater accountant's fees, but would also be faced with added Law Society fees to provide an appropriate investigative response to the increase in non filers.

Impact On the Discipline Process

61. In 1996, 419 matters were authorized for discipline prosecution, of which 172 pertain to failure to file forms and twenty four (24) pertain to trust account issues, i.e., misappropriation or misapplication.

62. This information is instructive in that it supports the notion that misuse of trust money is not a significant proportion of the matters authorized. The more extensive review of a law firm's trust transactions may increase the detection of minor trust money misuse and record keeping inadequacies, thereby increasing the number of prosecutions of this nature.

63. It can be expected that under this more demanding accountant review engagement, non filer prosecutions will increase given the additional costs associated with an audit as members with minimal practice "profits" will find difficulties absorbing the additional costs associated with an engagement of this nature.

Assessment of Risk to the Public

64. To respond to this issue, one must consider whether this model of enhanced accountant testing and reviewing will detect greater incidence of trust money misuse; whether the model will discourage members from misusing trust money; and/or will this model cause a member, who sets out to act in a dishonest manner, to falsify the records in such a manner as to avoid detection of trust money misuse. No empirical data exists to provide a statistically reliable answer to this question. To respond to this question, one must consider the following factors:

- The known incidence of trust money misuse is not significant in that only 24 of 419 matters authorized in 1996 pertained to trust money misuse. In 1995, 25 of 569 matters authorized pertained to trust money misuse. This information is instructive in that it supports the notion that misuse of trust money is not a significant proportion of the matters authorized. Current Law Society investigation activity does not support the notion that significant numbers of dishonest lawyers exist.

  To put the numbers in context, the 1996 statistics could be restated to say that for every 1000 members engaged in private practice, only 1.4 members are the subject of prosecution for the misuse of trust money.

  Although the more rigorous accountant engagement will likely detect greater incidence of minor trust money misuse and record keeping inadequacies, the benefits derived from this model of accountant engagement must be weighed against the additional cost for accountant's fees.

- Practitioners may attempt to avoid detection of trust money misuse or serious record keeping inadequacies by purposeful failure to retain an accountant to perform the audit, with the result that non filers of financial reports would increase.

The increase in non filers should be met with a meaningful `failure to file' investigation program. Existing staffing levels do not provide for such an extensive program, thereby creating an environment in which the profession will not only be faced with greater accountant's fees, but would also be faced with added Law Society fees to provide an appropriate investigative response to the increase in non filers.

- The enhanced accountant engagement will likely deter members from misusing trust money where the member may be contemplating such an action. However, some members may attempt to avoid detection of inappropriate use of trust money by transacting the client matter on an "off the books" basis, thereby increasing the difficulty in the Society's investigation of the public's complaints about misuse of trust money.

Costs To the Profession for an Enhanced Specified Procedures Review Engagement

65. Information gathered from a select group of accountants in public practice determined that the costs of an enhanced engagement for a sole practitioner, in an average practice environment, and one in which record keeping practices were not problematic, is likely to increase by an additional $500.00, or more, over current accountant fees, on an annual basis.

66. The additional costs are because of the expanded scope of the engagement.

Impact of the Enhanced Specified Procedures Review Engagement Model

☞ Significant increase to annual accountant's fee.
☞ No amendment is required to the Regulation.
☞ Convocation must prescribe an amended Public Accountant's Report to Lawyer.
☞ Likelihood of greater incidence of detection of trust money misuse.
☞ The long term benefits will be a reduction in substantial trust money misuse through early detection and disciplinary action.

☞ Likely increase in non filing of accountant reports thereby *necessitating additional investigative resources to audit the trust records of members who have failed to file.*

Proposal C: Current Model of Accountant Review and Form Filing Augmented by an Audit Team

Overview of the Current Model of Accountant Review and Form Filing Augmented by an Audit Team

67. This model is a modification to the current specified procedures review engagement model. The accountant's role would remain unchanged from their current role and the current Public Accountants Report to Lawyer form will continue to be used.

68. To focus on matters which give rise to Lawyers Fund For Client Compensation claims, auditors would be hired/retained and given a focused mandate to auditing law firms which display characteristics common to Compensation Fund claims, including issues of concern identified by LPIC and other departments of the Law Society.

69. This model will increase the Law Society's ability to detect problems of a serious nature through its proactive mandate of selective auditing of law firms. The early detection of trust money misuse or mortgage investment problems will allow for remedial activities where warranted, or in the alternative, disciplinary action. The audit programme will reduce the incidence of undetected matters which, where allowed to continue, often escalate into major dollar value claims against the Lawyers Fund for Client Compensation.

70. The discussion earlier in this report about the existing member annual filing model applies to this model save for comments about the lack of an audit programme.

71. This model is distinguished from the existing model of annual filing by the introduction of an audit team with a mandate of performing audits on members who meet a profile common to lawyers that give rise to claims against the Lawyers Fund for Client Compensation.

Factors which support the addition of an audit team:

- The creation of a Law Society audit team will bring a visible and meaningful Law Society presence at law firms. This measure will have the additional effect of reducing compliance issues through education and remedial activities where record keeping standards are sufficiently below standard.

  It is envisaged that the educational component will be comprised of on-site tutoring where the audit has detected record keeping inadequacies. It will also include the development of Website and Law Society Gazette materials to provide the profession with comprehensive guidance, interpretation and general information about record keeping requirements and practices.

- A practitioner's attempt to avoid detection of trust shortages by purposeful failure to file the form in a timely fashion will be met with the response of an immediate audit under a failure to file audit programme strategy.

72. The offsetting cost to the profession is the increase in annual fee associated with the creation of a suitably sized investigative audit team. The fee increase would approximate $ 42.00. The costs of the audit team will rise commensurate with any increase in resources necessary to fulfill its mandate.

73. Restricting the mandate of the audit team to only those serious matters which, if left unaddressed, may lead to claims to the Compensation Fund will allow for the timely fulfilment of this programme's mandate. On this basis, firms which display compliance with record keeping requirements and money handling standards, and who also dedicate sufficient human resources to record maintenance efforts, would be exempt from this programme.

Audit Team Direct Costs

74. The estimated annual cost of a single audit team is as follows:

One Supervisor - accountant-	$ 75,000
1 Support Person	$ 35,000
Three examiners (for narrow issues audits)	$130,000
Seven Accountants (for significant issues audits)	$485,000
Payroll Overhead Burden @ 14 % (rounded)	$100,000
Travel Costs (primarily mileage allowances)	$ 70,000
Overhead costs for supplies ($1000/person/rounded)	$ 12,000
Depreciation of computers ($55,000/3 years *)	$ 18,000
Team Total	$ 925,000

* On creation of the team, an equipment expenditure will also be required for computers for these staff. This expenditure should approximate $55,000, which would be capitalized and expensed over a three year period. The computers would be replaced every three years given wear and tear of travel.

In addition, the Society will be required to make office space available for the auditors. Given the nature of the position, a shared space arrangement would suffice as many of the staff would be away from the office a significant portion of the time. It may be desirable to locate a person in the Ottawa and London offices to respond to issues in those areas of the province. Some expenditures will be required to provide adequate facilities and work stations.

Mandate of the Proposed Audit Team and Comparison to a Spot Audit Programme

75. In prior decades, the Law Society of Upper Canada conducted spot audits. Members selected for spot audit were identified without regard to predetermined profiles or circumstances. The selection was often based on "coverage of a geographic area", "alphabetical selection", etc. The focus of the spot audit programme was to ensure compliance with regulatory record keeping standards. The detection of substantive matters was a by product of the programme.

Proposed Focused Audits Programme

76. Unlike the previous spot audit programme, members subject to a focused audit will be those selected based on a strategic member profile, as outlined later in this report at paragraphs 96 to 98. Given this focus of the audits, these proactive efforts will identify and address substantive compliance or conduct issues which often give rise to claims to the Compensation Fund and which, given their nature, often warrant consideration for disciplinary activity.

Impact of the Current Model of Accountant Review and Form Filing Augmented by a Audit Team

☞The annual accountant's fee is not affected by this model.

☞ No change to the Regulation or to existing prescribed forms.

☞The annual Law Society dues will increase by about $42.00 for a single audit team.

☞ Likelihood of an increase in the detection of trust money misuse through the efforts of the audit team.

☞ The long term benefits will be a reduction of substantial trust money misuse through early detection and disciplinary action.

Proposal D: Self Reporting Model

Overview of the Self Reporting Model

77. This model introduces significant proactive measures which may reduce operating expenses for a law firm, will reduce prosecutions for non filing of forms, will reduce the number of forms filed by the member, and will introduce a programme of visible and meaningful Law Society presence at law firms through the creation of audit teams dedicated to compliance efforts. The continued requirement to report trust account details to the Law Society, coupled with the benefits associated with audit teams, will ensure that the public's interest is well protected.

78. The proposal includes the elimination of the existing Public Accountant's Report to Lawyer form, and by extension, the elimination of the mandatory annual accountant engagement with respect to the review of the lawyer's accounting records. The result of this initiative will be that compliance reporting of law firm accounting records will be made solely by the practising lawyer, with or without the assistance of employed accounting staff, or, at the option of the member, with the assistance of a professional accountant.

Proposed Member Self Reporting Model

79. This model proposes that the Law Society adopt a member annual reporting model which eliminates the requirement that a public accountant be engaged to report to the Law Society on the law firm's accounting practices. A lawyer in private practice will likely continue to engage a professional accountant for annual financial and taxation reporting requirements, and may elect to retain a professional accountant to assist the member with the financial component of the member's annual filing report.

80. A lawyer that elects to continue to retain an accountant to perform a periodic overview assessment of the trust accounting practices of the law firm, as opposed to retention for the purposes of completing the form, will likely pay an accountant's fee which is less than that currently paid given the reduced role of the accountant.

81. This model proposes that the member file a consolidated annual practice report, which incorporates reporting on accounting matters, through use of the Private Practitioner Form modified for this purpose. This consolidated report will allow Convocation to eliminate the Public Accountant's Report to Lawyer form.

82. To maintain public confidence in the Law Society's governance of lawyers' trust accounting compliance, this model proposes that auditors be hired/retained to perform audits to ensure trust accounting record keeping compliance standards continue to be met and to service the profession by providing on site advice and continuous education in this regard.

83. Compliance or spot audits are an accepted part of every profession. Section 8 of the *Canadian Charter of Rights and Freedoms*, while providing protection from unreasonable search or seizure permits entry, by those charged with the duty of enforcing regulations, without reasonable grounds where the purpose is regulatory in nature, e.g health and safety, and not pursuant to a criminal investigation.

84. The audit program will also have a focus on matters which give rise to Compensation Fund claims. These matters include extremely poor trust accounting records, acting for private lenders in mortgage investments where the security is questionable and the lawyer acts for a multitude of parties, shortages in the trust bank account, etc.

85. An amendment to the Bar Admission Course is required to include a module specific to lawyer annual reporting obligations under this model so that future members will be familiar with their obligations under this model.

86. Under this model, merit exists to changing the filing period for the forms to require that members complete and file the financial report within 90 days from the end of the practice fiscal year end. This reduced filing period will enable the Society to respond to reported problems, or purposeful non filers, more readily than would be the case with the current 180 day filing period. Because the lawyer is no longer obliged to defer to the public accountant's busy schedule, it is expected that this reduced filing delay will not be overly onerous on the profession.

Pro

- This model provides an effective alternative reporting method regarding law firm accounting practices.

- Provides a model which will permit the Society to consolidate the existing Private Practitioner and Public Accountant's Report to Lawyer forms into one single annual reporting form. Given the "blank" pages on the existing Private Practitioner Form, it is anticipated that the physical size of the current form will not increase. (Tab 4)

- Provides the member with the *option* of engaging any qualified professional accountant to assist in the completion of the portion of the proposed consolidated form which pertains to the law firm's accounting system reporting requirement.

  The member in private practice will have the ability to report on the financial matters either by personally performing all the accounting system reviews, by using the assistance of the law firm's bookkeeping or accounting department staff to assist him/her in making the review and reporting, or by retaining a professional accountant for that purpose.

  As the retention of the licenced public accountant will be optional to the lawyer in private practice, the costs associated with the current mandatory annual engagement may be eliminated for those firms that elect to not retain an accountant to assist in the financial reporting under this model.

- As with the current model, the continuing requirement to report on financial matters will compel law firms to ensure that record keeping and trust accounting practices are in compliance with the Regulation.

- The public protection measures associated with annual law firm accounting reporting to the Law Society will continue to exist under this model.

- The model proposes an amendment to the Regulation which includes a provision which will give the Secretary or a Discipline Hearing Committee the discretion to require the member to retain a public accountant for purposes of an audit and report to the Law Society where circumstances warrant. (Tab 5)

- The creation of Law Society audit teams will bring a visible and meaningful Law Society presence at law firms. This measure will have the additional effect of reducing compliance issues through education and remedial activities where record keeping standards are not maintained so that the member does not continue with practices which may result in the misuse of trust money.

It is envisaged that the educational component will be comprised of on-site tutoring where the audit has detected record keeping inadequacies. It will also include the development of Website and Law Society Gazette materials to provide the profession with comprehensive guidance, interpretation and general information about record keeping requirements and practices.

- Provides an institutional response and relief to those practitioners who can ill afford the current public accountant engagement forms reporting model.

- Information gathered about law firm trust accounting systems, through the 1996 Public Accountant's Report to Lawyer form, has created a database of member record keeping practices to serve as a foundation from which to launch this initiative. This information will be used to assist lawyers in the Self Reporting Model. The Law Society will facilitate the completion of the reporting form by pre-completing portions of the form for each lawyer to reflect information already known to the Law Society and will ask the lawyer to confirm if the information remains correct.

Con

- This model is without precedent in Canada or the United States, therefore, it may properly be viewed with skepticism. (Most States do not have a financial reporting requirement or an audit program. All provinces have a reporting model similar to that of Ontario's current model.)

- This model requires an amendment to the Regulation.

- The Institute of Chartered Accountants of Ontario may voice objection to this model because of the reduction, or elimination in some cases, of their role in the lawyer's obligation to report on law firm record keeping practices.

- Although the practising lawyer will benefit significantly from the reduction in annual operating expenses associated with the existing public accountant engagement, average range of, from a low of $500.00 to $1,000 annually, this benefit will be somewhat offset by the Society's annual fee increase associated with the audits for purposes of ensuring compliance with accounting requirements.

- The proposal results in a permanent increase in Law Society staff (auditors/related staff).

- The model relies on the premise that practising lawyers will prefer, and possess the skill set, to self report on the law firm's accounting system and its compliance with the Regulation.

To ensure that lawyers are able to competently complete the financial reporting aspect of the new form, a Law Society education forum will be periodically required. As well, records review completion guide material will be developed and provided to the profession on the Website and in print. The audit visit will also include an education component. Further, the questions on the form will be instructive as to procedure in order to permit accurate self reporting.

Impact On the Discipline Process

87. In 1996, 419 matters were authorized for discipline prosecution, of which 172 pertain to failure to file forms and twenty four (24) pertain to trust account issues, i.e., misappropriation or misapplication.

88. It can be expected that under the current model of accountant report filing, or, under the proposed model of self reporting on accounting matters, private practitioner non filing will continue. However, it is expected that those lawyers who currently fail to file accountant reports because of the cost associated with the public accountant engagement will, under this model, find themselves in a position to self report without the financial burden associated with the existing filing model.

89. The ability to direct an immediate audit visit on any non filer firm will reduce non filing prosecutions where the cause of the failure to file is a matter of a substantive nature. Although the detection and investigation of the substantive issues may create discipline workload, the use of resources to address matters of a substantive nature are a more effective use of resources than those deployed on non filing prosecution matters.

90. In conclusion, it could be expected that the private practitioner non filer prosecution workload will decrease.

Assessment of Risk to the Public

91. The question arises as to whether the absence of the public accountant engagement will contribute to reduced trust accounting standards and/or an increase in the incidence of trust money misuse. No empirical data exists to provide a statistically reliable answer to this question. To respond to this question, one is asked to consider the following factors:

- The known incidence of trust money misuse is not significant in that only 24 of 419 matters authorized in 1996 pertained to trust money misuse. In 1995, 25 of 569 matters authorized pertained to trust money misuse. This information is instructive in that it supports the notion that misuse of trust money is not a significant proportion of the matters authorized. The current Law Society investigation activity does not support the notion that significant numbers of dishonest lawyers exist.

  To put the numbers in context, the 1996 statistics could be restated to say that for every 1000 members engaged in private practice, only 1.4 members are the subject of prosecution for the misuse of trust money.

- The proposed audit program will serve not only to ensure a member is in compliance with the regulation, but will also be charged with the responsibility to serve the profession by providing on site education about trust accounting and records keeping standards and will provide remedial alternatives in place of more traditional compliance enforcement measures.

  Under the current model of accountant report filing, the deterrent and educational components of an effective audit programme do not exist.

- A visible audit programme will deter a member from failing to maintain proper accounting records and will discourage trust money misuse.

- Significant value is derived from the current public accountant engagement where a report of client trust ledger overdrafts or trust bank account overdrafts is made.

These matters can be detected from the review of the monthly trust comparison, therefore, it is proposed that under this model, the member be required to submit several monthly trust comparisons with the annual form. This measure will provide for a ready detection of overdrawn client ledger accounts or any overdraft in the trust bank account. Substantive issues detected by the review will initiate an immediate visit by auditors. Therefore, this alternative method of reviewing the trust accounts will not reduce the Society's ability to detect trust shortages under this proposed model.

- A practitioner's attempt to avoid detection of trust shortages by purposeful failure to file the form in a timely fashion will be met with the response of an immediate audit under a `failure to file' audit programme strategy.

- Although the current model of accountant review and reporting adds value to the Society's program to protect the public, in itself, the accountant review seldom reports trust money misuse, but rather, it reports on factors which permit the Society to identify those matters which require more intensive investigation.

  The questions in the redesigned self reporting form will continue to require the member to report on the issues which serve as an indicator that further investigation is required.

92. This model will not erode the public protection mandate of the Society because of the enhanced educational programs, the continuing requirement that members file a financial report, and the significant deterrent effect of an aggressive and visible compliance audit team.

Financial Analysis and Impact on the Annual Fee

93. The demographic breakdown of law firms in Ontario is as follows:

Membership Records
Analysis of Firms by Firm Size as at MAY 1997

	<---- Firm Statistics ---->			<----- Member Statistics ----->		
Firm Size	Number of Firms	% of Total	Cumulative Firm Count	Member Count	% of Total	Cumulative Member Count
1	5,081	71.91	5,081	5,081	30.67	5,081
2	932	13.19	6,013	1,864	11.25	6,945
3	352	4.98	6,365	1,056	6.37	8,001
4	205	2.90	6,570	820	4.95	8,821
5	120	1.69	6,690	600	3.62	9,421
6 - 10	222	3.14	6,912	1,610	9.71	11,031
11 - 15	66	.93	6,978	830	5.01	11,861
16 - 20	28	.39	7,006	499	3.01	12,360
21 - 25	11	.15	7,017	251	1.51	12,611
26 - 50	25	.35	7,042	879	5.30	13,490
51 - 100	7	.09	7,049	520	3.13	14,010
101 - 200	11	.15	7,060	1,411	8.51	15,421
201 +	5	.07	7,065	1,144	6.90	16,565

Impact of the Self Reporting Model

☞ Requires an amendment to the Regulation.

☞ Includes a regulatory provision which retains the discretion to require a member to retain a public accountant for purposes of a report to the Law Society.

☞ Convocation must prescribe a "consolidated reporting form".

☞ Provides a proactive compliance approach with a view to reducing complaints and claims.

☞ Eliminates the mandatory nature of the accountant's fees associated with retaining an accountant to complete a form for reporting to the Law Society.

☞ Creation of audit teams increase operating costs of the Law Society/dues to the profession.

☞ Provides an effective alternative to members in private practice who can ill afford the costs associated with a public accountant engagement model.

☞ A neutral impact on compliance because of the audit programme.

Cost Impact to the Profession

94. The average smaller size law firm incurs an annual outside public accountant cost of, from a low of $500.00 to about $1,000, for purposes of the regulatory imposed accountant review. With about 7065 law firms in Ontario, it can be projected that $5 - $7 million in accountant fees and GST is expended annually by law firms in this regard. This proposal eliminates the mandatory nature of this annual expenditure. (Based on 16,500 members in private practice, the accountant fees range between $300.00 - $425.00 per lawyer.)

95. The offsetting cost to the profession is the increase in annual fee associated with the creation and existence of a suitably sized audit team.

96. Under the self reporting model, the audit teams will be responsible for ensuring compliance with record keeping requirements and also to focus on matters which give rise to Compensation Fund claims. On this basis, the firms which display compliance with records keeping requirements and money handling standards, and who also dedicate sufficient human resources to record maintenance efforts, would be the subject of infrequent audit visits. The audit programme resources will be directed toward law firms which display factors which may give rise to claims or who display poor trust records keeping practices. This will assist in reducing claims to the Fund that are both mortgage and non-mortgage related.

97. The lawyers to be targeted for focused audit will include all members and not just sole practitioners who meet a "profile" to be developed jointly by the Law Society, the Lawyers Fund for Client Compensation and the Lawyers' Professional Indemnity Company (LPIC). It is expected that the criteria making up the "profile" will include the following factors:

- trust account problems reported on the annual filing report or identified through a review of trust comparisons filed with the financial reports;
- law firm record keeping practices;

- failure to file complete financial reports on a timely basis;
- Complaints Department "profiles" based on extent and nature of complaints;
- LPIC "profiles" based on extent and nature of claims and other factors;
- Compensation Fund "profiles" based on claims characteristics.

98. The following information was compiled from the most current annual filings and provides a preliminary indication of the numbers of members that would fit the profile for some of the criteria listed above:

1) Q 13, Private Practitioner Form, asks "Have you acted for or received money from a lender that is lending money secured by a charge, or charges, on real property?" (Excluding exempt transactions pertaining to Form 4, Schedule A)

1035 positive responses were received to this question.

2) Q 14, Private Practitioner Form, asks members to report on "Have you, whether in the course of or separate from your practice of law, either directly or indirectly through a corporation .....arranged a lending of money, whether on the security of real estate or otherwise?"

172 positive were received to this question.

3) Q 15, Private Practitioner Form, asks members to report on "Number of mortgage advances during the period covered by this filing:"

1057 responded to this question. (These respondents include those who responded to Q 13 and Q 14.)

4) With respect to the Public Accountant's Report to Lawyer forms filed to date with respect to reports on the FIRM'S activity, 554 firms report acting for a lender or arranged for the lending of money on the security of real estate, excluding exempt family, institutional and other exempt transactions.

5) The dollar value of these mortgage transactions reported for the year range from $365 million to in excess of $825 million. Because the reporting is made on the basis of a range of dollar values, the precise amount cannot be provided.

Audit Team Cost and Units of Production Analysis

99. The following alternative size staffing proposals are based on approximately 7000 small sized law firms and 65 medium and large law firms.

100. On direction from the Lawyers Fund For Client Compensation, the audit effort will have a proactive investigative focus and will be directed toward those members within a "risk" profile which will be developed jointly with LPIC, the Law Society and the Lawyers Fund For Client Compensation.

101. This enhanced scope of audits reduces the number of audit visitations, compared to a model in which the audit visitations are of a more general nature.

102. In addition, the focused nature of investigation calls for fewer paraprofessional positions and a greater number of professional accountant (or some lawyer) investigative positions. This factor increases the costs associated with this model.

103. Convocation should be mindful that the reference to auditors and examiners should be interpreted as a mix of Law Society staff positions and the out sourcing of public accountant services.

Number of Teams	Cost	Number of Audit Visits Each Year
2 Teams	$1.9 million/$80 per member	1,500 audit visits * (visitation cycle of about once in 4 years)
3 Teams	$2.86 million/$120 per member	2,250 audit visits * (visitation cycle of about once in 2½ years)
4 Teams	$3.8 million/$165 per member	3,000 audit visits * (visitation cycle of about once in 2 years)

* The number of audit visits is based on each auditor/examiner spending 45 working weeks performing examinations and completing 1-2 audit visits each week for an average total of 75 audit visits each year. One Team would be capable of completing 10 x 75 = 750 audit visits each year on small firms. Where a more intensive review is required at any member's office, the visitation will exceed two days, thereby reducing the number of annual visitations.

Dedicated Audit Team Direct Costs

104. The estimated annual cost of each audit team is as follows:

One Supervisor - accountant-	$ 75,000
1 Support Person	$ 35,000
Eight Auditors	$560,000
Two Examiners	$ 90,000
Payroll Overhead Burden @ 14 % (rounded)	$105,000
Travel Costs (primarily mileage allowances)	$ 60,000
Overhead costs for supplies ($1000/person/rounded)	$ 10,000
Depreciation of computers ($55,000/3 years *)	$ 18,000
Team Total	$ 955,000

* On creation of the team, an equipment expenditure will be required for computers for staff. This expenditure should approximate $55,000, which would be capitalized and expensed over a three year period. The computers would be replaced every three years given wear and tear of travel.

In addition, the Society will be required to make office space available for staff auditors. Given the nature of the position, a shared space arrangement would suffice as many of the staff would be away from the office a significant portion of the time. It may be desirable to locate some of these staff in Ottawa and London to attend to matters in those respective areas of the province. Some expenditures will be required to provide adequate facilities and work stations.

Implementation Issues

105. To put the self reporting model in place will require the following measures:

- Amendment to Regulation 708 with respect to annual lawyer reporting;

- Development of audit programs for internal and external auditors;
- Hiring and intensive training of audit staff;
- Development of computerized data base profiles to identify members to be the subject of a focused audit;
- Development of audit program data bases to provide centralized/computerized systems .

POLICY DISCUSSION

The Committee's View

106. The Committee believes the Self Reporting Model [Proposal D] should be adopted.

107. 95% of lawyers are honest and maintain their books and records in accordance with Law Society regulations. However, due to the transgressions of a few, the entire profession is subjected to a complicated and often expensive reporting structure.

108. If the requirement to retain a public accountant is eliminated, the Committee believes the vast majority of the profession will remain honest and conscientious about their record keeping obligations. The current reporting structure has not adequately identified fraud and the misuse of trust funds. Alternatives that do permit the Law Society to become more proactive in identifying problems at an earlier stage should be considered.

109. The current Private Practitioner Form and the Public Accountant's Report to Lawyer have provided the Law Society with a more complete picture of the activities of private practitioners. With this information in hand, the Society is able to develop profiles of members involved in high risk activities and can concentrate its resources on ensuring those members are in compliance with the Regulation.

110. The profession will benefit from the self reporting model in that members will no longer be required to retain the services of a public accountant (some may choose to do so voluntarily) in order to complete their reporting obligations. This will represent a substantial cost savings to the membership.

111. The continued requirement to report trust account details to the Law Society, together with the compliance benefits associated with audit teams, ensures the public interest is also protected.

112. Having recommended the Self Reporting Model, the Committee was then left to consider the financial resources that would be required to establish a compliance audit programme. At paragraph 66 of this report, a chart is displayed which sets out the financial implications for the annual fee from forming 2, 3 or 4 audit teams. At its meeting the Committee elected to establish 4 audit teams, however, it is not at this time recommending to Convocation that the annual fee be increased by the corresponding amount. Rather, a recommendation will be made to Convocation in November 1997 so that it coincides with deliberation of the proposed 1998 Law Society annual fee.

113. The Committee opted for the larger number of audit teams because it felt a more conservative approach was appropriate at this time. If the Self Reporting Model is adopted, the role of the public accountant is removed from the financial reporting scheme. To ensure there is no reduction in compliance of the Regulation respecting books and records, more focused audit visits will initially be required. If experience dictates, the level of audit scrutiny can be reduced if it is shown there is no marked decline in compliance.

Other Options for Managing the Fund's Loss Exposure

114. As part of its overall review of the Fund, the Committee examined the potential institution of a "Two Lawyer Rule" to assist in preventing future claims. A Two Lawyer Rule would require an amendment to the Rules of Professional Conduct and would prohibit lawyers from acting for both lender and borrower in most non-institutional mortgage transactions.

115. In view of its recommendation to adopt the Self Reporting Model and the focused audit teams, the Committee decided a Two Lawyer Rule was unnecessary at this time. However, should the Self Reporting Model of financial reporting not be adopted, the Committee will re-examine such a Rule as a means of becoming more proactive and preventing future claims to the Fund.

Options and Alternatives for Decision by Convocation

116. There are four alternative reporting schemes as outlined above. The Committee recommends that the Self Reporting Model [Proposal D] for annual financial reporting to the Law Society be implemented.

117. Convocation should determine:
a. Whether to approve the Self Reporting Model [Proposal D];
b. Whether the language in the draft amendments to Regulation 708 [Tab 5] reflect the intention to adopt the Self Reporting Model.

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

(a) Draft for Discussion - The Law Society of Upper Canada Lawyers Fund for Client Compensation prepared by Craig A. Allen, F.C.I.A., F.C.A.S., September 8, 1997. (Tab 1)

(b) Copy of letter from Mr. Grant F. Dickson, FCA, Director of Technical Services and Practice Inspection to Mr. Jim Yakimovich, dated July 31, 1997 re: Auditing Lawyers' Trust Accounts. (Tab 2)

(c) Paper: Questions Proposed to be Added to the Accountant's Reporting Form. (Tab 3)

(d) Copy of the 1997 Private Practitioner's Report. (Tab 4)

(e) Copy of the Self Reporting Model: Possible Revisions to Regulation 708 Option A - Basic Revisions. (Tab 5)

A discussion followed.

Convocation took a brief recess at 11:10 a.m. and resumed at 11:25 a.m.

It was moved by Mr. Aaron, seconded by Mr. Gottlieb that the Report be amended to provide in clear language that there will be random spot audits as well as focused audits.

The Chair accepted the Aaron/Gottlieb motion.

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the Law Society auditors be governed by a code of conduct and that members being audited be treated with courtesy and respect.

Withdrawn

It was moved by Mr. Ruby, seconded by Ms. Sealy that the Self-Reporting Model (Proposal D in the Report) be adopted with the following provisos:

(1) that there will be random and focused audits;
(2) that the process will be re-evaluated in 2 years by Convocation;
(3) that the Report be amended so that the authority to require that reports be certified by an accountant be vested with the Chair, the Vice-Chairs or the Secretary;
(4) that discipline committee panels have the authority to alter the date of filing; and
(5) that the Report be amended to provide that staff management and accountability for the administration of the program be clearly established and delineated in written policies and that the progress of the implementation of the Model be reported quarterly in the CEO's report to Convocation.

Carried

ROLL-CALL VOTE

Aaron	For
Adams	For
Angeles	For
Banack	For
Carpenter-Gunn	For
Cole	Against
Copeland	For
Cronk	For
Crowe	For
Curtis	Against
DelZotto	For
Eberts	For
Epstein	For
Feinstein	For
Finkelstein	For
Gottlieb	For
Legge	For
MacKenzie	For
Manes	For
Marrocco	For
Martin	For
Millar	For
Murphy	For
Murray	For
O'Brien	For
Ortved	For
Puccini	Against
Ross	For
Ruby	For
Sachs	For
Sealy	For
Stomp	Against
Swaye	For
Wright	Against

Professional Development and Competence Committee Report

Meeting of October 9th, 1997

Ms. Eberts presented the Report of the Professional Development and Competence Committee which included a recommendation to make a submission to the Civil Rules Committee regarding mandatory mediation.

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IN CAMERA

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CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

CONVOCATION RECONVENED AT 2:15 P.M.

PRESENT:

The Treasurer, Aaron, Adams (conference call), Angeles, Banack, Carpenter-Gunn, R. Cass, Cronk, Crowe, Curtis, DelZotto, Eberts, Epstein, Feinstein, Finkelstein, Gottlieb, Lawrence, O'Brien, MacKenzie, Martin, Millar, Murphy, Puccini, Ross, Ruby, Sachs, Sealy, Stomp, Swaye and Wright.

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IN PUBLIC

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Resumption of discussions on Professional Development and Competence Committee Report

Professional Development and Competence Committee
October 9, 1997

Report to Convocation

Nature of Report: Policy

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

The Professional Development and Competence Committee ("the Committee") met on 9 October, 1997. In attendance were Mary Eberts (Chair), Michael Adams, Larry Banack (Vice-Chair), Kim Carpenter-Gunn, Ronald Cass, Carole Curtis, Susan Elliott, Helene Puccini, Heather Ross, David Scott and Rich Wilson (Vice-Chair). Staff members present were Janine Miller, Paul Truster, Susan Binnie and, for part of the meeting, Alan Treleaven, Elliot Spears and David Carey.

1. The Committee is reporting on five matters:

- A proposed submission to the Civil Rules Committee in response to a draft rule prepared by the Ministry of the Attorney General for mandatory mediation in civil cases in Ontario (Policy Item)
- County and District law libraries

  a) Short-term funding issues for the libraries
  b) Whether amendments to Regulation 708 are required at the present time

- Discussion of Matters Relating to Quality Assurance

- The establishment of a working group for the Specialist Certification Program Review

- A planned report to Convocation by the Post-Call Education Advisory Group.

2. This report contains:

- A report from the Committee recommending that the Law Society make a submission to the Civil Rules Committee concerning a Ministry proposal for mandatory mediation and a draft rule for mandatory mediation in Ontario. The report includes appendices with the following information:

  - background to the policy issues and processes relating to a Law Society submission;
  - an outline of the Committee's propositions which underlie a proposed submission to the Civil rules Committee;
  - a copy of the Ministry's draft Rule with comments by the Civil Rules Secretariat and a revised draft Rule recently prepared by the Secretariat.

- Statements of

  a) the Committee's approach to short-term funding issues for the County libraries;
  b) the Committee's review of whether amendments to certain sections of Regulation 708 are required at the present time.

- A short report on discussion of matters relating to Quality Assurance.

- A short report on Specialist Certification Program Review matters, concerning the establishment of a working group to assist with a review of both the present program and alternatives to the current program.

- A short report from a working group on Post-Call Education outlining a plan to report to Convocation in November, 1997.

I SUBMISSION ON PROPOSED RULE FOR MANDATORY MEDIATION (Policy)

3. Background

The Minister of the Attorney General announced a policy of mandatory mediation for civil cases on January 31, 1997. In June this year the Ministry brought a proposal to the Civil Rules Committee to amend the Rules of Civil Procedure to provide for mandatory mediation of defended actions. The proposed amendment was entitled "Rule 78 Civil Mediation."[1]

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[1] An amendment to Regulation 194 of the Revised Regulations of Ontario, 1990, made under the *Courts of Justice Act*. Draft Rule 78 is attached to this report at Appendix C. The draft rule is also available on the Law Society's Website at http://www.lsuc.on.ca/services/services_civil_rules_committee-en.shtml.

4. The Civil Rules Committee is currently deliberating on the draft rule and on the policy issues presented by the Ministry's proposal for mandatory mediation. The Civil Rules Committee has in turn proposed modifications to the Ministry's draft rule in the form of a revised draft referred to as draft Rule 24.1.[2] The Rules Secretariat recently requested submissions from interested parties and from the general public in response to the Ministry's proposal.

5. Additional information on the Ministry's proposal for mandatory mediation and the proposed rules is set out in Appendix A to this report. Appendix A also includes information on two further matters: the Professional Development and Competence Committee's decision to recommend a submission to the Civil Rules Committee on mandatory mediation; and how the submission on a proposal for mandatory mediation fits within the Society's mandate.

6. The draft submission is being prepared by a working group of the Professional Development and Competence Committee on behalf of the Committee. Due to the recent request for submissions by the Civil Rules Committee and the imminent deadline (10 November), the usual approach of prior approval of a draft submission by Committee and Convocation is inapplicable. Instead, a brief outline of the principles that will underlie the Committee's submission is provided in Appendix B to this report.

7. The Professional Development and Competence Committee requests Convocation to authorize the working group on the draft rule on mandatory mediation (formed by the Committee as reported to Convocation in September, 1997) to respond to the Civil Rules Committee with a submission based on the principles outlined in Appendix B to this report to Convocation. Convocation is asked to affirm the principles and approve the questions that are set out in Appendix B to this report, at items 2.1 to 2.13.

II COUNTY AND DISTRICT LIBRARY BUDGET ISSUES (Information)

A. Short-term Funding Issues

8. The Committee received a report from the Director of Libraries, Janine Miller, and a short review from the Director of Finance, David Carey, on the funding problems faced by the County and District law libraries. After discussion, the Committee requested a full set of financial statements and an audit of all monies collected and distributed for County libraries since July, 1992. The Committee requests that this information be available for the November meeting of the Committee.

B. Regulation 708 under the *Law Society Act*

9. The Committee reviewed those sections of Regulation 708 that refer to County law associations and County libraries. While recognizing that the sections are outmoded, the Committee concluded that discussion of amendments to the Regulation should be postponed. The matter should be brought forward again, preferably at a time to coincide with the consideration of amendments required in the event that the Law Society's new legislative package receives approval from the Ontario government.

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[2] See the material in Appendix C to this report.

III QUALITY ASSURANCE (Information)

10. Representatives of the Professional Development and Competence Committee have had discussions with the Lawyers Professional Indemnity Company ("LPIC"). LPIC staff will attend a special meeting of the Professional Development and Competence Committee on 28 October for discussion of matters relating to quality assurance and the profession.

IV SPECIALIST CERTIFICATION

11. The Committee agreed to establish a working group to consider and refine future options for a specialist certification program, as part of the review of the current Specialist Certification Program. The working group is to meet four or five times between October, 1997 and February, 1998 and will be monitored on a monthly basis by the Committee. The working group will consist of:

- two benchers
- three staff members
- three or four chairs of specialty committees
- two or three interested outsiders.

12. The options under review for the Committee include four alternatives with each alternative to be costed. The options are:

- a new model of specialist certification (under development);
- an alternative method of delivery of certification programs;
- the current program of specialist certification;
- an end to certification programs operated or endorsed by the Law Society.

V. POST-CALL EDUCATION (Larry Banack will speak to this information item)

13. The Post-Call Education Advisory Group reported that it plans to present a report to Convocation in November, 1997 on the status and progress of the work being undertaken on Post-Call Education.

APPENDIX A

PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE
REPORT TO CONVOCATION RE PROPOSED DRAFT RULE FOR MANDATORY MEDIATION, 27 OCTOBER, 1997

1. BACKGROUND TO DRAFT RULE FOR MANDATORY MEDIATION IN ONTARIO

Mandatory mediation is one of several major new programs proposed by the Ontario Ministry of the Attorney General for the justice system during the past two years. In announcing a policy of mandatory mediation in January, 1997, the Attorney General stated that the government was committed to "taking the steps required to modernize the justice system to better serve the public."[1] The main components of the Ministry's proposal are:

[1] Excerpt from "Improving Access to Our Courts"; notes for remarks by Attorney General Charles Harnick, CBA Ontario 1997 Institute of Continuing Legal Education, Keynote Address, Friday, January 31, 1997. The other major programs are the Integrated Justice Project and case management.

- mandatory mediation for most civil, non-family cases;
- mediation required for defended actions in the General Division within 60 to 90 days of the filing of the first statement of defence;
- a court order required to opt out of or defer mediation;
- use of mediators from a County roster of private sector mediators;
- mediators to be paid by the parties, with the first three hours of mediation to cost $300 for each party and the cost of additional time to be negotiated;
- a uniform program to be implemented across the province within the next four years.[2]

In June this year the Ministry of the Attorney General brought a proposal to the Civil Rules Committee to amend the Rules of Civil Procedure to provide for mandatory mediation of defended actions. The proposed rule on mandatory mediation, entitled "Rule 78 Civil Mediation,"[3] includes the features outlined above.

The Civil Rules Committee is currently deliberating on the draft rule and on the policy issues presented by the Ministry's proposal for mandatory mediation. To assist the Committee's deliberations the Secretariat to the Civil Rules Committee recently released a memorandum, dated September 24, 1997, with comments on the policy issues associated with mandatory mediation. The memorandum included the draft rule proposed by the Ministry (Rule 78) and a revised proposal for a draft rule prepared by the Rules Committee ("Rule 24.1"). The Secretariat also requested that submissions regarding the Ministry's proposal to amend the *Rules of Civil Procedure* be made to the Civil Rules Committee by 10 November, 1997. [A copy of the memorandum including the draft rules is attached as Appendix C of this report.]

The staff of the Rules Secretariat approached the Secretary of the Law Society to request assistance in making the memorandum available to the profession. With the agreement of the Treasurer and the Chair of the Professional Development and Competence Committee, the memorandum, including the draft rules, has been put on the Law Society's Website. A notice to this effect has been placed in the forthcoming issue of the *Ontario Lawyers' Gazette*.[4]

In the memorandum of 24 September, the Civil Rules Committee's Secretariat stated that:

> On behalf of the Committee the Secretariat requests submissions in writing from the bench, bar, the mediation community and the public regarding the Ministry's proposal.

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[2] Comments on the proposal and two versions of a draft rule have been provided in a memorandum from the Civil Rules Secretariat, attached to this report as Appendix C.

[3] As an amendment to Regulation 194 of the Revised Regulations of Ontario, 1990, made under the *Courts of Justice Act.*

[4] The memorandum including both draft rule 78 and draft rule 24.1 is available on the Law Society's Website at http://www.lsuc.on.ca/services/services_civil_rules_committee-en.shtml.

2. THE RESPONSE OF THE PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE

In view of the Law Society's interest in Alternative Dispute Resolution[5] and the emphasis on ADR in recent reports published by two major reviews of the Civil Justice System,[6] the Professional Development and Competence Committee decided early in 1997 to monitor developments in relation to Civil Justice issues and in the area of ADR.

It was not apparent before the Rules Secretariat's memorandum of 24 September that opportunities would arise for comment on the Ministry's draft rule. But, when the existence of a draft rule for mandatory mediation (Rule 78) became known in the summer of 1997, a copy of the draft rule was distributed to all members of the Committee and to other benchers, and the Committee established a working group, on 11 September, to review issues and developments relating to mandatory mediation. The Committee's working group is co-chaired by Kim Carpenter-Gunn and Heather Ross and its members are Helene Puccini and Allan Lawrence.

The working group met on Monday, 6 October to consider the Secretariat's request for submissions to the Civil Rules Committee. Opinion in the working group strongly favoured a Law Society submission to the Rules Committee. Members considered that a submission should, in general, respond favourably to the principle of mediation in civil cases. At the same time, the submission should comment on a number of significant issues in relation to the proposed form of mandatory mediation, asking questions about the possible effects of implementation both for the public and for the Law Society.

In the working group's view, the Law Society's submission should not respond from the perspective of the legal profession. The profession's views would be represented in other submissions to the Rules Committee, for instance from the Advocates' Society and the Canadian Bar Association Ontario. Instead the submission should emphasize two distinct perspectives which the Law Society could provide, namely,

- a) the public interest perspective - a perspective which focuses on whether justice is likely to be served by implementation of the Ministry's draft rule or the Civil Rules Committee's revised draft;
- b) the perspective of the Law Society as the regulatory body for the profession - a perspective that focuses on the effects of implementation of a draft rule for the Law Society's regulatory function.

The Professional Development and Competence Committee, at its meeting on October 9, approved the working group's proposal for a submission to the Civil Rules Committee and requested that the working group establish the principles of its approach for a report to Convocation. These principles are set out in Appendix B to this report.

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[5] See the Report of the Dispute Resolution Subcommittee of the Research and Planning Committee, February, 1993.

[6] The Canadian Bar Association Systems of Civil Justice Task Force and the Ontario Civil Justice Review.

3. WHY COMMENT ON A PROPOSED RULE FOR MANDATORY MEDIATION IS WITHIN THE LAW SOCIETY'S MANDATE

The issue of the Law Society's mandate to comment on public policies has arisen a number of times in the past, most recently in 1993 when the Law Society was asked to review the Court Administration Report of the Joint Committee on Court Reform. At that time the Sub-Committee on Court Reform defined a series of tests to measure the appropriateness of the Society's involvement in court reform issues. The tests, which provide a standard for Law Society submissions, are as follows:

> (1) Is the public interest in this matter directly tied to the administration of justice?
>
> (2) Might the issue have an effect on the way members of the Society deal with, and provide professional services to, their clients?
>
> (3) Might the issue affect the ability of counsel to meet the needs of clients or might it affect the relationship between counsel and client?
>
> (4) Might the issue effect significant changes in an area in which lawyers have special knowledge or unique insight?
>
> (5) Might significant and traditional rights and remedies of the public be diminished or eliminated if the Society does not intervene in this issue?

The Professional Development and Competence Committee suggests that this series of tests is clearly met. While perusal of the list of questions and issues in Appendix B will provide more detail on this proposition, a few highlights can be mentioned here. Dealing with the elements of the test one by one:

(1) The public interest in the issue of mandatory ADR is clearly tied to the administration of justice: introduction of mandatory ADR will substantially affect the dispute resolution system in the province. Importantly it would add, as a mandatory element, a cadre of practitioners about which very little is now known: it is unclear from the proposal how the selection of mediators will be done, what standards they will have to meet, and how complaints about them will be dealt with.

(2)3) There are several features of the mandatory proposal which may have an effect on the way members of the Society deal with and provide professional services to their clients, and also may affect the ability of counsel to meet the needs of clients: the mandatory proposal, for example, adds another element of cost to the early stages of a case, if adequate preparation for the ADR is to be done, and at the same time requires that the client pay out disbursements for the mediator. Lawyers who act for clients of modest means will be squeezed to provide good service on what the client will be able to put toward this dual burden.

(4) The Professional Development and Competence Committee also believes that the issue will affect significant changes in an area in which lawyers have special knowledge or unique insight: litigators have a wide range of knowledge about the settlement of cases, and increasing numbers of Law Society members are also acquiring credentials and experience in the area of ADR.

(5) Lastly, the Committee believes that some input from the Law Society could protect significant and traditional rights and remedies of the public, in particular access to the justice system: if costs, administration, and standards concerns are not well handled, mandatory mediation could hinder, rather than facilitate, the prosecution and fair settlement of actions.

APPENDIX B

PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE
REPORT TO CONVOCATION, 27 OCTOBER, 1997

PRINCIPLES OF THE SUBMISSION ON MANDATORY MEDIATION

The proposal for mandatory mediation and the draft rule developed by the Ministry of the Attorney General, together with the revisions proposed by the Civil Rules Committee, will be reviewed in the body of the submission from two perspectives: from a public interest perspective, in terms of the broad goals of a system of civil justice and the possible effects of the model of mandatory mediation on the public; and from the perspective of the Law Society, as the regulatory body for the profession and therefore responsible for lawyers who may also be mediators.

The main propositions that Convocation is asked to affirm in relation to the submission to the Civil Rules Committee are set out below.

Propositions underlying the Submission

a. General comments on the Ministry's Proposal for Mandatory Mediation

1. While the Law Society has as its purpose *the advancement of the cause of justice and the rule of law*, the Society exists in order to govern the legal profession *in the public interest*.[1] The Law Society agrees with the statement (made in the First Report of the *Ontario Civil Justice Review*[2]), that the public interest requires access to a fair, affordable, accessible and timely system of civil justice. The Law Society believes that if mediation is to be introduced into the system of civil justice it must have demonstrated benefits to the public in terms of fairness, affordability, accessibility and timeliness.

2. The Law Society has supported the use of alternative dispute resolution as a matter of formal policy since 1993[3] and has encouraged the use of dispute resolution both in its own operations and by its members. The Society has emphasised an educational function through both Continuing Legal Education and the Bar Admission Course and has amended the Rules of Professional Conduct to require lawyers to consider the appropriateness of ADR in the resolution of issues in every case. The Society has also used mediation in its regulatory function. The Society welcomes government initiatives in this area.

3. At the same time, the Society notes that the proposal put forward by the Minister in January, 1997 and reflected in draft Rule 78, does not follow the recommendations for mandatory mediation developed by a review of civil justice, the *Ontario Civil Justice Review*, in its Reports of March, 1995 and November, 1996. The Society therefore asks why the proposed form of mandatory mediation is preferred over other options? The Society also asks which other options have been considered and rejected and on what basis? As far as the Law Society is aware, the draft Rule has not been the subject of <u>formal</u> consultation with the profession, with professional organizations or with the Society.

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[1] From the Law Society's Role Statement, adopted by Convocation, 27 October, 1994.

[2] The Ontario Civil Justice Review, in its First Report of March, 1995, set as criteria for the operation of the civil justice system the following factors: fairness, affordability, accessibility, timeliness, acccountability, efficiency and cost-effectiveness, a stream-lined process and administration.

[3] See footnote 1, supra.

4. It is noted that, while the Minister's announcement in January 1997 referred to mediation as a program that "works" and cited the results of the Toronto ADR pilot project[4], the system of mandatory mediation now proposed is not the system used in the Toronto pilot project.[5] One major difference is that the Ministry's proposal is a system in which the litigants pay the costs - a "user-pay" system - as opposed to the Toronto project of a court-based system with full public funding and staff mediators.

5. These and other questions remain unanswered in relation to the draft rule. Rather than raising issues as criticisms of the proposal, the submission will take the approach that questions about the future operation of the proposed mandatory mediation program require answers before this or any other proposal is implemented across the province.

6. In the Professional Development and Competence Committee's view, the most fundamental problem is a lack of information on which to base policy decisions:

- Firstly, there appears to be an absence of information on the use of mediation in Ontario in civil cases *when mediation is used on a voluntary basis*. Is it possible to establish how much voluntary mediation is occurring at present in the types of civil actions that would be subject to mandatory mediation under draft Rule 78?
- Secondly, there appears to be a need for information on *the operation of alternative forms*[6] *of mandatory mediation in different settings*. Could alternative forms of mediation be tried and the pilot projects implemented in more than one location across the province?
- Thirdly, a full and formal evaluation of the Ottawa pilot project needs to be put in place; the results could then be compared with the findings of evaluations of alternative options for mandatory mediation tried in different locations across the province.

7. The submission emphasises Convocation's concern for litigants of modest means and unrepresented defendants. Not only are the costs of mediation considerable, but there will without doubt be hidden costs beyond the standard fee of $300 for each party. No information is available on this aspect of the proposal except for a provision in the draft rule for *pro bono* mediation. There are, for instance, issues around whether Legal Aid will cover the costs of mandatory mediation and how the ability of poorer litigants to pay mediation costs will be assessed.

b. Aspects of the two draft Rules where Comments and Questions will be raised

8. Mediators: the Law Society has identified a number of issues arising from draft Rule 78 in relation to mediators. The issues include a major absence of information in the following areas:

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[4] Note that the Toronto ADR project channelled only 40% of selected types of cases into mandatory ADR. Categories of cases excluded were: applications, family matters, motor vehicle claims and construction liens.

[5] The proposed system is currently being tried in a pilot project in Ottawa. That project has not received any systematic evaluation. Nor, according to Ministry staff, has any methodology been adopted or implemented for evaluating the Ottawa project. (The project continues to report "success" statistics which are not meaningful without a formal method of evaluation in place.) The project remains the only pilot project for a proposal that is intended to apply to the entire province.

[6] Two possibilities include: mandatory mediation at the request of one party to the action; and mandatory mediation later in the process than the 60 to 90 days after the filing of the first statement of defence, as set out in draft Rule 78.

- the qualifications of mediators;
- the training requirements;
- the standards to be set for mediators whose names appear on official rosters; and,
- the requirements for insurance.

There are also issues around the availability of qualified mediators, especially in remote areas, and the restrictions on the public's choice of mediators (from a local roster) unless the parties concerned obtain a court order allowing an outside mediator.

9. Local Mediation Committees: further questions concern the forty-seven local committees across the province whose task it will be, under Rule 78, to supervise local mediators and mediation processes. For example:

- How will standards and services be made consistent across the province?
- How will mediators be matched to cases, i.e. assigned to cases which they are qualified to mediate?
- How will local mediation committees ensure that mediators are trained, insured and competent?
- How will local mediation committees deal with complaints and discipline matters?

On the one hand, draft Rule 78 refers to "the Mediation Coordinator"; who will perform some of these functions but the rule does not make it clear who will pay the costs of the Committee and the Coordinator? On the other hand, draft Rule 24.1 suggests the appointment of a judge in each region to take responsibility for the program. Is an additional task reasonable for a judiciary whose members are already stretched by the demands placed on them?

10. The Regulation of Mediators

Some of the central questions in relation to draft Rule 78 are:

- How will complaints be monitored?
- What body will regulate the mediators?
- How will the public be protected against unsatisfactory mediators?
- What will be the discipline process for mediators?
- Under draft Rule 24.1, with mediators working outside the official roster, how will regulation to protect the public be possible?

11. The Costs of Mediation

Critical issues include the following:

- If one litigant is unable to pay a share of the costs of mediation will mediation be cancelled and a default process put in place?
- Who should arbitrate whether or not a litigant can afford to pay the costs of mandatory mediation?
- Will Legal Aid cover the costs of impecunious litigants, e.g. as defendants in civil cases?
- How will hidden cost of mediation, ranging from travel costs and charges for mediation facilities to lawyers' fees and the costs of motions under Rule 78, be met by poorer litigants?

12. The Processes of Mediation

Questions to be posed will include the following:

- Can the exclusion of family law cases from the draft rules be justified?

- ♦ Should other categories of cases also be excluded, e.g. personal injury cases?
- ♦ How will unrepresented parties fare in mandatory mediation especially when one party is represented and the other party is not?
- ♦ Does the timing of mandatory mediation, within 60 to 90 days of the filing of the first statement of defence, make sense as a "triggering event"?
- ♦ How could a system of mandatory mediation be made to fit with other pre-trial processes from the litigant's perspective?

c. Aspects of the draft Rules where Comments and Questions are Appropriate from the Perspective of the Law Society as the Regulatory Body

13.
- ♦ For fee-paying lawyers who also work as mediators, will there be a two-tier regulatory system with both the local Mediation Committee under Rule 78 and the Law Society receiving complaints?
- ♦ Does the Law Society bear a regulatory responsibility for fee-paying members acting as mediators whose names are on a local mediation roster under Rule 78?
- ♦ If so, should local mediation committees be asked, or at what stage should they be asked, to inform the Law Society if a fee-paying lawyer-mediator becomes the subject of complaints or discipline processes?
- ♦ In relation to mediators' qualifications, should local mediation committees be asked to contact the Law Society in order to inquire about a lawyer-mediator's past or present discipline complaints history, as is done for judicial appointments, before a lawyer is put on the local mediation roster? Does this set different and higher standards for lawyer mediators and is it a fair approach?

MEMORANDUM OF THE RULES SECRETARIAT

CONSULTATION ON MANDATORY MEDIATION
September 24, 1997

REQUEST FOR SUBMISSIONS

The Civil Rules Committee is considering a proposal by the Ministry of the Attorney General that the *Rules of Civil Procedure* be amended to provide for the mandatory mediation of defended actions. This memorandum, prepared by the Rules Secretariat (the research arm of the Civil Rules Committee) examines certain aspects of the proposal. On behalf of the Committee the Secretariat requests submissions in writing from the bench, bar, the mediation community and the public regarding the Ministry's proposal. These submissions will be considered by the Civil Rules Committee at a meeting scheduled for November 19, 1997.

Submissions should be sent to the following address by no later than November 10, 1997:

Mr. John H. Kromkamp, Secretary Civil Rules Committee,
Osgoode Hall,
130 Queen St. W.
Toronto, Ontario, M5H 2N5 Fax: (416) 327 5032
or by E-mail: coafiler@gov.on.ca

BACKGROUND AND STATUS OF THE MANDATORY MEDIATION PROPOSAL

In June 1997, the Ministry of the Attorney General sent the Civil Rules Committee a draft of a proposed new rule (Rule 78, attached as "Schedule A" to this memorandum) providing for the mandatory mediation of most actions and applications in Toronto and Ottawa and eventually the rest of the province. The key elements of the proposal are:

- mediation within 60/90 days of the filing of the first statement of defence would be mandatory for most cases and opting out or deferring the mediation would require a court order;
- mediations would be conducted by private sector mediators selected by the parties from a roster of mediators appointed by a local mediation committee;
- remuneration of the mediators would be on a "user pay basis" with each party paying a fixed rate fee of $300.00 for 3 hours of mediation (including one hour of preparation time; if the mediation lasts beyond 3 hours the further fee will be a matter of negotiation with the mediator)

The Rules Secretariat analysed the Ministry's proposal and prepared for the consideration of the Civil Rules Committee a revised proposal (Rule 24.1, attached as "Schedule B".). On the major policy issues the draft rule 24.1 is not radically different from the Rule 78 proposal, though it does introduce numerous changes of some substance. ("Schedule C" sets out explanations for many of the changes incorporated into the Rule 24.1 proposal.) Aspects of the Rule 24.1 proposal were considered by the Civil Rules Committee at its meetings on July 23, 1997 and September 16, 1997. The Civil Rules Committee's deliberations to date have focussed on a range of policy issues presented by both proposals (and discussed below).

The current status of the proposals is that they are under active consideration by the Civil Rules Committee. In its consideration of the proposals, and before any final decisions are made, the Civil Rules Committee welcomes the submissions of the bench, the bar, the mediation community and the public. (While this memorandum has been prepared by the Rules Secretariat at the direction of the Civil Rules Committee, the memorandum has not been before, or considered by the Committee.)

POLICY ISSUES

Introduction and Some Historical Background

This memorandum analyses some of the major policy issues associated with mandatory mediation[1]. It is necessary first to provide some historical background.

[1] For an extensive and excellent discussion of the arguments for and against court annexed ADR programs see the report published in 1995 by the U.S. Federal Judicial Center: D. Stienstra and T. Willging, *Alternatives to Litigation: Do They Have a Place in the Federal District Courts?*

ADR Centre and the Macfarlane Report. In October 1994, the ADR Centre of the Ontario Court (General Division) was introduced as a pilot program for the purpose of testing mediation in connection with the conduct of civil actions. The ADR Centre project was evaluated by Dr. Julie Macfarlane of the Faculty of Law, University of Windsor[2], and her conclusions supported the merits and popularity of court-connected mediation (sometimes called court annexed or court based). Her evaluation indicated that a significant number of cases mediated at the ADR Centre settled early in the proceedings.[3] About half the cases mediated at the ADR Centre settled, generally, before discoveries; a further 17% of the cases referred to the project settled between the referral and the scheduled mediation. A strong majority of lawyers and parties, both in cases that settled and those that did not, were satisfied with the services of the ADR Centre; 96% of lawyers and 95% of parties said they would participate in the ADR Centre again. Speed of disposition and reduced costs figured largely in the reasons given by lawyers and parties for proceeding with ADR; more than 70% of lawyers and parties believed that their case would have settled at significantly higher cost had it not been referred to the ADR Centre. Only 17.6% of lawyers expressed dissatisfaction with the timing of the referral prior to discovery. (However, in evaluating these figures it must be kept in mind that under the pilot project parties could simply opt out of the proposed mediation at will and this happened in about 34% of the cases. The report contains only limited data on the views of those who opted out.[4]

Civil Justice Review Recommendation. Relying on Dr. Macfarlane's report, the Final Report of the Civil Justice Review released in November 1996 recommended a court-connected mandatory mediation program. It recommended that the "court-connected mediation program be funded on a cost recovery basis from filing fees paid by all parties to an action."

Current Ottawa Program. Recently, an ADR mediation program has been introduced in Ottawa by practice direction.[5] The Ottawa program is different from the ADR Centre program and is for the most part the same as that proposed by the Ministry of the Attorney General for inclusion in the Rules -- it is a "user-pay" program involving a roster of mediators selected from the private sector. (But see the comments below re "court-connectedness".) To date there has been no independent evaluation of the Ottawa project, but the court reports results comparable to those contained in the Macfarlane Report.[6]

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[2] Dr Julie Macfarlane, *Court-Based Mediation of Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre* (Queen's Printer for Ontario, November 1995)

[3] Dr. Macfarlane was cautious in noting that it was unclear what precisely was causing the settlement effect. She notes in her report (pg. 17):

> What is less clear is whether these particular cases would ultimately have settled anyway, albeit later in the process, with or without the intervention of ADR. In other words, how far does the service provided by the ADR Centre qualitatively improve upon the settlement behaviours ordinarily practised by lawyers?

[4] Footnote 2 at 49-51.

[5] Practice Direction, Ottawa Region, Court-Connected Mediation Pilot Project, January 1997.

[6] The court reports the following outcomes, as of September 4, 1997, for the 477 cases referred to mediation for which there are outcomes to date. (Many more cases -- 1000+ --have been referred to mediation but outcomes for the remainder are not available as yet.)

Major Policy Issues

In attempting to evaluate the proposal for mandatory mediation, the Civil Rules Committee has been addressing the various policy issues presented by the proposal:

- Is it appropriate to make mediation mandatory?
- Is the proposal sufficiently "court annexed" and, if not, how can this be solved?
- Is the "user pay" concept appropriate within the context of a publicly funded court system?
- Given the caseload volume in Toronto are there available sufficient quality mediators to handle mandatory mediation and is the process and criteria to be used for their selection appropriate?
- Is the proposed time-frame for mediation (to be completed within 60/90 days of the filing of the defence/within 15 days of the close of pleadings) appropriate?
- Should the proposal be introduced as a further pilot project rather than as an immediate permanent feature of the Rules?

In the sections that follow, the Secretariat briefly comments on these and related issues.

The Secretariat's Starting Point

There are numerous policy issues surrounding the introduction and institutionalization of mediation as part of the court's process. However, it is necessary to balance against these concerns the Ontario evidence, and evidence from the United States[7], providing support for court-connected ADR. Notwithstanding the questions raised by the proposal (already outlined above and discussed in more detail below), the Secretariat takes as a starting point that there is a real possibility that mandatory mediation is a "good idea" and one that can make a substantial contribution to the administration of justice. There would appear to be more than enough evidence to justify the continued use of mediation in some form.

Settled prior to mediation	113/477	23.7%
Settled at mediation	86/477	18%
Issues narrowed, but not settled	41/477	8.6%
Not settled	70/477	14.7%
Mediation deferred	79/477	16.6%
Opted out	12/477	2.5%
Other outcomes*	76/477	15.9%

* These include 73 cases which appear to have been resolved by default or summary judgment or other court order, and 3 cases settled via other ADR.

Case Management Master Beaudoin offers the observation that the settlement rates may not be solely attributable to mediation, but to mediation in the context of close case management.

[7] Much of the U.S. evidence is canvassed in the report of the Federal Judicial Center, above footnote 1.

The Evidence for the Proposal for Mandatory Mediation

Limitations of the Macfarlane Report data. Having said that, the data from the Macfarlane Report is open to interpretation. For example, once wrongful dismissal cases are excluded[8], (these appear to be very susceptible to resolution through early mediation for reasons which are not difficult to fathom[9]) then about 2 out of every 3 of the remaining cases at the ADR Centre either opted out or did not settle after mediation. We are also concerned about the significance of the opting out. Again putting aside wrongful dismissal cases, about 4 out of 10 cases opted out under a regime where the mediation service was provided free. By contrast, the Ministry proposal appears to assume that very few cases will be permitted to opt out. It may be prudent to generate and evaluate additional data before arriving at the conclusion that mandatory mediation is desirable in as comprehensive a way as is being proposed.

Does the evidence actually support the current proposal? One overall concern is that the evidence relied upon by the Ministry of the Attorney General derives from a different model than the one now being proposed and may not support the proposed model. The Ministry's proposal would compel litigants to attend a mediation session at their own expense by selecting a mediator from a roster of private mediators who would mediate at an unspecified location. However, in support of this proposal, the Ministry relies on the apparent success of a mediation model that: (a) had litigants attend (but they could opt out if they wished) a mediation session where the cost of the mediator was paid for by the court/government; (b) the court/government appointed the mediator, (c) the court/government provided the premises for the mediation session; and (d) where, overall, the procedure was more clearly and closely associated with the court system. In assessing the differences between the current proposal with its private-sector orientation and the more public-sector oriented ADR centre scheme that was evaluated by Dr. Macfarlane, consider Dr. Macfarlane's statement quoted in the Globe and Mail of February 4, 1997:

> A lot of the credibility that mediation services have is based on their being part of a publicly funded court situation. They are seen as being part of a public, law enforcement, dispute settlement mechanism. It is not seen as somebody's private office downtown. I would be worried there is now potential for the process to fall into disrepute.

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[8] Excluding wrongful dismissal cases in reviewing the data is arguably sound for three reasons. First, they were somewhat over-represented in the project; while most cases were randomly assigned to the project (four out of ten of all defended actions), 50% of defended wrongful dismissal cases were assigned. (This resulted in 17% of all cases eligible for mediation being wrongful dismissal cases.) Second, they opted out at a much lower rate. Third, they settled at a much higher rate: see the text and the next footnote. For all these data see the Report, above footnote 2, Tables 2,3,5 and 6.

[9] Three factors seem readily apparent. First, the plaintiff is frequently unemployed and has a need for immediate compensation. Second, these are typically cases where there is a very high level of mutual knowledge (arising from the prior relationship) and there is little pressing need for discovery. Third, the law in this area is well settled and the issues quite limited e.g. was there just cause for termination? What is the appropriate notice period?

Is the Proposal Sufficiently Court-Connected?

Analysis of the issue. The above observations lead to the question of whether, if mandatory mediation is to be adopted, it should take a form that is more court-connected than the existing proposal. As presently proposed "court-connectedness" is minimal, being limited to the court hearing motions to defer or opt-out of mediation. In this context it is to be noted that the current Ottawa mediation program, while using the user pay model, is significantly more court-connected than is the rule proposal. In Ottawa the court strongly endorsed the introduction of the program and is actively involved in its administration (the Case Management Master chairs the local mediation committee). The Chief Justice of the General Division has expressed the view that he supports the proposal for mandatory mediation, and he does not believe the court should be any more involved than as presently provided for in the proposal.

The Ontario experience, Dr. Macfarlane's report and comments, and the literature reviewed by the Secretariat suggests that the manifest support and interest of the court may be of crucial importance to the success of mandatory mediation. This is so because it ensures equal access, it gives the litigants confidence in the fairness of the system, it enhances the credibility of the idea of mediation, and it is seen favourably as a public service and part of the court's role as a peace maker and not just a law maker. However, both the Rule 78 and the Rule 24.1 proposals have a very modest/minimal court-connection. Should the connection to the court be made more manifest, and if so, how?

Possible solution. A possible way to re-establish and make manifest the court-annexed character of mandatory mediation might be to have a mediation judge(s) appointed for each region. This judge, who would be a mediation enthusiast, would supervise the mediation procedure in the region, supervise the mediation co-ordinator and chair the local mediation committee.

Retention of the ADR Centre? The most obvious manifestation of the court-annexed nature of mandatory mediation to date in Ontario is the Toronto ADR Centre. The Ministry proposal envisages that this Centre would disappear and that arrangements for mediations would be made by the parties and they would take place at agreed upon and diverse locations (presumably in lawyer's offices, hotels or other rented premises). There is no similar facility in Ottawa where mandatory mediations are currently being conducted. We raise the question of whether a case can be made for the retention of the Toronto ADR Centre within the new regime of mandatory mediation? One argument for retention is that we do not know how important the existence and use of the Centre were to the high settlement rates reported in the Macfarlane Report. If the Centre itself played a significant role, settlement rates may be significantly different (i.e., lower) without the Centre. Continuing the Centre, and monitoring the results in Toronto for mediations held through the Centre/not through the Centre (and comparing them with Ottawa), might answer the question of the role, if any, of the Centre in success with mandatory mediation. A second argument for retention is that it may ease the introduction of across-the-board mandatory mediation at a large centre like Toronto (and improve the rate of compliance). Many litigants and counsel may prefer, if they have to participate in mandatory mediation, to simply arrange to do so at and through the Centre. It would not be necessary to use employed mediators at the Centre; arrangements could simply be made to use private mediators from the roster either for blocks of time (e.g., a week at a time) or on an appointment basis.

Why make mediation mandatory rather than voluntary?

The argument for making mediation *mandatory* is that if it is simply made available on a voluntary or optional basis it will not be used. U.S.data[10] from voluntary, court annexed (non-binding) arbitration programs provides some support for this argument. "Opt in" programs have had little success (programs in four courts generated 12 arbitrations out of more than 13,000 eligible cases). "Opt out" programs have been somewhat more successful (in programs in four other courts in 34-55% of cases one or more parties opted out).[11] However, it seems that "local legal culture" plays a role in determining usage rates and a mandatory requirement may only be needed temporarily i.e. only until there is sufficient cultural change to permit voluntary participation without risk. And such cultural change may occur more rapidly than one might expect. In the Missouri Western program (a mandatory mediation, controlled experiment), over the three years the program has been in effect nearly 30% of the non-assigned cases are now asking to be included in the program.[12] Query whether in Ontario we have already experienced a cultural change towards mediation (as a result of the ADR Centre and the Ottawa projects) such that an effective program could be built on an opt out model i.e. mediation would be mandatory if any party desired it, but if all parties agreed they could opt out for any reason and with no explanation.

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[10] Discussed and cited in the report cited in footnote 1, at p.51-55.

11 Why do parties not volunteer? Magistrate Judge Wayne Brazil (quoted in the report cited in footnote 1, at p.52) suggests various factors that may prevent lawyers from volunteering to use ADR:

- Attorneys and clients may suspect an ulterior motive if ADR is suggested by the opponent and thus refuse the suggestion. Since voluntary programs require agreement by all parties, refusal by one ends the possibility.
- Attorneys or clients may not be familiar with ADR or know how to use it.
- Attorneys and clients are accustomed to the familiar and resist the new.
- Attorneys fear that they will appear weak in suggesting ADR to their clients or to opposing counsel.
- Attorneys fear that in suggesting something new to their clients, they may become subject to criticism, second-guessing, or even a malpractice claim by the client.
- Many attorneys are unlikely to act against their perceived economic self-interest.

[12] See the report cited in footnote 1, at p.52-53.

Litigant Satisfaction with ADR

The Macfarlane Report found a high degree of litigant satisfaction with the mediation process. U.S. studies[13] have found that litigants appreciate ADR over lawyer arranged settlements because the litigants are given an opportunity to tell their story and feel more involved in the process. A U.S. Federal Judicial Center study[14] summarizes the literature as follows (footnotes omitted):

> In the traditional adjudicatory process, the litigants themselves seldom participate in the two most common forms of dispute resolution, attorney-negotiated settlements and judge-facilitated settlements. Only the few litigants whose cases proceed to trial will enter the courthouse or see the judge. Most will receive a settlement negotiated by their attorneys through meetings the litigants themselves do not attend.
>
> Most litigants express little satisfaction with either of the two most common forms of dispute resolution --particularly judicial settlement conferences, which they rank as the least fair method for resolving cases. Research has consistently shown, however, that litigants are highly satisfied with and give high ratings to the fairness of traditional trials and ADR procedures. Litigants value trial, arbitration, and mediation because these procedures permit them to tell their stories, assure them that they and their dispute have been taken seriously by the court, and help them maintain control over the process through involvement in it.

While these observations and evidence may be uncomfortable for lawyers, they must surely be given weight in evaluating the proposal for mandatory mediation.

The Method of Paying the Mediators

There are at least three[15] different models for paying private mediators under a court-connected ADR program -- direct funding by the government out of general revenue, funding through increased filing fees or user pay. The Ministry's proposal is "user pay", typically costing a litigant $300. The recommendation of the Civil Justice Review was for a (cost recovery) surcharge on the filing of statements of claim and statements of defence. It estimated such an approach would lead a per litigant fee of about $100-115 because plaintiffs in undefended cases would bear part of the burden. The government assumed the costs of the mediators at the ADR Centre.

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[13] See, for example, the following studies (referred to in the report cited above, footnote 1): E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System,* 24 Law & Society Rev. 953, 965 (1990); Susan Keilitz, *Court-Annexed Arbitration,* in National Symposium on Court-connected Dispute Resolution Research 35, 46 (National Center for State Courts 1994); Barbara Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* 43-49 (Federal Judicial Center 1990).

[14] See above, footnote 1.

[15] A further method could involve charging a court fee specifically for, and at the time of, mediation (similar to the current fee for setting down a motion or the action for trial). This would provide an amount to partially defray the cost of providing mediation services.

Some feel that user pay is an unattractive alternative because it raises access to justice issues for impecunious litigants,[16] and a philosophical issue as to whether litigants should be required to directly bear the cost of an additional, mandatory step in litigation. (It may be argued that a "user pay" policy for public services is usually accompanied with the consumer's option of forgoing the service, but that would not be the case here.)

In favour of user pay is the fact that the cost is imposed only on those who stand to benefit by the chance of a substantially quicker settlement with substantially lower costs. Viewed in the context of the overall costs of litigating a case in the Ontario Court (General Division), it can be argued that a mediation fee of $300 is a modest amount. Moreover, the imposition of the user pay model appears to have met with acceptance in Ottawa

A concern has been expressed that the proposed user pay scheme may lead to and foster an inefficient mandatory mediation regime. If the cost of mediation is directly and completely externalized to litigants there is no economic incentive for the Ministry, the court or the rule-makers to ensure that mediation is only mandated in those cases where it is shown to be effective. (However, determining in advance what categories of cases are amenable to mediation is presently considered by many to be a very difficult task.)

The resolution of the issue of the funding mechanism to be used to provide mediation services also needs to take into account the current government fiscal climate.

The Availability and Quality of Mediators

Availability. It is unclear whether the availability of sufficient quality mediators to handle mandatory mediations is really a problem. However if there are insufficient mediators, then there would seem to be a substantial risk that the proposal would harm the administration of justice and itself be discredited. This risk is that rather than reducing costs and delay, mandatory mediation would be a waste in individual cases and overall.

Selection and evaluation. Criteria for the selection of private mediators for the rosters are presently being developed by the Ministry. Even so, it is possible that any criteria and process for appointing mediators to the rosters will lead to persons making it to the rosters who may not be effective as mediators. A possible way to reduce this concern is to require that mediators agree to a continuous and public evaluation procedure; viz., in order to go on the roster, a mediator must agree that the litigants and counsel may complete a simple questionnaire[17] after each mediation and the cumulative results would be published by the Local Mediation Committee, perhaps on a home page available on the World Wide Web.

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[16] The court in Ottawa reports that to date, out of about 1000 cases assigned to mediation, there have been two instances of litigants acting in person who said they could not afford the fee. After a financial assessment by legal aid, the cases were mediated through an arrangement with mediators that they would act *pro bono*.

[17] Two questions may be all that is needed: In your view how effective was the mediator (on a scale of 1-5)? Would you select this mediator again?

Willingness of mediators to go on the roster. A further concern is that the most experienced mediators may decide not to apply to be placed on the mediation roster because (a) if they allow themselves to be listed, they will likely be swamped by parties seeking the best mediators at the fixed price and (b) they may be confident that they will be able to operate more profitably in the market outside the rule. There may be a small pool of experienced and very busy mediators who will not be willing to mediate for the stipulated tariff fee. Moreover, there will likely be numerous parties who, faced with mandatory mediation, will wish to use the services of such mediators and be quite willing to pay their regular fees. If these mediators did not ask to go on the roster, then under the Ministry proposal (Rule 78) a court application would be required in order to use such mediators for the mandatory mediation. This seemed cumbersome to the Secretariat which could see no reason why the rule should not take account of market realities and the autonomy of the parties. Consequently, our redrafted rule (Rule 24.1) provides that the parties may apply, on consent, for an order that the mediation be before a named, unlisted mediator (who would be free to charge his or her normal rates). Another approach is the Florida model. This model permits mediators going on the list of approved mediators with an asterix (*), indicating that they charge more than the regulated fee. These mediators are permitted to charge unregulated fees if they are selected by the litigants. However, like all mediators on the roster, they would be subject to having cases assigned to them (on a rotation basis) by the mediation coordinator where the parties cannot agree on a mediator. When so assigned the "asterixed" mediators would be required to charge only the regulated fee for the first 3 hours. Rostered mediators may also have to be assigned *pro bono* cases where parties, under a user pay regime, cannot afford the stipulated fee. A difficulty with this model is that it builds in a two tier system which may be inappropriate.

The Timing of the Mediation

Is the timing of the mediation session right? The rationale for the Ministry's proposal is that the ADR Centre data shows that about half of the cases sent to mediation settled before, during, or shortly after the mediation and therefore the public interest is served by early mediation, even though in individual cases, (and conceivably this could be the remaining half of the cases), the mediation might have come too early because there was not enough information to intelligently settle the case. In other words, the argument behind the Ministry's proposal is that the added cost and delay in individual cases is justified by the advantages overall.

It has been argued that if there is a legitimate factual dispute, then early mediation before discovery, while possible, may not be principled in the sense of being related to the underlying facts and the truth of the matter. In other words, the parties may settle pragmatically because of the economics of litigation, or creatively because they invent a mutually beneficial solution to their problems, but they will not be settling by reference to the legal or factual merits of their positions, because the truth of those positions cannot yet be assessed. If a party(ies) wants a principled settlement or decision, then mediation before discoveries may come too early, and a party may need a court order to reschedule the mediation. These reflections may explain the relative high incidence of opting out of the ADR Centre project.

The Need for Further Evaluation and Experimentation

Mandatory mediation is a major innovation in the practice of civil litigation, and given that such fundamental ingredients as the availability of an adequate number of qualified private-sector mediators, the role of the local mediation committee, the imposition and regulation of private-sector fees, the effect on interlocutory motion activity, and the significance of the role played by the ADR Centre have not been tested, it maybe sensible to move cautiously and in a manner that will permit the obtaining of additional data. (Compare the way in which case-management was only introduced following the assessment of several different pilot projects.) It should be noted that the Ministry has already made a commitment to funding the evaluation of its mediation proposal.

We thank you for your interest in reading this memorandum. Submissions may be sent to the address given on the first page.

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Schedule A
(Ministry's Original Proposal)

N0032.E/CJA-AG-16-CL
9-CS

REGULATION TO AMEND
REGULATION 194 OF THE REVISED REGULATIONS OF ONTARIO, 1990
MADE UNDER THE
COURTS OF JUSTICE ACT

Note: Since January 1, 1997, Regulation 194 has been amended by Ontario Regulation 118/97. For prior amendments, see the Table of Regulations in the Statutes of Ontario, 1996.

1. Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by adding the following Rule:

RULE 78 CIVIL MEDIATION

APPLICATION

Scope

78.01 (1) This Rule applies to proceedings commenced in a county named in the Schedule to this subrule on or after the date specified for that county in the Schedule.

Schedule

County	Date
Municipality of Metropolitan Toronto	.....
Regional Municipality of Ottawa-Carleton	.....

Order

(2) Despite subrule (1), a case management master or case management judge (or, if Rule 77 does not apply to the proceeding, any other judge or master) may make an order providing that this Rule applies to a proceeding, other than one described in subrule (4),

(a) that was commenced in a county named in the Schedule to subrule (1) before the specified date; or

(b) that was commenced in a county not named in the Schedule.

(3) An order under subrule (2) shall include any necessary directions.

Exceptions, Certain Proceedings

(4) This Rule does not apply to:

1. A proceeding under the *Change of Name Act*, Part III or VII of the *Child and Family Services Act*, the *Children's Law Reform Act*, the *Divorce Act* (Canada), the *Family Law Act*, the *Family Responsibility and Support Arrears Enforcement Act, 1996*, the *Marriage Act* or the *Reciprocal Enforcement of Support Orders Act*.

2. A proceeding for the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement or paternity agreement.

3. A proceeding for relief by way of constructive or resulting trust or a monetary award as compensation for unjust enrichment between persons who have cohabited.

4. A proceeding for the enforcement of a support order.

5. A proceeding under the *Construction Lien Act*.

6. A proceeding under the *Bankruptcy and Insolvency Act* (Canada).

7. A proceeding under the *Class Proceedings Act, 1992*.

8. A proceeding to which Rule 74 (Estates --Non-Contentious Proceedings) applies.

9. A proceeding to which Rule 76 (Simplified Procedure) applies.

10. A proceeding in relation to a matter that was the subject of a mediation under section 258.6 of the *Insurance Act*, if the mediation was conducted less than a year before the delivery of the first statement of defence in the proceeding.

Other Proceedings, Access to List

(5) The parties to a proceeding referred to in subrule (4) are entitled to have access to any list of mediators maintained under subrule 78.06 (1).

Duty of Mediation Coordinator

(6) The mediation coordinator shall monitor any mediation of which he or she becomes aware that is not governed by this Rule but has been facilitated by access to a list under subrule (5).

Proceedings Against the Crown Act

(7) In a proceeding to which the *Proceedings Against the Crown Act* applies, if the notice required by section 7 of that Act has not been served, the Crown in right of Ontario is entitled to participate in mediation under this Rule but is not required to do so.

NATURE OF MEDIATION

78.02 In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution.

PURPOSE

78.03 The purpose of this Rule is to establish a mediation scheme throughout Ontario, in order to reduce unnecessary cost and delay in litigation and facilitate the early and fair resolution of disputes.

DEFINITIONS

78.04 In rules 78.05 to 78.19,

"case management judge" and "case management master" have the same meanings as in Rule 77; ("juge responsable de la gestion de la cause", "protonotaire responsable de la gestion de la cause")

"defence" includes a notice of defence, a notice of intent to defend, a statement of defence, a notice of appearance and a notice of motion in response to a proceeding; ("défense")

"defendant" includes a respondent; ("défendeur")

"mediation coordinator" means the person who is responsible for the management of civil mediation under this Rule; (" ")

"plaintiff" includes an applicant. ("demandeur")

LOCAL MEDIATION COMMITTEES

Establishment

78.05 (1) A local mediation committee shall be established in each county named in the Schedule to subrule 78.01 (1).

Membership

(2) The members of each committee shall be appointed by the Attorney General and shall be chosen so as to represent lawyers, mediators, persons employed in the administration of the courts, and the general public.

Liaison

(3) The Chief Justice of the Ontario Court may appoint judges to ensure liaison between each committee and the judges who sit in the relevant county.

Functions

(4) Each committee shall,

(a) compile and keep up-to-date a list of mediators for the purposes of subrule 78.06 (1), in accordance with guidelines approved by the Attorney General;

(b) monitor the performance of the mediators named in the list;

(c) receive and respond to complaints about mediators named in the list;

(d) monitor the operation of this Rule in the county and evaluate its effectiveness;

(e) ensure that public education on the subject of this Rule is provided in the county; and

(f) ensure that training and mentoring are provided to mediators in the county in relation to this Rule.

MEDIATORS

List of Mediators

78.06 (1) The mediation coordinator shall maintain a list of mediators for each county, as compiled and kept up-to-date by the local mediation committee.

(2) Only a person who is named in one of the lists described in subrule (1) may conduct mediations under this Rule.

Exception

(3) Despite subrule (2), a case management master or case management judge (or, if Rule 77 does not apply to the proceeding, any other judge or master) may, at the request of the parties, make an order permitting a person who is not named on a list to conduct a mediation under this Rule.

NOTICE OF MEDIATION

78.07 In every proceeding to which this Rule applies, the originating process shall include the following:

IF YOU DEFEND THIS PROCEEDING, YOU WILL BE REQUIRED TO PARTICIPATE IN A MEDIATION SESSION UNDER RULE 78, AND TO PAY YOUR SHARE OF THE MEDIATOR'S FEE.

EXEMPTION FROM MEDIATION

Order, Criteria

78.08 A case management master or case management judge (or, if Rule 77 does not apply to the proceeding, any other judge or master) may make an order on a party's motion exempting the proceeding from this Rule if, in the opinion of the judge or master,

(a) the proceeding involves a matter of public law or public policy; or

(b) the circumstances or facts of the case (including, but not limited to, the history of the parties' relationship) make mediation inappropriate.

ORDER FOR ADDITIONAL MEDIATION

78.08.1 (1) Even though the parties have already participated in a mediation session required by subrule 78.09 (1), a case management master or case management judge (or, if Rule 77 does not apply to the proceeding, any other judge or master) may, at any stage in the proceeding, make an order requiring an additional mediation session and giving any necessary directions.

(2) Rules 78.09 to 78.19 apply in respect of the additional mediation session, with necessary modifications.

NOTE: Should this be renumbered now, or at a later stage?

MEDIATION SESSION

Time Limit

78.09 (1) The mediation session shall take place,

(a) if Rule 77 applies to the proceeding and it is to proceed on the fast track, within 60 days after,

(i) the originating process has been served on every defendant, and

(ii) at least one defence has been delivered;

(b) in all other cases, within 90 days after the conditions set out in subclauses (a) (i) and (ii) are met.

Lawyer's Duty

(2) As soon as possible after learning that a first defence has been delivered in a proceeding, every lawyer for a party shall advise and prepare his or her client in connection with the mediation session required by subrule (1).

Selection of Mediator

(3) Within 15 days after delivery of the first defence, or within the longer period specified in an order of a case management master or case management judge (or, if Rule 77 does not apply to the proceeding, of any other judge or master),

(a) the parties shall choose a mediator from the list referred to in subrule 78.06 (1) and obtain a date for the mediation session required by subrule (1); and

(b) the plaintiff shall file with the mediation coordinator a notice (Form 78.1) showing the mediator's name and the date of the session.

Default, Court Assignment of Mediator

(4) If the notice is not filed in accordance with subrule (3),

(a) the mediation coordinator shall immediately assign a mediator from the list; and

(b) on being assigned, the mediator shall fix a date for the mediation session required by subrule (1) and give every party a notice (Form 78.2) showing the place, date and time of the session and advising that attendance is obligatory.

EXTENSION OF TIME

Power of Judge or Master

78.10 (1) A case management master or case management judge (or, if Rule 77 does not apply to the proceeding, any other judge or master) may exercise the power conferred by subrule 3.02 (1).

Criteria

(2) In considering whether to order an extension of time under subrule (1), the judge or master shall take into account all the circumstances, including,

(a) the number of parties and the complexity of the issues in the proceeding;

(b) whether a party wishes to bring a motion under Rule 20 or Rule 21;

(c) whether the mediation will be more likely to succeed if it is postponed to allow the parties to acquire more information.

PROCEDURE BEFORE MEDIATION SESSION

Statement of Issues

78.11 (1) At least seven days before the mediation session arranged under subrule 78.09 (3) or (4), every party shall deliver a statement in Form 78.3 and give a copy to the mediator.

(2) The statement shall identify the factual and legal issues in dispute and briefly set out the case and interests of the party making the statement.

(3) The party making the statement may attach to it any documents that the party considers of central importance in the proceeding.

Default

(4) If a party fails to comply with subrule (1) the mediator shall file a certificate of default (Form 78.4) against the party, and shall cancel the mediation session if,

(a) there are only two parties to the proceeding; or

(b) there are more than two parties to the proceeding but it is not practical to conduct the session without the party in default.

Cancellation Fee, Costs

(5) The party in default shall pay,

(a) any cancellation fees; and

(b) any costs incurred by the other party or parties as a result of the default, on a solicitor and client basis.

ATTENDANCE AT MEDIATION SESSION

Who is Required to Attend

78.12 (1) The parties, and their lawyers if any, are required to attend the mediation session, subject to subrule (3).

Authority to Settle

(2) A party who requires another person's approval before agreeing to a settlement shall, before the mediation session required by subrule 78.09 (1), arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours.

Failure to Deliver Defence

(3) If a defendant does not deliver a defence before the mediation session required by subrule 78.09 (1),

(a) the defendant is not entitled to attend the mandatory mediation session; and

(b) the mediator shall file a certificate of default (Form 78.4) against the defendant.

ADJOURNMENTS

On Consent

78.13 (1) A mediation session may be adjourned at any time, subject to subrule (2), if the mediator and the parties who are present consent.

No Adjournments Without Fixed Date

(2) A mediation session may be adjourned only to a fixed date that is otherwise consistent with this Rule.

FAILURE TO ATTEND

Default

78.14 (1) A party who fails to attend within the first 30 minutes of a scheduled mediation session is in default.

Cancellation, Cancellation Fee, Costs

(2) Subrules 78.11 (4) and (5) apply, with necessary modifications, in respect of the failure to attend.

CERTIFICATE OF DEFAULT

Filing by Mediator

78.15 (1) The mediator shall file a certificate of default (Form 78.4) if,

(a) subrule 78.11 (3) (failure to deliver defence) or rule 78.13 (failure to attend) applies; or

(b) a party fails to file Form 78.3 (statement of issues) as required by rule 78.10.

Cancellation, Cancellation Fee, Costs

(2) Subrules 78.11 (4) and (5) apply, with necessary modifications, in respect of the failure to attend.

Effect if Rule 77 Applies

(3) When a certificate of default is filed in a proceeding to which Rule 77 applies, the mediation coordinator shall refer the matter to a master, case management master or case management judge, who may call a case conference under subrule 77.13 (1).

Effect if Rule 77 Does Not Apply

(4) When a certificate of default is filed in a proceeding to which Rule 77 does not apply,

(a) the party in default may not take a further step in the proceeding without leave of the court; and

(b) the court may, on another party's motion, strike out the pleadings of the party in default.

CONFIDENTIALITY AND IMMUNITY

Confidentiality of Statements and Documents

78.16 (1) If they are not otherwise subject to discovery, statements made and documents produced in a mediation session or in pre-mediation exchanges (including statements of issues and appended documents) are not,

(a) subject to discovery; or

(b) admissible in evidence, even to impeach credibility.

Mediator's Notes, Records and Recollections

(2) The mediator's notes, records and recollections are confidential, and are not,

(a) subject to discovery; or

(b) admissible in evidence, even to impeach credibility.

OUTCOME OF MEDIATION

Mediator's Report

78.17 (1) Within 10 days after the mediation is concluded, the mediator shall give the mediation coordinator a report (Form 78.5) that states,

(a) whether the parties have made an agreement resolving issues in dispute; and

(b) if there is an agreement,

(i) to which issues in dispute it applies, and

(ii) whether it was made before, during or after mediation.

(2) The mediation coordinator may remove from any list maintained under rule 78.06 (1) the name of a mediator who does not comply with subrule (1).

Agreement

(3) If there is an agreement resolving issues in dispute, it shall be signed by the parties or their lawyers and filed with the court.

(4) The agreement shall be deemed to be an offer to settle that has been accepted, for the purposes of Rule 49.

Failure to Agree

(5) If the parties do not agree to resolve any issues in dispute, no record of the mediation other than the report referred to in subrule (1) shall be made available to the trial judge.

MEDIATOR'S FEES

First Four Hours

78.18 (1) When a mediation is conducted under this Rule, the mediator's fee for the first four hours (three hours of actual mediation and one hour of preparation time) shall not exceed $300 per party, plus G.S.T.

Liability of Parties

(2) Each party is required to pay a proportionate share of the mediator's fee for the first four hours; a party's failure to pay does not increase the shares of the other parties.

INFORMAL MOTION PROCEDURE

78.19 A motion relating to a matter under this Rule may be made to a case management master or case management judge (or, if Rule 77 does not apply to the proceeding, to any other judge or master), depending on the practical requirements of the situation,

(a) with or without a notice of motion and supporting material or a motion record;

(b) by attendance, conference call, telephone call or fax, or in writing.

2. The Regulation is amended by adding the following forms:

FORM 78.1

(General heading)

NOTICE OF NAME OF MEDIATOR AND DATE OF SESSION

TO: MEDIATION COORDINATOR

1. The parties have chosen the following mediator for the mediation session required by subrule 78.09 (1): *(name)*

2. The mediator is named in the list of mediators for *(name county)*.

(or)

2. The mediator is not named in a list of mediators, but is permitted to conduct a mediation in this proceeding by *(give details of order made under subrule 78.06 (3))*.

3. The mediation session will take place on *(date)*.

(Date) *(Name, address, telephone number and fax number of plaintiff's lawyer or of plaintiff)*

FORM 78.2

NOTICE BY ASSIGNED MEDIATOR

TO:

AND

TO:

The notice of name of mediator and date of session (Form 78.1) required by clause 78.09 (3) (b) of the *Rules of Civil Procedure* has not been filed in this proceeding. Accordingly, the mediation coordinator has assigned me to conduct the mediation session required by subrule 78.09 (1). I am a mediator named in the list of court-connected mediators for *(name county)*.

The mediation session will take place on *(date)*, from *(time)* to *(time)*, at *(place)*.

Unless a case management master or case management judge (or, if Rule 77 does not apply to the proceeding, any other judge or master) orders otherwise, you are required to attend this mediation session. If you hire a lawyer to represent you in this proceeding, he or she is also required to attend.

You are required to file a statement of issues (Form 78.3) by *(date)* (7 days before the mediation session). A blank copy of the form is attached.

When you attend the mediation session, you should bring with you any documents that you consider of central importance in the proceeding. You should plan to remain throughout the scheduled time.

(Date) *(Name, address, telephone number and fax number of mediator)*

FORM 78.3

(General heading)

STATEMENT OF ISSUES

(To be filed with the court and given to mediator and parties at least seven days before the mediation session required by subrule 78.09 (1))

1. Factual and legal issues in dispute

The plaintiff *(or* the defendant *or* third or subsequent party*)* states that the following factual and legal issues are in dispute and remain to be resolved.

(Issues should be stated briefly, numbered and listed in numerical order.)

2. Party's case and interests

(Brief summary.)

3. Attached documents
Attached to this form are the following documents that the plaintiff *(or* the defendant *or* third or subsequent party) considers of central importance in the proceeding: *(list)*

(date) *(party's signature)*

FORM 78.4

(General heading)

CERTIFICATE OF DEFAULT

I, *(name)*, mediator, certify that this certificate of default is filed because:

() *(Identify party(ies))* failed to comply with subrule 78.10 (1) (statement of issues).

() *(Identify party(ies))* failed to comply with subrule 78.11 (3) (filing defence before mediation session).

() *(Identify party(ies))* failed to attend within the first 30 minutes of a scheduled mediation session.

(Date) *(Name, address, telephone number and fax number, if any, of mediator)*

FORM 78.5

(General heading)

MEDIATOR'S REPORT

TO: MEDIATION COORDINATOR

1. I conducted a mediation in this proceeding on *(date(s) of session(s))*.

2. The parties have made an agreement resolving the following issues in dispute: *(If entire proceeding settled, state "All issues"; if some issues, list.)*

The agreement was made () before mediation

() during mediation

() after mediation

(or)

2. The parties have not made an agreement resolving issues in dispute.

(Date) *(Name, address, telephone number and fax number of mediator)*

3. (1) Part I of Tariff A to the Regulation is amended by adding the following item:

1.1 Preparation and attendance at mediation session required by subrule 78.09 (1), for each party represented, up to . . . $300

(2) Part II of Tariff A is amended by adding the following item:

23.1 Fees actually paid to a mediator in accordance with Rule 78.

4. This Regulation comes into force on .....

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Schedule B
(Secretariat's Revision)
RULE 24.1 MANDATORY MEDIATION

PURPOSE

24.1.01 The purpose of this Rule is to establish as a pilot project a mediation scheme throughout Ontario, to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.

NATURE OF MEDIATION

24.1.02 In mediation, a neutral third party will facilitate communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution.

DEFINITIONS

24.1.03 In rules 24.1.04 to 24.1.20

"defence" includes a notice of defence, a notice of intent to defend, a statement of defence and a notice of motion in response to an action; ("défense")

"mediation coordinator" means the person who is responsible for the administration of civil mediation under this Rule; (" ")

APPLICATION OF RULE

Scope, Where Mediation Required

24.1.04 (1) This Rule applies to actions commenced in a county named in the Schedule to this subrule on or after the date specified for that county in the Schedule.

County	Schedule Date
The Municipality of Metropolitan Toronto	
Regional Municipality of Ottawa-Carleton	

Exceptions, Certain Actions

(2) This Rule does not apply to:

1. An action under the *Change of Name Act*, Part III or VII of the *Child and Family Services Act*, the *Children's Law Reform Act*, the *Divorce Act* (Canada), the *Family Law Act*, the *Family Responsibility and Support Arrears Enforcement Act, 1996*, the *Marriage Act* or the *Reciprocal Enforcement of Support Orders Act*.

2. An action for the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement or paternity agreement.

3. An action for relief by way of constructive or resulting trust or a monetary award as compensation for unjust enrichment between persons who have cohabited.

4. An action for the enforcement of a support order.

5. An action under the *Construction Lien Act*.

6. An action under the *Bankruptcy and Insolvency Act* (Canada).

7. An action to which Rule 74 (Estates-Non-Contentious Proceedings) or Rule 75 (Estates - Contentious Proceedings) applies.

8. An action under the *Substitute Decisions Act* or Part V of the *Succession Law Reform Act*.

9. An action to which Rule 76 (Simplified Procedure) applies.

11. An action in relation to a matter that was the subject of a mediation under section 258.6 of the *Insurance Act*, if the mediation was conducted less than a year before the delivery of the first statement of defence in the action.

Order for Mediation in Certain Other Cases

(3) Despite subrule (1), the parties to an action to which this Rule does not apply may within the times provided by this rule move for an order providing that this Rule applies, and the order shall include any necessary directions.

Proceedings Against the Crown Act

(5) In an action to which the *Proceedings Against the Crown Act* applies, if the notice of claim required by section 7 of that Act has not been served, the Crown in right of Ontario is entitled to participate in mediation under this Rule but is not required to do so.

CASE MANAGEMENT

24.1.05 In actions that are being case managed under Rule 77, only a case management judge or case management master may make an order under this Rule.

LOCAL MEDIATION COMMITTEES

Local Mediation Committee

24.1.06 (1) There shall be a local mediation committee for each county named in the Schedule to subrule 24.1.04 (1).

Membership

(2) The members of each committee shall be appointed by the Attorney General so as to represent lawyers, mediators, persons employed in the administration of the courts and the general public.

Liaison

(3) The Chief Justice of the Ontario Court may appoint judges to provide liaison between each committee and the judges who sit in the relevant county.

Functions

(4) Each committee shall,

(a) compile in accordance with guidelines approved by the Attorney General and keep current a list of mediators for the purposes of subrule 24.1.07(1);

(b) monitor the performance of the mediators named in the list;

(c) receive and respond to complaints about mediators named in the list;

(d) monitor the operation of this Rule in the county and evaluate its effectiveness;

(e) ensure that public education on the subject of this Rule is provided in the county; and

(f) ensure that training and mentoring are provided to mediators in the county.

MEDIATORS

List of Mediators

24.1.07 (1) The mediation coordinator shall maintain a list of mediators for each county, as compiled and kept current by the local mediation committee.

(2) Only a person who is named in any one of the lists described in subrule (1) may conduct mediation under this Rule.

Exception

(3) Despite subrule (2), the court may, at the request of the parties, make an order permitting a person who is not named on a list to,

(a) conduct a mediation under this Rule; or

(b) conduct a mediation in place of the mediation under this rule.

and the order shall require the person to comply with subrule 24.1.17 (mediator's report) and shall include any other necessary directions.

(4) On a motion under subrule (3), the parties shall provide evidence concerning the name and qualifications of the person proposed to conduct the mediation.

EXEMPTION FROM MEDIATION

Order, Criteria

24.1.08 The court may make an order on a party's motion exempting the action from this Rule if, in the opinion of the court,

(a) the action involves a matter of public law or public policy; or

(b) the circumstances or facts of the case (including, but not limited to, the history of the parties' relationship) make mediation inappropriate.

MEDIATION SESSION

Time Limit

24.1.09 (1) The mediation session shall take place within 15 days after the close of pleadings.

Selection of Mediator

(2) Within five days after the close of pleadings or within a longer period specified in an order of the court,

(a) the parties shall choose a mediator from the list referred to in subrule 24.1.07 (1) for the mediation session; and

(b) the plaintiff shall file with the mediation coordinator a notice (Form 24.1.1) showing the mediator's name and the date of the session.

Assignment of Mediator

(3) If the mediation coordinator does not receive a notice under subrule (2) within 60 days after the delivery of the first defence,

(a) the mediation coordinator shall immediately assign a mediator from the list; and

(b) on being assigned, the mediator shall fix a date for a mediation session and give every party a notice (Form 24.1.2) showing the place, date and time of the session and advising that attendance is obligatory.

EXTENSION OR ABRIDGMENT OF TIME

Power of Judge or Master

24.1.10 (1) The court may by order extend or abridge any time provided for in this Rule, on such terms as are just.

Criteria for Extension

(2) In considering whether to order an extension of time under subrule (1), the court shall take into account all the circumstances, including,

(a) the number of parties and the complexity of the issues in the action;

(b) whether a party wishes to bring a motion under Rule 20 (Summary Judgment), Rule 21 (Determination of an Issue Before Trial) or Rule 22 (Special Case);

(c) whether the mediation will be more likely to succeed if it is postponed to allow the parties to acquire more information.

PROCEDURE BEFORE MEDIATION SESSION

Statement of Issues

24.1.11 (1) At least seven days before the mediation session arranged under rule 24.1.09,

(a) every party shall prepare a statement in Form 24.1.3 and give a copy to the mediator and all the other parties; and

(b) the plaintiff shall provide the mediator with a copy of the pleadings.

(2) The statement shall identify the factual and legal issues in dispute and briefly set out the case and interests of the party making the statement.

(3) The party making the statement may attach to it any documents that the party considers of central importance in the action.

Non-compliance

(4) If a party fails to comply with subrule (1) the mediator shall file a certificate of non-compliance (Form 24.1.4), and shall cancel the mediation session if it is not practical to conduct the session.

Cancellation Fee, Costs

(5) The party who did not comply shall pay,

(a) any cancellation fees, which shall not exceed the amounts provided by rule 24.1.18; and

(b) any costs incurred by the other party or parties as a result of the non-compliance, on a solicitor and client basis.

ATTENDANCE AT MEDIATION SESSION

Who is Required to Attend

24.1.12 (1) The parties are required to attend the mediation session.

Authority to Settle

(2) A party who requires another person's approval before agreeing to a settlement shall, before the mediation session arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours.

ADJOURNMENTS

On Consent

24.1.13 (1) A mediation session may be adjourned at any time, if the mediator and the parties who are present consent.

No Adjournments Without Fixed Date

(2) A mediation session may be adjourned only to a fixed date.

FAILURE TO ATTEND

Certificate of Non-compliance, Cancellation Fee, and Costs for Failure to Attend

24.1.14 Where a party fails to attend within the first 30 minutes of a scheduled mediation session, subrules 24.1.11 (4) and (5) apply, with necessary modifications.

NON-COMPLIANCE

Effect if Rule 77 Applies

24.1.15 (1) Where a certificate of non-compliance is filed in an action to which Rule 77 (case management) applies, the mediation coordinator shall refer the matter to a case management master or case management judge, who may call a case conference under subrule 77.13 (1).

Effect if Rule 77 Does Not Apply

(2) Where a certificate of non-compliance is filed in an action to which Rule 77 does not apply,

(a) the party who has failed to comply may not take a further step in the action without leave of the court or the consent of the other parties; and

(b) the court may dismiss the action, if the party who has failed to comply is a plaintiff, or strike out the statement of defence, if the party who has failed to comply is a defendant.

CONFIDENTIALITY

Confidentiality of Statements and Documents

24.1.16 (1) No statement made or document produced for the purposes of a mediation is admissible in evidence in any action, even to impeach credibility, unless it was made or was produced or was producible independently of the mediation.

Mediator's Notes, Records and Recollections

(2) The mediator's notes, records and recollections are confidential, and are not,

(a) subject to discovery; or

(b) admissible in evidence, even to impeach credibility.

OUTCOME OF MEDIATION

Mediator's Report

24.1.17 (1) Within 10 days after the mediation is concluded, the mediator shall give the mediation coordinator a report (Form 24.1.5) that states,

(a) whether the parties have or have not made an agreement resolving issues in dispute; and

(b) if there is an agreement,

(i) to which issues in dispute it applies, and

(ii) whether it was made before or during mediation.

(2) The mediation coordinator may remove from any list maintained under rule 24.1.07 the name of a mediator who does not comply with subrule (1).

Agreement

(3) If there is an agreement resolving issues in dispute, it shall be signed by the parties or their lawyers and if the agreement settles the action, the defendant shall file a notice with the court stating that the action has been settled.

Failure to Comply with Agreement

(4) Where a party to an agreement fails to comply with its terms, the other party may,

(a) make a motion to a judge for judgment in terms of the agreement, and the judge may grant judgment accordingly; or

(b) continue the action as if there had been no agreement.

MEDIATOR'S FEES

Interpretation

24.1.18 (1) In this rule,

(a) where there is more than one plaintiff, they shall be deemed to be a single party; and

(b) where there is more than one defendant, the defendants that jointly serve a statement of defence or that are jointly represented shall be deemed to be a single party.

First Four Hours

(2) Where a mediation is conducted under this Rule, the mediator's maximum fee for the first four hours (three hours of mediation and one hour of preparation time) shall be determined in accordance with the following fee schedule:

Number of Parties	*Maximum Fee*
2	$600 plus GST
3	$900 plus GST
4	$1,200 plus GST
5 or more	$1,500 plus GST

Subsequent Hours

(3) Where a mediation is conducted under this Rule, the mediator's fee after the first four hours shall be determined by the agreement of the parties and the mediator.

Liability of Parties

(4) Each party is required to pay its share of the mediator's fee for the first four hours, and a party's failure to pay does not increase the shares of the other parties.

ORDER FOR ADDITIONAL MEDIATION

24.1.19 (1) Even though the parties have already participated in a mediation session required by subrule 24.1.09(1) the court may, with the consent of the parties at any stage in the action, make an order requiring an additional mediation session and giving any necessary directions.

(2) Rules 24.1.09 to 24.1.17 apply in respect of the additional mediation session, with necessary modifications.

(3) Rule 24.1.18 applies in respect of any additional mediation session whether it is conducted by the same or a different mediator from the mediator who conducted a prior mediation session.

INFORMAL MOTION PROCEDURE

24.1.20 A motion relating to a matter under this Rule may be made to the court, depending on the practical requirements of the situation,

(a) with or without a notice of motion and supporting material or a motion record;

(b) by attendance, conference call, telephone call or fax, or in writing.

AMENDMENT OF TARIFF

Part I of Tariff A to the Regulation is amended by adding the following item:

1.1 Preparation and attendance at mediation session required by subrule 24.1.09 (1) for each party represented, up to . . . $300

An increased fee may be allowed in the discretion of the assessment officer.

(2) Part II of Tariff A is amended by adding the following item:

23.1 Fees actually paid to a mediator in accordance with Rule 24.1.18

FORM 24.1.1

(General heading)

NOTICE OF NAME OF MEDIATOR AND DATE OF SESSION

TO: MEDIATION COORDINATOR

1. The parties have chosen the following mediator for the mediation session required by subrule 24.1.09(1): *(name)*

2. The mediator is named in the list of mediators for *(name county)*.

(or)

2. The mediator is not named in a list of mediators, but is permitted to conduct a mediation in this action by *(give details of order made under subrule 24.1.07(3)*.

3. The mediation session will take place on *(date)*.

(Date) *(Name, address, telephone number and fax number of plaintiff's lawyer or of plaintiff)*

FORM 24.1.2

NOTICE BY ASSIGNED MEDIATOR

TO:

AND

TO:

The notice of name of mediator and date of session (Form 24.1.1) required by clause 24.1.09 (2)(b) of the *Rules of Civil Procedure* has not been filed in this action. Accordingly, the mediation coordinator has assigned me to conduct the mediation session. I am a mediator named in the list of court-connected mediators for *(name county)*.

The mediation session will take place on *(date)*, from *(time)* to *(time)*, at *(place)*.

Unless the court orders otherwise, you are required to attend this mediation session. If you hire a lawyer to represent you in this action, he or she is also required to attend.

You are required to file a statement of issues (Form 24.1.3) by *(date)* (7 days before the mediation session). A blank copy of the form is attached.

When you attend the mediation session, you should bring with you any documents that you consider of central importance in the action. You should plan to remain throughout the scheduled time.

(Date) *(Name, address, telephone number and fax number of mediator)*

FORM 24.1.3

(General heading)

STATEMENT OF ISSUES

(To be filed with the court and given to mediator and parties at least seven days before the mediation session

1. Factual and legal issues in dispute

The plaintiff *(or* the defendant *or* third or subsequent party*)* states that the following factual and legal issues are in dispute and remain to be resolved.

(Issues should be stated briefly, numbered and listed in numerical order.)

2. Party's case and interests

(Brief summary.)

3. Attached documents

Attached to this form are the following documents that the plaintiff *(or* the defendant *or* third or subsequent party) considers of central importance in the action: *(list)*

(date) *(party's signature)*

FORM 24.1.4

(General heading)

CERTIFICATE OF NON-COMPLIANCE

I, *(name)*, mediator, certify that this certificate of non-compliance is filed because:

() *(Identify party(ies))* failed to comply with subrule 24.1.11 (statement of issues).

() *(Identify party(ies))* failed to attend within the first 30 minutes of a scheduled mediation session.

(Date) *(Name, address, telephone number and fax number, if any, of mediator)*

FORM 24.1.5

(General heading)

MEDIATOR'S REPORT

TO: MEDIATION COORDINATOR

1. I conducted a mediation in this action on *(date(s) of session(s))*.

2. The parties have made an agreement resolving the following issues in dispute: *(If entire action settled, state "All issues"; if some issues, list.)*

The agreement was made () before mediation

() during mediation

(or)

2. The parties have not made an agreement resolving issues in dispute.

(Date) *(Name, address, telephone number and fax number of mediator)*

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Schedule C
(Comments about Rule 24.1 Proposal)

For the purposes of assisting the Civil Rules Committee in its consideration of the Ministry's proposal, the Secretariat prepared a revised version, the Rule 24.1 Proposal. This proposal accepted the user-pay approach of the Ministry's proposal. What follows are comments explaining some of the changes.

- Since mediation may lead to a disposition without trial, the appropriate placement and number for the rule is 24.1.

- The Secretariat relocated the statement of purpose from rule 78.03, to make it the first rule. The Secretariat recommends that consideration be given to having the statement of purpose indicate that the rule is a pilot project. In any event, the Secretariat believes that careful monitoring and timely ongoing evaluation must be put into place from the outset to ensure that the Rule does indeed make a positive contribution to the administration of justice.

- The Secretariat reorganized the rule about the application: i.e., scope, of the rule. It no longer extends to applications.

- Should proceedings under the *Class Proceedings Act, 1992* be exempted? While this type of proceeding was excluded from the case management rule, that can be explained on the grounds of redundancy; i.e., certified class actions are in effect case managed.

- Mediation in estates matters is complicated because usually many interests are involved, including charities, children, and competing classes of beneficiaries. Although in favour of mediation, the Estates Subcommittee of the Civil Rules Committee recommended that estate proceedings be exempted from this rule until the rule can be modified for these proceedings.

- The Secretariat has simplified the wording of several subrules by deleting the language about case managed cases and by adding instead a discrete rule for case managed cases; see rule 24.1.05.

- Subrules 78.01 (5) and (6) were quite obtuse, and have been replaced by subrule 24.1.04(4). Their apparent purpose was to allow parties outside the scope of the mediation rule to have access to the mediator lists provided by the Rule, presumably for the purposes of a consensual mediation. The redrafted version gives parties access to the whole mediation procedure of the rule on consent including the provisions that regulate the initial costs of the mediator.

- A concern is that the best mediators may well decide not to make themselves candidates for the list of mediators provided for under the Rule because (a) if they allow themselves to be listed, they will likely be swamped by parties seeking the best mediators at the fixed price and (b) the best mediators may be confident that they will be able to operate more profitably in the market outside the rule. The Secretariat sees no reason why the rule should not take account of market realities and the autonomy of the parties. Consequently, we recommend and have redrafted the rule so that the parties are able to apply, on consent, for an order that the mediation be before a named, unlisted mediator, who would be free to charge his or her normal rates. In our redraft, we describe this somewhat inelegantly as "a mediation in place of the mediation under this rule." The requirement of a consent motion allows the Court to police the *bona fides* of the request and to refuse to make the order if the mediator is unqualified.

- The original proposal was blind to the status of the proceedings in the sense that it set times for the mediation to proceed in relation to the delivery of the first statement of defence. While this may be convenient for court administration, from the parties' perspective being forced on to a mediation where there are defendants who have not yet delivered their defence; i.e., with participants missing, is a waste of time, money, and a potential source of serious complaint. The Secretariat thought it was more sensible to have the pleadings for the action closed and then proceed to the mediation.

- Subrule 78.09(2) was deleted; it is not for *Rules of Civil Procedure* to regulate the solicitor and client relationship.

- The Secretariat does not see the need to direct invariably that the lawyers must attend the mediation session and believes that the lawyer and his or her client should be left to decide whether it is productive and cost efficient for a client to attend without representation.

- In revising subrule 78.17 (see now rule 24.1.17) for the situation where an agreement settles the proceedings, the Secretariat felt that it was unnecessary and in many cases it would be against the wishes of the parties to disclose the terms of the agreement to the court by the filing of the agreement. We thought that notifying the court of the settlement was sufficient.

- Without changing the underlying policy, the Secretariat changed to the rule about mediator's fees. Because of concern about how the rule applies to multi-party cases, the Secretariat redrafted the rule so that: (a) a mediator cannot charge in the aggregate more than $1,500 for the initial mediation; and (b) parties with a common interest are grouped together to more fairly apportion responsibility for the mediator's fee.

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It was moved by Ms. Eberts, seconded by Ms. Carpenter-Gunn that Convocation authorize the working group on the draft rule on mandatory mediation to make a submission to the Civil Rules Committee based on the principles outlined in Appendix B of the Report.

Carried

Mr. Banack reported on the item of Post-Call Education set out in the Report as information only.

Governance Restructuring Implementation Task Force Report

Mr. Feinstein presented the Report of the Governance Restructuring Implementation Task Force.

Governance Restructuring Implementation Task Force
October 27, 1997

Report to Convocation

Purpose of Report: Decision-Making

TRANSITIONAL GOVERNANCE ISSUES

A. Nature of the Issue

1. Benchers have always had a variety of roles outside the realm of discipline. These relate to relatively routine matters involving members, for example, applications to be an articling principal. Some of these roles are prescribed by our legislative framework. Others are prescribed by policy set by Convocation. In some instances, committees or Convocation consider matters in detail. In others, committees or Convocation simply rubber-stamp staff recommendations.

2. The adoption of the Policy Governance model, and the elimination of many of the former standing committees and subcommittees previously charged with the responsibility of reviewing staff decisions created transitional ambiguities that necessitate a review of some of these roles.

3. The amendments to the *Law Society Act* clarify some of these transitional ambiguities. However, until the amendments are enacted, a scheme must be devised so that staff, benchers, and members know what the procedures are for handling them.

B. Task Force Discussion

4. To develop a coherent and consistent policy, the Task Force considered an overall approach to functions, which are or should be, routine staff matters. The Task Force considered the following three approaches:

   a. standing committees and/or Convocation consider and decide individual applications;
   b. Convocation sets guidelines pursuant to which staff consider and decide individual applications, subject to an appeal to benchers;
   c. Convocation sets guidelines pursuant to which staff consider and decide individual applications, with no appeal to benchers.

5. The Task Force proposes the third approach, whereby Convocation will set guidelines, and staff will have final decision-making authority. This approach eliminates the inefficient necessity of having benchers rubber-stamp staff decisions, but continues to have Convocation exercise authority over these matters by setting the guidelines (policy) that will govern the decisions made by staff.

6. This approach also complies with our Governance Policies, which charge Convocation with the responsibility of making policy and the C.E.O. with the responsibility of implementing it.

7. The Task Force recognizes that our current legislative scheme technically requires bencher approval of staff decisions on these matters. In some cases, an amendment to our regulations and rules will be necessary. In other cases, Convocation may wish to delegate its authority to staff. Until amendments are made or authority is delegated, the Task Force proposes that the procedures set out in our legislation be followed.

8. Where the current legislative scheme permits, the Task Force proposes that staff have final decision-making authority on these matters.

9. The chart that begins at page 4 sets out the various issues that have required bencher approval. For each issue listed in the chart, the bencher role is described, the legislative authority for the role is noted, the manner in which the issue has been dealt with in the past is detailed, and a recommended course of action is set out. If the matter is dealt with in the pending amendments to the *Law Society Act*, the amendments are set out.

10. The recommended courses of action seek to accomplish a number of things.
- ♦ Compliance with the current legislation.
- ♦ Elimination of the process of rubber-stamping staff decisions by benchers and Convocation, where legislation permits.
- ♦ Consistency with policy and procedures set out in our proposed amendments.
- ♦ Where regulations and/or rules can be amended to be consonant with the Policy Governance Model, the recommended amendment is set out.

C. Issues for Decision

11. Convocation is asked to consider and approve the Task Force's overall proposed approach set out in paragraph 5, above.

12. Convocation is further asked to consider and approve in principle each of the recommended courses of action set out in the accompanying chart. If Convocation approves the recommendations, the Task Force will develop and present the relevant amendments to Convocation in November 1997.

I. ARTICLING ADMINISTRATION

The articling process is governed by the "Proposals for Articling Reform Report", approved by Convocation in October 1990, and amended in minor ways since that time. Section 1.0 requires the Legal Education Committee to establish a "permanent Articling Subcommittee", which, along with the Legal Education Committee, exercise ongoing decision-making functions in relation to individual applications of students and lawyers. (Articling itself is mandated by regulation 708, section 23.)

Issue	Legislative Requirements	Prior Practice	Recommended Action
Articling Principal Applications	Section 4.2 *Proposals for Articling Reform Report* The Articling Subcommittee must determine whether a member may serve as a principal, based on the recommendation of the Articling Director. A member whose application is denied may ask the Legal Education Committee to review the decision.	Members applied to the Articling Director for approval. In most cases, the Articling Director recommended a list of articling principals to the Articling Subcommittee, who rubber-stamped it. The Articling Subcommittee only considered the recommendation of the Articling Director. In 1996, 1,204 articling principal applications were processed. In a small number of difficult cases (2 or 3 each month), the Articling Director placed the application before the Articling Subcommittee for decision. Appeals to the Legal Education Committee rarely happened.	The Proposals for Articling Reform Report be amended to give staff final decision-making authority, to be exercised in compliance with standards set by Convocation.
Issue	Legislative Requirements	Prior Practice	Recommended Action
Applications for Approval of Articling Positions	Section 5.3 *Proposals for Articling Reform Report* Approved articling principals must have the actual articling position approved by the Articling Director, whose decision is subject to review by the Articling Subcommittee.	The Articling Director made the decision. There was never an appeal to the Articling Subcommittee.	The Proposals for Articling Reform Report be amended to give staff final decision-making authority, to be exercised in compliance with standards set by Convocation.
Applications for Approval of Education Plans	Section 6.1 *Proposals for Articling Reform Report* Education plans for each articling position must be approved by the Articling Director, whose decision is subject to review by the Articling Subcommittee.	The Articling Director approved education plans. There was never an appeal to the Articling Subcommittee.	The Proposals for Articling Reform Report be amended to give staff final decision-making authority, to be exercised in compliance with standards set by Convocation.

Intervention in Articling Relationship	Section 8.3 *Proposals for Articling Reform Report* The Articling Director is authorized to intervene in the principal/student relationship if a serious problem arises. The Articling Director may withdraw or suspend accreditation of a member as a principal. An appeal from the decision of the Articling Director lies to the Articling Subcommittee.	The Articling Director regularly dealt with issues that arose between principals and students. However, a principal's accreditation has never been suspended or withdrawn.	The Proposals for Articling Reform Report be amended to give staff final authority to deal with these issues.
Issue	Legislative Requirements	Prior Practice	Recommended Action
Application to Reschedule Bar Admission Course	Section 11.1 *Proposals for Articling Reform Report* Students must apply to the Articling Director, whose decision is subject to review by the Articling Subcommittee. Subsection 23(5) of regulation 708 prescribes the scheduling of the Bar Admission Course. Subsection 23(8) allows the Legal Education Committee to modify the requirements of s. 23(5).	The Articling Director considered applications to re-schedule the order of the Bar Admission Course. In 1996, 60 requests to reschedule the Bar Admission Course were dealt with. The Articling Director's decision could be appealed to the Articling Subcommittee, whose decision was final.	Admissions and Equity Committee consider the applications until the regulation is amended. Amend s. 23(8) of regulation 708 to permit staff to make the final decision, subject to guidelines set by Convocation.
Application to Abridge Articles	Section 14.1 and 14.1.3 *Proposals for Articling Reform Report*. Subsection 23(5) of regulation 708 prescribes the scheduling of the Bar Admission Course. Subsection 23(8) allows the Legal Education Committee to modify the requirements of s. 23(5).	The Articling Director could abridge the twelve-month articling requirement for candidates admitted to the Bar of another jurisdiction. In 1996, 55 applications were processed. The Articling Director's decision could be appealed to the Articling Subcommittee, whose decision was final. There has never been an appeal.	Admissions and Equity Committee consider the applications until the regulation is amended. Amend s. 23(8) of regulation 708 to permit staff to make the final decision, subject to guidelines set by Convocation.

II. STUDENT RECRUITMENT PROCEDURES

Issue	Legislative Requirement	Prior Practice	Recommended Action
Procedures Governing Recruitment of Articling Students The Procedures set out detailed procedures governing the articling interview and recruitment process. A breach of these procedures may constitute professional misconduct pursuant to Professional Conduct Rule 13, Commentary 7, depending on the severity of the breach.		The Legal Education Committee and Convocation considered and approved the procedures on an annual basis. Discipline proceedings have never been instituted against an employer for breach of the procedures.	The current procedures be made into rules pursuant to paragraph 20 of s. 62(1) of the *Law Society Act*.
Procedures Governing Recruitment of Summer Students The Procedures apply to Metropolitan Toronto, and in a less detailed way than the Procedures Governing the Recruitment of Articling Students, regulate the interviewing and recruitment process. Breach of the procedures may constitute professional misconduct.		The Legal Education Committee and Convocation considered and approved the procedures on an annual basis. Discipline proceedings have never been instituted against an employer for breach of the procedures.	The current procedures be made into rules pursuant to paragraph 20 of s. 62(1) of the *Law Society Act*.

III. BAR ADMISSION COURSE REQUIREMENTS FOR STANDING

Issue	Legislative Requirements	Prior Practice	Recommended Action
Bar Admission Course Requirements for Standing - Phases One and Three The Requirements for Standing prescribe the requirements for passing the Bar Admission Course, the consequences of failure, the attendance requirement, guidelines for granting exceptions to the attendance requirement, grounds upon which special accommodation is granted to disabled students, and consequences to students who violate applicable rules and procedures.	Section 10 of the *Law Society Act* states that benchers shall govern the affairs of the Society "including the call of persons to practise at the bar... and their admission and enrolment to practise as solicitors..." The Requirements for Standing set out the requirements a person must meet to successfully complete the Bar Admission Course. Section 2 of regulation 708 states that an applicant who has fulfilled the requirements of the Act and "who presents a certificate of successful completion of the Bar Admission Course may be called to the Bar." Satisfying the Requirements for Standing is thus necessary for call to the bar and admission as a solicitor - two matters specifically within the power of benchers, according to s. 10.	The Phase One and Phase Three Requirements for Standing were approved by both the Legal Education Committee and Convocation.	The Admissions and Equity Committee must recommend approval of the Requirements for Standing to Convocation.

IV. ADMISSIONS MATTERS

The following matters require Convocation to call applicants to the bar.

Issue	Legislative Requirements	Prior Practice	Recommended Action
Approval of Call to the Bar Lists	Section 10 of the *Law Society Act* states that benchers shall govern the affairs of the Society "including the call of persons to practise at the bar... and their admission and enrolment to practise as solicitors... Section 27(4) of the *Law Society Act* stipulates that no application for admission shall be refused, "until the applicant has been given the opportunity to appear in person before a committee of benchers."	Since the adoption of the Policy Governance model, the Director of Bar Admissions has presented a list of candidates to Convocation. Cases of applicants with good character issues were referred to the Chair and Vice-chair of the Discipline Committee for authorization to proceed with a good character hearing. If a hearing was authorized, it was held before a committee of three benchers.	Subject to Convocation's right to delegate this function to staff (legal opinion to be obtained), eliminate the necessity of having staff present lists of candidates to Convocation for rubber-stamping. Until this function is delegated, staff must submit a list of candidates to Convocation for approval. Candidates whose names staff is not willing to submit because they do not meet the good character requirement are entitled to a hearing before a committee pursuant to s. 27(4).
Admission of Law Teachers and Law Deans	Section 5 of regulation 708 permits Convocation to approve the call to the bar of Ontario law school deans and law teachers, without examination.	The Admissions and Membership Committee considered these applications based on staff recommendation. The Committee's decision then went to Convocation for approval.	Delegate this function to staff, whose decision is subject to s. 27(4). Pending this, staff must submit a list of candidates to Convocation for approval.

Applicants in the following situations are admitted to membership, not called to the bar.

Issue	Legislative Requirements	Prior Practice	Recommended Action
Request for Temporary Membership	Section 28.1 of the *Law Society Act* provides that a person of good character who is qualified to practise law outside of Ontario may be admitted by Convocation as a temporary member of the Society, at the request of the Attorney General. Pending amendments: Section 28.1 of the *Law Society Act* will be amended to permit staff to approve these applications. The staff decision will be subject to appeal to a three-bencher hearing panel.	Applicants applied to the Director of Bar Admissions. Applications were handled by staff, without the involvement of benchers. Applicants were entitled to a hearing pursuant to s. 27(4) if their application for admission was denied.	Delegate this function to staff, whose decision is subject to s. 27(4). Pending this, staff must submit a list of candidates to Convocation for approval.
Admissions for Occasional Court Appearance	Section 6 of regulation 708 permits Convocation to approve the admission of practising lawyers from other provinces for the purpose of appearing as counsel in a specific proceeding.	Applicants applied to the Director of Bar Admissions, who considered them subject to guidelines established by Convocation, including requirements that applicants be of good character, have professional liability insurance, and produce a Certificate of Good Standing from their home jurisdiction. Applicants were entitled to a hearing pursuant to s. 27(4) if their application for admission was denied.	Delegate this function to staff or amend s. 6 of regulation 708 to permit staff to approve these applications, subject to guidelines set by Convocation. Staff's decision is subject to s. 27(4). Pending this, staff must submit a list of candidates to Convocation for approval until the regulation is amended.

The following matters require the approval of Convocation upon the recommendation of a committee.

Issue	Legislative Requirements	Prior Practice	Recommended Action
Transfer Applications	Section 4 of regulation 708 provides that transfer applicants may be called to the bar upon the recommendation of the Admissions and Membership Committee.	Transfer applications were routinely approved by Convocation on the recommendation of the former Admissions and Membership Committee. If the Committee denied the request, the matter did not proceed to Convocation. Typically, the Committee rubber-stamped the recommendations of staff. Occasionally, the Committee was called upon to determine whether work the prospective transferee had performed satisfied the active practice requirement for purposes of transfer.	Delegate this function to staff or amend section 4 of regulation 708 to permit staff to approve these applications, subject to guidelines set by Convocation. Staff's decision is subject to s. 27(4). Pending this, staff must submit lists of candidates to the Admissions and Equity Committee, whose decision is subject to the approval of Convocation.

Membership Resignation Applications	Section 12 of regulation 708 requires that the Finance and Administration Committee consider every member and student member application for permission to resign and report to Convocation. This responsibility was transferred to the Admissions and Equity Committee with the adoption of the Policy Governance Model. Section 30 of the *Law Society Act* permits Convocation to accept a member's resignation. Section 44 of the Act provides for a right of appeal from Convocation to the Divisional Court. Pending amendments: Section 30 of the *Law Society Act* will be amended to eliminate the requirement that Convocation accept the resignation of members, and permit staff to handle them in accordance with regulations.	The Admissions and Membership Committee rubber-stamped staff's recommendation. The Committee's recommendation then went to Convocation for approval. Since the adoption of the Policy Governance Model, the Director of Bar Admissions has submitted lists of candidates to Convocation for approval.	Delegate this function to staff. Pending this or until the pending amendments are enacted, staff must submit lists of candidates to the Admissions and Equity Committee, whose decision is subject to the approval of Convocation.
Issue	Legislative Requirements	Prior Practice	Recommended Action
Membership Readmission Applications	Section 46 of the *Law Society Act* requires a decision by Convocation on whether to readmit someone, "after due inquiry by a committee." Pending Amendments: An applicant must appear before a reinstatement hearing panel, comprising three benchers. An appeal will be permitted before a seven-bencher appeal panel. This procedure applies to all readmission applicants, including those who were not disbarred or permitted to resign as a disciplinary sanction. On September 26, 1997, Convocation approved a change to the pending amendments to distinguish between applicants who have been disbarred or permitted to resign as a disciplinary sanction and those who have resigned otherwise.	The Admissions and Membership Committee considered these matters, and made a recommendation to Convocation. Unless the applicant had been disbarred or permitted to resign as a disciplinary sanction, the Committee rubber-stamped the recommendation of staff. Where the applicant had been disbarred or permitted to resign, a readmission hearing was held before a committee of benchers. The committee's decision then went to Convocation for approval. Since the adoption of the Policy Governance Model, the Director of Bar Admissions has submitted lists of applicants who were not disbarred or permitted to resign as a disciplinary sanction directly to Convocation.	Delegate to staff the ability to approve readmission applications for applicants who have not been disbarred or permitted to resign as a disciplinary sanction. Pending this, staff must submit lists of candidates to the Admissions and Equity Committee, whose decision is subject to the approval of Convocation.

The following matters relate to issues over which the Law Society has no express legislative authority. As a result, it is recommended that Convocation approve these matters pursuant to the power set out in s. 10 of the *Law Society Act* to govern the affairs of the Society.

Issue	Legislative Requirements	Prior Practice	Recommended Action
Foreign Legal Consultant Applications	This procedure has been developed pursuant to a policy adopted by Convocation. Pending amendments: The Secretary will issue a licence to a foreign legal consultant. If the Secretary refuses to issue a license, the applicant may appeal to a three-bencher hearing panel and may subsequently appeal to the seven-bencher appeal panel.	Each application by a non-Canadian lawyer to be licensed as a foreign legal consultant was considered by the Admissions and Membership Committee based on the recommendation of staff.	Staff must submit a list of candidates to Convocation for approval.
Requalification Requirement	The Joint Subcommittee on Requalification (1994) recommended that, before the requalification legislation is passed, members who are advised that they are not making use of their legal skills be permitted to appeal to the Professional Standards Committee. Pending amendments: A "summary disposition bencher" will have the power to order that a member must requalify before being entitled to practise law. This order will be subject to an appeal to the seven-bencher appeal panel.	Members who wished to challenge a decision that they were not making substantial use of their legal skills on a regular basis, and were thus going to be required to requalify, applied to the Professional Standards Committee.	The challenge should be brought before a single bencher, on the basis of written submissions.

VIII. RELIEF AND ASSISTANCE FUNDS

Issue	Legislative Requirements	Prior Practice	Recommended Action
J. Shirley Denison Trust Fund	Established under the Denison will to provide financial relief assistance to needy members and student members. The will stipulates that awards are to be made by the Treasurer and benchers. The Financial Aid office provides administrative support for these requests because of staff expertise.	For some time, applications for awards have been approved or rejected by the Special Committee for Relief and Assistance, without the approval of Convocation. This appears to be contrary to the terms of the trust.	The role of the Special Committee for Relief and Assistance ought to be eliminated and staff should make a recommendation about each application to Convocation for final confirmation or variation. This complies with the terms of the trust.
L.P.I.C. Fee Assistance Fund		Decisions are made by the Special Committee for Relief and Assistance, pursuant to Convocation's decision in October 1994.	The role of the Special Committee for Relief and Assistance ought to be eliminated and staff should be given final decision-making authority, to be exercised in compliance with standards set by Convocation.

IX. PROFESSIONAL STANDARDS

Issue	Legislative Requirements	Prior Practice	Recommended Action
Practice Checklists	Pending amendments: Section 40.1 of the amendments to the *Law Society Act* provides that "Convocation may establish and publish standards relating to specified areas of practice."	A subcommittee of the Professional Standards Committee drafted checklists, which were then sent to the Professional Standards Committee for approval. Finally, the checklist was approved by Convocation before being distributed to the profession.	Convocation must approve practice checklists.

It was moved by Mr. Epstein, seconded by Mr. Millar that under the Articling Administration that articling principals and other articling positions be given right of appeal to the Legal Education Committee

Not Put

It was moved by Mr. Crowe, seconded by Ms. Puccini that there be a right of a appeal for transfer applications and membership readmission.

Not Put

It was moved by Mr. Ruby, seconded by Mr. Wright that the Report be referred back to the Committee for further consideration on the points raised in Convocation and then circulated to the committees.

Carried

ROLL-CALL VOTE

Aaron	For
Adams	Against
Angeles	For
Banack	For
Carpenter-Gunn	For
Crowe	For
Curtis	Against
DelZotto	Against
Eberts	For
Epstein	Against
Feinstein	Against
Finkelstein	Against
Gottlieb	For
MacKenzie	Against
Martin	Against
Millar	Against
Murphy	For
O'Brien	For
Puccini	For
Ross	For
Ruby	For
Sealy	For
Stomp	For
Swaye	Against

CEO's Report

Mr. Saso gave a brief overview of his Report to Convocation.

CEO'S SECOND AND THIRD QUARTER REPORT TO CONVOCATION

APRIL - SEPTEMBER 1997

GENERAL OVERVIEW OF DEVELOPMENTS, INITIATIVES, RESULTS

The information contained within this report summarizes activities, initiatives and results for the Law Society's operations during the second and third quarter of 1997 - April 1 to September 30. The information is not exhaustive -- it is a highlight of our operational activities. Management's compliance with the executive limitations prescribed by Convocation is found at Tab 1.

A. Finance

Legal Aid. During the second quarter, the Finance Departments of both the Law Society and the Ontario Legal Aid Plan reached a consensus on the component costs comprising the assessable administrative expenses of the Plan. The result of this agreement is that the Law Society is in a surplus position for the year of $361,000 as opposed to a deficit position of $490,000 with respect to contributions to the Legal Aid Plan. This surplus will be applied towards the Society's 1997-98 obligation to the Legal Aid Plan.

Corporate banking change. Proposals for banking services were requested from the five major Canadian chartered banks. The proposals were assessed by staff to determine which bank could offer the Law Society the highest level of service at the most competitive cost. The selection of the Bank of Montreal as the Law Society's banker was approved by Convocation at its May meeting. Work on the final stages of the transition and implementation of the new services is drawing to a close and will be completed by the end of October.

Compensation Fund portfolio manager. In accordance with the Society's revised Investment Policy, requests for proposals to manage the Lawyers Fund for Client Compensation portfolio were sent to three independent investment managers all of whom responded. The proposals are currently being evaluated and a recommendation to employ the services of one of these firms will be brought forward for the Finance and Audit Committee's consideration.

Outsourcing of services. The Law Society has tendered for outsourcing of mailroom and printing services. The goal is to make available the most current printing, photocopying and distribution technology at a competitive price. These services are now being performed with outmoded equipment that will require replacement in the near future and a significant capital investment in order to improve service. Four reputable firms have responded to our call for proposals. Each firm has been asked to reassign existing Law Society staff to its own operation. Enhanced service will be provided by the successful firm from the current print shop and mailroom locations in Osgoode Hall. A staff committee has been created to conduct site inspections and evaluate the proposals and make recommendations to management for implementation in 1998.

Insurance proposals. Insurance proposals were also sought. All of our coverage and cost levels have been reviewed by staff to determine that the best insurance value is being obtained while at the same time maintaining adequate coverage.

Budget process. The 1998 budget process began in August with staff submissions being completed in September. An initial review by Finance staff and follow-up meetings with departmental staff resulted in a first submission to the Finance and Audit Committee on October 9, 1997. Work continues as staff strives towards the November 28 target date with Finance and Audit Committee meetings set for October 20 and November 13 to review the status of the 1998 budget.

Fee billing changes. Responding to requests from the profession and the Finance and Audit Committee, finance staff researched and drafted a report concerning the annual billing process and membership classes. The report was brought forward at the September 11 and October 9 meetings of the Finance and Audit Committee. Changes to the existing member suspension process were developed that should result in fewer members being suspended. An early payment discount plan, monthly payment options, credit card payments and a special assistance fund are key features of the member services which will be brought forward for Convocation's approval in October.

Osgoode Hall renovations. The architect's report on Osgoode Hall was received in May which outlined recommendations for work to be performed. The entrance area to the bencher's wing was identified as needing urgent repair. In June, Convocation approved the expenditure of $420,000 to repair the Benchers' Wing exterior in the current year. A tender for architectural services was issued and the contract was awarded to E.R.A. Architect Inc. Edwin Rouse has been assigned the task of overseeing the work.

Extensive scaffolding has been erected at the front of the building and repairs have begun on the stonework and east portico of the benchers' wing. Seven companies specialising in this type of work tendered. Summit Restorations was awarded the contract.

Completion of the installation of the permanent wheelchair access ramp at the east entrance of the Law Society took place in June and the much needed refurbishing of the Women Barrister's Robing Room has recently been completed.

B. SECRETARIAT

Complaints

Performance Data

- Files open as of April 1 2,947
- Files opened in period 2,089
- Files closed in period 2,240
- Files open as of Sept. 30 2,796
- Year-to-date Comparisons

Date	# Files Opened - year to date	Decrease from Previous Year	Total Files for Year	Decrease from previous year
Sept 30, 1997	3174	- 6.75 %	4232*	- 6.5%
Sept 30, 1996	3402	- 7 %	4510	- 7 %
Sept 30, 1995	3667	- 11.5 %	4852	- 12 %
Sept 30, 1994	4146		5513	

*Projected

Trends

These figures reflect a continuation of the downward trend in opened complaint files which began in 1994 and which has seen a steady decline over that period by approximately 23%. Process reforms initiated in 1993 which place more emphasis on resolving complaints at the intake and screening phases are largely responsible for the decline in numbers. A greater emphasis has also been placed on mediation efforts. Changes in the staff complement of the Complaints Department enabled this shift to take place. Since 1994 the number of staff lawyers investigating complaints has been reduced by three, and there has been greater use of intake officers who perform initial assessments and telephone resolution clerks who have made our operations more effective.

Changes and New Initiatives

The management of the Complaints Department has also experienced some recent changes. Scott Kerr, the former director of complaints and Heather Rosenthal, complaints supervisor, have accepted assignments to the lead the teams responsible for restructuring the regulatory function and introducing the consolidated customer service initiatives. Jon Fedder recently assumed overall management responsibilities for the Complaints Department and will be assisted by a newly appointed supervisor, Trish Danyluk.

audit & investigations

Performance Data

Number of investigations in progress:
- 2nd Quarter 155
- 3rd Quarter 163

Investigations completed:
- 2nd Quarter 37
- 3rd Quarter 39

Matters awaiting investigation:*
- 2nd Quarter 102
- 3rd Quarter 75

* All incoming investigation are screened for urgency. The above files represent routine matters awaiting investigation.

Trends

The case inventory of serious investigation matters has remained constant over the past year. During the late 80's the average inventory of open investigations ranged between 60 to 80 files. Rather than relying on external complaints to trigger an investigation, new administrative procedures have been put into place that allow the Society to proactively identify matters warranting investigation. These new procedures accounted for much of the increase in the number of matters under investigation.

New Initiatives & Activities

Electronic forms filing. An e-filing model is being developed for Law Society forms which will allow members to e-file the 1997 Member Information Form (MIF) in December 1997 and January 1998. The Society's Internet Service Provider has now submitted an updated proposal which will ensure that the requisite security and functionality will be in place to facilitate proper e-filing.

Joint forms filing with LPIC. Law Society and LPIC staff are amending the MIF to consolidate lawyer profile information which is currently reported separately by the member to both the Law Society and LPIC. This one stop filing, coupled with LPIC's use of the Society's bubble form processing and statistical model technologies makes this initiative highly desirable for the Law Society and LPIC. The revised form was approved by Convocation last month and the form will be distributed to the profession in November.

Forms Information Database. Data processed electronically from the revised Membership Information Form, Private Practitioner Form, and Public Accountant's Report to Lawyer Form is now available in a consolidated database. The data provides a ready statistical resource available to staff and committees who require strategic information about members' professional profiles and membership demographics.

Forms Processing. June and July represent the peak filing period for the filing of reporting forms by members. Eighty-nine per cent of private practitioners have filed their forms and 83 per cent of law firms have filed their public accountant's report. In the quarter ended September 30, the forms department contacted 2,700 private practitioners who had failed to file their forms to alert them that failure to do so would result in a default notice. This proactive measure prompted a significant number of members to complete their filings and fewer default notices relative to previous years were issued as a result.

Discipline

Performance Data

- Matters authorized and referred to discipline (2nd qtr) 124
- Matters authorized and referred to discipline (3rd qtr) 67

The following is a chart summarizing the total numbers of matters disposed of by Discipline Committees and by Discipline Convocations in the second and third quarters of 1997.

STATISTICS OF THE DISCIPLINE DEPARTMENT FOR THE PERIODS APRIL 1 TO JUNE 30, 1997 AND JULY 1 TO SEPTEMBER 30, 1997			
	2nd Quarter	3rd Quarter	TOTAL
NUMBER OF MATTERS DISPOSED OF BY DISCIPLINE COMMITTEES	46	53	99
NUMBER OF MATTERS DISPOSED OF BY DISCIPLINE CONVOCATIONS	65	11 (*see note below)	76
TOTAL NUMBER OF MATTERS DISPOSED OF BY DISCIPLINE COMMITTEES AND DISCIPLINE CONVOCATIONS	111	64	175

* There were no Discipline Convocations in July or August, 1997.

There were three unauthorized practice prosecutions heard and disposed of in the second quarter and one in the third quarter. There were two judicial review applications disposed of in the second quarter and none in the third quarter.

Angelina Codina brought an application for judicial review of the discipline committee's decision to disallow Harry Kopyto from representing her in her discipline proceedings. She also brought a motion seeking a stay of the discipline proceedings until her judicial review application had been heard. The court dismissed the motion as premature and the judicial review application was ultimately dismissed.

Henry Morgan brought an application for judicial review of the Discipline Committee's decision to proceed notwithstanding the withdrawal of his counsel. The Society's counsel moved to quash the application as premature and was successful.

There were no appeals heard and disposed of in the second and third quarters.

Practice advisory & professional conduct

Performance Data (2nd and 3rd quarters)

- No. of calls 5,168
- Calls from sole practitioners 42%
- Calls from employees, partners or associates of firms 37%
- Calls from non-members* 20%

(*articling students, support staff, law office managers and administrators)

Twenty five percent of the calls over the six month period dealt directly with situations arising from the Rules of Professional Conduct with particular emphasis of the rules relating to conflict, advertising, privilege and confidentiality. The most frequently asked questions dealt with accounting matters, law practice management, client instructions, file management, Law Society Act and Regulations and dissemination of Law Society publications.

About 43 percent of those who sought assistance from the practice advisory service were called to the bar within the last four years. More senior members of the bar -- called 20 years ago or longer represented 25 per cent of the users of the service.

Issues and Challenges

As the number of members in the profession increases, and the practice of law becomes more complicated, it is becoming increasingly difficult to maintain individualized, personalized one-on-one telephone assistance through the Practice Advisory Service. Although it is anticipated that there will always be a need for this type of service delivery, it is not the most efficient way to manage practice problems. There is a clear need for the Service to become more pro-active, and to reach out to a broader based audience and provide information and advice in ways that better leverage the use of newer forms of technology. Such initiatives are currently being developed under the umbrella of Project 200.

Professional standards

Performance Data

CASELOAD		
	Second Quarter	Third Quarter
Existing Caseload	156	154
New Files Opened	21	19
Files Closed	23	17
Total Open Files	154	156

The number of staff attendances remained constant at an average of 40 per month for both the second and third quarters of 1997.

The chart below depicts the volume of complaints according to year of call of lawyers participating in the practice review program as of September 30, 1997.

Year of call	*No. of participants*	*Average no. of complaints per participant*
1991-1995	29	8 complaints
1981-1990	53	22 complaints
1971-1980	55	21 complaints
1961-1970	16	21 complaints
1951-1960	3	12 complaints

New Initiatives

During the last two quarters, the Professional Standards Department has taken proactive measures to identify lawyers who may be developing practice problems in order to offer them remedial assistance before they experience serious difficulties. Using complaints volumes as an indicator of potential practice inadequacies, database searches are being conducted on members matching the following profiles:

a) those called to the bar since 1990, with 3 or more complaints;
b) those called to the bar 1980 - 1990, with 10 or more complaints in the past 5 years;
c) those with 4 or more complaints since 1996.

By year end we anticipate being able to conduct a preliminary assessment of the validity of this proactive approach.

C. Education

BAR ADMISSION COURSE

Performance Data

• No. of students enrolled in Phase III	1,208
• Change from 1996	- 3%
• Change from 1995	+5%

Trends

There are no substantial changes in the number of students enrolled in the Phase III of the bar admission course over the last five years.

New Initiatives

Operational review. An operational review of the Department of Education with a particular focus on bar admissions operations, has recently been completed. Conducted by a consulting team from the Ontario Institute for Studies in Education (OISE), the review produced a number of recommendations for enhancing the operational effectiveness of the Department, including a management reorganization to reduce layers in the reporting structure. Accordingly, the position of Director of Bar Admissions has been eliminated, and the Executive Director of Education, Alan Treleaven, has assumed the responsibilities of that position. To enhance the effectiveness of the articling operations, Mimi Hart has assumed the post of Acting Articling Director, while continuing in her position as Director of Financial Aid and Placement. With these interim measures having been taken, the staff are now working to refine and implement the remaining recommendations in the report, including a comprehensive redesign of the departmental structure.

Issues and Challenges

Student Evaluation. In addition to implementing operational changes, it is particularly important to focus on continued enhancement of the examination system, and on the special concerns of aboriginal students, visible minority students, and students in the French language section of the bar admission course.

Budgetary pressures. An anticipated reduction in Law Foundation funding of 20 per cent over the 1996 grant presents a significant challenge. There has already been significant cost cutting in the 1996 and 1997 budgets, and so there is little room for cost-cutting that would not significantly compromise the quality of the bar admission course program as it is now constituted. Staff are endeavouring, however, to maintain a hold-the-line budget so that the shortfall can be made up by a proposed modest student tuition increase of approximately 5% ($135.00). Proposed tuition increases, which would be accounted for in the budget setting process, must be supported by readily available student financial aid.

Financial Aid

Performance Data

Student Financial Aid for Phase One: Applications for assistance under the Ontario Student Assistance Program (OSAP) were processed from approximately 230 Phase One students (representing 21% of the class) in this quarter. In addition, 27 Phase One students (2.5% of the class) borrowed from the Law Society's own student loan fund to meet the costs of Phase One. There is no significant change in the numbers of students who required financial assistance to attend Phase One from 1996.

Student Financial Aid for Phase Three: Two hundred and seventy-four Phase Three students (22% of the class) applied for assistance under the OSAP program in this quarter. In 1996, 316 students (29% of the class) applied for assistance from OSAP to attend Phase Three. More applications are expected in 1997. In addition, twelve students have filed applications for assistance from the Law Society's loan fund with respect to their attendance at Phase Three.

Law Society's Student Loan Fund: The Law Society's student loan fund was implemented in 1990 to recognize the financial impact the sandwich model Bar Admission Course has on some students. Approximately $225,000 is outstanding in student loans to 150 students and members.

Member Financial Aid: The Special Committee on Relief & Assistance met on June 11, 1997 and July 24, 1997 to consider applications to the LPIC Insurance Assistance Fund (Fund) and the J. Shirley Denison Trust. A total of $6,078.22 in LPIC premiums were paid from the Fund on behalf of two members; and $700 was awarded from the Denison Trust to one student member.

Trends

With ever increasing tuition fees, student debt loads are also increasing. This is particularly evident in protracted educational programs such as the professions. The Society's Financial Aid staff estimate that the debt load of a bar admission course graduate who borrows to finance his/her entire post-secondary education could easily reach $40,000 today whereas ten years ago debt loads rarely exceeded $25,000.

Issues and Challenges

With the harmonization of the provincial and federal student loan programs, Phase One of the bar admission course was at risk of no longer qualifying as an eligible program for OSAP due to its length. Staff are working constructively with the Ministry of Education and Training to devise a mechanism by which financially needy students in Phase One will retain eligibility for student assistance from OSAP. OSAP provides approximately $225,000 in assistance to Phase One students on an annual basis.

PLACEMENT

Performance Data

Articling. Eighty percent of students of the Phase One class had secured articles by April 1,1997 to begin on September 1. This figure remains constant from the same quarter last year. At December 31, 1996, 98.4% of students seeking articles in Ontario for the 1996 term had been placed. Placement staff are projecting placement rates for 1997 to approximate the 1996 rates.

Graduate Placement. The graduate placement service lists vacancies for recent graduates of the bar admission course. It operates from the commencement of Phase Three to the following August. From October, 1996 to August, 1997, the service listed 153 employment opportunities. In addition, 28 notices of space sharing or other arrangements were advertised. Sixty seven per cent of students responding to a placement survey reported they had secured employment by the conclusion of the bar admission course. This compares favourably with an average placement rates of 65% over the past ten years. The number of students hired back by their articling employer continues to be around 40% of the class.

Professional Placement: The professional placement service consists of a monthly bulletin containing notices of available positions suitable for those with experience at the bar. The service listed approximately 100 vacancies in 1997.

Trends

Despite the 90s recession, articling placement rates have remained in the 98-99% range. With the improvements projected for the economy, it is anticipated that greater numbers of students will be placed in articles earlier in the year thereby relieving pressure on the Law Society's placement program. Further, most law schools have now engaged career development officers to assist their graduating students who have not secured articles. This is expected to accelerate the rate at which students secure articling placements.

Issues and Challenges

Articling placement continues to be the focus of placement office activities. Existing programs e.g., resume writing and interview skills training and the articling student mentor program continue to draw interest and appreciation from unplaced students.

New Initiatives

In addition to current efforts to get placement information to students and members, we are working to offer placement information on the Society's website so that unplaced students and members seeking employment may investigate opportunities by area of practice or geographic location and link to member sites where further information may be obtained. This service should be in place early in 1998.

Articling

Performance Data.

The Articling Office has on file 1,111 approved articling education plans and 1,310 applications from members approved to serve as an articling principal in the current articling term. Under the existing articling program prospective principals are approved based upon prescribed criteria in the areas of experience, competence and ethical standards. Principals are restricted to a maximum of two articling students and education plans must be developed and approved for each articling placement. and the articling program is formally evaluated by means of mid-term and end-of-term evaluations. Mid term evaluation forms for the current articling term will be distributed in October with a filing deadline of February, 1998.

Continuing Legal Education

Performance Data (April -	September 30, 1997)	(April - September 30, 1996)
No. of live programs:	68	34
No. of video replays:	64	53
No. of registrants:	6,970	2,865
Program revenue (gross):	$802,608	$449,045
Publications revenue:	$117,715	$190,885
Revenue increase (over 96):	44%	

Trends

Higher-than-expected program revenues are due in part to revived strength in the economy, which tends to have a direct relation to CLE attendance. It also reflects attendance at the May 6 program *Title Insurance* (undertaken in partnership with the CBAO, CDLPA and administered by LSUC). The program attracted 2,900 registrants and generated revenue of approximately $217,500.

New Initiatives

A group of family law practitioners headed up by Philip Epstein is working with CLE to develop a book/diskette package containing the definitive annotated separation agreement. This is expected to have a three-year shelf-life without major revision, during which period it will be adopted by the bar admission course and is expected to become a standard vade mecum for practitioners.

A partnership between CLE and the University of Western Ontario has generated on-line (Internet) courses on dispute resolution and negotiation, to be offered beginning in September. Registrants can take the courses from home or office at times convenient to them, logging on any time of the day or night. This new series is expected to be especially convenient for lawyers outside major metropolitan areas, offering considerable savings in time and money that would otherwise have to be spent on transportation and accommodation. Course handouts and exercises are delivered electronically, and teaching methods include case study, class discussion, and simulations. The courses are designed by Dr. Julie Macfarlane, Professor of Law at the University of Windsor. On-line CLE is an important innovation, and is of keen interest to the members of the Post-Call Education Advisory Group (reporting to the Professional Development and Competence Committee).

CLE has begun packaging two-or multi-program series in a manner calculated to cut the cost of individual CLE programs -- in the case of certain half-day programs, from the traditional $150-$165 to $99 or less. Although the admission price of CLE is only one component of the total cost--which includes everything from transportation to lost billable hours--lower prices appear to translate into increased attendance.

Specialist Certification

Performance Data *(to September 30 ,1997)*

No. of specialists certified:	42
No. of specialists recertified:	50
No. of applicants rejected:	1
No. of new applicants currently seeking certification:	59

There are currently 613 certified specialists in Ontario. Participation in the program increases only minimally each year, which seems to result directly from a general lack of interest or awareness on the part of the profession and the general public. Staff have been asked by the Professional Development & Competence Committee to propose important enhancements to the current program to make it more meaningful while allowing it to continue to meet its break-even mandate. (A modest budget surplus of approximately $8,000 is forecast this year.)

D. Information systems & libraries

Libraries

County libraries

CD-ROM Contract. A contract with Carswell was signed by the Treasurer and the CEO in June which has made available to each county library a package of seven CD-ROM publications including the Canadian Encyclopaedic Digest and The Canada Reporter. These publications should significantly enhance lawyers access to information in the county libraries.

Training Sessions. Training sessions on the use of these CD-ROM publications have been organized for county librarians. To date, five sessions have taken place and more are scheduled. The training sessions have been very well received and Carswell has agreed to offer hands-on workshops to lawyers as well.

Technology. PCs, CD-ROM towers and printers have been installed in all county libraries. A telephone support line, staffed by the Great Library's systems administrator, has been set up to help county librarians deal with any questions or difficulties that arise with the system. To date 65 calls have been received.

QuickLaw. QL Systems and the Law Society finalized an agreement in July that provides for QuickLaw to be available at a flat rate to all county libraries and allows the members of County Law Associations to do their online searching free of charge in the library using a personally assigned password. Funding for the first year of the two-year QuickLaw contract was provided by the Law Foundation.

Great Library

Performance Data

No. of requests for research & assistance: 41,000
No. of legal research seminars held: 4

New initiatives

CD-ROM Network. As part of the library's commitment to delivering information electronically, a CD-ROM has been installed in the Great Library. Proposals from a number of vendors have been received and implementation is anticipated in the fall. CD-ROM publications are much in demand in the library due to their enhanced search capability, their speed and their ease of use. Library users will soon have immediate access to the information on over 150 CD's at multiple workstations located throughout the library.

Information Systems

New initiatives

Information Technology Strategy. A long term information technology strategy will be available in November to guide the acquisition of new integrated systems and the replacement/upgrading of obsolete systems. The strategy will accommodate:

- improved electronic communications, to enable electronic business to be conducted between the Society, its members, and other legal entities;
- adequate security of systems; and
- the integration into the network of new software and hardware to facilitate efficient access to information.

Ongoing Projects

- Computer Aided Instruction computer has been upgraded providing students with a fourfold improvement in response times.
- More comprehensive automated back-up facilities have been installed for the main data server (AS/400) and for departmental servers.
- An intranet is being developed for the Society.
- Data between Teranet and the Law Society is being exchanged to enable access controls to be implemented.

E HUMAN RESOURCES/PROJECT 200

Project 200

Audit of Internal Operations. Benchers will have received a copy of "*Law Society Audit of Internal Operations*" which summarizes the status of the Law Society's administrative operations and itemizes the weaknesses discovered in our regulatory function, our customer service and human resources practices and our technology infrastructure. The document also sets out an eight point recovery strategy that includes redesigning the administrative components of our regulatory operations, investing significantly in our technology infrastructure and consolidating Law Society service functions into one customer service / call centre.

Business case. Key employees involved in the Law Society's restructuring are working with outside consultants Price Waterhouse and Trango Software Inc. and our internal finance department to assess the economic viability of proceeding with Project 200. The business case sets out the costs and benefits of the restructuring, isolates various risks and their projected economic impact, and identifies the project's payback. A report will be available for initial consideration by the Finance and Audit Committee at its November 13 meeting.

Human Resources

New Initiatives & Activities

In keeping with the commitment to provide continuous improvement within the Law Society, over the past quarter, the Human Resources department has undertaken the following:

- provided 60 employees with ongoing management training opportunities delivered through on site workshops and through North American business schools
- initiated an on-going review of group benefits plans as part of compensation management program
- participated in the selection of a consultant to provide services to the Law Society and LPIC in the development of a Contract Compliance Equity Program.

The Law Society's annual employee performance review cycle has begun and training has been provided to all staff.

F. COMMUNICATIONS

Website -- www.lsuc.on.ca

The Law Society website (www.lsuc.on.ca) was significantly revamped in July. Along with a reorganization of certain information and new graphics, improvements were made to the online member database and the member discussion forum. A French mirror of the static English content was also added to the site.

More than 1,300 members have completed the website sign-in which allows them access to member-only functions and to supply the Society with their e-mail addresses. For the six month period ending Sept. 30, a total of 152,519 web pages were accessed by visitors to the site. (Assuming on a conservative basis that 10 per cent of this activity would have otherwise resulted in a phone call to the Law Society, approximately 15,000 individuals were able to access information independently without the need of a "live voice".

Ontario Lawyers Gazette

In order to assess the revenue-generating potential of the *Gazette*, a market research firm has been retained to do a feasibility study of paid advertising. The goal for study is to assess market opportunities and to identify operational issues related to adding advertisements to the publication. An analysis of the study and a report on the possible implementation of advertising will be prepared during the fourth quarter.

Operational Review

As part of management's ongoing reassessment of the Society's business processes, an operational review of the Society's communication function has been initiated. Its purpose is to ensure that our communication capabilities will be adequate to meet the future demands. A number of stakeholders will be consulted in the course of this review including benchers, media, government representatives, members of legal organizations (CBAO, Advocates' Society, Criminal Lawyers, CDLPA, etc) and opinion leaders among the profession. The review will assess, among other things, the information and communication expectations of our members.

Internal Communications Overhaul

In January and February 1997, the Law Society conducted an audit of its internal communications practices. A survey and several focus groups were conducted to determine what was and wasn't working with communications at the Law Society. The results pointed to a series of problems and challenges including lack of clear responsibilities for communication among levels of management and staff, lack of infrastructure and certain institutional and cultural barriers. In response to these findings senior management called upon a 12-member team of employees -- representing different levels and divisions of the organization--who would design best practices and principles for internal communications at the Law Society. The team's job is to integrate communications into the Society's business processes so that the transition to a customer-service, performance-driven organization is both smooth and successful. The ultimate goal is to create an employee population where everyone understands her/his role and responsibility for achieving the Law Society's goals and to facilitate the efficient flow of clear, well-organized ideas and information among Law Society employees.

Media Relations

Performance data

No. of media inquiries (requests of the Society from news media for information or interviews)

- 2nd quarter 76
- 3rd quarter 111

As is usual, a high number (nearly 50 %) of the media inquires in the second and third quarters related to providing information about discipline matters or complaints against members. Other general inquiries in the reporting period ranged from questions about the election of a new Treasurer to requests for comment on the McCamus review and the law suit brought by the Society against Ernst & Young.

Media Coverage (No. of press reports about the Law Society or issues of interest to the Society)

- 2nd quarter 330
- 3rd quarter 247

Again, as with inquiries, the single largest grouping of media coverage (about 21 per cent) relates to reporting on complaints issued against members, or the outcome of disciplinary action taken by the Society against lawyers.

Legal Aid accounted for just over 11.5 per cent of the coverage generated. This considerable coverage was generated mostly by two issues -- the decision to apply a means test to legal aid duty counsel and the release of the McCamus review of legal aid.

The LPIC/LSUC litigation with Ernst & Young, and coverage of TitlePLUS and title insurance accounted for most of the LPIC coverage (2.4 per cent) in the reporting period.

Of Note...

- The CEO is providing advice to several organizations on their restructuring initiatives, namely:

  - Ministry of the Attorney General, Restructuring Advisory Committee
  - College of Physicians and Surgeons
  - Royal College of Dental Surgeons
  - Infonex.

- A staff team participated in the annual Aids Walk in September and raised $3,200 towards research for a cure.

- Staff raised over $2,000 for LEAF by participating in its annual marathon fundraising golf tournament.

- 28 Law Society staff made blood donations during the recent summer Blood Drive.

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

Copy of a report dealing with the status of the CEO's compliance with policies for the period April - September 1997 re: II. Compliance with Executive Limitations.

Suspensions - E & O Levy

It was moved by Mr. Banack, seconded by Mr. Swaye that the DelZotto/Puccini motion be set aside and that the date for suspension for members who failed to pay their E & O Levy be November 3rd, 1997.

Carried

REASONS OF CONVOCATION

The Reasons of Convocation were filed in the discipline matter of James Douglas Manfred Leopold Schlosser BARNETT.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act;

AND IN THE MATTER OF James Douglas Barnett, of the City of Etobicoke, a barrister and solicitor

REASONS OF CONVOCATION

Jane Ratchford - counsel for
The Law Society of Upper Canada

Harry Black, Q.C. - counsel for the Solicitor

D227/94 and D355/95

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act;

AND IN THE MATTER OF James Douglas Manfred Leopold Schlosser Barnett, of the City of Etobicoke, a Barrister and Solicitor

REASONS OF CONVOCATION

Finding of Professional Misconduct

On September 25, 1997, Convocation considered the Report and Decision of the Discipline Committee dated November 21, 1996, and the Recommendation as to Penalty of the Discipline Committee dated February 26, 1997.

Convocation adopted the Discipline Committee's finding that James Douglas Manfred Leopold Schlosser Barnett (the "Solicitor") is guilty of professional misconduct, and adopted the Report and Decision of the Discipline Committee subject to three variations, which are as follows:

1. In particular 2(m) of complaint D227/94 the Law Society alleged that the Solicitor was guilty of professional misconduct in that he failed to represent a client, Pierre Julien, in a competent, diligent and efficient manner in a litigation matter, in that he:

"(i) claimed certain relief in the client's statement of claim which he had no authority to claim on the client's behalf;

(ii) failed to review the statement of claim with his client before it was issued;

(iii) failed to prepare in a timely fashion affidavits of service for service by mail on the defendants after completing such service by mail;

(iv) failed to adequately and in a timely manner respond to a communication from counsel for one of the defendants;

(v) made a settlement proposal on the client's behalf without the client's knowledge or consent; and

(vi) failed to keep the client reasonably informed."

Particulars (m)(iii) and (v) were withdrawn at the hearing. It is apparent from the Report and Decision (at pages 68 to 69) that the Committee found that particulars (m)(i) and (vi) were not established to the necessary degree of certainty. The Committee made no finding that particulars (m)(ii) or (iv) were established.

Thus, none of the particulars alleged in paragraph 2(m) of complaint D227/94 were found established by the Committee. Rather, the Committee purported to find paragraph 2(m) established on the basis that "the Solicitor failed to maintain a reporting system or appropriate supervision of the assigned lawyer to ensure that the client's interests were properly represented and protected" (page 68).

In Convocation's view, it was entirely appropriate for the Committee to consider the way in which the Solicitor chose to structure his practice both in considering whether a proven allegation amounts to professional misconduct, and in considering the appropriate penalty. Convocation was not satisfied, however, that it was appropriate for the Committee to make a finding that the allegation in paragraph 2(m) was established based on the Solicitor's failure to maintain a reporting system or appropriate supervision when no such allegations were made against him in paragraph 2(m), while the allegations that were particularized in paragraph 2(m) were not found established. Convocation accepted the submission made on the Solicitor's behalf that the Committee found him guilty of misconduct that was different from that which was alleged against him.

Convocation accordingly did not accept the Committee's finding that paragraph 2(m) of complaint D227/94 was established.

In paragraph 2(b) of complaint B355/95 the Law Society alleged that the Solicitor permitted his name to appear as a solicitor in an advertisement run by a finance company".

The Solicitor testified at the hearing to the effect that the advertisement in question was not run "by" a financing company. During final submissions the Committee amended paragraph 2(b) to substitute the preposition "with" for "by".

Although there can be no doubt of the Committee's jurisdiction to amend a complaint of professional misconduct, Convocation was concerned that to have amended the complaint to conform to the Solicitor's evidence after the Solicitor had evidently raised a valid defence to the allegation as originally framed, may have resulted in unfairness to the Solicitor. If the allegation had been amended at the conclusion of the Law Society's case to conform to evidence that had been introduced to that point in the proceedings, it is likely that any concerns about the adequacy of the notice provided to the Solicitor in the complaint could have been remedied, for example by an adjournment. In such circumstances, the Solicitor would have had a full opportunity to respond to the complaint as amended in his defence. However, the Solicitor had no such opportunity in the present case, as the amendment was made after he testified, during final submissions.

Convocation accordingly did not accept the Committee's finding that particular 2(b) of complaint D355/95, was established.

3. In particular 2(e) of complaint D355/95, the Law Society alleged that the Solicitor "entered into a business arrangement with a financing company which placed him in a position where his obligations to a client might conflict with those of the said financing company" (emphasis added).

Rule 5 of the Rules of Professional Conduct provides that a lawyer, in the absence of the informed consent of the client or prospective client concerned, "should not act or continue to act in a matter were there is or there is likely to be a conflicting interest" (emphasis added).

Although a lawyer may be found guilty of professional misconduct even though no violation of a specific rule of professional conduct has been explicitly alleged (in that what constitutes professional misconduct is a matter for the benchers to decide: see Stevens v. Law Society (Upper Canada) (1979), 55 O.R. (2d) 405 at 410 (Div. Ct.)), Convocation concluded that it would not be appropriate to adopt a finding of professional misconduct in the present case on the basis of an allegation that purports to establish a more exacting standard than the standard articulated in Rule 5.

Convocation accordingly did not adopt the Discipline Committee's finding that particular 2(e) of complaint D355/95 was established. The finding of the Committee that particular 2(d)(ii) of complaint D355/95 was established, is vulnerable on the same basis.

Thus, Convocation adopted the findings of the Discipline Committee that the Solicitor is guilty of professional misconduct in that the following allegations were established:

Complaint D277/94

(a) he failed to respond within a reasonable time to communications from his client, Prenor Trust Company of Canada, which required a reply;

(b) he failed to respond within a reasonable time to communications from another solicitor, Fred Stasiuk, which required a reply;

(c) he failed to honour within a reasonable time his Undertaking to another solicitor, Fred Stasiuk, dated July 29, 1993;

(d) he failed to respond within a reasonable time to communications from his client, Scotiabank, which required a reply;

(e) he failed to provide within a reasonable time a report to his client, Scotiabank, upon the completion of a real estate transaction;

(h) he failed to provide within a reasonable time a report to his client, Hansa Mortgage Investment Corporation, upon the completion of a real estate transaction;

(i) he failed to respond within a reasonable time to communications from another solicitor, David Ruskin, which required a reply;

(k) he failed to provide within a reasonable time a report to his client, Bank of Montreal, upon the completion of a real estate transaction;

(l) he failed to honour in a timely manner his Undertaking to another solicitor, Stanley J. Abrus, dated October 29, 1993;

(n) he failed to serve his client, Royal Trust, in a conscientious, diligent and efficient manner in that he failed to register a charge/mortgage of land until approximately five months after funds had been advanced by the client.

Complaint D355/95

(a) He permitted his name to appear as a solicitor in an advertisement with a real estate agent;

(d) he entered into a business arrangement with a real estate agent and a consultant which:

(i) provided for a discount on legal fees incurred by a person who used the services of the three participants in the business arrangement.

Penalty

As mentioned above, the Solicitor has been found guilty of twelve allegations of professional misconduct.

The Discipline Committee recommended that the Solicitor be suspended for a period of one month; that he be required to pay costs in the amount of $5,000 within 60 days; and that the Solicitor continue to participate in the Law Society's Practice Review Program until the Professional Standards Department concludes that his participation is no longer required.

Counsel for both the Solicitor and the Law Society accepted the appropriateness of both the cost order and the Solicitor's continued participation in the Practice Review Program. The only issue on penalty was whether the Solicitor should be reprimanded in Convocation (as the Solicitor's counsel submitted) or suspended for a period of between one and three months (as the Law Society's counsel submitted).

For the reasons expressed above, Convocation decided not to adopt a few of the Discipline Committee's findings of professional misconduct. Convocation, nevertheless, decided that the penalty recommended by the Committee was a fit and appropriate penalty in respect of the twelve allegations of professional misconduct that were found established by the Committee and adopted by Convocation.

Ten of the twelve findings of professional misconduct were based on the Solicitor's failure to honour obligations to clients and other lawyers in a timely way. The Solicitor repeatedly failed to respond within a reasonable time to communications from clients that required a reply; to respond within a reasonable time to communications from other lawyers that required a reply; to honour undertakings given to other lawyers within a reasonable time; and to provide reports to clients within a reasonable time after the completion of real estate transactions. On one occasion the Solicitor failed to serve a mortgagee client in a conscientious, diligent, and efficient manner in that he failed to register a mortgage until approximately five months after the client advanced funds.

The other two allegations of professional misconduct that were made by the Committee and adopted by Convocation concerned violations of Rule 12 of the Rules of Professional Conduct, which regulates advertising by members of the profession.

Convocation agreed with the Committee that, in order to appreciate the reasons for the Solicitor's misconduct and to assess an appropriate penalty, it is important to have regard to the manner in which the Solicitor structured his law practice and conducted its operation.

The Solicitor commenced his own practice in 1987, approximately a year after he was called to the Bar. Shortly thereafter, his wife-to-be joined the practice as a legal secretary. Eventually, she became the Solicitor's senior real estate law clerk and office manager.

The Solicitor has practised little law himself, at least in recent years. Rather, the Solicitor has concentrated on marketing his law practice, endeavouring to solicit as much business as possible.

The Solicitor made an effort to meet with every client initially and then "hand-off" the client to another lawyer with whom the Solicitor had a contractual relationship. Fees generated were divided equally between the Solicitor and the lawyer to whom the client was referred.

After he put the client and the other lawyer together, the Solicitor would "step out of the way" or (as the Solicitor put it in his evidence) "wash my hands of it". The Solicitor regarded it as the responsibility of the other lawyer to ensure that professional standards were maintained.

However, the Solicitor maintained control over the clients and their files. All letters, faxes, and telephone calls were routed to the Solicitor's head office. These communications were then re-routed to the responsible lawyer, usually by the firm's receptionist. All correspondence was on the Solicitor's letterhead, and many letters were signed by the Solicitor though he was not involved in the file. The Solicitor maintained the client's trust account. As the Committee found, the clients would consider the Solicitor to be their lawyer, and to be responsible for their files.

By early 1993, the Solicitor's law practice was processing a great many real estate transactions each month. The firm was also active in other practice areas, including corporate and commercial work, litigation, and immigration law among others. The firm had expanded to 12 or 13 offices by then.

The Solicitor's marriage broke down in mid-1993, and his wife left the law firm. Because of the reliance the Solicitor placed on his wife's position in the firm, her departure precipitated a crisis. Correspondence and documents continued to arrive at the Solicitor's head office, but much of it was no longer re-routed. Correspondence and documents accumulated in boxes or bags. Staff turnover was high in the months after the Solicitor's wife's departure. For example, a real estate law clerk, a real estate secretary and a receptionist (who was responsible for re-routing mail), stayed at the firm for only a few weeks. For the most part, the Solicitor's failure to honour his obligations to clients and other lawyers occurred shortly before or during a period of about seven months after his wife's departure, from mid-1993 to early 1994. The Solicitor acknowledged to the Committee that the condition of his practice at that time was chaotic.

As the Committee pointed out, however, the Solicitor continued to be actively involved in marketing throughout this crisis. His marketing efforts consisted of advertising, organizing real estate and business seminars, and devising creative promotional schemes. All of these marketing initiatives required the Solicitor's personal attention in order to be successfully developed.

In addition to continuing to concentrate on his marketing efforts, during this period of crisis the Solicitor continued to take on new cases and expanded his practice. The Committee found that when it became apparent to the Solicitor that his practice was not structured in a way that allowed him to meet his obligations to clients, he took no effective steps to give primacy to his obligations to clients and others. The Committee found that the Solicitor subordinated both his clients' interest and his professional responsibilities to his business interests. Indeed, the Committee found that the Solicitor had "abdicated his professional responsibilities to those with whom he worked", and that "his lack of insight into the state of professional irresponsibility which he had created was stunning."

When the Solicitor testified before the Committee on the issue of penalty he was asked by his counsel about the effect on him of the Committee's findings of professional misconduct. He replied that the cost to him had been in the hundreds of thousands of dollars. The Committee observed in its recommendation as to penalty that "we did not sense that any revelation had come to the Solicitor concerning the primacy of professional values in his practice. He assessed the cost to him of our findings of professional misconduct in economic terms rather than in terms of professional reputation."

The fact that Convocation declined to accept certain of the findings of professional misconduct made by the Committee does not detract in any way from these important findings of the Committee regarding the underlying causes of the 12 allegations of professional misconduct that were adopted by Convocation.

Convocation accepted in mitigation that the Solicitor has already paid a high price for his misconduct. The fact that allegations of professional misconduct had been made against the Solicitor was reported in a Toronto newspaper, and the publication had a serious adverse effect on both the Solicitor's livelihood and his reputation. Moreover, the Solicitor has no disciplinary history.

A more important mitigating factor, however, is that the Solicitor has taken numerous steps to improve his firm's quality control systems. These steps have included hiring a senior real estate practitioner with excellent qualifications, hiring a former employee of Canada Trust to serve as head of the reports section of the law firm and to liaise with financial institutions, and establishing an in-house professional standards committee, among other things.

Convocation's attention was drawn to several cases in which lawyers were reprimanded in Convocation for misconduct that involved failing to serve clients in a conscientious, diligent and efficient manner. Convocation's attention was also drawn to two cases in which such allegations were found established in which Convocation suspended the lawyer. One of these cases (Junger, Order of Convocation dated April 27, 1995) involved repeated instances of failing to serve clients in a conscientious, diligent and efficient manner, failing to provide reports on real estate transactions, failing to provide replies to the Law Society concerning complaints it received, failing to file required forms, and failing to cooperate with the Law Society's audit department. The lawyer was suspended by Convocation for one month, and ordered to pay costs of $1,500. The other case (Zinszer, Order of Convocation dated May 26, 1994) involved a number of allegations of professional misconduct, some of which would appear to be more serious than those found established in the present case. However, it bears some similarity to the present case in that the Committee considered the underlying problem to be that the Solicitor turned over the real estate practice of his firm to a senior real estate secretary. Convocation in that case rejected the recommendation of the Committee that the lawyer be suspended for one month and ordered that the Solicitor be suspended for three months.

While the cases cited to Convocation are helpful in establishing a general range of penalty for misconduct that bears some similarity to the misconduct found established by the Committee and adopted by Convocation here, the present case involves elements that make it unique.

Convocation recognized that a suspension will have a significant impact on the Solicitor's practice. Nevertheless, having considered the factors referred to above, Convocation decided that a suspension is necessary to emphasize to the profession and the public alike that it is of fundamental importance that practitioners neither abdicate their professional responsibilities nor subordinate them to business considerations.

According, Convocation ordered that the Solicitor be suspended for a period of one month; that he pay the Law Society's costs fixed in the amount of $5,000 within 60 days; and that he continue to participate in the Practice Review Program until such time as the Professional Standards Department determines that his participation is no longer necessary.

DATED at Toronto this 9th day of October, 1997

Gavin MacKenzie

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CONVOCATION ROSE AT 3:50 P.M.

Confirmed in Convocation, this 28 day of November, 1997.

Treasurer

Harvey Strosberg