MINUTES OF CONVOCATION

Friday, 23rd June, 2000
8:30 a.m.

PRESENT:

The Treasurer (Robert P. Armstrong, Q.C.), Aaron, Arnup, Banack, Bindman, Boyd, Braithwaite, Carpenter-Gunn, R. Cass, Chahbar, Cherniak, Coffey, Cronk, Crowe, Diamond, DiGiuseppe, T. Ducharme, Elliott, Epstein, Feinstein, Finkelstein, Furlong, Gottlieb, Hunter, Jarvis, Krishna, Lalonde, Lamont, Laskin, Lawrence, MacKenzie, Marrocco, Martin, Millar, Mulligan, Murphy, Murray, Ortved, Pilkington, Porter, Potter, Puccini, Robins, Ross, Ruby, Simpson, Topp, Wardlaw, White and Wright.

.....

The reporter was sworn.

.....

IN PUBLIC

.....

TREASURER'S REMARKS

The Treasurer commented on the appointment of Madam Nancy Backhouse to the Bench and acknowledged her contribution to Convocation and the Law Society and particularly her role in the establishment of the Out of the Cold program.

The Treasurer advised that he had a discussion with the Chair of the Professional Regulation Committee concerning the complaints, investigations and discipline processes of the Law Society. As a result he intends to appoint an appropriate person possibly a retired judge to review the processes with the view to making recommendations for improvement of the process. Reference is to be made to the Baker case to ensure any deficiencies in the Report of the Discipline Panel have been effectively addressed. The appointed person is to have complete access to all Law Society information. The review is to be completed on September 29th, 2000 and a report is to be filed at Convocation.

REPORT OF THE DIRECTOR OF EDUCATION

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The 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 Friday, June 23rd, 2000:

Tristan Martin Moodie Brown	Bar Admission Course
James Herns Craig	Bar Admission Course
Jill Alene Edwards	Bar Admission Course
Andrew John Flock	Bar Admission Course
Lorne Corey Gross	Bar Admission Course
Alexander G. Guarnes	Bar Admission Course
Johna Martine Janelle	Bar Admission Course
Miran Kert	Bar Admission Course
Shahid Mahmood Khan	Bar Admission Course
Nirupama Kumar	Bar Admission Course
Christopher Hugh Maguire	Bar Admission Course
Umbreen Mahmud	Bar Admission Course
Anthony James Mandl	Bar Admission Course
Sumita Pillay	Bar Admission Course
Sara Lynne Ramshaw	Bar Admission Course
Gurbachan Singh Sehmbi	Bar Admission Course
Sven Michael Spengemann	Bar Admission Course
George Frank Tomossy	Bar Admission Course
Mielka Katja Visnic	Bar Admission Course

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 Friday, June 23rd, 2000:

Allyson Lynne Baker	British Columbia
Sylvie Bourassa	Quebec
Keenan Harry Hohol	British Columbia & Alberta
David Kim-Sum Li	British Columbia
Jasbir Parmar	British Columbia
Douglas Edward Roberts	Alberta

B.2. APPLICATION TO BE LICENSED AS A FOREIGN LEGAL CONSULTANT

B.2.1. The following applies to be certified as a foreign legal consultant in Ontario:

Paul Clifford Rivett	The State of New York - Shearman & Sterling

B.2.2. His application is complete and he has filed all necessary undertakings.

ALL OF WHICH is respectfully submitted

DATED this the 23rd day of June, 2000

It was moved by Mr. Millar, seconded by Mr. Chahbar that the Report of the Director of Education be adopted.

Carried

MOTIONS - COMMITTEE APPOINTMENTS

It was moved by Ms. Ross, seconded by Mr. Bindman that Derry Millar be appointed as Chair of the Admissions Committee.

Carried

It was moved by Ms. Ross, seconded by Mr. Bindman that Clayton Ruby be appointed as a member of the Litigation Committee.

Carried

REPORT OF THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE

May 2000 Report (Information Only)

Mr. Ruby presented for information only that item in the May Report dealing with responses to claims arising from a major defalcation by a member and the impact on the levy.

Lawyers Fund for Client Compensation Committee
May 26, 2000

Report to Convocation

Purpose of Report: Information

Prepared by the Lawyers Fund for Client Compensation Department

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee ("the Committee") met on May 11th, 2000. In attendance were:

Clayton Ruby (Chair)
Robert Aaron (Vice Chair)
Robert Topp (Vice Chair)
Stephen Bindman (by phone)
Gordon Bobesich
Abdul Chahbar
Gary Gottlieb

Staff: Craig Allen, Maryanne Cousins, Fred Grady, Sara Hickling, Vivian Kanargelidis, Maria Loukidelis, Paul McCormick, Richard Tinsley, Heather Werry and Jim Yakimovich.

2. This report contains:

- the Committee's information report considering the Fund's response to claims arising from a major defalcation by a member and measures which could be designed to prevent or reduce these kinds of losses in the future;
- the Committee's information report considering the impact on the levy caused by this major defalcation;
- the Committee's information report considering the budget forecast for the Fund to the year 2004.

INFORMATION

I. RESPONSES TO CLAIMS ARISING FROM MAJOR DEFALCATION BY A MEMBER

A. NATURE AND SCOPE OF THE ISSUE

3. Clayton Ruby, Chair of the Lawyers Fund for Client Compensation ('the Fund") expressed concern about the number and magnitude of claims to the Fund arising from the defalcation of a single member residing in the Ottawa area. Mr. Ruby wished to discuss with Committee members the Fund's response to these claims, the impact of the claims upon the Fund levy and possible measures that could be instituted to prevent such losses in the future.

4. Heather Werry, Manager of the Fund advised the Committee of background information concerning the dishonest member and how the defalcations were exposed. She presented a summary of the status of the investigation by the Law Society and indicated that the Fund has received 73 open claims to date and has been put on notice of 22 additional potential claims. As the Fund has a per claimant limit of $100,000.00 which is the maximum that can be paid for any single claim, the current maximum exposure for the Fund is $3 million dollars. This figure does not include potential claims which have not yet been received by the Fund and have been valued at $1 million without the application of the per claimant limit. She identified the types of claims received including mortgage and estate claims, trust misappropriations and some claims based on a failure to report in a timely fashion to the Lawyers Professional Indemnity Company ("LPIC").

5. Ms Werry advised the Committee that a principle issue to be decided is what level of coverage will be provided by LPIC. The dishonest member had a partner and there is a dispute between the claimants and LPIC which concerns whether the "innocent partner" provision of the policy will apply or whether coverage will be available for the partner's alleged negligence with respect to supervision of the law practice. The claimants assert that the level of coverage by LPIC should be $2 million because of the partner's negligence but LPIC maintains that the innocent partner coverage is limited to $250,000 inclusive of defence costs. While these issues will be decided in the courts, the Fund must decide whether it will pay claims in advance of LPIC. The guidelines of the Fund require claimants to try to recover their loss from other sources if it is reasonable to do so before a grant is made from the Fund. There are also various other remedies available to claimants, besides the LPIC options, but it is not anticipated that these will be resolved quickly and therefore the Committee's guidance was sought on whether the Fund should resolve claims before the exhaustion of other remedies.

6. The Committee was also asked to consider what recovery or indemnity the Fund should demand from claimants, if any, in the event that the Fund pays claims first. The Fund usually requires that if all other remedies have not been exhausted before a grant is awarded, the Fund will be reimbursed from the first dollars recovered by the claimant from any other source up to the value of the grant. However, the Committee noted that the losses of many claimants were well in excess of the per claimant limit allowed by the Fund and that the exhaustion of other remedies by claimants in many cases would still leave a shortfall to claimants at the maximum grant limit allowed by the Fund.

7. The Committee was of the view that every effort should be made to resolve these claims in a timely fashion and if that results in paying in advance of other remedies this should be allowed subject to the approval of the Review Committee on a case by case basis. The Committee was advised by Ms Werry that most of the claims to the Fund were straightforward and for the most part deserving of payment. There was agreement by the Committee that these claims should be resolved by the Fund as soon as possible because it was the moral and right thing to do in a situation like this where there was obvious dishonesty by a member. The Committee also noted that the case concerning the dishonest member had received a lot of attention in the Ottawa area and was seen by some as a test of the capability of the Law Society to deal quickly and efficiently with the hardship caused to clients by the occasional dishonest lawyer. The Committee indicated that since it would not necessarily require claimants to exhaust other remedies before a grant could be considered, its expectation was that most claims would be resolved and paid within 60 days.

8. The Committee was also of the view that the Fund should not insist on reimbursement by the claimant of the first dollar of recovery where a grant is paid in advance of the exhaustion of other remedies. The Committee instructed staff to formulate a guideline for the Committee's consideration, which provides that if recovery is made after a grant is awarded, the claimant will reimburse the Fund with a percentage of the recovery made, up to the value of the grant. The guideline concerning recovery is to be applied subject to the approval of the Review Committee on a case by case basis.

B. MEASURES DESIGNED TO PREVENT OR REDUCE LOSSES

9. Jim Yakimovich, the Director of Audit and Investigation, attended the meeting and discussed the various measures that are currently in place to prevent defalcations by members including the spot and focussed audit programs. He also outlined some new measures that could be instituted to monitor members' trust accounts and a discussion ensued about whether these suggestions were practical or effective. The Committee was of the view that the report presented by Mr. Yakimovich should remain confidential because it discusses various techniques used in the detection and prevention of fraud. Any bencher who wishes to review the report may request a copy from Sara Hickling, secretary to the Lawyers Fund for Client Compensation Committee.

10. The Committee was of the view that most of the new measures discussed would be extremely difficult to administer and would probably not result in increased fraud prevention or detection. The existing programs designed to monitor members' practices are generally working effectively and it is virtually impossible to prevent all fraud and/or dishonesty which only occurs rarely. It was acknowledged that dishonesty differs from either negligence or competence as those engaged in dishonest acts intentionally circumvent any rules in place.

11. The Committee indicated that it would be valuable to educate members and student members on the value of instituting proper business practices and procedures in order to reduce defalcations. It was noted that sometimes innocent partners in a firm are not aware of the warning signs of defalcation because they do not take an active role in the business and accounting aspects of their practice. It was decided that Jim Yakimovich and his staff should prepare a series of articles to run in the Gazette setting out how defalcations could be avoided.

C. EXPERIENCE IN OTHER JURISDICTIONS

12. Maryanne Cousins, a visiting lawyer from the Law Society of New South Wales, reported to the Committee that following a major defalcation resulting in claims estimated to be worth $55 million, the state government undertook a review of solicitors' mortgage practices and developed a new scheme of regulation. Generally, solicitors who wished to engage in mortgage practices were required to take out insurance in the private market and required government approval of their policies before being issued a practising certificate. Numerous types of mortgages that typically gave rise to fraud claims were considered "excluded mortgages" under the new legislation and claims arising from these kinds of mortgages were no longer compensated by the NSW Fidelity (Compensation) Fund. (The NSW Fidelity Fund is the Australian equivalent of the Lawyers Fund for Client Compensation.) For various reasons the new state legislation was deferred and will be replaced by a National Act which broadly adopts the scheme proposed in the state legislation.

13. The Committee discussed the New South Wales experience and was advised that in Ontario fidelity insurance is now available for sole practitioners from LPIC. Obtaining this coverage is sometimes a requirement imposed by financial institutions before they will agree to retain a lawyer.

D. IMPACT ON THE LEVY

14. Craig A. Allen, Vice President and Actuary for LPIC, who assists the Committee in setting the levy each year, attended the meeting and reported that he had reviewed the question of the impact of the defalcation on the levy imposed by the Fund. He advised that the Fund has an uncommitted balance of approximately eight million dollars after accounting for the defalcation in question. He told the Committee that this level of uncommitted balance is not low by historical standards, however the Fund is potentially volatile and the dishonesty of a single lawyer can cause extensive damage. As this claim illustrates the Fund is volatile and the Committee decided, in light of this volatility, that it wished to put the Fund in the financial position it was in prior to this latest large fraud. The Committee was advised that last year the levy amount was $165.00 and to restore the Fund balance to its December 31, 1999 level would require the Fund to raise the levy by an additional $188.00 per member as a result of this large fraud. The Committee also noted that the spot and focussed audit program is now fully phased in, so it is anticipated that the levy will increase for that reason as well. Therefore the Committee expects the levy to increase to somewhere in or above the region of $400.00. Mr. Allen advised the Committee that it would be valuable to wait to review the claims experience later in the year before making a decision concerning the levy as historical data reveals a seasonal pattern in the reporting of claims. He recommended to the Committee that no decision be taken with respect to an increase in the levy until November, 2000 when the Society must determine the levy for the coming year.

15. The Committee discussed that the claims experience of the Fund is affected by the economy at large and that typically the largest number of claims arise when the economy has experienced a boom period followed by a recession. There was also a general discussion that private mortgage lending was not nearly as prevalent as in the boom periods of the 1970's and 80's and that now this was a very small portion of most real estate lawyers' practices. It was generally agreed that both the economy and private mortgage lending are important factors which influence the Fund. The actuary will examine these issues and take them into account when recommending the amount of the levy.

16. It was the view of the Committee that the setting of the levy can safely be delayed until November, 2000.

II BUDGET FORECAST

17. There was a discussion of the merits of the spot and focussed audit program. Jim Yakimovich advised the Committee that there was a greater emphasis on focussed audits as the spot and focussed audit programs have merged. The Committee was advised that now the same staff conduct both the spot and focussed audit which allows staff who are conducting a spot audit to immediately upgrade the audit to a focussed audit if it is warranted. The Committee noted that the spot and focussed audit program is financed in part by the Fund as a prevention measure.

18. Bob Topp stressed the importance of the commitment to continuing the spot and focussed audit program along with the maintenance of the Fund to ensure that the Society is acting in the public interest when regulating the profession.

19. The Committee considered and approved the budget as presented. A copy of the budget is attached at Appendix 'A' which is found at page 10 of this report.

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

Copy of The Law Society of Upper Canada Program Analysis. (Appendix "A")

CALL TO THE BAR (Convocation Hall)

The following candidates were presented to the Treasurer and Convocation and called to the Bar by the Treasurer and the degree of Barrister-at-law was conferred upon each of them. They were then presented by Mr. Lamont to Justice Gerald F. Day to sign the Rolls and take the necessary oaths.

Tristan Martin Moodie Brown	Bar Admission Course
James Herns Craig	Bar Admission Course
Jill Alene Edwards	Bar Admission Course
Andrew John Flock	Bar Admission Course
Lorne Corey Gross	Bar Admission Course
Alexander G. Guarnes	Bar Admission Course
Johna Martine Janelle	Bar Admission Course
Miran Kert	Bar Admission Course
Shahid Mahmood Khan	Bar Admission Course
Nirupama Kumar	Bar Admission Course
Christopher Hugh Maguire	Bar Admission Course
Umbreen Mahmud	Bar Admission Course
Anthony James Mandl	Bar Admission Course
Sumita Pillay	Bar Admission Course
Sara Lynne Ramshaw	Bar Admission Course
Sven Michael Spengemann	Bar Admission Course
Gurbachan Singh Sehmbi	Bar Admission Course
George Frank Tomossy	Bar Admission Course
Mielka Katja Visnic	Bar Admission Course
Allyson Lynne Baker	Transfer, British Columbia
Sylvie Bourassa	Transfer, Quebec
Keenan Harry Hohol	Transfer, British Columbia & Alberta
David Kim-Sum Li	Transfer, British Columbia
Jasbir Parmar	Transfer, British Columbia
Douglas Edward Roberts	Transfer, Alberta

REPORT OF THE LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE

June 2000 Report

Mr. Ruby presented the June Report of the Lawyers Fund for Client Compensation Committee for Convocation's consideration.

The Lawyers Fund for Client Compensation Committee
June 23, 2000

Report to Convocation

Purpose of Report: Decision Making, Information

Prepared by The Lawyers Fund for Client Compensation Department

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee ("the Committee") met on June 19, 2000. In attendance were:

Clayton Ruby (Chair)
Robert Aaron (Vice Chair)
Robert Topp (Vice Chair)
Stephen Bindman (by telephone)
Gillian Diamond
Barbara Laskin (by telephone)

Staff: Craig Allen, Fred Grady, Malcolm Heins, Sara Hickling, Paul McCormick, Richard Tinsley and Heather Werry.

2. This report contains:

- a report on whether a per member cap on grants made from the Fund would have an impact on the levy required for maintaining a viable Fund and if so, to what extent

- a report recommending the appropriate levy for the Fund for the year 2001

I. INTRODUCTION

3. The Lawyers Fund for Client Compensation met on Monday, June 19, 2000 to consider two issues:

a) Whether a per member cap on grants made from the Fund would have an impact on the levy required for maintaining a viable Fund and if so, to what extent. In March 1999 the Committee considered this issue and many other possible measures to reduce the financial burden on the Fund. The Report of the Committee was debated and adopted by Convocation on March 26, 1999.

b) What is the appropriate levy for the Fund for the year 2001.

II. A PER MEMBER CAP ON THE LAWYERS FUND FOR CLIENT COMPENSATION

What would be the implication of introducing a per member cap of $1 million, $2 million or other amount?

4. Between 1965 and 1987 the Fund had a member cap in place. A member cap is a predetermined amount set by Convocation limiting the total amount of grants that may be paid in respect of one solicitor's misconduct. If total grants exceed the member cap then each claimant's grant must be pro-rated. The last per member cap was $1 million. In other words, in the period prior to the elimination of the cap the total grants paid to all claimants on behalf of any one member could not exceed $1 million.

5. The prime reason the per member cap was eliminated was the delay it built into the resolution of claims. All claims theoretically had to be received and evaluated before any grants were paid. There was much criticism of the delay and the resulting hardship it caused to clients who had just been defrauded by their solicitor. A second reason was the arbitrariness of limiting such claims, regardless of the impact on the individuals or the justice of the cause, by an amount dictated by the quantum of dishonesty.

6. Some individual claimants have remedies against third parties that may result in no grants being paid to them. However, it may take some time before that result is known and in the meantime other claims against the same member may have to be held up. If a cap were in place, a reserve for these types of claims would need to be set up which may not be utilized. If the reserve is not required, a further grant payout would need to be made to ensure the full cap amount is paid out. The administration of the Fund would become much more expensive and onerous if adherence to a cap were required.

7. Prior to 1988, Convocation, when faced with a large group of claims against one member, normally ignored the applicable per member limit because the compensation was reduced to an unacceptable percentage of the loss. As no principled basis for going beyond the member limit existed, it was very much an *ad hoc* decision as to whether the cap would be applied, this led to a lot of uncertainty. It is doubtful whether any principled basis could be stated, as the decision is invariably subjective in large part, and depends upon the composition of the Committee, Convocation and the particular facts of each claim. Even though the cap was often exceeded, its existence still caused long delays as generally the final decision came after all the claims had been evaluated.

8. There is also a certain unfairness to the percentage of a claimant's recovery being dependent on how much the solicitor misappropriated. It is difficult to explain why this fact should determine how the defrauded member of the public is to be treated. It is the same as putting the lawyers' interests ahead of the public's interest.

9. While staff has been asked to provide figures on what the savings to members would have been if there was a cap of $1 million and $2 million, this course of action is not recommended as both these caps are unrealistically low for the present time. Claimants might receive only 25% of their proven legitimate claims. In the past when the limit was this low, Convocation frequently chose not to apply it because the resulting payment levels would have been embarrassingly low and unfair. In the last five years claims at limits against one member are occasionally in excess of $2 million. Any cap implemented that bears in mind the good reputation of the profession should be in at least the $4 million range. Of course the savings from such a cap would be much smaller and would primarily address a possible catastrophic claim situation. The alternative would be to consider the adoption of such a limit only when such an event occurs which was the Committee's view of the appropriate course of action in March 1999.

Report to Convocation (#2) - Adopted by Convocation on March 26, 1999

10. The issue of instituting a per member cap was reported to Convocation on March 26, 1999. The relevant portions (paragraphs 39 to 48) of the Report are quoted below. The Report proposed no change from present policies. The Report was carried after this aspect of the report was drawn to the attention of Convocation during the discussion of the report.

"39. Between 1965 and 1987 the Fund had a per member cap in place. The last per member cap was $1 million. In other words, in the period prior to the elimination of the cap, grants paid to all claimants on behalf of any one member could not exceed $1 million.

"40. Pursuant to s. 51(6) of the *Law Society Act*, no grant may be paid unless the Society receives written notice of the loss within six months after it comes to the attention of the person suffering the loss. As it is a subjective test, it is not unheard of for claimants to become aware of losses years after they occur. When a cap was in place, the result was that payments to claimants who filed the first claims were being delayed several years if it was anticipated total grants would exceed $1 million.

"41. The practical effect of having a cap in place was that in those cases where grant payments were expected to be significant, all claims had to be received and evaluated before any grant payments could be made. If the cap was to be exceeded, all payments would be reduced on a pro rata basis to bring the total under the limit. This resulted in significant delays in payments and vocal criticism of the Law Society; some of it picked up by the media.

"42. A new $2 million cap could only apply to grant applications being made against members for which the Fund has yet to make grant payments. To do otherwise would have the effect of treating claimants differently for applications against the same lawyer. For example, the Fund is currently reviewing claims against members for which we have already paid out grants in excess of $2 million. If a cap were to apply to these claimants, they would not be eligible for any grant whatsoever despite the fact that others may have already received substantial grants.

"43. There is one former member being dealt with by the Fund where the first claims arrived in 1991. Legitimate claims were still being received as of the writing of this report. Claimants have been exhausting civil remedies (the Fund is a remedy of last resort) or are just discovering the true nature of their losses. Grant payments on behalf of this member have already exceeded $2 million. Had a $2 million cap been in place, some claimants would be waiting seven or eight years to receive payment. The elimination of the $1 million per member cap has had a major impact on the Fund's ability to pay grants to deserving claimants in a timely manner which has virtually eliminated public criticism concerning delays.

"44. The absence of a cap has not had a significant impact on the financial integrity of the Fund. Since 1988 there have only been six instances where the Fund has paid in excess of $1 million and in three of those where more than $2 million was paid on behalf of any one member. The largest of the six cost the Fund $2.7 million although this member will cost the Fund approximately $5 million by the time the last claim is dealt with. The remaining five cases cost $2.5 million, $2.5 million, $1.4 million, $1.2 million and $1.1 million respectively. While there have only been three occasions where a $2 million cap would have become a factor, had it been in place since 1988, 500 claimants or approximately 25% of all claimants from the last ten years would have had their grant payments delayed by years.

What is the financial impact had a $2 million per member cap been in place since 1988?

"45. Had a $2 million per member cap been in place since 1988 thereby limiting payments on those three occasions when it would have been exceeded, the Fund would have saved approximately $1.7 million or $7.50 per member in each of the last ten years.

"46. Any form of cap has the potential of once again delaying grant payments to deserving claimants. If the concern is guarding the Fund against catastrophic loss it should be noted that payments from the Fund are at the absolute discretion of Convocation; there is no legal entitlement to a grant.

"47. If faced with a catastrophic loss, Convocation always has the authority to cease paying grants or scale back the amount paid. While this would undoubtedly lead to hardship in certain cases, the harshness of such a ruling could be minimized for the most deserving of the hardship situations on a case by case basis.

Caps In Other Canadian Jurisdictions

"48. Saskatchewan, Quebec, Nova Scotia, Newfoundland and the Yukon have retained per member limits ranging from $250,000 to $2 million. Alberta and Prince Edward Island have per member limits of 50% of the balance of their funds. Some U.S. states have set per lawyer limits of 10% of their funds."

If a $1 million per member cap had been in place since 1988, what would have been the financial impact on the members' levy?

If a $2 million per member cap had been in place since 1988, what would have been the financial impact on the members' levy?

11. The statistics in the March 1999 Report have been updated to May 31, 2000 in the following table. The table includes the impact on the levy when a cap of $1 million and a cap of $2 million are applied. *(This table does not include any figures for the Ottawa solicitor where payout is in the preliminary stages but is estimated at approximately $3.5 million.)*

SUMMARY TABLE

	(i) Estimated Total Payout on Members	(ii) Application of Member Caps	(iii) Savings	(iv) Average Savings per Member per year (1988 to 1999)
$1,000,000 Member Cap	$21,808,900	$9,000,000	$12,808,900	$43
$2,000,000 Member Cap	$21,808,900	$16,034,514	$5,774,386	$19

12. In Column (iv) of the summary table the total savings has been divided by the average number of members and then divided by 12 years as they would have accumulated since 1988. The savings for a $1 million cap are quite substantial ($43 per year for 12 years) but it is questionable whether the Law Society would want to withstand the negative criticism it would receive if it imposed such a low limit. A $2 million cap would have saved the members $19 per year for 12 years.

13. The table which is marked and attached as Appendix 'A' factors in an estimate of the payout of the outstanding claims at their limited amounts. The estimated amount is conservative as generally grants are somewhat less than the limited amounts. Column C of the table shows the dollar amount of open claims with the current per claimant limits applied. The estimated total payout on the member (Column D) is based on the amount of open claims (with per claimant limits applied) plus the amount of grants already paid.

14. One can also see from the table (Appendix 'A') that a cap of $4 million would not result in substantial savings. Only one of the nine solicitors in the table is estimated to have a payout exceeding $4 million.

Fund Claim Situation

15. In looking at the adequacy of the Fund, it is appropriate to look at claims statistics from a historical perspective to see if the claims the Fund is receiving now are historically high. It can be seen from the graph attached and marked as Appendix 'B' that this is not the case. The graph depicts the dollar value of new claims received in each year since 1990. The 1990's began with very few claims but by 1991 during the height of the recession the situation changed dramatically when gross claims of $33.8 million ($15.7 million at limits) were received. Contrast those numbers with the five month total ending May 31, 2000 of $6.4 million ($5 million at limits). Nearly all new claims received in 2000 are against one solicitor and the majority of the claims against that solicitor have been received. Assuming that another sizable group of new claims is not received in the second half of the year, the volume of new claims in 2000 may not substantially exceed last year's total and is most certainly not going to approach the volume of claims received in 1991 and 1992.

16. It should also be remembered during those very high years of claims the levy for the Fund was only $1 per member from 1991 to 1997 because of the build up of Fund assets in the late 1980's. Financial year end statements for the Fund show total assets, even with the $1 levy, remained high until December 31, 1996. However, claims received in 1997 increased substantially over the previous year and in 1998 the levy had to be increased from $1 to $320.

17. For the Committee's information a table is attached and marked Appendix 'C' showing the Fund's year end assets and levy from 1990 to 1999. It should be remembered that from 1998 onwards approximately $55 was utilized to fund the Spot and Focussed Audit Programme.

18. Clay Ruby, Chair of the Committee advised that the issue of the per member cap would not ordinarily be reconsidered by the Committee so soon after an examination of the issue had already taken place. However some benchers had the mistaken impression that the issue had not been placed before Convocation in March, 1999 and had asked for further debate. An examination of the record showed that the issue was considered by Convocation only last year and that the Report of the Committee was debated and adopted on March 26, 1999.

The Committee's View

19. The Committee was of the unanimous view that it would not be in the public interest to impose a per member cap for all the reasons canvassed in 1999 and reconsidered at this time. They affirmed Convocation's decision that no per member cap should be imposed and saw no reason to revisit the issue.

Decision for Convocation

20. Convocation must decide whether:

a. to accept the Committee's affirmation of Convocation's previous decision that no per member cap should be instituted.

III. DISCUSSION OF THE APPROPRIATE LEVY FOR THE FUND FOR 2001

What is the Appropriate Levy for the Fund for the Year 2001?

Recommended Levy for 2001

21. Craig Allen, Vice President and actuary for LPIC, who assists the Committee in setting the levy each year, told the Committee that he was able to recommend a reduction in the levy last year to $165.00 because in 1999 no large scale defalcations occurred. All indicators last year seemed to show that the claims experience of the Fund would support a lower levy and that the negative effects of the last recession were coming to an end. However, the recent large scale fraud of approximately $4 million by an Ottawa area lawyer demonstrates that Fund continues to be exposed to major claims arising from a single lawyer. It is because of the claims arising from this major fraud that the Fund's uncommitted balance has been seriously depleted and its investment income generating capability compromised.

Stop-Loss Reinsurance Coverage

22. Malcolm Heins, the Director of LPIC told the Committee that it must be recognized that the Fund is continually subject to large claims like the Ottawa situation and in the past the Fund has dealt with this problem by building a large surplus to pay claims. In Mr. Heins' opinion, it is questionable whether this is the best way to cope with the volatility to which the Fund is subject.

23. At the request of the Chair, Clayton Ruby, Mr. Heins has investigated the purchase of reinsurance, (also known as stop loss insurance), in order to protect the Fund. Claims experience shows that the primary problem which the Fund faces is volatility arising from recurrent but infrequent large frauds by a single member rather than claims received in the ordinary course. The contract of reinsurance would cap the exposure of the Fund to claims arising from large scale defalcations and there would be no need to continually increase the Fund balance to pay claims. This reinsurance is designed to protect the Fund against catastrophic loss.

24. A discussion ensued as to how a reinsurance policy would affect the Fund and the costs of such an option. If this proposal were adopted, the Fund would purchase reinsurance coverage that would assume the costs of claims in excess of a specified annual amount in accordance with the opinion of Mr. Allen, the LPIC actuary who assists the Fund in these matters.

25. The Committee reviewed Craig Allen's opinion, which was later refined by Mr. Allen and Mr. Malcolm Heins. That document is attached and marked as Appendix 'D' to this Report. It was determined that if the reinsurance option was chosen this would cost approximately $50.00 per member. The $50.00 cost assumes that the Fund would cover the first $5 million in losses on an annual basis and any losses over this amount up to $10 million would be covered by the reinsurer. The Committee agrees that though it is a new direction, this alternative to building a large surplus in the Fund should be accepted.

26. The Committee expressed the view that the Fund should be immediately restored to its December, 1999 level as the Fund has clearly suffered a serious loss due to the $4 million defalcation of the Ottawa member. Concerns were expressed that this loss should be made up by members now when the economic times are relatively good. If the reinsurance proposal works, this will be the last such extraordinary payment.

The Committee's View

27. The Committee was of the view that Plan C as expressed in Appendix 'D' should be accepted as prudent and appropriate to enable the profession to fulfil its statutory obligation respecting the Fund. This would result in a levy this year of $470.00 and, if claims experience remains in expected limits, a levy next year of $290.00.

Decision for Convocation

- Convocation must decide whether:
  a. to accept the Committee's proposal as set out in paragraph 27 above;
  b. to decide upon other options either discussed above or to be articulated by Convocation.

APPENDIX 'A'

TABLE SHOWING EFFECT OF THE APPLICATION OF $1 MILLION AND $2 MILLION MEMBER CAPS ON MEMBER LEVY*

	A	B	C	D	E	F
Member	Since 1988 Grants paid >1 M	Since 1988 Grants paid >2 M	Open Claims with Per Claimant Limits Applied at May 31/00	Estimated Total Payout on Member	Application Member Cap if $1M	Application of Member Cap if $2M
Solicitor #10		2,153,894	200,000	2,353,894	1,000,000	2,000,000
Chernoff, Stephen	1,356,084			1,356,084	1,000,000	1,356,084
DeCosimo, Michael		3,842,913	905,422	4,748,335	1,000,000	2,000,000
Handelman, Arnold	1,539,059		470,000	2,009,059	1,000,000	2,000,000
Jones, Donald S.		2,481,852		2,481,852	1,000,000	2,000,000
Solicitor #47	1,283,821		296,835	1,580,656	1,000,000	1,580,656
Orzech, Morris C.	625,568		1,687,000	2,312,568	1,000,000	2,000,000
Sproule, John Alexander	1,097,774			1,097,774	1,000,000	1,097,774
Squires, Paul Douglas		2,877,178	991,500	3,868,678	1,000,000	2,000,000
TOTAL	5,902,306	11,355,837	4,550,757	21,808,900	9,000,000	16,034,514

* These figures do not allow for the Ottawa solicitor whose estimated payout is $3.5 million.

APPENDIX 'C'

Lawyers Fund for Client Compensation Annual Levy and Assets (in dollars), 1990 - 2000		
Year	Levy	Assets
1990	1	29,802,917
1991	1	32,345,000
1992	1	31,785,000
1993	1	29,654,000
1994	1	27,962,000
1995	1	27,191,000
1996	1	24,739,000
1997	1	20,193,000
1998	320	22,816,000
1999	235	20,208,000
May 31, 2000	210	23,450,444

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

(1) Copy of a graph re: Lawyers Fund - Dollar Amount of New Claims. (Appendix 'B' - page 15)

(2) Copy of a letter from Mr. Malcolm L. Heins, President, LPIC to Mr. Clayton Ruby dated June 21, 2000. (Appendix 'D' - pages 17 - 22)

Re: Per Member Cap

It was moved by Mr. Ruby, seconded by Mr. Topp that Convocation set the levy at $470 per member as provided for in Option C as set out at Appendix D on page 21 of the Report.

Not Put

It was moved by Mr. Ruby, seconded by Mr. Topp that Convocation affirms its previous decision that no per member cap be instituted.

Carried

It was moved by Mr. Gottlieb but failed for want of a seconder that the matter of a member cap be referred back to the Committee for reconsideration to prevent a catastrophic loss.

It was moved by Mr. Ruby, seconded by Mr. Topp that approval be given to engage in negotiations to obtain reinsurance and that a further report be brought back to Convocation.

Carried

It was moved by Mr. Murray, seconded by Mr. Banack that the Committee be directed to confer with LPIC's Board of Directors to review the Lawyers Compensation Fund to determine whether it could be replaced by or supplemented by insurance and report back to Convocation.

Carried

It was moved by Ms. Puccini, seconded by Messrs. Wright and Crowe that:

"Given that the Lawyer's Fund for Client Compensation currently has no aggregate limit per lawyer;

and

Given that most insurers, including LPIC, have an aggregate limit per lawyer;

and

Given that it would be financially imprudent for the Society to expose its members to a potentially ruinous series of claims;

and

Given that it is in the public interest that valid claims against the Fund be paid expeditiously; and

and

Given that it is necessary for proper fiscal planning both for the Society and for its members to have a Comp Fund levy that remains fairly consistent and stable:

It is therefore moved that the Lawyers Fund for Client Compensation Committee review this issue and provide policy options to Convocation:

1. Capping the Law Society's exposure to claims against the fund (be it through the purchase of re-insurance or other means), while at the same time ensuring that claims by the public can be paid in a timely manner;

2. Recommending an appropriate surplus for the Fund; and,

3. Recommending an appropriate amount for the annual levy to members that would be more consistent and stable over time;

It is further moved that the Committee report back to Convocation on this matter at the September, 2000 Convocation.

Carried

It was moved by Mr. Gottlieb, seconded by Mr. White that there be a $4 million cap per solicitor.

Not Put

Re: 2001 Levy

The amount of the levy was put over to the Budget debate in the fall.

REPORT OF THE PROFESSIONAL DEVELOPMENT & COMPETENCE COMMITTEE

Re: Beyond 2000: The Future Delivery of County Library Services to Ontario Lawyers Phase III

Ms. Cronk gave a brief introduction to the Report and thanked Ms. Elliott and the members of the working group for all their work.

Professional Development & Competence Committee
June 8, 2000

Report to Convocation

Purpose of Report: Decision Making
Information

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

TABLE OF CONTENTS

INFORMATION

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Development and Competence Committee ("the Committee") met on June 8, 2000. Kim Carpenter-Gunn chaired the meeting. Other Committee members in attendance were Earl Cherniak (Vice-Chair), Stephen Bindman, Dino DiGiuseppe, Greg Mulligan, Marilyn Pilkington, Judith Potter, and Bill Simpson. Eleanore Cronk (Chair) and Seymour Epstein attended a portion of the meeting. Staff in attendance were Scott Kerr, Janine Miller, Elliot Spears, Sophia Sperdakos, Ursula Stojanowicz, and Paul Truster. A portion of the meeting was held in conjunction with the Professional Regulation Committee.

2. The Committee is reporting on the following matters:

Policy - For Decision

- Report of the Working Group on Long-Term Delivery of County and District Library Services; Proposed By-Law regarding county libraries; Proposed Amendments to Regulation 708 regarding county libraries; and Proposed Amendments to By-law 9

- Protocol for Complainants in the Law Society's Conduct, Competence, and Capacity Processes [detailed report in the Professional Regulation Committee materials]

- Publications Protocol for Law Society CLE

- French Version of By-Law 28

- Increased Funding for LINK

Information

- Working Group on Protocol for Members Involved in Law Society Complaints, Investigations, and Hearings Processes

POLICY - FOR DECISION

REPORT OF THE WORKING GROUP ON THE LONG -TERM DELIVERY OF COUNTY AND DISTRICT LIBRARY SERVICES

(i) Report of the Libraries Working Group

1. On January 23, 1998 Convocation adopted the recommendations of the Professional Development and Competence Committee calling for the formation of a working group on the future delivery of services to the county and district law libraries. The working group's mandate was to,
   a) establish policy objectives for the libraries;
   b) consider broad alternative approaches to the delivery of library services in the light of stated policy objectives; and
   c) consider the costs of viable alternatives.

2. Convocation has considered two reports from the working group, the Phase I report on October 23, 1998 and the Phase II report on May 28, 1999, and approved a number of recommendations broadly outlining the nature of the new system for delivering library services and adopting the principles of universal access and universal funding. In May, 1999 Convocation requested that the working group explore a number of matters regarding the appropriate administrative structure for the library system and an appropriate business plan.

3. The working group on the administrative structure has completed its report, entitled *Beyond 2000 - A Fresh Start for Ontario Courthouse Libraries* (the "Libraries Report"), which was provided to Convocation in May 2000 under separate cover. Benchers were requested to review the report for consideration at June 23, 2000 Convocation. Benchers are requested to bring the copy of the report they received in May to Convocation in June as the report is not being re-distributed.

4. The Committee has considered the Libraries Report and the recommendations set out in Chapter 2, page 7 and recommends them for approval by Convocation.

5. A further matter the Committee is raising for Convocation's consideration concerns the wording of one of the requests to Convocation already approved by the Committee for inclusion in the Libraries Report, and set out in the report (Chapter 2, page7). It reads as follows:

   > Convocation is requested to
   > ...
   > d. authorize the Law Society to enter into a unanimous shareholders agreement with respect to the corporation.

6. The use of the term "Law Society" in this context means Convocation. Because, however, Convocation will not meet in July and August, it is proposed that the request to Convocation should be reworded to read as follows:

   > d. authorize *the Treasurer, on behalf of* the Law Society to enter into a unanimous shareholders agreement with respect to the corporation.

7. A second matter for consideration relates to the appointment of the first Law Society Director to the Corporation. If the Libraries Report is approved on June 23, 2000 and steps are to be taken over the summer to incorporate "LibraryCo", one of the necessary first steps will be the Law Society's appointment of the first Law Society director. To ensure that this necessary step is not held up due to the summer recess of Convocation the Committee recommends that Convocation approve the following as part of the Libraries Report recommendations:

> Convocation is requested to
> ...
> e. authorize the Treasurer, on behalf of the Law Society, to name the first Law Society Director of the corporation.

8. At its meeting on June 8, 2000 the Committee considered a further recommendation concerning the distribution of funds for "LibraryCo" during the remainder of the 2000 fiscal year. The proposed recommendation confirms that funds referred to as the "surplus library funds" in the Phase I Libraries Working Group Report, and elsewhere, including Convocation, are earmarked for incorporating LibraryCo and financing operations for the balance of the fiscal year 2000. The Committee approved the following motion for inclusion in the recommendations to Convocation:

> f. Funds required for the incorporation of LibraryCo for its operations during the balance of the fiscal year 2000 be advanced by the Law Society from funds allocated for County and District library purposes, on the approval of the Society's Chief Financial Officer.

Request to Convocation

9. Convocation is requested to review the Libraries Report and, if appropriate, approve the recommendations set out Chapter 2 of the report, page 7, and the additional recommendations set out in paragraphs 6, 7, and 8 above. For Convocation's convenience, the recommendations are all set out below:

Convocation is requested to consider the report and, if appropriate,

a. approve the report, including the recommendations for the governance structure set out in Chapter 4;

b. authorize the drafting of amendments to Regulation 708 to remove provisions relating to county law libraries;

c. approve the making of a By-law on county law libraries to include, among other provisions,

(i) an obligation on the Society to establish a corporation under the *Ontario Business Corporations Act*, consisting of fifteen directors;

(ii) A description of the share structure of the corporation, including the number of classes of shares, the rights, etc. attaching to each class of shares, and the holders of each class of shares;

(iii) a list of the objects of the corporation;

(iv) a requirement on the corporation to submit to Convocation an annual report, which includes audited financial statements, and an annual budget;

(v) a provision that county law libraries shall be operated by their associations in accordance with policies, priorities, guidelines and standards established by the corporation;

(vi) a provision, carried over from Regulation 708, dealing with the "ownership" of the library materials of the county law libraries;

(vii) a provision dealing with access to county law libraries (the "universal access" provision);

(viii) a provision specifying that the money required for the purposes of the corporation shall be paid out of money appropriated therefor by Convocation; and

(ix) a provision permitting Convocation to suspend or reduce funding of the corporation in specified circumstances.

d. authorize the Treasurer on behalf of the Law Society to enter into a unanimous shareholders agreement with respect to the corporation;

e. authorize the Treasurer, on behalf of the Law Society, to name the first Law Society Director of the corporation.

Convocation is further requested to authorize that,

f. funds required for the incorporation of LibraryCo for its operations during the balance of the fiscal year 2000 be advanced by the Law Society from funds allocated for County and District library purposes, on the approval of the Society's Chief Financial Officer.

(ii) Making of the Libraries By-law (Proposed By-law 29)

10. In the normal course, By-laws relating to policies adopted by Convocation are drafted following the passage of a policy and submitted to a subsequent Convocation for consideration and approval.

11. Because the Libraries Report is being considered in June, however, the first subsequent Convocation at which a library By-law could be considered is September, 2000. The working group and the Committee are of the view that if Convocation approves the Libraries Report in June every effort should be made to make and approve the necessary By-law at the same time so that valuable time is not lost over the summer.

12. The Committee has reviewed the draft By-law set out in Appendix 1 and recommends that if Convocation approves the Libraries Report, it also approve the making of By-law 30 regarding libraries, at the same time.

Request to Convocation

13. If Convocation approves the Libraries Report and recommendations it is also requested to consider the motion set out in Appendix 1 to make By-Law 30 and, if appropriate, approve it.

(iii) Proposed Amendments to Regulation 708

14. Regulation 708, which deals with county and district law associations and law libraries, is set out at Appendix 2. If Convocation approves the Libraries Report and recommendations, it will be necessary to seek amendments to those aspects of Regulation 708 that deal with libraries.

Request to Convocation

15. The following amendments to Regulation 708 are proposed:

(1) In section 24,
   a. delete "sections 25 to 35" in the first line and substitute "section 25"; and
   b. delete "'Committee' means the Libraries and Reporting Committee".

(2) In subsection 25 (3),
   a. delete "Chief Librarian" in the first and third lines and substitute "Secretary"; and

   b. delete "and in either case, proof of the condition of its funds and that proper accommodation has been provided for its library, together with an undertaking that the association has knowledge of and will comply with the regulations applicable to county law libraries and with such other particulars as are required by the Committee" at the end.

(3) Revoke sections 26 to 35.

(iv) Amendments to Existing By-Law 9

16. If Regulation 708 is amended as proposed above, a consequential amendment to By-Law 9, namely, the deletion of subsection 14 (3) thereof, will be necessary. It is proposed that this amendment to By-Law 9 be made at the same time as the new by-law dealing with county law libraries is made, but that its "commencement" be delayed until the day on which the amendments to Regulation 708 come into force. The motion and By-law 9 are set out at Appendix 3.

Request to Convocation

17. Convocation is requested to approve the motion set out in Appendix 3 to amend By-law 9 and to delay "commencement" of the amendment until the day on which the amendments to Regulation 708 come into force.

PROTOCOL FOR COMPLAINANTS IN THE LAW SOCIETY'S CONDUCT, COMPETENCE, AND CAPACITY PROCESSES

10. In November 1997, the Law Society adopted a Protocol for complainants in the discipline process, which sets out a scheme for informing and communicating with complainants. Much of the Protocol was a codification and refinement of processes already in place in the Society's investigatory and discipline departments.

11. As the Protocol pre-dated the amendments to the *Law Society Act* (the "*Act*") in force February 1, 1999 and the Project 200 operational reorganization, a working group of the Professional Development and Competence Committee and the Professional Regulation Committee was established to review the Protocol and propose appropriate changes.

3. The working group reported to the Committees in January 2000, which then reported to Convocation. This resulted in approval in principle to amendments to the Protocol and in specific amendments to the Rules of Practice and Procedure, essentially to permit complainants to be advised of the fact of proceedings in respect of capacity and competence, which otherwise are held *in camera.*

4. The Committees are now requesting that Convocation approve amendments to the language of the Protocol in respect of the implementation of policies approved in January and make further amendments to the Rules of Practice and Procedure to deal with the issue of what information complainants should receive in connection with the results of a capacity or competence proceeding.

5. The Professional Regulation Committee's report to Convocation contains the material for Convocation's consideration.

Request to Convocation

6. Convocation is requested to consider the report and recommendations of the Professional Regulation Committee and the Professional Development and Competence Committee, as set out in the Professional Regulation Committee's report to Convocation, and if appropriate, approve it.

BY-LAW 28 - FRENCH TRANSLATION

1. By-Law 28 [Requalification] was made by Convocation on October 29, 1999 and amended by Convocation on December 10, 1999. A French version of the By-law has now been prepared and is set out in Appendix 4.

Request to Convocation

2. Convocation is requested to approve the motion set out in Appendix 4 to further amend By-law 28 by adding the French version.

PUBLICATIONS PROTOCOL FOR LAW SOCIETY CLE

1. In June 1999 an issue was raised as to the scope and role of publications in the operations of the Law Society's CLE department. The Committee received a few submissions concerning the issue and the manner in which authors are chosen.

2. The Committee agreed to review the issue, but recommended that in the interim the CLE department proceed with its publications. In June 1999 Convocation passed a motion that "the current policy of the CLE department with respect to publications should continue as is and that the issue will be reviewed by the PD&C Committee, which will report back to Convocation in the fall."

3. The Committee established a working group to consider a protocol for CLE publications. The working group has met on a number of occasions and has developed a proposal, which is set out at Appendix 5. The publications protocol is based on the assumption that the CLE department should continue to "publish" educational materials.

4. The proposed protocol does not include a tender process for the selection of authors. At an earlier stage there had been a suggestion that there be such a process. There was general agreement in the working group, however, with which the Committee agrees, that a tender process is neither necessary nor practical, nor the only reasonable quality control mechanism that can be employed.

5. The Committee has reviewed the proposed publications protocol and recommends that Convocation approve it.

Request to Convocation

6. Convocation is requested to consider the proposed publications protocol for Law Society CLE, set out at Appendix 5 and, if appropriate, approve it.

FUNDING FOR LINK

1. In the advisory and compliance unit budget materials presented to the Committee in May, 2000, $150,000 was set out as the proposed Law Society funding to be contributed to the LINK program. If this amount is ultimately approved by Convocation it will represent an increase of approximately $45,000 from previous years.

2. This possible increase was reflected in the budget materials in anticipation of a formal request from LINK for such an increase. Scott Kerr and Ron Manes are both members of the LINK board.

3. A formal request for the additional funding has now been received in a letter from Laurence A. Pattillo, writing on behalf of the Board of Directors. The letter is contained at Appendix 6.

4. The Committee reviewed the materials and considered the impact on the request of the Law Society's strategic planning process and the 2001 budget process, both of which are ongoing. Because of these ongoing processes, the Committee is of the view that it would be inappropriate to recommend an increase to the LINK funding at this time.

5. The Committee considered and approved the following motion for recommendation to Convocation as follows:

> Pending the completion of the strategic planning process and the 2001 budget planning process there should be no increase in Law Society funding to LINK.

Request to Convocation

6. Convocation is requested to consider the motion set out in paragraph 5 above and, if appropriate, approve it.

III INFORMATION

WORKING GROUP ON PROTOCOL FOR MEMBERS INVOLVED IN THE LAW SOCIETY'S COMPLAINTS, INVESTIGATIONS, AND HEARINGS PROCESSES

1. The Professional Development and Competence Committee and the Professional Regulation Committee have agreed that work should begin on the drafting of a "protocol" for members in the Society's investigations and discipline process, an idea which had been raised earlier by benchers in Convocation.[1] A working group of the Committees will be established to consider the scope and content of such a protocol, mindful of the processes which have already been codified, in particular at the hearing stage, through the Rules of Practice and Procedure.

2. The working group will report to the Committees in the new committee year.

APPENDIX 1

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTION 62 (0.1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JUNE 23, 2000

MOVED BY

SECONDED BY

THAT, pursuant to the authority contained in paragraphs 1 and 27 of subsection 62 (0.1) of the *Law Society Act*, By-Law 30 [County Law Libraries] be made as follows:

BY-LAW 30

COUNTY LAW LIBRARIES

INTERPRETATION

Definitions
1. In this By-Law

"association" means a county or district law association formed under Regulation 708 of the Revised Regulations of Ontario, 1990 or any predecessor of it;

---

[1]When the complainants' Protocol was adopted by Convocation in November 1997, the suggestion for a members' protocol was referred to the Professional Regulation Committee. At May 29, 1998 Convocation, when amendments to the complainants' Protocol were made, the Committee discussed in its report its consideration of a members' protocol. Convocation at that time agreed with the Committee to defer the matter pending assessment at an operational level of certain process and procedural issues largely focussing on the hearing stage.

"Corporation" means the corporation established as required under section 3;

"county law library" means a law library established by an association;

"trustees", where an association is incorporated, means the directors of the corporation.

Interpretation: "county law library funded by the Corporation"

2. In this By-Law, "county law library funded by the Corporation" means a county law library established under Regulation 708 of the Revised Regulations of Ontario, 1990 or any predecessor of it and in existence on the day on which this By-Law comes into force or a county law library established with the approval of the Corporation after the day on which this By-Law comes into force.

LIBRARY CORPORATION

Corporation to be established

3. (1) The Society shall cause a corporation to be established in accordance with this section for the purposes of,

(a) establishing and administering a system for the provision of law library services and programs by county law libraries funded by the Corporation;

(b) establishing policies and priorities for the provision of law library services and programs by county law libraries funded by the Corporation based on the financial resources available to the Corporation;

(c) providing to associations funding to pay for the operation of county law libraries funded by the Corporation;

(d) monitoring and supervising the provision of law library services and programs by county law libraries funded by the Corporation, including establishing guidelines and standards for the organization and operation of county law libraries funded by the Corporation and for the provision of law library services and programs by county law libraries funded by the Corporation; and

(e) advising Convocation on all aspects of the provision of law library services and programs by county law libraries funded by the Corporation, including anything that affects or may affect the demand for or quality of law library services and programs.

Classes of shares

(2) The Corporation shall have two classes of shares as follows:

1. A class of shares to be issued to the Society.

2. A class of shares to be issued to the County and District Presidents' Association giving the Association the exclusive right to elect one director.

Directors

(3) The Corporation shall consist of fifteen directors.

COUNTY LAW LIBRARIES

Application to establish county law library

4. (1) An association that wishes to establish a county law library to be operated by the association and funded by the Corporation shall apply to the Corporation for its approval to establish the county law library.

Same

(2) An application under subsection (1) shall contain the information required by the Corporation.

Operation of county law library

5. (1) A county law library funded by the Corporation shall be operated by the association in accordance with any guidelines and standards established by the Corporation.

Provision of law library services and programs

(2) A county law library funded by the Corporation shall provide library services and programs in accordance with any guidelines, standards, policies and priorities established by the Corporation.

Library materials

6. (1) The trustees of an association shall continue to hold in trust for the Society all library materials of its county law library that the trustees held in trust for the Society before the day on which this By-Law comes into force.

Same

(2) The trustees of an association shall hold the library materials of its county law library in trust for the Society.

Return of library materials

(3) In case of the dissolution or winding-up of an association, the disposal of the property of an association or a direction from Corporation to return the library materials of an association's county law library to the Society, the trustees of the association shall, at the expense of the association, return all library materials of the association's county law library to the Society, subject to any contrary directions from the Society.

Same

(4) If the trustees of an association do not return the library materials of the association's county law library to the Society, as required under subsection (3), the Society may take such steps as it considers advisable to obtain the library materials, and any expense incurred in so doing shall be paid by the association to the Society.

Access to law library services and programs

7. A county law library funded by the Corporation shall give access to its law library services and programs to,

(a) every member of the Society, regardless of whether a member is also a member of an Association;

(b) judges of Ontario courts;

(c) Ontario justices of the peace; and

(d) members of boards, commissions or other tribunals established or provided for under Acts of Parliament or the Legislature in Ontario.

FINANCING

Provision of funds by Society

8. The money required by the Corporation for its purposes shall be paid out of such money as is appropriated therefor by Convocation

Suspension, reduction of funding

9. (1) Despite section 8, Convocation may, in respect of a fiscal year, suspend or reduce funding of the Corporation if,

(a) the Corporation does not comply or has not complied with section 10, 11 or 12; or

(b) the Corporation fails or has failed to provide to Convocation information requested under section 13.

Notice to Corporation

(2) Before taking action under subsection (1), Convocation shall give the board of directors of the Corporation notice of its intent and a reasonable opportunity to comply with the relevant provisions of this By-Law or to provide the required information.

Budget

10. (1) The Corporation shall submit its annual budget for the next fiscal year to the Finance and Audit Committee by such date as may be specified by the Chair of the Finance and Audit Committee.

Same

(2) The Corporation's annual budget shall be is such form as may be specified by the Chair of the Finance and Audit Committee.

Financial statements

11. (1) For the purposes of clause 12 (2) (a), the Corporation shall prepare annual financial statements for each fiscal year in accordance with generally accepted accounting principles.

Audit

(2) For the purposes of clause 12 (2) (a), the financial statements of the Corporation shall be audited by a public accountant.

Annual report

12. (1) The Corporation shall submit an annual report to Convocation within four months after the end of its fiscal year.

Contents

(2) The annual report shall contain,

(a) the audited financial statements of the Corporation;

(b) a report on the affairs of the Corporation; and

(c) such other information as Convocation may request.

Other reports

13. Convocation may at any time require the Corporation to report to it on any aspect of its affairs or to provide information on its activities, operations and financial affairs as Convocation may request.

APPENDIX 2

REGULATION 708
OF THE REVISED REGULATIONS OF ONTARIO, 1990

COUNTY AND DISTRICT LAW ASSOCIATIONS

DEFINITIONS

24. In this section and in sections 25 to 35,

"association" means a county or district law association;

"Committee" means the Libraries and Reporting Committee;

"county" includes a union of counties and a territorial district;

"trustees" where an association is incorporated, means the directors of the corporation.

FORMATION

25. (1) The members of the Society in any county or any part thereof may, with the approval of Convocation, form an association and elect the trustees thereof.

(2) At the time of the formation of an association or at any time thereafter, upon and in accordance with the request of Convocation, the trustees shall cause the association to be incorporated.

(3) Upon formation, an association shall send to the Chief Librarian a certified copy of its constitution and by-laws and thereafter shall send all amendments thereto as they are made, and, upon incorporation, an association shall send to the Chief Librarian a certified copy of its letters patent and by-laws and thereafter shall send all amendments thereto as they are made, and, in either case, proof of the condition of its funds and that proper accommodation has been provided for its library, together with an undertaking that the association has knowledge of and will comply with the regulations applicable to county law libraries and with such other particulars as are required by the Committee.

TWO LIBRARIES IN ONE COUNTY

26. Where sittings of the Ontario Court (General Division) are held in two or more places in a county, the association of that county may establish a library in each such place, and, where more than one library has been so established, the amount of the annual grant from the Society to the association may be increased by an amount not exceeding 50 per cent of the grant that would otherwise be made.

BOOKS HELD IN TRUST

27. The trustees of an association shall hold the books of its library in trust for the Society and in case of the dissolution or winding-up of an association or the disposal of its property, it shall return the books to the Society.

APPLICATION OF FUNDS

28. At least one-half of the fees received by an association from its members and the whole of the aid at any time granted to the association by the Society shall be applied in the purchase, binding and repairing of books for its library and in paying for telephone service and the salary of its librarian.

ANNUAL REPORTS

29. (1) Every association shall make a report to the Society before the end of February in each year showing the state of its finances and of its library as of the close of the previous calendar year, together with such other information as may be required by the Committee.

(2) If the Committee is satisfied that an association has complied with the regulations applicable to county law libraries, it shall make a report thereon to Convocation.

FIRST-YEAR GRANTS

30. The Society's grant in aid to an association for its first year shall be a sum equal to double the amount of,

(a) the contributions in money actually paid to the association; or

(b) the value of the books actually given to the association from all local sources,

but the amount of such grant shall not exceed $100 for each member of the Society in the county who is a member of the association.

ANNUAL GRANTS

31. (1) The Society's grant in aid to an association in each year after the first year shall be $3,000.

(2) A grant in aid under subsection (1) shall not be paid until the Committee makes a report to Convocation under section 29.

(3) Convocation, having regard to the report of the Chief Librarian on the condition of an association's library and the association's library requirements, may vary the amount of a grant in aid to the association under subsection (1).

(4) Where an association has complied with the regulations applicable to county law libraries, all sums making up the annual grant payable to the association shall, on the recommendation of the Committee, be paid before the end of March.

SPECIAL GRANTS

32. (1) When any association that has been established for at least two years and that has regularly made the required returns and that has complied with the requirements of the regulations applicable to county law libraries satisfies Convocation that the association is unable to purchase such reports or text books as are necessary to make the library thoroughly efficient and useful having regard to the locality in which the library is established and the number of members of the Society who are members of the association, or that it requires financial assistance in any way, Convocation, on the recommendation of the Committee, may make a special grant either of books or of money to the association or may advance by way of a loan without interest to the association a sum not exceeding the estimated amount of the next three years annual grants.

(2) Any loan made under subsection (1) shall be repaid out of future annual grants or otherwise in such manner as Convocation may direct.

(3) Security may be required to be given to the satisfaction of the Committee for the due expenditure of any money grant or loan made under this section or for the repayment of any such loan.

SUSPENSION, REDUCTION, ETC., OF GRANTS

33. (1) Where an association does not comply with the regulations applicable to county law libraries, Convocation may suspend all or part of any grant otherwise payable for such time as Convocation directs or may make a reduced grant or may refuse to make any grant.

(2) Where the failure to comply consists only in the failure of an association to transmit to the Chief Librarian of the Society its annual report on or before the end of February and where this failure is rectified before the end of May in the same year, the Committee shall make a special report to Convocation and Convocation may either refuse to make the annual grant or may grant a lesser sum than the sum that would otherwise be payable.

(3) Where the failure to comply continues beyond the end of May, the grant that would otherwise have been payable to the association except for such default shall, if made, be reduced by 10 per cent.

USE

34. County law libraries are for the use of,

(a) paid-up members of any county law association;

(b) members of the Society from outside the county while in the county on legal business;

(c) Ontario Court (General Division) judges, Ontario Court (Provincial Division) judges, and justices of the peace; and

(d) the members of administrative or quasi-judicial boards or commissions or other tribunals established or provided for by any Act while exercising their functions in the county.

35. (1) If in the opinion of the Committee a county law library is not being properly cared for or for any other reason it is not being satisfactorily maintained, the Committee may, with the approval of Convocation, require the trustees of the association to return the books comprising its library to the Chief Librarian at Osgoode Hall at the expense of the association in which case the trustees shall so do.

(2) If the trustees do not return the books when required or if there are no trustees capable of acting or willing to act, Convocation may make such steps to obtain the books as they consider advisable, and any expense incurred in so doing shall be paid by the association to the Society.

APPENDIX 3

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 9
[COMMITTEES]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JUNE 23, 2000

MOVED BY

SECONDED BY

THAT, on the day on which amendments to Regulation 708 of the Revised Regulations of Ontario, 1990, revoking sections 26 to 35, come into force, By-Law 9 [Committees] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, March 26, 1999, May 28, 1999 and December 10, 1999 be further amended as follows:

1. Section 14 of the By-Law is amended by deleting subsection (3).

BY-LAW 9

Made: January 28, 1999
Amended:
February 19, 1999
March 26, 1999
May 28, 1999
December 10, 1999

COMMITTEES

GENERAL

Powers of committees

1. Unless a by-law expressly authorizes a standing committee to exercise a power, the exercise of a power by a standing committee is subject to the approval of Convocation.

STANDING COMMITTEES

Establishment of standing committees

2. The following standing committees are hereby established:

1. Admissions Committee.

2. Finance and Audit Committee.

3. Government and Public Affairs Committee.

4. Lawyers Fund for Client Compensation Committee.

5. Legal Aid Services Committee

6. Litigation Committee.

7. Professional Development and Competence Committee.

8. Professional Regulation Committee.

9. Equity and Aboriginal Issues Committee.

Composition

3. (1) Each standing committee shall consist of at least six persons appointed by Convocation.

Benchers

(2) Each standing committee must include at least five benchers.

Appointment of persons to standing committees

(3) Convocation may appoint persons to a standing committee at any time.

Treasurer's recommendations for appointment

(4) The Treasurer shall recommend to Convocation all persons for appointment to standing committees.

Treasurer

4. The Treasurer is a member of every standing committee.

Term of office

5. Subject to section 6, a person appointed to a standing committee under section 3 shall hold office until his or her successor is appointed.

Removal from office

6. Convocation may remove from a standing committee any member of the committee who fails to attend three consecutive meetings of the committee.

Chairs and vice-chairs

7. (1) For each standing committee, Convocation shall appoint,

(a) one bencher, who is a member of the standing committee, as chair of the standing committee; and

(b) one or more benchers, who are members of the standing committee, as vice-chairs of the standing committee.

Term of office

(2) Subject to subsection (3), the chair and vice-chairs of a standing committee hold office until their successors are appointed.

Appointment at pleasure

(3) The chair and vice-chairs of a standing committee hold office at the pleasure of Convocation.

Vacancy

(4) If the chair or a vice-chair of a standing committee for any reason is unable to act, the Treasurer may appoint another member of the standing committee as the chair or a vice-chair and, subject to subsection (3), that member shall hold office as chair or vice-chair until his or her successor is appointed.

Appointment under subs. (4) subject to ratification

(5) The appointment of a member of a standing committee as the chair or a vice-chair of the committee under subsection (4) is subject to ratification by Convocation at its first regular meeting following the appointment.

Quorum

8. (1) Four members of a standing committee who are benchers constitute a quorum for the purposes of the transaction of business.

Meetings by telephone conference call, etc.

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

Right to attend meeting

9. (1) Subject to subsection (2), no person other than a member of a standing committee may attend a meeting of the committee.

Same

(2) The following persons who are not members of a standing committee may attend a meeting of the committee:

1. A bencher.

2. An officer or employee of the Society.

3. Any person not mentioned in paragraph 1 or 2 with the permission of the chair of the committee.

Voting rights

10. Only members of a standing committee may vote at meetings of the committee.

ADMISSIONS COMMITTEE

Mandate

11. The mandate of the Admissions Committee is to develop, for Convocation's approval,

(a) requirements for admission to the Bar Admission Course of persons who have not been called to the bar or admitted and enrolled as solicitors elsewhere;

(b) listings of courses and universities recognized by the Society as meeting the requirements for admission to the Bar Admission Course;

(c) policies to govern the transfer to the Society of persons qualified to practise law in any province or territory of Canada; and

(d) policies respecting the Bar Admission Course.

FINANCE AND AUDIT COMMITTEE

Mandate

12. The mandate of the Finance and Audit Committee is,

(a) to receive and review interim and annual financial statements for the Society and the Lawyers' Professional Indemnity Company;

(b) to review the integrity and effectiveness of policies regarding the financial operations, systems of internal control and reporting mechanisms of the Society;

(c) to recommend the appointment of the external auditor and to review the proposed audit scope, audit fees and the annual auditor's management letter;

(d) to review the plans and projections of the annual budget of the Society, including the Lawyers Fund for Client Compensation, or any special or extraordinary budget required for the purpose of the Society, including the Lawyers Fund for Client Compensation, to provide comments and advice to Convocation thereon, and to recommend approval of the annual budget or any special or extraordinary budget item; and

(e) to review the plans for any expenditure arising during a financial year that was not included in the annual budget or other budget approved by Convocation for that year, to provide comments and advice to Convocation thereon and to recommend approval of the expenditure by Convocation.

LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE

Mandate

13. (1) The Lawyers Fund for Client Compensation Committee is responsible to Convocation for the administration of the Lawyers Fund for Client Compensation.

Powers

(2) The Lawyers Fund for Client Compensation Committee may make such arrangements and take such steps as it considers advisable to carry out its responsibilities.

PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE

Mandate

14. (1) The mandate of the Professional Development and Competence Committee is to develop for Convocation's approval policy options on all matters relating to the professional competence of members.

Guidelines for professional competence

(2) Subject to the approval of Convocation, the Professional Development and Competence Committee may prepare guidelines for professional competence.

Functions of Libraries and Reporting Committee

(3) The Professional Development and Competence Committee shall perform the functions assigned to the Libraries and Reporting Committee under Regulation 708 of the Revised Regulations of Ontario, 1990.

PROFESSIONAL REGULATION COMMITTEE

Mandate

15. (1) The mandate of the Professional Regulation Committee is to develop for Convocation's approval,

(a) policy options on all matters relating to regulation of the profession in the areas of professional conduct and fitness to practise; and

(b) policies and guidelines for the prosecution of unauthorized practice.

Rules of professional conduct

(2) Except when Convocation has established a committee other than a standing committee to prepare rules of professional conduct, subject to the approval of Convocation, the Professional Regulation Committee may prepare rules of professional conduct.

Authority of Convocation

(3) Despite subsection (2), Convocation may at any time adopt rules of professional conduct.

GOVERNMENT AND PUBLIC AFFAIRS COMMITTEE

Mandate

16. The mandate of the Government and Public Affairs Committee is,

(a) to develop and maintain an effective working relationship with the Government of Ontario, the Attorney General of Ontario, the Ontario Public Service and all elected officials of the Ontario Legislature for the purpose of ensuring that the Society's policies and positions on matters affecting the interests of the public and the profession are understood before decisions affecting those matters are made;

(b) to ensure that the Society's legislative agenda is effectively presented to the Government of Ontario for its consideration and approval;

(c) to develop and maintain an effective working relationship with the Government of Canada and the Attorney General of Canada with respect to federal initiatives affecting matters within the Society's jurisdiction;

(d) to develop, for Convocation's approval, a public affairs mandate for the Society, which identifies the constituencies that the Society should address and sets out the outcomes that should be achieved with each constituency; and

(e) to develop a long range and comprehensive public affairs strategy consistent with the Society's public affairs mandate approved by Convocation.

EQUITY AND ABORIGINAL ISSUES COMMITTEE

Mandate

16.1 The mandate of the Equity and Aboriginal Issues Committee is,

(a) to develop for Convocation's approval, policy options for the promotion of equity and diversity in the legal profession and for addressing all matters related to Aboriginal peoples and French-speaking peoples; and

(b) to consult with the Treasurer's Equity Advisory Group, Roti io' ta'-kier, AJEFO, women and equity-seeking groups in the development of such policy options.

Transition: membership on Admissions and Equity Committee

17. (1) A person who, immediately before the day this By-Law comes into force, was a member, the chair or a vice-chair of the Admissions and Equity Committee as it was constituted immediately before that day, shall be deemed to be a member, the chair or a vice-chair of the Admissions Committee as established by this By-Law.

Same: membership on Finance and Audit Committee

(2) A person who, immediately before the day this By-Law comes into force, was a member, the chair or a vice-chair of the Finance and Audit Committee as it was constituted immediately before that day, shall be deemed to be a member, the chair or a vice-chair of the Finance and Audit Committee as established by this By-Law.

Same: membership on Lawyers Fund for Client Compensation Committee

(3) A person who, immediately before the day this By-Law comes into force, was a member, the chair or a vice-chair of the Lawyers Fund for Client Compensation Committee as it was constituted immediately before that day, shall be deemed to be a member, the chair or a vice-chair of the Lawyers Fund for Client Compensation Committee as established by this By-Law.

Same: membership on Litigation Committee

(4) A person who, immediately before the day this By-Law comes into force, was a member, the chair or a vice-chair of the Litigation Committee as it was constituted immediately before that day, shall be deemed to be a member, the chair or a vice-chair of the Litigation Committee as established by this By-Law.

Same: membership on Professional Development and Competence Committee.

(5) A person who, immediately before the day this By-Law comes into force, was a member, the chair or a vice-chair of the Professional Development and Competence Committee as it was constituted immediately before that day, shall be deemed to be a member, the chair or a vice-chair of the Professional Development and Competence Committee as established by this By-Law.

Same: membership on Professional Regulation Committee

(6) A person who, immediately before the day this By-Law comes into force, was a member, the chair or a vice-chair of the Professional Regulation Committee as it was constituted immediately before that day, shall be deemed to be a member, the chair or a vice-chair of the Professional Regulation Committee as established by this By-Law.

Same: membership on Government and Public Affairs Committee

(7) A person who, immediately before the day this By-Law comes into force, was a member, the chair or a vice-chair of the Public Affairs Committee as it was constituted immediately before that day, shall be deemed to be a member, the chair or a vice-chair of the Government and Public Affairs Committee as established by this By-Law.

Membership on Legal Aid Services Committee

(8) A person who, immediately before the day paragraph 5 of section 2 comes into force, was a member, the chair or a vice-chair of the Legal Aid Committee continued under subsection 18 (1), shall be deemed to be a member, the chair or a vice-chair of the Legal Aid Services Committee established under paragraph 5 of section 2.

Legal Aid Committee continued

18. (1) The Legal Aid Committee established before the day this By-Law comes into force is continued as the Legal Aid Committee.

Function

(2) The Legal Aid Committee continued under subsection (1) is responsible to Convocation for the supervision of the Ontario Legal Aid Plan under the *Legal Aid Act*.

Membership

(3) A person who, immediately before the day this By-Law comes into force, was a member, the chair or a vice-chair of the Legal Aid Committee as it was constituted immediately before that day, shall continue as a member, the chair or a vice-chair of the Legal Aid Committee continued under subsection (1).

Application of By-Law

(4) Section 1, subsections 3 (2) and (3), section 5 and subsection 7 (2) apply, with necessary modifications, to the Legal Aid Committee continued under subsection (1) and to the members, chair and vice-chair thereof.

Quorum

(5) Four members of the Legal Aid Committee continued under subsection (1) constitute a quorum for the purposes of the transaction of business.

Legal Aid Committee dissolved

(6) The Legal Aid Committee continued under subsection (1) is dissolved on April 1, 1999.

Commencement

19. (1) Except as provided in subsection (2), this By-Law comes into force on February 1, 1999.

Same

(2) Paragraph 5 of section 2 and subsection 17 (8) come into force on April 1, 1999.

RÈGLEMENT ADMINISTRATIF N^{O} 9

LES COMITÉS

DISPOSITIONS GÉNÉRALES

Pouvoirs des comités

1. Sauf autorisation expresse par règlement administratif, l'exercice de tout pouvoir par un comité permanent est subordonné à l'approbation du Conseil.

COMITÉS PERMANENTS

Constitution des comités permanents

2. Sont constitués les comités permanents suivants :

1. le Comité d'admission
2. le Comité des finances et de la vérification
3. le Comité chargé des relations avec le gouvernement et des affaires publiques
4. le Comité du Fonds d'indemnisation avec la clientèle
5. le Comité des services d'aide juridique
6. le Comité du contentieux
7. le Comité du perfectionnement professionnel et de la compétence
8. le Comité de réglementation de la profession
9. le Comité sur l'équité et les affaires autochtones.

Composition
3. (1) Chaque comité permanent est composé d'au moins six personnes nommées par le Conseil.

Conseillers
(2) Chaque comité permanent est composé d'au moins cinq conseillers et conseillères.

Nomination aux comités permanents
(3) Le Conseil peut nommer toute personne aux comités permanents.

Recommandations du trésorier : nomination
(4) Le trésorier ou la trésorière recommande au Conseil toutes les personnes à nommer aux comités permanents.

Trésorier
4. Le trésorier ou la trésorière est membre de tous les comités permanents.

Mandat
5. Sous réserve de l'article 6, les personnes nommées aux comités permanents aux termes de l'article 3 occupent leurs fonctions jusqu'à la nomination de leurs successeurs.

Expulsion
6. Le Conseil peut expulser des comités permanents les membres qui n'assistent pas à trois réunions consécutives d'un même comité.

Présidence et vice-présidence
7. (1) À chaque comité permanent, le Conseil nomme :

a) un membre du comité permanent ayant le titre de conseiller à la présidence;

b) un ou plusieurs membres du comité permanent ayant le titre de conseiller à la vice-présidence.

Mandat
(2) Sous réserve du paragraphe (3), les personnes assumant la présidence et la vice-présidence des comités permanents occupent leurs fonctions jusqu'à la nomination de leurs successeurs.

Mandat amovible
(3) Les personnes assumant la présidence et la vice-présidence des comités permanents occupent leurs fonctions au gré du Conseil.

Vacance
(4) En cas d'empêchement de l'une quelconque des personnes assumant la présidence ou la vice-présidence d'un comité permanent, le trésorier ou la trésorière peut nommer à sa place un autre membre du comité. Sous réserve du paragraphe (3), cette personne exerce les fonctions reliées à la présidence ou à la vice-présidence jusqu'à la nomination de son successeur.

Ratification des nominations visées au par. (4)
(5) Toute nomination visée au paragraphe (4) est subordonnée à la ratification du Conseil à la première réunion ordinaire qui suit la nomination.

Quorum
8. (1) Le quorum pour les affaires courantes des comités permanents est de quatre conseillers et conseillères.

Réunion par téléconférence, etc.

(2) Les réunions des comités permanents peuvent avoir lieu avoir lieu par téléconférence ou par d'autres moyens de communication, notamment électroniques, afin que toutes les personnes y participant puissent communiquer les unes avec les autres simultanément.

Droit d'assister aux réunions

9. (1) Sous réserve du paragraphe (2), seuls les membres des comités permanents ont le droit d'assister aux réunions de leurs comités permanents respectifs.

Idem

(2) Bien que n'étant pas membres des comités permanents, les personnes suivantes peuvent assister à leurs réunions :

1. les conseillers et les conseillères;

2. la direction et le personnel du Barreau;

3. outre les personnes mentionnées aux dispositions 1 et 2, celles qui y sont autorisées par les présidents et présidentes des comités.

Droit de vote

10. Seuls les membres des comités permanents ont le droit de voter aux réunions des comités.

COMITÉ D'ADMISSION

Mandat

11. Le Comité d'admission élabore et soumet à l'approbation du Conseil :

a) les conditions d'admission au Cours de formation professionnelle applicables aux personnes qui n'ont pas été reçues au barreau ni admises comme procureurs ailleurs;

b) les listes de cours et d'universités reconnus par le Barreau et satisfaisant aux conditions d'admission au Cours de formation professionnelle;

c) les politiques régissant l'admission au Barreau, par voie de transfert, des personnes habiles à pratiquer le droit dans une province ou un territoire canadiens;

d) les politiques concernant le Cours de formation professionnelle..

COMITÉ DES FINANCES ET DE LA VÉRIFICATION

Mandat

12. Le Comité des finances et de la vérification a le mandat suivant :

a) recevoir et examiner les états financiers provisoires et annuels du Barreau et de l'Assurance de la responsabilité civile professionnelle des avocats;

b) examiner l'intégrité et l'efficacité des politiques concernant les opérations financières, les mécanismes de contrôle interne et la présentation de l'information financière du Barreau;

c) recommander la nomination d'un vérificateur ou d'une vérificatrice externe et examiner l'étendue proposée de la vérification, les honoraires demandés et la lettre du rapport annuel remise à la direction;

d) examiner les plans et projections budgétaires annuels du Barreau, ainsi que les budgets de dépenses spéciales ou extraordinaires requis pour les besoins du Barreau, en particulier ce qui concerne le Fonds d'indemnisation de la clientèle, conseiller le Conseil en la matière et recommander l'approbation du budget annuel ou de tout poste budgétaire spécial ou extraordinaire;

e) examiner les plans proposés pour les dépenses survenant au cours de l'exercice qui ne figurent pas dans le budget annuel ou tout autre budget approuvé par le Conseil pour l'exercice, conseiller le Conseil en la matière et recommander l'approbation de telles dépenses par le Conseil.

COMITÉ DU FONDS D'INDEMNISATION DE LA CLIENTÈLE

Mandat

13. (1) Le Comité du Fonds d'indemnisation de la clientèle répond au Conseil de l'administration du Fonds d'indemnisation de la clientèle.

Pouvoirs

(2) Le Comité du Fonds d'indemnisation de la clientèle peut prendre toutes mesures et dispositions qu'il juge utiles pour l'exercice de ses fonctions.

COMITÉ DU PERFECTIONNEMENT PROFESSIONNEL ET DE LA COMPÉTENCE

Mandat

14. (1) Le Comité du perfectionnement professionnel et de la compétence élabore et soumet à l'approbation du Conseil des options stratégiques sur les questions relevant de la compétence professionnelle des membres.

Lignes de conduite sur la compétence professionnelle

(2) Sous réserve de l'approbation du Conseil, le Comité du perfectionnement professionnel et de la compétence peut rédiger des lignes de conduite traitant de la compétence professionnelle.

Fonctions du Comité des bibliothèques

(3) Le Comité du perfectionnement professionnel et de la compétence s'acquitte des fonctions assignées au Comité des bibliothèques et de la publication des décisions judiciaires par le Règlement 708 des Règlements refondus de l'Ontario de 1990.

COMITÉ DE RÉGLEMENTATION DE LA PROFESSION

Mandat

15. (1) Le Comité de réglementation de la profession élabore et soumet à l'approbation du Conseil :

a) des options stratégiques sur toutes les questions relatives à la réglementation de la profession en matière de déontologie et d'aptitude professionnelle;

b) des lignes de conduite relatives à la poursuite des personnes se livrant à l'exercice illégal de la profession.

Règles de déontologie

(2) Le Comité de réglementation de la profession peut, sous réserve de l'approbation du Conseil, rédiger les règles de déontologie, sauf si le Conseil charge un comité autre qu'un comité permanent de les rédiger.

Pouvoir du Conseil

(3) Malgré le paragraphe (2), le Conseil peut adopter des règles de déontologie.

COMITÉ CHARGÉ DES RELATIONS AVEC LE GOUVERNEMENT ET DES AFFAIRES PUBLIQUES

Mandat

16. Le Comité chargé des relations avec le gouvernement et des affaires publiques a le mandat suivant :

a) établir et entretenir des relations de travail fructueuses avec le gouvernement de l'Ontario, le procureur général de l'Ontario, la fonction publique de l'Ontario et tous les membres élus de l'Assemblée législative de l'Ontario afin de faire comprendre les politiques et positions du Barreau concernant les questions d'intérêt public et professionnel avant que des décisions ne soient prises à leur égard;

b) s'assurer que les propositions législatives du Barreau soient présentées efficacement au gouvernement de l'Ontario en vue de leur examen et de leur approbation;

c) établir et entretenir des relations de travail fructueuses avec le gouvernement du Canada et le procureur général du Canada à l'égard des initiatives fédérales qui concernent des questions relevant de la compétence du Barreau;

d) formuler et faire approuver par le Conseil le mandat du Barreau dans le domaine des affaires publiques, avec définition des groupes auprès desquels le Barreau devrait intervenir et les résultats à obtenir à l'égard de chaque groupe;

e) élaborer une stratégie globale à long terme dans le domaine des affaires publiques qui soit conforme au mandat du Barreau approuvé par le Conseil en la matière.

COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES

Mandat

16.1 Le mandat du Comité sur l'équité et les affaires autochtones est :

a) d'élaborer et de soumettre à l'approbation du Conseil un choix de politiques destinées à promouvoir l'équité et la diversité dans la pratique du droit et à aborder toutes les questions touchant les peuples autochtones et les personnes d'expression française; et

b) de consulter le Groupe-conseil du trésorier sur l'équité, Roti io' ta'-kier, l'AJEFO, les groupements féminins et les groupes luttant pour l'équité lors de l'élaboration de ces politiques.

Transition : membres du Comité d'admission et d'équité

17. (1) Les personnes qui, immédiatement avant l'entrée en vigueur du présent règlement administratif, étaient membres, président ou vice-présidents du Comité d'admission et d'équité, tel que constitué immédiatement avant cette date, sont réputés être membres, président ou vice-présidents du Comité d'admission constitué en vertu du présent règlement administratif.

Idem : membres du Comité des finances et de la vérification

(2) Les personnes qui, immédiatement avant l'entrée en vigueur du présent règlement administratif, étaient membres, président ou vice-présidents du Comité des finances et de la vérification, tel que constitué immédiatement avant cette date, sont réputés être membres, président ou vice-présidents du Comité des finances et de la vérification constitué en vertu du présent règlement administratif.

Idem : membres du Comité du Fonds d'indemnisation de la clientèle

(3) Les personnes qui, immédiatement avant l'entrée en vigueur du présent règlement administratif, étaient membres, président ou vice-présidents du Comité du Fonds d'indemnisation de la clientèle, tel que constitué immédiatement avant cette date, sont réputés être membres, président ou vice-présidents du Comité du Fonds d'indemnisation de la clientèle constitué en vertu du présent règlement administratif.

Idem : membres du Comité du contentieux

(4) Les personnes qui, immédiatement avant l'entrée en vigueur du présent règlement administratif, étaient membres, président ou vice-présidents du Comité du contentieux, tel que constitué immédiatement avant cette date, sont réputés être membres, président ou vice-présidents du Comité du contentieux constitué en vertu du présent règlement administratif.

Idem : membres du Comité du perfectionnement professionnel et de la compétence

(5) Les personnes qui, immédiatement avant l'entrée en vigueur du présent règlement administratif, étaient membres, président ou vice-présidents du Comité du perfectionnement professionnel et de la compétence, tel que constitué immédiatement avant cette date, sont réputés être membres, président ou vice-présidents du Comité du perfectionnement professionnel et de la compétence constitué en vertu du présent règlement administratif.

Idem : membres du Comité de réglementation de la profession

(6) Les personnes qui, immédiatement avant l'entrée en vigueur du présent règlement administratif, étaient membres, président ou vice-présidents du Comité de réglementation de la profession, tel que constitué immédiatement avant cette date, sont réputés être membres, président ou vice-présidents du Comité de réglementation de la profession constitué en vertu du présent règlement administratif.

Idem : membres du Comité chargé des relations avec le gouvernement et des affaires publiques

(7) Les personnes qui, immédiatement avant l'entrée en vigueur du présent règlement administratif, étaient membres, président ou vice-présidents du Comité des affaires publiques, tel que constitué immédiatement avant cette date, sont réputés être membres, président ou vice-présidents du Comité chargé des relations avec le gouvernement et des affaires publiques constitué en vertu du présent règlement administratif.

Membres du Comité des services d'aide juridique

(8) Les personnes qui, immédiatement avant l'entrée en vigueur de la disposition 5 de l'article 2, étaient membres, président ou vice-présidents du Comité de l'aide juridique, maintenu aux termes du paragraphe 18 (1), sont réputés être membres, président ou vice-présidents du Comité des services d'aide juridique constitué en vertu de la disposition 5 de l'article 2.

Maintien du Comité de l'aide juridique

18. (1) Le Comité de l'aide juridique constitué avant l'entrée en vigueur du présent règlement administratif est maintenu sous le nom de Comité de l'aide juridique.

Fonctions

(2) Le Comité de l'aide juridique maintenu en vertu du paragraphe (1) répond au Conseil de la supervision du Régime d'aide juridique de l'Ontario aux termes de la *Loi sur l'aide juridique*.

Membres

(3) Les personnes qui, immédiatement avant l'entrée en vigueur du présent règlement administratif, étaient membres, président ou vice-présidents du Comité de l'aide juridique, tel que constitué immédiatement avant cette date, sont réputés être membres, président ou vice-présidents du Comité de l'aide juridique maintenu en vertu du paragraphe (1).

Champ d'application du règlement administratif

(4) L'article 1, les paragraphes 3 (2) et (3), l'article 5 et le paragraphe 7 (2) s'appliquent, avec les adaptations nécessaires, au Comité de l'aide juridique maintenu en vertu du paragraphe (1) et à ses membres, président et vice-présidents.

Quorum

(5) Le quorum pour les affaires courantes du Comité de l'aide juridique maintenu en vertu du paragraphe (1) est de quatre membres.

Dissolution du Comité de l'aide juridique

(6) Le Comité de l'aide juridique maintenu en vertu du paragraphe (1) est dissout le 1er avril 1999.

Entrée en vigueur

19. (1) Sous réserve du paragraphe (2), le présent règlement administratif entre en vigueur le 1er février 1999.

Idem

(2) La disposition 5 de l'article 2 et le paragraphe 17 (8) entrent en vigueur le 1er avril 1999.

APPENDIX 4

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 28
[REQUALIFICATION]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON APRIL 28, 2000

MOVED BY

SECONDED BY

THAT By-Law 28 [Requalification] made by Convocation on October 29, 1999 and amended by Convocation on December 10, 1999 be further amended by adding the following French version:

RÈGLEMENT ADMINISTRATIF N^{O} 28

REQUALIFICATION PROFESSIONNELLE

Définitions

1. Dans le présent règlement administratif, le terme «gouvernement» s'entend du gouvernement du Canada, des gouvernements provinciaux et territoriaux canadiens, et du gouvernement de toute ville, cité, municipalité ou village, ou de toute autre entité similaire de toute province ou de tout territoire du Canada.

Délégation des pouvoirs et fonctions de secrétaire

2. Une ou un employé du Barreau qui occupe le poste d'avocat-conseil ou d'avocate-conseil du Comité chargé de la compétence professionnelle peut, sous réserve des modalités édictées par le ou la secrétaire, exercer ses pouvoirs et fonctions conformément à l'article 49.1 de la *Loi sur le Barreau* et au présent règlement administratif.

Durée de la période continue

3. La durée de la période continue visée à l'article 49.1 (1)de la Loi est de cinq années.

Exigence de rapport relatif à l'usage des habiletés juridiques

4. (1) À chaque année, les membres déposent auprès du Barreau un rapport indiquant qu'ils ont fait un usage considérable et régulier de leurs habiletés juridiques durant l'année en question et détaillant la façon dont ils ont fait usage de ces habiletés.

Rapport annuel des membres

(2) Le rapport exigé au paragraphe (1) est rédigé selon le Formulaire 17A [Rapport annuel des membres].

Usage considérable et régulier des habiletés juridiques

5. (1) Sont considérés faire un usage considérable et régulier de leurs habiletés juridiques au cours d'une année donnée les membres qui s'adonnent, pour un total d'au moins 600 heures ou quatre mois complets d'exercice par année, à l'une ou plusieurs des activités suivantes :

1. L'exercise de la profession d'avocat à titre privé.

2. Être à l'emploi d'une entité, notamment d'un service de consultation juridique, d'un gouvernement ou d'un organisme gouvernemental, à titre d'avocat ou d'avocate.

3. Travailler pour le compte d'un cabinet offrant des services à caractère juridique dans une des fonctions énumérées à l'Annexe 1.

4. Être à l'emploi d'un gouvernement ou d'un organisme gouvernemental dans une des fonctions énumérées à l'Annexe 2.

5. Occuper un poste de député ou de députée siégeant au parlement du Canada ou à l'une des assemblées législatives des provinces ou territoires du Canada.

6. Occuper un des postes à caractère éducatif énumérés à l'Annexe 3.

7. Suivre des études juridiques supérieures.

8. Sous réserve du paragraphe (2), être à l'emploi d'une des entités énumérées à l'Annexe 4 et occuper une des fonctions visées à l'Annexe 4.

9. Sous réserve du paragraphe (2), exercer toute autre activité qui, de l'avis du ou de la secrétaire, exige du membre un usage considérable et régulier de ses habiletés juridiques.

Stagiaires, secrétaires et techniciens juridiques

(2) Ne sont pas considérés faire un usage considérable et régulier de leurs habiletés juridiques les membres qui occupent un poste de secrétaire juridique, de technicien ou de technicienne juridique, ou de stagiaire en droit.

Examen d'autres facteurs

(3) Dans le contexte de l'alinéa 9 du paragraphe (1), afin d'établir si un membre fait un usage considérable et régulier de ses habiletés juridiques, le ou la secrétaire tient compte des facteurs suivants :

1. la similitude entre l'activité en question et les activités énumérées aux alinéas 1 à 8 du paragraphe (1);

2. la mesure dans laquelle cette activité exige habituellement du membre qu'il

i. s'adonne à la recherche et à l'analyse juridiques, et à la résolution de problèmes à caractère juridique,

ii. communique verbalement ou par écrit,

iii. assure l'organisation et la gestion du travail juridique,

iv. reconnaisse et résoude des dilemmes d'ordre éthique, et

v. se tienne à jour dans le (les) domaine(s) du droit relié(s) à l'activité en question;

3. la mesure dans laquelle cette activité exige du membre de posséder et de mettre en application les habiletés, attributs et valeurs que l'on trouve dans la définition du juriste compétent contenue dans le Code de déontologie du Barreau;

4. tout autre facteur permettant d'établir si l'activité en question fait appel de manière considérable et régulière aux habiletés juridiques de ce membre.

Période

(4) Au cours d'une année civile, nonobstant le paragraphe (1), sont considérés faire un usage considérable et régulier de leurs habiletés juridiques les membres qui, sur une période moindre que celle mentionnée au paragraphe (1) mais qui est suffisante de l'avis du ou de la secrétaire, exercent une ou plusieurs des activités mentionnées au paragraphe (1).

Examen des rapports par le secrétaire

6. (1) Conformément à l'article 4, le ou la secrétaire examine tout rapport déposé auprès du Barreau.

Avis au membre

(2) Si le ou la secrétaire doit étudier le rapport d'un membre déposé aux termes de l'article 4 afin d'établir si une activité exercée par un membre constitue un usage considérable et régulier de ses habiletés juridiques au sens de l'alinéa 9 du paragraphe 5 (1), ou d'établir si le membre a exercé une ou plusieurs des activités énumérées au paragraphe 5 (1) sur une période suffisante à la lumière des critères du paragraphe 5 (4), et si le ou la secrétaire est d'avis que le membre n'a pas fait un usage considérable et régulier de ses habiletés juridiques au cours de l'année en question conformément aux paragraphes 5 (1) ou (4), le ou la secrétaire avise alors le membre par écrit.

Transmission de l'avis

(3) Sont considérés comme étant suffisants les avis

(a) remis au membre en mains propres,

(b) transmis par courrier régulier à la dernière adresse connue du membre (apparaissant aux registres du Barreau),

(c) transmis par télécopieur au dernier des numéros de télécopieur connus du membre (apparaissant aux registres du Barreau).

Idem

(4) Sont réputés avoir été reçus par le membre les avis expédiés selon le paragraphe (?)

(a) le cinquième jour après avoir été mis à la poste, si transmis par courrier régulier,

(b) le jour suivant sa transmission, si transmis par télécopieur.

Requête à un comité de trois conseillers

(5) Sous réserve du paragraphe (12), si un membre reçoit un avis conformément au paragraphe (2), il peut déposer une requête d'examen auprès d'un comité, formé de trois conseillères ou conseillers nommés à cet effet par le Conseil, visant à établir si le membre a fait un usage considérable et régulier de ses habiletés juridiques au cours d'une année donnée.

Délai de la requête

(6) Sous réserve du paragraphe (13), une requête déposée aux termes du paragraphe (5) est introduite par la présentation par le membre d'un avis écrit au secrétaire ou à la secrétaire dans un délai de trente jours suivant la date de la réception par le membre de l'avis indiqué au paragraphe (2).

Parties

(7) Sont parties à la requête le ou la secrétaire et le membre visé par la requête introduite aux termes du paragraphe (5).

Procédure

(8) Avec les adaptations nécessaires, les règles de pratique et de procédure s'appliquent à l'examen de la requête déposée auprès du comité de trois conseillers et conseillères comme si l'examen constituait l'audition d'une requête effectuée conformément au paragraphe 49.1 (4) de la Loi.

Idem

(9) Advenant le silence des règles de pratique et de procédure quant à une question de procédure, la *Loi sur l'exercice des compétences légales* s'applique à l'examen par un comité formé de trois conseillers ou conseillères d'une requête déposée conformément au paragraphe (5).

Décision

(10) Après l'examen d'une requête déposée conformément au paragraphe (5), le comité formé de trois conseillers ou conseillères,

(a) conclut que le membre a fait un usage considérable et régulier de ses habiletés juridiques au cours de l'année; ou

(b) conclut que le membre n'a pas fait un usage considérable et régulier de ses habiletés juridiques au cours de l'année.

Décision définitive

(11) Toute décision rendue par le comité formé de trois conseillers ou conseillères relativement à une requête d'examen déposée conformément au paragraphe (5) est définitive.

Suspension, en raison d'une ordonnance, du droit de déposer une requête

12. Si une ordonnance rendue aux termes de l'alinéa 47 (1) (a) de la Loi est en vigueur au moment où le membre reçoit l'avis mentionné au paragraphe (2), le droit du membre selon le paragraphe (5) de déposer une requête auprès d'un comité formé de trois conseillers ou conseillères aux fins d'établir s'il a fait un usage considérable et régulier de ses habiletés juridiques au cours de l'année est suspendu jusqu'à ce que l'ordonnance cesse de s'appliquer.

Période d'introduction d'une requête en cas de suspension du droit de dépôt de requête

(13) Conformément au paragraphe (12), en cas de suspension du droit de déposer une requête en vertu du paragraphe (5), le membre doit présenter par écrit, auprès du ou de la secrétaire, toute requête d'examen en vertu du paragraphe (5) dans un délai de 30 jours à compter de la date où le membre se voit restaurer ses droits et privilèges.

Application de l'article 6

(14) Cet article s'applique au rapport d'un membre visé à l'article 4 à l'égard de l'année civile 1999 et de toute année subséquente.

Évaluation de l'usage d'habiletés juridiques de 1995 à 1998

7. (1) Le ou la secrétaire examine, relativement aux années civiles 1995, 1996, 1997 et 1998, tout renseignement relatif à l'usage d'habiletés juridiques fourni par les membres quant à chacune de ces années.

Application de l'article 5

(2) Avec les adaptations nécessaires, l'article 5 s'applique à l'examen par le ou la secrétaire de tout renseignement fourni conformément au paragraphe (1).

Avis au membre relativement à l'usage insuffisant des habiletés juridiques en 1995, 1996, 1997 et 1998

(3) À l'égard des renseignements fournis par un membre relativement aux années civiles 1995, 1996, 1997 et 1998, si le ou la secrétaire doit établir, aux fins de l'alinéa 9 du paragraphe 5 (1), si une activité exercée par un membre constitue un usage considérable et régulier de ses habiletés juridiques ou si aux fins du paragraphe 5 (4) un membre a exercé l'une ou plusieurs des activités visées au paragraphe 5 (1), et si le ou la secrétaire est d'avis qu'au cours des années 1995, 1996, 1997 et 1998 le membre n'a pas fait un usage considérable et régulier de ses habiletés juridiques aux termes des paragraphes 5 (1) ou (4), sous réserve des paragraphes (5), (5.1) et (6), le ou la secrétaire avise le membre par écrit avant le 1er janvier 2000.

Avis au membre : usage insuffisant de ses habiletés juridiques au cours des autres années

(4) À l'égard des renseignements fournis par un membre relativement aux années 1995, 1996, 1997 et 1998, si le ou la secrétaire doit établir, aux fins de l'alinéa 9 du paragraphe 5 (1), si une activité exercée par un membre constitue un usage considérable et régulier de ses habiletés juridiques ou si aux fins du paragraphe 5 (4) le membre a exercé sur une période suffisante l'une ou plusieurs des activités visées au paragraphe 5 (1), et si le ou la secrétaire est d'avis que le membre n'a pas fait un usage considérable et régulier de ses habiletés juridiques conformément aux paragraphes 5 (1) ou (4) uniquement au cours des années 1996, 1997 et 1998, uniquement au cours des années 1997 et 1998, ou uniquement au cours de l'année 1998, sous réserve des paragraphes (5), (5.1) et (6), le ou la secrétaire avise le membre par écrit avant le 31 janvier 2000.

Avis reporté

(5) Si en date du 22 décembre 1999 un membre n'a pas fourni au Barreau les renseignements relatifs à l'usage de ses habiletés juridiques au cours des années civiles 1995, 1996, 1997 ou 1998, le ou la secrétaire n'est pas tenu de donner un avis au membre conformément au paragraphe (3) ou (4) dans le délai prescrit mais, sous réserve du paragraphe (6), donne un avis au membre conformément au paragraphe (3) ou (4) dans un délai raisonnable, au plus tard 60 jours après la date où le membre fournit les renseignements en question.

Avis non requis

(6) Si le membre a fait un usage considérable et régulier de ses habiletés juridiques au cours de l'année civile 1999, la ou le secrétaire n'est pas tenu de remettre un avis au membre conformément au paragraphe (3) ou (4).

Application des paragraphes 6 (3) et (4)

(7) Avec les adaptations nécessaires, les paragraphes 6 (3) et (4) s'appliquent aux avis visés aux paragraphes (3) et (4).

Requête au comité de trois conseillers

(8) Tout membre qui reçoit un avis aux termes du paragraphe (3) ou (4) peut déposer une requête d'examen auprès d'un comité formé de trois conseillères ou conseillers nommés par le Conseil afin d'établir si le membre a fait un usage considérable et régulier de ses habiletés juridiques durant au moins une ou plusieurs années relativement aux années pour lesquelles le membre a reçu un avis visé au paragraphe (3) ou (4).

Délai du dépôt de la requête

(9) Le membre introduit par écrit, auprès du ou de la secrétaire, toute requête visée au paragraphe (8),

(a) si le membre reçoit un avis visé au paragraphe (3) ou (4) dans le délai prescrit à cet égard,

(i) trente jours à compter de la date où le membre a reçu un avis selon le paragraphe (3) ou (4);

(ii) trente jours à compter de la date où le membre a reçu un avis selon le paragraphe 6 (2) précisant que le membre n'a pas fait un usage considérable et régulier de ses habiletés juridiques au cours de l'année 1999.

(b) si le membre reçoit un avis selon le paragraphe (3) ou (4) dans les délais prescrits au paragraphe (5), dans un délai de trente jours à compter de la date où le membre a reçu l'avis.

Idem

(10) Si un membre désire déposer une requête en vertu du paragraphe (8) et si l'alinéa (9) (a) s'applique en l'espèce au membre, ce dernier avise par écrit le ou la secrétaire s'il désire se prévaloir des sous-paragraphes (i) ou (ii) dans un délai de trente jours à compter de la date à laquelle le membre reçoit un avis conformément au paragraphe (3) ou (4).

Application de certains paragraphes

(11) Avec les adaptations nécessaires, les paragraphes 6 (7), (8), (9), (10) et (11) s'appliquent aux requêtes déposées en vertu du paragraphe (8).

Requalification professionnelle

8. (1) Les critères de requalification professionnelle prévus à l'article 49.1 de la Loi sont :

(a) être à l'emploi d'une compagnie, du gouvernement ou d'un organisme gouvernemental en qualité d'avocat et procureur pour une période continue d'un an;

(b) (i) avoir complété un cours d'enseignement individuel offert par le Barreau et qui porte sur l'ensemble des domaines suivants :

(A) les questions réglementaires s'inscrivant dans l'exercice du droit,

(B) l'administration d'un cabinet juridique, y compris la gestion des dossiers,

(C) la comptabilité.

(ii) avoir réussi un examen de comptabilité ainsi qu'un ou plusieurs examens dans les domaines mentionnés aux sous-subdivisions (A) et (B) du sous-paragraphe (i),

(iii) avoir complété 10 heures de formation juridique continue, y compris au moins 5 heures de cours ou de cours retransmis sur vidéo, dans le(s) domaine(s) des règles juridiques de fond auxquelles le membre envisage de consacrer au moins 25 pour cent de sa pratique,

(iv) avoir complété la lecture du matériel préparé par le Barreau concernant deux domaines des règles juridiques de fond,

(v) lorsque le membre appartient à une catégorie énumérée au sous-paragraphe (2),

(A) suivre un atelier mis sur pied par le Barreau concernant l'ouverture d'un cabinet juridique, ou terminer la lecture du matériel préparé par le Barreau portant sur l'ouverture d'un cabinet juridique et réussir un examen portant sur ces lectures,

(B) avoir complété 10 heures de formation juridique continue, y compris au moins 5 heures de cours ou de cours retransmis sur vidéo dans le domaine de l'administration d'un cabinet juridique, y compris la gestion des dossiers.

Catégories de membres

(2) Aux fins du sous-paragraphe 8 (1) (b) (v), les membres se répartissent selon les catégories suivantes :

1. Un membre qui, immédiatement avant la période continue où il ou elle n'a pas fait un usage considérable et régulier de ses habiletés juridiques, a exercé le droit dans le cadre d'un cabinet privé pendant trois ans ou moins.

2. Un membre qui, immédiatement avant la période continue où il ou elle n'a pas fait un usage considérable et régulier de ses habiletés juridiques, a exercé le droit dans le cadre d'un cabinet privé durant plus de trois ans, mais moins de dix ans et qui, pendant les trois-quarts de ces années ou plus, exerçait le droit dans le cadre d'un cabinet privé à titre d'employé.

3. Un membre qui n'a pas fait un usage considérable et régulier de ses habiletés juridiques pour une période continue de dix ans ou plus.

4. Un membre qui, immédiatement avant la période continue pendant laquelle il ou elle n'a pas fait un usage considérable et régulier de ses habiletés juridiques, a été soumis à une révision par le Barreau conformément au Programme d'inspection professionnelle ou en vertu de l'article 42 de la Loi.

Période de requalification professionnelle

(3) Le membre doit satisfaire aux critères de requalification professionnelle définis au paragraphe (1) au cours de l'année précédant immédiatement le retour du membre à l'exercice privé du droit.

Interprétation

(4) Aux fins du paragraphe (1), on entend par «réussir»,

(a) dans le cas d'un examen de comptabilité, répondre correctement à 50 pour cent des questions de l'examen; et

(b) dans tous les autres cas, de l'avis du ou de la secrétaire, faire une démonstration suffisante des connaissances de la matière de l'examen.

Requête d'attestation relative aux exigences de requalification

9. (1) Un membre dépose par écrit auprès du ou de la secrétaire une requête d'attestation qu'il répond aux exigences de requalification professionnelle et, pour étayer la requête, dépose auprès du Barreau,

(a) dans le cas d'une requête d'attestation visée à l'alinéa 8 (1) (a), une preuve écrite démontrant que le membre a été à l'emploi d'une compagnie, d'un gouvernement ou d'un organisme gouvernemental à titre de procureur ou de procureure ou d'avocat ou d'avocate sur une période continue d'une année, tel qu'exigé à l'alinéa 8 (1) (a); et

(b) dans le cas d'une requête d'attestation visée à l'alinéa 8 (1) (b),

(i) une preuve écrite que le membre a suivi un cours de formation juridique continue de 10 heures, tel qu'exigé en vertu du sous-paragraphe 8 (1) (b) (iii),

(ii) un certificat prouvant que le membre a complété la lecture des documents exigés en vertu du sous-paragraphe 8 (1) (b) (iv),

(iii) une preuve écrite de la participation à un atelier sur l'ouverture d'un cabinet juridique, si le membre est tenu de répondre à cette exigence de requalification telle qu'établie à la sous-subdivision (A) du sous-paragraphe 8 (1) (b) (v) et choisit d'y participer, et

(iv) une preuve écrite que le membre a suivi un cours de formation juridique continue de 10 heures tel qu'exigé en vertu de la sous-subdivision (B) du sous-paragraphe 8 (1) (b) (v), si le membre est tenu de répondre à cette exigence de requalification telle qu'établie à la sous-subdivision (B) du sous-paragraphe 8 (1) (b) (v).

Exigences de requalification de l'alinéa 8 (1) (a)

(2) Sur réception par le ou la secrétaire d'une requête d'attestation soumise en vertu du paragraphe (1) que le membre répond aux exigences de requalification professionnelle telles qu'établies à l'alinéa 8 (1) (a), la ou le secrétaire atteste seul que le membre a été à l'emploi d'une corporation, d'un gouvernement ou d'un organisme gouvernemental à titre d'avocat ou d'avocate sur une période continue d'une année, tel qu'exigé en vertu de l'alinéa 8 (1) (a).

Exigences de requalification de l'alinéa 8 (1) (b)

(3) Sur réception par le ou la secrétaire d'une requête d'attestation soumise en vertu du paragraphe (1) que le membre répond aux exigences de requalification professionnelle telles qu'établies à l'alinéa 8 (1) (b), le ou la secrétaire étudie les copies des examens complétés par le membre aux termes du sous-paragraphe 8 (1) (b) (ii) et, le cas échéant, l'examen complété par le membre conformément à la sous-subdivision (A) du sous-paragraphe 8 (1) (b) (v) et peut attester seul que le membre a répondu aux exigences de formation juridique continue du sous-paragraphe 8 (1) (b) (iii) et le cas échéant, la réussite par le membre du cours de formation juridique continue visé à la sous-subdivision (B) du sous-paragraphe 8 (1) (b) (v).

Évaluation des exigences de requalification professionnelle

(4) Sur réception par le ou la secrétaire d'une requête d'attestation soumise en vertu du paragraphe (1) que le membre répond aux exigences de requalification professionnelle telles qu'établies à l'alinéa 8 (1) (a), après avoir satisfait aux exigences du paragraphe (2), le ou la secrétaire

(a) si elle ou il est d'avis que le membre a répondu aux exigences de requalification de l'alinéa 8 (1) (a) et qu'il s'est conformé aux délais relatifs aux exigences de requalification professionnelle du paragraphe 8 (3), atteste que le membre répond aux exigences de requalification; ou

(b) si elle ou il est d'avis que le membre n'a pas répondu aux exigences de requalification de l'alinéa 8 (1) (a) et qu'il ne s'est pas conformé aux délais relatifs aux exigences de requalification professionnelle du paragraphe 8 (3), refuse d'attester que le membre répond aux exigences de requalification.

Idem

(5) Sur réception par le ou la secrétaire d'une requête d'attestation soumise en vertu du paragraphe (1) que le membre répond aux exigences de requalification professionnelle de l'alinéa 8 (1) (b), après avoir satisfait aux exigences du paragraphe (3), le ou la secrétaire

(a) si elle ou il est d'avis que le membre a répondu aux exigences de requalification de l'alinéa 8 (1) (b) et qu'il s'est conformé aux délais relatifs aux exigences de requalification professionnelle du paragraphe 8 (3), atteste que le membre répond aux exigences de requalification; ou

(b) si elle ou il est avis que le membre n'a répondu aux exigences de requalification de l'alinéa 8 (1) (b) et qu'il ne s'est pas conformé aux délais relatifs aux exigences de requalification professionnelle du paragraphe 8 (3), refuse d'attester que le membre répond aux exigences de requalification.

Idem

(6) Nonobstant les paragraphes (4) (b) et (5) (b), le ou la secrétaire peut attester que le membre répond aux exigences de requalification professionnelle si il ou elle est d'avis que le membre répond aux exigences de requalification de l'alinéa 8 (1) (a) ou aux exigences de requalification de l'alinéa 8 (1) (b) sans que le membre ne se soit conformé aux délais prescrits au paragraphe 8 (3) relativement aux exigences de requalification.

Attestation par le Comité d'audition que le membre répond aux exigences

10. Lorsqu'une requête a été déposée auprès du Comité d'appel conformément au paragraphe 49.1 (4) de la Loi afin d'établir si le membre répond aux exigences de requalification professionnelle, le Comité, dans son processus décisionnel, examine les facteurs suivants :

1. Si le membre dépose une requête afin d'établir s'il répond aux exigences de requalification professionnelle de l'alinéa 8 (1) (a), l'ampleur et le type de travail effectué par le membre auprès d'une compagnie, d'un gouvernement ou d'un organisme gouvernemental et s'il répond à l'exigence de l'alinéa 8 (1) (a).

2. Si le membre dépose une requête afin d'établir s'il répond aux exigences de requalification professionnelle de l'alinéa 8 (1) (b),

   i. les connaissances du membre de chacun des domaines énumérés aux sous-subdivisions (A), (B) et (C) du sous-alinéa 8 (1) (b) (i), et

   ii. l'ampleur et le type de formation juridique continue que le membre a suivie et les exigences de requalification du sous-alinéa 8 (1) (b) (iii) et de la sous-subdivision (B) du sous-alinéa 8 (1) (b) (v), le cas échéant.

Dispositions

11. Les conditions suivantes peuvent être imposées par le ou la secrétaire conformément au paragraphe 49.1 (3) de la Loi ainsi que par le Comité d'audition en vertu de l'alinéa 49.1 (6) (a) de la Loi :

1. Une condition qui exige que le membre participe à des programmes précis de formation juridique ou professionnelle, dans une période précise, mais sans toutefois dépasser une période d'une année à compter de la date à laquelle la décision rendue aux termes du paragraphe 49.1 (1) cesse de s'appliquer.

2. Une condition qui exige que le membre restreigne ses activités à certains domaines de droit, sur une période précise, mais sans toutefois dépasser une période d'une année à compter de la date à laquelle la décision rendue aux termes du paragraphe 49.1 (1) cesse de s'appliquer.

3. Une condition qui exige, sur une période précise mais sans toutefois dépasser une période d'une année à compter de la date à laquelle la décision rendue aux termes du paragraphe 49.1 (1) cesse de s'appliquer, que le membre n'exerce sa profession qu'à titre

i. d'employé ou d'employée d'un membre ou de toute autre personne approuvée par le ou la secrétaire,

ii. de partenaire avec un membre approuvé par le ou la secrétaire, et sous sa supervision, ou

iii. de professionnel sous la surveillance d'un membre approuvé par le ou la secrétaire.

ANNEXE I

TRAVAIL POUR LE COMPTE D'UNE CLINIQUE OFFRANT DES SERVICES À CARACTÈRE JURIDIQUE

[ALINÉA 3 DU PARAGRAPHE 5 (1)]

1. L'alinéa 3 du paragraphe 5 (1) comprend l'occupation de l'un des postes suivants :

1. Directeur, directrice.

ANNEXE II

TRAVAIL POUR LE COMPTE D'UN GOUVERNEMENT OU D'UN ORGANISME GOUVERNEMENTAL

[ALINÉA 4 DU PARAGRAPHE 5 (1)]

1. L'alinéa 4 du paragraphe 5 (1) comprend l'occupation de l'un des postes suivants :

1. Juge de paix.

2. Membre d'un tribunal judiciaire ou quasi-judiciaire.

3. Adjoint ou adjointe judiciaire d'un ou d'une juge.

4. Analyste de politiques ou conseiller ou conseillère.

5. Rédacteur ou rédactrice de textes législatifs.

6. Juge d'une cour fédérale, provinciale ou d'une cour territoriale.

ANNEXE III

OCCUPATION D'UN POSTE D'ENSEIGNEMENT

[ALINÉA 6 DU PARAGRAPHE 5 (1)]

1. L'alinéa 6 du paragraphe 5 (1) comprend l'occupation de l'un des postes suivants :

1. Doyen ou doyenne d'une faculté de droit de l'Ontario reconnue par le Conseil.

2. Membre du corps professoral d'une faculté de droit de l'Ontario reconnue par le Conseil.

3. Chargé de cours enseignant

   i. dans une faculté de droit en Ontario reconnue par le Conseil, ou

   ii. au Barreau du Haut-Canada.

4. Rédactrice ou rédacteur juridique.

5. Réviseure ou réviseur juridique.

6. Bibliothécaire de droit.

7. Recherchiste juridique.

ANNEXE IV

OCCUPATION D'UN POSTE SPÉCIFIQUE POUR LE COMPTE D'UNE ENTITÉ

[ALINÉA 8 DU PARAGRAPHE 5 (1)]

1. L'occupation d'un poste autre qu'avocat ou avocate pour l'un des organismes suivants est visé par l'alinéa 8 du paragraphe 5 (1) :

   1. Régime d'aide juridique de l'Ontario / Aide juridique Ontario

   2. Assurance de la responsabilité civile professionnelle des avocats.

   3. Le Barreau du Haut-Canada.

   4. Société d'aide à l'enfance.

APPENDIX 5

========

Proposed Publication Guidelines (Continuing Legal Education)

Purpose and Scope

The purpose of these guidelines is to identify the general approach the Law Society's department of education should take in developing works for publication as part of its post-call education program.

The guidelines are not exhaustive, but provide the broad framework that will be followed in considering projects, recognizing that each potential project may require additional considerations.

Applicability

These guidelines apply to the publication of works by the department of education's CLE unit ("LSUC-CLE"), other than papers produced in the traditional binder format as an accompaniment to a CLE program.

A "work" that would be subject to these guidelines may include:

a. a collection of CLE papers printed in a more permanent form than the traditional binder;

b. a monograph or collection of papers, or a precedent or collection of precedents, developed as a "free-standing" publication independent of CLE programs;

c. electronic versions of such works and video or audiotapes produced independently of CLE programs.

Publications Development

As part of its mandate, LSUC-CLE will continue to choose and develop works for publication, considering only those proposed works that, *prima facie*, are likely to be of practical assistance to lawyers in their efforts to maintain or enhance their knowledge, skills and overall competence. Every work the department of education proposes to publish will be described in a written project description, which will identify the work's:

a. title;
b. author(s) (with a description of his/her/their qualifications for writing the work);
c. contents;
d. proposed length;
e. anticipated publication date;
f. price;
g. print run;
h. likely market (nature and scope; along with any:
    i. electronic or other supplementation;
    ii. proposed co-venturer/co-sponsor/co-publisher;
    iii. "tie-in" proposed with CLE programming, Bar Admissions, etc.;
    iv. existing works that may reasonably be regarded as overlapping or competitive and the basis for distinguishing them in light of one or more of the following criteria: scope, subject and contents, thesis or emphasis, format, timeliness;
i. any contribution the work may make to achieving LSUC's equity goals;
j. an itemized preliminary publication costing from our book manufacturer; and
k. any funding in aid of publication obtained or applied for (e.g. from the Law Foundation).

Peer Review

LSUC-CLE will maintain a list of practitioners, academics and judges who might serve as volunteer readers of proposals and manuscripts. The head of CLE will normally solicit comments and suggestions from a reader or readers drawn from this list, but may dispense with this in appropriate circumstances.

Comments received from the reader(s) will be forwarded to the author(s). A refusal by the author(s) to make changes to the manuscript in accordance with the reader's/s' advice may constitute grounds for LSUC-CLE's refusing to publish the work.

In the case of collective works along the lines of the Special Lectures volumes, the program chair may function as the external reader of the contributors' papers.

Solicitation of Proposals

LSUC-CLE will periodically advertise its criteria for publication and invite proposals from potential authors.

Disclaimer
Every work will contain the following note on the copyright page or one of the other prefatory pages:

> *This work appears as part of the Law Society of Upper Canada's efforts in continuing legal education (CLE). It aims to provide information and opinion which will assist lawyers in maintaining and enhancing their competence. It does not, however, represent or embody any official position of, or statement by, the Society, except where this may be specifically indicated; nor does it attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.*

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

Copy of a letter from Mr. Laurence A. Pattillo of Torys to Mr. Scott Kerr dated May 12, 2000 re: LINK. (Appendix 6)

Ms. Elliott presented Phase III of the Report of the Libraries Working Group on the administrative structure for approval by Convocation.

BEYOND 2000

A Fresh Start for
Ontario County Courthouse Libraries

Third Report of the Working Group on
Long-Term Delivery of County and District Library Services –
Administrative Working Group
May, 2000

A Fresh Start for a New System

Table of Contents

IV. Governance Structure
- Type of Entity
- Incorporation
- Ownership
- Governance as a System
- Accountability
- Governing Framework
- Roles of LibraryCo & Convocation
- Responsibilities of LibraryCo & Convocation
- Reporting to Convocation
- Transparency
- Performance
- Provision for Non-Performance & Adjustment by Convocation
- Location of LibraryCo.
- Size of Board
- Method of and Criteria for Appointment
- Role and Composition of Nominating Committee
- Term of Appointment
- Qualities and Competencies of Directors
- Role and Reporting of Managing Officer
- Qualifications of Managing Officer
- Board Meetings
- Board Committees

V. Summary of Governance Options Considered

VI. Conclusion

VII. Appendices

Chapter 1: Background & Introduction

BACKGROUND

1. On January 23, 1998 Convocation adopted recommendations from the Professional Development and Competence Committee calling for the formation of a Working Group on the future delivery of County Law Library services (the Working Group) giving it a three-fold mandate:

   - to establish policy objectives for the libraries
   - to consider broad alternative approaches to delivery of library services in light of stated policy objectives; and
   - to consider the costs of viable alternatives.

2. Convocation has considered two reports from the Working Group: Phase 1 on October 23, 1998 and Phase II on May 28, 1999.The Executive Summaries from these reports are attached as Appendix 4 and Appendix 5.

3. A list of the motions put at Convocation on May 28, 1999 in connection with the Phase II report is attached as Appendix 1. The overall result of the motions was that:

i. the Blended System outlined in Phase I and II was accepted and refined;
ii. Universal Funding and Universal Access was adopted;
iii. Central Management rather than simple coordination was approved for the library system;
iv. A committee was to be established to recommend the vehicle for central management;
v. A business plan was to be created in conjunction with Law Society staff to address concerns raised by the Chief Executive Officer, John Saso;
vi. Funding was allocated to the two committees, loosely referred to as the Administrative Structure group and the Business Plan group
vii. The need for a Transitional Board to implement certain aspects of the Phase II report became superfluous.

4. As a result of the overall discussion in Convocation certain questions and issues were raised and were subsequently referred to legal counsel for an opinion by the Administrative Structure group, namely:

- What administrative structure is most appropriate for the county library system?
- Whether the creation of a new entity to supervise county libraries is a permissible delegation under *The Law Society Act.*
- Whether there are any unintended consequences relating to occupancy, income tax, liability or any other issues in the model that is recommended.
- How to amend Regulation 708 to support the new model.

5. This report is the report of the Administrative Structure Working Group established pursuant to the May 28, 1999 motions: *Beyond 2000 – A Fresh Start for Ontario County Courthouse Libraries.*

6. The Law Society CEO, John Saso, has advised the Working Group that the business plan issues with which he was concerned and upon which Convocation instructed the Working Group to consult with him, were not related to financial matters or financial viability so much as to governance . He raised the following questions as examples of the kinds of business plan questions to be addressed:

- Who has power to set the fee?
- Can the fee be capped at a certain level of funding?
- Who sets the limit?
- Can libraries operate at a deficit?
- What happens if they do operate at a deficit?
- What are the standards?
- How will they be monitored and reported back to the LSUC?
- Will there be an annual report?
- Will there be audited financial statements?
- Who has dominant control of the Board?
- Who appoints to the Board?
- What is the process for appointing and removing directors?
- What are the limitations of liability?

7. The Administrative Structure group addresses all these questions in this report (not a separate business plan report) as they are all related to either the governance issues arising from an administrative structure or, have been addressed by the legal opinion obtained as part of that analysis.

INTRODUCTION

8. Moving ahead with the "blended system" that was adopted by Convocation in October, 1998 requires an administrative structure, with a clear decision-making framework. Accordingly, Phase II of Beyond 2000 recommended that a corporate board, independent from the Law Society, (and provisionally known as "LibraryCo") be created to administer and manage the county library system. The board would replace the existing administrative structure comprising a loose partnership of the Law Society and its various committees, the 48 individual county law library associations, and CDLPA and its various committees. Under the current structure any and each of the above-mentioned disparate groups has direct, uncoordinated, and unclear input into the operation of the local library, making accountability for the system both ad hoc as well as diffuse. As a result there is actually no one "in charge" of the county law libraries and there is no defined role for any of these groups, so that everyone *feels* in charge and at the same time each recognizes that no one is running the system overall.

9. A corporate board was determined to be the preferred vehicle for centralized management of the library system for the reason that in addition to providing a fresh start for a new system and connoting a business-like approach to its administration, it has the advantage of:

- providing well-understood institutions for governance with clear accountability for directors and a better focus for interested constituencies;
- being an effective vehicle for organizing ownership and management;
- creating a distinct entity for governance with a clear legal status and the ability to hold assets and employ staff; and
- providing independence from existing, historical relationships as well as funding bodies.

10. The Administrative Structure Group also considered the risks associated with a formal corporate structure. Ultimately it determined that these were not serious enough to warrant abandoning its recommendation given the considerable benefits as noted above. The principal disadvantages of a corporate entity are summarized below, namely:

- *Advocacy and conflict.* There is a risk that Convocation as the virtual sole-source funder of LibraryCo will be under pressure to increase its contribution to the county library system and that LibraryCo may engage in advocacy to encourage the Law Society to loosen its purse strings. In fact, historically this type of pressure has always existed. It is difficult to ascertain how a corporate entity over which the Law Society would exercise significant influence in the selection of its directors could possibly exacerbate a conflict that already exists under the current administrative arrangement wherein the Law Society has no influence whatsoever over the advocates. The Working Group concluded that the risk of conflict has the potential to exist under any administrative model.

- *Loss of control.* As the sole-source funder, the Law Society derives its power over LibraryCo from its control over the purse strings. The Law Society would set the conditions with which LibraryCo must comply in order to qualify for continued funding. Only the Law Society has the power to collect fees for the purpose of maintaining and operating county libraries. Effectively, the Law Society would exercise control through the budget and board selection process.

11. The Administrative Structure Group retained Lorie Waisberg of Goodman, Phillips & Vineberg to provide a legal opinion to address specific issues raised by Convocation in May 1999. These issues are discussed in Chapter 3. In his opinion letter, Mr. Waisberg:

- concurred with the Administrative Structure Working Group's recommendation that a corporate board is the preferred entity for administering the county library system;

- determined that there are no legal barriers to the incorporation of "LibraryCo." as a distinct corporate entity; and
- made several new recommendations to strengthen the governance of "LibraryCo.", all of which were adopted by the Administrative Structure Group and incorporated into the recommended governance structure discussed in Chapter 4.

12. A summary of the major differences between the way county law libraries are currently administered and the proposed method of administration as set out in the Phase I, II and III reports is attached as Appendix 2.

Chapter 2: Policy Issues before Convocation

13. Convocation is requested to consider this report and, if appropriate,

a. approve the report, including the recommendations for the governance structure set out in Chapter 4;
b. authorize the drafting of amendments to Regulation 708 to remove provisions relating to county law libraries;
c. approve the making of a By-law on county law libraries to include, among other provisions,

(i) an obligation on the Society to establish a corporation under the *Ontario Business Corporations Act*, consisting of fifteen directors;
(ii) A description of the share structure of the corporation, including the number of classes of shares, the rights, etc. attaching to each class of shares, and the holders of each class of shares;
(iii) a list of the objects of the corporation;
(iv) a requirement on the corporation to submit to Convocation an annual report, which includes audited financial statements, and an annual budget;
(v) a provision that county law libraries shall be operated by their associations in accordance with policies, priorities, guidelines and standards established by the corporation;
(vi) a provision, carried over from Regulation 708, dealing with the "ownership" of the library materials of the county law libraries;
(vii) a provision dealing with access to county law libraries (the "universal access" provision);
(viii) a provision specifying that the money required for the purposes of the corporation shall be paid out of money appropriated therefore by Convocation; and
(ix) a provision permitting Convocation to suspend or reduce funding of the corporation in specified circumstances.

d. authorize the Law Society to enter into a unanimous shareholders agreement with respect to the corporation

Chapter 3: Key Issues Concerning Governance

14. The legal opinion of Lorie Waisberg of Goodman, Phillips, Vineberg is attached as Appendix 3. It fully addresses the questions put by Convocation in May, 1999 and outlined in Chapter 1. A summary of the opinion follows.

Preferred Structure

15. Convocation asked the Working Group to explore with counsel what administrative structure should be employed to accomplish the objective of central management of county libraries.

16. Convocation had already determined that the existing "loose partnership" basis of administration for county libraries, in which over fifty different organizations have a say in the administration, should not continue. Mr. Waisberg considered that the county libraries could be supervised by any of:

- a committee of the Law Society that reports to Convocation
- a committee composed of benchers and representatives of other constituencies (CDLPA, CBAO, OCLA, MTLA). This committee could report to Convocation and the Boards of the other constituencies.
- a partnership of the Law Society and the other constituents.
- a corporation.

17. For reasons cited at pages 2-3 of the legal opinion he concurred that a corporation would more likely assist in achieving the desired results for the blended library system, including providing for:

- clear lines of authority, responsibility and accountability
- the application of uniform sets of policies, standards and procedures
- a centralized structure to oversee implementation of policies, standards and procedures
- the opportunity for various constituents to contribute appropriate input and influence.

18. Mr. Waisberg does however recommend several changes to the Phase II recommendations on administrative structure, resulting in clearer lines of authority and suggesting the corporation be incorporated under the *Ontario Business Corporations Act* rather than the *Corporations Act*. He also recommends the addition of a Nominating Committee to appoint directors to the Board. Chapter 5 outlines in more detail the various administrative options considered by the Working Group and by Mr. Waisberg.

Delegation of Power

19. Convocation directed the Working Group to obtain a legal opinion on the following: Is the creation of a new entity to manage county libraries a permissible delegation under *The Law Society Act?*

20. According to a review of the common law undertaken by Mr. Waisberg, there are two main factors to consider in determining whether delegation can be implied in cases where the legislation does not permit it:

- The nature of the delegated power; and,
- The degree of control which the delegating authority retains over the recipient of the delegated power.

21. It is the opinion of Mr. Waisberg that the creation of Library Co. (working name only) on the basis that it will manage county libraries and library expenditures on behalf of the Law Society within the policies articulated in the Phase I and Phase II reports would be permissible because,

- the discretionary power that would be afforded to "LibraryCo." is *administrative* in nature, not legislative, judicial or quasi-judicial; therefore, the power to delegate is implied. "LibraryCo." will manage the county law libraries and library expenditures on behalf of the Law Society within the policies articulated in the Phases I & II reports. Further, this delegation would not be permanent;

- the Law Society retains a significant degree of control over the recipients through the budget and board selection process. The Law Society ultimately approves "LibraryCo.'s" budget and exercises significant influence in the nomination and selection of directors;

- while the power of benchers to delegate their authority with respect to county law libraries is not expressly provided for in the *Act*, there is nothing in the relevant sections of the *Act* or Regulation 708 expressly forbidding such delegation.

Unintended Consequences

22. In May, 1999 Convocation was also concerned to know whether there are any unintended consequences relating to occupancy, income tax, liability or any other issues in the model that is recommended. Accordingly Mr. Waisberg was asked to determine this issue separately from the question of which structure ought to be employed. Then, he was asked to specifically address whether the use of a corporation would create any unintended consequences.

23. He advised that the prospect of unintended consequences would be minimized to the extent that the new structure introduced minimal changes to the current practice. In order to perform its function pursuant to the policies, standards and procedures articulated by the Law Society in Phases I & II, it is not necessary for LibraryCo. to acquire collections, directly employ county library staff or operate any county libraries which would continue to be run by the local association. As such LibraryCo. would not be liable for the obligations and activities of a local association or its library. This structure, according to the opinion provided by Mr. Waisberg, minimizes occupancy, income tax and liability issues.

24. The key element of his opinion, which was not articulated clearly in the Phase II report, is that LibraryCo would not acquire any of the county law library assets, it would merely supervise the management of the system.

Regulation 708

25. Currently, regulation 708, passed pursuant to the Law Society Act, governs funding for county libraries and matters related to the County and District law Associations. Under the recently amended *Law Society Act* most powers of the Society are exercised through by-laws. Given the decisions made by Convocation to adopt the new blended system and implement Universal Funding and Universal Access for county libraries, Mr. Waisberg was asked to review regulation 708 and recommend how it ought to be amended (or repealed) and how it might work with the Law Society by-laws in order to implement those policy decisions.

26. To provide for both universal access and universal fees Mr. Waisberg recommends that the Law Society establish the new county library system under the management of LibraryCo. by by-law passed under the authority of Section 62(.01)27 of the *Act*. Further, Mr. Waisberg recommends that the sections of the regulation that deal with county libraries be repealed. The balance of the regulation, dealing with law associations, would continue in force.

Chapter 4: Governance Structure

27. *Type of Entity*. The Administrative Structure Group with the concurrence of Mr. Waisberg recommends that an independent corporate entity—provisionally known as LibraryCo—be created to manage the new blended county library system.

28. *Incorporation*. Counsel recommends and the Administrative Structure Group agrees that LibraryCo. be incorporated under the *Ontario Business Corporations Act*. Notwithstanding that its purpose is to govern profit-making corporations, the OBCA was deemed by counsel to be the preferred vehicle for incorporation for the following reasons:

a. it is a more modern statute with which the participants will be more familiar
b. it is more flexible.

29. *Ownership.* As the Law Society is providing the funds to be administered by LibraryCo. it is recommended that the Law Society own the common shares of LibraryCo.. CDLPA, its partner in this venture, would be issued a separate class of shares that would permit it to elect one director.

30. *Governance as a system.* LibraryCo is part of an overall governance system in which it shares authority and responsibility with other critical parts of the system and where the relationships with those other parts are often crucial to their effective operation. The components of that system are represented graphically to the right. The five groups that make up the system (Convocation, shareholders, the Board, management and the county libraries) are represented as a series of overlapping spheres, each representing a delegation of power and authority beginning with Convocation and flowing from the owners (the shareholders or the "profession") down to the county libraries, with accountability flowing back up through LibraryCo management, the board, the owners and eventually to Convocation. The overlapping nature of the components means they are interdependent, and must function together for the same purpose for the system to work well.

31. *Accountability.* In keeping with delegated arrangements of this nature, LibraryCo is set up to be independent of the day-to-day involvement of the Law Society. It is intended to have the flexibility and the freedom to take reasonable risks and adopt innovative ways of delivering the objectives set out for the blended library system. At the same time, LibraryCo must be held accountable by those who have given it power. LibraryCo carries out an explicit purpose under Convocation's mandate to advance professional competence and Convocation therefore will maintain a strong, ongoing interest. LibraryCo's autonomy and flexibility must be balanced with appropriate and adequate accountability to Convocation. In using delegated arrangements, Convocation must ensure that members' money is being spent for intended purposes, that its authority is being exercised properly and that the objectives of the blended system are being achieved efficiently.

32. *Governing framework.* In order for Convocation to ensure that the flexibility LibraryCo needs to work efficiently is balanced with the requirements of good governance and accountability its governing framework must provide for,

- clarity of roles and responsibilities of LibraryCo and the Law Society;
- appropriate reporting to Convocation and the membership on the extent to which LibraryCo. has achieved its policy purpose and on the expenditure and investment of Law Society monies and the stewardship of members' assets;
- mechanisms to measure performance of LibraryCo;
- adequate transparency of important decisions on the management and operations of LibraryCo;
- formal mechanisms and guidance to resolve disputes; and
- means to deal with non-performance and termination of the delegated arrangement.

33. *Role of LibraryCo. and the Law Society.* LibraryCo is a delegated arrangement whereby a non-LSUC entity exercises discretionary authority in the administration of library programs and services within the broad policy framework known as the "blended system", developed by a committee of the Law Society in partnership with CDLPA and approved by Convocation in May 1999. Only the Law Society, in consultation with CDLPA, has the authority to establish or change the policy framework under which LibraryCo operates.

34. *Responsibility of LibraryCo and the Law Society.* The legal duty of LibraryCo is to manage the county library system in accordance with the objectives, policies and principles of the blended system. LibraryCo cannot alter the system's objectives, policies or principles without express permission from both Convocation and CDLPA. Convocation's responsibility is to ensure that LibraryCo achieves its policy purpose.

35. *Reporting to Convocation.* The Law Society approves LibraryCo's budget and has the authority to review and approve corporate plans including business plans, management financial reports, financial statements and budget requests. In addition, the Chief Financial Officer of the Law Society may, from time to time, request on Convocation's behalf access to corporate information that is relevant to ensuring that LibraryCo's resources are being allocated judiciously and appropriately.

36. *Transparency and Reports.* Delegated arrangements distance the delivery of programs from direct control of Convocation. Without direct control, provisions need to be made for enhanced transparency, including access to corporate information that is relevant to the delivery of library services. LibraryCo. must make an annual report to its funding bodies and to the users of the system. The annual report must provide full financial and budget information — including audited statements — and detail the major activities of the previous year. It must also outline long range planning activities for the system. In addition to annual reports, LibraryCo. shall make such periodic and special reports as may be necessary to properly inform all relevant constituencies of key activities and significant developments affecting the library system, its viability and its ability to delivery library services as required by the policies.

37. *Performance.* LibraryCo shall establish key measures to assess its overall performance in achieving the policy objectives of the blended library system. Key performance measures will be established in the following areas:

- Compliance with standards in the areas of information, reference and research services, staffing collections, physical facilities, operations, budgeting, technology and equipment;
- Service quality in county libraries;
- The extent to which accessibility and distribution of legal information throughout the province is enhanced;
- Client satisfaction: library user information on satisfaction levels; and
- Efficiency of program delivery.

Reporting of corporate performance measures to the Law Society on an annual basis as part of the budget approval process shall be a requirement of funding for LibraryCo.

38. *Provision for non-performance and adjustment by Convocation.* The Law Society must be able to take corrective action if and when the arrangements with LibraryCo stray from their intended purpose or when circumstances alter or invalidate their purpose. Each year, once the guidelines for the membership fee have been established, the Law Society shall communicate these guidelines to LibraryCo in writing--clearly setting out both the financial parameters and any adjustments to the broad policy framework under which LibraryCo is to prepare its corporate plan and budget for approval by Convocation. In the event of non-performance, the Law Society's main instruments of influence are the position of its appointees on the board of LibraryCo and the allocation of its operating budget. Ultimately, the priorities and direction of delegated arrangements can be adjusted by withholding payments or attaching new conditions.

39. *Size of the Board.* The optimum size of a board depends upon the circumstances of the organization. It is recommended that LibraryCo. comprise an uneven number of 15 voting directors in order to,

- provide sufficient breadth to accommodate the interests of various legitimate constituents;
- facilitate majority voting; and
- provide sufficient people to staff board committees.

40. *LSUC Director of Libraries.* The Working Group agreed that the Law Society's Director of Libraries should be an appointee to the board of LibraryCo. by virtue of office. All but one member agreed that the appointment ought to be a voting position, recognizing that on occasion the Director of Libraries might need to declare a conflict of interest and not vote on that occasion. One member of the Working Group was of the view that the appointment ought not to be a voting position as it would put the Director of Libraries in the position of having to vote in the best interest of LibraryCo. even if that interest conflicted with the best interest of the Law Society, an untenable position in which to put a Law Society employee. While the majority of the Working Group felt such conflict would be minimal and could be resolved by declaring a conflict of interest.

41. *Method of and Criteria for Appointment.* Directors would be appointed in the manner set out below which has been amended in accordance with the recommendations of Mr. Waisberg.

Appointing Entity	No. of Directors	Criteria for Appointment	Procedural Matters
LSUC	1	Affiliation	Direct appointment
CDLPA*	1	Affiliation	Direct appointment
MTLA	1	Affiliation	Direct appointment
OCLA	1	Affiliation	Direct appointment
LSUC-Director of Libraries	1	Affiliation	Ex officio
LibraryCo. Nominating Committee (comprising LSUC & CDLPA directors *only*) * If CBAO and CDLPA merge then there is 1 director appointed by the merged organization and therefore 10 remain for the nominating committee. If there is no merger then each of CDLPA and CBAO appoint 1 director, leaving 9 positions to be filled by the nominating committee.	9 or 10*	Must meet standards for directors as set out in Phase II and paragraph 44.	Joint appointments made by consensus and based on recommendations received from LSUC and CDLPA.

42. *Role and Composition of Nominating Committee.* Mr. Waisberg recommends the appointment of a nominating committee to see to appointment to the Board. The nominating committee of LibraryCo. will comprise two directors: one a direct appointee of the Law Society and the other a direct appointee of CDLPA. The nominating committee's role is to;

- select 9 or 10 suitable board candidates based on the criteria set out in paragraph 44;
- ensure balance and representation of constituencies among directors;
- ensure appropriate expertise and experience is represented on the board by considering a wide array of candidates including those outside of the legal profession;
- advertise for board candidates;
- give fair consideration to all who express an interest in or commitment to serving on the board; and
- evaluate the contribution of each board member.

43. *Term of Appointment.* Appointments to LibraryCo. should be for staggered terms of three years to preserve experience while introducing new energies and ideas on a regular basis. Initial appointments will need to be for various terms (1,2 and 3 years) to begin the process.

44. *Qualities and Competencies of Directors.* The standard for appointment to the board is to be related to library knowledge and interest. In order to provide informed guidance and support, the 10 directors not appointed on the basis of affiliation must have the following qualifications in order to be considered for appointment by LibraryCo.'s nominating committee:

- Knowledge of and interest in county law libraries;
- Knowledge of the community being served and its changing needs;
- Awareness of changing delivery methods (technology);
- Willingness to acquire familiarity with Phase I & II reports and decisions made by Convocation;
- Time to devote to meetings of the board in person;
- Geographic representation; and
- Ability to make decisions independently of any particular organization.

45. *Role and Reporting of Managing Officer.* The key to success of the blended system and of LibraryCo. is the newly created position of the Managing Officer of County Libraries who will report to the board of LibraryCo.. The Managing Officer's duties will include;

- planning and development for ongoing growth and operation of the library system;
- gathering and coordinating system-wide statistics;
- system budget preparation/assisting local associations as requested with local budgets;
- ensuring that standards for each category of library are met and maintained and assisting with attainment of standards where requested to do so by local associations;
- communication of policies and procedures;
- hiring other administrative office and clerical staff;
- providing local associations with assistance as requested in hiring/managing staff;
- personnel administration as determined in conjunction with local associations;
- seeking/monitoring sources of funding;
- financial reporting, accounting, budgeting and administration;
- liaising with the board and preparing agendas for board meetings;
- public relations/communication of information for system;
- ensure cooperation/smooth exchange of materials/reference services between libraries;
- ensuring continuing education opportunities for all staff in the system;
- monitoring/overseeing collections of materials (all formats) within the system;

- leading in the advancement of the distribution of legal information to all users, wherever they may be located in the province; and
- involvement with professional associations.

46. *Qualifications of Managing Officer.* The Managing Officer will become an expert on county law libraries and the blended system. S/he will advise the board of LibraryCo. on issues emerging in the system and will help lead the libraries into the next century. Strong administrative and management skills will be required. In addition to the above qualifications, the Managing Officer will possess,

- an MLS or MLIS;
- law library experience an asset;
- broad knowledge and experience of library procedures;
- knowledge and experience of law library related technology and electronic information sources;
- knowledge of legislation affecting law libraries;
- supervisory/administrative experience;
- budgeting/financial planning experience; and
- management of multi-branch organization at a senior level is desirable.

47. *Board Meetings.* Initially, LibraryCo. will meet at least monthly to establish the organization. It is expected it will meet at a minimum on a quarterly basis once the system is fully established.

48. *Board Committees.* It is expected that LibraryCo. will establish small, specialized committees on audit, standards, collections and technology that will meet 4-6 times per year as required. Outside expertise will be added to these committees (e.g. accountant).

Chapter 5: Summary of Governance Options Considered

49. Adopting the approach of many governments and governing-bodies in a large number of jurisdictions, the Administrative Structure Group examined and inquired into a wide variety of approaches to program and service delivery for the country library system. In reviewing the options available, and in departing from traditional models of delivery, the Working Group sought to balance the potential for greater efficiency, accountability, flexibility, participation and representation, member satisfaction and the protection of shareholder interest.

50. The options considered by the Working Group and evaluated by Mr. Waisberg in his legal opinion are summarized below.

Type of Arrangement	System Results
Corporation - e.g. independent board (LibraryCo) incorporated under the OBCA. This is a delegated governance arrangement. The Law Society, within the policy framework it has set out under the blended system, delegates key planning and operational decisions to the discretion of an independent board, LibraryCo.	• provides for a balance of power among shareholders, management, county libraries, LSUC • corporate structure provides for strong accountability inside the corporation • legal base provides for well recognized roles, accountabilities and institutions for governance • board will attract better directors than committee structures contemplated under the traditional or collaborative models • a board of LSUC and CDLPA representatives stands a better chance of enforcing county library compliance with uniform set of policies, standards and procedures than a committee of Convocation or a collaborative body • arms length arrangement means LSUC has less direct control-- delegated arrangements distance the delivery of LSUC policy from direct control and accountability to Convocation so more financial controls are required • transparency to LSUC is not assured • may create an advocate for increasing spending for library services that may place LibraryCo in conflict with Convocation as the holder of the purse strings

Traditional LSUC - e.g. Committee or sub-committee of Convocation that reports directly to Convocation through a bencher-chair. Composition could include benchers and representatives of other constituents (CDLPA, CBAO, OCLA, MTLA) or, could be solely a committee of benchers. Library programs and services from the Great Library have traditionally been delivered to counties by the LSUC by departments that report through the CEO directly to Convocation.	• contrary to policy adopted in Phase I and confirmed in Phase II • creates a new committee • will perpetuate multiple systems as local libraries and associations need inputs too – a vote in committee will not be seen as participation • CDLPA input is sought and used at the LSUC's discretion—CDLPA have no official standing before Convocation so local library issues will be presented indirectly • full control by Law Society—maximum accountability to LSUC • full access to information by LSUC but not others necessarily • transparency of the management and operations of the county libraries is at risk • sole discretion in making policies and decisions rests with LSUC
Enhanced Partnership or Enhanced Status Quo - e.g. an association between the LSUC, CDLPA, OCLA and MTLA. This could be achieved through a committee reporting to Convocation and the boards of the other constituencies. Under this arrangement, the LSUC shares policy formulation, risk and operational planning, design and management with other parties.	• recognizes the interdependence between the LSUC and the counties in the successful delivery of library services • provides constituents with opportunity for input and influence • greater participation from all partners enhances quality of decision-making and buy-in • perpetuates loose partnership arrangement that currently exists (described in both the Phase I and Phase II reports) wherein lines of accountability, authority and responsibility are unclear • risk of power vacuum—reporting to dual boards could slow down decision-making, creating bottlenecks and paralyzing the business of county libraries • no mechanism for resolving impasses or disputes between entities • diffuse accountability

Traditional Partnership – create a formal partnership between CDLPA, LSUC and others to eliminate the current loose arrangement but without adding a full corporate model	• outmoded form of organization prevalent in only a few industries such as farming, fishing, professional services and investments • confers primarily tax advantages • requires fresh start in discussions with possible partners to determine terms of arrangement, who partners are to be and rights of partners • may not provide adequate central management • is not well understood as a business model for complex business with multiple locations
Status Quo - any, all and each of the following have direct, uncoordinated and unclear input to the operation of the local library and the distribution of the central funds collected by the Law Society • 48 local association library committees with local lawyers • each of the local county law librarians • a CDLPA library funding committee • a full CDLPA library committee of over 25 members • executive members of the library committee (who meet together and with the Law Society's Director of Libraries) • the benchers on Professional Development and Competence Committee • various library working groups of PD & C • Convocation • CDLPA sitting in Plenary session twice a year • The Ontario Courthouse Librarians Association This list does not include other groups that influence or directly affect the county libraries such as the Law Foundation of Ontario, QL Systems, the major legal publishers, staff of the Law Society, the Canadian Bar Association - Ontario, the Ministry of the Attorney General, Ontario Realty Corporation, library users and other library communities.	• Convocation has already rejected this model when it twice endorsed the Blended system model as a replacement • Reasons for rejecting the Status Quo then and now include: • there is no systematic approach to the provision of library services across the province, even though some individual county libraries provide excellent service to members • There is actually no one "in charge" of the county law libraries • there is no defined role for any of the groups outlined above, so that everyone feels they are in charge and at the same time recognize that no one is running the overall libraries • lack of clarity and precision in responsibility and accountability cannot continue given the commitment to a system of libraries • a single group has to be accountable to the profession and to Convocation for the success or failure of the Blended System. This is particularly so if there is a decision to adopt universal funding for libraries. • a $6 million budget cannot be successfully administered and governed by the loose structure of disparate groups currently operating

Chapter 6: Conclusion

51. The governance arrangement Convocation is being asked to enter into with LibraryCo is expected to be in operation for a number of years and as such its provisions and practices for accountability and good governance will continue to evolve. New and unique approaches to delivering services require Convocation to be vigilant about how and to what extent it wishes to scrutinize the way in which delegated authorities are delivering programs funded by the profession's fees.

52. The concerns expressed by Convocation in May, 1999 have been fully investigated and resolved through the advice of legal counsel. There are no legal impediments to creating LibraryCo. and, in fact, it is the model recommended by counsel, with some important adjustments from the Phase II proposal such as incorporating under the OBCA, using a Nominating Committee and having two classes of shares. The most significant clarification the Working Group can make for members of the profession and for Convocation is that the administrative arm of county law libraries, LibraryCo., will be a supervisory/management vehicle and will not receive a transfer of assets or of any liabilities. Local autonomy is very much preserved while creating a means for central accountability. It is simply a more efficient way of administering the complex, $6 million system of county law libraries.

53. Attached as Appendix 2 is an overview of the most significant administrative and governance differences between the current method of operation for county law libraries and the proposed method outlined in Phases I, II and III. To avoid repetition it does not contain all the many recommendations of the Phase I and II reports but only the significant administrative highlights. The Executive Summaries from the Phase I and II reports are set out in Appendices 4 and 5.

54. The Administrative Structure Working Group has made a conscious effort to systematically consider the essential elements of reporting, accountability mechanisms, transparency and protection of members' interest when designing LibraryCo. The Working Group believes that the use of a structured approach, based on the governance framework we have suggested will guide the Law Society in addressing the needs of Convocation and the membership and still allow for the creation of an innovative, flexible arrangement for the provision of library services.

55. Convocation is requested to consider this report and, if appropriate,

a. approve the report, including the recommendations for the governance structure set out in Chapter 4;
b. authorize the drafting of amendments to Regulation 708 to remove provisions relating to county law libraries;
c. approve the making of a By-law on county law libraries to include, among other provisions,

(i) an obligation on the Society to establish a corporation under the *Ontario Business Corporations Act*, consisting of fifteen directors;
(ii) A description of the share structure of the corporation, including the number of classes of shares, the rights, etc. attaching to each class of shares, and the holders of each class of shares;
(iii) a list of the objects of the corporation;
(iv) a requirement on the corporation to submit to Convocation an annual report, which includes audited financial statements, and an annual budget;
(v) a provision that county law libraries shall be operated by their associations in accordance with policies, priorities, guidelines and standards established by the corporation;
(vi) a provision, carried over from Regulation 708, dealing with the "ownership" of the library materials of the county law libraries;
(vii) a provision dealing with access to county law libraries (the "universal access" provision);

(viii) a provision specifying that the money required for the purposes of the corporation shall be paid out of money appropriated therefore by Convocation; and

(ix) a provision permitting Convocation to suspend or reduce funding of the corporation in specified circumstances.

d. authorize the Law Society to enter into a unanimous shareholders agreement with respect to the corporation.

APPENDICES

TABLE OF CONTENTS

APPENDIX 1

Motions in Convocation
May 28, 1999
Phase II County Libraries Report

1. Should Convocation approve the further description of the blended system and the description of the operation as referred to on page 62 and referred to throughout the report?

   Carried unanimously.

2. Should there be universal funding and universal access?

   Carried unanimously.

3. Should there be central management of the library system or simply coordination?

   Central Management - carried

4. Should there be a committee established, staffed by persons selected by the Treasurer in consultation with Ms. Elliott, to recommend to Convocation the vehicle for central management?

   Carried. One abstention.

5. Should there be a business plan developed by Law Society staff in conjunction with the committee that created the report?

   Carried

6. Should a transition group be established today?

   Defeated.

7. If yes, what should the powers be of the transition group?

   No vote taken as a result of the vote in motion 6.

8. Should $368,000 be allocated today to the transition group?

   No vote taken as a result of the vote in motion 6.

9. That the business plan committee have a budget of $150,000 and the committee looking into the structure have a budget of $75,000, each to be paid from the library funds.

   Carried.

APPENDIX 2

Current Administration of County Courthouse Law Libraries	New Model of Administration of County Courthouse Law Libraries
• Ad hoc loose association between libraries • No Standards • No accountability to LSUC, only local • Muddled unclear accounting • All decisions made at local level • Difficult decisions are not being made • Independent County Law Associations • Inconsistencies between libraries of similar size • Reg. 708 alone, out of date with policies • Partnership - loose arrangement • Performance issues reviewed, if at all, at local level • Staff hired without qualifications being specified, many have no job descriptions, resulting in a huge discrepancy in standards of service • Salaries for similar responsibilities vary widely • Libraries inadequately staffed to suit needs • Some training for lawyers	• Managed system of libraries • Standards • Accountability to Convocation • Financial transparency • System requirements made by a Board representative of all shareholders overseeing total needs • Library Co. will make the difficult decisions and bear the consequences for these • Independent County Law Associations • Benefits of having a system and providing access to materials and services to all members • Reg. 708 amended by Law Society by-law, only clauses relating to Associations retained • Corporation under OBCA with LSUC owning common shares and CDLPA preferred shares • Performance requirements part of mandate • Clear job descriptions for staff in different sizes of libraries. Requirements for staffing in various libraries stated, expectations of performance articulated to staff and staff performance evaluations done • Salaries will be standardized at appropriate levels and staff will be remunerated fairly • Libraries appropriately staffed • All lawyers receive necessary training

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

(1) Copy of opinion dated May 3, 2000 from Lorie Waisberg, Goodman Phillips & Vineberg to the attention of Mr. Richard Tinsley, Secretary re: County Library System. (Appendix 3, pages 26 - 34)

(2) Copy of Executive Summary of Phase I Report. (Appendix 4, pages 35 - 39)

(3) Copy of Executive Summary of Phase II Report. (Appendix 5, pages 40 - 44)

A debate followed.

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:50 P.M.

The Treasurer and Benchers had as their guests for luncheon Mr. Sanford World and Mr. Peter Newcombe, life members.

CONVOCATION RECONVENED AT 2:15 P.M.

PRESENT:

The Treasurer, Banack, Bindman, Boyd, Braithwaite, Carey, R. Cass, Chahbar, Coffey, Cronk, Crowe, Diamond, DiGiuseppe, T. Ducharme, Elliott, Feinstein, Gottlieb, Hunter, Krishna, Lalonde, Lawrence, MacKenzie, Marrocco, Millar, Mulligan, Murray, Pilkington, Porter, Potter, Puccini, Ross, Simpson, Wardlaw, White and Wright.

.....

.....

IN PUBLIC

.....

RESUMPTION OF THE REPORT OF THE LIBRARIES WORKING GROUP

It was moved by Ms. Elliott, seconded by Ms. Cronk that the recommendations of the Libraries Working Group as set out in paragraphs 9, 13, 15 and 17 of the Professional Development & Competence Committee Report be approved.

Carried

It was moved by Ms. Cronk, seconded by Mr. Hunter that there be an explicit requirement that the Metropolitan Toronto Lawyers' Association be consulted by the members of the nominating committee, which are CDLPA and the Law Society representative, in the appointment of members to the board of LibraryCo.

Carried

The following amendments suggested by Mr. Krishna to new By-Law 30 were accepted by Ms. Cronk and Ms. Elliott:

- that the words "required by" in paragraph 8 be deleted and replaced with the words "paid to" so that the paragraph would then read:

  "The money paid to the Corporation for its purposes shall be paid out of such money as is appropriated therefor by Convocation"

- that subparagraphs (a) and (b) under paragraph 9 (1) be deleted; and

- the words "Despite section 8" be deleted from the beginning of paragraph 9 (1) and the words "in its absolute discretion" be inserted after the word "may". The paragraph would then read:

"Convocation may, in its absolute discretion, in respect of a fiscal year, suspend or reduce funding of the Corporation."

Ms. Elliott thanked the members of the Working Group including Michael Hennessey, Dino DiGiuseppe, Greg Mulligan, Peter Bourque, Bill Simpson, Anne Mathewman, Holly Harris, Janine Miller and Wendy Tysall.

REPORT OF THE TECHNOLOGY TASK FORCE

May 2000 Report

Mr. Banack presented the May Report of the Technology Task Force for Convocation's consideration.

Technology Task Force
May 26, 2000

Report to Convocation

Purpose of Report: Decision making

Prepared by the Policy Secretariat

TABLE OF CONTENTS

TERMS OF REFERENCE/ PROCESS

Mandate of the Task Force

On April 30, 1999 Convocation approved the following recommendation of the Competence Task Force:

"A Technology Task Force should be established with the specific mandate of examining the impact of technology on the practice of law and the role of the Law Society should play in leading the profession into the future."

Latest Meeting:

The Technology Task Force met on May 10, 2000. In attendance were:

Larry Banack (Chair)
Stan Kugelmass
Peter Wilson
Abe Feinstein (by telephone)
Gordon Lalonde
Maryann Cousins
Maria Paez Victor
Jannine Miller

The Task Force is reporting on the following issue:

For Decision

National PKI Certifying Authority

POLICY

PKI National Certifying Authority

The Issue

1. The Secretary of the Law Society and representatives of the Task Force met with the PKI Committee of the Federation of Law Societies of Canada in Montreal on May 7 and 8, 2000. As a result, the first steps towards creating a national entity to manage PKI for lawyers across the country were agreed upon. To this effect, a resolution was drawn up for the consideration and approval of each law society's convocation.

2. The Task Force was instrumental in setting up the meeting and it engaged a lawyer to prepare a memo on the governance structure of the PKI entity and the main points of a business plan outline.

3. The Task Force now asks Convocation to consider for its approval the resolutions reached with other Law Societies at this meeting.

Background

4. There are two definite trends in society today: increased adoption of electronic commerce and an increasing complexity of transactions. The role of lawyers as intermediaries in these transactions therefore, is being affected by these changes. For example, in Ontario, the *Electronic Land Registry System* is already in operation and the *Integrated Justice Project*, expected to be in operation by 2001, will create a new, electronic, way of organizing how information moves through Ontario's entire justice system, affecting all lawyers and judges.

5. Every practicing lawyer needs to be registered by one of the thirteen Law Societies of Canada. The Law Societies are currently providing only paper-based status certification for their membership. As transactions become more electronic, it will be necessary for Law Societies to understand and respond to the need for electronic-based certification since lawyers will be, without a doubt, primary participants in electronic commerce.

6. PKI (Public Key Infrastructure) is an electronic system for verifying the identity of the person who transmits electronic messages, such as e-mails, documents or instructions to financial institutions to carry out funds transfers.

7. Law Societies have a role to play because lawyers need them to attest their identity as active members of their law societies and to verify their credentials. Law Societies are already certifying authorities in terms of paper-based transactions, and now will be expected to have a role as electronic certifying authorities.

8. Law societies can become certifying authorities within their jurisdictions, however, because of the complexities of cross-certification, it will be more effective and less expensive if the law societies are coordinated at a national level. This is the conclusion reached by the Federation of Law Societies in their meeting in Whitehorse, in February 2000.

9. At the Whitehorse meeting, a resolution was passed supporting the formation of a separate entity to establish and manage a nationally co-ordinated certification authority for lawyers. (See APPENDIX A)

Convocation's Previous Decisions

10. On January 27, 2000 Convocation passed the following a motion:

> "It was moved by Mr. Banack, seconded by Mr. Feinstein that the Technology Task Force should be given the specific mandate of examining the impact of digital certificates on the practice of law and the role of the Law Society and to investigate and create a set of expectations in respect of the certifying authority and report back to Convocation for consideration."

11. On March 23, 2000 Convocation reviewed the resolution passed in February, 2000 by the Federation of Law Societies of Canada meeting at Whitehorse (See APPENDIX A) and approved the following motion:

> "Convocation is asked to review the resolution that was before the Federation of Law Societies and clarify that Ontario is in a position to support it as one of several options that would be explored by the Technology Task Force, in accordance with the mandate given it by Convocation in its motion of January 27, 2000."

PKI Service Provider

12. The outcome of the meeting in Montreal on May 7 and 8, 2000 was an agreement among all the attending members who represented most Canadian Law Societies, to establish a nationally coordinated PKI using Juricert Services Inc. as the federally incorporated entity.

13. Juricert Services was the preferred choice for the Law Society of Upper Canada, as prior internal consultation indicated that it was our vehicle of choice as Juricert has no prior obligations that could be an obstacle, it already has an established national infrastructure and the British Columbia government has given funds to the Law Society of British Columbia for the initial development of a PKI.

14. The resolution passed at the meeting with the unanimous agreement of all the attending members representing most Canadian Law Societies, to establish a nationally coordinated PKI using Juricert Services Inc. as the federally incorporated entity can be found at APPENDIX B. The Task Force requests Convocation consider it for approval.

Governance Structure Outline

15. At the Montreal meeting of May 2000, a series of items was agreed upon for inclusion in shareholders' agreement that outline a governance structure. These can be found at Schedule "A", APPENDIX C.

Business Plan Outline

15. As well, at the Montreal meeting, an outline was drafted to serve as a basis for the development of a business plan. It can be found at APPENDIX D.

Process

16. By June, 2000, each Law Society will have requested the consideration and general approval of its governing body for the agreements worked out this month among the Law Society representatives.
17. If the agreements are all ratified by the different convocations, the next step would be for the *pro tem* Board of Directors (referred to in paragraph 6 of APPENDIX B) to prepare a shareholders agreement and a business plan to which this Task Force would have input into and which will be brought to each member law society for approval.

18. If this process proceeds in this manner, it may be possible to have the Board of Directors selected by September, 2000.

Task Force's Recommendation

19. The Technology Task Force, having considered the issue of a nationally coordinated certifying authority for lawyers, convinced of the need for it and the economic benefits of a joint endeavor with other Canadian Law Societies, having taken the lead in bringing them together to discuss it, and having been instrumental in working out an agreement with the Law Societies on the first steps towards its implementation, recommends to Convocation that it approve the resolution, governance outline and business plan outline stated at APPENDICES B, C AND D.

Decisions for Convocation

20. Does Convocation approve of the establishment of a nationally coordinated PKI certifying authority for all Canadian Law Societies?

    a. If Convocation does not approve, then Convocation's choices are as follows:

        i. to allow private sector certifying authorities to certify lawyers, or

        ii. to create a Law Society PKI exclusively for Ontario members

21. If Convocation does approve of the establishment of a nationally coordinated PKI certifying authority, Convocation's choices are as follows:

    a. To approve the resolution, governance outline and business plan outline at APPENDICES B, C AND D ; or

    b. Propose modifications to be re-negotiated with the other Law Societies.

APPENDIX A

Resolution of the Federation of Law Societies of Canada adopted at Whitehorse, Yukon Territories on February 24-26, 2000

RESOLVED

1. That the Federation support the formation of a separate entity to establish and mange a nationally coordinated certification authority for lawyers;

2. That the entity should be composed of membership from each law society in Canada;

3. That each interested law society appoint a member to a *pro tem* board of directors no later than March 31, 2000 and that the board undertake:

   a. To organize the governance structure and business plan including a three year budget for the entity to govern the nationally coordinated certifying authority; and
   b. That Juricert be examined as a model; and
   c. That the entity should provide an avenue for current certifying authority initiatives to be suitably merged within the national effort; and
   d. That the entity determine the most suitable technology partners and the conditions of their relationship;

4. That the board present its organization and business plan to each member law society for approval no later than June 30, 2000;

5.

6. That each participating law society present the board's organization and business plan to their convocation no later than September 30, 2000;

7. That until the motion is implemented, the PKI Group should facilitate the establishment of the entity; and

8. That members of the PKI group should make themselves available for consultation at the incitation of Law Societies across Canada.

APPENDIX B

RESOLUTION PASSED AT THE MEETING OF THE PKI COMMITTEE OF THE FEDERATION OF LAW SOCIETIES AT MONTREAL, MAY 8, 2000

RESOLUTION

1. At a meeting of the PKI Committee of the Federation of Law Societies of Canada, the following resolution was passed on May 8th, 2000.

2. WHEREAS a meeting of the Federation of the Federation of Law Societies of Canada in February 2000, a Resolution was passed to support the formation of a separate entity to establish and manage a nationally co-ordinated certification authority for lawyers,

3. AND WHEREAS each Law Society of Canada was represented at a meeting held in Montréal to advance the establishment of this Certifying Authority,

BE IT RESOLVED THAT

4. The Law Societies purchase Juricert Services Inc./Les Services Juricert Inc. to become the Certifying Authority for lawyers and notaries in Canada.

5. Each Law Society will be entitled to purchase an equal number of shares of Juricert, and appoint one director with one vote.

6. A *pro tem* Executive Committee consisting of Gord Lalonde of the Law Society of Upper Canada, Stéphane Volet of the Barreau du Québec, Bruce Woolley of the Law Society of British Columbia, Dale Spackman of the Law Society of Alberta and Michel Turcot of the Chambres des Notaires is hereby appointed with Ron Usher of the Law Society of British Columbia acting as Project Director,

7. The *pro tem* Executive Committee and Project Director will prepare a Shareholders' Agreement and a Business Plan for Juricert addressing items identified in Schedules A & B to this Resolution.

8. Each Law Society will make an initial investment of $2.00 per full time equivalent member in Juricert through the Federation of Law Societies of Canada which funds can be expended on setup by the interim Executive Committee.

9. After approval of the Shareholders' Agreement and Business Plan by the Law Societies, the conveyance of the shares will occur and the operations of Juricert will commence.

APPENDIX C

Schedule "A"
Points for Inclusion in Shareholders' Agreement/Governance Documents

1. Each Law Society may own 100 shares.

2. There will be provisions for subsequent purchase of shares, selling of shares, buy/sell provisions among the shareholders and redemption of shares by Juricert.

3. Each Law Society will appoint a member of the Board of Directors.

4. The Board will appoint the following:
   a. Chair,
   b. President to act as the Chief Executive Officer, and as such to be an additional member of the Board,
   c. Executive Committee, consisting of Board members.

5. Provision for an interim Chair and Executive Committee.

6. The Board may appoint Advisory Committees in any areas it deems appropriate.

7. The Board will be responsible for the operations of Juricert and will meet at least twice a year.

8. The Executive Committee will be responsible for all matters between Board meetings. Its specific powers will be detailed.

9. Each Law Society will operate as a Registering Authority (RA) for lawyers/members who are resident/practicing in that province. The specific issues to be addressed include:
    a. standards to be applied to each Law Society for enrollment and maintenance of member information,
    b. inter-jurisdictional practice and members who practice in more than one province,
    c. rules governing non-practicing, part-time practicing, non-resident, insurance exempt members, etc.
    d. revocation of certificates as a result of suspension or disbarment,
    e. suspension of certificates.

10. Each Law Society will bear its own costs for acting as an RA.

11. Financial matters including:
    a. initial capitalization,
    b. subsequent capital requirements,
    c. allocation of profits based on the number of certificates issued to members of a Law Society,
    d. liability protection for all risks including general operations and errors/omissions,
    e. risk management

12. Privacy matters relating to databases.
    a. Reporting obligations to shareholders.

    b. Provisions for special resolutions and extra-ordinary resolutions.

APPENDIX D

Schedule "B"
Items for Business Plan

15. Primary obligation to provide certification to only lawyers and notaries.

16. Cross-certification with other certifying authorities.

17. Options for providing CA services through:
    a. its own hardware and licensed software,
    a. service agreements with hardware owners,
    b. partnership with other CAs,
    c. other.

5. Applications strategy — options for facilitating development or access to applications that will be available to lawyers and in order to enhance/expand the level of protection available to lawyers participating in e-commerce/e-communications.

6. Start-Up Model — What will Juricert do initially to establish itself? What staff is required? Relations with hardware/software providers, relations with shareholders, roll-out to the profession generally, etc.

7. Financial matters — initial capitalization ($2.00 per full-time equivalent member), budgets, etc.

8. User support — Provided by whom? By what means? Bilingual issues.

9. Establishment of a web presence.

10. Financial relations with lawyers — directly or through Law Societies? Payment for additional applications — directly or through Law Societies?, etc.

11. Marketing/education/training strategies.

12. Enrollment/revocation procedures.

13. Common standards for lawyer identification — naming standards, common numerical identifiers, etc.

14. Inter-jurisdictional issues for lawyers who are members of more than one Law Society.

15. Bill C-6 compliance.

16. Advisory Committees — what type, make-up, remuneration issues.

17. Ongoing relationship with Federation of Law Societies, if any.

18. Rolling in the CA operations of Notarius.

19. Development of a Certificate Policy.

20. Development of Certification Policy Statements.

21. Time line for activities — announcements to Law Societies, public announcements, etc. Development of a Communications Policy.

22. Relations with competitors, cooperators, stakeholders.

23. Relationships with RAs who are not shareholders.

24. Relationship with governments, both federal and provincial — development of a strategy.

.....

Re: National PKI Certifying Authority

It was moved by Mr. Banack, seconded by Mr. Feinstein that the establishment of a nationally coordinated PKI certifying authority for all Canadian Law Societies be approved.

Carried

It was moved by Mr. Banack, seconded by Mr. Feinstein that the resolution, governance outline and business plan outline be approved as set out at Appendices B, C and D of the Report.

Carried

.....

IN CAMERA

.....

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

.....

IN PUBLIC

.....

REPORT OF THE GOVERNMENT & PUBLIC AFFAIRS COMMITTEE

May 2000 Report

Mr. Marrocco presented the Report of the Government & Public Affairs Committee for Convocation's consideration.

Government & Public Affairs Committee
May 26, 2000

Report to Convocation

Purpose of Report: Decision Making

Prepared by the Client Service Centre

COMMITTEE PROCESS

1. The Government and Public Affairs Committee (G&PAC) met on April 12, 2000. Committee members in attendance were Frank Marrocco, Q.C., Richmond Wilson, Q.C., Marion Boyd, Leonard Braithwaite, C.M., Q.C., Abdul Ali Chabar, Andrew Coffey, Hon. Allan Lawrence, P.C., Q.C., Julian Porter, Q.C. and William Simpson, Q.C., LSM. Staff in attendance were Anji Husain, Dolly Konzelmann, Jane Noonan, Lucy Rybka-Becker, Elliot Spears and Wendy Tysall.

2. The Committee is reporting on the following matter:

   Policy - For Decision

   - Introduction of a 1-900 number for the Lawyer Referral Service.

POLICY - FOR DECISION

LAWYER REFERRAL

A. INTRODUCTION

1. Approval of Convocation is being sought to implement a '1-900' number for the Lawyer Referral Service (LRS). This would mean that callers to the LRS would be charged a fee of $6.00 for each completed call, which would appear on the caller's phone bill.

2. An independent Operational Review of LRS was conducted by consultants "Quality Service International" in order to identify the options available in the delivery of the LRS program. These options were presented to the Committee and it was decided that the '1-900' option best met the goals of the LRS and the needs of the Law Society.

B. BACKGROUND

3. LRS was established in 1969 by the Law Society to ensure public access to legal services. The participation fee for members is currently $267.50 per annum, with a 50% fee reduction for New Calls to the Bar. The participating member's name is then added to the LRS database.

   Callers seeking a lawyer are asked a number of questions about desired geographic location and nature of the legal issue. They are then given a referral, selected at random from the available lawyers in the database that meet the prospective client's criteria. Lawyers joining the LRS agree to provide ½ hour initial consultation, at no charge, to potential clients who are referred to them by the Service. Currently, 1,782 lawyers participate in LRS.

4. Experts from the American Bar Association, who reviewed our LRS earlier this year, have advised us that we run by far the largest LRS in the world.

5. The LRS has seen a dramatic rise in its use by the public since its inception. The volume of calls received has gone from 2,500 per year in 1971 to 235,000 in 1999.

6. The budget allocated to LRS in 1999 enabled us to respond to only 57% of the calls. We were able to answer only 132,000 of the 235,000 calls received in 1999. An estimated additional 50,000 calls could not get through. The remaining 103,000 callers stayed on hold until they hung up. 43% of the callers surveyed said that LRS needs to have more staff on the lines to eliminate wait time.

7. 82% (108,000) of callers to the LRS whose calls are answered receive a referral. 28% (or 30,000) have a consultation with a lawyer. The total range of revenue earned as the result of these referrals, as reported by the members, is $3.7-11 million.

8. Currently there is a budget for 4 employees. This is inadequate, especially when compared to the fact that 9 employees handled fewer calls per year in 1993. The budget for 4 employees enables LRS to answer only 40% of the calls received.

9. A transfer of funding for 5 additional temporary staff was made for the year (2000) only to improve the number of calls answered. The intention was to reduce the amount of time callers were kept on hold, thus improving the public's perception of the LRS service in particular and the Law Society in general (see item #10).

C. SERVICE SITUATION

10. The results of an inability to handle all incoming call attempts include: phone systems "plugged up" with callers on hold; unsatisfied callers who develop and spread a negative image of the Law Society; additional burden on other call centre groups as callers make numerous attempts to get through to other departments, such as complaints and general membership inquiry; lost opportunities to meet the LRS mandate of directing callers to qualified lawyers in good standing; and, lost potential revenue for LRS members.

11. The service levels achieved by LRS are far from those generally accepted in the service industry. The New York and San Francisco Lawyer Referral Services ensure that 85% of their calls are answered. Customers have come to expect prompt service from all of the services they access, which is reflected in the public image of service provider.

12. Despite the unsatisfactory service levels, LRS remains a popular service. The October 1999 client survey shows that 84% of respondents who reached a LRS representative "got what they wanted" from LRS.

13. Lawyers are also continuing to stay on as members of LRS. Most of the existing members of LRS have been members for 4 years or more.

D. REVENUE SITUATION

14. LRS revenue partly offsets the cost of providing the service. In 1998, for example, $500,000 was received in revenue compared to $715,000 in expenses.

15. The visitors from ABA felt that part of the reason for the large call volumes to the LRS is due to callers who have no intention of actually seeking the services of a lawyer. In fact, only about 6% of calls answered result in the retention of a lawyer. It is felt that the 1-900 service will help to reduce the number of inappropriate calls to LRS, which should allow easier access for those who genuinely need a referral.

16. In addition to the 1-900 number, a number of other options were researched and considered, including increasing member fees and discontinuing the service altogether. Surveys to members have indicated that the first option would result in a significant loss in participation levels. The second option, opting out of the LRS program, was not considered in this report.

17. The Committee is of the view that the '1-900' service option appears to best meet the goals of LRS and the needs of the Law Society. The '1-900' option enables LRS to:

- increase public access to legal services by answering more calls more quickly
- improve the image of LRS and the Law Society by improving the wait times
- improve the screening of callers which will improve the likelihood of a client engaging a lawyer become a self-funded service
- generate revenue that can be used by the Law Society to improve other services to the public and to members

18. A $6 FEE PER CALL IS PROPOSED FOR THE '1-900' LRS SERVICE, BASED ON THE RESULTS OF THE OCTOBER 1999 CLIENT SURVEY. $6/CALL IS WHAT THE MAJORITY OF CALLERS SAID THEY WERE WILLING TO PAY. In effect, a caller would receive a 30 minute consultation with a lawyer for $6.00, as opposed to the current system in which the consultation is free.

19. As required by telecommunications regulations, LRS would need to maintain a '1-800' number to handle questions or complaints about the '1-900' service.

COMMITTEE'S RECOMMENDATION

20. There is an urgent need to address LRS. It has an impact on the successful operation of the Client Service Centre and on our ability to efficiently meet the needs of the public and our members.

21. CONVOCATION IS REQUESTED TO:

- APPROVE THE RECOMMENDATION THAT THE LRS SERVICE BE OPERATED AS A '1-900' SERVICE AS OUTLINED IN THIS REPORT.

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

(1) Copy of the Lawyer Referral Service Options dated May 15, 2000.

(2) Copy of LRS 1-900 Annualized Budget Explanation.

Re: Introduction of a 1-900 number for the Lawyer Referral Service

It was moved by Mr. Marrocco, seconded by Mr. Simpson that the Lawyer Referral Service be operated as a '1-900' service as outlined in the Report.

Carried

REPORT FROM SOCIETY'S REPRESENTATIVE ON JOINT COMMITTEE ON CONTINGENCY FEES

Mr. Hunter presented the Report of the Joint Committee on Contingency Fees for Convocation's consideration.

Report from Society's Representative on
Joint Committee on Contingency Fees

Purpose of report: Decision

A. BACKGROUND

Establishment of Joint Committee on Contingency Fees

1. In September 1999, the Attorney General of Ontario expressed an interest in contingency fees and directed that a Ministry discussion paper on the subject be prepared in consultation with the Advocates' Society, the Canadian Bar Association (Ontario) and the Society. Shortly thereafter, a Joint Committee on Contingency Fees ("Joint Committee") was struck, consisting of representatives from the aforesaid organizations and Ministry staff, to work on such a paper. In October 1999, the Treasurer appointed George Hunter to be the Society's representative on the Joint Committee. Donald Kidd and Michael Eizenga are the representatives of the Canadian Bar Association (Ontario) and the Advocates' Society respectively.

Joint Committee's Work

2. The Joint Committee began meeting in November 1999. Since that time, it has met six times.

3. With the assistance of staff from the Ministry of the Attorney General,[1] staff from the Canadian Bar Association (Ontario)[2] and Society staff,[3] and with the input of Professor Michael Trebilcock, the Joint Committee has reviewed the background use and regulation of contingency fees in other provinces, the United States, England and Australia and the proposals made in the past by, among others, the Canadian Bar Association (Ontario) and the Society concerning the use and regulation of contingency fees in Ontario. The Joint Committee has explored arguments for and against introducing contingency fees into Ontario and has considered how contingency fees might be regulated if they were to be introduced into Ontario.

4. To guide its work, in March 2000, the Joint Committee engaged Environics to conduct a public opinion survey regarding contingency fees. The results of the survey were as follows:

   a. 46 percent of the respondents said that a lawyer's fee has a major impact on their decision to hire a lawyer whereas 20 percent said it has little or no impact

   b. At the beginning of the survey, 70 percent of the respondents (after receiving an explanation of how contingency fees work) strongly or somewhat agreed that the Ontario government should allow people to hire lawyers on a contingency basis.

---

[1]John Twohig, Judith Grant and Sunny Kwon.

[2]Kimberley Bates and Eva Lau.

[3]Jane Noonan and Sheena Weir.

c. 49 percent of the respondents said that they would be more supportive of contingency fees if they knew that, with contingency fees, more people might feel that they could afford the services of a lawyer for a court case.

d. 48 percent of the respondents said that they would be more supportive of contingency fees if they knew that there was to be legislation that would limit the percentage of a settlement that a lawyer would be permitted to take.

e. 45 percent of the respondents said that they would be more supportive of contingency fees if they knew that there was to be legislation that would give clients, in the event of a dispute, the right to ask a judge to review their contingency fee arrangements.

f. At the end of the survey, the level of support amongst respondents for contingency fees increased to 75 percent.

Joint Committee's Proposed Regulatory Scheme

5. The Joint Committee has reached a consensus on a regulatory scheme for contingency fees. Under the Joint Committee's scheme:

a. Contingency fees would be permitted in litigation matters other in than in criminal law and family law proceedings.

b. The maximum contingency fee rate would be capped at 33 ⅓ percent.

c. Notwithstanding the cap, a lawyer would be permitted to apply to the court, at the time of entering into a contingency fee arrangement, for approval to charge a contingency fee rate in excess of the cap. The application would be heard by a judge in chambers; it would be mandatory for the client to appear at the hearing of the application; and, in determining whether to grant the application, the judge would be required to consider the nature and complexity of, and the expense and risk involved in, the case.

d. The contingency fee rate would apply to the amount recovered by the client exclusive of any costs awarded and exclusive of disbursements.

e. Costs would be dealt with outside the contingency fee scheme. If costs were awarded, they would go to the client.

f. Disbursements would be dealt with outside the contingency fee scheme. The client would be responsible for reimbursing the lawyer for all disbursements made. However, it would be open to the client to negotiate with the lawyer for the lawyer to assume responsibility for payment of disbursements.

g. A contingency fee arrangement, to be enforceable, would have to be embodied in a written contract signed by the lawyer and client (with signatures witnessed), and a copy of the signed contract would have to be given to the client. In the absence of a written contract, if the client won, the lawyer would not be able to recover a contingency fee; however, the lawyer would be able to apply to the court to be paid on a quantum meruit basis.

h. There would be no restrictions on who may enter into a contingency fee arrangement with a lawyer. Specifically, there would be no prohibition against minors or persons under legal disability entering into contingency fee arrangements.

i. Certain standard information and terms would have to be included in every contingency fee contract. A lawyer would be prohibited from including other terms in a contingency fee contract.

j. A client would be entitled to ask a judge to review a contingency fee contract, and any charges rendered to the client under the contract,

i. absolutely within one month after delivery of the lawyer's bill, and

ii. in the discretion of a judge, within twelve months after payment of the lawyer's bill.

k. The regulation of contingency fees would be the responsibility of the government implemented through amendments to the *Solicitors Act*.

Past Consideration by Convocation

6. Contingency fees were most recently considered by Convocation on May 27, 1988 and July 10, 1992.

7. Over the course of those considerations, Convocation approved in principle the introduction into Ontario of contingency fees and established a relatively detailed scheme as to how contingency fees could be put into operation in Ontario.

8. The scheme established by Convocation provided as follows:

a. Contingency fees would be permitted in litigation matters other in criminal law and family law proceedings.

b. The maximum contingency fee rate would be capped a 20 percent.

c. Notwithstanding the cap, a lawyer would be permitted to apply to the court, at the time of entering into a contingency fee arrangement, for approval to charge a contingency fee rate in excess of the cap.

d. The contingency fee rate would apply to the amount recovered by the client exclusive of any costs awarded and exclusive of disbursements.

e. Party and party costs awarded to the client would go to the lawyer.

f. The issue of whether or not disbursements should be subject to the contingency, or should be paid by the client in any event, would be a matter to be agreed upon between the lawyer and the client.

g. A contingency fee arrangement, to be enforceable, would have to be embodied in a written contract signed by the lawyer and client. In the absence of a written contract, if the client won, the lawyer would not be able to recover a contingency fee; however, the lawyer would be able to charge the client on a quantum meruit basis.

h. The contingency fee contract would embody the terms of the contingency fee arrangement and the agreement reached between the lawyer and the client with respect to payment of disbursement.

i. There would be no standard form of contract.

j. A client would be entitled to ask a judge for a review of a contingency fee contract. The review would be permitted after the client's case was finished. A client would be able to ask for consideration of whether the contingency fee arrangement was a reasonable one at the time the contract was entered into, as well as whether, in the final result, regardless of whether or not the contingency fee arrangement was a reasonable one at the time the contract was entered into, the ultimate fee was unconscionably high.

9. Convocation expected that the introduction into Ontario of contingency fees would be accomplished through amendments to the *Solicitors Act* and, therefore, that the government would be responsible, not only for implementing any scheme for their introduction into Ontario, but also for their subsequent regulation.

Next Steps

10. The Joint Committee's scheme differs in several respects from the scheme adopted by Convocation in 1988 and 1992. The Joint Committee's scheme also addresses many matters that were not considered by Convocation in 1988 and 1992.

11. The Joint Committee's scheme for introducing contingency fees into Ontario is endorsed by the Advocates' Society and the Canadian Bar Association (Ontario).

12. If Convocation were to endorse the scheme worked out by the Joint Committee, the Joint Committee would be able to present to the Attorney General an unanimous discussion paper. If Convocation were to reject any portion of the scheme worked out by the Joint Committee, the Committee would still present a discussion paper to the Attorney General, however, it would list separately the recommendations of the Advocates' Society and the Canadian Bar Association (Ontario) and the recommendations of the Society.

13. The Attorney General has made public his intention to introduce legislation dealing with contingency fees in Fall 2000. To assist the Attorney General, the Joint Committee is required to submit its report to the Attorney General by the end of June 2000.

B. DECISIONS FOR CONVOCATION

14. Convocation is asked to reconsider its scheme for introducing contingency fees into Ontario (adopted in May 1988 and July 1992), where it differs from the scheme worked out by the Joint Committee on Contingency Fees, and to approve the following:

a. That the maximum contingency fee rate should be capped at 33 ⅓ percent.

b. That, in respect of a lawyer's application to the court for approval to charge a contingency fee rate in excess of the cap,

i. the application should be heard by a judge in chambers (not in open court),

ii. it should be mandatory for the client to appear at the hearing of the application, and

iii. in determining whether to grant the application, the judge should be required to consider the nature and complexity of, and the expense and risk involved in, the case.

c. That the client alone should be entitled to receive an award of costs.

d. That there should be no prohibition against minors and persons under legal disability entering into contingency fee arrangements.

e. That the signatures of the lawyer and the client on a contingency fee contract should be witnessed and that a lawyer should be required to give to the client a copy of the signed contingency fee contract.

f. That the following information and terms should be included in every contingency fee contract:

i. The name, address and phone number of the lawyer and client.

ii. The nature of the client's claim.

iii. A statement that the lawyer will be compensated for services provided by way of a contingency fee which will amount to x percent of the total amount recovered exclusive of any costs awarded or disbursements. The statement should include an explanation of who will be responsible for paying costs and disbursements in the following circumstances: The client wins; the client loses; and the claim is settled.

iv. A simple example of how a contingency fee is calculated.

v. A statement disclosing that the contingency fee rate which has been agreed upon by the lawyer and client may be greater or lesser than contingency fee rates charged by other lawyers for similar cases and that the client has the right to contact other lawyers to obtain their rates.

vi. A term that sets out the maximum contingency fee rate chargeable and advises the client that a contract which includes a contingency fee rate in excess of the maximum is not enforceable by the lawyer unless it is approved by a judge at the outset.

vii. A statement indicating the client's agreement and direction that all monies awarded to the client by the court or as the result of a settlement are to be paid to the lawyer to be held by the lawyer in trust for the client subject to the terms of the contingency fee contract.

viii. Notice to the client of his or her right to have the contingency fee contract, and any charges rendered to the client under the contract, reviewed by a judge.

ix. A statement of the grounds for termination, and the consequences of the termination, of the contract by the client.

x. A statement of the grounds for termination, and the consequences of the termination, of the contract by the lawyer.

xi. Notice to the client of his or her right to make the final decision regarding settlement of the claim.

g. That the following terms should not be included in a contingency fee contract and, if they are included, should be considered void:

i. A term requiring the client to obtain the lawyer's consent before the client may abandon, discontinue or settle the claim.

ii. A term preventing the client from terminating the contract or changing lawyers.

iii. A term permitting the lawyer to split the contingency fee with any other person, other than as permitted by the Society's Rules of Professional Conduct.

h. That the client should be entitled to seek review of the contingency fee contract, and any charges rendered to the client under the contract,

i. as of right within one month after delivery of the lawyer's bill, and

ii. in the discretion of a judge, within twelve months after payment of the lawyer's bill.

i. That subsection 20 (2) of the *Solicitors Act* should be amended to ensure that,

i. calculation of costs by the court, for the purposes of making a costs award, is not adversely affected by the fact that the client's lawyer is being compensated on a contingency fee basis, and

ii. the client is able to recover the full amount of costs awarded, even when the amount of the award exceeds the amount of the contingency fee payable by the client to his or her lawyer.

C. DISCUSSION

Cap

15. In July 1992, Convocation decided that, if contingency fees were introduced into Ontario, the contingency fee rate should be capped at 20 percent (subject to the court approving an increased rate). The cap was established taking into account that a lawyer being compensated on the basis of a contingency fee would be receiving, not only the contingency fee (*i.e.*, a percentage of the amount recovered by the client exclusive of costs), but also the party and party costs awarded. It was the view of Convocation that because the lawyer would be receiving a contingency fee plus costs, a higher contingency fee rate (*e.g.*, 25 to 50 percent) would be unreasonable.

16. The Joint Committee has determined that the contingency fee rate should be capped at 33 ⅓.

17. In determining the level at which contingency fee rates should be capped, the Joint Committee was mindful of,

a. the need to balance the lawyer's interest in being fairly compensated for work performed and risk assumed and the client's interest in receiving a substantial amount of the award or settlement;

b. the difficulty in establishing a fair fee, based on an arbitrary percentage of the amount recovered, given the complexity of factors that must be considered to calculate the value of the lawyer's services;

c. the need to have the contingency fee rate reflect the market rate for a lawyer's services (*i.e.*, an hourly rate plus a risk premium and interest on the loan of the lawyer's services) so as to encourage lawyers to take cases on a contingency fee basis

d. the fact that, under the Society's Rules of Professional Conduct (current and proposed, the lawyer is prohibited from charging or accepting a fee unless it is fair and reasonable;[4]

---

[4]See current Rule 9 (a) and Commentary 1 to Rule 9 and proposed new Rule 2.08 (1) and the commentary thereto. Rule 9 (a) and Commentary 1 to Rule 9 read as follows:

> The lawyer shall not ... undertake to act for, charge or accept any amount which is not fully disclosed, fair and reasonable, and when asked by the client to quote a fee shall explain the nature and approximate amount of any anticipated disbursements to be incurred.

e. the fact that in other provinces, the contingency fee rates tend to be in the range of 25 to 40 percent; and

f. the fact that the client will have a right to have reviewed the contingency fee contract and any charges rendered under the contract;

18. In deciding whether to accept the Joint Committee's cap of 33 ⅓ percent, it should be borne in mind that, under the Joint Committee's scheme for introducing contingency fees into Ontario, unlike under Convocation's scheme, the lawyer will not be entitled to receive the award of costs. Thus, the contingency fee (a percentage of the amount recovered by the client exclusive of costs) will be the lawyer's only compensation.

19. Accordingly, Convocation is asked to approve that the maximum contingency fee rate should be capped at 33 ⅓ percent.

Application to Court to Charge Contingency Fee Rate Above Cap

20. In July 1992, Convocation decided that under its scheme for introducing contingency fees into Ontario, notwithstanding that there would be a cap on the maximum contingency fee rate chargeable, the lawyer would be permitted to apply to the court, at the time of his or her retainer, for approval to charge a contingency fee rate in excess of the cap. Convocation did not consider in any further detail the mechanics of such an application.

A fair and reasonable fee will depend upon and reflect such factors as:
(a) the time and effort required and spent;
(b) the difficulty and importance of the matter;
(c) whether special skill or service has been required and provided;
(d) the amount involved or the value of the subject matter;
(e) the results obtained;
(f) fees authorized by statute or regulation or suggested fee schedule of a law association;
(g) such special circumstances as loss of other employment, uncertainty of reward or urgency.

A fee will not be fair and reasonable if it cannot be justified in the light of all pertinent circumstances, including the factors mentioned.

New rule 2.08 (1) and the commentary thereto read as follows:

A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

What is a fair and reasonable fee will depend upon such factors as:
(a) the time and effort required and spent;
(b) the difficulty and importance of the matter;
(c) whether special skill or service has been required and provided;
(d) the amount involved or the value of the subject matter;
(e) the results obtained;
(f) fees authorized by statute or regulation;
(g) special circumstances such as loss of other retainers, uncertainty of reward or urgency.

21. The Joint Committee is in agreement with Convocation that a lawyer should be permitted to apply to the court, at the time of entering into a contingency fee contract with a client, for approval to charge a contingency fee rate in excess of the cap. The Joint Committee has considered the mechanics of such an application in some detail and has determined that,

    a. the application should be heard by a judge in chambers (not in open court);

    b. it should be mandatory for the client to appear at the hearing of the application; and

    c. that, in determining whether to approve a contingency fee rate in excess of the cap, the judge should be required to consider the nature and complexity of, and the expense and risk involved in, the case.

22. The Joint Committee's decision to require the attendance of the client at the hearing of the application is based on two factors. First, in most cases, it is likely that the judge will want to hear from the client prior to reaching a decision. As a contingency fee rate will have a direct impact on the client, it is hard to imagine a situation in which a judge would not want to hear the client's position with respect to the request for a contingency fee rate in excess of the cap. Second, if the client is to be given the right to ask for a review of a contingency fee arrangement at the end of the case, as far as possible, there should be no doubt about the client's agreement at the outset of the case to pay a contingency fee rate in excess of the cap.

23. The factors which the Joint Committee believes should be considered by a judge when determining whether to approve a contingency fee rate in excess of the cap come, in part, from decisions made on reviews of contingency fee arrangements under the *Class Proceedings Act*. In those decisions, the nature and complexity of a case have been taken into account in determining the appropriateness of contingency fee arrangements.

24. Accordingly, Convocation is asked to approve that, in respect of a lawyer's application to the court for approval to charge a contingency fee rate in excess of the cap,

    a. the application should be heard by a judge in chambers (not in open court),

    b. it should be mandatory for the client to appear at the hearing of the application, and

    c. in determining whether to grant the application, the judge should be required to consider the nature and complexity of, and the expense and risk involved in, the case.

Costs

25. In a case, in addition to the amount recovered by a client as damages, typically there is an amount awarded by the court or incorporated into a settlement for "costs".

26. Courts usually award the winning side "party and party costs", which are intended to indemnify the client for expenses incurred to pursue the lawsuit. These expenses would include court filing fees, medical and other expert reports, the lawyer's fees and other disbursements. In a proceeding such as a lengthy personal injury case, these expenses can be substantial. The amount of costs awarded by the court is determined by a tariff contained in the civil procedure rules. Typically, party and party costs will cover about half the actual cost of carrying a case.

27. In July 1992, Convocation decided that under its scheme for introducing contingency fees into Ontario, a lawyer should be entitled to receive, not only a contingency fee (*i.e.*, a percentage of the amount recovered by the client exclusive of costs), but also the party and party costs awarded.

28. Convocation was of the view that this approach to compensating a lawyer ("costs plus approach") would be fairer (to both the lawyer and client) than the contingency fee arrangements then existing in other jurisdictions, under which the amount recovered and costs were added together and a contingency fee rate was applied to the sum to arrive at the lawyer's compensation. The costs plus approach would result in an ultimate recovery of fees that would be a fairer reflection of the work done by the lawyer to earn the fee.

29. In its report to Convocation in July 1992, the Special Committee on Contingency Fees made the following comments on the costs plus approach:

> It is apparent that in cases in which recovery is made with relatively small amounts of work by the solicitor, the party and party costs to be awarded will be relatively small.
>
> On the other hand, there are cases in which enormous amounts of work are required to be done by the solicitor which are subsequently reflected in very large amounts for party and party costs.
>
> We are aware of a case recently in our Courts in which the Judgment recovered by the Plaintiff, after a very lengthy trial, was in the neighbourhood of $600,000.00. The taxed party and party costs, it is our understanding, exceeded $300,000.00. If a "normal" contingency, on let's say 25%, was applied to the gross amount recovered, including party and party costs, the recovery of 25% of the total of $900,000.00, or $225,000.00, would be less than the amount of the assessed party and party costs.
>
> To the extent then that party and party costs have some reference to the amount of work done by the solicitor, it is fairer, both to the solicitor and the client, that the contingency fee arrangement should involve costs plus the percentage, rather than a flat percentage of the claim, including all of the costs.

30. The Joint Committee is of the view that the lawyer should not be entitled to receive the party and party costs awarded by court. Only the client should be entitled to receive an award of costs.

31. The Joint Committee would like to see contingency fees introduced into Ontario with as little interruption as possible to the status quo regarding entitlement to costs. Currently, only the client is entitled to receive payment of costs. The introduction of contingency fees should not alter this.

32. In adopting its view, the Joint Committee has noted that, in British Columbia and New Brunswick, a lawyer is prohibited from collecting both costs and a percentage of the recovery as a contingency fee, and in the Yukon, costs obtained through a settlement are excluded from being included as part of the recovery for the purpose of determining the contingency fee.

33. Accordingly, Convocation is asked to approve that the client alone should be entitled to receive an award of costs.

Prohibited persons

34. An issued addressed by the Joint Committee was whether any restrictions should be placed on the type of client who may enter into a contingency fee arrangement. Convocation, in its consideration of contingency fees, did not specifically address this issue.

35. The Yukon prohibits contingency fee arrangements with minors or persons under legal disability and New Brunswick requires the court to approve contingency fee arrangements with such persons. Most other provinces, however, do not restrict the type of client who may enter into a contingency fee arrangement.

36. The Joint Committee has determined that there should be no restriction on the type of client who may enter into a contingency fee arrangement; specifically, minors and persons under legal disability should not be prohibited from entering into a contingency fee arrangement.

37. There are sufficient safeguards in the existing Rules of Civil Procedure (*e.g.*, the requirement that such persons have a litigation guardian; the requirement that any settlement made by a litigation guardian be reviewed by the court), which would remain intact notwithstanding the introduction of contingency fees, to ensure that minors and persons under legal disability will be adequately protected when they enter into a contingency fee arrangement.

38. As well, if minors and persons under legal disability are prohibited from entering into a contingency fee arrangements, this may reduce access to legal representation for these persons without adequate justification.

39. Accordingly, Convocation is asked to approve that there should be no prohibition against minors and persons under legal disability entering into contingency fee arrangements.

Form and Content of Contract

40. Where contingency fees are permitted, a common minimum requirement in many jurisdictions is that there be a written contingency fee contract signed by the client. Another common requirement is that the client be provided with a copy of the signed contract so as to ensure adequate disclosure of the terms of the agreement.

41. In addition to these requirements, consumer protection would mandate that all contingency fee contracts include some basic contractual provisions, including a description of the claim, the basis of the lawyer's compensation, the client's right to have the contract reviewed, the grounds for terminating the contract and the treatment of costs and disbursements. This would ensure that clients are aware of key aspects of a contingency fee contract and know how to extricate to themselves from the contract. As well, if all contingency fee contracts included a standard set terms, this would provide for certainty, uniformity and simplicity.

42. Standard forms of a contingency fee contracts are not common, largely because it is almost impossible to develop a standard form contract that could apply to all cases. None of the other provinces in Canada have a standard form contingency fee contract.

43. However, most provinces prescribe minimum terms for contingency fee contracts, and contracts which do not contain the prescribed terms are void.

44. In addition to the prescription of standard terms for contingency fee contracts, it is common to see prohibitions against certain terms being included in contingency fee contracts, for example, terms requiring a client to obtain the permission of his or her lawyer before discontinuing or settling an action or terms preventing a client from changing lawyers.

45. In July 1992, Convocation determined that, in order for a contingency fee arrangement to be enforceable, there would have to be a written contract signed by the client and the lawyer. Convocation also determined that the contract should embody the terms of the contingency fee agreement and whatever is agreed upon between the lawyer and client with respect to payment of disbursements. Convocation chose not to recommend a specific form of contingency fee contract. Convocation did not consider in any further detail the contents of a contingency fee contract.

46. The Joint Committee has determined that, in order for a contingency fee arrangement to be enforceable, there should be a written contract signed by the client and the lawyer (with signatures witnessed). As well, there should be a requirement that the client be provided with a copy of the signed contract.

47. The Joint Committee has further determined that all contingency fee contracts should include certain standard information and terms (as set out in paragraph 49) and should omit certain prohibited terms (as set out in paragraph 50). This approach would be consistent with the approaches in most other provinces. This approach would also provide assistance to the client in negotiating contingency fee arrangements with the lawyer by ensuring that all contingency fee contracts meet certain minimum standards. At the same time, the approach would not inordinately restrain the parties' freedom to contract, leaving flexibility to negotiate terms that are specific to individual circumstances.

48. Accordingly, Convocation is asked to approve that the signatures of the lawyer and the client on a contingency fee contract should be witnessed and that the lawyer should be required to give to the client a copy of the signed contingency fee contract.

49. Further, Convocation is asked to approve that the following information and terms should be included in every contingency fee contract:

a. The name, address and phone number of the lawyer and client.

b. The nature of the client's claim.

c. A statement that the lawyer will be compensated for services provided by way of a contingency fee which will amount to x percent of the total amount recovered exclusive of any costs awarded or disbursements. The statement should include an explanation of who will be responsible for paying costs and disbursements in the following circumstances: The client wins; the client loses; and the claim is settled.

d. A simple example of how a contingency fee is calculated.

e. A statement disclosing that the contingency fee rate which has been agreed upon by the lawyer and client may be greater or lesser than contingency fee rates charged by other lawyers for similar cases and that the client has the right to contact other lawyers to obtain their rates.

f. A term that sets out the maximum contingency fee rate chargeable and advises the client that a contract which includes a contingency fee rate in excess of the maximum is not enforceable by the lawyer unless it is approved by a judge at the outset.

g. A statement indicating the client's agreement and direction that all monies awarded to the client by the court or as the result of a settlement are to be paid to the lawyer to be held by the lawyer in trust for the client subject to the terms of the contingency fee contract.

h. Notice to the client of his or her right to have the contingency fee contract, and any charges rendered to the client under the contract, reviewed by a judge.

i. A statement of the grounds for termination, and the consequences of the termination, of the contract by the client.

J. A statement of the grounds for termination, and the consequences of the termination, of the contract by the lawyer.

K. Notice to the client of his or her right to make the final decision regarding settlement of the claim.

50. That the following terms should not be included in a contingency fee contract and, if they are included, should be considered void:

a. A term requiring the client to obtain the lawyer's consent before the client may abandon, discontinue or settle the claim.

b. A term preventing the client from terminating the contract or changing lawyers.

c. A term permitting the lawyer to split the contingency fee with any other person, other than as permitted by the Society's Rules of Professional Conduct.

Review of Contingency Fee Contracts

51. In July 1992, Convocation determined that a client should be entitled to ask for a review by a judge of a contingency fee contract. The review would be permitted after the client's case was finished. The exact timing of the review was not considered.

52. At present, a client may seek an assessment of a lawyer's bill within one month after its delivery and, in the discretion of the court, within twelve months after payment of the lawyer's bill.[5]

53. The Joint Committee has determined that the time limitations that currently apply to reviews of lawyers' bills should apply to reviews of contingency fee arrangements that will be permitted once contingency fees are introduced into Ontario.

54. Accordingly, Convocation is asked to approve that the client should be entitled to seek review of the contingency fee contract, and any charges rendered to the client under the contract,

a. as of right within one month after delivery of the lawyer's bill;

b. in the discretion of a judge, within twelve months after payment of the lawyer's bill.

Solicitors Act: Subsection 20 (2)

55. Currently, costs may be used as a sanction to prevent parties from prolonging court proceedings, to encourage settlements or to discourage improper behaviour. This should not change if contingency fees are introduced into Ontario. Changes to the *Solicitors Act* will be required to achieve this result.

56. Subsection 20 (2) of the *Solicitors Act* provides that costs awarded to a client may not be greater than the amount paid by the client to the lawyer.[6] It is very possible that costs may exceed the amount of the contingency fee. To disallow such costs would remove any sanction against a party who is acting improperly. For example, if a defendant refuses a reasonable settlement offer, the court may impose a cost sanction. If the amount of costs is limited to the contingency fee, the defendant would have no incentive to settle.

---

[5] *Solicitors Act*, R.S.O. 1990, c. S-15, ss 3, 11.

[6] Subsection 20 (2) of the *Solicitors Act*, R.S.O. 1990, c. S-15 reads as follows:

However, the client who has entered into the agreement [*i.e.*, an agreement as to his or her lawyer's compensation] is not entitled to recover from any other person under any order for the payment of any costs that are the subject of the agreement more than the amount payable by the client to the client's own solicitor under the agreement.

57. Convocation is asked to approve that subsection 20 (2) of the *Solicitors Act* should be amended to ensure that,

a. calculation of costs by the court, for the purposes of making a costs award, is not adversely affected by the fact that the client's lawyer is being compensated on a contingency fee basis; and

b. the client is able to recover the full amount of costs awarded, even when the amount of the award exceeds the amount of the contingency fee payable by the client to his or her lawyer.

.....

Mr. Hunter amended the Report by adding to paragraphs 14 (c) and 33 the words "subject to the agreement of the solicitor and the client as approved by a judge".

The Treasurer withdrew from Convocation and Mr. Krishna took the Chair as Acting Treasurer.

It was moved by Mr. Carey, seconded by Mr. Porter that in paragraph 5(a) the words "other than in criminal law and family law proceedings" be deleted so that the paragraph would then read:

"Contingency fees would be permitted in litigation matters."

Lost

It was moved by Mr. Simpson, seconded by T. Ducharme that there be a choice of either 1/3 with the client keeping all of the costs or 20% plus the costs payable to the counsel.

Lost

It was moved by Mr. Hunter, seconded by Mr. Millar that the recommendations contained in the Report be adopted as amended.

Carried

ROLL-CALL VOTE

Bindman	For
Carey	For
Cronk	For
T. Ducharme	For
Feinstein	For
Gottlieb	For
Hunter	For
MacKenzie	For
Marrocco	For
Millar	For
Pilkington	For
Porter	For
Puccini	For
Simpson	For
Wright	For

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Mr. MacKenzie presented the item re: New By-Law on Audit Cost Recoveries for approval by Convocation.

Professional Regulation Committee
June 8, 2000[1]

Report to Convocation

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on June 8, 2000. In attendance were:

[1]Includes matter deferred from March 23, April 28, and May 26, 2000 Convocations (March 9, April 13 and May 9, 2000 Professional Regulation Committee meetings)

Gavin MacKenzie (Chair)
Niels Ortved (Vice-Chair)
Andrew Coffey
Todd Ducharme
Ross Murray
Julian Porter

Staff: Trevor Branion, Janet Brooks, Lesley Cameron, Margot Devlin, Scott Kerr, Elliot Spears, Richard Tinsley, Jim Varro and Jim Yakimovich.

On May 9, 2000, the following attended:

Gavin MacKenzie (Chair)

Larry Banack (Vice-Chairs)
Heather Ross

Todd Ducharme

Staff: Trevor Branion, Janet Brooks, Lesley Cameron, Scott Kerr, Elliot Spears, Richard Tinsley, Jim Varro and Jim Yakimovich.

At the April 13, 2000 meeting, the following attended:

Gavin MacKenzie (Chair)

Larry Banack (Vice-Chairs)
Neil Finkelstein
Niels Ortved
Heather Ross

Andrew Coffey
Carole Curtis
Ross Murray

Staff: Carol Austin, Janet Brooks, Leslie Cameron, Margot Devlin, Scott Kerr, Zelia Pereira, Elliot Spears, Richard Tinsley, Jim Varro and Jim Yakimovich.

At the March 9, 2000 meeting, the following were in attendance:

Gavin MacKenzie (Chair)

Larry Banack (Vice-Chairs)
Neil Finkelstein
Heather Ross

Andrew Coffey
Carole Curtis
Gary Gottlieb
Ross Murray
Robert Topp

Staff: Denise Ashby, Janet Brooks, Margot Devlin, Vivian Kanargelidis, Scott Kerr, Elliot Spears, Richard Tinsley and Jim Varro.

2. This report contains the Committee's policy reports on:

- a new by-law on audit cost recoveries (originally reported to March 23, 2000 Convocation);
- amendments to By-Law 17 (Filing Requirements) to add the French language version of Form 17A [Member's Annual Report] (originally reported to April 28, 2000 Convocation);
- amendments to the Protocol for Complainants and the Rules of Practice and Procedure.

I. POLICY

NEW BY-LAW ON AUDIT COST RECOVERIES

A. BACKGROUND

3. At the October 29, 1999 Convocation, during consideration of the report of James Yakimovich, Manager, Investigations on the spot and focussed audit programs, approval in principle was given to establishing a scheme for the recovery of the costs of audits, in certain circumstances.

4. Prior to the drafting of a by-law on cost recoveries, authority for which is provided in the *Law Society Act*[2], the Committee agreed to engage in a policy discussion about the scope of the by-law. The Committee has completed those discussions and is presenting with this report a draft by-law, found at page 8 of this report, for Convocation's review, together with explanatory information on the by-law's structure.

B. COMPONENTS OF THE BY-LAW

5. The Committee considered a number of issues in formulating the by-law, including:
   - the scope of the circumstances for recovery of costs;
   - whether the scheme for cost recoveries should be mandatory or discretionary;
   - whether a flat amount for costs should be charged;
   - whether a per hour amount should be specified in the by-law upon which costs would be calculated;
   - consideration of any disparity in costs that might exist between GTA lawyers and lawyers outside the GTA, given the use of staff in the GTA for the program, and accounting firms for lawyers outside the GTA.
   - whether the amount of the cost recovery should be unrestricted;
   - if a mandatory scheme, whether provision should be made to waive the costs, which may be based on special circumstances or compassionate grounds;
   - where the authority for a decision on costs recoveries should lie, and whether an appeal from that decision should be available.

---

[2]Section 62(0.1) of the *Law Society Act* states:

Convocation may make by-laws,

...

16. providing for the payment to the Society by a member or student member of the cost of an audit, investigation, review, search or seizure under Part II;

6. Based on the above together with the outline of the basis for cost recoveries set out in Mr. Yakimovich's report, the Committee determined the following to be the key components of the by-law (references are to the section numbers in the draft by-law).

Order for Costs

7. The payment of all or a portion of the costs of an audit should be the subject of an order which may be made by a bencher on application by the Society *(section 1)*. The by-law accordingly has been designed to reflect a discretionary scheme for the recovery of costs.

Circumstances in Which an Order May Be Made

8. An order for payment of costs may be made in the following circumstances:

   a. Costs may be recovered because of the member's failure to file the Member's Annual Report *(paragraph 1(a))*. A spot audit is sought in those circumstances because of the concerns inherent with the non-filing of the financial report;
   b. In the course of conducting audits, an appointment to conduct the audit is set with the member. Recovery of audits costs should be available where the member does not keep the pre-arranged audit appointment *(paragraph 1(b))*;
   c. Prior to an audit, the member is also provided with a listing of the financial records that must be available for the audit. Recovery of audits costs should be available if, on attendance at the audit, it is found that the member's records are not available *(paragraph 1(c))*;
   d. Recovery of audits costs should be available where the member's records are not up-to-date, thereby causing a significant increase in audit time;
   e. Recovery of audits costs should be available where there are numerous financial records inadequacies and this results in excessive time spent on the audit *(paragraph 1(e))*.

9. This by-law would permit the Society, for example, to seek payment of the full costs of an audit the Society undertakes because of member's failure to file the Member's Annual Report under By-Law 17. It would also permit the Society to seek a portion of the costs of an audit where time was lost on, and additional time expended to perform, an audit, because a member failed to keep a pre-arranged appointment with the Society for the audit.

10. The by-law would cover the followings types of audits:

   a. a spot audit arising from random selection of the member for the audit or information filed with the Law Society that shows that financial record keeping practices may not be adequate;
   b. a focussed audit conducted either separately or as part of a consolidated audit approach;
   c. an audit instructed pursuant to a re-audit (because of the nature or extent of financial record keeping issues identified during a previous audit) where there has not been substantial compliance.

Bill of Costs According to a Tariff

11. The costs to be charged a member under the by-law should be in accordance with a tariff to be established by Convocation, reflected in a bill of costs delivered to the member with the Society's application *(section 3)*. The Committee considered the option of including a dollar amount in the by-law upon which the bill of costs would be calculated, but determined that the scheme would better suited to the application of a tariff that Convocation could set, review and amend as appropriate.

Procedure

12. The bencher determines the procedure for consideration of the application and may decide who makes submissions with respect to the application and in what manner *(section 4)*. Both the member and Society are entitled to make submissions *(subsection 4(2))* and inherent in this process is the ability to raise any issues the member or the Society believes are relevant to the application.

13. The Committee felt it appropriate to include the member's ability to pay as a matter that may be raised before the bencher on the hearing of the application. Accordingly, the by-law indicates that the bencher shall consider, among other relevant factors, the issue of the member's ability to pay *(subsection 4(3))*.

Bencher's Decision

14. After considering the application, the bencher shall dismiss it or order that costs be paid as requested by the Society or as determined by the bencher, the bencher's determination being as far as possible in accordance with the tariff *(subsections 4(4) and (5))*. Reasons for the decision are to be provided on request to the member or the Society *(subsection 4(6))*.

Appeal

15. While the Committee debated various options on whether the bencher's decision should be subject to an appeal and, if so, who should hear the appeal (including an application before a single bencher with no appeal and an application before a three-bencher panel with no appeal), it determined that in those circumstances where the member or the Society is dissatisfied with the bencher's decision, an appeal should lie to a three-bencher panel *(section 5)*, whose decision is final.

The Committee's View

16. In establishing the scheme for recovery of audit costs, the by-law appropriately focusses on those circumstances where the member is in breach of regulatory requirements with respect to filings or trust record keeping or has not complied with arrangements agreed upon between the Society and member for the conduct of an audit. The by-law would apply to such circumstances arising from a spot or focussed audit or a re-audit.

17. At the same time, the by-law gives wide discretion to the bencher hearing the application to consider issues relating to the costs being sought by the Society. In particular, an inquiry into the ability of the member to pay the costs is designed as a compulsory feature of the bencher's consideration of the application.

18. In the Committee's view, the draft by-law represents a responsible and sound approach to the recovery of audit costs in those circumstances in which recovery is appropriate.

C. DECISION FOR CONVOCATION

19. Convocation is asked to review the draft by-law on audit cost recoveries, as set out below, and if in agreement, adopt the draft by-law, or make amendments thereto as it considers appropriate prior to adoption. A motion for the making of the by-law appears below prior to the text of the by-law.

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTION 62 (0.1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JUNE 23, 2000

MOVED BY

SECONDED BY

THAT, pursuant to the authority contained in paragraph 16 of subsection 62 (0.1) of the *Law Society Act*, By-Law 30 [Payment of Costs] be made as follows:

BY-LAW 30

PAYMENT OF COSTS

AUDIT

Payment of costs

1. On application by the Society, a bencher appointed for the purpose by Convocation may make an order requiring a member who was the subject of an audit under section 49.2 of the Act to pay the cost or a portion of the cost of the audit if the bencher is satisfied that,

(a) the audit was required because the member had failed to submit to the Society the report required under section 2 of By-Law 17;

(b) at the time arranged between the Society and the member, the person conducting the audit could not gain entry to the business premises of the member;

(c) at any time during the audit, the member failed to produce to the person conducting the audit the financial records and other documents that the member prior to a specified time had been requested to make available to the person at that time;

(d) at any time during the audit, the member failed to produce to the person conducting the audit financial records that were up to date and the failure to produce financial records that were up to date increased significantly the amount of time required to complete the audit; or

(e) at any time during the audit, the member produced financial records that were not in compliance with the requirements of By-Law 18 and the production of financial records that were not in compliance with the requirements of By-Law 18 increased the amount of time required to complete the audit.

Notice of application

2. (1) An application for payment of the cost or a portion of the cost of an audit shall be commenced by the Society notifying the member in writing of the application.

Method of giving notice

(2) Notice under subsection (1) is sufficiently given if,

(a) it is delivered personally;

(b) it is sent by regular lettermail addressed to the member at the latest address for the member appearing on the records of the Society; or

(c) it is faxed to the member at the latest fax number for the member appearing on the records of the Society.

Receipt of notice

(3) Notice under subsection (1) shall be deemed to have been received by the member,

(a) if it was sent by regular lettermail, on the fifth day after it was mailed; and

(b) if it was faxed, on the first day after it was faxed.

Bill of costs

3. (1) Where the Society is applying for payment of the cost or a portion of the cost of an audit, the Society shall send to the member at least ten days before the date fixed for consideration of the application a bill of costs setting out the expenses, fees, disbursements and other charges incurred by the Society to conduct the audit.

Tariff

(2) The bill of costs prepared by the Society shall, as far as possible, be in accordance with a tariff established by Convocation from time to time.

Application of certain sections

(3) Subsections 2 (2) and (3) apply, with necessary modifications, to the delivery of the bill of costs under subsection (1).

Consideration of application: procedure

4. (1) Subject to sections 2 and 3 and subsections (2), (3), (5) and (6), the procedure applicable to the consideration of an application for the payment of the cost or a portion of the cost of an audit shall be determined by the bencher and, without limiting the generality of the foregoing, the bencher may decide who may make submissions to him or her, when and in what manner.

Submissions by member and Society

(2) The member and the Society are entitled to make submissions to the bencher when he or she is considering an application for the payment of the cost or a portion of the cost of an audit.

Ability to pay

(3) In considering an application for the payment of the cost or a portion of the cost of an audit, the bencher shall take into account, among other relevant factors, the member's ability to pay.

Authority of bencher

(4) After considering an application for payment of the cost or a portion of the cost of an audit, the bencher shall,

(a) dismiss the application and declare that the member is not required to pay the cost of any portion of the cost of the audit; or

(b) order that the member pay the cost or a portion of the cost of the audit, as requested by the Society in the application or as determined by the bencher, and set the due date for payment.

Tariff

(5) Where the bencher determines under clause (4) (b) that the member is to pay the cost or a portion of the cost of the audit other than as requested by the Society in the application, the bencher's determination as to the amount payable by the member shall, as far as possible, be in accordance with a tariff established by Convocation from time to time.

Reasons for decision

(6) If requested by the member or the Society, the bencher shall state in writing the reasons for his or her decision on the application.

Appeal

5. (1) The member or the Society if dissatisfied with the bencher's decision under subsection 4 (4) may appeal the decision to a panel of three benchers appointed for the purpose by Convocation.

Time for appeal

(2) An appeal under subsection (1) shall be commenced,

(a) if the member is appealing, by the member notifying the Secretary in writing of the appeal within thirty days after the day the bencher delivers his or her decision; or

(b) if the Society is appealing, by the Society notifying the member in writing of the appeal within thirty days after the day the bencher delivers his or her decision.

Procedure

(3) The rules of practice and procedure apply, with necessary modifications, to the consideration by the panel of three benchers of an appeal under subsection (1) as if the consideration of the appeal were the hearing of an appeal under subsection 49.32 (2) of the Act.

Same

(4) Where the rules of practice and procedure are silent with respect to a matter of procedure, the *Statutory Powers Procedure Act* applies to the consideration by the panel of three benchers of an appeal under subsection (1).

Payment of cost of audit

(5) Where a member or the Society appeals under subsection (1), payment of the cost or a portion of the cost of an audit, as ordered by the bencher under subsection 4 (4), is postponed until the appeal is disposed of by the panel of three benchers.

Decision on appeal

(6) After considering an appeal made under subsection (1), the panel of three benchers shall,

(a) confirm the bencher's decision; or

(b) strike out the bencher's decision and substitute its own decision.

Decision final

(7) The decision of the panel of three benchers on an appeal made under subsection (1) is final.

RÈGLEMENT ADMINISTRATIF NO 30

PAIEMENT DES FRAIS

VÉRIFICATION

Paiement des frais

1. Sur requête du Barreau, le conseiller ou la conseillère que le Conseil a nommé à cette fin peut rendre une ordonnance exigeant que le membre qui fait l'objet d'une vérification prévue à l'article 49.2 de la Loi paie tout ou partie des frais de la vérification si elle ou s'il est convaincu de ce qui suit :

a) la vérification a été exigée parce que le membre n'a pas présenté au Barreau le rapport exigé par l'article 2 du règlement administratif no 17;

b) la personne qui procède à la vérification n'a pas pu pénétrer dans les locaux commerciaux du membre au moment don't celui-ci et le Barreau avaient convenu;

c) le membre n'a pas, pendant la vérification, produit à la personne qui y procède les registres financiers et autres documents qu'on lui a demandés, à l'avance, de mettre à la disposition de cette personne à un moment précisé;

d) le membre n'a pas, pendant la vérification, produit à la personne qui y procède des registres financiers à jour et cette omission a prolongé considérablement le délai nécessaire pour mener à bien la vérification;

e) le membre a, pendant la vérification, produit des registres financiers non conformes aux exigences du règlement administratif no 18 et, ce faisant, a prolongé considérablement le délai nécessaire pour mener à bien la vérification.

Avis de la requête

2. (1) La requête en paiement de tout ou partie des frais d'une vérification est introduite lorsque le Barreau en avise le membre par écrit.

Mode de remise de l'avis

(2) Est valablement donné l'avis prévu au paragraphe (1) qui, selon le cas :

a) est remis à personne;

b) est envoyé au membre par poste-lettre ordinaire à sa dernière adresse qui figure dans les dossiers du Barreau;

c) est envoyé au membre par télécopieur à son dernier numéro de télécopieur qui figure dans les dossiers du Barreau.

Réception de l'avis

(3) Le membre est réputé avoir reçu l'avis prévu au paragraphe (1) :

a) le cinquième jour qui suit son envoi par la poste, s'il lui a été envoyé par poste-lettre ordinaire;

b) le jour qui suit son envoi par télécopieur, s'il lui a été envoyé par ce moyen.

Facture des frais

3. (1) S'il présente une requête en paiement de tout ou partie des frais d'une vérification, le Barreau envoie au membre, au moins dix jours avant la date fixée pour l'étude de la requête, une facture de frais où sont énoncés les dépenses, les honoraires, les débours et autres frais qu'il a engagés pour procéder à la vérification.

Tarif

(2) La facture de frais préparée par le Barreau est, dans la mesure du possible, conforme au tarif établi par le Conseil.

Application

(3) Les paragraphes 2 (2) et (3) s'appliquent, avec les adaptations nécessaires, à la remise de la facture de frais prévue au paragraphe (1).

Étude de la requête : procédure

4. (1) Sous réserve des articles 2 et 3 et des paragraphes (2), (3), (5) et (6), le conseiller ou la conseillère établit la procédure d'étude de la requête en paiement de tout ou partie des frais d'une vérification et, notamment, peut choisir les personnes qui lui présenteront des observations et préciser le moment et la manière de le faire.

Observations du membre et du Barreau

(2) Le membre et le Barreau ont le droit de présenter des observations au conseiller ou à la conseillère qui étudie une requête en paiement de tout ou partie des frais d'une vérification.

Capacité de payer

(3) Lors de l'étude d'une requête en paiement de tout ou partie des frais d'une vérification, le conseiller ou la conseillère tient compte, entre autres facteurs pertinents, de la capacité de payer du membre.

Pouvoir du conseiller

(4) Après avoir étudié une requête en paiement de tout ou partie des frais d'une vérification, le conseiller ou la conseillère :

a) soit rejette la requête et déclare que le membre n'est pas tenu de payer tout ou partie des frais de la vérification;

b) soit ordonne que le membre paie tout ou partie des frais de la vérification, de la manière don't le Barreau le demande dans la requête ou de la manière don't il ou elle en décide, et fixe la date d'exigibilité du paiement.

Tarif

(5) Si le conseiller ou la conseillère décide, en application de l'alinéa (4) b), que le membre doit payer tout ou partie des frais de la vérification autrement que de la manière don't le Barreau le demande dans la requête, la somme qu'il ou elle fixe comme étant celle que le membre doit payer est conforme, dans la mesure du possible, au tarif établi par le Conseil.

Motifs de la décision

(6) À la demande du membre ou du Barreau, le conseiller ou la conseillère motive par écrit la décision qu'il ou elle rend au sujet de la requête.

Appel

5. (1) S'il n'en est pas satisfait, le membre ou le Barreau peut interjeter appel de la décision que le conseiller ou la conseillère rend en application du paragraphe 4 (4) devant un comité de trois conseillers ou conseillères que le Conseil nomme à cette fin.

Délai d'appel

(2) L'appel prévu au paragraphe (1) est interjeté de la manière suivante :

a) s'il est le fait du membre, celui-ci en avise le ou la secrétaire par écrit dans les 30 jours qui suivent celui où le conseiller ou la conseillère a rendu sa décision;

b) s'il est le fait du Barreau, celui-ci en avise le membre par écrit dans les 30 jours qui suivent celui où le conseiller ou la conseillère a rendu sa décision.

Procédure

(3) Les règles de pratique et de procédure s'appliquent, avec les adaptations nécessaires, à l'étude d'un appel prévu au paragraphe (1) par le comité de trois conseillers ou conseillères comme s'il s'agissait de l'audition d'un appel visé au paragraphe 49.32 (2) de la Loi.

Idem

(4) En cas de silence des règles de pratique et de procédure sur une question de procédure, la Loi sur l'exercice des compétences légales s'applique à l'étude d'un appel prévu au paragraphe (1) par le comité de trois conseillers ou conseillères.

Paiement des frais de la vérification

(5) Le paiement de tout ou partie des frais d'une vérification que le conseiller ou la conseillère a ordonné en application du paragraphe 4 (4) est reporté jusqu'à ce que le comité de trois conseillers ou conseillères tranche l'appel que le membre ou le Barreau interjette en vertu du paragraphe (1).

Décision

(6) Après avoir étudié l'appel interjeté en vertu du paragraphe (1), le comité de trois conseillers ou conseillères :

a) soit confirme la décision du conseiller ou de la conseillère;

b) soit annule la décision du conseiller ou de la conseillère et lui substitue sa propre décision.

Décision définitive

(7) La décision que le comité de trois conseillers ou conseillères rend à propos d'un appel prévu au paragraphe (1) est définitive.

AMENDMENT TO BY-LAW 17 ON FILING REQUIREMENTS

20.. On October 29, 1999, Convocation adopted a new member's annual reporting form, the Member's Annual Report (MAR), which is prescribed as Form 17A under the By-Law. At that time, only the English version of the form was before Convocation.

21. The French version of the form has now been prepared. Accordingly, as a "housekeeping" matter, the Committee is moving the amendment of By-Law 17 to add the French version of Form 17A.

DECISION FOR CONVOCATION

22. Convocation is requested to amend By-Law 17 to add the French version of Form 17A. The form in French, together with the appropriate motion to amend, appears at Appendix 1.

AMENDMENTS TO THE PROTOCOL FOR COMPLAINANTS IN THE LAW SOCIETY'S DISCIPLINE PROCESS AND THE RULES OF PRACTICE AND PROCEDURE
(Joint Meeting of the Professional Development and Competence and Professional Regulation Committees)

A. INTRODUCTION AND BACKGROUND

23. In November 1997, the Law Society adopted a Protocol for complainants in the discipline process, which sets out a scheme for informing and communicating with complainants. Much of the Protocol was a codification and refinement of processes already in place in the Society's investigatory and discipline departments.

24. As the Protocol pre-dated the amendments to the *Law Society Act* (the "*Act*") in force February 1, 1999 and the Project 200 operational reorganization, a working group of the two Committees noted above was struck to review the Protocol and propose appropriate changes.

25. The amendments to the *Act* established three types of proceedings which might result from a complaint, namely, conduct (formerly discipline), capacity (formerly section 35) and competence proceedings. The amendments also codified an obligation of confidentiality in respect of information relating to audits, investigations, reviews, searches, seizures or the proceedings as described. Because the amendments called into question the ability of the Society to observe the Protocol in respect of providing information to complainants and highlighted the fact that the Protocol, to be a useful and relevant document, required updating to encompass all three types of hearings and the changes to the Law Society's governing legislation, a review of the Protocol was undertaken.

26. The working group reported to the Committees in January 2000, which then reported to Convocation. That resulted in approval in principle to amendments to Protocol and in specific amendments to the Rules of Practice and Procedure, essentially to permit complainants to be advised of the fact of proceedings in respect of capacity and competence which otherwise are *in camera.*

27. In summary, Convocation agreed that:

a. a form of protocol should continue to be used to reflect the scope of appropriate communications with complainants at all stages;

b. subsections 49.12(2)(a) and (b) of the *Act* should be interpreted to permit the disclosure of the following information to complainants:

   i) as needed during an investigation;

   ii) a staff decision to close a file;

   iii) a staff decision to refer the matter to the Proceedings Authorization Committee (the "PAC") for consideration and the recommendation by staff;

   iv) a decision of the PAC to close the file; and

   v) a decision of the PAC to authorize a proceeding and the type of proceeding which has been authorised, whether conduct, capacity or competence;

c. Amendments should be made to rules 1.02(2), 3.04 and 3.04.1 of the Rules of Practice and Procedure to permit a complainant who referred a matter to the Society which is now at the hearing level to be notified of the *fact* of a capacity or competence application, without more;

d. The language of the existing Protocol should be substantively revised to reflect the current state of affairs, including any proposals that are adopted by Convocation as a result of the Committees' report on these issues.

28. The amendments in (c) above have been implemented. The Committees are now requesting Convocation approve amendments to the language of the Protocol in respect of the implementation of (d) above and make further amendments to the Rules of Practice and Procedure to deal with the issue of what complainants should receive in connection with the results of a capacity or competence proceeding.

B. THE AMENDED PROTOCOL

29. The amended version of the Protocol appears below.[3] The amendments were made after consultation with relevant staff in the complaints resolution, investigations and discipline departments. The redrafted Protocol includes obligations which are reflected at a procedural level in the amendments to the Rules of Practice and Procedure in respect of capacity and competence proceedings, discussed in the next section of this report.

30. Two definitions have been added to the Protocol - "member" and "complainant".

31. In the Rules of Practice and Procedure, "complainant" is defined as

> a person who has made a complaint to the Society regarding a member or student member which is relevant to the application

32. The definition of "complainant" in the Protocol reads

> "complainant" means a person who has made a complaint to the Society regarding a member or student member, but where an application has been commenced, it means a person who has made a complaint to the Society regarding a member or student member that remains open and that is relevant to the application

33. This definition limits the information available to a complainant to the information relevant to his or her complaint against a member. This makes the definition in the Protocol consistent with the definition in the Rules of Practice and Procedure. The definition in the Protocol also makes it clear that the Society has no duty to inform complainants whose files have been closed of, for example, results of competence or capacity proceedings.

Law Society of Upper Canada
PROTOCOL FOR COMPLAINANTS
(adopted by Convocation November 28, 1997; amended May 29, 1998 and -----)

In this protocol,

"complainant" means a person who has made a complaint to the Society regarding a member or student member, but where an application has commenced, it means a person who has made complaint to the Society regarding a member or student member that remains open and that is relevant to the application.

"member" means a member of the Law Society and includes a law student registered in the Law Society's pre-call program

Generally

1. A Complainant should at all times be treated professionally and with courtesy, respect and candour by Law Society staff , outside investigators and counsel engaged by the Law Society.

2. A Complainant should be provided with information about the Law Society's regulatory processes.

---

[3]The original version of the Protocol appears at Appendix 2 to this report.

3. The Law Society should communicate with a Complainant in "plain language".

4. The Law Society should communicate with a Complainant, if the Complainant so requests, in French, and use its best efforts to communicate with a Complainant in the language of his or her choice.

5. The location of meetings at the Law Society with a Complainant, as much as practicalities permit, should be comfortable and convenient for a Complainant.

Intake, Resolution and Investigation of Complaints

6. The Law Society should assist a complainant, where necessary, in recording a complaint about a lawyer. As a rule, complaints are requested to be made in writing, but the Law Society will accept complaints recorded on audiotapes or videotapes.

7. A Complainant has a right to be regularly informed of the status of the complaint with which he or she is involved. A status report should be provided at least every 90 days, unless otherwise agreed upon by the Complainant and the Law Society's staff handling the complaint.

8. The Complainant should be reasonably accommodated with his or her requests for meetings about the complaint to the Law Society as required for pursuit of the complaint, and in the scheduling of meetings with the Complainant as requested by the Law Society;

9. All written (including facsimile) or electronic communications from a Complainant that require a response should be acknowledged within 14 days of receipt by the Law Society. Telephone messages from a Complainant should be returned at the latest by the next business day.

10. Where a complaint matter is closed based on Law Society staff's or outside counsel's view of the matter, as the case may be, reasons for not taking further action on a complaint should be provided to a Complainant.

11. A Complainant shall be given the opportunity to have his or her complaint reviewed by a lay bencher of the Law Society, in accordance with the complaints review by-law and policies.

12. A Complainant should be advised of:
    i. the referral of a matter to the Proceedings Authorization Committee within 14 days after the fact of the referral is communicated to the member;
    ii. the decision of the Proceedings Authorization Committee, including the type of proceeding authorized, if any, within 14 days after the decision is communicated to the member.

Institution of Proceedings

13. Unless a Complainant advises that he or she does not wish to be kept informed, Law Society counsel should inform a complainant in writing that an application has been issued for a conduct, competence or capacity proceeding based on his or her complaint, as soon as is reasonably possible after the member has been served with the application, together with a brief explanation of the hearing process and advice on whether the Complainant has a right to be present at the hearing.

Hearing Stage

14. Law Society counsel should make themselves available to respond to a Complainants' reasonable inquiries or requests for information at any stage of the hearing process.

15. In conduct proceedings, Law Society counsel should:
    i. At an early stage in the prosecution of an application, seek the views of a Complainant on his or her expectations of the outcome of the proceedings against the member arising out of the Complainants' complaint;
    ii. Once a hearing date is set, advise the Complainant of this date and any subsequent changes in this date;
    iii. Where practicable, advise the Complainant of significant decisions regarding the withdrawal or amendment of particulars with which that Complainant is involved;
    iv. Where practicable, advise the Complainant of any joint submissions as to penalty;
    v. If the Complainant does not attend at the hearing, write to the Complainant advising of the final disposition of the application and provide a copy of written reasons of the hearing panel, if any;
    vi. In the event of an appeal, advise the Complainant of the appeal, the hearing date of the appeal and the outcome.

16. In competence or capacity proceedings, Law Society counsel should:
    a. Whether or not the hearing is in public, once a hearing date is set, advise the Complainant of this date and any changes in this date;
    b. Whether or not the hearing is in public, write to the Complainant advising:
        1. whether a finding of incapacity or incompetence was made or whether the application was dismissed;
        2. of the resulting order of the hearing panel as may be permitted by the rules governing practice and procedure at Law Society proceedings.
    iii. Provide a copy of any written reasons of the hearing panel, as may be permitted by the rules governing practice and procedure at Law Society proceedings;
    iv. Whether or not the hearing is in public, in the event of an appeal, advise the Complainant of the appeal, the hearing date of the appeal and the outcome.

17. The use of "victim impact statements"at conduct hearings will continue to be dealt with by the existing policy attached to this Protocol, amended to provide for videotaped statements from Complainants where the Complainant and the parties to the proceeding agree. The policy should be brought to the attention of Complainants so that they are aware of the opportunity to provide a victim impact statement to the Hearing Panel.

C. AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE

34. In amending the Protocol, an issue arose concerning what information should be provided to a complainant about the *results* of a capacity or competence proceeding. The Committees concluded that the complainant should be advised of whether or not a finding is made in such proceedings, and, if a finding is made, notwithstanding that the order may not be a matter of public record, should be advised of such parts of the order as the hearing panel determines appropriate. The same would apply at the appeal level. The relevant text is found at paragraph 16 of the amended Protocol above.

35. The Committees were of the view that it would be inconsistent with the scheme of the Protocol to tell a complainant about the fact of such applications but nothing further. Accordingly, this feature of the Protocol required the Committees to consider further amendments to the Rules of Practice and Procedure.

36. The proposed amendments the Rules appear in rules 3.04, 3.04.1 and 3.05 in order to implement the proposed amendments to the Protocol.

Amendment to Rules 3.04 and 3.04.1

37. The Committees recommend the following amendments to rules 3.04 and 3.04.1. The proposed amendments are in boldface type and underlined in the text below.

Capacity Proceedings

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

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

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

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

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

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

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

Professional Competence Proceedings

3.04.1 (1) A proceeding shall, subject to subrules (2), (5), (6) and (7), be held in the absence of the public if it is a proceeding in respect of a determination of whether a member is failing or has failed to meet standards of professional competence.

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

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

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

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

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

(6) Subject to subrule (7), where the hearing of an application for a determination of professional competence has been closed to the public, and where the tribunal has made an order limiting the member's rights and privileges, the tribunal shall determine what aspects of the order shall be made public in order to protect the public interest.

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

38. The Committees recognized that a policy decision was made when the rules on competence and capacity proceedings were drafted to differentiate these proceedings in terms of what aspects of an order would be made public, and in this respect, the Committees noted the difference between subrules 3.04.1(5) and (6) on competence and 3.04(5) on capacity - the competence subrules differentiate between orders which limit members' rights and those that suspend them. The capacity subrule does not.

39. The Committees determined that complainants should receive that part of the order permitted by rules 3.04(5) and 3.04.1(6) above, together with any other aspect of the order that is not a matter of public record that the tribunal determines is appropriate.

40. The Committees were of the view that to give complainants in every case more than that which the tribunal was prepared to give the public would undermine in particular the purpose of the competence stream (essentially, a remedial as opposed to disciplinary focus intended to assist rather than sanction a member). The preference was that whatever the tribunal ordered to be made public through 3.04.1(6) would be informed by the fact of a complainants' interest in the outcome of the proceeding, and that that approach would also permit the tribunal, if it so chose, to go beyond (6) to make other aspects of the order, not otherwise a matter of public record, available to the complainant.

41. Accordingly, these amendments would allow the Society,

a. in capacity proceedings, to provide a complainant with the Panel's decision and a copy of those aspects of the order that the Panel determines to be appropriate where such aspects could not otherwise be disclosed because they did not relate to an order to limit or suspend the member's rights and privileges; and

b. in competence proceedings, to provide a complainant with the Panel's decision and a copy of those aspects of the order that the Panel determines to be appropriate where such aspects could not otherwise be disclosed because they did not relate to an order to suspend the member's rights and privileges and in the case of an order to limit the member's rights and privileges, those aspects of the order were not made public.

42. The Committees discussed whether the word "may" or "shall" should precede the words "be informed of the tribunal's decision" in the above rules. There was a sense that "may" imparted a permissive as opposed to mandatory obligation, which was undesirable. Alternatively, "shall" would impose an obligation to advise a complainant, for example, where the complainant expressly indicated that he or she does not wish to be informed, or where the complainant could not be located. In these cases, it would be unnecessary or impractical to advise the complainant. Accordingly, the words "shall where practicable" were chosen. This change was also made to rules 3.04(3.1) and 3.04.1(3.1).

Amendments to Rule 3.05

43. The Committees recommend that the following amendments be made to rule 3.05. The proposed amendments are in boldface type and underlined in the text below.

Application to Appeals

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

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

44. In the first phrase of each subrule above, the deletion of "reasons" is a 'housekeeping' amendment. Because appeals are taken from a decision or order only pursuant to section 49.32 the *Law Society Act*, the word"reasons" should be deleted.

45. In the last phrase of each subrule, the deletion of "to the decision, order and reasons of the Appeal Panel" is made to ensure that *all* of the rules relating to hearings before the tribunal apply to the proceedings before the Appeal Panel and not only those relating to the decision, order and reasons of the Appeal Panel. This amendment would permit the Society, for example, to inform complainants of the fact of an appeal.

Members' Protocol

46. The Committees agreed that work should begin on the drafting of a "protocol" for members in the Society's investigations and discipline process, an idea which had been raised earlier by benchers in Convocation.[4] A working group of the Committees will be struck to consider the scope and content of such a protocol, mindful of the processes which have already been codified in particular at the hearing stage through the Rules of Practice and Procedure.

47. The working group will report to the Committees in the new committee year.

---

[4]When the complainants' Protocol was adopted by Convocation in November 1997, the suggestion for a members' protocol was referred to the Professional Regulation Committee. At May 29, 1998 Convocation, when amendments to the complainants' Protocol were made, the Committee discussed in its report its consideration of a members' protocol. Convocation at that time agreed with the Committee to defer the matter pending assessment at an operational level of certain process and procedural issues largely focussing on the hearing stage.

D. DECISION FOR CONVOCATION

48. Convocation is requested to:

a. Approve the amended Protocol; and
b. Make the amendments to the Rules of Practice and Procedure as discussed above. A motion for amendment to the Rules appears on the next page.

THE LAW SOCIETY OF UPPER CANADA

RULES OF PRACTICE AND PROCEDURE

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JUNE 23, 2000

RULE 3 - ACCESS TO HEARINGS AND NON-PUBLICATION ORDERS

MOVED BY

SECONDED BY

That rule 3 be amended by:

1. Replacing in rule 3.04(1) the words "subrule (2)," with the words "subrules (2), (5) and (6),".

2. Replacing in rule 3.04(3.1) the words "may advise" with the words "shall, where practicable, inform".

3. Adding to the beginning of rule 3.04(5) the words "Subject to subrule (6),".

4. Adding the following immediately after subrule 3.04(5):

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

5. Replacing in rule 3.04.1(1) the words "subrule (2)," with the words "subrules (2), (5), (6) and (7),".

6. Replacing in rule 3.04.1(3.1) the words "may advise" with the words "shall, where practicable, inform".

7. Adding to the beginning of rule 3.04.1(6) the words "Subject to subrule (7),".

8. Adding the following immediately after subrule 3.04.1(6):

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

9. Deleting subrules 3.05(1) and (2) and replacing them with the following:

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

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

APPENDIX 1

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 17
[FILING REQUIREMENTS]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JUNE 23, 2000

MOVED BY

SECONDED BY

THAT By-Law 17 [Filing Requirements] made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, May 28, 1999, October 29, 1999 and January 27, 2000 be further amended by adding the following French version of Form 17A [Member's Annual Report]:

APPENDIX 2

ORIGINAL VERSION OF COMPLAINANTS' PROTOCOL

Law Society of Upper Canada

PROTOCOL FOR COMPLAINANTS IN THE
LAW SOCIETY'S DISCIPLINE PROCESS
(adopted by Convocation November 28, 1997; amended May 29, 1998)

Generally:

1. A Complainant should at all times be treated professionally and with courtesy, respect and candour by Law Society staff , outside investigators and counsel engaged by the Society with respect to the Complainant's matter.

2. A Complainant should have unimpeded access to information about the Law Society's regulatory processes.

3. The Society should dedicate itself to communicate with a Complainant in "plain language".

4. The Society should communicate with a Complainant, if the Complainant so requests, in French, and use its best efforts to communicate with a Complainant in the language of his or her choice.

5. The location of meetings at the Society with a Complainant, as much as practicalities permit, should be comfortable and convenient for a Complainant.

In the investigatory stage:

6. The Society should assist a complainant, where necessary, in recording a complaint about a lawyer for the purpose of an investigation by the Society. As a rule, complaints are requested to be made in writing, but the Society will accept complaints recorded on audiotapes or videotapes.

7. A Complainant has a right to be informed of the status of the complaint with which he or she is involved. Accordingly, a Complainant should be regularly informed of and have the ability to access information on his or her complaint. For those matters investigated through the post-screening investigatory units of the Complaints Department and ongoing investigations in the Audit and Investigations Department (as a result of a matter directly referred to that department by a Complainant), a status report on the progress of the investigation should be provided at least every 90 days, unless otherwise agreed upon by the Complainant and the Society's investigator.

8. The Complainant should be appropriately and reasonably accommodated with his or her requests for meetings on the complaint matter with the Society as required for pursuit of the investigation, and in the scheduling of meetings with the Complainant as requested by the Society;

9. All written (including facsimile) or electronic communications from a Complainant should be acknowledged within 14 days of receipt by the Law Society. Telephone messages from a Complainant should be returned at the latest the next business day.

10. At the conclusion of an investigation, written reasons for not taking further action on a complaint (based on Law Society staff's or outside counsel's view of the matter, as the case may be) should be provided to a Complainant with an opportunity for review, in accordance with the complaints review procedures and the policies related thereto.

11. A Complainant should be advised of the disposition of a complaint by the Chair and Vice-Chairs of Discipline, other than an authorization for disciplinary action, within 14 days after notification to the member of the disposition.

12. A Complainant should be advised of the fact of an authorization for disciplinary action authorized by the Chair and Vice-Chairs of Discipline based on his or her complaint within 14 days of such a decision.

In the discipline hearing stage:

13. Discipline counsel should make themselves available to respond to a Complainant's inquiries or requests for interviews at any stage of the discipline process.

14. At an early stage in the prosecution of a member, discipline counsel should seek the views of a Complainant on his or her expectations of the outcome of the discipline proceedings against the member being disciplined as a result of the Complainant's complaint.

15. Unless a Complainant advises that he or she does not wish to be kept informed, discipline counsel should:
    i. Following service of a sworn complaint on the solicitor within the meaning of section 33(13) of the *Law Society Act*, write to all Complainants advising that a sworn complaint has been issued, setting out a brief explanation of the discipline hearing process and advising of a Complainant's right to be present at the hearing;

ii. Once a hearing date is set, advise the Complainant of this date and any subsequent changes in this date;

iii. Where practicable, advise the Complainant of significant decisions regarding the withdrawal or amendment of particulars with which that Complainant is involved;

iv. Where practicable, advise the Complainant of any joint submissions as to penalty;

v. Where a Complainant is a witness for the Society at a discipline hearing, adequately prepare the Complainant for the hearing;

vi. If the Complainant does not attend at the hearing, write to the Complainant advising of the final disposition of the sworn complaint and provide a copy of any written reasons of the hearing panel and/or Convocation;

vii. In the event of an appeal, advise the Complainant of the appeal, the hearing date of the appeal and the outcome.

16. The use of "victim impact statements" and the participation in and representation of a Complainant at discipline hearings will continue to be dealt with by the existing policy dated May 29, 1992, amended to provide for videotaped statements from Complainants where the Complainant and the parties to the proceeding agree. The policy should be brought to the attention of Complainants so that they are aware of the opportunity to provide a victim impact statement to the Discipline Committee.

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

Copy of the French language version of Form 17A [Member's Annual Report]. (Appendix I)

It was moved by Mr. Marrocco, seconded by Mr. T. Ducharme that the motion for approving the new By-Law be put.

Carried

It was moved by Mr. MacKenzie, seconded by Mr. Porter that the By-Law on audit cost recoveries be approved.

Carried

It was moved by Ms. Puccini, seconded by Mr. Carey that the matter go back to Committee to consider the issues raised in Convocation.

Not Put

REPORT OF THE ADMISSIONS COMMITTEE

The following items in the Admissions Committee Report were deferred to the September Convocation:

(1) Barristers and Solicitors Oath

(2) Queen's University Proposal for Joint LLB and Master of Public Administration Degree

REPORTS FOR INFORMATION ONLY

Government & Public Affairs Committee Report (June 2000 Report)

Government Relations and Public Affairs Committee
June 6, 2000

Report to Convocation

Purpose of Report: Information

Prepared by the Public Affairs Department

TERMS OF REFERENCE/COMMITTEE PROCESS

The Government & Public Affairs Committee met on June 6, 2000. In attendance were:

Frank Marrocco (Chair)
Rich Wilson (Vice-Chair)
Bob Aaron
Leonard Braithwaite
Abdul Chahbar
Paul Copeland
Allan Lawrence
Bill Simpson

Anji Husain
Dolly Konzelmann
Jane Noonan
Lucy Rybka-Becker
John Saso
Elliot Spears

The Committee is reporting on the following issue:

For Information

Public Affairs Protocol
Critical Issues Protocol

INFORMATION

Public Affairs Protocol & Critical Issues Protocol

The Issue:

1. Government & Public Affairs Committee had a discussion about the need to ensure the timely sharing of information and a process to co-ordinate the development of government and public affairs strategies . The Committee decided that a Public Affairs Protocol and Critical Issues Protocol be developed.

2. Set out at Appendix 1 for Convocation's information, are the Public Affairs and Critical Issues Protocols that will be used by the Law Society of Upper Canada.

APPENDIX 1

PUBLIC AFFAIRS PROTOCOL

Process

1. Public Affairs staff will work with Chairs of other Standing Committees, Task Forces and Ad Hoc Committees to complete the Public Affairs Strategy Template for each issue that impacts on public or government relations activities. This considers government relations needs, as well as stakeholder and public relations.

2. Committee Chairs will update the Government Relations and Public Affairs (GR & PA) Committee on their recommended strategy. Input and advice received from GR & PA Committee.

3. The Government Relations and Public Affairs Committee will add their comments/recommendations to the strategic document and forward them to the Treasurer.

4. With the benefit of input and advice from both the originating Committee or Task Force and the GR & PA Committee, the Treasurer decides whether to act immediately on the recommendations or to take them forward to Convocation.

Public Affairs Strategy Template

• Issue	Outlines issue for Law Society.
• Description and Status	Provides background information and status.
• Jurisdictional Authority	Identifies jurisdictional authority including government, legal organizations, etc.
• Jurisdictional Interest	Identifies bodies with clear interest.
• Desired Outcome	States Law Society's desired outcome or objective.
• Key Stakeholder Positions	Outlines position of other legal organizations, provincial, federal and municipal governments, community groups, social justice groups, media and public.
• Opportunities/Strategy	Suggestions regarding public relations and government relations opportunities and strategies.
• Actions	Outlines action items and next steps.

- Government Relations and Public Affairs Committee Recommendations — Outlines recommendations and advice from GR & PA Committee

CRITICAL ISSUES PROTOCOL

Process

1. Discipline Counsel flags case that contains one or more of the key criteria indicating a "Red Alert" matter with Public Affairs department and copies Secretary.

2. Public Affairs will prepare an issue note in consultation with the Secretary and forward it to the Treasurer and the Chair of GR & PA Committee.

3. The Treasurer will decide at which point an update will be circulated to benchers.

4. Public Affairs department will update benchers on the instruction of the Treasurer.

Red Alert Criteria

If one or more of the following criteria are identified, Discipline Counsel or Investigations staff are to flag issue with the Public Affairs department and Secretary.

Who Is Involved In This Case:

- Does this case involve a prominent member who will elevate external interest in Law Society proceedings?
- Is the member before the hearing panel the focus of an outside investigation or other court proceeding?
- Is the complainant a prominent individual who will contribute to an elevated interest in Law Society proceedings on this matter?

What Is The Case About:

- Is the nature of complaint or conduct, competence or capacity matter one likely to be of

  interest to the media and public?

How Has The Case Been Handled:

- Does the handling of this matter reflect negatively on the Law Society's ability to govern the profession in the public interest?
- Will the handling of the matter be perceived negatively by the membership?
- Will the Law Society appear too lenient in regulating its membership?
- Will time lines be missed?

Equity & Aboriginal Issues Committee Report

Equity & Aboriginal Issues Committee
June 23, 2000

Report to Convocation

Purpose of the Report: Information

Prepared by the Equity Initiatives Department

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

The Equity and Aboriginal Issues Committee met on Wednesday, June 7, 2000, 4:30 - 6:30 p.m. in Convocation Room. In attendance were:

Paul Copeland (Chair)
Judith Potter (Vice-Chair)
George Hunter (Vice-Chair)
Leonard Brathwaite
Marshall Crowe
Janet Stewart (non-bencher)

Staff: Charles Smith, Rachel Osborne, Josee Bouchard, Geneva Yee, Jewel Amoah, Andrea Burck

This report provides updates on four policy and program initiatives the Committee is considering at this time. Submitted as information, these address:

- Workplace Harassment and Discrimination Prevention Policy and Procedures for Benchers;

- Equity and Diversity Education and Training;
- Canadian Bar Association's Report on "Racial Equality in the Canadian Legal Profession"; and
- Demographic Profile of the Legal Profession in Ontario.

For each of these reports, the Committee provided direction identifying necessary modifications and revisions. The Committee anticipates that these reports with recommendations (save for the "Demographic Profile of the Legal Profession in Ontario") will be submitted to Convocation for consideration in September, 2000.

FOR CONVOCATION INFORMATION:

WORKPLACE HARASSMENT POLICY AND PROCEDURES RE BENCHER/STAFF INTERACTIONS:

This report provides a discussion on how Law Societies in other jurisdictions have addressed the issue of processing harassment complaints involving Benchers, and makes recommendations on how the LSUC should develop a workplace harassment policy and complaints procedure to address the issue of Bencher/staff relations.

The Equity and Aboriginal Issues Committee /Comité sur l'équité et les affaires autochtones has asked staff to further develop written complaints procedures.

Equity Initiatives

MEMORANDUM

To: Equity and Aboriginal Issues Committee /Comité sur l'équité et les affaires autochtones

Date: May 29, 2000

Re: Harassment Policy re Bencher / Staff Relations

Introduction

1. During the April 12 meeting of EAIC, the Committee requested that staff in the Equity Initiatives Department undertake research to determine how Law Societies in other jurisdictions have dealt with Bencher/staff relations in their harassment policies. This request was a follow-up to a memo from the CEO to EAIC in which John Saso reported that the existing LSUC *Workplace Harassment and Discrimination Prevention Policy* did not directly address interactions between staff and Benchers.

2. The Equity Initiatives Department surveyed Law Societies across Canada as well as the New York State and Michigan State Bar Associations as to the inclusion, or lack thereof, of Bencher/staff relations in harassment and discrimination policies. The Law Society of British Columbia and the Law Society of Manitoba are the only Law Societies in Canada to address Bencher/staff interactions in their harassment and discrimination policies, and of the two American State Bar Associations contacted, only the New York State Bar has addressed this issue.

Background

3. As John Saso stated in his February 3, 2000 memo to EAIC, the current LSUC *Workplace Harassment and Discrimination Prevention Policy* does not address staff/Bencher relations. The current policy also fails to identify the procedures which are to be followed when a complaint of discrimination or harassment is brought forward. As the Law Society of British Columbia and the Law Society of Manitoba are the only other Law Societies to address Bencher/staff interaction in their harassment policies, these are the only policies which can be referenced to inform the LSUC policy development. The New York State Bar Association also has a sexual harassment policy which covers interactions between members of the House of Delegates (Benchers) and staff, and this policy can also inform the LSUC policy development.

Application of the Policy

4. The Law Society of British Columbia's *Workplace Harassment Policy* states that the policy "...applies to all Benchers, committee members and all those working for the Society in any capacity, including management, professional staff, administrative staff, articling students, summer students and contract personnel". Although the Law Society of Manitoba does not specifically identify Benchers in its *Respectful Workplace Policy*, it does state in its *Benchers Code of Conduct* that ... "Benchers must behave so as to comply with the Law Society of Manitoba's *Respectful Workplace Policy* and must not engage in any of the conduct prohibited by that Policy". The New York State Bar Association's policy on sexual harassment covers members of the House of Delegates, employees, and non-member third parties.

Complaint Procedures

5. The current LSUC *Workplace Harassment and Discrimination Prevention Policy* does not identify any procedures though which a complaint of harassment or discrimination can be addressed. When revising the current policy in order to cover Bencher/staff interactions, the procedures for addressing complaints must also be considered.

6. The Equity Initiatives Department has been working with the Human Resources Department to develop a clear set of complaint procedures to accompany the existing *Workplace Harassment and Discrimination Prevention Policy.* (See TAB A) The proposed complaint procedures currently under consideration do not address Bencher/staff relations. However, since Bencher/staff relations are to be covered by the policy, a modification to the proposed procedures is required.

7. If the LSUC follows the example of the Law Society of British Columbia, then no special procedures need to be developed to process complaints involving Benchers. The LSBC policy does, however, delegate disciplinary responsibilities to specific individuals, and in the case of any disciplinary action taken against a Bencher, it is the responsibility of the Treasurer, upon receipt of the written report of the investigator, to impose disciplinary measures. The LSBC policy also specifically identifies the types of disciplinary measures that the Treasurer can impose, measures which are different from the types of disciplinary action taken in the case of employees. Under this policy, the disciplinary actions which may be taken in the case of Benchers include: " (a) a private reprimand; (b) referral to counselling; (c) reassignment; (d) removal from all committees; (e) public reprimand by the Benchers as a whole; or (f) with regard to lay Benchers, referral of the results of an investigation to the Lieutenant Governor in Council".

8. If the LSUC follows the example of the Law Society of Manitoba, any harassment or discrimination complaint against Benchers will be investigated by independent counsel rather than by internal harassment advisors. The Law Society of Manitoba's *Benchers Code of Conduct* states that complaints against Benchers "shall be supervised by experienced, independent counsel who shall ... exercise all investigatory powers of the Complaints Investigation Committee in connection with the investigation". The Law Society of Manitoba does not require the Treasurer to impose disciplinary measurers against Benchers, but rather states in its *Benchers Code of Conduct* that "... the Complaints Investigation Committee shall proceed to dispose of the matter as it deems appropriate within the scope of the Rules of the Society".

9. The New York State Bar Association's *Sexual Harassment Procedures* do not indicate that complaints against members of the House of Delegates (Benchers) be handled differently than complaints against employees. All complaints are investigated by a "Sexual Harassment Response Committee" which is composed of staff members appointed by the Executive Director, and in some cases may be investigated by outside counsel.

For Committee Consideration

10. In relation to Bencher/staff interactions, the Committee needs to consider both policy as well as procedural issues. In terms of policy, the Committee may wish to

a)adapt the current policy to explicitly cover Bencher/staff relations;

b)following the example of the Law Society of Manitoba, adapt the current LSUC Bencher Code of Conduct to make explicit reference to the LSUC *Workplace Harassment and Discrimination Prevention Policy*; or

c)request that the Equity Initiatives Department and Human Resources Department develop a separate policy to address Bencher/staff relations.

11. Option 'a' is recommended. The existing policy can be easily adapted to cover Bencher/staff relations given that the current LSUC *Workplace Harassment and Discrimination Prevention Policy* already makes reference to Benchers. Section II of the current policy states that "[t]his policy covers employment-related harassment and discrimination involving Law Society employees, Law Society management or its board of governors". However, Benchers are not directly named in the policy under the heading which identifies who is covered by the policy. Any ambiguity arising from the failure to explicitly identify Benchers under the policy description of who is covered can be clarified by including Benchers in this section which identifies to whom the policy applies.

12. In terms of procedures to address complaints of harassment or discrimination involving Benchers, the Committee may wish to:

a)following the model of the Law Society of British Columbia's *Workplace Harassment Policy* (See TAB B), adapt the draft procedures currently under consideration to cover complaints involving Benchers; or

b)request that the Equity Initiatives Department and Human Resources Department develop a separate set of procedures to address complaints involving Benchers.

13. Option "a" is recommended. The LSUC should follow the LSBC model and adapt the proposed complaints procedures to explicitly address complaints involving Benchers. Similar to the LSBC complaints procedures, the LSUC procedure should not place on advisors appointed under the policy the responsibility to proceed with complaints involving Benchers. Rather, the LSUC procedure should instruct that all staff complaints involving Benchers be reported directly to the CEO who will work with the Equity Advisor and the Treasurer to address the complaint. All Bencher-initiated complaints should be reported directly to the Treasurer who will work with the CEO and the Equity Advisor to address the complaint. Any complaints involving the Treasurer should be directed to the Chair of the Equity and Aboriginal Issues Committee who will work with the Equity Advisor and the CEO to address the complaint.

14. The LSUC complaints procedures should also indicate the types of disciplinary measures that may be taken in cases of harassment or discrimination involving Benchers. Again, following the model of the Law Society of British Columbia's *Workplace Harassment Policy*, the disciplinary measures that may be taken in cases involving Benchers will differ from those measures taken in cases involving staff. The LSUC complaints procedure should state that the following disciplinary actions may be taken in the case of Benchers: (a) a private reprimand; (b) referral to counselling; (c) reassignment; (d) removal from all committees; (e) public reprimand by the Benchers as a whole; or (f) with regard to lay Benchers, referral of the results of an investigation to the Lieutenant Governor in Council. These are different from the disciplinary actions that may be taken in cases involving staff which, as stated in the existing *Workplace Harassment and Discrimination Prevention Policy*, include "education, counselling, verbal or written reprimand, transfer or termination of employment".

Equity Initiatives

MEMORANDUM

To: Felicia North Date: May 11, 2000

From: Josée Bouchard
Education and Training Coordinator

Re: Workplace Harassment and Discrimination Prevention Policy & Procedures

---

The following is a draft proposal, for your consideration, of procedures to be included in the *Workplace Harassment and Discrimination Prevention Policy & Procedures.*

DRAFT PROPOSAL ON PROCEDURES AND CLARIFICATIONS TO BE BROUGHT TO THE *WORKPLACE HARASSMENT AND DISCRIMINATION PREVENTION POLICY & PROCEDURES*

Introduction:

The *Workplace Harassment and Discrimination Prevention Policy & Procedures* (the *LSUC Policy*), although quite detailed when describing the types of harassment and discrimination and the situations covered by the policy, does not address clearly the procedure to be followed when a matter is brought to the attention of an Advisor (as defined by the *LSUC Policy*), a manager or an employee of the Law Society of Upper Canada. The following is a proposal for amendments to the *LSUC Policy*. I have consulted a number of harassment and discrimination policies, such as policies adopted by other provincial law societies and universities, along with the guidelines adopted by the LSUC regarding harassment in law firms and guidelines proposed by the Human Rights Commission. The proposed amendments refer mostly to two policies (which are attached), the Law Society of British Columbia *Workplace Harassment Policy* (the *BC Policy*) and the Law Society of Upper Canada *Guide to Developing a Policy Regarding Harassment in Law Firms* (the *LSUC Law Firms Policy*), which are, in my view, well drafted.

Amendments proposed to the *LSUC Policy*:

1. Employer's responsibility

The *LSUC Policy* should include clear language regarding the role and responsibilities of the employer and managers of the organization to ensure a workplace free from discrimination and harassment. The *LSUC Policy* defines "condonation" (at p. 5 of 9) without specifying who is in a supervisory or management position and what procedure should be followed by a supervisor or manager who knows or might reasonably know that harassment or discrimination is occurring.

The Ontario *Human Rights Policy on Sexual Harassment and Inappropriate Gender Related Comments and Conduct* states that:

> Corporate liability may be found:
>
> > a) where the employer's personal action, either directly, or indirectly infringes a protected right, or authorizes or condones, the inappropriate behaviour; or
> >
> > b) where an employee responsible for the harassment or inappropriate behaviour, or who knew of the sexual harassment or inappropriate behaviour, or that a poisoned environment existed, but did not attempt to remedy the situation is part of the "directing mind" of the corporation.
>
> "Directing mind" is defined as an employer or its agents: Employees with supervisory authority may be viewed as part of a corporation's "directing mind", if they function, or are seen to function as a representative of the organization itself. Generally speaking, an employee who performs management duties is part of the "directing mind" of the corporation. If an employee is part of the directing mind of the corporation and a violation of the Human Rights Code occurs while this person is carrying out corporate duties, the act of the employee becomes an act of the corporation.
>
> A person who is a central decision-maker in a service provision or accommodation-related situation may also be liable if she or he knew of the harassment or inappropriate comment or conduct and did not address it.
>
> Persons who are not identified as supervisors per se may also be directing minds if they have supervisory authority or have significant responsibility for the guidance of employees.
>
> A corporate employer may also be responsible for a supervisor's actions where the employer had, or should have had, knowledge of the harassment and failed to take immediate and appropriate action to correct the situation.
>
> On being made aware of such inappropriate comments or conduct, an employer is required to take immediate action to remedy the situation. In particular, where the employer is satisfied that allegation has been substantiated, the employer should consider both disciplinary action and preventative steps including the development and introduction of policy statements and educational initiatives.

2. Definitions and Examples

The *BC Policy* defines terms such as "workplace harassment", "sexual harassment" and "retaliation" and gives examples of unacceptable behaviour and location in great detail. The definitions and examples in the *LSUC Policy* could be expanded to provide further guidance.

3. Threats or Reprisals

The *LSUC Policy* defines threats and reprisals but does not provide a procedure to follow when there are situations of threats or reprisals within the organization. The Canadian Bar Association states that retaliation is frequently defined as another example of harassment. Nevertheless, because retaliation creates a chilling effect on the reporting of harassment, the Canadian Bar Association recommends that retaliation be dealt with more harshly than a primary act of harassment especially if it is the person accused of harassment who is retaliating. It is the employer's responsibility to guard against retaliation and to be aware of the potential for recurring problems.

According to the Human Rights Commission, protection from reprisal covers: complainants, witnesses, advisors, representatives of complainants and witnesses, investigators and decision makers/management. (p. 83 of *Human Rights at Work*, the Human Rights Commission)

The *LSUC Policy* should be clear regarding the consequences of retaliation, the responsibilities of managers when faced with a situation of retaliation and the persons protected from reprisal.

4. Confidentiality

In order to protect the interests of complainants and to encourage complainants to come forward, it is important to include a statement regarding confidentiality of complaints. It is also important to clarify that information may not always be kept confidential, for example where disclosure is required by a disciplinary or other remedial process. The following is an example of a confidentiality statement, taken from the *LSUC Law Firms Policy*:

> The "Law Society of Upper Canada" understands that it is difficult to come forward with a complaint of harassment and recognizes a complainant's interest in keeping the matter confidential.
>
> To protect the interests of the complainant, the person complained against, and any other person who may report incidents of harassment, confidentiality will be maintained throughout the investigatory process to the extent practicable and appropriate under the circumstances.
>
> All records of complaints, including contents of meetings, interviews, results of investigations and other relevant material will be kept confidential by the "Law Society of Upper Canada", except where disclosure is required by a disciplinary or other remedial process.

The *BC Policy* also includes a similar statement of confidentiality:

> The Society recognizes the difficulty of coming forward with a complaint of workplace harassment and a complainant's interest in keeping the matter confidential.
>
> Allegations of harassment may involve sensitive disclosures. Confidentiality is important so that those who may have been harassed feel free to come forward and are reassured that reputations will be protected throughout the process. All information is considered confidential, with disclosure only to those involved in the investigation.
>
> Where a Bencher, committee member or employee initiates proceedings or makes comments outside the Law Society's internal harassment procedures, confidentiality cannot be assured.
>
> Information collected and retained may be subject to release under the rules governing court proceedings.

5. Roles and Responsibilities

The *LSUC Policy* should specify clearly that advisors do not have the same responsibilities as managers of the Law Society of Upper Canada. Advisors are not part of the "directing mind" of the corporation. If a complainant approaches someone who is part of the "directing mind" of the corporation, that person has the responsibility to attempt to remedy the situation. If someone who is part of the "directing mind" of the organization is aware of inappropriate behaviour or that a poisoned environment existed, he or she must attempt to remedy the situation.

The *LSUC Policy* should specify who is part of the "directing mind" of the LSUC, in particular, whether Human Resources Managers, Equity Coordinators and Managers are part of the "directing mind" of the organization. It is clear that the Director of Human Resources and the Equity Initiatives Advisor are part of the "directing mind" of the organization but the *LSUC Policy* should specify their role and responsibilities under the policy.

Team Leaders and Managers

Team Leaders and Managers may be part of the "directing mind" of the LSUC and have the responsibilities stated above.

The *LSUC Policy* presently states that "where issues exist team leaders and managers should seek guidance from an Advisor, Human Resources or Equity Initiatives". If Team Leaders and Managers are part of the "directing mind" of the Law Society, should they seek guidance from the Director of Human Resources and the Equity Initiatives Advisor as opposed to the Advisors under the *LSUC Policy?*

Advisors

The *LSUC Law Firms Policy* suggests that each Advisor shall have access to the notes and records kept by any other Advisor. This is a good practice in that it allows for the identification of repeat incidents of harassment or discrimination or systemic discrimination within the workplace.

The role of the Advisor within the *LSUC Policy* is appropriate and can remain the same.

Human Resources Manager(s) and Equity Coordinator(s)

Human Resources Managers and Equity Coordinator currently assume the same role as advisors. If they are considered to be part of the "directing minds" of the organization, it would be important to modify their role to reflect the added responsibilities of managers.

Director Human Resources and Equity Initiatives Advisor:

The role of the Director of Human Resources and the Equity Initiatives Advisor as described in the *LSUC Policy* is appropriate.

The following excerpt is taken from the *Policy on Sexual Harassment and Inappropriate Gender Related Comments and Conduct* of the Ontario Human Rights Commission and could be incorporated to the role description of the Director of Human Resources and of the Equity Initiatives Advisor:

> Have the responsibility for the development and maintenance of a work environment that is free from discrimination and harassment. Where the Director of Human Resources and/or the Equity Initiatives Advisor become aware of inappropriate behaviour or that a poisoned environment exists, they must attempt to remedy the situation.

6. Procedures:

The *LSUC Policy* is silent on procedural matters. The following are two examples of procedures that are relevant to our situation and well drafted. These procedures could either be included within the existing policy or be adopted as a separate document dealing specifically with procedures.

A) The following is a draft of the procedures suggested in the LSUC Law Firms Policy, adapted for the purposes of the internal structure of the LSUC:

A person who considers that she or he has been subjected to harassment or discrimination (the complainant) is encouraged to bring the matter to the attention of the person responsible for the conduct.

Where the complainant does not wish to bring the matter directly to the attention of the person responsible, or where such an approach is attempted and does not produce a satisfactory result, the complainant has several options to address his/her concerns within the LSUC as through an outside process. They include contacting:

- an Advisor appointed under this policy

- Human Resources Manager or Equity Coordinator

-Director of Human Resources or Equity Initiatives Advisor

-any member of management within the department up to and including the department head.

If a complainant approaches an Advisor:

The Advisor can assist employees by answering their questions, explaining any aspect of this Policy, outlining options for remedy, helping employees with the implementation of remedy and helping employees document a complaint for investigation. Once a complainant has sought the advice of an Advisor, the Advisor will, where appropriate, advise the complainant of :

a. the right to lay a formal written complaint under the policy.

b. the availability of counselling and other support services provided by the Law Society (for example the Employee Assistance Program)

c. The right to be represented by legal counsel, an advocate or other person of choice at any stage of the process when the complainant is required or entitled to be present. (This wording is used in a number of harassment and discrimination policies to ensure that the complainant will be accompanied by someone, if she or he wants, throughout the complaint process. This could be modified to say "the right to be represented by a person of choice...")

d. the right to withdraw from any further action in connection with the complaint at any stage.

e. Other avenues of recourse available to the complainant such as the right to file a complaint with the Ontario Human Rights Commission or where appropriate the right to lay an information under the Criminal Code. The complainant should be made aware of the fact that most complaints filed with the Human Rights Commission should be filed within 6 months of the offence.

If a complainant approaches Human Resources Manager, Equity Coordinator or any member of management:

The Human Resources Manager, Equity Coordinator or any member of management assume the same advisory role as advisors and in this capacity can answer questions, explain the Policy and help employees to resolve or document a complaint. The Human Resources Manager, Equity Coordinator or any member of management are also part of the directing mind of the Law Society of Upper Canada and in that capacity have the responsibility, on being made aware of inappropriate comments or conduct, to attempt to remedy the situation. The obligation to act, even without the consent of the complainant, should be made clear to the complainant at the beginning of the interview.

Once a complainant has sought the advice of a Human Resources Manager, Equity Coordinator or any member management, the manager or coordinator will, when it is appropriate, advise the complainant of :

a. the right to lay a formal written complaint under the policy.

b. the availability of counselling and other support services provided by the Law Society (for example the Employee Assistance Program)

c. The right to be represented by legal counsel, advocate or other person of choice at any stage of the process when the complainant is required or entitled to be present. (This wording is used in a number of harassment and discrimination policies to ensure that the complainant will be accompanied by someone, if she or he wants, throughout the complaint process. This could be modified to say "the right to be represented by a person of choice...")

d. the right to withdraw from any further action in connection with the complaint at any stage.

e. The fact that even if he or she withdraws the complaint, the Manager or Coordinator may have a responsibility to continue to investigate the complaint. All further investigation of the complaint will be done with the involvement of the Human Resources Director and the Equity Advisor.

f. Other avenues of recourse available to the complainant such as the right to file a complaint with the Ontario Human Rights Commission or where appropriate the right to lay an information under the *Criminal Code*. The complainant should be made aware of the fact that most complaints filed with the Human Rights Commission should be filed within 6 months of the offence.

Outcomes to a meeting between a complainant and an Advisor:

a-Where, after discussing the matter, the complainant and Advisor agree that the conduct in question does not constitute harassment as defined in the policy, the Advisor will take no further action.

b-Where the complainant brings to the attention of the Advisor facts which constitute prima facie evidence of harassment or discrimination but, after discussion with the Advisor, the complainant decides not to proceed with a formal written complaint:

i-The advisor may, at the request of the complainant, speak to the person whose conduct has caused offence, in which case the Advisor will keep a written record of what was said to that person.

ii-Where, after meeting with the Advisor, the complainant decides to lay a formal written complaint, whether or not the Advisor is of the opinion that the conduct in question constitutes harassment as defined in this policy, the Advisor will assist the complainant to draft a formal written complaint which must be signed by the complainant.

Outcomes to a meeting between a complainant and a Manager or a Coordinator:

a-Where, after discussing the matter, the complainant and Manager or Coordinator agree that the conduct in question does not constitute harassment as defined in the policy, the Manager or Coordinator will take no further action.

b-Where the complainant brings to the attention of the Manager or Coordinator facts which constitute prima facie evidence of harassment or discrimination but, after discussion with the Manager or Coordinator, the complainant decides not to proceed with a formal written complaint:

i-The Manager or Coordinator may, at the request of the complainant, speak to the person whose conduct has caused offence, in which case the Advisor will keep a written record of what was said to that person.

ii-The Manager or Coordinator will, with the involvement of the Director of Human Resources and the Equity Initiatives Advisor, decide whether or not the evidence and the surrounding circumstances are such as to require the laying of a formal written complaint, to lay a formal written complaint, despite the fact that the complainant does not wish to lay a formal complaint;

iii-Where, after meeting with the Manager or Coordinator, the complainant decides to lay a formal written complaint, whether or not the Manager or Coordinator is of the opinion that the conduct in question constitutes harassment as defined in this policy, the Manager or Coordinator will assist the complainant to draft a formal written complaint which must be signed by the complainant. The Manager or Coordinator will consult with the Director of Human Resources and the Equity Initiatives Advisor regarding the filing of the formal complaint.

Where a formal complaint has been issued, the Advisor, Manager , Coordinator, Director of Human Resources or Equity Initiatives Advisor will:

a. provide a copy of the complaint to the complainant and to the person against whom the complaint has been laid.

b. provide a copy of the Policy to the person against whom the complaint has been laid and advise the person that he or she has the right to be represented by legal counsel, advocate or other person of choice at any stage of the process when he or she is required or entitled to be present.

The Advisor, Manager or Coordinator may, with the complainant's consent, and with the advice of the Director of Human Resources and the Equity Advisor, seek a meeting with the person against whom the complaint is laid with a view to obtaining an apology or such other resolution as will satisfy the complainant; and in so doing, the Advisor will advise both parties that even if the matter is resolved to the satisfaction of the complainant, the managing body of the Law Society is nonetheless obliged under this policy to pursue the investigation and whatever disciplinary action is appropriate.

The Advisor, Manager or Coordinator will record any informal resolution reached between the parties.

The investigation and mediation procedures as described in pages 8 and 9 of the *LSUC Policy* should remain the same.

B. The following is the procedure followed by the BC Policy (Advisors under the *BC Policy* are appointed by the Secretary and the Treasure).

Informal procedure

If a complainant approaches an advisor

A complainant may approach an advisor to obtain information about the policy, and to express and discuss concerns about workplace harassment and alternative courses of action available under the policy.

The purpose of the informal procedure is to allow individuals to develop resolutions to any problems of workplace harassment with the assistance of an advisor. The advisor will inform the complainant of her/his right to be represented by legal counsel, advocate or other person of choice at any stage of the process when the complainant is required or entitled to be present.

Without the consent of the complainant, the advisor will take no further steps apart from providing information and discussing alternatives. As part of the informal process, the complainant, may decide to discuss the issue directly with the person whose conduct has caused the offence, with or without the advisor, or the advisor may offer to meet with the respondent with a view to arriving at a solution to the situation.

Where the complainant and the respondent are satisfied with the resolution achieved, then the advisor will make a confidential written record of the resolution. This record will be kept by the advisor in a locked filing cabinet.

The advisor will follow up to ensure that the solution is working.

Where the complainant does not wish the advisor to take any further action, the advisor may keep a written record of the complaint without disclosing the content of the complaint to the respondent or to any person, including another advisor. This record will also be kept by the advisor in a locked filing cabinet.

The advisor may consider at some later time, because of a change of circumstances (i.e. several complaints are brought forward against the same person), that further action should be taken. Although the advisor will not proceed without the consent of the complainant, the advisor may contact the complainant at that point to determine whether or not the complainant wishes to proceed.

If a complainant approaches a Manager, a Human Resources Manager, an Equity Coordinator, the Director of Human Resources or the Equity Initiatives Advisor

A complainant may also approach a Manager, a Human Resources Manager, an Equity Coordinator, the Director of Human Resources or the Equity Initiatives Advisor, to obtain information about the policy, and to express and discuss concerns about workplace harassment and alternative courses of action available under the policy.

The purpose of the informal procedure is to allow individuals to develop resolutions to any problems of workplace harassment with the assistance of a Manager, a Human Resources Manager, an Equity Coordinator, the Director of Human Resources or the Equity Initiatives Advisor. The complainant will be informed of her/his right to be represented by legal counsel, advocate or other person of choice at any stage of the process when the complainant is required or entitled to be present.

When the Manager, Human Resources Manager, Equity Coordinator, Director of Human Resources or Equity Initiatives Advisor is of the opinion that allegations of harassment or discrimination may be founded, he/she must take immediate action to remedy the situation.

As part of the informal process, the complainant may decide to discuss the issue directly with the person whose conduct has caused the offence, with or without the Manager, Human Resources Manager, Equity Coordinator, Director of Human Resources or Equity Initiatives Advisor.

Where the complainant and the respondent are satisfied with the resolution achieved, then the Manager, Human Resources Manager, Equity Coordinator, Director of Human Resources or Equity Initiatives Advisor will make a confidential written record of the resolution. This record will be kept by the Manager, Human Resources Manager, Equity Coordinator, Director of Human Resources or Equity Initiatives Advisor in a locked filing cabinet.

The Manager, Human Resources Manager, Equity Coordinator, Director of Human Resources or Equity Initiatives Advisor will follow up to ensure that the solution is working.

Formal procedure

The complainant may decide to make a formal complaint to an Advisor, a Manager, a Human Resources Manager, an Equity Coordinator, the Director of Human Resources or the Equity Initiatives Advisor. The complainant may do so by way of a written complaint provided directly to a Manager, a Human Resources Manager, an Equity Coordinator, the Director of Human Resources or the Equity Initiatives Advisor. The Director of Human Resources and the Equity Initiatives Advisor will be consulted throughout the formal procedure.

A copy of the complaint must be given, without delay, to the respondent. If an advisor or a Manager, a Human Resources Manager, an Equity Coordinator, the Director of Human Resources or the Equity Initiatives Advisor has previously been involved, a copy of the complaint will be provided to that person.

The advisor or Manager, Human Resources Manager, Equity Coordinator, Director of Human Resources or Equity Initiatives Advisor may assist the complainant to draft a written complaint which must be signed by the complainant. In that case the advisor or Manager, Human Resources Manager, Equity Coordinator, Director of Human Resources or Equity Initiatives Advisor must:

a) give copies of the complaint, without delay, to the respondent and to the complainant; and

b) without delay, forward the complaint to the department concerned.

7. Information gathering:

The *Human Rights Complaints Process* of Metro is very specific when it comes to fact gathering. The following wording is used when talking about the enquiry process:

> All contacts with an Advisor, Manager or Coordinator, whether they be in person, via telephone, fax, computer, etc. are recorded. At this stage, the Advisor, Manger or Coordinator records all enquiries, options made available to the individual complainant and the decision of the complainant.

When the complainant files a formal complaint, the following information is requested:

> A signed, dated, statement of complaint must be taken from the complainant. This statement should include basic personal information such as:
>
> -complainant's name, home address and telephone number (if the complainant wishes documentation to be sent to his/her home address rather than the work address)
>
> -work address and telephone number
>
> -name of immediate supervisor and work location

-position title and job

-length of service

-length of service in current position

The *LSUC Policy* is not clear on the extent of information gathering by Advisors and Managers. The Human Rights Commission specifies that it is important for everyone involved in the process to make and keep written notes about the events leading to the complaint. These details should include:

What happened: a description of the events or situation;

When it happened: dates and times of the events or incidents;

Where it happened;

Who saw it happen: the names of any witnesses, if any; and

In addition, any other documents of material, such as letters, notes of offensive pictures, connected to the behaviour or course of conduct that is the subject to the complaint.

The issue of whether or not to include specific language within the policy regarding information gathering should be considered.

The *BC Policy* specifies that all records of written complaints must be kept and where they should be kept. Whether or not to include such a provision within the *LSUC Policy* should be discussed further.

Other issues that should be discussed regarding the *LSUC Policy* are the following:

Should the policy specify delays for filing a complaint, for dealing complaints etc...?

Should complainants be entitled to ask for a transfer or to have the respondent transferred to another department for the duration of the investigation?

Should the policy be specific regarding who will receive training and education?

Should the policy specify that there will be a follow up after the resolution of a complaint?

MANUAL OF STAFF POLICIES	
Section: General Policy Statements	Code Number: 2.06
Subject: Workplace Harassment and Discrimination Prevention Policy & Procedures	
Effective Date: March, 2000	Page 1 of 10
Policy Issue Date: March, 2000	Supersedes: New

I. POLICY COMMITMENT

As set out in the H R Principles of the Executive Limitations of The Law Society of Upper Canada, as well as Rules (27 - Sexual Harassment and 28 - Discrimination) the Law Society is committed to providing a collegial environment in which all individuals are treated with respect and dignity. Each person has the right to work in a professional environment that promotes equal opportunities and a climate of mutual respect and understanding, free from harassment and discrimination.

This policy is consistent with the Human Rights Code of Ontario in that it prohibits discrimination and harassment with respect to employment because of:

- race
- ancestry
- place of origin
- colour
- ethnic origin
- citizenship
- creed
- sex (including pregnancy)
- sexual orientation
- age (18 - 64)
- record of offenses
- marital status
- family status
- handicap

The policy is broader than the Ontario Human Rights Code and prohibits discrimination and harassment on the basis of other human characteristics such as physical appearance, socio economic background or occupational group. It also considers unacceptable behaviour of any kind that is either physically and/or verbally abusive, demeaning or degrading of any employee.

MANUAL OF STAFF POLICIES	
Section: General Policy Statements	Code Number: 2.06
Subject: Workplace Harassment and Discrimination Prevention Policy & Procedures	
Effective Date: March, 2000	Page 2 of 10
Policy Issue Date: March, 2000	Supersedes: New

Furthermore, the Executive Limitations - Human Resources Principles section 1.3 states that the Chief Executive Officer shall not operate without a workplace harassment policy for staff that prohibits harassment of any person on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, marital or family status, disability or age.

The intent of this Policy is to prevent discrimination and harassment and where complaints arise to resolve allegations in as prompt, effective, and confidential a manner as possible.

II. WHO AND WHAT SITUATIONS ARE COVERED

Who
This Policy applies to all those working for the Law Society, whether part-time, full-time or casual, regardless of their position in the organization, including contract staff, temporary workers, articling students, summer students and independent contractors.

What
This Policy covers employment- related harassment and discrimination involving Law Society employees, Law Society management and its board of governors. By employment-related, the Law Society Policy includes, but is not limited to,

- the workplace;
- work assignments outside the office;
- office-related social functions;
- work-related conferences and training;
- work-related travel; and
- telephone calls, faxes or electronic mail. Additional information about use of Information Systems can be found in the Information Systems General Use Policy.

The Law Society does not consider as acceptable, harassment or discrimination from people such as Law Society contractors, external service or delivery people, clients, students, opposing counsel, court personnel or judges. Employees who believe that they are experiencing discrimination or harassment arising from their employment from any of these people are encouraged to bring those issues to the attention of The Law Society. The Law

Society will do all it can to ensure that this behaviour stops and to support employees subjected to such treatment.

The Law Society will use this Policy to deal with its own employees whose behaviour is alleged to be discriminatory or harassing toward anyone, internal or external to The Law Society.

III. DEFINITIONS AND EXAMPLES

Discrimination means treating an employee differently and less than others, in terms and conditions of employment, because of a prohibited ground. For example, a female employee is provided less training by a manager because he thinks she might become pregnant so "it would all be wasted".

As well, human rights law includes as discrimination, conduct which may not intend to discriminate but which has an adverse impact on individuals or groups on the basis of a prohibited ground. For example, making an assumption that a hard of hearing person cannot answer the telephone. The law requires that the affected employee be accommodated unless the accommodation would cause undue hardship to the employer.

Harassment is "a course of vexatious comment or conduct (based on a prohibited ground) that is known or ought reasonably to be known to be unwelcome". A course of vexatious comment or conduct is repeated behaviour that is felt to be distressing to an individual. Harassment can occur from coworkers, by supervisors toward their employees or by employees toward their supervisor. Harassment has the effect of creating a degrading, intimidating, hurtful or marginalizing work environment for the person experiencing it.

Though usually on-going and persistent, if a single harassing comment or conduct is serious enough it will be treated as if it were discrimination and one incident of harassment is enough to violate this Policy.

Sexual harassment is one or a series of incidents involving unwelcome comments or conduct of a sexual nature that,

- is likely to cause an intimidating, hostile, humiliating or uncomfortable work environment, or

MANUAL OF STAFF POLICIES	
Section: General Policy Statements	Code Number: 2.06
Subject: Workplace Harassment and Discrimination Prevention Policy & Procedures	
Effective Date: March, 2000	Page 4 of 10
Policy Issue Date: March, 2000	Supersedes: New

Sexual Harassment (Continued)

- may be seen to place acceptance of the unwelcome behaviour as a condition of employment, or
- make acceptance of the harassment as a basis for employment decisions, including matters of promotion, salary, job security or benefits affecting the employee.

Sexual harassment includes, but is not limited to,

Verbal harassment - such as derogatory comments about a person's sexual attractiveness, demeaning jokes, sexual suggestions and innuendo, sexual solicitations;

Physical harassment - unwanted touching, such as stroking, tickling or grabbing someone, impeding or blocking movement in an attempt to get physically close;

Visual harassment - (by any means) - derogatory or degrading posters, explicitly sexual images, cartoons, graffiti;

Racial or Ethnic harassment - unwelcome remarks, jokes, innuendos or taunting about a person's racial or ethnic background, colour, place of birth, citizenship or ancestry. The displaying of racist, derogatory, or offensive pictures or materials. Refusing to speak or work with an employee because of his or her racial or ethnic background. Insulting gestures or practical jokes based on ethnic or racial grounds that cause embarrassment or awkwardness.

Physical / Verbal abuse: offensive language or physically threatening treatment such as deliberately pushing an employee during a work related discussion or repeatedly shouting at an employee or co-worker in an offensive manner.

MANUAL OF STAFF POLICIES	
Section: General Policy Statements	Code Number: 2.06
Subject: Workplace Harassment and Discrimination Prevention Policy & Procedures	
Effective Date: March, 2000	Page . of 10
Policy Issue Date: March, 2000	Supersedes: New

Demeaning / degrading: refers to humiliating a person by reducing their self respect such as a supervisor who repeatedly degrades an employee's work performance in front of others; or jokes or comments made by peers about someone's physical appearance.

Harassment based on any of the prohibited grounds sometimes appears as a *Poisoned environment* which is usually defined as comments or conduct that tends to demean a group covered by a prohibited ground, even if not directed at a specific individual. It describes a situation where offensive behaviour "poisons" the workplace. For example, where staff routinely make derogatory jokes and comments about lesbians and gays.

Other behaviour that would constitute a violation of this Policy are:

Condonation - relates to employees in supervisory or management positions. Where supervisors and managers know "or might reasonably know" that harassment or discrimination is occurring, they have an obligation to take action to stop the offending
behaviour. If they fail to do so, they have "condoned" the behaviour and are violating The Law Society's Policy.

Threats or Reprisals - The Law Society has established this Policy to provide employees with an internal method of addressing harassment or discrimination. Any employees who engage in threats or actual reprisals because a Law Society employee has availed themselves of the Policy is in violation of this Policy. Threats and reprisals seriously escalate the situation and will be dealt with accordingly.

Malicious or Bad Faith Complaint - where the evidence proves that a person has made a complaint under this Policy that s/he knew was untrue, that is itself a violation of this Policy.

It is important to note that there may be insufficient evidence to prove a complaint. That does not mean the complaint was submitted in bad faith. Employees who submit a complaint in good faith, even where the complaint can not be proven, have not violated this Policy.

The above definitions are meant as a guide for employees. Violations are determined by "reasonable effect" on the person who experiences the behaviour as harassing or discriminatory, not by the intent of the respondent.

MANUAL OF STAFF POLICIES	
Section: General Policy Statements	Code Number: 2.06
Subject: Workplace Harassment and Discrimination Prevention Policy & Procedures	
Effective Date: March, 2000	Page 6 of 10
Policy Issue Date: March, 2000	Supersedes: New

Properly discharged supervisory responsibilities, including disciplinary action, are not discrimination or harassment.

This Policy is not intended to unduly interfere with normal social relations among employees, where all those who could be affected find the behaviour welcome.

IV. ROLES AND RESPONSIBILITIES

All employees should ensure that their comments and conduct are acceptable and appropriate.
If unsure, employees should ask if what they are saying or doing is welcome or not. As well, staff should actively work to discourage offensive behaviour by others. Employees are encouraged to discuss specific situations with an Advisor.

When employees feel that they, *or someone else*, have been subjected to harassment or discrimination contrary to this Policy, The Law Society encourages them to take one of the following actions to stop it:

- If comfortable and able to do so, the affected staff person should speak to the person(s) responsible, explaining that you find the comments and behaviour unwelcome, and asking that it be stopped.

- If unable to take that action, or where it has not been successful in stopping the behaviour, the staff person affected should go to one of the Advisors, anyone in management, Human Resources or Equity Initiatives.

Team Leaders and Managers have a major responsibility for the development and maintenance of a work environment that is free from discrimination and harassment.

Specifically, team leaders and managers are responsible for ensuring that,

- their own behaviour is a model for work relations free from harassment and discrimination;

- the workplace is free from discrimination and harassment as defined in this Policy;

- incidents are recorded to enable the Law Society to identify trends and provide education.

Where issues exist, team leaders and managers should seek guidance from an Advisor, Human Resources Manager(s) or Equity Coordinator(s) .

Advisors: Under this Policy, The Law Society will appoint and train Advisors, people who act as internal resources to all employees concerned about possible or actual harassment or discrimination.

Advisors can assist employees by,

- answering their questions;
- explaining any aspect of this Policy;
- outlining options for remedy;
- helping employees with the implementation of remedy; and
- helping employees document a complaint.

Advisors are impartial. If any employee wants their assistance in resolving issues of harassment and discrimination, the advisor can provide it. That can include guiding a supervisor through a situation, speaking to another employee on behalf of a complainant or respondent, facilitating a solution, between two or more affected parties or assisting either a complainant or a respondent through an investigation as a policy advisor.

Advisors are advocates for a workplace free of harassment and discrimination - they are not advocates for any individual. Advisors conduct their role in as confidential a manner as possible. They are not investigators under this Policy nor are they decision-makers.

Human Resources Manager(s) and Equity Coordinator(s) can also be consulted in an advisory capacity if the employee would prefer not to consult an advisor or manager. HR Manager(s) and Equity Coordinator(s) will assume the same role as advisors and in this capacity can answer questions, explain the Policy and help employees to resolve or document a complaint.

MANUAL OF STAFF POLICIES	
Section: General Policy Statements	Code Number: 2.06
Subject: Workplace Harassment and Discrimination Prevention Policy & Procedures	
Effective Date: March, 2000	Page 8 of 10
Policy Issue Date: March, 2000	Supersedes: New

Director, Human Resources and the Equity Advisor- represent the organization and are accountable for the implementation and application of the Policy for The Law Society including,

- educating all staff on the content and the scope of the Policy;
- ensuring appropriate and properly trained staff are in the role of Advisor;
- coordinating investigation of complaints; and
- ensuring the Policy is current and supporting documentation maintained.

Where there is an investigation of a complaint and based on the findings of that investigation, the Human Resources Director and the Equity Initiatives Advisor, in conjunction with the appropriate level of management, shall make a decision as to whether this Policy has been violated and what action will be taken as a result of the findings.

V. TYPES OF RESOLUTION

The intent of the following is to outline ways of remedying the alleged harassment or discrimination.

- A complainant can directly approach the alleged respondent (offender) informing her/him that the behaviour is unwelcome and should stop.

- The complainant can also approach a supervisor, advisor, manager, Human Resources Manager, Equity Coordinator or an Advisor for advice and assistance in resolving their concern.

- If these methods are not successful or are not considered appropriate because of the specific situation, a complainant can submit a complaint to any Advisor or directly to staff in Human Resources or Equity Initiatives requesting an investigation.

- Where a supervisor, manager or Advisor is concerned that harassment or discrimination may be occurring but has insufficient facts to act to remedy the situation, that supervisor, manager or Advisor may also request that staff in Human Resources or Equity Initiatives review the situation.

MANUAL OF STAFF POLICIES	
Section: General Policy Statements	Code Number: 2.06
Subject: Workplace Harassment and Discrimination Prevention Policy & Procedures	
Effective Date: March, 2000	Page 9 of 10
Policy Issue Date: March, 2000	Supersedes: New

Whether submitted by complainant, supervisor, manager or Advisor, the Director of Human Resources and the Equity Advisor will review the complaint and determine if there are reasonable grounds to proceed under this Policy with an investigation.

The investigation process will follow accepted principles of fairness, including'

- an impartial investigation;
- the right to know the allegation and the defence;
- the right to offer evidence and witnesses; and
- the right to rebut relevant evidence.

Investigations will be undertaken and completed as quickly as possible. Though conducted in as confidential a manner as possible, investigators share information on a "need to know" basis.

Each case of alleged discrimination and harassment is unique. The Law Society will use the procedure and resources necessary (including external investigation or mediation expertise) to effectively resolve individual situations of alleged harassment and discrimination.

VI CONSEQUENCES OF VIOLATING THE POLICY

The purpose of this Policy is preventative and remedial. It also provides guidance to employees to facilitate the maintenance of a workplace free of harassment. If it is determined that an employee has violated this Policy, and depending on the severity of the violation, appropriate consequences will be determined and can include education, counselling, verbal or written reprimand, transfer or termination of employment. Specific consequences will depend on the nature and severity of the incident(s).

In a case where it is proven that a complaint was laid by a complainant maliciously and in bad faith, consequences can include any of the above actions.

Where the results of an investigation find that there was a violation of this Policy, the record of disciplinary action shall be placed in the respondent's personnel file. With that exception, no documentation under this Policy will be placed in any employee's file. All other

MANUAL OF STAFF POLICIES	
Section: General Policy Statements	Code Number: 2.06
Subject: Workplace Harassment and Discrimination Prevention Policy & Procedures	
Effective Date: March, 2000	Page 10 of 10
Policy Issue Date: March, 2000	Supersedes: New

documentation under this Policy will be kept in a secure and separate place in Human Resources.

Nothing in this Policy is meant to interfere with any employee's right to take their concerns to the Ontario Human Rights Commission.

FOR CONVOCATION INFORMATION:

EQUITY AND DIVERSITY EDUCATION AND TRAINING PROGRAMS - A DISCUSSION DOCUMENT

The Discussion Document regarding Equity and Diversity Education and Training Programs was reviewed by the Equity and Aboriginal Issues Committee on June 7, 2000. The committee has asked the Equity Initiatives Department to provide an executive summary of the Discussion Document with particular emphasis on training and education programs for benchers. The Committee also directed staff to further clarify its purpose for setting up an "Equity and Diversity Training Centre", particularly respecting potential partners and the role of the Law Society in the Process.

EXECUTIVE SUMMARY
EQUITY AND DIVERSITY EDUCATION AND TRAINING PROGRAMS
DISCUSSION DOCUMENT

Introduction

In response to the recommendations of the *Bicentennial Report on Equity Issues in the Legal Profession* and to the Equity and Diversity Action Plans of the Law Society, the Equity Initiatives Department prepared a Discussion Document outlining equity and diversity education and training programs for internal staff of the L.S.U.C., for its Board of governors and for the legal profession. The development of a curriculum that establishes corporate and departmental objectives and addresses the specific needs and interests of the Law Society, its different departments and the groups within the departments, is particularly important in developing a feasible equity and diversity training and education program. Further, the Law Society's goal of becoming a resource to the profession on diversity and equity would be advanced by the creation of an equity education centre for the legal profession.

The Discussion Document is a first step in such an effort. It examines the importance of equity and diversity education, the initiatives undertaken by the Law Society in the areas of equity and diversity training and education, the development of training and education programs for benchers of the Law Society, the implementation of an equity and diversity training and education curriculum for internal staff of the Law Society, and the development of an equity education centre for the legal profession.

Background

The Law Society's commitment to eliminating discriminatory practices and achieving equity and diversity within the legal profession has led to a number of initiatives undertaken when the need for equity and diversity training has become pressing. The following are a few examples of education sessions undertaken by the L.S.U.C.:

6. The Law Society adopted, in December 1999, its *Workplace Harassment and Discrimination Prevention Policy & Procedure* which applies to all those working for the Law Society. The training of all employees of the Law Society regarding the roles and responsibilities of staff under the harassment policy was completed in March 2000.

- As a respond to the Equity and Diversity Action Plans, which recognise the need to educate staff regarding equity and diversity in employment and how these strategies impact on Aboriginal, Francophone and equity-seeking groups, the L.S.U.C. arranged for training sessions for managers and senior managers. The training focused on issues such as inequity as it occurs in systems and in individual behaviours, the practise of addressing equity and diversity issues with colleagues and similarities and differences in equity and diversity issues for Francophones, Aboriginal peoples and equity seeking groups.

- The Discipline Department, recognising that most systemic barriers to the prosecution of lawyer misconduct arise out of access to justice challenges for complainants and witnesses, and in order to work on the removal of systemic barriers to the prosecution of lawyer misconduct, undertook to train discipline counsel in issues surrounding sexual harassment prosecution.

- The Education Department recently arranged for training sessions for the education services representatives and faculty members on issues such as non-discriminatory language in the workplace and the creation of inclusive, non-discriminatory materials for the Bar Admissions Course.

Equity and Diversity Training and Education Curriculum within the Law Society

The Equity Initiatives Department is performing a needs assessment on equity and diversity education and training programs. The needs assessment involves a series of meetings with heads of departments to determine the needs and interests of each department regarding equity and diversity training programs, the priorities of each department, the objectives of training programs, the characteristics of groups within the departments and the ideal instructional design and delivery techniques.

Orientation and Education of Benchers

The Law Society of Upper Canada acknowledges its roles and responsibilities as governor of the legal profession and in respect of the public interest. In order to create an environment of equality within the legal profession and within its own workplace, the Law Society should ensure that its Board of Governors is committed to the promotion of equity and diversity principles and strives towards the achievement of equality.

The Discussion Document identifies three areas where orientation and education of benchers is desirable: 1) orientation and education of benchers on equity initiatives 2) training of benchers who sit on discipline panels and 3) training and education on the workplace harassment policy.

1) Orientation and education of benchers on equity initiatives

The Discussion Document proposes that an orientation session on equity issues be organised for all benchers to enable Convocation to assume its roles and responsibilities as they relate to equity initiatives. Such a session would be provided through a discussion or seminar involving speakers, preferably benchers who are experts in equity and human rights issues. The session would last approximately two hours and would be held in the context of a convocation meeting. The objectives of the session would be to:

- provide information on issues related to equity and diversity within society and within the legal profession
- review the development and implementation of equity and diversity initiatives by the Law Society and other legal associations within Canada and North America
- clarify the roles and responsibilities of Convocation for equity and diversity leadership as well as policy and program implementation.

An orientation session would also be developed and delivered to new benchers after each election.

The Discussion Document further proposes an ongoing interactive discourse and dialogue program. This would involve engaging benchers in timely discourse and dialogue on key equity and diversity issues which Convocation is required to address. To pursue this approach requires identification of the key issues to engage benchers in discourse and the coordination of seminar-like forums involving presentation, debate and discussion. We anticipate that such seminars would be held once a year, or more frequently if desirable, for a period of approximately two hours.

2) Training of benchers who sit on discipline panels

The Discipline Department's Equity and Diversity Action Plan establishes that it should work towards the removal of systemic barriers to the prosecution of lawyer misconduct. In order to ensure more just outcomes of prosecutions, it is desirable to offer training and education to benchers who sit on discipline panels. The importance of judicial or quasi-judicial education is now recognized and a notable feature of the response to problems of gender and race inequality in the judiciary has been consistency within which proponents of change have charged continuing legal education with a remedial role. The training and education would address issues such as the identification of systemic barriers to the prosecution of lawyer misconduct, the special nature of prosecution of lawyers under rules 27 or 28 of the Rules of Professional Conduct and differential treatment in the discipline process. The training sessions would be designed with the cooperation of benchers who sit on discipline panels and delivered by expert practitioners or academics.

3) Training and education on the workplace harassment policy

The Law Society is reviewing its workplace harassment policy in contemplation of it becoming applicable to Convocation. The L.S.U.C., recognizing the importance of creating a positive work environment exempt of harassment or discrimination, provided mandatory training of all its employees regarding the harassment policy. Training and education on the harassment policy and its impact on benchers and benchers/staff relations will be desirable when the review of the harassment policy is complete.

The Legal Profession

Convocation recognizes the role and responsibility of the Law Society as the governor of the legal profession and its capacities as a policy-maker, resource to the public and the profession, regulator, educator and employer. In this context, the *Bicentennial Report* provides that the Law Society of Upper Canada will strive to create an environment of equality within the legal profession for all people regardless of their race, creed, age, language, nationality, place of origin, ethnic origin, Aboriginal status, disability, gender, sexual orientation, political affiliation and socio-economic status. The Equity and Diversity Corporate Action Plan states that one goal of the Law Society is to develop opportunities for members of the profession to gain knowledge, experience and skills related to working effectively with diverse communities.

The Equity Initiatives Department has held preliminary discussions with lawyers and advocates representing diverse community groups to discuss the Law Society's mandate to develop programs for the improvement of knowledge and skills of lawyers on a broad range of equity issues. The group discussions focused on the creation of an equity education centre that would assist the legal profession in recognising the value of diversity and improve the knowledge of equity issues. The following are elements of the equity education centre:

- The equity education centre would be developed with the cooperation of partners able to access and influence the different parts of the legal profession.

- The curriculum and activities of the centre would be decided by the partners, in cooperation with the Equity Initiatives Department.

- Training and education programs would be structured to meet the needs and interests of the different law firms or members of the profession who may request such services.

- The curriculum and activities would be decided by the partners but would include updates and briefings on important equity-diversity developments in the legal profession, skills development training, intensive, high content sessions with prominent speakers on leading equity-diversity issues, testimonial events and networking forums for equity-committee members from large law firms.

- The equity education centre would provide models to assist law firms in the implementation of equity and diversity principles within the workplace, such as guides to ensure efficient development and delivery of training programs within law firms.

Equity and Diversity Education and
Training Programs

A Discussion Report

1. Introduction

The *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*[1] (the *Bicentennial Report*), which was unanimously adopted by Convocation in May 1997, provides a number of recommendations that address its goals of eliminating discriminatory practices and achieving equity and diversity within the legal profession. The Law Society is committed to implementing positive changes within its workplace and within the legal profession to

[1]The Law Society of Upper Canada, *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession,* (Toronto: The Law Society of Upper Canada, 1997).

achieve equality of outcomes for Francophones, Aboriginal peoples and equity-seeking groups, with the aim of ensuring that its workplace and the profession are free from harassment and discrimination. The Law Society took further initiatives to address equity and diversity issues by developing for implementation corporate and departmental Equity and Diversity Action Plans[2]. The Equity and Diversity Action Plans recognize a need to educate staff regarding equity and diversity in employment and how these strategies impact on Aboriginal, Francophone and equity-seeking groups.

This document provides a number of models for the education and training of the Law Society of Upper Canada staff and the legal profession regarding equity and diversity issues. The document examines: 1) the importance of equity and diversity training and education; 2) the initiatives undertaken by the Law Society in the areas of equity and diversity training and education; 3) principles of adult education; 4) the development of an equity and diversity training and education curriculum within the Law Society 5) the development of an equity education centre for the legal profession, and 6) the development of equity and diversity training in the context of the Connecting Communities with Counsel program.

2. The Importance of Equity and Diversity Training and Education

Recommendation 1 of the *Bicentennial Report* states that the Law Society "should ensure that the policies it adopts actively promote the achievement of equity and diversity within the profession and do not have a discriminatory impact". Recommendation 5 of the *Bicentennial Report* specifies that "in order to support the profession in its pursuit of equity and diversity goals, the Law Society should, in co-operation with other organizations, develop and maintain the tools to function as a resource to the profession on the issue of diversity and equity". Further, the *Bicentennial Report*'s recommendation 6 states that "in order to facilitate and further the advancement of equity and diversity goals, the Law Society must dedicate appropriate human and financial resources specifically to these goals".

The Law Society has recognised the need for education on equity and human rights issues by Law Society staff[3]. In particular, the *Bicentennial Report* indicates the need for education and training regarding Rules 27 and 28 for Law Society staff (investigators and prosecutors) and benchers involved in the complaints process[4] and addresses "Learning Partnerships" as a way of partnering with other organizations to promote education and training for members of the legal profession on equity and diversity issues[5]. In addition, as part of the Law Society development of equity and diversity plans, several departments have noted immediate education and training needs[6].

---

[2]The Law Society of Upper Canada, *Equity and Diversity Action Plans*, (Toronto: The Law Society of Upper Canada, 2000).

[3]*Bicentennial Report, supra* note 1 at 29-39.

[4] *Bicentennial Report, supra* note 1 at 33.

[5] *Bicentennial Report, supra* note 1 at 42.

[6] For example the Discipline Department, the Education Department, Client Services Department, Advisory and Compliance Services and others.

The development of a curriculum that establishes corporate and departmental objectives and addresses the specific needs and interests of the Law Society, its different departments and the groups within the departments, is particularly important in developing a feasible equity and diversity training and education program. Further, the Law Society's goal of becoming a resource to the profession on diversity and equity would be advanced by the creation of an equity education centre for the law profession[7]. The Law Society has undertaken training and education initiatives in response to immediate needs, but has not established a core curriculum based on the ongoing need for education concerning equity and diversity. The following section describes the initiatives undertaken to date by the Law Society in equity and diversity training and education.

3. Initiatives Undertaken by the Law Society in the Areas of Equity and Diversity Training and Education

The Law Society's commitment to eliminating discriminatory practices and achieving equity and diversity within the legal profession has led to a number of initiatives undertaken when the need for equity and diversity training has become pressing. Nevertheless, a core curriculum has not been developed.

A. Workplace Harassment and Discrimination Prevention Policy & Procedures

The Law Society adopted, in December 1999, its *Workplace Harassment and Discrimination Prevention Policy & Procedure* (the *Harassment Policy*) which applies to all those working for the Law Society, whether part-time, full-time or casual, including contract staff, temporary workers, articling students, summer students and independent contractors. The *Harassment Policy* specifies that the Director of Human Resources and the Equity Initiatives Advisor are accountable for the implementation and application of the *Harassment Policy*, including educating all staff on the content and the scope of the *Harassment Policy*.

The training of all employees of the Law Society regarding the *Harassment Policy* was completed in March 2000. The training sessions were prepared and delivered by a consultant company, Key Learning Group Inc. The evaluations by participants indicate that the training sessions were well received.

The training took into account the roles and responsibilities of staff under the *Harassment Policy*. A three day training session was held for Advisors appointed under the policy. The training sessions dealt with the definitions of harassment and discrimination, the roles of the Advisors, the techniques of conducting and documenting interviews, the informal and formal resolution procedures and the remedies. A full day training session was held for managers of the Law Society. That session dealt with the definitions of harassment and discrimination, the procedures to be followed when a complaint is made and the remedies prescribed under the *Harassment Policy*. The training of managers emphasized the special roles and responsibilities of managers as "directing minds"[8] of the organization.

---

[7]Recommendation 5 of the *Bicentennial Report*, supra note 1 at 27.

[8] The term "directing mind" is used by the Ontario Human Rights Commission with the following definition:

> "Directing mind" is defined as an employer or its agents: Employees with supervisory authority may be viewed as part of a corporation's "directing mind", if they function, or are seen to function as a representative of the organization itself. Generally speaking, an employee who performs management duties is part of the "directing mind" of the corporation. If an employee is part of the directing mind of the corporation and a violation of the Human Rights Code occurs while this person is carrying out corporate duties, the act of the employee becomes an act of the corporation.
>
> A person who is a central decision-maker in a service provision or accommodation-related

Finally, a training session of two hours was held for the staff of the Law Society who are not Advisors appointed under the Harassment Policy or managers of the Law Society. That session dealt more generally with the definitions of harassment and discrimination and the procedure to follow if an employee of the Law Society is aware of conduct or practices that could be considered harassment or discrimination.

The Law Society is reviewing its Harassment Policy in contemplation of it becoming applicable to Convocation. Training and education regarding the Harassment Policy and its impact on benchers should be developed when the review is complete.

B. Equity and Diversity Training Sessions for Managers and Senior Managers

The Law Society *Equity and Diversity Action Plans* recognise the need to educate staff regarding equity and diversity in employment and how these strategies impact on Aboriginal, Francophone and equity-seeking groups. As a first step to educate its staff, the Law Society arranged for three training sessions for managers and seniors managers. The training sessions dealt with issues such as inequity as it occurs in systems and in individual behaviours, the practise of addressing equity and diversity issues with colleagues and similarities and differences in equity and diversity issues for Francophones, Aboriginal peoples and equity seeking groups. The training sessions were delivered by Tina Lopes, an expert consultant on organization development and facilitation. Representatives of different organizations, such as Scotiabank and City of Toronto, were invited to talk about their experiences when dealing with equity and diversity issues.

C. Education Seminars on the Investigation and/or Prosecution of Sexual Misconduct Cases

In its *Equity and Diversity Action Plan*, the Discipline Department recognises that "most systemic barriers to the prosecution of lawyer misconduct arise out of access to justice challenges for complainants and witnesses". In order to work on the removal of systemic barriers to the prosecution of lawyer misconduct, the Discipline Department undertook to train discipline counsel in issues surrounding sexual harassment prosecution.

In June 1999, three education seminars were arranged on The Investigation and/or Prosecution of Sexual Misconduct Cases for the Discipline and Investigations Departments. The sessions dealt with issues such as the context of sex and the workplace, the legal context of harassment and discrimination in practice, Rule27- Sexual Harassment and Rule 28-Discrimination. The sessions were delivered by Professor Mary-Jane Mossman, an expert in gender equality and harassment and discrimination within the workplace.

D. Training Sessions on Non-Discriminatory Language in the Workplace for the Education Department

The Education Department's Equity and Diversity Action Plan describes the efforts of the department to address issues of equity raised in the Bicentennial Report as well as its consultations with Aboriginal groups. Its goals for 2000 include developing quality training programs for Education staff with respect to sensitivity and diversity issues and developing reference and seminar materials for use within the Bar Admissions Course that include the voices and faces of members of under-represented groups.

> situation may also be liable if she or he knew of the harassment or inappropriate comment or conduct and did not address it. 1
>
> Persons who are not identified as supervisors per se may also be directing minds if they have supervisory authority or have significant responsibility for the guidance of employees.

Ontario Human Rights Commission, *Policy on Sexual Harassment and Inappropriate Gender Related Comments and Conduct* (approved by the Ontario Human Rights Commission, September 10, 1996).

The Department of Education has hired Tina Lopes, an expert consultant, to plan and deliver training sessions, in cooperation with the Equity Initiatives Department. The sessions are to be held at the beginning of June. One two hour session will be attended by approximately forty education services representatives and faculty members and will deal with issues such as non-discriminatory language in the workplace. The second session, three hours in length, will be held for six faculty members and the Director and will deal with creating inclusive, non-discriminatory materials for the Bar Admissions Course. The sessions will allow for case studies and participation in simulation exercises.

4. Principles of Adult Education

Continuing education has been seen as a way of contributing solutions to problems of inequality before the law[9]. In order to develop a thorough and effective equity and diversity training and education program, a number of factors should be considered, such as the educational objectives, the characteristics of the students, the resources required to implement a particular method and the instructional operations that affect student learning[10].Equity and diversity training and education cannot be designed effectively unless they take into account the specific needs of an adult audience. Generally speaking, adult learning is characterised by being autonomous, self-directed, building on personal experience and the immediacy of application in problem solving[11].

The following principles will be an integral part of the training and education:

- The use of case studies and simulation exercises based on personal experiences
- Issues such as gender equality must be treated within a broader educational framework of promoting equality within a pluralistic society. With this context, gender, for example, is integrated with a range of issues relating to diversity arising from, for example, aboriginality, ethnicity or disability.
- The objectives of the education process are to provide information and promote awareness of problems and solutions; to develop and integrate practical skills and to promote analysis and critical self-reflection of disposition, attitudes and values.
- The program should be designed in multiple, sequenced segments and be ongoing, to consolidate learning and to integrate principle with practice.
- The instructional design of the course and delivery techniques are workshop-based to facilitate active, participatory, self-directed learning.[12]

5. Proposal for an Equity and Diversity Training and Education Curriculum within the Law Society

The Equity Initiatives Department is performing a needs assessment on equity and diversity education and training programs. The needs assessment involves a series of meetings with heads of departments to determine:

---

[9] Livingston, Armytage, "Judicial Education on Equality" (1995) 58 The Modern Law Review Limited 160 at 160.

[10] Alexander, J.T. and Davis, R.H., "Choosing Instructional Techniques", in *Guides for the Improvement of Instruction in Higher Education*, no. 11, p. 1-20.

[11] Livingston, Armytage, *supra* note 9 at 168.

[12] Adapted from the principles of Livingston, Armytage, *supra* note 9 at 182.

- The equity and diversity training programs already in place.
- The needs and interests of each department regarding equity and diversity training programs.
- The priorities of each department.
- The objectives of training the members of departments.
- The characteristics of the groups within the departments.
- The ideal instructional design and delivery techniques.

The following is a list of objectives already set by the Law Society and different departments in the Equity and Diversity Action Plans or other documents produced by the Law Society along with recommendations for the establishment of a long term equity and diversity program. These recommendations will be modified as the Equity Initiatives Department's needs assessment progresses.

A. Corporate Training

a-Equity and Diversity in Employment

The Equity and Diversity Actions Plans state that the Law Society will educate staff regarding equity and diversity in employment and how these strategies impact on Aboriginal, Francophone and equity-seeking groups. An education strategy will be designed and implemented to ensure all employees receive information and gain knowledge on the importance and purposes of equity and diversity in employment.

The Law Society of Upper Canada is conducting research regarding equity and diversity employment policy and programs. This research will address workplace and human resources issues which may pose a barrier to the full participation of Aboriginal peoples, Francophones and equity seeking groups in the organization. A researcher/consultant has been hired to review the literature and best practices on equity and diversity in employment, conduct a workforce availability study to identify appropriate applicant pools, prepare a workforce equity and diversity census form and provide advice and support to the development of the Law Society's equity and diversity employment strategies and actions plans, including outreach recruitment, staff development and employment systems review.

The Law Society, as employer to over 300 employees, faces the challenges of ensuring an inclusive, harassment-free work environment, barrier-free employment systems and a workforce reflective of the labour market. It is important that the Law Society ensure that all its employees are knowledgeable of equity and diversity issues, respectful of the diversity and dignity of all in the workplace, and implement equity initiatives.

Objectives of training sessions:

- Ensure that the employees at all levels of the workplace are aware of equity principles
- Emphasize the Law Society's commitment towards achieving equity and diversity and the initiatives undertaken by the Law Society in equity and diversity
- Communicate to all employees the Law Society's expectations concerning equity and diversity.

Characteristics of the Audience

All employees of the Law Society should receive education regarding general principles of equity and diversity and the corporation's commitment to achieving equity and diversity. Managers and senior managers should receive training that emphasizes their responsibilities as supervisors of employees.

Delivery of the training sessions

Short training sessions (approximately 2 hours) could be offered for employees, in small groups, on issues such as:

- What is equity and diversity in employment.
- How to recognize and analyse inequity as it occurs in systems and individual behaviours.
- The initiatives undertaken by the Law Society.
- Addressing equity and diversity with colleagues.

Managers and senior managers sessions would be longer and would put emphasis on issues such as the responsibility of supervisors when dealing with equity and diversity issues.

b-Harassment and Discrimination

The Law Society has adopted a Workplace Harassment and Discrimination Prevention Policy & Procedures (the Harassment Policy) to help create a professional environment that promotes equal opportunities and a climate of mutual respect and understanding, free from harassment and discrimination. Training programs for all staff members, structured to take into consideration the roles and responsibilities of employees and managers within the workplace and more particularly as defined by the Harassment Policy, helps in the promotion of a collegial environment in which all individuals are treated with respect and dignity.

Objectives of the training sessions:

Training and education programs regarding the Harassment Policy would aim at achieving the following objectives:

- Ensure that all staff receive training to enable them to identify what is discrimination and harassment and to take the necessary steps to prevent and eliminate such practices within the workplace;
- Ensure that Advisors, as defined under the Harassment Policy, receive ongoing training and education to enable them to identify practices or incidents of discrimination and harassment, to understand their role and responsibilities as Advisors under the policy, to develop the skills required to conduct interviews and interact with complainants and respondents, to know how to document the information received and to grasp the procedural structure established by the policy.
- Provide a forum where Advisors can exchange ideas and discuss relevant information regarding workplace harassment and discrimination. Ensure that Advisors remain abreast of the latest developments in the areas of harassment and discrimination within the workplace.

- Ensure that all managers and persons who are part of the "directing mind" of the Law Society of Upper Canada receive ongoing training and education to enable them to identify practices or incidents of discrimination and harassment, to understand their role and responsibilities as managers of the organization and more specifically as part of the "directing mind" of the organization, to develop the skills required to conduct interviews and interact with complainants and respondents, to know how to document the information received and to grasp the procedural structure established by the policy.

- Provide a forum for managers to discuss and exchange ideas and information on workplace harassment and discrimination and ensure that managers remain abreast of the latest developments in the areas of harassment and discrimination within the workplace.

Mandatory training

As mentioned above, the training of all employees of the Law Society regarding the Harassment Policy was completed in March 2000.

New staff will require training sessions. The training should be offered periodically when a sufficient number of new staff is available for training. (The training could be offered to groups of six to twelve people).

Further, the Harassment Policy will be modified from time to time. All staff of the Law Society should receive training on the Harassment Policy when the amendments are substantial.

All staff should receive mandatory training on a regular basis, such as every two to three years.

Although the training by external consultants has been successful, it would be desirable to transfer the responsibility of preparing and delivering the training sessions to the Equity Initiatives Department, with the cooperation of the Human Resources Department. This would alleviate the need to make arrangements with consultants well in advance, would reduce the cost of preparing and delivering the sessions and would allow for easier internal planning.

The training for staff would consist of one three hour session to deal with the following issues:

- The definitions of harassment, discrimination and the latest legal developments in those areas.

- The Harassment Policy.

- The roles and responsibilities of staff, advisors and managers within the policy and the procedure to file a complaint.

The training of all Advisors appointed under the Harassment Policy would be more intensive due to their roles as recipients of complaints under the Harassment Policy. Advisors will need to receive mandatory intensive training at regular intervals, such as every two to three years.

The training sessions would last 3 days and would cover the following issues:

- An overview of the definitions of harassment and discrimination and of the Harassment Policy.

- Overview of the procedural aspects of the Harassment Policy and the roles and responsibilities of staff, advisors and managers within the policy.

- The principles of conducting and documenting interviews.

- The confidentiality of information.

- The informal and formal resolution of complaints..

The training of all managers of the Law Society of Upper Canada and all employees who are part of the "directing mind" of the corporation under the Harassment Policy will be structured to address their supervisory authority as managers. New managers hired or appointed from time to time will require training sessions. The training should be offered periodically when new managers are hired or appointed. The mandatory training of managers at regular intervals, such as every two to three years, is also desirable.

The training sessions for managers would last one day and would address the following issues:

- The definitions of harassment and discrimination and the latest legal developments in those areas.

- The confidentiality requirements.

- The procedural aspects of the Harassment Policy .

- The roles and responsibilities of staff, Advisors and managers within the policy. Special emphasis will be placed on the management roles, responsibilities and accountabilities.

All sessions would allow for case studies and simulation exercises.

On-going dissemination of information

The purpose of this educational strategy is to ensure that staff receive regular information regarding workplace equity. The increased awareness of equity principles will help create a climate of mutual respect and understanding, and a work environment free from harassment and discrimination. This educational program would not replace the mandatory training sessions.

All staff would receive, on a regular basis(approximately once a month), up-to-date information via electronic mail or mail. The following are examples:

- Information regarding the promotion of equity, diversity and human rights within the workplace.

BBB) Summaries of court decisions or board of inquiry decisions in human rights and more particularly on workplace harassment and discrimination.

CCC) Information regarding the internal work of the Law Society regarding human rights and equity issues.

DDD) Announcements regarding meetings of Advisors appointed under the Harassment Policy.

EEE) Other information that is relevant to workplace harassment and discrimination.

Group Discussions for Advisors

The purpose of this educational strategy is to provide a forum where Advisors can exchange ideas and relevant information regarding workplace harassment and discrimination, receive support from colleagues and keep abreast of new developments regarding equity within the workplace. Advisors will meet with a representative of the Human Resources Department and of the Equity Initiatives Department once every month, or more frequently if desirable, for a period of approximately 2 hours. These sessions would be developed based on the needs and interests of the Advisors and will also put emphasis on practical skills such as case studies. These sessions would be informal, to encourage the exchange of practical information and experience, and would allow for:

- The analysis of case studies that deal with harassment and discrimination within the workplace.
- Discussions on relevant legal developments in the areas of human rights, harassment and discrimination.
- Conversations regarding equity initiatives within the Law Society of Upper Canada.
- The exchange of ideas and experiences between Advisors and with the equity initiatives representatives and/or human resources representative.
- The identification of information that should be disseminated to the staff of the Law Society of Upper Canada

Managers meetings

The purpose of this educational strategy is to provide a forum where managers can exchange ideas and relevant information regarding workplace harassment and discrimination and keep abreast of new developments regarding equity within the workplace. Managers will meet with a representative of the Human Resources Department and of the Equity Initiatives Department once every 6 months, or more frequently if desirable , for a period of approximately 2 hours. These meetings will take into account the needs and interests of the managers and will put emphasis on practical skills such as case studies. These sessions will be informal, to encourage the exchange of practical information and experience, and will allow for:

- The analysis of case studies that deal with harassment and discrimination within the workplace.
- Discussions of relevant legal developments in the areas of human rights, harassment and discrimination.
- The review of equity initiatives within the Law Society of Upper Canada.
- The exchange of information on the work environment within the Law Society of Upper Canada.
- The exchange of ideas and experiences between managers and with the equity initiatives representatives and/or human resources representative.
- The identification of information that should be disseminated to the staff of the Law Society of Upper Canada.

c-Accommodation

The Law Society is in the process of drafting a workplace accommodation policy and procedures. In order to facilitate the consultation process for the adoption of the accommodation policy, the Equity Initiatives Department proposes a mandatory discussion session for managers and senior managers, with the assistance of experts in human rights law, accommodations and undue hardship. The objectives of such a session would be to understand the concept of accommodation and undue hardship and to fully grasp the implications of the duty to accommodate within the workplace.

The adoption of the accommodation policy, which is anticipated in 2000-2001, will lead to more intensive training and education programs for all Law Society staff. These training sessions should not only deal with the issue of accommodation as a legal concept, but with more practical issues such as: how is accommodation put in practice, the policy and its application within the workplace.

d- Communications

The *Bicentennial Report* states that the Law Society "should continue to set and monitor equity standards for its own staff that will make it a model for the profession as an employer".[13] Ensuring inclusiveness in all Law Society communications is the foundation to creating an equitable workplace. General training for all Law Society staff should be provided on the use of inclusive language and material which include the voices and faces of members of under represented groups. Further training regarding the use of inclusive communication can be structured based on the practices of different departments and working groups within the departments.

e-Board of Governors

The Law Society of Upper Canada acknowledges its roles and responsibilities as governor of the legal profession and in respect of the public interest. In order to create an environment of equality within the legal profession and within its own workplace, the Law Society should ensure that its Board of Governors is committed to the promotion of equity and diversity principles and strives towards the achievement of equality. A memorandum for discussion, dated April 13, 1999 (Appendix A), was prepared by Charles Smith, Equity Advisor, regarding orientation and education of newly elected benchers. The memorandum suggested a number of issues which would help in the development of an educational opportunity: a review of the roles and responsibilities of benchers, particularly as they relate to equity initiatives, and how best to provide meaningful education to enable benchers to assume these roles well, thereby, enhancing Convocation's understanding of and commitment to equity implementation. In his memorandum, Charles Smith suggests that it would be useful to establish clear objectives for the proposed equity and diversity education of Convocation benchers. These should include:

- Providing information on issues related to equity and diversity within society and within the legal profession.
- Reviewing the development and implementation of equity and diversity initiatives by the Law Society and other legal associations within Canada and North America.
- Providing opportunities for discourse on the further implementation of equity and diversity initiatives by the Law Society.
- Clarifying the roles and responsibilities of Convocation for equity and diversity leadership and well as policy and program implementation.

These objectives lend themselves to various formats for equity and diversity education for elected officials such as orientation sessions, self-study, engagement in dialogue and the development of appropriate knowledge and skills.

---

[13] *Bicentennial Report, supra* note 1 at 35.

In its memorandum of 1999, Charles Smith proposed options for the education and orientation of newly elected benchers:[14]

- A traditional equity and diversity education and training program. This would involve providing knowledge and limited skills enabling members of Convocation to improve their awareness of equity and diversity issues and how they may impact on their responsibilities. Such sessions are normally provided through seminars and workshops involving speakers as well as team building and simulation exercises. The benefit of such an approach is that it provides a basis for the development of knowledge and skills that can be common to all benchers. It would also facilitate understanding of equity issues, their cause and purpose, and build a sense of common approach by benchers. The limitations of this approach is that it can be abstract from the day-to-day responsibilities for benchers and provide no clear expectations or performance measures.

- An interactive discourse and dialogue education and training program. This would involve engaging benchers in timely discourse and dialogue on key equity and diversity issues which Convocation is required to address. To pursue this approach requires identification of the key issue(s) to engage benchers in discourse and coordination of seminar-like forums involving presentations, debate and discussion. The benefit of such an approach is that it is specific to issues and, therefore, can be measured in terms of its impact. It also provides a venue to educate about equity and diversity issues more generally . The limitations of this approach is that it can be too narrowly tailored so that the broader equity and diversity issues are not adequately addressed. As such, it would require additional sessions, and issues to address, to achieve a more holistic understanding of equity and diversity issues.

- A combination of both options listed above. This maximizes on the benefits of each option which reducing their limitations.

It was recommended that the third option be adopted and that an orientation program be implemented to provide information on the Law Society's initiatives and commitments to equity initiatives; the initiatives of other associations in the legal profession: the social, cultural, economic and political trends related to equity work and key concepts and terms in the equity field. Following such seminar, benchers should be invited to participate in the consultations proposed to engage equity-seeking groups. This would expand on the seminar approach and provide an active dialogue with members of the profession concerned about equity and diversity implementation.

B-Departmental Education

a-Department of Education

The Equity and Diversity Plan prepared by the Department of Education adopts the following goals:

- To develop reference and seminar material for use within the Bar Admissions Course which include the voices and faces of members of under-represented groups.

---

[14]The Law Society of British Columbia has delivered a number of awareness sessions for its benchers. In 1993-94, the Law Society of British Columbia held an awareness session, during a retreat of benchers, with respected representatives of the Aboriginal community, an equity consultant and a professor knowledgeable in demographic studies. In 1998, a consolidated equity committee was established. A second awareness session was held with respected members of the community, a lawyer from the lesbian community, a lawyer with disability, a community worker, an aboriginal member from the parole board and an equity consultant. Presentations on equity issues are now held annually for the Law Society of British Columbia benchers.

- To develop quality training programs for Education staff (internal) and the BAC instructors (external) with respect to sensitivity and diversity issues.

- To develop a communication/education plan to make the profession aware of the needs of the students and the responsibility of the profession towards educating the students.

As mentioned above, two training sessions are scheduled (to take place in June 2000) to address sensitivity and diversity issues for staff and inclusiveness of language within the Bar Admissions Course material.

The Equity Initiatives Department is studying the Bar Admissions Course curriculum, its substance and its structure to evaluate how to make it inclusive of equity and diversity perspectives within its content and structure. A more comprehensive training proposal will be provided when this study is complete.

Nevertheless, the Equity Initiatives Department is of the view that equity principles should be respected and promoted, not only in the language used in the material of the Bar Admissions Course, but also in the language used in the classrooms. Inclusive pedagogy principles should be used and respected in order to promote the participation of all students and to ensure that all students are treated equitably. The Equity Initiatives Department proposes that all instructors, team leaders and faculty members be trained on issues such as inclusive pedagogy and how to deal with classroom incidents of discrimination or inappropriate behaviour by students or instructors. Further, consultation sessions between faculty members, team leaders and instructors and experts in critical theory could be organized to discuss the influence of equity perspectives in each of the subject areas taught in the Bar Admissions Course. The experts could assist in including critical theory within the core subject areas. This would allow for an exchange of information and perspectives that would assist in creating Bar Admissions Course lectures and materials that are more inclusive of critical perspectives.

b-Advisory & Compliance Services

The Department is divided into teams:

- Advisory Services - providing ethical and practice advice to lawyers.

- Resolution and Compliance - resolving minor complaints and assisting lawyers with practice windups, bankruptcies and compliance with filing obligations,

- Spot and Focussed Audits - ensuring widespread compliance with trust accounting and related filing requirements;

- Administrative Compliance Processes - processing and review of lawyer filings, assisting lawyers with voluntary resignation and requests for fee exemptions.

The legal profession is made up of people from diverse communities, including Francophones, Aboriginal peoples and equity-seeking groups. The Advisory and Compliance Service should design and deliver its services in a way that maximizes accessibility and impact. Training sessions should reflect the goal of offering services to a legal profession that is increasingly diverse.

c-Discipline Department

The Discipline Department's Equity and Diversity Action Plan establishes the following goals:

- The removal of systemic barriers to the prosecution of lawyer misconduct.

- To treat all members who are the subject of discipline hearings fairly and equitably.

The following has been suggested to meet these goals:

- Train discipline counsel not to make credibility or other judgments
- Train discipline counsel in issues surrounding sexual harassment prosecutions
- Sensitivity training for all staff

As noted above, the Discipline Department has already undertaken a series of training sessions regarding the handling of complaints of sexual harassment. The Equity Initiatives Department proposes that, with the cooperation of the Discipline Department, it structure regular training sessions, offered by members of the legal profession with identified skills and experience, regarding the handling of complaints of harassment, sexual or otherwise, and discrimination (under rules 27 and 28 of the Rules of Professional Conduct). These sessions could include sensitivity training on how to avoid making credibility or other judgments based on irrelevant factors. Ongoing information sessions regarding the development of the law and case law would also be desirable. The anticipated outcome of the training session are stated in the Discipline Department's Equity and Diversity Action Plan:

- Better communication between complainants or witnesses and counsel.
- Complainants and witnesses have better understanding and comfort level at hearing.
- Witnesses are better prepared to testify at hearing.
- Discipline counsel focus on relevant factors only in assessing and presenting evidence
- Discipline counsel have better awareness of difficulties faced by complainant and of behaviours consistent with allegations of harassment
- Discipline counsel are aware of availability of expert evidence on issues surrounding harassment and able to provide such evidence to panels where appropriate.
- Benchers have information which allows them to make credibility assessments based on relevant information only.
- More just outcomes of prosecutions.

Training should also be offered to benchers who sit on discipline panels. The importance of judicial education is now recognized and it is argued that "a notable feature of the response to problems of gender and race inequality in the judiciary has been the consistency with which proponents of change have charged continuing judicial education with a remedial role. Education, even within the judicial environment, has long been recognised as an agent of change."[15] Livingston Armytage also suggests that it is "open to the judiciary to recognise the existence of a perceived need for judicial education in relation to gender bias and ethnic inequality. This need is generally perceived in the community, whether correctly or otherwise. Equally, once it is recognised at a doctrinal level that justice must not only be done but must also be seen to be done, it is argued that the credibility of the judiciary is impaired if it is not seen to be concerned with redressing these perceived problems".[16] The need for training and education on issues involving systemic barriers

---

[15]Livingston, Armytage, *supra* note 9 at 160.

[16] Livingston, Armytage, *supra* note 9 at 165.

to the prosecution of lawyer misconduct has been recognized by the Discipline Department. Benchers who sit on discipline panels, although independent and impartial, would benefit, just as the judiciary benefits from continuing legal education on equity and diversity issues, from training and education. Such training and education programs would be developed with the ongoing cooperation of benchers involved in discipline cases.

d- Client Services Department

The Client Services Department has suggested the following in its Equity and Diversity Action Plan:

- Director of Client Services should be trained in Equity and Diversity issues that affect staffing such as: diverse communities (including Francophones and Aboriginal peoples), as well as equity-seeking groups (women, people with disabilities, ethno cultural and racial minorities, immigrants and refugees, lesbians, gays, bisexuals, transgenders, people with low incomes and people with different religious customs, beliefs and faiths.

- Provide equity and diversity training for Department staff (which would deal with issues such as: the history and background of equity and diversity, demographics of the Canadian, Ontario and Toronto populations, demographics of the members and employees of the Law Society)

- Provide harassment and stress management training for Department staff (including how to distinguish and deal with harassment and abuse from customers whether on the phone or in person)

The Client Services Department specifies that it will co-ordinate, with the Equity Initiatives Department, the structuring and delivery of the seminars. The seminars will have to be structured to take into account the busy nature of the work performed at the Call Centre.

e-Human Resources

Human Resources is committed to developing and improving current recruitment and selection policy, practices and tools. In that context, the Law Society has hired a researcher/consultant to address workplace and human resources issues which may pose a barrier to the full participation of Aboriginal peoples, Francophones and equity seeking groups. Further, the Equity and Diversity Action Plan for Human Resources states that it will raise awareness of equity and diversity and how they affect staff interactions in recruitment, performance management, and discipline.

Human Resources provides that they will educate and train users on the organization's hiring policies, practices, tools and how to apply said to ensure hiring decisions are bias free and in compliance. It will also provide education and skills development training for managers and employees about equity and diversity in the workforce.

6. The Legal Profession

Convocation recognizes the role and responsibility of the Law Society as the governor of the legal profession and its capacities as a policy-maker, resource to the public and the profession, regulator, educator and employer. In this context, the *Bicentennial Report* provides that the Law Society of Upper Canada will strive to create an environment of equality within the legal profession for all people regardless of their race, creed, age, language, nationality, place of origin, ethnic origin, Aboriginal status, disability, gender, sexual orientation, political affiliation and socio-economic status. The Equity and Diversity Corporate Action Plan states that one goal of the Law Society is to develop opportunities for members of the profession to gain knowledge, experience and skills related to working effectively with diverse communities, particularly Aboriginal, Francophone and equity-seeking groups. The Plan further suggests that education and training programs be implemented.

In September 1999, the Equity Initiatives Department held a meeting with lawyers and advocates representing diverse community groups to discuss the Law Society's mandate to develop programs for the improvement of knowledge and skills of lawyers on a broad range of equity issues. The group spoke broadly about the legal profession and some of its general characteristics which might affect the development of an equity education centre. Relevant characteristics include:

- A profession that is slow to change.
- A profession that is concerned about its negative image in society
- A large number of lawyers believe in individual achievement.
- A number of lawyers choose not to join larger firms because they are alienated by the large size and practises of many large firms.
- Small firms may not have adequate time to deal with equity and diversity issues.

The following were seen as key challenges that would have to be addressed to create a viable equity education centre:

- A belief that equity does not add value for law firms which already have strong reputation and clients.
- A professional mind set that recognizes and values individual achievement over concern for the removal of systemic barriers.

The group emphasized that the target for an equity education centre needs to be clearly understood. The following questions would have to be address:

- Who are the learners likely to be?
- Why would they come to learn?
- What influence would they have when they return to their firms and practise?

The development of an equity education centre requires partners able to access and influence the different parts of the legal profession. Some potential members to the Law Society were suggested, such as: CBA, LPIC, large firms, medium size firms, small firms, community leaders and other advocacy groups. The partners would be necessary in order to lend credibility to an equity education centre . They should be representative of different segments of the Ontario legal profession and reflective of advocacy and other organizations who serve Ontario's diverse communities.

The equity education centre would require a strong mandate which states an overall goal for equity-diversity training. The statement would have to address the different social justice, business, Convocation-mandated and legal reasons for establishing an effective equity education centre.

The curriculum and activities of the centre would be decided by the partners, in cooperation with the Equity Initiatives Department. All training and education programs would be structured to meet the needs and interests of the different law firms or members of the profession who may request such services.

A goal of the equity education centre would be to demonstrate the value of diversity. Law firms and legal practitioners have to offer services to an increasingly diverse population. Further, the legal community will have access to an increasingly larger demographic talent pool. Lewis Brown Griggs suggests that "more and more, organizations can remain competitive only if they can recognize and obtain the best talent, value the diverse perspectives that come with talent born of different cultures, races, and genders, nurture and train that talent, and create an atmosphere that values its workforce. One of the many rewards organizations begin to see when they establish a diverse workforce is an increased market for its services or products".[17]

The following are possible models of sessions that could be developed for law firms and legal practitioners. The curriculum and activities would be decided by the partners but would include updates and briefings on important equity-diversity developments in the legal profession, skills development training, intensive, high content sessions with prominent speakers on leading equity-diversity issues, testimonial events and networking forums for equity-committee members from large law firms.

A-Large and Medium Size Law Firms

Large and medium size law firms will have equity and diversity needs that are different from small law firms or sole practitioners. The needs and interests of large and medium law firms will also vary according to a number of other factors such as the type of law practice, the client base, the internal structure of the firm, the number of employees, lawyers and partners. The following are proposed models for discussion:

a-Informal Education Sessions

A number of law firms' organizational structures includes equity and diversity committees and other committees that deal with issues of equity and diversity on a regular basis. For example, law firms sometimes have articling committees and hiring committees who deal with issues of equity and diversity within the workplace such as hiring practices and interview techniques. The Equity Initiatives Department proposes that the Law Society be available to meet with such committees, or ensure that experts are available to meet with such committees, on an informal basis, to discuss issues such as:

- Harassment and discrimination within the workplace and organizational responsibility.
- Equity in recruitment practices and in hiring of articling students.
- Proper interviewing techniques .
- Accommodation within the workplace.
- Use of inclusive language within the workplace.
- The positive aspects of having a workforce reflective of the population.

---

[17] Lewis Brown Griggs, "Valuing Diversity" in Lewis Brown Griggs and Lente-Louise Louw, ed., *Valuing Diversity New Tools for a New Reality* (New York: McGraw-Hill, Inc., 1995) 1 at 9.

b-Continuing Legal Education

A number of law firms have adopted internal continuing legal education programs. Training programs could be coordinated by the Equity Initiatives Departments and the director of continuing legal education within the law firm, and take into account the firms already existing continuing legal education programs. The delivery of the seminars would be done by highly qualified and respected members of the legal profession. Such training could deal with subjects such as:

- Working with support staff: equity and diversity considerations.
- Dealing with other professionals at the firm: equity and diversity considerations
- Dealing with clients who come from diverse backgrounds.

c-Formal Training Sessions

A number of law firms have identified a need to educate all staff, lawyers and non-lawyers, on issues of equity and diversity. The Law Society could offer to coordinate the planning of training sessions, based on the structure of the law firm, its needs and interests, and the objectives of doing the training. The Law Society would also provide names of qualified and respected advocates who could effectively offer the training sessions. The sessions would be offered on a cost recovery basis. Such sessions would deal with issues identified by the law firms. For example:

- Harassment and discrimination within the legal profession
- How to draft a harassment and discrimination policy
- Flexible work arrangements and how to draft a policy
- Accommodations within the workplace and the duty of the organization
- Under-represented groups within the legal profession
- The discrimination and harassment counsel: mandate and responsibilities.
- Equity and diversity in hiring and recruiting
- The use of inclusive language
- Critical analysis of the law
- How to create a positive workplace environment, free from harassment and discrimination
- Same sex couples: their rights.

d-Train the Trainer

Law firms may be in a position to offer firm wide training programs through their own internal expertise. The Law Society could structure training programs to "train the trainers". The advantages of such programs are:

- Law firms members are trained and can in turn train others.

- Training internal staff by in-house experts might be well received.
- Increased cost efficiency.
- Creation of in-house expertise on equity and diversity issues.

The training programs could be structured to train key lawyers and/or staff regarding pedagogical techniques for instructors and the substance of the training sessions. The training sessions would focus on issues such as principles of adult learning, how to structure a training session regarding equity issues, how to deliver a training session and how to prepare relevant and practical material.

B-Small Law Firms and Sole Practitioners

Small law firms and sole practitioners may be interested in understanding how to best serve an increasingly diverse community and how to increase their client base by offering services to a diverse community. The education sessions for small law firms and sole practitioners would take the form of continuing legal education seminars offered on issues such as:

- Skills development training on how to serve diverse clients's needs in areas such as immigration law and real estate law.
- Updates on important equity-diversity developments in the legal profession
- How to offer legal services by taking into account the client's personal cultural background, values and perspectives.

7. Connecting Communities with Counsel

The Connecting Communities with Counsel is a joint initiative between the Law Society of Upper Canada and community agencies that work with marginalized clients. The agencies offer assistance to low-income and single parent families; First Nations People and people of colour; women who experience violence; and gay, lesbian, bisexual and transgendered communities. The goal is to provide pro bono legal assistance for those in need who are unable to access or do not qualify for legal aid. The group has been working to attract lawyers who have expertise in equality rights issues as many require assistance in the areas of administrative/welfare law, specifically pertaining to Canadian immigration, human rights, social assistance and police complaints.

Orientation sessions have been held to share information and establish boundaries for an appropriate, effective working relationship between the lawyer and the agency to serve the interest(s) of the client. The connecting communities with counsel program has recently received funding to proceed with its initial goal. Further orientation sessions will be held for new communities and counsel involved in the connecting communities with counsel project.

The project further provides for the development of education and training sessions to be held with the different communities and lawyers involved. The goal of the training programs will be to ensure that lawyers will provide legal services that take into account the specific needs of the community groups. The education and training sessions will be developed and structured by the community groups involved in the project, with the cooperation of the Equity Initiatives Department of the Law Society and with the assistance of legal practitioners chosen by the community groups.

APPENDIX A

Memorandum regarding Orientation and Education
of Newly Elected Benchers

FOR CONVOCATION INFORMATION:

CANADIAN BAR ASSOCIATION REPORT "RACIAL EQUALITY IN THE CANADIAN LEGAL PROFESSION":

This report provides commentary and analysis prepared by the Equity Advisor in response to the CBA report released in February, 1999. The Equity Advisor's response was endorsed by the Treasurer's Equity Advisory Group (now the Equity Advisory Group) and released to interested members of the CBA. The CBA has now adopted all of the recommendations contained in the February, 1999 report and has struck an implementation committee. The Law Society's Equity Advisor has been invited participate on this implementation committee.

The Equity Advisor's report was submitted to the Committee which has directed the Equity Advisor to review his report for submission to the Committee in September. The purpose of the review is to ensure that the Equity Advisor's original report is consistent with the current actions of the CBA on this matter.

Equity Initiatives

MEMORANDUM

To: Treasurer's Equity Advisory Group Date: May 26, 1999

From: Charles Smith
Equity Advisor

Re: Canadian Bar Association Report and Recommendations on "Racial Equality in the Legal Profession"

Introduction:

1. In February, 1999, the Canadian Bar Association (CBA) released its report with recommendations on "Racial Equality in the Canadian Legal Profession". Initiated in 1995 as a direct response to recommendation 13.3 of the CBA's report on Gender Equality (Touchstones for Change: Equality, Diversity and Accountability), this report addresses issues faced by "racialized communities", i.e., Aboriginal peoples and people of colour, in their efforts to participate in the legal profession in Canada and to receive justice in the Canadian legal system. A detailing of challenges, barriers and opportunities for change, the report provides a unique look into the issues of racial discrimination in terms of entry to and activity within the practice of law, and various models promoting racial equality within the legal profession. It also makes recommendations on how the CBA can take effective action in a planned, coordinated and cohesive manner to promote racial equality in the legal profession.

2. Essentially, the report is broken into three parts:

- the report of the CBA Working Group on Racial Equality in the Legal Profession co-chaired by Benjamin Trevino, Q.C. and Professor Joanne St. Lewis;
- a report by Professor St. Lewis entitled "Virtual Justice: Systemic Racism and the Canadian Legal Profession; and
- a bibliography of critical race theory articles.

The first two reports are part of the CBA's "Racial Equality in the Canadian Legal Profession"; the bibliography is available as a separate document.

3. Together, the two reports and bibliography provide an opportunity for the Law Society of Upper Canada (LSUC) to reaffirm its commitment to equity and diversity as adopted in the Bicentennial Report on Equity Issues in the Legal Profession and to encourage the CBA to adopt its report and to move ahead on its implementation.

Racial Equality in the Canadian Legal Profession:

4. The CBA report is divided into two parts which address the same issues. These are:

139. the history of racial discrimination in the Canadian legal profession;
140. law school as the first step to entry into the profession;
141. articling requirements and bar admission courses;
142. employment barriers and discrimination within the practice of law;
143. equity in judicial appointments and access to justice;
144. the unique relationship of Aboriginal peoples; and
145. actions incumbent on the CBA to promote racial equality in the legal profession.

5. The CBA Working Group report has stated its intention of being brief and moving through limited content on each section in order to proceed to its recommendations. Professor St. Lewis' report provides a more critical approach, underlining and calling on the presentations made to the Working Group and providing her own point of view in support of concerns received during the consultations.

The following provides a brief synopsis of each report.

The Working Group Report:

6. This report begins with the statement: "Canadian laws define discrimination and make it illegal, but we, as a society, have not been successful at obeying these laws and eliminating discrimination. Clearly, the challenge is for the individual members of our society and for institutions and organizations in which we work to put the legal principles into practice" (p.1). It then defines 'systemic discrimination and individual acts of racism' to introduce the scope of its concerns in terms of institutional policies and programs as well as individual behaviour. In this context, it refers to adverse impact, discriminatory outcomes that are unintended and individual acts of prejudice, harassment and discrimination.

7. The report also points out: "When individual accounts of racist acts and racial prejudice cannot be told publicly because the risks to the individuals are too great, we begin to appreciate the depth and impact of discrimination in our profession" (p.2). The report then notes its concerns in the categories identified above.

- History of racism in the legal profession. Concerns about the past are summarized in highlighting discrimination faced by: Delos Davis and Bora Laskin who faced difficulties in getting articling positions; Chinese, Japanese, South Asian and Aboriginal peoples in British Columbia who were prohibited from becoming members of the Law Society until the late 1940s; and the provisions of the Indian Act which, until 1951, forced Aboriginal peoples to choose between their Indian status and pursuing a legal education.
- Law School as entry to the profession. The process of considering and entering law school is identified along with barriers faced by racialized students, including: racist jokes and stereotyping in student newspapers; racist comments by students; the small number of racialized students in law schools and role models or teachers who understand the experience of racism; the financial hardship imposed by attending law school; and the absence of faculty from racialized communities. Addressing these barriers, several positive models were identified, including: summer programs to support high school students interested in law; outreach programs inviting racialized students who write the LSAT to apply to law school; admissions' policies that look beyond LSATs and grade point averages; changes to course curricula to eliminate racist or sexist materials and so on.

- Articling and Bar Admission Courses. The requirement to article is critical in being called to the bar. The report notes: "It is readily apparent that any discrimination that exists in the way students get articling positions, in the work they are given during articles, in the evaluation of their articles and in how Bar Admission Courses are structured can have a serious impact on students from racialized communities" (p. 11). Several examples of barriers are identified, including: bias in interviewing and hiring for articles; negative perceptions by articling principles about the quality of students from racialized communities leading to either refusal to hire or restricting the work of such students; students forced to work for free or for minimum wage; and fears by racialized students to complain about discrimination in the articling experience. (The report points out that in 1996 the LSUC found that of 133 students still looking for articles, 43.9% were from racialized communities even though these students comprised only 17% of the graduating class.)

  In terms of the Bar Admission Courses, several barriers are identified, including: exam-based evaluations failing to consider different learning styles or different ways of demonstrating knowledge and ability; in testing for the practical application of law, students with poor articling experiences are at a disadvantage; little to no reflection of racialized communities in course materials; and inappropriate assessment of foreign-trained lawyers seeking to practice in Canada. Several models are identified addressing some of these concerns, including: providing 'career days' for firms to attract articling students; law societies and schools finding articling assignments for those who do not have one; and establishing equitable hiring practices.

- Employment barriers. The Working Group starts this section of its report in stating: "The brick wall blocking people from racialized communities from senior positions in law firms, corporations and government became shockingly apparent to the Working Group" (p.17). It further notes: "...to the extent to which the decision to leave law is linked to systemic discrimination which continues to exist in the profession, the issue needs to be addressed" (p.17). Examples of barriers faced by lawyers from racialized communities are provided to underscore the aforementioned points, including: the barriers to attaining articles influences one's ability to attain employment. (The Nova Scotia Barristers' Society noted in 1995 that 70% of white males were hired back after their articles, only 28.9% of white women were hired back and no students from racialized communities were hired back); the apparent lack of advertising for employment by law firms leaving recruitment largely to word-of-mouth and networking; the influence of bias and stereotyping in terms of the type of work lawyers from racialized communities wish to undertake and the belief that such lawyers will not interact well with clients. Several models are identified addressing these concerns, including: employment equity practices; harassment and accommodation policies; advertisements for employment and internal reviews of recruitment policies to ensure they do not pose barriers to racialized communities.

- The judiciary and access to justice. This section of the report discusses the influence of the judiciary, particularly judges, on how law is interpreted and applied. The importance of both having judges from racialized communities as well as ones who understand the impact of racism on society are reviewed. The procedures for appointment of judges are identified and barriers faced by racialized communities also discussed, including: lack of information on the percentage of judges from racialized communities; a number of inquiry and commission reports (eg., "Royal Commission on the Donald Marshall, Jr., Prosecution", 1989, and "The Final Report of the Commission on Systemic Racism in the Ontario Criminal Justice System", 1995) documenting problems with racism in the justice system, including decisions about keeping an accused in custody, courtroom dynamics and sentencing decisions.

- Aboriginal peoples. A separate section on Aboriginal peoples is provided to highlight the need for specific action to address the concerns of this community. While many of the issues faced by Aboriginal peoples are similar to those of other racialized groups, there are a number of issues that are particular to Aboriginal peoples that need to be viewed separately, including: the law school curriculum and Bar Admission Courses tend to perpetuate an adversarial approach and do not recognize this as a barrier to students with different values' system; the lack of progress made since the 1988 CBA report "Aboriginal Rights in Canada: An Agenda for Action" which, in regards to the legal profession, called for increased education of lawyers and the public on Aboriginal issues and increased participation by Aboriginal peoples in the justice system. A few models have been identified addressing some of these issues, including: providing courses and seminars on Aboriginal law issues in law school and Bar Admission Courses; providing credits for law courses completed by Aboriginal students in pre-law programmes; and having law societies track the success of Aboriginal graduates.

- Access to the courts. In this section, the Report focusses on the importance of legal aid and court interpreters to promote and ensure access to the courts for low-income racialized groups. The Report notes the "... deterioration in legal aid funding across the country (as having) a disproportionate impact on many people from racialized communities as they represent a disproportionate number of people living below the poverty line" (p.31). Particular reference is made to immigration and refugee claimants who are also predominantly from racialized communities. Issues relating to access to counsel and court interpreters are identified as barriers these communities face. Models for action were presented to the Working Group by legal clinics specializing in service delivery to racialized communities.

- The CBA's responsibilities. This section of the Report discusses the importance of the CBA taking a leadership role in addressing the concerns documented by the Working Group. The Report points out several barriers imposed by the CBA impacting on racialized lawyers, including membership fees and the structures for participation. The Report notes the model of the American Bar Association which has a Commission on Minorities managed by a director with several staff members.

Professor St. Lewis Report:

8. Entitled "Virtual Justice: Systemic Racism and the Canadian Legal Profession" Professor St. Lewis' report concurs with many of the issues raised by the Working Group. There are, however, significant differences in her approach. This is evident in her style and in her openness regarding the challenging issues brought forth in the consultations which she believes essential to raise.

9. Examples of stylistic differences and their substantive implications are immediately evident beginning with concerns about the title of the Working Group report: "One of the prominent criticisms to be levelled at the Working Group concerned our titular mandate of 'Racial Equality'. Racial equality as a term can itself mask the pernicious impact of *racism*. The Canadian Bar Association intended to temper the emotional impact and apparent negative response which is attached to the term racism by searching for more neutral terminology. In that sense, the title was intended to increase the comfort of those who would participate in our work" (p.59).

10. Shortly after this, she writes: "We conclude that the legal profession is effectively segregated. It is segregated because the absence of certain communities is not strictly the result of individual choice, inclination or community self-selection. Entire sectors of the profession, such as the vast majority of large firms, licensing bodies, associations and law school academy lack proportional representation from racialized communities or anything close to it" (p.60).

11. Professor Lewis then retraces the subject areas examined by the Working Group. The following summarizes the substantive differences revealed in her work:

- Law Schools. This section of the report provides a more in-depth analysis of the areas which pose barriers and need attention. In particular, concerns regarding lack of data linking the applicant pool with the successful candidate pool is noted. "This makes the task of unmasking systemic patterns of exclusion even more difficult. This means subtle or direct discrimination in the admissions process can be hidden within current procedures. There is no public accountability for admissions results" (p.60). In terms of admissions criteria for law schools, Professor St. Lewis also notes: "There is strong resistance within the legal community to what are seen as 'special measures'. There is a presumption that the difference in criteria is actually a lowering of 'objective' standards" (p.60).

- First Nations/Aboriginal Peoples. This section focusses on the constitutional and historical location of Aboriginal peoples in Canada as being unique and a critical part of Canada's 'tri-juridical nature'. It points out the particular constitutional relationship between the federal government and Aboriginal peoples which distinguishes their situation from that of other racialized groups. It further identifies the distrust Aboriginal peoples have for the justice system and Canadian law as being incapable of treating them fairly particularly since "(t)he legal system has played an active role in the destruction, denial or limitation of First Nations cultural practices. The operations of the criminal justice system, whether intentional or not, have resulted in significant over-incarceration rates of First Nations peoples. This is coupled with their almost total invisibility at the most senior levels of policy-making and decision-making in the administration of justice. First Nations peoples also labour under a historical and contemporary myth that their legal and educational systems are less sophisticated than the Canadian systems" (p.69).

- The Practice of Law. Addressing barriers to employment and education for admission to the bar, this section highlights the importance of demonstrative action to eradicate employment barriers facing peoples from racialized groups. "History shows that in the face of blatant racism, legislative action had to be taken to permit entry into the practice of law by individual lawyers from racialized communities" (p.73). In terms of bar admission courses, the concerns of students are underscored and the impact of the educational and articling environment highlighted. In terms of responsibilities for law societies, Professor St. Lewis focusses attention on the importance of having anti-discrimination rules in codes of professional conduct. However, she also notes the relatively few complaints made under these rules and points out that most rules: do not define discrimination; fail to establish a duty as opposed to a 'responsibility' to respect human rights values; have no adequate enforcement mechanism; rely on lawyer self-monitoring; fail to address lawyers as employers; and provide piecemeal adaptation of human rights code or Charter language.

- The Justice System. This section raises issues regarding the application of equality analysis in decision-making and vigourous application of the Charter of Rights and Freedoms in legal arguments and jurisprudence. The absence of data to support allegations of systemic inequalities and the lack of Canadian-based critical race theory are noted. Further, the need for judges to understand the social context of litigants is underlined and the importance of using the Charter as something more than discretionary in the formulation of legal opinion and court decisions. In addition, Professor St. Lewis acknowledges that "(t)he judiciary has demonstrated the strongest commitment to education on social context of any sector of the legal profession. Social context education focusses on how neutral application of legal concepts can produce inequality. The National Judicial Institute's social context program includes staffing and an advisory committee which includes racialized judges and academics to assist in the development of its curriculum" (p.84).

- Professional Associations and Defining Justice into the Millennium. The development of legal associations amongst racialized lawyers is identified as a challenge to the relevance of the CBA to these individuals and groups. A number of issues have been raised by racialized lawyers regarding barriers to participation in the CBA, including: policy issues of concern are not addressed as well as under-representation in decision-making and a sense of discomfort with the CBA. In terms of the future, Professor St. Lewis writes: "Systemic racism, like other forms of systemic discrimination, is the most pernicious problem facing racialized communities. Individuals in institutions often make decisions without ever considering the underlying values and consequences of actions which are seen as 'every day common sense' ...

  "The legal decision-makers and individuals who participated in our consultations were united in their commitment to ensure that racism is eliminated from their organization. Their efforts were hampered by the lack of coordinated effort across the sectors in the legal profession to target the fundamental structures which reinforce racist practice. They were also limited by a lack of adequate financial resources."

  Professor St. Lewis then concludes: "As lawyers we must become radical. Radical in the sense of going back to our roots. The root of the law is justice. It demands that we no longer tolerate or remain passive in the face of racism" (p.91).

Analysis of the Report:

12. The two reports are cogent commentaries on the issues of racial equality and racism within the Canadian legal system. As integral parts of each other, they blend well; where one report focusses on the challenges to promote equality, the other provides an indictment of the legal system and puts forward the challenge that any attempt to promote racial equality must be done within the context of both understanding the depth of racism within Canadian society and the legal system and, thereby, taking action to eliminate it.

13. Unfortunately, both reports are not presented in this way and the CBA will need to reconcile these documents at its annual meeting in Edmonton in August. In terms of the Law Society, there are a number of issues that should be considered in presenting its response to the CBA. These relate to:

A) Critical race theory analysis and scholarly approach. Defined as "...suggest(ing) a complex strategy to use to eliminate racial discrimination in law and in society" (p.vi), both reports discuss the importance of this matter, but neither provides a literature review which may have been helpful in placing this essential concept within an appropriate context. Active reference and use of the work of Patricia Williams, Derrick Bell, Richard Delgado, Sherene H. Raczak, Toni Williams and other others would likely have been helpful in describing the social context giving rise to racism and the struggles for racial equality within law and society. This could have served to underscore the critical commentary provided by Professor St. Lewis and strengthened the arguments of the Working Group. It also could have served to educate the reader regarding the depth of racism within the legal profession, its causes and the importance of substantive strategies to eliminate it.

B) Focus on demographic data and its importance. Both reports provide very little demographic data to support their arguments. While both are aware of its importance, there is no consistent approach to either its reference or use. Professor St. Lewis is clearer in her referencing and recommendations on the use of demographic data; the Working Group is rather silent about this and makes little mention of it in its recommendations. Demographic data is critical to comparing the relative status of groups involved in a common activity. In

developing strategies to eliminate discrimination and promote equality, such data provides benchmarks to compare defined groups. Without it, it is difficult to know whether groups are being treated equally. Some of this data already exists and has been compiled by the LSUC in its Bulletins on Rules 27 and 28 (Spring, 1995). Further, in addressing the paucity of such data and its implications to human rights and racism, both the Supreme Court (Law v. The Minister of Employment and Immigration - SCC File No. 25374; Corbiere v. Canada - 20 May, 1999 - File No. 25708) and the Ontario Court of Appeal (R. v. Siew, Koh et al - 1998 - 116 OAC 245 - Ont. C.A.) have been willing to grant judicial notice to the existence of racism and discrimination. It is unfortunate that these references are not included in the CBA report.

C) Coordination of recommendations and strategic actions. Neither report discusses their stylistic or substantive differences nor the importance of distilling any differences in their recommendations in order to coordinate them and develop a common plan for action. Further, while Professor St. Lewis' report provides 'strategic steps' to guide her recommendations, the Working Group report does not. This presents a challenge to the CBA to identify how it will make decisions on these two reports. Which recommendations will it adopt? How will it adopt an action plan? Unfortunately, both reports are not helpful in this regard.

D) Identifying sources for model activities. Several models are identified, particularly in the Working Group report; however, source information is not provided. Such information would be useful so that the history, background and implementation strategies employed by these models can be shared. This is a critical matter for those involved in developing and implementing equity initiatives, eg., the ability to connect to sources for information-sharing and ongoing dialogue. It is also integral to facilitating a network of concerned equity practitioners and a critical mass of individuals who can share with and learn from each other, thereby, advancing the state of policy and program implementation.

E) Compiling up-to-date information on issues under consideration. A number of the references and sources cited in each report date back a few years and neither report appears to provide current information on activities aimed at addressing racism within the legal profession. For example, while information is used on LSUC articling experiences in 1996, there is no reference to the recent LSUC Bar Admission Reform nor the literature review conducted by the LSUC Equity Initiatives Department on equity in legal education. Further, there is no information on the strategies employed by the LSUC to address the articling issues raised in both reports; nor is there any reference to the LSUC's review of the Rules of Professional Conduct and establishment of the Discrimination/Harassment Ombudsperson. While it is always difficult to incorporate new developments in reports that have been in the making for a number of years, these shortcomings, on the one hand, challenge the credibility of the report but, simultaneously, point to the need for some type of national clearing house to share up-to-date information on initiatives to promote equity and diversity in the legal profession.

F) Reference to human rights law, the Charter of Rights and Freedoms (Equality Sections) and Law Society Discrimination/Harassment Ombudspersons. It is interesting that both reports do not point out challenges within equality law to many of the practices discussed as problematic or discriminatory. For example, in the area of articling, both reports seem to indicate that the crux of the dilemma rests with law firms in not providing equitable opportunities; neither report discusses this as a law society requirement and the attendant issues of liability to law societies for imposing a requirement which is not accessed equally. Further, neither report discusses the potential use of human rights legislation or complaints processes to address discrimination in employment or access to law schools. There is also little reference to the mandate and functions of Discrimination/Harassment Ombudspersons established by law societies in British Columbia, Nova Scotia, Alberta and Ontario. These are critical shortcomings since some key tools are not identified which law schools, law societies and racialized individuals/communities can use to fight discrimination and promote racial equality.

14. Despite these shortcomings, both reports provide an important and timely array of arguments and recommendations essential to addressing racism and racial equality in the Canadian legal profession. As such, it is incumbent on the CBA to acknowledge their importance and to develop a strategy to reconcile, coordinate and implement the recommendations of both reports. It is also incumbent on the LSUC to identify how it can cooperate with the CBA in this activity.

Recommendations for LSUC:

15. Both reports have recommendations for consideration and action by the CBA when it meets in Edmonton this August. These recommendations address the CBA, federal and provincial governments, the judiciary, local bar associations and lawyer associations, law schools and law societies. The Working Group puts forward 40 recommendations and Professor St. Lewis puts forward 37. While each report has a number of recommendations on the same subject, there is no substantive contradiction between them. In terms of Convocation's consideration, a response has been developed to address those matters that relating directly to law societies. These recommendations are detailed below.

Working Group Report:

A) Model Policies for Articling Interviews. In supporting Recommendation 5, the LSUC should forward to the CBA its guidelines for conducting articling interviews which are published annually in the Ontario Reports and provide commentary on human rights issues in such contexts. Further, the LSUC should inform the CBA regarding its proposed approach to address the articling requirement resulting from Convocation's adoption of the Bar Admission Course Reform and its recommendations addressing further study on articling.

B) Evaluating Competence. In supporting Recommendation 6, the LSUC should forward to the CBA and to the Federation of Law Societies both its definition of competence as well as key work of the Competence Task Force.

C) Complaints Regarding Lawyers and Equality Issues. In supporting Recommendation 8, the LSUC should forward to the CBA information on the establishment of the Discrimination/Harassment Ombudsperson program. The LSUC should also encourage the CBA to work in tandem with all law societies, particularly those that have instituted discrimination/harassment programs (eg., British Columbia, Alberta, Nova Scotia, Ontario), to further develop strategies on this sensitive matter.

D) Workplace Equity Policies. In supporting Recommendation 8, the LSUC should provide to the CBA its model policies on workplace equity and flexible workplaces adopted by Convocation. The LSUC should also forward the Bicentennial Report on Equity Issues in the Legal Profession as well as the "Law Society of Upper Canada: Development of Equity and Diversity Plans Discussion Document".

E) Data on Law Firms with Equity Policies. In supporting Recommendations 10 and 11, the LSUC should provide information on its and LPIC's contract compliance program and, further, request ongoing information with the CBA on those firms which have established equity policies. This may prove useful to both LSUC and LPIC contract compliance programs as well as provide information on model firms which can be acknowledged and emulated for their implementation of equity initiatives.

F) Education and Training for Law Firms. In supporting Recommendation 14, the LSUC should encourage collaboration between the CBA and the LSUC Equity Advisor on this matter. The Equity Advisor has already begun a process to develop an approach for such a program and such efforts can be augmented with cooperation by the CBA.

G) Aboriginal Issues in Bar Admission Courses. In supporting Recommendation 25, the LSUC should provide information to the CBA on course modifications which have taken place to ensure inclusion of Aboriginal issues in such areas as real estate, tax law and constitutional law. Further, the CBA should be referred to the recommendations included in the Bar Admission Reform report and recommendations addressing Aboriginal students.

H) Dialogue with Racialized Communities. In supporting Recommendation 26, the LSUC should forward information to the CBA on the specialized legal aid services established in Ontario to address concerns of Aboriginal and racialized communities (eg., the African Canadian Legal Clinic, the Metro Toronto Chinese and Southeast Asian Legal Clinic). Further, the LSUC should refer this recommendation to the Legal Aid Ontario for its comment, particularly respecting service provision to refugee claimants.

I) Establishing Court Interpreters. In supporting Recommendation 29, the LSUC should inform the CBA that the LSUC Equity Advisor is prepared to participate in any such proceedings.

J) Continuing Legal Education. In considering Recommendation 38, the LSUC should request that the CBA formally consult with law societies on coordinating development and delivery of CLE programs on human rights and anti-discrimination legislation and policies.

Professor St. Lewis' Report:

A) Law societies working with racialized lawyers. In supporting Recommendation 11, LSUC should forward to the CBA the implementation plans for the recently adopted Bar Admission Reform process which includes specific consultations with Aboriginal and equity-seeking lawyers, students and communities in the implementation of the Bar Ad reforms. In addition, the "Equity in Bar Admission Course Reform: A Review of the Literature" prepared by the Equity Initiatives Department should be provided to the CBA for its reference and use. In terms of publicizing equity initiatives, this is now being coordinated by the LSUC Equity Initiatives Department and the LSUC should indicate its interest in participating in any effort by the CBA to conduct longitudinal studies of Aboriginal and equity group law students and their journey into the legal profession.

B) Codes of Professional Conduct and Model Employment Policies. In supporting Recommendations 13 and 14, LSUC should provide to the CBA and the Federation of Law Societies the current revisions of its Rules of Professional Conduct, particularly the revised Rule on Non-Discrimination which has been redrafted to include clarification on grounds of discrimination and opportunities for positive action to address discrimination and its effects. The LSUC should also forward its model policies on workplace flexibility, and, equity policies for law firms.

C) Participation of Equity-Seeking Lawyers in Decision-Making. In supporting Recommendation 19, the LSUC should refer the CBA to the appropriate Recommendation in the Bicentennial Report on Equity Issues in the Legal Profession (Recommendation #7, p.30). LSUC should also forward the Terms of Reference for the Treasurer's Equity Advisory Group which was adopted by Convocation in January, 1999.

D) Equality Complaints and Legal Aid. In considering Recommendation 20, the LSUC should refer this matter to the Legal Aid Ontario with a request for information on how this matter can be addressed.

E) Dialogue with Human Rights Commissions. In supporting Recommendation 21, the LSUC should inform the CBA that it has initiated a dialogue process with key staff in the Ontario Human Rights Commission. This is being facilitated by Equity Advisor and includes such topics as the establishment of the Discrimination/Harassment Ombudsperson, outreach programs, articling and establishment of workplace equity policies and programs.

F) Cutbacks to Legal Aid. In considering Recommendation 22, the LSUC should refer this to the Legal Aid Ontario and encourage their participation in any proposed study undertaken by the CBA. This will ensure issues related to the current developments in Ontario are included in the scope of any national study on cutbacks to legal aid and their impacts on racialized communities.

G) Development of Clients Rights Document. In supporting Recommendation 25, the LSUC should refer the CBA to its process in developing the Discrimination/Harassment Ombudsperson program and how such a service will be promoted across Ontario.

H) Public Awareness Campaign on Equity in the Legal Profession. In supporting Recommendation 30, the LSUC should provide to the CBA its report on "Public Education Activities to Promote Equity and Diversity in the Legal Profession" adopted by Convocation in January, 1999. The LSUC should also indicate its interest in working jointly with the CBA and its local affiliates in developing and implementing such initiatives in Ontario.

I) Annual Conference on Equity Initiatives in the Legal Profession. In supporting Recommendation 31, the LSUC should indicate its interest in being part of any such annual gathering and that all law societies should be invited to participate.

J) CBA Implementation Committee. In supporting Recommendation 34, the LSUC should indicate its interest in having both the Chair of the Treasurer's Equity Advisory Group and the Equity Advisor as being part of this committee. This will allow LSUC opportunities to provide and receive information on current developments in equity and diversity within the legal profession at a national level. Such an opportunity can be very useful in setting standards for the profession at a national and local level.

16. Regarding those recommendations which do not have a direct bearing on the LSUC, its is recommended that Convocation indicate its interest in receiving information on their status as well as updates on those recommendations which are adopted for implementation by the CBA. This will ensure that information on the development of equity and diversity initiatives by the other bodies named in the recommendations of both reports is available to the LSUC for its reference, enabling the LSUC to be contemporary in its approach to equity implementation and to be knowledgeable about how other organizations within the legal profession are responding to equity and diversity issues. This may also be useful to direct services provided by LSUC, eg., education and regulatory, as a number of the bodies named in the CBA recommendations have either direct or indirect impacts on LSUC policies, programs and services.

Conclusion:

17. The CBA Working Group report on "Racial Equality in the Canadian Legal Profession" is both a timely and critical document. As more and more Aboriginal peoples and people of colour enter the profession of law, it is incumbent on governing bodies within the legal profession to ensure that these communities are welcome and that there are no artificial barriers to their entry and success within all levels of the profession. This principle was recognized by Convocation when it adopted the Bicentennial Report and has led to the LSUC taking a series of actions aimed at both identifying barriers to the practice of law facing Aboriginal and equity-seeking groups and eliminating them.

18. Based on the activities of the LSUC, it is recommended that Convocation endorse in principle the CBA report and forward this report, with accompanying materials, to the CBA for consideration at its annual meeting in Edmonton this August. It is also recommended that this report be forwarded to the Federation of Law Societies, the National Committee on Accreditation and to the Legal Aid Ontario requesting that they consider and respond to those recommendations which address them.

Charles Smith

APPENDIX "A"

Racial Equality in the Canadian Legal Profession
Presented to the Council of the Canadian Bar Association
February 1999
By the Working Group on Racial Equality in the Legal Profession

The Challenge of Racial Equality: Putting Principles into Practice
The Report of the Working Group on Racial Equality in the Legal Profession

Summary of Recommendations

Recommendation 1
We recommend that the Canadian Bar Association host a meeting with law school deans, from both civil and common law faculties, and with members of associations representing law students and lawyers from racialized communities to:

- develop and encourage the implementation of programs that would eliminate the systemic discrimination which deters students from racialized communities from applying to and getting into law schools; and
- create a national system for tracking the access of students from racialized communities to law schools.

Recommendation 2
We recommend that law school Deans require the editors of the law school student newspaper to review their editorial policies and practices to ensure that they conform to the requirements of provincial/territorial human rights legislation. The editorial policy should include a process for appropriately handling complaints of racist or discriminatory content in the newspaper.

Recommendation 3
We recommend that the Canadian Bar Association request that the members offer to the mentor students in law schools, where appropriate. The CBA could recognize the contribution of mentors at its Annual Conference and through its publications.

Recommendation 4
We recommend that the Canadian Bar Association conduct a fundraising campaign to raise money for bursaries and scholarships for:

- students entering and in law school who are disadvantaged because of discrimination; and
- graduate students studying issues of race and cultural difference and the law.

Recommendation 5
We recommend that the Canadian Bar Association develop and distribute a model policy for articling interviews, which includes:

- strategies for ensuring all students are given a fair chance to compete for available positions;
- a list of types of questions that are unacceptable to ask during interviews; and
- suggestions for ways to prevent racial bias from infiltrating the interview and hiring process and from affecting the articling experience.

Recommendation 6
We recommend that the Federation of Law Societies identify the qualities required of a lawyer going into the practice in the new millennium and the criteria that should be used to evaluate competence with a view the eliminating the systemic discrimination that persists in the current Bar Admission system.

Recommendation 7
We recommend that the Federation of Law Societies review standards for admitting people with non-Canadian experience and training to the practice of law, with a view to eliminating systemic discrimination from the process and to identifying ways in which CBA members can assist with the accreditation process (for example, through mentoring programs or extended articling programs).

Recommendation 8
We recommend that the Canadian Bar Association's racial equality specialist (see Recommendation 31) set up a system so that law students. Lawyers and associations of law students or lawyers can confidentially raise concerns about any lawyers or law firms that are not respecting the principles of racial equality in their hiring practices. The racial equality specialist will seek discreet and appropriate ways to remedy the situation.

Recommendation 9
We recommend that, if they do not already have a policy in place, the Canadian Bar Association, all the law societies and le Bureau du Québec, and all Justice Departments and all law firms adopt a workplace equity policy, including equitable hiring policies, and that they actively recruit and hire lawyers from racialized communities when they are positions to be filled.

Recommendation 10
We recommend that the Canadian Bar Association compile and publish a list of all law firms of more than 10 associates who have answered a CBA questionnaire and identified that they have an employment equity policy in place and provided evidence of an on-going commitment to ensuring that the policy is put into practice.

Recommendation 11
We recommend that the Canadian Bar Association compile and publish a list of all law firms of more than 10 associates who have answered a CBA questionnaire and identified that they have an appropriate system in place for responding to concerns about racial discrimination received from clients, support staff, summer students, articling students, associate lawyers and partners.

Recommendation 12
We recommend that all Justice Departments adopt a program of contract compliance whereby only those law firms which have demonstrated a commitment to equity through appropriate hiring, retention and promotion policies and practices would be granted government contracts.

Recommendation 13
We recommend that the Canadian Bar Association meet with federal, provincial and territorial Justice department officials to discuss the mechanisms that will be used to monitor the degree of compliance with these employment equity policies.

Recommendation 14
We recommend that the Canadian Bar Association's racial equality specialist (see Recommendation 31) prepare an equity awareness training course to offer to law firms across the country. This training course would support the development of employment equity and harassment policies to address, among other matters, recruitment, retention and promotion issues and would challenge senior managers to remove the barriers that block the advancement of lawyers from racialized communities.

Recommendation 15
We recommend that all Justice Departments recognize the need for representation of people from racialized communities in decision-making and policy-making roles.

Recommendation 16
We recommend that the Canadian Judicial Council and its provincial equivalents enhance their systems of responding to complaints about judges who are perceived as showing racial bias or discourtesy or unfairness to lawyers , clients, witnesses, court workers, and members of the public from racialized communities, and that Chief Justices and Chief Judges, who have not already done so, establish a protocol for responding to such complaints.

The Basic elements of the complaints system would include:
- discussing the complaint with the judge concerned;
- bringing the complaint to the attention of the Chief Justice or Chief Judge;
- monitoring complaints over time and, when there is a pattern of alleged offensive conduct, having a procedure for taking further action;
- keeping the complainant informed about the handling of the complaint; and
- communicating the existence of this system to all members of the Bar and to all users of the judicial system.

Recommendation 17
We recommend that the National Judicial Institute's and provincial court judge's social context education programs include materials and resource people with a critical race theory analysis. These programs should also promote a greater understanding and awareness of the experiences of Aboriginal people as they relate to legal issues involving the courts.

Recommendation 18
We recommend that the federal and provincial Attorneys General, in consultation with lawyers from racialized communities and community justice advocates, develop a complaints process for members of the public who have concerns about how they were treated by people in the court process and justice system.

Recommendation 19
We recommend that the federal and provincial Attorneys General implement a comprehensive training program for Crown Attorneys which would focus on incorporating a critical race theory perspective into all aspects of their work, including their exercise of discretion and the impact of their current approaches to legal argument.

Recommendation 20
We recommend that any disclosure of information about which cases will be heard by specific judges must be made available to all interested parties.

Recommendation 21
We recommend that the federal and provincial Attorneys General keep statistics to identify the number of federally and provincially-appointed judges who are from racialized communities.

Recommendation 22
We recommend that each law faculty immediately establish, fund and support an Aboriginal Advisory Committee to design, implement and monitor curriculum changes to ensure compulsory courses include analysis from an Aboriginal perspective. The Committee should also promote compulsory law school community awareness programming concerning Aboriginal matters. An Aboriginal Advisory Committee should include representatives from Aboriginal faculty, students, lawyers and community organizations.

Recommendation 23
We recommend that law faculties, particularly those with a significant number of Aboriginal students or those located in a region with significant Aboriginal population, develop employment equity strategies for hiring Aboriginal professors to tenure-track positions. These strategies should also seek to eliminate discriminatory barriers in the hiring process for contract, part-time and sessional lecturers.

Recommendation 24
We recommend that the Canadian Council of Law Deans establish an Aboriginal advisory committee with representatives from the Indigenous Bar Association, the CBA Aboriginal Law Section, the Native Law Centre and the Indigenous law students association to:

- conduct on-going evaluations of pre-law programs for Aboriginal students;
- promote the recognition of pre-law programs among law faculties; and
- expand pre-law programs to other areas of the country so that they are more readily accessible to Aboriginal students.

Recommendation 25
We recommend that the law societies work with the Indigenous Bar Association and the CBA Aboriginal Law Section to examine the content of Bar Admission Course materials from an Aboriginal perspective and to recommend how to eliminate systemic discrimination in Bar Admission Course materials and examinations.

Recommendation 26
We recommend that the Canadian Bar Association take a leadership role, working with its Branches, with the law societies and with the federal, provincial and territorial governments to initiate a dialogue with representatives from racialized communities and lawyers representing clients from racialized communities to:

- develop a strategic plan for the creation of specialized legal aid services to better serve the community; and
- define an appropriate legal aid program for refugee claimants.

Recommendation 27
We recommend that the federal government change its agreements with the provinces and territories to increase funding levels for criminal and civil legal aid and expand coverage in order to:

- improve access to justice for vulnerable peoples, including people from racialized communities;
- support the increased development of specialty legal clinics to serve specific community needs; and
- establish a fair, non-discriminatory system of legal aid for refugee claimants.

Recommendation 28
We recommend that the Aboriginal Court worker program be expanded to ensure that all Aboriginal people have access to cultural language interpreters when they are interacting with the civil or criminal justice system as a plaintiff, defendant, complainant, accused or witness.

Recommendation 29
We recommend that the Federal Department of Justice organize a consultation with interested parties, including, where appropriate, law societies, provincial and territorial department of the Attorney General, Ministries of Education, lawyers from racialized communities, community justice advocates working with clients from racialized communities and workers in community-based interpretation services to:

- develop guidelines on basic training for all court interpreters;
- consider the need for an interpretation certification program; and
- establish a protocol to protect the confidentiality of communications with an interpreter.

Recommendation 30
We recommend that the Canadian Bar Association, in consultation with lawyers from specialty clinics serving racialized communities, representatives from associations of lawyers from racialized communities, academics and other interested parties, develop a research methodology to assess, from a critical race theory perspective, the positions taken by the federal and provincial Attorneys General in cases involving people from racialized communities.

Recommendation 31
We recommend that the Canadian Bar Association create a full-time position of racial equality specialist to advise the CBA and its members on all matters relating to the elimination of racial discrimination in the legal process, including ways to gather relevant statistics, to measure law firm compliance with employment equity policies, and to monitor the implementation of the recommendations in this Report. This position is to be established for a minimum of 10 years and is to be staffed by a lawyer who has training in equity issues. The position should report to the Executive Director.

Recommendation 32
We recommend that the Canadian Bar Association, at the national and Branch levels, make every effort to remove the particular barriers that impede the participation of members from racialized communities in its committees and structures.

Recommendation 33
We recommend that the Canadian Bar Association, in consultation with law students and lawyers from racialized communities, develop a recruitment strategy and explore changes to its fee structure to attract more members from racialized communities. Changes to the fee structure could include fee reduction incentives and fee scales that recognize fees paid to other associations serving lawyers from racialized communities.

Recommendation 34
We recommend that the Canadian Bar Association Standing Committee on Equity be clearly mandated to pronounce the implementation of recommendations approved by CBA members and to monitor the implementation of recommendations made by Royal Commissions, inquiries and task forces that concern racial equality in the legal community. In its regular report to the membership, the Committee should strive to increase member awareness of these recommendations and the progress with respect to their implementation.
Recommendation 35
We recommend that the Canadian Bar Association cooperate and exchange information with the Indigenous Bar Association, the South Asian Lawyers Association, the African Canadian Legal Clinic and other associations which bring together lawyers from racialized communities.

Recommendation 36
We recommend that the Canadian Bar Association Standing Committee on Equality be mandated to assist with the development of the agenda for the Annual Conference and the Mid-Winter meetings to maximize the inclusion of equality perspectives at the meetings and to increase the participation of lawyers and law students from racialized communities.

Recommendation 37
We recommend that a status report on the elimination of racial discrimination within the legal profession be presented at every Annual Conference, orally and in writing.

Recommendation 38
We recommend that the Canadian Bar Association continue to expand the scope of its continuing legal education programs to include more courses on human rights law and anti-discrimination policies and attitudes.

Recommendation 39
We recommend that the Canadian Bar Association develop a critical race theory framework which its sections and committees can use to analyze issues from an equality perspective and ensure that their recommendations reflect anti-discrimination principles.

Recommendation 40
We recommend that the Canadian Bar Association demonstrate its commitment to racial equality in the legal profession by ensuring that persons in voluntary and staff leadership positions in the Canadian Bar Association participate in training courses that address the issues of discrimination and harassment in all areas of profession conduct, following Canadian Bar Association Resolution 96-05-M.

APPENDIX "B"

Virtual Justice:
Systemic Racism and the Canadian Legal Profession
A Report by Joanne St. Lewis
Co-chair of the Working Group on Racial Equality in the Legal Profession

Summary of Recommendations

It is recommended:

R1
That the Canadian Access to Legal Education Group (CALEG) be given lead responsibility to work in cooperation with the Council of Law Deans to develop:
- model criteria, guidelines for the establishment and monitoring of equity initiatives in Canadian law schools;
- a national review of equality measures and attitudes towards equality in Canadian law schools (to be undertaken every two years to monitor progress towards the elimination of racism in law schools).

R2
That the Canadian Association of Law Teachers (CALT) conduct a follow-up to its report *Creating the Pathways...Widening the Circle* with a particular focus on issues of curriculum, pedagogy and the law school environment. This report to be forwarded to the Council of Law Deans for discussion and appropriate action.

R3
That all law schools require mandatory participation in their law school legal aid program.

R4
That the Canadian Council of Law Deans establish a model ani-discrimination policy focused on law school environment issues, and that a committee comprised of both faculty and students be available to assist law schools in the mediation of internal conflicts or to provide counseling and support on a confidential basis to faculty or students. Law schools that have already established internal complaints procedures should include information regarding this body in all their communications.

R5
That the First Nations legal issues be included as a mandatory component of the law school undergraduate curriculum of every student prior to graduation. Development of the materials should be done in cooperation with the Indigenous Bar Association (IBA)

R6
That law schools provide annual reports to the CBA on faculty composition and retention from racialized communities for inclusion in it Annual Report.

R7
That the Indigenous Bar Association and the Department of Justice establish a committee with representatives from the Indigenous Bar Association, First Nations governments, and First Nations legal scholars to conduct a feasibility study, and design and establish a First Nations law school.

R8
That the federal and provincial Ministers of Justice and Attorneys-General fund and develop roundtables to meet quarterly with the Indigenous Bar Association to discuss the range of justice issues facing First Nations communities.

R9
That the Department of Justice take lead responsibility for establishing a strategic planning committee with representatives from other government departments, First Nations governments and the Indigenous Bar Association to develop a comprehensive funding protocol for community-focused First Nations law firms.

R10
That the Canadian Bar Association and the Indigenous Bar Association explore sharing resources and expertise through their annual assemblies/meetings. This would provide an opportunity for increased contact and identification of issues of mutual interest.

R11
That each law society work together with law schools and racialized lawyer associations (or members) in its jurisdiction to develop and establish permanent equity in practice committees. These committees would consult, coordinate and develop policies on issues related to entry into the profession. To fulfill their mandate, they would:

- identify the requisite skills and abilities required for admission to the Bar;
- undertake a curricular and pedagogical review of the Bar Admissions Courses to ensure that they combine the development of professional skills with service to a diverse community;
- publicize successful equality initiatives undertaken by law firms within their jurisdiction;
- conduct a longitudal study of students from equality-seeking communities to determine patterns of participation in the profession from law schools, to obtaining articles, to Bar Admissions examinations, to practice and longevity in the profession;
- facilitate the exchange of information on equality issues between law schools, law firms and individual lawyers.

R12
That the federal and provincial Attorneys-General jointly develop a scholarship and bursary fund for students from equity-seeking communities in three distinct areas: law school, non-funded Bar Admissions Courses and graduate programs. Every effort should be made to encourage the participation of the private bar but their failure to contribute should not preclude the establishment of the fund.

R13
That the Federation of Law Societies undertake a review of the Codes of Professional Conduct to ensure that members of the profession are subject to equal standards and remedies regardless of jurisdiction. This review should be undertaken in conjunction with representatives of human rights commissions so that positive measures such as training and education have an equal presence with remedial/punitive actions.

R14
That the Federation of Law Societies develop model employment guidelines for its members regarding the interviewing, hiring and retention process. These guidelines would then be incorporated by reference in the Codes of Professional Conduct.

R15
That the provincial and federal Attorneys-General work together with the private bar and law schools to establish consistent criteria for the monitoring of work-force and education participation of members of equality-seeking communities in their institutions.

R16
That the provincial and federal Attorneys-General prepare annual reports on the workforce participation of persons from equity-seeking communities which would be forwarded to the CBA for publication in its annual *Progress Towards Equality Report*.

R17
That the federal Department of Justice provide a list of the successful recipients of work under its contract compliance guidelines to the CBA for publication. Provincial Attorneys-General who have not yet done so should institute a contract compliance policy for the allocation of its legal work consistent with the demographics for their jurisdictions. Every effort should be made to contract directly with or ensure adequate representation of First Nations lawyers and lawyers from racialized communities in areas which directly relate to their communities.

R18
That corporate counsel meet regularly with racialized lawyer associations to discuss how equality issues can be encouraged and implemented through their leadership role as important clients of private law firms.

R19
That law societies take steps to eliminate barriers to the participation of members of equality-seeking communities as benchers and encourage their participation at all levels of their organizations.

R20
That provincial legal aid programs establish a process where client concerns regarding equality issues in the provision of services could be addressed.

R21
That law societies work together with local human rights commissions to develop programs for identification of systemic barriers within law firms and strategies for removal.

R22
That the Canadian Bar Association coordinate an immediate review of funding cutbacks in provincial legal aid programs by a committee comprised of provincial legal aid program representatives, legal aid lawyers and representatives from racialized communities to examine whether they have a disproportional impact on racialized communities. The results of this review could form the basis of a Court Challenges application.

R23
That the Canadian Bar Association together, with specialty clinics serving racialized communities and racialized lawyers, their associations and academics, develop a research protocol and, conduct a critical equality analysis of the federal and provincial legal departments role in cases involving equality and the advancement of the *Canadian Charter of Rights and Freedoms*.

R24
That the CBA together with provincial licensing bodies in cooperation with major financial institutions develop a funding strategy to assist lawyers from socio-economically disadvantaged backgrounds to establish legal practices.

R25
That law societies develop a client rights document which would inform clients of their rights and methods of seeking redress should they have any concerns regarding the quality or context of the service or advice they have received from a lawyer.

R26
That the federal government examine its judicial appointments process and develop a strategic plan to increase the representation of First Nations and racialized judges at the appellate level (Court of Appeal, Federal Court of Appeal and Supreme Court of Canada).

R27
That each province establish a committee under the auspices of the Attorney-General comprised of Crown Attorneys, policy analysts, representatives from the community justice organizations and lawyers from equality-seeking communities, to review its Crown Policy Manual in order to eliminate barriers to equality and advance service to diverse communities.

R28
That the Canadian Judicial Council establish a non-judge advocate or ombudsman to facilitate/assist in the mediation of concerns expressed by lawyers or members of the public regarding issues of discrimination by judges. The advocate would provide an annual report to the Council for its consideration.

R29
That the Privy Council Office and its provincial equivalents create an administrative tribunal training program which would provide orientation on basic law and education on social context and the Charter for its appointees at regular intervals during their tenure in office. The model of the National Judicial Institute social context education program should be considered for the development of a permanent training institute for members of Boards and Agencies and the expansion of provincial judges training programs.

R30
That the CBA take leadership role in the formation of a committee as part of the Vision Relevance work which would focus on the development of a public awareness campaign for the profession and the general public on its commitment to equality and the development of a diverse profession. This committee would also undertake to develop tools and provide support to local bar associations, law societies and law schools who find their equality initiatives subject to attacks based on stereotypes and misinformation. Participation in this committee would be invited from law schools, law societies, local bars and racialized professional lawyer associations.

R31
That, as part of its Annual Conference, the CBA sponsor an annual symposium funded by the Department of Justice, Heritage Canada, and the provincial Attorneys-General, to focus on issues and strategies that arise for the profession in serving a diverse clientele, and which would bring together lawyers, scholars and community justice advocates to share ideas, develop strategies and support initiatives on a national basis.

R32
That the CBA develop a consultation protocol which would enable cooperative work with associations serving racialized lawyers and their communities in the development of policy documents, briefs and interventions in cases to ensure that an equality perspective is incorporated.

R33
That the Department of Justice and the provincial Attorneys-General establish Cabinet Committee on Equality issues which would meet regularly with racialized lawyers and representatives of racialized communities on justice issues.

R34
That the CBA maintain administrative oversight of an implementation committee whose membership should consist of representatives of the diverse stakeholders implicated in the Working Group on Racial Equality Report. Consideration should be given to extending invitations to: members of the Working Group on Racial Equality; CBA branches and committees; law societies; racialized lawyers; First Nations lawyers; racialized law students; law firms; legal academics; and law deans. The committee should have twice yearly in-person meetings. Funding for its effective operation should be provided by the Department of Justice, Heritage Canada and the provincial Attorneys-General.

R35
That the CBA publish an annual *Progress Towards Equality Report* which would be comprised of the annual reports identified in the recommendations contained in this report and such other matters identified by the implementation committee.

R36
That the implementation committee would identify outstanding research areas such as (a) matters requiring empirical studies (B) issue papers to facilitate discussion (c) case studies for training (d) models for environmental scan of legal profession's attitudes and (e) major research projects. This would be included in the annual *Progress Towards Equality Report.*

R37
That the CBA undertake to conduct a critical analysis of Statistics Canada data on the legal profession every five years and make it publicly available to all interested parties in the annual *Progress Towards Equality Report.*

FOR CONVOCATION INFORMATION:

DEMOGRAPHIC PROFILE OF THE LEGAL PROFESSION BACKGROUND DISCUSSION PAPER:

This report was sent to the Equity and Aboriginal Issues Committee /Comité sur l'équité et les affaires autochtones in June and is being forwarded to Convocation as information.

Recommendation 2 of the Bicentennial Report directs the Law Society to "...conduct research on the changing demographics of the profession and the impact on the profession of barriers experienced by members". As part of the implementation of this recommendation, a background discussion paper has been prepared to address the benefits of undertaking a demographic analysis of the legal profession.

The next steps that will be taken to implement Recommendation 2 include an analysis of Statistics Canada census data (currently underway), an educational campaign on conducting a census of the profession, and finally conducting a census of lawyers in Ontario. The analysis of Statistics Canada data will construct a statistical profile of the legal profession based on personal characteristics as reported in census data. The educational campaign will distribute materials to the profession which will report on the results of the Statistics Canada data analysis and will identify the policy implications for the Law Society. The census of the profession will be based on self-identification and will provide information necessary for informed policy development.

It is anticipated that the results of the Statistics Canada analysis will be ready by December, 2000.

A Demographic Analysis of the Legal Profession in Ontario:
A Background Discussion Report

Prepared by the Equity Initiatives Department
May, 2000

A Demographic Analysis of the Legal Profession in Ontario:
A Background Discussion Report

1. Introduction

Recommendation 2 of the Bicentennial Report on Equity Issues in the Legal Profession[13], which was unanimously adopted by Convocation in May 1997, states that "*the Law Society should continue to conduct research on the changing demographics of the profession and the impact on the profession of barriers experienced by members ... for reasons unrelated to competence*". Through the policy statements adopted in the Bicentennial Report, the Law Society has made a commitment to achieving equity and diversity in the legal profession, and demographic research on the profession in Ontario is an essential component to the implementation of informed and effective policies to achieve this goal.

This report examines a number of issues related to undertaking demographic research of the legal profession. Specifically, this report offers a discussion of: 1/ the importance of demographic analyses to effective and meaningful policy development; 2/ demographic research and other survey research undertaken by various legal and non-legal professions; and 3/ conducting demographic research of members of the Law Society of Upper Canada.

2. Demographic Research and Policy Development

Recommendation 1 of the Bicentennial Report states that the Law Society "*should ensure that the policies it adopts actively promote the achievement of equity and diversity within the legal profession*"[14]. Recommendation 4 states that the Law Society "*should formally monitor and evaluate the effectiveness of current and future equity and diversity initiatives*"[15]. In order to implement both recommendations in a meaningful way, it is essential that the Law Society have the necessary demographic data in order to assess both the impact of Convocation's policies and the effectiveness of equity and diversity initiatives. If the goal of the Law Society is to achieve equity and diversity within the legal profession, what is first required is a "picture" of what the profession currently looks like, and a demographic analysis of the profession will provide the information necessary to determine which groups of individuals are under represented in the legal profession and provide direction and rationale for future equity and diversity initiatives.

---

[13]The Law Society of Upper Canada, *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Toronto: The Law Society of Upper Canada, 1997), p.26

[14]The Law Society of Upper Canada, *Op. Cit.*, 1997, p. 25

[15]The Law Society of Upper Canada, *Op. Cit.*, 1997, p.27

In 1995, Convocation adopted a "Statement of Values" that affirmed that the legal profession in Ontario "*is enormously enriched by, and values deeply, the full participation of men and women in our profession regardless of age, disability, race, religion, marital or family status or sexual orientation*"[16]. It is, therefore, essential that membership data be collected on these grounds in order to assess whether any of the above social characteristics are prohibiting the full participation of men and women in the legal profession in Ontario.

Although no comprehensive demographic analysis of the legal profession in Ontario has been undertaken to date, previous survey research enables us to construct a partial picture of the composition of the profession. Additionally, some demographic data are collected annually in the Membership Information Form which may be useful in terms of assessing equity and diversity within the profession.

41. Constructing a Sketch of the Profession using Existing Data

Gender:
Data collected from the LSUC membership database allows an accurate picture of the profession in terms of gender representation to be constructed. In addition to the availability of that data, a number of surveys have been undertaken to explore the barriers and inequalities facing women in the legal profession in Ontario and that research can assist in constructing a partial picture of the profession in terms of broader gender representation. The 1989 report Women in the Legal Profession[17] found that the gendered composition of the profession changed dramatically over the previous decade and that in 1988, women comprised only 20% of the legal profession. The 1990 research conducted for the Transitions in the Ontario Legal Profession[18] report revealed that the low numbers of women in the legal profession were experiencing gender discrimination and barriers; the Transitions survey data found that, even when the year of call was taken into account, women were more likely than men to occupy lower positions in the power hierarchy. The 1996 follow-up survey to the Transitions research found that despite considerable improvement in the mobility of women in the Ontario Bar over the six-year period, women continued to face barriers in the legal profession.[19]

Racial and Ethnic Identity:
Although data on the gendered composition of the legal profession in Ontario is currently being collected, there is no data available to construct a picture of the profession in terms of racial and ethnic composition. The LSUC membership database does not require members to self identify in terms of racial or ethnic identity, and no comprehensive research has been undertaken to gather quantitative data on the composition of various racial and ethnic groups in the legal profession. However, survey research and reports have clearly established that there is racial inequality in the legal profession, and that members of racialized groups face discrimination and barriers. The 1996 Barriers and Opportunities Within Law: Women in a Changing Legal Profession[20] report found that 92% of male survey respondents and 90% of female respondents identified as "Caucasian / European". A 1992 Law Society-

---

[16]The Law Society of Upper Canada, *Op. Cit.*,1997, p. 16

[17]The Law Society of Upper Canada, *Women in the Legal Profession* (Toronto: The Law Society of Upper Canada, 1989)

[18]The Law Society of Upper Canada, *Transitions in the Ontario Legal Profession: A Survey of Lawyers Called to the Bar Between 1975 and 1990* (Toronto: The Law Society of Upper Canada, 1991)

[19]The Law Society of Upper Canada, *Barriers and Opportunities Within Law: Women in a Changing Legal Profession* (Toronto: The Law Society of Upper Canada, 1996)

[20]The Law Society of Upper Canada, *Op. Cit.*, 1997, p.18

sponsored survey conducted by the Black Law Students Association of Canada (BLSAC) found that 50% of black law students and recently called lawyers felt that they were channeled into particular areas of law, and close to 60% felt that certain areas of practice were effectively closed to black lawyers[21]. The 1999 Canadian Bar Association report on Racial Equality in the Canadian Legal Profession stated that "systemic racism is still widespread within our profession and ... individuals still experience racism. Discrimination continues to deny many talented people the opportunity to contribute fully to the profession."[22].

Given the findings of above noted research, it is clear that racial inequalities exist in the legal profession in Ontario. As the Law Society is committed to implementing policies to achieve equity and diversity within the profession, it is essential that data on the racial composition of the profession be collected in order to be able to clearly identify the degree to which various racialized groups are under represented in the profession generally, and more specifically, within the power hierarchy of the profession. The Law Society of British Columbia has also been asked to consider this position, as their Multiculturalism Committee submitted that : "[i]t is in the public interest for the legal profession to know whether there is over-representation or underrepresentation of any one ethnic group in the legal profession ... [and] evidence of underrepresentation does provide good grounds for investigating what factors may contribute to that underrepresentation and whether any actions are needed to ameliorate over time any such underrepresentation"[23].

Sexual Orientation:
As in the case of data on the racial composition of the legal profession in Ontario, no quantitative research has been conducted to determine the number of gay and lesbian individuals in the legal profession or their level of participation throughout profession's power hierarchy. Research projects have revealed that members have experienced discrimination based on sexual orientation, and a 1992 Law Society survey of Bar Admission and articling students found that students were subjected to offensive remarks concerning sexual orientation[24]. A committee of the Canadian Bar Association of Ontario was established in 1994 to address issues facing gays and lesbians in the profession, including harassment and discrimination[25]. It is essential that demographic research on the legal profession gather data on sexual orientation in order to assess the the degree to which gays and lesbians are under represented in the profession generally, and more specifically, within the power hierarchy of the profession.

---

[21] As cited in Law Society of Upper Canada, *Op. Cit.*, 1997, p.8-9

[22]The Canadian Bar Association, *Racial Equality in the Canadian Legal Profession* (Ottawa: The Canadian Bar Association, 1999), p.2

[23]Gerry Ferguson, "Ethnic and Linguistic Diversity of B.C. Lawyers," *The Advocate*, Vol. 55, No. 6 (1997), p.880

[24]The Law Society of Upper Canada, Op. Cit., 1997, p.1 & 9

[25]The Canadian Bar Association-Ontario's Sexual Orientation and Gender Identity Committee (SOGIC) was founded in 1994 under the name of the Lesbian and Gay Issues And Rights Committee.

Aboriginal Peoples:
Although there is no data available to construct an accurate picture of the representation of Aboriginal peoples in the legal profession in Ontario, there have been reports that document the dismally low numbers of Aboriginal lawyers in the province. A 1988 CBA report on Aboriginal Rights in Canada recommended that efforts be taken to increase the participation of Aboriginal people in the legal profession[26] The CBA's 1999 *Racial Equality in the Legal Profession Report* stated that "the number of Aboriginal law students and lawyers continues to increase, but their representation falls far short of what one would expect given the number of Aboriginal people in Canada"[27]. A demographic profile of the profession would provide a more concrete and accurate picture of the level of representation of Aboriginal peoples in the legal profession in Ontario.

Disability:
The LSUC membership database does not collect any information concerning any disabilities that members may have, and there has been no research undertaken that specifically examines the representation of people with disabilities within and throughout the profession. The National Association of Women in the Law (NAWL) did recommend to the Canadian Bar Association that the problem of discrimination against lawyers with disabilities be examined, further underscoring the need to better understand the representation of lawyers with disabilities throughout the profession[28].

B. Benefits of Demographic Research

It is common sense that effective, meaningful policy must be based on reliable and up-to-date research. As the United Kingdom's Office of National Statistics states, "reliable official statistics are a cornerstone of democracy and are essential to good public management and accountability"[29]. Recognizing the relationship between demographic research and policy development, the Canadian government commissioned a demographic review report to examine "changes in the size, structure and distribution of the population" in order to better inform economic and social policy development[30]. The rationale offered for a demographic profile of the New Brunswick Bar was that "[i]n order to begin to assess the impact of change, a profession should have a profile or assessment of its current standing on the basis of key demographic or descriptive variables"[31]. The policy development directed by Convocation to address equality and diversity issues also requires an understanding of the changes in the size, structure, and distribution of various groups within the legal profession.

---

[26]The Canadian Bar Association, *Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: The Canadian Bar Association), p. 91

[27]The Canadian Bar Association, *Op. Cit.*, 1999, p.28

[28]National Association of Women in the Law (NAWL), *Submission by the NAWL to the CBA Task Force on Racism in the Legal Profession* (Ottawa: National Association of Women in the Law, 1997), p. 30

[29]Office for National Statistics, *Statistics: A Matter of Trust* (****:United Kingdom Office of National Statistics, 1998), p.1

[30]Health and Welfare Canada, *Posing the Questions: Review of Demography and Its Implications for Economic and Social Policy* (Ottawa: Health and Welfare Canada, 1987), p.1

[31]Linda Dyer, *A Study on the Practice of Law in New Brunswick: Final Report* (Fredericton: Law Foundation of New Brunswick, 1984), p.32

The Law Society, in its commitment to achieving equality and diversity within the legal profession, has recommended that policies be developed to actively promote equality and diversity. Furthermore, Convocation has also recommended that initiatives undertaken to achieve equality and diversity be monitored to determine their effectiveness. In order to develop such policies, it is necessary to first have accurate and comprehensive data on the composition of the legal profession in Ontario. Similarly, monitoring the effectiveness of current and future equity initiatives requires, among other things, measuring the levels of participation of various groups. A demographic survey of the profession will provide the data needed for policy development and policy review.

3. Previous Survey Research of Professional Organizations

A. Demographic Surveys of Legal Professional Bodies

Other legal professional bodies have undertaken demographic analyses of its members, although none have been as comprehensive as the demographic survey the LSUC will undertake. The Practising Certificate Survey conducted by Law Society of New South Wales, Australia provides a fairly good model for conducting demographic surveys of professional legal bodies[32], and the Law Society of British Columbia has begun to undertake a demographic analysis of the ethnic and racial diversity of its members[33]. The General Council of the Bar of England also commissioned a survey of gather information on the "numbers of barrister, pupils and applicants for pupillage from minorities"[34], and the American Bar Foundation has published lawyer statistical reports since the late 1950's, including the demographic changes association with the growth of the profession[35]. The Victoria Law Foundation in Melbourne, Australia conducted a survey of its members in order to construct a profile of various types of lawyers and examine some of the social implications of diversity[36], and the Law Society of Western Australia conducted an exit survey of lawyers to determine whether the issues which underlie the decision to leave the profession were gender-based[37].

---

[32]The Law Society of New South Wales, *1999 Profile of the Solicitors of New South Wales* (Sydney: The Law Society of New South Wales, 1999)

[33]Ferguson, *Op. Cit.*, 1997

[34]The General Council of the Bar of England, *Quality of Justice: The Bar's Response* (London: Butterworths)

[35]Barbara Curran and Clara Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in the 1990s* (Chicago: American Bar Association), p. vii

[36]Margaret Hetherton, *Victoria's Lawyers: The Second Report of a Research Project on Lawyers in the Community* (Melbourne: Victoria Law Foundation, 1981)

[37]The Law Society of Western Australia and Women Lawyers of Western Australia, *Report on the Retention of Legal Practitioners: Final Report* (Perth: The Law Society of Western Australia, 1999)

There have also been demographic surveys conducted of members of various Law Societies in Canada. An early study undertaken by the Young Lawyers Section of the Canadian Bar Association in 1979 surveyed all Law Societies in Canada for the purpose of collecting "basic information on the characteristics of the legal profession in Canada".[38] The data collected from that demographic survey was intended to "provide the first data base to enable the legal profession to monitor changes in its characteristics over time to assist it in meeting future needs"[39]. In 1984, a demographic census of the New Brunswick Bar was undertaken to "generate reliable and accurate information about the practice of law in New Brunswick". More recently, in 1998, the Law Society of Alberta conducted a membership survey for the purpose of constructing a "snapshot of the underlying demographic composition of the profession in Alberta"[40].

There have also been a number of surveys of Canadian provincial Bar Associations and Law Societies that have been specific to the issue of gender and the barriers and discrimination that female lawyers experience. A Survey of Active Members of the Law Society of Alberta was conducted in 1991 to "develop a descriptive profile of active members of the Law Society of Alberta" in order to examine issues concerning women in the legal profession[41]. A 1992 survey of all Manitoba lawyers was sponsored by The Law Society of Manitoba and the Manitoba Bar Association[42]. That research was undertaken to specifically examine gender equality within the legal profession in Manitoba, although, similar to the Alberta survey, did question respondents on discrimination they may have experienced on the basis of their racial or ethnic identity, disability, and sexual orientation[43]. Within the province of Ontario, as noted earlier, surveys of the profession have been undertaken for the purpose of gathering data on the issues specific to women.[44]

B. Demographic Surveys of Non-Legal Professional Bodies

Recognizing the importance of demographic data to effective policy development, a number of non-legal professions have also undertaken demographic surveys of its members. Since 1992, the Association of American Medical Colleges (AAMC) has maintained a database that collects information on all minority physicians in the United States in terms personal and practice characteristics. The Minority Physicians Database (MPDB) is utilized in the formulation and implementation of health policy, and has the long-term capability to monitor the status of these groups in the ranks

---

[38]Canadian Bar Association Young Lawyers Section, *Canadian Bar Association, Demographic Survey 1979: Survey of Canadian Lawyers #1* (Ottawa: Canadian Bar Association in association with the Federation of Law Societies, 1979), p. 1

[39]Canadian Bar Association Young Lawyers Section, *Op. Cit.*, 1979, p.1

[40]Law Society of Alberta, *Law Society of Alberta Final Report on 1998 Membership Survey* (Calgary: Law Society of Alberta, 1999), p.2

[41]Joan Brockman, *Identifying the Issues: A Survey of Active Members of the Law Society of Alberta* (Calgary: The Law Society of Alberta, 1992), p. vii

[42]Manitoba Working Group on Gender Equality, *Report of the Manitoba Working Group on Gender Equality to the Canadian Bar Association National Task Force on Gender Equality* (Winnipeg: The Law Society of Manitoba, 1993)

[43]See Appendix B: Questionnaire used in the "Survey of Active Members of the Law Society of Alberta", particularly questions 41 and 50; see also Appendix C: Questionnaire used in the "Survey of Manitoba Lawyers", particularly questions 40 and 41

[44]Women in the Legal Profession (1989); Transitions (1991); Barriers and Opportunities (1996)

of physicians in the U.S. and determine the representation of minority groups in the profession[45]. The AAMC collects the data for the MPDB from U.S. medical schools surveys. The medical profession in Ontario has also undertaken demographic surveys of its members; both the Ontario Nurses' Association and the Ontario College of Physicians have collected data from their memberships on *** Additionally, several professional bodies in the accounting profession in the U.S. have cooperated to conduct survey research to develop a profile of women in accounting in order to effectively assess the progress of women in that profession[46].

C. Research Methodologies

In considering a demographic survey of the legal profession in Ontario, it is useful to examine the various research methodologies employed in previous surveys of the legal profession in addition to a general examination of survey research methodology.

Survey Research

Survey-based data are useful in demonstrating that a problem is distributed in a particular way throughout a population, and may suggest factors that contribute to the problem which can then guide actions to address the problem. Survey research can also identify differences among groups in a population and the changes that may occur over time.[47] Given that the Law Society is interested in gaining a clear picture of the problem of under representation of various groups within the legal profession in Ontario, and is also interested in monitoring the progress of various groups over time, survey research is an appropriate methodology to implement.

There are several types of survey research methods, and the objective of the research project and the identified target population will typically determine the appropriate method of data collection. Surveys of target populations can be administered in three ways: 1/ face-to-face interviews; 2/ telephone interviews; or 3/ mailed questionnaires. Survey questions can be open-ended, allowing a respondent to elaborate on their answers to questions, or close-ended which provide the respondent with predetermined categories from which to chose. There are also sophisticated sampling techniques that can be implemented to ensure that the target population represents the boarder population of study.

There are various steps involved in the survey research process, and several issues must be addressed before a survey is conducted[48]. First, it is essential to have a very clear statement of objectives, and the clarity of the research question(s) aids in the development of an effective research tool, i.e. the survey questionnaire. Secondly, target population needs to be identified, and in the case of a demographic census of the legal profession in Ontario, the target population would include every member of the Law Society. Third, the method of data collection needs to be determined and, as mentioned above, options for collecting survey research data include mailed questionnaires, telephone interviews, or face-to-face interviews. The size of the target population, the cost of each method, and the sensitivity of the research questions will determine which is the most appropriate method of data collection. Finally,

---

[45]See the AAMC website on Community and Minority Programs at www.aamc.org

[46] The Educational Foundation for Women in Accounting, *A 1996 Profile of Women Accountants* (Southeastern, PA: The Educational Foundation for Women in Accounting, 1997)

[47]Shulamit Reinharz, *Feminist Methods in Social Research* (New York: Oxford University Press, 1992), p. 80-81

[48]For a comprehensive discussion of the survey research methodology, see Herbert Weisberg, Jan Krosnick and Bruce Bowen's *An Introduction to Survey Research, Polling, and Data Analysis* (London: Sage Publishers, 1996)

the actual design of the survey questions is an especially important part of the research process, as the response rate to surveys, particularly mailed questionnaires, largely depends on the questionnaire design. When constructing a questionnaire, it is important to follow the basic guidelines of questionnaire design. First, instructions on how to complete the questionnaire must be clearly written and easy to follow. Secondly, the physical layout of the questionnaire must be simple and easy to follow, and the questions should follow a logical order. Third, questions should be worded in such a way to avoid any ambiguity, and terms should be clearly defined and consistently used throughout the questionnaire. Finally, "sensitive" questions or questions that could offend should appear and the end of the questionnaire.[49]

Methodologies Used in Surveys of the Legal Profession

It is useful to review the research methodology used by other Law Societies in their surveys of members of the profession. The Law Society of Alberta and the Law Society of New South Wales collected demographic data from a sample of their members with the specific intent to construct a membership profile of their profession. The Law Society of New Brunswick, however, did conduct a membership census and that research undertook to survey all members of the legal profession in New Brunswick. A closer examination of these three demographic surveys will help to inform the demographic profile the Law Society of Upper Canada will undertake.

i) The Law Society of New South Wales

In 1999, the Law Society of New South Wales (LSNSW), Australia, produced the report 1999 Profile of the Solicitors of New South Wales.[50] That report collected and analyzed information about the demographic profile of their membership, and the data was drawn from two sources: the annual census data which is drawn from the Law Society's membership database; and from the annual Practising Certificate Surveys which the Law Society has conducted since 1993/94. The Practising Certificate Surveys, which are completed by solicitors on a voluntary basis, collects basic demographic data as well as information on relevant issues including dominant areas of practice, income, and use of technology.

The Practising Certificate Surveys are distributed by mail with the annual application for renewal of a practising certificate. The surveys are completed on a voluntary and anonymous basis, and consist primarily of close-ended questions. The 1998-1999 survey collected demographic information about solicitors, including gender, years in practice, age, number of dependents, type of employment, location of practice and whether they were employed in part time or full time work. Respondents were also asked to identify whether they identified as an Aboriginal Australian or Torres Strait Islander. The 1999 response rate to this voluntary survey was 73%, which is exceptionally high for any survey research.[51]

---

[49]Murray Hawtin, Geraint Hughes and Janice Percy-Smith, *Community Profiling: Auditing Social Needs* (Bristol: Open University Press, 1994), p.98

[50]The Law Society of New South Wales, *Op. Cit.*, 1999

[51]The Law Society of New South Wales, *1998/1999 Practising Certificate Survey* (Sydney: The Law Society of New South Wales, 1999)

The second source of information analyzed in the 1999 Profile of the Solicitors of New South Wales is the 1998 annual census data which is drawn from the Law Society's membership database. The 1998 census information collected from the membership data based included data on gender, age, years since admission to the Bar, type of employment, firm size, firm location, and a firm profile.[52] In terms of equity and diversity issues, the 1999 Profile of the Solicitors of New South Wales looks solely at gender and does not address equality or diversity on other grounds such as racial or ethnic identity, sexual orientation, or disability[53]. Although the Practising Certificate Survey does ask members to identify whether they are an Aboriginal Australian or Torres Strait Islander, the report does not offer any analysis of its membership on these grounds.

The Practising Certificate Survey is interesting from a methodological perspective given the unusually high response rate which has been consistent over the past several years. This can be partially attributed to the lack of "sensitive" questions asked in terms of an individual's social characteristics as well as the assurance of anonymity. Including the questionnaire with a form whose completion is mandatory on an annual basis may also attribute to the high response rate.

ii) The Law Society of Alberta

In 1998, the Law Society of Alberta (LSA), recognizing that the legal profession in that province was feeling the "rumblings of profound social change", undertook a survey of it members to provide an understanding of the degree to which the profession was impacted by the changing demographics of the profession and changes in the nature of the practice of law in Alberta. In February 1999, the LSA released the findings of that survey in the Law Society of Alberta Final Report on 1998 Membership Survey.[54] The 1998 membership survey had several objectives, including taking a snapshot of the underlying demographics of the profession.

The methodology used in the LSA's 1998 membership survey was a mailed questionnaire of consisting primarily of close-ended questions. The target population for the mailed questionnaire was a stratified random sample of the LSA's total membership. The random sample of one-third of the total profession, stratified by gender, geography of practice (urban-rural), type of firm, and type of practice, received the questionnaire, and 44.2% of the target population completed and returned the questionnaire.[55]

The LSA's 1998 membership survey did ask members to self-identify in terms of ethnic identity, and modeled that question after a similar question in the 1996 Statistics Canada Census. This particular question did not offer predetermined categories, but rather provided the respondent with four blank spaces in which they were asked to identify their ethnic origins, and a number of examples were provided for illustrative purposes.[56]

---

[52]The website for the Law Society of New South Wales offers information on the 1998 census in addition to other research projects and reports. For more information, visit the LSNSW at www.lawsocnsw.asn.au

[53]In 1996, the Council of the Law Society of New South Wales did not approve a survey research proposal brought forward by the Equal Opportunity Committee. For the purpose of demographic data collection, the survey proposed to ask members to identify on the basis of sexual orientation, racial/ethnic identity, and disability.

[54]The Law Society of Alberta, *Op. Cit.*, 1999

[55]Law Society of Alberta, *Op. Cit.*, 1999, p. 9

[56]Law Society of Alberta, *Op. Cit.*, 1999, p. 10

In terms of data collection for equity and diversity issues, the LSA's 1998 membership offered information on the gendered makeup of its members, and information on the ethnic composition of lawyers in Alberta. It did not ask members to identify on other social characteristic such as sexual orientation or disability, which hinders the construction of a comprehensive picture of the legal profession in that province for the purposes of examining the representation and participation of a number of equity-seeking communities.

Given that the LSA did not intend to undertake a census of its membership, it is entirely appropriate that a random, stratified sample was used in the membership survey. This obviously has cost advantages over surveying a larger target population, and the use of mailed surveys with close-ended questions can be attributed to the relatively successful response rate. In terms of the open-ended format of the question on ethnic identity, it may be useful to instead consider a close-ended question which offers a comprehensive list of options from which the respondent can chose. This format would allow for a more focused analysis of the data since categories would be consistent.

iii) The Law Society of New Brunswick

In 1984, the Law Society of New Brunswick (LSNB) undertook a survey of it members for the purpose of gathering "the type of information which would be useful in planning for programs necessary to meet the needs of the membership and the public in order to better adapt to changes in the internal and external environments within which the profession must operate".[57] In order to gather reliable and accurate information about the profession in that province for the purpose of informed policy development, the researcher decided that the target population should be the entire membership of the LSNB rather than a sample of the profession, and thus a census of the profession was conducted.

The method of data collection used in the census of the LSNB was a mailed survey. This is an appropriate research tool given the size and distribution of the target population. The response rate to the census survey was 50% which is higher than the typical 30% response rate for mailed surveys. A number of steps were taken to achieve this high response rate, including careful, clear wording of the questionnaire, mailing a letter of advanced notice of the study to all members of the profession, and including a letter outlining the purpose of the study and the importance of the respondent's participation with each questionnaire. Typical of surveys involving mailed questionnaires, a follow-up letter was mailed to all respondents several weeks after the questionnaire was distributed, and this did produce additional completed questionnaires.[58]

Given that the task ahead of the Law Society of Upper Canada is also a census of its membership, it is useful to note the methodology used by the LSNB in the earlier census of their membership. It is important to note, however, that the 1984 LSNB did not collect any demographic data on any social characteristics such as gender, racial or ethnic identity, sexual orientation, age, or disability that would lend itself to any analysis of equity and diversity issues in the legal profession.

Statistics Canada Data

Statistics Canada undertakes a Canada-wide census every five years, and 80% of the population receives a short form which collects basic census data. The remaining 20% of the population receives a long form survey which gathers detailed information on the occupation of respondents as well as information on social, ethnic and economic characteristics. Lawyers are easily identifiable in the census data as the occupational category "lawyer" is used in the long form distributed in Ontario. The long form also collects information pertaining to gender, age and disability in

[57]Dyer, *Op. Cit.*, 1984, p. iv

[58]Dyer, *Op. Cit.*, 1984, p. 159-161

a straightforward manner. Information on "ethno-racial identity" is also collected but is, as Ornstein[59] notes, a more complicated category given that both open-ended and close-ended questions are asked. It is possible, then, to utilize Statistics Canada census data to gather data on diversity in the profession, but there are limitations to this approach.

As Ferguson notes in his discussion of ethnic and linguistic diversity of lawyers in British Columbia, Statistics Canada census data can provide some information, but there are limitations inherent in the data[60]. Ferguson suggests that, for the purpose of examining ethnic and linguistic diversity of B.C. lawyers, Statistics Canada census data are limited in terms of sample sizes, margins of error and random sampling, and persons reporting multiple ethnicities. In addition to these limitations, Ornstein notes that the census data can only offer a snapshot of the profession as it looked in 1996 which is the year of the last census, and he also echoes Ferguson's concern regarding sample size, particularly in the case of some analytical categories such as female lawyers from individual ethno-racial groups[61] Another limitation of Statistics Canada census data is that it does not gather information on sexual orientation. Despite these limitations, Statistics Canada census data can provide a preliminary picture of the legal profession in Ontario but it does not serve the same function as a specific census of lawyers in Ontario.

4. Demographic Analysis of the Law Society of Upper Canada

The rationale for undertaking a demographic profile of the membership of the Law Society of Upper Canada has been discussed earlier in this report. In order to implement Convocation's policies, specifically the Bicentennial Report, it is necessary to construct an accurate demographic profile of the legal profession in Ontario.

Reviewing the research methodologies used in surveys of legal professions in other jurisdictions, it is clear that a properly designed questionnaire, coupled with an effective distribution plan, can generate high response rates. Developing questions on self-identification, particularly racial and ethnic origins and sexual orientation, require great care since such questions on personal characteristics may appear intrusive and perhaps offensive unless they are properly contextualized and carefully worded. Pre-tests of the survey with smaller focus groups will assist in developing appropriate wording.[62] It is also essential that adequate education of the membership concerning the objectives of the research take place prior to survey distribution.

Once the demographic profile of the profession has been completed, the level of representation of Aboriginal and various equity-seeking groups can be compared to the actual population distribution of those groups in Ontario using Statistics Canada census data. This will provide reliable and accurate data on those groups who are under-represented in the legal profession which will then inform the initiatives that need to be undertaken to achieve diversity and equality.

---

[59]Michael Ornstein, A *Study of the Social Characteristics of Lawyers in Ontario Based on the 1996 Canadian Census: A Proposal to the Law Society of Upper Canada* (Toronto: The Institute for Social Research, 2000), p. 2

[60]Ferguson, Op. Cit., 1997, p.875

[61]Ornstein, *Op Cit*, 2000, p. 3

[62]See Appendix C:Text of Possible Ethnic Origins Survey taken from Ferguson, *Op. Cit.*, 1997, p. 888-889

APPENDIX A:

Questionnaire used in the "Survey of Active Members of the Law Society of Alberta"

APPENDIX B:

Questionnaire used in the "Survey of Manitoba Lawyers"

APPENDIX C:

Text of Possible Ethnic Origins Survey

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

(1) Copy of the Law Society of British Columbia Workplace Harassment Policy. (pages 1 - 10)

REASONS OF CONVOCATION

The majority and dissenting Reasons were filed in the matter of Angelina Marie Codina.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the *Law Society Act;*

AND IN THE MATTER OF *Angelina Marie Codina,* of the City of Toronto, a member of the Law Society

DECISION OF CONVOCATION

Introduction

A Special Convocation met on January 28, 2000 to consider the report and recommendations of a Discipline Committee (the "Decision) with respect to complaints against Angelina Marie Codina ("Ms. Codina" or "the Solicitor") of the City of Toronto. On that occasion Convocation considered only a preliminary issue of jurisdiction: Did the Law Society of Upper Canada (the "Society") in dealing with the complaints against Ms. Codina comply strictly with the requirements of its constituting statute, *The Law Society Act* R.S.O. 1990, c.L.8 ("the *Act*"), and in particular with s.9(1) of Regulation 708 under that *Act* to allow it to file a complaint and proceed to the hearing which resulted in the Decision.

Ms. Codina, on her own behalf, and counsel for the Society made representations and responded to questions on this issue. At the conclusion of the Convocation on January 28, 2000 both parties were asked to prepare written comments on a number of questions seeking to elucidate the requirements of s.9(1) of Regulation 708 and whether there had been strict compliance with them. A Special Convocation on March 24, 2000 considered the responses to these questions from the solicitor and counsel for the Society and made a decision that the Society lacked jurisdiction to proceed with the complaints because of its failure to comply with s.9(1) of Regulation 708 under the *Act* and consequently set aside the Decision. The reasons of the majority follow.

The issue of jurisdiction was whether the Secretary, or anyone to whom he could properly delegate the responsibility, had complied with s.9(1) of Regulation 708 under the *Act*. Following is the text of s.9(1) and, to provide a more complete context, of s.9(2) as well:

> s.9.(1) Where information comes to the notice of the Society that indicates that a member may have been guilty of professional misconduct or of conduct unbecoming a barrister and solicitor, the Secretary shall make such preliminary investigation of the matter as he or she considers proper, and where in his or her opinion there are reasonable grounds for so doing, shall refer the matter promptly to the Committee or the chair or vice-chair for future directions.
>
> s.9(2) Subject to the directions of the Committee or the chair or vice-chair, the Secretary shall,
>
> (a) prepare and complete or cause to be completed under oath a complaint and file it in the office of the Secretary;
>
> (b) serve upon the member whose conduct is being investigated a copy of the complaint, a notice of the time and place of the hearing and a summons requiring the member to attend thereat; and
>
> (c) make all necessary arrangements for the conduct of the hearing, including as appropriate, the appointment of counsel for the Society, the arrangements for oral evidence to be taken down in writing, the issue of summonses to witnesses, the production of documents and things, and the notification to all members of the Committee of the time and place of the hearing. R.R.O. 1990, Reg. 708, s.9 (1,2).

Facts

On the jurisdiction issue, the facts may be simply stated. Information came to the notice of the Society that Ms. Codina may have been guilty of professional misconduct or conduct unbecoming a solicitor, causing the Secretary to make the preliminary investigation contemplated by s.9(1). It appears to be common ground, and we do not think it can be doubted, that the Secretary need not do this preliminary investigation personally. It can be done by Society staff.

The preliminary investigation having been done, authorization memoranda were prepared which went to the persons charged with receiving the reference under s.9(1) (the "Chairs") and giving direction with respect to a discipline hearing under s.9(2).

This reference resulted in the complaints against Ms. Codina that are the subject matter of the Discipline Committee's Decision.

The authorization memoranda were not put in evidence before the Discipline Committee or Convocation. Rather, the Society conceded both before the Discipline Committee and Convocation that the Secretary did not "author" the authorization memoranda. Following this concession, Ms. Codina did not pursue her attempt to require the Secretary to give evidence at the hearing.

The concession of the Society was expanded in submissions to Convocation that neither a deputy nor an assistant secretary was the author of the authorization memoranda.

Submissions of the Two Parties regarding the Facts and the Law with Respect to Jurisdiction

Convocation of January 28, 2000 posed a number of questions to Society counsel and to Ms. Codina. As summarized from the comments of the Treasurer, pages 153 to 157 of the transcript, they were as follows:

(1) The issue of implied delegation of authority from the Secretary to other staff members, in addition to the express power of delegation under Rule 20(2).

(2) Whether the *Carltona* case dealing with implied delegation is applicable. *Carltona Ltd. v. Works Commissioners,* [1943] 2 A11 E.R. 560 (C.A.).

(3) The issue of onus in respect to the challenge of jurisdiction: assuming it initially lies with the person making the challenge, after the concession that the Secretary did not sign or "author" the authorization memoranda did the onus shift to the Society at that point? Is there an evidentiary burden or some persuasive burden that then lies with the Society, or does the onus remain throughout with the person challenging jurisdiction? If so, has she satisfied the onus at that point where the Society conceded the Secretary had not authored the memoranda?

(4) The parties were asked to consider "a line of administrative law cases . . . . which stand for the proposition that [under] a statutory regime related to the discipline of a professional where his or her livelihood is at stake . . . . the principle of strict interpretation ought to apply".

(5) The parties were also asked to address the meaning of certain phrases in s.9(2), i.e. "shall refer" and "his or her opinion".

(6) The parties were also asked to review the record with respect to Ms. Codina's attempt to call Mr. Tinsley as a witness.

The Law Society Response to the Questions posed by Convocation (Society Response) at paragraph 15, reads as follows:

> 15. The Society acknowledges that there is a line of administrative case-law which establishes generally that an administrative body which is created by and derives its authority from statute must act in strict compliance with its enabling legislation, particularly where disciplinary powers are concerned.

However the Society goes on to argue that this applies only to the adjudicative stage of the process, not the investigative process, and that s.9(1) is "in its entirety" investigative, not adjudicative.

In the Solicitor's Reply on the Jurisdictional Issue (Solicitor's Reply) she makes the following points:

> 11. The Solicitor, however, submits that subsection 9(1) of Regulation 708 clearly encompasses quasi-judicial and adjudicative powers and does not consist strictly of an investigative process.
>
> 12. It is respectfully submitted that the forming of an "opinion" by the Secretary coupled with the mandate to "refer the matter" to the Chairs consists of a judicial act which triggers the disciplinary process.
>
> 14. Although it is the decision of the Chairs that triggers a Discipline hearing, it is the Secretary's decision to refer the matter to the Chairs for direction which initiates the process.
>
> 15. The decision of the Chairs is therefore predicated on the Secretary's decision although the Chairs' decision is ultimately independent of the Secretary's conclusion.

The central jurisdiction issue was whether the Secretary complied with the duty imposed on him by s.9(1). Did he personally form the "opinion" required and "refer the matter" to the Chair or Vice-Chair of Discipline notwithstanding that, as the Society conceded before the Discipline Committee and Convocation, he did not "author" the authorization memoranda that went before the Chairs. The Society's position was that the solicitor had failed to establish on a balance of probabilities that the Secretary did not comply with s. 9(1) and that as a result the Society had no obligation to establish that he had, and that Convocation should therefore be bound by the rule set out in the maxim, "omnia praesumuntur rite esse acta", a proposition that it is presumed all has been done correctly unless the contrary is established.

There was a subsidiary issue of whether and to whom the Secretary might properly delegate his role under s.9(1). The Society takes the position that he has express authority under Rule 20(2) under the *Act* to delegate all his duties, including this one, to a deputy or assistant secretary. The Society also contended that he could have, under the case law, an implied power to delegate s.9(1) duties to other staff members. However in the Society's Response (page 23, paragraph 5(ii)) the Society concedes that there can be no implied delegation to other staff of the decision to refer under s.9(1).

In the Solicitor's Reply (paragraphs 47, 48, 49) she contends in effect that s.9(1) is a statutory requirement and that the Secretary's duties set out there cannot be modified by a Society Rule i.e. that Rules made by the Society cannot derogate from Regulations which have legislative force under the *Act*. The issue appears to have no substantive significance for the outcome. The Solicitor's case that on a balance of probabilities the Secretary did not comply with s.9(1) would apply equally to any deputy or assistant secretary.

The Law Society Response puts the jurisdiction issue in these terms:

> (Page 10, paragraph 22)
>
> 23. The Central issue before Convocation is:
>
> Once the preliminary investigation was concluded, did the Secretary form the opinion that there were reasonable grounds for referring the matter to the Chairs for further direction?

(Page 11, paragraph 24)

"... it is the Society's position that ... the Secretary must form an opinion as to whether or not there are reasonable grounds to refer the subject matter of the investigation to the Chairs for direction".

(Page 12, paragraph 27)

It is "the Society's position ... that s. 9(1) requires that the Secretary personally form the opinion in question".

It is also the Society position that these references to the Secretary could include a deputy or assistant secretary as set out above.

The Society's Response concedes (page 2, para. 3, as the Society did before the Discipline Committee, that the Secretary did not "author" the authorization memoranda, and adds that neither did a deputy or assistant secretary.

However, having made this concession, originally before the Discipline Committee in November of 1996 (page 7, paragraph 13 of Society's Response) and now again, the Society's position (Society Response page 2, paragraph 4) is that "... the focus of Ms. Codina's submissions on the issue of who authored the authorization memoranda is really a "red herring" in that s.9(1) focusses on the decision to refer ...".

See also Society Response page 15, paragraph 40:

> 40. As discussed more fully below in relation to the onus issue (see page 20), the Society's acknowledgment that the authorization memoranda were not authored by the Secretary does not in any way address whether or not the Secretary formed the opinion that there were reasonable grounds to refer the matter to the Chairs. The authoring of the memoranda is not evidence which is relevant to such a determination.

The Solicitor's Reply seeks to establish that the question who authored the memoranda referring the matter to the Chairs is not without significance to the jurisdiction issue. For example:

(Page 7, paragraph 27)

> 27. Accordingly, it submitted that whether or not the Secretary authored the memoranda is important insofar as it evidences his involvement in studying or considering the subject-matter of the information and investigation of the Solicitor, in the context of forming an "opinion" as to whether or not there are reasonable grounds to refer the matter.

In the documentation before the Discipline Committee and Convocation the Solicitor indicated on a number of occasions that her concern was the substantial issue whether, as required by s.9(1), the Secretary had formed the necessary opinion and made the reference to the Chairs. There are also indications that when, in reference to her representations, the Society conceded that the Secretary had not "authored" the memoranda, she took this to mean her point of substance had been conceded.

For example: (Society's Response page 7, paragraph 13)

> "... notwithstanding that Ms. Codina initially summonsed Mr. Tinsley in August of 1996, she decided, as a result of the concession by the Society in November of 1996 that Mr. Tinsley was not the author of the authorization memoranda, that she did not need evidence from him to make her jurisdictional argument ...".

This is cited not with respect to summonsing Mr. Tinsley but to indicate the Solicitor's interpretation of the Society's concession.

The Discipline Committee transcript for 18 November 1996, page 32, lines 13 to 21 indicates that the Solicitor was concerned at that time with whether it was "the opinion of the Secretary" and not merely whether he "authored" the memoranda:

Codina: I have taken the position from the outset that there has been a breach of section 9 of the Regulations in that the authorization memoranda having (sic) before the chairpersons in this instance were not authored or were not - - - the foundation of the complaints were not in the opinion of the Secretary of the Law Society, and that my friend, Ms. Ratchford, has conceded that in fact the authorization memoranda have not been authored by Mr. - - - well, by the Secretary. (Emphasis added)

The Discipline Committee transcript for August 20, 1997 (Record Book, Part II, Exhibit II, Codina direct examination of Mr. Scott) shows that the Solicitor, at this date, before the Society conceded that the Secretary did not "author" the memoranda, was posing the issue of substance whether it would have to be the "opinion of the Secretary ... whether there were reasonable grounds to refer the matter to the Chair or Vice-Chair".

Codina: Q. Now, is it your understanding then that the Secretary shall make such preliminary investigation of the matter as he or she considers proper and where in his or her opinion there are reasonable grounds for discipline it shall be forwarded to the Committee or the Chair or Vice-Chair for further directions?

It that your understanding, that it is the Secretary of the Law Society that would authorize the preliminary investigation of the matter that she or he considers proper and that therefore it would be that the determination or the opinion of the Secretary of the Law Society whether there were reasonable grounds to refer the matter to the Chair or Vice-Chair?

Scott: A. Well, that's what happens.

The Society's position is that the Solicitor did not meet the onus to establish on a balance of probabilities that s.9(1) had not been complied with.

Society Response, page 20, paragraphs 54, 55, 56, 57.

54. In the instant case, it is the Society's position that the presumption of procedural regularity applies. It is Ms. Codina, as the challenger, who must establish, on a balance of probabilities, that there was irregularity in the procedures followed and, therefore, that reliance cannot be placed on the presumption of regularity. If Ms. Codina leads evidence which is sufficient to meet that evidentiary burden, then the Society can no longer rely on the presumption of regularity and must establish that the procedures followed were regular.

55. In paragraph 53 of her submissions, Ms. Codina concedes that she bore the onus of rebutting the presumption of regularity. The only issue, therefore, is whether the concession by the Society that the Secretary did not author the authorization memoranda is sufficient evidence to meet that burden.

56. As stated previously in these written submissions, in relation to the latter part of subsection 9(1) of Regulation 708 ("i.e. where in his or her opinion there are reasonable grounds for so doing, [the Secretary] shall refer the matter promptly to the Chairs for further directions"), the only function which the Secretary must perform is the determination of whether the matter should move beyond the investigation and if so, to ensure that the matter is directed to the Chairs for consideration. There is no requirement for either the preparation of an authorization memorandum in general or for the Secretary to personally author or sign these memoranda. Hence, the concession that the Secretary did not author these memoranda is irrelevant to the question of whether the required procedures were followed.

57. Consequently, it is submitted that the concession by the Society was not sufficient evidence to meet the burden placed upon Ms. Codina. As insufficient evidence was led by Ms. Codina to rebut the presumption of regularity, it must be accepted that the procedures followed were regular and the Society had the requisite jurisdiction to proceed with the hearing into the Complaints.

The Solicitor's position, as cited above, is that the concession by the Society that the Secretary did not "author" the authorization memoranda is an important step towards discharging the onus upon her.

The testimony of Mr. Scott and Mr. Marrocco is advanced by the Solicitor as further evidence that the presumption of compliance with s.9(1) has not been sustained and that the onus has been shifted to the Society to establish that s.9(1) was not breached.

In direct examination of Mr. Scott (Discipline Committee Transcript, August 20, 1996, page 93, Record Book, Part II, Exhibit II) Ms. Codina asks, "who usually sets the authorization memorandum that comes before you or before the Chairs?

A. Law Society staff.

Q. And is there a specific person, a specific position that normally would do that responsibility, or is it any member, any staff member of the Law Society?

A. The Law Society staff that work in these departments.

Q. And do you recollect in this instance who had forwarded or who had signed the authorization memorandum that came before you? Is there a possibility for the Committee and for us to obtain a copy of that authorization memorandum?

At this point Society counsel objected to the request to see a copy of the memorandum and the Discipline Committee went off on a long consideration of whether the actual memoranda are confidential or are protected, as claimed by the Society, by solicitor/client privilege. Eventually the Discipline Committee Chair ruled that "we are not going to order production of the authorization memorandum" (page 103) thus preventing the Solicitor from seeing whether an authorization memorandum itself might contain some indication or endorsement showing whether the Secretary himself had formed the required opinion and had himself referred the matter.

Mr. Scott never did get to answer the question but this examination at least raised doubts whether the Secretary had complied with s.9(1) and did nothing to establish that he had.

The testimony of Mr. Marrocco in the August 20, 1996 meeting of the Committee, (Committee transcript, Exhibit II, page 151, reproduced at paragraphs 84 and 85 of the transcript of the Special Convocation, January 28, 2000) also relates to whether the Secretary formed the requisite opinion and referred the matter to the Chairs:

Witness being Mr. Marrocco.

The Witness: We receive these ... what I guess you would call authorization memoranda. I don't know where - - - I don't know where they come from. They are authored by whomever they are authored by. I don't know where they come from, but we receive them, and that's the basis upon which we give - - - to paraphrase the regulation, we "give directions".

By Ms. Codina:

Question. And these memoranda generally, they, in your experience or knowledge, have been from time to time authored by staff members of the Law Society from different departments: Audit, or Complaints, or whatever?

Answer. I don't know where they - - - they are produced by the staff. I don't know where they - - - I don't know which staff. You know, I can't remember individual staff.

Question: I am not asking for specific names.

Answer. I don't know which departments they come from, but they produce these - - these staff produce the memoranda.

Question. And the memoranda are authored by others - - - I'm not precluding the Secretary, but I'm saying there are instances where the memoranda that you have come across have been authored by other staff members?

Answer. Other than ...?

Question. The Secretary?

Answer. Yes.

Question. That's all I wanted to establish, authored other than the Secretary.

Answer. You mean personally? By other than personally by the Secretary?

Question. Yes, that's correct.

Answer. Yes.

Question. That's all I wanted to establish here.

It can be asserted that Mr. Marrocco's evidence does not identify with precision and clarity the source of the authorization memoranda. The Society reads it that he confirms only that authorization memoranda are not always or necessarily "authored" by the Secretary and its view is that it is irrelevant who "authors" them. But the Solicitor's case is that he indicates that he does not know where they come from or what departments or which staff may be responsible for producing them. He makes no suggestion that the Secretary was involved in any way and, in particular, gives no indication that he has any notion whether the Secretary had himself formed the opinion and made the reference which the Society has conceded is required by s.9(1). (See page 12, paragraphs 27 and 28 of Society's Response, also page 15, paragraph 39, last sentence.) How could he then know whether they were properly authorized and referred in compliance with s.9(1) and constituted a valid basis for proceeding with the hearing?

Mr. Marrocco's evidence, along with Mr. Scott's, contribute substantially to the issue of whether the Solicitor discharged the onus to demonstrate on a balance of probabilities that there was a lack of compliance with s.9(1).

Analysis

The decisive issue was whether the Secretary, or possibly a Deputy or Assistant Secretary, had personally turned his or her mind to the "matter" and formed the necessary "opinion" that there were "reasonable grounds" to refer the matter to the Chair or Vice-Chair of Discipline for "further directions" and had done so.

Counsel for the Society concedes that those were personal responsibilities of the Secretary, or a Deputy or Assistant Secretary, but argued that Ms. Codina has not established that they have not performed them. The Society's position was that it could rely on a presumption that the procedure required by s.9(1) had been correctly followed unless Ms. Codina could meet the onus of establishing on a balance of probabilities that there had been a breach of s.9(1). Only then would the onus shift to the Society to establish that s.9(1) had not been breached. The Society also maintained that its concession that the Secretary (later expanded to include a Deputy or Assistant Secretary) had not "authored" the "authorization memoranda" by means of which the matter had been referred to the Chair or Vice-Chair was of no relevance or significance since s. 9(1) did not require that one of them "author" the memorandum, only that one of them had reached the required "opinion".

Ms. Codina's position was that the concession that no authorized person had "authored" the memoranda which constituted the referral was not irrelevant. It was an important step towards meeting the onus on her to establish that the Secretary, or Deputy or Assistant Secretary had not personally formed the opinion as to reasonable grounds. In addition the testimony of Mr. Scott and Mr. Marrocco, a Chair and a Vice-Chair of Discipline, to the effect that they did not know who actually had referred the matter to them, added to the probability that there had been a lack of compliance with s.9(1), i.e. that no authorized person had reached the required "opinion" and made the consequent reference.

It is useful to examine dictionary definitions of the word "author", used both as a noun and a verb.

Oxford English Dictionary (as a noun): the person who originates or gives existence to anything, he who gives a rise to an action, event or circumstance, or state of things; the prompter or instigator; (as a verb): to originate, cause, declare, say.

Random House Dictionary of the English Language (Unabridged Edition) (as a noun): the maker of anything, the creator; (as a verb): to write, be the author of, originate.

These definitions assist Ms. Codina in her contention that the concession that the Secretary was not the author included a concession that the Secretary was not involved in the forming of the opinion for the act of referring required by s.9(1). To paraphrase the definitions, he did not originate, give rise to, prompt or instigate the authorization memoranda. At the very least, Ms. Codina was justified in assuming that the concession gave rise to that inference. There was no evidence as to who was responsible for forming the opinion and making the referral.

If this concession had no significance why was it made? Ms. Codina made it clear on a number of occasions that her concern was with the substance of the Secretary's role under s.9(1), not with the mere mechanics by which the consequent referral was made, i.e. did he personally form the opinion? If the Society was responding with a concession which had no relevance to the real issue they should have made that clear to the Solicitor, at the very least by stipulating that there was no concession that the Secretary was not involved in forming the opinion and making the referral.

Instead she was allowed to assume that she had obtained an important and relevant concession, she did not then persist in her intention to summons the Secretary, and in the end the Discipline Committee ruled that there had been no breach of s. 9(1) and proceeded with the hearing on the merits of the complaints.

We are left with no knowledge of how s.9(1) works. The Society has conceded that while only the Secretary or a Deputy or Assistant Secretary is authorized to form the opinion and make the reference, no such authorized person necessarily had to "author" the memoranda. The Chair and Vice-Chair did not know where the memoranda came from or what staff had been involved in preparing them. There was an absence of evidence one way or the other as to whether the Secretary, or a Deputy or Assistant Secretary did form the opinion or make the reference. But if the Chairs did not positively know that it was the Secretary or a Deputy or Assistant Secretary who had reached the "opinion" and made the referral, they had no statutory authority to proceed further with the matter.

The Society contended that s.9(1) does not even require a written authorization memorandum, although there were such memoranda in this case. Is it reasonable or acceptable that so serious a responsibility placed on the Secretary by regulation under the statute can be met with no written evidence that the essential opinion has been reached by an authorized person? The Secretary's role under s.9(1) is a key step and a precondition in the process by which a discipline hearing may be launched with all its possible consequences for the complainants and the solicitor. It is not a minor administrative step. Following a preliminary investigation of information indicating a member may have been guilty of professional misconduct, or conduct unbecoming, the Secretary must reach an "opinion" that there are "reasonable grounds" and, if so, shall refer the matter to the Chair or Vice-Chair for further instructions. Until he does this, no discipline process can be authorized.

It is a reasonable assumption, as made by Ms. Codina, that the Secretary, in complying with this responsibility imposed on him by statute, would do so in a written communication to the Chair or Vice-Chair, which he would "author" at least to the extent of signing it or noting on it his approval. If the Secretary chose to do it some other way, it would be no great burden on the Society, when challenged, to demonstrate that it had, in fact, been done.

It is conceded by the Society that the Secretary did not perform the obligations imposed on him by s.9(1) in the most obvious and normal way, by authoring a written communication; the Chair and Vice-Chair of Discipline could offer no indication whether or how he had complied; and the Discipline Committee refused to let Ms. Codina examine the memoranda which might have contained some indication whether the Secretary had indeed performed his functions. Ms. Codina therefore met the onus on her, and the responsibility became the Society's to establish that there was no breach. This could have been done by calling the Secretary as a Society witness to provide the Discipline Committee with evidence, if it was available, that he had complied with s.9(1) by some means even if he had not "authored" the authorization memoranda. But no evidence of compliance was tendered by the Society.

Conclusion

The majority of Convocation concluded that Ms. Codina met the onus on her of establishing a prima facie failure to comply with the mandatory conditions of s.9(1). It was then up to the Society to show that there had been compliance. It did not do so.

The decision of Convocation is therefore that the Society lacked jurisdiction to proceed with the complaints because of its failure to comply with s.9(1) of Regulation 708 under *The Law Society Act* and the Decision of the Discipline Committee is set aside.

Earl A. Cherniak, Q.C. Marshall A. Crowe

17 April 2000

File Nos. D13/96, D89/96, D164/96, D16/98

THE LAW SOCIETY OF UPPER CANADA
IN THE MATTER OF THE *LAW SOCIETY ACT*

AND IN THE MATTER OF ANGELINA MARIE CODINA
of the City of Toronto,
a Member of the Law Society of Upper Canada

DISSENT

1. After a lengthy Hearing, a Discipline Committee of the Society found the Member guilty of serious professional misconduct and conduct unbecoming, and unanimously recommended disbarment.

2. On March 24, 2000, a majority of Convocation found that the Society had lacked jurisdiction to proceed with the complaints; chose not to hear fresh, potentially determinative evidence; found that the Discipline Committee had erred in principle on the jurisdictional issue; set aside the Decision of the Discipline Committee; and terminated the proceedings against the Member.

3. In the respectful opinion of the Minority, the Majority erred in concluding that the Society lacked jurisdiction. The Minority have had the advantage of reading the Reasons of the Majority.

4. The relevant provisions of *Regulation 708* under the *Law Society Act* are set forth below:

9(1)Where information comes to the notice of the Society that indicates that a member may have been guilty of professional misconduct or of conduct unbecoming a barrister and solicitor, the Secretary shall make such preliminary investigation of the matter as he or she considers proper, and where in his or her opinion there are reasonable grounds for so doing, shall refer the matter promptly to the Committee or the chair or vice-chair for further directions.

(2) Subject to the directions of the Committee or the chair or vice-chair, the Secretary shall,

(a) prepare and complete or cause to be completed under oath a complaint and file it in the office of the Secretary;

(b) serve upon the member whose conduct is being investigated a copy of the complaint, a notice of the time and place of the hearing and a summons requiring the member to attend thereat; and

(c) make all necessary arrangements for the conduct of the hearing, including as appropriate, the appointment of counsel for the Society, the arrangements for oral evidence to be taken down in writing, the issue of summonses to witnesses, the production of documents and things, and the notification to all members of the Committee of the time and place of the hearing.

The Committee referred to in Section 9 is the Authorizing Committee that decides whether to issue a complaint of misconduct against a member. The Committee, not the Secretary, determines whether to authorize a complaint. Hereinafter, the "Committee or the chair or vice-chair" shall be referred to collectively as the "Committee."

5. Section 9(1) requires the Secretary to do the following:

i. make such preliminary investigation of the matter as he or she considers proper;

ii. form an opinion as to whether or not there are reasonable grounds for referring the matter to the Committee; and

iii. if there are, refer the matter to the Committee.

6. Section 9(2) requires the Secretary to do the following, subject to the directions of the Committee:

i. complete or cause to be completed under oath a complaint and file it in his own office;

ii. serve upon the member a copy of the complaint, a notice and a summons; and

iii. make all necessary arrangements for the the hearing, including appointing counsel for the Society, arranging for oral evidence to be taken down in writing, issuing summonses to witnesses, producing documents and things, and notifying all members of the Committee of the hearing.

The duties of the Secretary in Section 9(1) arise before the Committee meets to consider the referral; the duties of the Secretary in Section 9(2) arise after the Committee authorizes a complaint. Insofar as the Secretary is concerned, the work of the Committee occurs between the Secretary's functions in 9(1) and his or her functions in 9(2).

7. Section 9(2)(a) requires the Secretary, in part, to "complete or cause to be completed under oath a complaint". This is the only phrase that could give rise to the argument that the Secretary must do personally all other functions set forth in the Section because this is the only provision that contemplates allowing the Secretary to "cause" something to occur. In fact, the Majority do not make this argument. (Section 9(2)(a) is merely poorly drafted.)

8. Instead, the Majority concede that Section 9 does not require the Secretary *personally* to conduct the preliminary investigation; *personally* to complete the sworn complaint; *personally* to serve the complaint, notice and summons on the member; *personally* to appoint Society counsel, arrange for transcription of oral evidence, issue summonses, produce documents or things, or notify all members of the Committee of the hearing. It is conceded that staff investigators may conduct the actual investigations; staff may swear the complaint; staff or process servers may serve the complaint, notice and summons; staff may arrange for transcriptions, issue summonses, produce documents or things, and notify Committee members.

9. The Section does not set forth how the Secretary is to fulfill his only other two functions under the Section, namely, forming an opinion and referring the matter. For example, the Section does not require that he personally record his opinion in writing, or that he attend in person before the Committee to refer the matter, or that the matter be referred and delivered in any special form of writing or format.

10. To find that the Society lacked jurisdiction, it must be found that Section 9 was breached. Ms. Codina attacked only that portion of Section 9(1) that reads, "the Secretary...where in his or her opinion there are reasonable grounds for so doing, shall refer the matter promptly to the Committee..." In other words, for the Society to have lacked jurisdiction, Ms. Codina bore the burden to prove on a balance of probabilities that the Secretary either did not form an opinion that the conduct exposed by the investigation constituted reasonable grounds to refer the matter to the Committee or, having formed the opinion, did not refer the matter to the Committee.

11. It was further conceded that the Codina matter was referred to the Committee, because of the obvious fact that the Committee did issue several complaints against the Member.

12. Thus, Ms. Codina had to prove on a balance of probabilities that the Secretary either did not form the necessary opinion or that someone else referred the matter without the Secretary's knowledge.

13. There was no evidence whatsoever that the Secretary did not form the necessary opinion or, having formed it, that he did not refer the matter. There was no evidence whatsoever that someone referred the matter without the Secretary's knowledge. The onus to lead such evidence was on the Member; she did not meet the onus. Indeed, the only evidence that does exist proves that the matter was referred in accordance with procedural regularity.

14. Ms. Codina obtained one concession from the Society, namely, that the Secretary had not "authored" the referral document to the Committee. In other words, Ms. Codina obtained a concession that he had not done something that the statute does not require him to do. The Society was content to concede an irrelevancy. It was never asked to concede anything further, and never did so.

15. Turning to a relevant matter, the statute requires the Secretary to form an opinion. Ms Codina did not obtain a concession from the Society to the effect that the Secretary had not formed the opinion. To establish that and to meet the burden imposed not on the Society but on her, Ms. Codina needed to call the Secretary as a witness and put that question to him. The Society did not prevent her from doing so. She chose not to. It may be supposed that the reason she did not is that she anticipated that his answer would have been wholly unhelpful to her. Her failure to call the Secretary should have redounded to her, not to the Society.

16. The Majority correctly accept the Society's position that "generally...an administrative body which is created by and derives its authority from statute must act in strict compliance with its enabling legislation, particularly where disciplinary powers are concerned." At page 3 of their decision, the Majority then concede that it is undoubted common ground that the Secretary need not conduct the preliminary investigation personally, but that it may delegated to staff. Thus, the Majority pick and choose among the the tasks set forth in the Section as to which may be caused to be done and which must be seen to be done personally by the Secretary.

17. The Society further submitted that Section 9(1) is "in its entirety" investigative, not adjudicative. The Majority and Minority jointly disagree that Section 9(1) is entirely investigative. The forming of an opinion by the Secretary is clearly an adjudicative act; however, in the opinion of the Minority, it is one with a low threshold. The Secretary's role is to weed out those matters that would clearly not warrant a complaint - matters founded on unreasonable or improbable grounds. He must be careful not to usurp the far more important adjudicative function performed by the Committee when it makes the determination whether or not to issue a complaint. Of the matters referred to the Committee by the Secretary, the Committee will still decide not to issue a complaint in a number of them and to issue complaints in the others.

18. The Society correctly submitted that the rule set forth in the maxim "omnia praesumuntur rite esse acta" applies and should have bound Convocation. The maxim stands for the proposition that administrative functions performed by public officials are presumed to have been performed in accordance with the procedure set forth in the statutory mandate unless the contrary is established. The burden of proof is on the person seeking to establish the contrary. The burden is met only by establishing on a balance of probabilities that a required act was not performed in accordance with the statutory mandate. The burden is not met if it is as likely that the act was performed as not performed. The burden is not met by establishing that the official did not do something he or she is not required to do under the statutory mandate.

19. The burden is not met by demonstrating irrelevancies or raising unproven speculations. The burden is not met by failing to call a witness whose testimony would be determinative and by criticising the failure to call the same witness by the party who does not bear the burden.

20. It was the Society's and Ms. Codina's position that Section 9(1) requires that the Secretary (or deputy secretary or assistant secretary as set forth elsewhere in the Act) must personally form the opinion in question. Everyone agrees with that.

21. The Society conceded that the Secretary (or deputy secretary or assistant secretary) did not author the document that referred the Codina matter to the Committee. There was no evidence and no concession that the Secretary had not formed the necessary opinion.

22. The Act does not require either that a referral document be prepared or that the Secretary personally author or sign any such document. At this point in the continuum, all the Secretary is required to do is personally to form the opinion. Thereafter, he must refer (in essence, arrange for the matter to be referred) to the Committee. Although the practice has arisen to make the referral in the form of a written memorandum, there is no statutory requirement to create such a document. The Secretary would fulfill this part of his mandate if he did nothing more than cause to be delivered the work product of the investigation to the Committee. In this case, there was incontrovertible evidence that the matter had been referred and no evidence that he had not formed the opinion that triggered the referral.

23. At pages 13 and 14 of their Reasons, the Majority refer to Ms. Codina's questions of Mr. Scott (the Chair of her Authorizing Committee) as to who authored the Memorandum. They refer to the fact that Mr. Scott never did get to answer the question owing to the Society's objection that the Memorandum be produced. The Majority then find that Ms. Codina's examination of Mr.Scott "at least raised doubts whether the Secretary had complied with Section 9(1) and did nothing to establish that he had." With respect, Ms. Codina's questions raised doubts only as to who authored the Memorandum (and the Society concedes that the Secretary did not) and raised no doubts at all as to who formed the opinion necessary to cause the Memorandum to be prepared in anticipation of the referral to the Committee. With further respect, and bearing in mind that no evidence had been led as to whether the Secretary had not formed the opinion, the phrase "...and did nothing to establish that he had" indicates that the Majority misinterpreted and misapplied the applicable law. The Society was not required to establish that the Secretary had complied with Section 9(1) by forming the opinion; Ms. Codina was required to establish that he had not.

24. On page 16 of their Reasons, the Majority find that the Vice-Chair of the Authorizing Committee, Frank Marrocco, made no suggestion that the Secretary was involved and gave no indication that he (Marrocco) had any notion whether the Secretary had himself formed the opinion and made the reference required by Section 9(1). The Majority then ask, "How could [the Committee] then know whether they were properly authorized and referred in compliance with Section 9(1) and constituted a valid basis for proceding with the hearing [meaning the determination as to whether or not to issue a complaint]?" The answer is that the members of the Committee are entitled to rely on the presumption of procedural regularity unless it is demonstrated to them on a balance of probabilities that there has been irregularity. If the matter reaches them, as this matter did, they are entitled to assume that the Secretary has complied with Section 9(1). Indeed, the receipt of the matter by them is evidence of that very compliance.

25. Twice, at pages 13 and 17 of their Reasons, the Majority mention that the Society's concession that the Secretary had not authored the Memorandum was "an important step towards" discharging the onus on Ms. Codina. With respect, a step does not a journey make, and a concession as to an irrelevency is a step to nowhere. The balance of probabilities had not been tipped.

26. Also on page 17, the Majority state that "...the testimony of Mr. Scott and Mr. Marrocco...to the effect that they did not know who actually had referred the matter, added to the probability that there had been a lack of compliance..." With respect, the appearance of the matter on their desk is evidence of compliance, not of lack of compliance, with the referral component of Section 9(1). If, instead, the Majority wished to assert that Scott and Marrocco's lack of knowledge as to who had formed the opinion added to the probability of lack of compliance, then the Minority would argue that Scott and Marrocco were not required to know who formed the opinion. They were entitled to assume procedural regularity unless the contrary were established on probabilities.

27. At page 18, the Majority put stock in the dictionary definitions of the word "author". They paraphrase the definitions and emphasize that the Secretary "...did not originate, give rise to, prompt or instigate the authorization memorandum." However, the two-volume Shorter Oxford English Dictionary, while providing the other definitions, sets forth that "author" *"especially and absolutely"* (emphasis, though in abbreviation, is in the original) means "One who sets forth written statements; the writer or composer of a treatise or book." The plainest and most common meaning of the noun "author" is "writer", not "originator". The plainest and most common meaning of the verb "to author" is "to write", not "to originate".

28. The Majority go on to say in support of their contention of procedural irregularity that "[t]here was no evidence as to who was responsible for forming the opinion and making the referral." With respect, this assertion misconstrues the law and the onus. The evidence begins with the wording of the statute. Thereafter, the law first presumes regularity (i.e., that the person responsible under the statute has formed the opinion and made the referral) and then requires the person attacking the procedure to adduce sufficient evidence to find that it is probable, not just possible, that the person responsible for forming the opinion and making the referral did not do so. Ms. Codina did not adduce such evidence.

29. The Majority then ask, "If this concession had no significance why was it made?" The concession was made precisely because it had no, or at most little, significance. The Majority then criticise the Society for failing to bring home to Ms. Codina that the concession had no or little significance. With respect, there was no obligation on the Society to teach Ms. Codina the law or expound upon the reasoning. That she did not then "persist in her intention to summons the Secretary" should have been her error, not the Society's. However, the Minority believes that Ms. Codina never intended to call the Secretary, else she would never have bothered to call Messrs. Scott and Marrocco. The function set forth in Section 9(1) that Ms. Codina attempted to impugn occurs before the Committee is even engaged. It was incumbent upon her to call, not Committee members who were not involved in the impugned function, but the Secretary who she alleged failed to perform the impugned function.

30. It is difficult to conceive how an attacker of the Secretary's performance could establish his nonperformance without calling him or without obtaining a concession touching upon his *statutorily required* duties. By her choice, Ms. Codina did not call him. Furthermore, she did not obtain a concession touching upon his statutorily required duties. All she succeeded in obtaining was a concession of no or little significance. It should not have availed her in the jurisdictional argument.

31. At page 20, the Majority argue that it is a reasonable assumption that "the Secretary, in complying with the responsibility imposed on him by statute, would do so in a written communication to the Chair or Vice-Chair, which he would "author" at least to the extent of signing it or noting on it his approval." Thus do the Majority seek both to read into the statute obligations that are not there, and to switch their interpretation of "author" from "originate" to "execute".

32. The Majority go on to recognize that the Secretary may choose to comply with his obligations in some other way. Indeed, the statute contemplates that the compliance be done another way; i.e., by forming a personal opinion and referring the matter to the Committee. The easiest way for the Secretary to comply with the statute is to say to the investigator, "I think you have found sufficient evidence of misconduct. Take your investigatory findings promptly to the Committee for further directions."

33. The Majority then say that, if the Secretary does choose to comply with the Act in this manner, "...it would be no great burden on the Society when challenged, to demonstrate that it had, in fact, been done." With respect, this misapplies the law and the onus. The onus is not met merely by challenging. The attacker must adduce evidence on point, not off point, and it must be sufficient to tip the scales of probability, not the scales of possibility. Only then is a response called for.

34. At page 20, the Majority state that "[i]t is conceded by the Society that the Secretary did not perform the obligations imposed on him by s.9(1) in the most obvious and normal way, by authoring a written communication...". With respect, this statement misconstrues the Society's concession.

35. The Majority state that "...the Chair and Vice-Chair of Discipline could offer no indication whether or how he had complied...". With respect, this information was irrelevant because the Chair and Vice-Chair were entitled to assume procedural regularity. It was not their role to investigate or assure compliance.

36. The Majority state that "...the Discipline Committee refused to let Ms. Codina examine the memoranda which might have contained some indication whether the Secretary had indeed performed his functions." With respect, the memoranda were part of the Society's work product, and a long line of cases has established that work product need not be produced except in limited circumstances not applicable here. Furthermore, the Society conceded that the memoranda did not contain (because they did not need to contain) the indication sought by Ms. Codina.

37. The Majority contended that it is probable the Secretary did not comply with the statute and that Ms. Codina met her onus; yet, nowhere is there evidence, as required under the presumption of procedural regularity, that the Secretary did not form the opinion required by the statute. Instead, the Majority chose to impose on the Society the onus of proving that the Secretary had formed the opinion. With respect, the decision of the Majority is contrary to law and is not supported by the facts.

38. In the event, Convocation did not not need to know whether the Secretary had or had not formed the opinion because Convocation was entitled to begin with the assumption that he had. The conceded reality of the referral supported that assumption. Thereafter, Ms. Codina led insufficient evidence of any procedural irregularity under the statute with respect to the forming of the opinion, and avoided her opportunity to call the one witness she needed to call

if she hoped to establish irregularity. She alleged only that the Secretary did not do something that the Act does not require him to do. The Majority decided that this was sufficient to deny jurisdiction and not consider the merits of the many findings of serious professional misconduct by the Hearing Committee. With respect, the decision of the Majority is in error.

39. Furthermore, even if there was a defect in the Society's evidence (which the Minority dispute), Convocation could have and should have remedied the defect by granting leave to the Society to call the Secretary to give evidence on the matter in issue. Convocation has frequently exercised its discretion to hear evidence. By taking a narrow, technical approach concerning Convocation's own procedure, and by choosing not to hear fresh, potentially determinative evidence, the Majority appear to have preferred form over substance and have compromised the public's interest in knowing the truth of the matter.

40. The Minority find that the Society had jurisdiction in these complaints and that Convocation should have proceeded to consider the merits of the recommendations of the Discipline Committee.

DATED May 25, 2000.

Bradley H. Wright, for the Minority

CONVOCATION ROSE AT 5:30 P.M.

Confirmed in Convocation this 21st day of September, 2000

Treasurer