MINUTES OF CONVOCATION

Thursday, 19th September, 2002

PRESENT:

The Treasurer (Vern Krishna, Q.C., FCGA), Aaron, Arnup, Banack, Bindman, Braithwaite, Carey, Carpenter-Gunn, Cass, Chahbar, Cherniak, Coffey, Copeland, Curtis, Diamond, Ducharme, Epstein, Feinstein, Furlong, Go, Gottlieb, Harris, Hunter, Laskin, Lawrence, MacKenzie, Marrocco, Millar, Minor, Mulligan, Murray, Ortved, Pilkington, Porter, Potter, Puccini, Ross, Ruby, St. Lewis (by telephone), Simpson, Topp, Wardlaw, White, Wilson and Wright.

……

The reporter was sworn.

……

IN PUBLIC

……

The Treasurer was saddened to announce the death of Rose Swaye, mother of Gerald Swaye on September 16th at the age of 93. The Treasurer extended condolences to Mr. Swaye and his family on behalf of Convocation. He advised that donations may be made to Shalom Village.

The Treasurer advised that the tribute reception to Don Lamont held on September 18th was well received by family and friends. The main Bar Admission Lecture Hall has been named the Donald Lamont Lecture Hall in his memory. A plaque is being prepared and will be ready in a few weeks.

The Ontario Securities Commission has sought the Law Society's input on the issue of "whistle-blowing" in corporations by legal counsel who may become aware of illegal activities. The Treasurer has referred the issue to the Emerging Issues Committee.

The Treasurer announced that Law Society members, staff, BAC students and family members of these groups are now eligible for discounts on selected IBM products and services through a new Law Society affinity program. Details of this program may be found on the Law Society website.

The Treasurer thanked those staff members who conducted tours of the building during the summer. Three hundred visitors participated.

MOTION – ELECTION OF BENCHER

It was moved by Mr. Hunter, seconded by Mr. Bindman:

WHEREAS Robert I. Martin, who was elected from the Province of Ontario "B" Electoral Region (the area in Ontario outside the City of Toronto) on the basis of the votes cast by all electors, was elected by Convocation in June to fill a vacancy in the office of bencher elected from the Southwest Electoral Region on the basis of votes cast by electors residing in that electoral region; and

WHEREAS Robert I. Martin's election in June created a vacancy in the number of benchers elected from the Province of Ontario "B" Electoral Region (the area in Ontario outside the City of Toronto) on the basis of the votes cast by all electors;

THAT under the authority contained in By-Law 5, Holly Harris, having satisfied the requirements contained in subsections 50 (1), 50 (2) and 52 (1) of the By-Law, and having consented to the election in accordance with subsection 52 (2) of the By-Law, be elected by Convocation as bencher to fill the vacancy in the number of benchers elected from the Province of Ontario "B" Electoral Region (the area in Ontario outside the City of Toronto) on the basis of the votes cast by all electors.

Carried

The Treasurer and benchers welcomed Ms. Harris to Convocation.

MOTION – DRAFT MINUTES

It was moved by Mr. Hunter, seconded by Mr. Bindman that the Draft Minutes of June 28, 2002 be approved.

Carried

MOTION – APPOINTMENT TO PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE

It was moved by Mr. Hunter, seconded by Mr. Bindman that Daniel Murphy be appointed as a member to the Professional Development, Competence & Admissions Committee.

Carried

MOTION – ESTABLISHMENT OF BENCHER ELECTION ADVISORY GROUP

It was moved by Mr. Hunter, seconded by Mr. Bindman that a Bencher Election Advisory Group be established and that the following benchers be appointed to it: Sydney Robins (Chair), Susan Elliott, Laura Legge and Prof. Vern Krishna (Treasurer).

Withdrawn

Following a discussion the motion was put back on the floor.

It was moved by Mr. Aaron, seconded by Mr. Gottlieb that the motion be tabled.

Lost

Mr. Bindman moved an amendment to the motion that Gillian Diamond be added as a member of the Bencher Election Advisory Group.

Not Put

Following further discussions the motion was deferred to the October Convocation.

MOTION – APPOINTMENT TO CANADIAN NATIONAL EXHIBITION

It was moved by Mr. Hunter, seconded by Mr. Bindman that Larry Banack be appointed the Law Society's representative on the Canadian National Exhibition Association.

Carried

MOTION – APPOINTMENTS TO ONTARIO BAR ASSOCIATION COUNCIL

It was moved by Mr. Bindman, seconded by Mr. Murray that Larry Banack, Judith Potter and Helene Puccini be reappointed to the Ontario Bar Association Council for a term of two years.

Carried

ROLL-CALL VOTE

Aaron	For
Arnup	For
Banack	Abstain
Bindman	For
Braithwate	For
Carey	For
Carpenter-Gunn	For
Chahbar	For
Cherniak	For
Coffey	For
Curtis	For
Diamond	Abstain
Ducharme	For
Epstein	For
Feinstein	For
Go	For
Gottlieb	For
Harris	For
Hunter	Abstain
Laskin	Abstain
MacKenzie	For
Marrocco	For
Millar	For
Minor	For
Mulligan	For
Murray	For
Ortved	For
Potter	For
Puccini	Abstain
Ross	For
Ruby	Abstain
St. Lewis	For
Simpson	For
Topp	For

White	For
Wilson	Abstain
Wright	For

Votes: For – 30, Against – 0, 7 Abstentions

MOTION - ESTABLISHMENT OF A TASK FORCE TO EXAMINE THE ONGOING SURVIVIAL OF SMALL FIRMS AND SOLE PRACTITIONERS

It was moved by Ms. Potter, seconded by Mr. Feinstein that the Emerging Issues Committee set up a working group including sole practitioners and lawyers from small firms to examine and report to Convocation the ongoing survival of small firms and sole practitioners.

Carried
(Unanimously)

ROLL-CALL VOTE

Aaron	For
Arnup	For
Banack	For
Bindman	For
Braithwaite	For
Carey	For
Carpenter-Gunn	For
Chahbar	For
Cherniak	For
Coffey	For
Curtis	For
Diamond	For
Ducharme	For
Epstein	For
Feinstein	For
Go	For
Gottlieb	For
Harris	For
Hunter	For
Laskin	For
MacKenzie	For
Marrocco	For
Millar	For
Minor	For
Mulligan	For
Murray	For
Ortved	For
Potter	For
Puccini	For
Ross	For
Ruby	For
St. Lewis	For
Simpson	For
Topp	For

White	For
Wilson	For
Wright	For

Votes: For – 37, Against – 0

REPORT OF THE FINANCE & AUDIT COMMITTEE

Mr. Ruby presented the Report of the Finance & Audit Committee for approval by Convocation.

Finance and Audit Committee
September 19, 2002

Report to Convocation

Purpose of Report: Decision
Information

Prepared by the Finance Department
Andrew Cawse (947-3982)

TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee ("the Committee") met on September 5, 2002. Committee members in attendance were: Ruby C. (c), Epstein S. (vc), Crowe M. (vc), Cass R., Chahbar A., Coffey A., Divinsky P., Lawrence A., MacKenzie G., Porter J., Swaye G., Topp R., White D., Wright B.. Benchers also attending were Krishna V. (Treasurer), Mulligan G., Wilson R.. Staff attending were Heins M., Tysall W., Grady F., Miller J., White R., Cawse A.. Also attending were Strom M. (LawPro), Kim Y. (LawPro), Hebditch S. (LibraryCo Inc.).

The Committee is reporting on the following matters:

Decision

X Banking Resolution and Signatories
X J. S. Denison Fund (Confidential)

Information

X Second Quarter Financial Statements for LSUC General Fund
X Second Quarter Financial Statements for LSUC Compensation Fund
X Second Quarter Financial Statements for LawPro
X Second Quarter Investment Compliance Reports
X First Quarter Statement of Revenues and Expenses for LibraryCo
X Law Society Budget Process
X LibraryCo Inc. Budget and Business Plan

FOR DECISION

AMENDMENT TO BANKING RESOLUTION AND SIGNATORIES

1. Amendments to the banking resolution to reflect the series of reorganizations within the Law Society's corporate structure are detailed in the memorandum attached (page 5). The memorandum also requests the approval of Mr. Gavin MacKenzie as a designated bencher cheque signatory to replace the late Mr. Don Lamont.

The Finance and Audit Committee recommends that Convocation approve changes to the banking resolution:

- The Director of Policy and Legal Affairs replaces the Secretary as an officer of the corporation (Section B of Certificate and Agreement with Bank of Montreal amended by Notice of Names of Directors and Officers)
- The following list amends Schedule A of the banking resolution. These titles are the Authorised Signing Officers of the corporation

Title	Incumbent as at September 1, 2002
Treasurer	Vern Krishna
Chair of Finance and Audit Committee	Clayton Ruby
Vice Chair of Finance and Audit Committee	Marshall Crowe
Vice Chair of Finance and Audit Committee	Seymour Epstein
Designated Bencher	Julian Porter
Designated Bencher	Gavin MacKenzie
Chief Executive Officer	Malcolm Heins
Chief Financial Officer	Wendy Tysall
Director of Policy and Legal Affairs	Katherine Corrick
Manager of Finance	Fred Grady

J.S. DENISON FUND (Confidential)

2. A memorandum concerning four applications to the J.S. Denison Fund (the "Fund") totaling $25,000 is attached from page 14.

3. The Committee discussed the future of the Fund. The Fund was established in 1968 with a bequest of $190,005. J. Shirley Denison's will states:

> "….deliver to the Law Society of Upper Canada the residue of my estate the same to be applied from time to time by the Treasurer and Benchers and both as to capital and income as they may see fit for the relief of impoverished or indigent members of the Law Society…."

4. The present value of the Fund is $373,000. Investment income has exceeded the value of grants over the life of the Fund. Grants have averaged $1,800 individually and $7,600 annually. If many larger grants are given the Fund will be exhausted.

5. Options for the future disposition of the Fund, will be discussed with the Treasurer.

The Finance and Audit Committee recommends that Convocation approve the disbursement of funds totaling $25,000 from the J.S. Denison Fund as recommended in the attached memorandum.

FOR INFORMATION

FINANCIAL STATEMENTS FOR THE SECOND QUARTER ENDED JUNE 30, 2002

6. The second quarter financial statements for the General Fund (page 18), Lawyers Fund for Client Compensation (page 22) and Lawyers Professional Indemnity Company (page 25) were received by the Committee. The Investment Compliance Reports as at June 30, 2002 confirming no exceptions were also received by the Committee (page 39).

FINANCIAL STATEMENTS FOR THE FIRST QUARTER ENDED MARCH 31, 2002

7. The first quarter Statement of Revenues and Expenses for LibraryCo Inc. (page 45), was received by the Committee.

BUDGET PROCESS

8. A memorandum addressing the status and assumptions in the preparation of the 2003 budget was reviewed by the Committee.

LIBRARYCO INC. 2003 BUDGET AND BUSINESS PLAN

9. In response to LibraryCo's 2002 budget, the Committee had requested a transition plan that will assist members in obtaining access to Local A libraries as they move from paper based to electronic formats. The Committee also requested that LibraryCo submit options on the business plan's proposed $134,000 reduction in spending on staffing in libraries designated as Local A. Documentation addressing these requests is attached from page 49.

10. LibraryCo Inc. presented a draft 2003 operating budget to the Committee. The Committee noted that LibraryCo was clearly making progress in their financial planning but requested:

- a more detailed analysis of 2003 expenses such as values and descriptions of the major electronic products to be purchased.
- improved integration between the 2003 budget and LibraryCo's Business Plan
- a balance sheet or alternative which illustrates the impact of the operating budget on the reserves of the company
- an improved description of how corporate reserves were to be utilized, such as financing the transition from paper based information to electronic products.

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

(1) Copy of a Memorandum to the Finance & Audit Committee from Wendy Tysall, CFO dated August 14, 2002 re: Amendment to Banking Resolution and Signatories.

(pages 5 – 13)

(2) Copy of a Memorandum (IN CAMERA) to the Finance & Audit Committee from Raymond White, Controller dated August 19, 2002 re: J. S. Denison Fund – Confidential.

(pages 14 – 17)

(3) Copy of the second quarter financial statements for the General Fund, Lawyers Fund for Client Compensation and Lawyers' Professional Indemnity Company.

(pages 18 – 38)

(4) Copy of the Investment Compliance Reports as at June 30, 2002.

(pages 39 – 44)

(5) Copy of the first quarter Statement of Revenues and Expenses for LibraryCo Inc.

(pages 45 – 54)

Re: Amendment to Banking Resolution and Signatories

It was moved by Mr. Ruby, seconded by Mr. Epstein that changes to the banking resolution be approved:

- The Director of Policy and Legal Affairs replaces the Secretary as an officer of the corporation (Section B of Certificate and Agreement with Bank of Montreal amended by Notice of Names of Directors and Officers)
- The following list amends Schedule A of the banking resolution. These titles are the Authorised Signing Officers of the corporation

Treasurer	Vern Krishna
Chair of Finance and Audit Committee	Clayton Ruby
Vice Chair of Finance and Audit Committee	Marshall Crowe
Vice Chair of Finance and Audit Committee	Seymour Epstein
Designated Bencher	Julian Porter
Designated Bencher	Gavin MacKenzie
Chief Executive Officer	Malcolm Heins
Chief Financial Officer	Wendy Tysall
Director of Policy and Legal Affairs	Katherine Corrick
Manager of Finance	Fred Grady

Carried

Re: Applications to the J. S. Denison Fund

It was moved by Mr. Ruby, seconded by Mr. Epstein that the disbursement of funds totaling $25,000 from the J. S. Denison Fund be approved as recommended in the in camera memorandum attached to the report.

Carried

Mr. Ruby indicated that he spoke to the Treasurer and suggested that a small committee be set up at his direction to examine the future of the fund.

Items for Information Only

- Financial Statements for the Second Quarter Ended June 30, 2002
- Financial Statements for the First Quarter Ended March 31, 2002
- Budget Process
- LibraryCo Inc. 2003 Budget and Business Plan

REPORT OF THE INTER-JURISDICTIONAL MOBILITY COMMITTEE

Mr. Millar presented the Report of the Inter-Jurisdictional Mobility Committee for approval by Convocation.

Inter-Jurisdictional Mobility Committee
September 19, 2002

Report to Convocation

Purpose of Report: Policy – For Decision

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

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Committee met on September 5, 2002. Committee members participating were Derry Millar (Chair), John Campion, Abe Feinstein, George Hunter, and Gavin MacKenzie. The Treasurer attended the meeting. Staff in attendance was Sophia Sperdakos.

2. The Committee is reporting to Convocation on the following:

   $ Consideration of the August 2002 National Mobility Agreement, accepted by the Federation of Law Societies

POLICY

NATIONAL MOBILITY AGREEMENT

Request to Convocation

That Convocation approve the National Mobility Agreement, set out at Appendix 1, which was accepted by the Federation of Law Societies on August 16, 2002, and authorize the Law Society to become a signatory to the Agreement.

That Convocation direct the preparation of the appropriate By-law amendments, for its approval, to implement the terms of the National Mobility Agreement.

The Issue

1. On May 23 2002, the Law Society's Committee on Inter-Jurisdictional Mobility (the "Committee") provided Convocation with the May 8, 2002 report of the Federation of Law Societies National Mobility Task Force.

2. Convocation
   a. approved the report, including the framework proposed for a protocol on temporary and permanent mobility set out in it; and

   b. authorized the Law Society's delegates to the annual meeting of the Federation of Law Societies in August 2002 to approve the report and the framework for a mobility protocol.

3. On August 16, 2002, the Federation of Law Societies accepted the Mobility Resolution set out at Appendix 1.

4. Pursuant to the Resolution the Federation,

   a. accepted the Task Force's May 8, 2002 report; and

   b. agreed that the National Mobility Agreement, set out at Appendix 2, be distributed to affected member governing bodies for their approval as to participation.

5. Federation members were also provided with a Commentary to the Agreement, set out at Appendix 3.

6. Pursuant to the Agreement, signatories to it would then take steps to implement the terms of agreement in their jurisdiction by approving whatever legislative, rule, or by-law changes are necessary. In the case of Ontario this will entail amendments to By-laws 11 (Call to the Bar and Admission and Enrollment as a Solicitor), By-law 22 (Appearance as Counsel in Specific Proceedings) and By-law 33 (Inter-Provincial Practice of Law).

7. The Committee has now considered the National Mobility Agreement and is of the view that it reflects the framework for mobility set out in the Task Force's report that Convocation approved in May 2002.

8. The Committee recommends that Convocation approve the National Mobility Agreement and authorize the Law Society to become a signatory to the Agreement. Thereafter, the appropriate amendments to By-laws would be prepared for Convocation's review and approval.

Appendix 1

Resolution on Mobility

National Mobility Task Force
August 16, 2002

WHEREAS the Federation of Law Societies (the "Federation") established the National Mobility Task Force (the "Task Force") in August 2001 to examine full mobility rights and conditions for lawyers and Quebec notaries in Canada;

WHEREAS in accordance with its terms of reference the Task Force surveyed all law and barristers' societies, the Barreau du Quebec and the Chambres des Notaires du Quebec, compiled the information received, and provided it to all jurisdictions;

WHEREAS the unique circumstances of the Chambre des Notaires du Quebɔc, and the Law Societies of the territories of the Yukon, Northwest Territories and Nunavut, necessitate special considerations that could not be undertaken within the time frame prescribed in the Task Force's terms of reference, but should be undertaken in the future;

WHEREAS in May 2002 the Task Force filed with the Federation its report addressing how full mobility might be implemented for consideration by each applicable governing body;

WHEREAS a multi-lateral National Mobility Agreement reflecting the Task Force's report has been presented to the Federation for ultimate signing by those jurisdictions that wish to participate in the mobility regime;

AND WHEREAS continued analysis of mobility issues and, where appropriate, development of mobility provisions with respect to jurisdictions outside of Canada is in the public interest.

THEREFORE BE IT RESOLVED

THAT the Task Force Report dated May 8, 2002 be accepted.

THAT the National Mobility Agreement presented to the Federation at the Annual Meeting in Niagara-on-the-Lake in August 2002 be distributed to affected member governing bodies for their approval as to participation.

THAT the Task Force be authorized to establish working groups to address implementation issues with respect to mobility including, but not limited to those related to,

- Defalcation Compensation Funds
- Professional Liability Insurance
- Arbitration Provisions
- A Draft Model Rule

THAT the Task Force be authorized to continue to explore and, where appropriate, develop recommendations for mobility with respect to members of the Chambre des Notaires du Queb9c and the Law Societies of the territories of the Yukon, Northwest Territories and Nunavut, as well as to lawyers in jurisdictions outside of Canada.

AND THAT the Task Force provide an interim report on its ongoing work to the May 2003 Federation meeting.

Mobility Resolution

Moved by:
Sarah A. E. Kay, Law Society of the Northwest Territories
Seconded by:
George Hunter, Law Society of Upper Canada

ADOPTED unanimously on August 16, 2002
Niagara-on-the-Lake, Ontario

Appendix 3

COMMENTARY TO NATIONAL MOBILITY AGREEMENT

Mobility Task Force

August 16, 2002

In May 2002 the Task Force on Mobility provided the Federation of Law Societies with its report and recommendations for enhancing inter-jurisdictional mobility among lawyers in Canada. Many jurisdictions have already considered the report. The accompanying document expresses the principles and recommendations enunciated in the May report in a multi-lateral agreement for the consideration of each jurisdiction and ultimately for signing by those that wish to take advantage of its provisions.

The purpose of this commentary is to:

- Provide an overview to the national mobility agreement;
- Reference its provisions to the May 2002 report; and
- Where appropriate, provide explanation of specific clauses.

The Agreement
The agreement is divided into sections as follows:

- Preamble
- Definitions
- General
- Temporary Mobility among Common Law Jurisdictions
  - Mobility without permit
  - Mobility permit required
  - Temporary mobility not allowed
- Permanent Mobility Among Common Law Jurisdictions
- Temporary Mobility Between Quebec and Common Law Jurisdictions
- Permanent Mobility Between Quebec and Common Law Jurisdictions
- Inter-Jurisdictional Practice Protocol
- Transition Provisions
- Withdrawal

The agreement is the first step in a process to implement the May 2002 report. The agreement does not, in and of itself, create any rights. It sets out the terms upon which signatory jurisdictions will operate with respect to inter-jurisdictional mobility, both temporary and permanent. Any jurisdiction that signs the agreement, however, will then pass whatever rules, by-laws or other provisions necessary within its jurisdiction to implement the terms.

Those jurisdictions that choose not to sign the agreement and implement its provisions will continue to be governed by whatever inter-jurisdictional mobility provisions are currently in place for that jurisdiction.

Overview to the Agreement Clauses and References to May 2002 Report
Paragraph references are to the May 2002 Task Force Report. *Clause* references are to the National Mobility Agreement.

Preamble
The preamble summarizes the background of the Task Force's establishment, the Federation of Law Societies' acceptance of its report and the general principles enunciated in the first part of the May 2002 report, namely,

- The civil law and common law contexts that define the Canadian legal landscape (paragraphs 13-26);
- The importance of facilitating temporary and permanent mobility (paragraphs 27-29);
- The voluntary and reciprocal nature of the agreement (paragraphs 30-33); and
- The importance of protecting the public interest (paragraph 34).

Definitions
These reflect the significant terms used throughout the agreement to define and describe the temporary and permanent mobility provisions set out in paragraph 61 of the May 2002 report.

General
This section states that the agreement does not create rights and that each signatory must

- take the necessary steps within its jurisdiction to implement the provisions of the agreement; and
- cooperate with other signatories to resolve conflicts with the application of the mobility rules.

The section reflects the importance of signatories complying with both the letter and the spirit of the agreement to faciliate mobility in the public interest.

It also reflects paragraph 61 (a) of the May 2002 report by affirming that lawyers cannot obtain greater rights under mobility provisions than they have in their home jurisdiction (with respect to both temporary and permanent mobility).

Temporary Mobility among Common Law Jurisdictions
This section addresses issues under the headings:

- Mobility without Permit
- Mobility Permit Required
- Temporary Mobility not Allowed
- National Registry of Practising Lawyers
- Liability Insurance and Defalcation Compensation Funds
- Enforcement

It covers the recommendations for temporary mobility in the common law jurisdictions described in paragraph 61(b)-(h) of the May 2002 report. It also reflects the principles for protecting the public interest set out in the May 2002 report concerning,

- National Registry of Lawyers (paragraphs 35-38);
- Good standing (paragraphs 42-44);
- Competence requirements (paragraph 50);
- Insurance and defalcation compensation fund requirements (paragraphs 52-55).

With respect to defalcation compensation funds it continues the provisions in place under the IJPP until such time as other provisions may be developed.

Three clauses in this section require some elaboration.

Clause 10(f)
Clause 10 requires that to be eligible for mobility without a permit a lawyer must meet certain criteria, including that he or she be entitled to practise in the home jurisdiction, have insurance and defalcation compensation coverage and not be subject to conditions or restrictions on his or her practice or membership. The lawyer must also not be the subject of criminal or disciplinary proceedings in any jurisdiction. Finally the lawyer must have no disciplinary record in any jurisdiction.

The clause does not specifically state that to be eligible for mobility without a permit the lawyer must not have a criminal conviction in any jurisdiction. This is because

(a) not all governing bodies track such information; and

(b) if the criminal conviction is of a serious enough nature it will be the subject of a disciplinary proceeding and, where appropriate, a disicpline finding. In such case the lawyer would have a disciplinary record and would not be eligible for mobility without a permit.

Clause 11
Clause 11 of the Agreement reflects paragraph 61(d) of the Task Force report and provides that a lawyer who practises law of federal jurisdiction in a host jurisdiction will be considered to be “providing legal services in a host jurisdiction” within the meaning of the temporary mobility rules.
Currently, lawyers who practise federal law are not required to be members of the governing body of the jurisdiction in which they are physically present and practising. They were excepted from the application of the rules under the Inter-Jurisdictional Practice Protocol in 1994.

The practical effect of clause 11 is that a member of one bar who works full-time for the federal Department of Justice in a jurisdiction other than the one in which he or she is a member of the bar, will be required to apply for membership in the bar of that jurisdiction.

In the Task Force's view this provision is important to the overall integrity of the mobility provisions and to regulatory integrity generally. It is essential that governing bodies have jurisdiction over all lawyers working in their jurisdictions. To exclude any group from this, except on the basis of rules for temporary mobility, undermines the integrity of the regulatory system.

Clauses 27-31
These clauses provide that in the event of alleged misconduct arising out of a lawyer's temporary provision of legal services in or with respect to the law of a host jurisdiction, the *home* governing body will assume responsibility for the conduct of the proceedings unless the home and the host governing bodies agree otherwise.

In the IJPP, it was the *host* governing body that assumed responsibility. In its May 2002 report the Task Force indicated that the approach taken under the IJPP should continue. Upon further reflection, however, the Task Force is of the view that it is more appropriate for the home jurisdiction to assume responsibility, as reflected in clauses 27-31.

In a temporary mobility situation it is the home governing body that is in the best position to proceed against its own member. It has complete knowledge of the member in a way that the host governing body does not. Most importantly, however, it is in a much better position to enforce any finding, since such a finding is made against its own member. Under the IJPP provisions a host governing body would be in a position of trying to enforce a finding against a lawyer who is not a member.

The interests of the host jurisdiction and the public in that jurisdiction are well protected under this approach as follows:

- Clause 26 requires the visiting lawyer to comply with the legislation, regulations, and standards of professional conduct of the host jurisdiction.
- Should the host and the home jurisdiction agree, the host *may* assume responsibility for the proceeding; and
- In determining the location of a hearing the primary considerations will be the public interest, convenience and cost.

Permanent Mobility among Common Law Jurisdictions
This section covers the recommendations for permanent mobility in common law jurisdictions described in paragraph 61(i)-(k) of the May 2002 report. It also reflects the principles for protecting the public interest set out in the May 2002 report concerning:

- Good character
- Good standing (in the sense of entitlement to practise law in a home jurisdiction)
- Disclosure of records and information
- Competence

Clause 32 addresses what qualifications one signatory jurisdiction may require a lawyer from another signatory jurisdiction to meet to be eligible for membership in that jurisdiction. The clause makes it clear that a signatory may not require further qualifications than those specified in it, although it may require fewer than those specified.

Temporary Mobility between Quebec and Common Law Jurisdictions
This section reflects the principles discussed in paragraphs 21-26 of the May 2002 report regarding the nature of the Barreau's participation in an enhanced mobility agreement and addresses temporary mobility between Quebec and the common law jurisdictions as described in paragraph 61(l)-(n) of the May 2002 report.

Permanent Mobility between Quebec and Common Law Jurisdictions
This section also reflects the principles discussed in paragraphs 21-26 of the May 2002 report regarding the nature of the Barreau's participation in an enhanced mobility agreement and addresses permanent mobility between Quebec and the common law jurisdictions as described in paragraph 61(o)-(s) of the May 2002 report.

Inter-Jurisdictional Practice Protocol (IJPP)
This section provides for the continuation of the IJPP for those jurisdictions that are signatories to it, but not to the National Mobility Agreement.

It also provides for the continuation of the arbitration provisions of the IJPP for signatories to this agreement.

Transition Provisions
This section deals with the period between signing the agreement and implementing it.

Withdrawal
This section allows for signatory governing bodies to opt out of the agreement in the future if conditions change. Unlike the 1994 Protocol, however, a signatory can only withdraw from the agreement after giving notice of one clear calendar year, increased from 90 days. This notice period is essential to allow lawyers to adequately address the impact of any withdrawal on their clients' interests and on their own practices.

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

(1) Copy of the National Mobility Agreement.

(Appendix 2, pages 1 – 18)

It was moved by Mr. Millar, seconded by Mr. MacKenzie that the National Mobility Agreement set out at Appendix 1 of the Report and accepted by the Federation of Law Societies on August 16, 2002 be approved and that the Law Society be authorized to become a signatory to the Agreement. Further, that the appropriate By-Law amendments be prepared for approval by Convocation to implement the terms of the National Mobility Agreement.

Carried

Mr. Bindman abstained.

The Treasurer thanked Mr. Millar, Mr. Hunter and the Committee for their good and valuable input with a special thanks to Sophia Sperdakos for her assistance.

LAWPRO REPORT

Mr. Marrocco presented an overview of the LAWPRO Report for approval by Convocation.

LAWPRO

September 2002
REPORT TO CONVOCATION

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LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LAWPRO)
REPORT TO CONVOCATION – SEPTEMBER, 2002

INTRODUCTION

1. Each September since 1995, LAWPRO's Board of Directors has reported to Convocation its recommendations for the Law Society's professional liability insurance program for the following calendar year. The timing of this report is necessitated by the logistics of renewing 18,400 policies effective January 1, and the need to place and negotiate any related or corollary reinsurance treaties.

2. This report is also an opportunity for LAWPRO's Board to review with Convocation issues of importance to its insurance operations and receive policy direction where necessary. Financial information on LAWPRO and the program is provided to Convocation throughout the year.

3. Convocation established LAWPRO's mandate in 1994 with the adoption of the Insurance Committee Task Force Report. The mandate and principles of operation were to be as follows:

- that LAWPRO be operated separate and apart from the Law Society by an independent board of directors;
- that LAWPRO be operated in a commercially reasonable manner;
- that LAWPRO move to a system where the cost of insurance reflected the risk of claims; and
- that claims be resolved fairly and expeditiously; however this was not to be a system of "no-fault" compensation and there would be certain circumstances where coverage was denied.

4. The LAWPRO Board of Directors believes that these recommendations have been achieved in LAWPRO's operations, and the proposed program for the year 2003 continues to operate on these principles.

SUMMARY OF RECOMMENDATIONS

5. The following are the recommendations made by LAWPRO's Board of Directors for the 2003 professional liability insurance program.

Premium pricing for 2003

(i) That the base premium be reduced by $200 to $2,500 per lawyer for the 2003 insurance program (paragraph 77).

(ii) That 100% of the premiums and losses for the Ontario professional liability program be retained by the company in 2003 (paragraph 68).

(iii) Revenues from supplemental premium levies (real estate and civil litigation transaction levies, as well as claim history levies) be budgeted at $24.9 million for the purposes of establishing the base premium for 2003 and other budgetary purposes (paragraph 77).

(iv) That $7.8 million be drawn from the Funds Held in Trust built up in previous years ($26.6 million at December 2001) and applied to the 2003 insurance premium (paragraph 77).

(v) To the extent that levies (noted in (iii) above) collected in 2003 are different than the budgeted amount, the surplus or shortfall shall flow to/from the Funds Held in Trust (paragraph 77).

Proposed changes to the insurance program for 2003

<u>Mobility of Lawyers Within Canada</u>
(vi) That LAWPRO be authorized to make the necessary and appropriate program changes to facilitate the implementation of a mobility protocol once the Law Society of Upper Canada becomes a signatory to the National Agreement on Mobility (paragraph 17).

Exemption for Occasional Practice

(vii) That section 9 (2) of By-Law 16 of the *Law Society Act*, R.S.O. 1990, c.L.8 be amended as follows:

"For the purposes of paragraph 2 of subsection (1), in any year, a member engages in the practice of law on an occasional basis if, during that year, the member,

a) practises law in respect of not more than ten matters, and
b) practises law for not more than twenty days in total." (paragraph 24).

Exemption for Members Employed Through Legal Aid Ontario

(viii) That section 9 (1) of By-Law 16 of the *Law Society Act*, R.S.O. 1990, c.L.8 be amended as follows:

"9 (1) The following are eligible to apply for exemption from the payment of insurance premiums levies:

…

5. Any member who, during the course of the year for which a levy is payable,
i. will be employed in a clinic (within the meaning of the *Legal Aid Services Act, 1998*), a student legal aid services society, or an aboriginal legal services corporation, that is funded by Legal Aid Ontario, but who will not be directly employed by Legal Aid Ontario,
ii. will provide legal service only through the clinic, student legal aid services society, or aboriginal legal services corporation, to individuals in communities served by the clinic, student legal aid services society, or aboriginal legal services corporation, and will not otherwise engage in the practice of law in Ontario, and
iii. demonstrates proof of coverage for the provision of such legal service under a professional liability insurance policy issued by a licensed insurer in Canada, such coverage to be at least equivalent to that required under the Society's insurance plan." (paragraph 29).

(ix) That the reference to "paragraph 1, 2, 3, or 4 of subsection (1)" in section 9 (1.1) of By-Law 16 be amended to read "paragraph 1, 2, 3, 4 or 5 of subsection (1)," to ensure that the existing *pro bono* exception also applies to this exemption (paragraph 30).

Pro Bono Law Ontario

(x) That the following program changes be made with respect to approved *pro bono* legal services provided by a member through an approved *pro bono* legal services program:

a) That members purchasing the ongoing practice coverage under the program not be required to pay any deductible amount or claims history levy surcharge for claims relating solely to such services;
b) That members purchasing the ongoing practice coverage under the program who wish to apply for the part-time practice option, not be required to consider any hours of professional time or past claims relating solely to such services in their application for that option;
c) That members claiming exemption under the program be provided with coverage for such services under the program in the ordinary course as part of their standard run-off program coverage (even though the services are provided while exempt under the program); and
d) That members claiming exemption under the program not be required to pay any deductible amount for claims relating solely to such services (paragraph 38).

For the purposes of the foregoing, approved *pro bono* legal services and approved *pro bono* legal services programs, would be as approved by LAWPRO in keeping with the following. Approved *pro bono* legal services would include services provided on or after January 1, 2003, and would not include legal services beyond those:

(a) rendered to low income persons in civil matters or in criminal matters for which there is no government obligation to provide counsel;
(b) simplifying the legal process for, or increasing the availability and quality of legal services to persons of limited means; and/or

(c) rendered to charitable, non-profit and public interest organizations with respect to matters or projects to address the needs of low income and disadvantaged individuals (paragraph 39).

Approved *pro bono* legal services programs would not include programs beyond those associated with Pro Bono Law Ontario, without further direction from Convocation (paragraph 40).

Defence Cost Protection Against Statutory Penalties

(xi) That coverage be expanded under the policy for all members purchasing the on-going practice coverage, to reimburse the member for the first $100,000 in investigation and defence costs incurred by the member in the successful defence of any penalty assessed against a member on or after January 1, 2003, pursuant to section 163.2 of the *Income Tax Act* and/or section 285.1 of the *Excise Tax Act* (paragraph 49).

This additional coverage would be provided for no additional premium, but would be reduced by the amount of the member's policy deductible (where applicable to claim expenses). This sub-limit coverage would be the total amount available with respect to all such claims reported under the policy during the year by members of the same law firm (paragraph 50).

Where the merits of the case dictate, LAWPRO may, in its sole and absolute discretion, enter into an agreement with the member to fund the first $100,000 in investigation and defence costs, as these amounts are incurred (paragraph 51).

Coverage Regarding Members' Estates

(xii) That, in the event of death of a practising member, a grace period be introduced whereby the estate of a member is automatically provided the full run-off buy-up limit coverage of $1 million per claim and $2 million in the aggregate, at no charge, for the first 90 days immediately following the death of the member carrying the ongoing practice coverage. During that period, the estate may apply for further run-off buy-up limit protection where it is felt that further protection may be warranted (paragraph 56).

Privacy Legislation

(xiii) That changes be made to the program materials, including the application and exemption forms, to inform members of the purposes for the collection, use or disclosure of personal information, and to ensure LAWPRO'S early compliance with the *Personal Information Protection and Electronic Documents Act*, R.S.C. 2000, c.5 (paragraph 61).

Continuation of Current Insurance Coverages

(xiv) That, subject to the recommendations made earlier in this Report, the exemption criteria, policy coverage, coverage options, and premium discounts and surcharges in place in 2002 remain unchanged for the 2003 insurance program (paragraph 82).

E & O Fund

(xv) That the investment income revenues of the Errors & Omissions Fund which are surplus to the obligations of the Fund be made available to the Law Society during 2003 (paragraph 8).

PART 1 – THE ERRORS & OMISSIONS FUND

6. LAWPRO manages the Law Society's Errors & Omissions Fund which is currently in run-off mode. (The Fund was responsible for the insurance program prior to 1990, and for a group deductible of up to $250,000 per claim prior to 1995.)

7. As of June 30, 2002, the Fund had outstanding claims liabilities of $25 million. The number of open files for 1994 and prior years stood at 197. Since there are sufficient assets in the Fund to fully meet the outstanding liabilities, the LAWPRO Board is again satisfied that the investment income of the Fund is surplus to the needs of the Fund and can be used by the Law Society for its general purposes. This surplus is estimated to be $3.0 million and would be available during the year 2003.

8. LAWPRO's Board recommends to Convocation that the investment income revenues of the Errors & Omissions Fund which are surplus to the obligations of the Fund be made available to the Law Society during 2003.

PART 2 – THE CHANGING PRACTICE CLIMATE:
PROPOSED CHANGES TO THE INSURANCE PROGRAM FOR 2003

9. Developments within the legal community, both nationally and provincially, over the last year will necessitate modifications to the insurance program in 2003. The proposed changes support current Law Society initiatives and ensure the insurance program is responsive to practice realities and the evolving needs of the legal profession.

Mobility of Lawyers within Canada

10. The Law Society approved the interim report of the Federation of Law Societies Task Force on Mobility in February 2002, which examined mobility rights and conditions for lawyers in Canada. This initiative is in response to the growing needs and expectations of clients whose affairs and business dealings extend across provincial boundaries, as well as the need for lawyers to meet new challenges under the growing number of national and international trade agreements.

11. A key objective of the task force has been to build on the Inter-Jurisdictional Practice Protocol signed in 1994, which permits lawyers in good standing in one province to provide legal services in another province for a maximum of 10 matters over 20 days in any 12-month period. This is reflected in the "10-20-12 rule" approved by Convocation in By-Law 33 in May 2001.

12. The task force considered the implications of a broader rule adopted in western Canada, and now under consideration in eastern Canada, called the "6-12 rule", which allows lawyers in good standing to provide legal services in another province for up to six months during a 12-month period.

13. The enhanced mobility protocol is expected to include provisions respecting insurance coverage and defalcation coverage for situations involving both temporary and permanent mobility. Temporary mobility envisages those situations where a lawyer provides legal services in another jurisdiction without establishing an "economic nexus" in that jurisdiction, such as in the case of handling a single trial or transaction, or providing a specialized legal opinion across multiple jurisdictions for a client.

14. Where a clear economic nexus is established, however, the lawyer would no longer be distinguished from those who are members of the bar in the host jurisdiction. Notably, a lawyer providing legal services in the host jurisdiction for more than a prescribed period in a year would generally be deemed to have established a permanent presence there.

15. From an insurance perspective, it is expected that the mobility protocol will:
    (a) confirm which signatory jurisdiction's policy should respond in the case of temporary practice and permanent practice;
    (b) ensure consistency in coverage for all lawyers practicing within a single jurisdiction;
    (c) avoid the stacking of different signatory jurisdiction's policy limits; and
    (d) allow for the exemption of lawyers called in more than one jurisdiction.

16. It is anticipated that Convocation will consider a final protocol for approval in the coming months, with the protocol to take effect in 2003.

17. Accordingly, the LAWPRO Board of Directors recommends that LAWPRO be authorized to make the necessary and appropriate program changes to facilitate the implementation of a mobility protocol once the Law Society of Upper Canada becomes a signatory to the National Agreement on Mobility.

Exemption for "Occasional Practice"

18. As mentioned in paragraph 11, the Inter-Jurisdictional Practice Protocol signed in 1994 provides that lawyers in good standing in one province be permitted to provide legal services in another for a maximum of 10 matters over 20 days in any 12-month period.

19. In May, 2001, Convocation approved By-Law 33 permitting lawyers from other Canadian jurisdictions to practise in Ontario on an occasional basis, in keeping with the 10-20-12 rule provided for in the protocol. This includes a requirement that the lawyer who is occasionally practising in Ontario have professional liability insurance coverage for his or her Ontario practice which is at least equivalent to that required of a Law Society member.

20. However, lawyers from other Canadian jurisdictions who happen to also be members of the Ontario bar must currently comply with a different and perhaps more narrow definition of occasional practice to qualify for exemption under the Ontario insurance program.

21. In accordance with section 9(2) of By-Law 16, any member engages in the practice of law on an occasional basis only if, during the year, the member completes not more than 10 real estate transactions; performs not more than 80 hours of work where such work is usually billed on an hourly basis; or completes such number of real estate transactions or performs such number of hours of work as may be permitted by the Law Society.

22. The member must be resident in a Canadian jurisdiction other than Ontario during the course of the year and demonstrate proof of at least equivalent coverage for the member's practice in Ontario under the mandatory professional liability insurance program of another Canadian jurisdiction, to qualify for exemption under section 9(1) of By-Law 16.

23. It seems appropriate that the occasional practice exemption provisions under By-Law 16 be amended to reflect the occasional practice criteria provided for under the Inter-Jurisdictional Practice Protocol and By-Law 33, to ensure that lawyers from other Canadian jurisdictions who practise law on an occasional basis and are called in Ontario, are treated the same as those who are not called in Ontario.

24. Accordingly, the LAWPRO Board of Directors recommends that section 9(2) of By-Law 16 of the *Law Society Act*, R.S.O. 1990, c.L.8 be amended as follows:

> "For the purposes of paragraph 2 of subsection (1), in any year, a member engages in the practice of law on an occasional basis if, during that year, the member,
> (a) practises law in respect of not more than ten matters, and
> (b) practises law for not more than twenty days in total."

Exemption for Members Employed through Legal Aid Ontario

25. Law Society members who are employed by community legal clinics, student legal aid services societies, and aboriginal legal services corporations, which are funded by Legal Aid Ontario, have long been able to exempt themselves under the program where they limit their legal services to those provided through these clinics.

26. Their exemption was approved by Convocation in January 1980, and was made available on the basis that liability insurance covering all such employees would be purchased and maintained by The Ontario Legal Aid Plan (now "Legal Aid Ontario") and the clinics.

27. Although these members have not formally been recognized as a group eligible for exemption under section 9 of By-Law 16 (nor section [k] of former Rule 50), it seems appropriate that the By-Law be updated to reflect this long-standing exemption.

28. As well, provision is made under section 9. (1.1) to permit lawyers who have exempted themselves under the program, to maintain their exemption even though the member engages in the practice of law in Ontario, where that activity is limited to providing legal advice or services on a *pro bono* basis to or on behalf of a non-profit organization. It seems appropriate that this provision should also include reference to any exemption for lawyers employed through Legal Aid Ontario.

29. Accordingly, the LAWPRO Board of Directors recommends that section 9 (1) of By-Law 16 of the *Law Society Act*, R.S.O. 1990, c.L.8 be amended as follows:

> "9 (1) The following are eligible to apply for exemption from the payment of insurance premiums levies:
>
> …
>
> 5. Any member who, during the course of the year for which a levy is payable,
> i. will be employed in a clinic (within the meaning of the *Legal Aid Services Act, 1998*), a student legal aid services society, or an aboriginal legal services corporation, that is funded by Legal Aid Ontario, but who will not be directly employed by Legal Aid Ontario,
> ii. will provide legal service only through the clinic, student legal aid services society, or aboriginal legal services corporation, to individuals in communities served by the clinic, student legal aid services society, or aboriginal legal services corporation, and will not otherwise engage in the practice of law in Ontario, and
> iii. demonstrates proof of coverage for the provision of such legal service under a professional liability insurance policy issued by a licensed insurer in Canada, such coverage to be at least equivalent to that required under the Society's insurance plan."

30. The LAWPRO Board of Directors recommends that the reference to "paragraph 1, 2, 3, or 4 of subsection (1)" in section 9. (1.1) of By-Law 16 be amended to read "paragraph 1, 2, 3, 4 or 5 of subsection (1)," to ensure that the existing *pro bono* exception also applies to this exemption.

Pro Bono Law Ontario

31. LAWPRO has been invited to consider what program changes may reasonably be made to remove barriers and encourage *pro bono* work in Ontario by facilitating the Pro Bono Law Ontario initiative. This invitation comes as part of a broader directive on the part of the Law Society's Access to Justice Committee to ensure better access to justice in Ontario.

32. Pro Bono Law Ontario was incorporated in 2001 as a non-share, non-profit corporation. It is governed by a board comprising leading members of the judiciary and legal profession. It is funded jointly by The Law Foundation of Ontario and Legal Aid Ontario, and is located on the Law Society premises at Osgoode Hall.

33. Pro Bono Law Ontario is committed to promoting access to justice in Ontario by creating and promoting opportunities for lawyers to provide *pro bono* legal services to those who lack the means to hire a lawyer. It is intended as an integral part of the legal services delivery system, complementing rather than replacing the role of Legal Aid Ontario or other government-sponsored programs.

34. Effectively, Pro Bono Law Ontario acts as a resource centre to provide a coordinated approach to the delivery of *pro bono* legal services in Ontario. It works with high volume service providers, such as community legal clinics, law associations, and large law firms, to achieve this goal, rather than play a direct role in the delivery of *pro bono* legal services or act as a referral agency for such work. The *pro bono* legal services are provided through these organizations, by practising lawyers, retired lawyers, in-house corporate counsel, lawyers employed by government or in education, and others.

35. Pro Bono Law Ontario provides ongoing support, consultation and technical assistance to support new and existing *pro bono* programs. Its support plan provides:

(a) a best practices manual for *pro bono* legal services delivery to ensure that these services are provided in accordance with the highest professional standards;

(b) a computerized case management system to facilitate intake, referral, quality assurance, and accurate record keeping;
(c) a continuing legal education training curriculum in substantive areas of law for volunteer lawyers, and
(d) a Web site that will match lawyers in each geographic area of the province to their local *pro bono* programs.

36. The LAWPRO Board of Directors believes that a number of program changes should be made to accommodate this type of initiative. Although no funds would be available to offset any increased program exposure, a review of past claims indicates the potential cost associated with these changes would not be substantial. Importantly, the potential claims exposure of these services would be managed and minimized through the use of the best practices manual, computerized case management system, legal education training for volunteer lawyers and Web site facility, provided by Pro Bono Law Ontario as part of its support plan.

37. Under the existing program, members who purchase the ongoing practice coverage are already insured for their *pro bono* legal services. As well, as discussed in paragraph 28, members who claim exemption under the program are not disqualified from exemption where the member provides *pro bono* legal services to or on behalf of non-profit organizations, as set out in section 9. (1.1) of By-Law 16.

38. Accordingly, the LAWPRO Board of Directors recommends that the following program changes be made with respect to approved *pro bono* legal services provided by a member through an approved *pro bono* legal services program:

(a) That members purchasing the ongoing practice coverage under the program not be required to pay any deductible amount or claims history levy surcharge for claims relating solely to such services;
(b) That members purchasing the ongoing practice coverage under the program who wish to apply for the part-time practice option, not be required to consider any hours of professional time or past claims relating solely to such services in their application for that option;
(c) That members claiming exemption under the program be provided with coverage for such services under the program in the ordinary course as part of their standard run-off program coverage (even though the services are provided while exempt under the program); and
(d) That members claiming exemption under the program not be required to pay any deductible amount for claims relating solely to such services.

39. For the purposes of the foregoing, approved *pro bono* legal services and approved *pro bono* legal services programs, would be as approved by LAWPRO in keeping with the following. Approved *pro bono* legal services would include services provided on or after January 1, 2003, and would not include legal services beyond those:

(a) rendered to low income persons in civil matters or in criminal matters for which there is no government obligation to provide counsel;
(b) simplifying the legal process for, or increasing the availability and quality of legal services to persons of limited means; and/or
(c) rendered to charitable, non-profit and public interest organizations with respect to matters or projects to address the needs of low-income and disadvantaged individuals.

40. Approved *pro bono* legal services programs would not include programs beyond those associated with Pro Bono Law Ontario, without further direction from Convocation.

Defence Cost Protection Against Statutory Penalties

41. The profession has indicated concern about certain statutory penalties that may be assessed against lawyers and law firms in connection with their practice, and has suggested that some form of insurance protection should be part of the insurance program.

42. Of particular interest are sections 163.2 of the *Income Tax Act*, R.S.C. 1985, c.1 and 285.1 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which were recently adopted and provide for penalties that may be assessed against lawyers, accountants and others either preparing, selling or promoting tax shelters (or like arrangements), or involved in providing tax return preparation and related services to taxpayers.

43. Under these provisions, the lawyer may be liable for a penalty without actual culpable intention and by act or omission. Sections 163.2(2) and 163.2(4) of the *Income Tax Act*, for example, provide as follows:

> "s. 163.2(2). Every person who makes or furnishes, participates in the making of or causes another person to make or furnish a statement that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by another person… for a purpose of this Act, is liable to a penalty in respect of the false statement."

> "s. 163.2(4). Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person… that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for that purpose of this Act is liable to a penalty in respect of the false statement."

44. For the purposes of these provisions, "culpable conduct" means conduct, whether an act or a failure to act, that is tantamount to intentional conduct; shows an indifference as to whether the Act is complied with; or shows a willful, reckless or wanton disregard of the law.

45. The amount of these penalties may also be substantial. For example, a penalty under section 163.2 of the *Income Tax Act* may be as much as 50% of the full amount of the tax assessed against the taxpayer or $100,000 more than the lawyer's fees charged, profit realized or other potential income involved in making the false statement. Similar provisions apply with respect to section 285.1 of the *Excise Tax Act*.

46. Under the current program, coverage is limited to compensatory damages only. No coverage is provided for fines or penalties, or for any interest thereon. This is consistent with professional liability insurance policies generally, and reflects the fact that fines and penalties are intended as a punitive measure and not a compensatory one.

47. That said, given the substantial costs that may be associated with the defence of these penalty assessments, it seems reasonable that some degree of protection should be provided to lawyers in their defence of these assessments.

48. Although lawyers and law firms may also be subject to substantial penalties under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c.17, it is not proposed that any related defence cost protection be provided in that regard until the application of this legislation to lawyers and law firms becomes better known. Pending the current juridical challenge, lawyers and law firms are exempt from the need to record and report suspicious and large cash transactions, as well as the need to establish a compliance regime, although the cross-border reporting requirements do continue to apply.

49. Accordingly, the LAWPRO Board of Directors recommends that coverage be expanded under the policy for all members purchasing the on-going practice coverage, to reimburse the member for the first $100,000 in investigation and defence costs incurred by the member in the successful defence of any penalty assessed against a member on or after January 1, 2003, pursuant to section 163.2 of the *Income Tax Act* and/or section 285.1 of the *Excise Tax Act*.

50. This additional coverage would be provided for no additional premium, but would be reduced by the amount of the member's policy deductible (where applicable to claim expenses). This sub-limit coverage would be the total amount available with respect to all such claims reported under the policy during the year by members of the same law firm.

51. Where the merits of the case dictate, LAWPRO may, in its sole and absolute discretion, enter into an agreement with the member to fund the first $100,000 in investigation and defence costs, as these amounts are incurred.

Coverage Regarding Members' Estates

52. Under the existing program, full limit coverage of $1 million per claim and $2 million in the aggregate is provided to all lawyers who purchase the ongoing practice coverage, including all lawyers in active private practice.

53. However, as lawyers retire or otherwise become exempt from the payment of premiums and levies under the program, their ongoing practice coverage is replaced by run-off policy coverage, with a reduced limit of $250,000 per claims and aggregate. This run-off limit is not reinstated at any point, but rather remains in place until fully eroded by claims reported while the member is exempt.

54. Members who withdraw from practice and choose to exempt themselves under the program are encouraged to consider their practice exposure and apply for additional run-off limit protection.

55. In the circumstances of a member who dies, however, some time may be needed before an estate representative is appointed and can assess the practice exposure of the estate and decide whether additional run-off limit protection is warranted.

56. The LAWPRO Board of Directors recommends that, in the event of death of a practising member, a grace period be introduced whereby the estate of a member is automatically provided the full run-off buy-up limit coverage of $1 million per claim and $2 million in the aggregate, at no charge, for the first 90 days immediately following the death of the member carrying the ongoing practice coverage. During that period, the estate may apply for further run-off buy-up limit protection where it is felt that further protection may be warranted.

Privacy Legislation

57. Preparations are now underway to ensure LAWPRO's compliance with the requirements of the *Personal Information Protection and Electronic Documents Act*, R.S.C. 2000, c.5 ("Privacy Legislation"). LAWPRO anticipates that it will be compliant with this legislation for the purposes of the program by January 1, 2003, a full year before this legislation is due to apply to LAWPRO.

58. This Privacy Legislation requires that private sector organizations follow a code for the protection of personal information, setting out ten principles of fair information practices which form the ground rules of the collection, use and disclosure of personal information.

59. These principles address the accountability within the organization, identifying the purposes for which the personal information is collected, obtaining the informed consent of the individual, as well as limiting the collection of personal information and its use, disclosure and retention. The principles also speak to security safeguards, making available policies and practices relating to the management of personal information, access by the individual to the existence, use, and disclosure of personal information, as well as providing an opportunity to address a challenge concerning compliance.

60. In keeping with this process, LAWPRO needs to modify the program materials, including the application and exemption forms, to ensure that members are informed of the purposes for the collection, use or disclosure of personal information. New privacy legislation to be introduced in Ontario this fall may necessitate additional modifications to the privacy initiative in 2004.

61. Accordingly, the LAWPRO Board of Directors recommends that changes be made to the program materials, including the application and exemption forms, to inform members of the purposes for the collection, use or disclosure of personal information, and to ensure LAWPRO'S early compliance with the *Personal Information Protection and Electronic Documents Act*, R.S.C. 2000, c.5.

PART 3 — THE PROFESSIONAL LIABILITY INSURANCE PROGRAM

62. The program appears to be on track for 2002, with LAWPRO currently performing at or better than budget. LAWPRO is currently forecasting a profit of $6.7 million, about $0.8 million in excess of that originally budgeted. An important measure of the current program's success is the consistent A (Excellent) rating it has received from A.M. Best Co. for the last two years.

63. Given the insurance program's financial strength and the profession's apparent satisfaction with its structure, the LAWPRO Board proposes that the structure of the insurance program be continued in its current form for 2003, with the following key changes:

(a) LAWPRO will retain 100 per cent of the premiums and losses for the core professional liability insurance program in 2003, rather than reinsuring a portion of the program in what has become a costly reinsurance marketplace; and

(b) Base insurance premiums will be reduced by $200 to $2,500 per lawyer, reflecting savings to be realized from not reinsuring the program as well as other factors discussed in detail below.

Reinsurance

64. Since 1995, LAWPRO has had a quota share reinsurance treaty on the professional liability insurance program.[1] The reinsurance arrangement was important for several reasons. In 1995, LAWPRO did not have sufficient capital to insure the program on its own and through the reinsurance arrangement "borrowed" the resources of more strongly capitalized companies. As well as bringing more than capital to the program, the reinsurers provided credibility, ensuring that the program was competitively priced and that best practices would be adopted by LAWPRO through the partnering arrangement with reinsurers. As LAWPRO's solvency improved, the percentage of the program ceded or shared with reinsurers has decreased from 57% in 1995 to 35% in 2002.

65. LAWPRO had been able to take advantage of what was a soft market to achieve favourable pricing for the treaty. Although prices had been edging higher prior to 2001, the events of last September drained significant resources from the industry, prompting prices to increase sharply, and reinsurers to re-evaluate their participation in different business lines and even withdraw where returns were deemed to be inadequate or volatile.

66. Annually, LAWPRO assesses its need for reinsurance based on its capital position, its claims results and volatility. As noted in the graph on page 22, claims results have been relatively stable. Furthermore, LAWPRO's capital position has improved to the point where the company could assume 100% of the risk of the program (based on expected claims results 95% of the time). Additional funds are being carried in the Errors & Omissions Fund (Funds Held in Trust), which at June 30, 2002, had a balance of $27.2 million.

67. Based on discussions LAWPRO has had with our reinsurance brokers and several of our reinsurers, we believe that the costs of reinsurance in this marketplace will add $5 million or more, without significantly reducing the risks from the program. Stated another way, this would add approximately $270 per lawyer to the base premium. Rather than pursuing this expensive course, we propose to amend the retroactive premium endorsement which will have the effect of backstopping the capital held in LAWPRO with the Funds Held in Trust to a maximum of $15 million in the event that claims experience falls above the 95% probability level – expanding our confidence to the 99.9% level.

68. The LAWPRO Board of Directors therefore recommends that 100% of the premiums and losses for the Ontario professional liability program be retained by the company in 2003.

[1] In such an arrangement the reinsurer is paid a percentage of the premiums written in exchange for an obligation to pay that same percentage of claims incurred. A commission is paid by the reinsurer to the insurance company to offset the cost of managing the business.

Premiums – Costs, revenues and pricing

69. LAWPRO's revenue requirements for the 2003 insurance program are based on the anticipated cost of claims for the year, as well as the cost of applicable taxes and program administration. With some measure of conservatism, we estimate total funds required in 2003 at $75.5 million, consistent with forecasted and actual premiums for the mandatory program for each of the last four years. As the graph below illustrates, claims numbers and costs for the coming year also are expected to be consistent with those of previous years, with approximately 1,800 new claims and $65 million in loss costs anticipated.

Claims Cost of Ontario Program, by Fund Year ($000's)

(see graph in LAWPRO Report)

70. Premium revenues to meet our fiscal requirements for 2003 will, as in past years, come from three principal sources:

a) Levy surcharges

71. Lawyers currently pay a transaction levy of $50 per file for real estate and civil litigation transactions, as well as a claims history levy surcharge that ranges from $2,500 for a lawyer with one claim paid in the last five years to $25,000 for a lawyer with five claims paid in the last five years (an additional $10,000 is levied for each additional claim paid in excess of five). Revenues from these levy surcharges are applied as premiums, to supplement the base levy. This approach ensures an element of risk rating in the insurance program, as both real estate and civil litigation continue to represent a disproportionate risk when compared to other areas of legal practice. It also avoids the substantial dislocation which would likely occur if the base premiums were increased to reflect the risk, and was agreed to by the affected sectors of the bar as the most equitable way to achieve risk rating when introduced in 2000. (Risk rating is discussed in more detail in paragraphs 83 to 106 of this Report.)

72. In 2003, LAWPRO estimates transaction and claims history levy surcharge revenues at $24.9 million, compared to $26.8 million in 2002 and $27.8 million in 2001. Vagaries in the economy, particularly in the real estate market, make it difficult to product with certainty transaction levy revenues. Real estate levy revenues also are affected by the increased use of title insurance, since the levy is waived for many title-insured real estate transactions.

Transaction Levies: Residential R/E Sales-Rolling 4 Quarter Basis

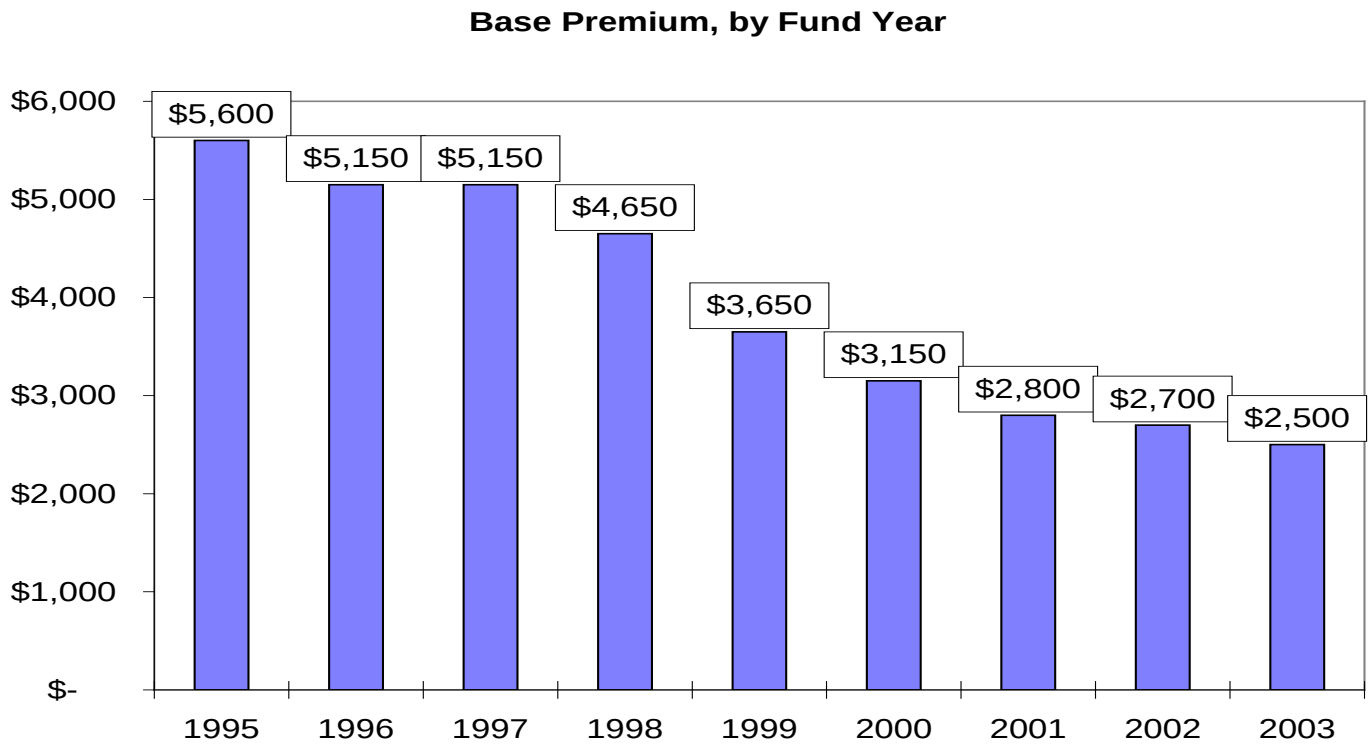
(see graph in LAWPRO Report)

b) Funds Held in Trust:

73. Since the introduction of the 1999 program, any excess receipts from the transaction levies and claims history surcharges collected in the year have been held and managed on a revolving account basis and applied to the insurance program. These funds are used to guard against any future shortfall in levy receipts in a given year, appreciating the difficulties in forecasting transaction levy revenues in an changing economic climate, and to act as a buffer against the need for sudden increases in base premium revenues**.** This return premium endorsement, first put in place for the 2000 policy period and applicable to all policy periods subsequent to 1994, has generated $17.6 million in return premiums.

74. For 2002, an anticipated $5.4 million will be drawn from the revolving fund. LAWPRO proposes that, for 2003, $7.8 million be drawn from the surplus. This would still allow for sufficient Funds Held in Trust to deal with adverse future claims experience.

c) Base premiums



75. For 2003, the LAWPRO Board proposes that the base premium be reduced by $200 to $2,500 per lawyer. This compares to a base premium of $2,700 in 2002 (see chart on previous page). The proposed base premium is based on the following assumptions:

- 18,400 practising insured lawyers (full-time equivalents);
- $65 million in anticipated total loss costs;
- $24.9 million in budgeted transaction and claims history levy revenues;
- $7.8 million drawn from Funds Held in Trust; and
- 5% investment income.

76. Although the number of lawyers in practice year over year has grown steadily by about 1.5 per cent, there has not been a corresponding increase in claims costs. For example, between 1995 and 2001, claims costs stood at about $65 million annually, even though an additional 1,500 lawyers came into practice over this time. In fact, the number of claims has decreased from 129 per thousand in 1995 to 102 per thousand in 2001. This factor has contributed to stable claims costs, and enabled LAWPRO to reduce premiums consistently over seven years. The change in base premium will mean that lawyers in Ontario will pay insurance premiums from as low as $1,113 for restricted area of practice, new calls and part-time practitioners, up to $2,500 for the mandatory insurance program (depending on the options chosen).

77. The LAWPRO Board of Directors recommends that:

a) The base premium be reduced by $200 to $2,500 per lawyer for the 2003 insurance program.

b) Revenues from supplemental premium levies (real estate and civil litigation transaction levies, as well as claim history levies) be budgeted at $24.9 million for the purposes of establishing the base premium for 2003 and other budgetary purposes.

c) That $7.8 million be drawn from the Funds Held in Trust built up in previous years ($26.6 million at December 2001) and applied to the 2003 insurance premium.

d) To the extent that levies (noted in [b] above) collected in 2003 are different than the budgeted amount, the surplus or shortfall shall flow to/from the Funds Held in Trust.

The 2003 program

78. With the exception of the $200 reduction in the base premium and proposed refinements in exemption criteria, and changes in policy coverage and form as detailed earlier in this Report, all aspects of the insurance program for 2003 will remain unchanged from that now in place.

79. As detailed in Appendix A, the current insurance program encompasses the following:

- exemption criteria;
- standard practice coverage, including Mandatory Innocent Party Coverage;
- policy options, including Innocent Party Buy-Up, Part-Time Practice, and Restricted Area of Practice; and
- Run-Off Coverage for lawyers eligible for exemption from paying the insurance premium.

80. The current program also provides for premium discounts and surcharges. Discounts and surcharges expressed as a percentage of premium include:

- new practitioner discount;
- Part-Time Practice discount; Restricted Area of Practice Option discount;
- adjustments for deductible options and minimum premiums; and
- a "no application form" surcharge.

81. Discounts and surcharges expressed as a stated dollar amount include:

- the Mandatory Innocent Party premium;
- Innocent Party Buy-Up premium;
- premium discount for early lump sum payment;
- e-filing discount; and
- Continuing Legal Education discount.

82. The LAWPRO Board recommends that, subject to the recommendations made earlier in this Report, the exemption criteria, policy coverage, coverage options, and premium discounts and surcharges in place in 2002 remain unchanged for the 2003 insurance program.

Risk Rating

a) Background

83. As already discussed in this report, the Task Force Report concluded that the cost of insurance under the program should generally reflect the risks.

84. Specifically the Report indicated that "... as a fundamental, shaping principle the cost of insurance should generally reflect the differences in risk history, differing risks associated with different areas of practice, and differing volumes of practice. But no insurance program can be solely risk-reflective and there must be some sharing and spreading of risk."[2]

[2] 1994 Task Force Report, at page 17.

85. In keeping with this, detailed analyses of the risks associated with the program have been undertaken by LAWPRO. The earlier results of these analyses are summarized in previous Reports to Convocation. Notably, these analyses concluded that the practice of real estate and civil litigation represented a disproportionate risk when compared to other areas of practice, and that lawyers with a prior history of claims have a greater propensity for future claims than do other lawyers.

86. The objective of risk-rating was finally achieved in 1999 by applying various discounts and the real estate and civil litigation transaction levies and claims history levy revenues to the insurance program.

87. Risk rating, however, is not static. The relationship between the cost of claims and different areas of practice may change, and it is important that LAWPRO continue to monitor the program to ensure that risk rating continues to be achieved. Accordingly, the results of these earlier risk analyses are re-evaluated each year, and are addressed in this report at paragraphs 91 to 106.

b) Practice trends

88. LAWPRO's present risk analysis reaffirms the results of its last report indicating that the practice of real estate and civil litigation represent a disproportionate risk when compared to other areas of practice, with civil litigation equalling or leading the practice of real estate as the area of practice with the greatest relative exposure for losses. In particular, the analysis indicates that:

- Overall, the practice of real estate and civil litigation represent a disproportionate risk when compared to other areas of practice, with these two areas of practice representing 62.6% of the claims reported and 54.6% of the claims costs under the program in 2001;

However:

a) the relative exposure relating to the practice of real estate law has declined, with this practice area accounting for 25.5% of the claims reported and 27.1% of the claims costs under the program in 2001 (well below the levels of 48.1% and 58.3% seen in the 1989-94 period); and

b) the relative exposure relating to the practice of civil litigation has increased, with civil litigation accounting for 37.1% of the claims reported and 27.5% of the claims costs under the program in 2001 (well above the traditional levels of 27.4% and 17.9% seen in the 1989-94 period);

c) the nature of claims against civil litigators was also reaffirmed, with claims involving the general conduct or handling of the matter at 66.4% compared to purely missed limitation period claims at 33.6% in 2001; and

d) lawyers with a prior claims history continue to have a considerably greater propensity for claims than other practising lawyers, with 13.1% of lawyers with claims in the prior nine years, compared to 3.7% of lawyers with no claims in the prior nine years reporting one or more claims during the last 12-month period.

89. The results of this analysis are summarized in the graphs contained in Appendix B of this report.

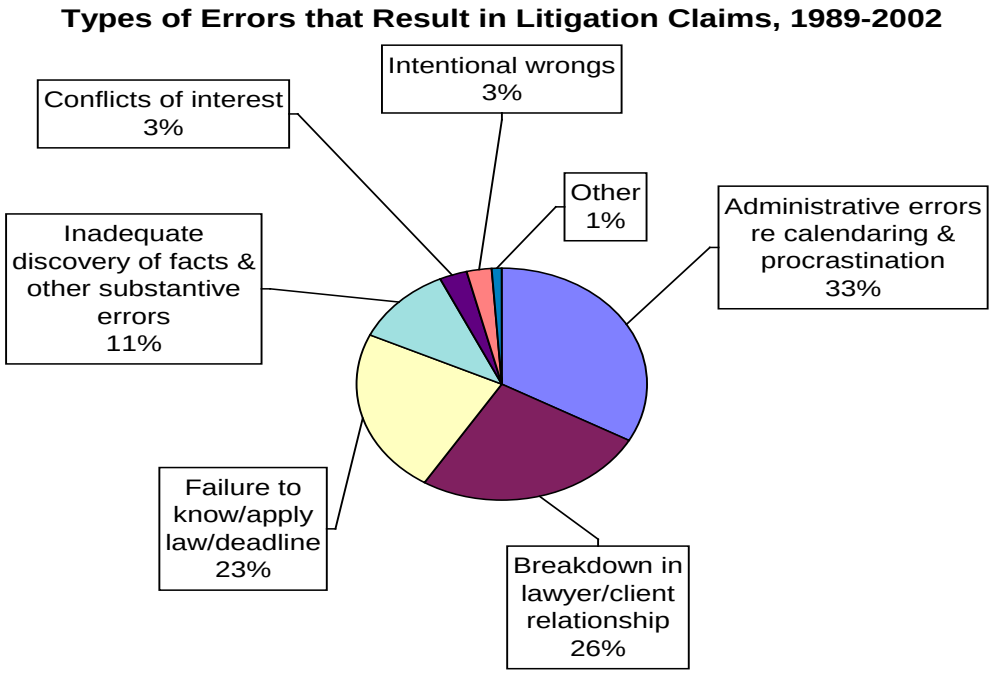
c) Risk management initiatives

90. A principal mandate of LAWPRO is to help the legal profession manage the risk associated with practice, by providing lawyers with tools and resources that help them manage risk and practise in a more risk-averse fashion. Among LAWPRO s major risk management initiatives are:

- *TitlePLUS:* Now in its fifth year, LAWPRO's successful title insurance program has had a significant impact on both real estate practice and real estate claims. Real estate claims today cost the program about $11.8 million less than they did six years ago – a decline that can be attributed to changes in the lawyers' practice environment and the insurance program, and to widespread acceptance of title insurance. It is, however, not possible to isolate the impact of this latter factor from others affecting real estate claims under the program. As well, given the time it takes for claims to arise after the transaction and legal services are provided, the full impact of title insurance on the program may not be known for some time.

- *Special Reports on Fraud and Civil Litigation*: Two trends were noted in previous reports to Convocation: (1) new sophisticated fraud schemes, and (2) changes in the number and nature of civil litigation claims. Through in-depth reports, LAWPRO has alerted the profession to these trends and provided risk management guidance.

  The *Report on Litigation* specifically noted that the general breakdown in the lawyer/client relationship is now a leading cause of claims. Traditional causes of claims such as poor calendaring, procrastination, and failure to know and/or apply the law or meet a deadline have declined; the leading causes of litigation-related claims are now: failure to follow instructions, poor communication with the client, and overall dissatisfaction on the part of the client with the relationship.



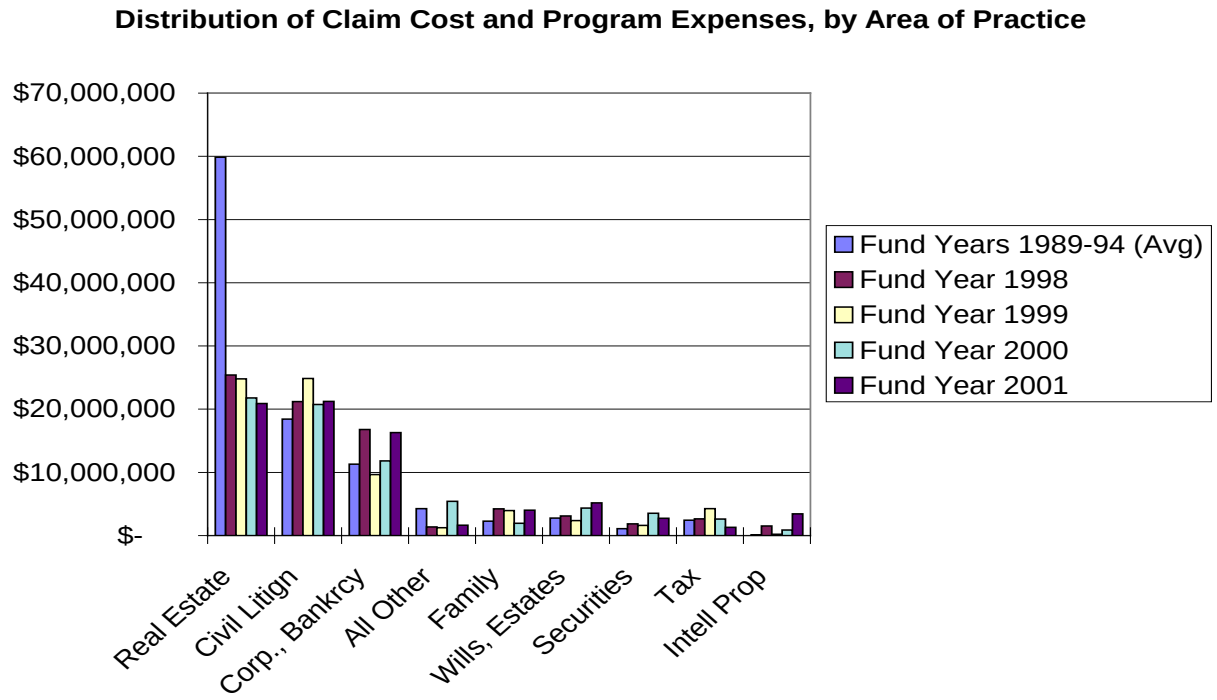
- *Promoting mentoring:* Concern with the apparent increase in incivility in the profession has raised interest in promoting mentoring within the profession. Last year, Convocation approved changes to the insurance program so that no deductible or claims history levy surcharge is applied against a mentoring lawyer for subsequent claims arising out of the mentoring relationship, where agreed upon mentoring procedures, guidelines and documentation have been applied.

  This year, LAWPRO actively promoted mentoring within the profession, dedicating a full issue of LAWPRO Magazine to the subject and producing a new practicePRO '*managing*' booklet dedicated to managing a mentoring relationship.

- *Disaster recovery:* The events of September 11, 2001, drove home the need for all professionals to prepare for the unpredictable. Through a full discussion in our LAWPRO Magazine, and a new practicePRO '*managing*' booklet dedicated to guiding lawyers through the steps needed to prepare for practice interruptions, LAWPRO provided the profession with access to hands-on advice on how to manage this risk.

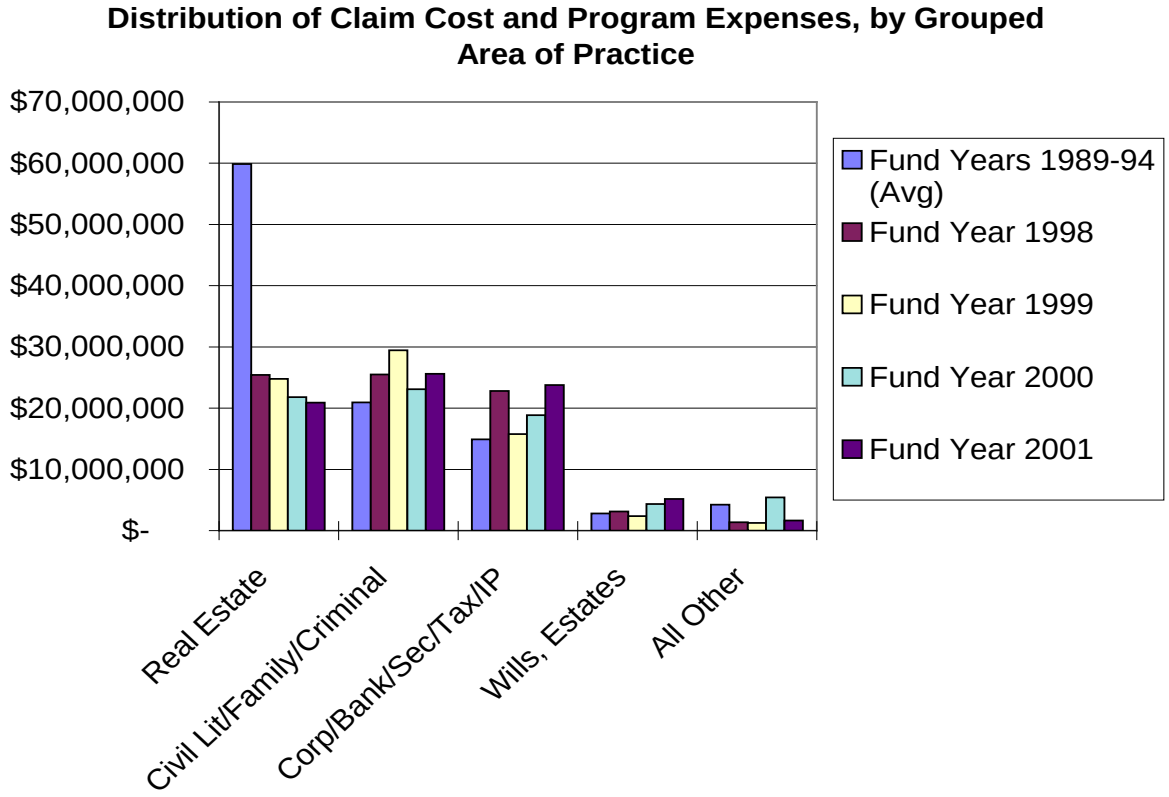
d) Revalidating risk rating

91. It is important to periodically re-evaluate the program by area of practice to ensure that it continues to be effective in its risk rating. The following chart shows the distribution of claims costs and expenses by detailed area of practice over the last decade. A similar chart is enclosed as part of Appendix B, providing a distribution by the number of claims.



92. Apparent from the chart on the previous page are the significant but declining claims costs associated with real estate claims; the significant and growing claims costs associated with civil litigation; and the variability associated with most other areas of practice. This variability, to large measure, is a reflection of the unpredictability associated with fewer losses and smaller group sizes – reflecting the diminishing assistance of the law of large numbers.

93. This, and the fact that few lawyers practise exclusively in one area, provides a compelling reason to group together common or related areas of practice. Grouping the areas of practice, we get the following chart which complements the first.



94. However, to ensure that risk-rating is being achieved, the program's anticipated losses must be compared to the premiums. Based on the most recent loss experience under the program (including that seen under the program in 2001 and the first six months of 2002), the following chart compares the anticipated losses distributed by area of law, to the proposed base levy premiums by the lawyer's primary area of practice. The premiums in this chart include only the proposed base levy premiums (together with discounts), and no amounts applied as transaction levies and claims history surcharges.

Comparison of Projected 2003 Premium by Lawyer's Primary Area of Practice to Claims and Expenses by Claim's Area of Law

(see graph in LAWPRO Report)

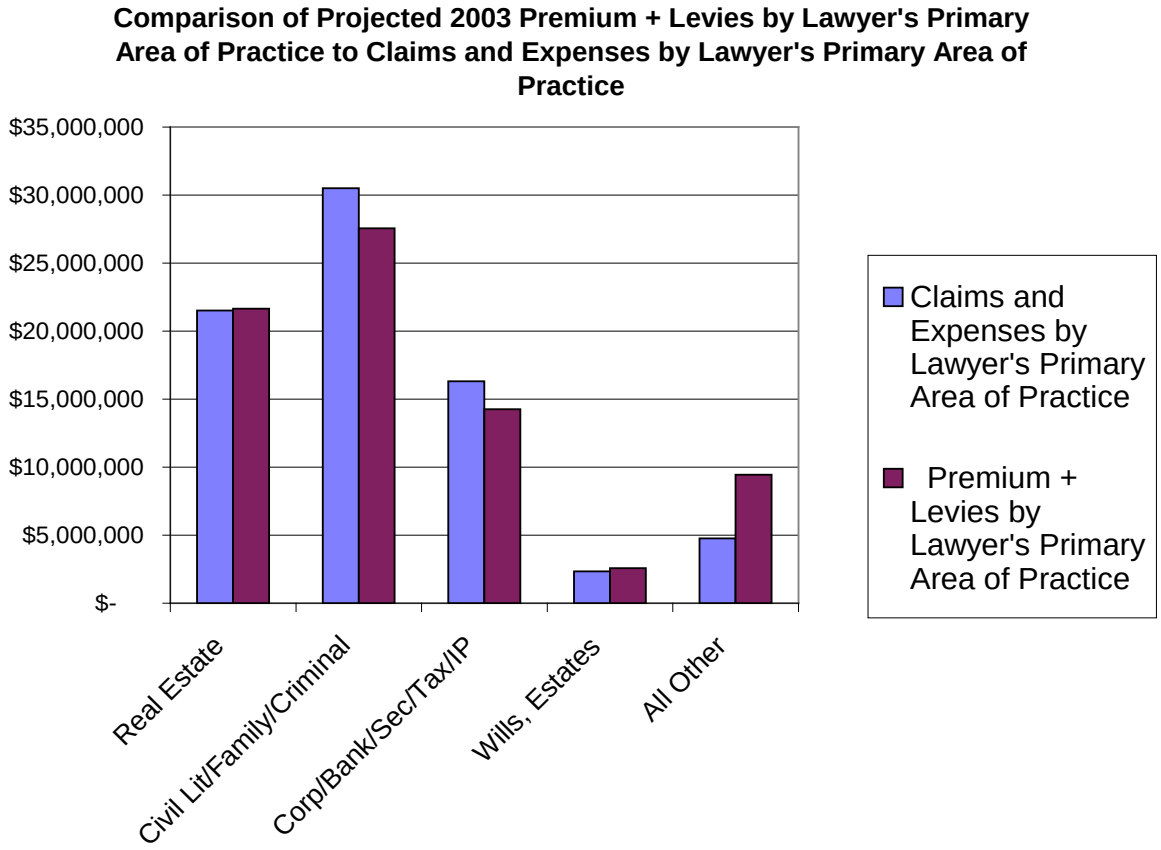
95. The shortfall between the anticipated claims costs and expenses to base levy premiums, both for both real estate and the litigation grouping, is clearly significant. As already noted, it is proposed that $24.9 million be provided through the transaction levies and claims history levy surcharges. Although clearly benefiting those whose primary area of practice is real estate or in the litigation grouping, these additional revenues also benefit those whose secondary and other areas of practice include payment of these levies.

96. The latest program statistics indicate that without the benefit of the transaction and claims history levy revenues, base premium levies of about $7,000 and $4,600 would be required of members whose primary area of practice is real estate or civil litigation, respectively.

97. Past reports have discussed the importance of using the transaction and claims history surcharge levies as premium, avoiding any substantial dislocation among the bar in the higher risk areas of practice which would otherwise occur with risk rating.[3]

98. By including the transaction and claims history surcharge levies as proposed, the shortfall between anticipated claims costs and expenses to total insurance levies is almost entirely overcome in these higher risk and other areas of practice.

99. To compare the actual claims experience of lawyers to revenues received from those lawyers, the chart below compares the anticipated premiums (with the transaction and claims history levies) sorted by the lawyer's primary area of practice, and compares this to the anticipated claims costs and expenses of these lawyers.



100. This comparison indicates that with the benefit of the transaction and claims history surcharge levies, there is a close correlation between revenues and claims.

101. However, the chart does indicate some subsidy by area of practice. Those lawyers whose primary area of practice is classified as "All Other" are expected to have their premiums somewhat exceed losses. This affects less than 15 per cent of the practising bar.

[3] 1999 LAWPRO Report to Convocation, pp. 18-22; 1998 LAWPRO Report to Convocation, pp. 35-37; and 1996 LAWPRO Report to Convocation, pp. 32-36.

102. Appreciating the foregoing variables and possibilities of comparison, by area of practice, it appears that the program does substantially meet its objective of risk rating, and that the proposed program will continue to do so in the coming year. Although a small amount of subsidy may exist for some areas of practice, taking into account the commercial realities and the relatively small amount of the subsidy, the cost of insurance under the program is considered to generally reflect the risk. Notably, the Task Force Report acknowledged that "… no insurance program can be solely risk-reflective and there must be some sharing and spreading of risk."[4]

103. Other aspects reviewed in the analysis included the exposure based on the size of firm, year of call, geographic location and prior claims history. The results of this analysis reaffirm the premium discounts already in place, including the discounts for new and for part-time practitioners and the surcharge applied to those practitioners with a prior claims history. The results of this analysis support the conclusions of previous reports, and are summarized in the graphs in Appendix B.

104. Although the volume (size) of practice may not be wholly determinative of risk, the transaction levies do reflect the volume of business transacted in a practice as well as the higher risk associated with real estate conveyancing and civil litigation.

105. Accordingly, the LAWPRO Board is satisfied with the continued use of the transaction and claims history levy revenues as premium with the result that the cost of insurance under the program continues to generally reflect the risk.

106. Various examples of premiums which would be charged to members depending upon the nature of their practice are summarized in Appendix C of this Report.

CONCLUSION

107. The LAWPRO Board considers the proposed program changes to be appropriate and consistent with its mandate as set out in the 1994 Insurance Task Force Report. The LAWPRO Board invites Convocation's consideration of this Report and recommendations for approval by Convocation in September, so that the 2003 insurance program can be implemented by January 1, 2003.

ALL OF WHICH LAWPRO'S BOARD OF DIRECTORS RESPECTFULLY SUBMITS TO CONVOCATION.

September, 2002

FRANK N. MARROCCO, Q.C.
Chair, LAWPRO's Board of Directors

APPENDIX A

- Standard Program Summary & Options 39

Appendix "A"

The Standard Insurance Program Coverage

[4] 1994 Task Force Report, at page 17.

Eligibility
- Required for all sole practitioners, lawyers practising in association or partnership, and lawyers practising in a Law Corporation, who are providing services in private practice.
- Available to other lawyers (e.g. retired lawyers, in-house corporate counsel and other lawyers no longer in private practice) who opt to purchase the insurance coverage.

Coverage limit
- $1 million per CLAIM/$2 million aggregate (i.e. for all claims reported in 2003), application to CLAIM expenses, indemnity payments and/or cost of repairs together

Standard DEDUCTIBLE
- $5,000 per CLAIM applicable to CLAIM expenses, indemnity payments and/or costs of repairs together.

Standard base premium
- $2,500 per insured lawyer

Transaction Premium Levy
- $50 per real estate or civil litigation transaction
- No real estate transaction levy generally payable by transferee's lawyer if title insured

Premium reductions for new lawyers
- Premium for lawyers with less than 4 full years of practice (private and public):
  - ◊ less than 1 full year in practice: premium discount equal to 40% of base premium;
  - ◊ less than 2 full years in practice: premium discount equal to 30% of base premium;
  - ◊ less than 3 full years in practice: premium discount equal to 20% of base premium;
  - ◊ less than 4 full years in practice: premium discount equal to 10% of base premium.

Mandatory Innocent Party Coverage

Eligibility
The minimum coverage of $250,000 per claim/in the aggregate must be purchased by all lawyers practising in association (including an MDP Association) or partnership (including general, MDP and LLP partnerships), or in the employ of other lawyers.

The minimum coverage must also be purchased by all lawyers practising in a Law Corporation, where two or more lawyers practise in the Law Corporation.

Premium
$250 per insured lawyer

2003 Program Options

1. Deductible option

$Nil deductible
- Increase in premium equal to 15% of base premium ($375 increase).

$2,500 deductible applicable to CLAIM expenses, indemnity payments and/or costs of repairs together
- Increase in premium equal to 7.5% of base premium ($187.50 increase).

$2,500 deductible applicable to indemnity payments and/or costs of repairs only
- Increase in premium equal to 12.5% of base premium ($312.50 increase).

Standard insurance program: $5,000 deductible applicable to CLAIM expenses, indemnity payments and/or costs of repairs together

- Base premium of $2,500 per insured lawyer.

$5,000 deductible applicable to indemnity payments and/or costs of repairs only

- Increase in premium equal to 10% of base premium ($250 increase).

$10,000 deductible applicable to CLAIM expenses, indemnity payments and/or costs of repairs together

- Decrease in premium equal to 7.5% of base premium ($187.50 decrease).

$10,000 deductible applicable to indemnity payments and/or costs of repairs only

- Increase in premium equal to 7.5% of base premium ($187.50 increase).

$25,000 deductible applicable to CLAIM expenses, indemnity payments and/or costs of repairs

- Decrease in premium equal to 12.5% of base premium ($312.50 decrease).

2. Innocent Party Sublimit Coverage Options

Innocent Party Coverage Sublimit Buy-Up: For lawyers practising in associations, partnerships and Law Corporations

Lawyers practising in association (including an MDP association) or partnership (including general, MDP and LLP partnerships) or a Law Corporation (with more than one practising lawyer) can increase their Innocent Party Coverage in two ways:

Increase coverage sublimit to:	Additional annual premium:
$500,000 per CLAIM/aggregate	$150 per insured lawyer
$1 million per CLAIM/aggregate	$249 per insured lawyer

Optional Innocent Party Sublimit Coverage: For sole practitioners and lawyers practising alone in a Law Corporation

Coverage limits

- $250,000 per CLAIM/in the aggregate
- $500,000 per CLAIM/in the aggregate
- $1 million per CLAIM/in the aggregate

3. Practice Options

Restricted Area of Practice Option

Eligibility

Available only to lawyers who agree to restrict their practice to criminal[5] and/or immigration law[6] throughout 2003.

Premium

Eligible for discount equal to 40% of base premium, to a maximum of $1,000.[7]

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[5] Criminal law is considered to be legal services provided in connection with the actual or potential prosecution of individuals, municipalities and government for alleged breaches of federal or provincial statutes or municipal by-laws, generally viewed as criminal or quasi-criminal.

[6] Immigration law is considered to be the practice of law dealing with any and all matters arising out of the *Immigration Act (R.S.C. 1985, C.I.-2)* and regulations, and procedures and policies pertaining thereto, including admissions, removals, enforcement, refugee determination, citizenship, review and appellate remedies, including the application of the *Charter of Rights and Freedoms* and the *Bill of Rights*.

Part-Time Practice Option
Eligibility
Available only to part-time practitioners who meet part-time practice criteria.

Premium
Eligible for discount equal to 40% of base premium, to a maximum of $1,000.[3]

4. Premium Payment Options

Instalment Options:
- Lump sum payment by cheque or pre-authorized payment: eligible for $150 discount.
- Lump sum payment by credit or debit card
- Quarterly instalments
- Monthly instalments

5. E-filing Discount
   - $50 per insured lawyer (if filed by November 1, 2002)

6. Continuing Legal Education (Risk Management) Premium Credit
   - $50 per course, subject to a $100 per insured lawyer maximum discount.
   - For pre-approved legal and other educational risk management courses taken in 2002 and successfully completed by the insured lawyer before September 15, 2002, where the lawyer completes and files the required LAWPRO CLE electronic declaration.
   - LAWPRO'S Online Coaching Centre is included as a pre-approved course, where the insured lawyer completes at least three modules between September 15, 2001 and September 15, 2002.

APPENDIX B

- Distribution of Claims by Geographic Region (graph) 45
- Distribution of Claims by Firm Size (graph) 46
- Distribution of Claims by Years Since Date of Call (graph) 47
- The 80-20 Rule (graph) 48

(see graphs in LAWPro Report)

APPENDIX C

Premium Rating Example 51

Premium Rating Examples (In Dollars)

"Appendix "C"

[7] The maximum premium discount for Restricted Area of Practice, Part-Time Practice options and the New Practitioners' discount combined cannot exceed 40% of the base premium.

	1995ϖ		2000ϖϖ	2001ϖϖ	2002ϖϖ	Proposed 2003ϖϖ
Base premium	$5,600		$3,150	$2,800	$2,700	$2,500
Examples:						
1. Sole Practitioner - $10,000 defence & indemnity deductible - early lump sum payment discount - early e-mail filing of application	$5,600*		$2,714	$2,390	$2,298	$2,113
2. Firm Practitioner - $25,000 defence & indemnity deductible - $250,000 mandatory innocent party cover - early e-mail filing of application	$6,000*		$2,956	$2,650	$2,563	$2,513
3. New Lawyer Practicing in Association - first year in practice discount - $250,000 mandatory innocent party cover - - $10,000 defence & indemnity deductible - early lump sum payment discount - early e-mail filing of application	$3,900*		$1,704	$1,520	$1,468	$1,363
4. Criminal Lawyer (sole practitioner) - Restricted Areas of Practice discount - $10,000 defence & indemnity deductible - early lump sum payment discount - early e-mail filing of application	$5,600*		$1,454	$1,270	$1,217	$1,113
5. Part-time Lawyer (in association) - Part-time Practitioner discount - $1,000,000 optional innocent party cover - $10,000 defence & indemnity deductible	$6,000* **		$2,153	$1,969	$1,917	$1,812
6. Firm Practitioner with 1 Claim - claim history levy surcharge - $5,000 defence & indemnity deductible - $250,000 mandatory innocent party cover	$8,500*		$5,900	$5,550	$5,450	$5,250
7. Sole Practitioner with 2 Claims - claims history levy surcharge - $5,000 defence & indemnity deductible	$10,600*		$8,150	$7,800	$7,700	$7,500

*****Subject to a $6,000 defence and indemnity deductible (adjusted to $7,500 in the case of an insured with one previous claim, or $8,500 in the case of two previous claims).
******Subject to $250,000 innocent party cover only, additional limits not available.
ϖ◈Members are also required to pay a $25 levy for each civil litigation or real estate transaction not otherwise excluded.
◈◈Members are also required to pay a $50 levy for each civil litigation or real estate transaction not otherwise excluded.

It was moved by Mr. Marrocco, seconded by Mr. Chahbar that the LawPro programme for 2003 be approved.

Carried

MOTION – AMENDMENT TO BY-LAW 16 (Professional Liability Insurance Levies)

It was moved by Mr. Marrocco, seconded by Mr. Millar that:

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

THAT By-Law 16 [Professional Liability Insurance Levies], made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, April 30, 1999, May 28, 1999 and September 24, 1999, be further amended as follows:

BY-LAW 16

[PROFESSIONAL LIABILITY INSURANCE LEVIES]

1. Subsection 9 (1) of By-Law 16 [Professional Liability Insurance Levies] is amended by adding the following:

5. Any member who, during the course of the year for which a levy is payable,

i. will be employed in a clinic within the meaning of the *Legal Aid Services Act, 1998*, a student legal aid services society or an Aboriginal legal services corporation, that is funded by Legal Aid Ontario, but will not be directly employed by Legal Aid Ontario,

ii. will provide legal service only through the clinic, student legal aid services society or Aboriginal legal services corporation to individuals in communities served by the clinic, student legal aid services society or Aboriginal legal services corporation and will not otherwise engage in the practice of law in Ontario, and

iii. demonstrates proof of coverage for the provision of such legal service under a professional liability insurance policy issued by a licensed insurer in Canada, such coverage to be at least equivalent to that required under the Society's insurance plan.

5. Les membres qui, au cours de l'année où les cotisations sont exigibles,

i. seront employés dans une clinique au sens de la *Loi de 1998 sur les services d'aide juridique*, une société étudiante de services d'aide juridique ou une société autochtone de services juridiques, financées par Aide juridique Ontario, mais qui ne seront pas directement employés par cette société,

ii. fourniront des services juridiques uniquement par le biais de la clinique, de la société étudiante de services d'aide juridique ou de la société autochtone de services juridiques aux personnes des communautés desservies par ces dernières, et ne se livreront pas autrement à l'exercice du droit en Ontario,

iii. feront la preuve que la protection offerte pour ces services juridiques, sous un régime d'assurance responsabilité civile professionnelle d'un assureur autorisé au Canada, est de qualité au moins équivalente à celle requise sous l'assurance du Barreau.

2. Subsection 9 (1.1) of the By-Law is amended by deleting "or 4" / "ou 4" and substituting ", 4 or 5" / ", 4 ou 5".

3. Subsection 9 (2) of the By-Law is amended by deleting subclauses (a), (b) and (c) and substituting the following:

(a) practises law in respect of not more than ten matters; and

a) traitent un maximum de dix affaires;

(b) practises law for not more than twenty days in total.

b) exécutent un maximum de vingt jours de travail.

Carried

Convocation took its morning recess at 11:00 a.m. and resumed at 11:20 A.M.

REPORT OF THE PROFESSIONAL REGULATION COMMITTEE

Re: Contingent Fees

Mr. Ducharme advised that the Professional Regulation Committee will be drafting rules on contingent fees and the matter will be brought back to Convocation in October.

Professional Regulation Committee
September 5, 2002

Report to Convocation

Purposes of Report: Decision and Information

Prepared by the Policy Secretariat

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FILE AND CASELOAD MANAGEMENT AND STAFFING INFORMATION IN THE COMPLAINTS RESOLUTION, INVESTIGATIONS AND DISCIPLINE DEPARTMENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

The Professional Regulation Committee ("the Committee") met on September 5, 2002. In attendance were:

Todd Ducharme (Chair)

Carole Curtis (Vice-Chairs)
Judith Potter
Heather Ross

Stephen Bindman
Tom Carey
Avvy Go
Ross Murray

Gavin MacKenzie

Staff: Lesley Cameron, Katherine Corrick, Terry Knott, David McKillop, Dulce Mitchell, Zeynep Onen, Elliot Spears, Andrea Waltman, Jim Varro, Jim Yakimovich

Other Attendees: Holly Harris

This report contains

- policy reports on
  - regulation of contingent fees
  - amendments to By-Laws 18, 19 and 25

- an amendment to the policy on suspension of members who fail to file the Membership Information Report
- a proposed new commentary to the *Rules of Professional Conduct* with respect to joint retainers in the context of mutual wills for spouses or partners

- information reports on file and caseload management and staffing information in the complaints resolution, investigations and discipline departments.

I. POLICY
(for decision)

REGULATION OF CONTINGENT FEES

OVERVIEW TO REPORT

Request to Convocation

Convocation is asked to approve amendments to the proposed regulatory scheme adopted by Convocation on June 2000 for contingent fee agreements between lawyers and clients, for the purpose of communication with the Attorney General of Ontario on implementation of contingent fee regulation. The amended proposals appear at pages 15 through 18.

Summary of the Issue

A working group[1] of the Professional Regulation Committee was formed to review the Law Society's current policy on contingent fees, adopted by Convocation in June 2000. The review was necessary to ensure that the Law Society has adequately prepared for anticipated discussions with the Attorney General of Ontario, given recent developments in the courts that appear likely to prompt legislative change to permit contingent fees. The thought is that the scheme for regulation of contingent fees would be embodied in provincial legislation, most likely through amendments to the *Solicitors Act*.

The working group proposed certain amendments to the regulatory scheme outlined in the June 2000 policy report, with which a majority of the Committee agreed. On September 10, after the Committee's meeting, the Court of Appeal released its reasons in *McIntyre v. Attorney General of Ontario*. While the Court allowed the appeal of the Attorney General on the question before it[2], more importantly for the Society, it found that contingent fees are not illegal in Ontario, either as offending the *Champerty Act* or the *Solicitors Act*. The Court also urged the government of Ontario to implement a scheme to regulate contingent fees.

Accordingly, the Committee recommends that the Society move forward and engage in discussions with the Attorney General with proposals for a regulatory scheme for contingent fees.

[1] Gavin MacKenzie (chair), Ab Chahbar, George Hunter, Judith Potter, Bill Simpson and Gerald Swaye.
[2] The Court overturned the judgment of the Superior Court which declared that the contingent fee arrangement in this particular case did not offend the *Champerty Act*. The Court said it was premature to determine if the agreement in question was offensive to that Act, and stayed the application for the declaration.

A. INTRODUCTION AND BACKGROUND

1. In early 2002, the Treasurer requested the chair of the Professional Regulation Committee to form a working group to formulate an appropriate scheme for regulation of contingent fees in Ontario.

2. The Law Society had already approved such a scheme in June 2000, when Convocation adopted the recommendations of a Joint Committee on Contingent Fees ("Joint Committee"), consisting of representatives from the Advocates' Society, the Canadian Bar Association (Ontario), now the Ontario Bar Association, and the Law Society. The report was transmitted to the Attorney General following June 2000 Convocation, given his stated intention to introduce legislation dealing with contingent fees in fall of 2000. The report is attached as Appendix 1.

3. For a number of reasons, the Attorney General did not act on the report and to date, the government has not pursued the issue.

4. More recently, two decisions of the Ontario Superior Court of Justice, one of which was appealed to the Ontario Court of Appeal, determined that contingent fees were not prohibited by the *Solicitors Act* and did not offend the act against champerty. The reasons of the Court of Appeal in appeal in *McIntyre v. Attorney General of Ontario* were released on September 10, 2002.[3] The Court allowing the appeal of the Attorney General, overturned the judgment of the Superior Court which declared that the contingent fee agreement in question did not offend the *Champerty Act.* The Court said that it was premature to make that determination and stayed the application for the declaration. However, the Court found that contingent fee agreements *per se* are not prohibited by the *Champerty Act* or the *Solicitors Act.* It urged the Attorney General to implement a regulatory scheme for contingent fees in Ontario.

5. Given the developing case law and the position of the provincial government on the issue, the Society decided to move forward with its own initiative, in preparation for discussions with the Attorney General on a regulatory scheme when the opportunity arises.

6. The working group, borrowing much of what has been accomplished by the Joint Committee, presented a revised scheme for the Committee's review. A majority of the Committee accepted the option favoured by the working group. This report discusses the favoured option and others considered by the Committee, as reported by the working group.

7. As with the June 2000 recommendations, the thought is that the scheme for regulation of contingent fees would be embodied in provincial legislation, most likely through amendments to the *Solicitors Act*.

B. SUMMARY OF RECENT INITIATIVES AND CURRENT POLICY

8. The Joint Committee, which conducted extensive research, including a public opinion survey on contingent fees, presented the following scheme for contingent fees, which Convocation approved on June 23, 2000:

    a. Contingent fees would be permitted in litigation matters other than in criminal law and family law proceedings.

    b. The maximum contingent fee rate would be capped at 33.3 percent.

[3] The reasons appear at Appendix 2.

c. Notwithstanding the cap, a lawyer would be permitted to apply to the court, at the time of entering into a contingent fee arrangement, for approval to charge a contingent 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 contingent 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 contingent fee scheme. If costs were awarded, they would go to the client.

f. Disbursements would be dealt with outside the contingent 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 contingent 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 contingent 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 contingent fee arrangement with a lawyer. Specifically, there would be no prohibition against minors or persons under legal disability entering into contingent fee arrangements.

i. Certain standard information and terms would have to be included in every contingent fee contract. A lawyer would be prohibited from including other terms in a contingent fee contract.

j. A client would be entitled to ask a judge to review a contingent fee contract, and any charges rendered to the client under the contract absolutely within one month after delivery of the lawyer's bill, and in the discretion of a judge, within twelve months after payment of the lawyer's bill.

k. The regulation of contingent fees would be the responsibility of the government implemented through amendments to the *Solicitors Act*.

9. The Joint Committee in formulating its proposals considered the work done by previous Society committees on contingent fees and the policies that were adopted by Convocation in 1988 and 1992. On those occasions, Convocation approved in principle the introduction of contingent fees and in 1992 established a relatively detailed scheme as to how contingent fees could be put into operation in Ontario. The Joint Committee's scheme differs in several respects from the scheme adopted by Convocation in 1992. The Joint Committee's scheme also addresses many matters that were not considered by Convocation in 1988 and 1992.

10. Convocation expected that the introduction into Ontario of contingent fees would be accomplished through amendments to the *Solicitors Act* and that the government would be responsible for implementing and regulating the scheme.

11. The Society's most recent initiative relating to contingent fee regulation was the Professional Regulation Committee's proposed amendment to the *Rules of Professional Conduct* on contingent fees, which the Committee suggested be considered at the appropriate time. The proposal appeared in the Committee's report to May 2001 Convocation.

12. The current rule, rule 2.08(4), reads:

A lawyer shall not enter into an arrangement with the client for a contingent fee except in accordance with the provisions of the *Solicitors Act* or in accordance with the *Class Proceedings Act, 1992*.

13. The Committee, noting the developments discussed above, formulated the following amendment to the rule, consistent with Convocation's policies:

2.08 (3) Subject to subrules (1) and (4) and the *Class Proceedings Act, 1992*, if applicable, and except in matrimonial or criminal matters, a lawyer may enter into a written agreement signed by the lawyer and his or her client that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition of the matter for which the lawyer's services are to be provided.

(4) A contingent fee agreement shall not
a) require the lawyer's consent if the client decides to abandon, discontinue, or settle the matter
b) interfere with the client's right to change lawyers at any time.

14. The Committee in May 2001 did not present the amended rule for adoption by Convocation. It acknowledged the pending consideration of the issue of contingent fees by the Court of Appeal and, at the appropriate time, the need to consult with the profession on the proposed amendment.

C. THE COMMITTEE'S VIEWS

Changes to the June 2000 Proposals

15. The Committee affirmed the June 2000 proposals with the exception of two issues: the percentage of the cap and the issue of costs awarded in the cause, which are interrelated.

History of the Cap and Costs Aspects of the Scheme

16. In July 1992, Convocation decided that the contingent fee rate should be capped at 20 percent (subject to the court approving an increased rate). The cap was established on the basis that a lawyer compensated through a contingent fee would be receiving a percentage of the amount recovered by the client exclusive of costs, but that the lawyer would be entitled to receive party and party costs awarded in the action. It was the view of Convocation that because the lawyer would be receiving a contingent fee plus costs, a higher contingent fee rate (*e.g.* 25 to 50 percent) would be unreasonable.

17. The Joint Committee in 2000 determined that the contingent fee rate should be capped at 33.3 percent. Under this scheme, the lawyer would *not* be entitled to receive an award of costs. Thus, the contingent fee (a percentage of the amount recovered by the client exclusive of costs) would be the lawyer's only compensation.[4]

[4] The working group noted that courts usually award the winning side partial indemnification (formerly "party and party costs"), which costs 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, partial indemnity will cover about half the actual costs of carrying a case.

18. As noted above, the Joint Committee was of the view that only the client, and not the lawyer, should be entitled to receive the party and party costs awarded by court. The Joint Committee's view was that contingent fees should be introduced 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, and the Joint Committee did not believe that the introduction of contingent fees should alter this.

The Options and the Committee's Proposal

19. The Committee, based on the working group's report, considered a number of options, including those discussed above, for the cap and costs aspects of the scheme, and identified them as follows:

    a. a 33.3 percent cap with no costs to the lawyer (the June 2000 recommendation)

    b. a 20 percent cap plus party and party costs (partial indemnity) to the lawyer (the July 1992 recommendation)

    c. a cap of 20 percent, with the percentage applied to the sum of the award and the costs

    d. a cap of 20 percent, plus costs awarded to the client in the action to the lawyer

    The majority of the Committee favoured option d. Commentary on each option and an explanation of the Committee's preference appears below.

a. 33.3 Percent Cap With No Costs To The Lawyer (the June 2000 recommendation)

20. As stated in the June 23, 2000 report of the Joint Committee, the 33.3 percent cap with no costs to the lawyer was determined after consideration of the following factors:
    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 contingent 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 contingent fee basis
    d. the fact that, under the Society's *Rules of Professional Conduct*, the lawyer is prohibited from charging or accepting a fee unless it is fair and reasonable;
    e. the fact that in other provinces, the contingent 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 the contingent fee contract and any charges rendered under the contract reviewed.

21. The Joint Committee in proposing the 33.3 percent cap also considered that under its scheme, the lawyer would not be entitled to receive the award of costs. Thus, the contingent fee (a percentage of the amount recovered by the client exclusive of costs) would be the lawyer's only compensation.

b. 20 Percent Cap, Plus Party And Party Costs (Partial Indemnity) To The Lawyer (the July 1992 recommendation)

22. As noted above, this proposal was adopted by Convocation in July 1992. The rationale for this "costs plus" principle was noted as follows in the report:

> 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" contingent, 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 contingent fee arrangement should involve costs plus the percentage, rather than a flat percentage of the claim, including all of the costs.

c. 20 Percent Cap, Applied to the Sum of the Award and the Costs Awarded

23. The application of a percentage to the total of the award and costs is attractive in its simplicity. According to the 1992 report to Convocation, many jurisdictions that permit contingent fee arrangements add together the recovery of claims and costs and apply the percentage for the contingent to that amount.

d. 20 Percent Cap, Plus Costs Awarded to the Client in the Action

24. The Committee preferred this option for the following reasons:

a. This method is a fairer approach to the costs, given the risk the lawyer assumes in agreeing to act on a contingent fee basis, and the fact that in some cases, a costs award can greatly exceed the recovery by the plaintiff in the action. The view was that even applying a larger cap (for example, 33.3 percent) but without providing that the lawyer is entitled to costs, an inequity may result should a generous costs award be made, where the lawyer assumes the risk but would not be entitled to share in the cost award.

b. A cap of 20 percent, with the percentage applied to the sum of the award and the costs awarded by the court, while similar to the preferred option, lacks clarity around the calculation of the percentage and how the costs should be distinguished from the award of damages or other recovery.

c. The type of costs (e.g. partial indemnity or full indemnity), as would be the case with the option of a cap of 20 percent, plus party and party costs (partial indemnity) (the 1992 proposal) in the Committee's view, need not be specified. A concern was that the client may have difficulty understanding the various types of costs that the court may award. The preference was for a scheme that simply referred to the costs awarded by the court in the action, which would be payable to the lawyer.

Other Aspects of the Scheme

25. The Committee affirmed, as agreed by Convocation in June 2000, that disbursements would be dealt with outside the contingent fee scheme. The client would be responsible for reimbursing the lawyer for all disbursements made, but it would be open to the client to negotiate with the lawyer for the lawyer to assume responsibility for payment of disbursements.

26. The Committee considered whether the agreement between the lawyer and client for the contingent fee arrangement should include "standard form" features such as

a. a time frame within which a client could have a contingent fee arrangement reviewed by the court,
b. a provision that would account for a client changing lawyers "mid-stream"
c. a provision to deal with a client's refusal to accept an offer of settlement that the lawyer strongly believes is in the client's best interests to accept.

27. The required terms of the agreement between the lawyer and client as approved by Convocation in June 2000 were reviewed. The sense was that the following paragraph (at page 6 of the June 2000 report) addressed the issue of review of the contract by the court, and that no further time frame for the court's review, such as prior to delivery of the lawyer's bill, should be included.

h. That the client should be entitled to seek review of the contingent 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.

28. The Committee also noted that the June 2000 scheme addressed the issue of a client changing lawyers (in which terms for termination of the contract, either by the lawyer or client, can be agreed upon) and issues around settlement, in the following paragraph (paragraph f, pages 5 and 6 of the June 2000 report).

> f. That the following information and terms should be included in every contingent 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 contingent 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 contingent fee is calculated.
> v. A statement disclosing that the contingent fee rate which has been agreed upon by the lawyer and client may be greater or lesser than contingent 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 contingent fee rate chargeable and advises the client that a contract which includes a contingent 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 contingent fee contract.
> viii. Notice to the client of his or her right to have the contingent 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.

29. The Committee concluded that no further elaboration was required, as lawyers could particularize the agreement if they so wished. In its view, above terms were sufficient for the basic content of the agreement. The concern was that specifying certain terms would make entering into such agreements with clients less attractive. The Committee felt that the requirement that certain matters must be addressed in the agreement would result in a negotiated agreement between the lawyer and client acceptable to both. This was viewed as a middle ground between mandating a standard form contract and not requiring any terms.

Summary of the Proposals

30. The following proposals represent the June 2000 proposals as amended by the Committee (changes are highlighted), in keeping with preferred option d at paragraph 23.

a. That the maximum contingent fee rate should be capped at 20 percent.

b. That, in respect of a lawyer's application to the court for approval to charge a contingent 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 lawyer should be entitled to receive the award of costs.

d. That there should be no prohibition against minors and persons under legal disability entering into contingent fee arrangements.

e. That the signatures of the lawyer and the client on a contingent fee contract should be witnessed and that a lawyer should be required to give to the client a copy of the signed contingent fee contract.

f. That the following information and terms should be included in every contingent 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 contingent fee, which will amount to x percent of the total amount recovered, and costs awarded, but exclusive of 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 contingent fee is calculated.

v. A statement disclosing that the contingent fee rate which has been agreed upon by the lawyer and client may be greater or lesser than contingent 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 contingent fee rate chargeable and advises the client that a contract which includes a contingent 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 (including costs) are to be paid to the lawyer to be held by the lawyer in trust for the client subject to the terms of the contingent fee contract.

viii. Notice to the client of his or her right to have the contingent 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 contingent 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 contingent 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 contingent 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 courgt, 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 contingent fee basis, and

ii. the client is able to recover the full amount of costs awarded, for payment to the lawyer, even when the amount of the award exceeds the amount of the contingent fee payable by the client to his or her lawyer.

Discussion with the Attorney General

31. The Committee was of the view that, if circumstances permit, further consultation with the profession to obtain input on the proposed scheme for contingent fees would be useful before the matter is reported to Convocation for decision. No specific call for input was issued before Convocation adopted the Joint Committee's report in June 2000.

32. The Committee's proposal for consultation, noted earlier in this report, accounted for the fact that the release of the *McIntyre* decision prior to the time consultation was begun would likely mean that a consultation phase would not be feasible. As the decision has been released, and endorses contingent fees in Ontario, the Committee's view is that the Society should press ahead with communications with the Attorney General for legislative change, and engage in discussions with a proposed scheme for regulation of contingent fees. The composition of the Joint Committee included broad representation from the profession and the Joint Committee obtained input from the public in the form of a public opinion poll.

33. The working group noted that on May 16, 2002, MPP Michael Bryant introduced a Private Members Bill, Bill 25, *An Act to amend the Solicitors Act to permit and to regulate contingency fee agreements* (see Appendix 3). It is not known at this time how the introduction of this legislation may influence the government on this issue.

Educational Information on Contingent Fees

34. The Committee also agreed that at the appropriate time, educational material should be prepared for the public about contingent fees. The Committee's view was that this would follow the implementation of contingent fee regulation by the Attorney General.

AMENDMENT TO THE POLICY ON SUSPENSIONS FOR FAILURE TO FILE THE MEMBERS ANNUAL REPORT

OVERVIEW TO REPORT

Request to Convocation

Convocation is requested to make a correcting amendment to its policy adopted on June 28, 2002 with respect to suspension of members who continue to fail to file the Member's Annual Report (MAR). The amendment is deletion of the requirement to file the MAR for the year the member is reinstated or readmitted. The amended policy would read:

a) That members who are already suspended for failure to file the Member's Annual Report and who fail to file in years subsequent to the year in which they are suspended for the failure to file should not be suspended again for each year they fail to file, and

b) That members, as a condition of reinstatement or readmission, be required to file the Member's Annual Report for the year they were suspended for failure to file.

Summary of the Issue

According to By-Law 17, members are required to file the MAR for a particular calendar year by March 31 of the year following that calendar year. The current requirement in the policy that a member file the MAR for the year of reinstatement or readmission is inconsistent with the By-Law as a condition of reinstatement or readmission and is also superfluous.

A. NATURE OF THE ISSUE

1. On June 28, 2002, Convocation adopted the following policy with respect to suspension of members who are suspended for failure to file the MAR and continue to fail to file the MAR for years subsequent to the year in which they first failed to file.

c) members who are already suspended for failure to file the Member's Annual Report and who fail to file in years subsequent to the year in which they are suspended for the failure to file should not be suspended again for each year they fail to file, and

d) members, as a condition of reinstatement or readmission, be required to file the Member's Annual Report for the year they were suspended for failure to file and the year they are reinstated or readmitted as a member with full rights and privileges. (Emphasis added)

2. The requirement to file the MAR is found in By-Law 17, which states as follows:

> 2. (1) Every member shall submit a report to the Society, by March 31 of each year, in respect of the member's practice of law and other related activities during the preceding year.
>
> (2) The report required under subsection (1) shall be in Form 17A [Member's Annual Report].

3. As the MAR filing for any given calendar year is made at the beginning of the year following the calendar year in question, the requirement in the policy, shown in the highlighted portion in paragraph 1, is inconsistent with the By-Law as a condition of reinstatement of readmission. Further, as the member, if readmitted or reinstated in the calendar year, is required to file the MAR for that calendar year in the year following the calendar year in accordance with the By-Law, the requirement in the policy appears to be superfluous.

B. PROPOSAL FOR CONVOCATION

4. For the above reasons, the Committee is requesting that Convocation delete the highlighted portion of the policy.

AMENDMENTS TO BY-LAWS 18, 19 AND 25

OVERVIEW TO REPORT

Request to Convocation

Convocation is requested to amend By-Laws 18, 19 and 25, as set out the following motions:

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON SEPTEMBER 19, 2002

MOVED BY

SECONDED BY

THAT the By-Laws made by Convocation under subsections 62 (0.1) and (1) of the *Law Society Act* in force on September 19, 2002 be amended as follows:

BY-LAW 18
[RECORD KEEPING REQUIREMENTS]

1. Subsection 1 (4) of By-Law 18 [Record Keeping Requirements] is amended by,

   (a) deleting "Land Information Services,"; and

   (b) deleting "Commercial Relations" / "de la Consommation et du Commerce" and substituting "Business Services" / "Services aux consommateurs et aux enterprises".

BY-LAW 19
[HANDLING OF MONEY AND OTHER PROPERTY]

2. Subsection 8.1 (1) of By-Law 19 [Handling of Money and Other Property] is amended by,

   (a) deleting "Land Information Services,"; and

   (b) deleting "Commercial Relations" / "de la Consommation et du Commerce" and substituting "Business Services" / "Services aux consommateurs et aux enterprises".

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON SEPTEMBER 19, 2002

MOVED BY

SECONDED BY

THAT By-Law 25 [Multi-Discipline Practices] made by Convocation on April 30, 1999 and amended by Convocation on May 28, 1999, June 25, 1999, December 10, 1999, April 26, 2001 and May 24, 2001, be further amended as follows:

BY-LAW 25
[MULTI-DISCIPLINE PRACTICES]

1. Section 19 of By-Law 25 [Multi-Discipline Practices] is deleted and the following substituted:

Interpretation: "Society's insurance plan"
19. (1) In this section, "Society's insurance plan" means the Society's professional liability insurance plan and includes any professional liability insurance policy which the Society may have arranged for its members.

Définition : « Régime d'assurance du Barreau »
19. (1) Dans cet article, « Régime d'assurance du Barreau » désigne le régime d'assurance responsabilité professionnelle du Barreau et comprend toute politique d'assurance responsabilité professionnelle que le Barreau peut avoir établie pour ses membres.

Insurance requirements: members
(2) A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law shall maintain professional liability insurance coverage for the individual,

(a) through the insurer of the Society's insurance plan, in an amount equivalent to that required of the member under the Society's insurance plan; and

(b) through any insurer, in an amount equivalent to the amount of coverage the member maintains in excess of that required of the member under the Society's insurance plan.

Exigences relatives à l'assurance : membres
(2) Les membres qui, en vertu du paragraphe 4 (1), se sont associés à un non-membre pour créer une société en nom collectif, si le non-membre exerce une profession ou un métier qui sert les intérêts de l'exercice du droit, doivent avoir

a) par l'entremise de l'assureur du régime d'assurance du Barreau une couverture d'assurance responsabilité civile professionnelle pour le non-membre équivalente à celle du membre;

b) par l'entremise de tout autre assureur, une couverture pour le non-membre équivalente à celle que le membre garde en surplus de ce qui est requis en vertu du régime d'assurance du Barreau.

Summary of the Issue

By-Law 18 and By-Law 19 on record keeping requirements and handling of trust money respectively require an amendment to reflect the correct corporate name of Teranet Inc. and to reflect the correct name of the provincial ministry connected with Teranet Inc.'s operations.

Amendments to By-Law 25 on multi-discipline practice are required to clarify that the Lawyers Professional Indemnity Company ("LAWPRO") is not the exclusive provider of excess liability insurance.

Copies of the current By-Laws are attached at Appendix 4.

A. NATURE OF THE AMENDMENTS

By-Laws 18 and 19

1. The amendments to these By-Laws are required to properly reflect the corporate name of Teranet, the corporation established by the provincial government to administer the electronic registration of title documents, and reflect the change to the title of the relevant government ministry connected to Teranet's operations.

2. The amendments will replace "Teranet Land Information Services, Inc." with the current title of the corporation, "Teranet Inc." and replace "Ministry of Consumer and Commercial Relations" with "Ministry of Consumer and Business Services".

3. By-Law 18 references the corporate name and the ministry in subsection 1(4) (Interpretation) in connection with section 2 paragraph 12 and the trust records members are required to maintain. By-Law 19 references the corporate name and the ministry in section 8.1 in connection with the electronic withdrawal of funds required for the registration of title documents and payment of Land Transfer Tax.

By-Law 25

4. An amendment to section 19 of By-Law 25 is required to address an inconsistency between what the section requires for insurance coverage for non-lawyer partners through LAWPRO and the amount actually provided through LAWPRO .

5. By-Law 25 establishes the regulatory scheme for multi-discipline practices (including partnerships). Currently, section 19 of the By-Law addresses the lawyer's liability insurance obligations for non-lawyer partners in multi-discipline partnerships. Section 19 reads:

> Insurance requirements: members
>
> 19. A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law shall maintain through the insurer of the Society's insurance plan professional liability insurance coverage for the individual in an amount determined by Convocation from time to time.

6. The phrase "the insurer of the Society's insurance plan" means LAWPRO .

7. On May 28, 1999, Convocation determined that the amount of insurance to be carried by non-lawyers should be that carried by lawyers in the partnership and any excess carried by the lawyers. The issue of LAWPRO acting as the sole provider of excess insurance for non-lawyers was subsequently addressed by Convocation, through a report of the Professional Regulation Committee, in December 1999. Convocation at that time determined that LAWPRO should not be the sole provider of excess insurance.

8. The amount of insurance set by Convocation is the equivalent of the lawyer's primary coverage and any excess the lawyer carries. Without distinguishing between the primary and excess coverage, section 19 effectively states that coverage in that amount is to be maintained through LAWPRO. As Convocation's decision was that LAWPRO is not required to provide excess coverage (but will provide primary coverage), the section indicates that LAWPRO provides coverage that in reality it does not provide (i.e. both primary and excess coverage for the non-lawyer partner).

9. Accordingly, an amendment is proposed that will effectively limit LAWPRO's obligation to providing non-lawyer partner insurance in an amount equivalent to a lawyer's primary coverage, by reference to coverage under "the Society's insurance plan". This is currently in the amount of $1 million per year ($2 million in the aggregate).

PROPOSED NEW COMMENTARY TO RULE 2.04(6) ON SPOUSAL/PARTNER WILLS

OVERVIEW OF REPORT

Request to Convocation

Convocation is requested to amend the *Rules of Professional Conduct* by adopting one of the following options for a new commentary to rule 2.04(6). The difference between the two options is indicated by the underlined text in Option 2, and is explained in the summary of the issue appearing below:

> Option 1:
> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty to decline to act unless both spouses or partners agree.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).
>
> Option 2:
> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty to make reasonable efforts to inform forthwith the other spouse or partner of the contact and to decline to act unless both spouses or partners agree.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

Summary of the Issue

In response to issues raised by the profession, the Committee undertook a review of lawyers' obligations when retained to prepare wills for spouses or partners based on their shared understanding of what is to be in each will, and when one spouse subsequently approaches the lawyer to make a change to the will. The Committee concluded that in these circumstances, a joint retainer exists which is subject to rule 2.04(6) of the *Rules of Professional Conduct* on conflicts of interest and joint retainers.

Convocation reviewed earlier proposals by the Committee on April 25, 2002 including two options for a new commentary to rule 2.04(6), but referred the matter back to the Committee for further consideration of concerns expressed by some benchers on the proposals. This report includes discussion of the Committee's reconsideration of the proposals and options for a new commentary to the rule for Convocation's review.

The Question:

The following is the question that has led to the divergence of opinion at the Committee as reflected in the two options:

> Once the lawyer is asked by one spouse the change the will, is the lawyer required to inform the other spouse of the contact?

The Issue:

It is accepted that when a lawyer is retained to prepare joint wills for spouses, the lawyer cannot later act for one spouse who wishes to change the will, without the consent of the other spouse. The issue that arises is as follows:

> Is the joint retainer for the wills at an end when the wills are executed by the clients, or does the joint retainer continue such that subsequent contact by one spouse to the change the will is within the joint retainer? If the joint retainer continues, the lawyer must advise the other spouse of the contact. If the joint retainer is at an end, the matter between the lawyer and returning client is a new retainer, and the lawyer cannot disclose the fact of the contact to the other spouse because of the duty of confidentiality.

A. THE ISSUE FOR CONVOCATION

1. The Committee is presenting two options for a new commentary to rule 2.04(6) of the *Rules of Professional Conduct* on conflicts of interest and joint retainers. The commentary clarifies a lawyer's obligations when retained to prepare wills for spouses or partners based on their shared understanding of what is to be in each will.

2. Convocation reviewed the Committee's proposals on April 25, 2002 but referred the matter back to the Committee for further consideration of concerns expressed by some benchers.

3. This report includes discussion of the Committee's reconsideration of the proposals and options for Convocation's review.

B. BACKGROUND

How the Issue Arose

4. An issue was raised by members of the estates bar with Advisory Services on the application of rule 2.04(6) on conflicts of interest and joint retainers to retainers in circumstances in which a lawyer prepares mutual wills for spouses or partners.

5. Rule 2.04(6) reads:

> Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that:
>
> (a) the lawyer has been asked to act for both or all of them,
>
> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
>
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

6. A preliminary question is whether the words "a matter or transaction" in the rule are intended to include the preparation of wills for spouses or partners that reflect the parties' shared understanding of what is to be contained in each will. Some members of the estates bar are of the view that preparation of these types of wills for a husband and wife are separate retainers, or that if the preparation of the wills is a joint retainer, the parties should be entitled to waive the requirement that information respecting each will not be treated as confidential.

7. With the November 2000 amendments and change in format to the Rules[5], this issue, which has had some history with the Society's Advisory Services, has been referred to the Society again. As the issue has important implications for the application of rule 2.04(6), it was referred to the Committee.

Specific Issues Relating to Preparation of Wills For Spouses or Partners

8. The Committee was assisted in its review of this issue by an informative memorandum prepared by Advisory Services staff.[6] The memorandum identified the questions put to the Law Society by members of the estates bar, discussed related legal issues, and provided options for the Committee's consideration on how the issue might be addressed.

9. The following summarizes the primary issues:

   a. Rodney Hull, Q.C., in an article prepared in July of 1992 for the Errors and Omissions Bulletin of the Law Society took the position that the preparation of spousal wills constitutes a joint retainer. He suggested that a lawyer should not prepare any subsequent will or codicil for either spouse without disclosure of this request to the other spouse. In that situation, Mr. Hull suggested advising the clients at the outset that if one of them later chooses to change his or her will, and approaches the lawyer to do so, the lawyer will be obliged to inform the other spouse of this intention. If the parties agree, then the lawyer may act, and if the parties do not so agree, the lawyer should decline to act.

   b. In determining whether a joint retainer exists, if the parties attend at the lawyer's office with common estate planning goals, which may necessitate the transfer of property between spouses or into new entities such as spousal or family trusts, the legal interests of the parties are being affected by the retainer. Accordingly, the definition of "matter or transaction" may be construed broadly, to encompass the expectations of the clients that each of their rights are being protected. As such, estate planning for spouses culminating in the preparation of wills for each of the spouses constitutes "a matter or transaction".

   c. Opinion varies on whether a lawyer must advise one spouse when the other spouse approaches the lawyer to change the will, even if the lawyer advises that he or she cannot act for the other spouse. One view is that although the preparation of spousal wills is a joint retainer, proposed changes to either of the spouse's wills is a new and separate retainer requiring no disclosure to the other spouse. However, the situation creates a conflict of interest with respect to the other spouse (who is a former client), barring the lawyer from acting without the consent of the other spouse, but requiring no disclosure if the lawyer declines to act. The other view is that the sharing of information survives the execution of the wills. As such, the lawyer would be required to inform the other spouse in the event he or she is approached to make changes to one of the wills arising out of the initial joint retainer, even if the lawyer declines to act.

A Proposed New Commentary and Call for Input

10. In November 2001, the Committee reported to Convocation on its initial review of rule 2.04(6) as related to the preparation of spousal or partner wills. The Committee's preliminary conclusion was that spouses or partners who together retain a lawyer to prepare wills for both of them, on a shared understanding of what is to appear in each will, jointly retain the lawyer. In such circumstances, the lawyer must make the appropriate disclosure, including advice to the clients that if one of the clients returns to discuss the will, or

[5]This issue, prior to the 2000 revisions to the Rules, was dealt with in a commentary to Rule 5 on conflicts of interest. As noted above, it has now been incorporated in a rule.

[6]The memorandum appears at Appendix 5.

has an intention to vary it, the lawyer must inform the other party to the retainer and cannot act unless both parties consent.

11. The Committee considered that the following would indicate a joint retainer:

- the parties attend at the lawyer's office at the same time;
- the parties meet with the lawyer together;
- the parties appear to have a common goal, and instruct the lawyer together on achieving that goal;
- the wills are executed at the same time;
- one account is rendered to both clients;
- a single reporting letter is usually prepared for both clients.

12. The Committee did not consider it appropriate that a waiver by the clients of the requirement to share information be an option. The Rules do not contemplate such a waiver. The Committee determined that, practically, not sharing information between the spouses or partners in an estate planning matter would defeat the efficacy of the service the lawyer is required to provide in advising the clients and fulfilling their instructions. Sharing of information about each spouse's assets, for example, would almost certainly be required to achieve an effective estate plan for both. Further, if a waiver were contemplated, the spouses may have to incur additional expense to obtain independent legal advice on the issue of the waiver before agreeing to such an arrangement.

13. The Committee determined that to provide additional guidance to members in these situations, a commentary should be added to rule 2.04(6) explaining the obligations of the lawyer. The Committee approved the following draft commentary prepared by staff, which included input from lawyer Paul Perell, the principal drafter of the current Rules:

> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty to inform forthwith the other spouse or partner of the contact and to decline to act unless both spouses or partners agree.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).[7]

[7]Subrules 2.04(7) and (8) read:

(7) Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

(8) Where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

14. The Committee acknowledged that some estates lawyers may have views that differ from the conclusion reflected in the proposed commentary, or views on how the rule on joint retainers might be interpreted in the context of spousal or partner wills. Accordingly, the Committee thought it appropriate to seek the views of members of the profession, particularly those in the estates bar, on the proposed commentary before a final version was presented to Convocation for discussion.

15. The Committee published the commentary in the *Ontario Lawyers Gazette*, the *Ontario Reports*, and on the Law Society's web site in December 2001 and January 2002, requesting comments on the proposed commentary. The Committee also sought comment from the Ontario Bar Association's Trusts and Estates Section.

Results of the Call for Input

16. Thirty six members or member groups commented on this issue. The responses in general were thoughtful assessments of the commentary and the issues that prompted it.[8]

17. Although a number of respondents disagreed with the draft commentary or questioned the need for it, others agreed with the proposal to the extent that the joint retainer rule applies. Some respondents had difficulty with certain aspects of the proposal. For example,

- some respondents said that the lawyer should not have to contact a spouse when the other spouse returns to change the will in situations in which the marriage has broken down or in which the spouse is suffering abuse

- others said that the lawyer should not have to inform the other spouse if the lawyer refuses to act for the returning spouse.

Report to April 25, 2002 Convocation

18. The Committee reported two options for a new commentary to April 25, 2002 Convocation. As noted later in this report, a number of issues were raised about the options, and the matter was referred back to the Committee for reconsideration.

C. THE COMMITTEE'S PROPOSALS

19. The Committee ultimately concluded that none of the responses to the call for input offered a compelling argument against the view that in these circumstances a joint retainer exists. The Committee also determined that, for the reasons explained later in this report, the issues raised by benchers on April 25 did not warrant a change in the options proposed by the Committee.

20. The Committee noted that the primary concern among those who generally favoured the commentary was with the lawyer's obligation to inform a spouse that the other spouse had contacted the lawyer to change the will, in circumstances in which the lawyer chooses not to act.

21. The Committee considered two ways of looking at the circumstances in which one spouse contacts the lawyer after execution of the wills, which are reflected in the two options discussed below. These options the two options presented for Convocation's consideration.

[8] A summary of the responses, without attribution, appears at Appendix 6.

Option 1

22. A majority of the Committee favoured option 1. The majority believe that a joint retainer for preparation of wills for the spouses or partners ends when the wills are executed. The only continuing obligation of the lawyer is not to act against a former client in the same matter or transaction without consent (rule 2.04(4) [9]). If one of the spouses later contacts the lawyer to make a change to the will, that contact is a new matter. The lawyer would be prevented from acting on the matter because it may adversely affect the interests of a former client. In the absence of the other spouse's consent, the lawyer cannot act, but if he or she decides not to act, the lawyer is not obliged under the rule to contact the other spouse to advise of the contact.

23. This approach is consistent with the current rules and affirms the intent of rule 2.04(4) for joint retainers for preparation of wills for spouses or partners. The proposed commentary, however, would require the following amendment to the draft circulated for comment to implement this approach:

> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty ~~to inform forthwith the other spouse or partner of the contact and~~ to decline to act unless both spouses or partners agree.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

Option 2

24. A minority of the Committee favoured this option. This option mirrors the first option to the point where the lawyer has been contacted by a spouse to change a will. In such situations, as above, the lawyer cannot act without disclosure and consent, but in circumstances in which the lawyer decides not to act, the lawyer must still contact the other spouse to advise of the spouse's contact. Thus, the difference between this option and the first is an obligation in addition to that in rule 2.04(4) to contact the other spouse, even if the lawyer does not act.

25. The proposed commentary as originally drafted would not require amendment for this option (subject to a minor change noted below).

26. This approach would serve to notify a spouse of developments that may adversely affect that spouse's interests, which the proponents of the approach see as part of the lawyer's role in these circumstances, flowing from the obligation not to keep information in confidence insofar as the other client is concerned.

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[9] (4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

(a) in the same matter,

(b) in any related matter, or

(c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information

unless the client and those involved in or associated with the client consent.

On this approach, in other words, the joint retainer would be regarded as continuing. Those supporting this option thought that it would better reflect what lawyers will actually do in terms of an appropriate ethical response to the circumstances facing them.

27. As a matter of clarifying the duty to contact the other spouse, the Committee determined that the lawyer should use reasonable efforts to make the contact, as a number of years may have passed since the wills were prepared, and the other spouse or partner may not be readily accessible. The commentary circulated for comment with this change would read:

> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will without informing the other spouse or partner, the lawyer has a duty to make reasonable efforts to inform forthwith the other spouse or partner of the contact and to decline to act unless both spouses or partners agree.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

28. Accordingly, the difference between the two options is the inclusion of the phrase "to make reasonable efforts to inform forthwith the other spouse or partner of the contact and" in option 2.

Issues Raised on April 25, 2002

29. At the April 25 Convocation, a number of benchers offered substantive comments on the proposals.

30. Mr. Cherniak proposed an amendment to Option 1, to add the words at the end of the commentary, "and is not permitted to advise the other spouse of the contact". The purpose would be to emphasize the positive duty the lawyer has not to disclose confidential information communicated by a client (a duty the lawyer would have even if the lawyer declines to act).

31. Mr. Wardlaw questioned whether situations such as death, divorce, separation, abuse of a spouse or mental incompetence end the joint retainer so that the lawyer can act for the spouse who returns with new instructions on a will.

32. Mr. Wardlaw added that two other options could be considered: do nothing and leave the matter as it is, or reject the Committee's proposals, referring the matter back to the Committee with instructions to consider the "human relationship" issues he raised.

33. Mr. Mulligan thought if the client for whom a will was done jointly with his or her spouse returns to the lawyer in a different capacity (for example, as a separated or divorced spouse), this might be sufficient for the lawyer to act. He added that cautious lawyers will act for only one spouse to avoid this dilemma, but that could mean more limited access to lawyers in smaller communities.

34. A caution was raised about any change to the nature of the confidentiality and conflicts regimes, to the extent that some of the above suggestions would permit a lawyer to act against a former client and effectively use confidential information against the client in a related matter. A question posed by the Treasurer to Mr. Finkelstein, who spoke on the issue, was whether such a change would affect the Society's position in the money-laundering litigation, for example, in which it is relying on the fundamental nature of the lawyers' confidentiality and conflicts obligations to

challenge the legislation. Mr. Finkelstein thought it would, and added that it may have implications for a whole host of areas that are at present unforeseen.

35. Mr. Arnup suggested (with significant support among the benchers in attendance) that the commentary as proposed should be replaced by a commentary that reflects that the profession is divided on this issue, and as a result the Society is not prepared to make a definitive ruling on the subject until after, if necessary, the issue is determined by a court.

36. When the Committee reconsidered this issue following April 25 Convocation, it concluded as follows in respect of the above issues:

a. There was no consensus among members of the Committee that the words suggested by Mr. Cherniak should be added to Option 1. One member of the Committee expressed concern that those words may be inconsistent with the rule on justified disclosure of confidential information.[10]

b. The Committee also rejected Mr. Wardlaw's and Mr. Mulligan's suggestions. The difficulty is that the basic rules on conflicts of interest still apply even in the circumstances described by Mr. Wardlaw and Mr. Mulligan. Those rules make it clear that a lawyer must not act against a former client on a related matter. Circumstances such as separation or incompetence may in fact impose a greater duty on the lawyer not to act against the other spouse. If a commentary stated what Mr. Wardlaw suggests, the Rules on conflicts of interest would require amendment to permit a lawyer to act in such circumstances. The Committee decided against introducing such a fundamental change to the rules on conflicts, noting the concern raised by the Treasurer with Mr. Finkelstein.

c. The Committee did not agree with Mr. Arnup's suggestion, as it would also not address the issue that has been placed before the Committee by members of the profession seeking clarification of the issue. Further, as Ms. Pilkington pointed out at April 25 Convocation, the courts are usually dealing with a specific set of facts that often will not have the general application that commentary under the Rules should have. The Committee's view is that the ambiguity around this issue should be resolved by addressing it in the rules.

Other Issues

37. Following similar discussion at its April 2002 meeting, the Committee considered the scope of the advice that a lawyer should provide to spouses or partners who retain the lawyer to prepare their wills, beyond the disclosure discussed in the proposed commentary. The Committee generally agreed that the lawyer, to receive proper instructions, must fully explain the circumstances of and basis for the joint retainer, the conflict issue and what may happen in the event of a conflict arising. In this way, the issues that the commentary addresses could be dealt with, and on that basis informed consent to act could be obtained.

38. The Committee felt, however, that as this matter bears on issues separate from the ethical guidance appearing in the Rules and commentary[11], it would be more appropriate to have these matters dealt with outside of the Rules and commentary. For example, it may be useful to include discussion of this topic in advisory material to the profession or in practice guidelines that may be developed.

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[10]Rule 2.03(3) reads: "Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required."

[11]E.g. the substantive law related to domestic contracts and the competence of the lawyer's advice to permit the clients to properly instruct the lawyer.

D. SUMMARY

39. The Committee is proposing that Convocation adopt one of the two options appearing at the outset of this report as new commentary to rule 2.04(6) of the *Rules of Professional Conduct*.

II. INFORMATION

FILE AND CASELOAD MANAGEMENT AND STAFFING INFORMATION IN THE COMPLAINTS RESOLUTION, INVESTIGATIONS AND DISCIPLINE DEPARTMENTS

Zeynep Onen, Director of Professional Regulation, reported to the Committee on caseload management in the Complaints Resolution, Investigations and Discipline Departments. The reports appear at Appendix 7. These reports are prepared monthly for review by the Committee as part of its monitoring function respecting file management. The Committee receives general information and statistics on file management and caseloads in the departments noted above.[12] The reports in this report cover the period to the end of July 2002.

[12]The chair, as a member of the Proceedings Authorization Committee, is not a member of the Hearing Panel and accordingly does not and cannot have adjudicative responsibilities. Information received by the Committee, as reflected in the reports appended to this report, does not itemize specific cases.

APPENDIX 1

JUNE 2000 REPORT FROM THE SOCIETY'S REPRESENTATIVE ON THE JOINT COMMITTEE ON CONTINGENCY FEES

Report to Convocation
June 23, 2000

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 1/3 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 1/3 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 1/3.

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]

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[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.
>
> 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.

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 1/3 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 1/3 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.

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.

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.

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]

[5] *Solicitors Act*, R.S.O. 1990, c. S-15, ss 3, 11.

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.

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.

APPENDIX 2

DECISION OF THE COURT OF APPEAL FOR ONTARIO IN
MCINTYRE V. ATTORNEY GENERAL OF ONTARIO

APPENDIX 3

PRIVATE MEMBER'S BILL
BILL 25
AN ACT TO AMEND THE SOLICITORS ACT TO PERMIT AND TO REGULATE CONTINGENCY FEE AGREEMENTS

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[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.

APPENDIX 4

BYLAWS 18, 19 AND 25

BY-LAW 18

Made: January 28, 1999
Amended:
February 19, 1999
May 28, 1999

RECORD KEEPING REQUIREMENTS

GENERAL

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

"client" includes a person or group of persons from whom or on whose behalf a member receives money or other property;

"firm of members" means a partnership of members and all members employed by the partnership;

"lender" means a person who is making a loan that is secured or to be secured by a charge, including a charge to be held in trust directly or indirectly through a related person or corporation;

"member" includes a firm of members;

"money" includes current coin, government or bank notes, cheques, drafts, credit card sales slips, post office orders and express and bank money orders.

"Arm's length" and "related"
(2) For the purposes of this By-Law, "arm's length" and "related" have the same meanings given them in the *Income Tax Act* (Canada).

"Charge"
(3) For the purposes of this By-Law, "charge" has the same meaning given it in the *Land Registration Reform Act*.

"Teranet"
(4) In paragraph 12 of section 2, "Teranet" means Teranet Land Information Services, Inc., a corporation incorporated under the *Business Corporations Act*, acting as agent for the Ministry of Consumer and Commercial Relations.

Requirement to maintain financial records
2. Every member shall maintain financial records to record all money and other property received and disbursed in connection with the member's practice, and, as a minimum requirement, every member shall maintain, in accordance with sections 4, 5 and 6, the following records:

1. A book of original entry identifying each date on which money is received in trust for a client, the person from whom money is received, the amount of money received and the client for whom money is received in trust.

2. A book of original entry showing all disbursements out of money held in trust for a client and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the person to whom money is disbursed, the amount of money which is disbursed and the client on whose behalf money is disbursed.

3. A clients' trust ledger showing separately for each client for whom money is received in trust all money received and disbursed and any unexpended balance.

4. A record showing all transfers of money between clients' trust ledger accounts and explaining the purpose for which each transfer is made.

5. A book of original entry showing all money received, other than money received in trust for a client, and identifying each date on which money is received, the person from whom money is received and the amount of money received.

6. A book of original entry showing all disbursements of money, other than money held in trust for a client, and identifying each date on which money is disbursed, the method by which money is disbursed, including the number or a similar identifier of any document used to disburse money, the amount of money which is disbursed and the person to whom money is disbursed.

7. A fees book or a chronological file of copies of billings, showing all fees charged and other billings made to clients and the dates on which fees are charged and other billings are made to clients and identifying the clients charged and billed.

8. A record showing a comparison made monthly of the total of balances held in the trust account or accounts and the total of all unexpended balances of funds held in trust for clients as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparisons:

    i. A detailed listing made monthly showing the amount of money held in trust for each client and identifying each client for whom money is held in trust.

    ii. A detailed reconciliation made monthly of each trust bank account.

9. A record showing all property, other than money, held in trust for clients, and describing each property and identifying the date on which the member took possession of each property, the person who had possession of each property immediately before the member took possession of the property, the value of each property, the client for whom each property is held in trust, the date on which possession of each property is given away and the person to whom possession of each property is given.

10. Bank statements or pass books, cashed cheques and detailed duplicate deposit slips for all trust and general accounts.

11. Signed electronic trust transfer requisitions and signed printed confirmations of electronic transfers of trust funds.

12. Signed authorizations of withdrawals by Teranet and signed paper copies of confirmations of withdrawals by Teranet.

Record keeping requirements if mortgages and other charges held in trust for clients

3. Every member who holds in trust mortgages or other charges on real property, either directly or indirectly through a related person or corporation, shall maintain financial records in addition to those required under section 2 and, as a minimum additional requirement, shall maintain, in accordance with sections 4, 5 and 6, the following records:

1. A mortgage asset ledger showing separately for each mortgage or charge,

   i. all funds received and disbursed on account of the mortgage or charge,

   ii. the balance of the principal amount outstanding for each mortgage or charge,

   iii. an abbreviated legal description or the municipal address of the real property, and

   iv. the particulars of registration of the mortgage or charge.

2. A mortgage liability ledger showing separately for each person on whose behalf a mortgage or charge is held in trust,

   i. all funds received and disbursed on account of each mortgage or charge held in trust for the person,

   ii. the balance of the principal amount invested in each mortgage or charge,

   iii. an abbreviated legal description or the municipal address for each mortgaged or charged real property, and

   iv. the particulars of registration of each mortgage or charge.

3. A record showing a comparison made monthly of the total of the principal balances outstanding on the mortgages or charges held in trust and the total of all principal balances held on behalf of the investors as they appear from the financial records together with the reasons for any differences between the totals, and the following records to support the monthly comparison:

   i. A detailed listing made monthly identifying each mortgage or charge and showing for each the balance of the principal amount outstanding.

   ii. A detailed listing made monthly identifying each investor and showing the balance of the principal invested in each mortgage or charge.

Financial records to be permanent

4. (1) The financial records required to be maintained under sections 2 and 3 may be entered and posted by hand or by mechanical or electronic means, but if the records are entered and posted by hand, they shall be entered and posted in ink.

Paper copies of financial records

(2) If a financial record is entered and posted by mechanical or electronic means, a member shall ensure that a paper copy of the record may be produced promptly on the Society's request.

Financial records to be current

5. (1) Subject to subsection (2), the financial records required to be maintained under sections 2 and 3 shall be entered and posted so as to be current at all times.

Exceptions

(2) The record required under paragraph 8 of section 2 and the record required under paragraph 3 of section 3 shall be created within fifteen days after the last day of the month in respect of which the record is being created.

Preservation of financial records required under s. 2

6. (1) Subject to subsection (2), a member shall keep the financial records required to be maintained under section 2 for at least the six year period immediately preceding the member's most recent fiscal year end.

Same

(2) A member shall keep the financial records required to be maintained under paragraphs 1, 2, 3, 8, 9, 10 and 11 of section 2 for at least the ten year period immediately preceding the member's most recent fiscal year end.

Preservation of financial records required under s. 3

(3) A member shall keep the financial records required to be maintained under section 3 for at least the ten year period immediately preceding the member's most recent fiscal year end.

Record keeping requirements when acting for lender

7. (1) Every member who acts for or receives money from a lender shall, in addition to maintaining the financial records required under sections 2 and 3, maintain a file for each charge, containing,

(a) a completed investment authority, signed by each lender before the first advance of money to or on behalf of the borrower;

(b) a copy of a completed report on the investment;

(c) if the charge is not held in the name of all the lenders, an original declaration of trust;

(d) a copy of the registered charge; and

(e) any supporting documents supplied by the lender.

Exceptions

(2) Clauses (1) (a) and (b) do not apply with respect to a lender if,

(a) the lender,

(i) is a bank listed in Schedule I or II to the *Bank Act* (Canada), a licensed insurer, a registered loan or trust corporation, a subsidiary of any of them, a pension fund, or any other entity that lends money in the ordinary course of its business,

(ii) has entered a loan agreement with the borrower and has signed a written commitment setting out the terms of the prospective charge, and

(iii) has given the member a copy of the written commitment before the advance of money to or on behalf of the borrower;

(b) the lender and borrower are not at arm's length;

(c) the borrower is an employee of the lender or of a corporate entity related to the lender;

(d) the lender has executed Form 1 of Regulation 798 of the Revised Regulations of Ontario, 1990, made under the *Mortgage Brokers Act*, and has given the member written instructions, relating to the particular transaction, to accept the executed form as proof of the loan agreement;

(e) the total amount advanced by the lender does not exceed $6,000; or

(f) the lender is selling real property to the borrower and the charge represents part of the purchase price.

Requirement to provide documents to lender

(3) Forthwith after the first advance of money to or on behalf of the borrower, the member shall deliver to each lender,

(a) if clause (1) (b) applies, an original of the report referred to therein; and

(b) if clause (1) (c) applies, a copy of the declaration of trust.

Requirement to add to file maintained under subs. (1)

(4) Each time the member or any member of the same firm of members does an act described in subsection (5), the member shall add to the file maintained for the charge the investment authority referred to in clause (1) (a), completed anew and signed by each lender before the act is done, and a copy of the report on the investment referred to in clause (1) (b), also completed anew.

Application of subs. (4)

(5) Subsection (4) applies in respect of the following acts:

1. Making a change in the priority of the charge that results in a reduction of the amount of security available to it.

2. Making a change to another charge of higher priority that results in a reduction of the amount of security available to the lender's charge.

3. Releasing collateral or other security held for the loan.

4. Releasing a person who is liable under a covenant with respect to an obligation in connection with the loan.

New requirement to provide documents to lender

(6) Forthwith after completing anew the report on the investment under subsection (4), the member shall deliver an original of it to each lender.

Requirement to add to file maintained under subs. (1): substitution

(7) Each time the member or any other member of the same firm of members substitutes for the charge another security or a financial instrument that is an acknowledgment of indebtedness, the member shall add to the file maintained for the charge the lender's written consent to the substitution, obtained before the substitution is made.

Exceptions

(8) The member need not comply with subsection (4) or (7) with respect to a lender if clause (2) (a), (b), (c), (e) or (f) applied to the lender in the original loan transaction.

Investment authority: Form 18A

(9) The investment authority required under clause (1) (a) shall be in Form 18A.

Report on investment: Form 18B

(10) Subject to subsection (11), the report on the investment required under clause (1) (b) shall be in Form 18B.

Report on investment: alternative to Form 18B

(11) The report on the investment required under clause (1) (b) may be contained in a reporting letter addressed to the lender or lenders which answers every question on Form 18B.

Commencement

8. This By-Law comes into force on February 1, 1999.

BY-LAW 19

Made: January 28, 1999
Amended:
February 19, 1999
May 28, 1999
April 26, 2001
January 24, 2002

HANDLING OF MONEY AND OTHER PROPERTY

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

"client" means a person or group of persons from whom or on whose behalf a member receives money or other property;

"firm of members" means a partnership of members and all members employed by the partnership;

"member" includes a firm of members;

"money" includes current coin, government or bank notes, cheques, drafts, credit card sales slips, post office orders and express and bank money orders.

(2) For the purposes of subsections 4 (1), (2) and (3) and section 8, cash, cheques negotiable by the member, cheques drawn by the member on the member's trust account and credit card sales slips in the possession and control of the member shall be deemed from the time the member receives such possession and control to be money held in a trust account if the cash, cheques or credit card sales slips, as the case may be, are deposited in the trust account not later than the following banking day.

Money received in trust for client
2. (1) Subject to section 3, every member who receives money in trust for a client shall immediately pay the money into an account at a chartered bank, provincial savings office, credit union or a league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or registered trust corporation, to be kept in the name of the member, or in the name of the firm of members of which the member is a partner or by which the member is employed, and designated as a trust account.

Interpretation
(2) For the purposes of subsection (1), a member receives money in trust for a client if the member receives from a person,

(a) money that belongs in whole or in part to a client;

(b) money that is to be held on behalf of a client;

(c) money that is to be held on a client's direction or order;

(d) money that is advanced to the member on account of fees for services not yet rendered; or

(e) money that is advanced to the member on account of disbursements not yet made.

Money to be paid into trust account
(3) In addition to the money required under subsection (1) to be paid into a trust account, a member shall pay the following money into a trust account:

1. Money that may by inadvertence have been drawn from a trust account in contravention of section 4.

2. Money paid to a member that belongs in part to a client and in part to the member where it is not practical to split the payment of the money.

Withdrawal of money from trust account

(4) A member who pays into a trust account money described in paragraph 2 of subsection (3) shall as soon as practical withdraw from the trust account the amount of the money that belongs to him or her.

One or more trust accounts

(5) A member may keep one or more trust accounts.

Money not to be paid into trust account

3. (1) A member is not required to pay into a trust account money which he or she receives in trust for a client if,

(a) the client requests the member in writing not to pay the money into a trust account;

(b) the member pays the money into an account to be kept in the name of the client, a person named by the client or an agent of the client; or

(c) the member pays the money immediately upon receiving it to the client or to a person on behalf of the client in accordance with ordinary business practices.

Same

(2) A member shall not pay into a trust account the following money:

1. Money that belongs entirely to the member or to another member of the firm of members of which the member is a partner or by which the member is employed, including an amount received as a general retainer for which the member is not required either to account or to provide services;

2. Money that is received by the member as payment of fees for services for which a billing has been delivered, as payment of fees for services already performed for which a billing will be delivered immediately after the money is received or as reimbursement for disbursements made or expenses incurred by the member on behalf of a client.

Record keeping requirements

(3) A member who, in accordance with subsection (1), does not pay into a trust account money which he or she receives in trust for a client shall include all handling of such money in the records required to be maintained under By-Law 18.

Withdrawal of money from trust account

4. (1) A member may withdraw from a trust account only the following money:

1. Money properly required for payment to a client or to a person on behalf of a client

2. Money required to reimburse the member for money properly expended on behalf of a client or for expenses properly incurred on behalf of a client;

3. Money properly required for or toward payment of fees for services performed by the member for which a billing has been delivered.

4. Money that is directly transferred into another trust account and held on behalf of a client.

5. Money that under this By-Law should not have been paid into a trust account but was through inadvertence paid into a trust account.

Permission to withdraw other money

(2) A member may withdraw from a trust account money other than the money mentioned in subsection (1) if he or she has been authorized to do so by the Secretary or, in the absence of the Secretary and all persons authorized to exercise the powers and perform the duties of the Secretary under this By-Law, the Chief Executive Officer.

Limit on amount withdrawn from trust account

(3) A member shall not at any time with respect to a client withdraw from a trust account under this section, more money than is held on behalf of that client in that trust account at that time.

Manner in which certain money may be withdrawn from trust account

5. A member shall withdraw money from a trust account under paragraph 2 or 3 of subsection 4 (1) only,

(a) by a cheque drawn in favour of the member;

(b) by a transfer to a bank account that is kept in the name of the member and is not a trust account; or

(c) by electronic transfer.

Withdrawal by cheque

6. A cheque drawn on a trust account shall not be,

(a) made payable either to cash or to bearer; or

(b) signed by a person who is not a member except in exceptional circumstances and except when the person has signing authority on the trust account on which a cheque will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all the trust accounts on which signing authority has been delegated to the person.

Withdrawal by electronic transfer

7. (1) Money withdrawn from a trust account by electronic transfer shall be withdrawn only in accordance with this section.

When money may be withdrawn

(2) Money shall not be withdrawn from a trust account by electronic transfer unless the following conditions are met:

1. The electronic transfer system used by the member must be one that does not permit an electronic transfer of funds unless,

i. one person, using a password or access code, enters into the system the data describing the details of the transfer, and

ii. another person, using another password or access code, enters into the system the data authorizing the financial institution to carry out the transfer.

2. The electronic transfer system used by the member must be one that will produce, not later than the close of the banking day immediately after the day on which the electronic transfer of funds is authorized, a confirmation from the financial institution confirming that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer were received.

3. The confirmation required by paragraph 2 must contain,

   i. the number of the trust account from which money is drawn,

   ii. the name, branch name and address of the financial institution where the account to which money is transferred is kept,

   iii. the name of the person or entity in whose name the account to which money is transferred is kept,

   iv. the number of the account to which money is transferred,

   v. the time and date that the data describing the details of the transfer and authorizing the financial institution to carry out the transfer are received by the financial institution, and

   vi. the time and date that the confirmation from the financial institution is sent to the member.

4. Before any data describing the details of the transfer or authorizing the financial institution to carry out the transfer is entered into the electronic trust transfer system, an electronic trust transfer requisition must be signed by,

   i. a member, or

   ii. in exceptional circumstances, a person who is not a member if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

5. The data entered into the electronic trust transfer system describing the details of the transfer and authorizing the financial institution to carry out the transfer must be as specified in the electronic trust transfer requisition.

Application of para. 1 of subs. (2) to sole practitioner

(3) Paragraph 1 of subsection (2) does not apply to a member who practises law without another member as a partner and without another member or person as an employee, if the member himself or herself enters into the electronic trust transfer system both the data describing the details of the transfer and the data authorizing the financial institution to carry out the transfer.

Same

(4) In exceptional circumstances, the data referred to in subsection (3) may be entered by a person other than the member, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

Additional requirements relating to confirmation

(5) Not later than the close of the banking day immediately after the day on which the confirmation required by paragraph 2 of subsection (2) is sent to a member, the member shall,

(a) produce a printed copy of the confirmation;

(b) compare the printed copy of the confirmation and the signed electronic trust transfer requisition relating to the transfer to verify whether the money was drawn from the trust account as specified in the signed requisition;

(c) indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and any file number in respect of which money was drawn from the trust account; and

(d) after complying with clauses (a) to (c), sign and date the printed copy of the confirmation.

Same

(6) In exceptional circumstances, the tasks required by subsection (5) may be performed by a person other than the member, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

Electronic trust transfer requisition

(7) The electronic trust transfer requisition required under paragraph 4 of subsection (2) shall be in Form 19A.

Definitions

7.1 (1) In this section,

"closing funds" means the money necessary to complete or close a transaction in real estate;

"transaction in real estate" means,

(a) a charge on land given for the purpose of securing the payment of a debt or the performance of an obligation, including a charge under the *Land Titles Act* and a mortgage, but excluding a rent charge, or

(b) a conveyance of freehold or leasehold land, including a deed and a transfer under the *Land Titles Act*, but excluding a lease.

Withdrawal by electronic transfer: closing funds

(2) Despite section 7, closing funds may be withdrawn from a trust account by electronic transfer in accordance with this section.

When closing funds may be withdrawn

(3) Closing funds shall not be withdrawn from a trust account by electronic transfer unless the following conditions are met:

1. The electronic transfer system used by the member must be one to which access is restricted by the use of at least one password or access code.

2. The electronic transfer system used by the member must be one that will produce immediately after the electronic transfer of funds a confirmation of the transfer.

3. The confirmation required by paragraph 2 must contain,

i. the name of the person or entity in whose name the account from which money is drawn is kept,

ii. the number of the trust account from which money is drawn,

iii. the name of the person or entity in whose name the account to which money is transferred is kept,

iv. the number of the account to which money is transferred, and

v. the date the transfer is carried out.

4. Before the electronic transfer system used by the member is accessed to carry out an electronic transfer of funds, an electronic trust transfer requisition must be signed by,

i. the member, or

ii. in exceptional circumstances, a person who is not the member if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

5. The data entered into the electronic transfer system describing the details of the electronic transfer of funds must be as specified in the electronic trust transfer requisition.

Additional requirements relating to confirmation

(4) Not later than 5 p.m. on the day immediately after the day on which the electronic transfer of funds is carried out, the member shall,

(a) produce a printed copy of the confirmation required by paragraph 2 of subsection (3);

(b) compare the printed copy of the confirmation and the signed electronic trust transfer requisition relating to the transfer to verify whether the money was drawn from the trust account as specified in the signed requisition;

(c) indicate on the printed copy of the confirmation the name of the client, the subject matter of the file and any file number in respect of which money was drawn from the trust account; and

(d) after complying with clauses (a) to (c), sign and date the printed copy of the confirmation.

Same

(5) In exceptional circumstances, the tasks required by subsection (4) may be performed by a person other than the member, if the person has signing authority on the trust account from which the money will be drawn and is bonded in an amount at least equal to the maximum balance on deposit during the immediately preceding fiscal year of the member in all trust accounts on which signing authority has been delegated to the person.

Electronic trust transfer requisition: closing funds

(6) The electronic trust transfer requisition required under paragraph 4 of subsection (3) shall be in Form 19C [Electronic Trust Transfer Requisition: Closing Funds].

Application of subss 8.1 (2) and (4) to (7)

(7) Subsections 8.1 (2), (4), (5), (6) and (7) apply, with necessary modifications, with respect to the doing of any act under this section.

Requirement to maintain sufficient balance in trust account

8. Despite any other provision in this By-Law, a member shall at all times maintain sufficient balances on deposit in his or her trust accounts to meet all his or her obligations with respect to money held in trust for clients.

AUTOMATIC WITHDRAWALS FROM TRUST ACCOUNTS

Interpretation: "Teranet"

8.1. (1) In sections 8.2 and 8.3, "Teranet" means Teranet Land Information Services, Inc., a corporation incorporated under the *Business Corporations Act*, acting as agent for the Ministry of Consumer and Commercial Relations.

Interpretation: time for doing an act expires on a holiday

(2) Except where a contrary intention appears, if the time for doing an act under sections 8.2 and 8.3 expires on a holiday, the act may be done on the next day that is not a holiday.

Interpretation: counting days

(3) In subsection 8.3 (4), holidays shall not be counted in determining if money has been kept in a trust account described in subsection 8.3 (1) for more than five days.

Interpretation: "holiday"

(4) In this section, "holiday" means,

(a) any Saturday or Sunday;

(b) New Year's Day;

(c) Good Friday;

(d) Easter Monday;

(e) Victoria Day;

(f) Canada Day;

(g) Civic Holiday;

(h) Labour Day;

(i) Thanksgiving Day;

(j) Remembrance Day;

(k) Christmas Day;

(l) Boxing Day; and

(m) any special holiday proclaimed by the Governor General or the Lieutenant Governor.

Same

(5) Where New Year' Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday.

Same

(6) Where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays.

Same

(7) Where Christmas Day falls on a Friday, the following Monday is a holiday.

Authorizing Teranet to withdraw money from trust account

8.2 (1) Subject to subsection (2), a member may authorize Teranet to withdraw from a trust account described in subsection 8.3 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction.

Conditions

(2) A member shall not authorize Teranet to withdraw from a trust account described in subsection 8.3 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction unless Teranet agrees to provide to the member in accordance with subsection (3) a confirmation of the withdrawal that contains the information mentioned in subsection (4).

Time of receipt of confirmation

(3) The confirmation required under subsection (2) must be received by the member not later than 5 p.m. on the day immediately after the day on which the withdrawal is authorized by the member.

Contents of confirmation

(4) The confirmation required under subsection (2) must contain,

(a) the amount of money withdrawn from the trust account;

(b) the time and date that the authorization to withdraw money is received by Teranet; and

(c) the time and date that the confirmation from Teranet is sent to the member.

Written record of authorization

(5) A member who authorizes Teranet to withdraw from a trust account described in subsection 8.3 (1) money required to pay the document registration fees and the land transfer tax, in any, related to a client's real estate transaction shall record the authorization in writing.

Same

(6) The written record of the authorization required under subsection (5) shall be in Form 19B and shall be completed by the member before he or she authorizes Teranet to withdraw from a trust account described in subsection 8.3 (1) money required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction.

Additional requirements relating to confirmation

(7) Not later than 5 p.m. on the day immediately after the day on which the confirmation required under subsection (2) is sent to a member, the member shall,

(a) produce a paper copy of the confirmation, if the confirmation is sent to the member by electronic means;

(b) compare the paper copy of the confirmation and the written record of the authorization relating to the withdrawal to verify whether money was withdrawn from the trust account by Teranet as authorized by the member;

(c) indicate on the paper copy of the confirmation the name of the client and any file number in respect of which money was withdrawn from the trust account, if the confirmation does not already contain such information; and

(d) after complying with clauses (a) to (c), sign and date the paper copy of the confirmation.

Special trust account

8.3 (1) The trust account from which Teranet may be authorized by a member to withdraw money shall be,

(a) an account at a chartered bank, provincial savings office, credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or a registered trust corporation kept in the name of the member or in the name of the firm of members of which the member is a partner or by which the member is employed, and designated as a trust account; and

(b) an account into which a member shall pay only,

(i) money received in trust for a client for the purposes of paying the document registration fees and the land transfer tax, if any, related to the client's real estate transaction; and

(ii) money properly withdrawn from another trust account for the purposes of paying the document registration fees and the land transfer tax, if any, related to the client's real estate transaction.

One or more special trust accounts

(2) A member may keep one or more trust accounts of the kind described in subsection (1).

Payment of money into special trust account

(3) A member shall not pay into a trust account described in subsection (1) more money than is required to pay the document registration fees and the land transfer tax, if any, related to a client's real estate transaction, and if more money is, through inadvertence, paid into the trust account, the member shall transfer from the trust account described in subsection (1) into another trust account that is not a trust account described in subsection (1) the excess money.

Time limit on holding money in special trust account

(4) A member who pays money into a trust account described in subsection (1) shall not keep the money in that account for more than five days, and if the money is not properly withdrawn from that account by Teranet within five days after the day on which it is paid into that account, the member shall transfer the money from that account into another trust account that is not a trust account described in subsection (1).

Application of ss. 4, 6, 7 and 8

8.4 Sections 4, 6, 7 and 8 apply, with necessary modifications, to a trust account described in subsection 8.3 (1).

Commencement

9. This By-Law comes into force on February 1, 1999.

BY-LAW 25

Made: April 30, 1999
Amended:
May 28, 1999
June 25, 1999
December 10, 1999
April 26, 2001
May 24, 2001

MULTI-DISCIPLINE PRACTICES

Interpretation: "Society official"

0.1 In this By-Law, a "Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this By-Law.

Interpretation: "member"

1. (1) In this By-Law, "member" includes a partnership of members.

Interpretation: practice of law

(2) For the purposes of this By-Law, the practice of law means the giving of any legal advice respecting the laws of Canada or of any province or territory of Canada or the provision of any legal services.

Application of certain sections

(3) Subsection 4 (2) and sections 5, 6, 14, 15, 18 and 19 do not apply in respect of a partnership or an association that is not a corporation entered into by a member with an individual who is authorized to practise law in any province or territory of Canada outside Ontario.

Prohibition against providing services of non-member

2. A member shall not, in connection with the member's practice of law, provide to a client the services of a person who is not a member except in accordance with this By-Law.

Permitted provision of services of non-member

3. A member may, in connection with the member's practice of law, provide to a client only the services of an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law.

Partnership, etc. with non-member

4. (1) Subject to subsection (2) and subsection 6 (1), a member may enter into a partnership or association that is not a corporation with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice law for the purpose of permitting the member to provide to clients the services of the individual.

Same

(2) A member shall not enter into a partnership or an association that is not a corporation with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law unless the following conditions are satisfied:

1. The individual is qualified to practise a profession, trade or occupation that supports or supplements the practice of law.

2. In the case of entering into a partnership with the individual, the individual is of good character.

3. The individual agrees with the member in writing that the member shall have effective control over the individual's practice of his or her profession, trade or occupation in so far as the individual practises the profession, trade or occupation to provide services to clients of the partnership or association.

4. The individual agrees with the member in writing that, in partnership or association with the member, the individual will not practise his or her profession, trade or occupation except to provide services to clients of the partnership or association.

5. The individual agrees with the member in writing that, outside of his or her partnership or association with the member, the individual will practise his or her profession, trade or occupation independently of the partnership or association and from premises that are not used by the partnership or association for its business purposes.

6. The individual agrees with the member in writing that, in respect of the practice of his or her profession, trade or occupation in partnership or association with the member, the individual will comply with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's Rules of Professional Conduct and the Society's policies and guidelines.

7. In the case of entering into a partnership with the individual, the individual agrees with the member in writing to comply with the Society's rules, policies and guidelines on conflicts of interest in relation to clients of the partnership who are also clients of the individual practising his or her profession, trade or occupation independently of the partnership.

Interpretation: "effective control"

(3) For the purposes of subsection (2), the member has "effective control" over the individual's practise of his or her profession, trade or occupation if the member may, without the agreement of the individual, take any action necessary to ensure that the member complies with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's Rules of Professional Conduct and the Society's policies and guidelines.

Interpretation: "good character"

(4) For the purposes of subsection (2), the individual is of "good character" if there is a reasonable expectation, based on the individual's record of integrity and professionalism in the practice of his or her profession, trade or occupation and on the individual's reputation in the community, that the individual will comply with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's Rules of Professional Conduct and the Society's policies and guidelines.

Responsibility for actions of non-member

5. Despite any agreement between a member and an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law, the member shall be responsible for ensuring that, in respect of the individual's practice of his or her profession, trade or occupation in partnership or association with the member,

(a) the individual practises his or her profession, trade or occupation with the appropriate level of skill, judgement and competence; and

(b) the individual complies with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's Rules of Professional Conduct and the Society's policies and guidelines.

Application by member forming partnership with non-member

6. (1) Before a member enters into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law, the member shall apply to the Society for approval to enter into the partnership.

Application fee

(2) An application under subsection (1) shall be in Form 25A and shall be accompanied by an application fee in an amount determined by Convocation from time to time.

Partnership agreement

7. At the time that a member makes an application under section 6, the member shall file with the Society a copy of so much of the agreement or agreements that will govern the member's partnership with the individual as may be required by the Society.

Consideration of application by Society official

8. (1) A Society official shall consider every application made under section 6, and the official shall approve the member's entering into a partnership with the individual if the official is satisfied that,

(a) the conditions set out in subsection 4 (2) have been satisfied; and

(b) the member has made arrangements that will enable the member to comply with sections 5, 14 , 15, 16 and 19.

Requirements not met

(2) If the Society official is not satisfied that a requirement set out in clause (1) (a) or (b) has been met, the official shall notify the member who may meet the requirement or appeal to the committee of benchers appointed under section 10 if the member believes that the requirement has been met.

Time for appeal

9. An appeal under subsection 8 (2) shall be commenced by the member notifying a Society official in writing of the appeal within thirty days after the day the official notifies the member that a requirement has not been met.

Committee of benchers

10. (1) Convocation shall appoint a committee of at least three benchers to consider appeals made under subsections 8 (2) and 17 (2).

Term of office

(2) A bencher appointed under subsection (1) shall hold office until his or her successor is appointed.

Consideration of appeal: quorum

11. Three benchers who are members of the committee appointed under section 10 constitute a quorum for the purposes of considering an appeal made under subsection 8 (2) or subsection 17 (2).

Procedure: application of rules of practice and procedure

12. (1) The rules of practice and procedure apply, with necessary modifications, to the consideration by the committee appointed under section 10 of an appeal made under subsection 8 (2) as if the consideration of the appeal were the hearing of an application under section 27 of the Act.

Procedure: *SPPA*

(2) 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 committee appointed under section 10 of an appeal made under subsection 8 (2).

Decision of committee of benchers

13. (1) After considering an appeal made under subsection 8 (2), the committee appointed under section 10 shall,

(a) if it determines that the requirement has been met, approve the member's entering into a partnership with the individual; or

(b) if it determines that the requirement has not been met, notify the member that the requirement has not been met and that the member may not enter into a partnership with the individual.

Decisions final

(2) The decision of the committee appointed under section 10 on an appeal made under subsection 8 (2) is final.

Filing requirements: partnerships

14. (1) A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law shall submit to the Society for every full or part year that the partnership continues a report in respect of the partnership.

Form 25B

(2) The report required under subsection (1) shall be in Form 25B.

Due dates

(3) The report required under subsection (1) shall be submitted to the Society by January 31 of the year immediately following the full or part year in respect of which the member is submitting a report.

Period of default

(4) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to complete or file the report required under subsection 14 (1) of this By-Law is 120 days after the day on which the report is required to be submitted.

Reinstatement of rights and privileges

(5) If a member's rights and privileges have been suspended under clause 47 (1) (a) of the Act for failure to complete or file the report required under subsection 14 (1) of this By-Law, for the purpose of subsection 47 (2) of the Act, the member shall complete and file the report in Form 25B in force at the time the member is filing the report.

Changes in partnership

15. (1) A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law shall immediately notify the Society when,

(a) the individual is expelled from the partnership;

(b) the individual ceases or for any reason is unable to practise his or her profession, trade or occupation;

(c) the term of the partnership has expired, if the partnership was entered into for a fixed term;

(d) the partnership is dissolved under the *Partnerships Act*; or

(e) any agreement that governs the partnership has been amended.

Dissolution of partnership

(2) If an event mentioned in clause (1) (b), (c) or (e) occurs, a Society official may require the member to dissolve the partnership.

Amendment of partnership agreement

(3) At the time that the member notifies the Society under subsection (1) that an agreement that governs the partnership has been amended, the member shall file with the Society a copy of the amended agreement.

Dissolution of partnership: breach of By-Law

16. If a member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law breaches section 5, section 14, subsection 15 (1), subsection 15 (3) or section 19, a Society official may require the member to dissolve the partnership.

Notice to member of requirement to dissolve partnership

17. (1) If a Society official requires a member to dissolve a partnership under subsection 15 (2) or section 16, the official shall so notify the member and, subject to subsection (2), the member shall dissolve the partnership.

Appeal

(2) If a Society official requires a member to dissolve a partnership under section 16, the member may appeal the requirement to dissolve the partnership to the committee of benchers appointed under section 10 if the member believes that there has been no breach of section 5, section 14, subsection 15 (1), subsection 15 (3) or section 19.

Time for appeal

(3) An appeal under subsection (2) shall be commenced by the member notifying a Society official in writing of the appeal within thirty days after the day the official notifies the member that the partnership is to be dissolved.

Procedure

(4) The rules of practice and procedure apply, with necessary modifications to the consideration by the committee appointed under section 10 of an appeal made under subsection (2) as if the consideration of the appeal were the hearing of an application under subsection 34 (1) of the Act.

Decision of committee of benchers

(5) After considering an appeal made under subsection (2), the committee appointed under section 10 shall,

(a) if it determines that there has been no breach of section 5, section 14, subsection 15 (1), subsection 15 (3) or section 19, cancel the requirement to dissolve the partnership; or

(b) if it determines that there has been a breach of section 5, section 14, subsection 15 (1), subsection 15 (3) or section 19, take any of the following actions:

(i) Confirm the requirement to dissolve the partnership.

(ii) Permit the partnership to continue, subject to such terms and conditions as the committee may impose.

(iii) Any other action that the committee considers appropriate.

Decisions final

(6) The decision of the committee appointed under section 10 on an appeal under made subsection (2) is final.

Stay

(7) The receipt by a Society official of the notice of appeal from the requirement to dissolve the partnership stays the requirement until the disposition of the appeal.

Association with non-member: multi-discipline practice.

18. (1) A member who, under subsection 4 (1), has entered into an association that is not a corporation with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law may refer to the association as a multi-discipline practice.

Partnership with non-member: multi-discipline practice or partnership

(2) A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law may refer to the partnership as a multi-discipline practice or multi-discipline partnership.

Insurance requirements: members

19. A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law shall maintain through the insurer of the Society's insurance plan professional liability insurance coverage for the individual in an amount determined by Convocation from time to time.

APPENDIX 5

ADVISORY SERVICES MEMORANDUM ON
JOINT RETAINERS FOR SPOUSAL/PARTNER WILLS

ADVISORY SERVICES

MEMORANDUM

TO: Professional Regulation Committee

FROM: Andrea Waltman, Advisory Counsel
Felecia Smith, Senior Counsel

DATE: September 6, 2001

SUBJECT: Joint Retainers

INTRODUCTION

Advisory Services receives many inquiries about joint retainers in the context of the preparation of spousal wills. There have long been divergent views about this within the estates bar. Recently the Society has received two formal requests for the interpretation of the new joint retainer rule, and its applicability in the spousal will context.

ISSUES

1) Does estate planning for spouses that culminates in the preparation of wills for each of them constitute "a matter or transaction" within the meaning of rule 2.04(6)?

2) If the answer to #1 is yes, would it be appropriate for the spouses to execute a waiver of the requirement to share information?

3) If the answer to #2 is no, what obligations does a member have with respect to advising one of the spouses that the other spouse has approached the member to change his or her will, either before or after its execution?

BACKGROUND

These matters have been at issue for many years and remain the subject of debate among estates practitioners. The debate was brought to the forefront as a result of an article prepared in July of 1992, by Rodney Hull, Q.C. for the Errors and Omissions Bulletin of the Law Society of Upper Canada ("the Society"). In his article, Mr. Hull takes the position that the preparation of spousal wills constitutes a joint retainer. Accordingly, Mr. Hull suggests that a member should not prepare any subsequent wills, nor codicils for either of the spouses without disclosure of this request to the other spouse. In order to avoid being placed in that situation, Mr. Hull suggests advising the clients at the outset that if one of them later chooses to change their will, and approaches the member to do so, he or she will be obliged to inform the other spouse of this intention. If the parties agree, then the member may act for both, and if the parties do not so agree, the member should consider declining to act for both[1].

In January of 1993, following Mr. Hull's article, correspondence was received by the Society from the then Executive of the Trusts and Estates section of the Canadian Bar Association -Ontario [now the OBA] ("the Executive"). The Executive indicated that some of the members of the section took issue with Mr. Hull's position, and inquired as to whether Mr. Hull represented the position of the Society on this matter. In response to this inquiry, it was decided that a policy should be established for dealing with this situation. Although the issue was subsequently raised for discussion at the Professional Conduct Committee, no formal decision was ever made, nor was any external policy ultimately formulated. An informal policy for dealing with inquiries to the Practice Advisory Service from members was adopted, to the effect that if at the outset of the retainer it was agreed that there could be no confidential information between the spouses, and this was acknowledged in writing by the spouses, then the spouse must be informed of any changes proposed by the other spouse. In the event that this has not been done, the member should simply refuse to draw the new will, but should *not* tell the other spouse. Stephen Traviss, then Senior Counsel, Professional Conduct revisited the issues in an October 27, 1994 paper for a continuing legal

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[1] Rodney Hull, Errors and Omissions Bulletin, Number 5, July 1992, Law Society of Upper Canada

education seminar. Once again, Mr. Traviss simply sets out the issues and reinforces the fact that "this is just one area where there is a lack of unanimity amongst estate lawyers", but does not come to a formal conclusion as to the position of the Society[2].

With the November 2000 amendments and change in format to the Rules, these issues have been resurrected. Mr. Donald Carr, Q.C. has written to the Society requesting a formal interpretation of the joint retainer rule and its applicability to the preparation of spousal wills. Mr. Glenn Davis, editor of *Deadbeat*, the newsletter for the Trusts and Estates section of the OBA has made a similar inquiry. Appended to this memo is correspondence from both Mr. Carr (Appendix "A") and Mr. Davis (Appendix "B").

RULES

Rule 2.04 (6) derives from paragraph 5 of the Commentary to former Rule 5, which provided, in part:

> Before the lawyer accepts employment for more than one client in *a matter or transaction* (emphasis added), the lawyer must advise the clients concerned that the lawyer has been asked to act for both or all of them, that no information received in connection with the matter can be treated as confidential so far as any of the others are concerned and that, if a conflict develops which cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely...If following such disclosure, all parties are content that the lawyer act, the latter should obtain their written consent, or record their consent in a separate letter to each....

Although the wording of rule 2.04(6) is quite similar, the above commentary has now become a rule. Rule 2.04(6) provides:

> Before a lawyer accepts employment from more than one client in *a matter or transaction* (emphasis added), the lawyer shall advise the clients that:
>
> (a) the lawyer has been asked to act for both or all of them,
> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

DISCUSSION

Issue #1 Does estate planning for spouses that culminates in the preparation of wills for each of t he spouses constitute "a matter or transaction" within the meaning of rule 2.04(6)?

In order to answer this question, it is essential to resolve the definition of "a matter or transaction", as these are not defined terms under the Rules. In his letter, Mr. Carr inquires whether the preparation of two separate wills for two separate clients, can be considered *a* [single] matter or transaction, since a technical reading of the Rule seems to connote the singular.

Definition

In its *Solicitor's Rules*, the Law Society of New South Wales has similar provisions dealing with joint retainers. Rule 9.2 provides in part that "a practitioner who intends to accept instructions from more than one party to *any proceedings or transaction* must be satisfied, before accepting a retainer to act, that each of the parties" is aware of certain facts. "For the purposes of [this rule], 'proceedings or transaction' mean any action or claim at law or in

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[2] Stephen Traviss, Law Society Rules of Professional Conduct: Avoiding the Pitfalls in an Estate Practice, October 27, 1994, p. 8-13

equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind"[3].

Accordingly, if this definition were to be applied to the Ontario rule, the change in beneficiary status of a client could be construed as something which would affect the legal or equitable rights of a party.

In American Bar Association Formal Opinion 342 (Nov.24, 1975), the word "matter" refers to "a discrete and isolatable transaction or set of transactions between identifiable parties".

Black's Law Dictionary (seventh edition) defines "matter" as "a subject under consideration", and "transaction" as: "1. The act or an instance of conducting business or other dealings. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons".

The *Concise Oxford Dictionary* (ninth edition) defines matter as "an affair or situation being considered", and transaction as "a piece of business done; a deal".

To further assist in defining the terms "matter or transaction", resort may be had to some of the indicia of a joint retainer:

1. the parties attend at the lawyer's office at the same time;
2. the parties meet with the lawyer together;
3. the parties appear to have a common goal, and instruct the lawyer together on achieving that goal;
4. the wills are executed together;
5. one account is rendered to both parties; and
6. one reporting letter is usually prepared for both parties.

Case law

The conclusion as to whether the retainer is a joint one must be viewed from the perspective of the clients. What are their expectations? The case law is scant, and the one reported case on point indicates that the above indicia may not be conclusive as to the existence of a joint retainer. In the English case of *Hall v. Meyrick*[4], a widow and her common law husband visited a lawyer with a view to preparing their wills. The lawyer carried out the clients' instructions, and prepared a will for each. However, neither at the time of preparation, nor at the time of the execution of the wills, did the lawyer discuss with the clients the effect of marriage on their wills. The clients subsequently married, which had the effect of revoking the wills, and the husband then died. The wife commenced an action against the lawyer for failure to properly advise the parties. In her statement of claim, the wife alleged the existence of a joint retainer. The trial judge determined that there was no joint retainer, but rather that there were separate retainers. He made the following comment:

> It is not disputed that as a result of the interview two wills were drafted by the defendant, one for Mr. Hall and one for the plaintiff. The result would appear to involve a finding that instructions to draft wills were given by Mr. Hall and the plaintiff, an it was not seriously suggested that only one of them gave instructions. The real problem is whether instructions were given to the defendant jointly or severally. While it is true that Mr. Hall and the plaintiff arrived at the defendant's office together, and were both in his room when the instructions were given, I am satisfied that the instructions were given severally. Each of them, Mr. Hall and the plaintiff, wished to make a will, an each wished to confer benefits on the other, but in my view these were separate wishes and involved separate instructions[5].

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[3] Solicitors= Rules, Law Society of New South Wales, Rules 9.1 and 9.2

[4] Hall v. Meyrick, [1957] 2 All E.R. 722 (C.A.)

[5] Ibid, p. 727

This decision was upheld on appeal. This case, however, must be read in light of the fact that at the time it was decided the only cause of action lay in contract (not yet in tort). Given the previous state of the law coupled with some odd procedural circumstances in that case, a finding of a joint retainer would have forced the court to confront some novel and difficult liability and damage issues. If decided today, the outcome may well have been different, both in England and in Canada.

Other Jurisdictions

In the *Restatement of the Law Governing Lawyers*, the Committee on Professional and Judicial Ethics of the New York Bar Association took the position that "clients of the same lawyer who share a common interest are necessarily co-clients. Whether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is determined by the understanding of the parties"[6].

The Law Society of Alberta would answer issue #1 in the affirmative, provided that the appropriate disclosure was made to the clients at the outset[7]. Similarly, the Law Society of British Columbia takes the same position[8]. The Law Society of Manitoba has recently grappled with this issue as well, and has also come to the conclusion that "...the lawyer who takes joint instructions from a couple for the preparation of their wills should be guided by the provisions ... of the Code of Professional Conduct as they pertain to joint retainers."[9] The Code defines a joint retainer as "one in which a lawyer is employed by more than one client in a matter or transaction"[10].

Conclusion

In applying the above definitions and cases to spousal estate planning and will preparation, a position could be taken that if the parties attend at the lawyer's office with common estate planning goals, which may necessitate the transfer of property between spouses, and /or into new entities, such as spousal or family trusts, the legal interests of the parties are being affected by the retainer. Accordingly the definition of matter or transaction must be construed broadly, to encompass the expectations of the clients that each of their rights are being protected. Further support for this position can be found in rule1.03(1)(f) which provides that ... "a lawyer should observe the rules in the spirit as well as the letter." Finally, rule1.03(2) provides that "words importing the singular number include more than one person, party , or thing of the same kind, and a word interpreted in the singular number has a corresponding meaning when used in the plural." Accordingly, estate planning for spouses, that culminates in the preparation of wills for each of the spouses constitutes "a matter or transaction".

Issue #2 If the answer to #1 is yes, would it be appropriate for the spouses to execute a waiver of the requirement to share information?

The Rules, as they are presently drafted, do not contemplate the ability to grant such a waiver. If the Committee wishes to consider including such a right, the Rules would require amendment.

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6 Restatement of the Law Governing Lawyers, 125 amt.c, Proposed Final Draft No. 1 (March 29, 1996), Committee of Professional and Judicial Ethics, New York Bar Association

7 Benchers Bulletin, Law Society of Alberta, 1995

8 AFrom the Ethics Committee@, Benchers Bulletin, Law Society of British Columbia

9 Draft Notice to the Profession, Law Society of Manitoba, 2001

10 Ibid

Other Jurisdictions

A review of the various provincial codes of professional conduct revealed that only the Alberta *Code of Professional Conduct* contains provisions permitting the representation of multiple parties without the sharing of information. Chapter 6, Rule 2, commentary 2.3 of the Alberta rules provides:

> In certain circumstances, knowledgeable clients in a conflict or potential conflict situation may desire representation by the same firm without the mutual sharing of material information referred to in Commentary 2.2. It may be acceptable for a firm to agree to act in such a situation provided that an effective screening device can be erected and the clients are fully apprised of, and understand, the risks associated with the arrangement. Such advice must be given by counsel that is independent of the firm involved.
>
> This kind of arrangement remains an exception to the general rule, however, and should be undertaken only when the justification is clear. In particular, multiple representation with or without sharing of information is unacceptable in a dispute or when the risk of divergence of interests is high. Responsibility remains with the lawyers to consider the factors outlined in Commentary 2.1 and to independently judge the advisability of the representation. Furthermore, the lawyers and clients involved must consider beforehand the risk that the screening device may be breached, intentionally, or otherwise, or that the lawyer acting for one of the clients will obtain information confidential to the other client through a legitimate outside source. In such a circumstance, it would be necessary for the firm to cease acting for all clients in the matter.

Even this fairly broad rule does not seem to contemplate one lawyer acting for multiple clients while maintaining their individual confidences, but contemplates different members of a firm acting in these circumstances. Accordingly, in the spousal wills situation, it does not appear as if one lawyer could act for both husband and wife, while keeping their individual confidences. However, another member of the firm could act for the other spouse in the preparation of his or her will. This may not, from a practical point of view, result in the best service to the clients. Oftentimes, to maximize a couple's estate planning, the sharing of information with respect to the spouses' respective assets may be required, or the transfer of property from one spouse to the other, or to another entity may be necessary. The above commentary also requires that before agreeing to such an arrangement, the parties should obtain independent legal advice on the retainer, a requirement which is expensive and time consuming. Therefore, it would be inappropriate to allow the spouses to waive the requirement to share information.

Issue #3 What obligations does the member have with respect to advising one of the spouses that the other spouse has approached the member to change his or her will?

When one spouse seeks to amend his or her instructions with respect to the preparation of his or her will, what are the lawyer's obligations? Can the lawyer act for the spouse seeking to make the change? Must the lawyer disclose the spouse's plan to change his or her will? Would the answers be different if the wills had not yet been executed? There appear to be two schools of thought on these issues. There are some members of the estates bar who take the position that despite the fact that the wills have been executed, the sharing of information in respect of that joint retainer continues, and accordingly, the lawyer may not act on the subsequent will, and further, has a fiduciary obligation to advise the other spouse of the change in circumstances(Position #1). Michael Silver, in his article *Solicitor's Conflict of Interest and Breach of Duty Acting for Spouses in the Preparation of a Will* states:

> As soon as the lawyer received instructions from the husband adverse to the wife, he should have disclosed to the wife that he was receiving such instructions, or encouraged her to retain her own counsel or at least to exert legitimate moral suasion on the husband. By failing to advise the wife of the new instructions, which instructions conflicted with the wife's expectations arising from the joint meeting, the lawyer deprived the wife of her opportunity to influence her husband legitimately with respect to his testamentary dispositions[11].

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[11] Michael Silver, ASolicitors Conflict of Interest and Breach of Duty Acting for Spouses in the Preparation of a Will@, (1994), 13 E.& T.J. 111 at p. 127

Failure to inform the other spouse deprives him or her of the ability to also change his or her will, which they may have done had they been privy to the intentions of the other spouse.

This seems to be an echo of the position taken by Mr. Hull in his earlier paper, and although his position seems to be coupled with the requirement that the clients be informed of the lawyer's obligation at the outset of the retainer. His position has been adopted by the Law Society of Alberta[12].

The other school of thought holds that once the wills have been executed, the retainer is at an end, and consequently, the exchange of information in respect of that retainer is also at an end. The consultation by one of the spouses to change his or her will should be viewed as a new and separate retainer, with its own duties with respect to confidentiality and disclosure (Position #2). Proponents of this position maintain that it is inappropriate for the lawyer to act in making the requested changes without the other spouse's consent, since this would breach the prohibition against acting against a former client in the same, or a related matter (rule 2.04(4)). Under this analysis, however, disclosure would be inappropriate, as it would breach the duty of confidentiality owed to the spouse in the new retainer.

Other Jurisdictions

The Law Society of Alberta has adopted this position in situations where the clients have not been informed of the ongoing obligation to share information relevant to the joint retainer even after it arguably has ended[13]. This situation may not bar the drafting lawyer's partner or associate from acting in this regard, even without the consent of the other spouse if the

> "law firm establishes that it is in the interest of justice that it act in the new matter, having regard to all relevant circumstances, including
> (i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,
> (ii) the extent of prejudice to any party,
> (iii) the good faith of the parties,
> (iv) the availability of suitable alternative counsel, and
> (v) issues affecting the public interest.

The Law Society of Manitoba has adopted position #2[14], although its *Code of Professional Conduct* does not include a provision similar to Ontario's Rule 2.04(5), that permits representation of the other spouse by another member of the firm in certain circumstances.

Hypothetical Situation

> A member in a small town is approached by husband and wife for the purpose of preparing their mirror wills. The member takes instructions from both and prepares and sees to the execution of their wills accordingly. Several weeks later the wife returns to the member's office and advises that she has been battered by her husband, and has left with her children, and is presently living in a shelter. She further advises the member that she wishes to change her will to leave everything in trust for her children, and delete her estranged husband as executor and beneficiary. She requests that her intentions not be communicated to her estranged husband. She has had a long- standing relationship with this member, feels comfortable dealing with the member, and doesn't know any other estates lawyers. Can the member act? Can her associate or partner act? Is the consent of the husband required?

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12 Supra note 9

13 Supra note 9

14 Supra. note 11

If one adopts the approach taken by the Manitoba Law Society given the existence of our Rule 2.04(5), it appears that while the member could not act, his or her partner or associate could carry out the wife's instructions, without the consent of the husband, on the basis that to do so would be in the interests of justice having regard to the factors enumerated in the above-noted rule.

To summarize, there are two differing opinions with respect to the answer to issue #3. The committee is requested to consider these divergent opinions, one requiring the ongoing sharing of information between the spouses, and the other treating this obligation as at an end, once the wills have been executed.

Options

Two options emerge:

A. Adopt a position similar to the one suggested by the Law Society of Manitoba in its draft Notice to the Profession (attached as Appendix "C") which views the preparation of spousal wills as a joint retainer, but which views proposed changes to either of the spouse's wills as a new and separate retainer requiring no disclosure to the other spouse, but creating a conflict of interest with respect to the other spouse (who would be considered a former client) which would bar the member from acting.

B. Adopt the position advanced by Mr. Hull, making it an additional requirement in the context of the preparation of spousal wills, that the member advise the clients at the outset that the sharing of information survives the execution of the wills, and that the member will be required to advise the other spouse in the event he or she is approached to make changes to the wills arising out of the initial joint retainer.

CONCLUSION

Advisory Services concludes as follows:

1) Spousal estate planning, which culminates in the preparation of will for each of the spouses, falls within the meaning of joint retainer in rule 2.04(6) and constitutes "a matter or transaction" within that rule; and

2) Spouses not be allowed to waive the requirement that all information may be shared in a joint retainer situation - therefore, no amendment to the rule is necessary; and

3) A member shall be required to advise the other spouse if he or she is approached to make changes to the wills which arise out of the initial joint retainer, irrespective of whether the wills have been executed.

APPENDIX

A Letter to Law Society of Upper Canada from Donald Carr, Goodman and Carr, dated April 12, 2001

B Letter to Law Society of Upper Canada from Glenn Davis, Sun Life Financial, dated May 3, 2001

C Draft Notice to Profession, Law Society of Manitoba

APPENDIX 6

SUMMARY OF RESPONSES TO CALL FOR INPUT ON THE ISSUE OF
JOINT RETAINERS FOR SPOUSAL/PARTNER WILLS

SUMMARY OF RESPONSES

Rule 2.04(6), Joint Retainers and Wills for Spouses/Partners

1. The duty to contact a spouse if the other spouse comes to the lawyer with different instructions should only exist during the period anticipated in the rule and commentary, that is, "throughout the joint retainer" (e.g. after taking instructions and before execution of the wills, where one party asks for a change that is adverse to the interest of and unknown to the other party). If a client returns anytime (2, or 20 years) after execution of the wills with new instructions, it is dangerous to imply that a retainer in the original form continues and that the lawyer's duty to a former client remains intact. The obligation to the public is to keep will preparation simple and inexpensive, and clients neither need nor expect it to be tortured with formal consents, ILA recommendations and perpetual obligations by the lawyer.

2. The bureaucratic framework proposed would be disconcerting to both clients and lawyers. Preparation of conflict letters and consents may make spouses or partners suspicious of one another and uncomfortable with the lawyer. It may also prevent spouses and partners from preparing or amending their wills with the help of a solicitor. The cost will increase, damaging the profession which must now compete with will kits, advertised as an inexpensive alternative to using a lawyer. The requirement to advise the other party is not necessary as any reputable lawyer simply would not prepare the new will. Advising the other party is a breach of confidentiality and puts the lawyer in a position of taking a moralistic and pious position of unilaterally interfering between spouses.

3. I fully endorse this initiative. The informal practice (reference is to the 1993 Advisory Services practice[1]) does not provide adequate protection to the spouse or partner relying on what is to appear in a will. In addition, the rules should set out procedures governing situations where one spouse pays for both his or her will and that of the other spouse. In one example, newlyweds asked a lawyer to prepare their wills, where the husband paid for both. No acknowledgements of a joint retainer, etc. were prepared. The wife's will was prepared (all to the husband) and executed. By the husband's will, he was to leave his interest in a house he owned with another party, pending change of ownership to the husband and wife. The wife paid for extensive renovations to that house. Immediately after the meeting with both, the lawyer, unknown to the wife, received instructions from the husband not to prepare his will. The parties eventually divorced. The title to the home was never changed.

4. The proposal could cause difficulty for clients. Example 1: one of the parties becomes incapacitated and the other wishes to make changes to the will to reflect the circumstances (set up a trust); the incapacitated spouse would not likely be able to consent unless the holder of a continuing power of attorney for the property, who may be the other spouse, can consent. Example 2: spouses separate or divorce and one wishes to make a new will; consent from the other spouse in the joint retainer to the lawyer acting is not likely to be obtained.

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[1] ... "if at the outset of the retainer it was agreed that there could be no confidential information between the spouses, and this was acknowledged in writing by the spouses, then the spouse must be informed of any changes proposed by the other spouse. In the event that this has not been done, the member should simply refuse to draw the new will, but should *not* tell the other spouse." (Memorandum by Felecia Smith and Andrea Waltman, Re: Joint Retainers and Spousal Wills dated Sept. 6, 2001, at p. 16)

5. The proposed rule may provide less protection than is thought - when one partner wants to change a will without the other knowing, he or she will simply go to another lawyer.

6. The proposal would extend the lawyer's conflict position under the joint retainer *ad infinitum.* If one of the clients dies, what would the lawyer's position be?

7. The commentary should be revised to indicate that a lawyer has a duty to inform forthwith the other spouse or partner only in the event that the lawyer intends to act for the party who initiated the contact.

8. The commentary is fine up to the last three lines ("the lawyer has a duty to inform forthwith the other spouse or partner of the contact and to decline to act unless both spouses or partners agree"). This should be clarified to provide that after contact, the lawyer should inform the contacting spouse that if he or she chooses to proceed, the lawyer will be obliged to contact the other spouse and that the lawyer will decline to act unless both spouses or partners agree. So that if the contacting spouse decides not to proceed, the lawyer has no duty to inform the other spouse. This course of action should be disclosed to the spouses at the outset of the retainer. Informing the other spouse of simple contact is unnecessarily complex and divisive.

9. A lawyer should have the option to make a decision not to inform a spouse of a subsequent request for change in the will of the other spouse in the event that the life/physical well-being of the other spouse would be endangered by such contact with the spouse (e.g. where the other spouse is being abused by the spouse and the other spouse wants to change his/her will in favour of the children).

10. If the lawyer who prepared the will acts for one spouse in a marriage breakdown, the lawyer will be placed in the untenable position of having to advise the other spouse that the spouse has changed her will (a reasonable precaution in marriage breakdown situations), where normally the lawyer could not disclose this without the spouse's consent. Effectively, the lawyer preparing the wills could not act in the family law matter, or would have to tell the other spouse that the spouse has sought the lawyer's advice because of the marriage breakdown. This runs counter to our practice. When spouses come to us when they decide to separate, the advice is that the firm can act for one but not the other and recommendations are made for another solicitor. If either objected, both would receive recommendations for other lawyers, but this has yet to happen in the firm. The commentary will mean that in small centres, access to legal services will become more difficult and more expensive, and there will be a further centralization of legal services in larger firms in larger communities.

11. The problem with getting clients to sign a consent is that clients will think we are crazy and will be fed up with the protective theme of the exercise. If we go to that point, why wouldn't the lawyer ask one or both of them to get independent legal advice? We should inform our clients as the commentary says, but choose whether to obtain the consent in writing.

12. The lawyer should refuse to accept the retainer from the party wishing to change a will when the other party has not been advised of the changes. It may be acceptable to accept the retainer if the parties have subsequently divorced or where it could not be reasonably intended that the other party expects the will to remain unchanged. Where the lawyer decides not to accept the retainer, it is unreasonable to expect the lawyer to advise the other party, as it would cause more problems for the parties and imposes an unreasonable burden on the lawyer.

13. If one of the parties comes to change a will, it may be appropriate to advise that client that the other party is still considered to be a client and the lawyer can do nothing that adversely affects that other client without disclosure. The message is that we do not or cannot be involved in any future problems between that parties.

14. It is erroneous to consider wills prepared together a joint retainer. Each spouse retains the lawyer to do the individual will. If the spouses came into the office at different times, presumably there would be no argument of joint retainer. Provided the lawyer explains to clients that wills can be revoked at any time by the party making them, there can surely be no possibility of anyone being misled.

15. The following would fall afoul of the proposed commentary:
    - $ preparing a new will where one spouse has died, without requiring a death certificate
    - $ preparing a new will for a spouse who has divorced his/her spouse (with personal knowledge of the divorce)
    - $ preparing a new will for a spouse who spouse has become mentally incapacitated

    The public should have the right to specify the level of legal services required from the lawyer. This includes the direction to the lawyer that the relationship is a one-time thing and releasing the lawyer from any future obligation. Lawyers will have to turn down clients or do less acceptable work for less money and be sued for any problems. You need only refuse to act for a client because you perceive that doing so would be against the interests of another client, but if you inform the other client, you have breached your obligations to the first client.

16. Raising the issue with both clients about one client making a subsequent will change would unduly upset the clients and possibly set into motion the seeds of distrust not only between the clients but between them and the lawyers. The written acknowledgement proposed is problematic - clients may see it associated with some situation where the lawyer wants to be exonerated or where the lawyer is receiving a perpetual release of a financial obligation to the client. The issue that the commentary responds to is more imaginary than real. The joint retainer rule wasn't intended to apply to marriage spouses who are really a single client.

17. The issue of undue influence is of concern. Sharing information of a will change with the other spouse is unfair to women who are in traditional marriages or who are restrained culturally, and who will sign what their husbands tell them to and thus are restrained in expressing their testamentary wishes. They cannot risk proposing a change that would immediately be conveyed to their husbands. Their husbands, and even the lawyers who follow this type of procedure, can be perceived as exerting undue influence on them.

18. Rule 2.04(6) should not apply to the preparation of wills for spouses. Routinely, spouses are told that they can change their wills without advising the other spouse. There is no obligation in these circumstances to tell the other spouse if one spouse attends to change their will. One would wonder why the Society is intent on making it more difficult to practice law.

19. The circumstances where two spouses make wills together imply an expectation that the wills will not be changed without the knowledge of the other, but this is between the testators and not a compact made with the lawyer. In marriage breakdown situations, a new will would not be unexpected by either spouse and preparing a new will for one but not the other is not a conflict and does not necessitate informing the other. Each spouse would have independent legal representation, with an obligation to exchange full financial information. In other situations, it seems sufficient to refuse to act on the request but it is not incumbent on the lawyer to inform the other spouse of the denied request. Would this not unnecessarily widen the duty of care and lay the foundation for further judicial restrictions on the freedom of a person to make a will, and raise the complexity, expense and anxiety surrounding the making of a will?

20. If one party comes back to change the will, the lawyer should refuse to act. A mandatory obligation to inform could cause the lawyer to be embroiled in issues between the parties which would be completely unnecessary. The lawyer would have to point out when receiving instructions for the wills retainer the fact that he or she would have to inform, and suggest that on party seek a separate lawyer to make the change. This would increase cost, cause frustration, delay and confuse clients.

21. The "big brother is watching you" aspect is being extended unnecessarily, placing additional hazards in the face of the solicitor. The spouses have the protection of the *Family Law Act* and the Dependent's Relief sections of the *Succession Law Reform Act*. Consider the lawyer's position where:
    - $ one party is considering separation and wants to know legal rights and liabilities
    - $ the parties have separated and see other lawyers for the matrimonial issues
    - $ one party mails a request for a change to the will in the form of a holograph will or a codicil
    - $ one spouse cannot be located
    - $ one spouse is incompetent, necessitating a prudent change in the will to perhaps set up a life interest
    - $ physical abuse it threatened

$ one will is revoked by destruction
$ one client wishes to sever a joint tenancy

It would be better to handle the matter on a conflict basis, if one exists, and where there is a conflict, the lawyer should decline to act but would not necessarily be under an obligation to advise the other spouse of the contact.

22. Where wills are prepared jointly for spouses as a small part of the work the lawyer does for one spouse who has an ongoing relationship with the lawyer, or is personal friend or relative of one spouse, it would be reasonable for that spouse to deal with the lawyer even after a marriage breakdown or where the interests of the spouses diverge. Otherwise, going to another lawyer places an unnecessary financial burden on the clients. The lawyer should carefully advise the clients about conflicts and obtain their informed consent to acting, and should contact the other spouse if one spouse requests changes to a will which the lawyer considers prejudicial to the other spouse. But the other spouse should consent in writing to the lawyer continuing to act for the one spouse if a conflict arises.

23. A distinction should be drawn when parties have entered into a separation agreement, most of which deal with financial issues between the parties and often provide releases to each other's estate and provide the freedom for each party to make a new will. In these circumstances, it shouldn't be necessary for the lawyer to inform and seek consent from the other party.

24. The commentary is inappropriate, fails to appropriately address the issues involved, and is like to put clients to unnecessary expense without corresponding benefit. The fact that people present may be spouses preparing reciprocal wills does not convert what are, in essence, two separate retainers into a joint retainer. The lawyer should decline to act where the spouses are still in a conjugal relationship and suggest that the party seek other counsel, but the fact of the contact should not be disclosed to the other or ongoing client. Where the parties are separated, it would be reasonable for the lawyer to act on behalf of a continuing client, with the issue of whether notice must be given to be resolved based on the particular circumstance.

25. The retainer should end when the wills are prepared and executed. If shortly thereafter, one party intimated some intention to mislead the other and change his or her will, there would be a duty on the lawyer to bring this to the attention of both spouses, or withdraw from the retainer. The proposal seems to extend the retainer to infinity. If people want to change their minds and be sneaky, lawyers can advise against it, but we should not have overlapping duties, in particular, the duty to squeal on them.

26. As the proposed commentary is too strict, two changes are suggested:

i. if a client approaches a lawyer to change a will, the lawyer must give the client a choice to continue with the lawyer, and the lawyer will inform the other client, or go elsewhere, in which case the lawyer is not obliged to inform the other client
ii. If the client agrees to notification, the other client's consent should not be necessary, and the notification should not occur until after the will is changed (the first client may have a change of heart)

The client is not prejudiced by ii., as any information that the client related to the lawyer is known by the client and can readily be given by that client to another lawyer

27. The commentary appears to be reasonable.

28. If parties are separated following execution of the wills, and one returns to the lawyer to change a will, contacting the other spouse does not seem appropriate. The other spouse may not agree to the representation for reasons that are totally without merit.

29. Support the amendment. It would force all lawyers to address conflict issues on will files. It will not add substantially to time or costs except in rare circumstances where clients want to get into a philosophical debate over it.

30. In the cases that cry out for relief, the proposal will result in the deceiving party going to another lawyer or another source to carry out the deception. The commentary is too broad and is likely to thwart instances where will revisions ought to be undertaken (for example, incapacitated spouses, deserted partners/spouses, separated spouses/partners). The effect should not be to bar a client from using the lawyer of their choice. This will undermine solicitor and client privilege, and will open up other areas where privilege should be abandoned. Denying the lawyer the ability to act further should be the extent of any limitation.

If the mischief the commentary addresses is truly prevalent, encourage an amendment to the *Succession Law Reform Act* making a new will made in such circumstances voidable at the instance of the wronged party on establishing that the rights of that party had been infringed.

Or existing trust law or contractual rights can offer redress. If implemented, the commentary should be narrowly applied to defined abusive situations.

31. Although in general agreement with the commentary, the following are suggested amendments. When the marriage bond has been broken or betrayed, the joint retainer has come to an end and the lawyer is free to draw a second will contradicting the mutual wills without disclosing the fact to the other spouse. (These events include death, divorce, separation, abuse, incompetence)

32. While in agreement that the preparation of spousal wills constituted a joint retainer, lawyers should not have to "rat" on their clients if they came back and wish to change their will. The obligation for sharing information ends once the wills have been executed, but it would be inappropriate to act for the returning spouse in making the proposed changes, as to do so places the lawyer in conflict with the former client. It would be distasteful to have to discuss with their happily married, or attached clients on what their continuing obligations would be if things turned bad and one of the clients wanted to cut the other one out, for example.

Another issue relates to the applicability of this continuing obligation to other areas of law, for example real estate. If acting for husband and wife on the purchase of a property, title to which was taken jointly, then in the event one of the spouses subsequently wanted to sever the joint tenancy, would the lawyer be required to contact the other spouse and advise?

The commentary seems to be geared to more complex estate planning, where property is actually being transferred either between the parties, or into other trust vehicles, and not to the simple mirror wills situation. In these situations it "might" be appropriate to have the continuing obligations to the clients, but what would be preferable, would be to treat the planning as a separate retainer from the actual will drafting.

33. As preparation of estate planning documents is extremely fee-sensitive, rule 2.04(6) should not apply in the usual case in such retainers, as its application will add to the time required in preparing the plan. However, there may be special circumstances that require the rule's application. As such the following revisions to the draft commentary are suggested:

- $ treat spouses or partners defined in the *Substitute Decisions Act* who prepare mutually agreeable estate plans as within a single retainer, to which the rule and commentary apply, where the lawyer must advise the spouses that until the retainer is completed not information provided to the lawyer can be kept confidential. Distinguish between mutually agreeable estate plans and joint or mutual wills in which one party is bound not to change his or her will without the other's consent.
- $ once the estate documents are executed, the lawyer's retainer is at an end
- $ contact by one party with the lawyer thereafter should be considered a new matter, and rule 2.04(4) applies; that is, if a conflict exists, and the other party does not consent (the only disclosure would be that contact has been made), the lawyer cannot act; if the lawyer refuses the retainer, the lawyer is not required to advise the other party
- $ the rule may apply in special circumstances, e.g. where one spouse has been a long standing client; in this case, the lawyer may wish to obtain the consent of the other spouse that if the current client contacts the lawyer respecting the wills the lawyer may accept the retainer and not advise the other spouse

34. Spouses retainer a firm to prepare wills or estate planning documents should not be considered a joint retainer simply because they give instructions at the same time for efficiency. Further, estate planning documents are not effective until death or incapacity, meaning that spouses must be allowed to make changes without the knowledge or consent of the other spouse. Otherwise,

- $ new counsel must be consulted, undermining the original solicitor/client relationship and affecting choice of counsel
- $ it gives the retainer an unending life
- $ one spouse will be committed to the contents of the documents unless the other spouse consents

Each spouse should be considered a separate retainer, and if contentious issues arise, and the issue of consent then arises, it should be not on the basis that the retainer was joint, but because both are clients of the firm, in which case rule 2.02(4) applies. If the Committee considers the retainer as joint,

- $ the commentary should make it clear that the retainer is at an end when the documents are completed, and any further contact thereafter is a new matter, and
- $ the spouses should be able to consent at the outset of the retainer under rule 2.04(10) that the lawyer will not be precluded from acting for one or the other spouse, and the lawyer need not advise the other spouse of future contact by the spouse.

APPENDIX 7

FILE AND CASELOAD MANAGEMENT AND STAFFING INFORMATION IN THE COMPLAINTS RESOLUTION, INVESTIGATIONS AND DISCIPLINE DEPARTMENTS

THE LAW SOCIETY OF UPPER CANADA
COMPLAINTS RESOLUTION, COMPLAINTS REVIEW AND TRUSTEE SERVICES

MEMORANDUM

TO: Professional Regulation Committee

COPY TO: Zeynep Onen, Director, Professional Regulation/Secretary

FROM: David McKillop
Manager, Compensation Fund, Resolution and Trustee Services

DATE: 26 August 2002

RE: Management Report - Complaints Resolution, Complaints Review and Trustee Services

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The purpose of this memorandum is to provide information about matters in the Complaints Resolution, Complaints Review and Trustee Services (including the Unclaimed Trust Fund) departments as at 26 August 2002.

COMPLAINTS RESOLUTION

Summary of Results for Complaint Files for Three Months Ending 26 August 2002

Complaints in Unit as at 31 May 2002	1,279
Complaints Reopened During Period	84
Complaints Resolved/Closed During Period	653
Complaints Transferred to Other Departments During Period	196
New Complaints Received During Period	852
Complaints in Unit as at 26 August 2002	1,366
Average Age of Active Complaints June/July/August (in days)	250/236/230

Comparative Results

The following graphs reveal comparative results for a) Complaints Opened and Closed in Period, and b) Number of Open Files in Unit; for the months January 2002 to August 2002 inclusive.

Complaints Resolution – Complaints Opened & Closed in Period

(see graph in Professional Regulation Committee Report)

Number of Active Files in the Complaints Resolution Department as at 26 August 2002 by File Type

Type of File	Number of Active Files
Complaint	1,229
Bankruptcy	78
Discipline Costs, Panel Orders & Undertakings	57
Practice Windup	2
TOTAL ACTIVE IN COMPLAINTS RESOLUTION	1,366

Number of Open Complaint Files

(see graph in Professional Regulation Committee Report)

Discipline Costs

As at 26 August 2002 outstanding costs awarded totalled $147,128.41. Of that amount, payment of $100,441.74 is being actively pursued. The remainder of $46,686.67 is not currently being pursued as the Members concerned are under suspension. Suspended Members are monitored bi-annually to determine whether there has been a change in their status to that of practising Member and, if so, the cost award is pursued.

The total amount received in June, July and August 2002 was $7,600.00. Year to date $30,000.00.

COMPLAINTS REVIEW

As at 26 August 2002, there were 50 files in the Complaints Review process. Further information on these 50 files is found in the following chart.

Request for Hearing Received	6
Hearings Pending	15
Hearing Held, Further Investigation Ordered	13
Hearing Held, Awaiting Decision	14
Files To Be Closed	2
TOTAL	50

The 50 files relate to complaints originally received by the Law Society in the following years:

1996	1
1997	1
1998	4
1999	7
2000	4
2001	27
2002	6
TOTAL	50

TRUSTEE SERVICES (INCLUDING THE UNCLAIMED TRUST FUND)

Summary of Results for Complaint Files Referred to Trustee Services for Resolution as at 26 August 2002

Complaints in Unit as at 31 July 2002	118
Complaints Reopened During Period	1
Complaints Resolved/Closed During Period	6
Complaints Transferred to Other Departments During Period	1
New Complaints Received During Period	1
Complaints in Unit as at 26 August 2002	113
Average Age of Active Complaints (in days)	425

Formal Trusteeships/Freeze Orders

Pursuant to Judgments made in the Superior Court of Justice, Trustee Services has been granted trusteeship over the practices, or freeze orders over the trust accounts, of 15 members which remain in effect. One trusteeship order was obtained during June, July and August 2002.

Member Files (including formal trusteeships)

One of the primary functions of Trustee Services is to provide support and assistance in relation to, and ensuring that proper provisions are made for the protection of clients' interests in circumstances where a Member is no longer able to practice through death, illness, disbarment, suspension, etc. While in some cases it is necessary to seek a formal trusteeship order, in the majority of cases the protection of client interests may be achieved through the cooperation of the Member or other parties.

Trustee Services Member Files as at 31 July 2002	192
Files Opened During Month	10
Files Closed During Month	15
Trustee Services Member Files as at 26 August 2002	187

Search Warrants

Trustee Services staff attend on the execution of search warrants by police or other government agencies in order to ensure client confidentiality and solicitor/client privilege are maintained. Staff attended on the execution of one warrant in August 2002 and have attended on three in total this year.

Trust monies

As a result of formal trusteeships or informal wind-ups, Trustee Services takes possession of client trust funds and attempts to return those funds to the proper beneficiaries. In August 2002 Trustee Services took possession of $21,213.89 and disbursed $8,304.43 in client trust funds.

Unclaimed Trust Fund

The Trustee Services department is also responsible for the administration of the Unclaimed Trust Fund. The following details the operation of the program since inception.

Applications For Payment Of Unclaimed Trust Funds To Law Society Received From Members

June/July/August 2002	Cumulative
115	424

Applications From Members Pending Determination (additional information required)

August 2002	Cumulative
74	103

Applications From Members To Transfer Trust Funds To The Law Society Approved

June/July/August 2002	Cumulative
51	292

Applications From Members Rejected

June/July/August 2002	Cumulative
5	29

Amount of funds received:

June/July/August 2002	Cumulative Amount
$80,591.45	$387,278.66

Investigations Department Report

TO: Chair, Professional Regulation Committee

Copy: Zeynep Onen, Director Professional Regulation/Secretary

FROM: J.N. Yakimovich, Manager, Investigations

DATE: August 29, 2002

RE: Report – June & July 2002 .

The following information pertains member under investigations in the Investigations Department.

A) Members Under Investigation at Month End

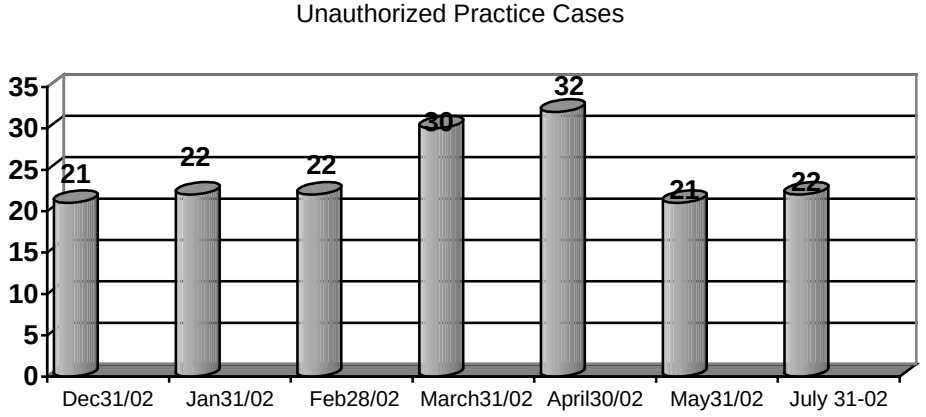
	Number of Members Under Investigation	Number of Complaints Open	Average Age of Complaints Files
April 2002	198	542	311
May 2002	209	548	313
June 2002	200	557	307
July 2002	200	598	323

B) Tracking the Complaints in the Investigation Process - The graph shows the stage of complaints in the investigation process at the end of July 2002.

(see graph in Professional Regulation Committee Report)

Unauthorized Practice Investigations

The non-member case investigations for unauthorized practice are in addition to the member investigations reported above. The chart that follows depicts the number of cases open.



Proceedings Authorization Committee – June & July Meeting Results

At the June and August 2002 meeting of the Proceedings Authorization Committee, it considered the matters brought before it and arrived at decisions as summarized below.

DECISION	NUMBER OF MATTERS – JUNE 28TH MEETING	NUMBER OF MATTERS – AUGUST 4TH MEETING
Invitation to Attend	7	2
Letter of Advice	0	1
Conduct Application	9	3
Conduct Application Withdrawn	0	2
Close File	3	2
Defer the Investigation	3	1
Defer to Future Meeting	3	1
Directions Provided	2	1
Unauthorized Practice Prosecution Authorized	1	0
Report to LPIC	5	10

DISCIPLINE DEPARTMENT
MEMORANDUM

TO: Professional Regulation Committee

FROM: Lesley Cameron
Senior Counsel - Discipline

DATE: August 28, 2002

RE: *Discipline Department Information*

The purpose of this memorandum is to provide information about matters in the discipline process for the months of June and July, 2002.

Total Matters in Discipline Process

Attached as Chart 1 is a list of the number of each type of file carried by the discipline department at month end in June and July, 2002. As can be seen from Chart 1, as of the end of July:

1. 130 matters are pending hearing or appeal;

2. 18 conduct applications have been authorised for prosecution by the Proceedings Authorisation Committee, but have not yet been issued;

3. 91 conduct applications have been issued and are in the discipline process: 35 are before the Hearings Management Tribunal with no hearing date set; 56 have hearing dates set or the hearing is underway;

4. 7 appeals are pending before the Law Society Appeal Panel;

5. 2 judicial reviews are pending before the Divisional Court; and

6. 41investigations files on which discipline counsel are providing assistance.

Aging of Matters Authorised but not Issued

Of the 18 files authorised for prosecution but in which the conduct application had not yet been issued as of July 31, 2002, 6 were authorised more than 3 months ago. Of these 6 files:

i) 3 are between 3 and 6 months old, meaning that between 3 and 6 months has elapsed since authorisation;

ii) 2 are between 6 and 12 months old; and

iii) 1 is over 1 year old.

The file which is over 1 year old required the Law Society to bring an application for search and seizure under section 49.10 and the Law Society is still waiting for third parties (two banks) to produce records. Records have been produced and have led to further requests for production, which is not yet complete.

The Chair of the Professional Regulation Committee and the Director of Professional Regulation have been provided with the names of the files, a description of the nature of the allegations in each file and a brief status report on each file in this category.

Historical Comparison

Attached as Chart 2 is a summary of the age and carriage of matters which were authorised for prosecution by the Proceedings Authorisation Committee, but in which the conduct application had not yet been issued as of the end of various months beginning in August of 2000 and ending in July of 2002.

Chart 1 - Matters in Discipline Process		
Type of File	June 30, 2002	July 31, 2002
Discipline Providing Assistance to Investigations	40	41
Conduct Applications Authorized But Not Issued	22	18
Conduct Applications Issued Hearing Date Not Set	37	35
Conduct Applications Issued Hearing Date Set or Hearing Started	56	56
Non-Compliance Applications Issued Hearing Date Not Set	0	0
Non-Compliance Applications Issued Hearing Date Set or Hearing Started	0	0
Capacity Applications Authorized But Not Issued	0	0
Capacity Applications Issued Hearing Date Not Set	1	1
Admission Hearings	8	8
Readmission Hearings	1	1
Reinstatement Hearings	2	2
Appeals to Law Society Appeal Panel	6	7
Appeals/Judicial Reviews Divisional Court	2	2
Total Matters	175	171

CHART 2 - HISTORICAL COMPARISON OF CONDUCT APPLICATIONS AUTHORISED FOR PROSECUTION BUT NOT ISSUED AS CONDUCT APPLICATIONS				
Month	Carriage	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
August 31, 2000	Law Society Counsel	14	5	15
	Outside Counsel	0	0	1
	Total	14	5	16
October 31, 2000	Law Society Counsel	14	3	5

CHART 2 - HISTORICAL COMPARISON OF CONDUCT APPLICATIONS AUTHORISED FOR PROSECUTION BUT NOT ISSUED AS CONDUCT APPLICATIONS				
Month	Carriage	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
	Outside Counsel	9	1	5
	Total	23	4	10
November 30, 2000	Law Society Counsel	12	2	2
	Outside Counsel	9	1	5
	Total	21	3	7
December 15, 2000	Law Society Counsel	9	2	2
	Outside Counsel	4	3	4
	Total	13	5	6
January 31, 2001	Law Society Counsel	11	4	1
	Outside Counsel	2	6	4
	Total	13	10	5
February 28, 2001	Law Society Counsel	7	2	1
	Outside Counsel	0	5	4
	Total	7	7	5
March 30, 2001	Law Society Counsel	6	1	0
	Outside Counsel	0	4	3
	Total	6	5	3
April 24, 2001	Law Society Counsel	6	2	0
	Outside Counsel	0	3	3
	Total	6	5	3
May 31, 2001	Law Society Counsel	6	3	0
	Outside Counsel	0	1	5
	Total	6	4	5
June 30, 2001	Law Society Counsel	5	3	1

CHART 2 - HISTORICAL COMPARISON OF CONDUCT APPLICATIONS AUTHORISED FOR PROSECUTION BUT NOT ISSUED AS CONDUCT APPLICATIONS				
Month	Carriage	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
	Outside Counsel	0	0	5
	Total	5	3	6
July 31, 2001	Law Society Counsel	5	5	1
	Outside Counsel	0	0	3
	Total	5	5	4
August 30, 2001	Law Society Counsel	4	5	0
	Outside Counsel	0	0	2
	Total	4	5	2
September 30, 2001	Law Society Counsel	6	4	0
	Outside Counsel	0	0	2
	Total	6	4	2
October 26, 2001	Law Society Counsel	2	3	1
	Outside Counsel	0	0	2
	Total	2	3	3
November 30, 2001	Law Society Counsel	5	0	1
	Outside Counsel	0	0	1
	Total	5	0	2
December 31, 2001	Law Society Counsel	4	0	1
	Outside Counsel	0	0	1
	Total	4	0	2
January 31, 2002	Law Society Counsel	6	0	1
	Outside Counsel	0	0	1
	Total	6	0	2
February 28, 2002	Law Society Counsel	7	3	1
	Outside Counsel	0	0	1

CHART 2 - HISTORICAL COMPARISON OF CONDUCT APPLICATIONS AUTHORISED FOR PROSECUTION BUT NOT ISSUED AS CONDUCT APPLICATIONS				
Month	Carriage	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
	Total	7	3	2
March 31, 2002	Law Society Counsel	4	1	1
	Outside Counsel	0	0	1
	Total	4	1	2
April 30, 2002	Law Society Counsel	10	1	1
	Outside Counsel	0	0	1
	Total	10	1	2
May 31, 2002	Law Society Counsel	11	1	1
	Outside Counsel	0	0	1
	Total	11	1	2
June 30, 2002	Law Society Counsel	6	1	1
	Outside Counsel	0	0	0
	Total	6	1	1
July 31, 2002	Law Society Counsel	3	2	1
	Outside Counsel	0	0	0
	Total	3	2	1

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

(1) A copy of the Decision of the Court of Appeal for Ontario in *McIntyre v. Attorney General of Ontario.*

(Appendix 2, pages 59 – 88)

(2) A copy of Bill 25 – *An Act to Amend The Solicitors Act To Permit And To Regulate Contingency Fee Agreements.*

(Appendix 3, pages 89 – 94)

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IN CAMERA

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IN CAMERA Content Has Been Removed

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IN PUBLIC

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MOTION - LEGAL AID IN ONTARIO

Moved by: George Hunter

Seconded by: Todd Ducharme

BE IT RESOLVED that Convocation reasserts its strong endorsement of, and continued commitment to, the current certificate based system whereby legal aid assistance is made available in the Province of Ontario.

BE IT RESOLVED THAT Convocation supports an immediate increase in the basic legal aid tariff rate to $125 per hour combined with an annual escalation of that rate in accordance with the Consumer Price Index as maintained by Statistics Canada for the City of Toronto.

BE IT RESOLVED that the Treasurer take all reasonable steps and apply all reasonable resources of the Law Society to:

(i) urge the Attorney-General to immediately implement this rate increase; and
(ii) engender broad and meaningful support for these resolutions amongst the profession.

It was moved by Ms. Pilkington, seconded by Mr. MacKenzie that the motion be amended by adding the words "and system of legal aid clinics and duty counsel" after the word "system" in the second line of the first paragraph.

The amendment was not accepted by the mover and seconder.

The amendment was voted on and lost.

ROLL-CALL VOTE

Aaron	Against
Arnup	Against
Banack	For
Bindman	Abstain
Braithwaite	Against
Carey	For
Carpenter-Gunn	Against
Chahbar	Against
Cherniak	Against
Coffey	Against
Copeland	Against
Curtis	Against
Diamond	Against
Ducharme	Against
Epstein	Against
Feinstein	Against
Go	Against
Gottlieb	Against
Harris	Against
Hunter	Against
Laskin	Against
MacKenzie	For
Marrocco	Against
Millar	Against
Minor	Abstain
Ortved	Against
Pilkington	For
Potter	Against
Puccini	Against
Ross	Against

St. Lewis	Against
Simpson	Against
Topp	Against
White	Against
Wilson	Against
Wright	Against

Vote: Against – 30, For –4, 2 Abstentions

The Hunter/Ducharme motion was voted on and adopted unanimously.

ROLL-CALL VOTE

Aaron	For
Arnup	For
Banack	For
Bindman	Abstain
Braithwaite	For
Carey	For
Carpenter-Gunn	For
Chahbar	For
Cherniak	For
Coffey	For
Copeland	For
Curtis	For
Diamond	For
Ducharme	For
Epstein	For
Feinstein	For
Go	For
Gottlieb	For
Harris	For
Hunter	For
Laskin	For
MacKenzie	For
Marrocco	For
Millar	For
Minor	Abstain
Mulligan	For
Ortved	For
Pilkington	For
Potter	For
Puccini	For
Ross	For
St. Lewis	For
Simpson	For
Topp	For
White	For
Wilson	For
Wright	For

Vote: For – 35, Against – 0, 2 Abstentions

REPORT OF THE PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE

Mr. Cherniak presented the Report of the Professional Development, Competence & Admissions Committee for approval by Convocation.

Professional Development, Competence & Admissions Committee
September 19, 2002

Report to Convocation

Purpose of Report: Policy - For Decision
Information

Prepared by the Policy Secretariat
(Julia Bass 416-947-5228
Sophia Sperdakos 416-947-5209)

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Committee met on September 5, 2002. Committee members in attendance were Earl Cherniak (Chair), Kim Carpenter-Gunn (Vice-Chair), George Hunter (Vice-Chair), Bill Simpson (Vice-Chair), Carole Curtis, Abe Feinstein, Janet Minor, Greg Mulligan, Dan Murphy, Rich Wilson, and Helene Puccini. Staff in attendance were Julia Bass, Ian Lebane, Diana Miles, Sophia Sperdakos, Ursula Stojanowicz, and Sheena Weir.

2. The Committee is reporting on the following matters:

Policy - For Decision

- Competence Model – Practice Enhancement Component
- Specialist Certification Designation

Information

- Specialist Certification Policies
- Report on Specialist Certification Matters Finalized by the Certification Working Group on June 24, 2002 and Approved by the Committee on September 5, 2002

POLICY - FOR DECISION

COMPETENCE MODEL – PRACTICE ENHANCEMENT COMPONENT

OVERVIEW TO REPORT

Request to Convocation

1. That Convocation approve the design for Part 1 of the practice enhancement component of the competence model, namely the self-assessment tool, approved by Convocation in March 2001, as described in Appendix 2 to this report.

2. That Convocation accept the Committee's recommendation to defer the development of Part 2 of the practice enhancement component of the competence model, namely the peer assessment pilot project, until there has been an opportunity to develop and evaluate Part 1.

Summary of Issue

In March 2001, Convocation approved the Professional Development and Competence Committee's Report on implementing the Law Society's competence mandate. The approved model has five components, one of which is a practice enhancement component consisting of a voluntary self-assessment program and a voluntary peer assessment pilot project.

The Committee was directed to prepare a design for each of the five components and return to Convocation for approval of each. The practice enhancement component is the final component for which the Committee seeks approval.

The proposed design of Part 1 (self-assessment tool) is contained in Appendix 2. Highlights of the program are:

- It is entirely voluntary.
- It is confidential.
- It is designed to allow lawyers to evaluate their own practice strengths and weaknesses and to have access to tools to improve their procedures should they wish to avail themselves of such tools.
- The program and its uses will be promoted to the profession.
- Incentives will be provided to encourage lawyers to use the program.
- Following initial design costs (which are set out) the program will entail minimal ongoing costs.

The Committee is recommending deferral of development of Part 2 of the practice enhancement component (voluntary peer assessment project) until after Part 1 has been developed and evaluated. This is because the extent to which members use the self-assessment tool and the evaluation of its usefulness will provide valuable insight into how best to design Part 2.

THE REPORT

1. In March 2001, Convocation approved the Professional Development and Competence Committee's Report on Implementing the Law Society's competence mandate. The approved model has five components, one of which is a practice enhancement component consisting of a voluntary self-assessment program and a voluntary peer assessment pilot project. Appendix 1 contains that portion of the March 2001 report relating to the practice enhancement component.

2. As described in Appendix 1 the practice enhancement component, as approved by Convocation, consists of 2 parts:

   a. Part 1: A voluntary self-assessment program

   b. Part 2: A voluntary peer assessment pilot project

3. Appendix 2 contains the proposed design of Part 1 – the voluntary self-assessment tool. Highlights of the program are:

   a. It is entirely voluntary.
   b. It is confidential.
   c. It is designed to allow lawyers to evaluate their own practice strengths and weaknesses and have access to tools to improve should they wish to avail themselves of such tools.
   d. The program and its uses will be promoted to the profession.
   e. Incentives will be provided to encourage lawyers to use the program.
   f. Following initial design costs the program will entail minimal ongoing costs.

4. The projected design costs are set out in Appendix 2 and are estimated at approximately $95,000. Approximately one-third of this cost will be allocated out of the current year's budget (2002), leaving approximately $65,000 to be allocated under the 2003 budget.

5. Once the program is implemented, it is anticipated that it will cost approximately $37,500 per year to maintain and, where appropriate, update the tool, as described in Appendix 2.

6. In developing the practice enhancement component the Committee has considered whether the two parts should be developed at the same time or whether it would be more effective to develop the self-assessment tool first. It has concluded that a gradual design and implementation is the more appropriate course for the following reasons:

   a. The design and development of the voluntary self-assessment tool will provide valuable insight into the most effective ways to assess practices under the voluntary peer assessment pilot project. Although a self-assessment tool is not as extensive as an on-site assessment there will inevitably be overlap in the topics addressed. To design the two processes at the same time could result in unnecessary duplication and expense;

   b. The success of the voluntary self-assessment tool will depend to some large degree on the extent to which lawyers use it, trust that it is voluntary and confidential, find it effective and recommend it to others. The design of the voluntary peer assessment pilot project will benefit enormously from the lessons learned in implementing the self-assessment tool. This is particularly important because the peer assessment pilot project will be more expensive to develop than the voluntary self-assessment tool; and

   c. The design for the self-assessment tool includes a consultation stage both at the beginning and end of the development process. The consultation on the self-assessment tool will include seeking views on the development of the peer assessment pilot project.

7. For the reasons set out above the Committee is of the view that the design and implementation of the second part of the practice enhancement component should be deferred pending implementation and assessment of the self-assessment tool.

SPECIALIST CERTIFICATION REDESIGN

Request to Convocation

That Convocation approve the use of the following designation following the name of a lawyer who has been certified a specialist by the Law Society:

English: *Certified Specialist [area of law*]
French: *Spécialiste agréé(e) [domaine de droit]*

The Issue

1. In June 2002, Convocation approved the Committee's proposal for the re-design of the Specialist Certification program, which included approval of a detailed business plan.

2. In the business plan approved by Convocation in June 2002, it was proposed that certified specialists be entitled to use a set of designation letters after their names. The example given was "CS (area of law)".

3. Upon further consideration of the use of letters only, however, the Committee is of the view that they may require too much explanation to be effective. The use of the full term "certified specialist" will be more effective.

INFORMATION

a) POLICIES IMPLEMENTING SPECIALIST CERTIFICATION REDESIGN

1. Following Convocation's approval in June 2002 of the redesign of the Specialist Certification program the Committee amended the policies governing the specialist certification program to reflect the approved redesign. The policies are set out for Convocation's information at Appendix 3.

2. To further reflect the redesign of the program the Committee prepared guidelines for specialty committees to use as they implement approved changes to the program. These are set out at Appendix 4 for Convocation's information.

b) REPORT ON SPECIALIST CERTIFICATION MATTERS FINALIZED BY THE CERTIFICATION WORKING GROUP ON JUNE 24, 2002 AND APPROVED BY THE COMMITTEE ON SEPTEMBER 5, 2002

1. The Committee is pleased to report final approval of the following lawyers' applications for certification, on the basis of the review and recommendation of the Certification Working Group.

Bankruptcy & Insolvency:	Percy Ostroff (Ottawa)
Civil Litigation:	Daniel J. Fife (Kitchener)
Construction Law:	Donald L. Marston (Toronto)
Family Law:	Céline T. Allard (Ottawa)
Intellectual Property Law:	Christopher C. Hale (Toronto)

2. The Committee is pleased to report final approval of the following lawyers' applications for re-certification, on the basis of the review and recommendation of the Certification Working Group.

Bankruptcy & Insolvency Law:	Richard D. Howell (Toronto)
Civil Litigation:	J. Daniel Dooley (Barrie) Peter William Sharpe Heisey (Toronto) W. Eric Kay (Toronto) Joseph J. Sullivan (Hamilton) David I. Wakely (Toronto) William W. Walker (Belleville) David S. Young (Toronto)
Immigration Law:	Paul Vandervennen (Toronto) Howard Greenberg
Labour Law:	G. James Fyshe (Toronto)
Workplace Safety & Insurance Law:	John C. Russell (Ottawa)

APPENDIX 1

EXCERPT FROM I*mplementing the Law Society's Competence Mandate: Report and Recommendations* (March 2001)

VIII. PRACTICE ENHANCEMENT

89. As discussed above, competence is not a static status. It must be nurtured and maintained throughout a lawyer's career in order that the lawyer continues to be competent to provide quality service and meet professional obligations, in the public interest. Programs such as focused practice review, for example, are designed to assist those who have fallen below acceptable competence to improve. But such programs are limited in scope and effect because they are directed at a small minority of the profession. The Committee, therefore, spent considerable time considering what components of the competence model should be directed at facilitating the enhancement of the practices of those competent lawyers who make up the vast majority of the profession. In the course of this analysis it also considered the extent to which monitoring of practice and work settings on a random basis should form part of the competence mandate.

90. Protection of the public is the fundamental goal of any monitoring system introduced by the Law Society, as well as systems in place to financially protect the public. The public in Ontario is financially protected by the fact that lawyers must be insured to practise law. A further measure of financial protection is afforded to the public through the Client Fund for Compensation, which is funded by the legal profession itself. In addition, the Law Society operates a random spot audit program directed at the examination of members' books and records, including client trust funds. The existence of such a program promotes general adherence to standards. It also assists audited lawyers to rectify problems and, as well, informs the profession at large of identified areas for improvement. In this sense, the concept of random review is not foreign to Ontario lawyers.

91. Many professions in Ontario and elsewhere have adopted random practice review as part of, or the central element of, their quality assurance programs. The College of Physicians and Surgeons of Ontario, for example, has a long-standing peer assessment program that was recently expanded to substantially increase the number of practices assessed each year. The Royal College of Dental Surgeons of Ontario will shortly have in place a statutory regulation authorizing the conduct of random peer assessments. The Institute of Charted Accountants, on an annual basis, conducts random practice inspection of one-quarter of accountants in public practice. The Barreau of Quebec has a long-standing random practice inspection program.

92. In the case of all these professions and regulators, random reviews were not instituted because of evidence of significant incompetence within the profession but, rather, as part of an overall quality assurance approach to competence that includes preventive as well as remedial components. The decision to institute such a program, therefore, should not be seen as a response to wide-scale competence deficiencies but, rather, as a tool to enhance competence and monitor it in the public interest. There is a case to be made that if designed so as to be flexible, cognizant of the diversity of the profession, and reasonable in scope, random practice reviews could play a significant role in enhancing the competence of lawyers in Ontario.

93. After careful discussion of the random practice review approach and having regard to,
    a. the financial provisions already in place to monitor and insure lawyers;
    b. the existence of a spot audit program with respect to lawyers' books and records; and
    c. the wide range of competence components being proposed by the Committee in this Report;

    the Committee is recommending that, at this time, the practice enhancement component of the proposed approach consist of a voluntary self-assessment program and a voluntary peer assessment project.

94. In the future, the effectiveness of the proposed practice enhancement component of the model, and the model overall, will need to be regularly evaluated to assess whether a random practice review program is necessary or desirable to complement and augment the provisions already in place to protect the public.

(i) Voluntary Self-Assessment Program

95. Many participants in the consultation process noted the importance of improving and expanding the tools available to allow members, on a voluntary basis, to assess their own competence and improve their individual approaches to professional development. It is self- evident that lawyers in Ontario will benefit if the professional development tools that modern, up-to-date research and practice experience afford can be made available to them.

96. During the consultation process including, in particular, during the regional and bar organization consultation meetings, members of the Committee sought to obtain specific examples of the ways in which individual practitioners maintain their own competence on an on-going basis. Many diverse methods of self-learning were identified by lawyers across the province. Some of these involved the usual techniques of attending organized continuing legal education programs. Others concentrated on electronically available programming material and information through new and emerging technologies.

97. The Committee is of the view that self-assessment and continual self-learning are important professional endeavors which should both be encouraged and promoted by any future competence model. The Committee reviewed with interest the self-reflective learning programs introduced by various other regulators as part of their quality assurance programs (as, for example, the self-reflective learning components of the quality assurance program of the College of Nurses of Ontario).

98. The Committee proposes the development of self-evaluation guides, as part of the practice enhancement component of the Law Society's future competence model, that would,

a. to the extent possible, be made available across the province in electronic and paper format for members to assess their practice management approaches, including use of technology and client service issues, and other practice or work-related systems;

b. where applicable, utilize existing guides, at least in the preliminary stages of implementation. For example, the existing guides used by practice reviewers may be capable of adaptation and refinement to address a wide range of issues. These types of guides, once revised, could then be made available directly to practitioners to assist them in self-evaluating their own compliance with the guides. The development of formal practice guidelines, urged as another component of the competence model, would also complement this approach; and

c. be voluntary. The self-evaluation guides could be designed to have "links" that would enable an individual member who is dissatisfied with the results of the self-assessment to access guidance on suggestions for improvement. Such "links" might be introduced, subject to design considerations, through electronic links to other information bases, through contact with the Practice Advisory Service of the Law Society, or through contact with a service-provider independent of, but accredited by, the Law Society.

99. The design process in connection with the proposed voluntary self-assessment program would include consideration of, among other issues,

a. the scope and detail of the self-evaluation tools including, in particular, whether they should be limited to practice management issues or include substantive law;

b. the type of work and practice settings to which the self-evaluation tools could be directed;

c. the potential use of incentives to promote the use of the self-evaluation tools; and

d. the estimated cost of developing the tools and providing them on an on-going basis to members.

(ii) Voluntary Peer Assessment Pilot Project

100. The Committee considered in detail the current peer assessment programs available to members of other professions in Ontario. Regard was had, in particular, to the peer assessment programs offered by the College of Physicians and Surgeons of Ontario both to family practitioners and specialist physicians. In some instances, peer assessment is undertaken on a voluntary basis in the medical profession. In other instances, mandatory forms of peer assessment are required pursuant to the College's quality assurance program or discipline processes. These peer assessment programs address both practice management and substantive medical issues.

101. The regulators of some professions in Ontario have required, in one form or another, peer assessment for many years. In some instances, the peer assessment programs offered by other professions are sophisticated and mature. Under some of these programs the participating practitioner bears the cost of participation. This "user-pay" approach is utilized by some regulators even where participation is mandatory as a result of compulsory quality assurance requirements or directions of discipline committee panels.

102. The Committee is of the view that, in addition to the self-evaluation component urged as part of a future competence model, a program designed to afford lawyers the opportunity to have a qualified peer conduct an assessment of their work or practice setting, should be seriously investigated. This approach has been adopted on a voluntary basis by the College of Nurses of Ontario as part of its "Practice Setting Consultation Program". The information available to the Committee suggests that the "take-up" rate to date experienced by that College is encouraging. Similarly, the ISO-9000 Quality Assurance Registration System entails assessment of office practices and procedures.

103. There is little doubt that a quality work setting contributes to the quality of service provided. There are key attributes that contribute to the creation and maintenance of such a setting. The Law Society's complaints statistics and LPIC's data both confirm that most of the major causes of complaints and claims against lawyers are related not to errors in knowledge, skill or application of substantive law but, rather, to practice management issues and client service inadequacies.

104. As earlier noted, the focused practice review program of the Law Society, as currently structured, is directed at those members who have already demonstrated competence-related deficiencies. This program is to be distinguished from the voluntary peer assessment pilot project recommended as part of a future competence model. The latter project would be designed to provide, on a voluntary basis, peer assessment as a mechanism through which competent lawyers, without demonstrated competence-related deficiencies, can seek to validate the standards of their practice and benefit from suggestions for improvement.

105. The Committee proposes that,

a. a voluntary peer assessment pilot project be developed;

b. if cost effective, the content of assessments should include both practice management, including technology and client service issues, and substantive law "best practices" issues;

c. the term of the pilot project be at least two years to allow for proper design, implementation, and evaluation;

d. volunteers be sought from among members of the profession in different geographic locations, work and practice settings, and circumstances to form part of a roster of lawyers prepared to conduct, on a *pro-bono* basis, confidential peer assessments and prepared to have their practices or work settings assessed; and

e. during the term of the pilot project there be no cost to the participants. Following the completion of the pilot project, and evaluation of its effectiveness and "take-up" by members of the profession, continuation of the program would be contingent on some degree of cost recovery, to be established at the time of approval for continuation.

106. The design process in connection with the proposed voluntary peer assessment pilot project would include consideration of, among other issues,

a. the attributes that define a quality work setting for lawyers, recognizing the legitimate variations that occur in settings across the province;

b. development of appropriate content for peer assessment;

c. the potential use of incentives to promote the program and its use by lawyers; and

d. the projected costs of the program, including potential cost recovery strategies.

APPENDIX 2

COMPETENCE MANDATE
PRACTICE ENHANCEMENT PROGRAM: SELF-ASSESSMENT

Prepared by:
Professional Development, Competence & Admissions Committee

September 2002

Practice Enhancement Program: Self-Assessment

Objective

1. To develop a voluntary practice enhancement system that uses self-learning, self-assessment, personal plans, support tools and consultation techniques to confirm and or achieve quality measures in a lawyer's practice. The program will focus on providing a systematic assessment process that evolves in stages and addresses all law practice management improvement or maintenance processes based on a best practices model.

Development of the Program

2. A model of best practices within the profession will be developed. It will be flexible in nature and applicable to a variety of practice sizes and legal areas.

3. A consultant versed in performance assessment in the professional services market will be retained to develop the model and tools. The model will be the foundation of this program and will focus on best practices within the profession. It will be designed to definitively state the elements, or competencies, to be assessed and to what extent. The relative importance of each element will be established through content expert input. These experts will be members of the profession with exceptional competencies in practice management and operational management to ensure that the measures have the greatest effectiveness and basis in reality. The use of exceptional professionals as models for the program will ensure validation and assist in achieving buy-in from the profession.

4. The consultant will be required to produce a summary of the purpose of the program (which would also be used as a marketing tool), the structure of the program (general design, format, presentation of content, length), its scoring (setting levels of performance in each category and establishing the methodology for diagnostic feedback that is meaningful), and the development of comprehensive documentation and tools supporting all improvement activities, to be completed in consultation with Law Society staff and using member input.

5. To derive the model, the consultants will meet with and review lawyers across the province who have either been recommended by other lawyers as best practices examples or who are known to the consultants to fall within that category of practitioners. The size of the sampling will be dependent upon information needed to develop a valid profile that could be applicable to varying practice types, with a particular focus on small to mid-sized firms where professionals are more inclined to assess themselves or promote self-assessment in their firm. Larger firms generally contract such performance assessment and operational reviews to consultants and derive their own internal benchmarks and measurements.

6. Other activities that may be undertaken by the consultant to ensure accuracy and applicability of the parameters of the assessment tool may include:

   a) Focus groups to validate elements of the assessment;

   b) Random survey of lawyers to further enhance input;

   c) Meetings with Professional Development and Competence Department staff and Professional Regulation Department staff to validate the importance of the elements of the assessment.

7. The key to the development process will be to establish a tool that is highly relevant in its application across the profession. To validate the content, a user test pilot of lawyers will be conducted. These lawyers will be asked to utilize the tools to validate applicability and practicality. The consultant will undertake an analysis with the test lawyers determining if any areas of the assessment require further development or if any key components of a logical self-assessment process for law practice are missing.

8. Once the assessment tool has been validated, the next step is to identify remedial strategies and support activities that will assist the lawyer in dealing with deficiencies in all of the diagnostic areas and can form part of a personal action plan. It is anticipated that this stage of the program development will heavily utilize the Professional Development and Competence Department staff, in conjunction with various lawyers in the profession, in the preparation of support tools and will incorporate, where feasible, components of already existing Law Society products.

9. There will be levels of achievement built into the self-assessment scoring that reflect competencies at the superior, competent or needs improvement stages of development.

10. The self-assessment will be designed as an on-line tool which will incorporate automatic tabulation. Modifications will be made to accommodate those who prefer a paper application but will not be encouraged given the administrative difficulties and the reality that the user will become frustrated with, or be unwilling to partake in, a manual scoring process and will not complete the assessment.

11. The self-assessment program will be an evolving product, continually updated to address developments in the profession. It is anticipated that incremental improvements will be put into place on an annual basis upon review and analysis of the available information and statistics. The consultant will only be required for this process if the improvement involves a unique competency-related revision. The assistance of the consultant to institute substantial change to the product will only be required approximately once every two to three years when decisions are made to extend the scope of the competencies being self-assessed.

Consultation Stage

12. As a final stage of the assessment process, a practice consultation activity will be included as one of the alternative recommendations for undertaking improvements. A recommendation that the user seek practice consultation will be included as a part of the scoring process on the self-evaluation component of the product. If, for instance, on eight (8) elements of practice management the lawyer scores in the “needs improvement” category in greater than four areas, the tool will recommend seeking external expertise to assist with improvement processes designed to address these specific issues.

13. The Law Society will develop a list of accredited providers of practice consultation services but will not make recommendations. Providers will be asked to supply information outlining expertise in areas of practice management improvement so that lawyers seeking assistance may make an informed initial choice. Should the lawyer wish to take his or her assessment to this level, all arrangements are made directly between the lawyer and the third party provider of services. All costs of such practice consultations will be borne by the lawyer.

14. Providers accredited by the Law Society will be required to utilize existing Law Society products and tools if appropriate and to spend time focusing on the categories of acceptable practice set out in the Practice Management Guidelines.

Positioning the Program with the Membership

15. The Practice Enhancement Program will be strictly confidential. The Law Society will not obtain the information that is developed by the lawyer in undertaking an assessment. The electronic tabulation system will ensure that the Law Society will be in a position to provide credit for having undertaken the exercise, without having to see the results as proof of that exercise. The information will not be available to other areas of the Law Society, which avoids any suggestion that the self-assessment results might be used in the furtherance of conduct or competence procedures in the future.

16. Marketing will play an integral role in the acceptance of an enhancement program by the members. The benefits of undertaking a self-assessment must be communicated frequently and clearly. Incentives will play a large part in the promotion of this program. Some incentives that should be considered in order to establish this program as the flagship quality improvement process for the membership include:

a) Insurance levy credits following the members' use of the system. The Director of PD&C has spoken with the President of LawPro and it has been agreed that such an incentive will be established to support the self-assessment component of this program. This will impact the design and usage requirements for the program; in particular, electronic tracking that will be necessary to establish that the member has used the system up to some determined point of completion. A process whereby these credits will be applied in an administratively efficient manner as between LawPro and the Law Society will also have to be established;

b) Reduction in registration fees for future Law Society continuing education programs and price reductions on the purchase of books and other continuing education and competence products;

c) Completion of the program, to the same extent as would be required to receive a LawPro credit, would result in the fulfillment of 3 hours of the CLE minimum expectations (proposed);

d) Completion of the program as noted above and further compilation of a personal action plan, filed with the Law Society, could result in a further 3 hours of CLE minimum expectations (proposed). Note that this option will be dependent upon the existence of an action plan with substantial requirements for completion on the part of the lawyer before it would qualify;

e) Supplementary tools attached to the self-assessment product are free and applicable in day-to-day practice as well as in conjunction with a self-assessment process. A member would not necessarily have to undertake a tabulated self-assessment to be able to utilize the supports;

f) Other benefits to be promoted would include the member's ability to improve client retention and profitability in practice.

Proposed Budget

17. The Director of PD&C has spoken with a number of consultants in advance of presenting this proposal. Although an estimate only, it is reasonable to assume that the costs of the development of the Practice Enhancement Program will approximate those set out below:

Expense	Detail	Cost
Consultants Fees	Planning, development, validation through to successful tabulation	$85,000
Technology Consultation (contingency)	Transfer of product onto LSUC website and testing	$10,000
Total Estimated Expense for Development Process	Expenses to be allocated in PD&C budget for 2002/2003 as Mandate developmental costs	$95,000

18. Operational expenses of approximately $37,500 are expected to be incurred on an annual basis to administer this program. These expenses relate to staff time required for general administration of program activities, approval of program promotions, ongoing discussions with consultants, reviews of trends in usage and for consultations, etc.

Implementation Process and Timelines

Action	Due Date
Implementation plan to Committee for discussion and approval	September 2002
Presentation to Convocation	September 2002
RFP to performance assessment consultants	October 2002
Consultant hired	October 2002
Full work plan and timelines presented by consultant	November 2002
Development begins	November 2002
RFP to practice management consultants to be accredited by the Law Society for the consultation component	March 2003
Development process completed	July 2003
Product up on website and tested	August 2003
Product promotions and marketing begins	September 2003

APPENDIX 3

THE LAW SOCIETY OF UPPER CANADA
POLICIES GOVERNING THE SPECIALIST CERTIFICATION PROGRAM

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DEFINTIONS

"Applicant" is a lawyer applying for certification or re-certification as a Specialist.

"Board" is the Specialist Certification Board.

"Consent to Disclosure" is a written authorization provided by an applicant for certification and re-certification to the Lawyers' Professional Indemnity Company authorizing disclosure of the applicant's claims history to the Law Society for use in the assessment of the application.

"Law Society" is the Law Society of Upper Canada.

"Policies" are these Policies Governing the Specialist Certification Program of the Law Society of Upper Canada.

"Practice Review" is a program of remedial assistance available to members of the Law Society of Upper Canada.

"Professional Development, Competence and Admissions Committee" is a standing committee of Convocation.

"Specialist" is a member of the Law Society of Upper Canada who is certified by the Board as having met the standards for certification or re-certification in a designated field of practice.

"Specialty Committee" is a committee established in a specialty field of law practice, also referred to as Committee.

PART I: INTRODUCTION TO THE SPECIALIST CERTIFICATION PROGRAM

1. Purpose

a) The Specialist Certification Program recognizes members of the Law Society who have met established standards of experience and knowledge in designated fields of law, and have maintained high standards of professional practice.

b) The program aims to promote the public interest and enhance lawyer competence by facilitating the development of specialty expertise in a given field.

2. Eligibility for Specialist Certification

Specialist certification is available only to members of the Law Society of Upper Canada who meet the standards for certification and re-certification established by the Board.

3. Duration of Certification

a) Certification commences on the date it was approved by the Board and remains in effect for a period of one (1) year, unless sooner terminated by the Board.

b) The certification period is prorated in the first year in which certification is granted.

c) The certificate may be renewed subject to requirements set out in the individual standards for re-certification.

4. Individual Attainment

Specialist certification can only be held by individuals, and cannot be attributed to the law firm or office of which the Specialist may be a member.

5. Voluntary Participation

No member of the Law Society is required to be certified as a Specialist in order to practice in the field of law covered by that specialty.

PART II: THE SPECIALIST CERTIFICATION BOARD

1. Status

a) The Board is responsible for the implementation and administration of the Specialist Certification Program.

b) The Board reports to the Professional Development, Competence and Admissions Committee.

2. Powers and Duties of the Board

The Board administers the Specialist Certification Program;

a) designates and implements new fields of specialty;

b) appoints and supervises the Specialty Committees and, in its discretion, acts on the recommendations of those Committees;

c) makes and publishes standards for certification and re-certification of Specialists, ensuring that such standards as adopted will produce a uniform level of competence in the various specialty fields in accordance with the nature of those specialties;

d) certifies Specialists or denies, suspends or revokes certification;

e) establishes and publishes policies and procedures for the administration of the program; and,

f) reports annually to the Professional Development, Competence and Admissions Committee on the performance of the program, and recommends amendments as appropriate.

3. Membership of the Board

a) Membership of the Board consists of five (5) benchers, including one (1) non-lawyer bencher, and two (2) members of the profession who are Specialists. Where practicable, no fewer than four (4) members of the Board are to be certified as Specialists.

b) Board members, including the Chair, are appointed by the Professional Development, Competence and Admissions Committee.

c) Appointment to the Board is for a term of three (3) years, renewable to a maximum of six (6) years.

PART III: SPECIALTY COMMITTEES

1. Status

a) The Board will establish a Specialty Committee for each field of law in which Specialists are to be certified.

b) The Board is not bound to act in accordance with the advice and recommendation regarding a particular issue or an application provided to it by a Specialty Committee.

2. Role of Specialty Committees

a) The Specialty Committees assist the Board in administering the Specialist Certification Program generally and advise the Board on matters relating to the particular field of specialty.

b) Matters on which the Specialty Committees are expected to advise and assist the Board include the following;
- standards for certification and re-certification;
- application procedures;
- assessment procedures; and
- recommendation of those who are qualified for Specialist certification.

c) The Specialty Committees review the professional development requirements for their specialty field annually and approve professional development programs which meet the learning objectives established for that field.

3. Membership of Specialty Committees

a) The minimum number of Specialty Committee members is five (5) and the maximum number is nine (9), including the Chair and Vice-chair.

b) Members must be certified Specialists in the subject specialty field. Members appointed to develop new specialty fields must obtain Specialist certification within three (3) years following implementation of that specialty.

c) The term of appointment is three (3) years renewable to a maximum of six (6) years. When a new Specialty Committee is established the terms will be staggered.

d) Membership on Specialty Committees is representative of the various facets and interests of the specialty field, and the diversity of the profession.

e) Members of Specialty Committees must advise the program office when unable to attend meetings. Members who miss more than three (3) meetings in any given year will be replaced by the Board, unless they can demonstrate to the Board that absences were due to reasons beyond their control.

f) Members of Specialty Committees must not take a public position on behalf of the Specialist Certification Program or the Specialty Committee, unless authorized to do so by the Board.

PART IV: ACHIEVING SPECIALIST CERTIFICATION

1. Eligibility to practice law in Ontario

Applications will be accepted from members of the Law Society who are eligible to practice law in Ontario.

2. Application Fee

a) Each application for certification must be accompanied by an application fee.

b) The application fee is non-refundable and may not be applied to subsequent applications.

3. Minimum Practice Experience

a) An applicant must have engaged in a minimum of seven (7) years of full-time experience in the practice of law in Ontario, of which five (5) years must be recent, and of which two (2) years must immediately precede the date of application.

b) As a general rule, recent experience will mean falling within the seven (7) years immediately preceding the date of application.

4. Substantial Involvement

a) An applicant must demonstrate substantial involvement in the area of each of the five (5) years of recent experience.

b) Substantial involvement means legal work in the specialty field equivalent to no less than the percentage of practice concentration and specific task requirements set out in the individual standards for certification.

c) An applicant in a part-time practice of law in Ontario may be considered for Specialist certification providing the applicant's substantial involvement in the specialty field is equivalent to the requirements set out in these Policies and the individual standards for certification.

d) An applicant may request consideration by the Specialty Committee and the Board of advanced course work directly related to the specialty field in lieu of *some* aspects of the substantial involvement requirement.

e) An applicant is not required nor permitted to disclose the names of people he or she has represented in order to substantiate a claim to having certain types of experience, unless those names are already in the public domain.

5. Professional Development

a) An applicant must demonstrate to the assessing Specialty Committee and the Board satisfactory completion of the professional development requirements of the specialty field, and no less than fifty (50) hours of self-study and eighteen (18) hours of approved professional development activities in each of the five (5) years of recent experience.

b) The professional development report must include the following essential information:
- date of each activity;
- topics and/or issues covered by each activity;
- format of each activity;
- name of provider of each activity; and
- hours of credit claimed for each activity.

c) No more than twelve (12) hours of the professional development requirement may be met through alternative methods such as:
- teaching a course in the specialty field;
- writing and editing of published books or articles relating to the specialty field;
- graduate or post-graduate studies in the specialty field; or
- involvement in the development and/or presentation of professional development programs related to the specialty field.

6. References

a) An applicant for certification as a Specialist must submit four references from eligible referees in the form prescribed by the Board.

b) References must be from legal practitioners, licensed to practice law in Ontario.

c) The individuals selected as a reference must have direct knowledge of the applicant's work in the specialty field in the five (5) years of recent experience and can attest to the applicant's competent performance of the tasks as outlined in the individual standards for certification.

d) None of the following is eligible to act as a reference:
- judges;
- members of tribunals;
- partners, associates, co-workers, employer or relative of the applicant
- members of the assessing Specialty Committee, the Board or the Professional Development, Competence and Admissions Committee;
- Treasurer of the Law Society; and
- staff of the Law Society.

e) The statement of reference and its contents is a confidential document, and will be made available for review only to members of Specialty Committees, the Board, the interview panel and the staff of the program office.

f) The individual providing a reference will not disclose the contents of the reference to the applicant.

7. Professional Standards

a) An applicant for certification as a Specialist must demonstrate adherence to high standards of professional practice.

b) The professional standards record of an applicant, outlining open and closed complaints and claims, and any discipline or audit history, in the five (5) years preceding the date of application, is reviewed at the initial stage of the application process by staff of the program office and the Practice Review office prior to the assessment of the application by the Specialty Committee.

c) The professional standards record is confidential and does not become part of the application file which is referred to the Specialty Committee. However, the applicant may request a copy of his or her professional standards record at any time during the application process.

d) Where an applicant's professional standards record indicates deficiencies in meeting the high standards of professional practice, the Board will be asked to decide how the application is to be handled. The Board may decline to consider the application or defer consideration of the application until the applicant has addressed specific deficiencies and/or has provided satisfactory undertakings.

e) An applicant who has been found guilty of professional misconduct and/or conduct unbecoming may be denied certification for that reason alone. The Board will consider the nature of the offence, the date it was committed and the applicant's conduct since the date of the finding of guilt.

f) When an applicant is currently participating in Practice Review or being considered for Practice Review, the application will be put in abeyance pending successful completion of Practice Review.

g) An applicant who is the subject of a current or pending disciplinary action or investigation by the Law Society will only be considered for Specialist certification following the disposition of the discipline matter or investigation.

h) An applicant who practices law in another jurisdiction must submit a professional standards record from the regulatory body of that jurisdiction with his or her application.

8. Evaluation by Specialty Committees and Board

a) An applicant for certification as a Specialist is assessed against the standards for certification in the specialty field.

b) The assessing Specialty Committee will satisfy itself that the applicant's experience, knowledge and professional development meet the required standards for certification. The applicant may be required to supplement the information in the application and/or provide additional references.

c) In the event an applicant is required to attend for an oral interview, the Specialty Committee will appoint a panel from the Committee or an external panel comprised of three (3) Specialists in the field who will report to the Committee.

d) When an interview is required, the reasons will be disclosed to the applicant prior to the interview.

e) When the recommendation of the Specialty Committee to the Board is to deny certification, the applicant will be notified in writing of the nature and substance of the information upon which the decision is based. The applicant may respond to the Specialty Committee with additional information or may withdraw the application prior to final decision on the application by the Board.

f) The names of applicants recommended for certification by the Board will be published in the Ontario Reports. The profession will have twenty one (21) days within which to respond with comments to the Board.

g) Following the expiry of the notice to the profession the applicant will be notified in writing of the Board's final decision on the application.

9. Application Guidelines

a) An application for certification must include the following:
- a completed application form;
- a Consent to Disclosure form;
- a description of the applicant's practice in accordance with the requirements set out in the individual standards for certification;
- four references;
- a professional development report;
- a professional standards record from another jurisdiction, if applicable; and
- an application fee.

b) An application which is incomplete will not be processed. The applicant will have one (1) year within which to complete the application and may be required to update all or part of the application in order to have it considered by the Specialty Committee. If the application remains incomplete beyond that period, it will be considered withdrawn by the applicant and no further action will be taken.

PART V: MAINTENANCE AND RENEWAL OF CERTIFICATION

1. Eligibility to Practice Law in Ontario

A Specialist must be eligible to practice law in Ontario in order to maintain certification.

2. Substantial Involvement

a) A Specialist must maintain substantial involvement in the specialty field as set out in the individual standards for certification.

b) The Specialty Committee or the Board may require a Specialist to substantiate his or her eligibility for renewal of the certificate.

3. Professional Standards

a) A Specialist is subject to the same professional standards requirements as an applicant for certification.

b) A Specialist licensed to practise in another jurisdiction must submit with his or her application a professional standards record for the past twelve (12) month certification period, from the regulatory body of that jurisdiction.

4. Professional Development

a) A Specialist must maintain an up-to-date record of professional development activities during the certification period in order to demonstrate compliance with the requirements of the specialty field.

b) The professional development report must include the following essential information:
- date of each activity;
- topics and/or issues covered in each activity;
- format of each activity;
- name of provider of each activity; and
- hours of credit claimed for each activity.

c) The minimum expectations for all specialty fields are fifty (50) hours of self-study and eighteen (18) hours of approved professional development activities in the twelve (12) month certification period.

d) No more than twelve (12) hours of professional development requirements may be met through alternative methods, such as:

- teaching a course in the specialty field;
- writing and editing of published books or articles relating to the specialty field;
- graduate or post-graduate studies in the specialty field; or
- involvement in the development and/or presentation of professional development programs related to the specialty field.

5. Notification of Change of Circumstances

A Specialist who is unable to satisfy the conditions for maintaining certification must notify the Board of circumstances in writing at the earliest opportunity. The Board will consider the individual circumstances in determining whether to suspend or revoke the certificate and advise the Specialist accordingly.

6. Renewal of Specialist Certification

a) A Specialist seeking renewal of his or certificate must submit an application for renewal no later than thirty (30) days prior to the certificate expiry date. An application for re-certification received beyond the deadline but prior to the expiry of the certificate will be at the discretion of the Board and subject to late charges.

b) The application must include:
- a declaration that the applicant continues to satisfy the conditions for maintaining certification in the specialty field;
- Consent to Disclosure;
- professional development report;
- professional standards record from another jurisdiction, if applicable; and
- renewal fee.

c) An application for re-certification which is incomplete will not be processed. The applicant will have thirty (30) days following expiry of the certificate within which to provide the missing information. Consideration of the application beyond that period will be at the discretion of the Board.

d) A Specialist who has failed to file an application for renewal of his or her certificate within thirty (30) days following the expiry of the certificate may be required to re-enter the program as a new applicant and pay the relevant application fee.

7. Leave of Absence

a) A Specialist contemplating a leave of absence from the Specialist Certification Program for personal or professional reasons may apply to the Board to have the certificate put in abeyance.

b) In order to be reinstated as a Specialist following a leave of absence from the Specialist Certification Program the lawyer must complete twelve (12) consecutive months of practice in the specialty field and submit an application for re-certification.

c) The application will be subject to the requirements set out in these Policies and in the individual standards for re-certification.

PART VI: GENERAL PROVISIONS

1. Accreditation of Professional Development Programs

a) A provider of professional development programs may apply to the Specialty Committee for accreditation of a program.

b) A professional program that has been approved by a Specialty Committee as having met the learning objectives of a specialty field may use the following standard wording in its advertising:

"This program has been approved by the [Field of Specialty] Specialty Committee of the Law Society for certification and re-certification professional development requirements."

c) The advertising will state the number of hours which qualify as professional development credits for purposes of certification and re-certification.

2. Action on Applications from Members of Specialty Committees, the Board or Professional Development, Competence and Admissions Committee.

Applications for certification and re-certification from members of the Special Committees, the Board or the Professional Development, Competence and Admissions Committee are subject to the same requirements as any other applicant and the same conflict of interest rules set out in these Policies.

3. Advertising Specialist Certification

a) A Specialist may advertise his or her designation Certified Specialist [Field of Specialty] or Sp9cialiste agr99(e) [Domaine de Droit] in accordance with Rules 3.03(1)(g) and Rule 3.05(2) of the Law Society's Rules of Professional Conduct.

b) Wrongful use of the designation is contrary to the Rules of Professional Conduct and may result in a complaint being initiated in accordance with the Law Society Act. Examples of wrongful use of the designation include:

- an application for renewal of the certificate was not filed;
- an application for renewal of the certificate was filed but is incomplete and the certificate has lapsed;
- an application for renewal of the certificate was denied by the Board;
- renewal of the certificate is pending completion of Practice Review or resolution of professional practice matters;
- the certificate was revoked by the Board;
- the certificate was cancelled;
- the holder of the certificate has accepted a judicial appointment; and
- the program for certification in that specialty field has been terminated.

4. Appeals

a) An applicant whose application for certification or re-certification has been denied or whose specialty certificate is suspended or revoked by the Board may appeal in writing to the Board within thirty (30) business days following the receipt of such notice. The applicant will state with as much specificity as possible the reasons why the decision of the Board was in error and may request a hearing.

b) At the discretion of the Chair of the Board, the hearing may be considered before the full Board or an appellate committee appointed by the Chair.

c) In the event an appellate committee is formed to consider the hearing, the appellate committee will submit its recommendations to the entire Board for final decision.

d) The decision on an appeal made by the Board is final.

5. Areas of Practice

a) Bankruptcy and insolvency law
b) Civil litigation
c) Construction law
d) Criminal law
e) Environmental law
f) Family law
g) Immigration law
h) Intellectual property law
i) Labour law
j) Workplace safety and insurance law

6. Cancellation, Suspension or Revocation of the Certificate of Specialty

a) The certificate of specialty will be cancelled when:
- the certificate holder has ceased to practice law in Ontario;
- the certificate holder no longer meets the requirements of the program;
- the certificate holder has failed to submit an application for renewal of the certificate; or
- the certificate holder has surrendered the certificate.

b) The certificate of specialty will be suspended when:

- the certificate holder has accepted a judicial appointment;
- the certificate holder is on an approved leave of absence from the program;
- the certificate holder is participating in Practice Review; or
- the renewal of the certificate is pending resolution of professional practice matters.

c) The certificate of specialty will be revoked by the Board if it is determined, after appropriate notice and hearing before the Board, that:

- the certificate was issued contrary to the standards for certification or recertification;
- the holder of the certificate has been convicted of a criminal offense or of a disciplinary charge, unless the Board determines that the circumstances of the conviction are such that the certificate should not be revoked; or
- any circumstance which, in the opinion of the Board, is inconsistent with the high standards of professional practice requirements of the Specialist Certification Program.

d) The Board will publish names of lawyers whose certificate of specialty it cancels, suspends or revokes for reasons outlined in this section, except where the certificate holder has surrendered the certificate.

7. Certificate of Specialty

a) A certificate of specialty will be issued to applicants who satisfy the requirements for certification.

b) A renewal seal will be issued to applicants who satisfy the requirements for re-certification.

c) A certificate of specialty must be returned to the Law Society if the certificate is cancelled, suspended or revoked.

8. Confidentiality

All information relating to an application including the contents of the application form, statements of reference, files, reports, investigations, findings and recommendations is confidential and will not be disclosed to anyone, including the applicant except the applicant may be informed as to the status of his or her application at any time and may receive a composite summary of assessment upon request.

9. Conflict of Interest

a) A member of a Specialty Committee or the Board is not permitted to participate in the review or to influence others with respect to the applicant when:
- the member is a law partner, associate, colleague or relative of the applicant;
- the member or the law firm or office with which he or she is affiliated represents the applicant; or
- the member has any personal bias or prejudice concerning the applicant which would prevent him or her from fairly evaluating any of the evidence and information concerning the qualification of the applicant.

b) A member of the Specialty Committee or the Board who is required to recuse himself or herself will:
- immediately disclose to the full Specialty Committee or the Board that he or she has a disqualifying interest but need not state circumstances;
- withdraw from any participation in the matter of the application of that applicant;
- refrain from attempting to influence another member of the Specialty Committee or the Board; and
- refrain from voting upon the application of the applicant.

c) An applicant who is aware of circumstances in section 9(a) may request in writing that the Specialty Committee or Board member be recused.

d) The fact that a member of the Specialty Committee or the Board represents one party to a legal matter and the applicant represents the opposing party is not a fact that requires recusal. However, the member of the Specialty Committee or the Board will notify the applicant, and the applicant may request in writing the recusal of that member, based on a belief of personal bias or prejudice.

10. Directory of Specialists

The names of currently certified Specialists will be included in the Directory of Specialists published by the Law Society.

11. Equal Opportunity

The Specialist Certification program encourages participation from all qualified applicants without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

12. Grounds for Denial of Certification or Re-certification

Certification or re-certification may be denied for any of the following reasons:

a) the applicant is not eligible to practice law in Ontario;

b) the applicant does not meet the substantial involvement requirements of the specialty field;

c) the applicant does not meet the professional development requirements of the specialty field;

d) the applicant does not meet the high standards of professional practice expected of a Specialist;

e) the applicant has failed to provide additional information relevant to his or her application;

f) the applicant has misrepresented facts in his or her application; or

g) the program for certification in that specialty field is terminated.

13. Limit on the Number of Specialty Areas

The limit on the number of fields of practice in which a lawyer may be accredited as a Specialist is determined by the practical limits imposed by the requirements of substantial involvement, as defined in these Policies and the individual standards for certification.

14. Negative or Adverse References or Comments on an Application

a) Where negative or adverse references or comments have been made with respect to an applicant for certification or re-certification, the Board will designate one member of the Board to investigate the comments at their source and report to the full Board.

b) If the investigation corroborates the negative references or comments, the Board may, as a matter of due process, invite the applicant to respond to the adverse allegations taking care to protect the confidentiality of the source of the negative references or comments, to the extent that this is possible.

15. Re-application for Specialist Certification

If an application has been denied or certification revoked by the Board, an applicant may re-apply the following year by submitting a new application form and application fee. The applicant must demonstrate compliance with the standards for certification established for the specialty field.

16. Referrals

a) A Specialist receiving a referral from another practitioner is required do all in his or her power to ensure that the referred client returns to the referring practitioner for all other legal work, and is required to notify the client of this obligation in writing at the earliest opportunity.

b) A Specialist will not undertake any new work from the client, unrelated to the retainer, without express consent from the referring lawyer.

APPENDIX 4

SPECIALIST CERTIFICATION PROGRAM
GUIDELINES FOR REVIEW OF STANDARDS FOR CERTIFICATION
BY SPECIALTY WORKING GROUPS
approved by the Certification Working Group and Chair, PD&C Committee July 30, 2002

1. Definition of a specialist and special ability

A specialist is a practitioner who, in addition to meeting the basic requirements set out below, has achieved a facility and a professional insight that combine legal knowledge with talent and experience in a way that distinguishes the specialist from other practitioners:

- a ready grasp of the substantive law for both typical and obscure cases;
- an immediate awareness of and experience with the entire range of appropriate remedies in both typical and unusual cases;
- a commitment to ongoing professional development;
- sound judgment in proposing solutions and approaches while maintaining a proportion between the nature of the problem and the cost and elaborateness of the solution; and,
- an attitude of professionalism vis-à-vis clients, courts and other lawyers.

2. Level of expertise and type of practice

Applicants will continue to have to demonstrate broad and varied experience in a sufficient number of matters of complexity, length and substance to demonstrate special ability in the field, regardless of where they practice.

However, in keeping with the goals of the new program the Specialty Working Groups are asked to consider any combination of task requirements which will enhance access to certification for a greater number of lawyers.

Representation on all specialty committees should mirror the geographic diversity in the profession so that the criteria for appropriate specialist standards accurately reflect the practice of law throughout the province.

3. Importance of trials

Some level of trial experience in the civil litigation field is mandatory, however the numerical requirements must be reduced. The Specialty Working Group for the civil litigation area should include some alternatives to ensure flexibility and remove barriers associated with large urban litigation practice.

There is recognition of the diversity in the area of family law practice but elimination of the trial component is not appropriate at this time. The Specialty Working Group for the family law area should explore the feasibility of sub-categorizing the area into trial and non-trial streams. Arbitration experience in lieu of trials is recognized.

The relevance of trials in the other specialty fields should be realistically determined by the Specialty Working Groups and requirements for certification amended accordingly.

4. Practice concentration requirement

Requirements are to be assessed individually, taking into account the nature of the specialty field and the ability of practitioners in that field to achieve certification, based on a practice concentration requirement set between 30% and 50%. The Specialty Working Groups must provide a rationale with their recommendations for a practice concentration requirement in their specialty field.

5. Universal access to certification for lawyers

Certification must be accessible to all lawyers *who meet the requirements*, regardless of whether they are in private practice or are in-house counsel, or lawyers employed in government or non-governmental organizations or academics.

Re: Specialist Certification Designation

It was moved by Mr. Cherniak, seconded by Mr. Banack that the use of the following designation following the name of a lawyer who has been certified a specialist by the Law Society be approved:

English: Certified Specialist [area of law]
French: Sp9cialiste agr99(e) [domaine de droit]

Carried

Re: Competence Model – Practice Enhancement Component

It was moved by Mr. Cherniak, seconded by Mr. Feinstein that the design for Part 1 of the practice enhancement component of the competence model be approved, namely the self-assessment tool, approved by Convocation in March 2001 as described in Appendix 2 to the Report and further that the Committee's recommendation to defer the development of Part 2 of the practice enhancement component of the competence model be accepted, namely the peer assessment pilot project, until there has been an opportunity to develop and evaluate Part 1.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCE

Re: Foreign Legal Consultant Applications

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Professional Development and Competence asks leave to report:

B.

ADMINISTRATION

B.1. APPLICATION TO BE LICENSED AS A FOREIGN LEGAL CONSULTANT

B.1.1. The following applies to be certified as a foreign legal consultant in Ontario:

Richard Bryan Raymer	State of New York Hodgson Russ LLP

B.1.2. The following applies to be certified as a supervised foreign legal consultant in Ontario:

David Patrick Armstrong	State of New York Skadden, Arps, Slate, Meagher & Flom LLP

B.1.3. Their applications are complete and they have filed all necessary undertakings.

ALL OF WHICH is respectfully submitted

DATED this the 19th day of September, 2002

The Report was voted on and adopted.

REPORTS NOT REACHED

Equity & Aboriginal Issues Committee Report/Comit9 sur l'9quit9 et les affaires autochtones
- Equity Advisory Group – Terms of Reference

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochtones
September 19, 2002

Report to Convocation

Purpose of Report: Policy - For Decision
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Prepared by the Equity Initiatives Department

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee /Comité sur l=équité et les affaires autochtones (EAIC) met on September 5, 2002. In attendance were:

Paul Copeland	(Chair)
Derry Millar	(Vice Chair)
Helene Puccini	(Vice Chair)

Stephen Bindman
Nathalie Boutet (AJEFO representative)
Thomas Carey
Gary Gottlieb
Janet Minor
Andrew Pinto (Chair, Equity Advisory Group/Groupe consultatif en matière d'équité)
Judith Potter
Bradley Wright

Staff: Josée Bouchard, Laura Cohen, Margaret Froh, Fred Grady, Malcolm Heins, Prathima Prashad

2. The Committee is reporting on the following matters:

Policy - For Decision

- Amendments to the Equity Advisory Group/Groupe consultatif en matière d'équité (EAG) Terms of Reference to include an appointment process –page 5.

Information

- Discrimination & Harassment Counsel Semi-Annual Report (January 1, 2002 – June 30, 2002) – page 7.
- Joint submissions of the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones and the Equity Advisory Group/Groupe consultatif en matière d'équité on the report of the Task Force on the Continuum of Legal Education– page 8.
- Promoting Dialogue, Creating Change; Equity and Diversity in the Legal Profession conference – page 9.

POLICY - FOR DECISION

AMENDMENTS TO THE TERMS OF REFERENCE OF THE EQUITY ADVISORY GROUP/GROUPE CONSULTATIF EN MATIÈRE D'ÉQUITÉ (EAG) TO INCLUDE AN APPOINTMENT PROCESS

Request of Convocation

3. Convocation is requested to approve the following amendments to the Terms of Reference of the Equity Advisory Group/Groupe consultatif en matière d'équité (EAG) which reflect the concerns addressed below:

- Sections 2 through 7 of EAG's Terms of Reference will be renumbered 3 through 8, respectively.
- Section 2 of EAG's Terms of Reference will read as follows:

  2. Appointment Process of Member of the EAG

2.1 The EAG will appoint, at the beginning of a selection process, a selection committee of no less than two members of EAG and one member of the legal profession who is not a member of the EAG. A staff member of the Equity Initiatives Department of the Law Society of Upper Canada will provide secretarial support to the selection committee.

2.2 The selection committee will adopt selection criteria, approved by the EAG, consistent with the Terms of Reference.

2.3 The EAG will invite applications for appointment to the EAG by announcing vacancies using various forms, including announcing in the Ontario Reports, emailing and/or targeted mailings to particular communities. The announcement will invite members of the profession to forward a curriculum vitae and letter of interest to the Equity Advisor of the Law Society of Upper Canada. The Equity Advisor will forward copies of the curriculum vitae and letter of interest to the Chair of the selection committee of the EAG.

2.4 The selection committee, guided by the selection criteria, will review each application and recommend candidates for appointment to EAG. The selection committee will support each recommendation by a rationale indicating how the candidate meets the criteria and the nature of the community involvement.

2.5 The applications that do not comply with the application process will not be reviewed.

2.6 EAG will consider the selection committee=s recommendations and approve the recommendation of candidates by consensus. In the event that EAG cannot arrive at a consensus, EAG will approve the recommendation based on a two-third majority vote of EAG=s membership.

2.7 EAG will recommend the candidates to EAIC for approval.

2.8 EAIC will forward approved names of new EAG members to Convocation along with brief biographical information.

The terms of reference, with amendments, are attached as Appendix A.

Summary of Issue

4. In February 2000, Convocation approved Terms of Reference for the EAG. The Terms of Reference did not include an appointment process for new EAG members. However, the practice followed by EAG to appoint new members is described in the Committee's report to Convocation dated February 11, 2000, and is as follows:

- Announcements appear in the Ontario Reports inviting members of the profession interested in joining EAG to forward a curriculum vitae and a letter of interest to the Equity Advisor.
- EAG adopts selection criteria.
- A selection committee, including a member of the legal profession who is not a member of EAG, is established by EAG to review and rank applicants.
- The selection committee makes recommendations to EAG. The recommendations are approved by the Committee.
- The Committee forwards the approved names of new EAG members to Convocation for information purposes.

5. At its meeting of June 26, 2002, the EAG approved amendments to its Terms of Reference to include an appointment process for members of EAG. The proposed amendments are consistent with the practice in place for appointing new members of EAG.

6. At its meeting of September 5, 2002, the Committee approved amendments to the Terms of Reference of EAG (presented at Appendix A) and requests Convocation to approve the amendments.

FOR INFORMATION

DISCRIMINATION & HARASSMENT COUNSEL SEMI-ANNUAL REPORT

7. The Committee submits the Discrimination & Harassment Counsel Program's semi-annual report for the period of January 1 to June 30, 2002 to Convocation pursuant to Section 5 of By-Law 36. The report is presented at Appendix B.

8. The report indicates that the Discrimination & Harassment Counsel received, during the reporting period, approximately 40 calls per month, for a total of 237 calls. This represents an increase in calls from the last reporting period. Eighty percent of the calls were within the mandate of the program. A quarter of the calls continue to deal with sexual and personal harassment. Women generated the majority of the calls. The other areas were calls regarding discrimination on the basis of disability (11%), religion (6%), race (5%) and sexual orientation (5%). Members of the public generated a majority of the calls (153 of 237 or 65%). There has been an increase in the number of calls received from lawyers (35% of the calls).

9. Sixteen files were opened regarding complaints and matters requiring follow-up. Nine of these files have been closed with the following resolutions: 2 matters through internal or external processes, 1 with a complaint to the Law Society, 2 through intervention by the Discrimination & Harassment Counsel and 4 by providing information.

10. As of June 30, 2002, $39,133.48 has been spent on the program. The budget for 2002 is $100,000.

11. The Discrimination & Harassment Counsel does not recommend policy changes to the program at this time.

WRITTEN SUBMISSIONS ON THE REPORT OF THE TASK FORCE ON THE CONTINUUM OF LEGAL EDUCATION

12. At its September 5, 2002 meeting, the Committee approved joint written submissions by the Committee and EAG on the report of the Task Force on the Continuum of Legal Education (the Task Force). The Committee/EAG's joint written submissions will be presented to the Task Force. They are presented to Convocation, at Appendix C, for information purposes.

Background

13. In July 2001, the Task Force on the Continuum of Legal Education received Convocation's approval to focus on the continuum within the jurisdiction of the Law Society, namely the period between law school graduation and the Call to the Bar. On April 25, 2002, the Task Force on the Continuum of Legal Education presented for Convocation's consideration an interim report that proposes a fundamental change in the way we currently ready candidates for their Call to the Bar.

14. The principal features of the reformed system recommended are as follows:

a) The Law Society will no longer teach substantive law in the BAC. Instead, it will focus on its regulatory obligation to establish a licensing process that ensures candidates demonstrate pre-determined standards of competence and an understanding of professionalism, including ethics, in the practice of law.
b) Although the Law Society will no longer teach substantive law, it will continue to prepare and provide the reference Materials for the subjects on which the candidates will be examined.

c) Licensing examinations, developed for the Law Society by professional educators, will test legal knowledge and analytical capabilities.
d) The Law Society will continue to teach professional responsibility as part of its many-pronged approach to nurturing the ethical values upon which the honour of the profession depends.
e) There will be greater flexibility built into the system, with licensing examinations and the professional responsibility course offered three times a year.
f) The Law Society will renew its commitment to the articling process and will seek ways to foster creative innovation, reinforce the mentorship aspect of articling and encourage collaboration among small or rural law firms to provide students with the opportunity for a meaning full articling experience.
g) The redesigned licensing process will continue to reflect the Society's firm commitment to the goal of improved access to, as well as equity and diversity within, the legal profession.

15. On April 25, 2002, Convocation decided to:

Permit the Task Force to seek input from lawyers, legal organizations, law schools, BAC section heads and faculty and students on the direction set out in the report.

16. Convocation also referred the report back to the Committee for its input on the direction set out in the Task Force Report.

17. The Committee and the Equity Advisory Group (EAG) have prepared joint submissions outlining the equity implications of the proposed model and recommending the integration, within the Task Force Report, of an analysis of equity implications (presented at Appendix C).

PROMOTING DIALOGUE, CREATING CHANGE CONFERENCE

18. On November 21-23, 2002, the Law Society of Upper Canada, with financial support from the Department of Canadian Heritage, will be hosting a national gathering of stakeholders in the legal profession to discuss various policy and program initiatives undertaken in legal institutions and associations across the country that promote equity and diversity in the legal profession.

19. Attendance at and participation in the national gathering is by invitation only. The three main objectives of the *Promoting Dialogue, Creating Change: Equity and Diversity in the Legal Profession* are:

- to provide a forum for informed dialogue on equity and diversity issues facing the legal profession;
- to bring together key stakeholders in the legal profession to share information on past and current policy and program initiatives to address equity and diversity issues; and
- to encourage the development of collaborative strategies amongst various stakeholders for future policy and program development.

20. Information on the conference is presented at Appendix D.

APPENDIX A

TERMS OF REFERENCE OF EQUITY ADVISORY GROUP/GROUPE CONSULTATIF EN MATIÈRE D=ÉQUITÉ *WITH* AMENDMENTS

The changes are highlighted

Terms of Reference:

1. Mandate

To assist the Equity and Aboriginal Issues Committee/Comité sur l=équité et les affaires autochtones, in the development of policy options for the promotion of equity and diversity in the legal profession by:

- identifying and advising the Committee on issues affecting equity seeking communities, both within the legal profession and relevant to those seeking access to the profession;
- providing input to the Committee on the planning and development of policies and practices related to equity, both within the Law Society and the profession;
- commenting to the Committee on Law Society reports and studies relating to equity issues within the profession; and

Organization and Structure

2. Appointment Process of Member of the EAG

2.1 The EAG will appoint, at the beginning of a selection process, a selection committee of no less than two members of EAG and one member of the legal profession who is not a member of the EAG. A staff member of the Equity Initiatives Department of the Law Society of Upper Canada will provide secretarial support to the selection committee.

2.2 The selection committee will adopt selection criteria, approved by the EAG, consistent with the Terms of Reference.

2.3 The EAG will invite applications for appointment to the EAG by announcing vacancies using various forms, including announcing in the Ontario Reports, emailing and/or targeted mailings to particular communities. The announcement will invite members of the profession to forward a curriculum vitae and letter of interest to the Equity Advisor of the Law Society of Upper Canada. The Equity Advisor will forward copies of the curriculum vitae and letter of interest to the Chair of the selection committee of the EAG.

2.4 The selection committee, guided by the selection criteria, will review each application and recommend candidates for appointment to EAG. The selection committee will support each recommendation by a rationale indicating how the candidate meets the criteria and the nature of the community involvement.

2.5 The applications that do not comply with the application process will not be reviewed.

2.6 EAG will consider the selection committee=s recommendations and approve the recommendation of candidates by consensus. In the event that EAG cannot arrive at a consensus, EAG will approve the recommendation based on a two-third majority vote of EAG=s membership.

2.7 EAG will recommend the candidates to EAIC for approval.

2.8 EAIC will forward approved names of new EAG members to Convocation along with brief biographical information.

3. Membership

3.1 The Advisory Group has no fewer than 15 members and no more than 19 members, with at least one member who may be a member of the Equity and Aboriginal Issues Committee/comité sur l=équité et les affaires autochtones.

3.2 Members have direct experience or commitment to access and equity for equity seeking communities, including but not limited to communities of ethno-racial people, people of colour, immigrants and refugees, people with disabilities, gays, lesbians, bisexuals, transgenders, and women. Such experience is in areas of employment equity, access to the legal system, human rights; anti-racism, anti-oppression training; managing access and equity plans, or social justice issues

3.3 The membership reflects gender parity and balance among the various equity seeking communities.

4. The Advisory Group has a chair and a vice-chair, who are named by the Advisory Group members.

5. Meetings

5.1 The Advisory Group meets once a month, [except in the months of July and August], with schedules and agendas being established by the co-chairs in consultation with staff and the members of the Advisory Group.

5.2 Special meetings may be convened by the chair.

5.3 Members must attend meetings regularly either in person or by electronic means such as teleconference.

5.4 Failure to attend more than three consecutive meetings without explanation constitutes resignation from the Advisory Group.

6. Quorum

6.1 Four members of the Advisory Group constitute a quorum for the purposes of the transaction of business.

7. Term of Membership

7.1 The term of membership is three years, for a maximum of two consecutive terms.

7.2 To maintain continuity, not more than half the membership is changed in any year.

8. Staff

8.1 Research and administrative support is provided by the Law Society=s Equity

TERMS OF REFERENCE OF EQUITY ADVISORY GROUP/GROUPE CONSULTATIF EN MATIÈRE D=ÉQUITÉ *BEFORE* AMENDMENTS

Terms of Reference:

1. Mandate

To assist the Equity and Aboriginal Issues Committee/comité sur l=équité et les affaires autochtones, in the development of policy options for the promotion of equity and diversity in the legal profession by:

- identifying and advising the Committee on issues affecting equity seeking communities, both within the legal profession and relevant to those seeking access to the profession;
- providing input to the Committee on the planning and development of policies and practices related to equity, both within the Law Society and the profession;
- commenting to the Committee on Law Society reports and studies relating to equity issues within the profession; and

Organization and Structure

2. Membership

2.1 The Advisory Group has no fewer than 15 members and no more than 19 members, with at least one member who may be a member of the Equity and Aboriginal Issues Committee/comité sur l=équité et les affaires autochtones.

2.2 Members have direct experience or commitment to access and equity for equity seeking communities, including but not limited to communities of ethno-racial people, people of colour, immigrants and refugees, people with disabilities, gays, lesbians, bisexuals, transgenders, and women. Such experience is in areas of employment equity, access to the legal system, human rights; anti-racism, anti-oppression training; managing access and equity plans, or social justice issues

2.3 The membership reflects gender parity and balance among the various equity seeking communities.

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7. Staff

7.1 Research and administrative support is provided by the Law Society=s Equity

APPENDIX B

DISCRIMINATION & HARASSMENT COUNSEL PROGRAM
SEMI-ANNUAL REPORT:
JANUARY 1, 2002- June 30, 2002

Submitted to
THE LAW SOCIETY OF UPPER CANADA

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DISCRIMINATION & HARASSMENT COUNSEL PROGRAM
SEMI-ANNUAL REPORT
JANUARY 1, 2002 - JUNE 30, 2002

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EXECUTIVE SUMMARY

This report covers the activities of the *Discrimination & Harassment Counsel (DHC) Program* from January 1, 2002 to June 30, 2002.

During this reporting period, I received approximately 40 calls per month for a total of 237 calls. This represents an increase in calls from the last reporting period when I received on average 30 calls per month. February and April were the most intense months with 50 or more calls per month. January was the slowest month with only 24 calls.

Of the 237 calls, the majority (186 or almost 80%) were within the mandate of the Program. This represents a slight decrease from the last reporting period when approximately 90% of the calls were within the mandate.

A quarter of the calls continue to deal with sexual and personal harassment. The vast majority of these calls were generated by women. The next most significant areas were calls regarding discrimination on the basis of disability (11%), religion (6%), race (5%), and sexual orientation (5%).The calls relating to discrimination on the basis of disability were fairly evenly divided between men and women. However, virtually all of the calls regarding racial discrimination were generated by men compared to the calls regarding discrimination on the basis of religion and sexual orientation which were generated almost exclusively by women.

Most of the calls (153 of 237 or 65%) were generated by members of the public. However, there has been a dramatic increase in the number of calls received from lawyers which accounted for 35% of all calls in this reporting period compared with 19% from the last reporting period. This increase is an encouraging sign that members of the profession are knowledgeable about the Program and willing to access the services offered.

Although to date, socio-economic data has not been collected, the available information shows that the majority of the callers are English speaking, female, and members of the public. Typically these women are either clients of lawyers or employees in law firms. A questionnaire has been developed to collect more comprehensive data from the callers such as age, education, income, and race. This information will be included in the next reporting period (July 1 - December 31, 2002).

Sixteen files were opened regarding complaints and matters requiring follow up. To date, nine of these files have been closed with the following resolutions:

1. 2 matters were resolved through internal or external processes, such as a grievance or a complaint to the Ontario Human Rights Commission;

2. 1 file was resolved with a complaint to the Law Society which resulted in a Discipline Hearing;

3. 2 files were settled through successful intervention of the DHC;

4. 4 files were resolved by providing the requested information;

There are currently 34 open files, including 7 ongoing files from this reporting period.

DIRECT SERVICES

Overview of Calls

From January 1, 2002 to June 30, 2002 I received 237 calls generated by 159 callers. Of these calls, 186 fall within the mandate of the Program. This figure refers to all calls from people with either a specific complaint requesting direct services, or requests for information about the Program.

Calls from members of the public continue to out-pace calls from members of the profession at a rate of 2:1 (153 calls from the public compared to 84 calls from lawyers). As well, significantly more women than men continue to

contact the Program, however the ratio has decreased from 3:1 to 2:1, both among calls from the public and calls from the profession. Callers are predominantly English speaking, however I did receive approximately eight calls from French speaking individuals.

	2002[1]	2001[2]	1999-2000[3]
Total number of calls received:	237	366	582
Total number of calls w/in mandate	186	325	430
Total number of individual callers:	159	295	469
Total number of female callers:	102	218	263
Total number of male callers:	57	77	91

Total number of calls from members from the profession (lawyers, law students):

		2002 (6 mos)	2001 (12 mos)	1999-2000 (14 mos)
a.	F	51	53	52
b.	M	33	18	27

Total number of calls from the public:

a.	F	98	165	267
b.	M	55	59	93

The monthly breakdown of calls for this reporting period is set out in "Appendix I" to this Report. Appendix "II" provides a breakdown based on subject areas of the calls within the mandate.

Appendix I: Number of Calls Received Each Month

On average, I received approximately 40 calls per month. February and April were the busiest months with 50 or more calls each month. January was the slowest month with only 24 calls.

Appendix "II": Breakdown of Calls Within the Mandate

Approximately a quarter of the calls were complaints, usually by women, of sexual and personal harassment (46 of 186).

The next most significant area was discrimination based on disability where I received 22 calls in total. Men and women complained in even numbers in this category.

I received 12 calls regarding racial discrimination, 11 calls regarding discrimination on the basis of religion, and 10 calls regarding discrimination on the basis of sexual orientation. Except for one caller, all of the calls involving racial discrimination were generated by men, whereas women generated virtually all of the calls involving discrimination on the basis of religion and sexual orientation.

Requests for general information about the DHC Program, including requests for specific information such as a copy of the *Rules of Professional Conduct*, or a *Model Policy*, accounted for 53 of the calls within the mandate (28%). Only 6 calls were received regarding requests for presentations and/or training.

Complaints

[1]This figure refers to calls received in the first 6 months of 2002, ie. January 1 - June 30, 2002.

[2]This figure refers to all calls received in 2001.

[3]This figure refers to calls received in the first 14 months of the Program's operation, ie. November 1999 - December 31, 2000.

ii. Number and Type

During this reporting period I opened 16 files.[4] Of these, 13 involved complaints within the mandate, 2 involved requests for assistance with problems involving the Law Society, and one involved a matter outside the mandate of the Program.

The breakdown of the 15 matters within the mandate is as follows:

a. sexual harassment
F 3
M 0

b. discrimination - disability
F 3
M 0

d. discrimination - gender
F 2
M 0

e. discrimination - race
F 0
M 2

f. discrimination - sexual orientation
F 2
M 0

g. discrimination - religion
F 1
M 0

h. problems with the Law Society
F 1
M 1

ii. Services Provided

Of the 16 files opened during this reporting period, the services provided include the following:

Information and Advice including what resources are available, copies of LSUC materials, reviewing a firm's existing policies and procedures and recommending changes: all 16.

Coaching including tips on how to handle the problem, who to approach, strategies, and possible responses: 3.

Support including ongoing contact through an external resolution process (usually a LSUC complaint) and/or attendance at the hearing: 6.

Mediation including negotiations with both parties to achieve a satisfactory result: 2.

[4]The decision to open files is a subjective one based on whether there will be ongoing contact with a caller requiring a file to be maintained. As such, this figure is not indicative of the number of matters dealt with under the mandate of the Program. Instead, reference should be made to the total number of calls within the mandate (186) during this reporting period.

The individuals involved in these matters are comprised of members of the profession (6 lawyers and 3 law students), clients (6) and employees (1).

Only four matters involved men. Two were complaints of racial discrimination. One was a complaint of sexual harassment on behalf of a female third party and one involved a complaint about the Law Society itself. The other matters all involved women.

The complaints made by clients involved allegations of sexual harassment (2), discrimination on the basis of race and disability (1 in each category), problems with the Law Society (1) and one matter outside the mandate of the Program.

iii. Open Files - Ongoing

Of the 16 files opened during this reporting period, 7 are ongoing and involve the following areas:

d.	Discrimination - Disability	2
b.	Discrimination-Gender	1
c.	Discrimination-Sexual Orientation	1
d.	Discrimination-Religion	1
e.	Problems with the LSUC	2

iv. Closed Files

During this reporting period, 9 files were closed. These files dealt with the following matters:

Sexual Harassment	3
Discrimination- Disability	1
Discrimination - Gender	1
Discrimination - Race	2
Discrimination - Sexual Orientation	1
Matter O/Side Mandate	1

The complaints involving allegations of racial discrimination are from a student and a client. The student was facing an administrative problem which was resolved through negotiation. The client, who is of Eastern European descent, felt the lawyer discriminated against him because of his accent and ethnic origin. A resolution was negotiated by the DHC, however, the client chose not to accept it and instead will pursue his matter through other avenues.
Of the 9 closed files, the resolutions were as follows:

Internal Process[5]:	1 (Matter settled; confidential terms)
External Process[6]:	1 (The matter is still ongoing and involves a complaint of systemic discrimination with the OHRC)
LSUC:	1 (Matter resolved through the LSUC Discipline Process)
Mediation[7]:	2 (Both settled; confidential terms)

[5]Internal processes include a complaint pursuant to the organization's internal policy or a grievance.

[6]External processes include filing a complaint with the Ontario or Canadian Human Rights Commission or filing a civil law suit.

[7]Mediation refers to formal and informal complaints to the DHC Program where the resolution was achieved either through negotiation, conciliation, or mediation.

Information Provided: 4 (All matters completed)

PROMOTION AND PUBLICITY

The promotional activities for this reporting period were sparse. In February, I attended the Brant Law Association Annual General Meeting where I presented the Program to approximately 50 lawyers and Judges.

In May, I attended the third annual inter-provincial meeting of Law Society Ombudspersons. This meeting was hosted by the Alberta Equity Ombudsperson in Edmonton.

In addition, information packages were prepared and distributed to more than 30 Sexual Assault Centres in Ontario. This initiative was prompted, in part, by the efforts of the Equity Initiatives Department to establish a link between the Centres, the Law Society and the DHC Program to ensure that complainants in Harassment and Discrimination Discipline Hearings at the Law Society have a support person available for the hearing.

There are two exciting initiatives that I will elaborate on in my next report. First, I have been invited to present the Program to lawyers and members from North Bay, Timmins, Sault Ste. Marie, Parry Sound and Sudbury at a Symposium on Sexual Abuse in November. Second, I am working with the Communications Department to develop a web page for the Program which should be available by the end of September.

INTER-PROVINCIAL LAW SOCIETY OMBUDS MEETING

In 2000, I attended the first inter-provincial meeting of Law Society Ombudspersons in Vancouver. This meeting was hosted by the BC Law Society and the BC Discrimination Ombudsperson. The Alberta Equity Ombudsperson also attended. Last year, I hosted the second annual meeting in Toronto with the same participants (BC, Alberta, Ontario). These meetings have been extremely helpful in sharing ideas, comparing programs, and discussing our work.

This year, the third annual meeting was held in Edmonton. In addition to the Ombudspersons from BC, Alberta and Ontario, we were joined by the Ombudspersons from Manitoba and Saskatchewan. These latter two Programs are pilot projects with their respective Law Societies.

While all of the Programs operate arm's length from their respective Law Societies, only Manitoba and Ontario offer the services to members of the public. The other Programs are restricted to members of the profession and law firm staff, which means that their Programs do not handle complaints from clients or other members of the public. As well, the mandate of each Program differs slightly depending mostly on the staff composition of the Law Society.

The Ontario Program, which serves 30,000+ lawyers and the general public is by far the busiest with on average 40 calls per month compared to 13, 10, and 8 for BC, Alberta, and Manitoba respectively.

We are in the process of developing a comparative chart outlining the features of each Program. I will include this information in my report once it is available.

APPENDIX "I"

NUMBER OF CALLS RECEIVED EACH MONTH[8]

Month	Total Calls	Calls w/i Mandate	Calls o/s Mandate
January	24	20	4
February	56	42	14
March	30	23	7
April	50	44	6
May	35	23	12
June	42	34	8
Totals	237	186	51

APPENDIX "II"
BREAKDOWN OF CALLS WITHIN THE MANDATE

During this reporting period, 186 calls were within the mandate as follows:

b. Sexual Harassment
F: 32
M: 10[9]

c. Personal Harassment
F: 3
M: 0

c. Discrimination - Disability
F: 11
M: 11

d. Discrimination - Gender
F: 3
M 1

e. Discrimination - Race
F: 1
M: 11

f. Discrimination - Religion
f. 10
M: 1

[8]These figures refer to the number of calls *received*, not the number of individuals calling. In some instances, particularly where the caller required ongoing assistance, one person generated several calls. Also, these figures do not refer to the number of outgoing calls made by the DHC in relation to matters within the DHC mandate.

[9]Except for one caller, all of these calls were from men complaining on behalf of a woman who had experienced sexual harassment or from men responding to a complaint of sexual harassment.

g. Discrimination - Sexual Orientation
F: 10
M: 0

h. Information
F: 41
M: 12

vii. Training/Presentations
F: 4
M: 2

j. Administrative
F: 13
M: 10

APPENDIX "III"
OVERVIEW OF TRENDS

- Overall increase in number of calls (40/month compared to 30/month in the last reporting period)
- Slight decrease in the number of calls within the mandate (80% compared to 90% in the last reporting period)
- Double the number of lawyers contacting the program (35% of calls within the mandate this reporting period compared with 19% in the last reporting period)
- Increase in the number of men contacting the Program. Although significantly more women continue to contact the Program, the ratio is now to 2:1 women to men, compared with 3:1 from all previous reporting periods
- More areas of discrimination and harassment identified, for example, discrimination on the basis of gender, sexual orientation, and religion

APPENDIX "IV"
BUDGET FOR 2002

The budget for 2001 was $100,000.00. As of June 30, 2002 the funds have been spent as follows:

Fees	$32,402.50
Disbursements	$ 4170.84
GST	$ 2,560.14
TOTAL	$39,133.48

APPENDIX C

Task Force on the Continuum of Legal Education

Comité sur l'équité et les affaires autochtones and
Equity Advisory Group/Groupe consultative en matière d'équité

September 5, 2002

Introduction

1. At its April 25th, 2002 meeting, Convocation referred the Task Force Report of the Task Force on the Continuum of Legal Education, dated April 25, 2002 (the Task Force Report), to the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (EAIC) for consideration.

2. At its May 29th , 2002 meeting, the Equity Advisory Group/Groupe consultatif en matière d'équité (EAG) decided that it would draft written submissions on the Task Force Report, outlining the equity implications of the proposed model.

3. The Task Force Report recommends that :
   - The Law Society no longer teach substantive law in the Bar Admission Course (BAC).
   - The Law Society continue to prepare and provide reference materials.
   - Licensing examinations be used to test legal knowledge and analytical capabilities.
   - The Law Society continue to teach professional responsibility.
   - Licensing examinations and the professional responsibility course be offered three times a year.
   - The Law Society renew its commitment to the articling process.
   - The Law Society continue its commitment to improved access and equity and diversity within the profession.

4. EAIC and EAG present the following joint submissions outlining the equity implications of the proposed model.

5. EAIC and EAG's submissions address the following:

   a. General comments on the Task Force Report.
   b. Equity implications of the proposed model.

a. General Comments on the Task Force Report

6. As mentioned in the Task Force Report, the extent to which an accreditation process is open and accessible depends upon a number of factors, among the most important of which are the cost and duration of the admission process. EAIC and EAG recognize that a reduction in cost and duration of the process would be beneficial to equity-seeking, Mature, Aboriginal and Francophone students. However, the elimination of the teaching component of the BAC would have other implications for equity-seeking, Mature, Aboriginal and Francophone students. EAIC and EAG submit that, assuming the adoption of the Task Force recommendations, the Law Society should ensure that proper institutional mechanisms are in place to ensure support for these students.

7. EAIC and EAG agree with the suggestion in the Task Force Report that the admission process must be both reliable as a measure of entry-level competence and free of unreasonable barriers to admission for all communities in the profession, especially those candidates for admission from groups currently under-represented in the legal profession.

8. Groups currently under-represented in the legal profession include Aboriginal Peoples, Francophones, women, persons with a disability, persons from racialized groups, gays, lesbians, bisexuals and transgendered[1]. Studies also indicate that Mature students face barriers in education and in accessing the legal profession.

9. The Task Force Report suggests at paragraph 55 that "The current approach of assessing separately eight substantive areas would be discontinued and replaced with a barrister's examination focusing on advocacy-related areas; a solicitor's examination focusing on solicitor-related areas; and a professional responsibility and practice management examination." However, without further information on exam content and subject matter, it is difficult to assess the impact of the proposed model on law school curriculum or on equity-seeking communities.

10. The Task Force Report does not provide statistics to support the statement made at paragraph 57 that "a significant proportion of the students already do not attend lectures or seminars and yet are able to successfully complete the current examinations". It would be useful to provide an analysis of statistics provided by the Professional Development & Competence department of the Law Society (see Appendix I). The BAC Report on Attendance and Exam Results for 2001 indicates that a significant proportion of students still attend BAC, suggesting that students find the courses valuable. However, there seems to be no correlation between level of attendance and passing rate of students. With the elimination of the teaching component of the BAC, the Task Force Report should underline the importance of providing alternate means of learning, such as tutorials, help centers including the availability of a help line to assist students with questions or access to materials through electronic means.

11. The Task Force Report covers the issue of privatization of courses in the absence of the BAC by essentially stating that this is unlikely to occur. However, EAG and EAIC are concerned that privatization of courses is likely to occur. The Task Force Report should consider ways to prevent privatization of courses and , in the event privatization occurs, what measures may be implemented to ensure access for all students to these programs. The ramifications of preferential access based on a student's ability to afford private instruction would, in a way, defeat one of the purposes of the elimination of the teaching component.

12. The Task Force Report also suggests that the offices of the Law Society in Ottawa would be sold. It is unclear whether the Professional Responsibility course, and other components of the remaining BAC, such as exam writing and the Student Success Centre, would be located at the Ottawa law school or elsewhere. EAIC and EAG recognize the value of partnerships with law schools but emphasize the importance of maintaining student support services for BAC students. Student support services can be administered by the Law Society or, in the alternative, the Law Society could work with law schools to ensure that university student support services are accessible to BAC students. In adopting the latter approach, it is important to recognize that if law schools were to allow BAC students access to their student support services, this would likely have a significant impact on the already high demands on law school student support services and would likely require an increase in resources.

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[1] In 1996, 7.3 percent of lawyers in Ontario were non-white, compared to 17.5 percent of the population. (The term non-white is used in the Ornstein report. It will be used here only when referring to statistics in the Ornstein report). Only 0.6 percent of lawyers were Aboriginal, compared to 1.4 percent of the population. 30.1 percent of lawyers in Ontario were women and 2.8 percent of lawyers in Ontario were Francophone. Among the youngest lawyers in Ontario there is a noticeable increase in the proportion of lawyers from all racialized groups except for Southeast Asians and Filipinos, who are almost absent. Thirteen percent of Ontario lawyers between 25 and 34 years of age are non-white, compared to 5.0 percent of lawyers 35-44, 3.7 percent of lawyers 45-54, and 7.1 percent of lawyers between 55 and 64. Michael Ornstein, *Lawyers in Ontario: Evidence from the 1996 Census, A Report for the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, 2001).

In 2001, the self-identified group membership distribution of the Bar Admission Course was: 5.3 percent Francophone, 1.0 percent persons with disabilities, 18.2 % visible minority, 1.4 percent gay/lesbian, 1.5% Aboriginal, 8.0 mature student.

b. Equity Implications of Proposed Model

13. The most significant recommendation of the Task Force Report is the elimination of the teaching component of the BAC. Clearly, there are equity implications to taking such a step.

14. Assuming that the proposed model is adopted, EAIC and EAG make the following submissions to ensure access of equity-seeking communities, Aboriginal Peoples and Francophones to the legal profession.

Student Support

15. Students from equity-seeking communities, Mature, Aboriginal and Francophone students are likely to benefit from classroom education programs and interaction with instructors. Before proceeding with the elimination of the teaching component of the BAC, EAIC and EAG believe that the Law Society should study both the positive and negative value of the teaching component of the present BAC model for equity-seeking, Mature, Aboriginal and Francophone students and the impact of eliminating the teaching component of the BAC on those students.

16. The Task Force recommendations provide that the current support mechanisms to assist candidates in overcoming unreasonable barriers to the Call to the Bar be maintained. These include tutoring, tutorials on examination writing, mentoring and accommodations for examinations. The support services offered in the BAC have proven beneficial to the success of equity-seeking, Mature, Aboriginal and Francophone students in the present BAC[2]. It is believed that, with the elimination of the teaching component of the BAC, the student support services should be entrenched, increased and adapted to meet the needs of those students.

17. Further, by not providing students with the opportunity to discuss the materials, ask questions and receive formal instruction, the void will likely be filled by the private sector - causing further financial strain on students.

Format of Course Material

18. The Task Force Report emphasizes that the Law Society would continue to prepare materials on which the exam contents would be based. This may alleviate the need for students to incur the costs of a private company's assistance. It is important, however, that course materials clearly indicate the examinable subject matters. Further, the report does not indicate whether the Task Force anticipates significant increases in costs for materials. This is particularly relevant to students facing economic hardship.

19. It is also important to ensure accessibility of materials for all students by continuing to provide materials in French and English, and by providing materials in French and English in more than one format, such as audio, Braille, electronic (on the internet or disc).

20. Further, assuming that the Task Force Report is adopted, it would be valuable to study the advantages and disadvantages of distance or electronic education tools for students of equity-seeking communities and Mature, Aboriginal and Francophone students. Studies have indicated that there are advantages and disadvantages to electronic and distance learning. (Appendix II – Advantages and Disadvantages of Electronic and Distance Learning)

Professional Responsibility and Practice Management course

21. The maintenance of the teaching component of the Professional Responsibility and Practice Management Course is important. However, the course should be revised to ensure that principles of equity be integrated into

[2] In 1997, a Task Force on Examination Performance inquired into the disproportionate failure rate of aboriginal and visible minority students and students in the French language BAC. Some recommendations from the report were implemented as part of BAC reform including: the creation of Student Success Centre, tutoring, longer writing time per examination, a changed appeal process and changes to the marking method.

all aspects of the course, including the content and structure of the reference materials and of the curriculum, and the approach to pedagogy and student evaluation[3].

The exam method as an evaluation tool for competency

22. The Working Group on Racial Equality in the Legal Profession of the Canadian Bar Association noted, in its report *Racial Equality in the Canadian Legal Profession*, that "probably the biggest barrier with respect to the Bar Admission Course is the prevailing approach that exams are the fairest measure of competence…The exam-based evaluation in Bar Admission Courses fails to consider different learning styles or different ways of demonstrating knowledge and ability.[4]" Relying on one method of student evaluation, such as exams, may create a barrier for some students who do not perform well under those conditions and who have different learning styles[5]. The value of the proposed methods of evaluation, and the various ways of designing and implementing adequate evaluation tools, would have to be studied further.

Location of exams

23. With an increased reliance on exams to assess students' competence, it is important to ensure that they be offered at various locations and at locations that are physically accessible to students. Further, the accommodation policy adopted by the Law Society should continue to apply.

Impact on curriculum in law school

24. The proposed admission process to the legal profession may have an impact on the course selection of students at the law school level. Courses that are not perceived as essential prerequisites to writing the barrister or solicitor examinations, such as history of law, jurisprudence, discrimination law, critical race theory, women and the law, Aboriginal law, critical disability theory, and so on, might not be perceived as important enough to be part of the law school curriculum. It may be valuable to study the impact of the proposed admission process on law school curriculum

25. Assuming that law school curriculum changes as a result of the proposed admission process, it may be valuable to study the impact of law school curriculum changes on the types and areas of legal practice.

Review of the Articling Process

26. The introduction of greater flexibility into the articling program may have a positive impact on students from equity-seeking communities and Mature, Aboriginal and Francophone students. However, assuming the recommendations of the Task Force are adopted, the Law Society should consider reviewing the articling process. Over the years, it has been shown that the articling experience is particularly difficult for students from

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[3] The Equity Initiatives Department has made a preliminary review of the course content, materials and curriculum and has noted that the course does not integrate principles of equity. Accordingly, recommendations have been made to integrate principles of equity throughout the course, materials and curriculum.

[4] Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Legal Profession* (Ottawa: Canadian Bar Association, 1999) at 12 and at 75.

[5] See Task Force on Examination Performance, 1997. Also see studies that indicate that exams reinforce hierarchy of knowledge and teach exclusion (Patricia J. Williams, *The Alchemy of Race and* Rights (Cambridge: Harvard University Press,m 1991) at Chapter 5; Shelina Neallani, "Women of Colour in the Legal Profession: Facing the Familiar Barriers of Race and Sex" (1992) 5 C.J.W.L. 148; Tarel Quandt, "Learning Exclusion: A Feminist Critique of the Dalhousie Law School Experience" (1991). Susan Sturm and Lani Guinier, "The Future of Affirmative Action: Reclaiming the Innovative Ideal" (1996) 84 Calif. L. Rev. 953 observe, in reference to the LSAT, that "these tests and informal criteria making up our meritocracy tell us more about past opportunity than about future accomplishments on the job or in the classroom." (at 959) See also L. Fisher, G. Levine, D. Labrèche and B. Mazer, "Evaluating Student Performance" in which the authors discuss methods of designing and implementing adequate evaluation programs.

equity-seeking communities and Mature, Francophone and Aboriginal students[6] who have more difficulty finding and retaining articles. A process by which the Law Society takes a more active role in obtaining and supervising articles may have to be implemented to ensure that all students have a valuable articling experience.

Costs

27. The proposal seems to indicate that costs will be saved if the Task Force recommendations are adopted. In order to increase accessibility to students, EAIC and EAG recommend that cost savings be used to reduce student fees. A reduction of fees would be consistent with the fact that students would no longer be attending lectures and presentations and would only be paying for materials and the opportunity to take exams.

French Bar Admission Course

28. The Task Force Report does not refer to the French BAC. It is assumed that the Task Force's recommendations to eliminate courses in the BAC include the elimination of courses in French. The Law Society should undertake further study to assess the impact of such measures on Francophone students. The elimination of the BAC courses in French might have an impact on the French Common Law Program of the University of Ottawa and could create a greater need for ongoing continuing legal education programs in French. The Task Force Report might also include recommendations to ensure that students will have the same access as English students to accommodations for French students with a disability, to reference materials in French, to write exams in French and to take the Professional Responsibility course in French. It might be valuable to consult with AJEFO and the French Common Law Program of the University of Ottawa on the implementation of the recommendations.

Recommendations:

EAIC and EAG recommend that the Task Force integrate, within its report, an analysis of equity implications of the proposed model, by including:

1. A description of the solicitor and barrister exams;
2. An analysis of the BAC Report on Attendance and Exam Results to determine whether students attend courses and the correlation, if any, between attendance levels and passing rates of students;
3. An assessment of the positive and negative value of the present teaching component of the BAC for Aboriginal, Mature and Francophone students, and for students from equity-seeking communities;
4. An indication of measures that will be taken by the Law Society to prevent privatization of courses and, in the event of privatization, measures that will be taken by the Law Society to ensure access for all students to private programs;
5. An indication of measures, including availability of resources, that will be taken by the Law Society to maintain access to student support services;
6. A recognition that, with the elimination of the teaching component of the BAC, student support services may have to be increased and adapted to meet new needs of students;
7. An indication of measures, including availability of resources, that will be taken by the Law Society to identify and address student needs;
8. An undertaking that the Law Society will offer all materials and exams in French and English in a format accessible to all students;

[6] The Law Society Placement Office surveys for the years 1994-1995 through to 1998-1999 and for 2000-2001 of incoming bar admission course students reveal that Aboriginal students, visible minority students and students with disabilities were over-represented among students who were without articling placements as of September of the year in which they would be expected to commence articles. The Working Group on Racial Equality in the Legal Profession of the Canadian Bar Association provides examples of barriers faced by people from racialized communities when accessing the articling process. These include bias in interviewing and hiring, difficulty in finding articling positions and discrimination during the articling experience. *Ibid.* at 11 and 76. the Canadian Bar Association's Task Force on Gender Equality in the Legal Profession also identified barriers for women. These include discriminatory recruitment practices and gender discrimination during articling. *Touchstones for Change* (Ottawa: Canadian Bar Association, 1993) at 39.

9. An undertaking that the Law Society will maintain its policy on accommodation of students;
10. An analysis of the advantages and disadvantages of electronic and distance learning for Aboriginal, Mature and Francophone students and students from equity-seeking communities and, where appropriate, an indication of measures that could be taken to remedy the disadvantages;
11. An undertaking that the Law Society will make revisions to the Professional Responsibility and Practice Management Course to ensure that principles of equity be integrated into all aspects of the course;
12. An undertaking that the Law Society will annually assess the impact of using licensing exams as the only method of evaluation on Aboriginal, Mature and Francophone students, and on students from equity-seeking communities, and, if appropriate, make recommendations to address disproportionate impact;
13. An undertaking that the Law Society will assess, within the first five years of implementation of the new model, the impact of the proposed model on law school curriculum, and, if appropriate, make recommendations for change;
14. A commitment that the Law Society will review, on an annual basis, the articling process to identify barriers faced by Aboriginal, Mature and Francophone students and students from equity-seeking communities, and, if appropriate, identify measures that will be taken to address discrimination in articling;
15. An indication that cost saved from the implementation of the revised model will be used to reduce student fees;
16. A commitment that Francophone students will have the same access as English students to reference materials, exams and the Professional Responsibility course in French.

APPENDIX I

BAC REPORT ON ATTENDANCE AND EXAM RESULTS
MAY TO AUGUST 2001

SEPTEMBER TO DECEMBER 2001

APPENDIX II

Advantages and Disadvantages of Electronic and Distance Learning

General Advantages to Electronic Education[7]

- Computer conferencing as a medium allows the opportunity for on-going contact between participants
- Empowerment of students realized by the expectation and enabling of a student to take a visible and meaningful role in the electronic classroom
- Increased potential to build a community of learners which fosters a sense of belonging when directed toward group efforts
- Creation of unique opportunities for participation not found elsewhere i.e. every learner has the opportunity to engage in the dialogue without regard for the structures of time and space
- The less assertive and more reflective students find it easier to participate in discussions, therefore, the interaction that takes place in a computer-conference learning environment is qualitatively better than in the traditional classroom
- No/minimal travel involved
- Flexibility for those students who have other commitments and time constraints
- Students can learn at their own pace and read materials as often as necessary
- Web site designers may incorporate options for different languages

[7] McLean, Scott, & Morrison, Dirk, "Sociodemographic Characteristics of Learners and Participation in Computer Conferencing" (2000) 15 Journal of Distance Education *2*.

General Disadvantages of Electronic Education

- Degree of (dis)comfort students may have with the medium of communication
- Some students lack computer skills and technical knowledge
- Motivation may be lacking without added incentive to be prepared for class each day
- Access to hardware/software, time available for study, and general (home) learning environment[8]
- Students do not always have access to hardware/software
- Variation of how people learn (therefore some will not be comfortable with the on-line mode of presentation, organization, and learning)
- Greater use of e-methods for learning associated with declines in student's communication with family members in the household, size of social circle, and may increase depression and loneliness[9]
- Quality and access to student support is crucial i.e. library resources, tutorials, telephone/live conferencing for Q & A's, etc. .[10]

Students with a Disability

Advantages

- Reduces barriers created by inaccessible facilities
- There are various tools/programs available to accommodate students with a disability i.e. Braille converters, audio players, touch screen, etc. [11]

Disadvantages

- Web sites are not always accessible to students with a disability[12]
- Even with proper hardware/software, a student with a disability may not be able to access the content of a web site because of the site's design[13]
- Students may be limited in their ability to gather basic course information, conduct research, participate in assignments, and participate in the social community of others[14]

Aboriginal Students [15]

Advantages

- Distance education can reduce isolation of students who cannot leave their communities because of family and cultural responsibilities
- Some students may feel more confident in expressing themselves outside of the classroom setting because they are not put on the spot and can think about response before participating

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[8] *Ibid*., at 3.
[9] Facey, Ellen E. "First Nations And Education By Internet: The Path Forward, Or Back?" (2001) 16 Journal of Distance Education 2-11.
[10] Thompson, Gordon , "How Can Correspondence-Based Distance Education Be Improved? A Survey of Attitudes of Students Who Are Not Well Disposed toward Correspondence Study" (1990) 5 Journal of Distance Education 1-7.; May, Susan, "Women's Experiences as Distance Learners: Access and Technology" (1994) 9 Journal of Distance Education 13.
[11] Slatin, John, *Currents in Electronic Literacy: The Imagination Gap: Making Web-based Instructional Resources Accessible to Students and Collegues with Diabilities* (2002) at 1-15.
[12] Rowland, Cyndi, Phd., "Accessibility of the Internet in Postsecondary Education: Meeting the Challenge" (Utah State: Center for Persons with Disabilities, 2000) at 3.
[13] *Ibid.* at 3.
[14] *Ibid,* at 9-12.
[15] Facey, *supra* note 3 at 6-8.

Disadvantages

- Some research points to the fact that Aboriginal Peoples favour face-to-face communication and may be at a disadvantage in phone conferencing or computer mediums
- Access is a baseline issue and includes matters of cost, availability, and competence. The quality of access to electronic and distance learning depends on the quality of the equipment, often related to costs of the equipment.

Women[16]:

Advantages

- Some studies have indicated that distance education offers flexibility to women with children[17]
- Typically more female students enroll in distance education courses[18]

Disadvantages

- Women tend to plan their schedules around needs of their families, resulting in "double-duty" of study and relatively little control over study schedules within their own homes
- Some women do not live in environments that are supportive of studying at home
- Assumptions about women's preferred methods of using technology should be avoided i.e. women do not necessarily find teleconferencing methods more useful than other methods [19]
- Without teaching strategies to counter "invisibility" of students in this delivery mode, the diversity among students may be concealed or overlooked[20]

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

(1) Copy of the BAC Report on Attendance and Exam Results, May to August 2001 – September to December 2001.

(Appendix I, pages 42 – 44)

(2) Copies of draft letters (English and French version) re: Promoting Dialogue, Creating Change: Equity and Diversity in the Legal Profession.

(Appendix D, pages 49 – 50)

Professional Regulation Committee

- Amendment to MAR Policy on Suspensions
- Amendments to By-Laws, 18, 19 and 25
- Proposed New Commentary to Rule 2.04(6) on Spousal/Partner Joint Retainers

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[16] Davie, Lynn E., "Facilitating Adult Learning Through Computer-Mediated Distance Education" (1988) 13 Journal of Distance Education 9.
[17] May, Susan "Women's Experiences as Distance Learners: Access and Technology" (1994) 19 Journal of Distance Education 1.
[18] *Ibid.* at 10.; Burge. Elizabeth, & Lenksyj, Helen , "Women Studying in Distance Education: Issues and Principles" (1990) 5 Journal of Distance Education 2.
[19] *Ibid.* at 9.
[20] *Ibid.* at 10.

CONVOCATION ROSE AT 1:00 P.M.

The Treasurer and benchers had as their guests for luncheon, Orlando Da Silva and Jay Hennick.

Confirmed in Convocation this 31st day of October, 2002

Treasurer