MINUTES OF CONVOCATION

Thursday, 23rd May, 2002
9:00 a.m.

PRESENT:

The Treasurer (Vern Krishna, Q.C., FCGA), Aaron, Arnup, Bindman, Bobesich, Boyd, Braithwaite, Campion, Carey, Carpenter-Gunn, Cass, Chahbar (by telephone), Cherniak, Coffey, Copeland, Crowe, Diamond, E. Ducharme, T. Ducharme, Elliott, Epstein, Feinstein, Finkelstein, Furlong, Go, Gottlieb, Hunter, Lamont, Laskin, Lawrence, Legge, MacKenzie, Manes, Marrocco, Millar, Minor, Mulligan, Murray, Ortved, Pilkington, Porter, Potter, Puccini, Robins, Ruby, St. Lewis (by telephone), Simpson, Swaye, Topp, Wardlaw, White, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer and Benchers congratulated Mr. Arnup who will celebrate his 91st birthday on May 24th.

The Treasurer welcomed to Convocation Mr. Ron Toews, a Bencher of the Law Society of British Columbia and Mr. James Tumbridge, a visiting Fox Scholar.

The Treasurer reported that Mr. Crowe's name was submitted to the Minister of Justice's office for federal appointment to the Judicial Advisory Committee for Ontario (East and North Region).

A Law Society Medal Criteria Committee was appointed by the Treasurer to examine the criteria upon which the medal is granted.

It was moved by Mr. Ruby, seconded by Mr. Wright that the Committee be composed of the following Benchers: John Arnup (Chair), Marion Boyd, Susan Elliott, Laura Legge and Sydney Robins.

Carried

The Treasurer recognized the success of the Special Lectures Series held on April 18th and 19th and extended a special thanks to Kathy Stolarchuk of the Continuing Legal Education department for her efforts in coordinating and organizing this event. Appreciation was also extended to the following staff: Helen Bernstein, Andrea Camenzuli, Sharon Cully, June Gavina, Heather Huckfield, Nicole Nightingale, Cathy Ouellet and Priya Vijayakumar.

The Treasurer reminded Convocation of the annual "Open Doors Toronto" program being held on May 25th and 26th. The program provides the public an opportunity to visit and tour heritage buildings in Toronto including Osgoode Hall.

DIRECTORS, BAR ADMISSION REPORT

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Directors, Bar Admission ask leave to report:

B. ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, May 23rd, 2002:

Emily Sarah Rivkah Abraham	Bar Admission Course
Fauzia Jahan Ahmed	Bar Admission Course
Claudy Delné	Bar Admission Course
James Scott Douglas	Bar Admission Course
Carol Ann Bernadette Foley	Bar Admission Course
Karl Yemandra Girdhari	Bar Admission Course
Melisa Paige Gust	Bar Admission Course
Duane Alan Jacobs	Bar Admission Course
Annette Vidya Sheila Kumar	Bar Admission Course
John Peter Nelson	Bar Admission Course
Muhammad Masood Qadar	Bar Admission Course
Christopher Colin Rootham	Bar Admission Course
Adrian Shaikh	Bar Admission Course
Yadvinder Singh Toor	Bar Admission Course
Todd Michael Wharton	Bar Admission Course
Caroline Ann Yull	Bar Admission Course

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

B.1.4. The following candidates have completed successfully the Transfer Examination or Phase Three of the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, May 23rd, 2002:

Anthony Casullo	Province of Quebec
Maureen Elizabeth Killoran	Province of Alberta
Angela Marie Powell	Province of New Brunswick

ALL OF WHICH is respectfully submitted

DATED this the 23rd day of May, 2002

It was moved by Mr. E. Ducharme, seconded by Mr. Hunter that the Directors, Bar Admission Report be adopted.

Carried

NOMINATION OF TREASURER

The Secretary reported that there was one nomination received for the Office of Treasurer by 5:00 p.m. on the second Thursday in May. Mr. Clayton Ruby and Mr. Todd Ducharme nominated Vern Krishna for the Office of Treasurer of the Law Society for 2002 - 2003. The nomination was seconded by Mr. E. Ducharme and Ms. Janet Minor.

There being no other nominations, Professor Vern Krishna was elected as Treasurer.

The Treasurer expressed his appreciation and thanked Benchers and staff for their support over the past year.

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Directors, Bar Admission Report were presented to the Treasurer and called to the Bar. They were then presented by Mr. Lamont to Justice Romain W. M. Pitt to sign the Rolls and take the necessary oaths:

Emily Sarah Rivkah Abraham	Bar Admission Course
Fauzia Jahan Ahmed	Bar Admission Course
Claudy Deln9	Bar Admission Course
James Scott Douglas	Bar Admission Course
Carol Ann Bernadette Foley	Bar Admission Course
Karl Yemandra Girdhari	Bar Admission Course
Melisa Paige Gust	Bar Admission Course
Duane Alan Jacobs	Bar Admission Course
Annette Vidya Sheila Kumar	Bar Admission Course
John Peter Nelson	Bar Admission Course
Muhammad Masood Qadar	Bar Admission Course
Christopher Colin Rootham	Bar Admission Course
Adrian Shaikh	Bar Admission Course
Yadvinder Singh Toor	Bar Admission Course
Todd Michael Wharton	Bar Admission Course
Caroline Ann Yull	Bar Admission Course
Anthony Casullo	Transfer, Province of Quebec
Maureen Elizabeth Killoran	Transfer, Province of Alberta
Angela Marie Powell	Transfer, Province of New Brunswick

MOTION – DRAFT MINUTES

It was moved by Mr. Wright, seconded by Mr. Crowe that the Draft Minutes of Convocation of April 25th, 2002 be approved.

Carried

MOTION – APPOINTMENT TO BOARD OF DIRECTORS OF THE FEDERATION OF LAW SOCIETIES OF CANADA

It was moved by Mr. Wright, seconded by Mr. Crowe that George Hunter be appointed to the Board of Directors of the Federation of Law Societies of Canada.

Carried

INTER-JURISDICTIONAL MOBILITY COMMITTEE REPORT

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

Inter-Jurisdictional Mobility Committee
May 23, 2002

Report to Convocation

Purpose of Report: Policy - For Decision

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

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Committee met on May 13, 2002. Committee members participating were: Gavin MacKenzie (Vice-Chair), Gillian Diamond, George Hunter and Niels Ortved. Edward Ducharme and Malcolm Heins also participated.

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

- Report of the Federation of Law Societies' Task Force on Mobility

FEDERATION OF LAW SOCIETIES' TASK FORCE ON MOBILITY

Request to Convocation

1. Convocation is requested to consider the report of the Federation of Law Societies' Task Force on Mobility and, if appropriate,

    a. approve the report, including the framework proposed for a protocol on temporary and permanent mobility as set out in paragraph 61(a)-(s) of the report; and

    b. authorize 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.

Background

2. On November 26, 2001 the Law Society's Committee on Inter-Jurisdictional Mobility (the "Committee") provided Convocation with an information report on the work of the Federation of Law Societies' Task Force on Mobility and on the views taken by the Committee with respect to the issues being considered by the Task Force.

3. The Committee provided Convocation with its preliminary view of an appropriate approach to enhanced mobility, for discussion with the Task Force at its meeting on December 4, 2001.

4. On December 7, 2001, following the Task Force's meeting, the Committee provided Convocation with a further information report setting out the Task Force's proposed direction on permanent mobility, some of which mirrored the approach proposed by the Law Society's Committee.

5. On February 20, 2002, following a further meeting of the Task Force, the Committee provided Convocation with the Task Force's interim report, which was to be considered by the delegates to the Federation of Law Societies' mid-winter meeting in Montreal on March 2, 2002. Convocation approved the general direction for mobility set out in the report.

6. At the mid-winter meeting in Montreal the Federation of Law Societies accepted the Task Force's interim report and authorized it to continue its work. Following the meeting the Task Force met on March 14, 2002 and April 24, 2002 to consider questions that were raised at the Montreal meeting and to address a number of unresolved issues.

7. The Task Force has now prepared its report, "A Framework for National Mobility", which is set out at Appendix 1. The report contains the Task Force's recommendations to the Federation of Law Societies for enhancing mobility among lawyers called to the bars of Canadian provinces and territories.

8. Provincial and territorial law societies are being provided with the report so that each has an opportunity to consider the recommendations and, if appropriate, approve them. The report and recommendations will then be considered and voted upon by delegates to the Federation of Law Societies' annual meeting in Niagara-on-the-Lake in August 2002.

9. A draft protocol will also be provided to the Federation of Law Societies' meeting for preliminary review and, at a subsequent time, approval. Signatory law societies will then have an opportunity to implement the mobility provisions within their jurisdictions, as appropriate.

The Committee's View

10. The Law Society's Committee on Inter-Jurisdictional Mobility has reviewed the Task Force's report and is in agreement with its direction and approach. In particular, the Committee agrees with the proposed framework for a protocol on temporary and permanent mobility set out in paragraph 61(a)-(s) of the report and recommends it to Convocation for its consideration and, if appropriate, approval.

APPENDIX 1

FEDERATION OF LAW SOCIETIES INTER-JURISDICTIONAL MOBILITY TASK FORCE
May 8, 2002

A Framework for National Mobility

Prepared for the Task Force by the Policy Secretariat
Law Society of Upper Canada
416-947-5209

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BACKGROUND

1. In August 2001, the Federation of Law Societies established a National Task Force on Mobility to examine full mobility rights and conditions for lawyers in Canada. The Federation appointed Vern Krishna (Chair), Francis Gervais, George Hunter, Eric Macklin and Mark McCrea as members to the Task Force [1]. Edward Ducharme, Abe Feinstein, Gavin MacKenzie, Darrel Pink, Derry Millar, Colleen Suche, Sophia Sperdakos, Don Thompson, and Alan Treleaven have assisted the Task Force.

2. The Task Force has met on five occasions and has provided two progress reports and an interim report that was considered at the Federation of Law Societies' mid-winter meeting in Montreal on March 2, 2002. The delegates at the mid-winter meeting accepted the interim report and authorized the Task Force to continue its work.

3. Following the mid-winter meeting, the Task Force met on March 14, 2002 and April 24, 2002 to consider questions that were raised at the meeting in Montreal and to address a number of unresolved issues.

4. This report contains the Task Force's recommendations to the Federation of Law Societies for enhancing mobility among lawyers called to the bars of the Canadian provinces and territories. The Task Force is not making recommendations with respect to mobility of members of the Chambre des Notaires in Quϑbec. The position of notaries in the framework of Quϑbec's legal system and their unique role within the Canadian legal structure necessitate particular analysis and reflection. In the Task Force's view this would best be done at a future point, after the protocol recommended here has been approved, implemented nationally, including by the Barreau du Quϑbec ("the Barreau"), and become operational. Evaluating the manner in which the protocol operates would inform such analysis and reflection. The Task Force will be discussing the scope of its recommendations with representatives of the Chambre des Notaires.[2]

5. The purpose of this report is to,

   a. summarize the principles, some of which were outlined in the interim report, upon which the Task Force's recommendations are based;

   b. set out the Task Force's recommendations for an enhanced Inter-Jurisdictional Practice Protocol respecting temporary and permanent mobility; and

   c. outline next steps.

PRINCIPLES UPON WHICH THE TASK FORCE RECOMMENDATIONS ARE BASED

Mobility and the Public Interest

6. The value and importance of inter-provincial and territorial mobility have been recognized for a number of years by Canadian law societies. This recognition varies from jurisdiction to jurisdiction, but includes provisions for occasional appearances, transfer from one jurisdiction to another, and, most recently, temporary mobility.

7. Provisions for temporary mobility, introduced in the Inter-Jurisdictional Practice Protocol (IJPP) signed by the Federation of Law Societies in February 1994, permit lawyers in any signatory jurisdiction in Canada to provide legal services in any other signatory jurisdiction for a maximum of 10 matters over 20 days in any 12 month period (the "10-20-12 rule"), without being a member of the host jurisdiction's bar or having a permit to practise. The four western provinces have expanded the protocol's terms to enable lawyers in any participating jurisdiction in Canada to provide legal services in any other participating jurisdiction in

[1] Following Eric Macklin's appointment to the Alberta Court, Queen's Bench, Ken Nielson attended in his place.
[2] The Chambre des Notaires is a signatory to the IJPP, although it has never implemented the provisions of that protocol.

Canada for up to 6 months in a 12-month period ("the western provinces agreement"). Currently only the four western provinces participate in the western provinces agreement. The eastern provinces have recently prepared an eastern provinces agreement similar to the western provinces agreement. Nova Scotia approved it in April.

8. From a regulatory perspective mobility rules render permissible certain activities that would otherwise only be permitted if the lawyer were a member of the law society in every jurisdiction in which he or she provides legal services. But they are much more than this. Mobility provisions recognize that an increasing number of clients have matters that cross provincial and territorial borders and require lawyers to be able to provide assistance in more than one jurisdiction. These are not just large corporate clients, but, increasingly, individuals with personal legal issues that are not neatly confined within the borders of the jurisdiction in which their lawyer has been called to the bar.[3]

9. In considering the expansion of mobility provisions, it is critical to keep the needs of clients in mind. Limitations on mobility must be based on the public interest, rather than on the imposition or continuation of artificial or arbitrary barriers to entry. Similarly, expansion of mobility must be done thoughtfully and developed progressively to ensure that appropriate rules are designed and the public properly protected.

10. The role of mobility considerations in the development of public policy has become increasingly clear. Mobility is an articulated right within the Canadian Charter of Rights and Freedoms. As well, a number of national and international agreements, to which law societies are not signatories, but to which they are or may become subject have demonstrated an obligation to address mobility issues in creative ways. Among these agreements are:
    a. The Agreement on Internal Trade (AIT);
    b. The North American Free Trade Agreement (NAFTA); and
    c. The World Trade Organization General Agreement on Trade in Services (GATS).

11. The current round of GATS negotiations (the "Doha Round") will continue the development of provisions related to services as well as the goods sector. Professional services, including legal services, will be addressed. The year 2005 has been established as the date for concluding the Doha Round of talks. This external factor renders it even more important that provisions for enhanced mobility within Canada be developed. There are already some rules in place relating to the global provision of accounting services.

12. In considering how best to address the issue of enhanced mobility, keeping the public policy approach in mind is particularly important.

The Legal Profession in Canada – Shared Values, Different Context

13. The Task Force has spent considerable time discussing the underlying characteristics of the legal profession in Canada, with a view to determining the best approach to enhanced mobility. It has considered,
    a. legal systems in use;
    b. approaches to legal education;
    c. admission requirements and regulatory provisions in each jurisdiction;
    d. the nature of "licences" within each jurisdiction;
    e. rules of professional conduct;
    f. principles regarding competence;
    g. trust accounting provisions;
    h. professional liability insurance coverage;
    i. compensation fund coverage; and
    j. good character and good standing requirements.

[3] Family law practitioners, for example, are increasingly faced with files in which there are property issues in more than one jurisdiction; children may be improperly removed from one province and taken to another; and clients may have moved back and forth between provinces raising issues about which jurisdiction governs the separation.

14. In particular, the Task Force has canvassed the differences and similarities of civil and common law systems as they operate in Canada and has compared provincial and territorial approaches to issues that are relevant to the protection of the public in a mobility context.

15. The Task Force believes that the practice of law and regulation of the legal profession across all jurisdictions in Canada is built upon a number of shared fundamental values that reflect a strong commitment to ethics, competence, and integrity, all in furtherance of the public interest. This has resulted in very similar standards and regulation across the country. These shared values operate, however, in different contexts, born out of the dual legal system that has developed within Canada.

Common Law and Civil Law Jurisdictions

Common Law

16. In its interim report the Task Force reported that among the considerations that underlie its recommendations with respect to the common law jurisdictions is the recognition that lawyers called to the bar in common law jurisdictions are subject to similar
    a. educational, admission, and regulatory requirements;
    b. legal principles, statutory structures and procedures; and
    c. rules of professional conduct arising from a common law legal system.

17. The Task Force has already expressed its view that, among common law jurisdictions, mobility provisions should reflect that this common approach and structural similarity render lawyers from common law bars more similar than not. As such, the transfer of lawyers from one common law jurisdiction to another should be as seamless a process as is possible in the public interest.

18. As set out in the interim report, in developing the enhanced mobility provisions relevant to lawyers in the common law jurisdictions, the Task Force has noted that lawyers are expected to provide legal services only in those matters in which they are competent. This is an ongoing requirement of law societies and is a fundamental underpinning of self-regulation. This is particularly important because lawyers in the common law jurisdictions are called to the bar with no restrictions on the areas in which they can practise and, in general, practise without restriction throughout their careers. The system relies on their professional responsibility to monitor their own competence. It is true that failure to comply with these rules can result in disciplinary action or negligence claims. It is not, however, these punitive measures that are the underpinning of lawyer motivation, but rather a commitment to principles of public service.

19. The Task Force is of the view that since each law society's self-regulation relies on a rule of professional conduct regarding competence and on lawyers' ethical responsibility, it is reasonable to accept the appropriateness of that principle in circumstances in which lawyers exercise mobility rights. In fact, this has been the accepted approach for decades in the development of "occasional practice" provisions across the country.

20. Having said this, however, the Task Force is of the view that there should be some responsibility on those who seek to become members of another law society to certify that they have familiarized themselves with local law, to the extent required by the applicable law society. Formal examinations are unnecessary for the reasons set out above. Similarly, it is not necessary for lawyers seeking to be called to the bar of another jurisdiction to re-read all the bar admission materials of that jurisdiction. Rather, it would be left to each law society to determine what statutory and other provisions, if any, it considers important for lawyers seeking admission to its jurisdiction to review.

Civil Law

21. As stated at the outset of this report, the Task Force's recommendations relate to mobility among lawyers called to the bars of Canadian provinces and territories and do not address participation of the Chambre des Notaires. With this focus in mind the Task Force has considered how to develop an enhanced mobility protocol in which the Barreau could participate.

22. There is little doubt that despite significant differences between civil and common law there is a shared legal culture among lawyers called to the bar within Canada. To begin with, there are important areas of law that are governed by national law. Criminal, divorce, and banking law are some significant examples. Moreover, lawyers in both systems adhere to similar principles of professional responsibility and ethics. Like lawyers elsewhere in the country, members of the Barreau are required to have liability insurance and contribute to a compensation fund.

23. In developing the principles for Quϑbec's inclusion in the protocol, the Task Force has paid particular attention to the fact that the Barreau, as well as all other professions in Quϑbec, is overseen by l'Office des Professions du Quϑbec. Any national Canadian protocol in which the Barreau wishes to participate must be compatible with the province of Quϑbec's overall approach to professional mobility. The Task Force has been guided by the Barreau's explanations of its particular circumstances and the direction in which professional mobility discussions in Quϑbec appear to be moving. The government of Quϑbec has begun consideration of an appropriate approach to mobility for its professions, including consideration of the approach applied among European Union states. The Task Force has paid attention to the fact that the inclusion of the Barreau in a national mobility protocol will need to reflect an approach compatible with the one advanced by the Quϑbec government for all Quϑbec professions.

24. Keeping these considerations in mind the Task Force's recommendations reflect,
    a. the goal of national mobility among members of provincial and territorial bars, developed in the context of protecting the public;

    b. appreciation of both the similarities and the differences among the common law bars and the Barreau; and

    c. recognition of the regulatory framework in Quϑbec that affects the Barreau.

25. Accordingly, the Task Force's recommendations for a mobility framework include,
    a. provisions for members of the bar moving from one common law jurisdiction in Canada to another; and

    b. provisions for members of the bar moving across legal systems (from common law jurisdictions in Canada to Quϑbec and from Quϑbec to common law jurisdictions in Canada).

26. The proposals regarding mobility for members of the Barreau are set out on the understanding that they are subject to approval as part of the Barreau's mobility discussions with l'Office des Professions in Quϑbec.

The Importance of Including Provisions both for Temporary and Permanent Mobility

27. The Task Force has concerned itself with two kinds of mobility situations:
    a. Temporary Mobility Situations: Those in which lawyers provide legal services in Canadian jurisdictions other than the ones in which they are members of the bar (the "host") without establishing an economic nexus in the jurisdiction. Typically, they will seek to provide services for a particular client, often from their home jurisdiction; handle a single trial or transaction; or provide legal opinions across multiple jurisdictions in a substantive area of law in which they have particular expertise; and

    b. Permanent Mobility Situations: Those in which a clear economic nexus to the host jurisdiction is established such that the lawyer should no longer be distinguished from those who are members of the bar in the host jurisdiction.

28. The Task Force is of the view that both temporary and permanent mobility should continue to exist in a regulatory context that protects the public. In the Task Force's view it is appropriate in the "temporary" situations to rely on the lawyer's connection to the home jurisdiction to ground the rules protecting the public, as is currently the case under the IJPP. In the "permanent" situations it is appropriate that the

lawyers become members of the bar in the host jurisdiction, assuming the rights and responsibilities that accompany such a commitment.

29. This general principle applies across the country and underlies provisions for enhanced mobility. The specific application of the principle will differ somewhat with respect to mobility to and from Quϑbec.

Voluntary and Reciprocal

30. The Task Force's approach has been developed on the understanding that participation in any enhanced mobility protocol would be voluntary and reciprocal, in the broad sense of that term. Any law society that does not wish to participate would not be obliged to do so.[4] The only consequence of this is that its members will not be entitled to take advantage of mobility in other jurisdictions. This is the reciprocal feature of the protocol. The voluntary and reciprocal nature of the protocol allows each jurisdiction to develop a policy that is relevant to its members and context.

31. To the extent that any jurisdiction does not sign and implement the protocol, the current rules for temporary mobility under the IJPP, the western provinces agreement, and the eastern provinces agreement, and the current transfer rules for permanent mobility will continue to apply.

32. To the extent that a jurisdiction signs and implements the protocol being recommended in this report, the new protocol will replace, for reciprocating jurisdictions, the IJPP and transfer rules with respect to temporary and permanent mobility and the western provinces agreement and the eastern provinces agreement with respect to temporary mobility.

33. Given the realities concerning Quϑbec's regulatory structure, as expressed at paragraph 23, and based on the Task Force's acceptance of different mobility provisions for Quϑbec, reciprocity will be interpreted to mean that signatories to the agreement agree to one set of requirements for exercising mobility between and among common law jurisdictions and another set of requirements for exercising mobility out of or into Quϑbec.

Protection of the Public in Implementation

34. It is important to ensure that mobility is implemented in such as way as to ensure that the public is protected. In developing its approach the Task Force focused on eight features designed to protect the public:
    a. national registry of lawyers (temporary mobility);
    b. "good character" requirement (permanent mobility);
    c. "good standing" requirement (temporary and permanent mobility);
    d. disclosure of records and information from jurisdictions in which the lawyer is a member (permanent mobility);
    e. competence requirements, including a reading requirement for permanent mobility (temporary and permanent mobility);
    f. insurance and compensation fund requirements (temporary and permanent mobility);
    g. trust accounting requirements (temporary and permanent mobility); and
    h. conduct, competence, capacity proceedings (temporary and permanent mobility).

National Registry of Lawyers not Check-in (temporary mobility)

35. Under the current temporary mobility provisions in the 10-20-12 protocol and the western provinces agreement (except with respect to mobility into Saskatchewan), lawyers are not required to "check in" with the "host" jurisdiction when they arrive.[5]

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[4] Nunavut has indicated some concern about the potential impact of a protocol on its ability to develop an indigenous bar. It would be possible for Nunavut to sign the protocol but delay implementation of it in Nunavut for a number of years to allow its local bar to develop.

[5] The specific approach envisioned for temporary and permanent mobility to and from Quϑbec for members of the Barreau involves an application process, not a check-in concept. The IJPP has not been implemented by the Barreau. In accordance with the Barreau's occasional practice rules a lawyer wishing to provide legal services on a temporary

36. Although on its face check-in may appear useful, the Task Force is convinced that, in the context within which mobility is being designed for the common law jurisdictions,
    a. check-in is not the best way to protect the public,

    b. is bureaucratically cumbersome, and

    c. may, by its very nature, engender breaches that undermine the integrity of the mobility provisions.

37. In reaching the conclusion that check-in should not form part of the protocol, the Task Force considered the following:
    a. One of the underlying premises on which mobility is based is acceptance of the qualifications and competence of lawyers called to the bar in other provinces and territories of the country, such that it is not a risk to the host jurisdiction if they provide legal services on a temporary basis. If the protocol is based on this, then check-in is antithetical to that philosophy. Moreover, the mere fact that lawyers check in does not address issues of qualification or competence; it simply announces their presence. Although promoted as a feature that protects the public, it is more of a calling card than a safeguard.

    b. The bureaucratic complexity of check-in, measured against its minimal effectiveness, militates strongly against its inclusion as a condition of temporary mobility. The Task Force asked itself a number of questions directed at how check-in would work and considered a number of reasons against its introduction.

        - Would it apply only if the lawyer were physically in the host jurisdiction or would a lawyer providing legal advice by telephone, correspondence, or the Internet be required to check in on each occasion? If only physical presence required check-in what would this say about the connection between competent legal service and check-in? If phone-calls and correspondence do require check-in, mobility would become more cumbersome than it currently is. To properly track every phone call or e-mail made across the country every day could overwhelm law societies for very little benefit.

        - It is unrealistic to expect lawyers to check in every time they make a phone call, write a letter, or attend in the host jurisdiction for a two-hour meeting. Securities lawyers, lawyers engaged in corporate matters, and managing partners of national law firms may "cross jurisdictions" many times a day. The reality is that hundreds of thousands of these types of activities are undertaken every year in Canada and have been for decades. In the Task Force's view a regime of check-in would invite breaches, both advertent and inadvertent. Such breaches would reflect the unrealistic and cumbersome nature of the check-in requirement. In the Task Force's view this inevitable result would be entirely contrary to the goals of simplicity and integrity that underlie the Task Force's proposal.

        - If the protocol did include check-in what would be the enforcement process? Would law societies ever be able to monitor the thousands of phone calls and correspondence or business meetings being conducted? And if they could, to what end? Moreover, would law societies, concerned with serious breaches of conduct and capacity, be prepared to expend limited resources disciplining lawyers for failure to check-in?

        - There has been no suggestion that the IJPP, which has operated for some time without check-in, has resulted in problems that check-in would have averted. The Task Force does not see the benefit of introducing a feature that experience has not demonstrated is necessary.

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basis must apply to do so, usually in connection with appearing on a specific case or representing a particular client. The permit lasts for one year and is renewable.

38. A National Registry is the best way to protect the public with respect to lawyers providing legal services in a host jurisdiction. The National Registry, which is currently under development, will provide all law societies with easy access to information about all lawyers in Canada. In the event a competence, capacity, or conduct-related issue arises with respect to a visiting lawyer any law society will easily be able to identify the lawyer and obtain information about him or her. Under a National Registry system each jurisdiction will prepare an accurate list of its members to be downloaded to a central site and will be responsible for keeping the list current. Each law society will maintain full control over its own list and the information set out in it. The Registry is simply the central repository for information provided by the individual law societies.

Good Character Requirement (permanent mobility)

39. When an individual is called to the bar in a jurisdiction he or she is required to be "of good character". Although there are some differences in the information each jurisdiction requires candidates for admission to provide, good character applications usually involve answering questions about criminal convictions, civil suits involving fraud or other dishonesty, bankruptcies, and disciplinary records, whether from law societies or other professions or organizations to which the applicant for admission belongs. The purpose is to ensure that those admitted to the bar have demonstrated honesty and integrity and "moral" behaviour.

40. Good character is a snapshot taken at the time a jurisdiction calls the person to the bar. The application to another jurisdiction to become a permanent member of that bar may occur many years after a call to the bar elsewhere. The Task Force is of the view that requiring applicants for admission to another jurisdiction to demonstrate that they remain of good character is an important feature of any protocol on permanent mobility. A review of good character is a statutory requirement in most jurisdictions.

41. In the Task Force's view it is essential that a lawyer seeking to take advantage of the permanent mobility provisions envisaged in this report be required to respond to questions asked by the jurisdiction to which he or she seeks admission concerning good character, as discussed in paragraph 39 above. It is also essential that the lawyer sign release forms necessary to authorize all jurisdictions in which the lawyer is a member of the bar to disclose to the jurisdiction to which he or she seeks admission information pertinent to the lawyer's character. This would include, but not limited to, investigations into or findings with respect to the lawyer's conduct, competence, and capacity, and the information discussed in paragraph 39 above.

Good Standing (temporary and permanent mobility)

42. "Good standing" is a term that has different meanings from jurisdiction to jurisdiction. In general it means that the lawyer is entitled to engage in the practice of law in his or her home jurisdiction. Within each jurisdiction, however, there may be different rules that prescribe when a member is, in fact, entitled to practise.

43. To protect the public a host jurisdiction should be entitled to hold those who wish to exercise temporary or permanent mobility rights to the same definition of "good standing" as its members must meet.

44. For this reason the Task Force is of the view that the protocol for temporary or permanent mobility must be based on the principle that those providing legal services to clients in any jurisdiction in the country must,

    a. be a member in good standing in at least his or her home jurisdiction (good standing is taken to mean that the lawyer is entitled to practise in his or her home jurisdiction -not suspended or otherwise precluded from practising); and

    b. meet the host jurisdiction's test for being entitled to practise.

Disclosure of Records and Information (permanent mobility) [6]

45. As indicated in the interim report, to ensure that law societies have appropriate access to the law society records of other law societies in which a lawyer is or has been a member, the protocol will continue the requirement, currently in place with respect to transfer provisions, that lawyers seeking to be called to the

[6] In Quϑbec disclosure of discipline history is also relevant with respect to temporary mobility because a lawyer must apply for an occasional practice permit to provide services in Quϑbec.

bar in a jurisdiction provide "certificates of standing" from each such law society *and* sign consent to disclosure forms authorising access to information and those aspects of their law society files relevant to protection of the public.

46. Disclosure requirements include the lawyer being required to advise the host jurisdiction if he or she has been disbarred or resigned membership in another jurisdiction, whether in or out of Canada.

47. The consent lawyers sign should permit the ongoing sharing of information among the law societies, including the sharing of confidential information relevant to the protection of the public. This would, in some cases, mean that the lawyer is consenting to the disclosure of,
    a. information about which he or she is not even aware, as is the case in investigations; or

    b. information that is not normally disclosed outside of the home law society, such as practice reviews.

48. It will be essential to develop rules concerning the use to which information received is put by a host law society and the preservation by the host law society of any confidentiality requirements.

49. In addition, in the same way that law societies disclose to the public the discipline records of members, discipline records from other jurisdictions would be available to the public in the jurisdiction to which the lawyer transfers, pursuant to the permanent mobility requirements. This provision, which does not currently exist, signifies the emphasis the Task Force places on ensuring that mobility is developed in such a way as to ensure the protection of the public on an ongoing basis.

Competence Requirements (temporary and permanent mobility)

50. As indicated above, and in the interim report, rules of professional conduct require that lawyers be competent in any area in which they provide legal services. Lawyers in common law jurisdictions are, generally speaking, entitled to practise in all areas in which they are competent. As a result, the rule of professional conduct on competence is an integral part of the profession. It recognizes both the importance of competent service and the duty of lawyers to accurately assess their strengths and weaknesses. If such a rule is sufficient protection of the public in each jurisdiction there is no reason it should not continue to be applied to both temporary and permanent inter-jurisdictional practice, in the same way it is now applied pursuant to the IJPP.

51. With respect to permanent mobility, the rule of professional conduct will be supplemented by a reading requirement, discussed above, that ensures that candidates for admission to the bar of a host jurisdiction have familiarized themselves with local law, to the extent required by the applicable law society. [7]

Insurance and Compensation Fund Requirements (temporary and permanent mobility)

52. The current IJPP contains provisions to ensure that lawyers providing legal services in host jurisdictions, pursuant to the temporary mobility provisions, have mandatory insurance coverage and defalcation/compensation fund coverage so that clients in host jurisdictions are protected from acts of negligence or malfeasance.

53. The underlying philosophy of the provisions regarding temporary mobility is that clients in the host jurisdictions should be protected to the same extent as if their lawyer were a member of the bar in the host jurisdiction. Although currently insurance plans and compensation funds across jurisdictions are not harmonized, the western law societies are attempting to develop such an approach.

54. The enhanced mobility protocol will include provisions respecting insurance coverage and defalcation coverage for both temporary and permanent mobility situations. Two working groups have been established to consider ways to harmonize insurance provisions and compensation provisions, keeping in mind the following goals:

[7] The provisions regarding Qu9bec will differ, as seen below.

a. Facilitate mobility;

b. Protect the public;

c. Address technical difficulties impeding harmonization; and

d. In the case of insurance, consider the impact on temporary and permanent mobility of requirements for multiple jurisdiction insurance coverage, in particular whether a lawyer has to be insured in more than one jurisdiction when his or her policy of insurance covers services provided outside the home jurisdiction.

55. The insurance working group has met on a number of occasions and will continue to meet to address outstanding issues. The compensation fund group will meet shortly. Both groups will report by June so that the Task Force can provide further recommendations with respect to insurance and compensation funds.

Trust Accounting Requirements (temporary and permanent mobility)

56. Under an enhanced mobility protocol, it will continue to be the case that lawyers exercising temporary mobility rights will not be entitled to open trust accounts in the host jurisdiction. This is because trust accounts suggest an economic nexus to the host jurisdiction that is greater than is anticipated by temporary mobility provisions.

57. It is true that many aspects of trust accounting provisions are similar across the country. There are, however, some differences with respect to features such as retention of records, electronic trust transfers, and documentation related to mortgages and charges. The western provinces are currently engaged in a process to harmonize trust accounting provisions. The Task Force is of the view that to the extent this can be done in all jurisdictions it would provide both greater certainty for lawyers who maintain membership in more than one jurisdiction as well as more consistent protection for clients. It is not necessary that this be done before the protocol is in place, but should be part of an ongoing national effort to facilitate the implementation of the mobility protocol.

Conduct, Competence, Capacity Proceedings (temporary and permanent mobility)

58. In the current IJPP, where misconduct is alleged to have arisen out of a lawyer's provision of legal services in the host jurisdiction under the temporary mobility provisions, the host jurisdiction assumes carriage unless there is an agreement to the contrary, but in any event there will be consultation among the affected law societies. Rules are set out in the IJPP concerning the operation of the proceedings and the remedies available against visiting lawyers.

59. In the Task Force's view the approach taken in the IJPP concerning which jurisdiction assumes carriage of complaints or proceedings against a visiting lawyer should be continued under the enhanced mobility protocol for temporary mobility, but should be broadened to include competence and capacity related matters. The goal of the approach is the protection and convenience of the public.

60. With respect to permanent mobility, lawyers would, in the normal course, be disciplined in the jurisdiction in which the services are provided. If the services cross jurisdictions the affected law societies will consult as is done pursuant to the temporary mobility provisions. As well, all signatories will be notified if any other signatory commences a conduct, capacity or competence proceeding against a member, as described in paragraphs 45-49 above.

PROPOSED FRAMEWORK FOR PROTOCOL ON TEMPORARY AND PERMANENT MOBILITY

61. Bearing in mind the need to craft different provisions for the common law jurisdictions and the Barreau, the Task Force recommends the following provisions for a protocol on temporary and permanent mobility:

General

a. No one will be entitled to provide legal services in a host jurisdiction on terms of licence greater than those he or she possesses in the home jurisdiction, whether pursuant to temporary or permanent mobility provisions. Such an approach will respect the regulatory requirements of each jurisdiction. To permit lawyers to obtain greater rights in a host jurisdiction than they have in the home jurisdiction would have the potential to undermine regulatory systems developed in accordance with the public interest as perceived in the home jurisdiction.

Mobility Among Common Law Jurisdictions

b. Lawyers who are members in good standing in accordance with paragraph 44 may provide legal services in other common law jurisdictions on a temporary basis for a cumulative period of not more than 100 days in a calendar year.[8]

c. For the purposes of the mobility requirements "providing legal services" means practising the law "of" or practising law "in" a host jurisdiction for the specified period.

d. A lawyer will be considered to have provided legal services in the host jurisdiction for *a full* day if he or she does so for *any part* of a day. It is not necessary to be physically "in" the host jurisdiction to have practised the law "of" the host jurisdiction. Lawyers who are only in a jurisdiction to appear before federal courts or tribunals physically located in that jurisdiction will not be considered to have provided legal services in the host jurisdiction. However, lawyers practising federal law in a host jurisdiction will be considered to be practising "in" the jurisdiction.[9]

e. As is the case with the current 10-20-12 rules there will be no requirement to check in with the host province during this 100 day period. There will, however, be a National Registry of lawyers so that any law society can obtain relevant information on any lawyer.

f. If a lawyer intends to provide legal services in a host jurisdiction for more than 100 days, or does, in fact, provide legal services in the jurisdiction for more than 100 days, he or she must forthwith notify the host law society. Lawyers providing legal services pursuant to the temporary mobility provisions will be required to keep track of the information on the number of days they have done so. In the event of a dispute with a host law society the onus will be on the lawyer to provide evidence of the number of days on which legal services have been provided.

g. A host law society will determine whether a lawyer who provides legal services in the host jurisdiction has demonstrated an *economic nexus* to the host jurisdiction such that he or she must apply to become a member of the host jurisdiction. "Economic nexus" will be a question of fact to be determined by the host jurisdiction. Indicia of economic nexus will include,

- Providing legal services in the host jurisdiction for more than 100 days in a calendar year (overstaying the 100 days);
- opening an office to the public in the host jurisdiction;

[8] In the interim report the Task Force proposed 183 days as the cut off. Following further discussions, the Task Force is of the view that based on working days in a year (excludes weekends and holidays) 100 days is a more reasonable calculation of what would constitute temporary activity in a host province. A process will be developed by which technical issues of timing and counting and other issues can be resolved.

[9] The Task Force is aware that its recommendation regarding those who practise federal law would result in a change to current practice, in which such lawyers are not required to be called to the bar of the host province. The Task Force will seek input on this point.

- establishing residence in the host jurisdiction; [10]

- establishing a trust account in the host jurisdiction. [11]

h. A host law society will have discretion to extend the lawyer's temporary status, to be determined upon application by the lawyer who will be required to demonstrate that his or her activities continue to fall within the temporary mobility requirements.

i. To be eligible for membership in another common law law society under the permanent mobility provisions, the lawyer will have to meet the following pre-requisites:

- Be a member of the bar of a common law province or territory;

- Be of good character;

- Be in good standing in accordance with paragraph 44; and

- Certify prior to call, that he or she has read all materials with respect to local law required by the province.

j. As part of the application process to become a member, the applicant will be required to sign a "consent to disclose" document that permits the law society of the province or territory in which he or she seeks to be called to have access to the lawyer's regulatory files from all other jurisdictions in which the lawyer is, or has been, a member of the bar (in accordance with the provisions on disclosure set out elsewhere in this report).

k. Once called to the bar of the jurisdiction the lawyer will be subject to all statutory obligations, regulations, rules, and fee and levy requirements of that jurisdiction, regardless of whether these differ from provisions of other law societies. This means that, as is currently the case, lawyers called in more than one jurisdiction will have rights and responsibilities in each of those jurisdictions. [12]

Mobility Between Qu9bec (the Barreau) and Common Law Jurisdictions

Temporary Mobility

l. The current Barreau provisions in place for temporary mobility will continue to apply to that province as part of the enhanced national mobility protocol. In essence the provisions provide that a lawyer from elsewhere in Canada may apply for the right to practice in Qu9bec on a specific case or for a specific client for a period of up to one year, renewable with the permission of the Barreau.

m. To be eligible, the lawyer must be in good standing, as discussed in paragraphs 42-44 above.

n. Members of the Barreau seeking temporary mobility rights in common law jurisdictions in Canada will, at the option of the common law jurisdiction in issue, be subject to,

- the same provisions set out above for temporary mobility among common law jurisdictions in Canada; or

[10] This could be defined as residence within the meaning of the *Income Tax Act.*

[11] Lawyers in the host jurisdiction under temporary mobility rules would not be entitled to open trust accounts. It would therefore be presumed that a lawyer who did so intended to establish a permanent presence in the jurisdiction.

[12] See paragraph 52-55 for discussion about harmonization of requirements.

- provisions in place in the common law jurisdiction for temporary practice by members of the Barreau that mirror those applicable to lawyers seeking temporary practice rights in Quθbec.

Permanent Mobility

o. A lawyer from a common law jurisdiction in Canada who wishes to go beyond the temporary rules to become a member of the Quθbec bar will be required to comply with whatever approach is approved for all professions in Quθbec. One of the possible approaches to permanent mobility being considered could be similar to that in place in European Union states. In Europe this approach includes the provision that a foreign lawyer who wishes to become permanently established in another EU state must practise the law of that jurisdiction for a period of three years, during which time the lawyer must make it clear that he or she is a lawyer from another jurisdiction. [13]

If the approach taken in Quebec reflects that adopted in the European Union a lawyer from a common law jurisdiction in Canada who wishes to go beyond the temporary rules to become a member of the Quθbec bar would be required to,

- Satisfy the language requirements established by the Quθbec government;
- Become a member of the Quθbec bar under a special permit to be established for lawyers from outside the province;
- For a period yet to be determined, practise Quθbec law, ensuring that in the provision of legal services to the public he or she makes it clear that he or she is a member of the bar of another Canadian jurisdiction;
- Comply with all the rules and regulations of the Barreau du Quθbec; and
- Pay fees and levies set by the Barreau, including insurance and compensation fund levies.

p. To assist applicants for admission under this rθgime, criteria would be developed outlining the degree of concentration of practice and any other terms to be met in order to be admitted as a full member of the Barreau at the end of the specified period.

q. If, at the end of the specified period all requirements were met, the lawyer would be called to the bar as a regular member of the Barreau.

r. Appropriate provision would be made to ensure that clients are appropriately protected in the event of negligence or malfeasance, such that having been represented by a lawyer from another jurisdiction does not prejudice clients' rights and convenience.

s. A member of the Barreau who wishes to become a member of the bar of a common law jurisdiction would either,

- be subject to rules not yet developed between the Barreau and the common law jurisdiction ensuring the protection of the public and providing that in the provision of legal services to the public he or she makes it clear that he or she is a member of the bar of Quebec, or
- at the common law jurisdiction's option, be subject to the same provisions set out above for admission of lawyers from common law jurisdictions to other common law jurisdictions.

[13] Given the fact that the legal culture among jurisdictions in Canada is more similar than exists among different countries in Europe, it is to be hoped that the period of three years could be substantially reduced, perhaps to the same length as the articling period in Quθbec (six months).

NEXT STEPS

62. The Task Force report will be provided to law societies for benchers to consider it by June 2002.

63. The report and a draft protocol will be provided to the Federation of Law Societies for consideration at the annual meeting in August 2002.

……

It was moved by Mr. Millar, seconded by Mr. MacKenzie that the Report be approved including the frame work proposed for a protocol on temporary and permanent mobility as set out in paragraph 61 (a) – (s) of the Report and that the Law Society's delegates be authorized at the annual meeting of the Federation of Law Societies in August 2002.

Carried

SPECIAL COMMITTEE ON LAWYER'S DUTIES WITH RESPECT TO PROPERTY RELEVANT TO A CRIME OR OFFENCE

Mr. MacKenzie spoke to the Report of the Special Committee on Lawyer's Duties with Respect to Property Relevant to a Crime or Offence.

Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence
March 21, 2002*

Report to Convocation

Purpose of Report: Discussion

Prepared by the Policy Secretariat

* for discussion at April 25, 2002 Convocation (deferred to May 23, 2002 Convocation)

TABLE OF CONTENTS

INTRODUCTION

1. The Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence, in accordance with Convocation's mandate, has prepared a proposed rule and commentary.

2. The Committee is requesting that Convocation review the proposal and approve the rule and commentary in its present form or as amended by Convocation as an addition to the *Rules of Professional Conduct*.

3. The members of the Committee are benchers Gavin MacKenzie (chair), Stephen Bindman, Todd Ducharme, Niels Ortved, The Hon. Sydney Robins, Heather Ross and Clayton Ruby, as well as Alan Gold (president of the Criminal Lawyers Association), Paul Lindsay (Director, Crown Law Office - Criminal, Ministry of the Attorney General) and Tony Loparco (president of the Ontario Crown Attorneys' Association). The Committee is grateful to Paul Perell of Weir & Foulds in Toronto, for his assistance in drafting the proposed rule and commentary.

4. This report includes
   - an explanation of the process followed by the Committee
   - discussion of the central issues the Committee identified
   - discussion of the input received from lawyers and the public on the draft of the proposed rule and commentary, released for comment in March 2001
   - comment on the scope of the rule and commentary and the language of certain provisions

THE COMMITTEE'S PROCESS

First Steps

5. The Committee was appointed on November 29, 2000 following the withdrawal of a professional misconduct complaint against lawyer Kenneth Murray of Aurora. The Committee was charged with examining lawyers' ethical duties in connection with property relevant to a crime and devising a rule to address the relevant professional conduct issues.

6. The Committee has met on twelve occasions. Prior to its first meeting, the Committee reviewed extensive material that included existing rules and standards in other jurisdictions and academic writing and case law on the subject. The Committee thanks Austin Cooper Q. C. and Ian Scott, the defence counsel and Crown counsel respectively in *R. v. Murray* (in which a charge of attempting to obstruct justice was dismissed), for making information from their files available for this review.

7. The Committee was fortunate to receive permission from Justice Michel Proulx and David Layton (a criminal lawyer now practising in Vancouver) to review a chapter on lawyers' duties with respect to incriminating physical evidence from their then unpublished book, *Ethics and Canadian Criminal Law*, which has since been published by Irwin Law. This material provided a very useful discussion of the subject.

8. Alberta is the only jurisdiction in Canada thus far to adopt a rule on lawyers' duties with respect to property having potential evidentiary value. The Committee also reviewed the rules of several United States state bar associations and the standards for defence counsel adopted by the American Bar Association.

9. Using this information as a starting point, the Committee began to "scope out" the rule and was assisted in this respect by a detailed list of issues prepared by Alan Gold, which was of great help to the Committee in its efforts to address those issues in a clear and enforceable rule and explanatory commentary.

The Issues

10. The issues that the Committee identified and attempted to address included the following:
    - the role of the lawyer as advocate and the lawyer's duties to the client and the administration of justice;
    - the fundamental importance of solicitor-client confidentiality and privilege in the relationship between and a lawyer and client in situations in which the lawyer learns of or is asked to receive property relevant to a crime or offence;
    - the distinction between the lawyer acquiring information about property and the lawyer acquiring possession of such property;
    - the possibility that the lawyer's duty may vary depending on whether the evidence is inculpatory, exculpatory, or partially inculpatory and partially exculpatory;
    - the possibility that the lawyer's duty may vary depending on the nature of the property (for example, whether the rule should apply only to the instrumentalities or proceeds of crime, as suggested in some American authorities, or whether it should apply to all property (including documents, electronic communications, and computerized information) relevant to a crime);
    - the possibility that the lawyer's duty may vary depending on whether the crime or offence to which the property is relevant is the subject of an existing charge, or investigation, or is undetected;
    - the circumstances requiring, and the timing and method of, disclosure of property to law enforcement authorities;
    - the necessity and scope of, and the lawyer's method of seeking, advice from senior counsel or the Law Society on issues respecting possession and disclosure of property.

The March 22, 2001 Draft

11. On March 22, 2001, the Committee presented a report to Convocation with a proposed rule and commentary recommended by the majority of the Committee. The report also quoted a proposed rule recommended by two dissenting members of the Committee who represent the Ministry of the Attorney General and the Ontario Crown Attorneys' Association, whose submission to the Committee is attached as Appendix A. As recommended by the Committee, Convocation directed the Committee to make its report including the proposed rule and commentary widely available to the public and the profession for written comments.

12. The Committee was attempting to accomplish two purposes with the March 22, 2001 proposed rule and commentary. First, the Committee proposed a mandatory rule that could be enforced through discipline proceedings if breached. Second, the Committee proposed an extensive commentary to provide guidance to lawyers in the multitude of circumstances in which issues may arise. The proposed commentary was designed to draw to the lawyer's attention the many distinctions and factors that should be taken into account, and provide advice on the approach the lawyer should adopt, when confronted with issues relating to property relevant to a crime.

13. This model would be consistent with the Law Society's current *Rules of Professional Conduct*, which came into force on November 1, 2000.

Call For Input And The Response

14. The proposed rule and commentary (including the explanatory report provided to Convocation on March 22, 2001) were made available to the public and the profession through the Society's web site and a notice in the *Ontario Reports*. A press release was also issued to the media commenting on the mandate of the Committee and the availability of the proposed rule and commentary for public comment. Selected legal

organizations and the Attorney General of Ontario, David S. Young, received a written request for comment on the proposed rule and commentary.

15. A number of organizations and individuals both within and outside the profession responded to the call for input. The Committee received over 25 letters or e-mail communications. Most contained thoughtful comments on the proposed rule and commentary. [1] The Committee publicly thanks all those who responded to the call for input.

16. Many of those responding (including the Attorney General and various chiefs of police) expressed concerns about certain sections of the proposed commentary that would permit the lawyer to maintain temporary possession of property relevant to a crime or offence in certain defined circumstances. These respondents preferred the approach taken by the Law Society of Alberta in its rules of conduct, which is reflected in the position of the two members of the Committee who represent the Ministry of the Attorney General of Ontario and the Ontario Crown Attorneys' Association. The Attorney General's submission is attached as Appendix B. Other respondents (including the Advocates' Society) preferred the approach recommended by the Committee, though they also made constructive suggestions for ways in which the proposed rule and commentary might be improved.

17. The Committee assessed the input against the Committee's proposal and the key issues originally identified by the Committee. This led to revisions to the March 22 proposals, which are discussed in the next section of the report.

SCOPE OF THE PROPOSED RULE

Revisions Following Review of Submissions

18. Revisions to the March 22, 2001 proposals recommended by the Committee were both substantive and structural, and include the following:

(i) expanding the rule with text from the commentary, thereby converting elements of guidance and advice to mandatory obligations,

(ii) reorganizing the concepts in the rule so that they are set out in a more logical sequence,

(iii) clarifying the circumstances in which a lawyer may take or keep temporary possession of property relevant to a crime or offence for use at trial, by specifying that the lawyer may do so only where the lawyer determines that to do so may prevent a wrongful conviction and that this use of the property would be significantly diminished if the property were disclosed to law enforcement authorities, and

(iv) adding a requirement that a lawyer who proposes to take or keep temporary possession of property either for testing or for use at trial may do so only if the lawyer promptly seeks and receives authorization from a committee of the Law Society that the lawyer should be permitted to do so.

These revisions respond to concerns expressed in submissions received by the Committee, including the submission of the Attorney General. The third and fourth revisions, in particular, respond to submissions that a lawyer should be permitted to take or keep temporary possession of property relevant to a crime or offence for use at trial, if at all, only in narrowly defined circumstances, and that the decision should not be made exclusively on the basis of the subjective judgment of the particular lawyer involved in the case.

19. The authors of a number of submissions (including the Ontario Association of Chiefs of Police and several other police services), argued that a lawyer should never be permitted to retain possession of property relevant to a crime for purposes of testing or for use at trial, but rather should be required to turn the property over to law enforcement authorities in every case.

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[1] A list of the organizations and individuals responding to the call for input and their responses is available through the Law Society's Policy Secretariat upon request.

20. The majority of the committee concluded that such an approach would fail to recognize the extensive range of circumstances in which issues can arise in this area, the fundamental importance of the independence of the bar, and the important role of defence counsel in preventing wrongful convictions. Although it was the *Murray* case that gave rise to the creation of the Committee, the Committee was mindful of the fact that any rule and commentary adopted by Convocation would apply to a vast array of other situations. It is not difficult to conceive of circumstances, for example, in which a lawyer may be given a document that exposes the falsity of a Crown witness's evidence but which, if turned over to law enforcement authorities, would enable the Crown witness to tailor his or her testimony in such a way as to make the lawyer's client vulnerable to a wrongful conviction. In such cases (which the Committee expects would be rare) to permit the lawyer to retain the document for use at trial would, in the Committee's view, advance rather than obstruct the cause of justice.

21. Again, if the Committee's proposal is accepted, the lawyer would be permitted to retain the document temporarily for use at trial only if a committee of the Law Society established for the purpose were to authorize the lawyer to do so.

Rules of Other Jurisdictions

22. In addition to responding to the issues raised in the submissions, the Committee examined more closely the rules of other jurisdictions.

23. Most codes of professional conduct are silent on the subject of lawyers' duties with respect to property relevant to a crime. As mentioned above, Alberta is the only Canadian jurisdiction that has thus far adopted a rule on the subject. Rule 20 of Chapter 10 of the Law Society of Alberta's *Code of Professional Conduct* reads as follows:

> A lawyer must not counsel or participate in:
>
> (a) the obtaining of evidence or information by illegal means;
>
> (b) the falsification of evidence;
>
> (c) the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value; or
>
> (d) the concealment of property having potential evidentiary value in a criminal proceeding.
>
> *Commentary*
>
> Lawyers must uphold the law and refrain from conduct that might weaken respect for the law or interfere with its fair administration. See Chapter 1, *Relationship of the Lawyer to Society and the Justice System*. A lawyer must therefore seek to maintain the integrity of evidence and its availability through appropriate procedures to opposing parties. The word "property" in paragraphs (c) and (d) includes computerized information.
>
> ….
>
> Paragraph (d) applies to criminal matters due to the danger of obstruction of justice if evidence in a criminal matter is withheld. While a lawyer has no obligation to disclose the mere existence of such evidence, it would be unethical to accept possession of it and then conceal or destroy it. The lawyer must therefore advise someone wishing to deliver potential evidence that, if possession is accepted by the lawyer, it will be necessary to turn the evidence over to appropriate authorities (unless it consists of communications or documents that are privileged). When surrendering criminal evidence, however, a

lawyer must protect confidentiality attaching to the circumstances in which the material was acquired, which may require that the lawyer act anonymously or through a third party.

There is no equivalent obligation of disclosure with respect to evidence in a civil proceeding in light of the extensive discovery process provided by the Rules of Court. However, it is improper to block disclosure of documents or other evidence duly requested pursuant to rules of production or practice.

24. The approach adopted in the Alberta rules differs markedly from the approach adopted in the American Bar Association Criminal Justice Section Standards. Standard 4-4.6 on Physical Evidence reads as follows:

> (a) Defense counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).
>
> (b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.
>
> (c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.
>
> (d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.
>
> (e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c) (1), he or she should do so in the way best designed to protect the client's interests.

25. The Committee considered both the Alberta rule and the ABA Defence Standards to be helpful in formulating its own rule. The majority of the Committee concluded, however, that both the Alberta approach and the ABA Defence Standards' approach could be improved upon.

26. The concerns of the majority about the Alberta rule and commentary may be illustrated by an example. If a client wishes to obtain a lawyer's advice about the effect of a document and forwards it to the lawyer as an e-mail attachment, and the document "has potential evidentiary value in a criminal proceeding", the lawyer would appear to have a duty under the Alberta rule to turn over the document to the authorities; the rule does not seem to allow lawyers to return property to its source. The lawyer's duty would seem to be to turn over such a document to the authorities whether the document is exculpatory or inculpatory.

27. Such a rule, in the view of the majority, would discourage persons from seeking legal advice and representation and would tend to undermine the independence of the bar by transforming lawyers into agents of the state.

28. At the same time, the Committee had concerns about certain features of the ABA Defence Standard. Specifically, paragraph (c) (4) of the Standard, which would allow defence counsel to receive and retain property whenever they intend to "use the item in any way as part of defense counsel's representation of the client", could in some circumstances permit defence counsel to retain property for an extended time – as in the *Murray* case itself – without any independent review of the effect of doing so on the administration of justice.

Discussion of Particular Provisions

The Rule

29. The following is the revised proposed rule on property relevant to a crime or offence, as recommended by the Committee. The proposed rule and commentary in their entirety are set out in Appendix C.

Rule 4 – Relationship to the Administration of Justice

4.01 THE LAWYER AS ADVOCATE

Property Relevant to a Crime or Offence

4.01 (10) A lawyer shall not take or keep possession of property relevant to a crime or offence, except in accordance with this rule.

(11) A lawyer may take or keep temporary possession of property relevant to a crime or offence only where:

(a) it is necessary to do so to prevent the alteration, loss or destruction of the evidence,

(b) it is necessary to do so to prevent physical harm to any person,

(c) the client or the person possessing the property instructs the lawyer to promptly arrange for the property to be disclosed or delivered to the Crown or law enforcement authorities,

(d) the lawyer reasonably believes it is in the interests of justice that the property be examined or tested before it is disclosed or delivered to the Crown or law enforcement authorities, and the property may be examined or tested without altering or destroying its essential characteristics, or

(e) the lawyer reasonably believes that a wrongful conviction may be prevented if the property is first disclosed at trial, and this use of the property would be significantly diminished if it were disclosed to the Crown or law enforcement authorities before the trial.

(12) A lawyer may take or keep temporary possession under subrule (11) (d) or (e) only if the lawyer has been authorized to do so by a committee of the Law Society established by the Treasurer to decide whether the lawyer may take or keep temporary possession. The lawyer must seek such authorization promptly.

(13) A lawyer who takes or keeps possession of property relevant to a crime or offence shall not

(a) counsel any alteration, concealment, loss or destruction of the property,

(b) alter, conceal, lose, or destroy the property, or

(c) deal with the property in a manner that there are reasonable grounds to believe would

(i) obstruct justice, or
(ii) risk physical harm to any person.

(14) A lawyer who takes or keeps property relevant to a crime or offence shall give up possession of the evidence as soon as practical and only in accordance with subrules (11)(d) or (e), (15) or (16).

(15) A lawyer in possession of property relevant to a crime or offence may return the evidence to its source only if the lawyer is satisfied on reasonable grounds that the evidence will not be
(a) altered, concealed, lost or destroyed or
(b) used to cause physical harm to any person.

(16) Subject to subrules (10) – (15), a lawyer in possession of property relevant to a crime or offence shall disclose or deliver it to the Crown or law enforcement authorities as soon as practicable in all the circumstances.

30. The rule deals with the lawyer's actual possession of property. The lawyer's knowledge of the existence of property relevant to a crime or offence does not usually raise the difficult issues associated with physical possession of the property, such as whether the property must be turned over to law enforcement authorities. As the commentary makes clear, information communicated to the lawyer by the client about property is generally protected by solicitor-client privilege and the lawyer's duty of confidentiality and must not be disclosed.

31. The rule's underlying theme is avoidance of conduct that may amount to an obstruction of justice. In a broader sense, the rule enshrines lawyers' obligations as key players in the proper administration of justice. The commentary, discussed below, recognizes the possible tension between these duties and the lawyer's duties of confidentiality and loyalty to the client.

32. The thrust of the rule and commentary is that lawyers generally should not accept or retain property relevant to a crime or offence. The rule recognizes that in some circumstances, the lawyer does not have a choice, for example where the client simply leaves the property at the lawyer's office. The rule provides that lawyers may take or keep property relevant to a crime or offence only in very limited circumstances and even then temporarily.

33. The purposes for which such property may be retained temporarily are as follows:
- To prevent the destruction of the property
- To prevent physical harm to any person
- To make arrangements to transfer the property to authorities pursuant to instructions
- To examine or test the property
- To prevent a wrongful conviction by making use of the property at trial

34. The Committee's discussions focussed on the merits of the fourth and fifth of these purposes.

35. The main concern expressed by the Crown counsel on the Committee and by a number of law enforcement agencies who made submissions, is that the lawyer's possession of the property, either for testing or for use at trial, and the timing of the lawyer's disclosure of the property, could impinge on the effectiveness of the investigation by the authorities and on the ability of the Crown to prosecute any charges laid that might arise out of the investigation. The circumstances may be aggravated, for example, if the property exculpates another accused, but is held by the lawyer until the trial of his or her client.

36. The Crown counsel on the Committee expressed concern that the lawyer's possession of the property may inappropriately affect a whole series of investigatory and prosecutorial decisions that are made at various stages of the proceedings up to and at trial, and that public confidence in the administration of justice would

not be enhanced by allowing defence counsel to retain possession of property relevant to a crime or offence for testing or for use in the defence even temporarily, and even in the narrow circumstances referred to in the proposed commentary.

37. The Crown counsel also suggested that lawyers who receive property relevant to a crime or offence should never be allowed to return the property to its original source or location, but should rather be required to turn over the property to law enforcement authorities in every case.

38. The rule and commentary proposed by the Crown counsel (which are based in part on the applicable rule and commentary in the Law Society of Alberta's *Code of Professional Conduct*, and which in the Crown's counsels' view are consistent with the law as articulated in *R. v Murray* (2000), 48 O.R. (3d) 544 (S.C.J.)) are set out in Appendix A.

39. The majority of the Committee preferred to include in the proposed rule provisions that would allow a lawyer in certain defined circumstances to take or retain temporary possession of property relevant to a crime or offence for the purpose of non-destructive testing or for use in the client's defence. In all such cases the rule would require the lawyer promptly to obtain authorization from a committee of the Law Society that the lawyer should be permitted to retain temporary possession for such a purpose. The Committee's view was informed by the following considerations:

(a) The retention of the property in some circumstances may be necessary to establish the client's innocence or to raise a reasonable doubt about the client's guilt, for example, by exposing the falsity of evidence on which the Crown relies;

(b) In some cases the disclosure of the property by defence counsel may enable a witness who has falsely implicated the accused person to tailor his or her testimony with a view to securing a wrongful conviction;

(c) The proposed rule and commentary make it clear that the circumstances in which a lawyer may retain temporary possession of property for use in the client's defence will be rare, and will be limited to circumstances in which the lawyer reasonably believes that a wrongful conviction may be prevented and that this use of the property would be significantly diminished if it were disclosed to law enforcement authorities;

(d) The permissibility of defence counsel retaining temporary possession for non-destructive testing or for use in the defence is recognized by the American Bar Association Standards for Criminal Justice, which expressly allow counsel to retain property for a reasonable time where defence counsel "intends to test, examine, inspect or use the item in any way as part of defence counsel's representation of the client.";

(e) As for whether lawyers should be required in every case to turn over to the authorities property relevant to a crime or offence, the Committee observed that such a requirement may discourage clients from seeking legal advice. Allowing lawyers to return the property to the client where they harbour no reasonable fear that the property will be altered, destroyed or used to cause physical harm to any person makes it no less likely that the evidence will see the light of day and has the advantage of ensuring that the client receives proper legal advice;

(f) The requirement that the lawyer promptly seek authorization from a committee of the Law Society recognizes, in a way the Crown proposal does not, the wide range of circumstances in which problems in this area may arise. There is a significant difference, for example, between a situation in which a murder suspect leaves a bloody knife on a lawyer's desk, on the one hand, and a situation in which a client provides a document to a lawyer that may expose the client to a prosecution for a provincial offence if it were provided to law enforcement authorities.

40. The Crown counsel on the Committee also expressed concern that the proposed rule and commentary recommended by the majority could potentially permit a recurrence of what occurred in the *Murray* case. In the view of the majority, this concern is without substance.

41. It is important to keep in mind what actually occurred in the *Murray* case. Defence counsel, Mr. Murray, on the instructions of his client, took possession of videotapes that were relevant to crimes of which his client was accused. He did not disclose the existence of the videotapes for approximately 17 months. On

the advice of senior counsel, Mr. Murray then sought the advice of a committee of Law Society benchers established for the purpose. The accused's trial was imminent. The Law Society committee advised Mr. Murray to turn over the videotapes to the trial judge, Associate Chief Justice (now Chief Justice) LeSage. Justice LeSage declined to receive the videotapes, which were turned over to the counsel for the accused's new counsel (not to the Crown). The accused's new counsel in turn disclosed the videotapes to the Crown, and they were introduced into evidence at trial. The central problem in the case was that the videotapes were not disclosed in a timely way. As a result of the advice of the Law Society, direction of the trial judge, and the decision of new counsel, the videotapes were eventually disclosed.

42. Under the rule and commentary recommended by the majority Mr. Murray would not be allowed to retain possession of the videotapes for such an extended time. If he were to claim a reasonable belief that a wrongful conviction would be prevented if the videotapes were first disclosed at trial – a requirement of the proposed rule - he would be required under the proposed rule promptly to seek authorization from a Law Society committee.

The Commentary

43. The commentary to the proposed rule is organized into the following sections:

A. Introduction
B. Information Distinct from Possession
C. Types of Property
D. The Lawyer's Duties With Respect To Property Relevant to a Crime or Offence
E. Where Disclosure to Authorities is Required
F. Advising the Client
G. Seeking Advice and Authorization

A. Introduction

44. The Introduction describes the factors the lawyer must take into consideration before deciding to take or keep possession of such property, including the need to fulfill duties of loyalty and confidentiality to the client and to observe duties to the administration of justice. Particular mention is made of the general obligation not to obstruct the course of justice. The Introduction also makes it clear that a lawyer is never *required* to take or keep possession of property relevant to a crime or offence from a client or any other person.

B. Information Distinct from Possession

45. The commentary distinguishes between the lawyer's possession of property and knowledge of it. The commentary focusses on circumstances in which the lawyer is asked to take possession, and the obligations flowing from the lawyer's decisions.

C. Types of Property

46. This section confirms that the rule applies to all property, including original documents and documents that are electronically stored or formatted.

D. The Lawyer's Duties With Respect To Property Relevant to a Crime or Offence

E. Where Disclosure to Authorities is Required

47. Section D complements the portion of the rule that discusses how lawyers should deal with property relevant to a crime or offence. Section E is devoted to the circumstances in which lawyers have duties to disclose such property to law enforcement authorities.

48. According to the rule, lawyers are not to accept or retain such property except in very limited circumstances and even then only temporarily. The commentary, in discussing circumstances in which the lawyer has a duty to disclose the property to law enforcement authorities, advises lawyers to retain independent counsel to make the disclosure anonymously to protect the confidentiality of information about the source of the evidence.

49. The commentary elaborates on matters relating to the purposes for which such property may be retained temporarily and the lawyer's obligations in handling the property, including the point at which the lawyer gives up possession.

F. Advising the Client

G. Seeking Advice and Authorization

50. These two sections relate to the advice that a lawyer should provide to a client when asked to take or keep property relevant to a crime or offence. The Commentary advises lawyers to seek the advice of experienced counsel or the Law Society with respect to the handling of the property or any other issues connected with it, but reiterates that a committee of the Law Society established for the purposes described in the rule *must* be approached by the lawyer for authorization before the lawyer takes or keeps property relevant to a crime or offence for testing or for use at trial.

51. The Commentary emphasizes that lawyers should keep a written record of the advice.

SUMMARY

52. The drafting of rules of professional conduct by its nature is an intricate exercise that calls for a delicate balancing of duties that sometimes conflict. The Committee's mandate not only illustrated the difficulty of that task, but also presented unique challenges as a result of the context in which the need for guidance in this problematic area arose. The extraordinary circumstances were set against the background of significant public interest in the events leading up to the formation of the Committee and decisions in both the courts and at the Society which called out for clear guidance. The themes appearing in the rule and commentary were, as noted above, the subject of significant debate among Committee members. This was not unexpected, given that the issues involved the need to ensure the integrity of the administration of justice, the fundamental nature of the solicitor and client relationship and the right of all persons to independent counsel.

53. The Committee as a whole recognizes the impossibility of anticipating all situations in which the rule and commentary may apply in future. The Committee expects that the efficacy of the rule will be tested only when issues falling within its ambit are dealt with on a case by case basis.

54. The primary objective of the proposed rule and commentary is to provide substantive guidance to lawyers in keeping with the Society's role to govern the profession in the public interest. The Committee urges Convocation to adopt the proposals as amendments to the Society's *Rules of Professional Conduct*.

DECISION FOR CONVOCATION

55. Convocation is asked to approve the proposed rule and commentary, and amend the Law Society's *Rules of Professional Conduct* to add the rule and commentary appearing at Appendix C as rule 4.01(10) through (16) and related commentary.

APPENDIX A

SUBMISSION OF THE ONTARIO CROWN ATTORNEYS' ASSOCIATION

CROWN DRAFT -- TONY LOPARCO, PAUL LINDSAY *March 2, 2001*

The Lawyer's Duties With Respect to Physical Evidence of Crime

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Proposed Rule

1. A lawyer shall not counsel or participate in:

(a) the obtaining of evidence or information by illegal means;

(b) the falsification of evidence;

(c) the destruction of physical evidence relevant to an offence, the alteration of such evidence so as to affect its evidentiary value, or the removal of such evidence from a crime scene;

(d) the concealment of physical evidence relevant to an offence;

(e) the possession or concealment of property obtained or derived directly or indirectly from the commission of an offence.

2. A lawyer shall:

(a) advise the client that it is the lawyer's duty to turn over to the authorities any property within the ambit of Rule 1 that comes into the lawyer's possession;

(b) immediately turn over to the authorities any property within the ambit of Rule 1 that comes into the lawyer's possession.

NOTES

- This rule is not intended to affect communications or documents which otherwise come within the ambit of solicitor-client privilege.

- This rule is intended to cover all forms of property, including documents, which may have evidentiary value in a criminal or *quasi*-criminal investigation or proceeding, whether commenced or not.

- Paragraph 1 (c) is not intended to interfere with the testing of evidence or the release of court exhibits as authorized by the *Criminal Code* or other federal or provincial statutes.

- When turning over evidence coming within this rule to the authorities, the lawyer must nevertheless take appropriate steps to protect the client's confidences and preserve solicitor-client privilege, which may involve the lawyer acting through another lawyer.

Why is a new rule being formulated?

There is a need to formulate a crystal clear rule in response to concerns expressed by Mr. Justice Gravely in *R. v. Murray* that the present rules of professional conduct are not clear, and in response to public concerns arising from the *Murray* case.

What are the purposes of new rule?

- To draft a "black letter" rule that can be enforced through discipline if breached.

- To give guidance to lawyers who need to address the dilemma of potentially conflicting duties, *i.e.* duty to client vs. duty to administration of justice.

How best to achieve this goal?

Formulate a rule as clear and simple as possible. This addresses the complaint that the Law Society gives no real guidance in situations of ethical conflicts.

This proposed formulation has the great advantage of being clear and simple, since it does not leave discretion in vaguely defined circumstances. It makes it clear that lawyers should not take possession of property that has potential evidentiary value. If such evidence nevertheless comes into the lawyer's possession it must be turned over to authorities in a manner that best protects the client's interests, without interfering with the due administration of justice.

Advantages of the proposed rule:

- The proposed rule is largely based upon Chapter 10, Rule 20, of the Alberta Code of Professional Conduct, and the Commentaries thereunder. There is no indication that the Alberta rule has unduly interfered with the relationship between lawyers and their clients. It is submitted that in the absence of compelling reasons justifying a different position, there is no good reason for Ontario to formulate a rule that justifies not turning evidence over to the authorities when the Alberta rule so requires. A rule which is based upon an American model is not one which is likely to instill public confidence in the administration of justice, given the very different legal and social environments in which our two systems operate.

- Easy to understand and comply with.

- No ethical dilemma, as rule is mandatory rather than discretionary.

- Client is fully aware of implications of turning items over to the lawyer.

- Administration of justice is enhanced by virtue of the fact that evidence of crime used for investigative or prosecutorial decision-making is not secreted by lawyers or is not otherwise placed out of the reach of the authorities by lawyers.

- Sophisticated criminals could never use lawyers as a repository of "contraband".

- Counsel can never be accused of obstructing justice or contravening s.354 of the Code.

- Counsel does not risk becoming a potential witness if continuity of evidence becomes an issue.

- Investigative and prosecutorial decisions will be made with more comprehensive information, resulting in lesser likelihood of miscarriages of justice and enhanced public confidence in the due administration of justice.

- If rule were to permit withholding of evidence until after trial commences, trials could be delayed or mistrials declared to permit Crown testing or recall of witnesses to address new evidence or to conduct further investigation.

- Does not offend duty of loyalty and confidentiality to client.

Problems with the Previously Formulated Draft Rule:

- Previously drafted rule might have effect of not preventing obstruction of justice. The previous draft gives inadequate consideration to the effect that the withholding of evidence, *even temporarily*, might have on the course of justice.

  As Justice Gravely indicated at paras. 106-108 of the *Murray* decision, the failure to disclose the tapes in that case not only tended to obstruct the police in their duty to investigate the crimes, but also impacted throughout on the series of prosecutorial decisions being made as the case was proceeding to trial. In this connection, Justice Gravely commented as follows:

  > *On the face of the evidence Murray's action in secreting the critical tapes had the tendency to obstruct the course of justice at several stages of the proceedings.*
  >
  > *The tapes were put beyond the reach of the police who had unsuccessfully attempted to locate them. Secreting them had the tendency to obstruct the police in their duty to investigate the crimes of Bernardo and Homolka.*
  >
  > *The impact of the absence of the tapes flowed through into the ability of the Crown to conduct its case throughout. Quite apart from, and in addition to, the possible impact of the tapes on the outcome of the Homolka proceedings, as Blacklock J. pointed out in his reasons for committal at the Preliminary Inquiry, "A whole series of prosecutorial decisions are being made as a case proceeds along to trial". One of those prosecutorial decisions occurred when, without knowledge of the tapes, Crown counsel approached Murray with a resolution offer which Murray recommended to his client. [Emphasis added.]*

Justice Blacklock's comments at page 17 of the his Reasons for Judgment on the preliminary inquiry are also most instructive:

> *I agree that the notion that incriminating physical evidence may be held to the point of trial is troubling for reasons other than those set out in Fairbank. A whole series of prosecutorial decisions are being made as a case proceeds along to trial that the strength of the case relates to. Decisions are made about judicial interim release, the form of the indictment upon which the Crown and the Court will proceed is determined, whether or not to enter into plea negotiations, what position to take in those negotiations. If counsel are entitled to hold incriminating physical evidence to the point of trial, on the basis that to do so furthers in any measure a defence tactic counsel could presumably permit all these key decisions to be made knowing that it had taken out of any potential zone of discovery, significant incriminating physical evidence which would impact on those decisions.*

- The previous draft rule does not achieve objective of being a clear rule that can be enforced through discipline proceedings if breached. That proposal continues to put counsel at risk of criminal prosecution because the judgment call on the part of counsel might result in an assessment that counsel's action had in fact tended to obstruct, pervert or defeat the course of justice, contrary to section 139 of the *Criminal Code*.

- If evidence is immediately handed over the authorities, examination or testing of evidence will normally be performed by the Crown and all results of testing will be disclosed to the defence; if the Crown declines to conduct testing or otherwise does not agree to reasonable defence testing, defence has ability to request the Court to order production of the evidence and, pursuant to s. 605 of the *Criminal Code,* the defence may seek a court order for the release of the evidence for scientific testing.

- With respect to the suggestion that it would be appropriate to withhold disclosure of evidence in order to test the credibility of witnesses at trial by surprising them with evidence relating to the crime, we offer the following observations:

  If evidence is wholly inculpatory, then the only purpose of keeping it would be to prevent the Crown from using it. This is not a valid reason for defence to be able to keep evidence for any period of time. If evidence is exculpatory, the administration of justice is not impaired by turning it over to the Crown ahead of time. If evidence might be both inculpatory and exculpatory and this is the basis for withholding evidence until the close of the Crown's case, the issue arises as to what degree of exculpatory use is required in order to justify the retention of the evidence; and who makes the decision. It is submitted that a belief that there is some peripheral or collateral use that can be made of the evidence to test a witness's credibility or ability to perceive is insufficient to justify conduct which otherwise has the effect of obstructing justice. If this were not so, then Mr. Murray's justification for suppressing the tapes would be appropriate in the future. Clearly, this is not what Justice Gravely found.

- With respect to taking temporary possession of evidence to avoid future harm; to prevent the destruction of the evidence; or to make arrangements to transfer the evidence the authorities, obviously these purposes do not obstruct justice and could be included in a proposed rule if it is felt that these situations are not adequately covered.

APPENDIX B

SUBMISSION OF THE ATTORNEY GENERAL OF ONTARIO

Attorney General *The Hon. David S. Young*
Minister Responsible for Native Affairs

Procureur général *L'hon. David S. Young*
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May 28, 2001

Secretary, Special Committee on Physical Evidence
Policy Secretariat
Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto, Ontario M5H 2N6

Dear Sir/Madame:

I would like to thank you for the opportunity to comment on proposed rule 4.01(10) relating to lawyers' duties with respect to physical evidence of crime. I have grave concerns about the rule proposed by the majority of the Special Committee which I believe is inconsistent with the criminal law relating to obstruction of justice, is incompatible with the due and proper administration of justice, and will only serve to undermine the public's confidence in the legal profession.

The proposed rule purports to permit lawyers to participate in the concealment of evidence for lengthy periods of time, in some instances forever. There are three major aspects of the proposed rule which cause greatest concern.

First, the proposed rule would allow a lawyer to secrete evidence from the appropriate authorities until after the trial had commenced and the Crown had closed its case, solely for the purpose of permitting the defence to maximize the tactical effectiveness of the evidence at trial. This use of evidence is not consistent with Justice Gravely's decision in *R. v. Ken Murray* (2000), 48 O.R. (3d) 544. Justice Gravely stated at p. 570:

> Once he had discovered the overwhelming significance of the critical tapes, Murray, in my opinion, was left with but three legally justifiable options:
>
> a. Immediately turn over the tapes to the prosecution, either directly or anonymously;
> b. Deposit them with the trial judge; or,
> c. Disclose their existence to the prosecution and prepare to do battle to retain them
>
> I am satisfied that Murray's concealment of the critical tapes was an act that had a tendency to pervert or obstruct the course of justice. [Emphasis added.]

Justice Gravely's judgement on this point should come as no surprise, since by holding on to the evidence until trial a lawyer is effectively concealing that evidence for that period of time. What the proposed rule fails to take into account is that even temporary concealment of evidence of crime can have the effect of obstructing the course of justice. That a rule of professional conduct of the Law Society of Upper Canada would purport to sanction such conduct is nothing short of scandalous. For example, the proposed rule would allow a lawyer to conceal physical evidence from the authorities even though the lawyer knows that the Crown is conducting plea discussions with a co-accused and that the physical evidence of crime would affect the outcome of those discussions. In short, it might allow a repeat of the *Bemardo* situation, in which the Crown was obliged to conduct plea discussions without knowledge of the existence of the most important physical evidence implicating the accused. As Justice Gravely indicated at pages 566 and 567 of his judgment, the failure to disclose the tapes in that case not only tended to obstruct the police in their duty to investigate the crimes, but also impacted throughout on the series of prosecutorial decisions being made as the case was proceeding to trial. In this connection, Justice Gravely commented as follows:

> On the face of the evidence Murray's action in secreting the critical tapes had the tendency to obstruct the course of justice at several stages of the proceedings.
>
> The tapes were put beyond the reach of the police who had unsuccessfully attempted to locate them. Secreting them had the tendency to obstruct the police in their duty to investigate the crimes of Bernardo and Homolka.
>
> The impact of the absence of the tapes flowed through into the ability of the Crown to conduct its case throughout. Quite apart from, and in addition to, the possible impact of the tapes on the outcome of the Homolka proceedings, as Blacklock J. pointed out in his reasons for committal at the Preliminary Inquiry, "A whole series of prosecutorial decisions are being made as a case proceeds along to trial. One of those prosecutorial decisions occurred when, without knowledge of the tapes, Crown counsel approached Murray with a resolution offer which Murray recommended to his client. [Emphasis added.]

Justice Blacklock's comments at page 17 of his Reasons for Judgment on the preliminary inquiry in *R. v. Murray* are also apposite:

> I agree that the notion that incriminating physical evidence may be held to the point of trial is troubling for reasons other than those set out in Fairbank. A whole series of prosecutorial decisions are being made as a case proceeds along to trial that the strength of the case relates to. Decisions are made about judicial interim release, the form of the indictment upon which the Crown and the Court will proceed is determined, whether or not to enter into plea negotiations, what position to take in those negotiations. If counsel are entitled to hold incriminating physical evidence to the point of trial, on the basis that to do so furthers in any measure a defence tactic counsel could presumably permit all these key decisions to be made knowing that it had taken out of any potential zone of discovery, significant incriminating physical evidence which would impact on those decisions.

Given the clear pronouncements by Justice Gravely and Justice Blacklock on this point and the inherent logic of their position, the proposed rule is most problematic, as it purports to permit a lawyer to do that which the courts have said cannot be done. The implementation of this rule permitting defence counsel to hold on to incriminating evidence, for tactical reasons, until after the Crown's case is closed would not instill public confidence in the administration of justice. To the contrary, I am forced to observe that such a rule would bring the administration of justice into disrepute.

My second major concern is that the proposed rule would purport to allow a lawyer to retain physical evidence of crime in order to conduct scientific testing. The difficulty with this is that the proposed rule, once again, fails to consider the adverse effects that even temporary concealment of the physical evidence of crime could have on the administration of justice. The proposed rule also fails to recognize that the defence is not prejudiced by immediately handing over the evidence to the authorities. Any examination or testing of evidence that the Crown performs will be disclosed to the defence. If the Crown declines to conduct testing, or otherwise does not agree to reasonable defence testing, the defence has the ability to request the Court to order production of the evidence and, pursuant to s. 605 of the *Criminal Code*, the defence may seek a court order for the release of the evidence for scientific testing.

My third major concern with the proposed rule is that it would allow a lawyer who took possession of evidence of crime to return the evidence to the original source. This would, in effect, allow the lawyer to participate in the permanent concealment of evidence of a criminal offence. For example, it appears that if the item was originally hidden or buried in some remote location, then the proposed rule would allow the lawyer to rebury the evidence. The spectre of an officer of the court participating in the concealment of evidence in this manner would certainly shock the sensibilities of the community and would only serve to lower public confidence in the legal profession and in the due administration of justice.

The proposed rule is surprising in that it is contrary to past opinions rendered by the Law Society's *ad hoc* "smoking gun" committee. One such opinion involved the famous "bloody shirt" case. In that case a person was wanted for murder and entered a lawyer's office with blood on his shirt. The lawyer instructed the client to remove the shirt, which he did, and then placed the shirt in the client's file. The lawyer started to worry about his actions, retained another counsel who approached the Professional Conduct Committee. The advice received from the Committee was:

> You should not have taken the shirt. It is a piece of physical evidence. Not only that, what you saw with your eyes as opposed to what you heard with your ears, is not privileged so that you may be a witness now in this case. Our advice to you is that you must withdraw from the case and you must turn the shirt over forthwith to the Crown Attorney.

The proposed rule is also contrary to the rule promulgated by the Law Society of Alberta. I am unaware of any suggestion that Alberta's rule has hampered the role of defence counsel. It would appear that the proposed rule is based upon an American model that is not likely to instill public confidence in the administration of justice, given the very different legal and social environments in which our two systems of law operate.

The proposed rule would do a great disservice to the legal profession. The Courts have routinely held that it is a criminal offence for anyone to conceal evidence of crime: *R. v. Lajoie* (1989), 47 C.C.C. (3d) 380 (Que. C. A.); *R. v. Lavin* (1992), 76 C.C.C, (3d) 279 (Que. C.A.) and *R. v. Akrofi* (1997), 113 C.C.C. (3d) 201 (Ont. C.A.). In attempting to formulate a rule regarding the retention of physical evidence of crime, the Law Society must ensure

that the rule it enacts is consistent with the law. Any rule that is inconsistent with the criminal law is of no force or effect and *ultra vires* the Law Society, since, as you know, the Law Society is a provincial body which cannot amend federal criminal law. A lawyer who follows the proposed rule and retains physical evidence of crime until trial, or who conducts scientific testing without the knowledge of the authorities, or who returns the physical evidence of crime to its source, may still run the risk of being charged with a criminal offence.

I support the rule proposed by the Crown members of the Special Committee which states that physical evidence of crime that comes into a lawyer's possession must immediately be turned over to the authorities. This proposed rule has many advantages: it is consistent with the criminal law; it is easy to understand and comply with; it poses no ethical dilemma to the lawyer, as the rule is mandatory rather than discretionary; investigative and prosecutorial decisions will be made with more comprehensive information, resulting in a reduced possibility of a miscarriage of justice; and ultimately, and most importantly, it serves to instill public confidence in the legal profession and in the administration of justice.

By way of summary, I am absolutely opposed to the rule proposed by the majority of the Special Committee. In my role as the chief law officer of the Crown, I am very concerned that this proposed rule gives no weight to the legitimate demands of the administration of justice that lawyers not become secret repositories of evidence of crimes. All right thinking members of the public will be appalled to discover that this proposed rule totally ignores the significant damage that can be caused to the administration of justice by any delay in handing over physical evidence of crime to the authorities. In many cases, defence counsel will have no information concerning what steps an investigation or a prosecution may be taking and is in no position to gauge what damage delayed disclosure or non-disclosure might have on the conduct of an investigation or prosecution. It is simply unacceptable that the Law Society of Upper Canada would purport to permit lawyers to arrogate to themselves the decision as to when, or even whether, it is in the best interests of the administration of justice to disclose to the appropriate authorities physical evidence of crime which is in the lawyer's possession. There can be no doubt that it is in the public interest that investigative and prosecutorial decisions are made with all available evidence and information. That the Law Society might promulgate a rule that permits lawyers to secrete evidence that would have an adverse impact on those decisions and which might result in miscarriages of justice is intolerable and would only serve to bring the administration of justice into disrepute.

Thank you again for this opportunity to comment on the proposed rule. I sincerely hope that the Special Committee and Convocation will reconsider the possible implementation of the rule proposed by the majority of the Special Committee and will find favour with the rule proposed by the Crown members of the committee.

Yours truly,

David Young,
Attorney General and
Minister Responsible for Native Affairs

c.c. Robert Armstrong, Q.C.
Treasurer, Law Society of Upper Canada

APPENDIX C

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.01(10) – (16) AND COMMENTARY

Rule 4 - Relationship to the Administration of Justice

4.01 THE LAWYER AS ADVOCATE

Property Relevant to a Crime or Offence

4.01 (10) A lawyer shall not take or keep possession of property relevant to a crime or offence, except in accordance with this rule.

(11) A lawyer may take or keep temporary possession of property relevant to a crime or offence only where:

(a) it is necessary to do so to prevent the alteration, loss or destruction of the evidence,

(b) it is necessary to do so to prevent physical harm to any person,

(c) the client or the person possessing the property instructs the lawyer to promptly arrange for the property to be disclosed or delivered to the Crown or law enforcement authorities,

(d) the lawyer reasonably believes it is in the interests of justice that the property be examined or tested before it is disclosed or delivered to the Crown or law enforcement authorities, and the property may be examined or tested without altering or destroying its essential characteristics, or

(e) the lawyer reasonably believes that a wrongful conviction may be prevented if the property is first disclosed at trial, and this use of the property would be significantly diminished if it were disclosed to the Crown or law enforcement authorities before the trial.

(12) A lawyer may take or keep temporary possession under subrule (11) (d) or (e) only if the lawyer has been authorized to do so by a committee of the Law Society established by the Treasurer to decide whether the lawyer may take or keep temporary possession. The lawyer must seek such authorization promptly.

(13) A lawyer who takes or keeps possession of property relevant to a crime or offence shall not

(a) counsel any alteration, concealment, loss or destruction of the property,

(b) alter, conceal, lose, or destroy the property, or

(c) deal with the property in a manner that there are reasonable grounds to believe would

(i) obstruct justice, or

(ii) risk physical harm to any person.

(14) A lawyer who takes or keeps property relevant to a crime or offence shall give up possession of the evidence as soon as practical and only in accordance with subrules (11)(d) or (e), (15) or (16).

(15) A lawyer in possession of property relevant to a crime or offence may return the evidence to its source only if the lawyer is satisfied on reasonable grounds that the evidence will not be

(a) altered, concealed, lost or destroyed or

(b) used to cause physical harm to any person.

(16) Subject to subrules (10) – (15), a lawyer in possession of property relevant to a crime or offence shall disclose or deliver it to the Crown or law enforcement authorities as soon as practicable in all the circumstances.

COMMENTARY

A. Introduction

A lawyer who takes from a client or other person property relevant to a crime or offence confronts difficult ethical issues and choices – and competing professional duties. This commentary is intended to assist lawyers who, in making decisions in the best interests of their clients, must also address their duties to the administration of justice.

A lawyer owes duties of loyalty and confidentiality to his or her client and must act in the client's best interests by providing competent and dedicated representation. These duties, which are fundamental to the administration of justice, among other things, encourage the client to be completely candid with the lawyer, who then can provide the best possible legal advice and representation, which is particularly important in the criminal law context where the reputation and liberty of the client may be at risk. The duties of loyalty and confidentiality must be fulfilled in a way that reflects credit on the legal profession, and inspires the confidence, respect and trust of clients and the public.

The lawyer also owes duties to the administration of justice, which require, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice. These duties must be observed in the context of our adversarial system of justice, in which the state bears the burden of proof and an accused's lawyer is not allowed, unless the client permits, to assist in the proof of the crime or offence.

It is in this context that a lawyer's responsibilities under subrules 4.01 (10) – (16) should be considered. Under these rules, a lawyer is never required to take or keep possession of property relevant to a crime or offence and generally should not take or keep such property. However, in certain limited circumstances, is it permissible for a lawyer to take or keep such property temporarily. These rules also address how a lawyer should give up possession of property relevant to a crime or offence that he or she temporarily possesses.

B. Information Distinct from Possession

This rule applies where the lawyer takes or keeps property relevant to a crime or offence. It does not apply where the lawyer is merely informed of property in the possession or control of the client or other person. In those circumstances, the lawyer will ordinarily have a duty to keep confidential the information disclosed by or on behalf of the client (see rule 2.03.) Even where the lawyer is asked by or on behalf of the client to take or keep property relevant to a crime or offence, such information communicated by or on behalf of the client (as contrasted with the property itself) will ordinarily be confidential. The duty of confidentiality will also ordinarily apply to information about property communicated orally or in writing by or on behalf of the client (such as the location of the property) as well as information communicated by the client's actions (such as the fact that the client has possession or control of property). The lawyer's actions in viewing the property, without more, will ordinarily be confidential, as will any advice the lawyer provides to the client with respect to the property, as long as the lawyer does not counsel or participate in any alteration, concealment, loss or destruction of it.

Where the lawyer refuses to take possession of the property, the lawyer should be careful not to counsel or participate in the alteration, concealment, loss, or destruction of the property. The lawyer may provide legal advice concerning obstruction of justice and about how the handling of incriminating evidence may show consciousness of guilt to allow the client to make an informed decision on what is in the client's best interests. Subject to the qualifications of this rule (for example, the qualification about preventing physical harm to others) what to do with the property is the client's decision, as the client will have to face the consequences of the decision.

If the client leaves with the property, the lawyer's observations of the property and the client's possession of it will usually be confidential under rule 2.03. Nevertheless, the lawyer's knowledge may affect his or her ability to act as defense counsel. For example, if the lawyer learns that the client intends to testify that he or she never had possession of the property that the lawyer observed in the client's possession, the lawyer could not lead the client's evidence and would have a duty to withdraw from the representation in accordance with rule 2.09 (7)(b) if the client insists on giving this testimony.

C. Types of Property

This rule applies to all types of property relevant to a crime or offence including original documents and documents that are electronically stored or formatted.

D. The Lawyer's Duties With Respect to Property Relevant to a Crime or Offence

Where under rule 4.10 (11)(d), the lawyer takes or keeps the property to examine or test it, the examination or testing must be genuinely for the purpose of the client's representation and not devised to aid in a ruse or to avoid disclosure of the property to the Crown or law enforcement authorities.

The lawyer should be satisfied that the person performing any test is reputable, and the lawyer should keep a record of the test and its observations and results. Where the testing method could alter or destroy the essential characteristics of the property, temporary possession is not authorized under rule 4.01(11)(d) and the lawyer should either (a) notify the Crown or law enforcement authorities so that the lawyer and the Crown may agree on a suitable testing process or apply to the court for directions or (b) give up possession of the property in accordance with the rule. The lawyer should give up possession of property kept for examination or testing as soon as is practicable.

Where under rule 4.10 (11)(e), the lawyer takes or keeps the property to make use of it at trial, the evidence should be disclosed to the Crown at trial, generally before the close of the Crown's case. If the property is not disclosed until after the close of the Crown's case, the lawyer should not oppose the Crown's case being reopened.

Where the lawyer takes or keeps temporary possession in any of the permitted circumstances, the lawyer should safeguard the property to ensure that it is not altered (for example by deterioration) or destroyed.

Where the lawyer takes possession of property relevant to a crime or offence but is not permitted to keep temporary possession of it, the lawyer should make arrangements for the property to be returned to the client or other source or disclose or deliver it to the Crown or law enforcement authorities in accordance with the rule as soon as practicable.

E. Where Disclosure Should be made to Authorities

When a lawyer discloses or delivers property relevant to a crime or offence to the Crown or law enforcement authorities, the lawyer has a duty to protect the client's confidences, including the client's identity, and to preserve solicitor and client privilege. This may be accomplished by the lawyer retaining independent counsel (who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer), to disclose or deliver the property.

F. Advising the Client

Before taking or keeping possession of property relevant to a crime or offence, the lawyer should advise the client that

(i) the lawyer cannot be used as a means of altering, concealing, losing, or destroying the property,
(ii) communications made for the purpose of altering, concealing, losing or destroying the property are not protected by solicitor and client privilege,
(iii) the lawyer may take or keep possession of the property only in exceptional circumstances, and only then temporarily, and may be required to disclose or deliver the property to the Crown or law enforcement authorities,
(iv) law enforcement authorities may seize the property by means of a valid search warrant, regardless of whether the property is kept by the client or the lawyer, and
(v) if the client chooses to keep the physical evidence,
    (A) the client cannot alter, conceal, lose, or destroy the property without committing a criminal offence,
    (B) the lawyer cannot lead the client's evidence if the client proposes to testify that he or she never had possession of the property,

(C) if the client persists in the instructions described in (B), the lawyer will be required to withdraw as the client's counsel subject to the rules about criminal proceedings and the direction of the tribunal (see subrules 2.09 (4) – (9)), and

(D) any evidence of alteration, concealment, loss, or destruction of the property that can be proved by the Crown may be incriminating evidence.

The lawyer should prepare a written record of all communications and actions taken by him or her respecting property relevant to a crime or offence. The record should be kept in the lawyer's file. If the lawyer takes or keeps property in accordance with the rule, the lawyer should keep the property in the file or record in the file the location of the evidence.

G. Seeking Advice and Authorization

A lawyer who is asked to take or does take property relevant to a crime or offence should generally seek the advice of senior counsel or the Law Society. The lawyer is *required* by the rule promptly to obtain the authorization of a committee of the Law Society established by the Treasurer before taking or keeping temporary possession of the property for testing or for use at trial. The lawyer should document all communications and dealings with respect to the property for the purposes of obtaining authorization including making a record of any advice obtained from senior counsel or the Law Society.

……

The Report was referred back to the Committee to obtain a legal opinion and to consider points raised by the Attorney General and others.

It was moved by Mr. MacKenzie, seconded by Mr. Ruby that the Report be referred back to Committee.

Withdrawn

RE: WORKING GROUP ON MOBILITY ISSUES

The Treasurer appointed the following working group to study mobility issues: Frank Marrocco (Chair), George Hunter, Derry Millar, Niels Ortved and Malcolm Heins.

Convocation took its morning recess at 9:40 a.m. and returned at 10:00 a.m. in camera.

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EQUITY & ABORIGINAL ISSUES COMMITTEE REPORT

Mr. Copeland presented the Report of the Equity & Aboriginal Issues Committee for approval by Convocation. He made reference to a letter from Dean Alison Harvison Young which had been distributed to the Benchers respecting the plans to commission a study into accessibility to Ontario law schools.

Equity and Aboriginal Issues Committee/
Comité sur l'équité et les affaires autochotones

May 23, 2002

Report to Convocation

Purpose of Report: Decision
Information

Prepared by the Equity Initiatives Department

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee /Comité sur l'équité et les affaires autochtones (EAIC) met on May 9, 2002. In attendance were:

Paul Copeland	(Chair)
Helene Puccini	(Vice Chair)
Stephen Bindman	
Gary Gottlieb	
Jeffrey Hewitt	(Co-Chair, Rotiio[7] taties)
Janet Minor	
Andrew Pinto	(Chair, Equity Advisory Group)
Judith Potter	
Brad Wright	

Staff: Josée Bouchard, Rachel Osborne

2. The Committee is reporting on the following matters:

Policy - For Decision

- Law school tuition fee increases.

Information

- AJEFO response to the French Language Services Report**.**

POLICY - FOR DECISION

LAW SCHOOL TUITION FEE INCREASES

Request of Convocation

3. Convocation is requested to consider and, if appropriate, approve the following course of action:

   X That the Treasurer send a letter to the Governing Council of the University of Toronto offering the Law Society of Upper Canada's support of, and participation in, the Accessibility and Career Choice Review which is to be conducted though the Provost's office.

Background

4. At its May 9, 2002 meeting, EAIC received a motion approved at the May 2, 2002 meeting of the Governing Council of the University of Toronto (a copy of the motion is attached at Appendix 1) regarding law school tuition fee increases. The motion reads as follows: "Be it Resolved : That there be no further substantial increase in tuition fees for the JD Program in the Faculty of Law until governing Council is satisfied that there has been no reduction in accessibility due to the 2002-03 tuition increase and no career distortion due to previous substantial increases based upon a comprehensive Accessibility and Career Choice Review to be conducted through the Provost's office".

5. The Governing Council of the University of Toronto will also consider, at its June 27, 2002, the following notice of motion: "That there be established a Faculty of Law Alumni Bursary Fund, designed to be eligible for matching funds from the Province of Ontario, if any, which, once it exceeds the annual alumni donations projected in the Strategic Plan, will be used to fund tuition fee rebates."

6. Given its concerns regarding potential impacts of increasing tuition fees on the accessibility of legal education, EAIC recommends that the Law Society offer its support of, and participation in, the Accessibility and Career Choice Review which is to be conducted by the Provost's office at the University of Toronto.

FOR INFORMATION

AJEFO RESPONSE TO THE FRENCH LANGUAGE SERVICES REPORT

7. EAIC Chair Paul Copeland received a letter from AJEFO President Peter Annis (a copy of the letter is attached in Appendix 2) commenting on the Law Society of Upper Canada Report on the Implementation of French Language Services (A copy of the report is attached in Appendix 3).

8. The letter offers congratulations to the Law Society on the progress it has made in regard to French language services, noting that AJEFO has observed a clear improvement in French language services in recent years.

9. The letter also suggests that the French Language Services Report could be improved by adding the following information:
   X recognizing the educational mandate of the Law Society and the importance of education in the promotion of access to justice in French;
   X recommending that the position of Director of the Ottawa Bar Admission Course be designated bilingual and that it be staffed by a bilingual person;
   X recommending that a position be designated bilingual in the Equity Initiatives Department and that it be staffed by a bilingual person.

10. AJEFO also indicates that it would assist the Law Society in maintaining its website in French. Further, AJEFO believes that the report could be improved if at least one position was reserved to a Francophpone or to a representative of AJEFO at Convocation and that AJEFO have permanent representation on EAIC.

Appendix 2

Translation of French letter dated April 10, 2002.

Paul Copeland
Chair, Equity and Aboriginal Issues Committee
Law Society of Upper Canada
130 Queen Street West
Toronto, Ontario M5H 2N6

Dear Paul,

As you know, the mandate of the Association des juristes d'expression française de l'Ontario (AJEFO) is to support the promotion of access to justice in the two official languages of the Ontario courts. We were pleased to receive a copy of the Law Society of Upper Canada Report on the implementation of French language services. We read the report with great interest and we would like to congratulate the Law Society for the excellent progress it has made in recent years. We have indeed observed a clear improvement of French language services. We thank you for soliciting AJEFO's feedback on the report and its implementation strategy.

Although the report is very good as a whole, we think that it could be improved by taking into account the following suggestions. First, the report could be improved by making mention of the role of the Law Society in legal education. The educational mandate of the Law Society could be further reviewed in the report. Education, in all aspects, is at the very heart of the improvement and continuity of French language services. As well, we propose that you further acknowledge the Ottawa Bar Admission Course program as a fundamental element of your strategy. The existence of the French Common Law Program at the University of Ottawa and the Law Society offices in Ottawa bear a crucial importance in the training of Francophone lawyers. As such, we recommend that the position of the Director of the Ottawa Bar Admission Course be a designated bilingual position, and that a bilingual person be hired in that position.

In our view, the report and the implementation of your policy could be made more complete if it recommended the designation of a bilingual position for the Equity Initiatives Department. It is in fact a key service within the Law Society for the development of policies on equity. It is important to designate a position that ensures continuity and progress of French language services and that ensures a link to our association. We respectfully ask that you accept to designate such position as bilingual and to staff it with a bilingual person.

We would also like to express our interest in the development of the Law Society's website, particularly the French version. We noticed that the French site is not updated as often as the English version. AJEFO acknowledges the importance of a website as a communication tool and we believe that Francophone lawyers and members of the public of Ontario would benefit from access to the resources offered by the Law Society. The AJEFO is willing to further discuss those issues with you to explore ways of possible solutions.

Finally, we firmly believe that the report and the Law Society's French language policy could be improved if at least one seat was reserved at Convocation for a Francophone or for a representative of AJEFO. We also recommend a permanent representation of AJEFO on the Equity and Aboriginal Issues Committee. In our view, the adoption of such measures is necessary for the development of our Francophone members.

Peter Annis
President

French version of letter from Peter Annis

Le 10 avril 2002

23rd May, 2002

M^e^ Paul Copeland
Président, Comité sur l'équité et les affaires autochtones
Barreau du Haut-Canada
Osgoode Hall
130, rue Queen Ouest
Toronto ON M5H 2N6

Cher confrère,

Comme vous le savez, l'Association des juristes d'expression française de l'Ontario (AJEFO) a pour mandat d'assurer l'accès à la justice dans les deux langues officielles des tribunaux de l'Ontario. Nous sommes alors très heureux d'avoir reçu une copie du rapport sur la mise en œuvre de la politique des services en française du Barreau du Haut-Canada. Nous avons lu le rapport avec grand intérêt et nous voulons exprimer nos plus sincères félicitations pour l'excellent progrès que le Barreau a accompli au cours des dernières années. Nous avons en effet constaté une nette amélioration en ce qui concerne les services en français. Nous vous remercions de solliciter les commentaires et suggestions de l'AJEFO sur le rapport et la stratégie de mise en œuvre.

Bien que le rapport nous semble très bien dans son ensemble, nous sommes d'avis qu'il pourrait être améliorer en tenant compte de certaines suggestions que nous désirons vous présenter. D'abord, nous croyons que le rapport pourrait bénéficier d'une mention de la composante de formation. Nous somme d'avis que le mandat de formation du Barreau du Haut-Canada devrait être étudié davantage dans le rapport. La formation, dans tous ses aspects, est au cœur même de l'amélioration et de la continuité des services en français. Dans le même sens, nous vous proposons de reconnaître davantage le programme de formation professionnelle d'Ottawa comme élément fondamental de votre stratégie. En raison du programme de common law en français de l'Université d'Ottawa, le centre d'Ottawa du Barreau revêt une importance capitale dans la formation de juristes francophones. À ce titre, nous vous recommandons de désigner le poste de Directeur du centre d'Ottawa comme étant bilingue et d'assurer qu'il soit aussi comblé par une personne bilingue.

À notre avis, le rapport et la mise en œuvre de votre politique pourrait être rendu plus complet en prévoyant que le poste de (nom du poste de Josée) soit également désigné et comblé bilingue. C'est en effet un poste clé au sein du Barreau, un poste qui permet d'assurer la continuité et la progression des services en français et le poste qui assure le lien avec notre association. Nous vous serions grés de bien vouloir désigné ce poste comme étant bilingue et de le combler avec une personne ayant ces capacités.

Nous désirons également vous aviser que nous sommes quelque peu préoccupés par le site internet du Barreau. En particulier, nous avons constaté que la version française du site n'est pas régulièrement mise à jour. L'AJEFO reconnaît l'importance d'un site internet comme outil de communication et nous croyons qu'il serait dans le plus grand intérêt des juristes et des justiciables francophones de l'Ontario de leur permettre d'avoir accès aux nombreuses ressources du Barreau par l'entremise de votre site. L'AJEFO est disposé à discuter davantage de ces questions avec vous afin d'explorer des pistes de solutions possibles.

Finalement, nous croyons fermement que le rapport et la politique des services en français du Barreau pourrait être grandement amélioré en prévoyant qu'il y aurait au moins un poste sur le conseil du Barreau qui soit réservé à un francophone. Dans le même sens, nous vous recommandons l'adoption de tels postes au sein de chacun des comités du Barreau et, en particulier, le Comité sur l'équité et les affaires autochtones. À notre avis, le plein épanouissement des membres francophones de notre profession pourra difficilement être réalisé sans l'adoption de telles mesures.

Le président,

PA/ab

M^e^ Peter Annis

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

(1) University of Toronto Governing Council Motions.

(Appendix 1, page 6)

(2) Copy of a Memorandum from Equity Initiatives to the Equity and Aboriginal Issues Committee dated December 11, 2001 re: Implementation of the Law Society's French Language Services Policy.

(Appendix 3, pages 11 – 26)

Re: Law School Tuition Fee Increase

It was moved by Mr. Copeland, seconded by Mr. Millar that the Treasurer send a letter to the Governing Council of the University of Toronto offering the Law Society of Upper Canada's support of, and participation in, the Accessibility and Career Choice Review which is to be conducted through the Provost's office.

Carried

Item for Information Only

- AJEFO Response to French Language Services Report

FINANCE & AUDIT COMMITTEE REPORT

Mr. Ruby presented the item in the Report regarding the Operating Reserve Policy for approval by Convocation.

Finance and Audit Committee
May 23, 2002

Report to Convocation

Purpose of Report: Decision

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

TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee (Athe Committee@) met on May 9, 2002. Committee members in attendance were: Ruby C. (c), Epstein S. (vc), Crowe M. (vc), Cass R., Chahbar A., Coffey A., Diamond G., Divinsky P., Lawrence A., Pilkington M., Porter J., Swaye G., Wright B.. Krishna V. (Treasurer), Mulligan G. and Potter J. also attended. Staff attending were Heins M., Tysall W., Miles D., Grady F., Miller J., Cawse A.. Mr. Peter Bourque from CDLPA and Ms. Suzan Hebditch from LibraryCo Inc. also attended.

The Committee is reporting on the following matters:

Decision

X Operating Reserve Policy

X Appointment of Auditor

X LibraryCo Inc. 2002 Budget and Business Plan

FOR DECISION

OPERATING RESERVE POLICY

1. A memorandum on the nature and amount of the Operating Reserve is attached at page 5. The memorandum develops a policy which establishes a range for the Operating Reserve at the Law Society.

2. The objective of this policy, in the context of operating the Society in a sound and prudent fiscal manner, is that Convocation will endeavor to maintain an Operating Reserve that provides for up to three months of the Society's operating expenses. This policy is intended to guide Convocation's fiscal oversight and management of the Operating Reserve.

3. Convocation is requested to approve the following policy:

> Convocation will, as a general principle, adopt budgets that maintain an Operating Reserve balance sufficient to provide for the Society's operating expenses for up to three months and not less than two months.
>
> In the event this balance exceeds three months of annual operating expenses at the end of any fiscal year, Convocation should designate the excess be employed as follows,
>
> - Appropriated to reduce the next year's annual membership levy;
> - Transferred to the Capital and Technology fund;
> - Appropriated to fund one-time expenditures;
> - Appropriated to fund start-up expenditures for new programs not included in the annual budget.
>
> If at the end of a fiscal year, the Operating Reserve falls below two months of annual operating expenses, the CEO shall inform Convocation of the implications and options for restoring the Operating Reserve balance to an acceptable level.
>
> This policy is intended to guide Convocation's fiscal oversight and management of the Operating Reserve. It is not intended to restrict Convocation's discretion to use some or all of the Operating Reserve balance when needed.

APPOINTMENT OF AUDITOR

4. The process approved by the Committee for the selection of the auditor for the Law Society funds and entities has been completed. Four of the six firms provided submissions in response to our Request for Proposal for audit services. A staff committee met with these four firms and recommended a short list to the Auditor Selection Group comprising Mr. Chahbar, Ms. Divinsky, Mr. Epstein, Mr. Heins and Ms. Tysall. The Auditor Selection Group met with the short listed firms and made a recommendation, approved by the Committee, that Deloitte & Touche LLP be appointed as our auditor. Reasons for the decision are set out in the attached memorandum (page 16).

5. Convocation is requested to approve Deloitte & Touche LLP as the Law Society's auditor for the year ended December 31, 2002.

6. Convocation is also requested to recommend that LibraryCo Inc. and the Law Society Foundation appoint Deloitte & Touche LLP as their auditors for the 2002 financial year.

LIBRARYCO INC. 2002 BUDGET AND BUSINESS PLAN

7. During the 2002 budget deliberations, LibraryCo. Inc. submitted a 2002 budget that required a membership levy of $208 per member. The levy amount for LibraryCo. was approved at that time, but actual budget approval was withheld contingent upon LibraryCo's provision of a satisfactory business plan by May 2002.

8. A Business Plan for the years 2002 through 2005 was prepared and presented to the Finance and Audit Committee that included a 2002 budget, and information on LibraryCo. operations, that was consistent with the approved 2002 levy for LibraryCo. The Business Plan, entitled *Out of the Box … and Beyond the Walls!* is attached as Appendix B.

9. The Business Plan is the implementation phase of the recommendations contained in the *Beyond 2000* report on the blended system for the provision of County Law Library Services. The Plan proposes the establishment of Regional, Area and Local libraries but in a departure from *Beyond 2000* proposes to sub-divide local libraries into two categories, Local A and Local B. The Plan proposes that Local A libraries be unstaffed with a full suite of electronic products and resources and a very small, traditional paper collection.

10. Staffing in Local A libraries will be phased out during 2003 and 2004 at an estimated savings of $134,000 annually. The Business Plan proposes to reallocate these savings to enhance electronic access and provide support from a roving librarian and nearby regional libraries.

The Committee is recommending:

11. Approval of LibraryCo's 2002 budget contained in the Business Plan.

12. Approval of LibraryCo's Business Plan subject to the following recommendations:

    i) That LibraryCo. give some priority to developing a transition plan that will assist members in obtaining access to Local A libraries as they move from paper based to electronic formats.

    ii) That LibraryCo. return to the Finance and Audit Committee when it has an opportunity to reconsider the proposed $134,000 reduction in spending in the Business Plan respecting staffing in libraries designated as Local A, and then make any proposal it thinks appropriate in that regard to the Finance and Audit Committee.

LAW SOCIETY OF UPPER CANADA
DEPARTMENT OF FINANCE

TO: The Members of Convocation

FROM: The Chair of Finance and Audit Committee

DATE: May 1, 2002

SUBJECT: Operating Reserve Policy

Discussion

In February, a discussion paper on Surplus/Reserves Fund balances was circulated to the Committee. The discussion paper is attached as Appendix A. The paper attempted to benchmark unrestricted and reserve fund balances to assist in the development of a policy for the maintenance of these balances at the Law Society of Upper Canada.

Data was presented that compared unrestricted and working capital reserve fund balances as a percentage of annual operating expenses for five large law societies across Canada. This percentage ranged from a high of 58% in Manitoba to a low of minus 28% in British Columbia, the only society of the five with an accumulated fund deficit. Without British Columbia, the average reserve as a percent of operating expenses for the four large law societies is 32%. The Law Society of Upper Canada's unrestricted and working capital reserve fund balances of $7.2 million are 14% of operating expenses. This percentage is based on $52 million, the 2001 total expenses of the Society's general fund.

To expand the benchmarking beyond law societies, an examination of financial information from municipalities in Ontario was conducted. This information was obtained from the Ministry of Housing and Municipal Affairs. Municipalities were used for comparative purposes because of the similarity in governance structure and financial issues between local governments and the Law Society of Upper Canada.

Data was presented that compared operating fund and reserve balances as a percentage of annual operating expenses for fourteen Ontario municipalities as well as the aggregate for all 800 plus municipalities in the province of Ontario. The percentage ranged from a low of 1% to a high of 34% in the selected municipalities and in aggregate was 16%.

The Committee directed that a policy on the management of the unrestricted fund and reserve for working capital fund balances be developed and an appropriate quantum for these funds be established.

Subsequent to the February meeting of the Finance and Audit Committee, discussions with PriceWaterhouse Coopers on the appropriate size of reserves indicated that it would not be unusual for an organization such as the Law Society to maintain surplus funds equivalent to four to six months of operating expenses. In the case of the Society's unrestricted fund, four months of operating expenses would equal approximately $15.3 million based on the Society's 2002 approved budget. The current balances of $7.2 million represent less than two months of the Society's operating expenses.

PriceWaterhouse Coopers referred to the Canada Customs and Revenue Agency (CCRA) interpretation bulletin 496R with regard to the tax implications of maintaining excessive accumulated fund balances in a not-for-profit organization. The interpretation bulletin provides guidance on the accumulation of surplus funds by not-for-profit organizations. CCRA allows the accumulation of surplus funds reasonable to carry on the organization's non-profit activities in a fiscally prudent manner.

Based on the research and being cognizant of potential issues related to excessive reserves, it is recommended that the combined unrestricted fund balance and working capital reserve fund balance (henceforth referred to as the "Operating Reserve") be in the range of two to three months of the Society's annual operating budget. For 2002, this would equate to a range between $7.6 million and $11.5 million, i.e. 17% to 25% of the operating budget.

This policy does not include funds restricted for specific purposes such as the Capital and Technology Fund. This fund has a balance of $2.5 million at the end of 2001. This fund is a dedicated fund, for the purpose of acquiring technology systems, restoration of Osgoode Hall and the acquisition of other capital assets. The appropriate quantum for this fund is not considered as part of this report. Discussion related to the quantum of the Capital and Technology Fund is best considered in the context of a five-year capital forecast. The utilization of funds for capital and technology will require an examination of the restoration initiatives to be considered by the Heritage Committee, the ongoing replacement and upgrade of Osgoode Hall's mechanical systems and the planned replacement of existing technology based systems. As this forecast is not available at this time, discussion on the capital fund will be deferred pending the development of an appropriate five-year capital plan.

Draft Policy for the Operating Reserve

Purpose:

To provide Convocation greater flexibility in establishing the annual member levy and to enable the funding of unanticipated expenditures or revenue shortfalls together with the funding of short-term cash requirements.

For the purpose of this policy the Operating Reserve is defined as the combined end of fiscal year balances of the Society's Unrestricted Fund and the Working Capital Reserve Fund.

Objective:

With respect to operating the Society in a sound and prudent fiscal manner, Convocation will endeavor to maintain an Operating Reserve that provides for up to three months of the Society's operating expenses.

Policy:

To achieve this objective, Convocation will, as a general principle, adopt budgets that maintain an Operating Reserve balance sufficient to provide for the Society's operating expenses for up to three months and not less than two months.

In the event this balance exceeds three months of annual operating expenses at the end of any fiscal year, Convocation should designate the excess be employed as follows,

- Appropriated to reduce the next year's annual membership levy;
- Transferred to the Capital and Technology fund;
- Appropriated to fund one-time expenditures;
- Appropriated to fund start-up expenditures for new programs not included in the annual budget.

If at the end of a fiscal year, the Operating Reserve falls below two months of annual operating expenses, the CEO shall inform Convocation of the implications and options for restoring the Operating Reserve balance to an acceptable level.

This policy is intended to guide Convocation's fiscal oversight and management of the Operating Reserve. It is not intended to restrict Convocation's discretion to use some or all of the Operating Reserve balance when needed.

It was moved by Mr. Ruby, seconded by Mr. Crowe that the following policy be approved:

Convocation will, as a general principle, adopt budgets that maintain an Operating Reserve balance sufficient to provide for the Society's operating expenses for up to three months and not less than two months.

In the event this balance exceeds three months of annual operating expenses at the end of any fiscal year, Convocation should designate the excess be employed as follows:

- Appropriated to reduce the next year's annual membership levy;
- Transferred to the Capital and Technology fund;
- Appropriated to fund one-time expenditures;
- Appropriated to fund start-up expenditures for new programs not included in the annual budget.

If at the end of a fiscal year, the Operating Reserve falls below two months of annual operating expenses, the CEO shall inform Convocation of the implications and options for restoring the Operating Reserve balance to an acceptable level.

This policy is intended to guide Convocation's fiscal oversight and management of the Operating Reserve. It is not intended to restrict Convocation's discretion to use some or all of the Operating Reserve balance when needed.

To:	Finance and Audit Committee
From:	Auditor Selection Group (A. Chahbar, P. Divinsky, S. Epstein, M.Heins and W.Tysall)
Date:	May 7, 2002
Re:	Selection of Auditor

The Auditor Selection Group reviewed the proposals received from 3 accounting firms and is unanimously recommending that Deloitte & Touche LLP be appointed Auditor for the Law Society's General Fund, Compensation Fund and for the Law Society Foundation and LibraryCo. Inc.

A request for proposal for audit services was sent to 6 firms of which 4 responded. Briefing sessions were arranged with the firms in order that staff could meet and assess the individual firms and also to provide the firms with additional insights to assist them in their bidding process.

Finance Department staff reviewed the submissions and 3 firms were short listed for interviews with the Auditor Selection Group: Deloitte & Touche, KPMG and Grant Thornton.

The following criteria were taken into account in evaluating the proposals:

- Overall knowledge of not-for-profit sector organisations & previous audit experience with medium to large sized not-for-profit organisations.
- Local and national resources available.
- Awareness and understanding of the Law Society Act, regulations and by-laws made thereunder.
- Audit approach and techniques, including review of actuarial valuations.
- Reporting process including opinion, management letter and report to Convocation.
- Cost of services.

It was determined that Deloitte & Touche possessed the relevant experience, knowledge and expertise that best fit the needs of the Law Society. Their two partners who attended made excellent presentations and demonstrated the required experience and knowledge of the Law Society's operations. They were also knowledgeable about e-commerce and web based services.

They submitted a detailed audit plan and competitive fee structure with maximum fees by component, with the opportunity for cost reductions.

A fee comparison by audit component is summarized below.

	DELOITTE & TOUCHE	KPMG
General Fund	$59,000	$59,000
Compensation Fund	$13,000	$11,600
Pension Plan	$13,000	$11,700
LibraryCo Inc.	$10,000	$12,700
Law Society Foundation	$10,000	$5,600
TOTAL	$105,000	$100,600

The Deloitte & Touche fee proposal was the only one submitted which provided for no increase in the fee for 2003.

Deloitte & Touche will have easier access to the Arthur Andersen files, given the announced discussions between the two firms, making the audit transition more efficient. In Canada, 10% of Deloitte & Touche partners are women (13% in the GTA), and 10% of staff in Canada are from visible minorities (20% in the GTA).

Deloitte & Touche services were discussed with Michelle Strom, President of LPIC. Ms. Strom reported that Deloitte & Touche has provided LPIC with good service over the past 7 years, has maintained a reasonable continuity of staff assigned to the audit and is able to offer good expertise and value added services as needed.

It was moved by Mr. Ruby, seconded by Mr. Crowe that the following policy be approved:

Convocation will, as a general principle, adopt budgets that maintain an Operating Reserve balance sufficient to provide for the Society's operating expenses for up to three months and not less than two months.

In the event this balance exceeds three months of annual operating expenses at the end of any fiscal year, Convocation should designate the excess be employed as follows:

- Appropriated to reduce the next year's annual membership levy;
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If at the end of a fiscal year, the Operating Reserve falls below two months of annual operating expenses, the CEO shall inform Convocation of the implications and options for restoring the Operating Reserve balance to an acceptable level.

This policy is intended to guide Convocation's fiscal oversight and management of the Operating Reserve. It is not intended to restrict Convocation's discretion to use some or all of the Operating Reserve balance when needed.

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

(1) Copy of Law Society of Upper Canada, Surplus/Reserves Fund Balance Policy Discussion Paper. (Appendix A, pages 8 – 15)

(2) Copy of LibraryCo Business Plan. (Appendix B, pages 1 – 45)

It was moved by Mr. Ruby, seconded by Mr. Crowe that the following policy be approved:

Convocation will, as a general principle, adopt budgets that maintain an Operating Reserve balance sufficient to provide for the Society's operating expenses for up to three months and not less than two months.

In the event this balance exceeds three months of annual operating expenses at the end of any fiscal year, Convocation should designate the excess be employed as follows:

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This policy is intended to guide Convocation's fiscal oversight and management of the Operating Reserve. It is not intended to restrict Convocation's discretion to use some or all of the Operating Reserve balance when needed.

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IN CAMERA

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RESUMPTION OF THE FINANCE & AUDIT COMMITTEE REPORT

Mr. Wilson continued with his submissions regarding the operating reserve policy.

A debate followed.

It was moved by Mr. Wright, seconded by Mr. Carey that the Operating Reserve Policy matter be tabled.

Lost

It was moved by Mr. Wright, seconded by Ms. Puccini that the main motion be amended that the reserve be $5 million or 10% of the operating budget whichever is lower.

Lost

ROLL-CALL VOTE

Bindman	For
Bobesich	For
Braithwaite	Against
Campion	For
Carey	For
Carpenter-Gunn	Against
Chahbar	Against
Cherniak	For
Coffey	For
Crowe	Against
Diamond	Against
E. Ducharme	Against
T. Ducharme	Against
Epstein	Against

Feinstein	Against
Finkelstein	For
Go	Against
Gottlieb	For
Hunter	Against
Laskin	For
Legge	Against
MacKenzie	For
Manes	For
Marrocco	For
Millar	Against
Minor	Against
Mulligan	Against
Murray	Against
Ortved	For
Pilkington	Against
Porter	For
Potter	Against
Puccini	For
Ruby	Against
St. Lewis	For
Simpson	Against
Swaye	Against
Topp	Against
White	For
Wilson	For
Wright	For

Vote: 22 – Against; 19 – For

It was moved by Mr. Murray, seconded by Mr. Simpson that the main motion be amended that the operating reserve balance be sufficient to provide the Society's operating expenses for up to two months.

Messrs. Ruby and Crowe accepted this amendment.

It was moved by Mr. Bobesich, seconded by Mr. Gottlieb that the last three bullets in the third paragraph of the main motion be deleted.

Lost

The main motion as amended was voted on and carried.

ROLL-CALL VOTE

Arnup	Abstain
Bindman	For
Bobesich	Against
Braithwaite	For
Campion	Against
Carey	Against
Carpenter-Gunn	For
Chahbar	For
Cherniak	For
Coffey	Against
Crowe	For
Diamond	For
E. Ducharme	For

T. Ducharme	For
Epstein	For
Feinstein	For
Finkelstein	Against
Go	For
Gottlieb	Against
Hunter	For
Laskin	For
Legge	For
MacKenzie	For
Manes	For
Marrocco	Against
Millar	For
Minor	For
Mulligan	For
Murray	For
Ortved	For
Pilkington	For
Porter	For
Potter	Against
Puccini	Against
Ruby	For
St. Lewis	Abstain
Simpson	For
Swaye	Against
Topp	For
White	For
Wilson	Against
Wright	Against

Vote: 28 – For; 12 – Against; 2 Abstentions

Re: Appointment of Auditor

Convocation voted on the approval to appoint Deloitte & Touche LLP to be the Law Society's auditor for the year ended December 31st, 2002 and the recommendation that LibraryCo. Inc. and the Law Society Foundation appoint Deloitte & Touche LLP to be their auditors for the 2002 financial year.

Carried

Re: LibraryCo Inc. 2002 Budget and Business Plan

It was moved by Mr. Topp, seconded by Mr. Carey that the LibraryCo Inc. 2002 Budget and Business Plan be tabled.

Lost

Convocation voted on the recommendation to approve LibraryCo's 2002 budget contained in the Business Plan and approve LibraryCo's Business Plan subject to the recommendations set out on page 4 of the Report.

Carried

PROFESSIONAL REGULATION COMMITTEE REPORT

Professional Regulation Committee
May 9, 2002

Report to Convocation

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat

TABLE OF CONTENTS

II.INFORMATION

TERMS OF REFERENCE/COMMITTEE PROCESS

The Professional Regulation Committee ("the Committee") met on May 9, 2002. In attendance were:

Gavin MacKenzie (Chair)

Carole Curtis (Vice-Chairs)
Heather Ross

Stephen Bindman
Avvy Go
Gary Gottlieb
Marilyn Pilkington
Judith Potter

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

Other Attendees: James Leal, Maurizio Romanin, Kathleen Waters

This report contains

- policy reports on
  - 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,[1]
  - a proposed amendment to rule 6.07 of the *Rules of Professional Conduct* respecting lawyers' applications to hire suspended or disbarred lawyers
  - continuing suspension of members who fail to file the Membership Information Report

- information reports on
  - proposed amendments to the *Rules of Professional Conduct* relating to lawyers' obligations in the electronic registration of title documents ("e-reg") system
  - file and caseload management and staffing information in the complaints resolution, investigations and discipline departments.

[1]A second estates practice issue, relating to payment of the Law Society's annual fee by retired lawyers acting as estate trustees, will be reported to Convocation in June 2002.

I. POLICY

PROPOSED NEW COMMENTARY TO RULE 2.04(6) OF THE *RULES OF PROFESSIONAL CONDUCT* ON JOINT RETAINERS FOR MUTUAL WILLS

ISSUE FOR DECISION

Convocation is requested either to amend the *Rules of Professional Conduct* by adopting one of the first two options for a proposed new commentary to rule 2.04(6), or to leave the commentary in its present form in accordance with Option 3. The difference between the first two options is indicated by the underlined text in Option 2:

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).

Option 3:
Leave the commentary in its present form.

A. THE ISSUE

1. The Committee is presenting two options for a proposed 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 as a result of concerns expressed by some benchers on the proposals.

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 for the preparation of 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,[2] 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 Felecia Smith, Senior Counsel, Advisory Services and Advisory Services counsel, Andrea Waltman.[3] 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.

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[2] 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.

[3] The memorandum appears at Appendix 1.

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, but creating a conflict of interest with respect to the other spouse (who would be considered 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 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 a proposed draft commentary prepared by staff, which included input from lawyer Paul Perell, the principal drafter of the current Rules. The proposed commentary reads as follows:

> 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).[4]

14. The Committee acknowledged that some lawyers in estates practices 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 is 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.[5]

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.

C. THE COMMITTEE'S PROPOSALS TO APRIL 25, 2002 CONVOCATION

18. The Committee concluded that none of the responses offered a compelling argument against the view that in these circumstances a joint retainer exists.

19. 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.

20. 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 options discussed below.

Option 1

21. 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)[6]). If one of the spouses later contacts the lawyer to make a change

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[4] 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 matte 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.

[5] A summary of the responses, without attribution, appears at Appendix 2.

[6] (4) A lawyerwho 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

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.

22. 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).

This approach is reflected in Option 1.

Option 2

23. 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.

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

25. 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. On this approach, in other words, the joint retainer would be regarded as continuing.

26. 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 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

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(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.

> 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).

This approach is reflected in Option 2.

27. The Committee was almost evenly split on which option should be recommended, though a slight majority preferred the first option. Accordingly, the Committee provided both options to Convocation for its decision.

D. CONVOCATION'S APRIL 25, 2002 REVIEW OF THE OPTIONS

28. A number of benchers offered substantive comments on the proposals.

29. 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).

30. 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.

31. 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.

32. 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.

33. 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, where 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.

34. 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.

E. THE COMMITTEE'S RECONSIDERATION OF THE ISSUE AND CURRENT PROPOSALS

35. The Committee discussed the following options when it reconsidered this issue, in addition to the options reported to April 25 Convocation:
    a. The Committee could add to Option 1 the words suggested by Mr. Cherniak.

b. The Committee could attempt to draft a new or revised commentary to address the concerns raised by Mr. Wardlaw and Mr. Mulligan about whether a lawyer should be permitted to act when an event such as divorce or mental incompetence intervenes.

c. The Committee could adopt the approach suggested by Mr. Arnup and state in a commentary that guidance cannot be offered at this time because of divergent views on the issue (or leave the commentary in its present form).

36. 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.[7]

37. After significant discussion, the Committee rejected option b. The difficulty with option b. 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. Such circumstances as separation or incompetence may in fact impose a greater duty on the lawyer not to act against the other spouse.

38. 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.

39. The Committee also recommends against option c., 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 Current Proposals

40. The Committee decided that three options should be placed before Convocation.

Option 1 - Option 1 for the Proposed Commentary

41. A minority of the Committee proposes that option 1 for the commentary, as proposed to April 25 Convocation, be adopted as the new commentary. In addition to the reasons in support of this version noted earlier in this report, the Committee members supporting this option felt that it took into consideration the comments received in response to the call for input, and that no new information has been provided that warrants substantive revision to the option.

Option 2 - Option 2 for the Proposed Commentary

42. A slight majority of Committee members favoured Option 2 for the proposed commentary for the reasons in support of this option articulated earlier in this report (at its April meeting, a slight majority of the Committee members in attendance favoured Option 1). Similar to the view on Option 1, Committee members supporting this option did not feel that any new information has been provided that would warrant revision to this option. 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.

Option 3 - No Commentary

43. The least effective option, and one that the Committee is not recommending, is to propose no new commentary to deal with the issue. While the Committee felt this should be an option for Convocation's consideration, the Committee felt that such an approach will be unsatisfactory to those seeking the requested clarification. The Committee noted that in the absence of clarifying commentary, the existing

[7] 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 that is required."

conflicts rules would apply and lawyers would be required to observe them in accordance with Option 1 or 2 for the proposed commentary, depending upon how the rules are interpreted when applied to the facts

44. The Committee's view is that it would be preferable for Convocation to remove any ambiguity.

Other Issues

45. 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.

46. The Committee felt, however, that as this matter bears on issues separate from the ethical guidance appearing in the Rules and commentary,[8] 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.

F. SUMMARY

47. 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*. A third option that Convocation may wish to consider, but which the Committee is not recommending, is to adopt no new commentary.

AMENDMENT TO SUBRULES 6.07 (2) AND (3) OF THE RULES OF PROFESSIONAL CONDUCT

ISSUE FOR DECISION

Convocation is requested to make the amendment appearing below to subrules 6.07(2) and (3) of the Rules of Professional Conduct.

The effect of the amendment is to make a committee of Convocation, rather than Convocation and a committee of Convocation, responsible for deciding all applications of lawyers who wish to retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, suspended, undertaken not to practise, or who has been involved in disciplinary action and been permitted to resign, and has not been reinstated or readmitted.

Disbarred Persons, Suspended Lawyers, and Others

(2) Without the express approval of a committee of Convocation appointed for the purpose ~~Convocation~~, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, suspended, undertaken not to practise, or who has been involved in disciplinary action and been permitted to resign, and has not been reinstated or readmitted.

~~(3) Where a person has been suspended for non-payment of fees or for some reason not involving disciplinary action, the express approval referred to in subrule (2) may also be granted by a committee of Convocation appointed for this purpose.~~

[8] 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.

A. THE ISSUE

48. The Committee is requesting that Convocation amend the *Rules of Professional Conduct* to make a committee of Convocation, rather than Convocation itself, responsible for review of all applications from members who wish to hire disbarred or suspended lawyers, pursuant to rule 6.07.

B. BACKGROUND

49. Prior to the revisions to the Rules that came into force in November 2000, Convocation reviewed all applications from members who wished to hire lawyers who were suspended or disbarred. The revised Rules, as recommended by the Rules Task Force, amended the process to permit a committee of Convocation to review applications involving administratively suspended members, while Convocation continued to review all applications involving lawyers who were suspended, disbarred or permitted to resign as a result of a discipline hearing.[9] The Hearing Panel was designated as the committee of Convocation referred to in the rule.

50. Subrules 6.07(2) and (3) provide as follows:

> Disbarred Persons, Suspended Lawyers, and Others
>
> (2) Without the express approval of Convocation, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, suspended, undertaken not to practise, or who has been involved in disciplinary action and been permitted to resign, and has not been reinstated or readmitted.
>
> (3) Where a person has been suspended for non-payment of fees or for some reason not involving disciplinary action, the express approval referred to in subrule (2) may also be granted by a committee of Convocation appointed for this purpose.

The Process

51. The application process under the rule was comprehensively described in material reviewed by the Rules Task Force prior to the amendments. The following information is drawn from that material:

- The process includes an administrative procedure for receiving and completing forms which is managed by staff and a decision procedure which is ultimately the responsibility of a committee of Convocation or Convocation itself.
- The applicant and the disbarred or suspended person must complete certain forms. A Plan of Supervision outlining the types of tasks the applicant expects the disbarred/suspended person to perform and the supervisory procedures the applicant intends to implement must be filed as part of every application. Based on the completed forms, staff prepare summaries of information from Law Society and Lawyers' Professional Indemnity Company records about both the applicant and the disbarred/suspended person.
- Staff submits a summary memorandum to Convocation with the application materials, including the Plan of Supervision. This material is treated as confidential and is reviewed with the proposed Plan of Supervision by Convocation or the committee of Convocation *in camera.*
- The applications are approved for a defined term, usually for an initial one year term. During that term, the applicant must submit status reports to the Law Society.
- At the end of the term, the applicant must formally reapply to the Society to extend Convocation's or the committee's approval. The materials submitted on a re-application update the original materials. The applicant must report on the activities and supervision of the disbarred or suspended person

[9] The proposal for revision emanated from a working group of the Committee that reported in September 1998 after reviewing the current policy. This report was then referred by the Committee to the Rules Task Force for consideration.

during the past term. The applicant must also report and respond to any concerns or complaints about the disbarred or suspended person during the original term and reaffirm that he or she will comply with the Plan of Supervision as approved for the next term.

52. The documentation requiring review by Convocation can be extensive.

Issues Considered by the Rules Task Force

53. The Rules Task Force felt that the only change in process should be with respect to what appears in subrule (3). While the Task Force considered having all applications approved by a committee of Convocation, it ultimately decided against it. The primary reason in favour of maintaining Convocation's review was that such a review was central to fulfilment of Convocation's role to govern the profession in the public interest.

54. The primary reasons in favour of having a committee of Convocation perform the review were
- elimination of demands on bencher time at Convocation to make recommendations and decisions which could be handled at other levels, freeing up Convocation for policy matters
- reducing delay in considering applications because of the schedule for Convocation meetings, and thus reducing inconvenience for applicants and financial hardship for disbarred or suspended members, allowing an individual to return to the work force and begin rehabilitation through supervised retraining and education more quickly.

C. CURRENT ISSUES RELATED TO THE PROCESS AND A SUGGESTED APPROACH

55. The Committee recognized that Convocation makes a variety of difficult policy decisions, and expressed concern that Convocation's process does not lend itself easily to quasi-judicial decision-making. Quasi-judicial decision-making with respect to conduct, competence, admission and readmission matters is left to the Hearing Panel and the Appeal Panel. Quasi-judicial decisions, such as under rule 6.07, in the Committee's view, should also be made by the appropriate committee of Convocation.

56. As the Hearing Panel has responsibility for matters under subrule 6.07(3), the Committee is proposing that that responsibility should include all applications under the rule. In this way, all applications will be dealt with by one body, whose function by design is to render decisions on issues relating to the regulation of the profession. The necessary checks and balances would remain through such a process, and the information reviewed by the committee would not vary from what would have appeared before Convocation.

57. The benefit, as noted above, would be that Convocation's time would not be taken up with review of these applications, and the applications could be considered on a more timely basis. The Hearing Panel is regularly scheduled for hearings throughout the year, and consideration of applications under the rule could be dealt with by the Hearing Panel as the need arose on any given hearing day.

D. SUMMARY

58. The Committee proposes that all applications under rule 6.07 be reviewed and approved by a committee of Convocation, namely, the Hearing Panel. This process will
- relieve Convocation of the time needed to review the applications in an already full agenda on Convocation's meeting day
- permit applications to be determined in a more timely way (i.e. without having to wait for the next meeting of Convocation)
- maintain the integrity of the process by keeping the decision-making with benchers

59. If Convocation agrees with this approach, the Committee suggests that the amendment to the rule set out at the beginning of this section of the report be adopted.

REVISION TO PROCESS FOR SUSPENSION OF MEMBERS FOR FAILURE TO FILE THE MEMBER'S ANNUAL REPORT

ISSUE FOR DECISION

Convocation is requested to adopt a policy that

a. 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. 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.

A. THE ISSUE

60. Convocation is requested to approve a new policy applicable to members suspended for failure to file the Member's Annual Report (" the MAR").

61. Under By-Law 17, a member (including a suspended member) is required to file the MAR each year. The operative section of By-Law 17[10] is section 2 which reads:

> 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].

62. The proposed new policy interprets this requirement to the effect that a member who is already suspended for failing to file the MAR and who fails to file in subsequent years remains suspended but is not suspended for each subsequent year the suspended member fails to file.

B. BACKGROUND

63. The February 1999 amendments to the *Law Society Act* gave the Society the authority to summarily revoke the membership of a member if the member has been suspended for more than 12 months. The relevant sections are section 47 and 48:

> 47. (1) An elected bencher appointed for the purpose by Convocation may make an order suspending a member's rights and privileges if, for the period prescribed by the by-laws,
>
> (a) the member has been in default for failure to complete or file with the Society any certificate, report or other document that the member is required to file under the by-laws; or
>
> (b) the member has been in default for failure to complete or file with the Society, or with an insurer through which indemnity for professional liability is provided under section 61, any certificate, report or other document that the member is required to file under a policy for indemnity for professional liability.
>
> (2) A suspension under this section remains in effect until the member completes and files the required document in accordance with the by-laws to the satisfaction of the Secretary.

[10] A copy of By-Law 17 appears at Appendix 3, which includes Form 17A, the Member's Annual Report.

48. An elected bencher appointed for the purpose by Convocation may make an order revoking a member's membership in the Society, disbarring the member as a barrister and striking his or her name off the roll of solicitors if an order under section 46 or clause 47 (1) (a) is still in effect more than 12 months after it was made.

64. Of the over 1,600 members who have been suspended for more than 12 months, and who are eligible to have their membership revoked pursuant to s. 48, 587 have been suspended more than ten years and 374 for more than five years but less than ten.[11] The Committee recently confirmed a plan to implement the summary revocation authority.[12]

65. The majority of suspended members are suspended for failing to file the MAR. These suspensions occur every year the member fails to file, whether it is a new suspension for failure to file, or a suspension for failure to file by a member already suspended for failing to file the MAR.

66. Several thousands of dollars are expended each year in postage for mailing to suspended members the MAR, the two notices that must be delivered prior to a suspension order, and the suspension order itself (by registered mail). Other expenses are associated with these members, including the telephone calls that must be made to them prior to suspension.

C. THE REASONS FOR THE COMMITTEE'S PROPOSAL

67. Not suspending such members every year would significantly reduce the number of suspension notices that must be mailed out year after year to those who continually fail to file the MAR, and reduce the other staff activities related to the annual suspensions of these members.

68. The Committee determined that as suspended members remain subject to the Society's regulation, issues arising from inappropriate activity during suspension can be adequately monitored through other regulatory processes. The Committee does not believe that re-suspending members who are already under suspension provides a significant incentive to file annually in any event.

D. THE PROPOSAL

69. The Committee proposes that a member be suspended for the first failure to file the MAR. This suspension would continue until the member files the MAR for the year in which he or she was suspended and the year of reinstatement as a member with full rights and privileges, or, if the membership of the member is revoked, upon readmission, on which one of the terms will be filing the MAR for the year of suspension and the year of readmission.

70. The Committee determined that an amendment to By-Law 17 would not be required to implement this policy. The Committee relies upon a policy adopted by Convocation in 1993 for payment of the annual fee (required under By-Law 15) for members who continue to be suspended for failure to pay the fee. In such cases, a member suspended for failure to pay the annual fee continues to be suspended until he or she pays the fee for the year of suspension and the year of reinstatement. The requirement for payment of the annual fee in By-Law 15 is worded in very similar fashion to the requirement to file the MAR in By-Law 17.[13]

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[11] These figures are as of October 2001.

[12] In March 2002, the Committee approved an implementation plan for the summary revocation authority, which was reported to March 22, 2002 Convocation for information. The Committee decided that the authority should be implemented in stages, given the February 2000 policy that permits such members to make a submission to the Society in writing or orally before revocation. The PRC determined that the initial implementation phase should involve those members who have been suspended for the reasons described in section 46 or clause 47 (1)(a) of the Act (failure to file or pay fees and levies) or the equivalent sections under the Act as it existed prior to February 1999, for seven years or longer.

[13] Subsection 1 (1) of By-Law 15 reads: "Every year, a member shall pay an annual fee, in accordance with sections

71. The 1993 policy reads:

i. That members who are suspended after this policy is adopted be reinstated upon payment of all outstanding fees and levies for the year of suspension, together with a reinstatement fee. On reinstatement, the member will be billed for the fees and levies for the current year.

ii. That this policy not be applied retroactively. Members currently suspended who apply for reinstatement will be required to pay the arrears which have accrued to the date the policy is adopted by Convocation.

iii. That arrangements for financial assistance continue to be made available.

iv. That notice be sent to all members, including those currently suspended, informing them of this policy and outlining the rights and obligations of members, suspended members and former members.

72. The Committee proposes that Convocation adopt the policy for continuing MAR suspensions as set out at the beginning of this section of the report.

II. INFORMATION

NEW ISSUES RELATED TO THE "E-REG" SYSTEM FOR REAL ESTATE TRANSACTIONS

73. In September 1996, the Law Society and the Ontario Bar Association (then the CBAO), formed a Joint Committee on Electronic Registration of Title Documents. Its mandate is to consider the impact of electronic registration ("e-reg") upon conveyancing practice and make recommendations as to what practice standards should be implemented to deal with e-reg.

74. Following a report to Convocation in June 1997, which included a number of recommendations, the Joint Committee has continued work on practice issues relating to e-reg. It recently prepared a report for the review by relevant Law Society committees which sets out the need for various steps to be taken expeditiously, as the scope of electronic registration is being rapidly expanded. The report is primarily for review by the Professional Development and Competence Committee, but it relates in part to the jurisdiction of the Professional Regulation Committee in that the Joint Committee is proposing that certain amendments be made to the *Rules of Professional Conduct* relating to lawyers' duties in the e-reg system.

75. The Professional Regulation Committee completed a review of the Rule issues and approved proposed Rule amendments. The proposals are being reviewed for style and consistency by lawyer Paul Perell, who assisted the Society as principal drafter of the new 2000 Rules.

76. The Professional Regulation Committee will be reporting the proposed amendments to Convocation in June 2002.

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

77. Senior regulatory staff reported to the Committee on caseload management in the Complaints Resolution, Investigations and Discipline Departments. The reports appear at Appendix 4. 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.[14] The reports in this report cover the period to the end of April 2002.

78. The chair informed the Committee of the appointment of the new Director of Professional Regulation. Ms. Zeynep Onen accepted the position of Director and will join the Law Society on June 10, 2002. Ms. Onen will be responsible for overseeing all functions involved in the complaints and disciplinary process

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2 and 3, unless the member is exempt from payment of an annual fee."

[14] 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.

following initial intake by the Client Service Centre. She will be responsible for complaints resolution, investigations, discipline, staff trustee, unclaimed trust funds and the compensation fund.

79. Ms. Onen comes to the Law Society after serving as Executive Director and Vice Chair of the Workplace Safety and Insurance Appeals Tribunal, where she was responsible for day-to-day operations of the Tribunal, with a budget of over $20 million, 200 employees and approximately 100 appointees.

80. Ms. Onen has also served as an arbitrator with the Ontario Insurance Commission, a mediator with the Ontario Mandatory Mediation Program, a special projects officer dealing with investigation and resolution of public complaints with Ontario's Office of the Ombudsman. She was called to the Bar in 1982.

APPENDIX 1

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. [15]

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 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. [16]

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.

[15] Rodney Hull, Errors and Omissions Bulletin, Number 5, July 1992, Law Society of Upper Canada

[16] Stephen Traviss, Law Society Rules of Professional Conduct: Avoding the Pitfalls in an Estate Practice, October 27, 1994, p. 8-13

DISCUSSION

Issue #1 Does estate planning for spouses that culminates in the preparation of wills for each of the 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 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". [17]

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*,[18] 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

[17] Solicitors' Rules, Law Society of New South Wales, Rules 9.1 and 9.2
[18] Hall v. Meyrick, [1957] 2 All E.R. 722 (C.A.)

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.[19]

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".[20]

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.[21] Similarly, the Law Society of British Columbia takes the same position.[22] 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."[23] The Code defines a joint retainer as "one in which a lawyer is employed by more than one client in a matter or transaction".[24]

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".

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[19] Ibid, p. 727

[20] 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

[21] Benchers Bulletin, Law Society of Alberta, 1995

[22] "From the Ethics Committee", Benchers Bulletin, Law Society of British Columbia

[23] Draft Notice to the Profession, Law Society of Manitoba, 2001

[24] Ibid

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.

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.[25]

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. [26]

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.[27] 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,[28] 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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[25] Michael Silver, "Solicitors 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
[26] Supra note 9
[27] Supra note 9
[28] 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 2

SUMMARY OF RESPONSES TO CALL FOR INPUT ON PROPOSED NEW COMMENTARY UNDER RULE 2.04(6)

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 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. Will preparation should be kept 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 [i.e. not to inform the other spouse when a spouse returns to change a will] 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.

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.

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. 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 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..

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. 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 spouses have the protection of the *Family Law Act* and the Dependent's Relief sections of the *Succession Law Reform Act*. 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 fails to appropriately address the issues involved, and is likely 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)

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. The amendment 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.

33. 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.

34. 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. 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 no 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 retaining 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 3
BY-LAW 17
FILING REQUIREMENTS
FORM 17A - MEMBER'S ANNUAL REPORT

BY-LAW 17
Made: January 28, 1999
Amended:
February 19, 1999
May 28, 1999
October 29, 1999
January 27, 2000
June 22, 2000
October 19, 2000
April 26, 2001
October 25, 2001

FILING REQUIREMENTS

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.

Notice of fiscal year

1. Every member who engages in the private practice of law in Ontario shall inform the Society in writing of the termination date of his or her fiscal year, and shall file with the Society written notice of any change in the fiscal year within one month after the change is made.

Requirement to submit annual report

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.

Member's Annual Report

(2) The report required under subsection (1) shall be in Form 17A [Member's Annual Report].

Exemption from requirement to submit annual report

(3) The following members may apply to the Society for an exemption from the requirement to submit a report under subsection (1):

1. A member who is over sixty-five years of age and who,

   i. does not practise law in Ontario,

   ii. is not an estate trustee, and

   iii. does not act as an attorney under a power of attorney for property given by a client or former client.

2. A member who is incapacitated within the meaning of the Act.

Application by member's representative

(4) A Society official may permit any person on behalf of a member to make an application under subsection (3).

Application form

(5) An application under subsection (3) shall be in a form provided by the Society.

Documents and explanations

(6) For the purposes of assisting a Society official to consider an application under subsection (3), the member or the person applying on behalf of the member shall provide to the official such documents and explanations as the official may require.

Consideration of application

(7) A Society official shall consider every application made under subsection (3) and if the official is satisfied that the member is eligible for an exemption under paragraph 1 or 2 of subsection (3), the official shall approve the application.

Duration of exemption

(8) A member whose application is approved is exempt from the requirement to submit a report under subsection (1) in respect of the year in which the application is approved and in respect of every year thereafter if the member remains eligible for the exemption throughout the entire year.

Interpretation: practising law

(9) For the purposes of subsection (3), a member practises law if the member gives any legal advice respecting the laws of Ontario or Canada or provides any legal services.

Period of default

3. (1) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to complete or file a report required under section 2 of this By-Law is 120 days after the day the report is required to be submitted.

Reinstatement of rights and privileges

(2) If a member's rights and privileges have been suspended under clause 47 (1) (a) of the Act for failure to complete or file a report required under section 2 of this By-Law, as amended on October 29, 1999, for the purpose of subsection 47 (2) of the Act, the member shall complete and file the report in Form 17A in force at the time the member is filing the report.

Same

(3) If a member's rights and privileges have been suspended under clause 47 (1) (a) of the Act for failure to complete or file a report required under section 2 of this By-Law, as that section read before October 29, 1999, for the purpose of subsection 47 (2) of the Act, the member shall complete and file the report required under

section 2 of this By-Law, as amended on October 29, 1999, in Form 17A in force at the time the member is filing the report.

Requirement to submit public accountant's report

4. (1) The Secretary may require any member who is required to submit a report under subsection 2 (2) to submit to the Society, in addition to the report required under that subsection, a report of a public accountant relating to the matters in respect of which the member is required to submit a report to the Society under subsection 2 (2).

Contents of report and time for filing

(2) The Secretary shall specify the matters to be included in the report and the time within which it must be submitted to the Society.

Member's obligation to provide access to files, etc.

(3) For the purpose of permitting the public accountant to complete the report, the member shall,

(a) grant to the public accountant full access, without restriction, to all files maintained by the member;

(b) produce to the public accountant all financial records and other evidence and documents which the public accountant may require; and

(c) provide to the public accountant such explanations as the public accountant may require.

Authority to confirm independently particulars of transactions

(4) For the purpose of permitting the public accountant to complete the report, the public accountant may confirm independently the particulars of any transaction recorded in the files.

Cost

(5) The cost of preparing the report required under subsection (1), including the cost of retaining a public accountant, shall be paid for by the member.

Public accountant's duty of confidentiality

(6) When retaining a public accountant to complete a report required under this section, a member shall ensure that the public accountant is bound not to disclose any information that comes to his or her knowledge as a result of activities undertaken to complete the report, but the public accountant shall not be prohibited from disclosing information to the Society as required under this By-Law.

Period of default

5. (1) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to file a report of a public accountant in accordance with section 4 of this By-Law is 60 days after the day the report is required to be submitted.

Reinstatement of rights and privileges

(2) If a member's rights and privileges have been suspended under clause 47 (1) (a) of the Act for failure to file a report of a public accountant in accordance with section 4 of this By-Law, for the purpose of subsection 47 (2) of the Act, the member shall file the report.

Failure to submit public accountant's report: investigation

6. (1) If a member fails to submit the report of a public accountant in accordance with section 4, the Secretary may require an investigation of the member's financial records to be made by a person designated by him or her, who need not be a public accountant, for the purpose of obtaining the information that would have been provided in the report.

Investigation: application of subss. 4 (3) and (4)

(2) Subsections 4 (3) and (4) apply with necessary modifications to the investigation under this section.

Confidentiality

(3) A person designated to investigate a member's financial records under this section shall not disclose any information that comes to his or her knowledge as a result of the investigation except as required in connection with the administration of the Act or the by-laws.

Cost

(3) The cost of the investigation under this section shall be paid for by the member.

Commencement

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

APPENDIX 4
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

FROM: David McKillop
Manager, Compensation Fund, Resolution and Trustee Services

DATE: 30 April 2002

RE: Management Report - Complaints Resolution, Complaints Review and Trustee Services

The purpose of this memorandum is to provide information about matters in the Complaints Resolution, Complaints Review and Trustee Services (Unclaimed Trust Fund) departments for the month of April 2002.

COMPLAINTS RESOLUTION

Summary of Results for Complaint Files in April 2002

Complaints in Unit as at 31 March 2002	1,551
Complaints Reopened During Month	20
Complaints Resolved/Closed During Month	196
Complaints Transferred to Other Departments During Month	136
New Complaints Received During Month	235
Complaints in Unit as at 30 April 2002	1,474
Average Age of Active Complaints (in days)	258

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 September 2001 to April 2002 inclusive.

Complaints Resolution – Complaints Opened & Closed in Period

(see graph in Convocation file)

Number of Open Complaint Files

(see graph in Convocation file)

Number of Active Files in the Complaints Resolution Department as at 30 April 2002 by File Type

Type of File	Number of Active Files
Complaint	1,474
Bankruptcy	77
Discipline Costs, Panel Orders & Undertakings	48
Practice Windup	1
TOTAL ACTIVE IN COMPLAINTS RESOLUTION	1,600

Discipline Costs

As at 30 April 2002 outstanding costs awarded totalled $143,413.10. Of that amount, payment of $111,676.73 is being actively pursued. The remainder of $31,736.37 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 April 2002 was $1,550.00. Year to date $19,500.00.

Comments

The box on page one of this report reveals that 136 files were transferred to other departments of the Law Society in April 2002. Typically that figure is less than 50 per month. The number of transferred files in April was significantly higher than normal due to changes in the Law Society's computerized Complaints Tracking System (CTS). Prior to April, complaint files being handled by the Trustee Services and Complaints Review departments could not be separately tracked and were included in the numbers for the Complaints Resolution Department. In other words, even though Trustee Services and Complaints Review took possession of the physical file and became responsible for its handling, the CTS still counted the file among those being handled by Complaints Resolution. Commencing in April 2002, complaint files being handled by Trustee Services and Complaints Review are tracked separately and are no longer included in the statistics for Complaints Resolution. The larger than normal transferred files figure is reflective of this new tracking capability.

COMPLAINTS REVIEW

As at 30 April 2002, there were 48 files in the Complaints Review process. Further information on these 48 files is found in the following chart.

Request for Hearing Received	9
Hearings Pending	20
Hearing Held, Further Investigation Ordered	0
Hearing Held, Awaiting Decision	19
Files To Be Closed	0
TOTAL	48

The 48 files relate to complaints originally received by the Law Society in the following years:

1996	2
1997	0
1998	3
1999	6
2000	7
2001	25
2002	5
TOTAL	48

TRUSTEE SERVICES (THE UNCLAIMED TRUST FUND)

The Trustee Services department is 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

April 2002	Cumulative
48	280

Applications From Members Pending Determination (additional information required)

April 2002	Cumulative
15	53

Applications From Members To Transfer Trust Funds To The Law Society Approved

April 2002	Cumulative
61	208

Applications From Members Rejected

April 2002	Cumulative
2	19

Amount of funds received:

April 2002	Cumulative Amount
$15,933.05	$272,121.99

Comments:

During April 2002 a new software system to track applications to the Unclaimed Trust Fund (UTF) became operational. The system was developed by the Law Society's Information Systems Department. Much of the information contained in Member applications to the UTF has now been entered into the system. In addition to serving as a case management system, the software permits users to do a search under either Member name or client name which will expedite requests from clients seeking the return of trust funds.

Investigations Department Management Report

TO: Gavin MacKenzie, Chair, Professional Regulation Committee

Copy: Malcolm Heins, C.E.O.

FROM: James Yakimovich, Manager, Investigations

DATE: April 30, 2002

RE: Management Report - Investigations Department –April 30 2002

Summary of Results for the Month:

Change in Total Case Numbers	Net Increase of 52 member cases
Number of Members Under Investigation	198 (Jan = 198, Feb = 188, March=186)
Cases Completed/Closed in April	23* (Jan = 46, Feb = 52, March=35)
Cases Older Than One Year Outstanding	34

At April 30, 2002, the department carries an investigation inventory of 327 member cases and 32 Unauthorized Practice cases, for a total of 359 investigation cases. (February = 313 cases & March =340 cases.)

(see graph in Convocation file)

*The 23 member investigation cases completed/closed in March reflect an average case age of five and a half (5.5) months from inception of the investigation to the date the investigation stage is completed or the file was closed without a referral to PAC. (In March, the average age was 6.75 months.)

Cases Older Than One Year

The number of cases older than one year is thirty-four (34) (March = 30 cases). The case inventory in this category is dynamic in that each month files are completed and additional ones are added to the list

Because of the recent requirement that Discipline Counsel review the substantive investigation case findings and evidence prior to the matter being forwarded to the Proceeding Authorization Committee, it is difficult to provide a reliable projection with respect to when these cases might be advanced to the discipline process. It is expected that once Discipline Counsel are in a position to absorb these new process demands and normalize the workflow, meaningful data can be provided with respect to planning around this group of cases.

Complaints Files Associated With Investigation Cases

The chart tracks the volume of complaints and their age in "days outstanding" with respect to complaints associated with member investigation cases. The days outstanding calculation includes time associated with the file while it was in departments other than the Investigations Department.

Month	Number of Complaints Files	Average Age of Complaints Files
December 2001	694	357 Days Outstanding
January 2002	688	345 Days Outstanding
February	623	364 Days Outstanding
March	543	307 Days Outstanding
April	554	311 Days Outstanding

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.

(see graph in Convocation file)

DISCIPLINE DEPARTMENT

MEMORANDUM

TO: Professional Regulation Committee

FROM: Lesley Cameron
Senior Counsel - Discipline

DATE: May 2, 2002

RE: *Discipline Department Information*

The purpose of this memorandum is to provide information about matters in the discipline process for the month of April, 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 April 30, 2002. As can be seen from Chart 1:

a) 136 matters are pending hearing or appeal;

b) 33 conduct applications have been authorised for prosecution by the Proceedings Authorisation Committee, but have not yet been issued;

c) 85 conduct applications have been issued and are in the discipline process: 44 are before the Hearings Management Tribunal with no hearing date set; 35 have hearing dates set or the hearing is underway; 6 are adjourned sine die;

d) 5 appeals are pending before the Law Society Appeal Panel;

e) 2 judicial reviews are pending before the Divisional Court.

Aging of Matters Authorised but not Issued

Of the 33 files authorised for prosecution but in which the conduct application had not yet been issued as of April 30, 2002, 13 were authorised more than 3 months ago.

Attached as Chart 2 is a summary of the age and carriage of these 13 files. As can be seen from Chart 2, of these 13 files:

i) 10 are between 3 and 6 months old, meaning that between 3 and 6 months has elapsed since authorisation;

ii) 1 is between 6 and 12 months old; and

iii) 2 are over 1 year old.

Of the 2 files over 1 year old, the first required the Law Society to bring an application for search and seizure under section 49.10 and the Law Society is still waiting for a third party (a bank) to produce records. The second file has been authorised for non disciplinary resolution but remains on the list pending the successful completion of this resolution.

The Chair of the Professional Regulation Committee and the Acting Secretary 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 3 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. Chart 3 includes the information summarised in Chart 2, but adds figures from previous months for comparison purposes.

While 7 of the 13 files required further investigation, part of the reason for the increase in the numbers of files which have not been issued relative to recent history is a reflection of a change in procedure which has resulted in substantial additional work for discipline counsel.

Historically, discipline counsel have provided some assistance to investigations on an ad hoc basis, but have basically had little involvement at the investigation stage. This has recently changed as follows:

> i) discipline counsel are now to assist from the beginning in all investigations of allegations of sexual harassment or discrimination and in all investigations in which allegations of professional misconduct are made against a federal or a provincial crown;
>
> ii) discipline counsel are now to assist at an early stage in investigations where the investigative team needs help with the theory of the case, the sufficiency of the evidence to prove an allegation or the scope of the investigation; and
>
> iii) discipline counsel are now to review all draft authorisation memoranda and associated investigation files before the memoranda are submitted to the Proceedings Authorisation Committee.

The above changes have resulted in a substantial increase in the volume of work for each discipline counsel and have had an impact on the ability of discipline counsel to process the files which have been authorised for discipline action. However it is anticipated that these changes will improve the quality and timeliness of the processing of complaints through the investigation and discipline departments and will assist in sorting out the skill sets and resources needed in the regulatory area.

Chart 1

Matters in Discipline Process as of April 30, 2002	
Discipline Providing Assistance to Investigations	28
Conduct Applications Authorized But Not Issued	33
Conduct Applications Issued Hearing Date Not Set	44
Conduct Applications Issued Hearing Date Set or Hearing Started	35
Conduct Applications Issued Adjourned Sine Die	6
Non-Compliance Applications Issued Hearing Date Not Set	0
Non-Compliance Applications Issued Hearing Date Set or Hearing Started	0
Capacity Applications Authorized But Not Issued	0
Capacity Applications Issued Hearing Date Not Set	1
Admission Hearings	7
Readmission Hearings	1
Reinstatement Hearings	2

Appeals to Law Society Appeal Panel	5
Appeals/Judicial Reviews Divisional Court	2
Total Matters	164

Chart 2

Conduct Applications Authorized For Prosecution but not Issued as Conduct Applications as of April 30, 2002			
	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
Law Society Counsel	10	1	1
Outside Counsel	0	0	1
Total	10	1	2

Chart 3

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
	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
	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
	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

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

(1) Copy of a letter to Law Society of Upper Canada from Donald Carr, Goodman and Carr, dated April 12, 2001.

(Appendix A, pages 39 –40)

(2) Copy of letter to Law Society of Upper Canada from Glenn Davis, Sun Life Financial, dated May 3, 2001

(Appendix B, pages 41 – 42)

(3) Copy of Draft Notice to Profession, Law Society of Manitoba.

(Appendix C, page 43)

(4) Copy of Form 17A – Member's Annual Report.

(pages 56 – 63)

Re: Amendment to Subrules 6.07(2) and (3) of the Rules of Professional Conduct

It was moved by Mr. MacKenzie, seconded by Ms. Pilkington that the following amendment to subrules 6.07(2) and (3) of the Rules of Professional Conduct be approved:

> (2) Without the express approval of a committee of Convocation appointed for the purpose ~~Convocation~~, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, suspended, undertaken not to practise, or who has been involved in disciplinary action and been permitted to resign, and has not been reinstated or readmitted.

~~(3) Where a person has been suspended for non-payment of fees or for some reason not involving disciplinary action, the express approval referred to in subrule (2) may also be granted by a committee of Convocation appointed for this purpose.~~

Carried

The following policy items were not reached:

- Proposed New Commentary to Rule 2.04(6) of The Rules of Professional Conduct on Joint Retainers for Mutual Wills
- Revision to Process for Suspension of Members for Failure to File the Member's Annual Report

Items for Information Only

- New Issues Related to the "E-Reg" System for Real Estate Transactions
- File and Caseload Management and Staffing Information in the Complaints Resolution, Investigation and Discipline Departments

PROFESSIONAL DEVELOPMENT & COMPETENCE COMMITTEE REPORT

The Report of the Professional Development & Competence Committee was not reached.

CONVOCATION ROSE AT 1:05 P.M.

The Treasurer and Benchers had as their guests for luncheon Mr. James Tumbridge, Mr. Ron Toews and Mr. Lally McCarthy.

Confirmed in Convocation this 28th day of June, 2002

Treasurer