MINUTES OF CONVOCATION

Thursday, 25th February, 2010
9:00 a.m.

PRESENT:

The Treasurer (W.A. Derry Millar), Aaron, Anand, Backhouse, Banack, Boyd, Bredt, Campion, Caskey (by telephone), Conway, Crowe, Dickson, Dray, Elliott, Epstein, Eustace, Fleck, Furlong, Go, Gold, Gottlieb, Hainey (by telephone), Hartman, Heintzman, Henderson, Krishna, Lawrie, Legge (by telephone), Lewis, MacKenzie, McGrath (by telephone), Marmur (by telephone) Minor, Murphy, Murray, Pawlitza, Porter, Potter, Pustina, Rabinovitch, Ross (by telephone), Rothstein, Ruby, Sandler, Schabas, Sikand, Silverstein, Simpson, C. Strosberg, Swaye, Symes and Wright.

…….

Secretary: Katherine Corrick

The Reporter was sworn.

…….

IN PUBLIC

…….

TREASURER'S REMARKS

The Treasurer announced that there are 39 candidates for the first election for the five positions on the Paralegal Standing Committee. Voting will take place in March 2010 and will be conducted electronically. The Treasurer thanked W. Paul Dray, Brian Lawrie, Michelle Haigh, Margaret Louter and Stephen Parker on behalf of Convocation for their contributions and dedication over the past three and a half years.

Congratulations were extended to Janet Minor who will receive the Ontario Bar Association's Tom Marshall Award for Excellence in Public Sector Law in April.

The Treasurer announced that on February 3, 2010, Pro Bono Law Ontario's signature project for unrepresented litigants, Law Help Ontario was awarded the 2010 Law Technology News Award for the Most Innovative use of Technology in a Pro Bono Project. Congratulations were extended to Chair, David Scott, Executive Director, Lynn Burns and the staff of Pro Bono Law Ontario.

The Treasurer advised that he had concluded the final Civility Forum in Toronto on February 16. Eleven forums were conducted across the province in which almost 900 lawyers, paralegals and members of the judiciary took part. The Treasurer thanked all those people who had participated as well as Law Society staff, Mary Shena, Zeynep Onen, Lisa Osak and Hershel Gross for their assistance.

The Treasurer spoke to the information item in the Litigation Committee Report about the Law Society's intervention in *Burstein v. Durham Regional Police Service Board et al.*

The Treasurer extended condolences to Deidre Rowe Brown and her family on the passing of her grandmother, Alice Crookshank.

DRAFT MINUTES OF CONVOCATION

The draft minutes of Convocation of January 28 and Special Convocation of January 29, 2010 were confirmed.

MOTION – COMPOSITION OF LAW SOCIETY AWARDS COMMITTEE

It was moved by Mr. Crowe, seconded by Mr. Bredt, –

THAT the Law Society Awards Committee be composed of:

Treasurer (Chair)
Five benchers
Chief Justice of Ontario
Chair of the Ontario Law Deans
President of the Ontario Bar Association
President of the Advocates' Society
Chair of the County and District Law Presidents' Association

Background:

In September 1983, Convocation approved the establishment of an honour or honours to those members of the Law Society of Upper Canada who had made a significant contribution to the profession. The Special Committee on the Law Society Honours, chaired by George Finlayson, presented its report to Convocation on June 22, 1984. The report proposed that the Law Society Medal be created to honour those members of the Society who had made a significant contribution to the profession. It set out the Medal design, criteria, nomination and selection processes. It recommended that the selection committee be composed of the Treasurer, who would act as Chair, four benchers approved by Convocation and the following external members: Chief Justice of Ontario, Chair of the Ontario Law Deans, President of the Canadian Bar Association (Ontario), and President of The Advocates' Society. The report was adopted by Convocation and the program was subsequently implemented.

In March 2002, then Treasurer, Vern Krishna, appointed the Honourable John Arnup, Q.C. to Chair the Special Committee on the Law Society Medal Program. The Special Committee was charged with the mandate to undertake a review of the Medal Program with particular emphasis on its criteria. The Committee presented its report to Convocation on October 31, 2002. It stated that the Committee was unanimously of the view that the criteria and nomination and selection processes were appropriate and should remain the same. The Report of the Special Committee was adopted by Convocation.

The majority of lawyers in private practice in Ontario now are sole and small firm practitioners outside the major urban areas. In recent years, concern has been expressed in Convocation that the number of sole and small firm practitioners being nominated for Law Society Awards remains low in comparison to their numbers in the profession. It is hoped that the addition of the Chair of the County and District Law Presidents' Association to the Law Society Awards Committee will ensure that the Committee better reflects the composition of the profession and encourage more nominations from this segment of the bar.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE

To the Benchers of the Law Society of Upper Canada Assembled in Convocation

The Director of Professional Development and Competence reports as follows:

CALL TO THE BAR AND CERTIFICATE OF FITNESS

Licensing Process and Transfer from another Province – By-Law 4

Attached is a list of candidates who have successfully completed the Licensing Process and have met the requirements in accordance with subsection 9.

All candidates now apply to be called to the bar and to be granted a Certificate of Fitness on
Thursday, February 25th, 2010.

ALL OF WHICH is respectfully submitted

DATED this 25th day of February, 2010

CANDIDATES FOR CALL TO THE BAR

February 25th, 2010

Jo-Ann Patricia Berardinucci
Caroline Mélissa Fortier
Pierre Joseph Yves Gagnon

Adam Douglas Guy Garrett
Nancy Elin Henderson
Ioana Luca
Jackson Keith MacGillivray
Grace Mary Mackintosh
Lana Diane Raelle Kathreen Rabinovitch
Wolfgang Riedel
Albert Samuel Wallrap
Michael Rubin Wilchesky

It was moved by Ms. Pawlitza, seconded by Ms. Dickson, that the Report of the Director of Professional Development and Competence listing the names of the Call to the Bar candidates be adopted.

Carried

LICENSING AND ACCREDITATION TASK FORCE REPORT

Professor Krishna presented the Report.

Report to Convocation
February 25, 2010

LICENSING & ACCREDITATION TASK FORCE

Task Force Members
Vern Krishna (Chair)
Raj Anand
Constance Backhouse
Larry Banack
Thomas Conway
Susan Hare
Carol Hartman
Janet Minor
Laurie Pawlitza
Bonnie Tough

Purpose of Report: Decision

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

TASK FORCE PROCESS

1. The Task Force met on October 26, 2009, November 5, 2009, November 27, 2009 and February 8, 2010 to consider the final report of the Federation of Law Societies of Canada's Task Force on the Canadian Common Law Degree and to make recommendations to Convocation.

MOTION

2. That Convocation approve the October 2009 final report of the Federation Task Force on the Canadian Common Law Degree.

3. That Convocation recommend that the Federation committee responsible for implementation,

   a. include appropriate representation from Canadian law schools, and
   b. seek approval of law societies for the Federation implementation committee's proposed recommendations for implementation and compliance policies, procedures or provisions.

BACKGROUND

4. The Federation of Law Societies of Canada established the Task Force on the Canadian Common Law Degree in June 2007 ("the Federation Task Force") to review the criteria in place establishing the approved LL.B/ J.D. law degree for the purposes of entrance to law societies' bar admission/ licensing programs. The Federation Task Force submitted its final report ("the final report") to Federation Council in October 2009, a copy of which is set out at Appendix 1.

5. Federation Council has referred the final report to law societies for approval and requested that law societies consider it by March 2010. As of February 11, 2010 seven (7) law societies have considered the final report and all have approved it.

6. Earlier, in September 2008 the Federation Task Force distributed a consultation report to law societies for comment. The Law Society's Licensing & Accreditation Task Force ("the L&A Task Force") proposed a submission to Convocation, which was approved and provided to the Federation Task Force. A copy of the Law Society's November 2008 submission is set out at Appendix 2.

7. The L&A Task Force has reviewed the final report and makes the recommendations set out in the motion at paragraphs 2 and 3 of this report. In developing these recommendations the L&A Task Force considered how the final report differs from the Law Society's November 2008 submission and in this report addresses its views on those differences. In reaching its recommendations it has also considered a number of letters and articles it has received that comment on the Federation Task Force Report. These are set out at Appendix 3.

8. This report and recommendations represent the views of all the Task Force members, with the exception of one member whose minority view follows this report.

THE FEDERATION TASK FORCE FINAL REPORT

9. The L&A Task Force recommends that Convocation approve the Federation Task Force's final report ("the final report") set out at Appendix 1.

10. The final report's recommendations reflect an approach that balances law societies' regulatory responsibilities with continued respect for the academic freedom so important to law schools and the profession. This balance is reflected throughout the final report, including in the proposed national competency requirement, approved law degree and compliance regime.

11. There are some differences between the recommendations in the final report and the Law Society's November 2008 submission. The Task Force has discussed these differences and has concluded that any such differences are best addressed through the implementation process, as discussed below. Moreover, any differences between the Law Society's November 2008 submission and the final report are not so significant as to undermine the overall balanced approach recommended in the final report.

12. In its November 2008 submission the Law Society supported the proposition that law school graduates seeking to enter law society bar admission programs/licensing processes should have acquired certain "foundational competencies" in law school.

13. The final report builds on this competencies approach and recommends that law societies in common law jurisdictions establish a uniform national requirement for entry to their bar admission programs/licensing processes "to be expressed in terms of competencies in basic skills, awareness of appropriate ethical values and core legal knowledge that law students can reasonably be expected to have acquired during the academic component of their education." The final report then goes on to set out the basis of an "approved law degree" for the purposes of entry into bar admission/licensing processes, outlining the qualifying academic program and the necessary learning resources that must be present.[1] This approach is reasonable and balanced and should be approved as the national requirement.

14. The Federation Task Force has accurately expressed why law societies must establish a national requirement for entry to their bar admission programs/licensing processes. Greater government scrutiny of regulators across Canada has resulted in increasing demand for transparency, fairness, objectivity and consistency in regulatory decision making. The passage of fair access to professions legislation in Ontario, Manitoba and Nova Scotia, the recent amendments to the Agreement on Internal Trade guaranteeing full national labour mobility and the 2009 agreement of the federal government and provincial and territorial premiers to develop a pan-Canadian framework for the recognition of foreign qualifications are clear examples of this governmental scrutiny and priorities.[2]

15. Equally importantly, law societies across the country share the same values and responsibilities to regulate in the public interest. Increasingly they are addressing their responsibilities through national approaches. The Federation Task Force's

[1] Federation Task Force Final Report. Executive Summary, Recommendation 4. ("Final Report").
[2] The scrutiny is directed at all professions.

recommendations reflect this. Its recommendations will not only enhance the approach to entry to bar admission programs/licensing processes in all common law jurisdictions, but will apply as well to the accreditation process for those with international law degrees and will guide schools seeking to establish new law faculties.

16. Despite its concentration on the regulatory perspective, the final report is replete with references to the importance of ensuring a regulatory approach that respects the role of flexibility and innovation in law school curricula, does not overly interfere with law schools' ability to design their curricula to meet their institutions' mandates, and recognizes that law schools are only one part of the legal educational process.

17. The Federation Task Force states,

> Law societies respect the academic freedom that law schools vigorously defend. There is a strong tradition within the legal education system, particularly in North America, to view law school education as not simply a forum for training individuals to become practitioners of a profession, but also as an intellectual pursuit that positions its graduates to play myriad roles in and make valuable contributions to society.[3]

18. It is clear throughout the final report that the recommendations are intended to support this approach. With one exception, which is discussed below, the Federation Task Force recommends that it be left "to law schools to determine how their graduates accomplish the required competencies." The required competencies proposed by the Federation Task Force are by and large already within law schools' curricula, leaving ample room for them to pursue innovative programming, delivery methods and area specialization as they deem fit. Further, the Federation Task Force's recommended compliance component makes it clear that "an intrusive or onerous approach" is not necessary. Finally, in articulating what will constitute an "approved Canadian law degree" the Federation Task Force has largely confirmed criteria that are currently in place.

19. During consultations,[4] the L&A Task Force heard the concerns of some members of the legal academy that the competencies are rigid and over-inclusive. Some believe the approach will fundamentally alter the relationship between law schools and law societies. Some are concerned that the approach will undermine law school independence and innovation.

20. The L&A Task Force has borne these comments in mind as it reviewed the final report. It believes that the final report and recommendations have addressed a number of these concerns and that the implementation process can largely alleviate the rest. While the recommendations are an articulation of national requirements, they do not represent a sea change in legal education and should not be viewed as such. While the Council of Canadian Law Deans disagrees with certain specific components of the Federation Task Force's recommendations, it endorses the general competencies approach.

[3] Final Report, p.18.

[4] And repeated in some of the correspondence in Appendix 3.

21. The final report notes that "for a national approach to succeed, provincial and territorial law societies must think nationally, as they did when adopting the NMA [National Mobility Agreement], the anti-money laundering rules and client-identification rules."[5] The Federation Task Force also notes that such a commitment will on occasion require compromise, but it believes law societies have enormous capacity to work together. The L&A Task Force agrees.

22. The L&A Task Force has reflected on those few areas in which the Law Society's November 2008 submission differs from the final report. It has reviewed the rationale behind the Federation Task Force's final recommendations in these areas. It has also considered the Federation Task Force's recognition that an implementation committee should be established to address a number of issues.

23. For the reasons set out in the final report and here, national requirements for entry to bar admission programs/licensing processes are an important enhancement to law society processes. The first step to moving forward is passage of the final report. From there the implementation process can reasonably and fairly be used to refine the requirements. In moving from principle to practice the implementation process can address areas of concern.

24. In furtherance of this belief, the L&A Task Force's recommendation of approval of the Federation's final report is accompanied by two other recommendations. It recommends appropriate representation from Canadian law schools on the Federation implementation committee. It also recommends that the Federation implementation committee seek the approval of law societies for its proposed recommendations for implementation and compliance policies, procedures or provisions.

25. Both these recommendations will contribute to effective implementation. The law schools' perspective and contribution would be an important part of the process and law societies would have the ability to ensure that the implementation reflects the principles underlying the report and addresses any areas that require clarification.

26. The Federation's goal will be to establish an implementation committee with a well-balanced membership of law society representatives, appropriate representation from Canadian law schools and any other members it may consider helpful to the implementation process. The Task Force is confident that in considering appropriate Ontario representation on the implementation committee the Federation will give consideration to the fact that Ontario has over one third of the law schools in the country offering a common law degree, receives the majority of the NCA Certificate holders and has the longest history with fair access to professions legislation and its implementation. The Task Force also expresses its recommendation that the implementation committee of the Federation provide regular reports to law societies during the course of its work to keep law societies apprised of its progress. This is important to ensure law societies remain connected to the issue.

[5] Final Report, p.24.

CONSIDERATION OF ISSUES RAISED IN THE LAW SOCIETY'S NOVEMBER 2008 SUBMISSION

27. The final report's recommendations differ from Law Society's November 2008 submission in three areas:

    a. The recommendation for a stand-alone course in ethics and professionalism.

    b. The inclusion of a competency known as "legal and fiduciary concepts in commercial relationships."

    c. The compliance mechanism.[6]

28. There is one additional area on which the L&A Task Force provides comment in this report. It addresses an issue concerning Canadian law as it applies to Aboriginal peoples that the L&A Task Force believes is worth exploring at the implementation level.

(i) Stand-Alone Course in Ethics and Professionalism

29. In its consultation report the Federation Task Force sought comment on the requirement of a stand-alone course in what it then called "professional responsibility." It stated as follows:

> Such a course should address both the broad principles of professionalism and the ethical issues with which lawyers must contend throughout their careers, including in areas such as conflicts, solicitor client privilege, and the lawyer's relationship with the administration of justice.[7]

30. The Law Society of Upper Canada was the only law society that raised concern about a stand-alone course. It felt that the Task Force's consultation document did not provide a justification for an exception from the "competencies" approach for an ethics and professional course requirement. It commented that a stand-alone course ran the danger of segregating the topic and rendering it less likely to be addressed across the curriculum. It agreed that law students should be taught principles of ethics and professionalism, but was concerned about mandating a course.

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[6] It is important to note that in a number of areas where the Law Society's November 2008 submission differed from the Federation Task Force's consultation paper the Federation Task Force's final report reflects the Law Society's perspective, as follows:

a. The Law Society suggested the removal of civil procedure as a separate competency. The final report adopts this.

b. The Law Society recommended adoption of the term "ethics and professionalism," rather than "professional responsibility" to identify the competency. The final report adopts this.

c. The Law Society recommended the removal of a number of separate competencies, two of which the Federation Task Force accepted.

[7] Consultation Report (September 2008). p. 22.

31. The L&A Task Force has re-examined the Law Society's comments in the face of a number of factors. Eleven of the 16 law schools have indicated that they already offer a mandatory "course" in professionalism and ethics. The law school argument against a regulatory requirement does not appear to be based on the merits of the approach, but rather on the interference with a law school's ability to allocate its resources and determine its pedagogical approaches as it sees fit. The L&A Task Force notes, however, that there is precedent for the regulator mandating specific courses, at least in Ontario where the 1957/69 requirements mandated seven courses.[8] These mandated courses have not stifled creativity and innovation within law schools.

32. A mandated ethics and professionalism course does not undermine the Federation Task Force's competencies based approach. The Federation Task Force has recognized the need for flexibility in law school education, through its general approach to competencies versus courses. It has made an exception for ethics and professionalism, based on its view of the fundamental nature of this topic in the development of lawyers. While the "embedded" approach to ethics and professionalism is seen by some as a viable alternative to the stand-alone course, the Federation Task Force has concluded that more is needed in an area that underpins the profession. It does not view the law school as the only place for this learning, but considers the need for focus on the topic as properly within legal education from the outset. Moreover, the stand-alone course can better lay the groundwork for successfully embedding the topic in other substantive courses.

33. The L&A Task Force has carefully considered the following principle that the Federation Task Force emphasizes in proposing a stand-alone course:

> …in recognition of the unique nature of its recommendation in this area, the Task Force has specifically not recommended credit hours or teaching methodology…[9]

34. The Federation Task Force was interested in law schools "spotlighting" the topic. It did not circumscribe the course's length or the teaching methodology. This provides enormous latitude to the law schools in the development of the course. In the L&A Task Force's view this recommendation is a balanced approach to the issue and the Task Force endorses it.

(ii) Legal and Fiduciary Concepts in Commercial Relationships.

35. In its consultation paper the Federation Task Force indicated its view that,

> …business organization concepts affect a multitude of legal relationships in the Canadian legal system. Competency in these principles and concepts is fundamental.[10]

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[8] Civil procedure, constitutional law of Canada, contracts, criminal law and procedure, personal property, real property and torts

[9] Final Report, p. 34.

[10] Consultation Report. (September 2008), p. 20.

36. The Law Society's November 2008 submission considered this an important competency, but was of the view that it did not need to be acquired in law school. The Law Society's submission expressed the concern that this competency,

> …open[s] up a potentially endless debate of what else should be included, with proponents of different components each advocating strongly for their particular area of law. This could result in law school curricula being largely mandated, a development that is neither necessary nor in the interest of quality education.[11]

37. By renaming the competency "legal and fiduciary concepts in commercial relationships" the Federation Task Force sought to minimize the concern that some expressed to the Federation Task Force that, "unlike the other requirements that simply restate current components of the curricula or are more generic in their description, this competency appears to reflect a more specific content choice." The Federation Task Force noted that,

> the suggestion has been that this opens up a potentially endless debate on why other areas such as family law, estates, or labour law have not been included. Just as an understanding of principles of constitutional law, administrative law, contract or property…are foundational so too is an understanding of the legal concepts in commercial relations.[12]

38. There is nothing in the final report to suggest that there was in fact pressure on the Task Force to add additional areas because "business" was in the mix. Moreover, although it has been suggested to the L&A Task Force that the inclusion of this competency would send the message that business law is more important than other areas such as poverty law, the L&A Task Force does not agree with this interpretation.

39. The recommendation in this area is not any different than the approach taken to administrative, contract, property and other competencies. Like the other competencies, it refers to principles, not courses, and denotes no special emphasis that distinguishes it from the other competencies. The Federation Task Force's only special emphasis is in ethics and professionalism, where it recommended a course.

40. The listing of a competency in this area is not directed at training Bay Street corporate lawyers. It simply recognizes that it is important for law students to understand the principles underlying legal structures and relationships. Lawyers are called to the bar as generalists. They may choose to specialize, but their education and training must be broadly based, to accommodate sole and small firm practice. The L&A Task Force has been told that over 95% of law students currently obtain some exposure to this competency. It is likely they do so not because they plan to become corporate lawyers, but because they must understand these principles in whatever area they practise.

[11] L&A Task Force submission, p. 7.
[12] Final Report, p. 37.

41. The renaming of this competency may confuse law schools about what will satisfy the competency. The most effective way to resolve this is through the implementation process. In fact, it may be possible to satisfy the competency in commercial relationships within other included competencies of contracts, property, torts and principles of common law and equity.

(iii) Compliance Mechanism

42. In its November 2008 submission the Law Society expressed concern about the introduction of a national monitoring body to address compliance with the requirements. It suggested that while it makes sense in the American context where there are hundreds of law schools of differing quality, it may not be necessary in Canada. It assumed that a national body would be "expensive, time consuming and controversial and difficult to implement because of the need for unanimity among all law societies." The Law Society's November 2008 submission noted that the consultation document provided little information on the nature of any monitoring regime.

43. The Law Society's submission preferred an approach somewhere between the status quo and the approved law degree models the Federation Task Force described in the consultation document.[13] National requirements would be articulated, but with no law society monitoring. The Law Society's November 2008 submission noted that nothing "in law societies' relationship with the current 16 common law schools suggests that a [monitoring regime] is necessary."

44. The final report recommends a compliance mechanism on the basis that "this is the most efficient and appropriate way to ensure consistency across the country and transparent, effective and objective processes."[14] However it emphasizes that an intrusive or onerous approach is not necessary, thereby addressing some of the concerns in the Law Society's November 2008 submission.

45. The Federation Task Force recommends a standardized annual report that each law school Dean completes, confirming that the law school has conformed to the academic program and the learning resources requirements, and explaining how the program of study (of the school) ensures that each graduate has met the competency requirements. The Federation Task Force recommends that the form and substance of the report should be developed as part of the implementation process.

46. This recommendation represents an appropriate compromise between the approach suggested in the Law Society's November 2008 submission and a highly bureaucratic and intrusive approach about which the submission was concerned.

47. In this recommended model it is the Dean who certifies compliance rather than an outside third party, an important indication that the Federation respects the role of law

[13] Under the "status quo" law societies have, in effect, not monitored law school curricula. They have accepted that students with a degree from one of the 16 Canadian common law faculties are automatically eligible for admission into law society bar admission programs. Under the approved law degree option a required standard would be established and law faculties would demonstrate what they are doing to ensure that their graduates have achieved the required competencies.

[14] Final Report, p. 43.

schools. Moreover, the monitoring system does not require the Dean to certify each graduate, rather it relies on the Dean confirming that the curriculum is such that the competencies are addressed and the law school has met the academic program and learning resources requirements. Finally, the Federation Task Force has recommended a long period for implementation until 2015, giving ample opportunity to ensure an effective process and compliance with the national requirements.

48. It is the L&A Task Force's view that once the implementation process is defined, the monitoring process will be simple and inexpensive. Having addressed what, if anything, the school must do to meet the criteria, the Dean will then be in a good position to continue to certify compliance from year to year. At the same time, with a monitoring process implemented across the country, there will be consistency upon which regulators can rely when admitting graduates from any common law school to their bar admission/licensing programs. Monitoring is an integral part of law societies' roles in the United States, Australia and England and Wales. The processes there are far more intrusive and detailed than the Federation Task Force recommends. The L&A Task Force is now satisfied with the reasonableness of the proposed approach.

CANADIAN LAW AS IT APPLIES TO ABORIGINAL PEOPLES

49. In its November 2008 submission the Law Society suggested expanding the Federation Task Force's proposed competency "constitutional law of Canada, including principles of human rights and Charter values" to read "the constitutional law of Canada, including principles of human rights and Charter values and *Canadian law as it applies to Aboriginal peoples."*

50. In its final report the Federation Task Force refined the competency to read,

> The constitutional law of Canada, including federalism and the distribution of legislative powers, the Charter of Rights and Freedoms, human rights principles and *the rights of Aboriginal peoples of Canada.*

51. In discussing the difference in the wording of the two proposed approaches, the L&A Task Force has realized that there was some ambiguity in what was intended by the language used in the Law Society's November 2008 submission. Most members of the L&A Task Force assumed that the additional language, inserted as part of the Canadian constitutional law competency, simply expanded on what should be addressed within that competency. On that basis there is little difference between the Law Society's November 2008 submission and the Federation Task Force's final report.

52. Another view has been expressed, however, that the addition was not limited to constitutional law, but rather was intended to incorporate, throughout the law school curriculum, education on the ways in which Canadian law applies to and affects Aboriginal peoples. This would be done by embedding in each course, where relevant, consideration of these issues.

53. The L&A Task Force recommends that the issue be considered in the implementation process. It represents an important perspective in the education of law students and is likely already part of many law school courses. In considering the issue it would be essential to seek input from those with expertise on the issue.

CONCLUSION

54. In its November 2008 submission on the Federation Task Force consultation process the Law Society agreed with the main principle of a national requirement for entry to bar admission/licensing programs in common law jurisdictions and with most of the competencies proposed. Its submission reflected some concerns with three aspects of the consultation paper.

55. It has carefully reviewed the Federation Task Force's final report and is satisfied that the report represents a balanced approach to national regulatory requirements for entry to bar admission programs /licensing processes that respects and supports innovation and creativity in law school education.

56. It strongly recommends Convocation approval of the October 2009 final report of the Federation Task Force. It believes that the final report has addressed the concerns the Law Society raised in its November 2008 submissions, and that the implementation process is the most appropriate forum to resolve any outstanding issues.

MINORITY VIEW

1. One LSUC Task Force member, Professor Constance Backhouse, had a dissenting opinion. This minority view can be summarized as follows.

2. An approval of the above motion will constitute a major and detrimental departure from an historic partnership between the Law Society and the university law schools in Canada. The Law Society first formulated a regulatory framework with respect to university legal education in 1957. It revised its standard in 1969. In both cases, the framework was based on consensual agreement between the Law Society and the legal academy.

3. In 2008, the Law Society of Upper Canada's Licensing & Accreditation Task Force ("the L&A Task Force") set forth a recommendation for a newly revised set of standards. Its position, set out at Appendix 2, was approved by Convocation in November 2008. This position received the unanimous approval of the Council of Canadian Law Deans, representing all sixteen common law schools and six civil law schools in Canada.

4. The Federation's Task Force on the Approved Law Degree chose to depart from the recommendations of the L&A Task Force and the unanimous recommendations of the Council of Canadian Law Deans. Contrary to what the majority of our L&A Task Force indicates above, there are many who believe that the distinctions between the Federation's Report and the original Law Society Report are significant and highly destructive of the future of legal education.

5. The six Ontario law deans have unanimously requested that our Law Society not approve the Federation's Report at this time. All six appeared before our Task Force on 28 October 2009 to request that the Law Society hold to its original position, and not endorse the Federation Report.

6. Writing on 25 November 2009, the Chair of the Ontario Law Deans, Western's Dean Ian Holloway stated that "the step that we are about to take is one that will forever alter the course of legal education in Ontario." He continued:

> I can't help but note that two previous agreements of 1957 and 1969 – which together have served the cause of legal education in Canada well – were the product of the process of agreement with the Ontario Law Deans. I don't mean to belabour the point that I made at the close of our meeting, but we really have come a long way in the past decade or so in terms of our engagement with one another. I completely agree that we should strive for a consistency in the standards of quality of legal education across the country. But I continue to believe – as past experience has shown – that we are much more likely to achieve positive outcomes if we worked together, than if a report is imposed upon us from the outside.

7. On 20 November 2009, the Chair of the Council of Canadian Law Deans Brent Cotter wrote to Treasurer Derry Millar, to express the unanimous concern of all the law deans in Canada over the recommendations of the Federation's Task Force. He emphasized that there had not been sufficient consultation with the law deans.

8. The Council of Canadian Law Deans stated that the mandating of the "stand-alone" course on Legal Ethics and Professionalism is an approach that is "unprecedented and inappropriate." It questioned the description of some of the competencies – "whose meaning we have struggled to understand." It indicated that the university law schools had not been consulted on the recommendations concerning compliance. And it added that "a variety of technical or 'institutional' matters" were left unresolved, "where implementation could jeopardize various aspects of our existing programs."

9. The Council of Canadian Law Deans requested that the Law Society of Upper Canada not approve the Federation's Report without further clarification and resolution. Dean Cotter's letter concluded:

> We recommend that you defer any decisions in relation to the Report and its Recommendations. We recommend that a dialogue be undertaken between the law societies and the Law Deans to work out the difficulties presented by the Task Force's Report and Recommendations and to put in place the necessary refinements and clarifications to optimize the Task Force's work and make it meaningful, effective and beneficial for legal education, for the legal profession and for the public interest.

10. The Council of Canadian Law Deans recommended the following process instead of a premature approval of the Federation Report:

> There are many unresolved issues related to the Report, and we believe that these must be resolved before law societies give their imprimatur to the features of any new regulatory regime. This is again a responsibility to ensure that the model you approve best serves the public interest.

11. The Council of Canadian Law Deans recommends that "the best process to address the unresolved issues would be a joint committee of the legal profession and the Council of Canadian Law Deans, co-chaired, with equal representation from these two communities of interest."

12. The majority of the Law Society L&A Task Force has suggested that the Federation's recommendations reflect a continued respect for academic freedom of the law schools. The law deans unanimously disagree.

13. In the Law Society's L&A November 2008 Report, Professor Constance Backhouse took the position that there were fundamental weaknesses with the approach of the Federation Task Force. All of these concerns listed below continue with respect to the final Report:

> This is a "static" approach that fails to recognize that the practice of law is multi-directional, fluid, and that the pace of change has never been so fast.
>
> The Federation Task Force failed to conduct sufficient or detailed research into the current educational offerings of law schools or to consult fully with experts in legal education prior to making its recommendations.
>
> The proposed list of "foundational competencies" is not based upon historical or current evidence of what lawyers actually know or do, nor is the list defended by evidence-based speculation about what they will have to know or do in the future.
>
> This approach fails to recognize the important distinctions between pre-entry foundations needed to register for a bar admission/licensing process, and foundations that will be acquired during the opportunities presented throughout the articling period, the bar admission/licensing process, the professional licensing exams, and the life-long continuing legal education that we know is necessary in today's changing world.
>
> The approach has the potential to stifle innovation, experimentation, and diversity amongst Canadian law schools.
>
> The Federation Task Force failed to consider the resource implications of mandating new "foundational competencies." It also failed to consider the diverse objectives of legal education, or to develop reliable measures to test the present or proposed education practices.

14. The implications of the imposition of this new regulatory regime are extremely serious. The unintended result of the new mandatory competencies is that the social justice curriculum will suffer. Elective courses in poverty law, access to justice, feminist legal issues, critical race theory, disability law, and others already face difficult battles for student enrolment. These important public interest areas of the curriculum will be further impoverished to make way for the growth in the list of mandatory competencies.

15. It is possible to create a new regulatory regime in a consensual, consultative manner. The law schools have expressed their willingness to move forward as partners in developing this important new framework. The Federation's Report will create totally unnecessary rifts between the profession and the law schools.

February 25, 2010 Convocation Handout
(Related to TAB 4 - L&A Task Force Report)

LAW SOCIETY RESOLUTIONS AND VOTES ON FEDERATION TASK FORCE REPORT ON THE CANADIAN COMMON LAW DEGREE

BRITISH COLUMBIA

On Friday, January 22, the BC Benchers endorsed the following resolution.

1. The Law Society of British Columbia approves the Federation of Law Societies' Report of the Task Force on the Canadian Common Law Degree.

2. The implementation issues flowing from the recommendations in the Report should be referred to an implementation committee that includes appropriate representation from Canadian Law Schools.

ALBERTA

That the Law Society of Alberta approves the Federation of Law Societies Report of the Task Force on the Canadian Common Law Degree, on the understanding that implementation issues flowing from the recommendations in the report should be referred to an implementation committee that includes appropriate representation from Canadian law schools.
Approved December 4, 2009

SASKATCHEWAN

The Law Society of Saskatchewan approve the Federation of Law Societies' Report of the Task Force on the Canadian Common Law Degree. Implementation issues flowing from the recommendations in the Report should be referred to an implementation committee that includes appropriate representation from Canadian Law Schools.

Approved February 11, 2010

MANITOBA

Council unanimously approved the following on December 17, 2009:
MOVED that the recommendations contained within the Final Report of the Task Force on the Canadian Common Law Degree be approved by the Law Society of Manitoba as presented.

NORTH WEST TERRITORIES

Be it resolved that the Law Society of the Northwest Territories approves the FLSC Report of the Task Force on the Canadian Common Law Degree, on the understanding that implementation issues flowing from the recommendations in the report should be referred to an implementation committee that includes appropriate representation from Canadian Law Schools.

Approved December 14, 2009

YUKON

On December 16, 2009 the Law Society of Yukon Executive voted in favour of the following motion:

Be it resolved that the Law Society of Yukon approve the FLSC Report of the Task Force on the Canadian Common Law Degree, on the understanding that implementation issues flowing from the recommendations in the report should be referred to an implementation committee that includes appropriate representation from Canadian Law Schools.

NUNAVUT

Has not voted yet.

NOVA SCOTIA

Resolution -Accreditation of Law Schools Task Force

WHEREAS THE FEDERATION OF LAW SOCIETIES Task Force on the Canadian Common Law Degree issued its final report in October 2009; and the Report recommends that the law societies in common law jurisdictions adopt a uniform national requirement for entry to their bar admission programs and details what the national requirement will involve;

AND WHEREAS the Report recommends that the Federation establish a committee to implement the recommendations;

AND WHEREAS the Council of the Canadian Law Deans has expressed to the Federation some reservations about the report, especially with regard to what they believe to be inconsistent application of the competencies approach adopted by the Task Force as it relates to a mandatory course in Legal Ethics, and regarding the proposed compliance requirement to be imposed upon the law schools;

AND WHEREAS the law deans have requested that a joint committee, co-chaired by a law dean, be established to address their concerns;

AND WHEREAS the Society has been assured that the issues identified by the law deans and others can and will be addressed through the implementation committee to be established by the Federation and the processes the committee adopts to move forward with the report;

AND WHEREAS the Federation's proposed recommendations for implementation and compliance will come back to the Society for approval;

BE IT RESOLVED that the Nova Scotia Barristers' Society approves the Federation of Law Societies Report of the Task Force on the Canadian Common Law Degree on the understanding that issues flowing from the recommendations in the Report should be referred to an implementation committee that includes appropriate representation from Canadian Law Schools.

Passed at a meeting of Council of the Nova Scotia Barristers' Society February 19th, 2010

NEW BRUNSWICK

On February 4, 2009, Council of the Law Society of New Brunswick endorsed the following resolution:

To approve the Federation of Law Societies' Final Report of the Task Force on Canadian Common Law Degree on the understanding that the implementation issues flowing from the recommendations in the Report should be referred to an implementation committee of the Federation that includes appropriate representation from Canadian Law Schools.

PRINCE EDWARD ISLAND

Has not voted yet.

NEWFOUNDLAND

At the January 25, 2010 Convocation, the Benchers of the Law Society of Newfoundland and Labrador passed the following motion to approve the Report of the Task Force on the Common Law Degree:

WHEREAS the Federation of Law Societies of Canada's Task Force on the Canadian Common Law Degree issued its final report in October 2009;

AND WHEREAS the Report recommends that the Federation establish a committee to implement the recommendations;

AND WHEREAS the Report recommends that an applicant for entry to a bar admission program must satisfy the competency requirements by either successful completion of an LL.B. or a J.D. degree that has been accepted by the Federation or possessing a Certificate of Qualification from the Federation's National Committee on Accreditation;

AND WHEREAS admission of Canadian law graduates to the Law Society of Newfoundland and Labrador's Bar Admission Course is governed by Rule 6.03 of the Law Society and the admission of foreign law graduates to the Bar Admission Course is governed by the Law Society's June 2009 Policy on "Requirements for Applicants with Non-Canadian Common Law Degrees";

AND WHEREAS the Council of the Canadian Law Deans has expressed to the Federation some reservations about the Report, more particularly with regard to what they believe to be inconsistent application of the competencies approach adopted by the Task Force as it relates to a mandatory course in Legal Ethics, and regarding the proposed compliance requirement to be imposed upon the law schools;

AND WHEREAS the law deans have requested that a joint committee, co-chaired by a law dean, be established to address their concerns;

AND WHEREAS the Society has been assured that the issues identified by the law deans and others can and will be addressed through the implementation committee to be established by the Federation and the processes the committee adopts to move forward with the report;

AND WHEREAS the Federation's proposed recommendations for implementation and compliance will come back to the Law Society for approval;

BE IT RESOLVED that the Law Society of Newfoundland and Labrador approves the Final Report of the Federation of Law Societies of Canada's Task Force on the Canadian Common Law Degree on the understanding that implementation issues flowing from the recommendations in the Report should be referred to an implementation committee and that the Law Society of Newfoundland and Labrador will assess applicants for admission pursuant to its Rules and Policies.

BARREAU DU QUÉBEC (Original French excerpt on following page)

Excerpts from minutes of the thirteenth session the Barreau du Québec executive committee for the year 2009-2010, held on February 18-19, 2010 at 9:00 am at the Auberge Ripplecove, Abenakis Room.

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339. APPROVAL OF THE REPORT FROM THE FEDERATION'S COMMITTEE ON THE COMMON LAW DEGREE

Re: On a motion duly seconded, it is hereby resolved:

> CONSIDERING the final October 2009 Report of the Task Force on the Canadian Common Law Degree of the Federation of Law Societies of Canada;
>
> CONSIDERING the presentation by Mr. Babak Barin, a member of the Task Force on the Canadian Common Law Degree;

TO APPROVE the final October 2009 Report of the Task Force on the Canadian Common Law Degree of the Federation of Law Societies of Canada.

Certified copy,

Sylvie Champagne, lawyer
Order's Secretary
February 22, 2010

(copy of the French excerpt attached to Convocation "Handout")

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

(1) Copy of the final report of the Federation Task Force to Federation Council – October 2009.

(Appendix 1, pages 20 – 108)

(2) Copy of the Law Society of Upper Canada Submission to the Federation of Law Societies of Canada Task Force on the Approved Common Law Degree – November 2008.

(Appendix 2, pages 109 – 126)

(3) Copies of letters and articles commenting on the Federation Task Force Report.

(Appendix 3, pages 127 – 209)

It was moved by Professor Krishna, seconded by Ms. Pawlitza, that Convocation approve the October 2009 final report of the Federation Task Force on the Canadian Common Law Degree.

Carried

It was moved by Professor Krishna, seconded by Ms. Pawlitza, –

That Convocation recommend that the Federation committee responsible for implementation,

a. include appropriate representation from Canadian law schools, and

b. seek approval of law societies for the Federation implementation committee's proposed recommendations for implementation and compliance policies, procedures or provisions.

Carried

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FINANCE COMMITTEE REPORT (in camera)

Ms. Hartman presented the Report.

Report to Convocation
February 25, 2010

Finance Committee

Committee Members
Carol Hartman, Chair
Chris Bredt, Vice-Chair
Raj Anand
Larry Banack
Jack Braithwaite
Mary Louise Dickson
Jack Ground
Susan Hare
Janet Minor
Ross Murray
Judith Potter
Jack Rabinovitch
Paul Schabas
Gerald Swaye
Brad Wright

Purpose of Report: Decision

Prepared by
Wendy Tysall, Chief Financial Officer
416-947-3322

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Finance Committee ("the Committee") and the Audit Committee met in a joint meeting on February 11, 2010. The Audit Committee is submitting a separate Report to Convocation. Committee members in attendance were: Carol Hartman, Chair, Chris Bredt, Vice-Chair, Larry Banack, Jack Braithwaite, Mary Louise Dickson, Susan Hare, Janet Minor, Ross Murray, Judith Potter, Jack Rabinovitch, Gerald Swaye, and Brad Wright.

2. Laurie Pawlitza also attended.

3. Staff in attendance were Malcolm Heins, Wendy Tysall, Diana Miles, Fred Grady, Sophia Sperdakos and Andrew Cawse.

4. Also in attendance were Dan Markovich and Marijn Jansen from Hewitt Associates.

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FOR DECISION

INTEGRATION OF PARALEGAL EXEMPTED CATEGORIES INTO LICENSING PROCESS

Motion

23. The Finance Committee recommends Convocation approve the budget for the integration of paralegal exempted categories into the licensing process at an estimated cost of $350,000.

24. Convocation is further requested to approve the funding model for the integration of paralegal exempted categories into the paralegal licensing process that funds current year expenditures from the Paralegal Fund balance and recovers these costs from future paralegal application and licensing process fees.

Background

25. The Paralegal Standing Committee (PSC) is submitting a recommendation to Convocation at the February 25, 2010 meeting, for a temporary new avenue into the paralegal licensing process for collection agents and previously exempt groups.

26. PSC proposes to recommend development of a program of study by the Law Society's Professional Development and Competence department to be delivered in a fashion similar to the recently approved Professional Responsibility and Practice Course for lawyers.

2010 Funding

27. This proposal was not included in the 2010 budget process and therefore funding for the program was not provided in the 2010 annual levy. The estimated direct costs of the development of this course total $350,000, $125,000 in direct program costs, plus PD&C staff time estimated at $225,000. There is also a standard allocation of indirect costs. These costs are for producing the course in English only.

28. The cost of this program is to be borne entirely by paralegals. The paralegal general fund is expected to end 2009 with a fund balance in the order of $1.5 million. The 2010 budget proposes to utilize $920,000 of this balance to support 2010 paralegal operations including the costs associated with completing the good character process for the initial tranche of grandparented paralegals. This will leave a fund balance in the order of $600,000 available for the purpose of funding the proposed integration of exempted paralegal categories.

29. Convocation is requested to approve a process for funding the costs of this program that would be similar to the funding mechanism that was used to initiate the Law Society's development of the original paralegal licensing and regulatory regime. At that time, the Law Society's General Fund for lawyers provided funding for the expenditures related to paralegal start-up and these expenditures were recovered from future application and examination fees levied on paralegal grandparent applicants.

30. It is proposed that this same approach be used with the exception that start-up funding for the process will be provided by existing paralegals, in the form of a draw on the paralegal General Fund balance, to be replenished by application fees and licensing process fees from those applying for admittance under this new process.

31. There could also be budget implications for the Professional Regulation Department, arising from the additional good character hearings as this application process could commence in 2010 It is proposed to explore the option of requiring applications to fulfill the "good character" requirement prior to entering the educational phase of the licensing process.

32. We do not anticipate significant extra regulatory expenses in the 2010 year as the timing of applications is likely to be weighted towards the end of the application period and the good character reviews can be held in 2011. These additional regulatory costs can therefore be included in the budget for 2011 through the usual budgeting process. In the event that additional regulatory costs for good character reviews do occur in 2010, the paralegal fund balance should be sufficient to provide for these costs.

FOR DECISION
CONTINUING PROFESSIONAL DEVELOPMENT

Motion

33. The Finance Committee recommends Convocation approve the draft costing of the continuing professional development requirements proposed by the Professional Development & Competence Committee and the Paralegal Standing Committee totaling approximately $1.4 million.

34. During 2009, the Professional Development & Competence Committee and the Paralegal Standing Committee ("the Committees") considered whether the Law Society should introduce a continuing professional development ("CPD ") requirement and, if so, how it would be developed. In October 2009, Convocation approved a consultation process with lawyers and paralegals. Following the completion of the consultation period, the Committees would provide Convocation with a final Report on a proposed CPD requirement for lawyers and paralegals.

35. The Committees met jointly in January 2010 to begin working through their draft final report to Convocation on the CPD requirement. The Committees held a joint meeting on February 11 and are submitting their final report to Convocation on February 25, 2010. The report recommends that the Law Society introduce a CPD requirement to complement and support the other competence requirements the Law Society has introduced.

36. This initiative will have financial implications in 2011 and beyond. An analysis of expected costs is set out below. The estimated impact of the CPD requirement on annual costs, starting in the 2011 budget, is an increase of $1.4 million.

37. The draft costing may be amended once details of the program are finalized. Costing changes would be brought back to Convocation for approval and incorporation into the 2011 budget.

38. This report does not address alternative funding for the CPD requirement other than member fees.

Background

39. The CPD requirement will primarily be administered by the Law Society's Continuing Legal Education (CLE) Department. The 2010 budget for CLE forecasts revenues of $3.7 million.

40. In recent years[1] the number of Law Society CLE programs (all formats) has averaged 74 and annual attendance has averaged 18,000.

41. The CPD requirement will apply to practising lawyers and paralegals - those who pay 100% fees and practise law and provide legal services. The total number of lawyers and paralegals in the 100% fee category at the date of this report was 32,600.

Estimate of the Financial Impact of CPD

REVENUE	
Continuing Legal Education revenue	
Additional revenues are not quantified. This financial analysis assumes increased revenues from more programs and attendance will offset the increased costs of holding (but not developing) more programs and higher attendance.	
EXPENSES	
Continuing Legal Education expenses	
Four additional full-time equivalent staff to support exemption and special accommodations processing, random auditing, program development, approval activities for providers and individual sessions, and general administration.	$300,000
Costs of developing and producing content for ethics, professionalism and practice management courses.	$400,000
The differentiation between CPD for licensees in their first two years of call from the CPD requirement for the rest of the professions means two more full-time equivalent staff will be required.	$150,000

[1] Excludes data for 2009 which at the date of this report had not been presented to Convocation.

Monitoring of compliance with the compulsory requirement will require an additional staff member in addition to the existing practice review resources, although this will only be required in 2012.	$100,000
Administrative Compliance expense	
Three additional full-time equivalent staff for the additional interaction with licensees including portal and compliance processes, status reminders, accommodation requests, annual reports, administrative suspension process. Also $120,000 for mailings / registered mailings / other communications with members on their specific CPD status.	$300,000
Space, indirect and contingency expense	$150,000
TOTAL EXPENSES	$1,400,000
FEE INCREASE PER LAWYER AND PARALEGAL	$38

Revenue

42. An increase in attendance at the Law Society's CLE programs is expected. For instance, of the lawyers in practice who completed the MAR in 2008, 4,905 reported taking no CLE.

43. However the exact impact of the CPD requirement on Law Society CLE attendance and revenues is difficult to predict primarily because:
- the Law Society will not be the sole provider of programs eligible for the CPD requirement.
- the ethics, professionalism and practice management course put on by the Law Society (comprising 25% of the CPD requirement) will be provided for free by the Law Society.

44. The current CPD requirement budget does not include any revenue projections. As noted above an accurate estimate is difficult. For budget purposes the anticipated increase in revenues will be offset by the anticipated increase in costs of holding the programs, such as course materials and bandwidth. Increases in these variable costs have not been included in the budget as they will be offset by increases in revenue.

Costs

Continuing Legal Education Costs

45. The introduction of a CPD requirement will necessitate an increase in program offerings. The CPD recommendations keep the increase reasonable by:
- limiting the requirement to those lawyers and paralegals in the 100% fee category;
- permitting a wide range of activities to qualify that go beyond traditional programming and providers; and
- requiring 12 hours of CPD instead of a higher number.

46. Historically, Convocation has required CLE to have the budget objective of full cost recovery after indirect expenditures are allocated. Due to increased development costs and the costs of free courses in ethics, professionalism and practice management this is no longer a valid objective without an increase in the fees for courses.

47. The "24 in 24" initiative for new calls has been retained, with some modifications to make it "12 in 12" and more compatible with the CPD requirements for older calls. However the programming requirements for new calls are still sufficiently different to require additional development costs of $150,000.

48. In 2010, the CLE department has already added one part-time equivalent staff to support the CPD requirement for lawyers in their first two years of practice (24 in 24). Assuming that Convocation ultimately approves a system of CPD requirements as recommended, it is anticipated that the PD&C Department would require, in 2011, the first full year of implementation, four additional full-time equivalent (FTE) staff to support exemption and special accommodations processing, random auditing, program development, approval activities for providers and individual sessions, and general administration of the portal system and program registrations.

49. Further costs to be included in the CPD requirement budget are the resources required to develop the courses in professionalism, ethics and practice management which the Law Society is providing for free. It is estimated that 35 to 40 courses will be produced at an initial cost of $10,000 each for a total of $400,000.

50. The Law Society currently offers income-based bursaries of 50% for lawyers earning less than $35,000. With CPD now becoming compulsory, more emphasis may be placed on these subsidies. The model and costs of this financial assistance have not been developed at this stage.

51. The Law Society is communicating with the Association des juristes d'expression francaise de l'Ontario (AJEFO) to ensure appropriate French programming. No significant incremental costs are expected.

Information Systems

52. The Law Society is currently developing a "portal" that lawyers and paralegals will be able to access securely through the Law Society website to address many of the interactions they have with the Law Society. It is envisaged that this portal will be used for administering the CPD requirement including:

- monitoring exemptions
- tracking CPD hours
- maintaining a database on types of CPD taken
- sending reminders of the CPD requirement during the year.

53. Provision has already been made for the 24/24 CPD requirement for newly-called lawyers to be tracked through the portal and this will also be an effective approach for any CPD requirement for lawyers and paralegals in the 100% fee paying category.

54. Although it appears that approximately 95% of lawyers and paralegals already have electronic access that will enable them to use the portal, for those who do not, the Law Society will accommodate a reporting system (as it currently does) in which such paralegals and lawyers may call and speak to a Law Society operator who will assist.

55. It is difficult for the I.S. department to forecast demand for resources such as bandwidth and support for additional staff. However based on current information, the I.S. department estimates that the implementation of the CPD requirement will not result in significant incremental cost increases in the I.S. budget.

Administrative Compliance Process ("ACP") Costs

56. ACP and Membership divisions will require an increase in expenditures that will depend upon the level of interaction required with lawyers and paralegals.

57. Interaction will include portal and compliance processes, such as status reminders, including the processing of accommodation requests. To ensure compliance with the CPD requirement, lawyers and paralegals subject to it would be required to report annually to the Law Society that they have fulfilled the requirement. In the normal course, if at the completion of the reporting period a lawyer or paralegal has not completed the required 12 hours, a minimum of 25% of which is in professionalism, ethics, and/or practice management, he or she would be subject to administrative suspension. Failure to fulfill the CPD requirement would result in notices to the licensee and, if not corrected, review by a summary suspension bencher followed by a suspension order.

58. Two additional full-time equivalent staff in Membership and one in ACP will be required for the additional interaction with licensees including portal and compliance processes, status reminders, accommodation requests, annual reports, administrative suspension process. An additional $120,000 increase in program expenses such as mailings is expected. The estimated total increase in ACP costs is $300,000 for 2011.

Compliance

59. The CPD requirement is based, in large part, on the honour system. The Committees recommend that each year, the Law Society verify compliance with the CPD requirement by random selection of lawyers and paralegals for a CPD audit, to be conducted the year following the completion of the full 12 hours. The Practice Management Review program and the Paralegal Practice Audit program are appropriate programs within which to conduct an assessment of CPD hours.

60. In order to ensure that a truly random CPD audit is conducted and that all practising lawyers and paralegals may be the subject of such an audit, the Committees recommend that PD&C also randomly select members for audit, in addition to any audits that are "piggy-backed" onto the programs discussed above. Monitoring of compliance with the compulsory requirement through these random audits will require an additional staff member in addition to the existing practice review resources for an incremental cost of $100,000, although this will only be required in 2012.

61. The Committees' recommendation combines random CPD audits with audits as part of the Practice Management Review and Practice Audits processes for a total of approximately 900 lawyers and 100 paralegals receiving a CPD compliance check every year (approximately 3% of practising lawyers and paralegals as at the end of 2009).

62. The Committees also recommend that the Law Society reserve the right to audit approved CPD providers to ensure that they continue to comply with the objectives of the requirement on which their provider approval is based. These types of one-off expenses have not been incorporated into cost projections because of their isolated nature.

Communications

63. The Committees' report recommends that the Law Society should immediately implement a communication plan that will continue all through the transition period prior to the CPD requirement commencing and during the first year of implementation. The communications plan will include:
    - articles and notices in the Ontario Lawyers Gazette;
    - notices in the Ontario Reports at least monthly;
    - reminders in the monthly e-Bulletins;
    - information on the Society's web site; and
    - information packages for providers seeking approval.

There is no incremental expense estimated as the Communications department has advised that any communication requirements can be provided by existing resources.

Space and Indirect Costs

64. The hiring of seven to ten new employees is not expected to create office space issues because a small amount of space is available and because of accommodation developments in the relevant departments such as telecommuting. However there are costs to equipping the new staff estimated at $5,000 each.

65. No costs of hiring or other support for the new staff have been estimated.

Impact on CLE Premium Credit at LAWPRO

66. According to LAWPRO's insurance report for the 2011 program, the Continuing Legal Education Premium Credit of $50 premium credit per program, subject to a $100 per lawyer maximum, is continuing. Although LAWPRO participated in the consultation process, we have not obtained feedback from LAWPRO on how the implementation of the Law Society's CPD requirement will affect the premium credit – if CPD is obligatory

the incentive is no longer required. For the 2008 – 2009 insurance year, an estimated 15,500 lawyers were eligible for the premium credit, which may not be available in the future. However if this credit is discontinued LAWPRO may be able to reduce premiums.

67. LAWPRO views CPD as a risk management tool. The benefits of CPD in reducing LAWPRO claims, and therefore the costs of the insurance program have not been measured

Program Assessment

68. The Committees envisage the assessment of the CPD requirement after two years. No costs have been estimated for this assessment.

Conclusion

69. The above cost estimates for the CPD requirement show the program will increase the member fee by $38, a significant amount to embed into future budgets.

Re: J. Shirley Denison Fund Applications

It was moved by Ms. Hartman, seconded by Mr. Bredt, The Finance Committee recommends that Convocation approve grants from the J. Shirley Denison Fund of:

- $6,600 to Applicant 2010-2, including $1,000, already paid under the administrative provisions of the Fund
- $3,000 to Applicant 2010-3, including $1,000, already paid under the administrative provisions of the Fund.

Carried

ADDENDUM TO THE FINANCE COMMITTEE REPORT (in camera)

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JOINT PARALEGAL STANDING AND PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE REPORT

Ms. Pawlitza and Mr. Dray presented the Report.

Joint Report to Convocation
February 25, 2010

Professional Development & Competence Committee

PD&C Committee Members
Laurie Pawlitza (Chair)
Constance Backhouse (Vice-Chair)
Mary Louise Dickson (Vice-Chair)
Alan Silverstein (Vice-Chair)
Larry Banack
Jack Braithwaite
Thomas Conway
Marshall Crowe
Aslam Daud
Lawrence Eustace
Jennifer Halajian
Susan Hare
Paul Henderson
Laura Legge
Dow Marmur
Daniel Murphy
Judith Potter
Nicholas Pustina
Jack Rabinovitch
Heather Ross
Catherine Strosberg
Gerald Swaye

Paralegal Standing Committee

Paralegal Standing Committee Members
Paul Dray (Chair)
Susan McGrath (Vice-Chair)
Marion Boyd
James R. Caskey
Seymour Epstein
Michelle L. Haigh
Glenn Hainey
Paul Henderson
Brian Lawrie
Douglas Lewis
Margaret Louter
Stephen Parker
Cathy Strosberg

Purpose of Report: Decision

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

COMMITTEES' PROCESS

The Professional Development & Competence Committee ("PD&C Committee") and the Paralegal Standing Committee ("PSC") met together on January 27 and February 11, 2010. PD&C Committee members Laurie Pawlitza (Chair), Mary Louise Dickson (Vice-Chair), Alan Silverstein (Vice-Chair), Larry Banack, Jack Braithwaite, Thomas Conway, Marshall Crowe, Lawrence Eustace, Susan Hare, Paul Henderson, Daniel Murphy, Judith Potter, Nicholas Pustina, Jack Rabinovitch, Cathy Strosberg, and Gerald Swaye attended one or both meetings. Paralegal Standing Committee members Paul Dray (Chair), Susan McGrath (Vice-Chair), Marion Boyd, James Caskey, Seymour Epstein, Paul Henderson, Brian Lawrie, Doug Lewis, Margaret Louter, Stephen Parker and Cathy Strosberg attended one or both meetings. Staff members Julia Bass, Diana Miles and Sophia Sperdakos attended both meetings. Terry Knott and Elliot Spears attended the meeting on February 11, 2010.

OVERVIEW

Continuing professional development is a positive tool that benefits lawyers and paralegals and is an essential component of the commitment they make to the public to practise law or provide legal services competently and ethically.

The Law Society has an important role to play in supporting lawyer and paralegal efforts to maintain and enhance that competence. It also has a duty to ensure that all persons who practise law or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide.

Over the last decade in particular, the Law Society has developed numerous competence enhancing tools for lawyers, and since 2008 for paralegals. It has also developed preventive monitoring requirements such as the spot audit and practice review programs. While these requirements have been developed in furtherance of the Law Society's mandate to regulate lawyers and paralegals in the public interest, they have at the same time been designed with the needs of lawyers and paralegals in mind, providing guidance on best practices while ensuring that deficiencies in quality of service are addressed. This has resulted in favourable comments from lawyers and paralegals in the course of meeting their regulatory requirements.

In this report, the Professional Development & Competence Committee and the Paralegal Standing Committee ("the Committees") recommend that the Law Society introduce a continuing professional development requirement ("CPD requirement") to complement and support the other preventive requirements the Law Society has introduced. In making this recommendation the Committees have developed an approach that will allow lawyers and paralegals to meet the CPD requirement in ways that are accessible, affordable and flexible.

Lawyers and paralegals will be able to choose their CPD hours from a wide range of eligible activities. They will be entitled to select the providers that offer the content most relevant to their continued learning, both within and outside Ontario, and without a requirement that they obtain approval from the Law Society. The Law Society will assume primary responsibility for the delivery of the portion of the requirement addressing ethics, professionalism and practice management content without charging program registration or materials fees.

The reporting mechanism will be simple and lawyers and paralegals will be provided with regular notices reminding them how many hours they have left to meet in the reporting year. There will be a fair and reasonable mechanism to address failure to comply with the requirement and a mechanism to permit exemptions from the requirement in a given year to address special circumstances. In the months leading up to the commencement of the program there will be frequent and straightforward communications with lawyers and paralegals to ensure they understand their obligations under the program.

The consultation process was helpful to the Committees. They have refined some recommendations and revised others. They believe the result successfully reconciles the Law Society's commitment to lawyer and paralegal competence with the needs of practitioners.

The report that follows details the recommendations and the considerations that underlie them.

CONTINUING PROFESSIONAL DEVELOPMENT ("CPD") REQUIREMENT

MOTION

1. That Convocation approve the introduction of a continuing professional development ("CPD") requirement commencing January 1, 2011 for lawyers who practise law and paralegals who provide legal services (those lawyers and paralegals in the 100% fee paying category) in accordance with the following:

RECOMMENDED CPD PROGRAM

Recommendation 1
That the Law Society introduce a CPD requirement for lawyers and paralegals who practise law and provide legal services, respectively, (those in the 100% fee paying category) commencing on January 1, 2011, with the first reporting of hours due on December 31, 2011.

Recommendation 2
That for the purposes of the requirement CPD is defined as follows:
Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career.

Recommendation 3
That lawyers and paralegals subject to the requirement be required to fulfill 12 hours of CPD annually, with 3 of the 12 hours to be taken in topics related to ethics, professionalism and/or practice management.

Recommendation 4
That lawyers or paralegals subject to the requirement may seek an exemption from the requirement in circumstances coming within the Human Rights Code and/or such other or additional circumstances as the Director of Professional Development and Competence, or her designate, deems appropriate.

Recommendation 5
That in calculating the exemption a lawyer or paralegal will be exempted from the requirement on the basis of one credit hour for each month for which the exemption is granted.

Recommendation 6
That the activities in paragraph 52 be considered eligible activities for the CPD requirement. That the activities set out in paragraph 62 be considered ineligible activities for the CPD requirement.

Recommendation 7
That lawyers and paralegals fulfill their CPD requirements from the list of eligible activities and in compliance with the definition of CPD set out at Recommendation 2. Subject to Recommendation 9 and 19 there is no program or provider accreditation.

Recommendation 8
That the Law Society assume primary responsibility for delivery of the required ethics, professionalism and practice management content that those subject to the CPD requirement must meet, without charging program registration or materials fees.

Recommendation 9
That providers other than the Law Society that wish to provide stand-alone programs or program content in ethics, professionalism and practice management must apply for and obtain program approval.

Recommendation 10
That lawyers continue to report annually on the Lawyers Annual Report the number of self-study hours they complete and that commencing in 2011 paralegals report annually on the Paralegal Annual Report the number of self-study hours they complete. The number of hours is not mandatory, but reporting is. This reporting is not part of the CPD requirement.

Recommendation 11
That lawyers and paralegals who are not otherwise exempted from the CPD requirement report their CPD activities annually by December 31 on the lawyer and paralegal portal, commencing December 31, 2011. They may not carry over credits from one year into the next.

Recommendation 12
That lawyers and paralegals be entitled to report their eligible activities at any time on or before December 31.

Recommendation 13
That lawyers and paralegals be provided with notices at regular intervals throughout the calendar year advising them how many credits they have obtained and how many credits remain outstanding.

Recommendation 14
That if a lawyer or paralegal is exempted from the requirement at any time during the year compliance will be calculated on a pro rata basis of one hour for each month in the year during which he or she is not exempted. He or she will be exempted from the balance of hours and will not be required to make them up when the exemption ends.

Recommendation 15
That following the completion of the calendar year the summary suspension bencher will be provided with the names of the lawyers and paralegals who have failed to comply with the requirement and who are subject to administrative suspension from practice. If administratively suspended the lawyer or paralegal may be re-instated by completing the missing credit hours.

Recommendation 16
That there be provision for random annual CPD audits to monitor compliance with the CPD requirement, to be undertaken as part of a practice management review or paralegal practice audit; and by random selection chosen from among all paralegals and lawyers subject to the requirement.

Recommendation 17
That the randomly selected CPD audits take the form of a written request for proof of completion.

Recommendation 18
That there be a total of 500 audits of lawyers and 25 audits of paralegals annually respecting CPD compliance.

Recommendation 19
That beginning in January 2011 new lawyers and paralegals be required to take 12 hours per year (for the equivalent of two full years of practice or providing legal services, respectively) of programming accredited by the Law Society, 3 hours of which per year will be in topics of ethics, professionalism, and practice management and will be integrated within the other 9 hours of accredited programming.

Recommendation 20
That Certified Specialists be required to obtain a total of 12 hours of CPD annually, with 3 of those hours to be taken in topics related to ethics, professionalism and/or practice management.

Recommendation 21
That the Law Society further investigate the issue of CPD registration subsidies for inclusion in discussions of the 2011 Law Society budget.

Recommendation 22
At regular intervals in 2010, the PD&C Committee and the PSC should receive reports on the implementation process. An annual information report should be provided to the Committees and Convocation in 2011 and 2012. An assessment report should be provided to the Committees and Convocation by the end of April 2013 addressing the first two years of operation, including but not limited to the issues set out in paragraph 96.

Recommendation 23
That the Law Society implement a communications plan in accordance with paragraphs 98-101 of this report.

BACKGROUND

2. In October 2009 Convocation approved the Professional Development & Competence and Paralegal Standing Committees' motion for consultation on their joint report regarding a continuing professional development (CPD) requirement ("the consultation report"). A copy of the consultation report is set out at Appendix 1.

3. The consultation period ran from October 30, 2009 to January 15, 2010. Appendix 2 sets out the steps taken to bring the consultation process to the attention of lawyers and paralegals.

4. The Committees received 48 responses from individuals and 28 from institutional groups or organizations. In addition, 72 paralegals and 46 lawyers participated in the teleseminars and a few sent in e-mail comments. Appendix 3 sets out the names of individuals and organizations that made submissions.[1] At the conclusion of the consultation period the CPD working group[2] and both Committees considered the submissions.[3]

5. This report,
   a. provides the results of the consultation, summarized at Appendix 4;
   b. sets out the Committees' further consideration of the CPD issue; and
   c. provides their final recommendations to Convocation.

A CPD REQUIREMENT

The Proposal

6. In their October 2009 consultation report the Committees recommended the introduction of an annual CPD requirement of 12 hours for lawyers and paralegals who practise law or provide legal services, respectively, (those lawyers and paralegals in the 100% fee paying category) with 3 of the annual 12 hours[4] being in topics that address ethics, professionalism and/or practice management.

The Definition

7. The Committees developed a proposed definition of CPD for the purposes of the requirement as follows:

> Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career.

8. The proposed definition attracted minimal comment in the submissions. The Equity and Aboriginal Issues Committee notes that the definition is sufficiently broad to encompass a large scope of qualifying activities.

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[1] The submissions are available on request. Some submissions are anonymous. In a few instances submissions have not been made public beyond the committee level, at individuals' requests. A few organizations requested an extension beyond the January 15 deadline to provide their submissions. All requests were accommodated. One individual requested an extension, which was granted.

[2] The CPD working group members are: Laurie Pawlitza (Chair), Mary Louise Dickson (Vice-Chair), Larry Banack, Tom Conway, Dow Marmur and Stephen Parker. Diana Miles and Sophia Sperdakos are staff to the working group. Mr. Marmur was unavailable to participate in the working group's meetings on January 20 and 21st.

[3] The PD&C Committee discussed the CPD issue and established a working group in June 2009 to more fully analyze the issue and report back. The CPD working group met five times in July, August and September, 2009. The PD&C Committee and the PSC Committee met jointly on September 25 and October 8, 2009 and presented their joint proposal to Convocation on October 29, 2009. The CPD working group met on January 20 and 21, 2010 to review and analyze the submissions. The Committees met jointly on January 27 and February 11, 2010 to consider their final recommendations to Convocation.

[4] 25% of the annual 12 hour requirement

9. LAWPRO suggests that since providing competent professional service to clients includes competent law practice management the definition should be expanded to include this. The Committees' view of the importance of practice management is reflected in the requirement that 3 hours of a total of 12 hours (25%) of lawyers' and paralegals' annual requirement should be in topics related to ethics, professionalism and/or practice management. In the Committees' view the definition should remain generic, with the 3 hour requirement addressing specific content issues.

10. When lawyers and paralegals subject to the CPD requirement consider what annual CPD activities to undertake, the definition will provide the broad overview to their decision-making.

Whether to Introduce CPD – The Merits

11. Forty-eight individuals responded in writing to the invitation to consult. Of these, close to half do not comment on whether the requirement should be introduced, but instead ask questions or make specific suggestions on components of the proposed program. Of the remaining individuals there is a mixture of those who support the requirement outright, support it with qualifiers based on implementation concerns, or oppose it. In addition, those who attended the teleseminars generally did not oppose the requirement, but either support it or focus on implementation questions.

12. Twenty-eight organizations responded to the invitation to consult. Of these only one opposes the introduction of the program. The others either support the introduction directly or by expressing support for CPD generally and then making suggestions on implementation issues. These organizations reflect a broad array of groups[5] representing diverse practice areas, geographic locations and size of practices and also representing perspectives of Aboriginal, Francophone and equity seeking communities.

13. For example, the County and District Law Presidents' Association supports the requirement. The Presidents represent law associations throughout the province, many of which are in locations remote from large centres where traditional live programming is most available. The Ontario Bar Association also supports the introduction of the requirement. It too speaks for lawyers situated throughout the province and includes representation from a broad membership base. The Law Society's Equity and Aboriginal Issues Committee[6] considers that the requirement has the potential to reduce isolation of lawyers and paralegals from Aboriginal, Francophone and equity seeking communities and to increase mentoring opportunities.

14. In the Committees' views the minimal opposition to the introduction of the CPD requirement can fairly be interpreted as a general acceptance of going forward with the proposal. This may be reflective of any number of factors, including acceptance that has resulted from reporting minimum expectations for CLE since 2002 on the Lawyers Annual Report[7] , increased accessibility to CPD programming and innovative delivery over the last decade, or the flexibility of the proposed requirement.

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[5] Only one paralegal organization commented. Given that paralegal regulation is relatively recent, paralegal organizations may still be developing their approaches to consultation requests.

[6] The Committee's comments also reflect the views of the Equity Advisory Group and the Aboriginal Working Group.

[7] To date paralegals have not yet been required to report CLE on the PAR.

15. Of the few submissions that oppose a CPD requirement the primary reasons given are those the Committees raise in their consultation report, namely,

    a. that there is no evidence that the requirement results in a reduction of negligence actions or complaints; and

    b. that a CPD *requirement* represents an overly broad regulatory brush, unnecessary for the vast majority of the profession that is competent, yet not sufficiently directive to improve the competence of those who are not.

16. LAWPRO's submission supports the implementation of a CPD requirement "as it believes CPD can increase professional competence and reduce malpractice claims." LAWPRO notes that it regularly receives personal comments from lawyers who state that information or resources LAWPRO provides has helped them recognize a potential claim and how to avoid it or has highlighted a risk of which they had not been previously aware. Moreover LAWPRO's submission notes that there is indirect empirical evidence from the LAWPRO CLE Premium Credit that attendance at CLE programs can reduce malpractice risks and costs. Data indicates that lawyers who have claimed one or more LAWPRO CLE Premium Credits have a lower average cost per claim than those who have not claimed a credit. They also have fewer claims resolved with an indemnity payment.[8]

17. A CPD requirement would constitute only one component of the Law Society's quality assurance and quality improvement mosaic of initiatives. The various components together comprise a regulatory template for lawyer and paralegal competence. The Committees continue to believe that such a requirement, properly and fairly implemented, will provide greater opportunity for those subject to it to reflect and act upon their professional development needs, all in pursuit of better service to the public.

18. As noted above, some of the submissions that raise concern about the requirement are in fact more focused on implementation issues than on the merits of a CPD requirement per se. In particular, they address concerns about affordability and accessibility. They also raise the concern that the requirement may have a disproportionate effect on sole practitioners and small firm lawyers and paralegals.

19. The Committees agree that these are important considerations. Some of the revised recommendations reflect a number of the comments made on these issues. In addition, however, the Committees are of the view that these issues can and should be addressed as part of the implementation process and of the assessment of the requirement that should take place after its initial years of operation. These issues are not a reason against introducing a CPD requirement. This report will comment on these concerns in more detail in subsequent sections.

[8] LAWPRO submission, pp. 14 and 15.

To Whom the Requirement Should Apply

20. The Committees recommend that the CPD requirement apply to lawyers and paralegals who practise law or provide legal services, respectively (those in the 100% fee paying category). In some cases these lawyers and paralegals may practise law or provide legal services on behalf of a single employer, but it is the nature of their activities that determine which category they are in. Those lawyers and paralegals who do not practise law or provide legal services, but who are otherwise employed are in the 50% fee paying category. Depending upon the work they do, for example, lawyers in government or in corporations may be in either the 100% or 50% fee paying categories. Those in education will typically be in the 50% fee paying category. Paralegals and lawyers who do not engage in any remunerative work, are in fulltime attendance at a designated education institution, college or university or are on pregnancy or parental leave and do not practise law or provide legal services are in the 25% fee paying category.

21. Almost no submissions address the issue of to whom the requirement should apply. One or two disagree with exempting those in the 50% and 25% fee paying category on the basis that they need CPD to keep them current in the event they return to the 100% fee paying category.

22. A few submissions suggest exemptions for additional categories such as those senior or other lawyers and paralegals working part-time; women during the 12 months after giving birth; corporate counsel, on the basis that they do not provide services to the general public and have narrow expertise not amenable to CPD; research lawyers and those in litigation support because they have no private clients, retainers or trust funds. In fact, lawyers and paralegals in these situations might be exempted on the basis of their fee category.

23. The Committees have considered whether those in the 50% and 25% fee categories should be included in the requirement as a condition of continued membership in the Law Society. In developing the CPD proposal the Committees sought a balanced approach that would focus the CPD requirement where it could be most effective. Those who practise law or provide legal services are the focus of the greatest regulatory attention. There is a heightened public interest in their competence, ethical behaviour and ability to manage their practices. While all lawyers and paralegals must be competent and maintain that competence in whatever work they do, the regulatory imperative for competence is at its highest for those in the 100% category. They have direction interaction with clients, providing legal advice and opinions upon which those clients rely. In contrast, those who have chosen to transfer to the 50% or 25% fee paying category are not practising law or providing legal services; they are not providing legal advice or opinions.

24. In the case of lawyers in the 50% category the average number who change their status annually from the 50% category to the 100% category is between 300 and 350. Most lawyers, once in the 50% category, tend to remain there. Lawyers in the 25% category tend to be more transitory, staying in the category for only finite, limited periods of time. There is as yet insufficient information on paralegals in these categories.

25. The Law Society has other quality assurance and quality improvement programs for those moving from the 50% and 25% categories to the 100% category, particularly where the absence has been lengthy.[9] In addition, the CPD requirement would begin to apply on a pro rata basis as soon as a lawyer or paralegal enters the 100% category, and thereafter annually on the basis of the full requirement. The pro rata calculation would be made on the basis of one credit hour for each month the lawyer or paralegal is in the 100% fee category. The consultation process has not led the Committees to conclude that, at this time, the scope of the requirement should be expanded beyond the 100% fee paying category.

26. The Committees also agree that the level of competence required is the same regardless of whether the lawyer or paralegal practises full or part time. LawPRO levies differentiate between part time and full time practice, but this is premised on a risk-based assessment that provides a link between the number of hours of practice yearly and the risk of errors. In the Committees' view there should be no reduction in the yearly hours of CPD. Maintenance and enhancement of competence are not tied to hours practised.

27. In addition to the category exemptions for those in the 50% and 25% categories, the Committees' proposal recommends exemptions based on individual circumstances. The purpose of such exemptions is to recognize isolated or individual events or conditions that preclude a lawyer or paralegal from completing the credits in a *particular year*. The Equity and Aboriginal Issues Committee recommends that the basis for exemptions be those characteristics coming within the *Human Rights Code.*[10] The Committees agree, but also consider that there may be other relevant circumstances deserving exemption, in addition to those coming within the *Human Rights Code*. The Committees are of the view that the Director of Professional Development and Competence or her designate must have discretion, as she currently does respecting licensing process issues, to consider additional circumstances for accommodation.[11]

28. The onus will be on lawyers and paralegals seeking the individual exemption to apply for it as soon as they become aware that they will or may be unable to complete the credit hours. There will be exceptional circumstances in which the request may come at the end of the reporting period. This is discussed further under the compliance section of this report, but in general terms the Director should have discretion to consider them.[12]

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[9] Lawyer licensees who, for 80 percent or more of the five years immediately preceding the date of their application to enter private practice were not in private practice, and who intend to practise in firms of five or fewer lawyers are subject to the re-entry review requirements (the practice management review) within 12 months of their entry into private practice.

[10] race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, same-sex partnership status, handicap.

[11] The Committees recommend that, *in the normal course*, exemptions should not be granted on the basis that the lawyer or paralegal does not have the time to complete the requirement. The purpose of the requirement is to encourage lawyers and paralegals to *make* time for CPD. At the same time, there may be unusual circumstances in a given year for which a lawyer or paralegal applies for exemption.

[12] Lawyers and paralegals in the 50% or 25% category will be automatically exempted without the requirement to apply, so long as they remain in these categories. If they return to the 100% fee category during the year they will be required to complete CPD hours on a pro rata basis of one hour per month during which they are in the 100% fee paying category If at any time in the future additional fee paying categories become subject to the requirement, the exemptions will be adjusted accordingly.

The Number of Annually Required Hours and Required Content (professionalism, ethics, practice management)

29. The majority of the submissions, from both individuals and organizations, either agree with a 12 hour annual requirement or make no comment. One or two submissions suggest, in contradiction to each other, that the hours are too few too make a difference or too many to introduce all at once.

30. The Committees reiterate that their proposal seeks to create a balanced program that mandates a minimum commitment, while recognizing the likelihood that most lawyers and paralegals will voluntarily pursue CPD over and above the minimum. In addition, the proposal takes guidance from the experience of many other jurisdictions, both in Canada and elsewhere, that have CPD requirements and have settled on and maintained 12 hours. This approach also recognizes that cost, time and accessibility issues need to be taken into account when developing a requirement.

31. Some submissions query whether those with highly specialized practices (some paralegals, lawyers with narrow practices), very senior practitioners and those with specific needs (eg. requiring Francophone programming; programming for those with disabilities) will be able to find sufficient content each year. Availability of relevant programming is, of course very important to making the requirement a meaningful one. As will be described later in the report, the fact that lawyers and paralegals will be able to satisfy the requirement through a wide range of eligible activities and programming that best meet their professional development needs and choose providers within and outside Ontario, will go a long way to addressing this issue. The Committees consider this an important *implementation* issue that should be monitored and reported as part of the assessment of the requirement following the initial years of operation. The Committees discuss the assessment process later in this report.

32. The Committees are reassured by the significant support in the submissions for a requirement that 25% of the annual 12 hour requirement be taken in topics related to ethics, professionalism and/or practice management. The Committees agree that it is less confusing to refer to hours instead of percentages. The requirement should specify that 3 hours of the total 12 required hours of CPD annually should be in topics related to ethics, professionalism and/or practice management.

33. Although a few submissions disagree with this component on the basis that ethics cannot be taught, or that it will be difficult to find sufficient content year after year, the Committees are satisfied that lawyers and paralegals understand the importance of these topics and that incorporating them into the CPD requirement is in the public interest. The Committees reiterate that there is no obligation to take content in all three areas in a given year. Also, although 3 hours is the requirement, there would be nothing to preclude a lawyer or paralegal from taking all 12 hours in ethics, professionalism and/or practice management programs.

34. The manner in which lawyers and paralegals will fulfill the 3 hour component of ethics, professionalism and/or practice management will be discussed elsewhere in the report.

Recommendation 1
That the Law Society introduce a CPD requirement for lawyers and paralegals who practise law and provide legal services, respectively, (those in the 100% fee paying category) commencing on January 1, 2011, with the first reporting of hours due on December 31, 2011.

Recommendation 2
That for the purposes of the requirement CPD is defined as follows:

Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career.

Recommendation 3
That lawyers and paralegals subject to the requirement be required to fulfill 12 hours of CPD annually, with 3 of the 12 hours to be taken in topics related to ethics, professionalism and/or practice management.

Recommendation 4
That lawyers or paralegals subject to the requirement may seek an exemption from the requirement in circumstances coming within the *Human Rights Code* and/or such other or additional circumstances as the Director of Professional Development and Competence, or her designate, deems appropriate.

Recommendation 5
That in calculating the exemption a lawyer or paralegal will be exempted from the requirement on the basis of one credit hour for each month for which the exemption is granted.

ACCREDITATION AND ELIGIBLE ACTIVITIES

Overview of the Consultation Report Approach

35. In the consultation report the Committees proposed the following approach to accreditation and eligible activities:

a. Lawyers and paralegals would satisfy their credit hours through a wide range of eligible activities that were specified in the consultation report. There was a short list of activities that the Committees proposed would not be eligible.

b. Lawyers and paralegals would be responsible for ensuring that they obtained the required 25% of content (3 hours) in ethics, professionalism or practice management out of their total 12 hour requirement.

c. Providers could apply to become accredited providers, but to be eligible to do so 25% of the content (3 hours) in each of their programs must address ethics, professionalism and/or practice management.

d. Lawyer and paralegals would not be required to obtain their CPD hours, including their 25% of the content (3 hours) of ethics, professionalism and/or practice management content, from an accredited provider.

e. Lawyers and paralegals would not have to have any of their activities pre-approved by the Law Society, however, if they so wished they could seek approval from the Law Society for an individual program.

36. The greatest number of comments the Committees received during the consultation process arose from these components of the proposal. In particular the submissions addressed the following:

a. Both individuals and providers raised questions about specific content eligibility. Would particular courses or activities be eligible?[13]

b. Both individuals and providers asked whether courses offered by specific providers would be eligible.[14]

c. Would becoming an accredited provider preclude that provider from offering any program that did not "embed" content in ethics, professionalism or practice management? Would this be a pedagogically sound approach?

d. If lawyers and paralegals were not *required* to obtain their 12 hours, including their ethics, professionalism and/or practice management content, through accredited activities and providers, what purpose would accreditation really serve?

e. Would the Law Society ensure sufficient content annually to satisfy the ethics, professionalism or practice management content requirement?

37. The Committees found these comments very useful for two reasons. They pointed out ways in which the proposal needs to be more clearly set out and they caused the Committees to rethink accreditation, "embedding" and delivery of the ethics, professionalism and practice management content.

38. The rationale for proposing that lawyers and paralegals were not required to obtain their CPD hours, including their 3 hours of ethics, professionalism and/or practice management content from an accredited provider, was to make the CPD requirement as flexible as possible and permit a broad range of activities to qualify to assist with issues such as accessibility and cost.

[13] Submissions referred to specific types of courses and asked whether they would qualify (e.g. Would a course in tax provided by other than lawyers qualify? Would a course originating outside of Ontario qualify? Would LL.M. programs qualify?)

[14] e.g. Canadian Property Tax Association, Prosecutors Association of Ontario, Canadian National Association of Real Estate Appraisers, Canadian Tax Foundation, Canadian Institute of Chartered Accountant, American Bar Association, International Fiscal Association (UK), Legal Aid Ontario clinic programs, and many others.

39. The rationale for requiring accredited providers to embed the ethics, professionalism and/or practice management content in all their programming was to emphasize the importance the Law Society places on this component of the program and to assist lawyers and paralegals to know that if they did take a program from an accredited provider it would have at least 25% content in ethics, professionalism or practice management.

40. Upon reflection, however, the Committees agree that while both rationales described in paragraphs 38 and 39 are valid, the mechanism the Committees proposed was not the most effective way to proceed. In fact, in the case of providers (of which there are many) who offer certain valuable programming that does not lend itself to meeting the 25% content requirement, it was unlikely they would apply for accreditation.

41. The Committees have also thought more about the underlying importance of the ethics, professionalism and practice management component of the CPD requirement and the most fair and effective way to deliver the content. As LAWPRO points out in its submission,

> Most lawyers are surprised to learn that failures to know or apply substantive law account for a relatively small portion of LAWPRO claims. Over the last ten years, by both count and cost, law-related errors were only the fourth most common cause of claims. The biggest claims risk by count and cost – over one-half of LAWPRO's claims in most areas of practice – involve basic lawyer/client communication/relationship issues and time/deadline management issues. Taking proactive steps to reduce these two types of claims is the biggest opportunity to reduce claims risks and costs.[15]

42. A number of submissions raise concerns about how lawyers and paralegals who do not take "embedded" content would be able to satisfy the requirement. They ask whether the Law Society would provide such programming and suggest that these programs should be free. These comments were often made by sole and small firm lawyers and paralegals who are concerned about the cost of the CPD requirement. These are valid questions.

Accreditation

43. The comments set out above have caused the Committees to reconsider whether a provider accreditation system is necessary. Having considered these various comments and thought further about the consultation report's recommendation that lawyers and paralegals not be required to meet their credit hours only through accredited activities, the Committees now consider that a system in which there are both accredited and unaccredited activities is confusing. In the Committees' view this conclusion leads to two alternatives:

    a. Accredit all activities in one of two ways: The Law Society pre-approves providers and the Law Society approves, before or after the event, individual courses and educational activities. This is essentially the model followed in British Columbia. It requires those subject to the requirement to obtain approval from that law society for each educational activity that is not from a pre-approved provider. The approval process is electronic and can be done without difficulty.

[15] LAWPRO submission, p. 5.

This approach would require additional administrative support on the part of the regulator. This alternative would be a more stringent approach than the Committees recommend in the consultation report, but might provide comfort to lawyers and paralegals who want certainty about their choices.

b. Accredit no activities. In this alternative, lawyers and paralegals determine for themselves whether an activity is eligible based on a list provided by the Law Society. This list describes *types* of activities, not specific content. (e.g. live program, teleseminar, live web cast, discussion group, etc...) The lawyer or paralegal then determines whether the content comes within the CPD definition[16] that the Law Society has approved. If the type of activity is eligible and the content comes within the CPD definition then the lawyer or paralegal is free to choose the activity. Providers do not have to be accredited.

This approach allows lawyers and paralegals to choose the content, delivery method and providers that are most relevant to their CPD needs. There is a slight risk to lawyers or paralegals that they will choose an ineligible activity or one that does not come within the CPD definition, but such risks are likely low and would in all likelihood be transitional in nature. If during a CPD audit it was discovered that an activity had been ineligible or did not fit within the CPD definition, the lawyer or paralegal would be instructed on why the choice was a problem and his or her choices would simply be reviewed again the following year to ensure the issue had been addressed.

This alternative removes a provider accreditation process, but is otherwise closer to the Committee's original proposal.

44. The Committees recommend that, with two exceptions to be discussed below,[17] the Law Society use alternative (b). In an effort to minimize the administrative burden on lawyers and paralegals the Committees continue to be of the view that lawyers and paralegals should be entitled to use their judgment in choosing their activities as described in alternative (b), without having to seek Law Society approval to do so. Given that view, a process of provider accreditation may be an unnecessary administrative step. Ontario is fortunate to have a significant number of quality CPD providers from law associations, not-for-profit providers, in-house law firms, government, Legal Aid Ontario, LAWPRO, and law schools, many of which groups made submissions. These entities will continue to provide excellent programming as their long history suggests. This is not to suggest lawyers and paralegals are restricted to Ontario providers under this alternative. As described above, an individual uses his or her judgment to determine that an activity is in the list of eligible activities and comes within the definition of CPD. If the activity and content is eligible then the lawyer or paralegal may choose the provider he or she wishes.

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[16] *"Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career."*

[17] Paragraphs 49-50 and 71-77.

45. If chosen, the effectiveness of this alternative can be considered when the CPD requirement is assessed following the initial years of operation. This would allow further discussion of alternative (a) at that time, if necessary.

Ethics, Professionalism and Practice Management Content Requirement

46. On the issue of the ethics, professionalism and practice management content the Committees have paid particular attention to the comments about who will ensure such content is available.

47. As regulator the Law Society observes firsthand and must address the difficulties lawyers and paralegals encounter related to ethics, professionalism and practice management. It has developed numerous materials and programming to assist lawyers and paralegals in these areas. It conducts practice management and financial audits using standards against which to assess practices and focusing on a wide range of practice management issues such as operating a practice, bookkeeping, and managing conflicts. It provides training and material related to the Rules of Professional Conduct and on civility in legal practice. It deals with conduct, capacity and competence issues within the regulatory processes. It addresses issues related to wellness and stress management[18] and their importance to maintaining professionalism and competence. It provides training and information on principles related to equity and diversity. All of these are within the scope of the ethical, professionalism, and practice management content requirement.

48. In the Committees' view the Law Society should assume primary responsibility for delivery of the ethics, professionalism and practice management content and should do so without charging program registration or materials fees. This would ensure that the content addresses those issues of primary regulatory concern, would free up other providers to focus on their core mandates, would further reinforce the recommendation not to require providers to "embed" this content and would address some of the cost issues that lawyers and paralegals have raised. The Committees intend that this Law Society programming would be designed specifically to meet the ethics, professionalism and/or practice management content requirement.

49. There may be other providers interested in developing stand alone programs or individual program content in the area of ethics, professionalism, and practice management. Nothing in this recommendation would preclude this and, in fact, the Committees hope that other providers will be interested in doing so. Some are already doing so both generally and to qualify their programming for the LAWPRO Premium Credit.[19]

[18] In the consultation report programs on stress management and wellness were ineligible activities. The Committees agree that these are relevant within the ethics, professionalism and practice management content and should be eligible in that context.

[19] Approval will also be required for programming for newly called lawyers and newly licensed paralegals. See the discussion beginning at paragraph 71.

50. The Committees recommend that for such programming to qualify as containing ethics, professionalism or practice management content for the purposes of the CPD requirement it must be approved by the Law Society. Programs created to support the LAWPRO Premium Credit could also be submitted to the Law Society for approval for the CPD requirement.

Eligible Activities

51. In the consultation report the Committees set out proposed eligible and ineligible activities. A number of submissions ask whether certain types of activities would fit within the categories. Others comment on the proposed ineligible categories.

52. Having considered these comments, the Committees propose that the following constitute eligible activities. In accordance with the Committees' recommendation lawyers and paralegals will decide whether the activity they wish to claim comes within these categories. The course content will be eligible if it comes within the definition of CPD:

a. Participation in CPD courses

This will include attendance at live programs or participating in online "real time" courses, streaming video, web and or teleconference courses, provided there is an opportunity to ask and answer questions, viewing a previously recorded course with at least one other lawyer or paralegal. This includes programming offered by providers both in and outside Ontario. To qualify there must be the opportunity to interact with colleagues and/or instructors, for example in person, by e-mail or on the phone.

b. Participation as a registrant in a college, university or other designated educational institution program, including distance education. This will include LL.M programs.

c. Teaching (to a maximum of 6 hours per year)

One hour of teaching will equal three hours of credit to reflect preparation time. The teaching content must be law-related and within the CPD definition. There is no limit on the audience. If the same content is taught more than once in a year credit is only available for the first time. Teaching credit will be available for volunteer or part-time teaching, not as part of full-time or regular employment.

Credit for chairing a program may apply, provided the chair does more than introduce speakers. Credit is as a facilitator of the program. Credit will be limited to time spent in the chair capacity.

d. Acting as an Articling Principal or mentoring or being mentored or supervising a paralegal field placement (to a maximum of 6 hours per year)
The Articling Principal, mentor, paralegal who is supervising a field placement and lawyer or paralegal being mentored may claim the hours spent on topics within the CPD definition.

e. Writing and Editing Books or articles (to a maximum of 6 hours per year)
The content must be law-related and within the CPD definition, must have been prepared solely by the person seeking the credit, and intended for publication or use in course materials, rather than for personal use or purposes or primarily for marketing purposes. Credit for an article or book may only be claimed once. The credit may also be claimed for editing legal texts or case reports and for preparing case headnotes, with the same restrictions as set out for writing. There is no limitation on the audience for whom the work is written.

Credit is only available for volunteer or part-time writing, not as part of full-time or regular employment.

f. Study Groups
This will include attendance in a group setting at an educational session of two or more lawyers or paralegals the purpose of which is to consider content that comes within the CPD definition. This may include lawyers in the same firm, legal department, government agency, clinic, or other similar entity. File specific discussion is not eligible. No time may be claimed for preparation for the discussion group unless it comes within c. or e. above.

g. Educational Components of bar and law association meetings
Where lawyers or paralegals attend meetings that involve both business related to the association and substantive law content that comes within the CPD definition, the lawyer or paralegal may claim credits for the hours devoted to the substantive law content.

53. The Committees considered the comments that were made about their list of proposed *ineligible* activities. Activities are designated as ineligible not because they are without value, but because the CPD requirement is focused on more formal education and designed to encourage or at least provide the opportunity for interaction among members of the profession in professional development endeavours. Similarly, while volunteer and pro bono activities are laudable they are not suitable for inclusion as activities in a CPD requirement.

54. Before setting out the proposed list of ineligible activities the Committees wish to comment on two areas on which they received comment: self-study and activities designed primarily for marketing to existing or potential clients.

Self-Study

55. The Committees have no doubt that lawyers and paralegals engage in self-study in significantly greater hours than the CPD envisioned in this requirement. This is an integral part of providing competent service and for many professionals is their preferred learning method. In a sense this may be described as the “private” form of education.

56. If self-study is the private form of education, the “public” form is participation in more formal forms of CPD, including courses, programs, seminars, and discussion groups. This form of professional development typically engages participants in more interactive learning in the broadest sense, namely providing them with the *opportunity* to consider

and exchange ideas with others in their profession in a more formal context. In the Committees' view, the CPD requirement should be directed at this "public" form of education. For this reason the Committees continue to recommend that self-study not be eligible for CPD credits.

57. The Committees note, that although there is currently no requirement to undertake a specified number of self-study hours, nor are they recommending there should be, there is a requirement that lawyers report on the Lawyers Annual Report (LAR) how much self-study they do, with 50 hours expressed as a "minimum expectation." Currently, paralegals are not asked to report this on the Paralegal Annual Report (PAR). The Paralegal Standing Committee is of the view that if lawyers continue to be required to report on self-study, paralegals should also be required to do so.

58. The Committees recommend that the requirement to report self-study hours should continue for lawyers on the LAR and that beginning in 2011 paralegals should also be required to report self-study hours on the PAR. As for lawyers there is no required minimum number of hours of self-study, rather 50 hours would be the "minimum expectation." What would be required on the PAR is the *reporting* of however many hours of self-study is undertaken, even if that number is zero.

Activities designed *primarily* for marketing to existing or potential clients.

59. The place where this type of activity will arise is in the context of the generally eligible activities of teaching or writing. In evaluating whether the activity is eligible or not the lawyer or paralegal will need to assess it in the context of the what constitutes an eligible activity and in the context of the definition of CPD. The ineligibility may arise more often for the presenter than for the recipient of the information, but this will not always be the case.

60. If the activity's *primary* purpose is marketing the lawyer or paralegal or their firm to clients, the activity will be ineligible. Rather than "teaching" the presenter will be primarily "pitching" to the audience. The educational content will be minimal or basic, the presentation may be repeated with modest changes to a number of audiences, and the audience to whom it may be delivered may have no members who are themselves subject to the CPD requirement.

61. The Committees recognize that there may be a fine line between an educational product and a marketing one. The product may be both at once. The Committees include this as an ineligible activity and suggest that if a lawyer or paralegal is in doubt he or she contact the Law Society for advice. During the assessment process that will occur after the completion of the early years of the requirement, issues concerning eligible and ineligible activities may be raised and consideration given to whether changes are advisable.

62. The Committees propose that the following be ineligible activities:

    a. Any activity undertaken or developed primarily for purposes of updating or marketing to existing or potential clients.

    b. Self-study.

c. Acting as an adjudicator for a tribunal or board.

d. Working as a member of a review or other panel.

e. Pro-bono work.

f. Marking work for law school or college courses.

g. Acting as the chair or member of a tribunal or other institution or board.

h. Attendance,

i. by benchers at the business portion of Law Society meetings of Convocation or committees;

ii. at the business portion of meetings of a legal association's board or committees;

iii. at the business portion of Annual General Meetings; or

iv. at the launch of any form of legal materials.

Recommendation 6
That the activities in paragraph 52 be considered eligible activities for the CPD requirement. That the activities set out in paragraph 62 be considered ineligible activities for the CPD requirement.

Recommendation 7
That lawyers and paralegals fulfill their CPD requirements from the list of eligible activities and in compliance with the definition of CPD set out at Recommendation 2. Subject to Recommendation 9 and 19 there is no program or provider accreditation.

Recommendation 8
That the Law Society assume primary responsibility for delivery of the required ethics, professionalism and practice management content that those subject to the CPD requirement must meet, without charging program registration or materials fees.

Recommendation 9
That providers other than the Law Society that wish to provide stand-alone programs or program content in ethics, professionalism and practice management must apply for and obtain program approval.

Recommendation 10
That lawyers continue to report annually on the Lawyers Annual Report the number of self-study hours they complete and that in 2011 paralegals report annually on the Paralegal Annual Report the number of self-study hours they complete. The number of hours is not mandatory, but reporting is. This reporting is not part of the CPD requirement.

COMPLIANCE AND MONITORING

63. Only a few submissions comment on the compliance and monitoring proposal. A few emphasize that there should be flexibility to address circumstances in which the failure to meet the annual credits are for reasons enumerated within the *Human Rights Code.*

64. As discussed earlier in this report[20] lawyers and paralegals may apply for an exemption as soon as they become aware of the need. Those who qualify for exemptions under the *Human Rights Code,* as well as in additional circumstances that the Director of Professional Development and Competence, or her designate, determines appropriate, will be exempted. While in the normal course the lawyer or paralegal in need of an exemption will apply before the end of the year, the Committees recommend that in appropriate circumstance an exemption could be provided retroactively. The Committees recommend sufficient flexibility to address the issue before a suspension occurs.

65. One or two submissions suggest that there should be a period of grace before suspension occurs for failure to comply. The Committees reiterate that the proposal does not contemplate automatic suspension. It provides that no suspension will occur before the summary suspension bencher reviews the relevant information and signs the order. In the normal course this will take anywhere from several weeks to a month. In the interval, if a lawyer or paralegal completes the required credits or seeks and obtains an exemption, the matter will not proceed to a summary suspension bencher. If a member is suspended, the suspension will be lifted as soon as the credits have been completed or an exemption has been granted.

66. The compliance and monitoring mechanism set out in the Committees' consultation report balances compliance obligations with a process that is easy to use and provides ample opportunity for lawyers and paralegals to be reminded of their status. In the proposal, reminders of status are to be sent regularly throughout the year. The breadth of eligible activities should also assist lawyers and paralegals to find the necessary content to allow them to comply. Suspension for failure to meet the credit requirement is not automatic, rather depends on the summary suspension bencher signing the order. In the Committees' view this approach, coupled with the frequent reminders lawyers and paralegals will receive throughout the year is fair and makes clear the importance of compliance within the required time frame.

67. The consultation report discusses a monitoring mechanism[21] consisting of CPD audits to be undertaken either as part of the current practice management review program or paralegal practice audit, and/or by random selection chosen from among all paralegals and lawyers subject to the requirement. The report proposes that the randomly selected audits take the form of a written request for proof of completion of the annual requirement.

[20] Paragraphs 27-28
[21] Paragraphs 103 – 110.

68. Any CPD audit will be conducted the year following completion of the full 12 hours. There will be no "interim" audits as lawyers and paralegals are entitled to obtain all 12 hours in the final days of the year if they choose. The random CPD audit will not include a visit. As set out below, it will consist of a paper audit, thereby keeping to a minimum the time a lawyer or paralegal must spend in verifying CPD.

69. In this audit process lawyers and paralegals will be asked to provide proof that they have undertaken the activity claimed on the CPD portal. Typically proof will consist of proof of registration and/or evidence of payment for a course or program; list of topics canvassed in discussion groups and names of other participants; transcripts or other proof of registration in college, university or other designated educational institution program, including distance education; copies of articles for which credit is claimed, program agendas confirming that the lawyer or paralegal taught in the program for which credit is claimed, etc. Lawyers and paralegals will be required to maintain proof for one year from December 31 of the year in which the credit is claimed.

70. As with other aspects of the program the Committees recommends that the assessment process that will be undertaken following the completion of the early years of implementation examine the effectiveness and impact of the compliance and monitoring approach.

Recommendation 11
That lawyers and paralegals who are not otherwise exempted from the CPD requirement report their CPD activities annually by December 31 on the lawyer and paralegal portal, commencing December 31, 2011. They may not carry over credits from one year into the next.

Recommendation 12
That lawyers and paralegals be entitled to report their eligible activities at any time on or before December 31.

Recommendation 13
That lawyers and paralegals be provided with notices at regular intervals throughout the calendar year advising them how many credits they have obtained and how many credits remain outstanding.

Recommendation 14
That if a lawyer or paralegal is exempted from the requirement at any time during the year compliance will be calculated on a pro rata basis of one hour for each month in the year during which he or she is not exempted. He or she will be exempted from the balance of hours and will not be required to make them up when the exemption ends.

Recommendation 15
That following the completion of the calendar year the summary suspension bencher will be provided with the names of the lawyers and paralegals who have failed to comply with the requirement and who are subject to administrative suspension from practice. If administratively suspended the lawyer or paralegal may be re-instated by completing the missing credit hours.

Recommendation 16
That there be provision for random annual CPD audits to monitor compliance with the CPD requirement, to be undertaken as part of a practice management review or paralegal practice audit; and by random selection chosen from among all paralegals and lawyers subject to the requirement.

Recommendation 17
That the randomly selected CPD audits take the form of a written request for proof of completion.

Recommendation 18
That there be a total of 500 audits of lawyers and 25 audits of paralegals annually respecting CPD compliance.

COORDINATING LAW SOCIETY CPD

CPD for those entering a practice category

71. There are two other groups for whom Convocation has already approved a CPD requirement. These are lawyers in the first 24 months of practice following call to the bar and Certified Specialists.

72. In September 2008 Convocation approved the introduction of a requirement that new lawyers must take 24 hours of continuing professional development within the first 24 months of practice. The requirement is scheduled to begin in January 2011. In its report to Convocation in 2008 the L&A Task Force described the requirement as follows:

> The objective of this component of the training program is to ensure that candidates receive the practical training they need during their first 24 months of practice to serve their clients in accordance with the expectations of lawyers prescribed in the *Rules of Professional Conduct*. Law practice skills and professional responsibility issues will be integrated with substantive law programming.
>
> The requirement will engage adult learners who have the professional capacity to make appropriate decisions about the direction and focus of their education. The Law Society will accredit specific courses to ensure that the content covers the requisite professional responsibility and practice management components. However, the Law Society will not dictate specific course structures or content requirements. The post-call instruction is designed to create a tighter nexus between learning and day-to-day practice requirements, permitting students to relate their educational materials directly to the events and issues that confront them in their own law practice. It also allows more diversity in the practice-based learning, permitting individuals to tailor the education to their specific needs when they choose among a range of approved courses. It inculcates in new lawyers the principle that legal education is a life-long enterprise, and that continuing legal education is an essential component of professional responsibility.

> The post-call component will allow new lawyers to choose the accredited program and provider of their choice. A substantial proportion of the program content must cover defined professional responsibility and practice skills competencies. The balance of the program can address the substantive law that meets practice needs. To ensure that lawyers outside of city centers have access to these professional development opportunities without having to leave their communities multiple delivery methods will be used, including traditional live programming, webcasting, teleseminars, archived audio and video and others. In addition, efforts will be made to develop programming that accommodates the learning needs of different cultural and other groups within the profession.

73. The Committees are of the view that this focused approach to the CPD requirement for lawyers in the early years of entering a practice category (new lawyers) should continue for the reasons set out above. This focused approach would apply to satisfy these lawyers' total CPD requirement for the equivalent of their first two full years of practice.[22] Thereafter, these lawyers would be free to choose from the same eligible activities as all other lawyers in the 100% fee paying category. The Committees recommend that during this two year period, 25% (3 hours) of the accredited programming requirement per year be taken in topics related to ethics, professionalism and practice management and that this content be integrated within the other 9 hours of accredited programming.

74. Since the programs that new lawyers will take must be accredited, providers who develop programs for this group will be required to include, as 25% of the content of each program, topics in ethics, professionalism and/or practice management. Only programs that the Law Society approves to address learning in the early years of practice will fulfill the requirement. The Law Society will accredit individual programs of other providers for this purpose. Only programs that have integrated professionalism concepts as 25% or more of the learning will be accepted for accreditation.

75. The compliance procedure will be the same as for all others subject to the CPD requirement. To enable there to be one compliance mechanism for all those subject to CPD requirements the Committees recommend that instead of calculating the new lawyer requirement on the basis of 24 credit hours in the first 24 months of practice as was originally approved, it be calculated as 12 credit hours per year for the equivalent of the first two full years of practice. This will obviate the need for different tracking mechanisms and will save administrative costs. In addition, for ease of calculation, the requirement should begin on January 1 following call to the bar and continue until the subject lawyer has completed the equivalent of two full years of practice.

76. The Paralegal Standing Committee also considered whether newly licensed paralegals (new paralegals) should be subject to the same focused approach to CPD for the equivalent of the first two years of providing legal services. It agrees that they should for the same reasons that such a focused approach would benefit new lawyers. The PD&C Committee supports the Paralegal Standing Committee's view.

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[22] "Equivalent" is used to make it clear that if, for example, someone takes a leave of absence from practice before the first 24 months of actual practice has occurred, whenever he or she returns to the 100% fee paying category he or she will be expected to complete this requirement.

77. The Committees recommend that beginning in January 2011 new lawyers and paralegals be required to take 12 hours per year (for the equivalent of two full years of practice or providing legal services, respectively) of programming accredited by the Law Society, 3 hours of which per year will be in topics of ethics, professionalism, and practice management and will be integrated within the other 9 hours of accredited programming.

Certified Specialists

78. Lawyers can only become Certified Specialists if they apply and meet specified practice standards, experience and continuing legal education requirements. In order to maintain their certification, Certified Specialists must demonstrate, on an annual basis, that a substantial percentage of their practice is devoted to their specialty area and that they participate in at least 12 hours of CLE per year. The Committees do not recommend that Certified Specialist be required to meet additional CPD hours. The Certified Specialist CPD requirement should be merged into the CPD requirement and they should be required to obtain 12 hours of CPD in total annually, with 3 of those hours to be taken in topics related to ethics, professionalism and/or practice management.

Recommendation 19
That beginning in January 2011 new lawyers and paralegals be required to take 12 hours per year (for the equivalent of two full years of practice or providing legal services, respectively) of programming accredited by the Law Society, 3 hours of which per year will be in topics of ethics, professionalism, and practice management and will be integrated within the other 9 hours of accredited programming.

Recommendation 20
That Certified Specialists be required to obtain a total of 12 hours of CPD annually, with 3 of those hours to be taken in topics related to ethics, professionalism and/or practice management.

COST ISSUES

79. Some submissions raise cost concerns for the lawyers and paralegals subject to the requirement, particularly those in sole practices and small firms. In developing its array of eligible activities and in proposing that the Law Society assume primary responsibility for delivery of the ethics, professionalism and practice management content, without charging program registration or materials fees, the Committees have developed the final recommendations with cost issues in mind.

80. A few comments suggest that study groups are an impractical expectation on sole and small firm lawyers and paralegals already burdened with the administration of their practices. One or two comments suggest that while assisting with cost issues this approach runs the risk of creating two tiered learning where those who can afford it go to live programming and those who cannot teach themselves.

81. These observations may apply to some, but the Committees are hopeful that the discussion group opportunities may result in greater interaction as well as development of innovative ways to learn at low cost and despite distance. The Committees agree, however, that these are issues to monitor as part of the assessment of the requirement.

82. There is one cost related issue on which the Committees wish to comment further. A few submissions suggest that there should be an increase in the threshold income level at which lawyers and paralegals could be eligible to receive a subsidy on the cost of CPD programming. Currently, the Law Society provides a subsidy for those whose net income is $35,000 or less. Some other providers also have bursary programs.

83. The Law Society's bursary program was introduced in 1986 with a threshold income of $25,000. There is no information on how that figure was reached. In 1995 the amount was increased to $35,000. Again, there is no information on how this figure was reached.

84. In the Committees' view this is an issue that should be explored further, but it would not be appropriate to continue the arbitrary choice of the threshold amount. There should be actuarial information on the appropriate threshold and information on the budgetary implications of going forward. This should form part of the discussions for the 2011 budget, which would allow this issue to be addressed before the requirement take effect on January 1, 2011.

Recommendation 21 That the Law Society further investigate the issue of CPD registration subsidies for inclusion in discussions of the 2011 Law Society budget.

BUDGET IMPLICATIONS

85. Assuming that Convocation ultimately approves a system of CPD requirements that mirrors the recommendations in this report, it is anticipated that the PD&C Department would require, in the first full year of implementation (2011), six additional full-time equivalent (FTE) staff.

86. The total increase in expenditures for the PD&C department for 2011 for staffing requirements is estimated at $450,000. Activities will include,

    a. development and delivery of learning modules and programming to support lawyer and paralegal completion of the professional responsibility, ethics and practice management requirement of 3 hours per year offered to participants with no program fees or charges for materials;

    b. development and delivery of accredited learning for new lawyers and paralegals in their first two years of practice and provision of legal services, respectively;

    c. development and implementation of an accreditation system to review and manage program accreditation for professionalism content and programming for new lawyers and paralegals;

    d. provision of assistance to members working in the portal; and

    e. review of applications for, and provision of assistance to, lawyers and paralegals seeking accommodation or exemption.

87. The PD&C Department will provide the professional responsibility, ethics and practice management content and programming to lawyers and paralegals without charge for program registration or materials fees. The cost of developing and providing programming throughout each year, in a variety of formats that allow for interaction, is anticipated to be approximately $400,000.

88. Administrative Compliance and Membership divisions will require an increase in expenditures that will depend upon the level of interaction required with lawyers and paralegals during notification of failure to complete the requirement. Activities will include interaction with lawyers and paralegals respecting the portal and compliance processes. Assuming the process described in this Report, the estimated increase for 2011 is $300,000.

89. Additional costs related to office space, supports and systems and indirect expenses are expected to be in the range of $150,000.

90. The PD&C Department will also require additional staff in 2012 to support the CPD audit process that will begin at that time to monitor compliance with the requirements at an estimated cost of approximately $100,000.

91. Total anticipated expenditures to develop and maintain the new CPD systems set out in this report are therefore expected to be in the range of $1,400,000 or $38 per lawyer and $38 per paralegal.

92. An increase in attendance at the Law Society's CLE programs is expected. For instance, of the lawyers in practice who completed the MAR in 2008, 4,905 reported taking no CLE. However the exact impact of the CPD requirement on Law Society CLE attendance and revenues is difficult to predict primarily because,

    a. the Law Society will not be the sole provider of programs eligible for the CPD requirement; and

    b. the ethics, professionalism and practice management programming put on by the Law Society (comprising 3 hours of the CPD requirement) will be provided without charge for program registration or materials fees.

93. The current CPD requirement budget does not include any revenue projections. As noted above an accurate estimate is difficult. For budget purposes the anticipated increase in revenues will be offset by the anticipated increase in costs of holding the programs, such as course materials and bandwidth. Increases in these variable costs have not been included in the budget as they will be offset by increases in revenue.

94. Although it is feasible that Law Society programming for which there is a registration fee may continue to achieve full cost recovery and although the PD&C Department will continue to strive to achieve that goal, the expenses related to the development and delivery of the professionalism programming (no charge for attendance) is unlikely to be fully supportable within the current program fee/revenue generating structure. Therefore, on a go forward basis, the CPD/CLE system may no longer be a cost recovery program for the Society.

PROGRAM ASSESSMENT

95. A CPD requirement will be a new initiative and as such the year leading to the commencement of the requirement and the first several years of implementation will provide concrete examples of what is effective and what can be improved upon, the implications of the program on its participants and any issues that have arisen.

96. The Committees have identified a number of issues that may form part of the program assessment, including,

    a. sufficiency of programming generally;
    b. sufficiency of certain types of programming including, Francophone programming, programming for those with disabilities; specialized substantive programs and programming for paralegals;
    c. whether the requirement has a disproportionate impact on sole practitioners, small firm lawyers and paralegals, and lawyers and paralegals from Aboriginal, Francophone and equity seeking groups;
    d. the quality and viability of education in discussion groups;
    e. cost issues;
    f. communication issues; and
    g. information related to exemptions, compliance and monitoring.

97. To allow the program sufficient implementation time to make its assessment meaningful, the Committees recommend that the assessment occur after completion of two full years of implementation. To the extent that there are any issues that require addressing before that date, whether in the developmental year of 2010 or during the first two years of implementation, they should be reported to the Committees. The Committees and Convocation should, in any event, receive regular information reports during 2010, 2011 and 2012.

Recommendation 22
At regular intervals in 2010, the PD&C Committee and the PSC should receive reports on the implementation process. An annual information report should be provided to the Committees and Convocation in 2011 and 2012. An assessment report should be provided to the Committees and Convocation by the end of April 2013, addressing the first two years of operation, including but not limited to the issues set out in paragraph 96.

COMMUNICATION PLAN

98. The communication plan would take effect immediately upon approval of the requirement and continue throughout the transition period prior to implementation of CPD requirement and during the first and second year of implementation. Specifically, the Society will begin immediately to communicate with all members the policy and its implications. This lead up to the implementation date on January 1, 2011 will include information about the requirement, its goals and objectives and will also provide substantial supporting information in the form of Frequently Asked Questions and Answers (FAQs) that will address some of the themes and concerns that were expressed in the consultation process. The communications will continue into the first full year of implementation and beyond, and will include, but will not be restricted to, supporting information in,

a. articles and notices in the Ontario Lawyers Gazette;

b. notices in the *Ontario Reports* at least monthly;

c. reminders in the monthly e-Bulletin;

d. reminders in the monthly Paralegal Update;

e. information on the Society's web site outlining the program, the objectives, the requirements and the process of fulfillment; and

f. information to CPD providers on the nature of the requirement and rules.

99. This will be in addition to the automatic reminders that will be generated as part of the compliance portal, informing lawyers and paralegals regularly how many credit hours they have acquired and how many they still have to obtain.

100. Adjustments will be made to the communication plan as necessary on an ongoing basis. The assessment process will also consider communication issues that have arisen in the first two years.

101. Few submissions comment on the communication plan. EAIC suggests that the Law Society set out how it will implement the requirement in keeping with equity and diversity principles and suggests that the plan should include outreach to various groups through their community based media outlets. Some providers suggest that the Law Society engage the assistance of legal organizations to communicate the plan. The Committees agree that these suggestions are helpful to further facilitate effective communication of the requirement.

Recommendation 23 That the Law Society implement a communications plan in accordance with paragraphs 98-101 of this report.

CONCLUSION

102. In their consultation report the Committees state that they are of the view that the time has now come to include a CPD requirement as part of the Law Society's competence mandate. Following the consultation process they continue to be of this view. A CPD requirement is a positive tool that benefits lawyers and paralegals and is part of a commitment they should make to the public they serve. The recommendations set out in the motion at paragraph 2 and repeated throughout this report balance professional obligations in this area with a reasonable requirement that is accessible and affordable. Moreover, by requiring 3 hours of the total 12 hours annually to address topics in ethics, professionalism and practice management, the proposal addresses areas of particular concern to the Law Society as regulator.

103. The Committees thank those individuals and organizations and institutions that took the time to provide thoughtful and helpful submissions and to attend meetings and teleseminars at which the CPD issue was discussed.

Appendix 1

Joint Report to Convocation
October 29, 2009

Professional Development
& Competence Committee

PD&C Committee Members
Laurie Pawlitza (Chair)
Constance Backhouse (Vice-Chair)
Mary Louise Dickson (Vice-Chair)
Alan Silverstein (Vice-Chair)
Larry Banack
Jack Braithwaite
Thomas Conway
Marshall Crowe
Aslam Daud
Lawrence Eustace
Jennifer Halajian
Susan Hare
Paul Henderson
Laura Legge
Dow Marmur
Daniel Murphy
Judith Potter
Nicholas Pustina
Jack Rabinovitch
Heather Ross
Catherine Strosberg
Gerald Swaye

Paralegal Standing Committee

Paralegal standing Committee Members
Paul Dray (Chair)
Susan McGrath (Vice-Chair)
Marion Boyd
James R. Caskey
Seymour Epstein
Michelle L. Haigh
Glenn Hainey
Paul Henderson
Brian Lawrie
Douglas Lewis
Margaret Louter
Stephen Parker
Cathy Strosberg

Purpose of Report: Decision
(Approval for Consultation)

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

TABLE OF CONTENTS

- Definition of CPD
- To Whom the Requirement Should Apply
  - Applicability
  - Exemptions
- Scope of Activities that will fulfill the Requirement
- Annual Credit Hour Requirement
  - General Requirement
  - Ethics, Professionalism, Practice Management Component
- Provider/Program Approval
- Compliance and Monitoring
  - Compliance
  - Monitoring

COMMITTEE PROCESS

1. The Professional Development & Competence Committee ("PD&C Committee") and the Paralegal Standing Committee ("PSC") met together on September 25, 2009. PD&C Committee members Laurie Pawlitza (Chair), Constance Backhouse (Vice-Chair), Mary Louise Dickson (Vice-Chair), Alan Silverstein (Vice-Chair), Thomas Conway, Marshall Crowe, Lawrence Eustace, Paul Henderson, Dow Marmur, Dan Murphy, Judith Potter, Nicholas Pustina, Heather Ross, Cathy Strosberg and Gerald Swaye attended. PSC members, Paul Dray (Chair), Marion Boyd, James Caskey, Michelle Haigh, Paul Henderson, Brian Lawrie, Margaret Louter, Stephen Parker and Cathy Strosberg attended. Staff members Julia Bass, Diana Miles and Sophia Sperdakos also attended.

2. The PD&C Committee met on October 8, 2009. Committee members Laurie Pawlitza (Chair), Mary Louise Dickson (Vice-Chair), Alan Silverstein (Vice-Chair), Jack Braithwaite, Thomas Conway, Marshall Crowe, Lawrence Eustace, Jennifer Halajian, Dow Marmur, Judith Potter, Nicholas Pustina, Jack Rabinovitch, Cathy Strosberg and Gerald Swaye attended. Staff members Diana Miles and Sophia Sperdakos attended. Michael Lucas, Manager of Policy at the Law Society of British Columbia attended as a guest.

3. The PSC met on October 8, 2009. Committee members Paul Dray (Chair), Susan McGrath (Vice-Chair), Marion Boyd, James Caskey, Seymour Epstein, Michelle Haigh, Glenn Hainey, Brian Lawrie, Doug Lewis, Margaret Louter, Stephen Parker and Catherine Strosberg attended. The Chair of the Professional Development & Competence Committee, Laurie Pawlitza, joined the meeting for a discussion of the continuing professional development requirement. Staff members in attendance were Julia Bass, Katherine Corrick, Fred Grady, Terry Knott, Diana Miles, Elliot Spears, Sophia Sperdakos, Roy Thomas, Arwen Tillman, Sybila Valdivieso, and Sheena Weir. Michael Lucas, the Manager of Policy at the Law Society of British Columbia, attended as a guest.

DECISION

CONSULTATION ON CONTINUING PROFESSIONAL DEVELOPMENT ("CPD") REQUIREMENT

MOTION

4. That Convocation approve for consultation with lawyers and paralegals the joint report of the Professional Development & Competence Committee and the Paralegal Standing Committee ("the Report") regarding a continuing professional development requirement.

5. That Convocation approve a consultation period from October 30, 2009 to January 15, 2010.

6. That Convocation approve the following consultation plan:

    a. The Law Society will provide notices to lawyers and paralegals in the *Ontario Reports*, the monthly e-Bulletin, the monthly Paralegal Update and the Law Society website advising of the Report, providing a link to it, and seeking written input by January 15, 2010.

    b. The Law Society will undertake electronic communication with lawyers and paralegals in "Convocation Updates" and in 3 e-mail communications dedicated to the CPD issue and the Report, to be sent out to lawyers and paralegals on November 1, 2009, December 1, 2009 and January 4, 2010.

    c. The Report will be sent to legal organizations and associations seeking their written submissions by January 15, 2010. If organizations/associations request, Law Society representatives may meet with them to answer questions on the Report.

    d. The Law Society will conduct teleseminars on the Report during November and December, 2009 to elicit feedback directly from lawyers and paralegals, the dates and times to be included in the notices to lawyers and paralegals.

7. That following the completion of the consultation period the Committees will provide Convocation with a final Report on a proposed CPD requirement for consideration at February 2010 Convocation.

BACKGROUND

8. On May 28, 2009 the Treasurer advised Convocation that he had requested the PD&C Committee, through its Chair, to consider whether the Law Society should introduce a continuing professional development (CPD) requirement and, if so, how it would be developed. Subsequently the Treasurer and others, including the Chair of PSC agreed that it was appropriate to study the issue as it relates to lawyers and paralegals.

9. In outlining the reasons for his original request the Treasurer noted that on issues of lifelong learning and continuing professional development other law societies in Canada have now taken the lead, including the law societies of British Columbia, Saskatchewan, New Brunswick and the Barreau du Québec. The various law societies have published reports discussing continuing professional development and the details of the CPD requirement they have recommended or implemented.

10. For its June 2009 meeting the PD&C Committee read the reports of a number of other law societies discussing CPD. Cumulatively these reports and information address the significant policy issues relevant to consideration of a CPD requirement, regardless of the specific jurisdiction that might introduce it. Reports or bulletins from the law societies of British Columbia, New Brunswick, Saskatchewan and the Barreau du Québec are set out for information at Appendix 1.

11. The PD&C Committee Chair then appointed a working group to consider the issues relevant to a CPD requirement and report to the PD&C Committee. To reflect the expanded scope of the issue the PSC appointed a member to the join the working group. The working group members, Laurie Pawlitza (Chair), Mary Louise Dickson (Vice-Chair), Larry Banack, Tom Conway, Dow Marmur and Stephen Parker, met five times in July, August and September, 2009. It was agreed that the working group should consider the issues and report to both the PD&C Committee and PSC.

12. The PD&C Committee and PSC met in a joint meeting on September 25, 2009 to discuss the working group's analysis of the issues. The Committees considered the rationale for a CPD requirement and a possible model for implementing a requirement. The Committees jointly agreed on a proposal and finalized it in their respective committee meetings on October 8, 2009.

13. The two Committees provide this as a joint report to Convocation on a CPD requirement. Both agree that the issue applies equally to lawyers and paralegals. The recommendations reflect the views of both Committees.

14. The Committees provide this Report to Convocation for approval to consult with lawyers and paralegals. Following the consultation process the Committees propose to return to Convocation in February 2010 with a final report.

WHY INTRODUCE A CPD REQUIREMENT?

15. No one disputes the importance of continued learning, regardless of the profession. What has been debated is whether a regulator should require that its members meet and report on a minimum number of hours of professional development annually to retain their right to practise.

16. In many jurisdictions and across many professions the debate around a CPD requirement is long since over. Minnesota was one of the first jurisdictions to introduce a CPD requirement for lawyers in the United States in 1975. Since then 45 American states have added a requirement for lawyers to complete an annual minimum of between 12 and 15 hours of CLE to retain their right to practise. Most jurisdictions in Australia require lawyers to meet CPD requirements as do England, Wales, Scotland and Hong Kong, to name a few.

17. Until recently no law societies in Canada required their members to meet continuing professional development requirements. This is in contrast to many other professions throughout Canada that have included CPD requirements for years.[1]

18. The legal profession in Canada has debated CPD requirements repeatedly over a number of years. When the discussions first began law societies had a much different approach to their mandate, focusing more of their attention on reactive regulation through discipline, than on preventive regulation. In recent years law societies have begun developing systematic approaches (Quality Assurance and Quality Improvement measures) to assist members of the profession to maintain and enhance their competence. The Law Society has paid particular attention to providing supportive tools and introducing preventive requirements designed to assist practitioners, particularly those in sole and small firm practice, to maintain and enhance their competence.

19. Quality assurance (QA) is designed to determine whether a professional meets specified requirements or standards. Among its goals are increasing public confidence and professional credibility by improving work processes and efficiency. Quality assurance systems emphasize detecting deficiencies before they become entrenched as part of the product or service. Quality improvement (QI) measures involve continuous analysis and improvement of the components that make up professional practice or work. Together these quality initiatives interact to support a competent profession.

20. When the Law Society last debated a CPD requirement in 1996,

    a. the 1999 amendments to the *Law Society Act* introducing consequences for failure to meet standards of professional competence had not yet been introduced;

    b. the Law Society had not yet approved its competence mandate;

    c. there was no minimum expectation for CLE, to be reported annually in the Member's Annual Report (the "MAR");

    d. technological delivery methods for CLE were in their early development, making live attendance at CLE the primary source of delivery;

    e. there were significant issues around the availability of sufficient programs to meet the needs of a CPD requirement province-wide;

    f. there was less public scrutiny of the profession; and

    g. no other law societies in Canada had implemented such a program.

[1] e.g. College of Family Physicians of Canada: a minimum of 250 credits in each five-year cycle; Institute of Chartered Accountants of Ontario: a minimum of 20 hours per calendar year, with at least one-half of this time in verifiable learning and a minimum of 120 hours in a 3-year period; Royal College of Dental Surgeons of Ontario: 90 credit points every 3 years; Royal College of Physicians and Surgeons of Canada: a minimum of 40 credits in each years of a five-year cycle and 400 credits during the span of the cycle; Ontario Association of Architects: licensed architects must obtain 15 core hours and 55 self-directed hours over each 2-year cycle.

21. In 1999 the *Law Society Act* was substantially amended to focus for the first time directly on lawyer competence.[2] It provided that a lawyer (now a lawyer or paralegal) fails to meet standards of professional competence if there are deficiencies in,

    a. his or her knowledge, skill or judgment;
    b. his or her attention to the interest of clients;
    c. the records, systems or procedures of his or her professional business; or
    d. other aspects of his or her professional business;

    and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

22. This direct legislative articulation speaks to the importance of practitioners maintaining their competence and to the Law Society's responsibility to ensure competence.

23. In March 2001, Convocation approved the PD&C Committee's recommendations for implementing the Law Society's competence mandate. The recommendations reflected a conscious policy commitment to competence - to the responsibility the profession has to maintain and enhance it and the regulator has to monitor it. The PD&C Committee recommended that there be a minimum expectation of continuing legal education for all lawyers in Ontario. The expectation is expressed as a minimum of 12 hours of professional development annually in addition to 50 hours of self-study. Although the recommendation did not require that members take CPD it did require that they report how much they took. This requirement has been in place for lawyers since 2002.

24. CPD opportunities for paralegals are developing. As a transitional matter, paralegals have not yet been required to report in the Paralegal's Annual Report (the "PAR") the annual number of hours of CPD they take.

25. Certified Specialists are required to take a minimum of 12 hours of CLE annually, including a specified number of hours in the area of their specialty. In addition, as of 2011 newly-called lawyers will be required to take 24 hours of professional development in the first 24 months they are in a practice category. For a number of years, LawPRO has provided a premium reduction for those who take certain professional development activities designed to promote risk avoidance.

26. All of these initiatives and requirements demonstrate the regulatory view that CPD enhances competence, that there is a minimum amount of CPD that every lawyer and paralegal should take and that regulators have an interest in and duty to articulate the importance of CPD, requiring a minimum commitment. Moreover, they reflect a view that professional development is not a remedial measure aimed only at those who fall below certain competence standards, but a positive, preventive tool that benefits everyone.

27. Since the last time the Law Society considered a CPD requirement there has been a substantial increase in the accessibility and delivery of professional development programming, with significantly greater capacity for practitioners to receive their learning

[2] There was no paralegal regulation at the time.

in flexible ways and closer to home. Technological delivery methods have increased and the definition of professional development has expanded to allow inclusion and support of wide range of approaches. These improvements benefit both lawyers and paralegals.

28. Recently the law societies of British Columbia, Saskatchewan and New Brunswick and the Barreau du Québec have approved and/or introduced CPD requirements.[3] As law societies work to harmonize their processes to create national approaches wherever possible, it is important for the Law Society of Upper Canada to consider whether greater harmonization in this area is also in the public interest.

29. The Committees have considered the reasons traditionally given for not introducing a CPD requirement. These have typically included the following:

    a. There is no empirical evidence that a CPD requirement results in fewer complaints or claims.

    b. Given (a) the requirement could be viewed as "window-dressing," rather than having a positive effect on lawyer competence.

    c. Most lawyers are competent. The regulator should not introduce a requirement for all, to address the incompetence of the few.

    d. CPD is too expensive and too inaccessible and has a disproportionately negative effect on sole and small firm practitioners.

    e. Given the need to develop substantially more programs, quality will suffer.

    f. Lawyers and paralegals will resent the requirement. They are the best judge of their CPD needs. They should not be told what to do.

30. The Committees agree that there does not appear to be any empirical evidence of a *direct* link between a CPD requirement and reduced claims. They have considered whether this fact is fatal to introducing a requirement, but in the end they disagree that this resolves the issue. The impact of much of formal education on behaviours, abilities, and performance cannot truly be quantified and yet few dispute its importance. Moreover, by setting minimum expectations for CLE and requirements for CPD for Certified Specialists and newly-called lawyers, the Law Society has already accepted the value of CPD without empirical evidence that it "makes a difference." It is not reasonable to argue that CPD is worth *encouraging* even though there is no empirical evidence, but not worth *requiring* for the same reason.

31. The introduction of a CPD requirement could only properly be seen as "window-dressing" if one accepts that it has no role in the development and maintenance of competence. Few people have argued this and, once again, the Law Society's own policy decisions militate against acceptance of this view.

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[3] The Law Society of Alberta has chosen to require members to complete a CPD education plan annually, but has not mandated hours of CPD. The Law Society of Manitoba has a minimum expectation requirement similar to the Law Society's current approach. The Barristers' Society of Nova Scotia has a CPD requirement for lawyers in certain practice areas and a minimum expectation requirement more generally.

32. A CPD requirement is a preventive policy choice, not a reactive one. Its goal is to make a minimum amount of professional development a central component of what goes into making a competent lawyer. It is not a response to "bad apples," but rather a profession-wide commitment that should be part of a self-regulatory environment. A CPD requirement is about learning, not about testing. There is no evidence that other jurisdictions have used the requirement as a first step to competency testing and the Committees agree that this is not the purpose of such a requirement.

33. The Committees have paid particular attention to issues relating to quality and to accessibility and cost, particularly as they affect sole and small firm practitioners. These issues are fundamental to the implementation and fairness of any CPD requirement, but in the Committees' view they do not speak to the merits of the requirement *per se.* The type of model adopted has a significant effect on issues of accessibility and cost, as discussed below.

34. There have been many changes to the cost, availability and delivery of CPD since the Law Society last considered the issue in depth. In addition to this a number of other factors are relevant to the development of a reasonable requirement:

    a. The activities that qualify to satisfy the requirement should be flexible and reflect the importance of fairness to all those who must meet it.

    b. The increase in the number of people required to take CPD will inevitably result in greater availability and content.

    c. Ontario has many reputable not-for-profit providers who deliver excellent programming. There is no basis on which to suppose that they will cease to do so in a different environment. Moreover, a flexible approach to what are eligible activities will lessen the pressure on providers.

    d. If availability and accessibility were to become an issue during the transition period leading up to implementation, the Law Society would be in a position to adjust the program to reflect this.

35. The Law Society regulates in the public interest. While, many of its requirements affect lawyers and paralegals' practices through additional regulation or cost, or both, they are introduced to further the Law Society's mandate. The Law Society should not introduce additional requirements without a public interest reason, but once that interest is identified, it cannot decline to do so because the profession may not wish to have the requirement imposed.

36. The Committees are aware of at least some anecdotal evidence that lawyers overall are no longer opposed to the requirement, as they may have been 12 years ago. Lawyers are now used to reporting to the Law Society their annual participation in CPD. Their major concern is not "whether" the Law Society should introduce a CPD requirement, but rather the reasonableness of any requirement that is introduced. Moreover, a number of providers have established CPD committees to consider the logistics of meeting the demand for additional programming.

37. In the case of paralegals, the majority of those currently licensed were grandparented. This means many have had little or no formal education in their areas of practice and are interested in obtaining regular CPD to enhance their competence.

38. While there will always be those who resent the regulator imposing a CPD requirement the Committees believe that the concern will be minimized if the requirement is reasonable.

39. The Law Society has addressed many of its quality assurance gaps in the past five to seven years, increasing the amount of proactive competence assessment within the profession by adding to and enhancing its well-received Spot Audit and Practice Review programs. These programs apply to both lawyers and paralegals.

40. The one noticeable gap that remains in the Ontario quality improvement and quality assurance regulatory model is the post-call professional development requirement. It is difficult to assert that the regulator for lawyers in Ontario is meeting its full mandate when it exercises little oversight for competence maintenance and development in the post-call professional development landscape. Although the majority of lawyers in practice who completed the MAR in 2008 (27,924) reported taking some CLE, 18% or 4,905 reported taking **no** CLE. This is simply unacceptable for a profession that provides services to the public.[4]

41. For the reasons, set out here, the Committees have concluded that the time has come to introduce a CPD requirement for lawyers and paralegals in Ontario. They believe that such a requirement is a necessary component of self-regulation and will further demonstrate the Law Society's commitment to professional competence for lawyers and paralegals. Provided the model chosen is fair, transparent and reasonable the Committees believes that lawyers and paralegals will recognize and accept the requirement as part of their responsibility to the public and to their own maintenance and enhancement of competence.

Recommendation

42. That the Law Society introduce a CPD requirement for lawyers and paralegals.

THE MODEL

Definition of CPD

43. In considering how to define CPD for the purposes of the requirement the Committees concluded that the definition should,
    a. be flexible;
    b. be directed primarily at the development of a lawyer or paralegal's career;
    c. be directed at enhancing competence in substantive knowledge and skills;
    d. include reference to professional development in ethics; and
    e. be directed at both maintaining and enhancing professional competence.

[4] For information on the 2008 member responses on CLE in the MAR see **Appendix 2**. There is no formal information respecting paralegals.

44. The Committees are of the view that the following definition meets these considerations:

> Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career.[5]

Recommendation

45. That the definition of CPD for the purposes of the Law Society's requirement be,

> Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career.

TO WHOM THE REQUIREMENT SHOULD APPLY

Applicability

46. The Committees agree that any CPD requirement should apply to both lawyers and paralegals. Within their respective scopes of practice paralegals and lawyers must be competent and ethical. The reasons for which the Committees concluded that a CPD requirement is properly within the Law Society's mandate apply equally to both groups. Further, most current paralegal licensees entered through grandparenting provisions and have varied educational backgrounds. A CPD requirement can provide added benefit to these licensees.

47. The Committees have concluded that the CPD requirement should apply to only *practising* lawyers and paralegals. This is defined in the Law Society's environment as lawyers and paralegals who are in the 100% fee paying category. Lawyers and paralegals who are not in this fee category (i.e. 50% or 25%) will not be required to meet this requirement.[6] A change of status to the practising category will result in a requirement to fulfill the CPD hours. A change of status out of a practising category will result in the hiatus of that requirement.

48. So for example,

    a. if a lawyer or paralegal, normally in the 100% fee category, is on parental leave or unable to work due to illness, or not working for other reasons, the "clock" will stop running on the annual requirement;

    b. if a lawyer or paralegal, normally in the 100% fee category, takes a sabbatical from practice to do work that does not come within the 100% fee category, upon advising the Law Society of this, the "clock" will stop running and will not be started again until the practitioner returns to the 100% category; and

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[5] The definition draws on information and approaches from other professions and law societies.

[6] 100% fee applies to those who practise law or provide legal services; 50% fee applies to those who do not practise law or provide legal services, including those employed in education, in government or in a corporation in a position where he or she is not required to practise law or provide legal services; 25% fee applies to those who do not engage in any remunerative work or are in full-time attendance at a university, college or designated educational institution or are on pregnancy or parental leave and do not practise law or provide legal services.

c. if the lawyer or paralegal returns to the 100% fee category during the calendar year, the requirement will be prorated to reflect the proportion of the year in which the lawyer or paralegal is in the 100% fee paying category.

49. In the Committees' view it would not be a wise use of resources to require lawyers and paralegals in all fee categories to meet the requirement. The program is primarily intended for the maintenance and enhancement of the competence of those who practise and provide services to the public. By limiting the requirement to those who pay 100%, the Law Society will focus attention where it is most effectively placed and reduce the amount of programming that must be developed.

Exemptions

50. The main exempted category is lawyers and paralegals who are not in the 100% fee paying category. They will be exempt for the relevant period, with pro rata determinations for periods of less than a calendar year.

51. Beyond this, there should be criteria for eligibility for exemption from the CPD requirement. A formal application will be made in writing to the Law Society detailing extenuating circumstances. The exemptions will generally speak to personal circumstances or exigencies that interfere with the lawyer or paralegal's ability to fulfill the requirement. They will generally reflect circumstances that the Law Society already deals with on a regular basis in the PD&C and other departments when processing accommodations and special needs requests. Typically, these will relate to health and other personal difficulties or impecuniosity. Being too busy to meet the requirements should not, in the normal course, be considered an acceptable reason for an exemption request. Exemption requests will be considered on an individual basis.

Recommendations

52. That all lawyers and paralegals in the 100% fee paying category be required to meet an annual CPD requirement, subject to exemptions to accommodate special needs and circumstances.

SCOPE OF ACTIVITIES TO FULFIL THE REQUIREMENT

53. In considering an appropriate model the Committees paid particular attention to cost issues. Professional development is a fundamental component of professional competence, but it has time and cost implications that cannot be ignored. These factors cannot, however, be used as an excuse for not implementing an appropriate competence program.

54. The model being proposed pays attention to the fact that many of those lawyers and paralegals who will be required to comply with the requirement are sole or small firm practitioners who may not be situated in locations close to "live" programming and whose professional development budget is limited.

55. At the same time the Committees believe that the very fact that so many lawyers and paralegals practise alone or in very small firms makes it that much more essential that they dedicate a certain number of hours a year to CPD, particularly in settings that allow them to interact with others.

56. The Law Society has detailed information about the potential isolation of sole and small practice on lawyers, stemming from its Sole and Small Firm Task Force. In its 2005 report the Task Force noted:

> …the research illustrates the extent to which survey respondents who identified themselves as "sole practitioners who practise alone without other lawyers in the same office space" report that isolation affects their sense of satisfaction and practice viability. Isolation from other lawyers is a significant complaint of sole practitioners alone.[7]

57. Given this, the Law Society should be concerned that of 7400 sole practice law firms in the province approximately 27% or 2000 reported in 2008 that they took **no** CLE.

58. Although the Law Society does not yet have information on the CPD habits of paralegals, the fact that approximately 98% of them are in sole or small firm practice makes it likely that they too will face similar issues to those expressed in the Sole and Small Firm Task Force Report.

59. The key to a fair and meaningful CPD requirement is to permit a wide range of eligible activities. This reflects a number of factors including,

    a. lawyers and paralegals learn in variety of ways and maintain and enhance their competence according to their specific context. Traditional live attendance at a CLE program is only one way to do this. Provided the activity complies with the definition of CPD effort should be made to allow it;

    b. the more options lawyers and paralegals have the more likely they are to be able to approach the requirement as an integral part of their practices, reflecting learning they may already be undertaking; and

    c. from a practical perspective it is only fair to permit latitude in compliance, to reflect accessibility and cost implications of the requirement. Provided the activity complies with the definition of CPD, attention to practical considerations is appropriate.

60. At the same time there are activities that, though valuable, do not come within the CPD definition and should not be eligible activities for the purpose of fulfilling the CPD requirement.

61. The following should be *eligible* activities for the CPD requirement:

    a. Attendance in person, online or by telephone, at continuing education programs and courses, either original or archived:

        i. To qualify, there must be an opportunity to interact with colleagues and instructors – this may include the ability to ask questions directly or indirectly. For instance, the ability to email a question to the content provider during the online presentation.

[7] Final Report of the Sole Practitioner and Small Firm Task Force, March 24, 2005. p. 40.

ii. To fulfill the interaction requirement, two or more participants must be involved at the same time.

iii. Includes but is not restricted to,
- legal organization/association programs;
- in-house programming provided in,
  - government;
  - corporate or other non-private legal employment environments; and
  - private law firms;

- Law Society CLE programs;
- participation in a study group of two or more participants; and
- mentoring – both the mentor and the recipient of the mentoring are entitled to claim the hours spent on matters related specifically to substantive law, practice management or professionalism and ethics, and skills development to a maximum of 6 hours of the requirement.

b. Completion of an online or self-study course (distance learning)

i. For an on-line or self-study course to be eligible, a formal assessment must be conducted at the conclusion of the course.

ii. Formal assessment results must be made available to the Law Society, if requested.

c. Teaching law-related* content (to a maximum of 6 hours of the annual requirement)

i. One hour of teaching will equal three hours of reporting credit to take into account preparation time.
ii. The audience can consist of a variety of attendees, not exclusively lawyers or paralegals.
iii. Chairing a program or course is an eligible activity (maximum allowable credit equals the total hours spent in Chair capacity only)

d. Writing law-related* books or articles (to a maximum of 6 hours of the annual requirement)

i. Must be intended for other than personal use (e.g. for publication, paper for CPD program)

*Law-related means in furtherance of the definition of CPD and would not generally include presentations to clients.

62. The following should be *ineligible* activities for the CPD requirement:
a. Wellness programs: stress management, etc.

b. Any activity undertaken or developed primarily for purposes of updating or marketing to existing or potential clients.

c. Acting as an adjudicator for a tribunal or board.

d. Working as a member of a review or other panel.

e. Pro-bono work.

f. Marking work for law school or college courses.

g. Acting as the chair or member of a tribunal or other institution or board.

h. Attendance at Law Society meetings of Convocation or committees.

i. Attendance at meetings of a legal association's board or committees.

j. Attendance at the business portion of Annual General Meetings

k. Attendance at the launch of any form of legal materials.

63. The Committees are satisfied that by permitting a very broad array of activities to qualify for the required hours, the Law Society can accomplish the goals of a CPD requirement, while respecting and balancing the practical issues that lawyers and paralegals face, particularly those in sole and small firm practice. So, for example, with a little forethought a lawyer or paralegal could satisfy the entire requirement, or most of it, without spending a significant amount, or indeed any, additional money.

64. Most lawyers and paralegals could reasonably afford at least some additional expense to participate in CPD programming led by experts in the field. This kind of learning should be encouraged whenever possible or accessible. The eligible activities recommended here do, however, allow for a variety of approaches.[8]

Recommendation

65. That the activities described in paragraph 61 of this Report be considered "eligible" activities for the CPD requirement. That the activities described in paragraph 62 of this Report be considered "ineligible" activities for the CPD requirement.

ANNUAL CREDIT HOUR REQUIREMENT

(a) General Requirement

66. The determination of how many hours should be specified in a CPD requirement varies somewhat from jurisdiction to jurisdiction, but in most cases ranges from between 10 and 20 hours annually, with the most common choice being 12 hours.[9] There does not

[8] For examples of ways to satisfy the requirement at a reasonable cost see the next section under "annual credit requirement."

[9] British Columbia – 12 hours per year; Saskatchewan – 36 hours over 3 years; New Brunswick – 12 hours per year; Barreau du Québec – 30 hours over two years.

appear to be literature that points to any pedagogical rationale for one choice or another, rather the choice probably reflects a somewhat pragmatic decision to articulate the requirement as a minimum, which in traditional CLE delivery terms represents the equivalent of two full days of learning. The number of hours also seeks to balance time and cost pressures, particularly on sole and small firm practitioners.

67. The Committees considered a number of possible credit hour requirements. They recommend that the requirement be for **12 hours** annually of CPD in eligible activities for the following reasons:

    a. This number of hours dovetails with the most common approach of many other jurisdictions, including other Canadian law societies and American and Australian jurisdictions. Other than Quebec, each of the British Columbia, Saskatchewan, and New Brunswick requirements is for the equivalent of 12 hours per year. Given the inability to justify one requirement over another (no empirical evidence) there is some comfort in consistency across jurisdictions. This choice also addresses concerns that the Competition Bureau of Canada has raised when law societies have different requirements with no justification.

    b. The Law Society has already approved 12 hours as an appropriate amount in its minimum expectations for CLE reporting requirement, its Certified Specialist requirement and indirectly its 24/24 requirement for newly called lawyers (24 credits over 2 years – amounts to 12 hours a year).

    c. Given familiarity among lawyers of a 12 hour requirement, there will be less adjustment if Convocation approves a 12 hour requirement across the lawyer membership. For paralegals, of course, the 12 hour requirement will be new.

68. Both paralegals and lawyers should have to meet the same hourly requirement. As stated above, within their respective scopes of practice they have the same duties to be competent and ethical.

69. Certified Specialists are currently required to take 12 hours of continuing professional development annually, with 6 of the 12 hours to be taken in the substantive area in which the specialist is certified. The Committees recommend that this continue under the CPD requirement. Thus Certified Specialists will come under the general CPD requirement, but they will continue to meet a targeted substantive law learning requirement for 6 of their 12 hours.

70. As with the current “minimum expectation” 12 hours is the required amount. Lawyers and paralegals are free and indeed encouraged to undertake more hours if they choose.

(b) Ethics, Professionalism, Practice Management Component

71. In most jurisdictions that require CPD there is a specific requirement that a portion of the hours be devoted to a basket of topics that include ethics, professionalism and/or practice management. This approach reflects a common understanding of the importance of these issues. Traditionally, CLE programming has not included these topics in substantive law courses and CLE attendees have not tended to sign up for programs focusing only on these issues.

72. Yet, there is evidence to suggest that lawyers and paralegals require additional exposure to learning in both ethics and professionalism and in practice management. For example, complaints and LawPRO statistics both regularly reveal that the primary areas of concern relate more to client and practice management than they do to weakness in knowledge of substantive law. Further, ethical issues are becoming increasingly complex and require continuous consideration both generally and in relation to the specific practice context within which lawyers and paralegals work.

73. The Law Society has highlighted the importance of ethics, professionalism and practice management training and learning on previous occasions, reflecting its commitment to increasing education and support in this area through policy decisions. These include the introduction and development of the Spot Audit and Practice Review programs, the integration of a professional responsibility component within the articling term, the 24/24 professional development requirement for newly-called lawyers and the development of voluntary learning supports provided through the Law Society's Professional Development and Competence ("PD&C") department.

74. To ensure that all paralegals and lawyers have some annual exposure in these areas the Committees recommend that a minimum of 25% of the 12 hour requirement be taken in the basket of topics that includes ethics, professionalism and/or practice management. Given the difficulty in attracting the profession to programs devoted solely to professionalism, ethics and practice management, this basket of topics should be integrated into programming, wherever possible. The ultimate responsibility for obtaining the 25% must lie with the individual lawyer or paralegal. Since the 25% is a minimum requirement a lawyer or paralegal would be entitled to take the entire 12 hour annual requirement in one or all of these topics.

Examples of Ways to Satisfy the Annual Requirement

75. A few examples of ways to satisfy the annual requirement at a reasonable cost illustrate the ability for lawyers and paralegal to develop plans that best suit their needs and address affordability and accessibility issues:

    a. Two (or more) lawyers or paralegals establish a bi-monthly two hour CPD session to discuss recent case law developments in their practice area. They take turns "developing" the program, one taking responsibility to determine the case (s) or the other issues to discuss. They consider ethics, professionalism and/or practice management issues for 25% of each of those sessions. They could, for example, use the materials the Professional Development and Competence department includes regularly in the *Ontario Reports* on practice management or ethics or articles the OBA includes in its *Briefly Speaking*. They keep a record of the issues discussed. (6 CPD sessions x 2 = 12 hours with 25% requirement met).

    b. A lawyer in a firm with an in-house CPD program meets the 12 hour requirement by attending 12 one hour lunchtime sessions, to address issues coming within the CPD definition. Provided the sessions embed professionalism, ethics or practice management in 25% of the content, the CPD requirement is likely met at no cost.

c. Three sole practitioner or small firms in one community combine to develop a CPD curriculum. They each "host" two two-hour events per year held, for example, at the end of the work day or on a Saturday morning. (This could happen across communities, using SKYPE (a free internet-enabled phone service to connect them). They embed the required 25% in their discussions.

d. A senior practitioner teaches in 2 CPD programs for one hour each for a total of 6 credit hours (maximum allowable for this category) (one hour of teaching is three hours of credit to take into account preparation time); for the balance of the required 12 hours the practitioner attends one all day CPD program. These two components would need to meet the 25% requirement.

e. A junior practitioner seeks out a senior practitioner in the community and asks if she or she will act as a mentor to discuss issues related to substantive law and ethics, professionalism and/or practice management. They meet bi-monthly for at least 30 minutes. Each can claim the mentoring time that comes within the definition to a maximum of 6 hours. Both then each attend one live all day program or, if travelling to live CLE is difficult, participate in a few shorter telephone programs.

f. A senior lawyer satisfies 6 hours of "mentoring" in his or her role as an articling principal.

g. A practitioner who is also is a part-time small claims court judge, adjudicator, tribunal or board member or appears before administrative tribunals or boards attends annual professional development sessions related to this work. Provided these sessions come within the definition of CPD recommended in this Report the hours would count toward the annual requirement.

76. To assist sole and small firm practitioners who wish to meet in small groups, as described above, the Law Society could develop modules in a variety of topics that practitioners could use as the basis for their discussion, including components that address ethics, professionalism and/or practice management.

Recommendations

77. That the annual credit hours for the CPD requirement be 12 hours for each lawyer and paralegal to whom the requirement applies.

78. That a minimum of 25% of the annual 12 hour CPD requirement for lawyers and paralegals be taken in ethics, professionalism and/or practice management.

PROGRAM/PROVIDER APPROVAL

79. The eligible activities described above fit within two broad categories. The first is programming developed and delivered by CPD/CLE providers, such as the Ontario Bar Association, the Criminal Lawyers Association, the Law Society, the Paralegal Society of Ontario and many other groups and in-house providers. The other types of eligible activities reflect more personalized approaches to learning and a wide variety of ways to meet the requirement.

80. Lawyers and paralegals will be entitled to meet their CPD hours through either of these two groups of activities, provided that the activity is eligible for inclusion.

81. The Committees recommend that in the case of providers of CPD, a pre-approval system be implemented that will determine whether their programming meets the CPD requirements. Typically, there are two methods used for determining whether an activity meets the CPD requirement of eligibility: approving individual programs or approving providers of programs. Under the second approach, approval for individual activities is also used as a supplement to the main approach.

82. In determining which approach makes the most sense for the Ontario environment the Committees considered the current provider landscape for paralegal and lawyer programming, the importance of keeping the process simple and cost efficient and the need to ensure quality control.

83. Ontario has a highly developed, sophisticated CPD environment with a number of professional development providers who have been delivering high quality programming for lawyers for many years. In the not-for-profit environment, in particular, there is a similar approach to professional development programming that is geared to quality and which increasingly has begun to integrate or embed more and more ethics, professionalism and practice management content.

84. Generally, provider approval makes more sense in this environment and can be fashioned to ensure that the approved providers conform to the goals and requirements of the CPD system. The advantage of this approach is that it provides a level of certainty as to CPD expectations that will make it easier for the providers to operate and for lawyers and paralegals to know without further inquiry that the activities of these providers qualify for the requirement. This approach reduces the resources necessary for the approval process. To follow an individual program approval process in all cases would result in a much more expensive administrative process that is not generally necessary in Ontario.

85. At the same time, however, individual program approval should also be permitted, to be used in the following circumstances:

    a. Where a provider does not qualify for provider approval, it should still be entitled to submit individual programs for approval. This might be the case for a new provider (particularly in the area of paralegal programming since this is still a developing area) that is still establishing itself and whose content quality and consistency is evolving. It might also be the case for a provider whose programs typically are more about networking than they are about the content contemplated in the CPD definition, but might have a number of programs that could qualify as eligible activities.

    b. A lawyer or paralegal wants to attend a program outside Ontario and wants to know if the hours will count toward the required 12. In this case the individual program description could be examined to make a determination of eligibility.

86. The Law Society will reserve the right to audit approved providers or programs to ensure that they continue to meet the objectives of the CPD requirements.

87. If the Committees' recommendation that the CPD requirement include a provision that a minimum of 25% of the 12 hours be in ethics, professionalism and/or practice management is accepted, in a "provider approval" approach this would mean that providers would be required to integrate or "embed" 25% of this content in every program. Many providers are already including this kind of content and with the necessary understanding of what is expected of them providers will be able to integrate this learning without difficulty. Moreover, those who do not wish to do this for all their programs will still be able to seek program by program approval.

88. This embedding requirement will assist lawyers and paralegals to know that any program they take from an approved provider will include an ethics, professionalism and/or practice management component that will count toward their required 25%. This is an easy and sure way for lawyers and paralegals to accumulate their credits.

89. This approval system would only apply to programming developed and delivered by CPD/CLE providers. As has been described under eligible activities, lawyers and paralegals will not be required to obtain their CPD hours through these providers. To the extent that they do, however, they will be assured that their program is both eligible and addresses the 25% requirement. To the extent they meet their requirements through other eligible activities they will need to pay closer attention to whether they have accumulated the required 25%. This will be discussed further under compliance.

90. Introduction of a CPD requirement will necessitate an increase in program offerings. This may be particularly true in the case of the paralegal community, given that the number of providers is still developing. There will be an incentive for providers to increase their programming to meet these increased needs. At the same time, however, the recommendations keep the increase reasonable by,

    a. limiting the requirement to those lawyers and paralegals in the 100% fee category;

    b. permitting a wide range of activities to qualify that go beyond traditional programming and providers; and

    c. requiring 12 hours instead of a higher number.

91. A reasonable transition period before implementation will be necessary to allow providers time to adapt their processes for the new system. This will be particularly true in the case of paralegals who are still developing programming, but the Committees note, for example, that the Licensed Paralegals Association and the Paralegal Society of Ontario already include a CLE component in their annual meetings.

Recommendation

92. That as part of the CPD system,
    a. CPD providers may apply for "provider approval" for all their programs based on meeting certain criteria, including the integration in all their programs of a

minimum of 25% of the content in ethics, professionalism and/or practice management; and

b. The Law Society will adopt criteria for individual program approval where the provider does not qualify for, or does not seek, provider approval status.

COMPLIANCE AND MONITORING

(a) Compliance

93. To ensure compliance with the CPD requirement lawyers and paralegals subject to it would be required to report annually to the Law Society that they have fulfilled the requirement. In the normal course, if at the completion of the reporting period a lawyer or paralegal has not completed the required 12 hours, a minimum of 25% of which is in professionalism, ethics, and/or practice management, he or she would be subject to administrative suspension.

94. This suspension provision is an essential component, recognizing that compliance with this competence initiative is not a recommendation, but rather a requirement for continued entitlement to practise. Legislative authority to introduce such a requirement and to suspend for failure to meet it is established in the *Law Society Act*. Section 49 (1) provides that,

> a person appointed for the purpose by Convocation may make an order suspending a licensee's licence if the licensee has failed to comply with the requirements of the by-laws with respect to continuing legal education.

Section 62(0.1) of the *Act* specifies that Convocation may make by-laws,

> 24. …prescribing continuing legal education requirements that must be met by licensees, subject to such exemptions as may be provided for by the by-laws;

95. As with the other *Law Society Act* provisions that provide for administrative suspension (failure to meet specified requirements such as payment of fees or levies, failure to file or failure to comply with indemnity requirements) the key is to ensure that the requirements are implemented in such a way that suspensions are limited and can be easily rectified.

96. The Law Society is currently developing a "portal" that lawyers and paralegals will be able to access securely through the Law Society website to address many of the interactions they have with the Law Society (e.g. completing the MAR and PAR; advising of status changes). The system will assign a secure password to each lawyer and paralegal and establish rules governing access.

97. Provision has already been made for the 24/24 CPD requirement for newly-called lawyers to be tracked through the portal and this will also be an effective approach for any CPD requirement for lawyers and paralegals in the 100% fee paying category.

98. Although it appears that approximately 95 % of lawyers and paralegals already have electronic access that will enable them to use the portal, for those who do not the Law Society will accommodate a reporting system (as it currently does) in which such paralegals and lawyers may call and speak to a Law Society operator who will assist.

99. Under the portal system each lawyer or paralegal will input their CPD hours onto the system. The page will be pre-populated with a list of approved providers, as well as a list of other eligible activities for the member to check off, indicating the number of hours. The system will automatically tally the hours, so it will be most effective for lawyers and paralegals if they update the portal each time they undertake an eligible activity.

100. The system will automatically communicate with the member at regular intervals throughout the year advising of the number of hours taken/remaining and providing constant reminders of consequences of failure to comply. The exemption system will interact with the portal so that someone who has been excused from compliance will not find themselves suspended. The "clock" will cease to run during the period of exemption. Reminders will be provided with sufficient time to meet the requirement (at least 60 days).

101. At the completion of each calendar year, the summary suspension bencher will be provided with the names and information concerning lawyers and paralegals who have failed to comply with the requirement and who are subject to be administratively suspended from practice. At this point, they will have received at least 4, if not more, notices of achievement and remaining requirements, including multiple warnings of the consequences of failing to complete the requirement.

102. Once administratively suspended the lawyer or paralegal will remain suspended until he or she has fulfilled the previous year's requirement. The lawyer or paralegal will still be required to obtain an additional 12 CPD credits for the following year, regardless of number of hours spent fulfilling the previous year's requirement in order to remove the suspension. CPD activities may only be counted once as against the calendar year in which they should have been completed.

(b) Monitoring

103. The CPD requirement is based, in large part, on the honour system. There are many eligible activities which do not require lawyers and paralegals to seek pre-approval. Rather lawyers and paralegals determine for themselves what is an eligible activity and then undertake it.

104. The Committees have emphasized their belief that through the inclusion of a wide range of activities in addition to approved provider programming, lawyers and paralegals will be in a better position to meet the CPD requirements at little or no cost and close to home. At the same time, however, what this means is that in choosing activities other than those that have been pre-approved, lawyers and paralegals are responsible for ensuring that the chosen activities are eligible, that they have met their 25% requirement of ethics, professionalism and/or practice management and that they accurately report.

105. The Committees recommend that each year, the Law Society verify compliance with the CPD requirement by random selection of lawyers and paralegals for a CPD audit, to be conducted the year following the completion of the full 12 hours. The Committees have considered ways in which to conduct the CPD audit.

106. The Spot Audit program does not have the authority to audit beyond financial books and records matters at this time. In addition, spot audits are conducted on law firms, not individual lawyers, and occur only once every 5 years. Even if this program could be used, once audited, the lawyer or paralegal would know that the firm may not receive a visit for another 5 years, assuming there are no issues in the interim. This would be a significant gap in the CPD audit process.

107. The Practice Management Review program and the Paralegal Practice Audit program are appropriate programs within which to conduct an assessment of CPD hours. Practice Management program reviewers and Paralegal Practice auditors could include an assessment of a lawyer or paralegal's previous year of CPD information in the normal course of a practice review. It is important to note, however, that the program for lawyers only reviews practitioners in their first 8 years of practice – leaving out a significant portion of the practising lawyer population.

108. In order to ensure that a truly random CPD audit is conducted and that all practising lawyers and paralegals may be the subject of such an audit, the Committees recommend that the PD&C Department's CPD division also randomly select members for audit, in addition to any audits that are "piggy-backed" onto the programs discussed above.

109. Any audit of CPD will be conducted the year following the completion of the full 12 hours. There will be no "interim" audits conducted as lawyers and paralegals are free to obtain all 12 hours in the final days of the year if they so choose. The CPD audit will not entail a visit. There will simply be a request for proof of completion, including submission of copies (electronically or hard copy) of invoices and other supporting information. So, for example, lawyers and paralegals who,

    a. obtain their CPD hours through a discussion group should be able to provide documentation of the topics discussed and the extent to which ethics, professionalism and/or practice management were included;

    b. act as the chair of a program should be able to provide a copy of the program brochure; or

    c. take an online or self-study course should be able to provide their formal assessment results.

110. The Committees recommend that the Law Society randomly conduct CPD audits on approximately 500 practising lawyers and 25 paralegals, per year. If the audit is also conducted as a part of the Practice Management Review and Practice Audits processes, that would result in an additional 400 lawyers and 75 paralegals receiving a CPD compliance check, for a total of approximately 900 lawyers and 100 paralegals receiving a CPD compliance check every year (approximately 3% of practising lawyers and paralegals as at the end of 2009).

111. As set out elsewhere in this Report, the Committees also recommend that the Law Society reserve the right to audit approved CPD providers to ensure that they continue to comply with the objectives of the requirement on which their provider approval is based.

Recommendations

112. That to ensure compliance with the CPD requirement each lawyer and paralegal subject to it be required to report annually to the Law Society that he or she has fulfilled the requirement. In the normal course, if at the completion of the reporting period a lawyer or paralegal has not completed the required 12 hours, a minimum of 25% of which is in professionalism, ethics, and/or practice management he or she will be subject to administrative suspension.

113. That each year, the Law Society verify compliance with the CPD requirement by random selection of lawyers and paralegals for an audit, to be conducted the year following the completion of the full 12 hours through,

    a. the Practice Management Review program and the Paralegal Practice Audit program; and
    b. random "paper" CPD audits.

114. That the Law Society reserve the right to audit approved providers to ensure that they continue to comply with the objectives of the requirement on which their provider approval is based.

COMMUNICATION PLAN

115. If following the consultation process Convocation approves a CPD requirement the Law Society should immediately implement a communication plan that will continue all through the transition period prior to the CPD requirement commencing and during the first year of implementation.

116. The communications plan will include,

    a. articles and notices in the Ontario Lawyers Gazette;

    b. notices in the *Ontario Reports* at least monthly;

    c. reminders in the monthly e-Bulletin;

    d. reminders in the monthly Paralegal Update;

    e. information on the Society's web site outlining the program, the objectives, the requirements and the process of fulfillment; and

    f. information packages for providers seeking approval, including approval policies, protocols and forms (to be available in June 2010 so that the approval process for providers and individual programs may commence).

117. This is in addition to the automatic reminders that will be generated as part of the compliance portal, informing lawyers and paralegals regularly how many credit hours they have acquired and how many they still have to obtain.

Recommendation

118. That upon approval of a CPD requirement the Law Society implement a communication plan as set out in paragraph 116.

BUDGET IMPLICATIONS

119. Assuming that Convocation ultimately approves a system of CPD requirements that mirrors the recommendations in this report, it is anticipated that the PD&C Department would require, in the first full year of implementation, four additional full-time equivalent (FTE) staff to support exemption and special accommodations processing, random auditing, program development, approval activities for providers and individual sessions, and general administration of the portal system and program registrations.

120. The total increase in expenditures for the PD&C department for 2011 is estimated at $300,000 or approximately $9 per lawyer and $9 per paralegal. Activities will include,

    a. development of learning modules and prototypes to assist and support lawyers and paralegals to facilitate their own professional development activities in small groups;

    b. formal program development;

    c. assistance provided to members working in the portal;

    d. accommodation and exemption requests; and

    e. the development of implementation of the compliance (audit) process.
    It is anticipated that most, if not all, of this additional expenditure may be recovered in registration fees for programs and learning activities, as is the case with the current CLE program.

121. Administrative Compliance and Membership divisions will require an increase in expenditures that will depend upon the level of interaction required with lawyers and paralegals during notification of failure to complete the requirement. Activities will include interaction with lawyers and paralegals respecting the portal and compliance processes. Assuming the process described in this Report, the estimated increase is $250,000 for 2011, or approximately $7 per lawyer and $7 per paralegal.

CONCLUSION

122. The Committees are of the view that the time has now come to include a CPD requirement as part of the Law Society's competence mandate, for the reasons discussed in this report. They are convinced that this is a preventive tool that benefits lawyers and paralegals and is part of a commitment they should make to the public they serve. The recommendations set out throughout this Report (and repeated together in the following section) balance professional obligations in this area with a reasonable requirement that is accessible and affordable. Moreover, by requiring the inclusion of professionalism, ethics and practice management in the learning, the proposal addresses areas of particular concern to the Law Society as regulator.

123. The Committees agree that the Law Society should consult on this Report to obtain lawyer and paralegal input. There should be a series of print and electronic communications seeking input by January 15, 2010, with notices to lawyers and paralegals provided at regular intervals throughout the consultation period.

124. In addition, there should be an interactive discussion on the Report with lawyers and paralegals through the use of teleseminars. In November and December, teleseminars will be scheduled as a means to obtain direct feedback from lawyers and paralegals, to hear their comments about delivery of content and completion of the requirement. The Committees recommend that two teleseminars be scheduled for lawyers and one teleseminar for paralegals during this time.

125. This consultation approach reflects the importance of engaging both lawyer and paralegal organizations and individual lawyers and paralegals in the process to obtain feedback in a cost effective manner. The consultation proposal is contained in the Motion to Convocation as follows:

a. That Convocation approve for consultation with lawyers and paralegals the joint report of the Professional Development & Competence Committee and the Paralegal Standing Committee ("the Report") regarding a continuing professional development requirement.

b. That Convocation a consultation period from October 30, 2009 to January 15, 2010.

c. That Convocation approve the following consultation plan:

i. The Law Society will provide notices to lawyers and paralegals in the *Ontario Reports,* the monthly e-Bulletin, the monthly Paralegal Update and the Law Society website advising of the Report, providing a link to it, and seeking written input by January 15, 2010.

ii. The Law Society will undertake electronic communication with lawyers and paralegals in "Convocation Updates" and in 3 e-mail communications dedicated to the CPD issue and the Report, to be sent out to lawyers and paralegals on November 1, 2009, December 1, 2009 and January 4, 2010.

iii. The Report will be sent to legal organizations and associations seeking their written submissions by January 15, 2010. If organizations/associations request, Law Society representatives may meet with them to answer questions on the Report.

iv. The Law Society will conduct teleseminars on the Report during November and December, 2009 to elicit feedback directly from lawyers and paralegals, the dates and times to be included in the notices to lawyers and paralegals.

126. The Committees look forward to receiving input on their recommendations. They propose to return to Convocation in February 2010 with their final Report.

COMMITTEES' CPD RECOMMENDATIONS

(a) That the Law Society introduce a CPD requirement for lawyers and paralegals.

(b) That the definition of CPD for the purposes of the Law Society's requirement be,

> Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career.

(c) That all lawyers and paralegals in the 100% fee paying category be required to meet an annual CPD requirement, subject to exemptions to accommodate special needs and circumstances.

(d) That the activities described in paragraph 61 of this Report be considered "eligible" activities for the CPD requirement. That the activities described in paragraph 62 be considered "ineligible" activities for the CPD requirement.

(e) That the annual credit hours for the CPD requirement be 12 hours for each lawyer and paralegal to whom the requirement applies.

(f) That a minimum of 25% of the annual 12 hour CPD requirement for lawyers and paralegals be taken in ethics, professionalism and/or practice management.

(g) That as part of the CPD system,

a. CPD providers may apply for "provider approval" for all their programs based on meeting certain criteria, including the integration in all their programs of a minimum of 25% of the content in ethics, professionalism and/or practice management; and

b. the Law Society will adopt criteria for individual program approval where the provider does not qualify for, or does not seek, provider approval status.

(h) That to ensure compliance with the CPD requirement each lawyer and paralegal subject to it be required to report annually to the Law Society that he or she has fulfilled the requirement. In the normal course, if at the completion of the reporting period a lawyer or paralegal has not completed the required 12 hours, a minimum of 25% of which is in professionalism, ethics, and/or practice management he or she will be subject to administrative suspension.

(i) That each year, the Law Society verify compliance with the CPD requirement by random selection of lawyers and paralegals for an audit, to be conducted the year following the completion of the full 12 hours through,

a. the Practice Management Review program and the Paralegal Practice Audit program; and
b. random "paper" CPD audits.

(j) That the Law Society reserve the right to audit approved providers to ensure that they continue to comply with the objectives of the requirement on which their provider approval is based.

(k) That upon approval of a CPD requirement the Law Society implement a communication as set out in paragraph 116.

The Law Society
Of British Columbia

Preliminary Report of the Lawyer Education Task Force On
Mandatory Continuing Professional Development

For: The Benchers

Date: November 15, 2006

Prepared on behalf of: Lawyer Education Task Force
Policy and Legal Services Department
Michael Lucas 604-443-5777

Preliminary Report of the Lawyer Education Task Force On Mandatory Continuing Professional Development

Executive Summary

The Lawyer Education Task Force (the "Task Force") has concluded that the time has come for the introduction of mandatory continual professional development in British Columbia that, amongst other things,

- serves as a basis for a comprehensive post-call education programme;
- provides for the development of skills as well as knowledge about developments in the law;
- provides resources that are relevant to lawyers at various stages of their careers;
- is based on criteria (or "credits") that are broadly categorized and will therefore be easily obtainable by lawyers irrespective of their practice location;

- will be able to ensure that subjects that the Law Society considers to be important to a lawyer's professional development are addressed, irrespective of market considerations.

The Task Force is not convinced that simply requiring lawyers to take a certain number of hours of courses offered through current education providers will materially advance the quality of legal services provided. Therefore, the form of a mandatory programme, how that programme is to be developed, and which organization or organizations should offer it still needs some consideration. However, the Task Force has reached a consensus that four options warrant further consideration;

i. A programme requiring a certain number of hours of study, of which a portion requires the study of certain subjects;
ii. A programme of required courses for all lawyers, with the remainder of hours to be made up of courses chosen by lawyers;
iii. A programme of required courses for certain areas of practice;
iv. A programme requiring a certain number of hours of study through approved activities.

If the Benchers agree in principle with the recommendation that a mandatory continuing professional development programme be established, the Task Force asks that the issue be returned to it for the purpose of making recommendations about which option to develop, how a lawyer may obtain credit toward the programme, and over what period of time or stage of one's career the credits need to be obtained as well as programme enforcement, the consequences of non-compliance, and the staff required to run the programme.

1. Purpose of this Report

The Lawyer Education Task Force has reached a consensus to recommend to the Benchers that the Law Society develop a programme of mandatory continuing professional development. This Report has been prepared to outline the reasons for the Task Force's recommendation, as well as to outline preferred options for further consideration.

The Task Force asks the Benchers to agree in principle with the recommendations made in this Report, and to return the issue to the Task Force to discuss and develop the options further and return with a recommendation concerning how the programme should be structured.

2. Introduction

In December 2004, the Benchers considered five proposed policy objectives identified by the Task Force. The Benchers resolved that the Task Force examine the proposed objectives and return with recommendations to the Benchers. One of the proposed objectives was "mandatory continuing legal education."

The Task Force has spent a considerable amount of time reviewing mandatory education programmes from other jurisdictions in the United States, Australia and England, as well as discussing whether there is a need for a mandatory programme of education in British Columbia, and if so, what such a programme should look like.

(a) Quality Assurance

Much of the focus of the Law Society has historically been on discipline and setting standards of ethics and professional conduct. These remain of crucial importance to the Law Society, as a regulator, in protecting the public interest. However, more recently the legal profession's regulators in Canada and in other Commonwealth jurisdictions have been placing increased importance on how to establish a standard of quality in how lawyers practise law.

Part of the Law Society's responsibility in protecting the public interest in the administration of justice is to establish standards for the education of lawyers. Section 28 of the *Legal Profession Act* (found in Part 3 of that *Act* under the heading "Protection of the Public) allows the Benchers to take any steps they consider advisable to promote and improve the standard of practice of lawyers. The use of this section allows the Benchers to establish "quality assurance" in the way lawyers practise law.

The Law Society currently has programmes targeted at quality assurance, including its Practice Standards Programme and Committee, its Practice Advice Programme and its recently created Trust Assurance Programme. The Small Firm Practice Course will be operational as of January 1, 2007 and will provide valuable practice management education and resources. The Law Society is currently engaged, as we understand are other law societies in Canada, in determining what else is necessary in order to ensure a standard of quality in the way lawyers practise law.

Establishing a programme of post call education for all lawyers is part of the overall enhancement of "quality assurance." A programme of mandatory education as a condition of permitting a lawyer to continue to practise law is an important part of that enhancement.

(b) A Note on Terminology

"Mandatory continuing professional development" and "mandatory continuing legal education" are often used interchangeably. They denote a programme of continuing education requirements required of lawyers in order to maintain a licence to practise law. This Report uses the phrase "mandatory continuing professional development." In British Columbia, the phrase "continuing legal education" or "cle" is closely associated with the Continuing Legal Education Society of British Columbia. "Mandatory continuing legal education" may be read by some as a determination by the Task Force that lawyers will be required to take a certain number of courses offered through the Continuing Legal Education Society. While that Society may become an important part of a mandatory continual professional development programme, the Task Force wants readers to understand that "continuing professional development" can be undertaken in a variety of ways.

(c) Definition of the Issue

The issue, simply put, is should the Law Society implement a programme requiring a lawyer to partake in a certain defined amount of professional development activity on a periodic basis as a condition of that lawyer's continued ability to practise law, and if so, what options are available for consideration?

(d) Background

The debate on mandatory continuing professional development British Columbia goes back to the 1970s. In 1975, Minnesota became the first jurisdiction in North America to require lawyers to take education programmes. Not long afterwards, mandatory continuing professional development was debated in British Columbia. It has been the subject of reports and discussion by the Benchers through the late 1970s and early 1980s, and appears to have last come to the Benchers at their February 1985 meeting. Full "mandatory continuing legal education" was not sought at that meeting, rather motions were approved (1) to collect data about lawyers' continuing legal education activity; and (2) to consult the membership about implementing an education "tax" of $75 per year, $25 of which would be a grant to the Continuing Legal Education Society and $50 of which would be a credit for lawyers against courses offered by that Society.

"Mandatory continuing legal education" was also discussed in the Report to the Law Society of British Columbia on Professional Legal Education and Competence prepared by James Taylor in September 1983 (the "Taylor Report"). The Taylor Report did not recommend mandatory continuing legal education. It instead recommended steps to encourage voluntary participation. The topic was also one of the subjects of discussion by the Post Call Curriculum Planning Committee in the early 1990s. There is a useful review of the arguments for and against mandatory continuing legal education in the report, but the focus of the report as it relates to continuing legal education activity is directed at broader issues, including how lawyers might be better motivated to participate in continuing legal education activities. The index of Benchers' Minutes does not refer to any minutes of Bencher debate on mandatory continuing legal education as a result of that Committee's work.

In many ways, the debate on mandatory continuing professional development in British Columbia has remained quite stagnant over the past 25 – 30 years. Each time it is raised, it seems to get about as far as the stage of suggesting ways to improve access to educational activities, seeking further information from the profession, or trying to find ways to motivate lawyers to take courses. The debate then seems to fade away. Mandatory continuing professional development has never been approved by the Benchers when it reached them for decision, although at least one Bencher, as long ago as 1985, is recorded as having expressed the view that some form of mandatory education was long overdue.

3. The Arguments in Favour of and Against Mandatory Continuing Professional Development

The Task Force reviewed the arguments for and against mandatory continuing professional development, and noted that there does not appear to be any conclusive answer militating in favour of or against such a programme. To a large extent, there seems to be a bit of a "leap of faith" that implementing a regime will improve the competency of lawyers. On the other side, the argument seems to be that if there is no empirical evidence that it improves competence, then why do it? This might be described as an "absence of faith." Objective science plays no part in this debate. Instead, more vague concepts such as how decision makers gauge public interest, member reaction, and public confidence in the profession come into play.

The arguments in favour of and against the programme have to be understood in order to decide what might be done. They are as follows:

(a) In Favour

- Mandatory continuing professional development raises professional competence by exposing lawyers to new developments and renewing basic knowledge and skills. Law is in constant flux – therefore requiring lawyers to take continuing education is necessary to ensure lawyers keep up with the law and remain competent;

- All lawyers would benefit from exposure to new developments in theory and practice contained in well-designed programmes;

- Mandatory continuing professional development programmes demonstrate to the public that the legal profession is resolved to combat competency concerns;

- For lawyers who find practice pressures deter them from taking continuing education programmes (even for those who enjoy them when they can find the time to take them), mandatory continuing professional development will provide a positive incentive;

- Extra funds from mandatory continuing professional development programmes would improve the quality and quantity of continuing education programmes and would assist providers of such programmes to devote more time and resources to develop more effective programmes;

- Recertification based on continuing professional development is preferable to periodic re-examination;

- Some evidence that lawyers in jurisdictions with mandatory continuing professional development *believe* it increases competency;

- Online and technology based continuing education is expanding quickly throughout the Province, thereby enhancing access by reducing geographic and time barriers.

- Many other jurisdictions and most, if not all, other professions in British Columbia have mandatory continuing professional development programmes – how do we explain to the public why we do not?

(b) Against

- There does not appear to be any empirical evidence proving that participation in mandatory continuing professional development actually *improves* lawyer competence;

- It may be expected that lawyers will resent the requirement. Forcing people to take courses may interfere with their desire to learn;

- Only a small percentage of lawyers are truly incompetent – it is therefore unfair to force all lawyers to comply with a programme designed to remedy the problems of a few;

- Mandatory continuing professional development may simply be a facile response to public concern, and therefore be no more than superficial window-dressing that does not actually address lawyers with serious competency problems. It is very difficult to teach practical skills, proper management and good judgment. Mandatory continuing professional development may therefore actually mislead the public into believing that all lawyers are current and competent in their field of practice, which may not be the case;

- Standard mandatory continuing professional development programmes do not differentiate between types or modes of learning;

- Mandatory continuing professional development plans are expensive, both for the regulator in administering, and for the practitioner in attending due to programme fees, travel, and lost productivity;

- The quality of continuing professional development courses will be reduced due to the massive increase in time.

It has been suggested that the true problem with mandatory continuing professional development is not with the concept, but with the programmes of simply requiring a prescribed number of credits over a prescribed period of time – often resulting in a rush to take *anything* as the time is running out. There is criticism that, from lecture-style courses, most information is not applied and is indeed forgotten not long after the course unless it is immediately applicable. The Task Force generally agrees with these concerns and criticisms and believes that any implementation of a mandatory education programme must be tailored to address them. Otherwise, the programme simply becomes a requirement to take a certain number of hours of study in an unstructured way, which the Task Force does not believe will lead to an optimal result.

4. Examining Statistics from the Mandatory Reporting of Post Call Education Activity

In March 2004, the Benchers approved a recommendation of the Task Force requiring lawyers to report annually the amount of continuing education taken, both through course study and through self-study. The Benchers endorsed the recommendation that minimum expectations should be set for each category – 12 hours for course study and 50 hours for self-study.

The Task Force obtained a report from the Chief Information Officer on the Mandatory Reporting statistics based on responses for the 2005 year. Rather alarmingly, the statistics disclosed that just over one-third of respondents reported *no* hours of “formal” course study. While it was heartening to see that just over 50% of respondents took 12 or more hours, the one-third number suggests that a significant number of lawyers currently take no formal education activity at all. This number seems to increase with length of call. For example, the report discloses that 19% of lawyers with less than 5 years call reported no formal study, while 54% of those with 30 or more years at the bar did so.

Just over 19% of respondents (almost 1 out of every 5) also reported no self-study hours for 2005. Again, the percentage of lawyers reporting no self-study hours increased with length of call.

For each of formal study and self-study reporting, the statistics show that women and insurance-exempt lawyers (those not in private practice) were more likely to report in engaging above the recommended level of 12 and 50 hours respectively. It is unclear what conclusions can be drawn about why women tended to partake in more activity.

One possible explanation about why insurance exempt lawyers tended to report above the minimum expectation *might* have to do with different practice pressures.

There was nothing that showed a significant relationship between hours of formal study and claims or complaints, although lawyers of 15 – 20 years of call tended to have made one or more reports of claims or possible claims if they had reported no formal study hours. The overall analysis, however, showed that the amount of formal study hours reported is unrelated to a lawyer's claims or complaint record. The report *did* note, however:

> ….having undertaken some formal study is related, at least with respect to the likelihood that the lawyer will have experienced one or more complaints. This result indicates that there may be an underlying factor related to both the likelihood of claims and complaints and the tendency to engage in some formal study. For example, it may be that lawyers who undertake some formal study are more careful and conscientious than those who do not.

With respect to self-study reporting, the report noted no significant relationship between the amount of reported self-study hours and the claims or complaints ratio. The report also noted no significant relationship between those who engaged in no self-study and the likelihood of experiencing one or more complaints.

5. The Policy Considerations

(a) <u>General Considerations Debated by the Task Force</u>

Throughout one's legal career, a lawyer must continue to develop his or her knowledge, skills, and professionalism. Moreover, a lawyer's understanding of, and ability to apply, ethical considerations to his or her work also continues to develop. This knowledge and skill can be developed in a number of ways, both formal and informal. However, it *must* be developed. A lawyer cannot ignore the need for continuous learning and development.

However, the Task Force was mindful of the lack of empirical evidence that competence is actually improved by taking continuing education courses. While this lack of evidence may not be the determining factor in deciding whether to implement a mandatory education program, it has caused the Task Force to think hard about whether an unstructured programme of education is the best way to generate learning in lawyers.

Opportunities for learning present themselves frequently in practice, and the Task Force expects that most lawyers seize those opportunities. Opportunities for "formal" education are also available through courses offered by programme providers. Lawyers in the Lower Mainland can, apart from cost considerations, easily access these courses as the vast majority are offered in Vancouver or its suburbs. They are, however, less easy to access for lawyers in other

areas of the Province. This is a complaint that the Task Force has heard repeatedly from the profession.

Moreover, the Task Force is concerned that the courses offered by continuing education providers are driven by market-based considerations. The Task Force does not blame the course providers for this – it is to be expected. Courses must be provided in areas that will generate enrolments, even for organizations that operate on a non-profit basis. The result, however, is that subjects that historically receive poor registrations are rarely, if ever, the primary subject matter of a course. Unfortunately, the Task Force notes that ethics and practice management courses fall into this category.

Further, currently available courses tend to focus on knowledge rather than skills. Knowledge is an important component of being a lawyer, but the application of knowledge is also crucial to gaining competence as a lawyer. Skills may be picked up through practice, although there is a danger that if proper skills are not established early on, a lawyer will only end up continuing to develop poor skills. The lack of "performance evaluation" in most current post-call education courses in British Columbia also means lawyers are unable to gauge how much they have taken away from the activity. Some ability to provide for a common denominator of skills development thorough education would, the Task Force believes, do much to promote "quality assurance."

The Task Force was also concerned to note that registrations for course study decreased markedly for senior lawyers. The Task Force concluded that senior lawyers either did not find that the courses currently offered were sufficiently relevant for their purposes, or were otherwise unmotivated to take courses.

There is no comprehensive post-call education programme for the legal profession in British Columbia. Lawyers who have gone through an established pre-call education and who have been called to the Bar have developed a set of knowledge, skills and behaviours expected of a newly-called lawyer.[1] Once a lawyer has been called to the Bar, however, the Law Society provides no education programme that the lawyer may follow to guide his or her development. The Task Force was concerned that this too often results in the pursuit of a haphazard continuing education programme, which seems to tail off as a lawyer becomes older. What education activity there is may be focused heavily on lecture-style courses with little, if any, performance evaluation. There are many activities besides courses that could be incorporated into a planned continuing education programme if one were developed.

(b) Policy Objectives to be Served

Section 3 of the *Legal Profession Act* requires the Law Society to uphold and protect the public interest in the administration of justice by, amongst other things, establishing the standards for the education of its members. Section 28 permits the Benchers to take any steps they consider advisable to promote and improve the standard of practice by lawyers.

The "Ends" of the Law Society are set out in Part 1 of the Bencher Policies. Ends relevant to this discussion are as follows:

[1] See the "Competency Profile" at Appendix "C" of the Report of the Admission Programme Task Force, June 28, 2002

End 2 Lawyers provide services competently after call to the Bar

(b) post call legal education that is relevant and of appropriate quality is available and voluntarily consumed.

End 10 The public has confidence in the legal profession

(b) the public, government and the media have confidence that lawyers are honest, ethical and competent and that the Law Society does a good job regulating the profession.

Implementation of a mandatory continuing professional development programme would obviously not be a "voluntary consumption" of post call legal education. The statistics from the report of the Chief Information Officer referred to above, however, indicate that there are problems with the current voluntary consumption of post call education activity. The statistics indicate to the Task Force that lawyers either aren't voluntarily taking the recommended minimum amounts of course study, or that the resources offered are not sufficiently relevant or available.

The Task Force believes that the implementation of a mandatory programme that aims to improve the availability of professional development resources and the relevance of those resources to individual practitioners best meets the post call education component of the Ends of the Law Society in ensuring that lawyers provide competent services. It will also demonstrate to the public that it may have confidence that lawyers are competent (as well as honest and ethical) and that the Law Society takes steps to ensure a continued level of competence after the lawyer is called to the Bar.

(c) Goals of a Mandatory Continuing Professional Development Programme

The Task Force considered that a mandatory continuing professional development programme ought not to form part only of an overall programme of learning that lawyers should expected to take, but, more importantly, that lawyers would want to take because it would be useful to their practice and to their development as a lawyer.

In order to become a lawyer, a prescribed course of legal education is required, first through law school and later through articles and PLTC. Part of being a member of a profession, however, includes a commitment to continuous learning. The Task Force believes that call to the Bar ought not to be seen as an end of a lawyer's formal education.

Day-to-day practice is currently expected to provide much of a lawyer's learning, and the Task Force agrees that "learning on the job" can be an excellent means to develop knowledge and skills, provided it is done in the right environment. However, opportunities to learn and what is available to be learned vary widely from practice setting to practice setting and from place to place. In any event, on-the-job learning is only one form of education, and ought to be supplemented by learning through other environments. A formal, continuing programme of education would be a standard to ensure that, throughout the stages of one's career, a lawyer is continuing to upgrade and augment his or her skills and knowledge. This result will not only help

lawyers, but will help the Law Society meet public expectations that it is doing all it can to ensure that lawyers are competent in the areas of law in which they practise, consistent with its statutory mandate. This, in turn, is expected to enhance the quality of services provided by lawyers, and thereby improve the standing of the profession in the community.

The goal of a mandatory continuing professional development programme is to provide education resources that are easily available and relevant to lawyers at all stages of their practices, and to ensure that the resources are consumed in order to be able to assure the public that there is a commitment within the profession to establishing, promoting and improving the standards of practice in the Province.

(d) Key Comparisons

No other law society in Canada has mandatory post call education requirements with the exception of Nova Scotia, which requires lawyers who wish to work in land registrations to complete a certain course. The Task Force has looked at the mandatory continuing professional development programmes of several of the United States, as well as those in England and Wales and the larger Australian states. In addition, the programmes of several of the other professions in British Columbia – particularly, those required by the College of Physicians and Surgeons, the British Columbia Dentist College, and the Institute of Chartered Accountants – were reviewed. It is worth noting that, apart from mid-wives, lawyers are the only professional body in British Columbia that are not required to participate in continuing professional education requirements by their governing body.

The type and requirements of the different mandatory education programmes vary considerably. Some are simply a requirement that lawyers take a certain number of credits which they can obtain by registering in a course offered by an approved provider. Usually one unit of credit amounts to one hour of course study. Other programmes are more intricate, and, while most are still based on obtaining a certain number of credits over a prescribed period of time, the manner in which the credit can be earned is varied. “Work-shadowing”, mentoring, or teaching can generate credits in some jurisdictions. Still other jurisdictions require certain credits to be obtained in certain areas of study. The Task Force unanimously favoured programmes that offered more varied ways of obtaining credits.

(e) Policy Considerations

(i) Public Interest

How would implementing or not implementing a mandatory continuing professional development programme affect the public interest? The Law Society’s mandate is to protect the public interest in the administration of justice in a number of ways, including by establishing standards for education, professional responsibility and competence. Would the public interest therefore be enhanced by mandatory continuing professional development? There is no doubt it would be if there were empirical evidence that allowed one to connect improvement in competence with post call education activity. This may lead some observers to suggest that the Law Society may be able to effectively discharge its mandate through the encouragements it has given toward voluntary consumption of post call education activity.

(ii) Member Relations

Member relations have figured prominently in the past as an argument against mandatory continuing professional development, as there is a presumption that lawyers will resent the requirement and that forcing members to take courses may interfere with their desire to learn. On the other hand, mandatory continuing professional development may be viewed as a positive inducement for busy lawyers to take time out to engage in post call education activity that they may not otherwise undertake. Some studies also suggest that while there is initial resentment to the imposition, that dissipates relatively quickly and that the mandatory continuing professional development requirement soon becomes an accepted norm of the requirements of being a lawyer. In any event, the public interest must prevail over member preferences.

(iii) Public Relations

There seems to be a presumption that mandatory continuing professional education will improve the legal profession's standing with the public. It *is* one way of demonstrating publicly that the profession (and its regulator, the Law Society) takes the issue of competence seriously. It would bring the legal profession in British Columbia into line with other professions in the Province. How important this is may be a matter of debate if there is no real evidence to support that it produces a better quality of lawyer and may, depending on the cost of the programme, increase the cost of legal services.

(iv) Financial Implications

The cost of implementing a mandatory continuing professional development depends, of course, on what type of programme is implemented. Depending on the form of implementation, some standardization or vetting of course providers, and approval of courses will be required. A programme of mandatory education will require regulation through the tracking of the reporting of hours taken, and will require a consideration of what disciplinary consequences will follow if the mandatory requirements are not met, as well as the cost of imposing those sanctions where required. On the members' side, cost of participating in courses, travel, and lost productivity will no doubt be raised. As mentioned above, it is at least possible that the cost of legal services might increase, depending on the increase in Law Society fees, if any, and the cost of mandatory participation in courses.

(v) Programme Effectiveness

How would mandatory continuing professional development affect the effectiveness of the post-call education programme and mandate of the Law Society?

The Small Firm Practice Course is a form of mandatory continuing professional development for a designated group, and the Benchers, by approving it, have obviously considered it an effective way of ensuring a standard of education within a discrete category. Broader forms of mandatory continuing professional development in other categories (advocacy, ethics, professional responsibility)

might do likewise, and might create a market for courses where there is none now. Doing so would require the Law Society to conclude that the current absence of a market is a *bad* thing in the public interest, and that the lack of such a market is an abdication by lawyers in discharging their responsibilities in this area.

On the other hand, if implementing mandatory continuing professional development were to discourage lawyers in education and learning, and make them reluctant participators instead of enthusiastic or well-motivated ones, the effectiveness of post call education might be adversely affected.

(vi) Government Relations

As far as the Task Force is aware, there is no discussion at the government level about legislating mandatory continuing legal professional development, nor is it aware of any negative comments by the government about the legal profession's lack of mandatory continuing professional development. The Task Force suspects that the government would not view the imposition of such a programme negatively.

(vii) Equity and Diversity

If there were to be a mandatory continuing professional development programme, the Task Force believes that there would be renewed calls for a bursary to ensure that economically disadvantaged lawyers were accommodated.[2] There might also be a call to ensure that mandatory continuing professional development addressed areas such as discrimination, substance abuse, and eliminating bias. California, for example, has mandatory continuing professional development requirements in each of these areas.

(viii) Legal Implications

Section 28(a)(ii) of the *Legal Profession Act* ought to give the Law Society the statutory authority to introduce a mandatory continuing professional development programme.

There was a challenge a few years ago to the California programme by a lawyer who was involuntarily enrolled as an inactive member of the State Bar (and therefore unable to practise law) for failing to comply with its requirements. He challenged the constitutionality of the programme on the basis that it exempted certain groups of members (law school professors, retired judges, elected officials and state officers) on the grounds that this violated equal protection. The California Court of Appeal agreed. However, the Supreme Court of California overturned the Court of Appeal's decision, holding that the programme did not violate equal protection principles. It did comment that the wisdom of some or all of the exemptions may be debatable as a matter of policy, however. See *Warden* v. *State Bar of California* 21 Cal.4th 628 (1999).

[2] The Continuing Legal Education Society of BC currently provides a bursary programme that provides for a 50% discount on courses for any lawyer identifying a financial need. That Society also allows for payments on an instalment programme.

6. Options

The Task Force has identified six options for the implementation of a mandatory continuing professional development programme, four of which the Task Force recommends for further discussion, and two of which the Task Force recommends no further consideration be given.

The four options recommended for further consideration by the Task Force are:

i. A programme requiring a certain number of hours of study, of which a portion requires the study of certain subjects.

Many of the American states have adopted a mandatory continuing professional development education programme that requires a given number of hours of study per year, a portion of which must be devoted to certain subjects. Most usually require study of legal ethics and/or professionalism. Still others require courses in the study of harassment and discrimination. Some states have certain requirements for courses in skills development for newly admitted lawyers, which is likely an effort to address the lack of practice experience faced by young American lawyers - experience that BC lawyers are supposed to receive through articles and PLTC.

The Task Force believes that this may be an attractive option because it allows the Law Society to determine what subjects or skills it considers lawyers *need* to study – in other words to regulate the profession about the requirements that the Law Society, in its role as regulator, sees are not being met well by lawyers, or where there is a real, or even perceived, lack of knowledge of an issue. It could allow the Law Society to ensure that lawyers understood the Society's perspective on certain topics or issues, and allow the Society to prescribe the form of the education activity. On the other hand, it also allows a proportion of continuing education activity to be chosen by the lawyer with respect to the needs that the lawyer has identified for him or herself. It allows the lawyer some control in the direction of his or her continuing education by allowing the lawyer to make up the balance of required credits from courses or activities of a lawyer's own choosing.

The Task Force has, in the course of its work, debated requirements for a number of hours in courses on ethics and professionalism. There are, generally speaking, no such courses available, however, and would therefore either require the Law Society to develop and offer them, or to expect that commercial course providers will recognize the opportunity of a captive audience and offer the courses themselves. If this were to occur, it would be likely that the Law Society would have to pre-approve the course or other activity. There would be little purpose in requiring study in a given area without ensuring that the form of education offered met the need the Law Society considered was currently not being met. Otherwise, the requirement would be only for the sake of the requirement itself.

ii. A programme of required courses for all lawyers, with the remainder of hours to be made up of activities chosen by lawyers.

This is a variation of option 1. Rather than require that lawyers devote a certain number of hours on a certain subject, the Law Society could require a lawyer to take a certain *course* that would cover one or more subjects. The remainder of courses or activities needed to meet mandatory education requirements would be left to the lawyer. Again, this would permit the Law Society to prescribe the form of the course. It would continue to allow the lawyer some choice in courses or activities to make up the balance of required credits.

The Law Society of England and Wales has a variation of this option. For example, all solicitors in England and Wales are required to take the Law Society Management Course Stage 1[3] between the date of admission and the third year of their mandatory continuing legal education reporting requirements. The 7 hours of that course counts toward the lawyer's mandatory continuing legal education requirement. Solicitors in their first year of reporting requirements must also take the Client Care and Professional Standards and Financial and Business Skills modules of the Professional Skills Course, unless exempted.

The points in favour of this option are similar to Option 1, with the added benefit to the Law Society of a simpler form of administration. The Society would only have to ensure that a particular course was taken, rather than having to check that courses or activities taken met the Society's requirements that prescribed subjects had been included in courses taken by a lawyer over the course of the reporting period. The course or courses contemplated by this option needn't be offered through the Law Society. They can be contracted out, provided they meet Society standards.

iii. A programme of required courses for certain areas of practice.

This option would require a lawyer to participate in a programme of study prescribed by the Law Society if the lawyer wants to practise in a particular area of law. The Law Society has started down this road with the Small Firm Practice Course which will require all lawyers who wish to offer legal services after January 1, 2007 through a firm of four or fewer lawyers to take a particular online course prepared and offered by the Law Society.

This option requires the Law Society to identify what areas of law are amenable to the option and to ensure that it was satisfied with the courses or other education activities available. It means that the Law Society would have to take considerable care in defining the area of law affected and the concomitant education requirement(s). The programme could open up the option of developing a limited licensing programme on areas of law, or a specialization programme.

[3] The Course itself covers the following subjects, of which three must be studied:
- Managing finance
- Managing the firm
- Managing client relations
- Managing information
- Managing people

The Law Society could, through this option, also prescribe the form of the course or activity. These could be focused on skills enhancements useful to practice in the given area of law, as well as on developments in the law. It is doubtful that the lawyer would be required to take the prescribed form of education *every* year. Moreover, the courses or other education activities could be aimed at various stages of a lawyer's career. This, the Task Force believes, would allow the Law Society to focus requirements on skills and knowledge, in different practice areas, that would be useful at various stages of a lawyer's practice. It would also allow the use of senior practitioners as teachers, if credit were given at the senior level for teaching younger lawyers necessary skills and knowledge in various practice areas.

The prescribed form of education and the providers of the education would have to be accredited or alternatively the Law Society would have to develop and operate some or perhaps all of the education itself, to ensure a standard of quality. This would add administrative burdens to the option.

Standard mandatory continuing professional development programmes require credits to be earned annually, or require a certain number of credits be earned over a period of years, allowing the lawyer to take more or fewer credits in any given year provided the required number is met at the end of the period. An alternative method of delivering the programme would be to divide a lawyer's career into defined periods, and to require certain activities or courses to be taken at each stage of one's career. The Task Force has obviously not yet determined what it would recommend if any of these three options were pursued. Each of the options described could be developed in either fashion.

iv. A programme requiring a certain number of hours of study through approved activities.

Rather than having the Law Society identify particular subjects or courses that each lawyer will be required to take over certain periods of time, this option would leave it to each lawyer to identify the subjects and modes of education that he or she wishes to take during the reporting period. The option would permit "approved activities" of education that would extend beyond courses offered by continuing legal education providers. Examples of such activities (which the Task Force considers can be extended to all options under consideration) are set out in Part 7 below. The Task Force believes that an expansion of the forms of study will improve the accessibility of education, especially to lawyers in rural areas.

The lawyer will be left to determine the relevance of the subject and form of study to his or her practice and/or career or educational goals. This option therefore risks the development of haphazard education activity referred to above, but that concern may be alleviated if lawyers are reminded to give consideration to continuing education requirements each year. The mandatory aspect of the programme should assist in encouraging lawyers to consider the form and content of their education requirements on an on-going basis.

The options that the Task Force does not recommend are:

v. A requirement that lawyers simply take a certain number of hours of courses already available.

The Law Society could simply require that lawyers take a certain number of hours of courses already available through current course providers, such as the Continuing Legal Education Society, Trial Lawyers Association, Canadian Bar Association or the Federation of Law Societies. While this would be the simplest option to implement, the Task Force considers that it would be the least desirable option from the point of view of programme effectiveness.

vi. A professional development programme created by lawyers themselves.

Some firms and government agencies require lawyers to submit an annual plan outlining their intended professional development activities. The Law Society could emulate such a programme by requiring each lawyer to submit a plan of professional development annually. The Task Force does not support this option. While it has the benefit of engaging each lawyer to actively think about his or her professional education and development, the Task Force considers that this option would be too difficult and expensive to administer and monitor.

7. Forms of Education Activity

The Task Force believes that credit for mandatory continuing professional development activity should be based on a broad range of activities, and not limited simply to course study. After discussion, it recommends that the following activities be included for credit in any programme developed:

- Accredited courses. The time spent can be for *attending* courses, and for *preparing* and *delivering* courses. Review of video repeats can be permitted. Some consideration could be given to whether such review in a group setting, facilitating discussion, ought to be required for credit under this heading. If not, credit might still be available under another heading.

- Non-accredited courses. Some programmes permit credit for time spent in nonaccredited courses if they are of particular relevance to a lawyer's area of work. Time for preparing and delivering such courses can also be credited.

- Coaching and mentoring. The Law Society of England and Wales, for example, allows actual time to be claimed for structured coaching and structured mentoring sessions involving professional development of 30 minutes or more, as long as they have written aims and objectives, are documented showing an outcome, and are accredited under an authorization agreement. The same Law Society also permits credit for "work shadowing" if it has clear aims and objectives and feedback or reflection.

- In-house programmes. Credit can be offered for courses offered by a law firm or other employer on legal topics relevant to a lawyer's practice. Debate may be necessary to determine the criteria on which the quality of the programme would be judged, as there would have to be some standard against which to measure the programme. Credit for in-house programmes is available in other jurisdictions, so there are precedents which we may draw from. Teaching and preparation time can also be available for credit.

- Professional group attendance, if an educational component is part of the meeting. Attendance at meetings of CBA sections is available currently to lawyers for the purpose of their reporting requirements. However, other professional group attendance can be available for credit. For example, rural bar associations could, as a group, bring in a speaker to address substantive or practice issues. This would allow lawyers in less densely populated areas to obtain credits for mandatory continuing professional development purposes without the need to travel to Vancouver.

- Study groups. Formal or informal study groups can be established amongst members. This method of professional development is common in dentistry and accounting. To qualify, the group probably ought to develop some objectives and, perhaps, report on some form of "outcome."

- Writing. Credit can be given for hours spent on writing on law or practice for law books, journals, or newspapers.

- Teaching PLTC. Actual time spent teaching (and, if necessary, preparation for teaching) articling students at PLTC can be available for credit

- Research. At present, lawyers are not permitted to claim credit for hours spent researching legal topics on client matters. Not all research is client oriented, however. Some programmes permit credit for actual time spent researching legal topics or matters relevant to the practice of law, if the research results in a memorandum, written document, precedent, or survey.

- Post-graduate study/preparation of a dissertation. Study for a post-graduate degree on a matter relevant to law is available for credit in some jurisdictions.

In developing a programme, there are still a number of issues that would need to be addressed beyond the nature of the credits, such as the period over which the credit must be earned, how many credits are necessary, and whether credits may be carried over, to name a few.

8. Conclusion

The Task Force has concluded that it is time for the Law Society to develop a mandatory continuing professional development programme, provided that the programme is one designed to meet the goals and general considerations described in Part 5 above. The Task Force generally does *not* support or recommend the development of a simplistic programme requiring lawyers to take a certain number of hours of course study based upon the current availability of programmes.

Instead, a programme of education should be developed that, amongst other things

- serves as a basis for a comprehensive post-call education programme;

- provides for the development of skills as well as knowledge about developments in the law;

- provides resources that are relevant to lawyers at various stages of their careers;
- is based on criteria (or "credits") that are broadly categorized and will therefore be easily obtainable by lawyers irrespective of their practice location;
- will be able to ensure that subjects that the Law Society considers to be important to a lawyer's professional development are addressed, irrespective of market considerations.

While the Task Force has reached a consensus that the time has come to create a mandatory continuing professional development programme, it has not reached a consensus on which of the four options outlined in Part 6 (i), (ii), (iii) amd (iv) should be preferred. The Task Force has reached a consensus that, whatever option is ultimately pursued, credit toward the programme should be as broadly based as possible from the list outlined in Part 7 above.

The Task Force has prepared this Report to determine if the Benchers agree in principle with the recommendations made. If so, the Task Force will discuss and develop the options further and return with a recommendation concerning how the programme should be structured. The Task Force plans to accomplish this by July, 2007.

If the Benchers agree in principle to create a programme of mandatory continuing professional development, the Task Force believes that a reasonable date for its introduction would be January 1, 2009, and will work toward that schedule.

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The Law Society
of British Columbia

Report of the Lawyer Education Advisory Committee
on Continuing Professional Development

For: The Benchers

Date: July 4, 2008

The Committee's Final Report was approved by the Benchers, in a slightly amended manner, on July 4, 2008. This version of the Report reflects the Benchers' final decisions.

Prepared on behalf of: Lawyer Education Advisory Committee

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Report of the Lawyer Education Advisory Committee on Continuing Professional Development

I. Background

On November 16, 2007, the Benchers approved the former Lawyer Education Committee's recommendations for a continuing professional development ("CPD") program as outlined in the November 6, 2007 *Report of the Lawyer Education Committee on Continuing Professional Development*, to begin on January 1, 2009. This decision was the culmination of a periodic debate on the subject that had been ongoing for over 30 years.

First and foremost, the introduction of CPD is premised on assuring both the public and the profession that the Law Society is committed to the establishing, maintaining and enhancing standards of legal practice in the province.

Although CPD requirements for lawyers exist in many other jurisdictions, including England, Wales, Australia and 43 American states, the Benchers' decision marked the first time in Canada that a law society had introduced a CPD program. Until that decision, Nova Scotia was the only Canadian jurisdiction that had any compulsory legal education requirements, and those were limited to lawyers engaging in land registration work. In early 2008 the Chambre des Notaires du Québec introduced a CPD requirement, and the Barreau du Québec is expected to implement a CPD requirement in early 2009, shortly after the Law Society of British Columbia implements its program.

II. Purpose of this Report

This Report outlines the program by which the Lawyer Education Advisory Committee recommends the CPD requirement (approved last November) be implemented. As will be recalled, last November the Lawyer Education Committee (as it then was) made a series of recommendations outlining broad requirements concerning CPD. Those recommendations (as approved on November 16, 2007) are contained in Appendix 1 to this Report.

At the time the recommendations were approved, the Benchers referred the issue back to the Committee to consult with the profession and legal organizations in order to determine the best way to implement the proposed CPD requirement. The Benchers required the Committee to report by July 2008 with final recommendations for implementation of the program effective January 1, 2009.

The Lawyer Education Advisory Committee, as successor to the Lawyer Education Committee, outlines its conclusions in this Report. It recommends Bencher approval of the program, together with the draft Rules included in the Report at Appendix B.

III. Consultation

The Lawyer Education Committee, and later, the Lawyer Education Advisory Committee has, since the recommendations were approved last November, sought and received input from members and law-related organizations. The Law Society provided the information outlined in Appendix C by email bulletin and through the website seeking such consultation.

Responses from the profession and legal organizations have been largely positive. In fact, the Law Society's initiative into CPD has been lauded nationally in the legal media. For example, an article in the Canadian Bar Association's *National* magazine entitled *The Dawn of MCPD* (March 2008, Vol. 17, No. 2) spoke positively about CPD requirements and approved the Law Society's initiative as a necessary one at this time. In the same edition, an editorial entitled *Exploding the Classroom* spoke favourably of the Benchers' decision to offer a broad range of CPD activities beyond standard courses.

Where concerns have been raised, they arise mostly in connection with questions relating to approved subject-matter, geographic barriers, and cost. Once some context is given to the proposed program, many of the concerns are often (although not always) alleviated. Some organizations endorse the concept of CPD requirements, but disagree with where the Committee proposes to "draw the line" concerning what counts toward CPD activity, and what does not.

IV. Committee Conclusions

Although the Committee has encountered and considered a number of complexities and potential options, the Committee has been guided by the need to implement a program that will be as straight-forward and stream-lined as reasonably possible for lawyers, legal education providers, and the Law Society. The Committee has come to the following detailed conclusions relating to the new CPD program.

(a) Overall Subject Matter Requirement

The subject matter of all accredited learning modes, including courses, will satisfy the following criteria provided the subject matter contains:

1. Significant, intellectual, or practical content, with the primary objective of increasing lawyers' professional competence;

2. Material dealing primarily with substantive, procedural, ethical, or practice management (including client care and relations) matters relating to the practice of law;

3. Material primarily designed and focused for lawyers, not for other professions (such as courses for business leaders, including leadership skills, management skills, project management, facilitation, how to run an effective meeting, marketing skills).

Learning activities will not be limited to subject matter dealing with primarily BC or Canadian law. Credits will be available for the study of the law of other provinces and foreign law or practice that is related to the conduct of the lawyer's practice.

The following activities will not be accredited:

1. Any activity designed for or targeted at clients;

2. Topics relating to law firm marketing or profit maximization;

3. Lawyer wellness topics.

(b) Credit Available for Participation in Courses

Courses will be accredited based on the following criteria:

1. Generally, credit will be given for actual time in attendance at a course;

2. Two or more lawyers reviewing together a previously recorded course will be able to obtain credit;

3. Credit will be available for the actual time participating in online "real time" courses, streaming video, web and /or teleconference courses, provided there is an opportunity to ask and answer questions.

(c) Credit Available for Education Activities other than Courses

Education other than courses will be available for credit, based on the following criteria:

(i) Teaching

1. The teaching must be to an audience that is primarily composed of lawyers, paralegals, articling students and /or law school students. Accreditation for teaching will not be available if it is targeted primarily at clients, the public, other professions, or students other than law students;

2. Three hours of credit will be available for each hour taught. If the lawyer is "chairing" a program, however, the actual time spent chairing the program is all that may be reported (not 3 hours per hour of chairing);

3. Credit will only be available for the first time the teaching activity is performed in the reporting year. Credit will not be available for repeat teaching of substantially the same subject matter within the same reporting year;

4. Credit will be available for volunteer or part-time teaching only, not as part of full-time or regular employment;

5. Credit will be available for the teaching of legal skills training courses;

6. For 2009, credit will not be available for mentoring. Mentoring will be the subject of further Committee investigation.

(ii) Writing

Credit will be available for writing as follows:

1. Writing law books or articles that are intended for publication or to be included in course materials;

2. Credit will be based on actual time to produce the final product, to a maximum of 6 hours per writing project;

3. Credit will be available for volunteer or part-time writing only, not as a part of full-time or regular employment;

4. The available credit will be in addition to credit available for teaching and preparation for teaching;

5. No credit will be available for time spent producing PowerPoint materials.

(iii) Study Groups

Credit for study group activity will be available as follows:

1. Attendance in a group setting at an educational session in a law firm, legal department, governmental agency or similar entity, provided that at least two lawyers are together (including by telephone) at the same time;

2. Attendance at editorial advisory board meetings for legal publications;

3. The hours available for credit will be the actual time spent at the study group meeting, excluding any time that is not related to educational activities;

4. Credit will not be available for activity that is file specific;

5. A lawyer must have overall administrative responsibility for each meeting, and a lawyer must chair each meeting;

6. No credit will be available for time spent reading materials, handouts or PowerPoint, whether before or after the study group session.

(iv) Local Bar and CBA Section Meetings

1. Credit will be available for the actual time spent attending at an educational program provided by a local or county bar association in British Columbia, as well as for section meetings of the Canadian Bar Association, excluding any portion of the meeting that is not devoted to educational activities;

2. To qualify, at least two lawyers must participate in the activity at the same time, including by telephone.

(v) Online Education

A Group Event

1. Credit will be available for the actual time spent by the lawyer participating in online "real time" courses, streaming video, web and/or teleconference courses, but only if, through the course offering, there is an opportunity to ask and answer questions;

2. The credit available will include a study group's review of a previously recorded course.

B Self-Study

1. Credit will be available up to a pre-accredited limit per on-line course, as well as for completing an audio, video or web course, provided the course includes the following characteristics:

(a) a quiz component (where questions are to be answered, and where an answer guide is provided to the lawyer after the lawyer completes the course and quiz. It is not necessary for the lawyer to submit the quiz for review);

(b) the quiz can be at the end of the course or interspersed throughout the course;

(c) there is an ability for the lawyer taking the course to email or telephone a designated moderator with questions, and a timely reply;

(d) there is no requirement for a "listserv;"

(e) there is no requirement for reading materials, handouts or PowerPoint to be included in the course.

C Listserv/forum /network site

1. These forms of learning call for further Committee consideration, and will not be available for credit for the 2009 calendar year.

(d) Accreditation Process

1. All reportable credits will be approved by the Law Society in either of two ways:

   (i) by pre-approval of the provider; or
   (ii) approval (before or after the event) of individual courses and other educational activities.

2. An individual course or other educational activity offered by a preapproved provider does not require further approval unless requested by the provider;
3. Providers are pre-approved and remain pre-approved if they maintain integrity and quality according to standards;

4. Lawyers can individually apply for approval of courses, either before or after the course or other educational activity takes place, where the course has not otherwise been approved;

5. All applications by providers and lawyers will be submitted electronically;

6. Approvals will be made by Law Society staff.

(e) Compliance and Reporting Requirements

1. The CPD requirement will be based on the calendar year, with the first compliance date to be December 31, 2009 for the 2009 year;

2. Lawyers will login to the Law Society website and click on to a link to the program, where they will be shown their individual credits and time remaining to comply with the CPD requirement for the given calendar year. After completing a course or other accredited learning activity, lawyers can make that addition to their record;

3. The lawyer will be notified electronically by the Law Society of the approaching calendar deadline and, if the deadline is not met, will be given an extension of 90 days to complete the necessary requirement (in which case a late fee will be charged). The lawyer will be suspended from practice for failure to comply within the extended 90 day time limit. Rules will include provisions and grounds for applying for further extensions;

4. The twelve hour requirement is subject to adjustment for entering or re-entering practice mid-year. Members who have been exempt during the reporting year, but who resume practising law within the reporting year, must complete one credit hour for each full or partial calendar month in the practice of law;

5. Embedded ethical, practice management, and client care and relations content will comply with the two hour requirement. Providers will also be encouraged to offer non-embedded content.

(f) Exemptions

1. All members of the Law Society with a practicing certificate, whether full or part-time, are subject to the requirement, with the following exemptions:

(a) Members with a current practicing certificate who submit a declaration that they are not practising law. Examples of members who might submit a declaration that they are not practising law could include:

- inactive members;
- members on medical or maternity leave;
- members taking a sabbatical;

(b) New members who have completed the bar admission program of a Canadian law society during the reporting year;

(c) A partial exemption will be available to members who resume practising law within the reporting year after having been exempt, and new members by way of transfer (subject to b, above). These members must complete one credit hour for each full or partial calendar month in the practice of law;

(d) No exemption will be available for

- being too busy (such as a long trial);
- practice of law having been in another jurisdiction.

V. Budget

In the 2008 Law Society General Fund budget, $25,000 is allocated for developing and determining how to implement the CPD program. The information and compliance systems will be online, and accessible to members and providers through the Law Society website, which will require modification to the Law Society's website. These modifications are being made by Law Society staff during the current budget year.

The 2009 Law Society General Fund budget, subject to Bencher consideration and approval, includes up to $50,000 for administration of the CPD program. A new Member Services Representative position will be largely dedicated to administration of the CPD program, including responding to member and provider questions and requests for approvals, and handling the approvals and compliance process. Overall management supervision will be handled by current managerial staff.

VI. Proposed Rules for the Continuing Professional Development Program

Rules will be necessary to implement the CPD requirement. The proposed Rules, attached as Appendix B to this Report, have been reviewed and endorsed by the Act and Rules Subcommittee.

The proposed Rules accomplish two main purposes:

1. they require lawyers to complete the required amount of CPD on an annual basis;

2. they provide for consequences if the required amount is not completed.

(a) Requirement to Complete Continuing Professional Development

Rule 3-18.3(3) will require lawyers to complete the prescribed CPD program, and certify its completion to the Executive Director. Rule 3-18.3(1) requires the benchers, each year, to set the required number of hours of required continuing education.

The Rule permits exemption of lawyers from the requirement. Two specific exemptions are included in Rules 3-18.3(4) and (5). Subrule (4) ensures that newly called lawyers, who have just completed a structured program of bar admission training, will have that training recognized and will not be required to complete more education activity in the year they qualify. Subrule (5) recognizes that, just as non-practising members are not subject to the requirement, members with practicing status but who are not actually practising should also be exempt. Subrule (6) provides for a pro rata reduction of the requirement for the amount of time that a practicing member, seeking exemption under subrule (5), has not been engaged in the practice of law during the reporting year.

Subrule (2) will permit the Practice Standards Committee to prescribe additional circumstances in which a class of lawyers might be excused from completing the requirement during a reporting year. The Rule is drafted to avoid as much as reasonably possible a number of “one off” applications by lawyers for exemption from the requirement.

The Practice Standards Committee is the Committee designated with assigned responsibilities under the Rules rather than the Lawyer Education Advisory Committee, because the Practice Standards Committee is required by statute, unlike the Lawyer Education Advisory Committee, which could be disbanded by Bencher motion.

(b) Consequences of Not Completing the Continuing Professional Development Requirement

Rules 3-18.4 and 3-18.5 deal with what happens if a lawyer fails to complete the requirement for the year.

Failure to complete the requirement each year would mean that the lawyer is in breach of the Rules. The proposed rules permit a lawyer to complete the requirement after the end of the year, if the requirement is completed prior to April 1 of the following year. The lawyer will then be deemed to have complied with the requirement. Time spent on completing the requirement during this three month extension period will be accredited toward only the prior year's requirement, not the current year's requirement. A late fee of $200.00 must also be paid.

If the requirement is not completed by April 1, the expiry date of the extension period, the lawyer is automatically suspended. However, the lawyer will be given at least 60 days' notice that the lawyer is about to be suspended for non-completion of the requirement, and will be able to apply to the Practice Standards Committee, which, in its discretion where there are special circumstances, may order that the lawyer not be suspended, or may delay the suspension. As this notice will be given during the period of time in which the lawyer may still complete the requirement and be deemed to have complied with the rule, the Committee anticipates that most, and ideally all, lawyers will simply complete the requirement rather than face suspension.

The Committee notes that there is no specifically worded authority in the *Legal Profession Act* permitting the Benchers to create rules to suspend a lawyer in these circumstances, and compares this with the power to create rules to suspend a lawyer who fails to meet standards of financial responsibility under s. 32 of the *Act*. The Committee has determined that the combination of s. 28, which authorizes the Benchers to establish and maintain a system of continuing legal education, and s. 11, which authorizes the Benchers to make rules for the carrying out of the *Act*, ought to be read to permit the Benchers to create a system of CPD that can be enforced in the most effective manner possible, if the approach is principled and fair.

The Committee has considered different methods by which to ensure compliance, and concludes that the "suspension" route is the most effective and principled. It is effective, because a suspension from practice is a considerable consequence that most lawyers will want to avoid. It is principled because the goal of the rules ought to be to ensure that lawyers complete the requirement. On the other hand, a monetary penalty or fine would simply enable lawyers to pay a sum of money to the Law Society rather than complete the continuing professional development requirement, which the Committee concludes is neither an appropriate nor principled outcome. The "suspension" consequence, as drafted, is also fair because the lawyer is given ample notice of a suspension, may complete the requirement in the meantime and be deemed to have complied with the rule or, if necessary, be able to apply to the Practice Standards Committee to seek relief from the suspension if there are special circumstances to justify such relief.

VII. Recommendation

The Lawyer Education Advisory Committee recommends that the Benchers approve the proposed program outlined by the Committee, including the proposed rule amendments attached as Appendix B to this Report.

APPENDIX A

Lawyer Education Committee Recommendations, approved by the Benchers on November 16, 2007

1. Each practising member of the Law Society of British Columbia must complete not fewer than 12 hours per year of CPD undertaken in approved educational activities that deal primarily with the study of law or matters related to the practice of law.

2. Approved educational activities include:

(a) Traditional courses and activities:

- Attendance, in person, at a course offered by a provider approved by the Law Society;
- Participation in online "real time" courses, streaming video, web and/or teleconference courses offered by a provider approved by the Law Society where there is an opportunity to ask and answer questions;
- Review, in a group with one or more other lawyer(s) of a video repeat of a course offered by a provider approved by the Law Society;
- Completion of an interactive, self study online course offered by a provider approved by the Law Society, provided that a testing component is included in the course;
- Teaching at a course related to law or to the practice of law. In the case of teaching, the lawyer is entitled to a credit of three hours of reporting for each one hour taught.

"Course offered by a provider approved by the Law Society" includes:

- any course offered by the Continuing Legal Education Society of British Columbia, the Trial Lawyers' Association of British Columbia, the Canadian Corporate Counsel Association, the Canadian Bar Association, the Federation of Law Societies of Canada, or the Law Society of British Columbia;
- any course offered by Canadian law schools dealing primarily with the study of law or matters related to the practice of law;
- any other course, or provider who offers courses, dealing primarily with the study of law or matters related to the practice of law, provided that the attendee has obtained prior approval from the Law Society of British Columbia.

(b) Non-traditional activities:

- Attendance at CBA section meetings;

- Attendance at a course or other education-related activity offered by a local or county bar association;

- Participation in (including teaching at) an education program offered by a lawyer's firm, corporate legal department, governmental agency or similar entity, provided that the program is offered in a group setting;

- Participation in a study group of two or more provided that the group's study focuses on law related activities;

- Writing law books or articles relating to the study or practice of law for publication.

3. Not less than two hours of the required 12 hours of CPD must pertain to any one or any combination of the following topics:

    - professional responsibility and ethics;
    - client care and relations;
    - practice management.

4. Each lawyer must report to the Law Society the number of hours of approved professional development activity completed over the previous 12 month period. Failure to complete and report the minimum number of required hours will result in a breach of a Law Society Rule, and may subject the lawyer to sanctions.

APPENDIX B

[Note: Insert the draft rules after approval by Act and Rules Subcommittee.]

APPENDIX C

Consultation Communication to the Profession and Legal Organizations

Over the past 6 months the Lawyer Education Advisory Committee has sought and received input from members and law-related organizations. The Law Society provided the following information by email bulletin and through the website.

Frequently Asked Questions

Why do we need a continuing professional development program?

- Implementation of a continuing professional development program recognizes that the *Legal Profession Act* requires the Law Society to establish educational standards for lawyers as part of its duty to protect the public interest.

- The mandatory reporting information reveals some problematic trends:

- Almost one-third of the profession has reported no formal course study.
- Nearly one-fifth has reported no self-study.
- The number of lawyers reporting no professional development increases with age: 19 per cent of lawyers of less than five years call reported no formal study while 54 per cent of lawyers with 30 or more years at the bar reported no formal study.

- Making participation in a program of continuing professional development as a condition of practice would demonstrate to the public and to the provincial government the Law Society's commitment to ensuring that BC lawyers maintain a continued level of competence after their call to the bar.

What are the requirements?

- All practising lawyers — full time and part time — must complete a minimum of 12 hours of approved educational activities annually.

- At least two hours must pertain to any combination of professional responsibility and ethics, client relations, and practice management.

Do I have to take CLE courses?

- Continuing professional development does not mean only being in a classroom attending courses. The Law Society's goal is to ensure lawyers can meet the requirements of the new program through a variety of educational opportunities. The Law Society wants lawyers to be able to select the type of learning that suits them and their practices best.

How will I report my educational activities?

- It will be done in a way that is quick and efficient, as an online form. The administrative mechanisms will be quite simple with modern technology.

Will I still be required to report my self-study?

- The current requirement to report voluntary self-study, such as reading legal texts and articles and reviewing recorded material on one's own, will continue. The recommended minimum will continue to be 50 hours annually.

What are other professions doing?

- Most other professions in BC and Canada have mandatory, continuing professional development programs.

Approved Educational Activities

The Benchers have already approved a wide variety of educational activities for the continuing professional development program, and will be considering other activities as well.

- Attendance in person, as well as online or by telephone, if there is an opportunity to ask questions, at courses offered by educational providers, including the Continuing Legal Education Society of BC, the Trial Lawyers' Association of BC, the Canadian Corporate Counsel Association, the Canadian Bar Association, the Federation of Law Societies of Canada, the Law Society of BC, and Canadian law schools. As the Law Society continues to consult with course providers and local Bar associations, this list of course providers will expand.

- Attendance in person, as well as online or by telephone, if there is an opportunity to ask questions.

- Video repeats of an approved course provided if there is participation by one or more other lawyers, so there is opportunity for discussion.

- Completion of an online self-study course, if a testing or self-assessment quiz component is included in the course.

- Teaching a law-related course (one hour of teaching will count as up to three hours of reporting credit, to account for preparation time).

- Attending CBA section meetings or education-related activities offered by a local or county Bar association.

- Participation in (including teaching at) a legal education program offered by a lawyer's firm or employer, if the program takes place in a group setting.

- Participation in a study group of two or more people if the group's study focuses on law-related activities.

- Writing law books or articles relating to the study or practice of law.

HAS THE TIME ARRIVED FOR MANDATORY CONTINUING PROFESSIONAL DEVELOPMENT IN NEW BRUNSWICK?

Date: January 26, 2009

Prepared by: Crystal D. Critch
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HAS THE TIME ARRIVED FOR MANDATORY CONTINUING PROFESSIONAL DEVELOPMENT IN NEW BRUNSWICK?

EXECUTIVE SUMMARY

There is an increasing trend of concern regarding the accountability of all organizations that serve the public, and of professions in particular. Globally, there is an ever-increasing emphasis on promoting professional quality. While other self regulating professions have had mandatory continuing education programs, otherwise known as “mandatory continuing professional development” (“MCPD”), in place for quite some time, the Law Society of New Brunswick (like many of our counterparts across the country) has come to realize that our obligations to the public require us to implement such a program for the New Brunswick bar.

Part of being a member of a profession includes the commitment to continuous learning. Lawyers must continue to enhance their competency by continuing to develop their knowledge and skills throughout their careers.

Mandatory continuing professional development initiatives seek to support and expand upon this culture of life-long learning, of continuous self-improvement. For most lawyers who are conscientious about keeping their knowledge and skills current, they would find that MCPD does not create additional learning requirements. For these lawyers a mandatory program will only entail an added reporting obligation. Mandatory continuing professional development is not only about making the incompetent better, but increasing the competence of all lawyers.

The introduction of MCPD is premised on assuring both the public and the profession that the Law Society is committed to establishing, maintaining and enhancing standards of legal practice in the Province. At the same time, we want to implement a program that will be as straightforward and streamlined as reasonably possible for lawyers, legal education providers and the Law Society, wherein lawyers will be able to select the type of learning that best suits them and their practices.

The primary recommendations for the New Brunswick MCPD program are as follows:

- Twelve (12) hours of mandatory continuing education/ professional development annually (January 1 – December 31) is a reasonable expectation of lawyers given the important and serious tasks and roles with which we are entrusted by our clients and/or employers. Twelve hours equates to roughly two full days of education or professional development per year.

- It may be possible to carry over some or all of the hours earned in excess of 12 annually to the following year, with the following year’s requirement being reduced accordingly.

- The Law Society, at this time, will not implement mandatory areas or topics which must be undertaken, which allows members more leeway or control in the direction of their educational activities, allowing them to choose the areas which they feel would be most relevant or beneficial to their individual practices. It is possible that mandatory education may be required in the future when there is significant legislative change in an area of practice, or when there are significant areas of risk identified which may require protection of the public, for example, for members opening trust accounts for the first time or opening a practice as a sole practitioner.

- Several provinces recommend lawyers undertake 50 hours annually of self-study, exclusive of structured educational activities, simply to stay current with the law. Self-study would be counted toward the mandatory 12 hours, up to a maximum of two (2) hours annually, with the exception of specific publications, articles or reports that the Law Society of New Brunswick encourages members to read, wherein it would be possible to specify a “credit hour” allowance for that piece, which could be counted over and above the standard maximum two hours for self-study. Members will report, at year end, how many hours of self-study they have completed; with fifty (50) hours being the recommended amount.

- The MCPD program will be based on a broad range of educational activity, extending beyond courses currently offered by CLE providers. The subject matter of these activities will be eligible for “credit hours” provided the subject matter of the activity contains sufficient intellectual or practical content, with the primary objective of increasing lawyers’ professional competence: substantive/ procedural knowledge; lawyering skills (advocacy , research, communication, etc.); and survival skills (practice management, time management, wellness, etc.). Credit hours will be available for:

    - Participation in courses:

        - In person, teleconference, or online “real-time” courses, streaming video and web courses (provided there is an opportunity to ask questions);

        - Two or more lawyers reviewing together a previously recorded course;

        - Post-LLB degree programs

    - Teaching:

        - To audience primarily composed of lawyers, paralegals, or law/articling students;

        - 3 hours of credit for each hour taught (no credit for repeat teaching of content);

        - Credit available only for volunteer/ part-time teaching, not regular employment;

        - Includes teaching legal skills training courses

- Writing:
  - Law books/articles for publication or use in course materials (i.e., Bar Course);
  - Credit based on actual time to produce final product, to max 6 hours per product;
  - Credit available only for volunteer/ part-time writing, not regular employment;
  - Credit in addition to teaching
- Study Groups:
  - Attendance in group setting at educational session in law firm, legal department, government agency or “in-house” activities with at least 2 participants – may be by telephone- credit hours are actual time spent at meeting, excluding time unrelated to MCPD educational activities;
  - Attendance at editorial advisory board meetings for legal publications;
  - Does not include file-specific activity as part of regular practice;
  - Lawyer has administrative responsibility for meeting and lawyer chairs meeting;
  - No credit for time spent reading materials, handouts, before or after session;
  - No credit where predominantly a social gathering without educational purpose;
  - Includes “Lunch and Learns”
- Local Bar and Other Meetings with an Educational Purpose:
  - Credit hours given for actual time spent on educational activities;
  - At least 2 lawyers participating, including by telephone
- On-line:
  - Time spent participating in online “real time” courses, streaming video and web courses

- Self Study:
  - Maximum 2 hours of credit out of 12, unless subject to above-noted exception;
  - Includes reading legal journals, publications, newsletters, etc.;
  - Includes audio, video or online courses, viewing listservs, online databases or media such as CD Roms

- Mandatory annual reporting by members of MCPD activities undertaken. A new Law Society database component should be in place which will allow members, through a confidential website link, to log on to their own member page to update their personal information, including their MCPD profile, allowing members to track their progress and remaining required hours. This database add-on is expected to have the capability to send reminders to members regarding their remaining requirements. Paper reporting will be available for those members who do not wish to use electronic means.

- Failure to complete MCPD requirements by December 31 of the calendar year would mean that the member is in breach of the Rules. Member could be granted an extension to complete the requirements by April 1 of the following year, upon payment of $200 late fee. Time spent on completing the requirements during this three month extension period will be accredited toward only the prior year's requirements, not the current year's requirements.

- If member does not meet requirements by April 1, could be suspended for non-compliance. Before suspension issued, member would receive 60 day notice of impending suspension and could apply to Law Society or MCPD Committee, which in its discretion, where special circumstances exist, may order that member not be suspended or delay suspension.

- Exemptions given for members not practicing (i.e., parental / medical leave), for members who completed the Bar Admission Course during that calendar year, and any additional exceptions as granted by the Law Society of MCPD Committee or on a case by case basis.

- Requirements are pro-rated for months in which member is not practicing (1 credit hour required per month or partial month member is in practice per calendar year)

The Law Society has a commitment to ensuring that lawyers treat their continuing education responsibilities seriously and to encourage lawyers to engage in career-long learning. MCPD will permit the Law Society of New Brunswick to develop a comprehensive, strategic approach to promoting the excellence and competence of lawyers through post-call learning and information support.

HAS THE TIME ARRIVED FOR MANDATORY CONTINUING PROFESSIONAL DEVELOPMENT IN NEW BRUNSWICK?

BACKGROUND

The topic of Mandatory Continuing Education or Mandatory Continuing Professional Development has been at the forefront of many debates in recent years amongst numerous professions. Mandatory Continuing Education or Continuing Professional Development ("MCE/PD") denotes a program of continuing education requirements, the completion of which is compulsory in order for professionals to be authorized to continue to practice their profession. Many professions, in New Brunswick and throughout the country, have well established mandatory continuing education or professional development regimes in place.

There is an increasing trend of concern regarding the accountability of all organizations that serve the public, and of professions in particular. Some previously self-regulated professions have become subject to standards legislated by provincial governments, including mandatory continuing education or professional development. Governments are advising professions that continuing education is a necessary part of their mandate.

In addition to increasing scrutiny from governments, there is a growing tendency across Canada for the public to question why the legal profession does not require MCE/PD, particularly when so many other professions do. Globally, there is an ever-increasing emphasis on promoting professional quality.

Nationally, the legal profession, to date, has seemingly lagged behind other professions in terms of determining the requirements for continuing education or professional development, and in implementing appropriate regimes.

Scrutiny of the legal profession's inaction in this regard will only increase over time. Our options remain two-fold: do nothing until we are told what to do, thereby potentially jeopardizing some of our rights to self govern; or deal with the situation upfront, on our own terms, with an appropriate regime designed for and by lawyers.

The Law Society of New Brunswick is committed to the continued self-regulation of the legal profession while establishing the highest of standards to uphold and protect the public interest in the administration of justice and to ensure the greatest competence in its members.

In its first strategic planning session, undertaken by the Law Society and its Council in January 2007, Quality Improvement, more particularly, Continuing Legal Education and Quality Assurance was highlighted as the number one priority to be addressed by the Society in the next several years.

Developing a program of post-call education for all lawyers was seen as the next logical step in promoting overall enhancement of quality in the practice of law. A program of mandatory continuing education/ professional development as a condition of permitting lawyers to continue to practice law is an important aspect of that enhancement. The purpose of this paper is to explore the idea of Mandatory Continuing Education / Professional Development, "MCE/PD",

including outlining the available options for the development of such a program, ideas regarding the difficulties such a program may pose, as well as some recommendations to be discussed by Council. Ultimately, the determining factor will likely be whether it is in the public interest that such a program be implemented in New Brunswick.

For the remainder of this paper the term Mandatory Continuing Professional Development ("MCPD") will be used to describe a program consisting not only of additional education requirements, but of a myriad of possible activities, all of which contribute to one's professional development.

POLICY CONSIDERATIONS

Once a lawyer is called to the Bar, the Law Society provides no education program that the lawyer may follow to guide his or her development. The application of knowledge is crucial to gaining competence. Skills may be picked up through practice, though there is a danger that if proper skills are not established early on, a lawyer will only continue to develop poor skills.

Part of being a member of a profession includes the commitment to continuous learning. On the job learning is only one form of education and ought to be supplemented by learning through other environments.

Most lawyers currently avail of the numerous opportunities for professional development within their fields. The vast majority of lawyers understand the value of undertaking continuing professional development activities, formal or informal, whether they are subject to reporting requirements or simply for their own benefit. MCPD initiatives seek to support and expand upon this culture of life-long learning, of continuous self improvement.

Lawyers must contribute to the protection of the administration of justice by continuing to enhance their competency, by continuing to develop their knowledge and skills throughout their careers, so they can do an increasingly better job representing their clients.

The law sometimes changes very rapidly. There can be a substantial overhaul of an entire legal regime based on a single case. It can be very easy to fall behind and, as a result, provide a disservice to yourself as a professional as well as to your clients. It is vital for lawyers to keep up with changes in the legal world, to keep fully educated and knowledgeable. Lawyers must accept that continuing their education is not an option, but an obligation to maintain and enhance their competence, both as a matter of professional responsibility and as a marketplace necessity. Lawyers should seek to improve their competence on an ongoing basis in order to facilitate optimum performance in each matter.

It is vital that lawyers meet their ongoing obligation of continuing education and professional development. For most lawyers who are conscientious about keeping their knowledge and skills current, they would find that MCPD does not create additional learning requirements. For these lawyers a mandatory program will only entail an added reporting obligation. For those who do not undertake professional development through a broad range of educational activity, they may not be providing themselves with sufficient professional development to remain current or on the cutting edge of new developments in the law.

Part of the Law Society's responsibility in protecting the public interest in the administration of justice is to establish standards for the education of lawyers. Quality of work is not something the Law Society tends to see until it becomes incompetence, as competence is not regularly monitored. Entry level competence is tested, but after that there is no competence testing. However, a MCPD regime is not intended to measure competence. The goal is to provide professional development tools for improvement so marginal lawyers can become good lawyers and good lawyers can become excellent lawyers. MCPD is not only about making the incompetent better, but increasing the competence of all lawyers.

The Law Society has a commitment to ensuring that lawyers treat their continuing education responsibilities seriously and to encourage lawyers to engage in career-long learning. We are all now life-long learners. MCPD will permit the Law Society of New Brunswick to develop a comprehensive, strategic approach to promoting the excellence and competence of lawyers through post-call learning and information support.

Implementing MCPD, which aims to improve the availability of educational and professional development resources and the relevance of those resources to individual practitioners, best meets the post-call education component of the goals of the Law Society in ensuring lawyers provide competent services. Implementing such a program should demonstrate to the public that it may have confidence that lawyers are competent, honest & ethical, and will also help the Law Society meet public expectations that it is doing all it can to ensure lawyers are competent in areas of the law in which they practice, consistent with its statutory mandate. This, in turn, is expected to enhance the quality of services provided by lawyers and therefore improve the standing of the profession in the community. At the same time, it will bring itself more in line with what other self-governing professionals do within the province.

The Law Society must ensure that lawyers are not only competent to practice law, but that they also do so ethically and that they are able to manage their practices. A solid ability to manage one's practice is a key component of a lawyer's ability to practice law competently and effectively. While keeping up with changes in the law is important, it is equally as important for lawyers to have good practice management skills and an understanding of professional responsibility issues. Most complaints made against lawyers are of professional misconduct. Lack of knowledge of these areas can give rise to serious regulatory consequences and can affect the public's confidence in lawyers and in the administration of justice overall.

In implementing such a program it is imperative to foster the feeling of necessity of MCPD among the members so they do not simply consider such a regime as the Law Society forcing more and more upon the membership. Lawyers must be encouraged to desire to take a program because it would be useful to their practice and to their development as a lawyer, not simply because they must.

The experience in other jurisdictions that have implemented MCPD is that the initial resentment on the part of the members dissipates quickly and MCPD soon becomes an accepted norm of the requirements of being a lawyer.

The nature of the requirements of a MCPD regime should be modest enough that lawyers will view them as reasonable and, furthermore, as not likely to increase the cost of legal services overall (as most lawyers already undertake at least 12 hours of continuing education or professional development annually).

In order to articulate, implement and evaluate a MCPD regime, the Law Society must turn its attention to providing members with ways to assess their own level of competence, as well as providing them with increased educational opportunities.

It is vital to make such a program accessible and valuable to all lawyers, including:

- Lawyers in large firms;
- Newly admitted lawyers;
- 10 – 15 year lawyers (it is largely knowing what these lawyers are undertaking for their education that allows the Law Society to identify what type(s) of education would enhance and maintain member competence);
- Those who practice in specialized areas (i.e., real property, tax, family, etc.);
- Those who handle trust accounts;
- Sole practitioners; and
- Lawyers in small to medium sized firms

The majority of problems that lawyers encounter are related more to their ability, or inability, to manage their practice than not knowing the law. Examples include:

- Dealing with client expectations;
- Managing the retainer and accounts/invoices (the business of law);
- Communicating effectively and in a timely manner (with clients and colleagues);
- Professional conduct; and
- Ethics

The MCPD regime must therefore:

- Foster a regular reflective practice of self assessment for lawyers;
- Offer education to enhance skills and expose lawyers to new ways of doing/ managing their practice; and
- Create a framework for monitoring for risk to ensure quality within the legal profession.

Learning is accomplished in a variety of ways and at a variety of levels. What is important is that the lawyer continues to develop his or her knowledge and skills throughout his or her career. Education must be thought of as a continuum. Lawyers must take time to consider and plan their professional development. In fact, the MCPD program is designed to promote excellence in the profession by requiring lawyers to turn their minds to their own continuing development.

We want education/ professional development activities to be:

- Relevant to the professional needs of lawyers;
- Pertinent to long term career interests as a lawyer;
- In the interests of the employer and the lawyer;
- Related to the professional ethics and responsibilities of the lawyer; and
- To contain significant substantive, technical, practical or intellectual content

The Law Society does not support or recommend the development of a simplistic program requiring lawyers to take a certain number of hours of course study based only upon the current availability of CLE programs. Education takes many forms and is offered by many providers. Education will continue to be offered by a diverse group of providers and must be offered in increasingly diverse delivery methods.

The Law Society believes that a MCPD program can accomplish the goal of ensuring a wider variety of professional education resources that are easily available & relevant to lawyers at all stages of their practices. Such a program will also ensure that lawyers use education resources. Lawyers will benefit by having a wider array of resources available to assist them in their practice. The public will benefit by being assured that there is a commitment within the profession to the establishment, promotion and improvement of the standards of legal practice in the Province by ensuring that, throughout the stages of one's career, a lawyer is continuing to upgrade and augment his or her skills and knowledge.

In short, the introduction of MCPD is premised on assuring both the public and the profession that the Law Society is committed to establishing, maintaining and enhancing standards of legal practice in the Province. At the same time, we want to implement a program that will be as straightforward and streamlined as reasonably possible for lawyers, legal education providers and the Law Society, wherein lawyers will be able to select the type of learning that best suits them and their practices.

ARGUMENTS IN FAVOUR AND AGAINST MCPD

There are many who do not feel that MCPD programs are necessary or worthwhile. The arguments in favour and against MCPD are the same nationally and must be understood in order to decide what might be done in terms of implementing a program. They are as follows:

(a) Arguments in Favour of MCPD:

• Mandatory continuing professional development raises professional competence by exposing lawyers to new developments and renewing basic knowledge and skills. Law is in constant flux – therefore requiring lawyers to take continuing education is necessary to ensure lawyers keep up with the law and remain competent;

• All lawyers would benefit from exposure to new developments in theory and practice contained in well-designed programs;

• Mandatory continuing professional development programs demonstrate to the public that the legal profession is resolved to combat competency concerns and that it is committed to uphold and protect the public interest in the administration of justice by establishing standards for education;

• For lawyers who find practice pressures deter them from taking continuing education programs (even for those who enjoy them when they can find the time to take them), mandatory continuing professional development will provide a positive incentive to take time out to engage in post-call education/ professional development activity that they may not otherwise undertake;

• Young lawyers, tasked with large volumes of work, will not feel uncomfortable asking firms for time off to attend educational or professional development activities or requesting that their firms cover their cost, given that MCPD is mandatory;

• Extra funds from mandatory continuing professional development programs would improve the quality and quantity of continuing education programs and would assist providers of such programs to devote more time and resources to develop more effective programs;

• Recertification based on continuing professional development is preferable to periodic reexamination;

• Some evidence that lawyers in jurisdictions with mandatory continuing professional development *believe* it increases competency;

• The Law Society will clearly articulate its expectations to lawyers and the public concerning MCPD which will further emphasize the importance that such education plays in assuring competence in its members;

• Online and technology-based continuing education is expanding quickly throughout the Province, thereby enhancing access by reducing geographic and time barriers;

• The regime is based on credits broadly categorized and therefore readily attainable by lawyers regardless of their location;

• Many other jurisdictions and most, if not all, other professions in New Brunswick have mandatory continuing professional development programs – how do we explain to the public why we do not?

(b) Arguments Against MCPD:

• There does not appear to be any empirical evidence proving that participation in mandatory continuing professional development actually *improves* lawyer competence;

• It may be expected that lawyers will resent the requirement. Forcing people to take courses may interfere with their desire to learn;

• Only a small percentage of lawyers are truly incompetent – it is therefore unfair to force all lawyers to comply with a program designed to remedy the problems of a few;

• Mandatory continuing professional development may simply be a facile response to public concern, and therefore be no more than superficial window-dressing that does not actually address lawyers with serious competency problems. It is very difficult to teach practical skills, proper management and good judgment. Mandatory continuing professional development may therefore actually mislead the public into believing that all lawyers are current and competent in their field of practice, which may not be the case;

• Standard mandatory continuing professional development programs do not differentiate between types or modes of learning;

• Mandatory continuing professional development plans are expensive, both for the regulator in administering, and for the practitioner in attending due to program fees, travel costs, and lost productivity resulting from time spent away from the office;

• The cost of legal services might increase depending upon the increase, if any, of Law Society fees and cost of mandatory participation in courses.

AUTHORITY FOR MANDATORY CONTINUING PROFESSIONAL DEVELOPMENT

It is part of the Law Society's responsibility in protecting the public interest in the administration of justice to establish standards for the education of lawyers.

Section 5 of the *Law Society Act, 1996*, c. 89 (1996) states:

PART 2

Objects

5. It is the object and duty of the Society

a. to uphold and protect the public interest in the administration of justice,
b. to preserve and protect the rights and freedoms of all persons,
c. to ensure independence, integrity and honor of its members,
d. to establish standards of education, professional responsibility and competence of its members and applicants to membership,
e. to regulate the legal profession, and
f. subject to paragraphs (a) to (d), to uphold and protect the interests of its members.

Many are of the opinion that in order to fulfill these objects and duties, a system to ensure that all lawyers continue to learn, increase their overall knowledge and expand upon their professional development is required. As previously noted, the Law Society of New Brunswick, with its Council, considered this subject in their strategic planning session in 2007 and identified Continuing Legal Education and Quality Assurance as worthy of in-depth examination.

A continuing legal education or professional development program is, in fact, already contemplated by the *Law Society Act, 1996*, at sections 16 and 31:

PART 4

Powers of Council

16(1) Council shall govern and administer the affairs of the Society.

16(2) Without limiting the generality of the foregoing, Council may
…

(n) establish, administer, maintain and operate a system of legal education, including

(i) the setting of academic requirements for the enrolment of students-at-law and the admission of members,

(ii) the operation of a bar admission course,

(iii) the operation of a system of continuing legal education,

(iv) the operation of a system of compulsory continuing legal education and require that every member, unless exempted in writing by the Executive Director in accordancewith the rules, attend and successfully complete a course of study approved by Council as a condition of the right to practise law,

(v) the operation of a program of remedial legal education, and

(vi) the operation of a program of loss prevention and quality assurance

It was further contemplated that participation in such a program be mandated upon lawyers as a condition precedent to continued membership in the New Brunswick Law Society:

Continuing legal education

31(1) Practising and non-practising members shall complete such mandatory continuing legal education programs as prescribed by the rules as a condition of maintaining membership in the Society.

PROGRAM OPTIONS

There are a vast array of possible regimes to promote the goals, objects and duties of the Law Society. Options which may foster competence in the areas in which lawyers practise and encourage ongoing learning include:

A. Mandatory Periodic Retesting

This could entail periodic retesting of all lawyers on certain topics (i.e., legislation and rules of civil procedure/court; ethics; and professional conduct); or The periodic retesting of a particular group of lawyers on limited topics (i.e., real property law; family law; corporate law; etc.).

B. Limited Licensing Provisions

This could entail limiting a member's licence to practice when called to the Bar to certain situations. In order to remove these limitations on practice a lawyer would have to take certain courses or complete certain activities or programs of study prescribed by the Law Society, and/or pass an examination on a certain area of law. The Law Society would have to decide what areas of law are amenable to this option and ensure it is satisfied with the courses and educational activities available. For example, all lawyers registered as subscribers to the Land Titles system must take and pass a Land Titles course.

C. Specialist Certification

Lawyers would be designated specialists in various areas of law by meeting prescribed lawyer education standards and/or examinations. No lawyers would be restricted from practicing in these areas, but only those who had completed the additional educational requirements would receive Law Society designation as specialists.

D. Mandatory Reporting of Voluntary Completion of Continuing Education/ Professional Development

There would be no requirement to complete ongoing education activities, however there may be a recommended number of activities that lawyers are encouraged to engage in, and a requirement to report, annually, the educational and/or professional development activities actually undertaken. There would be no consequences for not meeting the recommended amount of educational and/or professional development activities. This is the middle ground solution, lying between the laissez-faire approach of relying on lawyers to meet their professional obligations to keep up to date in the law, and a more interventionist approach of imposing a regulatory requirement that lawyers must undertake a certain amount of education annually.

E. Mandatory Continuing Education/ Professional Development

There is an established guideline for the types and/or amount of continuing education or professional development activities required to be undertaken by lawyers, annually or over some greater period of time. It may be left to the lawyers to decide upon or identify subjects and modes of education they wish to take, subjects may be specified, or there may be a combination of both. There would be mandatory reporting and there may be consequences for not meeting the prescribed requirements in the allotted time. Even within mandatory continuing education, this can encompass numerous components: formal educational programs; experiential learning; self-study as well as many other formats of learning. There is considerable leeway for the number of hours required and the types of activities that meet the criteria to qualify for inclusion in the program.

Some Canadian provinces have instituted variations of these regimes, while other provinces and territories have yet to take any action. Mandatory continuing education/ professional development, however, is a relatively new program which is currently being considered by multiple provinces. In the next section we will examine several of these MCPD regimes in greater detail. For a summary of MCPD programs by province/ territory see Appendix 2.

THE BRITISH COLUMBIA MODEL

The most structured MCPD program is the newly instituted program in British Columbia, which came into effect on January 1, 2009.

British Columbia originally introduced a program of mandatory reporting of voluntary continuing education in 2004. However, the Law Society of British Columbia discovered from the mandatory reports that approximately one third of all lawyers in the province reported no continuing education/ professional development. This was particularly true of senior members of the Bar. This was of great concern to the Law Society of British Columbia.

As a result, the Law Society of British Columbia set out to develop a program which would, among other things:

- Serve as a basis for a comprehensive post-call education program;
- Provide for the development of skills as well as knowledge about developments in the law;

- Provide resources that are relevant to lawyers at various stages of their careers;

- Be based on criteria (or "credits") that are broadly categorized and will therefore be easily attainable by lawyers irrespective of their practice location; and

- Be able to ensure that the subjects that the Law Society considers to be important to the lawyer's professional development are addressed, irrespective of market consideration.

The Law Society of British Columbia initially considered four broad options:

1. A program requiring a certain number of hours of study, of which a portion requires the study of certain subjects;

2. A program of required courses for all lawyers, with the remainder of hours to be made up of activities individually chosen by lawyers;

3. A program of required courses for certain areas of practice; and

4. A program requiring a certain number of hours of study through approved activities, with credit for professional development activity not to be limited to course study, but to be extended to a broad range of activities.

Of these options, the primary characteristics of the British Columbia model, as adopted, are as follows:

1. Each practising member of the Law Society of British Columbia must complete not fewer than 12 hours per year of CPD undertaken in approved educational activities that deal primarily with the study of law or matters related to the practice of law.

2. Approved educational activities include:

   (a) <u>Traditional Courses and Activities:</u>

- Attendance, in person, at a course offered by a provider approved by the Law Society;

- Participation in online "real time" courses, streaming video, web and/or teleconference courses offered by a provider approved by the Law Society where there is an opportunity to ask and answer questions;

- Review, in a group with one or more other lawyers, of a video repeat of a course offered by a provider approved by the Law Society;

- Completion of an interactive, self study online course offered by a provider approved by the Law Society, provided that a quiz/testing component is included in the course (it is not necessary for the lawyer to submit the quiz for review);

- Teaching at a course related to law or to the practice of law (including the Bar Admission Course or CLEs). In the case of teaching, the lawyer is entitled to a credit of three hours of reporting for each hour taught. Credit is not available for repeat teaching of substantially the same subject matter within the same reporting year and credit is not available as part of full-time or regular employment;

- "Course offered by a provider approved by the Law Society" includes:
any course offered by the Continuing Legal Education Society of British Columbia, the Trial Lawyers' Association of British Columbia, the Canadian Corporate Counsel Association, the Canadian Bar Association, the Federation of Law Societies of Canada, or the Law Society of British Columbia;

- Any course offered by Canadian law schools dealing primarily with the study of law or matters related to the practice of law;

- Any other course, or provider who offers courses, dealing primarily with the study of law or matters related to the practice of law, provided that the attendee has obtained prior approval from the Law Society of British Columbia.

(b) Non-Traditional Activities:

- Attendance at CBA section meetings;

- Attendance at a course or other education-related activity offered by a local or county bar association;

- Participation in (including teaching at) an education program offered by a lawyer's firm, corporate legal department, governmental agency or similar entity, provided that the program is offered in a group setting;

- Participation in a study group of two or more provided that the group's study focuses on law related activities (including by telephone), provided that a lawyer has overall administrative responsibility for each meeting, a lawyer chairs each meeting, the activity is not file specific, and credit is not given for gatherings in a social setting;

- Writing law books or articles relating to the study or practice of law for publication or to be included in course materials. Credit is based on actual time to produce the final product, to a maximum of six hours per writing project (and is in addition to credit for teaching);

3. Not less than two hours of the required 12 hours of CPD must pertain to any one or any combination of the following topics:

- professional responsibility and ethics;

- client care and relations;

- practice management.

4. Each lawyer must report to the Law Society the number of hours of approved professional development activity completed over the previous 12 month period. Failure to complete and report the minimum number of required hours will result in a breach of a Law Society Rule, and may subject the lawyer to sanctions.

Self-Study

A number of groups commented that lawyers are very good at independent learning and independent self-study should therefore be sufficient for MCPD purposes. The Law Society of British Columbia agreed that self-study is important but for purposes of the program it recommended education where a lawyer is more likely to be engaged with others is more preferable for the minimum 12 hours requirement. Self-study is expected to be undertaken in addition to the MCPD program, and therefore self-study does not count towards the 12 hours unless undertaken in connection with interactive online courses with a testing component.

The Law Society of British Columbia does not discount the general importance of lawyers engaging in self-study and feel this should be encouraged, and members are asked to report the number of hours per year spent on voluntary self-study (reading, participating in Listservs, review of course video, other archived material etc.); with 50 hours stated to be the recommended norm.

British Columbia Accreditation Process

1. All reportable credits will be approved by the Law Society in either of two ways:
(i) by pre-approval of the provider; or
(ii) approval (before or after the event) of individual courses and other educational activities;

2. An individual course or other educational activity offered by a pre-approved provider does not require further approval unless requested by the provider;

3. Providers are pre-approved and remain pre-approved if they maintain integrity and quality according to the Law Society standards;

4. Lawyers can individually apply for approval of courses, either before or after the course or other educational activity takes place, where the course has not otherwise been approved;

5. All applications by providers and lawyers will be submitted electronically; and

6. Approvals will be made by Law Society staff.

The Law Society of British Columbia recommends courses offered by any of the current CLE providers be recognized, and courses relating to law offered by universities be recognized. Other courses by other educators could be available for credit, if they have substantial connection to legal issues. Lawyers should check whether the course meets the requirements before they enroll.

Recognizing courses in this manner avoids having to create a full accreditation system for courses & course providers, as the Law Society of British Columbia is not convinced that a full accreditation system is necessary at this stage.

Compliance and Reporting Requirements

The Law Society of British Columbia determined that:

1. The CPD requirement will be based on the calendar year, with the first compliance date to be December 31, 2009 for the 2009 year;

2. Lawyers will log in to the Law Society website and click on a link to the program, where they will be shown their individual credits and time remaining to comply with the CPD requirement for the given calendar year. After completing a course or other accredited learning activity, lawyers can make that addition to their record;

3. The lawyer will be notified electronically by the Law Society of the approaching calendar deadline and, if the deadline is not met, will be given an extension of 90 days to complete the necessary requirement (in which case a late fee will be charged). The lawyer will be suspended from practice for failure to comply within the extended 90 day time limit. Rules will include provisions and grounds for applying for further extensions;

4. The twelve hour requirement is subject to adjustment for entering or re-entering practice midyear. Members who have been exempt during the reporting year, but who resume practising law within the reporting year, must complete one credit hour for each full or partial calendar month in the practice of law;

5. Embedded ethical, practice management, and client care and relations content will comply with the two hour requirement. Providers will also be encouraged to offer non-embedded content.

Exemptions

1. All members of the Law Society with a practicing certificate, whether full or part-time, are subject to the requirement, with the following exemptions:

(a) Members with a current practicing certificate who submit a declaration that they are not practising law. Examples of members who might submit a declaration that they are not practising law could include:

- inactive members;
- members on medical or maternity leave;
- members taking a sabbatical;

(b) New members who have completed the bar admission program of a Canadian law society during the reporting year;

(c) A partial exemption will be available to members who resume practising law within the reporting year after having been exempt, and new members by way of transfer (subject to b, above). These members must complete one credit hour for each full or partial calendar month engaged in the practice of law;

(d) No exemption will be available for being too busy (such as a long trial); or practice of law having been in another jurisdiction.

Consequences of Not Completing the Continuing Professional Development Requirement

British Columbia's amended Rules deal with the consequences if a lawyer fails to complete the requirement for the year.

Failure to complete the requirement for the year would mean that the lawyer is in breach of the Rules. The Rules permit a lawyer to complete the requirement after the end of the year, if the requirement is completed prior to April 1 of the following year. The lawyer will then be deemed to have complied with the requirement. Time spent on completing the requirement during this three month extension period will be accredited toward only the prior year's requirement, not the current year's requirement. A late fee of $200.00 must also be paid.

If the requirement is not completed by April 1, the expiry date of the extension period, the lawyer is automatically suspended. However, the lawyer will be given at least 60 days notice that the lawyer is about to be suspended for non-completion of the requirement, and will be able to apply to the Practice Standards Committee, which, in its discretion where there are special circumstances, may order that the lawyer not be suspended, or may delay the suspension. As this notice will be given during the period of time in which the lawyer may still complete the requirement and be deemed to have complied with the rule, the Committee anticipates that most, and ideally all, lawyers will simply complete the requirement rather than face suspension.

There is no specifically worded authority in the British Columbia Legal Profession Act permitting the Benchers to create rules to suspend a lawyer in these circumstances, and the Law Society of British Columbia compares this with the power to create rules to suspend a lawyer who fails to meet standards of financial responsibility under the Act (i.e., membership fees). The Law Society of British Columbia has determined that the combination of the rule which authorizes the Benchers to establish and maintain a system of continuing legal education, and the rule which authorizes the Benchers to make rules for the carrying out of the Act, ought to be read to permit the Benchers to create a system of CPD that can be enforced in the most effective manner possible, if the approach is principled and fair.

The Law Society of British Columbia has considered different methods by which to ensure compliance, and concluded that the "suspension" route is the most effective and principled. It is effective because a suspension from practice is a considerable consequence that most lawyers will want to avoid. It is principled because the goal of the rules ought to be to ensure that lawyers complete the requirement. On the other hand, a monetary penalty or fine would simply enable lawyers to pay a sum of money to the Law Society rather than complete the continuing professional development requirement, which the Committee concludes is neither an appropriate nor principled outcome. The "suspension" consequence, as drafted, is also fair because the lawyer is given ample notice of a suspension, may complete the requirement in the meantime and be deemed to have complied with the rule or, if necessary, be able to apply to the Practice Standards Committee to seek relief from the suspension if there are special circumstances to justify such relief.

The British Columbia program was designed to accomplish two desired outcomes:

1. Introduce MCPD for lawyers that meets the goals outlined above; and

2. Ensure that lawyers may meet MCPD requirements in a variety of ways, recognizing that traditional CLEs can be expensive and courses do not always meet the learning needs of all practitioners (either due to subject matter or level of experience the course is aimed at), the Law Society of British Columbia has worked to identify & include non-traditional activities through which lawyers may meet the CPD requirements.

The combination of two hours of specific topics required of the 12 recognized the Law Society's responsibility to ensure lawyers receive, annually, at least some education in areas important to the regulatory responsibilities that the Law Society must promote - topics that the Committee considers have not been routinely addressed in the voluntary CLE programs.

The Law Society of British Columbia feels that such a program is advantageous for those in remote areas but feels that the relatively modest 12 hours of CPD requirements is attainable, especially if course providers will have most of their programs available through live webcasts.

THE ONTARIO MODEL

The Law Society of Upper Canada has no MCPD program for lawyers already called to the Bar. There is, however, mandatory reporting of any professional development undertaken. Voluntary minimum expectations are recommended of 12 hours of CLE and 50 hours of self-study annually.

The Law Society of Upper Canada has updated its licensing process to include a new professional responsibility and practice course to be integrated with its articling program. Furthermore, beginning in 2010, all new lawyers called to the Bar in Ontario will be required to complete 24 hours of compulsory professional development during their first two years of practice.

The necessity for MCE/PD in Ontario is tempered somewhat by their Certified Specialist Program, which requires compliance with specified professional development requirements in order to obtain a specialist designation, comprised of the completion of no less than 12 hours of CLE per year, in two years immediately preceding the date of application and one additional year within the past five years. This requirement may be met through participation in CLE programs or alternative methods such as, but not limited to: teaching or lecturing in a course, authoring of books or articles for publication, post-graduate or other studies, participating in the development and/or presentation of CLE programs related to the specialty area, or involvement in the development of policy related to the specialty area.

THE NOVA SCOTIA MODEL

A Continuing Competency Task Force was created in 2006 to make recommendations about how a continuing competence regime could be provided to the Nova Scotia Members of the Barristers' Society. This Task Force examined continuing professional development and determined that a comprehensive competence regime would require attention to three areas: self assessment, education and quality assurance.

Self Assessment

The Barristers' Society started from the assumption that lawyers are competent, and that at their call to the Bar, new lawyers are competent to the degree they should be. The question then becomes how to ensure that lawyers continue to be competent. One of the ways, and certainly the least intrusive way, is to provide lawyers with the tools, standards and other information that they can use to assess themselves. What is required here is self-reflection. The individual lawyer must make use of the information the Society provides to assess for themselves whether they are maintaining and/or enhancing their competence.

The Task Force outlined numerous options to help lawyers self-assess:

- On-line self assessments that make use of already existing tools in Quebec and Ontario;
- A template for a professional development plan for lawyers to use;
- Additional questions on the annual member report to find out about member plans for professional development (thereby planting the seed that it is important and checking in as the report is an already existing mandatory requirement);
- Offer examples of self-assessment that allow people to see how they are already selfassessing in their work (i.e. feedback);
- Begin to capture annual member report data by individual, not anonymously;
- NSBS can actively educate lawyers how to self-assess (i.e. easy to offer a session outside the metro area where small firms can come together for a joint session);
- Change the role of educators at the Nova Scotia Barristers' Society from front line training to facilitators for reflective practice and/or "train the trainer"; and
- The Nova Scotia Barristers' Society could play the role of enabling other educators (CBA, APTLA) in this function

Education

The Task Force was adamant that education takes many forms and is offered by many providers. As such, it would not recommend that all education be offered by the Society alone, nor would it support a narrow view of what constituted education. It recommended that education be offered by a diverse group of providers and be offered in increasingly diverse delivery methods.

The Task Force proffered:

- Educational offerings should be based on some form of self assessment in order to ensure that the sessions be based on learner needs and are therefore relevant;

- Openness to different forms of learning, use a variety of techniques/models not just lecture and classroom setting. (i.e. BC model includes in-house training, mentoring, online, etc);

- Tailor activities to individual learning needs;

- Mandatory as needed, i.e., for a new area of law like the Land Registration Act;

- Establish and publish a continuous learning curriculum that is developmental in nature and that addresses the issues that arise for lawyers throughout their practice life; and

- Create a marketplace in which others could offer education. The Society could offer expertise and assistance to identify what is needed rather than necessarily being the deliverer of the education.

Quality Assurance

With respect to Quality Assurance, the Task Force recommended the following:

- Establish law office standards with two components:

    - Lawyer/client component
    - Law office management component;

- Give tools to lawyers at the time of the Annual Member's Report;

- Adapt Quebec/Ontario Quality Assurance checklist for NS and begin to use it in the PRPRS (professional responsibility practice reviews) to develop a consistent format for reports and give us some comfort using it;

- Ensure the quality assurance approach is incorporated into the new Land Registration Act audits; and

- In 5 years consider whether a comprehensive quality assurance system is required, which would include some form of peer review or mandatory audit as seen in Ontario and Quebec.

The Nova Scotia Task Force chose not to require Mandatory Continuing Education/ Professional Development, rather to recommend that all members of the Society participate in at least 12 hours of structured CPD annually, and at least 50 self-study hours annually. Structured activity includes preparation and teaching of courses as well as attending courses, including teleconferences, and other on-line technologies.

There is mandatory reporting of the continuing education or professional development on an annual basis.

The Task Force recommended that continuing professional development activities be broadbased and include:

- Live CLE programs, workshops, conferences, in-house programs;
- Telephone CLEs;
- Interactive On-line CLEs;
- Reading of journals and printed material;
- Audio and video tapes and DVDs;
- Writing published texts, articles, or licensing process/ CLE materials;
- Preparation for and instructing in CLE, law school programs and in-house training;
- Organized discussion groups such as CBA subsection meetings;
- General education relevant to the member's practice; and
- Participation in post-LLB education programs.

The Task Force did not favour a wide spread program of mandatory education. Instead, it believed the Society should continue to collect data and monitor lawyers use of current opportunities, leaving it open to implementing any changes, as necessary, based upon the data collected. The Task Force offered the following principles for consideration:

- The Society should give serious consideration to implementing mandatory education when there is significant legislative change that will overhaul an area of practice, as with the Land Registration Act. Mandatory education during these times will ease the learning curve and protect the integrity of the system and the public interest. Looking forward, a complete overhaul of the current civil procedure rules is one area where mandatory education would likely be required.
- The Society also needs to consider implementing mandatory education when there are significant areas of risk that require it to protect the public interest. One area where this has already been done is when a member wants to open a trust account for the first time. In addition, this might be required when members wish to change from public to private practice or to go back into practice after a lengthy absence. In both Ontario and British Columbia courses have been created for these situations. A member wishing to go into private practice from public or to return after an absence is required to take and pass a course prior to their return. The Society may also wish to require members who have multiple complaints that result in discipline to take professional responsibility education or to take some type of remedial education if the issue is member competence.
- The Society may want to consider requiring mandatory education when/if statistical data from both professional responsibility and/or claims indicates that education is needed to protect the public interest. Studies and the statistics gathered by the Society support the fact that the majority of problems lawyers

> encounter are related more to their ability or inability to manage their practice than not knowing the law. Dealing with client expectations, managing the retainer, communicating effectively and in a timely manner are all things that result in complaints and law suits. While it is important that lawyers keep up with the law it is equally important to ensure that they have good practice management skills. These skills would include professional responsibility and legal accounting skills. It is common across Canada for lawyers to avoid taking these kinds of “soft” courses. If the Society were to determine that members do not engage in this type of education and continue to have difficulty in this regard there may be a case for requiring this type of education.

Since 2006, Nova Scotia has made certain courses mandatory for lawyers practicing in certain areas of law, as a result of the recent implementation of new Nova Scotia Civil Procedure Rules. All practicing members and articled clerks must take Tier I Civil Procedure Rules training, and those who reported 20% or more (combined) of civil litigation, administrative, or family law on their 2008 annual members report and all articled clerks must take Tier II training. There is also a mandatory course pertaining to the *Land Registration Act* for those who practice in the area of real property.

THE ALBERTA MODEL

In Alberta, Council of the Law Society agreed that most lawyers are competent – that only about five percent pose a risk to the public or an embarrassment to the profession, therefore a continuing professional development program should not make the 95 percent, the vast majority of competent lawyers, pay for the other five percent.

After an extensive review and engaging the services of educational consultants, the consultants introduced the idea of the Professional Development Plans ("PDP"). Professional Development Plans do not focus on counting hours of programming or mandatory hours. PDPs focus on the professional development needs of each individual lawyer and, to that extent, are lawyercentered.

The Law Society of Alberta came up with three basic categories of skills that were integral to professional competence:

- Substantive /Procedural knowledge;
- Lawyering Skills; and
- "Survival Skills" (e.g. practice management, time management).

The Law Society of Alberta developed a basic list of continuing professional development activities which would fall within each of the first three categories and identified the following activities:

Substantive/ Procedural Knowledge

- Attending seminars (including in-house seminars)
- Attending CBA subsection meetings
- Any committee work involved in studying the common law, legislation, law reform, etc.

- Publishing
- Teaching
- General reading (law reports, articles, etc.)
- File-specific reading of a non-routine nature

Lawyering Skills

- Advocacy
- Research
- Writing/drafting
- Negotiation, ADR skills
- Ethical decision-making skills
- Mentoring
- Advising/counseling
- Client communication
- Interpersonal skills
- Facilitation skills
- Leadership and firm management skills
- Presentation skills
- Computer /technology skills

Survival Skills

- Time management
- Marketing
- File management
- Stress management
- Personal practice management
- Law firm management

The Alberta Self-Assessment and Planning Process

The Law Society of Alberta developed a 4-stage approach to the creation of Professional Development Plans:

1. Review by the lawyer of the Law Society of Alberta MCPD requirements;

2. Performance by the lawyer of a self-assessment process. The lawyer will reflect on how to improve their practice, and review their educational needs on various aspects of their practice including communication, practice management, etc. The self-assessment could be a series of questions or statements to assist in reflections on accessing the appropriate learning opportunities and resources;

3. The lawyer will develop a professional development plan. They will be asked to develop a plan on how they will improve in the areas identified in their self-assessment and provide a plan for the resources they will access to complete their learning such as: CBA sections; practitioner groups; self-study; courses; etc. This will lead to the development of action items and the creation of a general plan to meet self-improvement goals;

4. At the end of the year, and before the next year's CPD filing requirement, the lawyer would assess the past year and whether they have met their articulated goals in the previous year. A new professional development plan would then be created for the next year.

Both the self-assessment tool and the professional plan tool were designed to be accessed online (although they could be printed off and worked on in hard copy by those who are uncomfortable using technology). The plan brings forward information from the self-assessment tool, and includes drop-down menus with all the relevant learning possibilities, including non-courses.

The Law Society of Alberta reached a consensus on the following with respect to how to regulate this initiative:

- This initiative applies to all active members resident in Alberta;
- The plan needs to be completed annually, in writing. Most lawyers will complete the Self-Assessment tool and professional development plan and access the Resource Bank Online. However, the process should be able to be translated to a written (hard copy) form for those who are not comfortable using technology;
- The professional development plan need not be filed with the Law Society of Alberta or any other agency; however, a copy must be kept by the member for some period of time and produced on demand;
- The professional development plan that is completed and kept will not include the selfassessment tool worksheet;
- The lawyer will check a box on one of the annual filing forms to the effect that the annual professional development plan is completed;
- In the second and subsequent year, there will be a box (or a declaration) to the effect that all or some of last year's professional development activities were completed. The report on the preceding year will in effect become part of the professional development plan for the next year;
- Plans will be reviewed on a risk basis – that is, if a member's competence or conduct is under any kind of review, the plans may be demanded and reviewed
- There will be no spot audits on professional development plans other than what occurs through existing Law Society reviews (Practice Review, complaints or conduct, or any other review process the Law Society may adopt, e.g. practice assessments); and
- There might be a fine in the future for failure to declare.

The Law Society of Alberta contemplates a very light regulatory scheme. It is designed to be easy and inexpensive to maintain, and to be minimally intrusive for members. The lack of measurement is intentional. Hours can be measured, but that does not measure learning, and learning is not equivalent to competence. The Law Society of Alberta feels that the administrative cost of accreditation, measurement and enforcement of MCPD is not the best use of the Law Society's resources.

The Law Society of Alberta decided not to adopt a mandatory attendance at continuing legal education courses. The Law Society of Alberta is of the opinion that most lawyers do a remarkable job of keeping on top of the law and practice in their particular fields by reading relevant journals and papers, subscribing to web-based update services, researching the law for particular client files, participating in their local bar association activities and programs, and attending online or in-person continuing legal education programs.

The Law Society of Alberta believes that the vast majority of lawyers understand the value of undertaking continuing professional development activities, whether formal or informal, whether subject to reporting requirements or simply for their own benefit. The MCPD initiative seeks to support and expand upon this culture of continuing professional development, continuous selfimprovement. The MCPD initiative also creates an accountability regime so that the Law Society of Alberta, as the regulator of the legal profession, can satisfactorily answer the question:
"What is the Law Society doing to ensure that lawyers continue to deliver high quality legal services"?

The Law Society of Alberta considers that the Alberta process has two advantages over the current process where a lawyer chooses courses from brochures that show up in the mail from time to time:

- It is intentional as opposed to a response to CLE brochures, and adults learn better when learning is self-directed; and

- Lawyers have a huge range of options to choose from in terms of courses and non-course activities

RECOMMENDATIONS

A. WHICH OPTION TO DEVELOP?

There are two main purposes of the MCPD:

1. Accountability; and
2. The enhancement and strengthening of the culture of continuous learning

It is the opinion of the author that MCPD programs contribute to lawyer competence and benefit the public and the profession by assuring that lawyers remain current with respect to the law, the obligations and standards of the profession, and the management of their practices.

In reality, most lawyers understand the necessity of MCE/PD programs in achieving these purposes, and want to do their part in the promotion of these two purposes.

The Law Society of New Brunswick must therefore consider what can be done to address the wants and needs of the majority of lawyers who are competent but who wish to enhance their skill and proficiency and, at the same time, do what is necessary to enhance the competency of those lawyers who either do not realize that their level of competency is insufficient or those who do nothing, although they realize their skills and knowledge require improvement.

Of all the regimes examined, the author is of the view that the British Columbia model would be the regime most suited to the attainment of the objects and duties of the Law Society of New Brunswick, in conjunction with the above noted purposes.

No matter how much we know, how good we are at what we do and how long we have been good at it, all members still need to learn and grow- not just because law and practice are always changing, but because we need to keep growing and learning to stay interested and mentally sharp.

For a summary of the recommendations for a mandatory continuing professional development program in New Brunswick see Appendix 3.

- MCPD Time Requirements

Twelve (12) hours of mandatory continuing education/ professional development annually is a reasonable expectation of lawyers given the important and serious tasks and roles with which we are entrusted by our clients and/or employers. Twelve hours equates to roughly two full days of education or professional development per year. That is surely not too much to ask of a group of professionals afforded the respect and recognition such as lawyers expect to be afforded.

- Mandatory Areas/ Topics

Is there a necessity to make certain areas or topics mandatory? For example, do we want to implement British Columbia's requirement that at least two hours must pertain to a combination of professional responsibility and ethics; client care and relations; and/or practice management? Do we want to mandate certain skills development for newly admitted lawyers? Do we want to mandate specific courses for specific practice areas, or for certain situations such as opening a sole practice or opening a first trust account?

This would allow the Law Society to determine which skills and subjects it considers lawyers need to study (i.e., ones not met well by lawyers or where there is real or perceived lack of knowledge of an issue). Judges and senior practitioners could provide feedback to the Law Society of areas where they feel lawyers need to improve their skills and/or competence. Such programs would also allow the use of judges and/or senior practitioners as teachers, where credit is given for teaching younger lawyers the necessary skills and knowledge in various practice areas.

We must first examine what professional development services and materials are currently available to lawyers. At present, there appear to be few CLEs offered on the subject of ethics and professionalism. As such, it would likely be necessary for the LSNB to either develop and offer such courses or request others to do so, in which case the LSNB would likely be required to approve or accredit the course or activity.

A lack of mandatory areas of study would also allow lawyers more leeway or control in the direction of their educational activities, allowing them to choose the areas which they feel would be most relevant or beneficial to their individual practices.

The author is of the opinion that until the educational activity offerings have increased, no mandatory areas or topics be included in the required hours. This would, of course, be subject to amendment as the MCPD program develops and evolves. For example, if statistics show a higher risk for incompetence in specific areas, it may be necessary to develop mandatory courses for those who practice in that area of law in order to protect the public interest. Mandatory education may be required when there is significant legislative change that will essentially overhaul an area of practice. Eventually, mandatory courses may be developed if considered to be in the public interest in specific instances, i.e., for lawyers opening a sole practice or lawyers opening trust accounts for the first time.

The Law Society of New Brunswick must prioritize the areas in which MCPD is needed to support the public interest and the membership, and identify these for Council (i.e., from a riskanalysis standpoint). It is equally important to ensure that members have good practice management skills, including professional responsibility and accounting skills. It is reported nationally that it is common to avoid taking these types of courses.

If, after review, concerns develop regarding the nature or usefulness of the education taken or offered, or it becomes evident that there are better ways to ensure competence, reforms to the program may have to be considered.

- Self-Study

Should self-study be included in the requisite 12 hours of continuing education or professional development? Several provinces suggest a recommended amount of 50 hours annually of selfstudy, in addition to structured educational activities, simply to stay current of developments in the law. This amount would be comprised of only one hour of study per week. It is doubtful if there are any lawyers who do not spend at least this amount of time on self-study, whether by virtue of reading texts, caselaw, print materials and publications such as the *National, Canadian Lawyer, The Lawyers Weekly*, or other legal journals and publications, or by viewing listservs, on-line databases or media such as CD Roms, videotapes and audiotapes. The entire purpose of the MCPD program could be compromised if every lawyer simply fulfilled his or her annual requirements by declaring that they spent 12 hours in self-study.

Consequently, the author would recommend that self-study be counted toward the mandatory hours, up to a maximum of two (2) hours annually.

However, if there are specific publications, articles or reports that the Law Society of New Brunswick encourages members to read, it could be possible to specify a “credit” allowance for that piece, which could then be counted over and above the standard maximum two hours for self-study.

Members will report, at year end, how many hours of self-study they have completed; with fifty (50) hours being the recommended amount.

- Professional Development Plans

Should individual professional development plans be mandated and, if so, should they be required to be submitted to the Law Society? Self-reflection is a necessary part of one's professional development. Without reflection upon one's goals, expectations and desires it becomes very difficult to move forward towards these ideals.

Every member should, of their own accord, already have a professional development plan, whether it is outlined in their head, on paper or neatly scheduled into their PDA. There are self assessment tools available to assist in the creation of a professional development plan, which should be made available to the members to help them decide in which areas of their practice they would like to increase their competency, knowledge and skills, and how to go about doing so.

Creation of a professional development plan, although suggested, will not be mandatory. The Law Society of New Brunswick's website should be updated to include templates for a professional development plan, as well as self-assessment tools to assist in the creation of same.

B. OVER WHAT PERIOD OF TIME MAY CREDITS BE OBTAINED?

Based on the requirement of 12 hours of continuing education/ professional development, one year seems a more than adequate reporting period in which to amass the requisite educational activity. Twelve hours of educational activity represents approximately two full days per year involved in continuing education/ professional development.

There may be times when a member undertakes in excess of 12 hours of continuing education/ professional development annually. In such a case it may be possible to carry over some or all of the hours earned in excess of 12 annually to the following year, with the following year's requirement being reduced accordingly.

However, there may arise from time to time unforeseen circumstances that prevent a member from completing the requisite amount of education/ professional development within one year. What should be the result in such a case? In such a case, for example, an extended illness, it may be possible to grant an extension in order to permit the additional hours of educational activity to be undertaken. We will deal with this in more detail in section D.

C. HOW LAWYERS MAY OBTAIN CREDIT (INCLUDED ACTIVITIES)

In most cases the focus for MCPD becomes mandatory attendance at CLEs, which is easily demonstrated and quantified. We want to avoid this. The goal is to have more meaningful professional development initiatives: extending beyond courses currently offered by CLE providers, and not limited only to legal studies, but extending to other areas of professional development such as communications courses and language training.

Most Law Societies are also abandoning the notion that MCPD means exclusively classroom learning. Many now recognize a broad range of activities, from teaching and writing to in-house educational sessions and professional seminars. At present, it is not simply traditional lawyering skills such as trial advocacy and research that lawyers are being urged to study. Many Law Societies are now pushing practice survival skills such as time management and client relations.

The list of included activities shall generally fall within the three (3) basic categories of skills integral to professional competence:

- Substantive/ procedural knowledge;
- Lawyering skills (advocacy, research, etc.); and
- Survival skills (practice management, time management, wellness, etc.)

It is vital to expand the types of activities through which members can obtain credit, and to have offerings from all three areas. CLEs are only one way of learning and there are many other professional activities that can generate learning. The MCPD program should therefore be based on a broad range of educational activity.

It is important to continue to ask: what other kinds of education can and should be offered to enhance and maintain lawyer competence? Law Societies must offer a wide range of education and continue to work toward increasing the number and type of educational activity offerings.

That being said, there is an increasing necessity for more skill-based educational activities, as opposed to simply substantive information.

A new, broader educational activity approach must be more sophisticated in its appreciation of how adults actually learn and more cognizant of lawyers' lives. For example, the benefit of online/ telephone seminars, tutorials, and courses mean a lawyer never has to leave the office to attend a CLE, thereby resulting not only in less cost, but allowing the lawyer to join in with people from many different places, thereby being exposed to a diverse set of experiences and opinions. We are all enriched by the exchange of such knowledge.

Not only are new methods of delivery required, but educational activities also must not be limited to substantive legal topic CLEs, but also to perfecting member competency, which may include language training, communication courses and writing courses.

It should be possible to have a link on the Law Society of New Brunswick website which would list upcoming events that meet the educational activity criteria, ideally with a link to online registration and payment, for increased convenience to members. It is essential to increase, as much as possible, the online and financial accessibility of MCPD services.

It would be beneficial for the Law Society of New Brunswick to collaborate with the other Law Societies so that programs offered in another jurisdiction that would be beneficial to New Brunswick members could be listed on the Law Society of New Brunswick's website.

The subject matter of educational activities will meet the goals of the MCPD regime, and be eligible for hours or "credits" provided the subject matter of the activity contains significant intellectual or practical content, with the primary objective of increasing lawyers' professional competence: material dealing primarily with substantive, procedural, ethical, or practice management (including client care and relations) matters relating to the practice of law; or other material which may be primarily designed and focused for lawyers, although it may also be applicable to other professions (such as language training, communications courses, and writing courses), although the overall goal must relate to increasing professional competence, and not profit maximization. Activities designed for or targeted towards clients, or topics relating to law firm marketing or profit maximization will not qualify towards the required 12 hours of educational activity. However, programs on lawyer wellness, as it is inextricably linked with professional competence, should be counted towards the required 12 hours.

Credits should also be awarded for educational activities undertaken in other provinces and foreign law or practice that is directly related to the member's practice, provided the subject matter is as outlined above.

The following is a non-exhaustive list of activities that will qualify for credit in the MCPD regime:

Credit Available for Participation in Courses

Courses will be accredited based on the following criteria:

1. Generally, credit will be given for actual time in attendance at a course;

2. Two or more lawyers reviewing together a previously recorded course will be able to obtain credit;

3. Credit will be available for the actual time participating in online "real time" courses, streaming video, web and /or teleconference courses, provided there is an opportunity to ask and answer questions.

4. Credit may also be earned for participation in post-LLB degree programs.

Credit Available for Education Activities other than Courses

Education other than courses will be available for credit, based on the following criteria:
(i) Teaching

1. The teaching must be to an audience that is primarily composed of lawyers, paralegals, articling students and /or law school students. Accreditation for teaching will not be available if it is targeted primarily at clients, the public, other professions, or students other than law students;

2. Three hours of credit will be available for each hour taught. If the lawyer is "chairing" a program, however, the actual time spent chairing the program is all that may be reported (not 3 hours per hour of chairing);

3. Credit will only be available for the first time the teaching activity is performed in the reporting year. Credit will not be available for repeat teaching of substantially the same subject matter within the same reporting year;

4. Credit will be available for volunteer or part-time teaching only, not as part of full-time or regular employment;

5. Credit will be available for the teaching of legal skills training courses;

(ii) Writing

Credit will be available for writing as follows:

1. Writing law books or articles that are intended for publication or to be included in course materials (including Bar Admission Course);

2. Credit will be based on actual time to produce the final product, to a maximum of 6 hours per writing project;

3. Credit will be available for volunteer or part-time writing only, not as a part of full-time or regular employment;

4. The available credit will be in addition to credit available for teaching;

5. No credit will be available for time spent producing PowerPoint materials.

(iii) Study Groups

Credit for study group activity will be available as follows:

1. Attendance in a group setting at an educational session in a law firm, legal department, governmental agency or similar entity, provided that at least two lawyers are together (including by telephone) at the same time ("in-house" educational activities);

2. Attendance at editorial advisory board meetings for legal publications;

3. The hours available for credit will be the actual time spent at the study group meeting, excluding any time that is not related to educational activities, such as time spent merely socializing;

4. Credit will not be available for activity that is file specific;

5. A lawyer must have overall administrative responsibility for each meeting, and a lawyer must chair each meeting;

6. No credit will be available for time spent reading materials, handouts or PowerPoint, whether before or after the study group session;

7. Study groups must be structured. No credit will be given for "study groups" transpiring in an informal gathering in a social setting;

8. In-house "lunch and learns" or roundtables are an easy and inexpensive way to earn credits. For example, a lunch hour could be dedicated to a firm-wide or in-house (in the case of lawyers outside private practice) training seminar, covering a mix of topics such as updates on caselaw or legislation, strategies in advocacy, practice management or client relation skills. Senior lawyers could lead most of the seminar presentations on legal topics with research and preparationsupport by junior lawyers. It would also be possible to bring in outside speakers, such as from the Law Society, to address issues such as legal ethics and professionalism.

(iv) Local Bar and Other Meetings with an Educational Purpose

1. Credit will be available for the actual time spent attending at an educational program provided by a local or county Law Society, as well as for other meetings with an educational purpose, excluding any portion of the meeting that is not devoted to educational activities;

2. To qualify, at least two lawyers must participate in the activity at the same time, including by telephone.

(v) Online Education

A. Group Event

1. Credit will be available for the actual time spent by the lawyer participating in online "real time" courses, streaming video, web and/or teleconference courses, but only if, through the course offering, there is an opportunity to ask and answer questions;

2. The credit available will include a study group's review of a previously recorded course.

(vi) Self-Study

1. Credit will be available up to a maximum of 2 hours out of 12 per on-line course, or for completing an audio, video or web course;

2. Reading texts, caselaw, legal journals, publications, newsletters, etc; and

3. Viewing listservs, on-line databases or media such as CD Roms.

D. CONSEQUENCES OF NON-COMPLIANCE WITH THE MCPD REGIME

New Rules would have to be adopted to make provisions for the MCPD program and issues arising therefrom, such as consequences of non-compliance.

Failure to complete the requirement each year would mean that the lawyer is in breach of the Rules. A lawyer would be permitted to complete the requirement after the end of the year, if the requirement is completed prior to April 1 of the following year. The lawyer will then be deemed to have complied with the requirement. Time spent on completing the requirement during this three month extension period will be accredited toward only the prior year's requirement, not the current year's requirement. A late fee of $200.00 must also be paid. If the requirement is not completed by April 1, the expiry date of the extension period, the lawyer may be suspended. However, the lawyer will be given at least 60 days' notice that the lawyer is about to be suspended for non-completion of the requirement, and will be able to apply to the Law Society or a MCPD Committee which, in its discretion where there are special circumstances, may order that the lawyer not be suspended, or may delay the suspension. As this notice will be given during the period of time in which the lawyer may still complete the requirement and be deemed to have complied with the rule, it is anticipated that most, and ideally all, lawyers will simply complete the requirement rather than face suspension.

The “suspension” consequence is fair because the lawyer is given ample notice of a suspension, may complete the requirement in the meantime and be deemed to have complied with the rule or, if necessary, be able to apply to the Law Society to seek relief from the suspension if there are special circumstances to justify such relief.

E. METHODS OF PROGRAM ENFORCEMENT

It may be uncomplicated for both members and the Law Society to monitor members’ individual progress and remaining required hours/ credits, depending upon the capabilities of the new database currently being implemented by the Law Society. This new database will enable members to log on to their own member page to update their personal information. It may be possible to allow a confidential link to allow members to update their own MCPD profile, listing the credits they have obtained thus far. Those who are uncomfortable with such technology could report in paper format.

Law Societies vary greatly in the proof, if any, required of completion of educational activities. It is possible to operate on the honour system, whereby members are responsible to include all educational activities undertaken, along with the hours/ “credits” accumulated. In the alternative, it is possible to have forms verifying participation in a professional development activity, required to be signed by the member and the professional development activity provider. This becomes more difficult in web-based activities, however, confirmation of receipt of payment may suffice in that situation, as long as it specifically refers to the member by name.

Unless any cause for concern arises, the author recommends that members be responsible to verify their participation, while cognizant that attendance or sign in lists will be required at educational activities and that proof of attendance may be required by the Law Society (i.e.- verification of registration and/or payment for the educational activity).

F. SPECIAL CONSIDERATIONS/ PROBLEMS

Before addressing special considerations or problems facing a MCPD regime it is important to consider the following:

What educational resources are offered to lawyers?

Who offers them?

At what cost?

How do we determine what education is needed?

How are resources assessed?

How can access problems be ameliorated?

We must also consider fundamental problems such as whether the issue is that lawyers simply are not voluntarily taking the recommended amounts of course study or that the members perceive that the resources offered are not sufficiently relevant or accessible.

Often repeated potential and/or perceived problems with MCPD programs are:

- Bureaucracy involved in the accreditation of educational activity providers. This might be avoided by providing upfront accreditation to groups or institutions who already provide the majority of educational activities: CBA, APTLA, Universities, etc. and accredit others on an individual basis, at the request of the provider or the member;

- Bureaucracy involved to enforce compliance by the profession. This should be more easily managed with the new membership database, where lawyers can self- report the educational activities undertaken, or non-electronically via one simple form, filedannually;

- Unwilling seminar participants bringing files, IPods, Blackberries, or laptops to educational sessions because the only measure arising from the activity is of attendance. Just as there is no requirement to check class attendance at law school prior to admitting members to the Bar, there are no means by which to easure who pays attention at educational activities. This is where the members' sense of professionalism comes into play.
- Such a regime makes CLEs a joyless, externally driven obligation, focused on putting in an appearance, rather than self-directed learning on the part of lawyers. Again, a 4member's sense of professionalism ought to lead him or her to stay current with the law and seek out ways to benefit the member's practice, which many members already do. Members will continue to have the selection of which programs they feel are most beneficial to that individual, and for most an MCE/PD regime will involve only an added reporting requirement;

- A prescribed number of credits over a period of time often results in a rush to take any available course as time runs out. While that may arise as a result of failure to make a professional development plan in advance, this will still contribute to the overall competence of the profession, as these members likely would not otherwise undertake any continuing education;

- For lecture style courses, most information is not applied and is likely forgotten, unless applied immediately. While this is true of most information we learn, such courses usually also give relevant and up to date reference materials and also allow members to make contacts to whom they can turn for guidance or assistance in applying the information at a later date.

It will be necessary to establish a new Mandatory Continuing Professional Development Committee to address concerns such as those noted herein, as well as to assist with issues relating to the administration and implementation of the program itself, such as whether a formal accreditation system is required and what types of professional development would be most beneficial to the members.

How will we address concerns regarding members of multiple bars with conflicting MCPD requirements? A simple solution would be to permit activities from one jurisdiction or the other to meet both or multiple sets of requirements (i.e., a CLE taken in British Columbia by a New Brunswick lawyer could be used to count towards the required hours in both British Columbia and New Brunswick.

If a member primarily practices in another jurisdiction with no MCPD requirements perhaps there could be a partial requirement, for example, depending on the percentage of time spent practicing in New Brunswick, with an ongoing duty to report in New Brunswick both the percent of time engaged in practice in New Brunswick and the number of hours of educational activities undertaken, with particulars provided.

How do we address the resentment against MCPD? There are arguments that the focus of MCPD is not on a culture of self-directed self-improvement, but on a culture of compliance. The role of the Law Society is to deal with the profession collectively. As professionals, lawyers have both an individual and a collective obligation to ensure their ongoing competency and that they remain current with the law. If, as a profession, members do not take an individual initiative to ensure this happens, then the Law Society must step in to regulate the situation for the collective. Most lawyers will already easily meet the MCPD requirements, and will likely not take issue with the added reporting requirement. For the most part, the lawyers who will oppose MCPD are the individuals who do not currently fulfill their professional continuing education obligations, and are therefore the members who most need such a program – these are the members who, from a perception of ongoing competency perspective, necessitate the implementation of such a program. Such a program, although mandated, continues to be selfdirected when lawyers choose their own educational activities which they see as most beneficial to their personal situation and needs.

Larger provinces often have many more professional development activities and lecture series than smaller provinces such as New Brunswick. How do we address the decreased availability of such programs? This issue may become moot with the implementation of MCPD, as there will almost certainly be an increased market for such offerings. With the increased participation of members, it is very likely that they will not only share opinions and ideas for more educational activities, but more senior members will likely want to participate by teaching such sessions and preparing updated and valuable materials. Another option is to bring in the speakers from other provinces to repeat their educational activities here, or set up activities by videoconference or webcast with these individuals. Furthermore, there should be cooperation with other Law Societies to ensure that we advertise good quality CLEs from other provinces that would be beneficial to lawyers of all jurisdictions.

Many lawyers, primarily sole practitioners, or those in small firms, state that CLEs are too expensive. This is where technology will play a large role in permitting all lawyers access to good quality professional development activities. Webcasts allow an affordable alternative to the cost, monetarily and in terms of time taken for attendance at and travel to educational activities, as well as lost productivity, as lawyers do not have to leave their offices. They can avail of those professional development activities from the comfort of their own office with technology they already utilize in their practice, via webcasts and tele-seminars, thereby substantially reducing the associated cost.

There may be options available such as bursaries for economically disadvantaged lawyers. Such lawyers could complete an application and qualify for a discount towards professional development activities that they would not be able to attend without financial assistance. It may be possible to start a bursary fund to which members may donate voluntarily or, alternatively, there may be a small fee charged on each educational activity, the proceeds of which are placed in a bursary fund.

There may be concerns raised from lawyers subject to externally controlled budgets to which they must apply for funding to attend educational activities, for example, those who work for various government departments, Crown corporations, or Legal Aid. Possible solutions for such circumstances include group viewing of videotaped CLES or webcasts, as well as study groups to discuss recent caselaw or topics relevant to that particular group.

Some in-house counsel and public sector lawyers criticize that the majority of CLEs available are not relevant to the nature of their work. However, all lawyers have a professional need to grow, to learn and to stay current. The more specialized or unusual a member's practice is, the more difficult and less likely they are to find courses that work for them. However, MCPD is broadly defined to include educational activities that are relevant to lawyers no matter where they are employed. These members often have access to conventions and in-house sessions that pertain precisely to their field of work which will meet the MCPD requirements. Nonetheless, we must be cognizant that there are many members engaged in the practice of law outside private practice, and we must seek to make the program as relevant, meaningful and beneficial to these varied groups as to lawyers engaged in private practice.

We wish to ensure that the quality of programs offered justifies the costs incurred. We must ensure good quality educational activities. For example, it may be necessary, in the event that there are not sufficient members volunteering to compile materials and present the activities, to offer a per diem for instructors and/or fee credit for them towards another professional development activity. Of utmost importance is that sufficient professional development activities are offered in both French and English.

G. IMPLEMENTATION

Accreditation Process

Depending on the form of implementation of MCPD, some standardization or vetting of course providers and approval of courses will be required.

1. All reportable credits will be approved by the Law Society in either of two ways:

   (i) by pre-approval of the provider; or

   (ii) approval (before or after the event) of individual courses and other educational activities
   (at the request of the member or the provider).

2. An individual course or other educational activity offered by a pre-approved provider does not require further approval unless requested by the provider;

3. Providers are pre-approved and remain pre-approved if they maintain integrity and quality according to the standards of the Law Society;

4. Members can individually apply for approval of courses, either before or after the course or other educational activity takes place, where the course has not otherwise been approved;

5. Applications by providers and members may be submitted electronically or the method which is most convenient for members;

6. All requests for approval should be forwarded to one designated individual. Approvals will be made by Law Society staff.

Compliance and Reporting Requirements

1. The MCPD requirement will be based on the calendar year, with the first compliance date to be December 31, 2010 for the 2010 year;

2. If supported by the new database, members could use online resources to track individual progress. Lawyers will login to the Law Society website and click on a link to the program, where they will be shown their individual credits and time remaining to comply with the MCE/PD requirement for the given calendar year. After completing a course or other accredited learning activity, lawyers could record and report their professional development online;

3. The lawyer will be notified by the Law Society of the approaching calendar deadline and, if the deadline is not met, will be given an extension of 90 days to complete the necessary requirement (in which case a late fee will be charged). The lawyer will be suspended from practice for failure to comply within the extended 90 day time limit. Rules will include provisions and grounds for applying for further extensions;

4. The twelve hour requirement is subject to adjustment for entering or re-entering practice mid-year. Members who have been exempt during the reporting year, but who resume practising law within the reporting year, must complete one credit hour for each full or partial calendar month engaged in the practice of law in the reporting year;

5. Members will be reminded quarterly of the MCPD requirements and, if reporting is done via the new member database, to remind them to log on to review their progress.

Exemptions

1. All practicing members of the Law Society, whether full or part-time, are subject to the requirement, with the following exemptions:

    (a) Members who submit a declaration that they are not practising law. Examples of members who might submit a declaration that they are not practising law could include:

        - members on medical or parental leave;
        - members taking a sabbatical;

    (b) New members who have completed the Bar Admission Program of a Canadian Law Society during the reporting year;

(c) A partial exemption will be available to members who resume practising law within the reporting year after having been exempt, and new members by way of transfer (subject to b, above). These members must complete one credit hour for each full or partial calendar month engaged in the practice of law in the reporting year; and

(d) Any other exemptions as granted by the Law Society or MCPD Committee or on a case by case basis.

Proposed Rules for the Mandatory Continuing Education/ Professional Development Program

Rules will be necessary to implement the CPD requirement and to accomplish two main purposes:

1. To require lawyers to complete the required amount of CPD on an annual basis; and

2. To provide for consequences if the required amount is not completed.

Additional Costs to be Incurred

Depending upon the role of the Law Society in the development and provision of educational activities or programs, there could be additional costs incurred for:

- speakers and presenters at professional development activities (for their time, travel costs and accommodations);

- rental of appropriate venues for professional development activities;

- potential cost of Law Society staff to attend at professional development activities, subject to availability of a Section Chair or other volunteer to attend on the Law Society's behalf, as necessary;

- the development of certain online learning technologies or for the use of technology, such as that required for webcasting, etc.; and

- the development of courses and materials on specific topics (i.e., professionalism and ethics, trust accounts, Land Titles System), if necessary to ensure members' competence.

Costs should be kept to a minimum, where possible, in order to avoid increases in member fees arising from the implementation of MCPD.

H. CONCLUSION

With the wealth of legal knowledge available, in New Brunswick and abroad, and the vast array of technological means by which to access this knowledge quickly, conveniently and economically, the Law Society is confident that the MCPD program will be relevant, meaningful

and beneficial to each member. The self-reflection necessitated by this program will provide the opportunity for each member to contemplate the state and quality of the member's practice and will provide numerous opportunities to assist members in the amelioration of the quality of their practices and in their professional development.

SUGGESTED TIMELINES

Provide Discussion Paper to Council:	March 27, 2009
Solicit comments from the Bar:	April 29 – June 15, 2009
Provide collected comments to Council:	June 16, 2009
Make decision regarding program:	July 10, 2009 (at Council meeting)
Prepare FAQs & Amend Rules:	July-September, 2009
Work with CBA re delivery of courses to: - increase quality - increase access - increase number of programs available	July 2009 –onward
Program Implementation:	January 1, 2010
Follow up re revisions/ amendments:	February- March, 2011

Appendix 1: MCPD PROGRAMS OF PROFESSIONALS IN NEW BRUNSWICK

Pharmacists

- 15 units annually from two or more sources to qualify for licensing the next year
- 1 hour of activity time = 1 unit
- Continuing education is normally determined in increments of .25 units
- Certain percentage of members audited annually to verify correctness of form filed
- If not compliant may be referred to Complaints Committee for possible disciplinary
  action, including sanctions of fines, requirement to complete additional continuing education activities, suspension of license, or combination thereof
- Right to appeal within 30 days

Architects

- 100 points (20 professional renewal and 80 self-directed) per two year cycle
- Full day activity attracts 10 points
- Half day activity attracts 5 points
- Two hours attracts 2 points

Chiropractors

- 20 credit hours of approved continuing education seminars over a two year period
- One hour activity = 1 credit hour
- Credit hours cannot be banked in period over the 2 years in which obtained, except
  seminars upon the approval of Committee
- Seminars must be pre-approved for credit
- Registration will not be renewed if requirements not met
- May apply in writing to the Board for extension for extraordinary reasons

Dentists & Licensed Dental Hygienists

- Dentists - 60 credits over 3 year period
- Dental Hygienists – 36 credit hours over 3 year period
- 4 credits for full day attendance Board of Directors meetings
- Hour per hour credit (max 3) for regional meetings
- Hour per hour credit (max 6) for national meetings
- .5 credit per hour for self-study courses not accompanied by sponsor corrected quiz (max 5 hours every 3 years)
- Credit allowed for preparation/development of course and credits associated with course
  (2 hours per hour of instruction, to maximum of 8 hours
- Audiotapes and videotapes, not accompanied by quiz qualify for credits as approved by the Board
- If pre-approval of course not sought, will receive only 1/3 of regular continuing education
  credit amount for that course
- Specialists must take 50% of required credits pertaining to their specialty
- Falsification of reporting records constitutes professional misconduct
- Cannot carry over credits beyond 3 years, unless exemption by Committee/ Registrar's Office
- Completed reports MUST be filed
- Failure to file report will result in non-renewal of license

<u>Appendix 2: SUMMARY OF MCPD PROGRAMS BY PROVINCE/ TERRITORY</u>

<u>Yukon</u>

- No mandatory MCPD regime

<u>Northwest Territories</u>

- No mandatory MCPD regime

<u>Nunavut</u>

- No mandatory MCPD regime

British Columbia

- Mandatory 12 hours / year with at least 2 hours in professionalism/ ethics
- Mandatory annual reporting
- Broad base of educational activities, traditional and non-traditional, are applicable
- Exemptions exist, and there is a mechanism by which to permit additional time to complete the requirements, where appropriate
- Membership may be suspended for non-compliance

Alberta

- Must make a professional development plan
- Not required to submit plan, unless asked for it by Law Society
- Not required to report what CPD actually completed
- No minimum amount of time/ specific type of activities mandated
- Recommend 12 structured hours of CPD and 50 hours of self-study

Saskatchewan (Commencing January 1, 2010)

- At least 36 hours CPD in approved educational activities related to the practice of law in 3 year period
- Not less than 6 hours must be related to professional responsibility, ethics, client care & practice management
- Mandatory annual reporting
- Failing to report or meet 36 hours could result in administrative suspension

Manitoba

- No mandatory MCPD regime
- Suggested “minimum expectation” for CLE is 12 hours/ year
- Mandatory reporting

Ontario

- No mandatory MCPD regime
- Mandatory to report any self-study & CLE activities in which one participates
- Voluntary minimum expectation for self-study: 50 hours annually (includes file related research)
- Voluntary minimum expectation for CLE: 12 hours annually (about 2 full day programs/year)
- MCPD program is less necessary to make mandatory in light of the Certified Specialist Program
- New professional responsibility and practice course in articling program
- Mandatory 24 hours of education/ professional development in first two years after called to the Bar Québec
- Mandatory 30 education/ professional development hours within 2 years
- No mandatory activities, is up to the member to choose what educational activities to undertake that will be relevant to his/her practice
- Activities will be provided by other education providers, in addition to the Barreau (i.e.CBA, Canadian Institute, Montreal Young Lawyers’ Association, etc.)

- Participation in educational activities can be in person or via electronic means
- Accredited educational activities will be listed on the Barreau website
- Other activities may be submitted to the Barreau for accreditation
- No carry-over of hours is permitted from one reporting period to the next
- Self-study does not count towards the mandatory 30 hours

Prince Edward Island

- No mandatory MCPD regime

Nova Scotia

- Mandatory education program for the Nova Scotia Bar regarding introduction of new Civil Procedure Rules in 2009
- Also mandatory course for Land Registration Act
- All practicing lawyers & articling clerks must complete Tier 1 of Society's Training Program & pass online multiple choice test – no fee
- Lawyers whose practices consist of 20% or more in combined areas of civil litigation; family and admin law (as reported in 2008 Annual Member Report) and articled clerks must complete Tier 2 (minimum 7 hours in person training) No testing - $325 / person,
  can do the training in-house
- Recommended 12 hours structured CPD and 50 hours self-study annually
- Mandatory annual reporting of CPD undertaken

Newfoundland and Labrador

- No mandatory MCPD regime

Appendix 3: SUMMARY OF RECOMMENDATIONS FOR NEW BRUNSWICK MCPD

- 12 "credit" hours MCPD annually
- No mandatory areas/ topics in professional development offerings
- Self-study counts to a maximum of 2 hours annually (unless specific publication permits credit over and above 2 hours maximum)
- Members will report, at year end, how many hours of self-study completed; 50 hours being the recommended amount
- May be possible to carry over some or all of the hours earned in excess of 12 annually to the following year, with the following year's requirement being reduced accordingly
- Credit available for broad range of professional development activities, including participation in courses, teaching, writing, study groups and meetings, and online education
- Mandatory annual reporting of CPD activities undertaken
- Members could be granted extension to April 1 of following year to complete requirements, will result in $200 late fee

- If do not meet requirements by April 1, could be suspended for non-compliance
- Exemptions given for members not practicing (i.e., parental/ medical leave), new members having completed the Bar Admission Program of a Canadian Law Society during the reporting year, and any other exemptions granted by the Law Society or MCPD Committee or on a case by case basis
- Requirements pro-rated for months in which not practicing (1 "credit" hour per month)

LAW SOCIETY OF SASKATCHEWAN
MANDATORY LEGAL EDUCATION POLICY

1. PURPOSE

The Law Society of Saskatchewan regulates the Legal Profession in the public interest by ensuring its members meet and maintain high standards of integrity and competency. The purpose of Minimum Legal Education requirements is to ensure that members of the Law Society of Saskatchewan meet and maintain these requirements by undertaking legal education throughout their careers.

2. DEFINITIONS

i. " Accredited Educational Activities" means either educational activities supplied by an Approved Provider or approved by the Law Society pursuant to Section 9.

ii. "Approved Provider" means an individual or organization accredited by the Law Society to provide educational activities pursuant to Section 10.

iii. "Director of Education" means a person appointed by the Executive Director of the Law Society to perform the duties described herein.

iv. "Law Society" means, unless otherwise stated, the Law Society of Saskatchewan.

v. "Minimum Education Requirements" means the number of hours in Approved Educational Activities required by the Law Society pursuant to Section 4.

vi. "Provider" means an individual or organization which is not accredited by the Law Society to provide legal education.

vii. "Term" means each three year period to complete minimum requirements pursuant to Section 5.

3. SCOPE AND EXEMPTIONS TO MINIMUM REQUIREMENTS

i. Active Members

Members with current practicing certificates are required to achieve Minimum Educational Requirements in order to maintain practicing status.

ii. Inactive Members

Inactive members are not required to achieve Minimum Educational Requirements in order to maintain inactive status. However, inactive members who apply for active membership will be required to report all Approved Education Activities taken between December 31, 2009 and the date of application for re-admission. If the hours do not meet the Minimum Education Requirement, the inactive member will be required to provide a remedial education plan for approval by the Director of Education.

iii. Members of Other Law Societies

Members of other Law Societies, who also hold membership in the Law Society, are required to comply with the Minimum Educational Requirements.

iv. Suspended Members

Suspended members are required to maintain Minimum Education Requirements or to submit a remedial education plan to the Director for approval before reinstatement.

v. New Members

Minimum Education Requirements will be adjusted to require one credit hour for each full or partial calendar month for the remainder of the Term, including the proportionate number of hours required for professional responsibility.

4. MINIMUM EDUCATION REQUIRMENTS

i. Minimum Education Requirements are the completion of 36 hours of Approved Educational Activities in the three-year Term referenced in paragraph 5 of this policy.

ii. Not less than six hours of the required 36 hours must pertain primarily to any one or any combination of the following topics:

- Professional responsibility;
- Ethics;
- Practice standards;
- The *Code of Professional Conduct;*
- Conflict of Interest;
- Rules of the Law Society;
- Client care and relations;
- Practice management.

5. TERM

i. The first Term will commence on January 1, 2010 and end on December 31, 2012. Immediately thereafter, all Terms will run for consecutive three year periods.

6. OVERALL SUBJECT MATTER REQUIREMENTS

i. The subject matter of all educational activities will satisfy the following criteria:

a. The content must have significant intellectual or practical content with the primary objective of increasing lawyers' professional competence.

b. The content should deal with all or any of the following:

substantive legal issues
procedural issues
the ethical obligations of lawyers
practice management
client care and relations

c. The content should be designed primarily for lawyers and not for other professions. Courses for business, including leadership skills, project management, marketing skills etc., will not qualify.

d. The content should be designed and presented primarily by members of the legal profession.

e. The Law Society recognizes and encourages the diversity of legal practice. Credits will be available for content which does not strictly comply with the above criteria if the lawyer can demonstrate that it is directly related to improving professional competence in the lawyer's practice.

7. APPROVED EDUCATIONAL ACTIVITIES

i. Law Society policy is to accommodate the educational needs of all members by providing a wide range of educational opportunities. Subject to all other terms and conditions of this policy and Section 9, educational activities include:

a. Attendance at traditional courses and activities;
b. Attendance at a legal education program offered by:

- a law firm;
- corporate legal department;
- government agency or department;
- local bar association;
- CBA sections;

or similar entity, provided that the program is offered in a group setting.

c. Participation in online "real time" courses, streaming video, web and/or teleconference courses where there is an opportunity to ask and answer questions;

d. Review, in a group with one or more other lawyer(s), a video repeat of a course;

e. Completion of an interactive self-study online course provided that a testing component is included in the course;

f. Teaching at a course related to law or to the practice of law;

g. Participation in a study group of two or more, provided that the group's study focuses on law related activities;

h. Writing and publishing books or articles relating to the study or practice of law.

8. ACTIVITIES AND CONTENT WHICH ARE NOT APPROVED

i. Content and activities designed for or targeted at clients;

ii. Content and activities relating to law firm marketing or maximizing profit;

iii. Content and activities prepared and delivered in the ordinary and usual course of practice.

9. ACCREDITATION OF ACTIVITIES

i. All credits will be approved by the Law Society in any of three ways:

a. By pre-approval of the Provider as referenced in Paragraph ten of this policy;

b. By an application by a member for approval of individual courses or other educational activities; or

c. By an application by a Provider for approval of an educational activity.

ii. All applications by providers and lawyers must demonstrate compliance with the approved subject matter requirements, approved educational activity requirements and the overall objectives of Law Society education policy. Applications will be submitted for approval by the Director of Education 30 days prior to the activity, although in exceptional circumstances, credit may be approved retroactively. Credits will not be provided after the expiration of the Term.

10. APPROVED EDUCATIONAL PROVIDERS

i. Approved Educational Providers, with pre-approval to provide accredited education, are as follows;

- Saskatchewan Trial Lawyers' Association;
- Canadian Bar Association;
- Canadian Corporate Counsel Association;
- Federation of Law Societies of Canada;
- The Law Society of Saskatchewan;
- Any provincial or territorial Law Society in Canada and any educational organization affiliated with such a Law Society;
- Any College of Law in Canada which is recognized by the admission rules of the Law Society.

11. APPROVAL OF PROVIDERS

i. To be approved as a Provider, and to continue to be approved as a Provider, individuals and organizations must demonstrate:

- Substantial recent experience in offering high quality continuing legal education;
- An ability to organize and effectively present continuing legal education;
- The ability to promote the policy and the educational objectives of the Law Society;
- Integrity.

ii. Approved Providers must agree to the following:

- To refrain from advertising or encouraging the use of their products or services during accredited activities.

- To provide an Attendance Declaration for Law Society members who attend the activity to the Director of Education.

- Approved providers for courses offered in Saskatchewan must provide a copy of any published material provided to those who attend an Educational Activity to the Law Society of Saskatchewan without charge and to waive any copyright to the extent necessary to allow the Law Society to index the publication and make it available on the Law Society website one year after the final date of publication.

iii. Any provider not approved in Paragraph 10 of this policy may apply to be designated as an Approved Provider by applying to the Director of Education.

12. CALCULATION OF CREDITS

Courses will be accredited based on the following criteria:

1. Generally, credit will be given for the actual time of the educational session excluding social breaks. For participating in online “real time” courses, streaming video, web and/or teleconference courses, the actual time of participation. Partial hours shall be rounded up or down to the closest whole number.

2. Approved Educational Providers or providers of Accredited Educational Activities must seek approval of credit hours prior to advertising or promoting the event.

3. Education other than courses will be available for credit, based on the following criteria:

(i) Teaching

1. The teaching must be in compliance with the overall subject matter requirements and must be designed for an audience that is primarily composed of lawyers, paralegals, articling students and/or law school students. Credit for teaching will not be available if it is targeted primarily at clients, the public, other professions, or students other than law students;

2. Three hours of credit will be available for each hour taught. If the lawyer is “chairing” a program, however, the actual time spent chairing the program is all that may be reported (not 3 hours of credit for each hour of chairing);

3. Credit will only be available for the first time the teaching activity is performed in the reporting year. Credit will not be available for repeat teaching of substantially the same subject matter within the same reporting year;

(ii) Writing

Credit will be available for writing as follows:

1. Credit is available for writing law books or articles that are intended for publication or to be included in course materials;

2. Credit will be based on actual time to produce the final product, to a maximum of 6 hours per writing project;

3. Credit will be available for volunteer or part-time writing only, not as a part of full-time or regular employment;

4. The available credit will be in addition to credit available for teaching and preparation for teaching;

5. No credit will be available for time spent producing PowerPoint materials.

(iii) Study Groups

Credit for study group activity will be available as follows:

1. The hours available for credit will be the actual time spent at the study group meeting, excluding any time that is not related to educational activities;

2. Credit will not be available for activity that is file specific;

3. A lawyer must have overall administrative responsibility for each study group meeting and a lawyer must chair each meeting;

4. No credit will be available for time spent reading materials, handouts or PowerPoint, whether before or after the study group session.

(iv) Local Bar and Canadian Bar Association Section Meetings

1. Credit will be available for the actual time spent attending an educational program provided by a local bar association, as well as for section meetings of the Canadian Bar Association, excluding any portion of the meeting that is not devoted to educational activities.

(v) Online Education

A. Group Event

1. Credit will be available for the actual time spent by the lawyer participating in online "real time" courses, streaming video, web and/or teleconference courses, but only if there is an opportunity to ask and answer questions through the course offering;

2. The credit available will include the actual time of a study group's review of a previously recorded course.

B. Self-Study

1. Credit will be available up to a pre-approved limit for on-line courses, as well as for completing an audio, video or web course, provided the course includes the following characteristics:

(a) a quiz component (where questions are to be answered and where an answer guide is provided to the lawyer after the lawyer completes the course and quiz. It is not necessary for the lawyer to submit the quiz for review);

(b) there is an ability for the lawyer taking the course to email or telephone a designated moderator with questions and receive a timely reply;

(c) there is no requirement for a "listserv";

(d) there is no requirement for reading materials, handouts or PowerPoint to be included in the course.

13. REPORTING

Lawyers will be responsible for ensuring that they comply with educational policies and for reporting educational activities to the Law Society. Lawyers will be required to report their own credits in one of two means as follows:

1. By completing a Law Society Attendance Declaration at an Accredited Educational Activity.

2. By logging onto the Law Society website and following the form required by the Director of Education.

14. CREDITS CARRIED FORWARD

Credits may not be carried forward past the end of the Term.

15. AUDIT

Lawyers are responsible for retaining records of educational activities and to make the records immediately available to the Law Society upon request.

16. NON COMPLIANCE

A lawyer who does not complete Minimum Education Requirements by the end of the Term is subject to administrative suspension, pursuant to Rule 251.

A lawyer who does not complete Minimum Education Requirements prior to the end of the Term may submit a remedial education plan, along with the prescribed fees in part 8 of the Rules for review and approval by the Education Director. All remedial educational activities must be completed by April 1st of the year following the end of the Term.

Under special circumstances, the Executive Director may recommend that the suspension be delayed for a specified period of time.

17. REINSTATEMENT

A member that has been suspended pursuant to Rule 251 may apply for reinstatement pursuant to Rule 252.

18. GENERAL

In the absence of policy or where there has been substantial compliance with this policy, the Executive Director of the Law Society is authorized to make rulings which are consistent with the objectives of this policy.

19. APPEAL

Decisions of the Director of Education may be appealed to the Chair of the Admissions & Education Committee of the Law Society, along with the prescribed fee in part 8 of the Rules. The Chair may either dispose of the application or order a hearing pursuant to Rule 230.

20. NOTICE

Any notice required to be given a member shall be deemed effective when sent to the member at the address the member maintains on the Law Society membership database.

The Lawyers Weekly
Governing Barreau in Quebec adopts mandatory continuing legal education
By Luis Millan
Montreal
April 24, 2009 Issue

Following in the footsteps of the Law Society of British Columbia, the Barreau du Québec is compelling all of its 23,000 practising lawyers to go back to school as of this month and complete no fewer than 30 hours of approved continuing legal education courses every two calendar years to remain in good standing.

The subject of debate over the past three years, the mandatory educational requirement is a ? preventative? measure aimed at establishing, promoting and improving the standards of legal practice in the province to help ensure the protection of the public, according to a motion that was approved by the General Council of the Bar.

? I have 40 years of practice under my belt, and it is not a natural reflex for me to contemplate sitting behind a school desk,? admitted Gérald Tremblay, the Barreau? s batonnier, in an interview with *The Lawyers Weekly*. ? But the more one thinks about it, the more one realizes that things are changing so quickly that it seems to me to be absolutely normal that all lawyers should maintain and bolster their intellect as much as possible. And when I saw that other bars too demand continuing professional development, I embarked on the project with enthusiasm.?

Like similar requirements in England, Wales, Australia and 42 American states, the Law Society of British Columbia (LSBC) introduced a continuing professional development program in January. The LSBC now requires its 11,000 members to complete at least 12 hours of accredited educational activities per year, with no less than two of the hours pertaining to any combination of professional responsibility and ethics, client care and relations, and practice management. Nova Scotia is the other Canadian jurisdiction that has compulsory legal education requirements, but it is limited to lawyers engaging in land registration work.

Unlike in B.C. where failure to meet the continuing education requirements can lead to suspension, the Barreau has taken it one step further ? disbarment.

? Law is an evolving discipline, and it is important that people stay up-to-date,? said Stuart Cobbett, the managing partner of the Montreal office at Stikeman Elliott. ? But life being what it is, some people just don? t pay attention to it. Therefore it is a good idea for any self-regulatory body to establish certain minimum continuing education requirements.?

The Barreau already has a 22-page list of approved educational activities, which range from lectures to presentations to workshops delivered through a host of different vehicles, be it conferences, seminars and so-called webinars or through the Internet. Some 30-odd presentations and workshops that will be offered at the Barreau? s annual convention next month in Montreal have already been given the nod as approved educational activities. Lawyers attending the convention can fulfill up to nine hours of their requirements, which is why it is widely expected that there will be increased attendance at the convention.

The Barreau, besides encouraging smaller firms and sole practitioners to band together in small groups to share costs and resources to cover the costs of accredited training, is also in the midst of negotiating agreements over accrediting in-house training with law firms. Stikeman Elliott is a case in point. At least two training seminars, ? Managing Your Staff in Tough Economic Times? and ?The New Quebec Derivatives Act: Spotlight on the Issues,? that the firm will be offering in the near future, have been accredited by the Barreau.

? If the Barreau was the only provider of continuing legal education activities, it would have been an onerous project,? said Tremblay, adding that the Barreau has budgeted between $300,000 and $500,000 to launch the program. ? This project is supposed to be self-supporting ? we? ll see. But we want to encourage all organizations who provide continuing education to do even more. We want the net to be as wide as possible.?

While lauding the initiative, insisting that it is a lawyer? s obligation to the public to keep up-to -date, David Collier of Ogilvy Renault believes that the Barreau will have to demonstrate flexibility in the way it administers and manages the program for it to achieve wide acceptance.

? A lot will depend on the way the program will be administered, and the flexibility the Barreau shows in accrediting various activities,? said Collier, a partner with the Montreal law firm who practices in all areas of intellectual property law, with an emphasis on litigation. ? With some flexibility and creativity it shouldn? tbe onerous.?

Appendix 2

Self-Reported Continuing Legal Education Activities
2008 Members' Annual Report

Practising lawyers[1] who do not report taking any form of CLE: 18% (4,905)

Practising lawyers who report taking some form of CLE: 82% (23,173)

Average number of CLE hours taken by all (including those reporting zero hours):32 hours

Average number of CLE hours taken by all (NOT including those reporting zero hours):40 hours

Average number of CLE hours for those who report taking CLE:

Number of CLE hours	Number of lawyers	Percentage
0	4,905	18%
1-5	853	3%
6-10	2,195	8%
11-15	3,594	13%
16-20	4,044	14%
21-25	2,192	8%
26-30	1,924	7%
>30	8,217	29%
TOTAL	27,924	100%

Most popular delivery method/format of CLE:

Format	Hours Taken	Percentage
Live Programs	13,965	41%
Discussion Group	4,375	13%
Writing Published Texts	4,167	12%
Telephone CLE	3,561	10%
Interactive Online CLE	3,468	10%
Video Replay	1,954	6%
Prep and Teach CLE	1,469	4%
Other	1,167	3%
Participation in Degree Programs	305	1%
TOTAL	34,431	100%

[1] Practising lawyers are those who pay 100% fees and are in private practice, employed in education, government or other or are corporate counsel. The total number of lawyers in this group is 30,416. Of those, 27,924 submitted their MAR so therefore sample size is 27,924.

Average number of CLE hours reported by year of call

	Number of CLE hours								
Years since call	0	1-5	6-10	11-15	16-20	21-25	26-30	>30	Total
1-5	702	176	412	736	831	411	411	1,522	5,201
6- 10	567	140	350	724	796	443	387	1,563	4,970
11-15	493	105	293	498	538	292	276	1,252	3,747
16-20	589	94	263	419	487	268	220	1,144	3,484
21-25	547	76	235	383	454	283	237	994	3,209
26-30	640	89	240	353	393	217	185	856	2,973
>30	1,367	173	402	481	545	278	208	886	4,340
TOTAL	4,905	853	2,195	3,594	4.044	2,192	1,924	8,217	27,924

Average number of CLE hours reported by practice area

Practice Area	Number of hours	Percentage
ADR	219	1%
Administrative	1,101	3%
Bankruptcy	677	2%
Civil Defendant	5,057	12%
Civil Plaintiff	4,466	11%
Construction	445	1%
Corporate	6,004	14%
Criminal	2,579	6%
Employment	2,299	6%
Environmental	266	1%
Family	4,095	10%
Immigration	671	2%
Intellectual Property	1,635	4%
Real Estate	5,551	13%
Securities	1,592	4%
Tax	1,112	3%
Wills	1,979	5%
Workplace	151	0
Other	1,542	4%

APPENDIX 2

CONSULTATION PROCESS

The following steps were taken to bring the CPD consultation report to the attention of lawyers and paralegals.

- On October 30, 2009 and December 4, 2009 the Convocation Newsletter which is sent to approximately 32,000 lawyers and 2,600 paralegals for whom the Law Society has an e-mail address, contained information on the CPD consultation.

- The Law Society highlighted the report and consultation process on the latest news section of it website at http://www.lsuc.on.ca/latest-news/a/consultation-on-continuing-professional-development-requirement/

- The Law Society placed a Notice to the Profession in the *Ontario Reports* in English and French on November 13, 2009, November 20, 2009 and December 4, 2009 and January 8, 2010 advising of the consultation process and (where applicable) the teleseminars.

- The approximately 32,000 lawyers for whom the Law Society has an e-mail address received information on the CPD Report and consultation in the November e-Bulletin.

- The approximately 2600 paralegals for whom the Law Society has an e-mail address received information on the CPD Report and consultation in the November 19, 2009 Paralegal Update.

- The *Ontario Lawyers Gazette,* Winter 2009, included an article on the CPD proposal and consultation process.

- The Law Society sent the Consultation Report to over 50 legal organizations and parties and another 61 people/organizations received the report in their capacity as members of the Equity Advisory Group or the Aboriginal Working Group.

- The Director of Professional Development & Competence, Diana Miles, attended a meeting of the Ontario Bar Association Council to discuss the Report and answer questions.

- The Treasurer addressed the CDLPA annual meeting on the CPD Report.

- Three teleseminars were held on November 30, 2009 (paralegals), December 2, 2009 (lawyers) and December 7, 2009 (lawyers). A total of 72 paralegals and 46 lawyers registered for the seminar, which was free of charge.

- A number of legal publications and blogs also reported on the consultation process, further bringing it to the attention of the lawyers and paralegals.

APPENDIX 3

LIST OF SUBMISSIONS

INDIVIDUAL COMMENTS[1]

Sent by e-mail
Harry Blaier
Ken Chasse
Maria De Angelis-Pater
Albert Frank
William Grimmett
Jane Hegney
Kate Henderson
Dean Ian Holloway – individual capacity
Joan Kosmenko
Scott McEachran
Gordon McKechnie
J. Noonan
Robert Patchett
Mark Quail
Bev Seney
David M. Sherman
Jonathan Spiegel
Carolyn Weafer

Teleseminar comments

Individual Comments - Letter
Paul Calarco
Jason R. Cherniak
Joseph A. De Sommer
Phil Downes
David Fernandes
Philip Friedlan
Peter Kirby
Benjamin Levinter
John Morrissey
Alan Wheable
J. Sebastian Winny
Marshall Yarmus

Article sent by Eugene Meehan

[1] Of The 48 individuals who made comments 11 requested that their comments not be made public and six requested that their submissions be anonymous if made available publicly. These anonymous submissions are signified in the public copy of the submissions by the reference "Lawyer." There were no anonymous comments from paralegals.

INSTITUTIONAL/ORGANIZATIONAL COMMENTS

Advocates' Society
Aird Berlis
L'AJEFO (and translation)
Borden, Ladner Gervais
Cambridge Law Association
Canadian Environmental Law Association
County and District Law Presidents' Association
Davies
Equity and Aboriginal Issues Committee (LSUC)
Family Lawyers Association
Goodmans
Gowlings
LawPRO
Law Society of British Columbia
Legal Aid Ontario
Legal Aid Ontario (Clinic Resource Office)
Legal Aid Ontario (Provincial Learning Action Committee –on behalf of Community Legal Clinics
McCarthy Tétrault
McMillan
Miller Thomson
Ontario Bar Association
Ontario Trial Lawyers Association
Osgoode Hall Law School
Osler
Prosecutors' Association of Ontario
Stikeman Elliott
Toronto Lawyers Association
University of Toronto Faculty of Law

APPENDIX 4

SUMMARY OF SUBMISSIONS

SHOULD A CPD REQUIREMENT BE INTRODUCED

Forty-eight individuals responded in writing to the invitation to consult. Of these, close to half do not comment on whether the requirement should be introduced, but instead ask questions or make specific suggestions on components of the proposed program. Of the remaining individuals there is a mixture of those who support the requirement outright, support it with qualifiers based on implementation concerns, or oppose it. In addition, those who attended the teleseminars generally did not oppose the requirement, but either support it or focus on implementation questions.

Twenty-eight organizations responded to the invitation to consult. Of these only one opposes the introduction of the program. The others either support the introduction directly or by expressing support for CPD generally and then making suggestions on implementation issues.

These organizations reflect a broad array of groups representing diverse practice areas, geographic locations and size of practices and also representing perspectives of Aboriginal, Francophone and equity seeking communities.

The Law Society's Equity and Aboriginal Issues Committee considers that the requirement has the potential to reduce isolation of lawyers and paralegals from Aboriginal, Francophone and equity seeking communities and to increase mentoring opportunities.

PROPOSED DEFINITION OF CPD

There are almost no comments on the definition of CPD. The Equity and Aboriginal Issues Committee's submission is satisfied that the definition is sufficiently broad to encompass a large scope of activities to qualify. For those from Aboriginal, Francophone and equity seeking communities it "can encompass areas of law and legal theory such as Aboriginal law, linguistic rights and critical race theory."

LAWPRO suggests expanding the definition to include practice management.

TO WHOM THE REQUIREMENT SHOULD APPLY AND EXEMPTIONS

There are few comments on to whom the requirement should apply. To the extent there are comments they suggest either that the requirement is under inclusive or the exemptions should be broader.

In the former group the comments suggest that the requirement should be expanded to include those in the 50% or 25% category on the basis that if these categories return to the 100% category they will need to be up to speed in their practice area.

Those comments concerning additional exemptions are as follows:

a. In-house counsel should be exempted because they do not provide services to the general public and because they have narrow expertise not amenable to CPD.

b. There should be an exemption for women for 12 months after giving birth (due to difficulty of attending CPD when breast-feeding.)

c. There should be accommodation for senior practitioners who are semi-retired. There should be a pro rata requirement for those working part time.

d. Those working in research/litigation support should be exempted because they have no private clients, no retainers, no trust funds.

EIAC suggests the need for more precision in how the pro rata exemptions would operate. It also suggests that that the wording around exemptions for special circumstances be clarified to say "subject to exemptions provided because of accommodation under the *Human Rights Code*."

NUMBER OF CREDIT HOURS

There is very little disagreement with the number of hours, per se, including from EAIC, which considers the number reasonable. The few concerns are of the following type:

a. The number of hours should vary with the level of experience. The more experience the lower the number.

b. The number of hours should be phased in over three years as 12 is too many all at once.

c. 12 hours is not enough to stay current. The requirement should be higher and should begin sooner than 2011.

d. For those in specialized areas of practice or providing legal services in narrow area it may be difficult to find 12 hours. What is the remedy for a lawyer or paralegal who cannot find "relevant" CPD in a given year? Must he or she take irrelevant programs just to meet the requirement? Examples of those who express concern are entertainment lawyers, those practising mining law, paralegals specializing in narrow areas of practice; those in need of programming in French; senior counsel.

SCOPE OF ACTIVITIES TO FULFILL THE REQUIREMENT

This engendered a fair amount of comment. The main issues identified in this topic are as follows:

a. Concerns and questions about whether specific programs would "qualify." (e.g. part-time LLM programs; international programs, specialized CLE, Canadian Tax Foundation program, programs that qualify for CPD requirement in other jurisdictions should qualify for Ontario).

b. A number of people raise concerns about the fact that self-study is not an eligible activity. The argument is that educational research shows that people learn differently. Some absorb more through lecture or other "public" learning process; other by self-study. In those CPD regimes that allow only in-person accredited provider CLE to qualify the argument against permitting self-study is that while there are a variety of ways to learn and all are important the CLE requirement is directed at the ensuring that everyone obtains a minimum of CLE that is done in public, through organized providers and taught by experts. The proposed regime for Ontario is so broad that it is more difficult to make an argument against self-study. Is it really that much more "valuable" when 2 people discuss a case than when 1 person reads it and considers it? The self-study argument is also raised,

- to address cost and accessibility issues.
- In the context of senior practitioners who have difficulty finding required programs that are meaningful.

c. Legal editing should count as well as legal writing.

d. Make clear that although attendance at meetings of a legal association board or committee is not an eligible activity, to the extent that there is a substantive component it would count.

e. Make clear that if members of LSUC Committees are non-benchers and there are discussions about ethics, professionalism or practice management at meetings they attend these can be counted toward the 25%.

f. The exclusion of programming with a "marketing" focus is a mistake. There is often significant content in such programs. Law firms will often undertake such programming to in-house counsel to obtain company's business – doesn't make the education any less valid.

g. Clarify the confusion over paragraph 61(b) on-line courses.

h. Why cap the number of hours for mentoring, writing, teaching? For those who are senior lawyers who have difficulty finding programs this may be a compromise of sorts on self-study.

i. Difficult for paralegals to find hours particularly those out of Toronto. Are local law associations prepared to include paralegals in their associations or allow them to attend educational activities?

j. Unrealistic to expect sole and small firm practitioners to meet and organize their own CPD programs. Nice idea but not manageable especially for those already trying to run their practices and make money in this economy.

ETHICS, PROFESSIONALISM AND PRACTICE MANAGEMENT COMPONENT

There is little opposition to this component of the requirement. One or two submissions suggest frustration at constantly hearing how unethical the profession is since the actual number of people who act without civility or are otherwise unprofessional is still the minority. One comment says it is impossible to "teach" ethics. One or two submissions suggest the 25% requirement is irrelevant to in-house counsel.

Of those who comment on the details of the 25% component the following are most often noted:

a. There is some misunderstanding about the way in which the component can be satisfied and the number of hours required.

b. Some suggest the category seems somewhat amorphous and would like more detail on the kind of content that would satisfy the component.

c. Some ask if the Law Society will develop specialized topics so that lawyers and paralegals can learn with materials relevant to their practice area. Will they have sufficient programs that one won't repeat the same thing each year?

d. EAIC suggests that the final report make clear that it will include subjects and principles related to equity and diversity. (e.g. cultural sensitivity to people with disabilities, members of equity seeking groups, delivery of services to immigrants and those whose primary language is not English or French, linguistic rights and other topics that promote inclusion, equity and diversity with the profession and client communities.)

e. Will LSUC packages be free?

PROGRAM/PROVIDER APPROVAL
The comments suggest misunderstanding around,

a. whether lawyers and paralegals must have their choices of activities pre-approved by the LSUC,

b. whether an approved provider must only provide approved programming (must all contain 25%) or can provide approved and unapproved programming; and

c. whether lawyers/paralegals who set up courses with peers must have them approved; whether law society approves providers outside Ontario.

EAIC expresses a number of points:

a. The provider approval process be transparent and cognizant of the limited resources that Francophone, Aboriginal and equity providers have.

b. Make accessibility of courses and materials a condition of approval including physical access to programs, use of alternative delivery methods such as webcasting at reduced cost, language of delivery and costs.

COMPLIANCE AND MONITORING

There are only a few comments on this issue as follows:

a. On the issue of suspension for failure to meet hours there should be some flexibility for those who fail to meet for reasons within the grounds enumerated in the Ontario Human Rights Code.

b. There should be a formal grace period before suspending or for allowing people to make up credits into the next year.

c. Clarify when the year begins.

d. Provide some further information on kind of verification one needs to keep,
   i. if lawyer or paralegal, to be prepared for CPD audit
   ii. if provider, on required documentation.

e. Will providers be subject to documentary audits; attendance audits or both?

f. How long will the professional or provider be required to keep documentation (12 months?)

g. Will the audits have a disproportionate impact on sole practitioners and small firm lawyers?

COMMUNICATION PLAN

There are only a few comments on the proposed communication plan as follows:

a. The Law Society should explain and highlight how it would implement the requirement in accordance with equity and diversity principles.

b. The plan should include outreach to various groups through their community based media outlets.

c. The Law Society should seek the assistance of legal organizations to communicate the plan.

BUDGET IMPLICATIONS

There are no comments.

COST CONSEQUENCES TO PARALEGALS AND LAWYERS

This was the second most commented upon issue. Those who comment on this topic are not necessarily opposed to the introduction of the CPD requirement, although there is that connection for some.

The main comments are along these lines:

a. There should be an increase in the threshold for qualifying for a bursary. It has not been changed in many years (LSUC threshold is $35,000). There will be serious pressure on sole and small firm lawyers and paralegals. Financial burdens are already present. Large firm lawyers will be able to get quality CPD for free in-house. While it is good that small group discussion group activities will count there is a risk of two-tier CPD system – higher quality for those who can afford it; lower quality for those who can't. At least with increased bursary level some may have access to CPD when wouldn't otherwise. Suggestions that threshold should be increased to $50,000; some suggest $70,000.

b. CPD should be offered at minimal cost or free. This comment takes a variety of forms, including,
   i. There should be CPD discounts for new sole and small firm practitioners.
   ii. LSUC should offer free interactive seminars on the website.
   iii. Make "BAC" materials available free on the website.
   iv. Free annual conference to meet 25% component.
   v. LSUC should offer distance education course of study requiring on-line submission to qualify for this component.
   vi. Define part-time category for CPD to reduce burden to part-time practitioners.

vii. Too far to drive to Toronto for CLE – will if have to, but make it free.

c. CPD will simply be a boon or providers; inelastic demand created; prices could easily go up because of this; should go down.

d. Cost will be a problem for sole and small firm practitioners

OTHER

There are a few miscellaneous comments, as follows:

a. There is currently a lack of CPD programming geared to sole and small firm practitioners and those in community clinics; LSUC should identify areas where more programming needed and encourage providers to offer more in these areas.

b. There should be some quality assurance or other measurement of the program to assess whether it has had any disproportionate effect on practitioners from particular groups.

Re: Continuing Professional Development ("CPD") Requirement

It was moved by Ms. Pawlitza, seconded by Mr. Dray, –

That Convocation approve the introduction of a continuing professional development ("CPD") requirement commencing January 1, 2011 for lawyers who practise law and paralegals who provide legal services (those lawyers and paralegals in the 100% fee paying category) in accordance with the following:

RECOMMENDED CPD PROGRAM

Recommendation 1
That the Law Society introduce a CPD requirement for lawyers and paralegals who practise law and provide legal services, respectively, (those in the 100% fee paying category) commencing on January 1, 2011, with the first reporting of hours due on December 31, 2011.

Recommendation 2
That for the purposes of the requirement CPD is defined as follows:
Continuing professional development is the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career.

Recommendation 3
That lawyers and paralegals subject to the requirement be required to fulfill 12 hours of CPD annually, with 3 of the 12 hours to be taken in topics related to ethics, professionalism and/or practice management.

Recommendation 4
That lawyers or paralegals subject to the requirement may seek an exemption from the requirement in circumstances coming within the *Human Rights Code* and/or such other or additional circumstances as the Director of Professional Development and Competence, or her designate, deems appropriate.

Recommendation 5
That in calculating the exemption a lawyer or paralegal will be exempted from the requirement on the basis of one credit hour for each month for which the exemption is granted.

Recommendation 6
That the activities in paragraph 52 be considered eligible activities for the CPD requirement. That the activities set out in paragraph 62 be considered ineligible activities for the CPD requirement.

Recommendation 7
That lawyers and paralegals fulfill their CPD requirements from the list of eligible activities and in compliance with the definition of CPD set out at Recommendation 2. Subject to Recommendation 9 and 19 there is no program or provider accreditation.

Recommendation 8
That the Law Society assume primary responsibility for delivery of the required ethics, professionalism and practice management content that those subject to the CPD requirement must meet, without charging program registration or materials fees.

Recommendation 9
That providers other than the Law Society that wish to provide stand-alone programs or program content in ethics, professionalism and practice management must apply for and obtain program approval.

Recommendation 10
That lawyers continue to report annually on the Lawyers Annual Report the number of self-study hours they complete and that commencing in 2011 paralegals report annually on the Paralegal Annual Report the number of self-study hours they complete. The number of hours is not mandatory, but reporting is. This reporting is not part of the CPD requirement.

Recommendation 11
That lawyers and paralegals who are not otherwise exempted from the CPD requirement report their CPD activities annually by December 31 on the lawyer and paralegal portal, commencing December 31, 2011. They may not carry over credits from one year into the next.

Recommendation 12
That lawyers and paralegals be entitled to report their eligible activities at any time on or before December 31.

Recommendation 13
That lawyers and paralegals be provided with notices at regular intervals throughout the calendar year advising them how many credits they have obtained and how many credits remain outstanding.

Recommendation 14
That if a lawyer or paralegal is exempted from the requirement at any time during the year compliance will be calculated on a pro rata basis of one hour for each month in the year during which he or she is not exempted. He or she will be exempted from the balance of hours and will not be required to make them up when the exemption ends.

Recommendation 15
That following the completion of the calendar year the summary suspension bencher will be provided with the names of the lawyers and paralegals who have failed to comply with the requirement and who are subject to administrative suspension from practice. If administratively suspended the lawyer or paralegal may be re-instated by completing the missing credit hours.

Recommendation 16
That there be provision for random annual CPD audits to monitor compliance with the CPD requirement, to be undertaken as part of a practice management review or paralegal practice audit; and by random selection chosen from among all paralegals and lawyers subject to the requirement.

Recommendation 17
That the randomly selected CPD audits take the form of a written request for proof of completion.

Recommendation 18
That there be a total of 500 audits of lawyers and 25 audits of paralegals annually respecting CPD compliance.

Recommendation 19
That beginning in January 2011 new lawyers and paralegals be required to take 12 hours per year (for the equivalent of two full years of practice or providing legal services, respectively) of programming accredited by the Law Society, 3 hours of which per year will be in topics of ethics, professionalism, and practice management and will be integrated within the other 9 hours of accredited programming.

Recommendation 20
That Certified Specialists be required to obtain a total of 12 hours of CPD annually, with 3 of those hours to be taken in topics related to ethics, professionalism and/or practice management.

Recommendation 21
That the Law Society further investigate the issue of CPD registration subsidies for inclusion in discussions of the 2011 Law Society budget.

Recommendation 22
At regular intervals in 2010, the PD&C Committee and the PSC should receive reports on the implementation process. An annual information report should be provided to the Committees and Convocation in 2011 and 2012. An assessment report should be provided to the Committees and Convocation by the end of April 2013 addressing the first two years of operation, including but not limited to the issues set out in paragraph 96.

Recommendation 23
That the Law Society implement a communications plan in accordance with paragraphs 98-101 of this report.

Recommendations 1 and 19 were amended as follows:

(a) The following sentence was added to Recommendation 1:

"Lawyers who are excused from paying fees who practise law will also be subject to the requirement".

(b) The words "other 9" in the last line of Recommendation 19 were replaced with "12 hours".

The main motion as amended was carried.

INTERJURISDICTIONAL MOBILITY COMMITTEE REPORT

Mr. Henderson presented the Report.

Report to Convocation
February 25, 2010

Interjurisdictional Mobility Committee

Committee Members
Paul Henderson (Chair)
Glenn Hainey (Vice-Chair)
Thomas Conway
Carl Fleck
Susan McGrath

Purpose of Report: Decision

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

COMMITTEE PROCESS

1. The Committee met by teleconference on February 4, 2010. Committee members Paul Henderson (Chair), Glenn Hainey (Vice Chair), Tom Conway and Susan McGrath participated. The staff member to the Committee, Sophia Sperdakos, also participated.

DECISION
MOBILITY AGREEMENT WITH THE BARREAU DU QUÉBEC

MOTION

1. That Convocation authorize the Law Society to sign the Federation of Law Societies of Canada's *Québec Mobility Agreement.*

2. That appropriate by-law amendments be made, for Convocation's approval, to implement that Agreement.

Introduction and Background

3. In August 2002 the Federation of Law Societies of Canada accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

4. Eight law societies, including the Barreau du Québec, signed the National Mobility Agreement ("NMA") on December 9, 2002. The remaining provincial law societies signed and implemented the agreement over the next few years. The Agreement recognized that special circumstances applicable to the Barreau, arising primarily out of civil and common law distinctions, would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions. It was also recognized that the requirement for the Barreau to comply with regulations applicable to all profession in Québec would delay implementation of mobility with respect to the Barreau.

5. In 2006 the law societies of all 10 provinces, including the Barreau, and the territorial law societies signed the Territorial Mobility Agreement. The Agreement addresses only the permanent mobility (transfer) provisions of the NMA and is in place until January 1, 2012 at which time it will expire unless its provisions are renewed or other provisions are enacted.

6. In July 2008 the Barreau du Québec ("the Barreau") enacted a permanent mobility regime that reflects the unique transfer limitations that arise because of different legal systems in Québec and the common law jurisdictions. The Barreau has created a form of membership known as Canadian Legal Advisor ("CLA").

7. A member of the Barreau who is a CLA is entitled to,

    a. give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he or she is legally authorized to practise law or involving matters under federal jurisdiction;

b. prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;

c. give legal advice and consultations on legal matters involving public international law; and

d. plead or act before any tribunal, but only with respect to matters under federal jurisdiction.

8. The Federation of Law Societies of Canada has been working on a mobility structure that would be similar to the Barreau's provisions. The Federation has developed a proposed agreement for law societies' approval.

9. The draft Agreement is set out at Appendix 1. The Agreement itself does not confer rights. Each signatory will enact rules or by-laws to implement the Agreement. Once a jurisdiction does so mobility will apply in that jurisdiction. Law societies may implement the Agreement at different times. A model rule, set out at Appendix 2, has been prepared for guidance on the areas that rules should address. Jurisdictions are not required to follow the structure of the model rule. As was the case with implementation of the NMA, if Ontario signs the Agreement the Law Society would implement it terms in conformity with the Law Society's legislative and by-law structure.

10. Prior to drafting the Agreement, the Federation consulted with liability insurers across the country to ensure that the Agreement reflects the most effective way to approach liability coverage. The approach chosen is consistent with the way in which the insurers addressed national mobility and ensures consistency across the country. In essence, the "home" jurisdiction will continue to cover the lawyer for his or her work in the other jurisdiction. This approach is feasible because under the Agreement the Canadian Legal Advisor will be required to remain a member in his or her originating home jurisdiction.

11. If Ontario approves the Agreement the legal affairs department will draft the appropriate by-law provisions for Convocation's approval. The Law Society will create an L3 licence whose members will be limited to services described in the Agreement and whose membership will be conditional upon their continued membership in the Barreau du Québec, more specifically their ability to practise there. A Québec lawyer who becomes an L3 lawyer in Ontario will be covered for his or her activities by his or her Québec liability insurance. Lawyers called to the bar in the L3 category will have all the same professional responsibilities and be subject to the same by-laws as L1 lawyers.

12. As the Agreement sets out the L3 lawyer will be limited to,

(a) giving legal advice on,

(i) the law of Québec and matters involving the law of Québec,
(ii) matters under federal jurisdiction, or
(iii) matters involving public international law, provided his or her home jurisdiction's insurer covers such services,

(b) drawing, revising or settling a document for use in a proceeding concerning matters under federal jurisdiction,

(c) appearing as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.

13. The Committee is satisfied that the Québec Mobility Agreement reflects the principles and goals of national mobility, while at the same time addressing the differences in the civil and common law legal systems in Canada. The Agreement will enhance clients' ability to retain lawyers of their choice, while at the same time ensuring that those called to the bar as L3 lawyers in Ontario meet the Law Society's standards of competence, conduct and professional responsibility. Ontario lawyers already enjoy this mobility in Québec. If Ontario signs the Québec Mobility Agreement it will be reciprocating for members of the Barreau.

Federation of Law Societies Of Canada

Fédération des orders professionnels de jurists du Canada

Appendix 1

Quebec Mobility Agreement

Quebec Mobility Agreement

FEDERATION OF LAW SOCIETIES OF CANADA

October 15, 2009
Winnipeg, Manitoba

Introduction

The purpose of this Agreement is to extend the scope of the National Mobility Agreement (the "NMA") in facilitating reciprocal permanent mobility between the common law jurisdictions and the Barreau du Québec ("the Barreau"). Clause 40(b) of the NMA provides that "a signatory governing body, other than the Barreau, will admit members of the Barreau as members on one of the following bases:…(b) as permitted by the Barreau in respect of members of the signatory governing body."

The Barreau has implemented a scheme under which members of the law societies of the other provinces and the territories may become members of the Barreau and practise federal law and the law of their home jurisdictions as Canadian Legal Advisors. It is the intention of the signatories to this Agreement that the other provincial and territorial law societies will reciprocate with the Barreau by implementing provisions that will permit members of the Barreau to become members of other law societies and practise federal and Quebec law in other jurisdictions.

The signatories recognize that,

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil jurisdictions, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Background

In August 2002 the Federation of Law Societies of Canada (the “Federation”) accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

Eight law societies, including the Barreau, signed the NMA on December 9, 2002. The Agreement recognized that special circumstances applicable to the Barreau would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions. The signatories also recognized that the requirement for the Barreau to comply with regulations applicable to all professions in Quebec would delay implementation of the NMA with respect to the Barreau.

In 2006, the law societies of all 10 provinces, including the Barreau, signed the Territorial Mobility Agreement, along with the law societies of all three territories. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces, for a five-year period ending January 1, 2012.

Quebec Mobility

In June 2008 Quebec enacted a "Regulation respecting the issuance of special permits of the Barreau du Québec", which is stated to be "made in order to facilitate the mobility of advocates." The Regulation provides, *inter alia*, that a member in good standing of a bar of another Canadian province or territory may apply for a "special Canadian legal advisor permit" in Quebec. A person granted such a permit may engage in the following activities on behalf of another person:

(1) give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he or she is legally authorized to practise law or involving matters under federal jurisdiction;

(2) prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;

(3) give legal advice and consultations on legal matters involving public international law; and

(4) plead or act before any tribunal, but only with respect to matters under federal jurisdiction.

Recognizing the provisions of the Quebec Regulation, the signatories to this Agreement agree to enter into an arrangement with the Barreau to enable its members to exercise mobility in the common law jurisdictions on a reciprocal basis. It is recognized that members of other governing bodies will not be able to exercise the reciprocal right to practise public international law unless they have professional liability insurance coverage that specifically includes such practice.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

"Advisor" means a Canadian Legal Advisor;

"Barreau" means the Barreau du Québec;

"Canadian Legal Advisor" means a member of a governing body who holds a current Canadian Legal Advisor certificate issued by another governing body;

"governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction, and the Barreau;

"home governing body" means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and "home jurisdiction" has a corresponding meaning;

"lawyer" means a member of a signatory governing body;

"liability insurance" means compulsory professional liability errors and omissions insurance required by a governing body;

"National Mobility Agreement" or "NMA" means the 2002 National Mobility Agreement of the Federation of Law Societies of Canada;

"permanent mobility provisions" means clauses 32 to 36, 39 and 40 of the NMA;

General

2. The signatory governing bodies will

   (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

   (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;

   (c) comply with the spirit and intent of this Agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and

   (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

3. Signatory governing bodies will subscribe to this Agreement and be bound by means of the signature of an authorized person affixed to any copy of this Agreement.

4. A signatory governing body will not, by reason of this agreement alone,

   (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or

   (b) relieve a lawyer of restrictions or limits on the lawyer's right to practise, except under conditions that apply to all members of the signatory governing body.

5. Amendments made under clause 2(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Canadian Legal Advisor

6. The Barreau will continue to issue Canadian Legal Advisor certificates to qualifying members of governing bodies, and the other signatories will establish and maintain an equivalent program in order to issue Canadian Legal Advisor certificates to qualifying members of the Barreau.

7. Members of the Barreau whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted as equivalent by the Barreau are not qualifying members of the Barreau for the purpose of clause 6.

8. The permanent mobility provisions of the NMA apply with respect to requirements and qualifications to obtain a Canadian Legal Advisor Certificate, except that a signatory governing body must require that an Advisor continue to maintain practising membership in the home governing body.

9. A signatory governing body that has adopted regulatory provisions giving effect to the requirements of clauses 6 and 8 of this Agreement is a reciprocating governing body for the purposes of this Agreement, whether or not the signatory governing body has adopted or given effect to the NMA or any provision of the NMA.

Liability Insurance

10. A governing body will continue to make available to its members who are also Advisors in another jurisdiction ongoing liability insurance as required in the governing body's jurisdiction that provides occurrence or claim limits for indemnity of $1,000,000 and $2,000,000 annual per member aggregate.

11. If a member of more than one governing body becomes an Advisor member of a third governing body, the governing body that makes ongoing liability insurance available to the member at the time or did so most recently, will continue to do so or resume doing so, whether or not the member continues to be a resident of that jurisdiction.

12. On application, a signatory governing body will exempt an Advisor member from liability insurance requirements if the Advisor maintains, in another signatory jurisdiction, ongoing liability insurance that provides occurrence or claim limits for indemnity of $1,000,000 and $2,000,000 annual per member aggregate.

Transition Provisions

13. This agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.

14. This Agreement is intended to implement clauses 39 and 40 of the NMA. It does not affect the obligations of any party under others provision of the NMA or other agreements in effect.

15. Provisions governing temporary and permanent mobility in effect at the time that a governing body becomes a signatory to this agreement will continue in effect

    (a) until this Agreement is implemented, and

    (b) when this Agreement is implemented, except to the extent modified by this Agreement.

Dispute Resolution

16. Signatory governing bodies adopt and agree to apply provisions in the Inter-Jurisdictional Practice protocol in respect of arbitration of disputes, specifically Clause 13 and Appendix 5 of the Protocol.

Withdrawal

17. A signatory governing body may cease to be bound by this agreement by giving each other signatory governing body written notice of at least one clear calendar year.

18. A signatory governing body that gives notice under clause 17 will immediately notify its members in writing of the effective date of withdrawal.

SIGNED as of the dates indicated below.

LAW SOCIETY OF ALBERTA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF BRITISH COLUMBIA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF MANITOBA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NEW BRUNSWICK

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR

Per: _____ _____
Authorized Signatory Date

NOVA SCOTIA BARRISTERS' SOCIETY

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF THE NORTHWEST TERRITORIES

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF NUNAVUT

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF UPPER CANADA

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF PRINCE EDWARD ISLAND

Per: _____ _____
Authorized Signatory Date

BARREAU DU QUÉBEC

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF SASKATCHEWAN

Per: _____ _____
Authorized Signatory Date

LAW SOCIETY OF YUKON

Per: _____ _____
Authorized Signatory Date

Appendix 2

MODEL RULE – CANADIAN LEGAL ADVISER

Categories of membership

1 The following are the categories of members of the Society:
(a) practising lawyers;
(b) retired members;
(c) non-practising members
(d) Canadian legal advisors.

Certificates and permits

2 The Executive Director may approve the form of
(a) practising certificate,
(b) retired membership certificate,
(c) non-practising membership certificate,
(d) Canadian legal advisor certificate,
(e) foreign legal consultant permit, and
(f) inter-jurisdictional practice permit.

Transfer as Canadian Legal Advisor

3 (1) Subject to subrule (3), a member of the Barreau du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(a) a completed application for call and admission as a Canadian legal adviser in a form approved by the Credentials Committee, including written consent for the release of relevant information to the Society;

(b) a certificate of character;

(c) a certificate of standing from the Barreau du Québec and each other body regulating the legal profession, in any jurisdiction, in which the applicant is or has been a member of the legal profession;

(d) an errors and omissions insurance application or exemption form;

(e) the following fees:
(i) the investigation fees and call and admission fees;

(ii) a prorated practice fee;

(iii) a prorated annual insurance fee, unless exempt under Rule YY;

(iv) a prorated Special Compensation Fund assessment;

(f) any other information and documents required by the Act or these Rules that are requested by the Credentials Committee or the Benchers.

(2) Subject to subrule (1), Rules [Transfer general provision; In-house counsel rule; Transfer under NMA and TMA; Consideration of transfer application] apply, with any necessary changes, to an application for call and admission on transfer as a Canadian legal adviser.

(3) This Rule does not apply to a member of the Barreau of Québec unless he or she has earned a bachelor's degree in civil law in Canada or a foreign degree and a certificate of equivalency from the Barreau.

Canadian legal advisors

4 (1) A Canadian legal advisor may
(a) give legal advice on

(i) the law of Quebec and matters involving the law of Quebec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law,

(b) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(c) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.

(2) A Canadian legal advisor must not engage in the practice of law except as permitted under subrule (1).

(3) A member of the Society in good standing who is admitted as a Canadian legal advisor has all the duties and responsibilities of a practising lawyer under the Act, these Rules and the Professional Conduct Handbook.

(4) A Canadian legal advisor must

(a) be a member in good standing of the Barreau du Québec authorized to practise law in that Province,

(b) undertake to comply with subrule (2), and

(c) immediately notify the Executive Director in writing if he or she ceases to be authorized to practise law in Quebec.

Exemption from liability insurance

5 (1) A Canadian legal advisor may apply to the Executive Director for exemption from the requirement to maintain professional liability insurance and pay the insurance fee.

(2) On an application under subrule (1), the Executive Director must grant the exemption, provided the Canadian legal advisor maintains the full mandatory professional liability insurance coverage required by the Barreau that extends to the lawyer's practice in [this province/territory].

Re: Mobility Agreement with the Barreau du Québec

It was moved by Mr. Henderson, seconded by Mr. Conway, –

1. That Convocation authorize the Law Society to sign the Federation of Law Societies of Canada's *Québec Mobility Agreement*.

2. That appropriate by-law amendments be made, for Convocation's approval, to implement that Agreement.

Carried

PARALEGAL STANDING COMMITTEE REPORT

Mr. Dray presented the Report.

Report to Convocation
February 25, 2010

Paralegal Standing Committee

Committee Members
Paul Dray, Chair
Susan McGrath, Vice-Chair
Marion Boyd
James R. Caskey
Seymour Epstein
Michelle L. Haigh
Glenn Hainey
Paul Henderson
Brian Lawrie
Douglas Lewis
Margaret Louter
Stephen Parker
Cathy Strosberg

Purpose of Report: Decision
Information

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

TABLE OF CONTENTS

COMMITTEE PROCESS

1. The Committee met jointly with the Professional Development & Competence Committee on January 27th, 2010. Committee members present were Paul Dray (Chair), Susan McGrath (Vice-Chair), Marion Boyd, James Caskey (by telephone), Seymour Epstein, Paul Henderson, Doug Lewis, Margaret Louter, Stephen Parker and Cathy Strosberg. Staff members in attendance were Diana Miles, Sophia Sperdakos and Julia Bass.

2. The Committee further met jointly with the Professional Development & Competence Committee on February 11th, 2010. Committee members present were Paul Dray (Chair), Susan McGrath (Vice-Chair), James Caskey, Paul Henderson, Brian Lawrie,

Doug Lewis, Margaret Louter, Stephen Parker and Cathy Strosberg. Staff members in attendance were Diana Miles, Terry Knott, Elliot Spears, Sophia Sperdakos and Julia Bass.

3. The Committee further met on February 11th, 2010. Committee members present were Paul Dray (Chair), Susan McGrath (Vice-Chair), James Caskey, Seymour Epstein, Michelle Haigh, Paul Henderson, Brian Lawrie, Doug Lewis, Margaret Louter, Stephen Parker and Cathy Strosberg. Staff members in attendance were Diana Miles, Zeynep Onen, Terry Knott, Elliot Spears, Sheena Weir, Arwen Tillman and Julia Bass. For the item on legal expenses insurance, the Committee was joined by Barbara Haynes and Jas Basra of DAS Insurance.

FOR DECISION

PROPOSED INTEGRATION OF MEMBERS OF SOME EXEMPTED GROUPS

4. Motion

   a. That Convocation approve in principle the creation of an integration programme to permit members of some of the exempted groups in By-law 4 to apply to become licensed as paralegals, as set out below, and

   b. That Ontario collection agents also be permitted to apply under this programme.

Background

5. Discussions during the review of exemptions in 2009 revealed considerable interest in a further opportunity for people in some of the exempt groups to become licensed. Examples would be municipal prosecutors, government employees, and employees of legal clinics and the offices of the worker and employer adviser. (The programme would not be relevant to all of the exempted groups - for example it would not be applicable to articling students and MPP's). An excerpt from By-law 4, setting out the full list of exemptions, is attached at Appendix 1.

6. The Committee Report presented at Convocation on January 28th set as an objective the reduction of the number of exemptions over time. There were indications that many members of exempted groups regret not having applied during the 'grandparenting' process.

7. The Committee concluded that a further avenue to permit members of some of the exempted groups to become licensed would be appropriate, but that this should be a somewhat more formal process than the grandparenting offered in 2007.

8. If approved by Convocation, implementation of the proposal will require a by-law amendment. The Committee will thus be returning to Convocation with a proposed by-law showing the full details of the programme.

9. There is no reliable method for establishing how many applicants would come forward if offered a further opportunity to become licensed; a rough estimate would be in the region of 400 to 450.

Collection Agents

10. In addition to the interest expressed by members of some of the exempt categories in By-Law 4, the Law Society also received a request for an exemption for Ontario collection agents, attached at Appendix 2. The collection agents have been directly affected by the introduction of paralegal licensing, as prior to regulation, some collection agents used to appear in small claims court on behalf of their clients, and many prepared statements of claim, even when the court work was to be undertaken by a lawyer or paralegal.

11. Collection agents are regulated by the Ontario Ministry of Consumer Services. As such, their collection work is deemed not to be "legal services" by subsection 1 (8) of the Law Society Act:

> Not practising law or providing legal services
>
> (8) For the purposes of this Act, the following persons shall be deemed not to be practising law or providing legal services:
>
> 1. A person who is acting in the normal course of carrying on a profession or occupation governed by another Act of the Legislature, or an Act of Parliament, that regulates specifically the activities of persons engaged in that profession or occupation.

12. However, when licensing was first introduced, there was a lack of clarity about the proper interpretation of the words "in the normal course of carrying on" the occupation of collection agent, specifically whether this could reasonably extend to the drafting of statements of claim. At that time, the Law Society did not take a clear position that the preparation of statements of claim was prohibited as a result of the changes to the Law Society Act, since the collection agents were clearly regulated by the Ontario government.

13. In discussions with the Ontario Registrar of Collection Agents, it was since clarified that such drafting is not "in the normal course of" acting as a collection agent. A letter from the Registrar of Collection Agents is attached at Appendix 3.

14. The determination that the drafting of pleadings is not part of the normal course of a collection agent's work produces a lacuna in regulation, in that a client with a complaint about this area of work cannot complain to the Registrar and cannot complain to the Law Society. This is not in the public interest and produces a gap in consumer protection.

15. Collection agents who contacted the Law Society during the grandparent 'window' in 2007 were told that they were ineligible to apply if they lacked the courtroom advocacy experience that formed part of the required criteria. However, they now find that their drafting work is considered the provision of legal services and can be the subject of a complaint of unauthorized practice.

16. As a result, a number of collection agents are anxious to become licensed. The Committee is of the view that offering them an opportunity to become licensed would be preferable to considering the creation of further exemptions at this stage in the implementation of licensing.

17. While the request from the collection agents could be considered separately, the staff recommendation is that the most efficient and effective approach would be to adopt a new process applicable both to the members of the exempted categories and to the collection agents interested in becoming licensed. It is recommended that this new process be called "Integration of Exempted Paralegals".

18. Any collection agents who choose to become licensed will be required to provide legal services by means of permitted business structures, which may involve a change of practice since a business corporation such as a collection agency cannot be the vehicle for providing legal services. The Ontario Society of Collection agents has requested advice as to the best manner to achieve compliance with the rules in this regard, and staff will be meeting with them in the near future.

Educational Requirement

19. To address the varying backgrounds of the potential applicants in the various groups, a key feature of the proposal is the creation of a short educational programme that all applicants would be required to complete successfully before entering the licensing process.

20. It is important that such an educational requirement be made as accessible as possible, to applicants from all over Ontario. For this reason, it is recommended that a short modular course be developed and offered by the Law Society and made available on-line for distance learning. This is considered preferable to asking the community colleges to provide the necessary course - the colleges have only just been accredited to offer the normal two year programme, and have not yet been audited to ensure they are meeting Law Society standards. It would thus be onerous for them to develop a further new programme, and they lack the Law Society's experience with distance learning. Having the Law Society deliver the programme guarantees that Law Society standards will be met.

21. Since applicants will be required to have three years of experience in their field, they will be assumed to have knowledge in the following areas:
    a. Operating a small business;
    b. Client interactions;
    c. Legal procedure pertinent to paralegal practice;
    d. Identification and application of pertinent statutory and case law pertinent to paralegal practice;
    e. File management;
    f. Communication/writing;
    g. Legal computer applications.

22. Accordingly, it is recommended that the primary focus of the required educational requirement be ethics, professional responsibility and client service with emphasis on advocacy-related knowledge and the *Paralegal Rules of Conduct.*

23. The proposed course would consist of 15 three-hour modules, with a 20 minute multiple-choice assessment at the end of each module. (All applicants would in addition have to pass the standard licensing examination).

24. Once licensed, the new paralegals would also be subject to random practice audits to assess and assure the assumed skills and other practice requirements.

25. The Law Society may be able to utilize certain components of the existing materials for the Professional Responsibility and Practice course developed for lawyers, which would permit cost savings.

Proposed Application Process

26. The new process would not be open to individual paralegals who chose not to apply in 2007 if they are not members of one of the exempt groups. A number of persons in this situation have been told that their application is out of time, and it would not be fair to go back on these decisions.

27. To take advantage of the process, applicants would have to show that they,
    a. are a member of one of the eligible groups approved by Convocation;
    b. have three years of experience, or a combination of three years of experience and education, as of the date of application;
    c. can provide the required references;
    d. have or can obtain professional liability insurance, and
    e. are of good character.

28. It is proposed that there be a 'window' of 12 months during which applicants could apply. The start date would be contingent on the date the required by-law is approved by Convocation. An extensive communications initiative would be required to draw the attention of all relevant persons to the new opportunity.

29. Once applicants have applied, they would be required to complete the educational course, the licensing examination (with the usual three opportunities to attempt it) and all other requirements by December 31st 2014, at which point the process would be terminated.

Good character issues

30. In contrast to the grandparenting process in 2007, it is proposed to explore the option of requiring applicants to fulfill the "good character" requirement prior to entering the educational phase of the licensing process.

Budget

31. The proposal is that the process should pay for itself by setting the fees at a cost recovery level. However, there would be cash flow implications as the costs would be incurred before the necessary fees are received. The estimated direct cost of the educational requirement is $350,000 plus the standard allocation of indirect costs. This estimate is based on initially offering the programme in English only.

32. There would also be budget implications for the Professional Regulation Department and the Tribunals Office arising from the additional good character hearings. The proposal was considered by the Finance Committee on February 11th.

The Committee's Deliberations

33. Some applicants may complain that the original 'grandparents' were not subject to any educational requirement. However, the Committee is of the view that the proposed process can reasonably be seen as part of the transition from the 2007 grandparent process (no educational requirement) to the post-2014 permanent application process (two year diploma required).

34. The Committee's discussion of the request for further grandparenting from the Ontario Society of Collection Agents indicated that the process adopted for the licensing of collection agents should ensure a proper standard of competence.

35. There may be requests from other groups wishing to use the proposed process. (As discussed above, it will not be available to non-exempt individuals who regret not having applied in 2007). If so, the Committee will return to Convocation with more information on the applicants concerned.

36. The Committee was of the view that the proposal would advance consumer protection and access to justice by addressing a current gap in regulation and increasing the number of licensed, competent paralegals. This would serve to strengthen the paralegal community.

Appendix 1

BY-LAW 4 – EXCERPT

PART V PROVIDING LEGAL SERVICES WITHOUT A LICENCE
Interpretation
29. In this Part,

"accredited law school" means a law school in Ontario that is accredited by the Society;
"law firm" means,
(a) a partnership or other association of licensees each of whom holds a Class L1 licence,
(b) a professional corporation described in clause 61.0.1 (a) of the Act, or
(c) a multi-discipline practice or partnership described in section 17 of By-Law 7 [Business Entities] where the licensee mentioned therein is a licensee who holds a Class L1 licence;
"legal services firm" means,
(a) a partnership or other association of licensees each of whom holds a Class P1 licence,
(b) a professional corporation described in clause 61.0.1 (b) of the Act, or
(c) a multi-discipline practice or partnership described in section 17 of By-Law 7 [Business Entities] where the licensee mentioned therein is a licensee who holds a Class P1 licence;
"licensee firm" means a partnership or other association of licensees, a partnership or association mentioned in Part III of By-Law 7 [Business Entities] or a professional corporation.

Providing Class P1 legal services without a licence
30. (1) Subject to subsections (2) and (3), the following may, without a licence, provide legal services in Ontario that a licensee who holds a Class P1 licence is authorized to provide:

In-house legal services provider
1. An individual who,
i. is employed by a single employer that is not a licensee or a licensee firm,

ii. provides the legal services only for and on behalf of the employer, and
iii. does not provide any legal services to any person other than the employer.

Legal clinics
2. An individual who,
i. is any one of the following:

A. An individual who is enrolled in a degree program at an accredited law school and volunteers in or is completing a clinical education course at a clinic, within the meaning of the Legal Aid Services Act, 1998, that is funded by Legal Aid Ontario.
B. An individual who is employed by a clinic, within the meaning of the Legal Aid Services Act, 1998, that is funded by Legal Aid Ontario,
ii. provides the legal services through the clinic to the community that the clinic serves and does not otherwise provide legal services, and
iii. has professional liability insurance coverage for the provision of the legal services in Ontario that is comparable in coverage and limits to professional liability insurance that is required of a licensee who holds a Class L1 licence.

Student legal aid services societies
3. An individual who,
i. is enrolled in a degree program at an accredited law school,
ii. volunteers in, is employed by or is completing a clinical education course at a student legal aid services society, within the meaning of the Legal Aid Services Act, 1998,
iii. provides the legal services through the clinic to the community that the clinic serves and does not otherwise provide legal services, and
iv. provides the legal services under the direct supervision of a licensee who holds a Class L1 licence employed by the student legal aid services society.

Student pro bono programs
3.1 An individual who,
i. is enrolled in a degree program at an accredited law school,
ii. provides the legal services through programs established by Pro Bono Students Canada, and
iii. provides the legal services under the direct supervision of a licensee who holds a Class L1 licence.

Not-for-profit organizations
4. An individual who,
i. is employed by a not-for-profit organization that is established for the purposes of providing the legal services and is funded by the Government of Ontario, the Government of Canada or a municipal government in Ontario,
ii. provides the legal services through the organization to the community that the organization serves and does not otherwise provide legal services, and
iii. has professional liability insurance coverage for the provision of the legal services in Ontario that is comparable in coverage and limits to professional liability insurance that is required of a licensee who holds a Class L1 licence.

Acting for family, friend or neighbour
5. An individual,
i. whose profession or occupation is not and does not include the provision of legal services or the practice of law,

ii. who provides the legal services only occasionally,
iii. who provides the legal services only for and on behalf of a related person, within the meaning of the Income Tax Act (Canada), a friend or a neighbour, and
iv. who does not expect and does not receive any compensation, including a fee, gain or reward, direct or indirect, for the provision of the legal services.

Constituency assistants
6. An individual,
i. whose profession or occupation is not and does not include the provision of legal services or the practice of law,
ii. who is any one of the following:
A. A member of Parliament or his or her designee,
B. A member of Provincial Parliament or his or her designee,
C. A member of a council of a municipality or his or her designee, and
iii. who provides the legal services for and on behalf of a constituent of the member.

Other profession or occupation
7. An individual,
i. whose profession or occupation is not the provision of legal services or the practice of law,
ii. who provides the legal services only occasionally,
iii. who provides the legal services as ancillary to the carrying on of her or his profession or occupation, and
iv. who is a member of,
A. the Human Resources Professionals Association of Ontario,
B. the Ontario Professional Planners Institute,
C. the Board of Canadian Registered Safety Professionals
D. the Appraisal Institute of Canada, or
E. the Canadian Society of Professionals in Disability Management.

Individuals intending to apply or who have applied for a Class P1 licence
8. An individual,
i. whose profession or occupation, prior to May 1, 2007, was or included the provision of such legal services,
ii. who will apply, or has applied, by not later than October 31, 2007, to the Society for a Class P1 licence,
iii. who has professional liability insurance for the provision of the legal services in Ontario that is comparable in coverage and limits to professional liability insurance that is required of a holder of a Class L1 licence, and
iv. who complies with the Society's rules of professional conduct for licensees who hold a Class P1 licence.

Time limit on providing Class P1 legal services without a licence
(2) The individual mentioned in paragraph 8 of subsection (1) may, without a licence, provide legal services in Ontario that a licensee who holds a Class P1 licence is authorized to provide only until,
(a) if the individual is granted a licence prior to May 1, 2008, the day the individual is granted a licence; or
(b) if the individual is not granted a licence prior to May 1, 2008, the later of,
(i) April 30, 2008,

(ii) the day the individual is granted a licence, and
(iii) the effective date of the final decision and order, with respect to the individual's application for a Class P1 licence,
(A) of the Hearing Panel, or
(B) of the Appeal Panel, if there is an appeal from the decision and order of the Hearing Panel.

Interpretation
31. (1) In this section,
"employer" has the meaning given it in the Workplace Safety and Insurance Act, 1997;

"injured workers' group" means a not-for-profit organization that is funded by the Workplace Safety and Insurance Board to provide specified legal services to workers;
"public servant" has the meaning given it in the Public Service Act;
"survivor" has the meaning given it in the Workplace Safety and Insurance Act, 1997;
"worker" has the meaning given it in the Workplace Safety and Insurance Act, 1997.

Office of the Worker Adviser
(2) An individual who is a public servant in the service of the Office of the Worker Adviser may, without a licence, provide the following legal services through the Office of the Worker Adviser:

1. Advise a worker, who is not a member of a trade union, or the worker's survivors of her or his legal interests, rights and responsibilities under the Workplace Safety and Insurance Act, 1997.
2. Act on behalf of a worker, who is not a member of a trade union, or the worker's survivors in connection with matters and proceedings before the Workplace Safety and Insurance Board or the Workplace Safety and Insurance Appeals Tribunal or related proceedings.

Office of the Employer Adviser
(3) An individual who is a public servant in the service of the Office of the Employer Adviser may, without a licence, provide the following legal services through the Office of the Employer Adviser:

1. Advise an employer of her, his or its legal interests, rights and responsibilities under the Workplace Safety and Insurance Act, 1997 or any predecessor legislation.
2. Act on behalf of an employer in connection with matters and proceedings before the Workplace Safety and Insurance Board or the Workplace Safety and Insurance Appeals Tribunal or related proceedings.

Injured workers' groups
(4) An individual who volunteers in an injured workers' group may, without a licence, provide the following legal services through the group:
1. Give a worker advice on her or his legal interests, rights or responsibilities under the Workplace Safety and Insurance Act, 1997.
2. Act on behalf of a worker in connection with matters and proceedings before the Workplace Safety and Insurance Board or the Workplace Safety and Insurance Appeals Tribunal or related proceedings.

Interpretation
32. (1) In this section,
"dependants" means each of the following persons who were wholly or partly dependent upon the earnings of a member of a trade union at the time of the member's death or who, but for the member's incapacity due to an accident, would have been so dependent: 1. Parent, stepparent or person who stood in the role of parent to the member.
2. Sibling or half-sibling.
3. Grandparent.
4. Grandchild;
"survivor" means a spouse, child or dependent of a deceased member of a trade union;
"workplace" means,

(a) in the case of a former member of a trade union, a workplace of the former member when he or she was a member of the trade union; and
(b) in the case of a survivor, a workplace of the deceased member when he or she was a member of the trade union.

Trade unions
(2) An employee of a trade union, a volunteer representative of a trade union or an individual designated by the Ontario Federation of Labour may, without a licence, provide the following legal services to the union, a member of the union, a former member of the union or a survivor:

1. Give the person advice on her, his or its legal interests, rights or responsibilities in connection with a workplace issue or dispute.
2. Act on behalf of the person in connection with a workplace issue or dispute or a related proceeding before an adjudicative body other than a federal or provincial court.
3. Despite paragraph 2, act on behalf of the person in enforcing benefits payable under a collective agreement before the Small Claims Court.

Review
33. Not later than May 1, 2009, the Society shall assess the extent to which permitting the individuals mentioned in sections 30, 31 and 32 to provide legal services without a licence is consistent with the function of the Society set out in section 4.1 of the Act and the principles set out in section 4.2 of the Act and determine whether the sections, in whole or in part, should be maintained or revoked.

Student under articles of clerkship
34. (1) A student may, without a licence, provide legal services in Ontario under the direct supervision of a licensee who holds a Class L1 licence who is approved by the Society.

Other law student
(2) A law student may, without a licence, provide legal services in Ontario if the law student,
(a) is employed by a licensee who holds a Class L1 licence, a law firm, a professional corporation described in clause 61.0.1 (c) of the Act, the Government of Canada, the Government of Ontario or a municipal government in Ontario;
(b) provides the legal services,
(i) where the law student is employed by a licensee, through the licensee's professional business,
(ii) where the law student is employed by a law firm, through the law firm,
(iii) where the law student is employed by a professional corporation described in clause 61.0.1

(c) of the Act, through the professional corporation, or
(iv) where the law student is employed by the Government of Canada, the Government of Ontario or a municipal government in Ontario, only for and on behalf of the Government of Canada, the Government of Ontario or the municipal government in Ontario, respectively; and
(c) provides the legal services,
(i) where the law student is employed by a licensee, under the direct supervision of the licensee,
(ii) where the law student is employed by a law firm, under the direct supervision of a licensee who holds a Class L1 licence who is a part of the law firm,
(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, under the direct supervision of a licensee who holds a Class L1 licence who practise law as a barrister and solicitor through the professional corporation, or
(iv) where the law student is employed by the Government of Canada, the Government of Ontario or a municipal government in Ontario, under the direct supervision of a licensee who holds a Class L1 licence who works for the Government of Canada, the Government of Ontario or the municipal government in Ontario, respectively.

Same
(3) A law student may, without a licence, provide legal services in Ontario that a licensee who holds a Class P1 licence is authorized to provide if the law student,
(a) is employed by a licensee who holds a Class P1 licence, a legal services firm or a professional corporation described in clause 61.0.1 (1) (c) of the Act;
(b) provides the legal services,
(i) where the law student is employed by a licensee, through the licensee's professional business,
(ii) where the law student is employed by a legal services firm, through the legal services firm, or
(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, through the professional corporation; and
(c) provides the legal services,
(i) where the law student is employed by a licensee, under the direct supervision of the licensee,
(ii) where the law student is employed by a legal services firm, under the direct supervision of a licensee who holds a Class P1 licence who is a part of the legal services firm, or
(iii) where the law student is employed by a professional corporation described in clause 61.0.1 (1) (c) of the Act, under the direct supervision of,
(A) a licensee who holds a Class P1 licence who provides legal services through the professional corporation, or
(B) a licensee who holds a Class L1 licence who practises law as a barrister and solicitor through the professional corporation.

Interpretation: "law student"
4) For the purposes of subsections (2) and (3), "law student" means an individual who is enrolled in a degree program at an accredited law school.

Appendix 2

February 1, 2010

Ms. Julia Bass
Policy Counsel
Law Society of Upper Canada
130 Queen St W
Toronto, Ontario
M5H 2N6

Dear Ms. Bass,

Re: Paralegal Licensing / Collection Agencies

As discussed in mid January, OSCA has drafted a proposal for the exemption of Collection Agencies from Paralegal Regulation.

OSCA has put a Paralegal Committee in place to deal with the current issues of concern to our members.

The items presented in this proposal have been discussed and agreed upon by our Board of Directors.

I would like to thank you again for listening to the concerns that our members have about the licensing process.

Please feel free to contact me at (416) 277-8463 or at bradleyrice@centralcredit.ca

Yours truly

Bradley Rice
President
Ontario Society of Collection Agencies

Proposal for the exemption of Collection Agencies from Paralegal Regulation

We propose that licensed Debt Collection agencies are not captured by the Law Society Act or should be exempted by a Law Society By-law.

"Anyone in Ontario providing legal services requires a license, unless the group or individual is not captured by the Law Society Act or is exempt by a Law Society by-law. The Law Society Act enables the Law Society to make exemptions through by-laws."

We believe this proposal will satisfy any reasonable standard of fairness for both the collection industry and the consumers for which we serve.

Description of the Collection Industry.

A collection agency is an organization that obtains or arranges for payment of money owed to a third party; this could be a person or a company.

Collection Agencies operating in Ontario are required to be licensed and bonded under the Collection Agencies Act.

The Collection Agencies Act sets out a code of ethics for Ontario's collection agencies. Ontario's Ministry of Consumer Services worked with the industry to put this law into place to ensure all collection agencies and their employees adhere to the same set of rules. Through this legislation the public has been provided with detailed information as to the permitted and prohibitive practices of registered collection agencies.

At the time of writing, there are 193 organizations registered under the collection Agencies Act.

The collection of debt facilitates the recovery of hundreds of millions of dollars annually, that are returned to credit grantors. These funds, returned to every strata of business organizations, represent cash that companies can put into developing new products, expanding operations, or even paying their own debts. Business organizations use the services of collection agencies in their business models. In the absence of collection services it is not inconceivable that available credit might be restricted to consumers or increased prices to offset this additional risk. By providing collection services, our member organizations contribute an integral service in maintaining lower prices for all consumers.

Besides boosting business, collection agencies assist public policy by providing similar services to government agencies, at all levels of governance.

In fact, the services provided by collection agencies contribute to such an extent on our nation’s financial situation that experts have stated that in the absence of our members’ services, the economy would be in much worse condition.

In addition to the most obvious ways that debt collection helps our economy, it also serves as one of Canada's strongest and most rapidly-growing industries. Third-party collection services employ thousands of Canadians each year, providing a paycheque and a stable work environment for people across the country.

The vast majority of our member's activities do not require the use of the court system. There is though, a segment of our business that requires legal activity through the court system, whether it be the Small Claims or General Court venue. It is in the former court where our member organizations have extensive experience in managing and administering those cases that proceed in this manner.

Collection through the Small Claims court system is acting in the normal course of carrying on our profession. This profession is governed by another Act of the Ontario Legislature, The Collection Agencies Act.

Problem Statement

Changes to the Law Society Act have not fully accounted for the impacts to businesses which avail themselves of the Small Claims Court system in the execution of their regulated business practices.

When these changes were proposed, there was a degree of confusion in our industry due the response received from the Law Society to our industry that collection agencies would be able to continue to use the Small Claims Court system in their normal business practices.

Currently, there continues to exist a level of confusion as to what actions or involvement is permissible to Collection Agencies when utilizing the court system in their normal business activities.

From the LSUC's website at time of writing the following appears under the heading "Do Collection Agencies staff require a license?"

Staff of collection agencies, who work to collect debts owing to clients of their agencies, need a licence to appear in small claims court. Under the Law Society Act, a person who is acting in the normal course of carrying on a profession or occupation governed by another Act of the Legislature that regulates specifically the activities of persons engaged in that profession or occupation, does not require a licence. Under the Law Society Act, staff of collection agencies working to collect debts owing to clients of their agencies who do **not** use the small claims court to do so do not need a licence to carry on that work.

Solution

We believe that a reasonable solution to the problem would be to exempt licensed Collection Agencies from the Law Society Act. This solution would allow licensed Collection Agencies to continue to operate as they have for decades,

professionally recovering monies that are rightly owed to the businesses for which we work for.

We propose that the exemption of Collection Agencies be subject to certain restrictions. The restriction would allow Collection Agencies to use the small claims court only for the sole purpose of collecting debts.

Collection agencies have not and do not solicit clients for the purpose of providing legal services. Our involvement in the small claims court process is to bring to completion to a file that has been placed for collection.

Justification

The reasoning behind the request for exemption to be considered takes into account the following points:

1. Collection Agencies' use of the Small Claims Court system is an extension of acting in the normal course of business. This business is governed by another Act of the Legislature, namely The Collection Agencies Act.
Per Section 4 (1) of the Collection Agencies Act *"No person shall carry on the business of a collection agency or act as a collector unless he is registered by the Registrar under this Act."*

Collection Agencies must adhere to strict government regulations including, but not limited to;

- Trust Account requirements
- Bond requirements
- E/O Insurance
- Investigation of Complaints through the Ministry
- Powers of Inspection by the Ministry
- Financial Statement filing requirements

2. The majority of collection agencies in Ontario are members of OSCA, The Ontario Society of Collection Agencies.

OSCA's mission is to provide a governing body that will provide guidance, support, and education to our business partners as well as provide recommendations and education to perspective agency clients in both the local and national marketplace.

In pursuing this goal we pledge to remain of high integrity and professionalism at all times; build long term rewarding relationships; and to act in the best interest of our membership in pursuing the highest standards of communication and good faith.

OSCA is well underway an accreditation process for its members. We are currently in consultation with Brian Pitkin, The Registrar for Collection Agencies, for guidance.

The accreditation process allows for OSCA to be a standard setting organization.

3. Disallowing Collection Agencies to collect debt through the court system would seriously hinder the collection process.

Paralegals cannot legally collect debt unless they are licensed under the Collection Agencies Act.

If a claim is issued by a paralegal and they are the agent of record, any enforcement attempts would constitute acting as a collector.

Furthermore, when creditors place accounts with a Collection Agency they enter into specific contract for the collection of accounts. Most contracts would not allow for additional parties to be involved, say in the case of a Paralegal acting as agent for the creditor.

With claims being issued across the province in varying jurisdictions, it would be impossible to include a specific Paralegal in a contract for the provision of Collection services.

4. Regulation 103, Section 19, under the Collection Agencies Act, states that No collection agency or collector shall,

(*b) commence legal proceeding with respect to the collection of a debt , or recommend to a creditor that legal proceedings be commenced with respect to the collection of a debt, unless the collection agency or collector first gives notice to the debtor that the collection agency or the collector intends to commence such proceedings or recommend that proceedings be commenced, as the case may be;*

Furthermore, the Ministry of Consumer Services own website states the following, when informing the public about Collection Agencies

“Debts should not be treated lightly. They can result in court action, which could lead to money being taken from your paycheque (garnisheed) or seizure of your assets”

Both the above mentioned regulation and the public information provided by the Ministry of Consumer Services speak to the use of the court system by Collection Agencies.

<u>Conclusion</u>

The use of the court system has been historically a logical and effective course of debt collection since the legal system was formed.

Enforcement through Small Claims Court occurs only when all other methods of collection are exhausted.

Collection Agencies' use of the court system is for the sole purpose of debt collection. We do not solicit the provision of legal services and our only desired use of the Small Claims Court system is to effect the collection of debt that is legitimately owed, which is done under the guidance and strict regulation of the Collection Agencies Act.

AMENDMENT TO BY-LAW 3 – ELECTION OF COMMITTEE CHAIR

Motion

37. That Convocation approve the amendments to By-Law 3 governing the election of the Chair of the Paralegal Standing Committee, attached at Appendix 4.

Background

38. In June 2009, Convocation approved the required policies for the conduct of the first paralegal election and the election of the paralegal benchers. However, the Convocation has not yet approved the necessary by-law amendments providing for the election of the Committee Chair.

39. The 2004 Task Force Report to Convocation provided that the Paralegal Standing Committee Chair must be a paralegal licensee and is to be elected by all 13 members of the Paralegal Standing Committee, but did not detail the form of election to be used.

40. The proposed amendments for Convocation's consideration have been prepared following the procedures used for the election of the Treasurer by Convocation, such as use of a secret ballot and the requirement that the successful candidate receive at least 50% of the available votes. (In the case of the Paralegal Standing Committee, this would avoid a situation where a person could be elected chair with only 3 or 4 votes).

Appendix 4

DRAFT WORDING FOR BY-LAW 3 *RE*: ELECTION OF COMMITTEE CHAIR

CHAIR

Definitions

130.1. (1) In this section and in sections 130.4 to 130.12, "Elections Officer" means the person who is assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of those sections.

Appointment of chair

130.2. (1) The Committee shall appoint as its chair the member of the Committee whom it elects as chair in accordance with sections 130.3 to 130.12.

Time of appointment

(2) The Committee shall appoint a chair of the Committee immediately after it elects a chair in accordance with sections 130.3 to 130.12.

Election of chair: time

130.3. (1) There shall be an election of chair by the Committee,

(a) on the day on which there is an election of benchers licensed to provide legal services under Part I.1 of this By-Law; and

(b) on every anniversary of the day mentioned in clause (a), until the next election of benchers licensed to provide legal services under Part I.1 of this By-Law.

Same

(2) The election of chair by the Committee shall be the first matter of business for the Committee on the day of the election of chair except that, on the day on which there is an election of benchers licensed to provide legal services under Part I.1 of this By-Law, the election of chair shall be the first matter of business for the Committee immediately after the election of benchers.

Elections Officer

130.4. The election of chair shall be conducted by the Elections Officer.

Who may be candidate

130.5. (1) Every person who was elected to the Committee under Part VII.1 of this By-Law and took office as a member of the Committee pursuant to that Part may be a candidate in the election of chair if the person is nominated as a candidate in accordance with this section.

Nomination and consent

(2) A candidate in the election of chair must,

(a) be nominated by at least one member of the Committee; and

(b) consent to the nomination.

Nomination requirements

(3) The nomination of a person as a candidate in the election of chair must,

(a) be in writing;

(b) be signed by the person being nominated, to indicate his or her consent to the nomination;

(c) be signed by the member or members of the Committee nominating the person as a candidate; and

(d) be submitted to the Elections Officer by the time specified by the Elections Officer.

Invalid nomination

(4) A nomination that does not comply with subsection (3) is invalid and the person who is the subject of the nomination shall not be a candidate in the election of chair.

Election by acclamation

130.6. If after the time specified by the Elections Officer for the submission of nominations there is only one candidate in the election of chair, the Elections Officer shall declare that candidate to have been elected the chair.

Poll

130.7. (1) If after the time specified by the Elections Officer for the submission of nominations there are two or more candidates in the election of chair, a poll shall be conducted to elect the chair.

Poll: secret ballot

(2) A poll to elect the chair shall be conducted by secret ballot.

Poll: right to vote

(3) Every person who is a member of the Committee on the day of the election of chair is entitled to vote in the election of chair.

Procedure for voting: first ballot

130.8. (1) On the day of the election of chair, each member of the Committee who is in attendance in person at the meeting of the Committee at the time of the first ballot shall receive a first ballot listing the names of all candidates in the election of chair.

Procedure for voting: second ballot

(2) If the chair is not elected as a result of the votes cast on the first ballot, each member of the Committee who is in attendance in person at the meeting of the Committee at the time of the second ballot shall receive a second ballot listing the names of the candidates remaining in the election of chair at the time of that ballot.

Application of subs. (2) to second and further ballots

(3) Subsection (2) applies to the second ballot and, with necessary modifications, any further ballots in the election of chair.

Marking ballot

(4) Each member of the Committee voting on a ballot in the election of chair shall vote for one candidate only on the ballot and shall indicate the candidate of his or her choice by placing a mark beside the name of the candidate.

Ballot box

(5) After a member of the Committee voting on a ballot in the election of chair has marked the ballot, he or she shall fold the ballot so that the names of the candidates do not show and, in the presence of the Elections Officer, put the ballot into the ballot box.

Counting votes

130.9. (1) After all members of the Committee voting on a ballot in the election of chair have voted or declined to vote on the ballot, the Elections Officer shall, in the absence of all persons but in the presence of the vice-chair of the Committee, open the ballot box, remove all the ballots from the ballot box, open the ballots and count the votes cast for each candidate.

Counting votes: application

(2) Subsection (1) applies to the count of votes on the first ballot in the election of the chair and, with necessary modifications, to the count of votes on the second and any further ballot in the election of chair.

Report of results: two candidates

130.10. (1) If on any ballot in the election of chair there are not more than two candidates, immediately after counting the votes cast for each candidate, the Elections Officer shall report the results to the Committee and shall declare to be elected as chair the candidate who received the larger number of votes.

Report of results: three or more candidates

(2) If on any ballot in the election of chair there are three or more candidates and, after counting the votes, the Elections Officer determines that at least one candidate received more than 50 percent of all votes cast for all candidates, the Elections Officer shall report the results to the Committee and shall declare to have be elected as chair the candidate who received the largest number of votes.

Same

(3) If on any ballot in the election of chair there are three or more candidates and, after counting the votes, the Elections Officer determines that no candidate received more than 50 percent of all votes cast for all candidates, the Elections Officer shall report to the Committee that no candidate received more than 50 percent of all votes cast for all candidates and that a further ballot will be required in order to elect the chair.

Further ballot required

(4) If a further ballot is required under subsection (3), the Elections Officer shall report to the Committee the candidate on the previous ballot who received the least number of votes and that candidate shall be removed as a candidate in the election of chair.

Casting tie-breaking vote

130.11. If at any time an equal number of votes is cast for two candidates and an additional vote would entitle one of the candidates to be declared to be elected as chair, the vice-chair of the Committee shall, in the presence of the Elections Officer, randomly select one of the candidates and cast an additional vote for that candidate.

Equal number of votes

130.12. (1) If at any time an equal number of votes is cast for two or more candidates and an additional vote would entitle one or more of them to remain in the election of chair, a poll shall be conducted to select the candidates to remain in the election.

Secret ballot

(2) A poll conducted under subsection (1) shall be conducted by secret ballot.

Right to vote

(3) Each member of the Committee entitled to vote in the election of chair is entitled to vote in a poll conducted under subsection (1).

Ballot

(4) Each member of the Committee entitled to vote in a poll conducted under subsection (1) who is in attendance in person at the meeting of the Committee at the time of the ballot shall receive a ballot listing the names of the candidates who received the equal and least number of votes.

Marking ballot

(5) A member of the Committee voting on a ballot in a poll conducted under subsection (1) shall vote for the candidate or candidates, but not for all the candidates, whom he or she wishes to remain in the election of chair and shall indicate his or her choice or choices by placing a mark beside the name of each candidate chosen.

Ballot box

(6) After a member of the Committee voting on a ballot in a poll conducted under subsection (1) has marked the ballot, he or she shall fold the ballot so that the names of the candidates do not show and, in the presence of the Elections Officer, put the ballot into the ballot box.

Counting votes

(7) After all members of the Committee voting on a ballot in a poll conducted under subsection (1) have voted or declined to vote on a ballot, the Elections Officer shall, in the absence of all persons but in the presence of the vice-chair of the Committee, open the ballot box, remove all ballots from the ballot box, open the ballots and count the votes cast for each candidate.

Report of results

(8) Immediately after counting the votes cast for each candidate in a poll conducted under subsection (1), the Elections Officer shall report the results to the Committee.

Removal of candidate

(9) The candidate who receives the least number of votes in a poll conducted under subsection (1) shall be removed as a candidate in the election of chair.

Further polls

(10) If two or more candidates in a poll conducted under subsection (1) each receive the least and the same number of votes, additional polls shall be conducted under subsection (1), for the candidates with the same number of votes, until only one candidate from all the candidates included in the initial poll conducted under subsection (1) is removed as a candidate in the election of chair.

Taking office

130.13.(1) A person appointed as chair shall take office immediately after his or her appointment and shall remain in office until his or her successor takes office.

Ceasing to be chair

(2) Despite subsection (1), a person ceases to be the chair of the Committee if the person ceases to be a member of the Committee.

Vacancy in office

(3) If the chair resigns, is removed from office or for any reason is unable to act during his or her term in office, or if there is for any other reason a vacancy in the office of chair of the Committee, the Committee shall appoint a new chair whom it elects as soon as is practicable.

Application of provisions

(4) Subsection 130.2 and sections 130.4 to 130.12 apply to the appointment and election of chair under subsection (3)

Acting chair

(5) If the chair of the Committee for any reason is temporarily unable to perform the duties or exercise the powers of the chair during his or her term in office, or if there is a vacancy in the office of the chair of the Committee, the vice-chair shall perform the duties and exercise the powers of the chair until,

(a) the chair is able to perform the duties or exercise the powers of the chair; or

(b) a new chair is appointed under subsection (3).

VICE-CHAIR

Appointment by Convocation

130.14. (1) Convocation shall appoint as vice-chair of the Committee a member of the Committee who is,

(a) an elected bencher who is licensed to practise law in Ontario as a barrister and solicitor; or

(b) a lay bencher.

Term of office

(2) A person appointed as vice-chair of the Committee shall take office immediately after his or her appointment and shall remain in office until his or her successor takes office.

Appointment at pleasure

(3) Despite subsection (2), the vice-chair of the Committee holds office at the pleasure of Convocation.

Vacancy

(4) If the vice-chair of the Committee for any reason is unable to act, the Treasurer may appoint as vice-chair of the Committee another member who is,

(a) an elected bencher who is licensed to practise law in Ontario as a barrister and solicitor; or

(b) a lay bencher.

Appointment by Treasurer subject to ratification

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

AMENDMENT TO PARALEGAL RULES - DUTY TO REPORT TO INSURER

Motion

41. That Convocation approve the deletion of paragraph 3 (13) of the *Paralegal Rules of Conduct*.

Background

42. In September, the Committee approved additions to the list in section 2 of Ontario Regulation167/07, setting out the types of cases that a single panel member may hear. The Report was approved by Convocation on September 24. At the time the policy change was discussed, there appeared to be a difference in the obligations for lawyers and paralegals, in that the lawyers' Rules of Professional Conduct contain a requirement to report an incident that may give rise to a claim on a professional liability insurance policy.

43. The Committee indicated that a comparable provision for the Paralegal Rules should be prepared. Accordingly, wording was developed, to be placed in Rule 8 – Practice Management. It was approved by Convocation in January 2010, as follows:

> *8.04 (2) A paralegal shall give prompt notice of any circumstance that the paralegal may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.*

44. In revising a reference version of the rules, it became apparent that similar wording already existed in the rules, under Rule 3 – Duty to Clients, as follows:

> 3. (13) A paralegal shall give prompt notice of any circumstances that he or she may reasonably expect to give rise to a claim, to an insurer or other indemnitor, so that the client's protection from that source will not be prejudiced.

45. Accordingly, one of these versions is redundant. Part 8 – *Practice Management* is a more suitable location for this obligation. The comparable rule in the lawyers' *Rules* is in *Rule 6 – Relationship to the Society and Other Lawyers*, not in *Rule 2 – Relationship to Clients.*

FOR INFORMATION

PROPOSED AMENDMENT TO RULES RE COMMUNICATIONS

46. On February 11th, the Paralegal Standing Committee considered the proposed changes to the Rules governing communications with represented organizational parties being proposed by the Professional Regulation Committee. The Committee was in agreement with the direction of the proposed changes and supports the Report of the Professional Regulation Committee being submitted to Convocation at TAB 8.

PRESENTATION ON LEGAL EXPENSE INSURANCE BY DAS CANADA

47. The Committee received a presentation from DAS Canada on proposals to introduce legal expenses insurance in Canada. Some information on the proposal is attached at Appendix 5.

3/5/2010 1:26 PM

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

(1) Copy of letter dated June 18, 2008 from Brian Pitkin, CD, Registrar to Malcolm Heins, LSM Re Law Society Administration of Paralegals.

(Appendix 3, pages 23 – 24)

(2) Copy of presentation from DAS Canada on proposals to introduce legal expenses insurance in Canada.

(Appendix 5, pages 35 – 39)

Re: Duty to Report to Insurer

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve the deletion of paragraph 3 (13) of the *Paralegal Rules of Conduct.*

Carried

Re: Amendment to By-Law 3 [Election of Chair of Paralegal Standing Committee]

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve the amendment to By-Law 3 governing the election of the Chair of the Paralegal Standing Committee as set out in the motion distributed under separate cover.

Carried

THE LAW SOCIETY OF UPPER CANADA

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

BY-LAW 3
[BENCHERS, CONVOCATION AND COMMITTEES]

THAT By-Law 3 [Benchers, Convocation and Committees], made by Convocation on May 1, 2007 and amended by Convocation on June 28, 2007, September 20, 2007, November 22, 2007, June 26, 2008, April 30, 2009 and September 24, 2009, be further amended as follows:

1. The English version of the By-Law is amended by adding the following after section 130:

CHAIR

Definition

130.1. In sections 130.4 to 130.12, "Elections Officer" means the person who is assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of those sections.

Appointment of chair

130.2. (1) The Committee shall appoint as its chair the member of the Committee whom it elects as chair in accordance with sections 130.3 to 130.12.

Time of appointment

(2) The Committee shall appoint a chair of the Committee immediately after it elects a chair in accordance with sections 130.3 to 130.12.

Election of chair: time

130.3. (1) There shall be an election of chair by the Committee,

(a) on the day on which there is an election of benchers licensed to provide legal services under Part I.1 of this By-Law; and

(b) on every anniversary of the day mentioned in clause (a), until the next election of benchers licensed to provide legal services under Part I.1 of this By-Law.

Same

(2) The election of chair by the Committee shall be the first matter of business for the Committee on the day of the election of chair except that, on the day on which there is an election of benchers licensed to provide legal services under Part I.1 of this By-Law, the election of chair shall be the first matter of business for the Committee immediately after the election of benchers.

Elections Officer

130.4. The election of chair shall be conducted by the Elections Officer.

Who may be candidate

130.5. (1) Every person who was elected to the Committee under Part VII.1 of this By-Law and took office as a member of the Committee pursuant to that Part may be a candidate in the election of chair if the person is nominated as a candidate in accordance with this section.

Nomination and consent

(2) A candidate in the election of chair must,

(a) be nominated by at least one member of the Committee; and

(b) consent to the nomination.

Nomination requirements

(3) The nomination of a person as a candidate in the election of chair must,

(a) be in writing;

(b) be signed by the person being nominated, to indicate his or her consent to the nomination;

(c) be signed by the member or members of the Committee nominating the person as a candidate; and

(d) be submitted to the Elections Officer by the time specified by the Elections Officer.

Invalid nomination

(4) A nomination that does not comply with subsection (3) is invalid and the person who is the subject of the nomination shall not be a candidate in the election of chair.

Election by acclamation

130.6. If after the time specified by the Elections Officer for the submission of nominations there is only one candidate in the election of chair, the Elections Officer shall declare that candidate to have been elected the chair.

Poll

130.7. (1) If after the time specified by the Elections Officer for the submission of nominations there are two or more candidates in the election of chair, a poll shall be conducted to elect the chair.

Poll: secret ballot

(2) A poll to elect the chair shall be conducted by secret ballot.

Poll: right to vote

(3) Every person who is a member of the Committee on the day of the election of chair is entitled to vote in the election of chair.

Procedure for voting: first ballot

130.8. (1) On the day of the election of chair, each member of the Committee who is in attendance in person at the meeting of the Committee at the time of the first ballot shall receive a first ballot listing the names of all candidates in the election of chair.

Procedure for voting: second ballot

(2) If the chair is not elected as a result of the votes cast on the first ballot, each member of the Committee who is in attendance in person at the meeting of the Committee at the time of the second ballot shall receive a second ballot listing the names of the candidates remaining in the election of chair at the time of that ballot.

Application of subs. (2) to second and further ballots

(3) Subsection (2) applies to the second ballot and, with necessary modifications, any further ballots in the election of chair.

Marking ballot

(4) Each member of the Committee voting on a ballot in the election of chair shall vote for one candidate only on the ballot and shall indicate the candidate of his or her choice by placing a mark beside the name of the candidate.

Ballot box

(5) After a member of the Committee voting on a ballot in the election of chair has marked the ballot, he or she shall fold the ballot so that the names of the candidates do not show and, in the presence of the Elections Officer, put the ballot into the ballot box.

Counting votes

130.9. (1) After all members of the Committee voting on a ballot in the election of chair have voted or declined to vote on the ballot, the Elections Officer shall, in the absence of all persons but in the presence of the vice-chair of the Committee, open the ballot box, remove all the ballots from the ballot box, open the ballots and count the votes cast for each candidate.

Counting votes: application

(2) Subsection (1) applies to the count of votes on the first ballot in the election of the chair and, with necessary modifications, to the count of votes on the second and any further ballot in the election of chair.

Report of results: two candidates

130.10. (1) If on any ballot in the election of chair there are not more than two candidates, immediately after counting the votes cast for each candidate, the Elections Officer shall report the results to the Committee and shall declare to be elected as chair the candidate who received the larger number of votes.

Report of results: three or more candidates

(2) If on any ballot in the election of chair there are three or more candidates and, after counting the votes, the Elections Officer determines that at least one candidate received more than 50 percent of all votes cast for all candidates, the Elections Officer shall report the results to the Committee and shall declare to have be elected as chair the candidate who received the largest number of votes.

Same

(3) If on any ballot in the election of chair there are three or more candidates and, after counting the votes, the Elections Officer determines that no candidate received more than 50 percent of all votes cast for all candidates, the Elections Officer shall report to the Committee that no candidate received more than 50 percent of all votes cast for all candidates and that a further ballot will be required in order to elect the chair.

Further ballot required

(4) If a further ballot is required under subsection (3), the Elections Officer shall report to the Committee the candidate on the previous ballot who received the least number of votes and that candidate shall be removed as a candidate in the election of chair.

Casting tie-breaking vote

130.11. If at any time an equal number of votes is cast for two candidates and an additional vote would entitle one of the candidates to be declared to be elected as chair, the vice-chair of the Committee shall, in the presence of the Elections Officer, randomly select one of the candidates and cast an additional vote for that candidate.

Equal number of votes

130.12. (1) If at any time an equal number of votes is cast for two or more candidates and an additional vote would entitle one or more of them to remain in the election of chair, a poll shall be conducted to select the candidates to remain in the election.

Secret ballot

(2) A poll conducted under subsection (1) shall be conducted by secret ballot.

Right to vote

(3) Each member of the Committee entitled to vote in the election of chair is entitled to vote in a poll conducted under subsection (1).

Ballot

(4) Each member of the Committee entitled to vote in a poll conducted under subsection (1) who is in attendance in person at the meeting of the Committee at the time of the ballot shall receive a ballot listing the names of the candidates who received the equal and least number of votes.

Marking ballot

(5) A member of the Committee voting on a ballot in a poll conducted under subsection (1) shall vote for the candidate or candidates, but not for all the candidates, whom he or she wishes to remain in the election of chair and shall indicate his or her choice or choices by placing a mark beside the name of each candidate chosen.

Ballot box

(6) After a member of the Committee voting on a ballot in a poll conducted under subsection (1) has marked the ballot, he or she shall fold the ballot so that the names of the candidates do not show and, in the presence of the Elections Officer, put the ballot into the ballot box.

Counting votes

(7) After all members of the Committee voting on a ballot in a poll conducted under subsection (1) have voted or declined to vote on a ballot, the Elections Officer shall, in the absence of all persons but in the presence of the vice-chair of the Committee, open the ballot box, remove all ballots from the ballot box, open the ballots and count the votes cast for each candidate.

Report of results

(8) Immediately after counting the votes cast for each candidate in a poll conducted under subsection (1), the Elections Officer shall report the results to the Committee.

Removal of candidate

(9) The candidate who receives the least number of votes in a poll conducted under subsection (1) shall be removed as a candidate in the election of chair.

Further polls

(10) If two or more candidates in a poll conducted under subsection (1) each receive the least and the same number of votes, additional polls shall be conducted under subsection (1), for the candidates with the same number of votes, until only one candidate from all the candidates included in the initial poll conducted under subsection (1) is removed as a candidate in the election of chair.

Taking office

130.13. (1) A person appointed as chair shall take office immediately after his or her appointment and shall remain in office until his or her successor takes office.

Ceasing to be chair

(2) Despite subsection (1), a person ceases to be the chair of the Committee if the person ceases to be a member of the Committee.

Vacancy in office

(3) If the chair resigns, is removed from office or for any reason is unable to act during his or her term in office, or if there is for any other reason a vacancy in the office of chair of the Committee, the Committee shall appoint a new chair whom it elects as soon as is practicable.

Application of provisions

(4) Section 130.2 and sections 130.4 to 130.12 apply to the appointment and election of chair under subsection (3)

Acting chair

(5) If the chair of the Committee for any reason is temporarily unable to perform the duties or exercise the powers of the chair during his or her term in office, or if there is a vacancy in the office of the chair of the Committee, the vice-chair shall perform the duties and exercise the powers of the chair until,

(a) the chair is able to perform the duties or exercise the powers of the chair; or

(b) a new chair is appointed under subsection (3).

VICE-CHAIR

Appointment by Convocation

130.14. (1) Convocation shall appoint as vice-chair of the Committee a member of the Committee who is,

(a) an elected bencher who is licensed to practise law in Ontario as a barrister and solicitor; or

(b) a lay bencher.

Term of office

(2) A person appointed as vice-chair of the Committee shall take office immediately after his or her appointment and shall remain in office until his or her successor takes office.
Appointment at pleasure

(3) Despite subsection (2), the vice-chair of the Committee holds office at the pleasure of Convocation.

Vacancy

(4) If the vice-chair of the Committee for any reason is unable to act, the Treasurer may appoint as vice-chair of the Committee another member who is,

(a) an elected bencher who is licensed to practise law in Ontario as a barrister and solicitor; or

(b) a lay bencher.

Appointment by Treasurer subject to ratification

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

2. The French version of the By-Law is amended by adding the following after section 130:

PRÉSIDENCE

Définition

130.1. La définition qui suit s'applique aux articles 130.4 à 130.12.

« responsable de l'élection » La personne que le directeur général ou la directrice générale charge d'appliquer ces articles.

Nomination à la présidence

130.2. (1) Le Comité pourvoit à sa présidence en y nommant celui de ses membres qu'il élit président ou présidente conformément aux articles 130.3 à 130.12.

Moment de la nomination

(2) Le Comité pourvoit à sa présidence immédiatement après avoir élu le président ou la présidente conformément aux articles 130.3 à 130.12.

Élection du président ou de la présidente : moment

130.3. (1) Le Comité procède à l'élection du président ou de la présidente :

a) d'une part, le jour de l'élection des conseillers et des conseillères pourvus d'un permis les autorisant à fournir des services juridiques prévue à la partie I.1 du présent règlement administratif;

b) d'autre part, à chaque anniversaire du jour visé à l'alinéa a), jusqu'à la prochaine élection des conseillers et des conseillères pourvus d'un permis les autorisant à fournir des services juridiques prévue à la partie I.1 du présent règlement administratif.

Idem

(2) L'élection du président ou de la présidente du Comité constitue le premier article à l'ordre des travaux du Comité le jour de cette élection. Toutefois, le jour de l'élection des conseillers et des conseillères pourvus d'un permis les autorisant à fournir des services

juridiques prévue à la partie I.1 du présent règlement administratif, l'élection du président ou de la présidente constitue le premier article des travaux du Comité immédiatement après l'élection des conseillers et des conseillères.

Responsable de l'élection

130.4. Le ou la responsable de l'élection administre l'élection du président ou de la présidente.

Candidats

130.5. (1) Toute personne élue au Comité en application de la partie VII.1 du présent règlement administratif qui prend ses fonctions de membre du Comité conformément à cette partie est candidate à l'élection du président ou de la présidente si elle est mise en candidature conformément au présent article.

Mise en candidature et consentement

(2) Tout candidat ou toute candidate à l'élection du président ou de la présidente :

a) d'une part, est mis en candidature par au moins un membre du Comité;

b) d'autre part, consent à sa mise en candidature.

Mises en candidature : critères

(3) La mise en candidature d'une personne lors de l'élection du président ou de la présidente doit réunir les conditions suivantes :

a) elle est faite par écrit;

b) elle porte la signature du candidat ou de la candidate pour indiquer son consentement;

c) elle porte la signature du ou des membres du Comité qui met la personne en candidature;

d) elle est présentée au ou à la responsable de l'élection dans le délai qu'il ou elle précise.

Mise en candidature invalide

(4) La mise en candidature qui ne respecte pas le paragraphe (3) est invalide et la personne qu'elle sert à mettre en candidature n'est pas candidate à l'élection du président ou de la présidente.

Élection sans concurrent

130.6. Si, après l'expiration du délai de présentation des mises en candidature précisé par le ou la responsable de l'élection, il n'y a qu'un seul candidat ou une seule candidate à l'élection du président ou de la présidente, le ou la responsable de l'élection le ou la déclare élu.

Scrutin

130.7. (1) Si, après l'expiration du délai de présentation des mises en candidature précisé par le ou la responsable de l'élection, il y a plusieurs candidats ou candidates à l'élection du président ou de la présidente, il est tenu un scrutin pour pourvoir à la présidence.

Scrutin secret

(2) Le scrutin tenu pour pourvoir à la présidence est secret.

Scrutin : droit de vote

(3) A droit de vote aux fins de l'élection du président ou de la présidente quiconque est membre du Comité le jour de l'élection.

Procédure de vote : premier tour de scrutin

130.8. (1) Le jour de l'élection du président ou de la présidente, au premier tour de scrutin, tous les membres du Comité présents en personne à la réunion du Comité reçoivent un bulletin où apparaissent les noms des candidats et candidates à l'élection du président ou de la présidente en lice.

Procédure de vote : deuxième tour de scrutin

(2) Si le président ou la présidente n'a pas été élu à la suite du décompte des voix exprimées lors du premier tour de scrutin, les membres du Comité présents en personne à la réunion du Comité au moment du deuxième scrutin participent alors au deuxième tour de scrutin et reçoivent un bulletin où apparaissent les noms des candidats et candidates à l'élection du président ou de la présidente encore en lice.

Application du par. (2) aux tours de scrutin subséquents

(3) Lors de l'élection du président ou de la présidente, le paragraphe (2) s'applique, avec les adaptations nécessaires, aux tours de scrutin subséquents.

Comment remplir le bulletin

(4) Les membres du Comité qui participent à un scrutin lors de l'élection du président ou de la présidente ne votent que pour un seul candidat ou une seule candidate par bulletin de vote en sélectionnant le nom du candidat ou de la candidate de leur choix.

Boîte de scrutin

(5) Après avoir rempli leurs bulletins de vote, les membres du Comité qui participent à un scrutin lors de l'élection du président ou de la présidente les plient de façon à ce que les noms des candidats et des candidates ne soient pas visibles et, en présence du ou de la responsable de l'élection, les déposent dans la boîte de scrutin.

Dépouillement

130.9. (1) Après que tous les membres du Comité qui participent à un scrutin lors de l'élection du président ou de la présidente ont voté ou refusé de voter, le ou la responsable de l'élection, en l'absence de toutes les personnes sauf du vice-président ou de la vice-présidente du Comité, ouvre la boîte de scrutin, en retire tous les bulletins, les ouvre et procède au décompte des voix exprimées par candidat.

Dépouillement : application

(2) Le paragraphe (1) s'applique au décompte des voix exprimées au premier tour de scrutin de l'élection du président ou de la présidente et, avec les adaptations nécessaires, au décompte des voix exprimées au second tour de scrutin et aux tours de scrutin subséquents.

Annonce des résultats : deux candidats

130.10. (1) Si deux noms seulement apparaissent sur les bulletins de vote, le ou la responsable de l'élection, immédiatement après avoir procédé au décompte de voix par candidat, annonce les résultats du scrutin au Comité et déclare président ou présidente la personne qui a reçu le nombre le plus élevé de voix.

Annonce des résultats : au moins trois candidats

(2) Si au moins trois noms apparaissent sur les bulletins de vote et que le ou la responsable de l'élection, après avoir procédé au décompte de voix, détermine qu'au moins un candidat ou une candidate a reçu plus de 50 pour cent des voix, il ou elle annonce les résultats du scrutin au Comité et déclare président ou présidente la personne qui a reçu le nombre le plus élevé de voix.

Idem

(3) Si au moins trois noms apparaissent sur les bulletins de vote et que le ou la responsable de l'élection, après avoir procédé au décompte de voix, détermine qu'aucun des candidats n'a reçu plus de 50 pour cent des voix, il ou elle en informe le Conseil et annonce la tenue d'un tour de scrutin supplémentaire afin d'élire le président ou la présidente.

Tour de scrutin supplémentaire

(4) S'il est nécessaire de procéder à un autre tour de scrutin conformément au paragraphe (3), le ou la responsable de l'élection annonce au Conseil le nom du candidat ou de la candidate qui a reçu le moins de voix et son nom est retiré du processus électoral.

Voix prépondérante

130.11. Si au moins deux candidats ou candidates reçoivent un nombre égal de voix et qu'une voix supplémentaire permettrait à l'un ou à l'une d'eux d'être déclaré élu à la charge de président, le vice-président ou la vice-présidente du Comité, en présence du ou de la responsable de l'élection, choisit au hasard l'un des candidats ou l'une des candidates et exprime une voix supplémentaire pour lui ou pour elle.

Nombre égal de voix

130.12. (1) Si au moins deux candidats ou candidates reçoivent un nombre égal de voix et qu'une voix supplémentaire permettrait à l'un ou à plusieurs d'entre eux de rester en lice dans l'élection du président ou de la présidente, un sondage a lieu afin de choisir les candidats et les candidates qui resteront en lice.

Scrutin secret

(2) Le sondage tenu en application du paragraphe (1) a lieu par scrutin secret.

Droit de vote

(3) Les membres du Comité habilités à voter à l'élection du président ou de la présidente ont le droit de participer au sondage prévu au paragraphe (1).

Bulletin

(4) Les membres du Comité habilités à participer au sondage prévu au paragraphe (1) qui sont présents en personne à la réunion du Comité au moment du scrutin reçoivent un bulletin où apparaissent les noms des candidats ou des candidates qui ont reçu le moins élevé et le même nombre de voix.

Comment remplir le bulletin

(5) Les membres du Comité qui participent au sondage prévu au paragraphe (1) votent pour le ou les candidats ou la ou les candidates qu'ils souhaitent conserver pour l'élection du président ou de la présidente, mais non pour la totalité de ceux-ci ou de celles-ci, en sélectionnant le nom de chaque candidat ou de chaque candidate de leur choix.

Boîte de scrutin

(6) Après avoir rempli leurs bulletins de vote, les membres du Comité qui participent au sondage prévu au paragraphe (1) les plient de façon que les noms des candidates et des candidats ne soient pas visibles et, en présence du ou de la responsable de l'élection, les déposent dans la boîte de scrutin.

Dépouillement

(7) Après que toutes les membres qui participent au sondage prévu au paragraphe (1) ont voté ou refusé de voter, le ou la responsable de l'élection, en l'absence de toutes les personnes sauf du vice-président ou de la vice-présidente du Comité, ouvre la boîte de scrutin, en retire tous les bulletins, les ouvre et procède au décompte des voix exprimées par candidat ou candidate.

Annonce des résultats

(8) Immédiatement après avoir procédé au décompte des voix par candidat ou candidate dans le sondage prévu au paragraphe (1), le ou la responsable de l'élection annonce les résultats du sondage au Comité.

Élimination des candidats

(9) Le candidat ou la candidate qui reçoit le nombre le moins élevé de voix dans le sondage prévu au paragraphe (1) est éliminé de la liste des candidats et candidates à l'élection du président ou de la présidente.

Sondages supplémentaires

(10) Si au moins deux candidats ou candidates figurant dans le sondage prévu au paragraphe (1) reçoivent le moins élevé et le même nombre de voix, d'autres sondages prévus à ce paragraphe sont tenus pour ces candidats et candidates jusqu'à ce qu'une candidate ou un candidat visé par le premier sondage soit éliminé de la liste des candidats et candidates à l'élection du président ou de la présidente.

Entrée en fonction

130.13. (1) La personne nommée à la charge de président entre en fonction immédiatement après sa nomination et conserve son poste jusqu'à l'entrée en fonction de son successeur.

Cessation de fonction

(2) Malgré le paragraphe (1), cesse d'occuper la charge de président du Comité la personne qui cesse d'être membre de celui-ci.

Vacance

(3) En cas de démission, de destitution ou, pour quelque raison que ce soit, d'empêchement du président ou de la présidente au cours de son mandat, ou en cas de vacance de la charge, le Comité nomme un nouveau président ou une nouvelle présidente qu'il élit dès la première occasion.

Application de dispositions

(4) L'article 130.2 et les articles 130.4 à 130.12 s'appliquent à la nomination et à l'élection du président ou de la présidente visées au paragraphe (3).

Président intérimaire

(5) Si, pour quelque raison que ce soit, le président ou la présidente du Comité est temporairement incapable de remplir les attributions de sa charge au cours de son mandat, ou en cas de vacance de la charge, le vice-président ou la vice-présidente remplit les attributions de la charge de président jusqu'à ce que se présente l'une des situations suivantes :

a) le président ou la présidente est en mesure de remplir les attributions de sa charge;

b) un nouveau président ou une nouvelle présidente est nommé conformément au paragraphe (3).

VICE-PRÉSIDENT

Nomination par le Conseil

130.14. (1) Le Conseil nomme à la charge de vice-président du Comité le membre de ce dernier qui est :

a) soit un conseiller élu ou une conseillère élue qui est pourvu d'un permis l'autorisant à pratiquer le droit en Ontario à titre d'avocat ou d'avocate;

b) soit un conseiller ou une conseillère non juriste.

Mandat

(2) La personne nommée à la charge de vice-président entre en fonction immédiatement après sa nomination et conserve son poste jusqu'à l'entrée en fonction de son successeur.

Mandat amovible

(3) Malgré le paragraphe (2), le vice-président ou la vice-présidente du Comité occupe ses fonctions au gré du Conseil.

Vacance

(4) En cas d'empêchement du vice-président ou de la vice-présidente du Comité, le trésorier ou la trésorière peut nommer à sa place un autre membre qui est :

a) soit un conseiller élu ou une conseillère élue qui est pourvu d'un permis l'autorisant à pratiquer le droit en Ontario à titre d'avocat ou d'avocate;

b) soit un conseiller ou une conseillère non juriste.

Ratification de la nomination

(5) La nomination d'un membre du Comité à la vice-présidence qui est visée au paragraphe (4) est subordonnée à la ratification du Conseil à la première réunion ordinaire qui suit la nomination.

Re: Integration of Exempted Paralegals

It was moved by Mr. Dray, seconded by Ms. McGrath, –

a. That Convocation approve in principle the creation of an integration programme to permit members of some of the exempted groups in By-Law 4 to apply to become licensed as paralegals, as set out below, and

b. That Ontario collection agents also be permitted to apply under this programme.

Carried

Item for Information

- Communications with Organizational parties

PROFESSIONAL REGULATION COMMITTEE REPORT

Report to Convocation
February 25, 2010

Professional Regulation Committee

Committee Members
Linda Rothstein (Chair)
Julian Porter (Vice-Chair)
Bonnie Tough (Vice-Chair)
Christopher Bredt
John Campion
Carl Fleck
Patrick Furlong
Gary Lloyd Gottlieb
Glenn Hainey
Brian Lawrie
Ross Murray
Sydney Robins
Baljit Sikand
Roger Yachetti

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat
(Jim Varro – 416-947-3434)

TABLE OF CONTENTS

COMMITTEE PROCESS

1. Following its January 14, 2010 meeting, the Professional Regulation Committee ("the Committee") referred the matter of amendments to rule 6.03(9) of the *Rules of Professional Conduct* to the Paralegal Standing Committee for review, given that the Paralegal Rules of Conduct contain a very similar rule. This report reflects the Committee's recommendation on the amendments, endorsed by the Paralegal Standing Committee.

2. In attendance at the January 2010 meeting were Linda Rothstein (Chair), Julian Porter (Vice-Chair), Christopher Bredt, Patrick Furlong, Glenn Hainey, Brian Lawrie and Ross Murray. Staff attending were Nicole Anthony, Julia Bass, Cathy Braid, Lesley Cameron, Grace Knakowski, Terry Knott, Lisa Mallia, Zeynep Onen, Sophia Sperdakos, Arwen Tillman and Jim Varro.

AMENDMENT TO RULE 6.03(9) OF THE *RULES OF PROFESSIONAL CONDUCT*

Motion

3. That Convocation

   a. approve in principle the proposed amendments to rule 6.03(9) of the Rules of Professional Conduct, as set out at paragraph 28, and

   b. refer the proposed amendments to the Law Society's Rules drafter for preparation of a final draft for adoption.

Introduction

4. During discussions at November 22, 2007 Convocation on amendments to rules 4.03 and 6.03, some benchers raised concerns about lawyers' compliance with rule 6.03(9)(b), which prohibits a lawyer from communicating with certain individuals at an organizational client opposed in interest to the lawyer's client, without the consent of the organization's lawyer.

5. Based on the concerns expressed, the Committee undertook a review of the rule, which included:

   a. Considering the appropriateness of the prohibition in paragraph (b);
   b. Preparing a draft of an amended rule, which was published for comment by lawyers and paralegals;
   c. Striking a working group to assess the input received, and
   d. Preparing a revised version of the amended rule and an expanded commentary, for Convocation's consideration.

6. The Paralegal Standing Committee reviewed this matter at its February 11, 2010 meeting, as the *Paralegal Rules of Conduct* include a very similar rule. That Committee approves of the Committee's draft.

7. Convocation is requested to review the Committee's proposed revised version of the amended rule and commentary and decide if it articulates an appropriate standard on this issue. If Convocation agrees with the draft proposal, the Law Society's Rules drafter will then be engaged to prepare final versions of the rule for adoption.

Background and the Committee's Review

8. Rule 6.03(9) currently reads:

> Communications with a represented corporation or organization
>
> 6.03(9) A lawyer retained to act on a matter involving a corporation or organization that is represented by a licensee shall not approach
>
> (a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or
>
> (b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,
>
> in respect of that matter unless the licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

Commentary

This subrule applies to corporations and "other organizations." "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. In the case of a corporation or other organization (including, for example, an association or government department), this rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

Concerns About the Current Rule

9. Among the concerns expressed about the rule at Convocation on November 22, 2007 were the following:

   a. Rule 6.03(9)(b) creates compliance issues for lawyers representing trade unions (and others). For example,

i. A lawyer is retained to represent three unions to respond to an application by the employer to remove certain positions from the three bargaining units. The employer is represented by counsel. The persons the employer is seeking to remove are the lawyer's clients' members, whose evidence is needed to prove the lawyer's case. Rule 6.03(9) would say that the lawyer could not contact his or her clients' own members without advising counsel for the employer and getting his or her permission.

ii. A lawyer is retained by two different unions with respect to appeals in which the clients allege that the employer has breached health and safety legislation. The employers are represented by counsel. Rule 6.03(9) would say that the lawyer could not contact employees who have been affected by the employers' actions even though that evidence is necessary to establish the violations.

iii. In every grievance, union-side labour lawyers call evidence from employees without obtaining the approval of counsel for the employer.

iv. A lawyer is retained to represent a professional regulatory body (for nurses) in an inquest in which a doctor murdered a nurse in a recovery room. The hospital is represented by counsel and is opposed in interest to the regulatory body. Rule 6.03(9) would say that counsel could not contact nurses employed by the hospital without hospital counsel's approval, even though these nurses may be members of the regulatory body.

b. Rule 6.03(9)(b) may be contrary to the purpose of the statutory provisions that are found in labour legislation, health and safety laws and human rights codes that provide no reprisals for testifying in proceedings.

c. Given the language of the commentary, management-side labour lawyers may also be in violation of rule 6.03(9)(b) if they talk to an employee who is a member of a bargaining unit represented by a lawyer.

10. At Convocation's direction, the Committee undertook a review of the rule to determine if the concerns could be addressed.

<u>The Committee's First Proposal</u>

11. The Committee focused primarily on the prohibition in paragraph (b) of the rule. In this circumstance, a lawyer would be approaching a potential witness who is an employee of an opposite party that is a corporation or organization. If the employee's acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability, the lawyer would be prohibited from making the contact.

12. The Committee considered whether the scope of this prohibition was appropriate. One view is that this could be seen as a significant contraction of a lawyer's access to witnesses. Another issue is the difficulty in some circumstances of determining when a person falls within the prohibited category. The Committee learned through research conducted on the approaches in some other Canadian jurisdictions that the prohibition was contrary to existing practice.

13. The Committee also reviewed the background to the development of this rule, which formed part of the new Rules adopted by Convocation in 2000. This material appears at Appendix 1. One source of information was an excerpt from Charles W. Wolfram's text, *Modern Legal Ethics*, on the issue, which read, in part:

> …[Anticontact] rules seek to prevent lawyers from gaining for their clients an unfair advantage over other represented persons and to protect the client against intrusions by an opposing lawyer into the confidential client-lawyer relationship. They are not meant to protect others who interests might be impaired by factual information willingly shared by the contacted employee. Contact by a lawyer with a corporate employee will typically do little, if anything, to impair the corporate lawyer's own ability to gather information about legal matters…. So an employee whose position in a matter is only that of a holder of factual information should be freely accessible to either lawyer.
>
> Application of the anticontact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anticontact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. Thus, in the case of corporate and similar entities, the anticontact rule should prohibit contact with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation. And generally the anticontact rules should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.

14. The Committee felt that the Wolfram excerpt stated the appropriate principles and that this should guide any revisions to the rule.

15. The Committee then prepared a proposed amended rule as follows:

> A lawyer retained to act on a matter involving a corporation or an organization that is represented by a licensee shall not approach a constituent of the corporation or organization
>
> (b) who has the authority to bind the corporation or organization,
>
> (c) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or
>
> (c) whose own interests are directly at stake in the representation,
>
> in respect of that matter unless the licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

16. The Committee thought that this draft would address the concerns expressed at Convocation, as it would provide a less restrictive standard for such communications without the consent of counsel for the corporation or organization while ensuring that confidential or privileged information is not disclosed by uncounselled individuals.

17. The Committee also determined that additional commentary would assist in providing guidance on the meaning of the amended rule, in particular, with respect to the meaning of the word "bind" and the phrases "regularly consults" and "interests are directly at stake". The proposed amended commentary (redline version) read as follows:

Commentary

This subrule applies to corporations and "other organizations." "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. ~~In the case of a corporation or other organization (including, for example, an association or government department), t~~This rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals would have the authority to commit the organization to a position with regard to the subject matter of the representation, because of the person's authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions or whose duties include answering the type of inquiries posed. These individuals include those to whom the organization's lawyer looks for decisions with respect to the matter.

The individual who regularly consults with the organization's lawyer concerning the matter need not be a constituent who also directs the organization's lawyer. In some large organizations, some management constituents may direct or control counsel for some matters but not others. The mere fact that a constituent holds a management position does not trigger the protections of the rule. A constituent who is simply interviewed or questioned by an organization's lawyer about a matter does not "regularly consult" with the organization's lawyer.

The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that it would be unfair to interview them without the presence of counsel.

If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule.

A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

Input from Lawyers and Paralegals

18. With Convocation's approval, the Committee sought input from lawyers and paralegals on the proposed rule amendments. When the rule was initially adopted in 2000, a number of interested parties expressed their views on the scope and content of the rule.

As the Committee's proposals are more than superficial changes to the rule, it believed that Convocation would benefit from having external views before Convocation discussed whether to adopt the amendments.

19. The call for input was published in late 2008 in the *Ontario Reports* and on the Law Society's website, and was also included in Law Society informational e-mails to lawyers and paralegals. The Chair also wrote to three legal organizations (the Advocates Society, the OBA and the Ontario Trial Lawyers Association) requesting their comments on the proposal. Input from paralegals came through the Paralegal Society of Ontario and the Licensed Paralegal Association (Ontario). The deadline for responses was February 16, 2009 but some responses continued to arrive towards the end of February and into early March 2009.

20. The Law Society received over 50 written responses from lawyers who represent individual clients, corporations or organizations and municipalities, lawyers working for the federal and provincial governments, in-house counsel and from the legal organizations.

21. The responses represented a wide and somewhat divergent range of views. Several respondents were opposed to the amendments. Some thought that the current rule was not restrictive enough and would expand the scope of those within organizations who could not be contacted by a lawyer without consent of the organization's lawyer. The remaining respondents either agreed with the changes or agreed generally with the changes but suggested clarifying amendments or additions.[1]

22. At its May and June 2009 meetings, the Committee reviewed the responses and discussed the issues they raised. In June, the Committee determined that a small working group of the Committee should be struck to consider how best to move the matter forward. The working group was formed following the June meeting, and included Linda Rothstein as chair, Chris Bredt, Brian Lawrie and Bonnie Tough.

The Committee's Second Proposal

23. Based on its assessment of the feedback received on the proposed amendments, the working group reviewed options for revisions to the rule and provided the Committee with a revised draft of the amended rule and commentary for consideration.

24. The Committee discussed the draft and decided that at this stage, Convocation should review the revision. As noted earlier, the Paralegal Standing Committee also reviewed the draft and endorsed the position of the Professional Regulation Committee.

25. The revised amended rule follows paragraph 28. In this version, paragraphs (a) and (c) restate some provisions that appear in the existing rule that were proposed to be deleted. This change is based on the views of some respondents that the substance of

[1] A summary of the responses without attribution appears in **Appendix 2.**

the original language should remain in the rule. The four paragraphs that describe who may not be contacted without the consent of counsel, in the Committees' view, provide a reasonable and justifiable limit on those intended to be covered by the prohibition. Other changes incorporate suggestions by respondents that make the rule more comprehensive.

26. The commentary has also been significantly expanded to provide clearer guidance on the purpose and scope of the rule. It includes language from the existing rule, new language added in the original proposed amendments and new language added following the call for input. In particular, the commentary makes clear that the purpose of the rule, in the context of informal discovery, is to protect the lawyer/paralegal-client relationship and prevent clients from making ill-advised statements without the advice of their lawyer, but not to protect a corporate or organizational party from the revelation of prejudicial facts.

27. The Committees thank Janet Minor for seeking and offering comments from the government perspective on the commentary on that subject.

28. The following is the proposed revised draft of the amended rule and commentary.

PROPOSED REVISED RULE 6.03(9) AND COMMENTARY

A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee in respect of that matter shall not, without that licensee's consent, communicate or facilitate communication with, approach or deal with a person

(a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization,

(b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter,

(c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its liability, or

(d) who supervises, directs or regularly consults with the corporation's or organization's lawyer and effectuates the advice of that lawyer with respect to the matter,

unless otherwise authorized or required by law.

Commentary

This subrule sets out the appropriate conduct for lawyers who engage in informal discovery methods, such as information-seeking interviews with individuals in corporations or organizations, that have the potential to streamline discovery and foster the prompt resolution of claims.

The purpose of the subrule is to protect the lawyer-client relationship and prevent clients from making ill-advised statements without the advice of their lawyer, not to protect a corporate party from the revelation of prejudicial facts. The subrule is intended to advance the public policy of promoting efficient discovery and favors the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence.

The subrule applies to corporations and organizations, the latter of which include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. The manner in which the subrule applies in some of these contexts is discussed later in this commentary.

Generally, the subrule precludes contact only with actors, not mere witnesses. Further, communications with corporate employees are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. The subrule does not proscribe a lawyer's contact with all or virtually all employees on the ground that any employee might conceivably make statements that might be admissible in evidence against the employer. Such an interpretation is inconsistent with the intent of the subrule and would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. This would be overly protective of the organization and too restrictive of an opposing counsel's ability to contact and interview employees of an adversary organization. Fairness to the organization does not require the presence of a lawyer every time an employee may make a statement admissible in evidence against his or her employer.

This subrule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions, or because his or her duties include answering the type of inquiries posed. These individuals include those to whom the organization's lawyer looks for decisions with respect to the matter.

Thus, the subrule would prohibit contact, without consent, with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

A lawyer is not prohibited from communicating with a person unless the person's act or omission is believed to be so central and obvious to a determination of corporate liability that the person's conduct may be imputed to the corporation. If it is not reasonably likely that the person may be a central actor for liability purposes, nothing in the subrule precludes informal contact with such an employee.

The individual who regularly consults with the organization's lawyer concerning the matter will not necessarily be a person who also directs the organization's lawyer. In some large organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

A person who is simply interviewed or questioned by an organization's lawyer about a matter to gather factual information does not "regularly consult" with the organization's lawyer. While a person's duties within a corporation or organization may include answering litigation-related inquiries, this rule does not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this subrule.

The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where it is reasonable to believe that the entity with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing his or her eyes to the obvious.

A lawyer may communicate with employees or agents concerning matters outside the representation.

As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also rule 4.03 (Interviewing Witnesses).

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

Unions – The subrule is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to an appeal in which the union alleges that the employer, who is represented, has breached health and safety legislation, is not prohibited from contacting employees who have been affected by the employer's actions to obtain information necessary to establish the violations.

Similarly, a management-side labour lawyer would not offend the subrule if the lawyer contacted an employee who is a member of a bargaining unit represented by a lawyer.

Government –The concept of the individual who may "bind the organization" may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, the rule is intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under the subrule.

In addition, the legal branch at the particular ministry is usually considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised

In general, the subrule is not intended to:

a. constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;
b. affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal *Access to Information Act*, including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or
c. affect the exercise of the duties of public servants under the *Public Service of Ontario Act, 2006* with respect to disclosure of information.

Municipalities – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. The subrule, for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

The subrule is not intended to:

a. prevent lawyers appearing before council on a client's behalf and making representations to a public meeting held pursuant to the Planning Act;

b. affect access to information requests under such legislation as the Municipal Freedom of Information and Protection of Privacy Act, including situations where a litigant has named the municipality as a defendant; or

c. restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.

APPENDIX 1

THE DEVELOPMENT OF RULE 6.03(9)
(ORIGINALLY ADOPTED IN JUNE 2000)

The first draft of the rule, then numbered 4.03(3), and its commentary was prepared in January 1999 by Gavin MacKenzie, co-chair of the Rules Task Force. It read as follows:

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 …
(3) A lawyer shall not approach or deal with directors, officers, or management personnel of a corporation or other organization that is professionally represented by another lawyer save through or with the consent of that party=s lawyer.

Commentary:

This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. A lawyer may communicate with a represented person, or an employee or agent of such a person, concerning matters outside the representation. Also parties to a matter may communicate directly with each other.

The prohibition on communications with a represented person applies only in circumstances in which the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. Such an inference may arise where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In the case of a corporation or other organization (including for example an association or government department), this rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization in represented in the matter by his or her counsel, the consent of that counsel to a communication will be sufficient for purposes of this rule.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances the lawyer must comply with the requirements of rule 2.03 (avoidance of conflicts of interest), and particularly subrules 2.03 (5) through (9). A lawyer must not represent that he or she acts for an employee of a client unless the requirements of rule 2.03 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

In his explanatory information on the draft, Mr. MacKenzie indicated to the Task Force that the first three paragraphs of commentary were based on the ABA Model Rules, and that the last paragraph was new, reflecting discussions at the Task Force meetings. He referenced an excerpt from Charles Wolfram's text, *Modern Legal Ethics*, on the issue, which read, in part:

> …[Anticontact] rules seek to prevent lawyers from gaining for their clients an unfair advantage over other represented persons and to protect the client against intrusions by an opposing lawyer into the confidential client-lawyer relationship. They are not meant to protect others who interests might be impaired by factual information willingly shared by the contacted employee. Contact by a lawyer with a corporate employee will typically do little, if anything, to impair the corporate lawyer's own ability to gather information about legal matters…. So an employee whose position in a matter is only that of a holder of factual information should be freely accessible to either lawyer.
>
> Application of the anticontact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anticontact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. Thus, in the case of corporate and similar entities, the anticontact rule should prohibit contact with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation. And generally the anticontact rules should apply if an employee or other nonofficial person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.

This draft rule remained in the form appearing above (except for revised references to rule 2.04 in the commentary) in the Task Force's report to April 1999 Convocation, which introduced the new Rules. In that report, the new rule was explained in the following way:

> …a new rule was added, appearing at rule 4.03(3), dealing with the circumstances in which it is permissible for counsel to interview witnesses who are employees of a corporate party that is represented by a lawyer. In the Task Force=s view, this fills a gap in the rule and provides valuable guidance on the issue. The rule provides that a person acting for a corporation cannot claim to professionally represent an employee as a witness unless he or she is in fact acting for that employee, and commentary is added to the effect that this is designed to prevent corporate counsel from sheltering factual information from another party;

In commenting on the draft rule at Convocation, Mr. MacKenzie said:

> …it should permissible, for, say, an individual plaintiff suing a corporate defendant to interview lower level employees who have knowledge about the matters in issue without going through the corporate defendant's lawyer, and that's a distinction, as I say, which is observed in the case law generally and also in Rules of Professional Conduct with other jurisdictions.

In response to a request for comments on the proposed Rules before they were adopted, the Task Force received input from lawyers and law firms on this rule, including comments relevant to the subject of employees and agents, as follows:

a. The rule does not specifically deal with employees and agents, even though the commentary references employees and agents. The right of a party to have its employees shielded from direct interrogation by counsel for an opposing party remains an important part of the adversary system, and there is no danger in continuing with the present arrangement.[2] At present, opposing counsel may still, through counsel, direct relevant questions to employees of an opposing party in the discovery process;

b. To date, these obligations have been defined by the common law test which requires the consent of counsel only where the witness is likely involved in the decision-making process of the party (as opposed to merely carrying out the direction of others). The common law test should be incorporated in the rule, and that the rule should go no further;

c. The prohibition is all too frequently ignored. As an example, a lawyer may attempt to interview a nurse who was involved in health care matters in issue, was employed by the subject health care institution whose conduct was in issue, and whose conduct may be imputed to the institution for purposes of civil liability. The rule should apply to this type of situation and an amendment should be made that would add "other employees of a corporation or other organization or any other person whose act or omission in connection with the matter is in issue or may be imputed to the organization for purposes of civil or criminal liability" who are represented by counsel.

These comments informed the next draft of the rule. In particular, revisions made to the rule included a division between directors and officers in paragraph (a), and employees and agents in paragraph (b).

In advance of Convocation's consideration of the rules in the spring of 2000, further comments were received from a number of individuals and organizations, including then bencher Earl Cherniak. He commented on rule 4.03(3) as follows:

> …I am not certain that it should be impermissible to interview an employee of a corporation or organization as long as those employees are not in a fiduciary relationship with the corporation, such as a director or officer would be. For instance, why shouldn't a lawyer be entitled to interview a whistle-blower, or an employee who is a witness, not a participant and is willing to talk to the lawyer?

The draft that was eventually adopted at Convocation in June 2000 read as follows:

[2] The reference is to former Rule 10 commentary 14 which read: "The lawyer may properly seek information from any potential witness (whether under subpoena or not) but should disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way. An opposite party who is professionally represented should not be approached or dealt with save through or with the consent of that party's lawyer."

(3) Where a corporation or other organization has retained a lawyer on a matter, another lawyer seeking information about that matter shall not, without the consent of the lawyer representing the corporation or organization, approach or deal with

(a) directors, officers, or persons likely involved in the decision-making process concerning that matter; or

(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter are in issue or whose acts or omissions may expose the corporation or organization to civil or criminal liability.

The commentary to the rule was not changed substantially.

Reconsideration of the Rule After June 2000

Following adoption of the new Rules in June 2000, effective November 2000, comments were received from the profession on its experience with the new Rules. One of these rules was rule 4.03(3). The following is an excerpt from the Professional Regulation Committee's report to May 2001 Convocation with suggested amendments to the rule based on comments received.

Rule 4.03(3) - Advocacy - Interviewing Witnesses

27. New rules and commentary were added in the 2000 Rule revisions to deal with the circumstances in which a lawyer may interview employees of a corporate party that is represented by a lawyer.

28 Lawyers who prosecute provincial offences and who appear before tribunals such as the Ontario Securities Commission raised a concern that a literal interpretation of the rule may prevent them from adopting certain investigative measures specifically authorized by their governing statutes, and may also prevent them from interviewing and preparing for trial certain witnesses who are employees of corporate defendants. An unrelated concern that was raised was that the new rule may prevent a plaintiff's counsel from speaking with a "whistleblower" who approaches the plaintiff's counsel to disclose corporate wrongdoing.

29. The Committee concluded that the most effective way of addressing these legitimate concerns would be to revise the rule as follows:

a. By adding language making it clear that communications with employees of corporate parties that would otherwise be proscribed are permissible if they are otherwise authorized or required by law;
b. By deleting the prohibition against communications with corporate employees whose acts or omissions are "in issue", while maintaining the prohibition against communicating with employees whose acts or omissions may expose the corporation to civil or criminal liability; and
c. By deleting the prohibition against "dealing with" employees whose acts or omissions may expose the corporation to liability, while maintaining the prohibition against "approaching" such employees.

30. The Committee proposes the following new subrule 4.03(3):

> (3) A lawyer retained to act on a matter involving a corporation or organization that is represented by another lawyer shall not approach
>
> (a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or
>
> (b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,
>
> unless the lawyer representing the corporation or organization consents or unless otherwise authorized or required by law.

These changes were adopted by Convocation.

Through these developments, the rule evolved into the form appearing above. The rule was renumbered as rule 6.03(9) in November 2007 following amendments to the rule addressing communication with a represented individual (then rule 4.03(3) and now rule 6.03(7))

APPENDIX 2

RESULTS OF CALL FOR INPUT ON RULE 6.03(9)
(WITHOUT ATTRIBUTION)

The following is the version of the amendments that was submitted for comment:

A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not approach a constituent of the corporation or organization

(a) who has the authority to bind the corporation or organization,

(d) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or

(c) whose own interests are directly at stake in the representation,

~~(a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or~~

~~(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,~~

in respect of that matter unless the licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

Commentary

This subrule applies to corporations and "other organizations." "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies, and sole proprietorships. ~~In the case of a corporation or other organization (including, for example, an association or government department), t~~This rule prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals would have the authority to commit the organization to a position with regard to the subject matter of the representation, because of the person's authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions or whose duties include answering the type of inquiries posed. These individuals include those to whom the organization's lawyer looks for decisions with respect to the matter.

The individual who regularly consults with the organization's lawyer concerning the matter need not be a constituent who also directs the organization's lawyer. In some large organizations, some management constituents may direct or control counsel for some matters but not others. The mere fact that a constituent holds a management position does not trigger the protections of the rule. A constituent who is simply interviewed or questioned by an organization's lawyer about a matter does not "regularly consult" with the organization's lawyer.

The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that it would be unfair to interview them without the presence of counsel.

If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule.

A lawyer may communicate with employees or agents concerning matters outside the representation.

A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of rule 2.04 (Avoidance of Conflicts of Interest), and particularly subrules 2.04(6) through (10). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

General Comments From Respondents

Support for the amendments

1. The amendments to the current rule are appropriate for the following reasons:

a. There has been a continual erosion of lawyer's behavior relative to the wording of the rule; it should be wider in application than "micro" so that technical interpretations cannot be made to frustrate its purpose;

b. The rule was not intended to shield corporations from liability and the current original wording does just that;

c. Precluding access to those who are not involved in instructing corporate counsel and who are not involved in decision-making can deprive a party adverse in interest to the organization of evidence that is critical to the prosecution of claims against the organization; this is exacerbated by the ambiguity of current clause (b), which requires considerable judgment.

d. The rule in the context of provisions in the *Ontario Securities Act* can impose "insuperable" obstacles to the plaintiff;[3]

e. Not all directors, officers or persons likely involved in decision-making have the ability to bind the corporation or regularly consult with counsel – as such, there is no need to provide blanket protection of these people, as they may be holders of factual information;

f. Current paragraph (b) is subject to overly broad interpretation to the degree that no corporate employee who could expose the corporation to liability could be approached;

g. The proposed rule provides more reasonable restrictions;

h. The amendments add clarity to the rule and commentary. The writer, as a federal government lawyer, has encountered situations where counsel have inappropriately contacted officials within the client department; it will help to have a clear and detailed rule to reference in discussions with outside counsel;

i. The rule is much improved;

j. The original rule gave an unfair advantage to corporate defendants, and prevented counsel from speaking with employees whose interests were not necessarily consistent with the corporation's, and whose input could often be said to be more objective than interested parties;

k. There will be situations where it is beneficial to employees, and to the cause of justice, to have the veil drawn back somewhat, as the changes propose, such that facts and information are more readily available to the parties; more openness and availability of information will enhance access to and the administration of justice.

[3] Reference is to s. 138.8 of the Act by which a plaintiff must obtain leave of the court before commencing an action for misrepresentations in the secondary market, and must show that the claim has a reasonable possibility of success. This means obtaining evidence that is often non-public and only in the possession of current employees of the corporation.

2. One respondent "wholeheartedly" supports the amendments for the reasons stated in the report.

Suggested revisions to improve the rule (from those who support the amendments)

3. The rule could be reorganized to have clearer meaning, as follows:

> A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not **directly or indirectly communicate or facilitate communication with** ~~approach~~ a constituent of the corporation or organization
>
> (a) who has the authority to bind the corporation or organization,
>
> (b) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or
>
> (c) whose ~~own interests are directly at stake in the~~ representation **is related to the subject matter of the communication,**
>
> ~~(a) directors, officers, or persons likely involved in the decision-making process for the corporation or organization, or~~
>
> ~~(b) employees and agents of the corporation or organization whose acts or omissions in connection with the matter may expose the corporation or organization to civil or criminal liability,~~

4. As the rule applies to both litigation and transactions, some clarification from a transactional perspective is need to deal with situations where consent is explicitly or implicitly given at the outset for direct communication between counsel and another licensee, and subsists unless clearly revoked.

5. The rule should be rewritten in plain language.

6. The proposed amended rule should be revised as follows:

> A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee shall not, without the other licensee's consent approach a constituent of the corporation or organization
>
> (a) who has the authority to bind the corporation or organization,
>
> (b) who supervises, directs or regularly consults with the corporation's or organization's lawyer, or
>
> (c) whose own interests are directly at stake in the representation,
>
> in respect of that matter ~~unless the other licensee consents~~ or unless otherwise authorized or required by law.

7. The phrase "unless otherwise authorized or required by law" is so far adrift from the related noun (is it the licensee or the retained organization counsel?) that the writer recommends adding both a repeated noun and verb from to the phrase for clarification.

The scope of the rule should be broadened (i.e. more restrictive)

8. The rule should be broadened to make it clear that all employees, whether senior management or others, may not be consulted by a third party lawyer without the consent of the in-house legal department or outside counsel. The information the employee has belongs to the company and should only be disclosed through an appropriate representative in a discovery process or as otherwise permissible to protect the integrity of confidential information. If there were two individual parties to a lawsuit, contact would be impermissible – why should it be different for a corporation, which acts through many people?

9. Would it not be simpler to state that a lawyer is prohibited from communicating with any person within the organization or its concerning a matter in question without first obtaining the consent of the lawyer acting for them or unless otherwise authorized or required by law?

10. The rule uses "a licensee shall not approach" while the commentary uses "This rule prohibits communication…" which are different standards. For example, under the first standard, the lawyer may communicate with employees as long as they initiate the communication, but under the second standard, no communication is permitted subject to consent, apart from "who approaches who." In the writer's view, no communication should be permitted, subject to the conditions and exceptions noted, to avoid contentious and disputable fact-finding associated with "who approached who."

The scope of the rule should be narrowed (i.e. less restrictive)

11. The amendments are too stringent. The rule should allow the other lawyer to deal with an organization if the shares are publicly-traded or if it is or appears to be sophisticated in legal matters, and the organization allows him or her to be involved in the dealing.

The unique government context[4]

12. For the purposes of this rule, the structure of government branches, divisions and ministries is unique and does not parallel the corporate world in form or function. That said, the writer supports the creation (with some comments about the amended rule that are included in this summary).

13. It would be inappropriate for licensees to approach people in government when the parties are actually or potentially adverse in interest. Legal work including litigation, advisory services, sensitive negotiations and contract management may all require protection of the rule.

[4] More comments from the government perspective appear later in this summary with respect to specific parts of the rule and commentary.

14. Public servants are required to take an oath or affirmation of office under the *Public Service of Ontario Act, 2006.* If the employee divulges any information to a licensee, the employee may fact sanctions by the employer. There is also public interest immunity protection for a significant number of Crown documents, since access to such documents is provided to public servants at varying levels.

15. Might it be preferable to have a separate rule or commentary that addresses the unique issues in government?

16. From the government perspective, the rule should not operate to constrain lawyers who wish to contact government officials for a discussion of policy matters on behalf of a client. This is a valuable mechanism to address issues that may move up to the political level, and allows those who wish to speak to an issue to do so freely.

17. Is the Society proposing with Rule 6.03(9) to attempt to deny the availability of Access to Information Requests (ATIP) to litigants who have named the Federal Crown as a defendant? The proposed Rule purports to do just that. The rules of paramountcy would appear to dictate that the current proposed formulation of this Rule that disallows contact with 'government departments and agencies' is in direct conflict with, *inter alia*, the *Access to Information Act* and is thus clearly *ultra vires* the power of the LSUC. Quite apart from the obvious conflict with federal statutes, it is not for the Society to attempt to lead the courts in this matter. An amendment with respect to the Crown in general that allows contact 'in the ordinary course of business' and specifically excludes ATIP requests from the ambit of the Rule might be more appropriate.

<u>The municipal context</u>

18. The revisions to not adequately address situations that municipalities encounter that should fall within the scope of the rule.

19. In the municipal context, lawyers can appear as a delegation before council on a client's behalf and can make representations to a public meeting held pursuant to the *Planning Act*. Lawyers can also utilize the *Municipal Freedom of Information and Protection of Privacy Act* to obtain factual information.

20. Legal counsel retained by persons having dealings or negotiations or disputes with municipalities must not be restrained from communicating with the elected representatives of their clients i.e. councillors; the same can be said of municipal staff. Such communication is vital to effective representation by legal counsel of the public bodies' constituencies, in particular when there are so many diverse opportunities for this type of communication, including lobbying and social encounters.

<u>Disagreement with the proposals</u>

21. One respondent disagrees with the proposed amendments, and believes that the current rule should continue to apply.

22. There is no mischief that justifies amendment of the rule.

23. A federal government lawyer writes that the amendments increase the scope of government officials who may be approached. As such the amendments are neither desirable nor necessary, and are vague and unworkable:

    a. Individuals in the prohibited categories may not be readily identifiable to someone outside government;

    b. Narrowing the restriction by the amendments would undermine the respect that the profession routinely expects between counsel, as it does not respect the right of an employee to seek the advice of his or her employer's counsel and invites an unseemly chase to get to the witness first;

    c. The amendments will not further public respect for the law or lawyers, as witnesses could feel pressured to make statements not made if they had received legal advice – their careers or employment could be negatively affected;

    d. Formal and informal mechanisms exist to facilitate access to witnesses (e.g. Rule 53.07, Rule 39.03, exchange of will-say statements at case conferences, interviewing witnesses upon request to the counsel).

24. The report appears to indicate that the change is labour, not civil litigation, related. Clarification of that issue could be pursued rather than a significant revamping of the rule.

25. The rule appears to be designed to remedy a potential problem in one or two areas of practice (trade unions and whistleblowers) at the cost of creating significant problems in others, including insurance defence litigation. The exiting rule could be preserved but altered to create exceptions in the trade union or whistleblower or similar situations (for example, allowing an employee to speak with opposing counsel if the employee voluntarily approaches opposing counsel).

26. The amendments open a host of practical problems in this area of practice. Approaching an employee, who may not have the benefit of legal counsel, may result in the unwitting provision of information directly affecting the legal position and strategy of the organization. It is not a situation of preventing factual disclosure (through the examination for discovery process) but a misuse or misinterpretation of information. The current rule protects the employee and the organization – the amendments would erase that. The proposed amendments may undermine one of the purposes of the rule – to foster the prevention of major capitulations of legal position on the part of a momentarily uncounselled but represented party.

27. One respondent expresses concern that the amendments would permit opposing counsel to communicate with personnel of organizations about their involvement in the very subject matter of the litigation, whereas the current rule would not. The broad access would give opposing counsel an unfair advantage, allowing communication with those within an organization who are most intimately involved in the issues being litigated, and would tend to undermine the general purpose of the rule. This will leave lawyers with two classes of represented persons: individuals to whom other lawyers are denied access and organizations where lawyers are permitted access.

28. The rule will adversely affect a lawyer's ability to properly defend a client and will infringe on solicitor-client privilege.

29. A clear and straightforward rule is proposed to be replaced with one that is inordinately complicated, obscure and dependent upon a commentary which muddies rather than clarifies. This respondent suggests the Society "stick with what you have."

30. One respondent is "very opposed" to the proposed changes (and another law firm wrote to support this view entirely). The respondent uses as an example a motor vehicle accident on a snowy, icy highway that results in serious injury (where he represents the municipality) and where the people approached are the municipality's roads superintendent/plowmen:

    a. Not contacting "directors or officers" (authority to bind) is irrelevant in this example (e.g. the mayor and councillors);

    b. It would be rare for there to be an employee whose own interests are directly at stake in such a situation;

    c. The plaintiff's lawyer, under the amended rule, would be permitted to contact the roads supervisor/plowmen, as they do not fall within a prohibited category (they do not supervise or direct counsel, or regularly consult with counsel);

    d. The fact that these people would usually be the witness for the municipality on examination for discovery does not enter the analysis under the rule and serves to show how wrong the amendments are. The municipality's lawyer could attend at the examination and find out that the witness has already been interviewed and "statementized" by plaintiff's counsel.

    e. In the interview, there is no protection against privileged material being disclosed and no protection against defence assessments, tactics and strategies being disclosed.

    f. Why is it deemed necessary to allow plaintiff's counsel an opportunity to interview the primary personification of the defendant corporation in the absence of counsel of record for the defendant corporation?

31. The proposed rule will give an unfair and substantial advantage to the client of the adverse lawyer where liability is an issue.

<u>Other comments</u>

32. Should the same rule apply to non-profit/charitable organizations and public/for profit organizations?

33. Contact with former employees should be permitted pursuant to the principle that there is no property in a witness. The rule should make clear whether such contact is permitted (based on the amended rule, it appears contact with them would not be prohibited). This respondent made reference to the case of *Anderson v. City of Niagara Falls* which deals with the rule in question. In *Anderson,* the plaintiff was rendered a

quadriplegic as a result of a motor vehicle accident on an icy highway. The action against the City included allegations of negligence in failing to adequately salt and sand roads where the collision occurred. The City failed to fulfill undertakings on discovery to provide the names and contact information for certain employees and one former employee for *subpoena* purposes, arguing that do so would breach rule 4.03(3) (now 6.03(9)). The plaintiff sought leave to appeal the motions judge's decision to decline to compel fulfillment of the undertaking, and was successful, for the reason, *inter alia*, that there was no evidence that the purpose of seeking the information in question was to interview employees. Further, the judge said in a footnote that

> I do not think that the wording of subrule 4.03(3) of the *Rules of Professional Conduct* or of the Commentary to rule 4.03 supports a finding that it applies to former employees of a corporation, as is implicit in the decision of the motions judge. Therefore, I would regard this finding as an additional error.

34. There is a "grey area" around communications between plaintiff's counsel and the no fault accident benefits adjuster, i.e. the plaintiff's own insurer for Statutory Accident Benefits (SABS), *after* the plaintiff has failed a FSCO Mediation and elected to add the no fault accident benefit insurer in lieu of electing to pursue a FSCO arbitration application. Suppose that there is a tacit agreement between the adjuster, who is usually the insurer's corporate representative at discovery and the instructing client of the insurer corporation, the insurance defence counsel, the plaintiff and the plaintiff's counsel that matters in the action will only be discussed by counsel whereas matters at issue, i.e. accident benefits and treatment plans being applied for and/or denied but not yet mediated or litigated can be discussed directly by the plaintiff (the insured) or the plaintiff's counsel and the no fault insurance adjuster on an ongoing basis without the need to include the defence counsel or seek his or her consent or approval. (To do otherwise would require that the adjuster not be the corporate rep at discovery, or that a different corporate rep of the no fault insurer, who will have no knowledge of the day to day handling of the claim, would have to produced for discovery.) This practice may offend the letter and, possibly, the spirit of the amended rule. It remains an open question whether an exception exists in the *Insurance Act's* regulation regarding this corporate representative/claims adjuster and plaintiff's counsel direct post-litigation communication.

Specific Issues Raised by Respondents

<u>Meaning of "constituent"</u>

35. Confusion was expressed about the word "constituent". Some respondents said that it should be replaced with "individual".

36. Some questioned who a constituent of a partnership or government department would be. For example, one respondent (with government) said that the individuals falling within "constituent" may be significantly different between a private corporation and a municipality. In the latter, it would include elected officials, department heads, consultants, full time staff, and even summer students, depending on the circumstances.

37. Others said that the rule or commentary should include a definition of "constituent". One suggested definition was "directors, officers, employees, agents or others who act on behalf of the corporation or organization."

38. Using "who has authority to bind" assumes that the roles and responsibilities of such individuals are discrete. In government, there could be different officials at different levels in different departments providing advice and recommendations. An outside lawyer may only determine whether someone is caught by the rule after unintentionally violating it.

Paragraph (a) of the proposed rule

39. This paragraph should be revised to read "who has authority, either individually or as part of a group, to bind…". In the municipal context, no one individual member has the authority to bind. As worded, the paragraph may allow an applicant's lawyer to contact individual members of Council on a controversial planning matter that is before the Ontario Municipal Board without the consent of the municipal solicitor.

40. In government, because of its complexity and despite its hierarchy, it is difficult to conclude who a licensee is authorized to approach on a particular matter, who is involved in the decision-making process or who has authority to "bind." The legal, policy and finance branches may all have individuals who are directly related to a decision. "Binding" is somewhat of a misnomer in government – it is expected that the rule is intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter, and not merely the individual who can "bind" the government.

41. In the context of a law firm's representation of individual school principals in some level of disagreement or dispute with their employer Boards, while each Board has a unique organization structure, and some have counsel that a lawyer may know will be assigned to and are eventually retained for a matter, absent notice of the lawyer's involvement, the question is at what point does the entity become a represented organizational client on a matter? A lawyer may not assume that because the Board has in-house counsel, that counsel will be necessarily involved in a matter. A lawyer might deal directly with non-lawyers to resolve issues or settle matters. A modification to (a) is suggested:

> A licensee retained to act on a matter involving a corporation or organization that is represented by a licensee in respect of that same matter shall not, upon being advised of such representation, approach a constituent… (and remove "in respect of that matter" from the last part of the rule).

42. The commentary relating to this paragraph (and paragraph (b)) uses the words "persons likely involved in the decision-making", where as the rule uses "persons who have authority" or "who supervise or direct." The suggestion is that "likely" be deleted from the commentary or the "likely" concept reintroduced into the rule (it was in the original rule). The latter suggestion is preferable as that would prohibit contact with anyone with apparent authority.

43. Three points:

    a. Does the licensee need to know that organization is represented in the matter or is the fact that he or she is aware that the organization is represented by a licensee *in other matters* sufficient?

b. Should not that representation be inferred where the organization has in-house counsel, even though not expressly stated to be represented in the matter?

c. If representation is only inferred in circumstances where a licensee has had previous dealings with the organization where in-house counsel was involved, should the representation be inferred again, particularly where the matter is similar?

The rule/commentary should be clarified to indicate whether the licensee needs to have knowledge of representation in relation to a matter and the circumstances where such representation might reasonably be inferred in the absence of express communication to the licensee.

44. A new paragraph (d) should be added to maintain the intent of the present rule by including those persons involved in decision-making:

> "who, by nature of his or her position, may provide advice or recommendations to those in the corporation or organization charged with the responsibility of making a decision in respect of the matter."

Paragraph (b) of the current rule ("acts or omissions" exposing the organization to liability)

45. Original paragraph (b) should not be deleted. A person not having "authority to bind" (the new concept) may still possess information or opinion which should be afforded the protection of "right to counsel" oversight. In such cases, it is the information and not the authority to bind that exposes the entity to liability. The following paragraph should be added to the amended rule as (d):

> (d) who is an employee, agent or contractor of the corporation or organization whose own, or knowledge of any other constituents', acts, omissions or duties in connection with the matter may expose the corporation or organization to civil or criminal liability

46. This paragraph (deleted paragraph (b)) should remain. The individuals described deserve the benefit of representation to ensure they are aware of their rights and the implications of information they provide, even if they cannot bind the corporation. Employees won't become inaccessible if this paragraph remains, as they can still be questioned during the discovery process.

47. An insurance defence lawyer, with support from the firm's public entity insurer clients, strongly opposes the elimination of this paragraph. In a municipality, for example, individual employees may not know the full picture or how their communications may impact on litigation. Statements that are obtained "off the cuff" without reference to underlying business records can be both unfair to the employee and to the entity in defence of the action. Allowing direct contact with municipal employees without the involvement of counsel constitutes an invasion of the employees' privacy rights (by demanding disclosure of direct contact information) and a potentially highly prejudicial act to a defendant. Disclosure can properly be made through the discovery process – there is no evidence that this process is unfair or has worked an injustice in the preparation of a plaintiff's case against corporate defendants. The rule changes will sanction unfair behavior.

48. The original rule protects the corporation from a procedural standpoint (decision-makers) and substantive standpoint (those exposing the corporation to liability) whereas the amendment only protects it from a procedural standpoint (binding the corporation and the role of consulting with corporate counsel). However, both interests ought to be protected through the advice of corporate counsel. All employees, agents, etc. in a position to influence the outcome of a proceeding either from procedural or substantive perspectives ought to benefit from the advice of corporate counsel before communicating with an opposing lawyer.

Paragraph (b) of the proposed rule

49. The phrase "regularly consults with" should be removed as it does not reduce or eliminate and may in fact only increase the potential for compliance issues. If it remains, the words "with respect to the matter" should be added to the relevant commentary.

50. Some rationale is needed for this paragraph. The original paragraph is not limited to those who supervise, direct or regularly consult with the organization's lawyer. How often must an employee consult to meet the regularly "consult test" and how is a lawyer supposed to know?

51. As a practical matter, the writer is not sure how counsel would know without asking opposing counsel which employees are caught by this paragraph – the thought is that opposing counsel would take a very broad view.

52. While for government there is agreement generally that a licensee should not approach those who supervise, etc. the organization's counsel, due to the nature of government, it may be problematic for a licensee to approach an employee who does not appear to be directly related to the matter (an example is a contract negotiation, where employees from one ministry would be directly involved but those from other ministries may also have sensitive information that may require protection under the rule).

53. Licensees must be aware that in government, even if there is no named lawyer on the file, the legal branch at the ministry is considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. Further, instructions provided to a ministry's lawyer may come from a variety of sources, meaning that it is not necessarily one person who is supervising, etc. a government lawyer.

Paragraph (c) of the proposed rule

54. The Ministry of the Attorney General is in agreement with this limitation.

55. The word "directly" is highly interpretive and subjective.

56. It is not clear who is caught by this paragraph. The commentary suggests that unfairness is the test. But would it apply to any employee who is a witness in a proceeding? Most organizations would consider it unfair for opposing counsel to interview an employee who is a witness, and whose evidence could harm the organization's case, without the knowledge or consent of corporate counsel.

57. The intent of the "so closely tied" language in the commentary is not sufficiently captured by new paragraph (c). The paragraph should be worded as follows:

…whose own interests or course of conduct are directly at stake…

This may help preserve the distinction between an employee who is a witness and one who is a participant.

58. What does it mean for an employee or agent's own interest to be "directly at stake?" This is not clear and may lead to compliance issues.

59. This paragraph is so wide reaching that it could apply to anyone, including a shareholder not even involved in decision-making. More clarity is needed.

60. With respect to "those who own interests are directly at stake", this suggests that the approval for contact must come from both corporate counsel and the individual's counsel - in effect, double approval. However, the commentary is confusing on this point, as one part says

> The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that it would be unfair to interview them without the presence of counsel.

and another part says

> If an agent or employee of the organization is represented in the matter by a licensee, the consent of that licensee to the communication will be sufficient for purposes of this rule.

and eliminates the approval of corporate counsel. As individual and corporate identities may operate seamlessly, it is proper that the opposing lawyer obtain the consent of both counsel for the individual and the corporation prior to approaching the employee.

61. The following amendment would help to clarify the categories of individuals with whom contact is prohibited:

> The subrule also disallows contact with those members of the organization who are so closely tied with the events at issue that I would be unfair to interview them without the presence of counsel <u>for the member personally or for the organization</u>.

This will make it clear that counsel are not in position to close their eyes to the obvious when attempting to communicate with the organization.

62. With respect to paragraph (c) of the rule, cross-reference should be made to the rule dealing with unrepresented persons (2.04(14)).[5]

Proposed new commentary

63. The commentary corresponding to paragraph (b) of the rule is ambiguous. Does the proposal capture only those who supervise, direct etc. the counsel on the specific matter or everyone in the organization who does so, including for other non-related matters? Clarification is required.

64. The amendments must clearly state that they do not derogate from protection of solicitor-client privilege, and that all constituents who supervise, direct etc. counsel, whether or not for the specific matter, are "off limits" for an approach by the licensee without consent.

65. The last sentence of paragraph two of the commentary should be qualified to include "interviewed or questioned to gather factual information".

66. The commentary needs to be tightened up. The writer suggests that the rule should permit contacted with those who are knowledgeable but have no responsibility over the litigation. As worded, it could be taken to exclude anyone with knowledge, and would, for example, immunize a government bureau from facing evidence of wrongdoing by those frontline workers who actually know about it firsthand. The commentary should be expanded to include the following (after the word "posed"):

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[5] **Unrepresented Persons**

2.04 (14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall

(a) urge the unrepresented person to obtain independent legal representation,

(b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and

(c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Commentary
If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

> But with respect to the latter group, those only excluded because their duties include answering litigation related inquiries of the type posed, this rule does not preclude an inquiry that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation. The individuals with whom communication is prohibited include those to whom the organization's lawyer looks for decisions with respect to the matter.

67. The commentary would be improved by adding bracketed definitions for the two types of licensees mentioned ("institutional licensee" and "retained licensee") and the "organizational constituents."

68. For consistency sake, use the word "prohibit" in the sentence "The subrule also <u>prohibits</u> ~~disallows~~ contact…"

69. The sentence "The individual who regularly consults…" might be clearer if "need not be" were replace with "will not necessarily be."

70. The paragraph beginning with the sentence noted above is somewhat unclear – using "regularly consults" with "in respect of the matter." The commentary might be clarified to make clear that while someone in management may consult regularly with the entity's lawyers, if they don't consult in respect of this matter they are not off-limits.

71. The part of the paragraph discussing "who regularly consults…" is confusing, as it does not appear to match the language of the rule. It seems to draw a distinction between "regularly consults' and "directs" which is not included in paragraph (b) of the rule. The writer assumes that the rule is triggered in either case where the individual is a constituent of the organization.

72. The sentence in the commentary "These individuals would have the authority to commit…" does not appear to read correctly. It could be amended to say

> "These individuals would have the authority to commit the organization to a position with regard to the subject matter of the representation, because of the person's authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making litigation decisions or <u>because his or her duties</u> include answering the type of inquiries posed."

73. The addition of the paragraph about members of the organization "so closely tied" would be cold comfort to public entities. This is open to interpretation. For example, would it include a municipal employee at an accident cleanup who has relevant information which might impact on the municipality's liability but who was not directly involved in the events?

74. The meaning of "so closely tied" is not clear. When will a lawyer know that this is the case? And what does it mean to be "unfair?" This should be made clearer or removed.

FOR INFORMATION

PROFESSIONAL REGULATION DIVISION
QUARTERLY REPORT

29. The Professional Regulation Division's Quarterly Report (fourth quarter 2009), provided to the Committee by Zeynep Onen, the Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period October to December 2009 and cumulative information for 2009.

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

The Professional Regulation Division Quarterly Report October – December 2009.
(pages 45 – 140)

The Report was deferred for further consultation.

Item for Information

- Professional Regulation Division Quarterly Report

FINANCE COMMITTEE REPORT

Ms. Hartman presented the Report.

Re : Financial Implications of Paralegal Integration

It was moved by Ms. Hartman, seconded by Ms. Potter, that –

1. The Finance Committee recommends Convocation approve the budget for the integration of paralegal exempted categories into the licensing process at an estimated cost of $350,000.

2. Convocation is further requested to approve the funding model for the integration of paralegal exempted categories into the paralegal licensing process that funds current year expenditures from the Paralegal Fund balance and recovers these costs from future paralegal application and licensing process fees.

Carried

Re : Financial Implications of Continuing Professional Development

It was moved by Ms. Hartman, seconded by Mr. Swaye, that –

The Finance Committee recommends Convocation approve the draft costing of the continuing professional development requirements proposed by the Professional Development & Competence Committee and the Paralegal Standing Committee totaling approximately $1.4 million.

Carried

AUDIT COMMITTEE REPORT

The Report was not presented.

Mr. Brian Lawrie addressed Convocation.

REPORTS FOR INFORMATION ONLY

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

- Report of the Activities of the Discrimination and Harassment Counsel – July to December 2009 and Summary of Data since January 1, 2003
- Public Education Equality Series Calendar 2009

Report to Convocation
February 25, 2010

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

Committee Members
Janet Minor, Chair
Raj Anand, Vice-Chair
Paul Copeland
Mary Louise Dickson
Avvy Go
Susan Hare
Doug Lewis
Dow Marmur
Judith Potter
Linda Rothstein
Beth Symes

Purpose of Report: Information

Prepared by the Equity Initiatives Department
(Josée Bouchard, Equity Advisor - 416-947-3984)

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("the Committee") met on February 10, 2010. Committee members Janet Minor, Chair, Raj Anand, Vice-Chair, Avvy Go, Susan Hare, Doug Lewis and Judith Potter participated. Sandra Nishikawa, representative of the Equity Advisory Group/Groupe consultatif en matière d'équité, and Chantal Brochu, representative of the Association des juristes d'expression française de l'Ontario, also participated. Cynthia Petersen, Discrimination and Harassment Counsel ("DHC"), attended to make a presentation about the DHC program. Staff member Josée Bouchard attended.

FOR INFORMATION

REPORT OF THE ACTIVITIES OF THE DISCRIMINATION AND HARASSMENT COUNSEL

JULY 1, 2009 – DECEMBER 31, 2009 AND SUMMARY OF DATA SINCE JANUARY 1, 2003

BACKGROUND

2. Subsection 20 (1) a) of By-Law 11, *Regulation of Conduct, Capacity and Professional Competence* provides that, unless the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (the "Committee") directs otherwise, the Discrimination and Harassment Counsel (the "DHC") shall make a report to the Committee not later than January 31 in each year, upon the affairs of the Counsel during the period July 1 to December 31 of the immediately preceding year.

3. Subsection 20(2) of By-Law 11 provides "The Committee shall submit each report received from the Counsel to Convocation on the day following the deadline for the receipt of the report by the Committee on which Convocation holds a regular meeting".

4. On February 10, 2010, the DHC Program presented to the Committee, pursuant to Subsection 20(1) (a) of By-Law 11, the *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada* for the period July 1, 2009 to December 31, 2009 (Appendix 1), along with a summary of data since January 1, 2003 (Appendix 2). The Committee submits both reports to Convocation for information.

PUBLIC EDUCATION EQUALITY AND RULE OF LAW SERIES 2010

5. The calendar of Public Education Equality and Rule of Law Series is presented at Appendix 3.

APPENDIX 1

REPORT OF THE ACTIVITIES OF THE DISCRIMINATION AND HARASSMENT COUNSEL FOR THE LAW SOCIETY OF UPPER CANADA

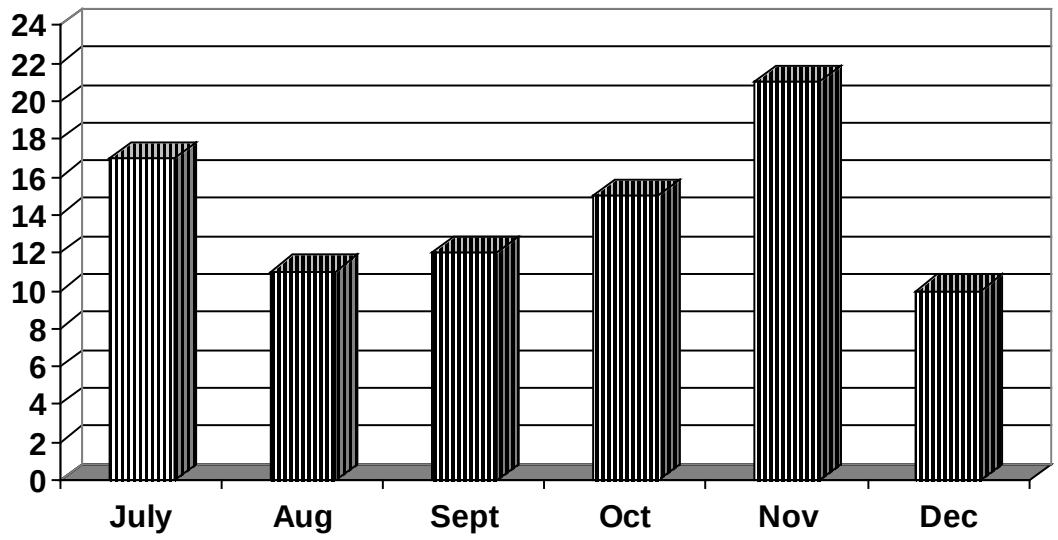
For the period from July 1, 2009 to December 31, 2009

Prepared By Cynthia Petersen
Discrimination and Harassment Counsel

OVERVIEW OF NEW CONTACTS WITH THE DHC PROGRAM

1. During this reporting period (July 1 to December 31, 2009), 87 individuals contacted the DHC Program with a new matter.[1]

2. The volume of new contacts was distributed as follows:



3. Of the 87 individuals who contacted the DHC, 55 (63%) used the telephone to make their initial contact, 29 (33%) used email, 1 used a fax communication and 2 used regular mail.

[1] Individuals who had previously contacted the Program and who communicated with the DHC during this reporting period with respect to the same matter are not counted in this number.

4. Of the 87 new contacts with the Program, 34 (39%) were made by men and 53 (61%) were made by women.

5. During this reporting period, the DHC provided services to four (4) individuals in French. All other persons who contacted the DHC received Program services in English.

DISCRIMINATION AND HARASSMENT COMPLAINTS AGAINST LAWYERS

6. Of the 87 new contacts with the Program, 33 individuals made human rights based discrimination or harassment complaints against lawyers. Twelve (12) of these complaints were made by members of the public and 21 were made by members of the legal profession (either lawyers, law students, or paralegals).

Complaints against Lawyers from within the Legal Profession

7. During this reporting period, there were 21 complaints of discrimination or harassment against lawyers from members of the legal profession. Of these

    a. two (2) were made by paralegals, two (2) were made by law students, and the remaining 17 complaints were made by lawyers; and

    b. fifteen (15) were made by women (including two complaints from female paralegals); six (6) were made by men (including two complaints by male articling students).

8. Fifteen (15) of the 21 complaints (71%) from within the legal profession arose in the context of the complainant's employment or a job interview.
9. Three (3) complaints from within the legal profession were made against opposing counsel in the context of ongoing litigation.

10. Two complaints related to services provided by a lawyers' organization and one complaint was a client complaint made by a lawyer who had retained another lawyer to represent him.

11. The following grounds of discrimination were raised in the complaints from members of the legal profession: sex, disability, race, religion, age, family status, marital status, ethnic origin, and place of origin.

12. Seven (7) complaints were based (in whole or in part) on <u>sex</u>:

    a. Three women complained about sexist treatment and/or sexual harassment by male opposing counsel. Specifically, one complainant was a criminal defence lawyer who complained about sexist conduct by a Crown Attorney. One complainant was a paralegal who complained about sexual harassment by a male opposing counsel. The third complainant was a female lawyer who was representing herself in a family law matter and complained about sexist comments by the male opposing counsel in her case, including crude sexual remarks.

b. Two female lawyers complained about pregnancy-related discrimination in their employment.

c. One female lawyer complained that her employer was refusing to accommodate pregnancy-related health concerns.

d. One female lawyer complained about systemic gender-based discrimination in her employment.

13. Seven (7) complaints were based (in whole or in part) on disability:

a. Three individuals complained that their employer was failing to accommodate their disability. Specifically, a male lawyer who suffers from depression and anxiety reported that his firm was refusing to accommodate his illness. A female lawyer who suffers from infertility complained that her employer was unwilling to accommodate certain medical restrictions imposed by her treating physicians. Finally, a disabled female lawyer reported that she was required to resign from her job because of her firm's unwillingness to accommodate her.

b. Two individuals complained about employment-related discrimination based on disability. Specifically, a female lawyer reported that her employer was refusing to permit her to return to work after a prolonged medical leave, despite documentation from her treating physician attesting to her fitness to return to work. A male lawyer complained that his employment contract was not renewed because of his employer's negative stereotypical assumptions about his professional abilities based on his disability.

c. A male lawyer complained about systemic discrimination against disabled lawyers, in respect of a service provided to lawyers by a lawyers' organization.

d. A disabled lawyer retained another lawyer to represent him in a legal matter. The complainant felt that the lawyer whom he hired treated him in a discriminatory manner based on his disability. The lawyer resigned from the file and the complainant felt that this, too, was because of the lawyer's unwillingness to accommodate his disability.

14. Three (3) complaints were based (in whole or in part) on race:

a. A Black female paralegal complained about derogatory racialized remarks made by her coworkers about her appearance.

b. A woman lawyer of colour complained about systemic racial discrimination in her workplace, including routine under-valuation of her contribution and her employer's tendency to give credit to other employees for work that she had performed.

c. A male articling student of colour complained about racial harassment by his principal at his firm.

15. Two complaints were based in part on age. A male lawyer and a female lawyer each complained about systemic age discrimination in respect of services provided to them by a lawyers' organization.

16. Two complaints were based in part on family status. A female lawyer complained that her employer was assigning a disproportionately higher workload to her than to others in her practice group because she had no children (and no spouse). Another female lawyer reported that she was the sole caregiver for her elderly ailing parents and that her employer was refusing to accommodate her parental-care needs.

17. One complaint was based in part on marital status. A single female lawyer complained that her employer was assigning a disproportionately higher workload to her than to others in her practice group because she had no spouse (and no children).

18. One complaint was based on ethnic origin. A male law student complained that he was asked inappropriate questions about his ethnicity during a job interview by a law firm. He was not hired for the position and felt that his ethnicity might have been a factor in the employer's decision.

19. One complaint was based on religion. A Muslim lawyer complained that her employer was unreasonably refusing to accommodate her request for time off work in order to observe religious holy days.

20. One complaint was based on place of origin. A female lawyer reported that she was denied a service by a lawyers' organization based on her place of origin.

21. In summary, the number of complaints[2] in which each of the following prohibited grounds of discrimination was raised are:

a.	sex	7	(3 sexual harassment and 3 pregnancy-related)
b.	disability	7	
c.	race	3	
d.	age	2	
e.	family status	2	
f.	marital status	1	
g.	ethnic origin	1	
h.	place of origin	1	
i.	religion	1	

[2] The total exceeds 21 because some complaints involved multiple grounds of discrimination.

Grounds Raised in Complaints by Members of the Profession

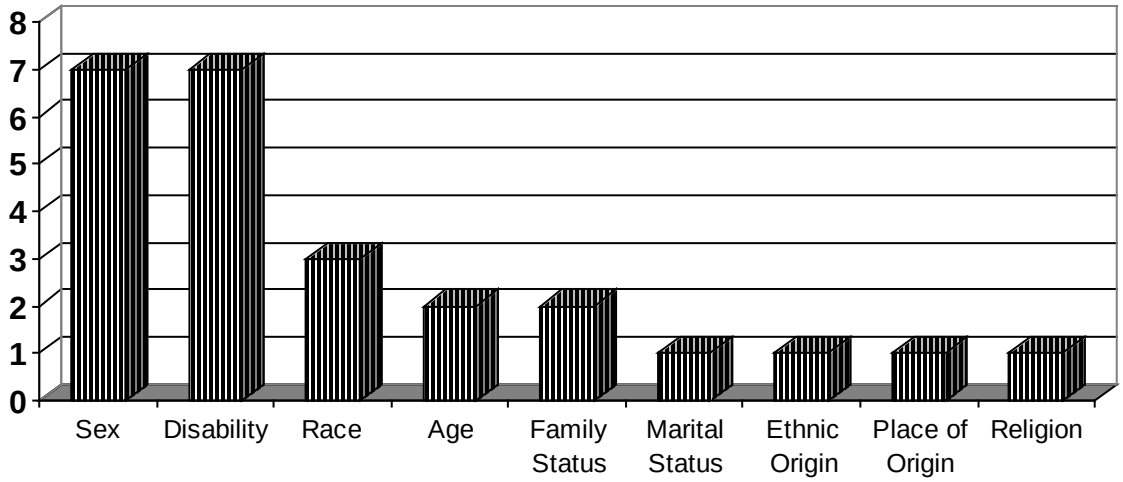
Complaints against Lawyers from Members of the Public

22. During this reporting period, 12 members of the public made complaints of human rights based discrimination or harassment against lawyers.

23. Nine (9) of the 12 public complaints were made by women and 3 were made by men.

24. Of the 12 public complaints:

    a. 5 arose in the context of the complainant's employment;
    b. 4 involved litigants complaining about the conduct of opposing counsel; and



    c. 3 involved clients complaining about the conduct of their own lawyer or of a lawyer that they attempted to retain.

25. The following grounds of discrimination were raised in the public complaints: disability, sex, religion, and race.

26. Seven (7) of the public complaints were based on disability as a ground of discrimination:

    a. Three disabled litigants complained about the conduct of opposing counsel in their cases. Two women reported that the opposing lawyer was exploiting their disability and refusing to accommodate them in the litigation process. A male litigant reported that the opposing counsel derided and mocked his disability and humiliated him both in court and outside the courtroom.

    b. Two disabled women reported that their employers were refusing to accommodate their disabilities. One worked as a legal assistant and the other worked as a law clerk.

c. Two disabled women complained about lawyers who were refusing to represent them. The women felt that their disabilities were a factor in the lawyers' decisions.

27. Two (2) of the public complaints were based on race:

a. An Aboriginal male litigant complained that the opposing counsel in his case treated him in a rude and disrespectful manner due to racial bias.

b. An Aboriginal man complained about racial discrimination by his own lawyer.

28. Two (2) of the public complaints were based on sex:

a. A woman complained about sexual harassment by her own male lawyer; and

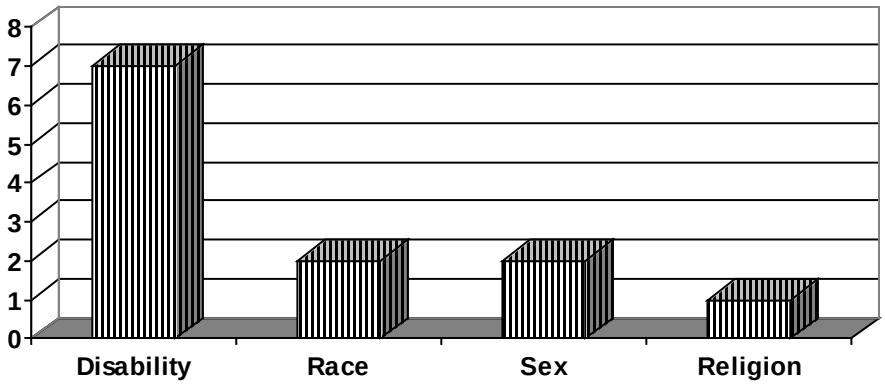
b. A law clerk reported that her employment was terminated after she announced that she would be taking a maternity leave.

29. One complaint was based on religion. A Muslim law clerk reported that her employer was refusing to accommodate her religious observance.

30. In summary, the number of complaints in which each of the following grounds of discrimination was raised are as follows:

a.	disability	7
b.	race	2
c.	sex	2
d.	religion	1

Grounds raised in Public Complaints



COMPLAINTS AGAINST PARALEGALS

31. During this reporting period, there were three (3) discrimination and harassment complaints against paralegals.

32. Two of the complaints against paralegals were made by other paralegals, one of whom was a student.

33. One of the complaints against a paralegal was made by a member of the public.

34. All of the complaints against paralegals were made by women.

35. The complaints against paralegals arose in a variety of contexts. One involved a litigant complaining about the opposing paralegal in her case, one involved a student complaining about her instructor, and one was a paralegal complaining about the conduct of another paralegal with whom she had professional dealings.

36. The following grounds were raised in the complaints against paralegals: sex, race, and disability:

    a. A female litigant complained about offensive sexist remarks made by the male paralegal on the opposing side of her case.

    b. A female paralegal student reported that her paralegal instructor was harassing her based on her disability.

    c. A female paralegal complained about racial harassment by another paralegal with whom she had professional dealings.

SERVICES PROVIDED TO COMPLAINANTS

37. In a number of cases, complainants who contacted the DHC program were given advice and strategic tips on how to handle their situation without resort to a formal complaints process (eg. confronting the offender, documenting incidents, speaking to a mentor).

38. Complainants who contacted the DHC were also advised of various avenues of redress open to them, including (but not limited to),

    a. complaining to the respondent's supervisor or managing partner;

    b. filing an internal complaint within their workplace;

    c. filing an application with the Ontario Human Rights Tribunal;

    d. filing a complaint of professional misconduct with the Law Society; and

    e. retaining a lawyer for advice regarding possible legal actions.

39. Complainants were also provided with information about each of these options, including,

    a. what (if any) costs might be involved in pursuing an option;

    b. whether legal representation is required in order to pursue an option;

c. how to file a complaint or make a report (eg. whether it can be done electronically, whether particular forms are required, etc.);

d. the processes involved in each option (eg. investigation, conciliation, hearing, etc.);

e. what remedies might be available in different fora (eg. compensatory remedies in contrast to disciplinary penalties, reinstatement to employment versus monetary damages, etc.); and

f. the existence of time limits for each avenue of redress.

40. Complainants were told that the options available to them are not mutually exclusive.

41. Complainants were given information about who to contact in the event that they decided to pursue any of their options.

42. Some complainants were directed to relevant resource materials available from the Law Society, the Ontario Human Rights commission, or other organizations.

43. In addition to being advised about the above-noted options, where appropriate, complainants were offered the intervention or mediation services of the DHC Program. Where mediation was offered, the nature and purpose of mediation were explained, including that it is a confidential and voluntary process, that it does not involve any investigation or fact finding, and that the DHC acts as a neutral facilitator to attempt to assist the parties in reaching a mutually satisfactory resolution of the complaint.

44. The DHC mediation services sometimes involve formal mediation sessions, including a meeting of the parties (with or without their respective counsel) and the execution of a mediation agreement prior to the meeting. In other instances, the DHC assists parties in attempting to reach a resolution to their dispute through informal intervention (eg. by shuttle diplomacy, telephone discussions and/or email exchanges with the parties, etc.).

45. During this reporting period, the DHC's mediation/intervention services were offered in a number of different matters. In one case, the respondent refused to participate, preferring instead to conduct an internal investigation of the complainant's allegations. In each other instance, where mediation/intervention was provided upon the mutual consent of the parties, a successful resolution was reached.

SUMMARY OF GENERAL INQUIRIES

46. Of the 87 new contacts with the DHC during this reporting period, 13 involved general inquiries relating to issues within the Program's mandate. These inquiries included:

a. questions about the scope of the DHC Program's mandate;

b. questions about the services offered by the DHC;

c. requests from the public for promotional materials about the DHC Program;

d. requests for education seminars or training workshops on anti-harassment in legal workplaces; and

e. inquiries about the data collected by the DHC.

MATTERS OUTSIDE THE DHC MANDATE

47. During this reporting period, the DHC received a number of calls and emails relating to matters outside the Program's mandate. These contacts included complaints about the conduct of judges, complaints about lawyers outside Ontario, complaints about workplace harassment or discrimination that did not involve lawyers or paralegals, and complaints against lawyers that did not involve discrimination or harassment issues (eg. sharp practice, allegations of breach of confidentiality, client billing disputes, etc.).

48. There were also several complaints about lawyers' lack of civility, bullying, and intimidation tactics. These complaints came from both members of the public (either clients complaining about their own lawyer's conduct or litigants complaining about the conduct of opposing counsel) and members of the legal profession (typically lawyers complaining about the conduct of opposing counsel on a file). Most of the complainants characterized the respondents' conduct as "harassing", but no human rights grounds were alleged/raised in the complaints.

49. In addition, several individuals called the DHC to seek legal representation and/or a referral to a lawyer for a human rights case.

50. All of these individuals were referred to other agencies, including the Human Rights Legal Support Centre, the Law Society's complaints department and the Law Society's Lawyer Referral Service. An explanation of the scope of the DHC Program's mandate was provided to each person.

51. Although there is a relatively high volume of these "outside mandate" contacts, they typically do not consume much of the DHC's time or resources, since we do not assist these individuals beyond their first contact with the Program.

PROMOTIONAL ACTIVITIES

52. The Law Society maintains a bilingual website for the DHC Program.

53. Periodic advertisements are placed (in English and French) in the Ontario Reports to promote the Program.

54. During this reporting period, the DHC made initial contact with representatives of a number of professional associations that have a high number of paralegal members. These contacts were made in the hope of increasing the visibility of the DHC program among paralegals.

55. French, English, Chinese and Braille brochures for the Program continue to be circulated to legal clinics, community centres, libraries, law firms, government legal departments, and faculties of law.

56. Contact information about the Program is provided to multiple community organizations across the province, so that referrals to the Program can be made.

EDUCATIONAL ACTIVITIES

57. Throughout this reporting period, the DHC worked closely with the Director of the Equity Initiatives Department at the Law Society to develop and deliver anti-discrimination and anti-harassment training workshops in law firms across the province.

APPENDIX 2

REPORT OF THE ACTIVITIES OF
THE DISCRIMINATION AND HARASSMENT COUNSEL
FOR THE LAW SOCIETY OF UPPER CANADA

Summary of Data from
January 1, 2003 to December 31, 2009

Prepared By Cynthia Petersen
Discrimination and Harassment Counsel

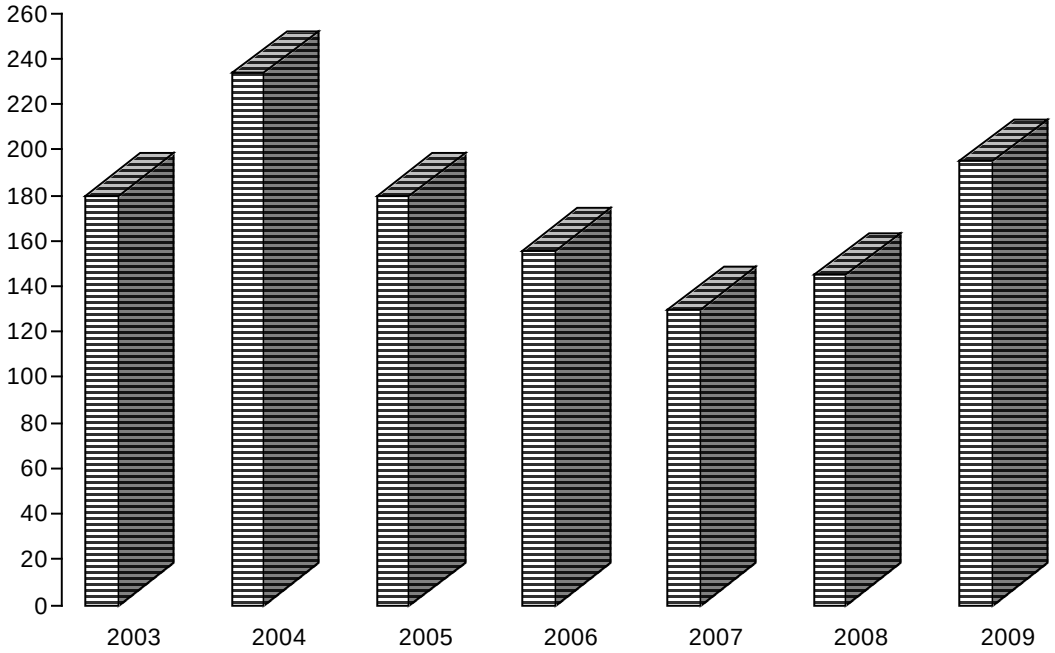
VOLUME OF CONTACTS WITH THE DHC PROGRAM

1. There have been a total of 1,220 contacts[3] with the DHC Program during the seven year period since January 1, 2003.

2. There were 180 new contacts in 2003, 234 in 2004, 180 in 2005, 156 in 2006, 130 in 2007, 145 in 2008 and 195 in 2009.

[3] Individuals who contacted the DHC program more than once about the same matter are only counted once in this number.

Number of New Contacts Annually



3. Thus the Program has received an average of 14.5 new contacts per month over the past 7 years.

Language of Communication

4. The DHC services are offered in French and English. Since January 1, 2003, 46 individuals have communicated with the DHC in French:

   a. 10 people in 2003 received DHC services in French;

   b. 6 people in 2004 received DHC services in French;

   c. 6 people in 2005 received DHC services in French;

   d. 8 people in 2006 received DHC services in French;

   e. 5 people in 2007 received DHC services in French;

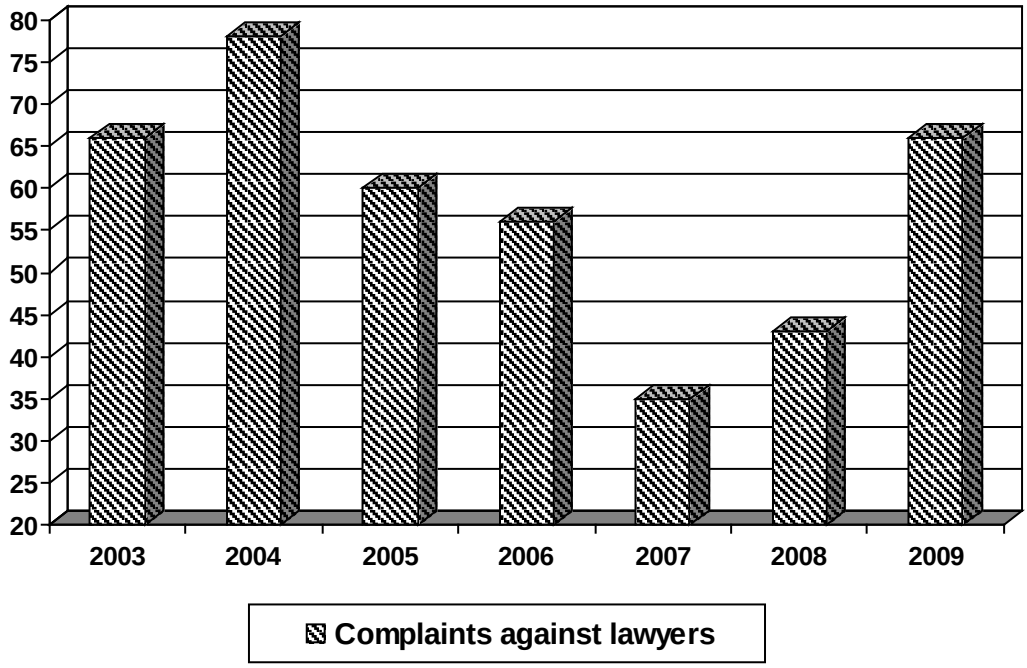
   f. 4 people in 2008 received DHC services in French; and
   g. 7 people in 2009 received DHC services in French.

5. All other individuals were provided services in English, either directly or through the aid of a language interpreter.

OVERVIEW OF COMPLAINTS AGAINST LAWYERS

Number of Complaints

6. Of the 1,220 new contacts with the Program over the past seven years, there were a total of 404 human rights based discrimination and harassment complaints against Ontario lawyers.[4] There were a total of 66 complaints against lawyers in 2003, 78 in 2004, 60 in 2005, 56 in 2006, 35 in 2007, 43 in 2008, and 66 in 2009.



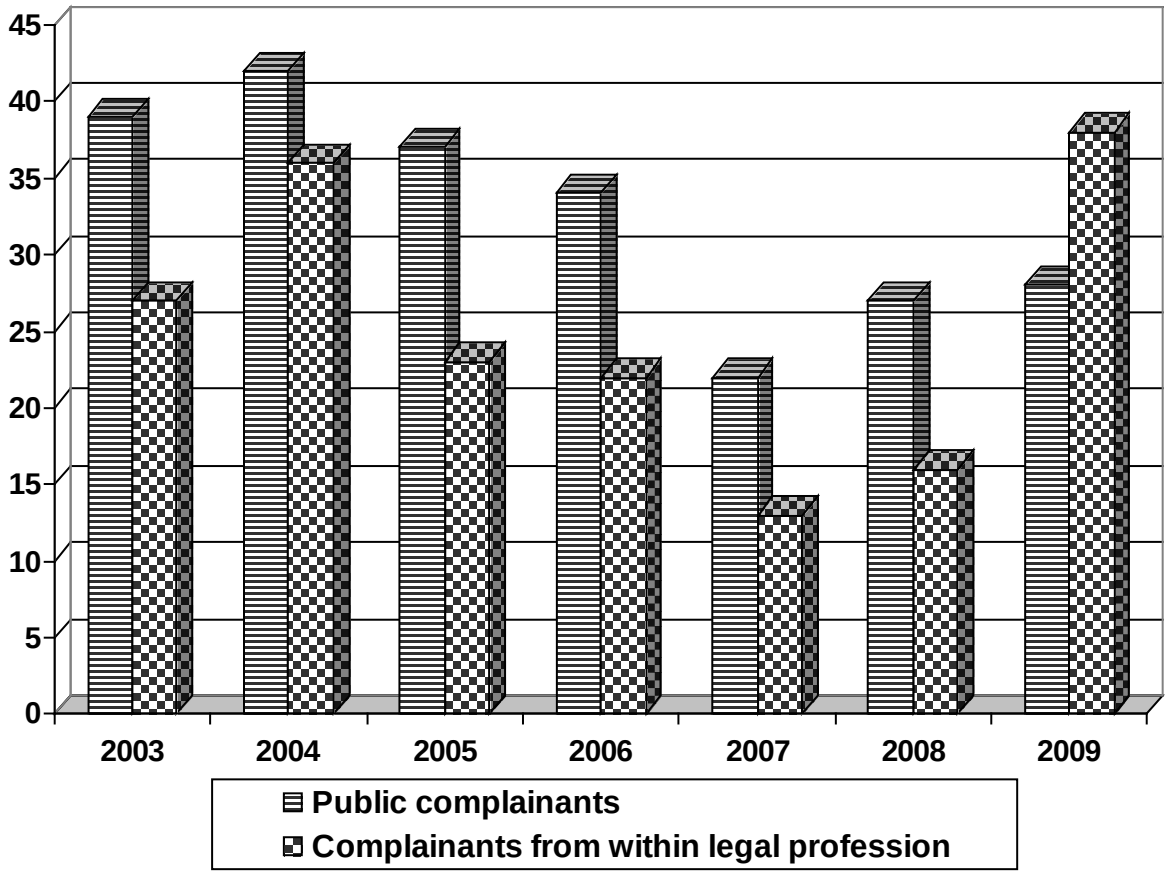
Public / Profession Ratio of Complainants

7. Out of the 404 discrimination and harassment complaints against lawyers since January 1, 2003, there have been 229 complaints from the public and 175 complaints from within the legal profession (i.e., from lawyers, law students, paralegals or paralegal students[5]).

8. Thus over the past 7 years, complaints from the public have constituted on average 57% of all discrimination and harassment complaints against lawyers.

[4] One of the complaints was against an articling student.

[5] Prior to 2008, any complaints against lawyers by paralegals would have been considered as complaints by members of the public, because paralegals were not regulated by the Law Society at that time. Since 2008, complaints by paralegals or paralegal students have been recorded separately and are considered as complaints by members of the legal profession.



Law Student Complaints

9. A total of 38 law students[6] have made discrimination and harassment complaints to the DHC Program in the seven years since January 1, 2003 (out of a total of 175 complaints from within the legal profession):

   a. 8 complaints were made by students in 2003, out of a total of 27 complaints from within the legal profession;

[6] Either articling students, summer students, or university law students. There have been no complaints against lawyers by paralegal students.

b. 6 complaints were made by students in 2004, out of 36 complaints from within the legal profession;

c. 6 complaints were made by students in 2005, out of 23 complaints from within the legal profession;

d. 6 complaints were made by students in 2006, out of 22 complaints from within the legal profession;

e. 5 complaints were made by students in 2007, out of 13 complaints from within the legal profession;

f. 5 complaints were made by students in 2008, out of 16 complaints from within the legal profession; and

g. 2 complaints were made by students in 2009, out of 38 complaints from within the legal profession.

10. Student complaints therefore constitute 22% of the discrimination and harassment complaints received from members of the legal profession over the past 7 years.

Complaints by Paralegals

11. Complaints by paralegals were not recorded separately prior to 2008.[7]

12. There were no complaints against lawyers by paralegals in 2008. In 2009, there were three (3) complaints against lawyers by paralegals.

Context of Complaints by Members of the Legal Profession

13. The overwhelming majority (81%) of complaints by lawyers, law students and paralegals arise in the context of the complainant's employment or in the context of a job interview:

a. in 2003, 23 out of 27 (85%) complaints from within the profession were employment related;

b. in 2004, 27 out of 36 (75%) complaints from within the profession were employment related;

c. in 2005, 21 out of 23 (91%) complaints from within the profession were employment related;

d. in 2006, 17 out of 22 (77%) complaints from within the profession were employment related;

e. in 2007, all of the 13 (100%) complaints from within the profession were employment related;

[7] See footnote 3 above.

f. in 2008, 14 out of 16 (87%) complaints from within the professional were employment related; and

g. in 2009, 27 out of 38 (71%) complaints from within the profession were employment related.

14. There have been some discrimination and harassment complaints from lawyers in non-employment contexts, such as complaints about the conduct of opposing counsel, mediators or investigators. There have also been a few complaints by lawyers who had retained other lawyers to act for them and were complaining as clients.

Male / Female Ratio of Complainants within the Legal Profession

15. Of the 175 discrimination and harassment against lawyers by members of the legal profession since January 1, 2003, 136 (78%) were made by women.

16. Complaints from women lawyers have consistently been disproportionately higher than complaints from male lawyers. Over 7 years, 103 female and 31 male lawyers have made discrimination and/or harassment complaints against other lawyers.

a. in 2003, 13 out of 19 (68%) complaints by lawyers were made by women;

b. in 2004, 25 out of 30 (83%) complaints by lawyers were made by women;

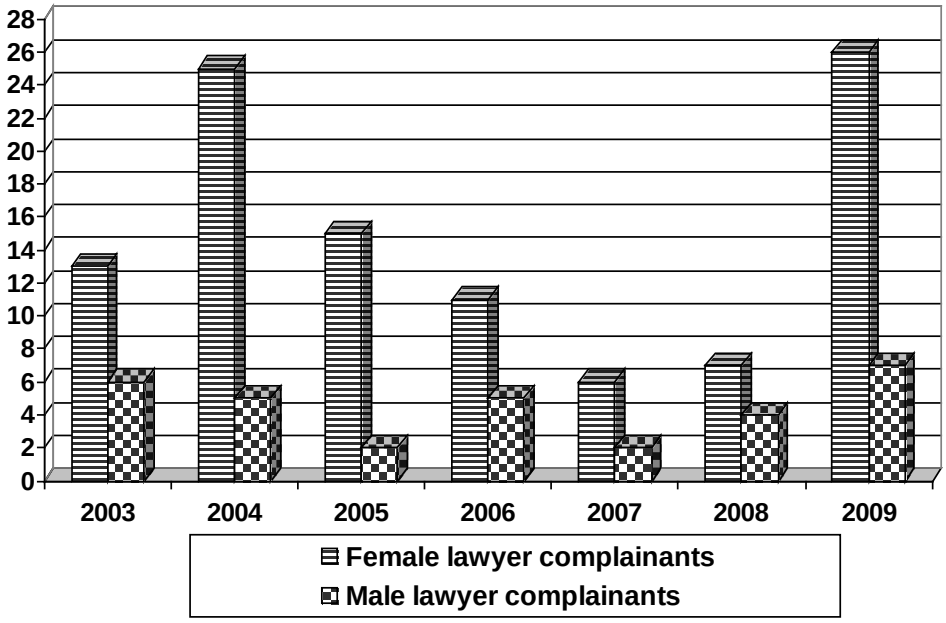
c. in 2005, 15 out of 17 (89%) complaints by lawyers were made by women;

d. in 2006, 11 out of 16 (69%) complaints by lawyers were made by women;

e. in 2007, 6 out of 8 (75%) complaints by lawyers were made by women;

f. in 2008, 7 out of 11 (64%) complaints by lawyers were made by women; and

g. in 2009, 26 out of 33 (79%) complaints by lawyers were made by women.



17. Discrimination and harassment complaints from law students are also predominantly made by women.

18. Over the past 7 years, there have been a total of 38 students complaints against lawyers. Only 8 of those complaints were from men:

    a. in 2003, 5 of the 8 student complainants were women;

    b. in 2004, 5 of the 6 student complainants were women;

    c. in 2005, 4 of the 6 student complainants were women;

    d. in 2006, all of the 6 student complainants were women;

    e. in 2007, all of the 5 student complainants were women;

    f. in 2008, all of the 5 student complainants were women; but

    g. in 2009, both of the 2 student complainants were men.

19. There has been a total of 3 complaints against lawyers by paralegals and all were made by women.

20. Thus, over the past 7 years, women have made 77% of the complaints by lawyers, 79% of the complaints by law students, and 100% of the complaints by paralegals.

Context of Complaints from Members of the Public

21. Over the past 7 years, there have been 229 discrimination and harassment complaints against lawyers by members of the public.

22. Almost half (48%) of public complaints involve clients complaining about their own lawyer or a lawyer that they attempted to retain:

    a. in 2003, 25 out of 39 (64%) public complaints involved clients;

    b. in 2004, 21 out of 42 (50%) public complaints involved clients;

    c. in 2005, 13 out of 37 (35%) public complaints involved clients;

    d. in 2006, 17 out of 34 (50%) public complaints involved clients;

    e. in 2007, 8 out of 22 (36%) public complaints involved clients;

    f. in 2008, 14 out of 27 (52%) public complaints involved clients; and

    g. in 2009, 12 out of 28 (43%) public complaints involved clients.

23. Many of the public complaints (27%) arose in the context of the complainant's employment:

    a. in 2003, 6 out of 39 (15%) public complaints were employment related;

    b. in 2004, 14 out of 42 (32%) public complaints were employment related;

    c. in 2005, 16 out of 37 (44%) public complaints were employment related;

    d. in 2006, 8 out of 34 (23%) public complaints were employment related;

    e. in 2007, 5 out of 22 (23%) public complaints were employment related;

    f. in 2008, 5 out of 27 (19%) public complaints were employment related; and

    g. in 2009, 8 out of 28 (29%) public complaints were employment related.

24. A number of public complaints (17%) have been made by litigants against opposing counsel:[8]

    a. in 2003, 6 of the 39 public complaints involved litigants;

    b. in 2004, 7 of the 42 public complaints involved litigants;

[8] These include complaints by criminal defendants against Crown Attorneys.

c. in 2005, 2 of the 37 public complaints involved litigants;

d. in 2006, 7 of the 34 public complaints involved litigants;

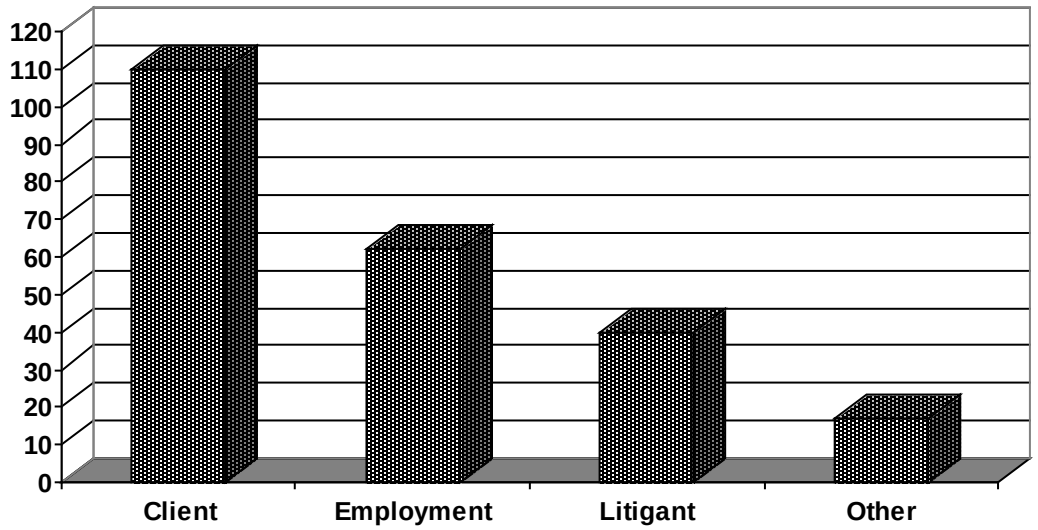
e. in 2007, 5 of the 22 public complaints involved litigants;

f. in 2008, 7 of the 27 public complaints involved litigants; and

g. in 2009, 6 of the 28 public complaints involved litigants.

25. Approximately 8% of public complaints arose in other contexts, such as litigants complaining about discriminatory conduct by a Tribunal member or mediator, an individual complaining about a government lawyer who was providing a public service, and witnesses and victims in criminal proceedings complaining about Crown Attorneys.

26. In summary, the total number of public complaints against lawyers that has arisen in each of the different contexts is as follows:



Male / Female Ratio of Public Complainants

27. Since January 1, 2003, there has consistently been a higher proportion of public complaints from women than men:

a. in 2003, 25 of the 39 (64%) public complaints were from women;

b. in 2004, 26 of the 42 (62%) public complaints were from women;

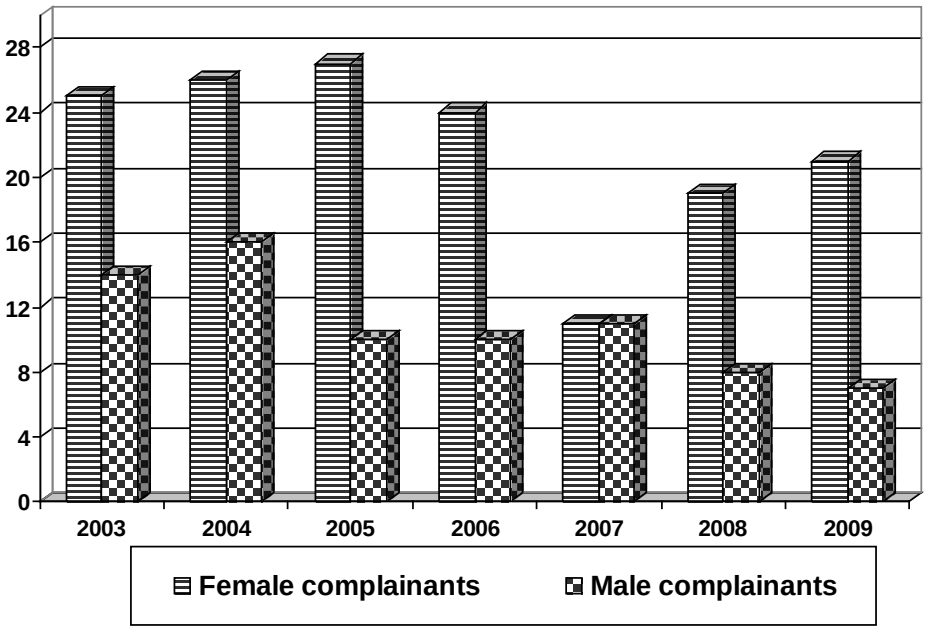
c. in 2005, 27 of the 37 (73%) public complaints were from women;

d. in 2006, 24 of the 34 (71%) public complaints were from women;

e. in 2007, 11 of the 22 (50%) public complaints were from women;

f. in 2008, 19 of the 27 (70%) public complaints were from women; and

g. in 2009, 21 of the 28 (75%) public complaints were from women.



28. Thus of the 229 members of the public who have made discrimination and harassment complaints against lawyers to the DHC over the past 7 years, 143 (62%) were women.

Grounds of Discrimination Raised in Complaints against lawyers

29. There was a total of 404 discrimination and harassment complaints against lawyers between January 1, 2003 and December 31, 2009. Of these,[9] <

a. sex was raised as a ground of discrimination in 204 complaints (50%);

b. disability was raised as a ground of discrimination in 100 complaints (25%);

c. race was raised as a ground of discrimination in 61 complaints (15%);

[9] The sum of the numbers in this paragraph exceeds 404 and the sum of the percentages exceeds 100% because many of the complaints involved multiple grounds of discrimination.

d. sexual orientation was raised as a ground of discrimination in 22 complaints (5%);

e. religion was raised as a ground of discrimination in 16 complaints (4%);

f. age was raised as a ground of discrimination in 15 complaints (4%);

g. family status was raised as a ground of discrimination in 15 complaints (4%);

h. ethnic origin was raised as a ground of discrimination in 12 complaints (3%);

i. place of origin was raised as a ground of discrimination in 4 complaints;

j. ancestry was raised as a ground of discrimination in 3 complaints;

k. record of offences was raised as a ground of discrimination in 3 complaints and

l. marital status was raised as a ground of discrimination in 2 complaints.

Breakdown of Sex Discrimination Complaints 2003-2009

30. Of the 204 complaints that were based (in whole or in part) on sex as a ground of discrimination:

a. pregnancy was specifically raised in 31 complaints;
b. gender identity was raised in 3 complaints; and
c. sexual harassment was reported in 107 complaints.[10]

31. The overwhelming majority (178 or 87%) of the 204 sex discrimination complaints were made by women, including two transsexual women.

32. Of the 178 female complainants who raised concerns about discrimination or harassment based on sex:

a. 71 were lawyers;
b. 16 were law students;
c. 2 were paralegals; and
d. 89 were members of the public.

33. In almost every instance, the women who contacted the DHC were reporting that they themselves had been the victim of sex discrimination or sexual harassment by a male lawyer, that they had suffered employment reprisals after making a complaint of sexual harassment against a male colleague, supervisor or client, or that they had suffered discrimination in their employment due to the fact that they were pregnant and/or had taken a maternity leave. The only exceptions were as follows: One woman lawyer called on behalf of a female articling student in her firm and a female office manager called on behalf of 3 female legal assistants in her firm.

[10] Thus 26% of all complaints received over the past 7 years involved sexual harassment.

34. In contrast, 14 of the 26 men who complained about discrimination or harassment based on sex raised concerns about the inappropriate conduct of other male lawyers toward women that they knew (or, in one instance, toward a gay man that he knew).

35. Only 12 men complained about sex discrimination or harassment that they themselves had experienced. Five (5) of these complainants self-identified as gay men and one self-identified as a trans-man.

36. Of the 26 male complainants who raised concerns about sex discrimination or harassment:

    a. 11 were lawyers;
    b. 1 was an articling student; and
    c. 14 were members of the public.

37. Of the 26 complaints of sex discrimination or harassment made by men, only 4 involved female respondents.

38. Of the 12 sex discrimination or harassment complaints from men within the legal profession:

    a. a lawyer complained about a colleague (another male lawyer) who was sexually harassing a female lawyer in his firm;

    b. a lawyer complained about a male lawyer in another firm who was sexually harassing a female lawyer in that other firm;

    c. a lawyer complained about a colleague (another male lawyer) who was sexually harassing a secretary in his firm;

    d. a lawyer complained about sexist remarks made by opposing counsel (another male lawyer) during discovery proceedings involving a female client;

    e. a lawyer complained about sexist remarks made by opposing counsel (another male lawyer) directed toward a female junior associate in his firm;

    f. a lawyer complained about sexist remarks posted by another male lawyer on an internet website;

    g. a trans-identified articling student in a government office complained about sex discrimination to which he was subjected at his workplace;

    h. a gay male lawyer complained about sexual harassment by a supervising female lawyer in a government office;

    i. two gay male lawyers complained about sexual harassment by male partners in their respective firms;

    j. a lawyer complained that his client, a female lawyer, suffered employment discrimination when she was terminated just prior to commencing a maternity leave; and

k. a lawyer complained that he was being subjected to sex discrimination in his employment.

39. Of the 14 public complaints of sex discrimination or harassment made by men:

a. a police officer complained about sexist remarks made by a male Crown Attorney regarding a female police officer and female defence counsel;

b. 3 men called on behalf of female friends or relatives who had been sexually harassed or assaulted by their male lawyers;

c. 2 litigants in family law matters complained about anti-male sexist remarks made by their ex-wives' female lawyers;

d. a process server and a law clerk each complained about sexual harassment by male lawyers in their workplaces;

e. a physician reported that one of his gay male patients had been sexually abused by a court-appointed male lawyer as a youth;

f. a psychiatrist reported that one of his female patients had been sexually assaulted by her male lawyer;

g. two gay male clients complained that their respective male lawyers were sexually harassing them;

h. a heterosexual paralegal student complained about sexual harassment by a female lawyer who was his instructor; and

i. a man complained that a male Crown Attorney discriminated against his son in the course of a prosecution for domestic assault.

COMPLAINTS AGAINST PARALEGALS

40. Prior to 2008, complaints against paralegals would have been considered outside the mandate of the DHC program and data about such complaints were not recorded separately.

41. In 2008, there was only one discrimination or harassment complaint against a paralegal. In 2009, there were 4 complaints against paralegals.

42. Of the 5 discrimination and harassment complaints against paralegals, two were made by paralegals, two were made by Student paralegals, and one was made by a member of the public.

43. The member of the public who complained about a paralegal was female. She was a litigant complaining about the conduct of a paralegal on the opposing side of her case.

44. Of the two paralegal students who made complaints, one was female and one was male. Both made complaints about paralegal instructors in the context of their education.

45. Both of the paralegals who made complaints about other paralegals were female. One complaint arose in the context of the complainant's employment and the other arose in the context of professional dealings between two paralegals who were acquainted.

46. Of the five (5) complaints[11] against paralegals:

    a. Race was raised as a ground of discrimination in 3 complaints;
    b. Disability was raised as a ground of discrimination in 2 complaints; and
    c. Sex was raised as a ground of discrimination in one complaint.[12]

EXAMPLES OF COMPLAINTS

Public Complaints against Lawyers

47. The following are detailed examples of discrimination and harassment complaints received from members of the public over the past seven years. They are a random selection of complaints listed in random order.

48. A male litigant with severe burn scars reported that the opposing counsel in his case made disparaging remarks and mocked his injuries both inside and outside the courtroom.

49. A number of disabled litigants reported that the opposing counsel in their cases exploited their disabilities and/or made derogatory ableist remarks or assumptions about them.

50. A number of disabled litigants reported that their own lawyers exploited their vulnerability and took advantage of them based on their mental disabilities.

51. A number of legal assistants and law clerks complained that their employers were refusing to accommodate their disabilities.

52. A woman with a brain injury reported that her male lawyer arranged for them to meet privately on the pretext of preparing for a discovery, then sexually assaulted her.

53. A law clerk with a speech impediment complained that her boss (a male lawyer) would get drunk and then mock her publicly by imitating her stutter.

54. A transsexual woman involved in a family dispute with her ex-wife complained about her ex-wife's lawyer who, among other things, continued to refer to her in correspondence, pleadings and submissions as "he" and "him" despite repeated requests to cease doing so.

55. A self-represented litigant who was blind complained about a letter he received from opposing counsel, which stated: "I wish I could see things from your perspective, but I can't get my head that far up my ass."

[11] The sum of the numbers in this paragraph total more than 5 because some complaints involved multiple grounds of discrimination.

[12] The sex discrimination complaint did not involve sexual harassment, pregnancy-related discrimination or gender identity issues.

56. A Chinese man complained that his lawyer treated him in a dismissive and demeaning manner (e.g. ordering him to "sit down" in front of other parties, interrupting him when he spoke, patronizing him, etc.) that was different from how the man observed the lawyer interacting with other white clients.

57. An aboriginal man complained that his own lawyer treated him in a demeaning racist manner and did not take his concerns seriously.

58. A secretary in a legal clinic complained that she was pressured not to take a year of pregnancy/parental leave and then was demoted on the day that she returned to work from her shortened leave.

59. A woman called on behalf of her visually impaired mother, whose lawyer refused to permit her to bring a reader (a friend who would read documents aloud) with her to review documents in the lawyer's office before signing them.

60. A female client complained that her male lawyer always insisted on meeting her outside his office, constantly told her how attractive she was, and put his hands around her waist while alone in an elevator.

61. A secretary in a legal clinic complained that a male lawyer tried to "grope" her and pull her toward him when they were working alone.

62. A secretary in a law firm complained that one of the male lawyers in her office repeatedly tried to hold her hand, stroked her hair, and frequently commented on her appearance.

63. A Filipino woman complained that her lawyer made a racially derogatory remark by referring to her as a "monkey".

64. A receptionist at a law firm complained that she was terminated when she advised her new employer that she would be taking a maternity leave. The employer told her that he would not have hired her if he had known she was pregnant.

65. A secretary in a law firm, who has fibromyalgia, complained that her boss (a lawyer) who was refusing to accommodate her disability and was violating confidentiality with respect to her medical condition in the workplace.

66. A man complained on behalf of a female friend, an impoverished woman with a drug addiction, who was charged with drug-related offences and whose male defence lawyer agreed to act for her pro bono if she performed sexual acts on him.

67. A secretary in a law firm complained that lawyers in the office began harassing her after she announced that she intended to marry her same-sex partner.

68. A woman complained that her lawyer repeatedly commented on her appearance and always insisted on hugging her after their meetings, even though she had advised him that it made her uncomfortable.

69. A female law clerk asked her boss (a male lawyer) for an increase in her salary and he responded, “if you want a raise, bend over”. This same male lawyer also threatened to fire her if she did not persuade another female law clerk in their office to have sex with him.

70. A male police officer reported a male defence counsel’s remark that his (male) client’s conviction was based on fabricated allegations and that “that’s what happens when you have a female officer and female prosecutor on the same case.”

71. A Pakistani man complained that he was being verbally abused by a white lawyer whose office was on the same floor in his building. The lawyer was often aggressive and rude, regularly used profane language, and made offensive comments like “you fucking Muslims”. The lawyer once referred to the man as a “mother fucking Paki” in front of a client.

72. A female law clerk complained that a male lawyer in her office commented on her breasts and asked her to join him in a hotel room.

73. A female criminal defendant complained that her (male) defence counsel was condescending and patronizing, called her “silly” and “stupid”, and frequently cut her off when she was speaking. In contrast, the lawyer spoke to her boyfriend in a respectful manner.

74. An administrative assistant in a law firm complained that she was transferred and demoted after the termination of a brief consensual affair with her boss (a male partner).

75. A female client with a cognitive impairment complained that her lawyer refused to accommodate her (e.g. he spoke quickly despite her requests for him to slow down, he became impatient and shouted at her when she asked him to repeat things, he refused to communicate his advice in writing).

76. A lesbian woman reported that a female lawyer refused to represent her because of her sexual orientation.

77. A legal secretary complained that a male lawyer at her workplace regularly made sexual advances toward her. Before leaving the office one night he asked, “how about a quick blow job before you go?” He displayed a violent temper when she rejected his advances. Later he would apologize for his behaviour and say he was “just kidding”.

78. A physically disabled legal secretary with modified employment duties and modified hours of work reported that she was called a “princess” by a woman lawyer in her office because of her accommodations.

79. A Chinese woman complained that a male lawyer with whom she was acquainted licked his lips suggestively and told her that he could “have” any Chinese woman and has “had” many Chinese women because he is white.

80. A woman of middle-Eastern descent complained that a female lawyer she had retained questioned her about her inter-racial relationship, implying disapproval.

81. A woman involved in family law litigation complained that her male lawyer asked her to have sex with him and said that he could not continue representing her if she rejected him.

82. A male paralegal student complained that his female instructor (who is a lawyer) touched him affectionately and asked him if he was married and whether he was happily married.

83. A male process server employed by a law firm complained that a male lawyer in his office called him “pussy” and “faggot” and made lewd jokes ending with the lawyer touching his (the complainant’s) penis through his pants.

84. A South Asian man complained that a corporate lawyer called him a “petty ethnic” and criticized him for operating his business “like a Third World idiot” (the respondent was also South Asian but from a different ethnic background).

85. A gay male police officer reported that a male Crown Attorney called him “faggot” and “homo” in front of other lawyers at a social gathering in a public place.

86. A woman attended a job interview for a legal assistant’s position with a sole practitioner. The interview was conducted in the (male) lawyer’s home. She reported that the lawyer touched her arm suggestively during the interview and asked her for her bra size during a subsequent phone conversation.

87. A legal assistant, who was a recent Russian immigrant, reported that she was fired from her job after she refused to have sex with her male boss. She suspected that her boss exploited her status as a newcomer to Canada, believing that she would have few other employment opportunities available to her. The lawyer had frequently asked her out for drinks, had photographed her at firm events, had put his arm around her shoulders, and had ultimately told her that he wanted to have sex with her and to be her “boyfriend”.

88. A gay male client, who was accused of committing a criminal act of indecency, reported that his male defence counsel always insisted on meeting in his (the lawyer’s) home, despite the client’s objection and expressed preference to meet in the lawyer’s office. The lawyer’s overly “friendly” demeanour made the client uncomfortable

Complaints about Lawyers from Within the Profession

89. A disabled female lawyer complained that her employer was refusing to permit her to return to work after an extended medical leave of absence, despite having provided medical evidence to substantiate her fitness to work.

90. A female lawyer complained about her employer’s refusal to accommodate her family status by reassigning her and transferring her to an office work location that was closer to her elderly parents’ residents, for whom she was providing care.

91. Two female lawyers complained about their employer’s unwillingness to accommodate their breastfeeding needs after returning from maternity leaves.

92. A Black female paralegal complained about derogatory racialized remarks made by her coworkers about her appearance.

93. A Black woman lawyer complained about the conduct of a white male lawyer who snapped at her in anger, called her a "fucking bitch" in front of other parties, told her that she was an example why "women shouldn't practice law" and called her "an Afro ethnic".

94. A number of female lawyers complained about employment discrimination based on pregnancy, ranging from denial of advancement opportunities after a maternity leave to termination of employment.

95. A number of disabled lawyers (both male and female) complained about their employer's failure to accommodate them.

96. A female articling student complained that a male articling student in her office had sexually assaulted her.

97. A female Filipino articling student reported that a female partner in her law firm swore at her, verbally abused her, criticized her legal skills and sarcastically suggested that she work as a "nanny" for one of the other partners in the firm.

98. A female associate complained about a male partner in her firm who yelled "fuck you bitch" at her during a disagreement in front of articling students employed by the firm.

99. A lesbian articling student in a law firm complained that associates in the firm started asking her unwelcome and intrusive personal questions about her sexual practices after she came out to them. When she expressed her discomfort regarding their inquiries, they began to criticize her work and indicated to partners that she should not be hired back.

100. A Jewish lawyer complained that she was routinely loaded down with a high volume of work by a partner in her firm just prior to the Jewish holidays, so that she would not be able to take leave for religious observance.

101. A Muslim lawyer complained that her employer was refusing to accommodate her request for leave for religious observance of Islamic holy days.

102. A senior female associate in a law firm complained that male associates were given better work and had more advancement opportunities within her firm. She also complained about differential partnership structures within her firm that disadvantaged women partners.

103. A Black female litigator working in a government office complained about systemic racial discrimination in her workplace, consisting of preferential treatment of white lawyers in her office (who were given better files and more advancement opportunities).

104. A female lawyer working in a government office complained that she was given substandard work after her return from pregnancy/parental leave. She felt she was being put on a "mommy track" that would stifle her advancement opportunities within her department.

105. A female lawyer complained about a male opposing counsel who, in front of their respective clients, called her “uppity” and said that the “women’s liberation movement” had made life difficult for men like him.

106. A female associate in a law firm returned from maternity leave and was told that she would not be receiving a salary increase. Other male associates in the office all received increases.

107. A female lawyer complained about harassment by a male lawyer in her office with whom she had had a consensual sexual relationship. After she ended the relationship, he repeatedly insulted and embarrassed her in front of clients and physically shoved her while in the office.

108. A Black female lawyer complained about a white female lawyer who called her a “nigger” in the presence of other parties.

109. A female associate in a law firm complained that a male partner always hugged her when they parted after work-related social events. On the last occasion before she contacted the DHC, the partner had attempted to kiss her on the lips after a client dinner.

110. An articling student in a mid-size law firm reported that a male partner had put his arm around her shoulder at a client dinner and had suggested that they share a hotel room and sleep together while out of town on a business trip.

111. A woman with two young children, who had been out of the paid workforce for two years since the completion of her articles, complained that she was repeatedly asked inappropriate questions in job interviews regarding her childcare obligations. She felt that her status as the mother of two young children was negatively influencing her employment opportunities.

112. A female associate in a small law firm was given a good performance review and was told that she would be assigned a full-time secretary to assist her with her growing practice. After she announced that she was pregnant, her employer advised her that she would not be assigned a secretary.

113. A female associate complained about a male partner who regularly shouted at her, shook his fist in anger, called her “lazy” and “stupid” and said she must have “slept her way to getting hired” at the firm.

114. A number of lawyers with various disabilities (e.g. hearing impairment, diabetes, depression, anxiety) complained that their employers were failing to accommodate them.

115. A female lawyer complained that she was given disproportionately more work than her colleagues because she was single and did not have children.

116. A number of lawyers with child care obligations, including some with seriously ill children, complained that their employers were refusing to accommodate their family status by making flexible work arrangements for them.

117. A Black lawyer working within government complained about systemic barriers to advancement for lawyers of colour in her department. She was given less responsibility than other (white) lawyers, less trial work, more routine and mundane cases, etc. She was also demeaned by being assigned to work at a secretarial station rather than in a lawyer's office.

118. A female associate in a large law firm complained that one of the male partners referred to her as "sweetie" and "darling" and called other women in the office "babe".

119. A Black female articling student complained that, although she received excellent performance appraisals throughout her articling year, she was not hired back to work at her firm. All of the students who were hired back were white males. There were no female associates and no associates of colour in her firm. The only reason provided for the hire-back decision was that she was not a "good fit" with the firm.

120. A female associate hired to work in a small law office with two male partners complained that one of the partners called her "blondie" and frequently made "dumb blond" jokes.

121. A single mother working as a lawyer in a firm requested reduced work hours to allow her to spend more time with her son, who was hospitalized with a serious illness. The firm refused to accommodate her request and suggested instead that she take an unpaid leave of absence.

122. A female associate in a large law firm complained to the partnership about unwelcome sexual advances and unwanted touching by a male partner. The firm cautioned the partner about his inappropriate behaviour, but refused to assign the complainant to a different practice group or separate her from the harasser. The offending partner stopped giving her work, she became ostracized in the office, and eventually took a stress-related sick leave. Soon after she returned to work, she was terminated from her employment for failing to meet the firm's productivity / billing targets.

123. A female associate complained that, after an office social function, one of the male associates in her office "joked" about going back to a hotel with other male lawyers to "gangbang" her. When she confronted him about the inappropriate comment the next day, he attributed it to the fact that he was drunk.

124. A female articling student complained that a male partner in her firm got angry with her at an office social function and shouted at her, "I'll fuck you, you little bitch", "your career is over" and "you're dead!"

125. A female articling student with a chronic pain condition became very ill during her articling year and took a month off work. She initially returned to work on reduced hours. She complained that lawyers in her office were hostile toward her after her sick leave. She was advised by a partner that her prospects of hire-back at the firm were adversely affected by the time she took off work. She was also advised to pursue a different career (other than law) because of her chronic illness, which interfered with her ability to work long hours.

126. A female associate in a small firm was advised by a male partner that the firm was reluctant to train her because she had recently become engaged (to marry a man) and the firm assumed that she would soon have children and quit the practice of law.

127. A senior associate who had met all of her law firm's partnership criteria was told that she would not be made an offer of partnership this year because she was pregnant.

128. A gay male lawyer complained that one of the female lawyers in his office asked him intrusive questions about his sexual experiences and then tried to kiss him, saying that she would "turn him straight".

129. A lesbian articling student complained that she was outed at work by her female principal, to whom she had confidentially confided her sexual orientation.

130. A pregnant lawyer working in a government office reported that, when she expressed interest in a promotion, she was asked how many children she planned to have, and when she requested pay for duties that she had assumed on an acting basis, she was denied the higher rate of pay on the basis that she was going on maternity leave and therefore would not be doing the acting job for long.

131. A female associate in a law firm complained that she was pulled off files and was denied advancement opportunities after she reported to the partnership that a male client had been sexually harassing her.

132. A disabled government lawyer complained that his male manager (also a lawyer) was refusing to modify his job duties and to purchase adaptive devices to accommodate his medical restrictions.

133. A trans-identified articling student in a government office complained about gender-based employee appearance expectations in his workplace that required him to conform to conventional masculine appearance at work.

134. Two male lawyers and a female articling student reported that they were asked "how old are you?" in job interviews. (All self-identified as older than their peers.)

135. A female lawyer reported that she was asked whether she had any children in a job interview.

136. A male lawyer reported that he was asked whether he was married in a job interview.

137. A man reported that an immigration lawyer made offensive remarks to him, equating Muslims with terrorists. The man had consulted the lawyer with the intention of retaining his services.

138. An female articling student reported that she was asked to accompany a male partner on an overnight trip to attend an out-of-town hearing. During the trip, the male partner insisted on socializing together (e.g. eating meals, drinking wine), stood and sat very close to her, gave her leering looks, and used "double entendres" to flirt with her. The student was warned by other women in the firm that this partner had a history of "hitting on" young female lawyers and articling students.

139. A woman complained that her male lawyer was pressuring her to have sex with him. She reported that he told her she could not change lawyers because she had retained him on a Legal Aid certificate.

140. A woman lawyer complained that her law firm was refusing to accommodate her with flexible hours of work upon her return from a maternity leave. She also complained that she was getting "substandard" files to work on since her return to the office. She attributed this discriminatory treatment to her family status as a new mother.

141. A female client reported that her male lawyer asked her whether she was a virgin. He also called her at home, very late at night, and asked "are you alone?"

142. A woman complained that her former lawyer sent her pornographic images by email, with sexually explicit messages indicating that he was interested in pursuing a sexual relationship with her.

143. A disabled male litigant reported that opposing counsel called him a "psycho" .

144. A disabled woman reported that her own male lawyer refused to accommodate her disabilities (multiple chemical sensitivities and environmental allergies), spoke to her condescendingly about her disabilities, and called her "sweetie".

145. A woman lawyer with a psychiatric disability reported that another female lawyer at her former firm, who agreed to provide her with an employment reference, disclosed the fact of her disability to a prospective employer, thereby violating her privacy and jeopardizing her job prospects.

146. A Black woman lawyer working in a government office reported that her manager was refusing to intervene to protect her from ongoing workplace harassment by a member of her staff. Although she did not believe that the harassment was racially motivated, she felt that the manager would not have ignored the situation if she were white ("no white lawyer would have to put up with this").

147. A male lawyer complained that opposing counsel in one of his cases (another male lawyer) had made derogatory remarks about his clients' Dutch ancestry (including, "wooden shoes, and wooden heads").

148. A 52 year old male lawyer, recently called to the bar, complained that he was not given a job interview for a position for which he was highly qualified. He had previous work experience related to the position and high grades in law school. He felt that his age was the reason why he was not considered for the job.

149. A woman reported that she was sexually assaulted by a male lawyer in a bar (who touched her buttocks and grabbed her breasts). The lawyer gave her his business card after the assault.

150. A woman lawyer working in a legal clinic reported that she was harassed and discriminated against at work because she took two maternity leaves in rapid succession.

151. A woman lawyer working in a legal clinic reported that her employer was refusing to accommodate her psychiatric disability and was threatening to terminate her employment if she could not complete her duties without accommodation.

152. A South Asian junior female associate reported that a senior white male partner in her firm sexually harassed her.

153. A male lawyer complained that his employer refused to accommodate his disability, saying “we are not a rehab clinic”, and terminated his employment shortly after he requested the accommodation.

154. A woman litigator reported that a male mediator suggested that she might “achieve better outcomes” for her clients if she engaged in a sexual relationship with him.

155. A female associate complained that a male partner in her law firm repeatedly suggested to her that she should wear make-up and shoes with stiletto heels to attract male clients.

156. A female client complained that her own (male) family law lawyer, who knew she had been a victim of domestic abuse in her marriage, repeatedly told her to “shut up” and said that he “understood why her husband had left her” because she was “difficult”.

157. A disabled law student was asked in an articling job interview at a litigation boutique how she thought her hearing impairment would hurt her in the courtroom.

158. A female client of mixed race complained that her own female lawyer was repeatedly rude to her and made sexist and racist remarks, including a comment about how she “didn’t look like a normal human being”.

159. A female associate who had a consensual sexual relationship with a senior male partner in her law firm complained about employment reprisals (e.g. unwarranted poor performance appraisals, ostracization, poor quality of work) after the affair ended. She left the firm claiming that it had become a poisoned work environment.

160. A female law clerk reported that her male boss repeatedly made uninvited sexual advances toward her (“I can see you’re interested in me”, “if you sleep with me I’ll take you away on vacation”, “I like your short skirt”, etc.) She rejected his advances and he subsequently gave her unwarranted negative job references when she sought employment elsewhere.

161. A male associate complained that his employment was terminated by a law firm because he suffered from depression and anxiety.

162. A female associate who is a single mother of two young children reported that she was refused flexible hours and flexible working arrangements to accommodate her child care responsibilities, and complained that she was discriminated against at her firm (in terms of compensation and quality of work) because she requested this accommodation.

Complaints about Paralegals

163. An Asian female paralegal complained that her boss, who was also a paralegal, was discriminating against her on the basis of race.

164. A male paralegal student reported that his instructors (also paralegals) were discriminating against him based on disability and race.

165. A female litigant complained about offensive sexist remarks made by the male paralegal on the opposing side of her case.

166. A female paralegal student reported that her paralegal instructor was harassing her based on her disability.

167. A female paralegal complained about racial harassment by another paralegal with whom she had professional dealings.

APPENDIX 3

PUBLIC EDUCATION EQUALITY AND RULE OF LAW SERIES
2010

WOMEN'S LAW ASSOCIATION & LAW SOCIETY SYMPOSIUM
February 22, 2010
Lamont Learning Centre (5:00 P.M. – 7:00 P.M.)
Topic: Guide to Success – A Dialogue with Women in Law

A joint symposium presented by the Women's Law Association of Ontario and the Law Society of Upper Canada

The Women's Law Association of Ontario and the Law Society are pleased to host a symposium that will feature a panel of successful and influential women lawyers who will share their experiences from diverse areas of legal practice and work environments. A panel of leading women lawyers will offer tips for success in different practice settings, and guidance to avenues for career advancement. The dialogue will cover different ways to overcome obstacles unique to women lawyers, building and maintaining networks, and marketing in a competitive environment.

Speakers:
- Kim Bernhardt, Barrister and Solicitor, Grant and Bernhardt
- Kathy Laird, Executive Director, Human Rights Legal Support Centre
- Anne Ristic, Assistant Managing Partner, Stikeman Elliott, Toronto Office
- Beth Symes, Bencher of the Law Society of Upper Canada, Partner, Symes and Street

INTERNATIONAL WOMEN'S DAY
March 8, 2010
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)
Topic: Redefining Mother: The Impact of Reproductive Technologies and the Assisted Human *Reproduction Act* on Women and Family Law

The Law Society of Upper Canada, the Feminist Legal Analysis Section of the Ontario Bar Association, the Women's Law Association of Ontario, and the Women's Legal Education and Action Fund are pleased to present a panel discussion and reception to celebrate International Women's Day.

Assisted human reproductive (AHR) technologies continue to raise difficult social, ethical and legal questions. Who can receive AHR services? Are AHR services paid by the state medically necessary? What are the legal rights of donors and non-biological parents? After years of debate, Canada has enacted a governance regime for these technologies—the 2004 *Assisted Human Reproduction Act*. A panel of legal experts will discuss the impact of the *Assisted Human Reproduction Act* on women and their children and the challenges that the use of new reproductive technologies pose on the traditional notion of family, family status and the development of family law in Ontario.

RULE OF LAW SERIES
March 24, 2010
Convocation Hall (6:00 p.m. – 8:00 p.m.)

Reception and Keynote Address: Christopher Alexander, Former Deputy Special Representative of the Secretary General, UNAMA, Kabul, Afghanistan will be the keynote speaker.

JOURNÉE DE LA FRANCOPHONIE 2010 RECEPTION
March 25, 2010
Convocation H all (6:00 p.m. – 8:00 p.m.)

HOLOCAUST MEMORIAL DAY
April 12, 2010
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

ASIAN HERITAGE MONTH
May 10, 2010
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

NATIONAL ABORIGINAL DAY
June 14, 2010
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

PRIDE WEEK
June 29, 2010
Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

Litigation Committee Report
- Intervention in *Burstein v. Durham Regional Police Services Board et al*

Report to Convocation
February 25, 2010

Litigation Committee

Committee Members
John A. Campion (Chair)
James R. Caskey
Thomas G. Heintzman
Paul J. Henderson
Linda R. Rothstein
Bonnie A. Tough

Purpose of Report: Information

Prepared by Legal Affairs
(Elliot Spears – 416-947-5251)

COMMITTEE PROCESS

1. The Litigation Committee met on February 23, 2010. Committee members present were John A. Campion (Chair) and Paul J. Henderson. Participating by telephone were Committee members James R. Caskey and Thomas G. Heintzman. The Treasurer was also present. Staff members in attendance were Malcolm Heins, Katherine Corrick and Elliot Spears.

FOR INFORMATION

INTERVENTION IN BURSTEIN V. DURHAM REGIONAL POLICE SERVICES BOARD ET AL.

2. The Law Society is seeking leave to intervene in an application for judicial review that has been brought by Paul Burstein, naming the Durham Regional Police Services Board and Michael Ewles (the Chief of the Durham Regional Police Services) as respondents.

3. On February 8, 2010, a new consolidated courthouse for Durham Region opened at 150 Bond Street in Oshawa.

4. On the same date, Paul Burstein commenced an application for judicial review, naming the Durham Regional Police Services Board and Michael Ewles (the Chief of the Durham Regional Police Services) as respondents.

5. Paul Burstein seeks judicial review of the decision of the Durham Regional Police Services Board and/or Michael Ewles to subject to a security screening all lawyers and paralegals, other than court staff, Crown Attorneys and members of the Durham Region Law Association presenting identification issued by The Law Society of Upper Canada within the previous two years and identification issued by the Ministry of the Attorney General, entering the new consolidated courthouse for Durham Region. The security screening would involve walking through a magnetometer, the possibility of being wanded, having bags scanned by an x-ray machine and the possibility of having bags manually inspected.

6. At issue is the respondents' position that lawyers and paralegals may pose a security risk; therefore, there is reason to implement security screening of all lawyers and paralegals entering the new consolidated courthouse for Durham Region.

7. On February 8, 2010, the application for judicial review was not heard but adjourned to be heard on February 12, 2010. However, an interim injunction order was made "prohibiting the Respondents from requiring any lawyer carrying a valid Law Society of Upper Canada identification card to submit to security scanning or search to enter the courthouse at 150 Bond St. Oshawa Ontario." The order was to remain in effect until the hearing of the application on February 12, 2010.

8. The application for judicial review returned to the court on February 10, 2010. On that date, the application was not heard but was adjourned to be heard on a date to be fixed by the trial coordinator. The interim injunction order that was made on February 8, 2010 was extended until the hearing of the application or a further order of the court.

9. The application for judicial review may be heard as early as the end of March 2010.

Professional Development and Competence Committee Report
- Professional Development & Competence Department – Bi-Annual Report

Report to Convocation
February 25, 2010

Professional Development & Competence Committee

Committee Members
Laurie Pawlitza (Chair)
Constance Backhouse (Vice-Chair)
Mary Louise Dickson (Vice-Chair)
Alan Silverstein (Vice-Chair)
Larry Banack
Jack Braithwaite
Thomas Conway
Marshall Crowe
Aslam Daud
Jennifer Halajian
Susan Hare
Paul Henderson
Laura Legge
Dow Marmur
Daniel Murphy
Judith Potter
Nicholas Pustina
Jack Rabinovitch
Heather Ross
Catherine Strosberg
Gerald Swaye

Purpose of Report: Information

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

INFORMATION
PROFESSIONAL DEVELOPMENT & COMPETENCE DEPARTMENT - BI-ANNUAL REPORT

1. The PD&C Department's bi-annual report is provided at Appendix 1 for Convocation's information.

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

PD&C Department's Bi-annual Report.

(Appendix 1, pages 3 – 30)

Tribunals Committee Report
- Tribunals Office Quarterly Statistics

Report to Convocation
February 25, 2010

Tribunals Committee

Committee Members
Mark Sandler (Chair)
Alan Gold (Vice-Chair)
Thomas Conway
Jennifer Halajian
Tom Heintzman
Paul Schabas
William J. Simpson

Purposes of Report: Information

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

INFORMATION

TRIBUNALS OFFICE QUARTERLY STATISTICS

1. The Tribunals Office Fourth Quarter Report for the period October 1, 2009 – December 31, 2009 is set out at Appendix 1 for Convocation's information.

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

Copy of Tribunals Office Fourth Quarter Report for the period October 1, 2009 – December 31, 2009.

(Appendix 1, pages 3 – 22)

CONVOCATION ROSE AT 1:25 P.M.

Confirmed in Convocation this 22nd day of April, 2010.

Treasurer