MINUTES OF CONVOCATION

Friday, 12th October, 1990
9:00 a.m.

PRESENT:

The Treasurer (James Spence, Q.C.), Bastedo, Callwood, Carey, Carter, Cass, Chapnik, Cullity, Ferguson, Ground, Hickey, Kiteley, Lamont, Lawrence, Legge, Lerner, McKinnon, Manes, O'Connor, Pepper, Peters, Rock, Somerville, Thom, Thoman, Topp, Weaver and Yachetti.

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"IN PUBLIC"

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SPECIAL COMMITTEE ON DISCIPLINE PROCEDURES

Convocation continued its consideration of the Report of the Special Committee on Discipline Procedures which had commenced on September 7th, 1990.

Mr. Yachetti presented the Report and distributed to Convocation a Report from Ms. Marilyn Pilkington dated October 10th, 1990 regarding legislative changes which would be required if the Report of the Special Committee on Discipline Procedures and the Recommendations made therein are adopted by Convocation.

(Ms. Pilkington's Report in Convocation file)

SPECIAL COMMITTEE ON DISCIPLINE PROCEDURES

FINAL REPORT

OVERVIEW

In October 1989, Convocation appointed a Special Committee of Benchers to look into the current discipline procedures and to recommend how these procedures could be improved. Roger Yachetti was appointed to be the Chair of this Committee and Harvey Strosberg was appointed as Vice-Chair. The following Benchers were also appointed to the Committee: Messrs. G. Arthur Martin, Thomas Bastedo, Ms. Netty Graham, Ms. Fran Kiteley, Messrs. Paul Lamek, Dennis R. O'Connor, Clayton Ruby, Marc Somerville, Stuart Thom, Douglas Thoman and Robert C. Topp. The following non-Benchers were also asked to participate: Messrs. Robert Conway, Donald Crosbie, Scott Kerr, Gavin MacKenzie, Richard Tinsley and H. Reginald Watson. Mr. Patrick Ballantyne served as Secretary to the Committee. Ms. Anne Merritt sat as an observer for the Ministry of the Attorney General.

The former Treasurer, Lee Ferrier, provided the Special Committee with "Terms of Reference" (attached as Appendix "1"). The Special Committee decided that these Terms should be interpreted broadly so as to ensure a full and complete review of the issues contained therein as well as to enable it to address those issues thoroughly.

Your Committee invited the oral and written comments of various persons who have over the years gained considerable experience with the current discipline procedure. Attached as Appendix "2" is a list of those persons whose contributions were received and carefully reviewed by your Committee. Your Committee expresses its sincere gratitude to all who assisted it in its work.

Convocation also appointed a second Special Committee to review the complaints procedure. This Committee, which was chaired by Ms. June Callwood, has reported to Convocation under separate cover after having been in close contact with the Special Committee On Discipline Procedures. It is hoped that with the benefit of the Reports of these two Committees, Convocation will be able to review, evaluate and adapt for the future the complaints and discipline procedures, the most significant and important functions of self-regulation carried on by the Society.

PRELIMINARY TASKS

Your Committee had initial concerns about the potential for overlap between the two Special Committees looking into the complaints and discipline procedures. At the first meeting of the Special Committee On Discipline Procedures, the Committee heard from Ms. Callwood, who outlined the mandate of her Committee and identified some specific areas which she expected her Committee to review. After some discussion, your Committee agreed that a line could be drawn between the work of the two Committees. It was agreed that the Yachetti Committee should review the procedure from the point when an authorization of a discipline complaint is requested. The Committee then agreed to break its work down into sub-committees that would review specific areas of concern. Accordingly, Messrs. Bastedo and Topp each prepared briefs: Mr. Topp reviewed the legislation governing other professions in the Province of Ontario and Mr. Bastedo undertook a review of the discipline procedures in other jurisdictions. These Reports proved to be helpful to your Committee in its deliberations. In addition to these two Reports, the Chair asked Ms. Kiteley and Messrs. O'Connor and Somerville to prepare a list of issues which this Committee had to consider in order to fulfill its mandate. This list was prepared, submitted and later edited by Ms. Kiteley and Mr. Bastedo and continued to be amplified by the Committee during the course of its meetings. This list (attached as Appendix "3") became the "road map" used by your Committee.

Your Committee also had the benefit of various reports prepared by Mr. Watson with the assistance of the Complaints and Discipline Staff. These Reports outlined the complaints and discipline procedures presently in place at the Society.

Your Committee also received a written submission from Gavin MacKenzie following release of the interim report.

Finally, the Committee also had the benefit of materials prepared by Ms. Anne Merritt of the Attorney General's Office. These materials concerned matters of interest to your Committee and proved to be very helpful.

RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON DISCIPLINE PROCEDURES

Your Committee held its initial meeting on December 12, 1989. Between that date and the time of the presentation of this Report, the Committee met seventeen times. What follows are the formal Recommendations adopted by your Committee and a brief review of the opposing views taken with respect to important issues:

SELF-REGULATION

THE ROLE OF THE LAW SOCIETY OF UPPER CANADA AS A SELF-GOVERNING BODY MUST BE MAINTAINED AND WITH IT THE POWER TO DISCIPLINE ITS MEMBERS.

Your Committee believes that an independent profession of law is as necessary in a Democracy as an independent judiciary and that a necessary requirement of this independence is the right to self-regulate and self-discipline. The Committee referred to the McRuer Report of 1968 which dealt in part with self-governing professions. The Report firmly stated that self-governing professions are created to safeguard

the public interest - the question is not "does the profession desire self-regulation?", but "does the public interest require it?" Reference was also made to an article by Ron Ellis entitled "The Independent Bar" in which Mr. Ellis argues inter alia that an independent profession of law is as necessary as an independent judiciary, although that point is often misunderstood by the public. Your Committee agrees and believes that, ideally, the only role for the courts in the discipline process is that of judicial review. Mr. Ellis equates self-government of the legal profession with a constitutional imperative and asks whether putting the responsibility of certification and disciplining of lawyers in the hands of the government would offend this imperative. Your Committee is of the view that it would.

INDEPENDENCE

THE INTEGRITY OF THE DISCIPLINE PROCEDURE REQUIRES THAT SOCIETY STAFF PROCEED WITH INVESTIGATIONS AND DISCIPLINE HEARINGS INDEPENDENTLY OF THE BENCHERS, SUBJECT ONLY TO GENERAL POLICY GUIDELINES.

Note: Motion, see page 24

Your Committee spent a considerable amount of time discussing this issue. The fundamental problem which prompted the Committee to pass this resolution is that in a unitary organization such as the Society, agents of the organization (with the term "agents" used broadly) must discharge investigative, prosecutorial and adjudicative responsibilites. In our courts, by way of contrast, investigative, prosecutorial and adjudicative responsibilities are discharged by agents of organizations which are wholly independent of each other. (The objective underlying the Committee's resolution is to separate to the greatest extent possible, the Society's prosecutorial and investigative responsibilities on the one hand, from its adjudicative responsibilities on the other. Although steps have been taken within the Society to separate the investigative and prosecutorial functions themselves, that objective is, in the view of your Committee, much less important). The need for this separation of responsibilities is recognized by the American Bar Association Model Rules and the commentaries accompanying them. Your Committee agrees entirely with the following comment found on page 10 of the American Bar Association Model Rules:

> "vesting all prosecutorial responsiblity in disciplinary counsel is necessary if there is to be a separation of prosecutorial and adjudicative functions in a unitary agency."

Much of the debate in the Committee on this and other subjects centred on the issue of whether professional disciplinary proceedings are civil or criminal in nature. The American Bar Association Model Rules (at page 36) state:

> "disciplinary proceedings are neither civil nor criminal but are sui generis."

While analogies to the Rules of Civil Procedure are appropriate in some circumstances (for instance, the issue of two-way disclosure discussed below), it would be an error to regard Convocation, its members or its Senior Executive Officers as "discipline counsel's clients" because of Convocation's adjudicative responsibilities; it would compromise both the impartiality of Convocation and the independence of Discipline Counsel if the latter were constrained to follow the former's instruction in making discretionary decisions in individual cases.

For this reason, the Committee endorses the views expressed by Mr. Martin, that Discipline Counsel, like Crown Attorneys, represent the public, although their salaries or fees are paid by the Law Society.

The current legislation and the model envisioned by your Committee call for the "charging" decision to be made by one or more Benchers (possibly in the model envisioned by your Committee, in conjunction with a non-Bencher lawyer). While this involvement of Benchers in the "charging" decision might be seen by some as an inappropriate involvement of adjudicators in what is essentially a prosecutorial responsibility, it is the Committee's view that the charging decision is of sufficient importance that there is a legitimate expectation on the part of members of the public that that decision will be made by Benchers who have been elected by the profession (or in the case of lay-Benchers, duly appointed) to its governing body. Concerns about compromising Convocation's impartiality or the impartiality of a smaller group representing Convocation can be answered satisfactorily by strict adherence to two principles:

1) Benchers involved in the charging decision in a particular case must be disqualified from any adjudicative responsibility with respect to that same case; and

2) Once the complaint has been authorized, Discipline Counsel must be free to conduct the proceeding (including providing disclosure, recommending penalty, requesting withdrawal or reduction, deciding on appeal initiatives and response) uninhibited by the necessity of taking instructions from any of Convocation, its members or its Senior Executive Officers.

The need for Discipline Counsel to be independent does not extend beyond their prosecutorial functions. In your Committee's view it is entirely appropriate and even perhaps essential to the smooth operation of the Society that Discipline Counsel report to and take direction from the Senior Executive Officers of the Society on managerial or administrative matters, such as, budgeting. It is equally appropriate that Discipline Counsel take direction from the Benchers on policy matters which apply to all or specified types of discipline cases as opposed to individual cases.

DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE

1) A NEW COMMITTEE SHOULD BE CREATED TO AUTHORIZE FORMAL DISCIPLINE COMPLAINTS. THIS DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE SHOULD CONSIST OF ONE BENCHER, ONE LAY-BENCHER AND ONE NON-BENCHER LAWYER. THIS COMMITTEE SHOULD BE APPOINTED BY THE TREASURER AND APPROVED BY CONVOCATION AND IT SHOULD SIT FOR A ONE-YEAR TERM. THE MEMBERS OF THIS COMMITTEE SHOULD BE DISQUALIFIED FROM ANY ADJUDICATIVE RESPONSIBILITIES DURING THEIR TERM ON THIS COMMITTEE AND SUBSEQUENTLY IN RESPECT OF ANY FORMAL DISCIPLINE COMPLAINT PREVIOUSLY AUTHORIZED BY THE COMMITTEE WHILE THEY WERE MEMBERS.

2) THE SOLICITOR SUBJECT TO DISCIPLINE SHOULD HAVE NO RIGHT OF REPRESENTATION BEFORE THE DISCIPLINE AUTHORIZATION COMMITTEE.

3) THE DECISION TO AUTHORIZE A FORMAL COMPLAINT SHOULD REMAIN A PURELY ADMINISTRATIVE ONE.

4) THERE SHOULD BE NO REVIEW OF THAT DECISION AVAILABLE.

5) REASONS SHOULD BE GIVEN BY THE DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE IN ALL INSTANCES WHERE IT REFUSES TO AUTHORIZE A FORMAL COMPLAINT, OR REFUSES THE FORMAL COMPLAINT SOUGHT BUT SUBSTITUTES A LESSER FORMAL COMPLAINT. CARE SHOULD BE TAKEN IN THE REASONS NOT TO PREJUDICE A FAIR HEARING OF ANY FORMAL COMPLAINT;

6) THE DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE SHALL AUTHORIZE AN INVITATION TO ATTEND WHENEVER IT DEEMS THAT COURSE APPROPRIATE.

When reviewing the discipline systems in place in other jurisdictions throughout the world, what became clear was the increased reliance upon laypersons in various important decision-making positions. Your Committee has considered the role of laypersons carefully and applauds the quality of work performed by the lay-Benchers, past and present, at the Law Society of Upper Canada. Your Committee concluded that their function as the voice of the public is one that ought to be expanded, one such instance being the mandatory placement of a lay-Bencher on the Discipline Complaints Authorization Committee. It is expected that the lay-Bencher will provide this important Committee with a fresh perspective as to how the general public views the responsibilities and conduct of a lawyer.

Just as important as the perspective of the lay-person is the perspective of a lawyer's peers and thus the recommendation that a non-Bencher lawyer sit on the Discipline Complaints Authorization Committee. There was considerable discussion amongst your Committee members, as well as recommendations from other interested parties, that centred on the increased use of non-Bencher lawyers in the discipline process. While the consensus of your Committee was that Benchers are elected to perform discipline functions and thus should not unduly delegate that responsibility, it was concluded that the inclusion of a non-Bencher lawyer on the Discipline Complaints Authorization Committee would promote the perception that the authorization process is a fair one, with the views of a layperson and a lawyer being given full and equal consideration.

Another significant benefit of the inclusion of a lay-Bencher and a non-Bencher lawyer on this Committee will be the lessening of an already heavy workload currently burdening the elected Benchers. The time pressures on the Benchers are significant, and this was recognized by not only the members of your Committee but also by numerous lawyers who made submissions to your Committee; all recommended that, wherever possible, Bencher time be used as efficiently as possible. The increased workload on the lay-Bencher may require consideration of the adequacy of having only four lay-Benchers.

It should be noted that your Committee had the benefit of an in depth review of the Quebec discipline process where the investigation of complaints and the decision to commence formal discipline proceedings are matters decided independently of their "General Council". While your Committee was of the view that Benchers were elected in large part to perform this disciplinary function, it did see some merit in the "independence" of the Quebec system. Your Committee believes that the inclusion of the lay-Bencher and the non-Bencher lawyer on the Discipline Complaints Authorization Committee would go a significant way toward achievement of this goal, provided that those Benchers who sit on the Discipline Complaints Authorization Committee be relieved of all disciplinary adjudication during their terms in office and thereafter in regards to those complaints approved during their term. Another benefit of a one-year term is the likelihood of consistency in the charging process.

Your Committee was of the view that the current practise of not allowing representation by the solicitor at the complaints authorization level is acceptable and fair, as is the determinative nature of that decision. To provide otherwise would be to complicate unduly and unnecessarily the authorization process where there is clearly no reason to do so. Your Committee does recommend, however, that reasons be given by the Discipline Complaints Authorization Committee wherever it refuses to authorize a complaint or wherever a lesser complaint than the one sought is substituted. Once again, the goal here is to deflect any criticism that the Society is operating behind closed doors, as well as to ensure that the complainant is kept fully informed of the proceedings. It is not recommended that the Society take active steps toward publishing these reasons nor is it anticipated that these reasons need be voluminous in nature. Finally, the reasons of the Discipline Complaints Authorization Committee should be drafted so that they do not in any way prejudice any other formal complaint that may be substituted by the Discipline Complaints Authorization Committee or any existing or concurrently authorized complaint where the issues may overlap.

The existing role of the Secretary in the Discipline Complaints Authorization process should be maintained, as efficiency dictates that complaints should go through a central office. Your Committee has confidence that the Secretary is the appropriate person to perform this function.

DEFINITION OF "PROFESSIONAL MISCONDUCT" and "CONDUCT UNBECOMING A BARRISTER AND SOLICITOR"

Your Committee was urged by some lawyers to attempt definitions of the two discipline offences. Your Committee concluded that the present practice of charging one or other of the general offences, with particulars provided in each complaint, is preferable. It was felt that legislative definitions would be unnecessarily restrictive and not necessarily in the interest of the profession or the public.

DISCLOSURE

The Committee adopted the guidelines which follow: (Note - Disclosure pursuant to Law Society proceedings is only for the purpose of Society proceedings, i.e., not for other purposes, such as criminal proceedings.)

The following disclosure must be made in every case:

1) THE SOCIETY AND THE SOLICITOR SHALL DISCLOSE ALL RELEVANT DOCUMENTS IN THEIR POSSESSION, CONTROL OR POWER EXCEPT TO THE EXTENT SUCH DOCUMENTS ARE PRIVILEGED AS A MATTER OF LAW. THE WORD "DOCUMENT" SHALL BEAR THE SAME MEANING AS IN RULE 30.01(1)(a) OF THE RULES OF CIVIL PROCEDURE WHICH READS AS FOLLOWS:

Note: Amendments, see pages 24

""DOCUMENT" INCLUDES A SOUND RECORDING, VIDEOTAPE, FILM, PHOTOGRAPH, CHART, GRAPH, MAP PLAN, SURVEY, BOOK OF ACCOUNT AND INFORMATION RECORDED OR STORED BY MEANS OF ANY DEVICE";

2) THE SOCIETY SHALL DISCLOSE THE NAMES AND ADDRESSES OF PERSONS WHO MIGHT REASONABLY BE EXPECTED TO HAVE KNOWLEDGE OF THE MATTERS IN ISSUE TOGETHER WITH A COPY OF ANY WRITTEN STATEMENTS OF SUCH PERSONS;

3) WHERE WRITTEN STATEMENTS DO NOT EXIST, THE SOCIETY SHALL PROVIDE A SUMMARY OF THE ANTICIPATED EVIDENCE OF SUCH PERSONS;

4) THE SOCIETY SHALL DISCLOSE ALL EXPERT REPORTS IN ITS POSSESSION. THE SOLICITOR SHALL DISCLOSE ONLY THOSE EXPERT REPORTS THAT THE SOLICITOR INTENDS TO RELY UPON AT THE HEARING. A PARTY WHO INTENDS TO CALL AN EXPERT WITNESS AT A HEARING SHALL, NOT LESS THAN TEN DAYS BEFORE THE COMMENCEMENT OF THE HEARING, SERVE ON THE OTHER PARTY A REPORT SIGNED BY THE EXPERT SETTING OUT THE EXPERT'S NAME, ADDRESS, AND QUALIFICATIONS AND THE SUBSTANCE OF THE EXPERT'S PROPOSED TESTIMONY. NO EXPERT WITNESS MAY TESTIFY, EXCEPT WITH LEAVE OF THE PANEL, UNLESS THIS REQUIREMENT IS MET.

5) A PRE-HEARING CONFERENCE SHALL BE HELD AT THE REQUEST OF EITHER PARTY.

Note: Motion, see page 25
Amendment, see page 25

Both in reviewing the current disclosure policy in place in the Discipline Department as well as in formulating ideas as to how to improve it, your Committee had the benefit of a memorandum prepared by Mr. Watson. The discussions focused to a large degree on the question

of whether discipline proceedings were civil or criminal in nature. Your Committee gave full consideration to R. v. Wigglesworth [1987], 2 S.C.R. 541, a decision of the Supreme Court of Canada which held that s. 11 of the Charter of Rights did not apply to internal discipline proceedings as "by nature" they were not criminal and there were no "true penal consequences". Some members of your Committee thus argued that Law Society proceedings are not criminal in nature and, accordingly, procedures associated with Law Society Discipline Hearings such as disclosure, should also not be criminal in nature. Those holding that point of view argued that it would be unreasonable to impose a criminal type procedure on a body whose mandate is to protect the public. In light of this significant mandate, Society proceedings should have a disclosure process which more closely approximates that of civil, rather than criminal proceedings. In other words, there should be disclosure obligations on both the solicitor and the Society.

That said, there were some members of your Committee who felt it was unfair and unreasonable to require a solicitor involved in discipline proceedings to make full and total disclosure. One member argued that the right to silence is a fundamental right and must not be disturbed without good reason. He noted that a member has no right to remain silent before a formal complaint has been issued as the Society has the power to require cooperation with a discipline investigation. Failure to respond to inquiries from the Society at this stage could lead to a finding that the solicitor is ungovernable (Rules of Professional Conduct - Rule 13, Commentary 3 for example). Once the formal complaint has been issued, he argued, there should be no formal obligation on the solicitor to make disclosure. Another member of your Committee went further and argued that to require disclosure by a solicitor would be to run the risk of:

i) Self-incrimination by the solicitor; and

ii) incrimination of clients.

It was countered that excessive reliance upon the type of protections afforded a person charged with a criminal offence is out of place in the Law Society environment. The object of the discipline process is to maintain the integrity of the profession for the benefit of the public, a consideration ranking ahead of the protections afforded by criminal procedure.

What your Committee ultimately recommends is a hybrid of these two points of view. While the solicitor will not be required to make full and total disclosure, both parties (the Society and the solicitor) should be required to disclose all relevant documents in the possession, control or power of each except to the extent that such documents are privileged as a matter of law. It is hoped that in this way the discipline process may be expedited, with maximum opportunity for resolution of the matter and minimum opportunity for surprise. The broad definition given the word "document" is to ensure that all relevant material be disclosed. At this point, the solicitor's obligation to make disclosure stops, save and except for the disclosure of any expert reports that the solicitor will be relying upon at the hearing.

It is also urged by your Committee that a pre-hearing conference be mandatory at the request of either party to a Discipline Hearing. The efficacy of pre-trial hearings was lauded by certain members of your Committee and your Committee fully expects that the adoption of this process will lead to a more efficient discipline procedure.

Your Committee wishes to emphasize that in no way should these disclosure recommendations be seen to reduce a solicitor's obligation to cooperate with a Law Society investigation before the authorization of a formal complaint. It is meant to be seen as a compromise between the Society's mandate to protect the public and the presumption of innocence applicable to criminal proceeedings. The burden of proof which the Society counsel must meet in a discipline prosecution approaches that of

the criminal burden, i.e., beyond a reasonable doubt. This burden dictates that a full two-way disclosure would be inappropriate. Your Committee is satisfied, however, that these recommendations set out an appropriate balance between the member's rights and the public interest.

DISCIPLINE HEARING PANEL

1) THE DISCIPLINE HEARING PANEL SHALL:

a) MAKE A DECISION ON THE CHARGE OF PROFESSIONAL MISCONDUCT OR CONDUCT UNBECOMING A BARRISTER OR SOLICITOR; AND

b) IMPOSE THE APPROPRIATE PENALTY;

2) THE HEARING PANEL SHOULD BE CHOSEN IMPARTIALLY BY A "HEARINGS COORDINATOR";

3) THE SELECTION OF THE PANELISTS SHOULD BE MADE HAVING DUE REGARD FOR A JOINT REQUEST BY COUNSEL FOR A PANELIST WITH "PARTICULAR QUALIFICATIONS". IT SHOULD BE A POLICY OF THE LAW SOCIETY THAT SUCH REQUESTS WILL BE HONOURED WHEREVER POSSIBLE;

4) EACH DISCIPLINE HEARING PANEL SHALL CONSIST OF TWO ELECTED BENCHERS AND ONE LAY-PERSON, BENCHER OR OTHERWISE; AND

5) NON-BENCHER LAWYERS SHOULD NOT BE MEMBERS OF A DISCIPLINE HEARING PANEL.

Note: Motion, see page 22

One of the major issues for discussion with regard to the Discipline Hearing Panel was the inclusion of a layperson, Bencher or otherwise, on each and every Panel. It is suggested that the two main reasons for recommending the increased participation of laypersons in the discipline process are that,

a) by so increasing the representation of laypersons, their role would be more visible and the Society would be less subject to criticism that it is operating a closed discipline process; and

b) it would help reduce the heavy workload of the Benchers, but, as noted above, if lay-Benchers are included it will further increase their workload.

Once again, your Committee praised the work being done by past and present lay-Benchers on Discipline Hearing Panels and suggests that the role of laypersons on these panels should be expanded.

There was some significant discussion regarding the possible placement of non-Bencher lawyers on Discipline Hearing Panels. Those in favour of this recommendation argued strongly that to exclude non-Bencher lawyer representation would be to dispense with a broad range of experience that Convocation may not have. While not discounting the experience these non-Bencher lawyers might bring to the discipline process, your Committee takes that position that Benchers are elected to perform the discipline function and to recommend that non-Bencher lawyers sit on Discipline Hearing Panels would be to delegate improperly one of the chief responsibilities of Benchers. Given the recommendation of your Committee that a layperson sit on every Discipline Hearing Panel, it is of the opinion that the remaining two positions on every Discipline Hearing Panel should be filled by Benchers elected by the Profession.

The recommendation that the Discipline Hearing Panel be chosen impartially by a "Hearings Coordinator" is merely a formalization of the policy currently in place at the Society. This system has been working well and should be continued.

Many of those lawyers who made representation to your Committee were of the view that certain Discipline cases required a panel containing at least one member with special expertise in the area of concern. Examples of such areas are obvious and need not be expanded upon by your Committee at this stage. Your Committee is of the view that indeed there may be cases where at least one member of a panel should have particular expertise in the area of law in question. Accordingly, it recommends that upon a joint request by counsel, a request for a panelist with particular qualifications should be honoured wherever possible. However, this request should be made jointly in an effort to minimize the possibility or the perception of "panel shopping". Further, your Committee is of the view that cases requiring particular expertise will be obvious to both sides and accordingly, the requirement of a joint request is a reasonable one.

CHANGE OF COUNSEL

AFTER A DATE FOR A DISCIPLINE HEARING HAS BEEN SET, A NOTICE OF CHANGE OF SOLICITORS WILL BE REQUIRED WHERE COUNSEL OF RECORD IS DISCHARGED OR FOR WHATEVER REASON DECLINES TO ACT FOR THE SOLICITOR. THIS SHOULD BE ACCOMPLISHED BY WAY OF WRITTEN NOTICE AND AN APPEARANCE BY COUNSEL BEFORE A DISCIPLINE HEARING PANEL OR A ONE-MEMBER PANEL.

Note: Motion, see page 25

This procedure is meant to mirror the one currently in place in the courts where a solicitor of record is required to appear before that solicitor may be removed from the record. The purpose of this recommendation is self-evident. The Committee hopes that the implementation of this resolution will help ensure that hearings are not unduly or unnecessarily delayed due to a change of solicitors.

WITHDRAWAL OF COMPLAINTS

THE DISCIPLINE HEARING PANEL MUST HAVE CONTROL OF ITS OWN PROCESS AND THEREFORE, ONCE A PANEL BECOMES SEIZED OF A COMPLAINT, THE COMPLAINT MAY NOT BE WITHDRAWN WITHOUT THE CONSENT OF THAT PANEL. WHERE NO DISCIPLINE HEARING PANEL IS SEIZED OF A COMPLAINT, IT SHALL NOT BE WITHDRAWN WITHOUT THE CONSENT OF THE DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE.

Note: Amendment, see page 25
Motion, see page 25

The purpose of this resolution is also self-evident. Your Committee is of the view that once a Discipline Hearing Panel is seized of a complaint, the reasons for the withdrawal of the complaint should be on the record and should be approved by the Panel. This would go some way toward demonstrating that the Society is not operating in a closed environment. Similarly, where a panel is not seized, the approval of the body that authorized the complaint in the first place should be obtained.

COSTS

THE DISCIPLINE HEARING PANEL SHOULD HAVE POWER TO AWARD COSTS AT ITS DISCRETION, ANY SUCH AWARD BEING SUBJECT TO APPEAL TO THE DESIGNATED PANEL OF CONVOCATION DESCRIBED HEREAFTER.

Note: Motion, see page 25

The Committee is of the view that the Discipline Hearing Panel should be given the authority to award costs against either party where it deems it appropriate. Examples of instances where costs might be awarded are:

a) Where a complaint is withdrawn;

b) where insufficient disclosure was given requiring an adjournment of a hearing; and

c) where a complaint has been found to have been unwarranted.

PENALTIES

Note: Amendment, see page 26

A) THE FOLLOWING RANGE OF PENALTIES SHOULD BE AVAILABLE TO A DISCIPLINE HEARING PANEL:

(i) DISBARMENT;

(ii) PERMISSION TO RESIGN;

(iii) SUSPENSION;

(iv) INTERIM SUSPENSION;

Note: Amendment, see page 25

(v) FINES;

(vi) REPRIMANDS;

(vii) ADMONITIONS.

Note: Amendment, see page 26

B) A DISCIPLINE HEARING PANEL SHOULD BE AUTHORIZED TO IMPOSE MANDATORY ORDERS UPON A SOLICITOR ALONE OR IN CONJUNCTION WITH ANY OF THE APPROPRIATE PENALTIES LISTED ABOVE. SUCH ORDERS MAY REQUIRE THE SOLICITOR TO DO ANY ONE OR MORE OF THE FOLLOWING:

(i) PERFORM MANDATORY COMMUNITY SERVICE;

(ii) OBTAIN MEDICAL TREATMENT, INCLUDING DRUG OR ALCOHOL TESTING AND TREATMENT;

(iii) UNDERGO PSYCHOLOGICAL TESTING;

(iv) ENGAGE IN CONTINUING LEGAL EDUCATION PROGRAMS;

(v) NOTIFY PARTNERS AND ASSOCIATES OF THE MEMBERS' DISCIPLINARY STATUS;

(vi) ATTEND UPON LAW SOCIETY COMMITTEES OR AGENCIES SUCH AS THE PROFESSIONAL STANDARDS COMMITTEE OR THE PRACTICE ADVISORY;

(vii) RESTRICT PRACTICE TO SPECIFIED AREAS OF LAW OR OTHERSPECIFIED CONDITIONS;

(viii) MAINTAIN A SPECIFIC TYPE OF TRUST ACCOUNT OR A TRUST ACCOUNT FOR LIMITED PURPOSES;

(ix) ACCEPT SPECIFIED CO-SIGNING CONTROLS;

(x) ACCEPT ANY OTHER REQUIREMENT THAT TO THE DISCIPLINE HEARING PANEL SEEMS JUST AND REASONABLE IN THE CIRCUMSTANCES;

THE PENALTIES LISTED ABOVE AND THE MANDATORY ORDERS SUGGESTED ARE NOT MEANT TO BE EXHAUSTIVE, BUT ONLY AN INDICATION OF YOUR COMMITTEE'S BELIEF THAT THE DISCIPLINE HEARING PANEL SHOULD HAVE AS MUCH FLEXIBILITY AS POSSIBLE IN IMPOSING PENALTIES AND ASSISTING IN THE REHABILITATION OF THE SOLICITOR.

Note: Amendment, see page 25

(C) YOUR COMMITTEE RECOMMENDS THAT ALL ADMONITIONS AND REPRIMANDS ARE TO BE DELIVERED IN PUBLIC WHERE THE HEARING HAS BEEN HELD IN PUBLIC. FURTHER, IN THE CASE OF REPRIMANDS, THESE SHALL BE PUBLISHED;

(D) YOUR COMMITTEE RECOMMENDS THAT ANY REPRIMAND OR ADMONITION ARISING FROM AN IN-CAMERA HEARING SHALL BE DELIVERED IN PUBLIC UNLESS CAUSE CAN BE SHOWN IN THE ORDINARY WAY WHY IT SHOULD BE DELIVERED IN-CAMERA.

E) YOUR COMMITTEE RECOMMENDS THAT A SOLICITOR INVOLVED IN A DISCIPLINARY PROCEEDING SHOULD NOT BE ASKED TO WAIVE A RIGHT OF APPEAL. THIS PRACTICE OF REQUESTING A WAIVER IS CURRENTLY IN PLACE WITH REGARD TO SOLICITORS WHO ARE REPRIMANDED IN COMMITTEE; HOWEVER, YOUR COMMITTEE FEELS THAT THE PRACTICE IS UNFAIR AND UNNECESSARY.

Note: Motion, see page 26

The majority of the penalties and mandatory orders listed above are self-explanatory; however, a few of them warrant special comment. The power to order an interim suspension is one needed by the Discipline Hearing Panel to deal effectively with those situations where the solicitor's alleged conduct is such that to allow the solicitor to practise during the course of the discipline proceedings may be inconsistent with the Society's responsibility to protect the public. Such a power does not currently exist.

Your Committee notes that the concept of a reprimand in Convocation no longer fits into the discipline scheme envisioned by your Committee and accordingly, recommends that it be abolished. Your Committee recommends that all reprimands be delivered in public where the hearing has been held either in public or in-camera, except in those cases where a Discipline Hearing Panel is convinced that a reprimand should be delivered in-camera and the hearing was held in-camera. Once again, the goal of your Committee is to achieve a higher level of visibility and public accessibility and to deflect any criticism that the Society operates in a closed fashion.

Your Committee recommends that there be publication of the names of lawyers who have been reprimanded, for example, in the "buff pages" of the Ontario Reports. Your Committee appreciates that in some situations the publication of the finding of misconduct may be unnecessary or inappropriate (for instance, on compassionate grounds). Accordingly, it recommends the creation of the penalty of admonition which, while delivered in public by the Discipline Hearing Panel, is not published.

The mandatory orders enumerated above are intended to give the Discipline Hearing Panel flexibility and creativity in sanctioning a solicitor found guilty of professional misconduct or conduct unbecoming. It is envisioned that these terms will assist a solicitor in correcting the problem that has brought the solicitor before the Discipline Hearing Panel. The Society's role should be not only to sanction, but also to assist an offending solicitor. Where a solicitor is found to not have complied with a mandatory order of the Discipline Hearing Panel, that breach of an order of the Discipline Hearing Panel must be the subject of further appropriate discipline proceedings.

Your Committee briefly discussed the concept of sanctions against law firms in light of the proposal of the Ontario Securities Commission to sanction iself lawyers and/or law firms for violation of its own legislation. It is felt by your Committee that the question of discipline proceedings against law firms should initially be dealt with by the Professional Conduct Committee. Any rules or guidelines developed by the Professional Conduct Committee and approved by Convocation could then be superimposed on the Law Society discipline procedure in place at that time.

REVIEW OF DISCIPLINE HEARING PANEL

1) AN APPEAL FROM A DISCIPLINE HEARING PANEL'S FINDINGS AS TO MISCONDUCT AND PENALTY SHOULD LIE TO A DESIGNATED APPEAL PANEL OF CONVOCATION CONSISTING OF FIFTEEN BENCHERS WITH A QUORUM CONSISTING OF NINE BENCHERS;

Note: Amendment, see page 23

2) THERE SHALL BE AT LEAST TWO LAY-BENCHERS SITTING ON THIS DESIGNATED APPEAL PANEL OF CONVOCATION AT ALL TIMES;

Note: Amendment, see page 23

3) THIS DESIGNATED APPEAL PANEL OF CONVOCATION SHALL HAVE A SET MEMBERSHIP WHICH WOULD SIT FOR A TERM OF ONE-YEAR;

4) THIS DESIGNATED APPEAL PANEL OF CONVOCATION SHALL BE DESIGNATED BY THE TREASURER AND APPROVED BY CONVOCATION;

5) THE WHOLE OF CONVOCATION WOULD NO LONGER CONVENE FOR DISCIPLINE MATTERS;

6) THIS DESIGNATED APPEAL PANEL OF CONVOCATION SHALL HAVE A REVOLVING CHAIR AND THE CHAIR SHALL HAVE A VOTE;

7) THE GROUNDS FOR APPEAL TO THE DESIGNATED APPEAL PANEL OF CONVOCATION SHALL BE ERRORS OF FACT OR LAW AND IT SHALL HAVE THE AUTHORITY TO ALLOW THE APPEAL, DISMISS THE APPEAL OR SUBSTITUTE A DIFFERENT FINDING OR PENALTY;

Note: Amendments, see pages 23

8) THERE SHALL BE NO APPEAL FROM THIS DESIGNATED APPEAL PANEL OF CONVOCATION; AND

Note: Motion, see page 23
Amendment, see page 23

9) NO BENCHER SHALL SIT ON THIS DESIGNATED APPEAL PANEL OF CONVOCATION ON AN APPEAL FROM A DISCIPLINE HEARING PANEL ON WHICH THE BENCHER SAT.

Note: Motion, see page 22

The question of the appropriate body to hear a review or appeal from a Discipline Hearing Panel took up a considerable amount of your Committee`s time, having been thoroughly debated on several occasions. Until very late in its deliberations, your Committee had considered two very different options to deal with appeals from the Discipline Hearing Panel; one reflecting largely the status quo (with refinement) and the other suggesting the creation of a new panel of Benchers that would function essentially as an Appeal Tribunal. Your Committee believes that for the purpose of having a complete record, these two options and the arguments supporting them should be set out in this report.

A) It was argued by some members of your Committee that the procedure laid down in sections 33, 34 and 44 of the Law Society Act, when properly understood and followed, is quite workable. The great objection to the practice that has developed is the excessive amount of time that is taken up in Convocation with discipline matters.

The reason for this is that when a Discipline Report comes before Convocation, there is confusion as to whether Convocation is sitting as an appellate body or is limited simply to determining the penalty imposed on the guilty solicitor. It was argued that Convocation does not have, and should not have, appellate jurisdiction over the "decision" of the Committee with regard to a finding of professional misconduct or conduct unbecoming. This does not exclude the exercise of jurisdiction akin to judicial review if the decision was patently in error on its face and natural justice required that it be rejected. This, however, would be the exceptional case.

The language of the Act is explicit and in no way ambiguous. Subsection 33 (1) may be summarized as follows:

No disciplinary action under sections 34, 35, 37 or 38 (that is to say by Convocation) shall be taken unless....(c) a committee has reached the decision that he/she (the person subject to the complaint) is guilty.

Subsection 33 (12) may be summarized as follows:

The decision shall be in writing accompanied by reasons setting out the findings of fact and conclusion of law and that the guilty solicitor shall be given notice of the solicitor's right of appeal.

The Act provides for two appeal routes only. One is if the solicitor has been reprimanded in the Committee under section 37. In that case, the solicitor may appeal to Convocation under section 39. If Convocation confirms the decision of the Committee under subsection 39 (5), that is the end of the matter. If Convocation increases the penalty, the solicitor may appeal to the Divisional Court under section 44. There is a lacuna in the statutory procedure when the Committee chooses not to impose the penalty of a reprimand on a solicitor who has been found guilty (i.e. where any recommendation as to penalty is made to Convocation). There is no direction that its decision shall be delivered to Convocation for the imposition of an appropriate penalty. It is implicit in section 34, however, that this is the next step. That section assumes that the decision of the Committee is before Convocation and provides that Convocation may "by order" impose a penalty. Subsection 44 (1) states that:

"the solicitor may appeal from that order to the Divisional Court".

There is no provision in the Act for an appeal to Convocation from the decision of the Committee in the case where the Committee has not itself reprimanded the solicitor. It is clear from succeeding subsections of section 44 that the appeal to the Divisional Court is from both the decision of the Committee and the Order of Convocation and is similar to an appeal from a decision of a Trial Judge in a court of law. The confusion and misunderstanding regarding Convocation's function is the result of the language used in Section 9 of Regulation 573. This regulation was promulgated in 1970 more or less contemporaneously with the passage of the revised Act of that year, but appears to give expression to the procedure that has been followed. Under that procedure, the Committee merely reported its findings to

Convocation and Convocation made the decision as to guilt or innocence (see subsection 6). The regulation provides that the solicitor be told that the solicitor can dispute findings of fact by the Committee before Convocation, that is to say, that Convocation has an appellate function. This is not correct and the regulation should be amended to bring it into conformity with the Act.

A criticism of the current appeal procedure is that Convocation might find itself considering what penalty to impose on a solicitor who wants to appeal from the decision of the Committee. Until such an appeal had been heard and determined, it would seem to be pointless to discuss penalty, but the solicitor's right of appeal arises only after the order for penalty has been made. Possibly, consideration should be given to providing that the solicitor should have the right to appeal immediately to the Divisional Court from a decision of a Committee. If unsuccessful, the matter would then go to Convocation for penalty.

The members of the Committee making these arguments based their support of this option and their opposition to the other option then being considered by your Committee on two major grounds. The first is that a court is the best and most appropriate tribunal to hear an appeal from a decision of a Discipline Committee of first instance. That is a judicial activity pure and simple. Judges are trained and experienced in the art and their impartiality is assured. Without denegrating the personal capacities of the potential members of a Discipline Review Tribunal composed of Benchers, there can be no comparison between their fitness to function as an Appellate Tribunal and that of a court. The second ground is that it is the function and responsibility of the Benchers as a body to determine the penalty that should be imposed on a member found guilty of professional misconduct or conduct unbecoming. It is vital to the independence of the profession that it discipline its members. The Benchers are the governing body and should not resile from exercising that responsibility which can only properly be performed by the Bench as a whole. The Bench taken as a whole includes a cross-section of the profession, including representation by gender, experience, type and location of practice. The profession is entitled to expect to be dealt with by its elected governing body and not by some lesser body. Any proposal that removes from the Benchers the authority to impose penalty may well be seen by the profession and the public to be an abandonment of responsibility by the Benchers. The profession has not indicated any dissatisfaction with Convocation imposing penalty and it may be observed that appeals from Convocation's decisions are seldom launched.

A proposal that would reduce the number of eligible Benchers from its present state to a lower number deprives the other Benchers of the responsibility with which they have been entrusted by the professsion. The wide range of experience held by the Benchers has in the past served the profession and the public well.

B) The second option then being considered by your Committee was that of a Discipline Appeal Tribunal (now referred to in your Committee's recommendation as a Designated Appeal Panel of Convocation) consisting of a Panel of nine Benchers, at least two of whom would be lay-Benchers, with a quorum of five and a minimum of one lay-Bencher. This Panel would be appointed by the Treasurer and approved by Convocation for a term of one year. Those Benchers serving on this Panel would be exempted from all other disciplinary responsibilites. The function of the Discipline Appeal Tribunal would be to hear appeals by either party from findings and/or penalties imposed by the Discipline

Hearing Panel. These appeals would be on the record and not by way of a trial de novo. The Discipline Appeal Tribunal's decision would be final, subject to judicial review. It was argued that the current procedure was subject to a variety of criticism, among which, that it was procedurally hazy, inconsistent and unpredictable. It was noted that those solicitors making submissions to your Committee, by and large shared these criticisms. Under this model, Benchers would not be shirking part of their elected responsibilites as they would still be serving in an appellate function. Restricted or smaller panels are found everywhere. For instance, in the Court of Appeal one does not get the benefit of a hearing before all of the members of that Court. It was argued that efficiency dictated smaller panels. It was also argued that the creation of a Discipline Appeal Tribunal would allow the development of expertise and consistency in discipline matters.

The workload of Benchers and the number of complaints of professional misconduct can reliably be predicted to increase over the next several years, as they have in the last several years, since the Barr Committee's Report in 1983. The Barr Committee cited the increasing number of practitioners in the province, the continuing squeeze between decreasing revenues and increasing costs, improved "policing" and new standards as reasons for the increase in the number of complaints of professional misconduct or conduct unbecoming. It was emphasized that the latter two factors are of particular importance in 1990.

As the number of complaints increases it will become increasingly impractical for Convocation to sit in plenary session to review all reports of Discipline Hearing Panels in which a recommendation of a penalty at least as severe as a reprimand is made. Secondly, if Convocation is restricted to determining issues of penalty, (as is argued by those supporters of Option "A") a system featuring the nine Bencher Discipline Review Tribunal, whose members sit for a period of one year to determine the issues of both professional misconduct or conduct unbecoming and penalty, is likely to be considerably more conducive to the evolution of a consistent body of jurisprudence than is the other system described in Option A above.

Your Committee subscribes to the argument that there are many benefits to creating a specific Panel of Benchers to deal with appeals from the Discipline Hearing Panels, but also agrees that the benefit of the experience of a wide range of elected and appointed Benchers should not be discounted. Accordingly, it has recommended that a Designated Appeal Panel of Convocation consisting of fifteen Benchers be appointed for a one-year term to deal exclusively with appeals from the Discipline Hearing Panels. The Committee concluded that an appeal should be available to either party to the hearing on a question of fact or law. While the legislation currently provides for an "appeal" from Convocation, your Committee is of the view that this "appeal" has, in fact, meant judicial review as the Divisional Court has almost always dealt with appeals from Convocation in that fashion. Accordingly, your Committee feels that this reference to an "appeal" should be removed, the consequence of which would be to leave the Divisional Court with its statutory jurisdiction of judicial review.

By creating a Designated Appeal Panel of Convocation to hear appeals, your Committee believes that Convocation will thus remain the ultimate body deciding the fate of a solicitor facing disciplinary proceedings. Elected and appointed Benchers would be fullfiling their mandate, albeit on a revolving basis.

Your Committee also believes that this proposal addresses many of the concerns raised by those lawyers who made submissions to your Committee with regard to the unweildy, unpredictable and sometimes inconsistent functioning of Convocation as a whole. It is expected that by reducing the number of Benchers participating on the Designated Appeal Panel of Convocation, the process will become more efficient and effective.

The requirement that there always be two lay-Benchers on the Designated Appeal Panel of Convocation again, ensures lay-input into the discipline process, the benefits of which need not again be set out by your Committee.

It is appreciated by your Committee that this recommendation is a significant one. However, it is not that much of a departure from the current situation in that Convocation will still retain ultimate authority over the disciplining of the members of the legal profession. The improvements as recommended above will enable Convocation to fullfil this responsibility in a more efficient and consistent manner.

MINOR OFFENCE PROCEDURE

Note: Amendment, see page 26

THERE SHOULD BE A CLASS OF MINOR OFFENCES THAT MAY BE DEALT WITH BY A ONE-MEMBER PANEL, WITH SAFEGUARDS PUT IN PLACE WITH RESPECT TO THE TYPE OF OFFENCE, PROCEDURE AND RANGE OF PENALTIES AVAILABLE, AS WELL AS TRANSFERABILITY BY EITHER PARTY OR THE ONE-MEMBER PANEL TO A FULL DISCIPLINE HEARING PANEL.

Note: Motion, see page 26

Much Bencher time is spent on what are essentially minor disciplinary proceedings involving most commonly a member's failure to reply to Law Society correspondence and the failure of a member to file a Form 2/3. With a view toward more efficient use of Bencher time, your Committee urges the creation of a one-member panel to deal with these minor offences. While it is currently anticipated that the vast majority of these matters would be failure to reply and failure to file a Form 2/3, the full range of offences and penalties available should be developed and specific guidelines drawn up. Your Committee is of the view, however, that the appeal procedure should be the same as that recommended for the Discipline Hearing Panel. Also significant in this recommendation is the ability of either party or the one-member panel to transfer a matter to a full Discipline Hearing Panel where it becomes apparent that the one-member panel is not the appropriate forum to hear a particular authorized discipline complaint.

JURISPRUDENCE

PAST DECISIONS OF DISCIPLINE COMMITTEES SHOULD BE COMPILED AND MADE AVAILABLE TO INTERESTED PERSONS. FURTHER, ALL DISCIPLINE HEARING PANELS FROM THIS POINT ON SHOULD BE REQUIRED TO PREPARE WRITTEN REASONS FOR THEIR DECISIONS OR ORAL REASONS FOR THEIR DECISIONS ON THE RECORD, IN ALL CASES INCLUDING THOSE WHERE THE COMPLAINT IS DISMISSED OR A REPRIMAND OR ADMONITION IS IMPOSED.

Note: Amendment, see page 26

One of the most consistent criticisms of the current discipline procedure leveled by those solicitors making submissions to your Committee was that of a lack of available jurisprudence to assist defence counsel. Your Committee agrees with this criticism.

INCAPACITY

THE FOLLOWING MODEL IS PROPOSED BY YOUR COMMITTEE TO DEAL WITH QUESTIONS OF A MEMBER'S INCAPACITY TO PRACTICE LAW:

1) THE SECRETARY OF THE LAW SOCIETY MAY REFER A MATTER TO THE HEARINGS COORDINATOR WHERE THE SECRETARY IS SATISFIED THAT THERE IS CONCERN ABOUT A MEMBER'S CAPACITY TO PRACTICE LAW.

2) THE HEARINGS COORDINATOR SHALL SELECT A BENCHER AS A ONE-MEMBER PANEL WHO SHALL DETERMINE WHETHER AN INVESTIGATION INTO A MEMBER'S CAPACITY IS WARRANTED AND, IF SO, ORDER SUCH AN INVESTIGATION.

3) THE ONE-MEMBER PANEL SHALL REVIEW THE EVIDENCE OBTAINED IN THE INVESTIGATION AND, IF WARRANTED, MAY REFER THE MATTER TO THE CHAIR OF THE PROFESSIONAL STANDARDS COMMITTEE FOR A HEARING.

4) WHEN IN RECEIPT OF THE REPORT OF THE ONE-MEMBER PANEL, THE CHAIR OF THE PROFESSIONAL STANDARDS COMMITTEE SHALL APPOINT A THREE-MEMBER FITNESS TO PRACTICE PANEL WHO MAY, WHERE THEY HAVE REASONABLE GROUNDS TO BELIEVE THAT A MEMBER'S CAPACITY TO PRACTICE LAW IS IN DOUBT, ORDER THAT MEMBER TO UNDERGO A MEDICAL OR PSYCHIATRIC EXAMINATION. IF A MEMBER FAILS TO COMPLY WITH THAT ORDER, THE MEMBER MAY BE SUSPENDED.

5) AFTER CONDUCTING A HEARING, THE FITNESS TO PRACTICE PANEL SHALL MAKE A FINDING THAT EITHER THE MEMBER IS:

A) NOT INCAPACITATED; OR

B) INCAPACITATED, AND IN THE LATTER EVENT, THE FITNESS TO PRACTICE PANEL SHALL MAKE A DISPOSITION OF THE MATTER.

6) WHERE THE FITNESS TO PRACTICE PANEL HAS FOUND A MEMBER TO BE INCAPACITATED, IT MAY BY ORDER LIMIT OR SUSPEND THE MEMBER'S RIGHTS AND PRIVILEGES AS A MEMBER FOR SUCH TIME AND ON SUCH TERMS THAT IT CONSIDERS JUST IN THE CIRCUMSTANCES, AND IN ADDITION IT MAY ORDER THE SOLICITOR TO DO ANY ONE OR MORE OF THE FOLLOWING;

A) OBTAIN MEDICAL TREATMENT, INCLUDING DRUG OR ALCOHOL TESTING AND TREATMENT;

B) UNDERGO PSYCHOLOGICAL TESTING;

C) ENGAGE IN CONTINUING LEGAL EDUCATION PROGRAMS;

D) NOTIFY PARTNERS AND ASSOCIATES OF THE SOLICITOR'S DISCIPLINE STATUS;

E) ATTEND UPON LAW SOCIETY COMMITTEES OR AGENCIES SUCH AS THE PROFESSIONAL STANDARDS COMMITTEE OR THE PRACTICE ADVISORY COMMITTEE;

G) RESTRICT PRACTICE TO SPECIFIED AREAS OF LAW OR OTHER SPECIFIED CONDITIONS;

H) MAINTAIN A SPECIFIC TYPE OF TRUST ACCOUNT OR A TRUST ACCOUNT FOR LIMITED PURPOSES;

I) ACCEPT SPECIFIED CO-SIGNING CONTROLS;

J) ACCEPT ANY OTHER REQUIREMENT THAT TO THE FITNESS TO PRACTICE PANEL SEEMS JUST AND REASONABLE IN THE CIRCUMSTANCES.

7) THE REPORT OF THE FITNESS TO PRACTICE PANEL MAY BE APPEALED TO THE DESIGNATED APPEAL PANEL OF CONVOCATION.

8) THERE WILL BE NO APPEAL FROM THE DESIGNATED APPEAL PANEL OF CONVOCATION. HOWEVER, JUDICIAL REVIEW BY THE DIVISIONAL COURT WILL BE AVAILABLE.

9) A PROCEDURE SIMILAR TO THAT CURRENTLY IN PLACE FOR RE-ADMISSION OF A MEMBER (AS OUTLINED IN SECTION 47 OF THE LAW SOCIETY ACT) SHOULD BE PUT INTO PLACE.

10) A DISCIPLINE HEARING PANEL MAY REFER A MATTER TO THE FITNESS TO PRACTICE PANEL AND THE DISCIPLINE HEARING SHALL BE HELD IN ABEYANCE UNTIL THE FITNESS HEARING HAS BEEN COMPLETED.

Note: Motion, see page 26

The current practice of treating questions of incapacity as matters to be dealt with in the discipline stream is no longer acceptable or appropriate. The goal of the proposals outlined above is to create a new process whereby questions of a member's capacity to practise law are treated exactly as that, and not as a matter for discipline. This is accomplished in part by transferring the responsibility of determining capacity to a panel appointed by the Chair of the Professional Standards Committee, a more appropriate Committee to determine this issue. The responsibility of the Society to protect the public is here coupled with the Society's obligation to locate those members demonstrating an incapacity to carry on the practice of law due to some form of infirmity. Further, those dispositions available to a Fitness to Practice Panel are meant to afford the Panel flexibility and creativity in assisting a member found to be working under an incapacity.

PUBLICATION OF COMPLAINTS

1) THE SOCIETY SHOULD DISCONTINUE ITS CURRENT PRACTICE OF ISSUING PRESS RELEASES ANNOUNCING DISCIPLINE PROCEEDINGS AGAINST AN UNNAMED MEMBER IN A GENERAL GEOGRAPHICAL LOCATION;

2) THE SOCIETY SHOULD NOT TAKE POSITIVE STEPS TO PUBLISH A LIST OF AUTHORIZED DISCIPLINE COMPLAINTS, BUT THAT INFORMATION SHOULD BE MADE AVAILABLE UPON REQUEST;

3) ON A WEEKLY BASIS, A LIST OF CASES TO BE HEARD BY A DISCIPLINE HEARING PANEL OR THE DESIGNATED APPEAL PANEL THAT WEEK SHOULD BE MADE AVAILABLE TO THE PUBLIC;

Note: Amendment, see page 27

4) A COPY OF THE AUTHORIZED DISCIPLINE COMPLAINTS THEMSELVES SHOULD BE MADE AVAILABLE TO THE PUBLIC UPON REQUEST AT ANY STAGE AFTER AUTHORIZATION;

5) THE WEEKLY LIST OF UPCOMING AUTHORIZED DISCIPLINE COMPLAINTS HEARINGS AND APPEALS SHOULD INCLUDE THE NAME AND LOCATION OF THE SOLICITOR, AS WELL AS THE NATURE OF THE COMPLAINT;

6) ALL MATTERS TO BE HEARD BY THE DISCIPLINE HEARING PANEL OR THE DESIGNATED APPEAL PANEL ON A PARTICULAR DAY (INCLUDING FIRST APPEARANCES, MATTERS TO BE SPOKEN TO AND HEARINGS) SHOULD BE LISTED AND MADE AVAILABLE TO THE PUBLIC.

Note: Amendment, see page 27
Motion, see page 27

As Convocation has accepted the concept of open Discipline Hearings, it is fitting that the Society should be prepared to respond fully to any inquiry from the public regarding the existence and status of discipline proceedings against a member once a complaint has been authorized.

PUBLICATION OF DECISIONS AND REPORTS OF THE DISCIPLINE HEARING PANEL

IN-CAMERA HEARINGS

THE REASONS FOR DECISION OF THE DISCIPLINE HEARING PANEL SHOULD REFLECT THE REASONS FOR ORDERING AN IN-CAMERA HEARING IN THE FIRST INSTANCE. THE WORD "DECISION" IS MEANT TO INCLUDE THE DISPOSITION OF AN AUTHORIZED DISCIPLINE COMPLAINT AND REASONS THEREFORE.

PUBLIC HEARINGS

YOUR COMMITTEE RECOMMENDS THAT THE REASONS FOR DECISION SHOULD BE MADE PUBLIC, SUBJECT TO ANY POWER THAT THE SOCIETY MAY HAVE IN THE FUTURE TO MAKE AN ORDER FOR NON-PUBLICATION. IT WAS AGREED BY YOUR COMMITTEE THAT THE SOCIETY SHOULD SEEK THE POWER TO MAKE SUCH AN ORDER FOR NON-PUBLICATION. FURTHER, THAT THE LAW SOCIETY ACT SHOULD BE AMENDED WITH REGARD TO THE IN-CAMERA HEARING SO AS TO BRING IT INTO COMPLIANCE WITH THE STATUTORY POWERS AND PROCEDURES ACT.

Note: Amendment, see page 27
Motion, see page 27

Your Committee's recommendation that the Reasons for Decision of the Discipline Hearing Panel be published is intended once again to recognize the necessity of opening the discipline process as much as possible. Your Committee recognizes, however, that there may exist circumstances where such publication would be inappropriate and it has attempted to accommodate this possibility in its recommendations. Further, your Committee envisions the occasional case where an order for non-publication would be appropriate. This power currently does not lie with the Society, however, steps should be taken to remedy this situation.

HOLDING DISCIPLINE HEARINGS IN ABEYANCE PENDING CONCURRENT CIVIL OR CRIMINAL PROCEEDINGS

CRIMINAL PROCEEDINGS

WHERE THE FACTS GIVING RISE TO CONCURRENT CRIMINAL CHARGES AND THE LAW SOCIETY AUTHORIZED DISCIPLINE COMPLAINT ARE SIMILAR AND ARISE FROM THE MEMBER'S PRACTICE OF LAW, YOUR COMMITTEE RECOMMENDS THAT THE POLICY OF THE SOCIETY SHOULD BE TO PROCEED WITH THE DISCIPLINE HEARING EXPEDITIOUSLY, SUBJECT TO THE DISCRETION OF THE DISCIPLINE HEARING PANEL. WHERE THE FACTS DO NOT ARISE FROM THE MEMBER'S PRACTICE, BUT SUGGEST CONDUCT UNBECOMING A MEMBER, THE SOCIETY MAY AWAIT THE DECISION OF THE CRIMINAL COURT.

CIVIL PROCEEDINGS

THE SAME RULE AS DISCUSSED ABOVE APPLY TO CONCURRENT CIVIL PROCEEDINGS.

Note: Motion, see page 27

Currently, the Discipline Department will proceed with a Discipline Hearing where the facts in issue in the Discipline Hearing are similar to those of a criminal proceeding. It is suggested by your Committee that the public interest necessitates the hearing of such cases on an urgent basis and that the duty the Society owes to the public dictates that the Society should proceed with these hearings as soon as it is able to do so (subject to the discretion of the Discipline Hearing Panel). Where the alleged criminal offence does not arise from the member's practice, there is less urgency to proceed and, accordingly, the Society should await the decision of the Criminal Court (again, subject to the discretion of the Discipline Hearing Panel).

Similarly, to defer Discipline Hearings in the face of civil proceedings often seriously prejudices the Discipline Hearing because civil matters are generally much more protracted. The public interest may be no less at risk in the face of such civil proceedings and, accordingly, your Committee is of the view that the same rule applicable to criminal proceedings should be made to apply to civil proceedings as well.

DISCIPLINE PROCEDURE GUIDELINES

DISCIPLINE PROCEDURE GUIDELINES SHOULD BE PREPARED BY THE SOCIETY AND MADE AVAILABLE TO THE PROFESSION AS WELL AS TO THE PUBLIC. FOR THE PROFESSION, THE GUIDELINES SHOULD FORM PART OF THE LAW SOCIETY "MANUAL" WHICH ALSO INCLUDES, INTER ALIA THE LAW SOCIETY ACT AND THE RULES OF PROFESSIONAL CONDUCT.

Note: Motion, see page 27

Many of the lawyers who made submissions to your Committee encouraged the preparation of Discipline Procedure Guidelines. Your Committee agrees and is of the view that such guidelines would help to de-mystify the discipline process for both the profession and the public.

COMPLAINTS AGAINST THE SOCIETY - BENCHERS AND SOCIETY STAFF

COMPLAINTS AGAINST BENCHERS

THE FOLLOWING MODEL IS PROPOSED BY THE COMMITTEE TO DEAL WITH COMPLAINTS AGAINST BENCHERS:

1) ALL COMPLAINTS RECEIVED AGAINST BENCHERS SHALL BE REFERRED TO THE COMPLAINTS RESOLUTION OFFICER (C.R.O.). THE C.R.O., AS ENVISIONED BY THE CALLWOOD COMMITTEE, WILL INDEPENDENTLY REVIEW CASES WHERE LAWYERS REFUSE TO COMPLY WITH STAFF SUGGESTIONS TO REMEDY ISOLATED CASES OF UNSATISFACTORY PROFESSIONAL PRACTICE. THE C.R.O. WILL BE INDEPENDENT OF THE LAW SOCIETY AND COULD BE A RETIRED JUDGE, LAWYER OR A LAY-PERSON WELL VERSED IN THE LAW.

2) THE C.R.O. SHALL RETAIN INDEPENDENT COUNSEL TO INVESTIGATE AND REPORT TO HIM OR HER ON THE COMPLAINT.

3) UPON RECEIVING THE REPORT OF INDEPENDENT COUNSEL, THE C.R.O. MAY REFER THE COMPLAINT TO THE COMPLAINTS AUTHORIZATION COMMITTEE.

4) THE DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE MAY AUTHORIZE A FORMAL COMPLAINT AGAINST THE BENCHER; HOWEVER, WHERE THE AUTHORIZATION IS REJECTED, IT SHALL GIVE REASONS.

5) IN SITUATIONS WHERE THE DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE REJECTS A REQUEST FOR AUTHORIZATION BUT DOES AUTHORIZE A LESSER FORMAL COMPLAINT, CARE SHOULD BE TAKEN IN THE REASONS OF THE COMMITTEE NOT TO PREJUDICE A FAIR HEARING OF THE LESSER FORMAL COMPLAINT.

6) A FORMAL DISCIPLINE HEARING AGAINST A BENCHER SHALL BE PROSECUTED BY OUTSIDE COUNSEL RETAINED BY THE C.R.O., BUT OTHERWISE SHALL BE HEARD AS ANY OTHER AUTHORIZED DISCIPLINE COMPLAINT AGAINST A MEMBER OF THE LAW SOCIETY.

7) THE INDEPENDENT COUNSEL PROSECUTIING AN AUTHORIZED DISCIPLINE COMPLAINT SHALL HAVE FULL AUTHORITY TO PROSECUTE AND APPEAL INDEPENDENTLY OF THE LAW SOCIETY STAFF AND BENCHERS.

COMPLAINTS AGAINST STAFF LAWYERS

1) WHERE A COMPLAINT AGAINST A STAFF LAWYER SUGGESTS THAT THE LAWYER IS GUILTY OF PROFESSIONAL MISCONDUCT OR CONDUCT UNBECOMING, THE COMPLAINT SHALL BE DEALT WITH AS IF IT WERE A COMPLAINT AGAINST A BENCHER, FOLLOWING THE PROCEDURE AS OUTLINED ABOVE.

This resolution is intended to ensure that any complaint received by the Society against a Bencher or a staff lawyer is dealt with and is seen to be dealt with in a fair and independent manner. All such complaints will be referred to the Complaints Resolution Officer, an office whose creation is recommended by the Callwood Committee and whose purpose is to be an impartial and independent body who will review complaints. The use of independent counsel is recommended as your Committee is of the view that such investigations of Benchers or staff lawyers should not be conducted internally. The authorization process, however, should remain the same as that for any other member. The presence of a non-Bencher lawyer and a lay-Bencher on the Discipline Complaints Authorization Committee, in your Committee's opinion, will enable it to review the request for an authorization in an independent fashion. Further, the requirement that this Committee give reasons will help ensure that a complaint against a Bencher is handled fairly.

With regard to the Discipline Hearing, your Committee is of the view that a normally constituted Discipline Hearing Panel, receiving evidence and submissions in an open hearing, sufficiently meets the requirement of openness and is the appropriate body to deal with complaints against Benchers and staff lawyers.

Your Committee recognizes that it is unusual for counsel not to take instructions from a client However, in the case of independent counsel prosecuting complaints against Benchers or staff lawyers, your Committee is of the view that this unusual step must be taken. Independent counsel must be free to make all decisions regarding all facets of the prosecution, including Agreed Statements of Fact and appeals, in order to guarantee that all such decisions are made and are seen to be made in the public interest.

SWEARING OF COMPLAINTS

DISCIPLINE COMPLAINTS SHOULD NOT BE SWORN, BUT SHOULD BE SIMPLY SIGNED BY THE CHAIR OF THE COMPLAINTS AUTHORIZATION COMMITTEE ON BEHALF OF THE DISCIPLINE COMPLAINTS AUTHORIZATION COMMITTEE.

Your Committee makes this recommendation with a view toward updating the procedure currently followed by the Law Society in issuing formal discipline complaints. There is no compelling reason why formal discipline complaints need to be sworn. In light of the recommendations for a Discipline Complaints Authorization Committee, this additional safeguard is no longer needed.

INELIGIBLE COUNSEL

1) THE POLICY ADOPTED BY CONVOCATION PROHIBITING LAWYERS FROM BENCHER FIRMS FROM APPEARING AS COUNSEL BEFORE DISCIPLINE PANELS SHOULD NOT BE ABANDONED.

2) A BENCHER SHALL NOT SIT ON ANY DISCIPLINE MATTER WHERE COUNSEL OF RECORD IS A PARTNER, ASSOCIATE OR EMPLOYEE OF HIS/HER LAW FIRM.

The current prohibition of lawyers from Bencher firms from appearing as counsel before Discipline Panels is, in your Committee's view, unnecessarily severe. The Society's duty to be fair to its members demands the revocation of a rule that has the effect of limiting severely the right of solicitors involved in the discipline process to select as their counsel many of the lawyers most capable of presenting them. The safeguard built into this resolution (paragraph 2 above) sufficiently and more fairly addresses the concerns of Convocation in adopting this policy in the first instance.

CLOSING NOTES

Your Committee recognizes that many of the recommendations in this Report will require amendments to the current Law Society Act and regulations, as well as procedural clarification. Accordingly, Convocation is asked to direct this Report to the Legislation and Rules Committee for the purpose of preparing draft amendments.

Finally, your Committee hopes for the cooperation of the Attorney General in promptly effecting the legislative changes necessitated by Convocation's approval of this Report.

DATE:

Roger D. Yachetti
Chair
Special Committee on
Discipline Procedures

Mr. Yachetti reviewed the motions which were made at the last Convocation and not put.

There were two amendments to the motions. Motion (b) (set out below) was amended to show that the motion originally was seconded by Mr. Thom not Thoman and motion (e) was amended so that it would read that paragraph 4 be amended by deleting the words "one lay person, Bencher or otherwise" and inserting "a lay Bencher".

The following motions which were before Convocation on September 7th, 1990 but not voted on were then put.

Motions

(a) It was moved by Mr. Yachetti, seconded by Mr. Strosberg that the recommendations on pages 15 and 16 of the Report regarding the Discipline Hearing panel be adopted.

Carried

(b) It was moved by Mr. Topp, seconded by Mr. Thoman that item 1 be amended to read "and should recommend an appropriate penalty".

Lost

(c) It was moved by Mr. Topp, seconded by Mr. Thoman that item 5 be deleted and paragraph 4 be amended to provide that each discipline hearing panel consist of one lay person and at least one elected Bencher and may include a non-Bencher member of the Society.

Lost

(d) It was moved by Mr. McKinnon, seconded by Mr. Thoman that every member of The Law Society of Upper Canada on being called to the Bar be made ex-officio a member of the Discipline Committee.

Not Put

(e) It was moved by Mrs. Graham, seconded by Mr. Ground that paragraph 4 be amended to read "shall include a lay Bencher."

Lost

REVIEW OF DISCIPLINE HEARING PANEL

It was moved by Mr. Yachetti, seconded by Mr. Somerville that the recommendations contained at pages 24 and 25 of the Report headed "Review of Discipline Hearing Panel" be adopted. The recommendations were adopted as amended.

It was moved by Mr. Thom, seconded by Mr. Topp that Convocation confirmed the disciplinary process as it is now set out in the Statute with consideration being given to allowing members to appeal to the courts from the decision of the hearing committee.

Lost

Mr. Yachetti amended the Report at page 24, item 8 by adding after the word "Convocation" the words "subject of course, to judicial review" so that paragraph 8 would now read "there shall be no appeal from this designated appeal panel of Convocation subject of course, to judicial review".

It was moved by Mr. Bastedo, seconded by Ms. Callwood that item 1 on page 24 be amended to read 7 rather than 15 and that 9 be changed to 5 and that item 2 be amended to read 1 rather than 2 so that item 1 would now read " a designated panel of Convocation consisting of 7 Benchers with a quorum of 5 and item 2 would read "at least one Bencher".

Carried

Mr. Yachetti accepted an amendment to item 7 on page 24 suggested by Mr. Ground that the powers of the appeal panel include the authority to refer the matter back to the Discipline Committee which originally heard the matter so that item 7 would now read "a different finding or penalty or refer the matter back to the Discipline Committee which initially heard the matter".

Mr. Yachetti also accepted an amendment made by Ms. Chapnik that item 7 at page 24 be amended by the addition of the words "and give written reasons".

It was moved by Mr. McKinnon, seconded by Mr. Rock that there not be an automatic stay of penalty following a finding of guilt by a hearing committee and that the penalty imposed by the hearing committee be effective from the date it is made but that the solicitor may make an application for a stay of the penalty pending the completion of any appeal procedures open to the solicitor.

Carried

It was moved by Mr. Ferguson, seconded by Mr. Lerner that there be an appeal to Convocation on orders of suspension, permission to resign, or disbarment.

Lost

It was moved by Mr. Carter, seconded by Mr. Ferguson that there be an automatic stay on the imposition of a penalty of suspension, permission to resign or disbarment on the filing of the solicitor of an appeal to Convocation.

Not Put

It was moved by Mr. Lerner but failed for want of a seconder that the imposition of penalty be stayed only where the solicitor undertakes not to practice.

It was moved by Ms. Peters, seconded by Mr. Lerner that item 8 be amended to read that there should be no appeal to Convocation as a whole other than from an order of disbarment.

Lost

It was moved by Ms. Chapnik, seconded by Mr. McKinnon that item 1 on page 24 be amended to read in the first item 9 rather than 15 and that 9 be changed to 5.

Not Put

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OTTAWA UNIVERSITY LAW SCHOOL STUDENT LEGAL AID SOCIETY

The Treasurer then dealt with the issue that had arisen in regard to the position of the Ottawa University Law School Legal Aid Society's position regarding its policy of not acting for males who were charged with assault in a domestic setting. He announced that he was forming a special committee composed of Mr. Bastedo, Chair of the Legal Aid Committee, Ms. Kiteley, Chair of Women in the Legal Profession and Vice-Chair of Legal Aid and Mr. Somerville Chair of Professional Conduct.

It was moved by Mr. Lerner, seconded by Mr. Carey that the matter be investigated and the Committee report back to Convocation for consideration after consultation with the Professional Conduct and Legal Aid Committees and that the Treasurer have authority to make decisions regarding the work and procedures of the Committee in consultation with the members of the Committee should the need arise.

Carried

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Convocation then resumed its consideration of the Special Committee on Discipline Procedures.

RESOLUTION RE: INDEPENDENCE

It was moved by Mr. Yachetti, seconded by Ms. Kiteley that the integrity of the discipline procedure requires that Society staff proceed with investigations and discipline hearings independently of the Benchers subject only to general policy guidelines.

Carried

DISCLOSURE

It was moved by Mr. Topp, seconded by Mr. Carter that item 1 on page 12 be amended by deleting the words "and the solicitor" so that the paragraph would now read " the Society shall disclose all relevant documents in its possession, control or power except to the extent such documents are privileged as a matter of law. The word "document" shall bear the same meaning as in Rule 30.01(1) (a) of the Rules of Civil Procedure which reads as follows:"

Carried

It was moved by Mr. McKinnon, seconded by Mr. Rock that item 1 be rephrased by the addition of the words "after a Complaint has been authorized" so that the paragraph would now read "After a Complaint has been authorized the Society shall disclose....".

Carried

It was moved by Mr. McKinnon, seconded by Mr. Rock that item 4 be amended by deletion of the second sentence which reads "The solicitor shall disclose only those expert reports that the solicitor intends to rely upon at the hearing" so that the paragraph would now read "the Society shall disclose all expert reports in its possession and where it intends to call an expert witness at a hearing shall not less than 10 days before the commencement of the hearing serve on the solicitor a report signed by the expert setting out the expert's name, address and qualifications and the substance of the expert's proposed testimony.

Lost

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Convocation adjourned for lunch at 12:45 p.m.

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At Convocation lunch the Treasurer presented Mr. Gil Frois, the Society's steward with a watch in honour of his twenty-five years of service with the Law Society.

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Convocation resumed at 2:15 p.m. with the following being present:

The Treasurer (James Spence, Q.C.), Bastedo, Carey, Cass, Cullity, Hickey, Kiteley, Lawrence, McKinnon, Peters, Rock, Somerville, Thom, Thoman, Topp and Yachetti.

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It was moved by Mr. Yachetti, seconded by Ms. Kiteley that the Recommendations on disclosure found on pages 12 and 13 be adopted as amended.

Carried

It was moved by Mr. Yachetti, seconded by Mr. Topp that the procedure for change of counsel set out at page 18 of the Report be adopted.

Carried

The recommendation regarding the procedure for withdrawal of complaints was amended by adding a sentence at the end "For the purposes of this paragraph seised shall mean the committee has heard some evidence".

It was moved by Mr. Yachetti, seconded by Mr. Thoman that the procedure set out on page 19 for withdrawal of complaints as amended be adopted.

Carried

It was moved by Mr. Topp, seconded by Mr. Rock that item 5 in the procedure dealing with disclosure and found at page 13 be amended by adding at the end of the paragraph the words "or on direction of the Chair or Vice-Chair of Discipline" so that the paragraph would now read "a pre-hearing conference shall be held at the request of either party or at the direction of the Chair or Vice-Chair of Discipline."

Carried

It was moved by Mr. Topp but failed for want of a seconder that the procedure regarding withdrawal of complaints be referred back to the Committee.

It was moved by Mr. Yachetti, seconded by Mr. Thoman that the procedure as to costs set out at page 19 of the Report be adopted.

Carried

It was moved by Mr. Yachetti, seconded by Ms. Kiteley that dispositions set out at pages 20 to 22 of the Report be adopted.

Not Put

It was moved by Mr. Thom, seconded by Mr. Carey that permission to resign be changed to "required to resign".

Lost

Mr. Yachetti accepted an amendment to the wording of the paragraph at page 21 starting "The penalties listed above and the mandatory orders suggested...." by deleting the words "the penalties listed above and" so that the paragraph would now read "The mandatory orders suggested are not meant to be exhaustive, but only an indication of your Committee's belief that the discipline hearing panel should have as much flexibility as possible in imposing penalties and assisting in the rehabilitation of the solicitor".

Mr. Yachetti also accepted an amendment which would remove interim suspensions from the penalty section clause and put it in a separate section dealing with the authority of committees.

It was moved by Mr. Cass, seconded by Mr. Somerville that "permitted to resign" be altered to read "required to resign in lieu of other disciplinary action".

Lost

It was moved by Mr. Hickey, seconded by Mr. Carey that items B (i) and (x) be deleted.

Withdrawn

It was moved by Mr. McKinnon, seconded by Mr. Topp that the item in regard to penalties be sent back to the Committee for further consideration.

Lost

It was moved by Mr. Rock, seconded by Mr. Thoman that the term restitution be added to the list under paragraph A of penalties found at page 20 and that paragraph B at page 20 be amended to provide that the panel may order a member's membership in the Law Society be conditional on compliance with the terms listed in (i) through (x) of paragraph B.

Withdrawn

Mr. Yachetti accepted the addition of restitution to paragraph A.

Mr. Yachetti also accepted an amendment which would see the Report amended by deleting the heading, Penalties, at page 20 and substituting the word, Disposition.

It was moved by Mr. Rock, seconded by Mr. Somerville that Convocation approve the dispositions section of the report in principle and that the Implementation Committee be asked to review the section in light of the concerns raised in Convocation and make any recommendations on the dispositions section arising out of that review to Convocation.

Carried

It was moved by Mr. Thom but failed for want of a seconder that paragraph (E) at page 22 of the Report be deleted.

MINOR OFFENCE PROCEDURE

Mr. Yachetti accepted an amendment to the Report which would see the heading, Minor Offence Procedure, at page 33 deleted and substituted with the words, Offences to be Disposed of by a Single Member Panel.

It was moved by Mr. Yachetti, seconded by Mr. Thom that the paragraph dealing with Offences to be Disposed of by a Single Member Panel be adopted.

Carried

JURISPRUDENCE

The recommendation concerning Jurisprudence found at pages 33 and 34 of the Report was amended by adding the words "or withdrawn" in the last sentence so that the last sentence on page 34 would read "in all cases including those where the Complaint is dismissed or withdrawn or a reprimand or an admonition is imposed".

INCAPACITY

It was moved by Mr. Yachetti, seconded by Mr. Thoman that items 1 through 10 on pages 34 to 37 of the Report be adopted in principle with Benchers having the right to draw any concerns they have regarding specific items in the procedure to the attention of the Implementation Committee which would then consider them and report to Convocation if necessary.

Carried

PUBLICATION OF COMPLAINTS

On pages 38 and 39 the following amendments were made:

Item 3 on page 38 has been amended by replacing the word "or" with "and" so that the sentence should now read: "on a weekly basis, a list of cases to be heard by a discipline hearing panel and the designated appeal panel.....".

Item 6 on page 38 has been amended by replacing the word "or" with "and" so that the sentence should now read: "all matters to be heard by the discipline hearing panel and the designated appeal panel on a particular day.....".

In the paragraph under Public Hearings on page 39 the word "and" has been deleted following the words "Statutory Powers" and should now read ".....Statutory Powers Procedures Act.".

It was moved by Mr. Yachetti, seconded by Mr. Thoman that the procedure for publication of complaints set out at pages 37 and 38 be adopted.

Carried

It was moved by Mr. Yachetti, seconded by Mr. Thoman that the procedure set out for in camera hearings at page 38 and public hearings at page 39 be adopted.

Carried

It was moved by Mr. Yachetti, seconded by Mr. Thoman that the procedures set out at pages 39 and 40 of the Report dealing with concurrent civil and criminal proceedings be adopted.

Carried

It was moved by Mr. Yachetti, seconded by Mr. Thoman that the discipline procedures guidelines set out at page 41 of the Report be adopted.

Carried

It was moved by Mr. Topp, seconded by Mr. Rock that Convocation adjourn.

Carried

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Convocation adjourned at 4:15 p.m.

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Confirmed in Convocation this 25th day of January, 1991.

Treasurer