MINUTES OF CONVOCATION

Thursday, 30th October, 2008
9:00 a.m.

PRESENT:

The Treasurer (W. A. Derry Millar), Aaron, Aitken, Anand, Backhouse, Banack, Boyd, Braithwaite, Bredt, Campion, Caskey, Chahbar, Conway, Copeland, Crowe, Dickson, Dray, Elliott, Epstein, Go, Gold, Gottlieb, Hainey, Halajian, Hare, Hartman, Heintzman, Henderson, Krishna, Lawrie, Legge, Lewis, McGrath, Minor, Murray, Pawlitza, Porter, Potter, Pustina, Rabinovitch, Ross (by telephone), Rothstein, Ruby (by telephone), St. Lewis, Silverstein (by telephone), Simpson, C. Strosberg, Symes, Tough, Wardlaw and Wright.

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Secretary: Katherine Corrick

The Reporter was sworn.

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer extended Convocation's condolences to the family of the Honourable Charles Dubin, Q.C. who passed away on October 27, 2008.

Congratulations were extended to Thomas Heintzman who was awarded the OBA Award of Excellence for Litigation on October 16, 2008.

The Treasurer congratulated Malcolm Heins, Chief Executive Officer and the Senior Management Team on the selection of the Law Society of Upper Canada as one of the Greater Toronto area's top 75 employers for the third year in a row.

DRAFT MINUTES OF CONVOCATION

The Draft Minutes of Convocation of September 24 and 25, 2008 were confirmed.

MOTION – AMENDMENT TO JUNE 25, 2008 MINUTES

It was moved by Ms. Tough, seconded by Ms. Strosberg, that the June 26, 2008 approved Minutes of Convocation be amended by adding that the Minutes of May 22, 2008 were confirmed.

Carried

MOTION – APPOINTMENTS

It was moved by Ms. Tough, seconded by Ms. Strosberg, that, -

Jennifer Halajian be removed from the Proceedings Authorization Committee at her request.

THAT Glenn Hainey be appointed to the Proceedings Authorization Committee.

THAT Jennifer Halajian be appointed to the Tribunals Committee.

THAT Marshall Crowe be appointed to the Heritage Committee.

THAT Susan McGrath be appointed as the Law Society's representative on the Alliance for Sustainable Legal Aid.

THAT Janet Minor and Malcolm Heins be reappointed as the Law Society's representatives on the Ontario Lawyers' Assistance Program Board of Directors.

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, October 30, 2008.

ALL OF WHICH is respectfully submitted

DATED this 30th day of October, 2008

CANDIDATES FOR CALL TO THE BAR

October 30th, 2008

Lan Tuyet An
Susan Nicole Berry
Jenny Ying Ngo Chai
Thomas Patrick Durcan
Cathy Zi Jun Ma
Colin Grant MacArthur
Michael Heath Mc Laren
Nicholas David Wansbutter

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

Carried

FINANCE COMMITTEE REPORT

Ms. Hartman explained to Convocation why the presentation of the budget is delayed.

AUDIT COMMITTEE REPORT

Ms. Symes explained the impact of the economic turmoil on the Law Society's investment funds.

FINANCE COMMITTEE REPORT

Re: J. S. Denison Fund (in camera)

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IN CAMERA

…….

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IN PUBLIC

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It was moved by Ms. Hartman, seconded by Mr. Wright, that Convocation approve a $3,000 grant from the J. S. Denison Trust Fund to Applicant 2008-20.

Carried

PARALEGAL STANDING COMMITTEE REPORT

Mr. Dray presented the Report.

Report to Convocation
October 30th, 2008

Paralegal Standing Committee

Note: TAB A & B: deferred from June Convocation
TAB C to G: deferred from September Convocation

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

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COMMITTEE PROCESS

1. The Committee met on October 8th, 2008. Committee members present were Paul Dray (Chair), Susan McGrath (Vice-chair), Marion Boyd, James Caskey, Michelle Haigh, Glenn Hainey, Paul Henderson, Brian Lawrie, Doug Lewis, Margaret Louter, Stephen Parker and Cathy Strosberg. Staff members in attendance for all or part of the meeting were Malcolm Heins, Terry Knott, Zeynep Onen, Diana Miles, Elliot Spears, Roy Thomas, Sybila Valdivieso, Arwen Tillman, Fred Grady, Sheena Weir, Lisa Mallia, and Julia Bass.

FOR DECISION

PARALEGAL PROFESSIONAL CONDUCT GUIDELINES

Motion

2. That Convocation authorize the Paralegal Standing Committee to approve and publish *Paralegal Professional Conduct Guidelines* and to amend them as required.

Background – the Paralegal Rules and Guidelines

3. The *Paralegal Rules of Conduct* (the "*Paralegal Rules*") were considered by the Committee on March 8, 2007 and approved by Convocation on March 29, 2007. At that time, the materials presented to the Committee and Convocation indicated as follows:

   Since the draft reflects the Task Force Report on Paralegal Regulation approved by Convocation, the rules are not identical to those for lawyers, and there are some format differences. Based on responses from the consultations, some of the information found in commentaries in the lawyer rules have been integrated into the paralegal rules. Where the purpose of the commentary in the lawyer rules is educational, practice Guidelines to the paralegal rules will be developed as an explanatory aid. These Guidelines will be developed after the paralegal rules have received preliminary approval.

4. The *Paralegal Rules* were drafted to be,

   a. consistent with the *Rules of Professional Conduct* for lawyers,
   b. focused on the ethical and professional obligations of paralegals,
   c. clear and accessible for paralegals and the public; and
   d. enforceable in a fair and transparent process.

5. The *Paralegal Rules* are compatible with and conform to the obligations of lawyers contained in the *Rules of Professional Conduct* to the extent possible. However, in order to achieve the four goals set out above, the format of the *Paralegal Rules* is different from the format of the *Rules of Professional Conduct;* in particular, the *Paralegal Rules* do not contain any commentary.

6. As reported to the Committee and Convocation in March 2007, in preparation for the development of the *Paralegal Rules*, Law Society staff met informally with a number of stakeholders in order to understand the context in which the rules would be used. The consultations included meetings with representatives of four large Ontario tribunals before which a number of paralegals appear – the Financial Services Commission of Ontario, the Ontario Rental Housing Tribunal, the Assessment Review Board and the

Workplace Safety & Insurance Appeals Tribunal. In addition, staff met with representatives of Ontario colleges and some paralegal representatives. Codes of Conduct developed by Ontario agencies and paralegal organizations were also reviewed.

7. The information gathered through these meetings was extremely valuable, and may be summarized as follows:

   a. Agencies generally have positive experiences with the paralegal representatives who appear before them, and believe that paralegals have an important role to play in providing legal services to the public and in increasing access to justice.
   b. Many paralegals have a good sense of their obligations to their clients and the tribunal before which they are appearing. Many paralegals have significant expertise in their area of focus, understand the law, rules and procedures of the tribunal, act in the best interests of their client and respect the tribunal and the administration of justice.
   c. Paralegals currently in practice have diverse backgrounds, often without formal academic education in legal subjects, and it would be important to have a clear, focused and accessible code of conduct, both for the paralegals and the agencies in their area of practice.

8. The draft *Guidelines* considered by the Committee are attached at Appendix 1. They were created on the same basis as the *Paralegal Rules*, and with the same objectives. To make the *Guidelines* as complete as possible, they were developed using information in the Paralegal Licensing Materials, information from the Commentaries in the *Rules of Professional Conduct* and advice from Law Society staff based on Hearing Panel and common law jurisprudence developed for lawyers. References to jurisprudence developed for lawyers are contained at various points in the *Guidelines*, for example regarding the client file as well as obligations to prospective clients.

9. The *Guidelines* have been created to generally mirror the *Paralegal Rules*. The document has the following headings:

   Introduction to the *Guidelines*
   1. Professionalism
   2. Outside interests
   3. Undertakings
   4. Harassment & Discrimination
   5. Clients
   6. Competence
   7. Advising clients
   8. Confidentiality
   9. Conflicts of interest
   10. Client property
   11. Withdrawal from representation
   12. Advocacy
   13. Fees
   14. Retainers
   15. Trust accounts
   16. Duty to the administration of justice
   17. Duty to paralegals, lawyers and others

18. Supervision
19. Advertising, firm names & letterhead
20. Insurance
21. Duty to the Law Society
22. The Law Society's disciplinary authority

Use of the *Guidelines*

10. The *Guidelines* are intended as an educational tool for paralegals to use in interpreting and applying their professional obligations and responsibilities under the *Law Society Act,* its by-laws, and the *Paralegal Rules.* The *Guidelines* should be considered by paralegals along with the *Paralegal Rules,* the *Act*, the by-laws and any other relevant case law or legislation. Neither the *Paralegal Rules* nor the *Guidelines* can cover every situation; they should be interpreted and applied with common sense and in a manner consistent with the public interest and the integrity of the paralegal profession. Paralegals will be expected to exercise their professional judgment in interpreting the *Guidelines*, keeping in mind their obligations to the client, the court or tribunal and the Law Society.

11. The *Guidelines* do not create mandatory obligations for paralegals. Only the *Paralegal Rules*, the *Act* and the by-laws are mandatory.

Guidelines and Commentaries: Similarities and Differences

12. Some of the information in the *Guidelines* is derived from the Commentaries in the *Rules of Professional Conduct*. The Commentaries are a rich and complex source of information and guidance for lawyers and contain information that could be useful to paralegals. They are based in part on the jurisprudence that has developed over the many years that lawyers have been regulated. Since paralegal regulation is new, there is no comparable jurisprudence to refer to. Accordingly, information was extracted from the Commentaries where it was within the paralegal scope of practice and where it could provide helpful guidance to paralegals. For example, information from the Commentaries was included regarding steps to take where there are warning signs of dishonesty, fraud or crime by a client (*Guideline on Advising Clients, Paralegal Rule* 3.02(3) & (4)), dealing with admissions by a client (*Guideline on Advocacy, Paralegal Rule* 4.01(5)(b), (c) & (f)) and understanding the potential for conflicts of interest arising out of personal relationships (*Guideline on Conflicts of Interest, Paralegal Rule* 3.04(1)).

13. The *Guidelines* differ from the Commentaries in several respects. The *Guidelines* are more comprehensive, because the information in them has been extracted from a number of sources to address the perceived needs of paralegals, and to ensure that they are as complete as possible. Also, the *Guidelines* are not embedded in the rules in the same manner as the Commentaries, to avoid confusion about what is an enforceable obligation, and what is a guide to assist in the interpretation of the obligation.

14. As noted above, this structure responds to the information received by the Society during the 2006 consultation process. There was general agreement that a newly regulated profession requires a clear distinction between the enforceable rules and guides, and this is reflected in the structure of the *Paralegal Rules* and *Guidelines*.

15. Lawyers and licensed paralegals are both regulated under the *Law Society Act*, but there are necessarily differences between them, including the more limited scope of practice for paralegals set out in By-law 4. Other important differences include the fact

that paralegals are new to regulation, and that paralegals' backgrounds and training are currently quite diverse as a result of the grandparent admission process.

16. There is general consensus that licensed paralegals should be held to the same standard of professional conduct as lawyers. While the standards must be comparable, the ways in which they are regulated may necessarily vary in order to address differences, including in scope of practice and training.

The Committee's Deliberations

17. The draft *Guidelines* were approved by the Committee on May 8, 2008.

18. Although the Commentaries to the *Rules of Professional Conduct* for lawyers are approved by Convocation, the Committee recommends that the *Paralegal Professional Conduct Guidelines* be approved by the Committee and provided to Convocation for information. This will give the *Guidelines* increased flexibility at the beginning of regulation, to permit faster response to emerging issues, gaps and any guidance provided by Tribunal decisions as they are released. Any necessary amendments would be presented to the Committee for approval and to Convocation at its next meeting for information, reducing the time required for implementation.

19. Previous examples of guidelines approved by a committee and forwarded to Convocation for information include the Guideline on Ethics and the New Technology, found at http://rc.lsuc.on.ca/jsp/pmg/technology.jsp and the guidelines for suspended members found at http://www.lsuc.on.ca/media/convjan08_prc.pdf (at page 22).

REQUEST FOR EXEMPTION – CSPDM

Motion

20. That Convocation approve an exemption for members of the Canadian Society of Professionals in Disability Management who are Certified Disability Management Professionals (CDMP) or Certified Return to Work Coordinators (CRTWC).

Background

21. The Law Society has received a request for exemption from Canadian Society of Professional Disability Managers (CSPDM). The CSPDM is a national body with approximately 100 members in Ontario. A copy of the materials submitted by Executive Director Wolfgang Zimmerman is attached at Appendix 2.

22. The core expertise of CSPDM members is to "minimize the socio-economic impact of disabling injuries and illnesses" through "consensus based disability management."

23. The CSPDM is similar to the Board of Canadian Registered Safety Professionals (BCRSP), which was provided with a partial exemption in June 2007 (By-law 4, section 30, sub-paragraph (1) 7 iv. C), as part of the list of bodies under the heading "Other profession or occupation."

24. Members of the CSPDM must meet eligibility requirements, including education and work experience, and pass a 7-hour examination. To maintain their membership they must file an annual report with proof of continuing education, proof of work in the field and commitment to the Ethical Standards and Professional Conduct.

25. Most members of the CSPDM provide services that do not require a P1 licence. However, Mr Zimmerman states that a number of their Ontario members occasionally represent employers and workers with regard to workers compensation claims.

26. The rationale for the partial exemption in section 30 (1) 7 was that members of these groups were considered to provide services that would fall within the definition of 'legal services' only very occasionally, while normally providing specific other professional services. The exemption granted was partial, in that only occasional services would be permitted, and the exemptions are to be reviewed after two years. In this sense, the exemptions can be regarded as somewhat transitional in nature, giving the professionals concerned time to decide whether to obtain a licence or refocus their practice away from the provision of legal services.

27. The exemption for the Board of Canadian Registered Safety Professionals is among those that must be reviewed by May 1, 2009.

The Committee's Deliberations

28. The Committee was of the view that a partial exemption should be granted, on the same basis as the exemption for the Board of Canadian Registered Safety Professionals, i.e.,
    a. the exemption will be monitored, and
    b. it will be reviewed by May 2009.

REQUEST FOR EXEMPTION – TRADE UNION REPRESENTATIVES IN SMALL CLAIMS COURT

Motion

29. That Convocation approve an exemption for trade union representatives appearing in Small Claims Court to enforce benefits payable under a collective agreement.

Background

30. The Law Society has received an exemption request from the Ontario Public Service Employees Union, (OPSEU), regarding cases where the union is assisting members to enforce benefits payable under a collective agreement in Small Claims Court. The letter from Roman Stoykewych, General Counsel for OPSEU, is attached at Appendix 3.

31. There are already two exemptions applying to trade union representatives. Paragraph 1 (8) 4 of the *Law Society Act* exempts,

> *An employee or a volunteer representative of a trade union who is acting on behalf of the union or a member of the union in connection with a grievance, a labour negotiation, an arbitration proceeding or a proceeding before an administrative tribunal.*

32. In addition, By-law 4, subsection 32 (2) provides as follows:

> *(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.

33. The trade union representatives in question are thus already exempt when they appear before grievance arbitrations and labour relations tribunals. However, the OPSEU request indicates that there are some benefits payable under collective agreements that are not "arbitrable" and can only be enforced in Small Claims Court. The exemption request is for the appearances to enforce collective agreement benefits only, and not any other Small Claims Court proceedings.

The Committee's Deliberations

34. The Committee was of the view that the narrow additional exemption requested falls within the rationale for the trade union exemptions in the Act and by-laws and recommends the exemption to Convocation.

Appendix 3

"Stoykewych, Roman"
<rstoykew@opseu.org>

07/14/2008 05:08 PM

To <sweir@lsuc.on.ca>
cc "Turtle, Paula" <pturtle@usw.ca>, "Lavigne, Ron" <rlavigne@opseu.org>, "Dileo, Lori" <ldileo@opseu.org>
Subject Exemption from Paralegal Regulation for Trade Union Representatives in Insurance Cases

Dear Ms Weir:
Further to our conversation today, I ask that the Law Society consider the granting of an exemption for non-lawyer trade union representatives, including both staff and elected officials, from regulation as paralegals when they appear in the Small Claims Court of the Superior Court of Justice.

As you are of course of aware, trade union officials are not subject to the provisions of the *Law Society Act* when they are appearing before administrative tribunals. Together with the various exemptions to coverage that have been developed in the Rules, the vast majority of trade union representative functions may be handled by persons who are neither lawyers nor are registered as paralegals. These exceptions and exemptions are critical to trade unions ability to function in

a cost-effective manner, providing a broad range of representational services to our members. It is also facilitates the central idea of member empowerment within trade unionism.

OPSEU, together with a number of other unions which I have informally canvassed, have experienced an anomaly in this regard in instances in which unions are required to represent their members in insurance matters that require attendance at the Small Claims Court of the Superior Court. As you may be aware, many collective agreements provide for health, dental, disability, and similar benefits and insurance. In some cases, the receipt of these benefits are directly "arbitrable" pursuant to the provisions of the grievance and arbitration process of the various collective agreements, in which case no problem is presented from a Law Society's regulatory perspective. However, many other collective agreements include an obligation to provide coverage only, leaving the issue of compliance with the terms of the insurance contract outside the scope of the collective agreement. It is left to the member to enforce outside the scope of the collective agreement. Although there may well have been some doubt on this point previously, in those latter instances, employees do not have access to the grievance processes of the collective agreements. Instead, disputes concerning compliance with the terms of the insurance contract must be adjudicated in the Small Claims Court (in instances in which the policy does not include an internal arbitration clause). These cases include such matters as claims for prosthetic devices, benefits for a period of illness, and other similar matters, all of which fall under the current monetary limit of the Small Claims Court.

In the past, trade union representatives have represented our members in Small Claims Court. Usually, the same staff members or elected officials who represent employees at arbitrations, workers compensation proceedings and other administrative proceedings served as their representatives. We are not aware of any difficulties that were experienced in their so doing since for the most part they were trained and experienced representatives. However, with the advent of paralegal regulation, this practice is now no longer possible, since the exception in the statute deals only with trade union representatives' appearance at administrative tribunals, and the existing exemptions do not appear to include this particular activity. We would ask that you consider further exempting trade union officials to permit this practice to continue.

To be clear, we are not seeking a broad exemption for trade union representatives at the Small Claims Court. Rather, the exemption that we seek could be limited to those cases in which trade union representatives are seeking to enforce an insurance benefit that arises out of a collective agreement to which the trade union is a party.

As noted, I have informally canvassed a number of trade union lawyers, and have already obtained the support of the United Steelworkers in this endeavour. I have copied Ms. Paula Turtle, the head of the USW Canadian Legal Department on this email. If you would think it useful, it is likely that additional trade unions would be prepared to similarly support this request and I would be happy to bring this issue to their attention.

Thank you very much for your help in this matter. If you have any questions or comments, please do not hesitate to contact me.

Roman Stoykewych

General Counsel

Ontario Public Service Employees Union
416.443-8888 (ext. 8230)

AMENDMENTS TO BY-LAW 11 RE: PRACTICE REVIEWS

Motion

35. That Convocation approve the amendment to By-law 11 respecting practice reviews for paralegals, attached at Appendix 5.

Background

36. On February 21st Convocation approved the per-claimant limit, audit programme and annual Compensation Fund levy for paralegals.

37. The authority to conduct practice reviews and audits of both lawyers and paralegals is found in the *Law Society Act*, in sections 42 rand 49.2. However, in order to commence the audit programme approved by Convocation, amendments to By-law 11 are required, to extend to paralegals the procedural provisions applicable to lawyers. The current by-law wording is attached at Appendix 4. The required wording for paralegals is attached at Appendix 5.

Appendix 4

BY-LAW 11 - EXCERPT

PRACTICE REVIEWS

Reviews

27. (1) A review of a licensee's professional business may be conducted if,

(a) an employee of the Society holding the office of Director, Professional Development and Competence is satisfied that there are reasonable grounds for believing that the licensee may be failing or may have failed to meet standards of professional competence; or

(b) the licensee has held a Class L1 licence for not more than eight years.

Determination of reasonable grounds

(2) For the purposes of clause (1) (a), in determining that there are reasonable grounds for believing that the licensee may be failing or may have failed to meet standards of professional competence, the following may be considered:

1. The nature, number and type of complaints made to the Society in respect of the conduct and competence of the licensee.

2. Any order made against the licensee under section 35, 40, 44 or 47 or subsection 49.35 (2) of the Act.

3. Any undertaking given to the Society by the licensee.

4. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of considering a complaint which suggests that the licensee may be failing or may have failed to meet standards of professional competence.

5. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of an investigation which suggests that the licensee may be failing or may have failed to meet standards of professional competence.

6. Any information that comes to the knowledge of an officer, employee, agent or representative of the Society in the course of or as a result of a proceeding which suggests that the licensee may be failing or may have failed to meet standards of professional competence.

7. The result of an audit where the result suggests that,

(a) the licensee is in default of the requirements of By-Law 9 [Financial Transactions and Records;

(b) the licensee is in default of the requirements of the rules of professional conduct for licensees with respect to conflicts of interest;

(c) there are deficiencies in the records, systems or procedures of the licensee's professional business; or

(d) there are deficiencies in the administration of the licensee's professional business.

Review of licensee's professional business

28. (1) The Society shall assign one or more persons to conduct a review of a licensee's professional business.

Assignment of additional persons to review

(2) At any time after a review has commenced, the Society may assign one or more persons to assist or replace the person or persons originally assigned to conduct the review.

Review of professional business is not public information

(3) The fact that a review of a licensee's professional business is being or has been conducted shall not be made public, except as required in connection with a proceeding under the Act.

Final report

29. (1) On completion of a review of a licensee's professional business, the person or persons who conducted the review shall submit to the Society a final report on the review.

Contents of final report

(2) The final report on a review of a licensee's professional business shall contain,

(a) the opinion of the person or persons who conducted the review as to whether the licensee who was the subject of the review is failing or has failed to meet standards of professional competence; and

(b) if the person or persons who conducted the review are of the opinion that the licensee who was the subject of the review is failing or has failed to meet standards of professional competence, the recommendations of the person or persons.

Final report

(3) The Society shall provide to the licensee who is the subject of the final report a copy thereof.

Recommendations

30. (1) If on completion of a review of a licensee's professional business and receipt of the final report on the review, the Society decides to make recommendations to the licensee under subsection 42 (3) of the Act, but not to include the recommendations in a proposal for an order under subsection 42 (4) of the Act, the Society shall so notify the licensee in writing.

Same

(2) The Society may make recommendations to the licensee at the same time as the Society notifies the licensee under subsection (1) or within a reasonable period of time after the Society notifies the licensee under subsection (1).

Proposal for order

31. (1) If on completion of a review of a licensee's professional business and receipt of the final report on the review, the Society decides to make recommendations to the licensee under subsection 42 (3) of the Act and to include the recommendations in a proposal for an order under subsection 42 (4) of the Act, the Society shall so notify the licensee in writing.

Same

(2) The notice under subsection (1) shall be accompanied by the proposal for an order.

Form of proposal for an order

(3) A proposal for an order shall, as far as possible, be in the form of an order made under subsection 42 (7) of the Act.

Time for responding to proposal

(4) A licensee who receives a proposal for an order shall, not later than thirty days after the date specified on the notice given to the licensee under subsection (1), notify the Society in writing as to whether the licensee accepts the proposal.

Extension of time for responding to proposal

(5) Despite subsection (4), on the request of the licensee, or on its own initiative, the Society may extend the time within which the licensee is to respond to the proposal.

Request for extension of time

(6) A request to the Society to extend time under subsection (5) shall be made by the licensee in writing and not later than the day on which the licensee is required under subsection (4) to respond to the proposal.

Modifying proposal for order

(7) Before the time for responding to a proposal for an order has expired, the Society may modify the proposal if the licensee consents to the modification, and the modified proposal shall be deemed to be the proposal to which the licensee is required to respond under subsection (4).

Failure to respond

(8) A licensee who fails to respond in writing to a proposal for an order within the thirty day period specified in subsection (4), or within the extended time period specified by the Society under subsection (5), the licensee shall be deemed to have refused to accept the proposal.

Review of proposal by panelist: materials

32. The Society shall provide to the panelist the following materials:
1. The final report on the review of the licensee's professional business.

2. The licensee's written response, if any, to the final report, including the licensee's written response, if any, to the recommendations of the person or persons who conducted the review.

3. The proposal for an order made to the licensee.

4. The licensee's written response, if any, to the proposal.

Review of proposal by panelist: refusal to make order

33. The panelist may refuse to make an order giving effect to the proposal only after a meeting with the licensee and the Society.

Review of proposal by panelist: modifications

34. The panelist may make an order that includes modifications to the proposal only after a meeting with the licensee and the Society.

Communications with licensee and Society prohibited

35. The panelist shall not communicate with the licensee or the Society with respect to the proposal except in accordance with section 36.

Meeting with licensee and Society

36. (1) The panelist may meet with the licensee and the Society by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other instantaneously and simultaneously.

Both parties to be present

(2) Subject to subsection (3), the panelist shall not meet with the licensee alone or with the Society alone to discuss the proposal, but nothing in this subsection is intended to deny to the licensee the right to counsel.

Exception

(3) The panelist may meet with the Society alone to discuss the proposal if,

(a) the meeting is not held under section 34; and

(b) notice of the meeting has been given to the licensee in accordance with subsections (4) and (5) and the licensee fails to attend at the meeting.

Notice

(4) The Society shall give to a licensee reasonable notice of a meeting with the panelist.
Same

(5) A notice of a meeting shall be in writing and shall include,

(a) a statement of the time, place and purpose of the meeting; and

(b) a statement that if the licensee does not attend at the meeting, the panelist may meet with the Society alone to discuss the proposal.

Order

37. (1) An order made under subsection 42 (7) of the Act shall be in Form 11A and shall contain,

(a) the name of the panelist who made it;

(b) the date on which it was made; and

(c) a recital of the particulars necessary to understand the order, including the date of any meeting and the persons who attended at the meeting.

Same

(2) The operative parts of an order made under subsection 42 (7) of the Act shall be divided into paragraphs, numbered consecutively.

Notice of order

(3) The Society shall send to the licensee who is the subject of an order made under subsection 42 (7) of the Act a copy of the order by any of the following methods:

1. Personal delivery to the licensee.

2. Regular lettermail to the last known address of the licensee.

3. Fax to the last known fax number of the licensee.

4. E-mail to the last known e-mail address of the licensee.

Date of receipt: mail

(4) If the copy of the order is sent by regular lettermail, it shall be deemed to be received by the licensee on the fifth day after the day it is mailed, unless the day is a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday.

Date of receipt: fax or e-mail

(5) If the copy of the order is sent by fax or e-mail, it shall be deemed to be received by the licensee on the day after it was sent, unless the day is a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday.

Effective date of order
(6) Unless otherwise provided in the order, an order made under subsection 42 (7) of the Act is effective from the date on which it is made.

Order is not public information

(7) An order made under subsection 42 (7) of the Act shall not be made public.

Order making licence subject to terms, etc., is public information

(8) Despite subsection (7), an order made under subsection 42 (7) of the Act that imposes terms, conditions, limitations or restrictions on the licensee or the licensee's licence is a matter of public record.

PART V

PAYMENT OF COSTS

AUDIT

Payment of costs

38. On application by the Society, a bencher appointed for the purpose by Convocation may make an order requiring a licensee who was the subject of an audit under section 49.2 of the Act to pay the cost or a portion of the cost of the audit if the bencher is satisfied that,

(a) the audit was required because the licensee had failed to submit to the Society the report required under section 4 of By-Law 8 [Reporting and Filing Requirements];

(b) at the time arranged between the Society and the licensee, the person conducting the audit could not gain entry to the business premises of the licensee;

(c) at any time during the audit, the licensee failed to produce to the person conducting the audit the financial records and other documents that the licensee prior to a specified time had been requested to make available to the person at that time;

(d) at any time during the audit, the licensee failed to produce to the person conducting the audit financial records that were up to date and the failure to produce financial records that were up to date increased significantly the amount of time required to complete the audit; or

(e) at any time during the audit, the licensee produced financial records that were not in compliance with the requirements of By-Law 9 [Financial Transactions and Records] and the production of financial records that were not in compliance with the requirements of By-Law 9 [Financial Transactions and Records] increased the amount of time required to complete the audit.

Notice of application

39. (1) An application for payment of the cost or a portion of the cost of an audit shall be commenced by the Society notifying the licensee in writing of the application.

Method of giving notice
(2) Notice under subsection (1) is sufficiently given if,

(a) it is delivered personally;

(b) it is sent by regular lettermail addressed to the licensee at the latest address for the licensee appearing on the records of the Society; or

(c) it is faxed to the licensee at the latest fax number for the licensee appearing on the records of the Society.

Receipt of notice

(3) Notice under subsection (1) shall be deemed to have been received by the licensee,

(a) if it was sent by regular lettermail, on the fifth day after it was mailed; and

(b) if it was faxed, on the first day after it was faxed.

Bill of costs

40. (1) Where the Society is applying for payment of the cost or a portion of the cost of an audit, the Society shall send to the licensee at least ten days before the date fixed for consideration of the application a bill of costs setting out the expenses, fees, disbursements and other charges incurred by the Society to conduct the audit.

Tariff

(2) The bill of costs prepared by the Society shall, as far as possible, be in accordance with a tariff established by Convocation from time to time.

Application of certain sections

(3) Subsections 39 (2) and (3) apply, with necessary modifications, to the delivery of the bill of costs under subsection (1).

Consideration of application: procedure

41. (1) Subject to sections 39 and 40 and subsections (2), (3), (5) and (6), the procedure applicable to the consideration of an application for the payment of the cost or a portion of the cost of an audit shall be determined by the bencher and, without limiting the generality of the foregoing, the bencher may decide who may make submissions to him or her, when and in what manner.

Submissions by licensee and Society

(2) The licensee and the Society are entitled to make submissions to the bencher when he or she is considering an application for the payment of the cost or a portion of the cost of an audit.
Ability to pay

(3) In considering an application for the payment of the cost or a portion of the cost of an audit, the bencher shall take into account, among other relevant factors, the licensee's ability to pay.
Authority of bencher

(4) After considering an application for payment of the cost or a portion of the cost of an audit, the bencher shall,

(a) dismiss the application and declare that the licensee is not required to pay the cost or any portion of the cost of the audit; or

(b) order that the licensee pay the cost or a portion of the cost of the audit, as requested by the Society in the application or as determined by the bencher, and set the due date for payment.

Tariff

(5) Where the bencher determines under clause (4) (b) that the licensee is to pay the cost or a portion of the cost of the audit other than as requested by the Society in the application, the bencher's determination as to the amount payable by the licensee shall, as far as possible, be in accordance with a tariff established by Convocation from time to time.

Reasons for decision

(6) If requested by the licensee or the Society, the bencher shall state in writing the reasons for his or her decision on the application.

Appeal

42. (1) The licensee or the Society if dissatisfied with the bencher's decision under subsection 41 (4) may appeal the decision to a panel of three benchers appointed for the purpose by Convocation.

Time for appeal

(2) An appeal under subsection (1) shall be commenced,

(a) if the licensee is appealing, by the licensee notifying the Society in writing of the appeal within thirty days after the day the bencher delivers his or her decision; or

(b) if the Society is appealing, by the Society notifying the licensee in writing of the appeal within thirty days after the day the bencher delivers his or her decision.

Procedure

(3) The rules of practice and procedure apply, with necessary modifications, to the consideration by the panel of three benchers of an appeal under subsection (1) as if the consideration of the appeal were the hearing of an appeal under subsection 49.32 (2) of the Act.

Same

(4) Where the rules of practice and procedure are silent with respect to a matter of procedure, the Statutory Powers Procedure Act applies to the consideration by the panel of three benchers of an appeal under subsection (1).

Payment of cost of audit

(5) Where a licensee or the Society appeals under subsection (1), payment of the cost or a portion of the cost of an audit, as ordered by the bencher under subsection 41 (4), is postponed until the appeal is disposed of by the panel of three benchers.

Decision on appeal

(6) After considering an appeal made under subsection (1), the panel of three benchers shall,

(a) confirm the bencher's decision; or

(b) strike out the bencher's decision and substitute its own decision.

Decision final

(7) The decision of the panel of three benchers on an appeal made under subsection (1) is final.

Appendix 5

THE LAW SOCIETY OF UPPER CANADA

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

BY-LAW 11
[REGULATION OF CONDUCT, CAPACITY AND PROFESSIONAL COMPETENCE]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 30, 2008

MOVED BY

SECONDED BY

THAT By-Law 11 [Regulation of Conduct, Capacity and Professional Competence], made by Convocation on May 1, 2007 and amended by Convocation on February 21, 2008 and April 24, 2008, be further amended as follows:

1. The definition of "licensee/ titulaire de permis" in section 24 of the By-Law is deleted.

2. Subsection 27 (1) of the By-Law is deleted and the following substituted:

Reviews	Inspections
27. (1) A review of a licensee's professional business may be conducted if,	27. (1) Une inspection des activités professionnelles d'un titulaire de permis peut être ordonnée si :
(a) an employee of the Society holding the office of Director, Professional Development and Competence is satisfied that there are reasonable grounds for believing that the licensee may be failing or may have failed to meet standards of professional competence;	a) la personne assumant la charge de directrice ou directeur du perfectionnement professionnel est convaincue qu'il existe des motifs raisonnables de croire que le titulaire de permis ne respecte pas ou n'a pas respecté les normes de compétence de la profession;

(b)	the licensee has held a Class L1 licence for not more that eight years; or	b)	le titulaire de permis détient un permis de catégorie L1 depuis un maximum de huit ans.
(c)	the licensee holds a Class P1 licence.	c)	le titulaire de permis détient un permis de catégorie P1.

REPORTING REQUIREMENTS: PARALEGAL ANNUAL REPORT (PAR)

Motion

38. That Convocation approve the amendment to By-law 8 respecting annual reporting requirements for paralegals, attached at Appendix 7.

Background

39. To ensure that the Law Society has the correct address and practice information for all lawyers, the Law Society currently requires lawyers to file an Annual Report with basic information about the lawyer's practice. This also permits the Law Society to verify compliance with the trust account rules and to compile basic statistics about such matters as age, areas of practice, and geographic location.
40. The Law Society's legal authority to require lawyers to file an annual report is found in Part II of By-law 8, attached at Appendix 6.

The Committee's Deliberations

41. The Committee recommends extending these reporting requirements to paralegals. The proposed wording is attached at Appendix 7

42. A draft Paralegal Annual Report ('PAR') has been prepared, based on the existing Members' Annual Report (MAR) filed by lawyers, and is attached at Appendix 8 for information.

Appendix 6

By-Law 8

Made: May 1, 2007
Amended: June 28, 2007
April 24, 2008
June 26, 2008

REPORTING AND FILING REQUIREMENTS

PART II

FILING REQUIREMENTS

ANNUAL REPORT

Requirement to submit annual report

4. (1) Every licensee who holds a Class L1 licence shall submit a report to the Society, by March 31 of each year, in respect of,

(a) the licensee's professional business during the preceding year; and

(b) the licensee's other activities during the preceding year related to the licensee's practice of law.

Annual Report

(2) The report required under subsection (1) shall be in a form provided by the Society.

Exemption from requirement to submit annual report

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

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

i. does not practise law in Ontario,

ii. is not an estate trustee,

iii. is not a trustee of an inter vivos trust; and

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

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

Application by licensee's representative
(4) The Society may permit any person on behalf of a licensee to make an application under subsection (3).

Application form

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

Documents and explanations

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

Consideration of application

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

Duration of exemption

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

Period of default

5. (1) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to complete or file a report required under section 4 is 120 days after the day the report is required to be submitted.

Reinstatement of licence

(2) If a licensee's licence has been suspended under clause 47 (1) (a) of the Act for failure to complete or file a report required under section 4, for the purpose of subsection 47 (2) of the Act, the licensee shall complete and file the report in a form provided by the Society.

Requirement to submit public accountant's report

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

Contents of report and time for filing

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

Licensee's obligation to provide access to files, etc.
(3) For the purpose of permitting the public accountant to complete the report, the licensee shall,

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

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

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

Authority to confirm independently particulars of transactions

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

Cost

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

Public accountant's duty of confidentiality

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

Period of default

7. (1) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to file a report of a public accountant in accordance with section 6 is 60 days after the day the report is required to be submitted.

Reinstatement of licensee

(2) If a licensee's licence has been suspended under clause 47 (1) (a) of the Act for failure to file a report of a public accountant in accordance with section 6, for the purpose of subsection 47 (2) of the Act, the licensee shall file the report.

Failure to submit public accountant's report: investigation

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

Investigation: application of subss. 6 (3) and (4)

(2) Subsections 6 (3) and (4) apply with necessary modifications to the investigation under this section.

Confidentiality

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

Cost

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

Appendix 7

THE LAW SOCIETY OF UPPER CANADA

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

BY-LAW 8
[REPORTING AND FILING REQUIREMENTS]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 30, 2008

MOVED BY

SECONDED BY

THAT By-Law 8 [Reporting and Filing Requirements], made by Convocation on May 1, 2007 and amended by Convocation on June 28, 2007, April 24, 2008 and June 26, 2008, be further amended as follows:

1. Subsection 4 (1) of the By-Law is deleted and the following substituted:

Requirement to submit annual report	Obligation de déposer la déclaration annuelle
4. (1) Every licensee shall submit a report to the Society, by March 31 of each year, in respect of,	4. (1) Tout titulaire de permis dépose auprès du Barreau, au plus tard le 31 mars de chaque année, une déclaration relativement
(a) the licensee's professional business during the preceding year; and	a) à ses activités professionnelles menées au cours de l'année qui précède,
(b) the licensee's other activities during the preceding year related to the licensee's practice of law or provision of legal services.	b) à ses autres activités menées au cours de l'année qui précède dans le cadre de son exercice du droit ou de sa prestation de services juridiques.

3. Subsection 4 (3) of the By-Law is deleted and the following substituted:

Exemption from requirement to submit annual report

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

1. A licensee who holds a Class L1 licence who is over sixty-five years of age and who,

   i. does not practise law in Ontario,

   ii. is not an estate trustee,

   iii. is not a trustee of an *inter vivos* trust, and

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

2. A licensee who holds a Class P1 licence who is over sixty-five years of age and who does not provide legal services in Ontario.

3. A licensee who is

Exonération du dépôt de la déclaration annuelle

(3) Les titulaires de permis suivants peuvent soumettre au Barreau une demande d'exonération de dépôt de la déclaration annuelle visée au paragraphe (1) :

1. Les titulaires de permis de catégorie L1 âgés de plus de soixante-cinq ans et qui

   i. n'exercent pas le droit en Ontario,

   ii. ne pratiquent pas en qualité de fiduciaires d'une succession,

   iii. ne sont pas administrateurs de fiducies entre vifs,

   iv. n'exercent pas les fonctions d'avocat ou d'avocate dans le cadre de la gestion par procuration de biens qui leur sont confiés par un(e) client(e) ou un(e) ancien(ne) client(e).

2. Les titulaires de permis de catégorie P1 âgés de plus de 65 ans et qui ne fournissent pas de services juridiques en Ontario.

3. Les titulaires de permis qui sont

incapacitated within the meaning of the Act.	frappés d'incapacité aux termes de la Loi.

AMENDMENTS TO THE *PARALEGAL RULES OF CONDUCT*

Motion

43. That Convocation approve the amendments to the *Paralegal Rules of Conduct* shown in the chart at Appendix 9.

Issue

44. The Committee considered a group of proposed amendments to the *Paralegal Rules of Conduct.* Most of the changes are required to provide guidance on matters related to affiliations and MDP's, which are now permitted business structures for paralegals under the By-laws. These amendments are based on the business structure provisions in the lawyers' *Rules of Professional Conduct*. The other proposed changes are designed to mirror provisions in the lawyers' rules governing situations where paralegals may face similar practice issues.

45. The chart attached at Appendix 9 sets out the reason for the change, the lawyer rule reference and the new proposed paralegal rule. The chart also shows reference points that would be added to the *Paralegal Guidelines* that are currently before Convocation.

46. Examples of the changes shown are:
    a. Defining the terms "associate," "affiliation" and "affiliated entity";
    b. Addition to the definition of "professional misconduct" to include assisting or inducing a partner or associate in an MDP in violating the rules;
    c. Requiring a paralegal to ensure partners and associates in an MDP observe the conflict of interest rules;
    d. Prohibiting communication with the media where it would prejudice a fair trial.

The Committee's Deliberations

47. The Committee considered the proposed changes and recommends them to Convocation.

Appendix 9

PROPOSED HOUSEKEEPING AMENDMENTS TO THE *PARALEGAL RULES OF CONDUCT*

September 2, 2008

ISSUE	*RULE OF PROFESSIONAL CONDUCT* REFERENCE	PROPOSED NEW PARALEGAL RULE
1. MULTI-DISCIPLINE PRACTICES		

(applicable to paralegals under By-Law 7)		
The definition of “associate” in the lawyer rules includes a non-lawyer employee of a multi-disciplinary practice. “Associate” is not defined in the *Paralegal Rules of Conduct*.	Rule 1.02 definition of “associate”	“associate" includes: (a) a paralegal who is an employee of the paralegal firm in which the paralegal provides legal services; and (b) a non-licensee employee of a multi-discipline practice providing services that support or supplement the practice of law or provision of legal services in which the non-licensee provides his or her services.
The definition of “professional misconduct” includes “knowingly assisting or inducing a non-lawyer partner or associate of a multi-discipline practice to violate or attempt to violate the rules or a requirement of the Act, its regulations or by-laws. There is no similar reference in the definition of professional misconduct in the *Paralegal Rules of Conduct*.	Rule 1.02 definition of “professional misconduct”	Rule 9.01(13) "professional misconduct" means conduct by a paralegal that tends to bring discredit upon the paralegal profession including (c) knowingly assisting or inducing a non-licensee partner or associate of a multi-discipline practice to violate or attempt to violate the rules in the *Paralegal Rules of Conduct* or a requirement of the *Law Society Act* or its regulations or by-laws,
The commentary in the lawyer rules raises awareness of the potential for confusion on the part of clients of a lawyer in a multi-disciplinary practice.	Commentary to Rule 2.01(1)	This point is covered in By-Law 7 but should be elaborated in the Guideline on Advising Clients.
The lawyer rules require a lawyer in an MDP to ensure that non-lawyer partners and associates observe the conflict of interest rule. There is no similar requirement in the *Paralegal Rules of Conduct*.	Rule 2.04(13)	3.04 (15) A paralegal in a multi-discipline practice shall ensure that non-licensee partners and associates observe this rule for the provision of legal services and for any other business or professional undertaking carried on by them outside the professional business.
The lawyer rules provide an exception to the requirement around division of fees for lawyers in multi-discipline practices. Under the	Rule 2.08(8) & (9)	5.01 (11) A paralegal shall not (a) directly or indirectly share, split, or divide his or her fees with any person who is not a licensee,

Paralegal Rules of Conduct, a paralegal is currently prohibited from directly or indirectly sharing, splitting or dividing fees with someone who is not a licensee; there is no exception for MDPs.		or (b) give any financial or other reward to any person who is not a licensee for the referral of clients or client matters. 5.01 (12) Subrule (11) does not apply to multi-discipline practices of paralegal and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm.
There is a general requirement in the lawyer rules on a lawyer in a multi-discipline practice to ensure that non-lawyer partners and associates comply with the Rules and all ethical principles that govern a lawyer in the discharge of his or her professional obligations. There is no similar provision in the *Paralegal Rules of Conduct*.	Rule 6.10	8.01(5) A paralegal in a multi-discipline practice shall ensure that non-licensee partners and associates comply with these rules and all ethical principles that govern a paralegal in the discharge of his or her professional obligations.
2. AFFILIATIONS		
The terms “affiliation” and “affiliated entity” are defined in the lawyer rules but not defined in the *Paralegal Rules of Conduct*.	Rule 1.02	1.02 In these rules, "affiliated entity" means any person or group of persons other than a person or group authorized to provide legal services in Ontario; "affiliation" means the joining on a regular basis of a paralegal or group of paralegals with an affiliated entity in the delivery or promotion and delivery of the legal services of the paralegal or group of paralegals and the non-legal services of the affiliated entity;
The lawyer rules and commentary require a lawyer in an affiliation to make certain disclosure to a client in respect of conflicts of interest. There	Commentary to Rule 2.04(1) Rule 2.04 (10.1), (10.2), (10.3)	3.04 (15) Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal

is no similar requirement in the *Paralegal Rules of Conduct*.		services of an affiliated entity, a paralegal shall disclose to the client (a) any possible loss of confidentiality because of the involvement of the affiliated entity, including circumstances where a non-licensee or staff of the affiliated entity provide services, including support services, in the paralegal's office, (b) the paralegal's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be, (c) any financial, economic or other arrangements between the paralegal and the affiliated entity that may affect the independence of the paralegal's representation of the client, including whether the paralegal shares in the revenues, profits or cash flows of the affiliated entity; and (d) agreements between the paralegal and the affiliated entity, such as agreements with respect to referral of clients between the paralegal and the affiliated entity, that may affect the independence of the paralegal's representation of the client. 3.04 (16) Where there is an affiliation, after making the disclosure as required by subrule (15), a paralegal shall obtain the client's consent before accepting a retainer under subrule (15). 3.04 (17) Where there is an affiliation, a paralegal shall establish a system to search for conflicts of interest of the affiliation.

The commentary to the lawyer rules discusses the applicability of the fee-splitting rule to affiliations. There is no comment about affiliations in the *Paralegal Rules of Conduct*.	Commentary to Rule 2.08(9)	5.01 (11) A paralegal shall not (a) directly or indirectly share, split, or divide his or her fees with any person who is not a licensee, including an affiliated entity, or (b) give any financial or other reward to any person who is not a licensee, including an affiliated entity, for the referral of clients or client matters.
3. GENERAL		
Consent: lawyers must confirm oral consent in writing whether from one or multiple parties; paralegals must only confirm oral consent in writing if provided by multiple parties	Rule 1.02	Rule 1.02(3) "consent" means: (a) a consent in writing, provided that where more than one person consents, each may sign a separate document recording his or her consent, or (b) an oral consent, provided that each person giving the oral consent receives a separate letter recording his or her consent;
The lawyer rules impose reporting and withdrawal requirements when a lawyer is acting for an organization and knows that the organization intends to act dishonestly, fraudulently, criminally or illegally with respect to that matter. There is no specific parallel obligation in the *Paralegal Rules of Conduct*.	Rule 2.02(5.1), 2.05(5.2)	3.02 (4.1) When a paralegal is employed or retained by an organization to act in a matter and the paralegal knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrules (3) and (4), the paralegal shall (a) advise the person from whom the paralegal takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,

		(b) if necessary, because that person refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal, (c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct would be dishonest, fraudulent, criminal, or illegal, and (d) if the organization, despite the paralegal's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 3.08. 3.02 (4.2) When a paralegal is employed or retained by an organization to act in a matter and the paralegal knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrules (3) and (4), the paralegal shall (a) advise the person from whom the paralegal takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, (b) if necessary because that

		person, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and (c) if the organization, despite the paralegal's advice, continues with the wrongful conduct, withdraw from acting in the matter in accordance with rule 3.08.
The commentary in the lawyer rules regarding division of fees / referral fees explain that the rules do not prohibit an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues from the practice sold. There is no mention of this exception in the *Paralegal Rules of Conduct* or Guidelines.	Commentary to Rule 2.08(8)	This discussion should be added to the Guidelines on Fees.
New By-Law 7.1 was created to more specifically address delegation and supervision issues. Rule 5.01(2) refers to By-Law 7.1 but there is no reference to the By-Law in the *Paralegal Rules of Conduct*.	Rule 5.01(2)	8.01 (1) A paralegal shall, in accordance with the By-Laws, assume complete professional responsibility for all business entrusted to him or her. 8.01(3) A paralegal shall, in accordance with the By-Laws, directly supervise staff and assistants to whom particular tasks and functions are delegated.
The lawyer rules prohibit lawyers from making public statements or communicating with the media if they know or ought to know that it will have a substantial likelihood of materially prejudicing a party's right to a fair trial. There is no parallel prohibition in the *Paralegal Rules of Conduct*.	Rule 6.06(2)	6.01 (4.1) A paralegal shall not communicate information to the media or make public statements about a matter before a tribunal if the paralegal knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair

		trial or hearing.

PROPOSED REVISIONS TO RULE 8 OF THE *PARALEGAL RULES OF CONDUCT* REGARDING ADVERTISING & MARKETING

Motion

48. That Convocation approve the amendments to the *Paralegal Rules of Conduct* shown at Appendix 10.

49. It is proposed to simplify the rules governing firm names, advertising and marketing, for both lawyers and paralegals. With regard to the *Paralegal Rules*, this involves primarily changes to Rule 8. (There is also a small change to Rule 2, whereby a subsection of Rule 2 is moved to Rule 8). A clean copy of the proposed provisions for the *Paralegal Rules* is attached at Appendix 10, followed by a red-lined version showing the changes.

50. The Professional Regulation Committee is recommending to Convocation the equivalent proposals for lawyers.

Background: the Lawyers' Rules

51. The initiative to amend the marketing and advertising rules was prompted by the need identified by staff in the Professional Regulation Division to reconsider the scope and detail of Rule 3 of the *Rules of Professional Conduct* for lawyers, for a number of reasons, including the following:

    a. Some of the rules deal with matters more properly characterized as lawyer to lawyer relationships, rather than regulation for public protection;
    b. Few complaints about these issues arise, fewer are referred to the Proceedings Authorization Committee, which in turn rarely authorizes action against the lawyer in question;
    c. A number of other law societies in Canada are examining these rules, or their equivalent, with a view to simplifying and rationalizing the rules;
    d. The recent Competition Bureau report on the self- regulated professions recommended that law societies should lift any unnecessary restrictions on advertising unless they can be justified;
    e. The Federation of Law Societies of Canada, in its Model Rules initiative, has identified this topic as a rule that should be reduced in its scale and rationalized around a small number of key concepts.

52. While this initiative originated with concerns about the lawyers' Rule 3, it is appropriate to consider parallel revisions to the *Paralegal Rules of Conduct,* as the same rationale for simple, clear rules applies, and it is desirable to have a consistent approach to the rules for both paralegals and lawyers.

Key Concepts

53. The rules governing advertising, marketing of legal services and making legal services available involve a small number of key concepts, namely:
    a. ensuring advertising or marketing is not false;
    b. ensuring that advertising or marketing is not misleading or deceptive, and

c. ensuring that the ways legal services are marketed are in the best interests of the public and consistent with lawyers' and paralegals' duties of professionalism.

54. The objective is to rationalize the Rules to create a clearer, more straightforward statement on this aspect of professional regulation.

Principal changes

55. The principal proposed changes to the *Paralegal Rules* would be the removal of,
   a. the prohibition on a paralegal's name appearing on advertising material offering goods/services to the public other than legal services,
   b. the prohibition on comparison of services or charges with other paralegals or with lawyers,
   c. the prohibition on the use of the words "from…minimum…and up" in fee advertisements, and
   d. many of the detailed restrictions on firm names.

The Committee's Deliberations

56. The Committee considered the proposed changes and recommends them to Convocation.

Drafting Process

57. The Legal Services department of the Law Society advises that once the rule amendments are considered by Convocation, the Society's drafter can review the proposed amendments and provide a final version for adoption. This would also permit the Legal Department to prepare consequential amendments to By-Law 7, which governs the permitted names of Professional Corporations. The matter would return to October or November Convocation for approval of the final wording.

Appendix 10

PROPOSED NEW WORDING OF RULE 8

Rule 8 – Practice Management

Making Legal Services Available

8.02 (1) A paralegal shall make legal services available to the public in an efficient and convenient way.

Restrictions

(2) In offering legal services, a paralegal shall not use means

(a) that are false or misleading,

(b) that amount to coercion, duress or harassment,

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,

(d) that are intended to influence a person who has retained another paralegal or a lawyer for a particular matter to change his or her representative for that matter, unless the change is initiated by the person or the other representative, or

(e) that otherwise bring the paralegal profession or the administration of justice into disrepute.

(3) A paralegal or paralegal firm shall not advertise services that are beyond the permissible scope of practice of a paralegal.

Marketing

8.03 (1) In this Rule, marketing includes not only advertisements and other similar communications in various media but also firm names, which may include trade names, letterhead, business cards and logos.

(2) A paralegal may market professional services provided that the marketing

(a) is demonstrably true, accurate and verifiable,

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive, and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Advertising of Fees

(3) A paralegal or paralegal firm may advertise fees charged for their services provided that

(a) the advertising is reasonably precise as to the services offered for each fee quoted,

(b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee, and

(c) the paralegal adheres to the advertised fee.

<u>RED-LINE VERSION – PROPOSED CHANGES TO RULES 2 & 8</u>

2.01 Integrity and Civility

Integrity

2.01 (1) A paralegal shall conduct himself or herself in such a way as to maintain the integrity of the paralegal profession.

(2) Paralegals shall make legal services available to the public in an efficient and convenient way that commands respect and confidence and is compatible with the integrity and independence of the paralegal profession. (Rule 3.01)

8.02 Advertising

Permitted Advertising

Making Legal Services Available

8.02 (1) A paralegal shall make legal services available to the public in an efficiently and conveniently manner. and, subject to rule 8.02(2), may offer legal services to a prospective client by any means.

Restrictions

8.02 (1) Subject to subrules (2) through (5), A paralegal or a paralegal firm may advertise their services or fees in any medium including the use of brochures and similar documents, if the advertising, In offering legal services, a paralegal shall not use means

(a) that are is not false or misleading;,

(b) that amount to coercion, duress or harassment,

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,

(b)(d) that are intended to influence a person who has retained another paralegal or a lawyer for a particular matter to change his or her representative for that matter, unless the change is initiated by the person or the other representative, or

(e) (b) is in good taste and is not such as tothat otherwise bring the paralegal profession or the administration of justice into disrepute.; and

(c)

(c) does not compare services or charges with other firms.

Restrictions on Advertising

(23) A paralegal or paralegal firm shall not advertise services that are beyond the permissible scope of practice of a paralegal.

(3) The means by which it is sought to make legal services more readily available to the public, shall be consistent with the public interest and shall not detract from the integrity, independence, or effectiveness of the paralegal profession.

Marketing

8.03 (41) In this Rule, marketing includes not only advertisements and other similar communications in various media but also firm names, which may include trade names, letterhead, business cards and logos.

(2) A paralegal may market professional services provided that the marketing

(a) is demonstrably true, accurate and verifiable,

(b) is neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive, and

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Advertising of Fees

(3) A paralegal or paralegal firm may advertise fees charged for their services provided that

~~(a) In addition to the requirements of subrule (1), the following conditions apply to an advertisement of fees:~~

~~(a) 1.~~(a) the advertising is reasonably precise as to the services offered for each fee quoted, ~~An advertisement of fees for consultation or for specific services shall contain an accurate statement of the services provided for the fee and the circumstances, if any, in which higher fees may be charged.~~

~~(a)~~(b) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee, and ~~2.The fact that disbursements are an additional cost shall be made clear in the advertisement.~~

(c) the paralegal adheres to the advertised fee.

~~3.An advertisement shall not use words or expressions such as "from...","minimum" or "... and up", or the like in referring to the fees to be charged.~~

~~4. Services covered by advertised fees shall be provided at the advertised rate to all clients who retain the advertising paralegal or paralegal firm during the 30-day period following the last publication of the fees unless there are special circumstances that could not reasonably have been foreseen, the burden of proving which rests upon the paralegal.~~

~~(5) A paralegal shall not,~~

~~(a) permit the paralegal's name to appear as representative on any advertising material,~~

~~(i) offering goods, other than legal publications, to the public, or~~

~~(ii) offering services, other than legal services, to the public; and~~

~~(b) while in private practice, permit the paralegal's name to appear on the letterhead of a company as being its representative, other than an honorary designation on the letterhead of a nonprofit or philanthropic organization.~~

~~8.03 Paralegal Firm Names, Letterheads and Signs~~

~~Paralegal Firm Names~~

~~8.03 (1) The name of a paralegal firm shall not include any name that is not,~~

~~(a) a name of a current, a retired from practice, or a deceased member of the paralegal firm who is or was qualified to provide legal services in Ontario; or~~

~~(b) a descriptive or trade name that is in keeping with the dignity, integrity, independence and the role of the paralegal profession.~~

~~(2) A paralegal who purchases a practice may, for a reasonable length of time, use the words "Successor to _____" in small print under the paralegal's own name.~~

~~(3) A paralegal firm name shall not include a descriptive or trade name that is misleading about,~~

~~(a) the identities, responsibilities, or relationships of the paralegals practising under the paralegal firm name; or~~

~~(b) the association or relationship of the paralegal firm with other licensees or with non-licensees.~~

~~(4) The name of a paralegal firm shall not include the use of phrases such as "John Doe and Associates", "John Doe and Company" or "John Doe and Partners" unless there are in fact, respectively, two or more other paralegals employed by John Doe in the paralegal firm or two or more partners of John Doe in the paralegal firm.~~

~~Letterheads and Signs~~

~~(5) The letterhead and the signs identifying the office of a paralegal firm may only include,~~

~~(a) the name of the paralegal firm;~~

~~(b) a list of paralegals who are partners or employees of the paralegal firm;~~

~~(c) the words "licensed paralegal" or "licensed paralegals", as the case may be;~~

~~(d) the words "notary" or "commissioner for oaths" or both, if applicable;~~

~~(e) the words "patent and trade mark agent" if applicable;~~

~~(f) the addresses, telephone numbers, office hours, and the languages in which the paralegal firm is competent and capable of conducting a practice;~~

~~(g) a logo; and~~

~~(h) advertising permitted under these Rules.~~

~~(6) A paralegal or paralegal firm may place, after the names on its letterhead, degrees from bona fide universities and postsecondary institutions including honorary degrees, professional~~

~~qualifications such as the designations of P. Eng., C.A. and M.D. and recognized civil and military decorations and awards.~~

VOLUNTARY SURRENDER OF PARALEGAL LICENCES UNDER BY-LAW 4

Motion

64. That Convocation approve the amendment of By-law 4 to provide that paralegals may voluntarily surrender their licences in the same manner as lawyers.

Background

65. By-law 4, Part III, provides that lawyers may voluntarily surrender their licences if they no longer wish to practise. (This is to be distinguished from situations where a lawyer loses his or her licence to practise for disciplinary reasons). Now that there are a substantial number of licensed paralegals, it is appropriate to extend these provisions to paralegals. Part III is attached at Appendix 13.

66. The necessary by-law wording will be developed once Convocation has approved the necessary policy change. This will include provisions requiring the return of the licence document and identification card.

Re-application

67. Where a lawyer has voluntarily surrendered an L1 licence, Part II of By-law 4, Section 9 provides that he or she may apply for a new licence without repeating all the educational requirements. Section 9 reads in part as follows:

> Exemption from examination requirement
> (2) An applicant is exempt from the requirement mentioned in paragraph 2 of subsection (1) if,
> (d) the applicant was previously licensed to practice law in Ontario as a barrister and solicitor

68. If the provisions on surrender of licence for paralegals are added, it will also be appropriate to add provisions for re-application. These would be added as an exception to the licence application requirements in sections 12 and 13, attached at Appendix 14.

69. It is also appropriate to prescribed forms for surrender of a licence, based on the existing form 4A, and for surrender of a certificate of authorization, based on the existing form 7A (for situations where paralegals have been practising in a professional corporation), and to add provisions governing the situation where a licensee has lost his or her licence documents. Copies of the current forms are at Appendix 15.

The Committee's Deliberations

70. The Committee considered the proposed changes and recommends them to Convocation.

Appendix 13

BY-LAW 4 [EXCERPT]

PART III

SURRENDER OF LICENCE

SURRENDER OF LICENCE TO PRACTISE LAW

Procedure for surrendering licence

23. (1) Subject to section 25, a licensee who wishes to surrender his or her licence to practise law in Ontario as a barrister and solicitor shall apply in writing to the Society to do so.

Statutory declaration or affidavit

(2) An application under subsection (1) shall be accompanied by a statutory declaration or, if the applicant is not a resident of Canada, an affidavit, setting forth,

(a) the applicant's age, the date on which the applicant was issued his or her licence to practise law in Ontario as a barrister and solicitor, the applicant's place of residence, the applicant's business address, if any, the number of years, if any, that the applicant has practised law in Ontario and the reasons why the applicant wishes to surrender his or her licence;

(b) that all money or property held in trust for which the applicant was responsible has been accounted for and paid over or distributed to the persons entitled thereto, or, alternatively, that the applicant has not been responsible for any money or property held in trust;

(c) that all clients' matters have been completed and disposed of or that arrangements have been made to the clients' satisfaction to have their papers returned to them or turned over to some other licensee licensed to practise law in Ontario as a barrister and solicitor, or, alternatively, that the applicant has not practised law in Ontario;

(d) that the applicant is not aware of any claim against him or her in his or her professional capacity, or in respect of his or her practice of law in Ontario; and

(e) such additional information or explanation as may be relevant by way of amplification of the foregoing.

Same

(3) An accountant's certificate to the effect that all money and property held in trust for which the applicant was responsible have been accounted for and paid over or distributed to the persons entitled thereto shall be attached, and marked as an exhibit, to the statutory declaration or affidavit required under subsection (2).

Publication of notice of intention to surrender licence

24. (1) Subject to subsection (2), a licensee who wishes to surrender his or her licence to practise law in Ontario as a barrister and solicitor shall, at least thirty days before the day on which he or she applies to the Society under subsection 23 (1), publish in the Ontario Reports a notice of intention to surrender a licence.

Exemption from requirement to publish notice

(2) Upon the written application of the licensee, the Society may exempt the licensee from the requirement to publish a notice of intention to surrender a licence.

Notice of Intention to Surrender Licence

(3) The notice of intention to surrender a licence which the licensee is required to publish under subsection (1) shall be in Form 4A [Notice of Intention to Surrender Licence].

Proof of publication of notice of intention to surrender licence

(4) Unless the licensee is exempted from the requirement to publish a notice of intention to surrender a licence, an application under subsection 23 (1) shall be accompanied by proof of publication, in accordance with subsection (1), of a notice of intention to surrender a licence.

Application by licensee's representative

25. (1) The Society may permit any person on behalf of the licensee to make an application under subsection 23 (1) if the Society is satisfied that the licensee for any reason is unable to make the application himself or herself.

Application of subss. 23 (2) and (3) and ss. 24, 26 and 27

(2) Subsections 23 (2) and (3) and sections 24, 26 and 27 apply, with necessary modifications, to an application made under subsection 23 (1) by a person on behalf of the licensee.

Society to consider application

26. (1) Subject to subsection (2), the Society shall consider every application made under subsection 23 (1) in respect of which the requirements set out in subsections 23 (2), 25 (3) and 24 (3) have been complied with, and the Society may consider an application made under subsection 23 (1) in respect of which the requirements set out in subsection 23 (2), 25 (3) and 24 (3) have not been complied with, and,

(a) the Society shall accept an application if it is satisfied,

(i) that all money or property held in trust for which the applicant was responsible have been accounted for and paid over or distributed to the persons entitled thereto, or, alternatively, that the applicant has not been responsible for any money or property held in trust,

(ii) that all clients' matters have been completed and disposed of or that arrangements have been made to the clients' satisfaction to have their papers returned to them or turned over to

some other licensee licensed to practise law in Ontario as a barrister and solicitor, or, alternatively, that the applicant has not practised law in Ontario,

(iii) that there are no claims against the applicant in his or her professional capacity or in respect of his or her practice of law in Ontario,
(iv) that the applicant has paid all insurance premium levies which he or she is required to pay and has filed all certificates, reports and other documents which he or she is required to file under any policy for indemnity for professional liability;

(v) that the applicant is no longer the subject of or has fully complied with all terms and conditions of any order made under Part II of the Act, any order made under Part II of the Act as it was before May 1, 2007, any order, other than an order cancelling membership, made under section 34 of the Act as that section read before February 1, 1999 and any order made under section 35 or 36 of the Act as those sections read before February 1, 1999; and

(vi) that the applicant if not exempted from the requirement to publish a notice of intention to surrender a licence has complied with subsection 2 (1); or

(b) subject to subsection (2), the Society shall reject an application if it is not satisfied of a matter mentioned in clause (a).

Acceptance of application

(2) The Society may accept an application if it is not satisfied of the matter mentioned in subclause (1) (a) (iv) or (v) but is satisfied of the matters mentioned in subclauses (1) (a) (i), (ii), (iii) and (vi).

Society not to consider application

(3) The Society shall not consider an application made under subsection 23 (1) of this By-Law if the applicant is,

(a) the subject of an audit, investigation, search or seizure by the Society; or

(b) a party to a proceeding under Part II of the Act.

Documents, explanations, releases, etc.

(4) For the purposes of assisting the Society to consider the application, the applicant shall,

(a) provide to the Society such documents and explanations as the Society may require; and

(b) provide to the insurer of the Society's insurance plan such releases, directions and consent as may be required to permit the insurer to make available to the Society information relating to the payment by the applicant of insurance premium levies and the filing by the applicant of any certificate, report or other document required under any policy for indemnity for professional liability.

Rejection of application

27. If the Society rejects an application under clause 26 (1) (b), the Society may specify terms and conditions to be complied with by the applicant as a condition of his or her application being accepted, and if the applicant complies with the terms and conditions to the satisfaction of the Society, the Society shall accept the application.

Appendix 14

BY-LAW 4 [EXCERPT] RE REQUIREMENTS FOR A P1 LICENCE

Requirements for issuance of Class P1 licence: application received after October 31, 2007 and prior to July 1, 2010

12. (1) The following are the requirements for the issuance of a Class P1 licence for an applicant who applies for the licence after October 31, 2007 and prior to July 1, 2010:

1. The applicant must have graduated, within the three years prior to the application, from a legal services program in Ontario that, at the time the applicant graduated, was approved by the Minister of Training, Colleges and Universities and that included,

i. 18 courses, the majority of which provided instruction on legal services that a licensee who holds a Class P1 licence is authorized to provide and one of which was a course on professional responsibility and ethics, and

ii. a field placement of at least 120 hours.

2. The applicant must have successfully completed the applicable licensing examination or examinations set by the Society.

Exemption from education requirement

(2) An applicant is exempt from the requirement mentioned in paragraph 1 of subsection (1) if, for an aggregate of at least 3 years, the applicant has exercised the powers and performed the duties of a justice of the peace in Ontario on a full-time basis.

Requirements for issuance of Class P1 licence: application received after June 30, 2010

13. (1) The following are the requirements for the issuance of a Class P1 licence for an applicant who applies for the licence after June 30, 2010:

1. The applicant must have graduated from a legal services program in Ontario that was, at the time the applicant graduated from the program, an accredited program.

2. The applicant must have successfully completed the applicable licensing examination or examinations set by the Society not more than three years prior to the application for licensing.

Exemption from education requirement

(2) An applicant is exempt from the requirement mentioned in paragraph 1 of subsection (1) if, for an aggregate of at least 3 years, the applicant has exercised the powers and performed the duties of a justice of the peace in Ontario on a full-time basis.

Appendix 15

Form 4A

Notice of Intention to Surrender Licence

(*Name of licensee applying to surrender his or her licence, in capital letters*)

Pursuant to section 28 of the Law Society Act and By-Law 4 made under subsection 62 (0.1) of the *Law Society Act*, the above named hereby gives notice of (*his/her*) intention to surrender (*his/her*) licence to practise law in Ontario as a barrister and solicitor.

The above named has practised law in Ontario at (*identify where the above named has practised law in Ontario*) (or has not practised law in Ontario since (*date*)) (or has never practised law in Ontario).

Dated at (*place*) (*Date*)

(*Full name of licensee applying to surrender his or her licence*)

Form 7A

Notice of Intention to Surrender a Certificate of Authorization

NOTICE OF INTENTION TO SURRENDER A CERTIFICATE OF AUTHORIZATION

(*Name of professional corporation applying for permission to surrender a certificate of authorization, in capital letters*)

Pursuant to section 10 of By-Law 7 made under paragraph 28.1 of subsection 62 (0.1) of the *Law Society Act*, the above named hereby gives notice of its intention to surrender its certificate of authorization.

The above named has carried on the practice of law at (*identify where the above named has carried on the practice of law*) (or has not carried on the practice of law since (*date*)) (or has never carried on the practice of law in Ontario).

Dated at (*place*) (*Date*)

(*Name of professional corporation*)

(*Signatures of all directors*)

FOR INFORMATION

AMENDMENTS TO BY-LAW 7 RESPECTING LAWYER AND PARALEGAL MDPs

71. The Committee considered and approved the amendments to By-law 7 being proposed by the Professional Regulation Committee governing lawyer and paralegal MDP's.

COMPENSATION FUND LEVY FOR 2009

72. The issue of an appropriate Compensation Fund levy for paralegals for 2009 was discussed at the recent meeting of the Compensation Fund Committee. The Compensation Fund Committee was of the view that, since there have as yet not been any paralegal claims, and the levy was established quite recently, that the levy should remain at the current level of $145 for 2009.

RULES ON CLIENT IDENTIFICATION AND VERIFICATION IN BY-LAW 7.1

73. The Committee considered and approved the amendments to By-law 7.1 being proposed by the Professional Regulation Committee governing the rules on client identification and verification.

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

(1) Copy of the Paralegal Guidelines.

(Appendix 1, pages 9 – 58)

(2) Copy of the materials from Wolfgang Zimmerman, Executive Director of the Canadian Society of Professionals in Disability Management.

(Appendix 2, pages 61 – 69)

(3) Copy of the draft Paralegal Annual Report.

(Appendix 8, pages 92 – 102)

Re: Paralegal Professional Conduct Guidelines

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation authorize the Paralegal Standing Committee to approve and publish *Paralegal Professional Conduct Guidelines* and to amend them as required.

Carried

It was moved by Mr. Banack, seconded by Ms. Ross, that the words "and to amend them as required" be deleted from the motion.

Lost

Re: Exemption – Application of Canadian Society of Professionals in Disability Management

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve an exemption for members of the Canadian Society of Professionals in Disability Management who are Certified Disability Management Professionals (CDMP) or Certified Return to Work Coordinators (CRTWC).

An amendment to the motion was accepted by adding the words "from licensing" after the word "exemption".

Carried

Re: Exemption – Trade Union Representatives in Small Claims Court

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve an exemption for trade union representatives appearing in Small Claims Court to enforce benefits payable under a collective agreement.

An amendment to the motion was accepted by adding the words "from licensing" after the word "exemption".

Carried

Re: Proposed Amendments to By-Law 11 Re: Practice Reviews for Paralegals

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve the amendment to By-Law 11 respecting practice reviews for paralegals attached at Appendix 5.

Carried

Re: By-Law 8 - Reporting Requirements for Paralegals (the 'PAR')

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve the amendment to By-Law 8 respecting annual reporting requirements for paralegals, attached at Appendix 7.

Carried

Re: Proposed Amendments to the *Paralegal Rules of Conduct*

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve the amendments to the *Paralegal Rules of Conduct* shown in the Chart at Appendix 9.

Carried

Re: Proposed Amendments to Rule 8 Governing Advertising and Marketing

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve the amendments to the *Paralegal Rules of Conduct* shown at Appendix 10.

Carried

Re: By-Law 4 – Voluntary Surrender of Licence

It was moved by Mr. Dray, seconded by Ms. McGrath, that Convocation approve the amendment of By-Law 4 to provide that paralegals may voluntarily surrender their licences in the same manner as lawyers.

Carried

Items for Information

- By-Law 7 Amendments Regarding Multi-Discipline Practices
- Paralegal Compensation Fund Levy for 2009
- By-Law 7.1 Provisions on Client Identification and Verification

PROFESSIONAL REGULATION COMMITTEE REPORT

Ms. Rothstein presented the Report.

Report to Convocation
October 30, 2008*

Professional Regulation Committee

Committee Members
Linda Rothstein (Chair)
Julian Porter (Vice-Chair)
Bonnie Tough (Vice-Chair)
Bob Aaron
Melanie Aitken
Christopher Bredt
John Campion
Patrick Furlong
Gary Lloyd Gottlieb
Glenn Hainey
Brian Lawrie
Ross Murray
Sydney Robins
Baljit Sikand
Roger Yachetti

Purpose of Report: Decision

Prepared by the Policy Secretariat
(Jim Varro – 416-947-3434)

*Includes items deferred from September 25, 2008 Convocation

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COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on October 8, 2008. In attendance were Linda Rothstein (Chair), Julian Porter (Vice-Chair), Bob Aaron, Christopher Bredt, Patrick Furlong, Gary Gottlieb, Glenn Hainey, Brian Lawrie, Ross Murray and Sydney Robins. Staff attending were Cathy Braid, Naomi Bussin, Caterina Galati, Malcolm Heins, Terry Knott, Janice LaForme, Zeynep Onen, Elliot Spears, Arwen Tillman, Sybila Valdivieso and Jim Varro.

AMENDMENTS TO BY-LAW 7.1

Motion

2. That By-Law 7.1 (Operational Obligations and Responsibilities) be amended as set out in the motion at Appendix 1.

Introduction

3. On April 24, 2008, Convocation amended By-Law 7.1, Part III to add requirements for lawyers and paralegals to identify and verify the identity of their clients. These provisions are based on a Model Rule adopted by the Federation of Law Societies of Canada on this subject. The Part III amendments come into force on October 31, 2008.

4. Since April 2008, the Law Society has been publishing material about the new requirements to inform the professions. This includes extensive information on the Law Society's website, notices in the *Ontario Reports* and the Law Society's E-Bulletin and an article in the *Ontario Lawyers Gazette*.[1] The Law Society has also been liaising with other law societies in Canada which are implementing the new requirements before the end of 2008.

[1] The information includes a Backgrounder on the development of the By-Law amendments, links to the April 2008 Professional Regulation Committee report to Convocation, a series of frequently asked questions and answers on the By-law's requirements, a document outlining steps for compliance with the By-Law, and suggested forms for licensees' use in identifying and verifying clients. This information can be accessed at http://www.lsuc.on.ca/latest-news/a/hottopics/new-client-identification-and-verification-requirements/

5. In preparing for the new requirements and having reviewed the By-Law and the Law Society's material, lawyers have provided feedback to the Society and raised some questions about the requirements.[2] The Society has also received information from other law societies on their implementation experiences, through which other issues have been identified.

6. Some of the issues will be dealt with through additions to explanatory information about the By-Law. However, some of the issues have prompted the need for amendments to the By-Law. The proposal is that Convocation approve these amendments, discussed in this report, in advance of the coming into force date of the Part III provisions.

7. This report outlines the proposed amendments (chronologically in the By-Law) and the reasons they should be made. Appendix 1 is the motion to amend the By-Law. Appendix 2 is a redline version of the relevant sections of Part III showing the amendments.

Amendment # 1 – Amend s. 20 to add a definition for "lawyer", to facilitate an amendment to s. 22(2) and (3) to add the words "or a lawyer" after "another licensee" where those words appear

8. "Licensee" for the purposes of By-Law 7.1 currently refers only to lawyers and paralegals in Ontario.

9. A number of the Canadian law societies in implementing the equivalent of By-Law 7.1 have defined "lawyer" to mean a lawyer in any province or territory in Canada. This has been done for the following reasons:

   a. A lawyer referred to in s. 22(2)(b) (or the equivalent section in other law societies' rules or regulations) would include, for example, a lawyer in Calgary who has complied with the identification and verification requirements and is referring a client to a lawyer in Ottawa. The By-Law provides that when that identification has been done, the Ottawa lawyer need not repeat it;
   b. A lawyer referred to in s. 22(2)(c) would include, for example, a lawyer in Winnipeg who has complied with the identification and verification requirements engaging as agent a Toronto lawyer for a client's matter. The By-Law provides that the Toronto lawyer need not also identify and verify the identity of the client; and
   c. Lawyers referred to in s. 22(3) would include lawyers in another province or territory from whom trust funds are received or to whom funds are paid in trust. Such funds transactions do not require that the Ontario licensee verify the identity of the client.

10. The amendment would permit the addition of the words "a lawyer" in s. 22(2) and (3), as noted above, where reference is made to "another licensee".

[2] This included feedback obtained through a meeting with representatives of 13 large Toronto firms who requested an opportunity to discuss with the Law Society some issues about the new provisions. This group, with the Committee's approval, is also acting as an informal consultative group to the Committee on the client identification and verification issues.

11. A number of lawyers have raised this issue with the Law Society. In the Committee's view, the amendment is appropriate, and is in keeping with the goal of having a uniform standard in Canada, including reciprocal provisions where warranted, for client identification and verification.

Amendment #2 - Amend s. 20 in the definition of "public body" in (d) to add the word "authority" after "hospital"

12. The definition of "public body" mirrors that in federal regulations on client identification and verification.[3] Through an oversight, the word "authority", which appears in the federal regulations, was not included in the Law Society's definition.

Amendment #3 – Amend s. 20 to add a definition for "securities dealer"

13. The term "securities dealer" is mentioned in s. 23(2)1. and is based on the Federation of Law Societies' Model Rule's provision. In the By-Law, with respect to verification of the identity of organizational clients, licensees are not required to ascertain the names and occupations of directors of a securities dealer.

14. This provision in the Model Rule was a late addition to the drafting and is similar to a provision that appears in the federal regulations. A definition of "securities dealer" is included in the federal regulations and the Committee is proposing that a similar definition be adopted for the purposes of the By-Law.

Amendment #4 - Amend s. 22(3) to clarify that a licensee is not required to comply with the requirements in s. 23(2) when a funds transaction, which is the event that requires verification of a client, is one that falls within the exemptions in s. 22(3)

15. Section 23(2) requires a licensee to obtain certain information about shareholders, directors and owners of organizational clients when the licensee is engaged in fund transactions (s. 22(1)(b)). The receipt, payment or transfer of funds, unless exempt, precipitates the identity verification requirements in the By-Law.

16. Some lawyers asked if the requirements of s. 23(2) had to be met if the s. 22(3) exemptions applied. The answer is no, although the opening words of s. 22(3) do not make this clear, as they reference compliance with the verification requirements only in s. 23(4). However, if the funds transaction is exempt, the verification requirements to not apply, and the additional information required in s. 23(2) is not required, because that requirement is linked to a funds transaction. If the funds transaction is exempt, these requirements do not apply.

17. The By-Law should be amended to make this clearer.

Amendment #5 - Amend s. 22(3)(a) through (c) as described in the three following paragraphs:

[3] While federal regulations have been adopted applicable to the legal profession, as a result of an injunction obtained in the legal profession's constitutional challenge to the money laundering legislation, they do not currently apply.

a. extend the exemption in paragraph (a) with respect to verification requirements for public bodies or a company that is not a private company to a subsidiary of a public body or company that is not a private company, the financial statements of which are consolidated with the financial statements of that public body or company.

18. Information from large law firms which have reviewed the requirements is that this amendment would be appropriate and would ease the burden of compliance without compromising the integrity of the regulation. The firms also correctly pointed out that this exemption is included in the federal regulations with respect to receiving funds[4] .

19. In the Committee's view, it would be appropriate to make this amendment and apply it to both the receipt and payment of funds respecting these organizations.

b. amend s. 22(3)(c) to delete the words "a client that is" appearing after "paid to".

20. Paragraph (c) exempts a licensee from verifying the identity of a client when the funds are paid to a client that is a public company. The words "a client that is" were included in this exemption in the Model Rule, and thus in the By-Law. The thinking at the time was that the narrower approach for the payment of funds, where the public company was a client, and not any public company, was more appropriate. On reflection, and in consultation with the Federation, it was determined that these words need not be included.

c. Amend s. 22(3)(g), (h) and (i) to have both the payment and receipt of funds apply to these exemptions.

21. Paragraph (i) exempts funds transactions that involve professional fees, disbursements, expenses or bail. The exemption as currently drafted only refers to "received". The exemption is similar to an exemption in the federal regulations, as follows:

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[4] Section 62(2) of the federal regulations provides as follows:

...

(2) Sections 14, 14.1, 19, 20.1 and 23, subsection 33.2(1), section 33.4, subsections 36(1), 39(1) and 39.7(1), sections 43, 49, 54, 54.1, 54.2, 55, 56, 56.1, 57, 57.1 and 59.1, subsection 59.2(1) and sections 59.3, 59.4 [this section includes the requirements for lawyers to identify and verify identity of clients], 59.5, 60 and 61 do not apply in respect of

…

(m) instances where the entity in respect of which a record is otherwise required to be kept is a public body, or a corporation that has minimum net assets of $75 million on its last audited balance sheet and whose shares are traded on a Canadian stock exchange or a stock exchange designated under subsection 262(1) of the *Income Tax Act*, and operates in a country that is a member of the Financial Action Task Force;

(n) instances where the entity in respect of which a record is otherwise required to be kept is a subsidiary of a public body or a corporation referred to in paragraph (m) and the financial statements of the entity are consolidated with the financial statements of that public body or corporation;…

33.3(1) Subject to subsection (2), every legal counsel and every legal firm is subject to Part 1 of the Act[5] when they engage in any of the following activities on behalf of any person or entity:

(a) *receiving or paying* funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail;

(emphasis added)

22. Likely through an oversight, the Federation's Model Rule, and thus By-Law 7.1, did not include language that would also exempt the *payment* of such funds. It is appropriate that the exemption cover such funds paid and received.

23. The Committee also determined that both the payment and receipt of funds should apply to exemptions for funds related to a court order (paragraph (g)) and settlements in a proceeding (paragraph (h)).

Amendment #6 - Amend s. 23(5) and (8) to clarify that the individual mentioned in these subsections includes the individual described in paragraph 23(1)7 (the instructing individual for an organizational client)

24. Subsection 23(5) requires a licensee to verify the identity of an individual at the outset of a retainer that involves a funds transaction. This includes an individual who is the instructing individual for an organizational client, described in paragraph 23(1)7.

25. Some law firms who contacted the Law Society said that this was not clear enough in the By-Law, and some firms thought that the individual to whom subsection 23(5) applied was only an individual client. In the Committee's view, a clarifying amendment is appropriate.

26. Subsection 23(8) requires a licensee to follow a particular process for identification and verification of identity when the individual instructing the licensee is not present before the licensee. Some law firms said it is not clear enough that this individual includes not only an individual client but also the instructing individual for the organizational client, mentioned in paragraph 23(1)7. In the Committee's view, a clarifying amendment is appropriate.

APPENDIX 1

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

BY-LAW 7.1
[OPERATIONAL OBLIGATIONS AND RESPONSIBILITIES]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 30, 2008

[5] Part I of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* includes s. 6.1 which requires reporting entities to verify the identity of a person or entity in accordance with the regulations.

MOVED BY

SECONDED BY

THAT By-Law 7.1 [Operational Obligations and Responsibilities], made by Convocation on October 25, 2007 and amended on November 22, 2007, January 24, 2008, April 24, 2008 and June 26, 2008 be further amended as follows:

1. Section 20 of By-Law 7.1 is amended by adding the following definitions:

"lawyer" means an individual who is authorized to practise law in a province or territory of Canada outside Ontario;

"securities dealer" means a person authorized under an Act of a province or territory of Canada to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services.

2. The definition of "public body" in section 20 of the By-Law is amended by deleting "public hospital" and substituting "public hospital authority".

3. Subsection 22 (2) of the By-Law is amended by adding "or a lawyer" after "another licensee" whenever it occurs.

4. Subsection 22 (3) of the By-Law is deleted and the following substituted:

Exemptions re certain funds

(3) A licensee is not required to comply with the client identification requirements set out in subsection 23 (2) or the client verification requirements set out in subsection 23 (4) in respect of funds,

(a) paid to or received from a financial institution, public body, company that is not a private company or subsidiary of a public body or company that is not a private company where the financial statements of the subsidiary are consolidated with the financial statements of the public body or company;

(b) paid to another licensee or a lawyer in trust, on the direction of a client;

(c) received from the trust account of another licensee or a lawyer;

(d) received from a peace officer, law enforcement agency or other public official acting in an official capacity;

(e) paid or received pursuant to a court order;

(f) paid to pay a fine or penalty;

(g) paid or received as a settlement in legal or administrative proceedings; or

(h) paid or received for professional fees, disbursements, expenses or bail.

5. Subsection 23 (5) of the By-Law is deleted and the following substituted:

Timing of verification, individuals

(5) A licensee shall verify the identity of an individual mentioned in subsection (1), including an individual mentioned in paragraph 7, immediately after first engaging in the activities described in clause 22 (1) (b).

6. Subsection 23 (8) of the By-Law is deleted and the following substituted:

Client verification, non-face-to-face

(8) When a licensee is engaged in the activities described in clause 22 (1) (b) and the licensee is not receiving instructions from an individual face-to-face, the licensee complies with the verification requirements set out in subsection (4) if the licensee obtains an attestation from a person described in subsection (9) that the person has seen the appropriate independent source documents.

APPENDIX 2

BY-LAW 7.1
Made: October 25, 2007
Amended: November 22, 2007
January 24, 2008
April 24, 2008
June 26, 2008

OPERATIONAL OBLIGATIONS AND RESPONSIBILITIES
PART III
CLIENT IDENTIFICATION AND VERIFICATION

Definitions

20. In this Part,

"financial institution" means,

(a) a bank to which the *Bank Act* (Canada) applies,

(b) an authorized foreign bank within the meaning of section 2 of the *Bank Act* (Canada) in respect of its business in Canada,

(c) a cooperative credit society, savings and credit union, credit union or caisse populaire that is regulated by an Act of a province or territory of Canada,

(d) an association that is regulated by the *Cooperative Credit Associations Act* (Canada),

(e) a company to which the *Trust and Loan Companies Act* (Canada) applies,

(f) a loan or trust corporation regulated by an Act of a province or territory of Canada, or

(g) a ministry, department or agent of the government of Canada or of a province or territory of Canada if the ministry, department or agent accepts deposit liabilities in the course of providing financial services to the public;

"funds" means cash, currency, securities, negotiable instruments and other financial instruments that indicate a person's title or interest in them;

"lawyer" means an individual who is authorized to practise law in a province or territory of Canada outside Ontario;

"organization" means a body corporate, partnership, fund, trust, co-operative or an unincorporated association;

"private company" means a company the constating documents of which,

(a) restrict the right to transfer shares,

(b) limit the number of its shareholders, exclusive of persons who are in the employ of the company, to 50, two or more persons holding one or more shares jointly being counted as a single shareholder, and

(c) prohibit any invitation to the public to subscribe for its shares or securities;

"public body" means,

(a) a ministry, department or agent of the government of Canada or of a province or territory of Canada,

(b) a municipality incorporated by or under an Act of a province or territory of Canada and includes a city, town, village, metropolitan or regional municipality, township, district, county, rural municipality or other incorporated municipal body or an agent of any of them, or

(c) a local board of a municipality incorporated by or under an Act of a province or territory of Canada including any local board as defined in the *Municipal Act* (Ontario) or similar body incorporated under the law of another province or territory,

(d) an organization that operates a public hospital authority and that is designated by the Minister of National Revenue as a hospital under the *Excise Tax Act* (Canada) or an agent of the organization,

(e) a body incorporated by or under an Act of a province or territory of Canada for a public purpose.

"securities dealer" means a person authorized under an Act of a province or territory of Canada to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services.

Application of Part

21. This Part applies only to matters in respect of which a licensee is retained to provide her or his professional services after this Part comes into force regardless of whether the client is a new or existing client.

Application of client identification and verification requirements

22. (1) Subject to subsections (2) and (3), a licensee shall,

(a) when the licensee is retained to provide her or his professional services to a client, comply with the client identification requirements set out in subsection 23 (1); and

(b) when the licensee engages in or gives instructions in respect of the receiving, paying or transferring of funds,

(i) comply with the client identification requirements set out in subsection 23 (2), and

(ii) comply with the verification requirements set out in subsection 23 (4).

Exemption re certain licensees

(2) A licensee is not required to comply with the client identification and verification requirements set out in section 23 if,

(a) the licensee is engaged in the activities described in subsection (1) on behalf of her or his employer;

(b) the licensee is engaged in the activities described in subsection (1) as agent for another licensee or a lawyer who has already complied with the client identification and verification requirements set out in section 23; or

(c) the licensee is engaged in the activities described in subsection (1) for a client referred to the licensee by another licensee or a lawyer who has already complied with the client identification and verification requirements set out in section 23.

Exemptions re certain funds

(3) A licensee is not required to comply with the client identification requirements set out in subsection 23(2) or the client verification requirements set out in subsection 23 (4) in respect of funds,

(a) paid to or received from a financial institution, public body or company that is not a private company or a subsidiary of a public body or a company that is not a private company where the financial statements of the subsidiary are consolidated with the financial statements of the public body or company;

~~(b) paid to a financial institution or public body;~~

~~(c) paid to a client that is a company that is not a private;~~

(b) ~~(d)~~ paid to another licensee or a lawyer in trust, on the direction of a client;

(c) ~~(e)~~ received from the trust account of another licensee or a lawyer;

(d) ~~(f)~~ received from a peace officer, law enforcement agency or other public official acting in their official capacity;

(e) ~~(g)~~ paid or received pursuant to a court order or to pay a fine or penalty;

(f) paid to pay a fine or penalty;

(g) ~~(h)~~ paid or received as a settlement in any legal or administrative proceedings; or

(h) ~~(i)~~ paid or received for professional fees, disbursements, expenses or bail.

Client identification

23. (l) When a licensee is retained to provide her or his professional services to a client, the licensee shall obtain the following information about the client:

1. The client's full name.

2. The client's business address and business telephone number, if applicable.

3. If the client is an individual, the client's home address and home telephone number.

4. If the client is an organization, the organization's incorporation or business identification number and the place of issue of its incorporation or business identification number, if applicable.

5. If the client is an individual, the client's occupation or occupations.

6. If the client is an organization, other than a financial institution, public body or company that is not a private company, the general nature of the type of business or businesses or activity or activities engaged in by the client, where applicable.

7. If the client is an organization, the name, position and contact information for those individuals authorized to give instructions with respect to the matter for which the licensee is retained.

8. If the client is acting for or representing a third party beneficiary or a principal, information about the beneficiary or principal as set out in paragraphs 1 to 7, as applicable.

Same

(2) When a licensee is engaged in the activities described in clause 22 (1) (b) and the client is an organization, in addition to complying with the client identification requirements set out in subsection (1), the licensee shall make reasonable efforts to obtain the following information about the client:

1. The name and occupation or occupations of each director of the organization, other than an organization that is a securities dealer.

2. The name, address and occupation or occupations of each person who owns twenty-five percent or more of the organization or of the shares of the organization.

Same, previous identification

(3) A licensee complies with the identification requirements set out in subsection (2) if the licensee has previously complied with the identification requirements and has also previously complied with the verification requirements set out in subsection (4) in respect of the organization.

Client verification requirements

(4) When a licensee is engaged in the activities described in clause 22 (1) (b), the licensee shall take reasonable steps to verify the identity of the client and, where appropriate, the third party beneficiary or principal, using what the licensee reasonably considers to be reliable, independent source documents, data or information.

Timing of verification, individuals

(5) A licensee shall verify the identity of an individual mentioned in subsection (1), including an individual mentioned in paragraph 7, immediately after first engaging in the activities described in clause 22 (1) (b).

Timing of verification, organizations

(6) A licensee shall verify the identity of an organization mentioned in subsection (1) by not later than 60 days after first engaging in the activities described in clause 22 (1) (b).

Examples of independent source documents

(7) The following are examples of independent source documents for the purposes of subsection (4):

1. If the client or third party beneficiary or principal is an individual, an original government issued identification that is valid and has not expired, including a driver's licence, birth certificate, provincial or territorial health card (if such use of the card is not prohibited by the applicable provincial or territorial law), passport or similar record.

2. If the client or third party beneficiary or principal is an organization such as a corporation or society that is created pursuant to legislative authority, a written confirmation from a government registry as to the existence, name and address of the organization, including the names of its directors and officers, such as,

i. a certificate of corporate status issued by a public body,

ii. a copy obtained from a public body of a record that the organization is required to file annually under applicable legislation, or

iii. a copy of a similar record obtained from a public body that confirms the organization's existence.

3. If the client or third party beneficiary or principal is an organization other than a corporation or society, such as a trust or partnership which is not registered in any government registry, a copy of the organization's constating documents, such as a trust or partnership agreement, articles of association or any other similar record that confirms its existence as an organization.

Client verification, non-face-to-face

(8) When a licensee is engaged in the activities described in clause 22 (1) (b) and the licensee is not receiving instructions from an individual face-to-face, ~~When a licensee is engaged in the activities described in clause 22 (1)(b) and the client is an individual who is not instructing the licensee face-to-face~~, the licensee complies with the verification requirements set out in subsection (4) if the licensee obtains an attestation from a person described in subsection (9) that the person has seen the appropriate independent source documents.

…

PROPOSED AMENDMENTS TO RULE 6.03 OF THE *RULES OF PROFESSIONAL CONDUCT*

Motion

27. That Convocation approve the proposed amendments to rule 6.03(9)(b) and its commentary, set out in this report at paragraphs 47 and 50 respectively, for publication to obtain input from the professions prior to Convocation's consideration of the proposed amendments.

Introduction and Background

28. 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) when dealing with organizational clients opposed in interest to the lawyers' clients.

29. The current rule (with emphasis added) and commentary read:

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.

30. A companion rule deals with communications with a represented person (rule 6.03(7)):

Communications with a represented person

(7) Subject to subrule (8), if a person is represented by a licensee in respect of a matter, a lawyer shall not, except through or with the consent of the licensee,

(a) approach or communicate or deal with the person on the matter, or
(b) attempt to negotiate or compromise the matter directly with the person.

…

Commentary
Subrule (7) applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a licensee concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This subrule does not prevent parties to a matter from communicating directly with each other.
The prohibition on communications with a represented person applies only where the lawyer knows that the person 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 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 the other licensee by closing his or her eyes to the obvious.

31. Among the concerns expressed about the rule at Convocation on November 22, 2007, and referred on to the Committee, 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)9b) 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.

32. Because of these concerns, the Committee undertook a review of the rule to determine if the concerns could be addressed.

Background to Development of the Rule

33. The Committee reviewed material on the development of the rule, the first draft of which appeared in 1999 as a result of the work of the Task Force on Review of the *Rules of Professional Conduct* ("the Task Force").

34. The first draft of then rule 4.03(3) and commentary was prepared in January 1999. It read as follows:

4.03 INTERVIEWING WITNESSES

Interviewing Witnesses

4.03 …
(3) 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.

35. The Task Force was guided by an excerpt from Charles M. 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.

36. This draft rule remained in the form appearing in paragraph 34 (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;

37. In commenting on the draft rule at Convocation, Gavin MacKenzie, the Task Force's co-chair, 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.

38. In response to a request for comments on the proposed Rules before they were adopted, the Task Force received specific 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.[6] At present, opposing counsel may

[6] 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."

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.

39. 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).

40. 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?

41. The draft that was eventually adopted at Convocation in June 2000 read as follows:

(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.

42. 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. Convocation adopted these changes.

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.

43. Through these developments, the rule evolved into the form appearing at paragraph 29.

Considerations Supporting Change

44. The Committee acknowledged the concerns expressed by benchers about the rule. The Committee focused on the prohibition in the rule on a lawyer 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.

45. The Committee felt that this was a significant contraction of a lawyer's access to witnesses. The Committee also learned through research conducted on other law societies' regulatory provisions that this prohibition was contrary to existing practice in other jurisdictions.

46. The Committee agreed that this should not be included in this rule. It felt that the Wolfram excerpt, noted earlier, stated the appropriate principles and that this should guide revisions to the rule.

Proposed Amendments

47. The Committee is proposing the following as a redrafted rule:

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

(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 licensee representing the corporation or organization consents or unless otherwise authorized or required by law.

48. The Committee believes that the draft addresses the concerns expressed at Convocation, as it

a. limits the prohibition on contact to individuals who have fiduciary responsibilities and control with respect to the organization, who are responsible for implementing the advice of the corporation's lawyer or whose interests are directly affected in the matter, and
b. would permit a lawyer to contact a corporate employee, whose position, in the words of Wolfram, "in a matter is only that of a holder of factual information [and who] should be freely accessible to either lawyer".

49. The Committee believes that the changes to the rule appear to be more in line with the initial purpose of the rule.

50. 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 amended commentary would 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 the Professions

51. The Committee is of the view that input from the professions should be sought on the proposed rule amendments. As noted earlier in this report, during the formation of the rule and within the first year after its adoption 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 believes that Convocation will benefit from having the views of the professions before Convocation discusses whether to adopt the amendments.

52. This type of review was anticipated at Convocation in November 2007, when the Committee's chair at that time, Clayton Ruby, in responding to the Treasurer's comment about the submissions made by the profession in formulating the rule, said:

> I should not be surprised if once we formulated a view in the material, we send it out to other interested organization for opinions and consultation before coming back here. I don't think we want to rush through this.

53. The Committee proposes that a notice be published as soon as possible in the *Ontario Reports* and on the Law Society's website, and be included in any other appropriate electronic or print media, including the *Ontario Lawyer's Gazette* if timing permits, that are distributed to the professions. The Committee suggests that a period of approximately six weeks from the date the notice first appears in the *Ontario Reports* be allowed for responses. The Committee also suggests that at least two legal organizations, the Advocates Society and the Ontario Trial Lawyers' Association, be asked to provide input.

AMENDMENTS TO BY-LAW 7

Motion

54. That Convocation amend By-Law 7 (Business Entities) as follows:

1. Subsection 15 (3) of the By-Law is deleted.

2. Sections 16 and 17 of the By-Law are deleted and the following substituted:

Prohibition against providing services of non-licensee

16. A licensee shall not, in connection with the licensee's practice of law or provision of legal services, provide to a client the services of a person who is not a licensee except in accordance with this Part.

Permitted provision of services of non-licensee

17. A licensee may, in connection with the licensee's practice of law or provision of legal services, provide to a client the services of a person who is not a licensee who practises a profession, trade or occupation that supports or supplements the practice of law or the provision of legal services.

3. Paragraph 1 of subsection 18 (2) of the By-Law is amended by deleting "if other than a licensee who holds a Class P1 licence".

Introduction and Background

55. By-Law 7 permits lawyers and paralegals to form multi-discipline partnerships or practices (MDPs). The relevant part of By-Law 7, Part III, appears at Appendix 3.

56. Currently, under s. 17(1), lawyers may partner with paralegals and non-licensee professionals to provide their respective services to clients. The MDP in such a case remains a law practice. Under s. 17(2), paralegals may partner with non-licensee professionals to provide their respective services to clients. In these cases, the MDP remains a practice of legal services.

57. Paragraph 2 of subsection 18(2) of the By-Law provides that where a licensee and a professional, which includes a paralegal through s. 15(3), enter into a partnership, the lawyer must, among other things, maintain "effective control" over the professional's practice of his or her profession. This means that paralegals in such practices are treated as any non-lawyer service provider in an MDP for the purpose of control.

58. At the request of a working group of Law Society staff examining business structures as a result of paralegal regulation, the Committee reviewed this issue. The Committee noted that the scheme for professional corporations contrasts with that for MDPs on the regulation of control. Where a lawyer and a paralegal establish a professional corporation together under the Law Society Act and the By-Laws, neither the Act nor By-laws require that a lawyer control the professional corporation.

59. The Committee saw no reason to differentiate between the two business structures on the issue of regulating the control by lawyers of the paralegal's services. Both lawyers and paralegals are regulated by the Law Society, and the Committee could not determine a reason for paralegals in MDPs of lawyers and paralegals to be subject to the "effective control" of lawyers.

The Proposal

60. The Committee is recommending that the MDP provisions in the By-Law be amended so that lawyers not control the provision of legal services of paralegals in a partnership of lawyers and paralegals for the delivery of their respective legal services. The amendments will effectively mean that such partnerships (and practices) will be outside the MDP structure. The amended By-Law would simply refer to licensees (lawyers or paralegals) partnering or practising with non-licensee professionals.

61. This recommendation is endorsed unanimously by the Paralegal Standing Committee, which reviewed this matter on September 11, 2008.

62. This does not mean that the issue of control within a partnership that includes lawyers and paralegals need not be addressed within the practice. It is expected that the partners would determine, for example, how control of the paralegals' services is exercised within a practice of law, subject to the obligations under the *Rules of Professional Conduct* and the By-laws. The appropriate way to provide guidance to the professions on this issue, which may involve additional regulation with respect to this business structure, is the subject of continuing discussion.

63. Amending language for By-Law 7 is found at the motion at paragraph 54. The relevant sections of the By-Law with amendments shown are as follows:

PART III

MULTI-DISCIPLINE PRACTICES

Interpretation

15. (1) In this Part,

"licensee" includes a partnership of licensees who each hold the same class of licence;

"professional" means an individual whose services a licensee may, under section 17, provide to a client in connection with the licensee's practice of law or provision of legal services.

Application of certain sections

(2) Subsection 18 (2) and sections 19, 20, 25, 26, 29 and 30 do not apply in respect of a partnership or an association that is not a corporation entered into by,

(a) a licensee who holds, or a partnership of licensees who each hold, a Class L1 licence with an individual who is authorized to practise law in any province or territory of Canada outside Ontario; or

(b) a licensee who holds, or a partnership of licensees who each hold, a Class P1 licence with an individual who is authorized to provide legal services in any province or territory of Canada outside Ontario.

~~Interpretation: practice of a profession, *etc.*~~

~~(3) For the purposes of paragraphs 2 to 6 of subsection 18 (2), subsection 18 (3), section 19 and subsection 26 (1), the practice of a profession, trade or occupation includes the provision of legal services.~~

Prohibition against providing services of non-licensee

16. A licensee shall not, in connection with the licensee's practice of law or provision of legal services, provide to a client the services of a person who is not a licensee except in accordance with this Part.

~~16. (1) A licensee who holds a Class L1 licence shall not, in connection with the licensee's practice of law, provide to a client the services of a person who does not hold a Class L1 licence except in accordance with this Part.~~

~~Same~~

~~(2) A licensee who holds a Class P1 licence shall not, in connection with the licensee's provision of legal services, provide to a client the services of a person who does not hold a Class P1 licence except in accordance with this Part.~~

Permitted provision of services of non-licensee

17. A licensee may, in connection with the licensee's practice of law or provision of legal services, provide to a client the services of a person who is not a licensee who practises a profession, trade or occupation that supports or supplements the practice of law or the provision of legal services.

~~17. (1) A licensee who holds a Class L1 licence may, in connection with the licensee's practice of law, provide to a client only,~~

~~(a) the legal services of a licensee who holds a Class P1 licence; or~~

~~(b) the services of an individual who is not a licensee who practises a profession, trade or occupation that supports or supplements the practice of law.~~

~~Same~~

~~(2) A licensee who holds a Class P1 licence may, in connection with the licensee's provision of legal services, provide to a client only the services of an individual who is not a licensee who practises a profession, trade or occupation other than the practice of law that supports or supplements the provision of legal services.~~

Partnership, *etc*. with professional

18. (1) Subject to subsection (2) and subsection 20 (1), a licensee may enter into a partnership or association that is not a corporation with a professional for the purpose of permitting the licensee to provide to clients the services of the professional.

Same

(2) A licensee shall not enter into a partnership or an association that is not a corporation with a professional unless the following conditions are satisfied:

1. The professional, ~~if other than a licensee who holds a Class P1 licence,~~

   i. is qualified to practise a profession, trade or occupation that supports or supplements the practice of law or the provision of legal services, and

   ii. in the case of entering into a partnership with the professional, is of good character.

…

APPENDIX 3

BY-LAW 7
BUSINESS ENTITIES

PART III
MULTI-DISCIPLINE PRACTICES

Interpretation
15. (1) In this Part,

"licensee" includes a partnership of licensees who each hold the same class of licence;

"professional" means an individual whose services a licensee may, under section 17, provide to a client in connection with the licensee's practice of law or provision of legal services.

Application of certain sections

(2) Subsection 18 (2) and sections 19, 20, 25, 26, 29 and 30 do not apply in respect of a partnership or an association that is not a corporation entered into by,

   (a) a licensee who holds, or a partnership of licensees who each hold, a Class L1

licence with an individual who is authorized to practise law in any province or territory of Canada outside Ontario; or

(b) a licensee who holds, or a partnership of licensees who each hold, a Class P1 licence with an individual who is authorized to provide legal services in any province or territory of Canada outside Ontario.

Interpretation: practice of a profession, *etc*.

(3) For the purposes of paragraphs 2 to 6 of subsection 18 (2), subsection 18 (3), section 19 and subsection 26 (1), the practice of a profession, trade or occupation includes the provision of legal services.

Prohibition against providing services of non-licensee

16. (1) A licensee who holds a Class L1 licence shall not, in connection with the licensee's practice of law, provide to a client the services of a person who does not hold a Class L1 licence except in accordance with this Part.

Same

(2) A licensee who holds a Class P1 licence shall not, in connection with the licensee's provision of legal services, provide to a client the services of a person who does not hold a Class P1 licence except in accordance with this Part.

Permitted provision of services of non-licensee

17. (1) A licensee who holds a Class L1 licence may, in connection with the licensee's practice of law, provide to a client only,

(a) the legal services of a licensee who holds a Class P1 licence; or

(b) the services of an individual who is not a licensee who practises a profession, trade or occupation that supports or supplements the practice of law.

Same

(2) A licensee who holds a Class P1 licence may, in connection with the licensee's provision of legal services, provide to a client only the services of an individual who is not a licensee who practises a profession, trade or occupation other than the practice of law that supports or supplements the provision of legal services.

Partnership, *etc*. with professional

18. (1) Subject to subsection (2) and subsection 20 (1), a licensee may enter into a partnership or association that is not a corporation with a professional for the purpose of permitting the licensee to provide to clients the services of the professional.

Same

(2) A licensee shall not enter into a partnership or an association that is not a corporation with a professional unless the following conditions are satisfied:

1. The professional, if other than a licensee who holds a Class P1 licence,

i. is qualified to practise a profession, trade or occupation that supports or supplements the practice of law or the provision of legal services, and

ii. in the case of entering into a partnership with the professional, is of good character.

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

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

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

5. The professional agrees with the licensee in writing that, in respect of the practice of his or her profession, trade or occupation in partnership or association with the licensee, the professional will comply with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's rules of professional conduct for the licensee and the Society's policies and guidelines.

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

Interpretation: "effective control"

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

Interpretation: "good character"

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

rules of practice and procedure, the Society's rules of professional conduct for the licensee and the Society's policies and guidelines.

Responsibility for actions of professional

19. Despite any agreement between a licensee and a professional, the licensee shall be responsible for ensuring that, in respect of the professional's practice of his or her profession, trade or occupation in partnership or association with the licensee,

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

(b) the professional complies with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's rules of professional conduct for the licensee and the Society's policies and guidelines.

Application by licensee forming partnership with professional

20. (1) Before a licensee enters into a partnership with a professional, the licensee shall apply to the Society for approval to enter into the partnership.

Application fee

(2) An application under subsection (1) shall be in a form provided by the Society and shall be accompanied by an application fee.

Partnership agreement

21. At the time that a licensee makes an application under section 20, the licensee shall file with the Society a copy of so much of the agreement or agreements that will govern the licensee's partnership with the professional as may be required by the Society.

Consideration of application by Society

22. (1) A Society official shall consider every application made under section 20, and it shall approve the licensee's entering into a partnership with the professional if it is satisfied that,

(a) the conditions set out in subsection 18 (2) have been satisfied; and

(b) the licensee has made arrangements that will enable the licensee to comply with sections 19, 25, 26, 27 and 30.

Requirements not met

(2) If the Society is not satisfied that a requirement set out in clause (1) (a) or (b) has been met, the Society shall notify the licensee who may meet the requirement or appeal to the committee of benchers appointed under section 37 if the licensee believes that the requirement has been met.

Time for appeal

23. An appeal under subsection 22 (2) shall be commenced by the licensee notifying the Society in writing of the appeal within thirty days after the day the Society notifies the licensee that a requirement has not been met.

Decision of committee of benchers

24. (1) After considering an appeal made under subsection 22 (2), the committee of benchers appointed under section 37 shall,

(a) if it determines that the requirement has been met, approve the licensee's entering into a partnership with the professional; or

(b) if it determines that the requirement has not been met, notify the licensee that the requirement has not been met and that the licensee may not enter into a partnership with the professional.

Filing requirements: partnerships

25. (1) A licensee who, under subsection 18 (1), has entered into a partnership with a professional shall submit to the Society for every full or part year that the partnership continues a report in respect of the partnership.

Form

(2) The report required under subsection (1) shall be in contained in a form provided by the Society.

Due dates

(3) The report required under subsection (1) shall be submitted to the Society by January 31 of the year immediately following the full or part year in respect of which the licensee is submitting a report.

Period of default

(4) For the purpose of clause 47 (1) (a) of the Act, the period of default for failure to complete or file the report required under subsection 25 (1) is 120 days after the day on which the report is required to be submitted.

Reinstatement of rights and privileges

(5) If a licensee's rights and privileges have been suspended under clause 47 (1) (a) of the Act for failure to complete or file the report required under subsection 25 (1), for the purpose of subsection 47 (2) of the Act, the licensee shall complete and file the report mentioned in subsection (1) in force at the time the licensee is filing the report.

Changes in partnership

26. (1) A licensee who, under subsection 18 (1), has entered into a partnership with a professional shall immediately notify the Society when,

(a) the professional is expelled from the partnership;

(b) the professional ceases or for any reason is unable to practise his or her profession, trade or occupation;

(c) the term of the partnership has expired, if the partnership was entered into for a fixed term;

(d) the partnership is dissolved under the *Partnerships Act;* or

(e) any agreement that governs the partnership has been amended.

Dissolution of partnership

(2) If an event mentioned in clause (1) (b), (c) or (e) occurs, the Society may require the licensee to dissolve the partnership.

Amendment of partnership agreement

(3) At the time that the licensee notifies the Society under subsection (1) that an agreement that governs the partnership has been amended, the licensee shall file with the Society a copy of the amended agreement.

Dissolution of partnership: breach of certain provisions

27. If a licensee who, under subsection 18 (1), has entered into a partnership with a professional breaches section 19, section 25, subsection 26 (1), subsection 26 (3) or section 30, the Society may require the licensee to dissolve the partnership.

Notice to licensee of requirement to dissolve partnership

28. (1) If the Society requires a licensee to dissolve a partnership under subsection 26 (2) or section 27, the Society shall so notify the licensee and, subject to subsection (2), the licensee shall dissolve the partnership.

Appeal

(2) If the Society requires a licensee to dissolve a partnership under section 27, the licensee may appeal the requirement to dissolve the partnership to the committee of benchers appointed under section 37 if the licensee believes that there has been no breach of section 19, section 25, subsection 26 (1), subsection 26 (3) or section 30.

Time for appeal

(3) An appeal under subsection (2) shall be commenced by the licensee notifying the Society in writing of the appeal within thirty days after the day the Society notifies the licensee that the partnership is to be dissolved.

Decision of committee of benchers

(4) After considering an appeal made under subsection (2), the committee appointed under section 37 shall,

(a) if it determines that there has been no breach of section 19, section 25, subsection 26 (1), subsection 26 (3) or section 30, cancel the requirement to dissolve the partnership; or

(b) if it determines that there has been a breach of section 19, section 25, subsection 26 (1), subsection 26 (3) or section 30, take any of the following actions:

(i) Confirm the requirement to dissolve the partnership.

(ii) Permit the partnership to continue, subject to such terms and conditions as the committee may impose.

(iii) Any other action that the committee considers appropriate.

Stay

(5) The receipt by the Society of the notice of appeal from the requirement to dissolve the partnership stays the requirement until the disposition of the appeal.

Association with professional: multi-discipline practice

29. (1) A licensee who, under subsection 18 (1), has entered into an association that is not a corporation with a professional may refer to the association as a multi-discipline practice.

Partnership with professional: multi-discipline practice or partnership

(2) A licensee who, under subsection 18 (1), has entered into a partnership with a professional may refer to the partnership as a multi-discipline practice or multi-discipline partnership.

Interpretation: “Society’s insurance plan”

30. (1) In this section, “Society’s insurance plan” means the Society’s professional liability insurance plan and includes any professional liability insurance policy which the Society may have arranged for its licensees who hold a Class L1 licence.

Insurance requirements: Class L1 licence

(2) A licensee who holds a Class L1 licence who, under subsection 18 (1), has entered into a partnership with a professional shall maintain professional liability insurance coverage for the professional,

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

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

Insurance requirements: Class P1 licence

(3) A licensee who holds a Class P1 licence who, under subsection 18 (1), has entered into a partnership with a professional shall maintain professional liability insurance coverage for the professional, in an amount equivalent to the total of the amount of coverage required of the licensee and the amount of coverage the licensee maintains for herself, himself or itself in excess of that required of the licensee.

AMENDMENTS TO RULE 3 OF THE *RULES OF PROFESSIONAL CONDUCT*

Motion

64. That Convocation approve the amendments to Rule 3 of the *Rules of Professional Conduct* set out in this report at Appendix 5, to be reported thereafter to Convocation for adoption after review by the Law Society's Rules drafter.

Introduction

65. The Committee is recommending amendments to Rule 3 of the *Rules of Professional Conduct* that would significantly reduce the length – but not the substantive instruction - of the current rules on advertising and marketing legal services. The proposed Rule is a more purposive approach to the regulation of lawyer marketing and provides a shorter, more concise statement on lawyers' obligations in this area.

66. This report includes background information on the proposed amendments, including the impetus for change and developments that support the proposed change to the Rule.

Background

67. The Committee's review of the marketing and advertising rules was prompted by the need identified by the Professional Regulation Division to reconsider the scope and detail of Rule 3 for a number of reasons, including the following:

a. Many of the subrules deal with matters more properly characterized as lawyer to lawyer relationships, rather than regulation of lawyers for public protection;
b. While the Rule contains important prescriptions on key regulatory issues, much of the Rule simply elaborates on these issues and arguably is unnecessary as part of the Rule;
c. Very few complaints on advertising arise, and fewer are referred to the Proceedings Authorization Committee, which upon review, rarely authorizes action against the licensee in question;
d. A number of other law societies in Canada are examining the Rule, or its equivalent, to make it a more rational regulatory instrument;

e. The Competition Bureau has issued a report following its review of the self-regulated professions in Canada, and recommended that law societies should lift any unnecessary restrictions on advertising unless they can be justified.

Regulation in the Public Interest vs. Regulating Competition

68. Arguably, many of the subrules in Rule 3 deal with protecting a lawyer's practice from competition by other lawyers, rather than dealing directly with public protection issues. Examples include
    a. the prohibition on use of a judge's name in the firm name once a member of the firm has been appointed to the bench,
    b. the prohibition on a lawyer's name appearing on any advertising material offering goods/services to the public other than legal services,
    c. the prohibition on comparison of services or charges with other lawyers, and
    d. the prohibition on use of words "from…minimum…and up" in fee advertisements.

Importance of the Major Concepts in the Current Rules

69. In the Committee's view, the necessary regulation around advertising, marketing of legal services and making legal services available centres on a small number of key concepts, namely:
    a. ensuring advertising or marketing is not false;
    b. ensuring that advertising or marketing is not misleading or deceptive; and
    c. ensuring that the ways legal services are marketed are in the best interests of the public and consistent with lawyers' duties of professionalism.

70. The current Rule includes all of these concepts. Much of the detail in the Rule, however, appears to only elaborate on these concepts, which has the effect of "cluttering" the Rule, and in some respects, making it appear arcane.

71. The Committee believes that it is appropriate to rethink the extensiveness of the language in the Rule, apart from the key regulatory concepts which must remain, and rationalize the Rule to create a clearer, more straightforward statement on this aspect of professional regulation.

Incidence of Complaints on Advertising

72. Information received from the Professional Regulation Division, below, shows the small number of complaints received since 2003 up to the first quarter in 2008 about advertising, and their disposition:

Year	Total Cases	Open	Closed	Total Lawyers
2003	19	0	19	19
2004	8	0	8	8
2005	31	1	30	30
2006	25	1	24	22
2007	43	14	29	40
2008 (March)	16	4	12	16
Total	142			

73. The Committee learned that advertising complaints are usually dealt with by Law Society staff requesting that the lawyer discontinue the impugned conduct. Rarely are such matter

referred to the Proceedings Authorization Committee (PAC) for review. On those occasions when matters are referred to PAC, the files are typically closed. The following are examples of some of the advertising, firm name or letterhead complaints received and addressed by the Law Society staff:

a. A lawyer who uses the term "& Associates" in his or her firm name when the lawyer is a sole practitioner who retains other lawyer;
b. A lawyer who uses the word "retired" to describe another lawyer on his or her letterhead when that lawyer is not actually retired under the provisions of By-Law 5;
c. A lawyer purchases a practice, including goodwill and firm name, but later becomes offside the rules when the lawyers in the previous practice leave the practice of law or are appointed to the bench;
d. A lawyer who is not practicing law but who uses the phrase "barrister & solicitor" on his letterhead or business cards;
e. A lawyer (e.g. Jones) who purchased an adword in a competitor's name (e.g. Smith) so that when the competitor's name Smith is "googled" one of the links that comes up is the lawyer Jones' website.

Other Law Societies' Reviews

74. The Nova Scotia Barristers' Society has made significant changes to the equivalent of the Law Society's advertising rules.

75. Nova Scotia's rule (in its regulations under its statute) is a more streamlined approach to regulation in this area. The current rule was reduced from 14 provisions to five key provisions in nine paragraphs that deal primarily with false or misleading marketing, restrictions on advertising a specialist designation (Nova Scotia has no specialist program) and accuracy of fee advertisements.

76. The Law Society of British Columbia has also begun a review of its advertising rules.

The Competition Bureau's Report

77. In late 2007, the Competition Bureau released its report on self-regulated professions, including lawyers, following extensive information-gathering and review. The Federation of Law Societies of Canada (FLSC), with the assistance of each law society in Canada, provided information to the Bureau in aid of the review through a consultation submission requested by the Bureau.

78. In its discussion of regulation by law societies, the report dealt with marketing rules. In the section titled "Market conduct restrictions", the report discloses current restrictions on lawyer advertising in a number of jurisdictions, and recommends lifting unnecessary restrictions.

79. While a longer excerpt from the report is at Appendix 4, the following provides a sense of the report's direction:

> The FLSC stated in its consultation submission that advertising is regulated to "protect public interest and confidence in the legal system." From the Bureau's perspective, the restrictions currently in place on advertising go outside of what is necessary to guarantee this, since the public needs only to be protected against advertising that is false or misleading. The elimination of the superfluous

restrictions would allow for more innovative and informative advertising and, as a result, increase competition and lower consumers' search and information-gathering costs.

The Federation of Law Societies' Model Code of Conduct Initiative

80. As reported to Convocation in November 2007, the Federation's Model Code Committee is completing a draft Model Code of Conduct, which was the result of a thorough review and analysis of law societies' rules of conduct. The Model Code initiative is aimed at creating uniform professional conduct standards where possible among the law societies.

81. The recent initiatives of other law societies with respect to advertising and marketing rules and the report of the Competition Bureau will contribute to this effort, and will likely be considered in the proposals in the Model Code related to advertising and marketing.

82. The Law Society of Upper Canada as a participant in the Model Code initiative is in a position, through the proposals in this report, to contribute to the direction the Federation takes in this respect.

The Proposed Amendments

83. Appendix 5 contains the draft amendments to Rule 3. The amendments significantly reduce the text of the Rule, and include new headings, some new language for existing provisions, new commentary and a consolidation of the advertising and marketing provisions. A redline version is included, followed by a "clean" version.

84. The commentary emphasizes that marketing includes not only advertisements, but firm names, letterhead and business cards.

<u>Implications of Changes to Rule 3</u>

85. The Committee noted the following implications of changes to Rule 3:

    a. By-Law 7 (Business Entities) would require review, as it mirrors parts of Rule 3 on firm names with respect to regulation of names of professional corporations (see Appendix 6);
    b. The *Paralegal Rules of Conduct,* as a result of Convocation's decision to approve amendments to Rule 3, would require review on the basis that a consistent approach should be taken to rules on marketing for all licensees.

86. The Committee determined that once the rule amendments are considered by Convocation and a final version prepared for approval after review by the Law Society's Rules drafter, amendments to By-Law 7, as required, could be made at the same time.

87. The Committee is also aware that in a separate report before Convocation this month, the Paralegal Standing Committee is recommending changes to the advertising and marketing rules in the *Paralegal Rules of Conduct* that mirror the proposals in this report.

Next Steps

88. The Committee is asking for Convocation's approval of the amendments to Rule 3, subject to a review by the Society's Rules drafter. Once that review is complete, the final version will be reported to Convocation for adoption, together with the final version

of amendments to the *Paralegal Rules of Conduct* and any required amendments to By-Law 7.

APPENDIX 4

EXCERPT FROM THE COMPETITION BUREAU REPORT

Market conduct restrictions

Advertising

Typically, lawyers are permitted to advertise their services and fees, provided that the advertising claims are not false or misleading and are in good taste, so as not to bring the profession or the administration of justice into disrepute. The Bureau recognizes the need for such restrictions; however, some of those currently in place go beyond simply preventing false or misleading advertising and, as a result, raise competition concerns in light of the numerous benefits advertising brings to consumers.

Size, style and content of advertising

In Newfoundland and Labrador, and Ontario, lawyers may only advertise fees charged for their services when the advertisements do not use words or expressions such as *from..., minimum, ...and up* or the like, when referring to the fees to be charged.[46] Similarly, in Nova Scotia, an advertisement may not contain the words *simple* or *complicated,* or words of like import, in addition to the words previously mentioned.47 The Law Society of Newfoundland and Labrador, besides forbidding the use of certain words, also prohibits members from indicating in advertisements that prices are discounted, reduced or special rates.[48]

In advertisements in Yukon, lawyers may only convey information about their places and hours of business, the identity of lawyers in their firms, the identity of representative clients, the fields of law to which they restrict their practices and the types of services they provide.[49] Contrary to other law societies, Yukon's does not permit lawyers to use photographs, logos or symbols in their advertisements.[50]

The Law Society of Alberta recently amended its Code of Professional Conduct to remove the restriction on advertising by former judges and to allow them to refer to their former status.[51] In contrast, the law societies of Nova Scotia, Prince Edward Island, Saskatchewan and Yukon have maintained their restrictions on such advertising.[52] The law societies of Yukon and Nova Scotia are the only ones to restrict the size of advertisements. Both require advertisements to be of a size commensurate with the amount of information being given.[53] In Yukon, lawyers may only place one listing in each of the white pages and yellow pages, no bigger than a double quarter column.[54] Certain law societies, such as those in Newfoundland and Labrador, and Quebec, prohibit their members from using statements of gratitude in their advertisements.[55]

Referral fees

Lawyers are also prohibited from compensating non-lawyers for recommending their services or referring clients to them. In Newfoundland and Labrador, the law society rules state that lawyers may not provide to or receive from real estate brokers or title

insurers any reward for directing or receiving clients.[56]

The FLSC stated in its consultation submission that advertising is regulated to "protect public interest and confidence in the legal system."[57] From the Bureau's perspective, the restrictions currently in place on advertising go outside of what is necessary to guarantee this, since the public needs only to be protected against advertising that is false or misleading. The elimination of the superfluous restrictions would allow for more innovative and informative advertising and, as a result, increase competition and lower consumers' search and information-gathering costs.

Recommendation

Generally, law societies should lift any unnecessary restrictions on advertising—that is, any restriction above and beyond the prohibitions on false, misleading and deceptive advertising—unless they can justify their existence. In particular, law societies should remove restrictions on the size, style and content of advertisements and allow nonlawyers to be compensated for referring services or clients.

Of particular concern to the Bureau are restrictions on claiming to be a specialist or expert in a field of law as well as on comparative advertising, as set out below.

Specialist and expert certification

Although most law societies allow members to list preferred areas of practice, they prohibit members from claiming to be specialists or experts in given fields. For example, lawyers in British Columbia may state a preference for practising in certain fields when they have devoted at least 20 percent of their time to it in the past three years.[58] At the same time, they are strictly prohibited from using the title of specialist.[59] Manitoba lawyers "may advertise a preferred area or areas of practice provided the advertisement does not contain a claim, either directly or indirectly, that the advertising lawyer is a specialist or expert."[60] In Newfoundland and Labrador, lawyers may advertise preferred areas of practice so long as they do not claim to be specialists, experts, leaders or established or experienced practitioners in any field.[61] In Prince Edward Island, lawyers may only advertise preferred areas of practice that are approved under regulation.[62]

Interestingly, although Saskatchewan does not permit lawyers to use the titles specialist, expert and leader, or any similar designation, members of the law society may be identified as leading practitioners in any publication that relies on input from independent parties approved by the ethics committee.[63]

The Law Society of Upper Canada is the only law society to have implemented a program for lawyers to obtain specialist certification in a given practice area when they can show they meet the following qualifications:

- that they practised for a minimum of seven years prior to the date of the application;
- that they had substantial involvement in the specialty area during five of the seven years;
- that they complied with the professional development requirements; and
- that they complied with the professional standards requirements.[64]

Although the laws and regulations of certain law societies allow lawyers to state that they

are specialists or experts when certified, no means for obtaining certification have been put in place. This is the case in Alberta and Quebec.[65] In New Brunswick, although the *Law Society Act* specifies that the law society rules may designate specialized areas of practice and set out how and under what conditions members may present themselves as preferring or limiting their practice to one area, no such rules have been adopted.[66]

The FLSC stated in its consultation submission that the constraints on members of the legal profession from presenting themselves as specialists are "intended to ensure that potential clients are accurately informed about the skills and knowledge of a particular practitioner."[67] However, such restrictions also reduce the quantity and quality of information available to the public and prevent consumers from being able to identify the most competent lawyers in a given field. The Bureau is of the view that allowing the designation of specialists through a recognized certification program, similar to that offered by the Law Society of Upper Canada, will ensure information about lawyers' skills and knowledge is accurate. Such a designation may help members of the public choose lawyers that best suit their needs and assure that the public has access to a certain calibre of lawyers who meet specific requirements. Such a designation contrasts favourably with lawyers simply stating preferred areas of practice, which provides no indication of the quality of their services.

Recommendation

Law societies should evaluate the possibility of adopting a specialist certification program similar to that in Ontario. Alternatively, law societies could consider allowing members to be identified as leading practitioners in publications that rely on data from independent parties approved by the law societies' ethics committee, as is the case in Saskatchewan.

Comparative advertising

Lawyers in Alberta, British Columbia, New Brunswick, Ontario and Saskatchewan may not, in their advertisements, compare their fees to those of other lawyers.[68] In addition, lawyers in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan are not permitted, in advertisements, to compare the quality of their services to those of other lawyers.[69]
In most instances, lawyers may not state or imply any qualitative superiority over other lawyers, although the regulations do not explicitly state that lawyers are proscribed from using comparative advertising (in Manitoba and Nova Scotia, for example).[70] In its chapter on advertising, the Law Society of Alberta's *Code of Professional Conduct* states that lawyers' advertisements must, among other things, be verifiable: "an advertisement that states or implies qualitative superiority to another firm or lawyer is generally unacceptable, because it cannot be verified according to any objective, widely-held standard."[71]
In Yukon, the regulation takes a more general form, prohibiting lawyers from referring to the quality of the services they provide, regardless of whether the advertisements are comparative or claiming superiority.[72]

Comparative advertising fosters price competition by allowing prospective clients to compare fees. When consumers cannot compare the prices for legal services, there is little or no incentive for lawyers to compete on price, thereby raising the costs to consumers. Additionally, such restrictions hinder competition between lawyers and make

it particularly difficult for new lawyers to advertise their entry and distinguish their services from those of their competitors.

Recommendation

Law societies should abolish prohibitions on comparative advertising of verifiable factors, such as price.

Pricing and compensation

Every provincial and territorial law society has a section in its code of professional conduct that describes the rules concerning fees. Some have adopted the Canadian Bar Association's code in its entirety; others have adopted it with slight variations. Lawyers may not charge or accept any fee that is not fully disclosed, fair and reasonable. The CBA code lists several factors to consider when determining a fair and reasonable fee, namely the time, effort and skill required, customary charges for similar work, the exposure and risk to the client in criminal cases, and any prior relevant agreements made between the client and lawyer. Disciplinary action may be taken against lawyers who cannot justify their fees as being fair and reasonable.[73] New Brunswick's code further clarifies that fees should not entirely depend on the outcome of the case or the hours spent on the case.[74] Clients who do not believe their lawyers' fees to be reasonable can request an independent review of them by the courts.

The restrictions appear reasonable and do not raise any competition concerns. However, there are some that seem overly restrictive, as follows.

According to the FLSC, none of the law societies has adopted suggested fee schedules.[75] However, under Quebec's *Professional Code*, the General Council of the Barreau du Québec, which governs the Quebec Bar, "may, in particular, by resolution […] suggest a tariff of professional fees that the members of the order may apply in respect of the professional services they render."[76]

The presence of suggested fees may create an opportunity for price fixing, which is contrary to the principles of competition. As a result of the suggested fees, lawyers may set prices higher than they otherwise would. The quality of legal services may decrease, since professionals who have fixed prices likely have little or no incentive to improve the quality of their services.

Recommendation

The Quebec legislature should consider repealing the provision of the Professional Code that gives professions the right to suggest a tariff of professional fees that the members may apply.

Contingency fee agreements are generally acceptable as long as they remain fair and reasonable, and respect any other condition the law societies have established.[77] Some jurisdictions have restricted the areas of practice in which contingency fees may be used. For example, Yukon prohibits lawyers from entering into contingency fee agreements when the services provided relate to matrimonial causes, the property of people under legal disability or the distribution of estates.[78] In Ontario, lawyers may not enter into contingency fee agreements for criminal or quasi-criminal proceedings or for family law

matters.[79] Other law societies void agreements in certain areas of the law unless the courts approve the agreements: this is the case, for instance, in British Columbia, New Brunswick and Saskatchewan.[80]

Since contingency fee agreements attach a lawyer's remuneration to the outcome of a case, they may provide lawyers with incentive to act in their clients' best interests. Furthermore, contingency fee agreements render the justice system more accessible for those who are unable to access it due to financial limitations.
Recommendation

Law societies should identify the goals of the restrictions on contingency fees in certain practice areas, and then determine whether the restrictions are the best means of achieving the desired goals, considering that other law societies have not deemed such restrictions necessary.

Two law societies have set maximums for the remuneration lawyers are entitled to receive under contingency fee agreements. In British Columbia, this maximum is 33.3 percent of the amount the plaintiff recovers for a claim for personal injury or wrongful death arising out of the operation of a motor vehicle. The maximum remuneration for any other type of claim for personal injury or wrongful death is 40 percent.[81] In New Brunswick, a reviewing officer must approve agreements that set the contingency fees at more than 25 percent of the amount recovered.[82]
The Bureau recognizes that restrictions on the maximum percentage that lawyers may demand under contingency fee agreements have been put into place to protect consumers. However, a maximum percentage has the potential to be anti-competitive when it is set at a supra-competitive level and serves as a focal point towards which lawyers will move, creating an inviting opportunity for tacit collusion.

Recommendation

The law societies of British Columbia and New Brunswick should consider eliminating the maximum percentage to which lawyers are entitled under contingency fee agreements. The appropriate fee structure should be left to market forces to determine.

[notes]

46 Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.11(c); Law Society of
Upper Canada, *Rules of Professional Conduct*, r. 3.04(2)(c)
47 *Regulations made pursuant to the Legal Profession Act*, r. 7.6.6 (c).
48 Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.11 (c)
49 *Legal Profession Act*, R.S.Y. 2004, c. 134, s. 105.
50 Law Society of Yukon, *Rules of the Law Society of Yukon,* r. 193.
51 Law Society of Alberta, "Changes to Advertising Rules Effective February 2007," www.lawsocietyalberta.com/advisory/advisory_nov_04.cfm.
52 Nova Scotia, *Regulations made pursuant to the Legal Profession Act*, r. 7.6.3 (d); Law Society of Prince Edward Island, *Regulations of the Law Society of Prince Edward Island,* r. 41(2); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan,* r.
1605; Law Society of Yukon, *Rules of the Law Society of Yukon,* r. 199.
53 Nova Scotia, *Regulations made pursuant to the Legal Profession Act*, r. 7.6.2 (d); Law Society of Yukon, *Rules of the Law Society* of Yukon, r. 193.

54 With the approval of the Chairman of the Discipline Committee, an advertisement may be allowed to exceed the prescribed size
(Law Society of Yukon, *Rules of the Law Society of Yukon,* r. 197).
55 Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.05 (c); Quebec: *Code of ethics of advocates*, R.Q. c. B-1, r.1, s. 5.06, for lawyers; Code of ethics of notaries, R.Q. N-3, r.0.2, s 70, for notaries.
56 Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.12(1), 8.12(2).
57 FLSC, consultation submission, June 11, 2007.
58 Law Society of British Columbia, *Professional Conduct Handbook*, c. 14, r. 16.
59 Ibid, r. 18.
60 Law Society of Manitoba, *Code of Professional Conduct,* c. 14, C8.
61 Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.10.
62 Law Society of Prince Edward Island, *Regulations of the Law Society of Prince Edward Island,* s. 40(1), 40(2).
63 Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan,* r. 1615(1), 1615(3).
64 Law Society of Upper Canada, "About the Program," http://mrc.lsuc.on.ca/jsp/csp/index.jsp.
65 Law Society of Alberta, *Code of Professional Conduct*, c. 5, r. 5; Quebec *Professional Code,* R.S.Q., c. C26, s. 58.
66 *Law Society Act*, 1996, S.N.B. 1996, c. 89, s. 17(2)(u), 17(2)(v).
67 FLSC, consultation submission, June 11, 2007.
68 Law Society of Alberta, *Code of Professional Conduct,* c. 5, r. 6(d); Law Society of British Columbia, *Professional Conduct Handbook,* c. 14, r. 12c; Law Society of New Brunswick, *Code of Professional Conduct,* c. 16, commentary 4f); Law Society of Upper Canada, *Rules of Professional Conduct*, r. 3.04(1)c); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, r. 1611(1)(c).
69 Law Society of Alberta, *Code of Professional Conduct,* c. 5, R.1, C.1a); Law Society of British Columbia, *Professional Conduct Handbook*, c. 14, r. 5d; Law Society of New Brunswick, *Code of Professional Conduct,* c. 16, commentary 4e); Law Society of Newfoundland and Labrador, *Rules of the Law Society of Newfoundland and Labrador*, r. 8.05(1)(a); Nova Scotia: *Regulations made pursuant to the Legal Profession Act*, r. 7.6.3; Law Society of Upper Canada, *Rules of Professional Conduct,* r. 3.04(1)c); Law Society of Prince Edward Island, *Regulations of the Law Society of Prince Edward Island,* s. 38(3)(b); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan*, r. 1602 (d).
70 Law Society of Manitoba, *Rules of the Law Society*, r. 5-114(1), and *Code of Professional Conduct*, c. 14, r. 7; Nova Scotia: *Regulations made pursuant to the Legal Profession Act,* r. 7.6.3.
71 Law Society of Alberta, *Code of Professional Conduct,* c. 5, R1, C1(a).
72 Nova Scotia: *Regulations made pursuant to the Legal Profession Act*, r. 7.6.3; Law Society of Yukon, *Rules of the Law Society of Yukon*, r. 193.
73 Canadian Bar Association, *Code of Professional Conduct,* c. XI, Commentary 1.
74 Law Society of New Brunswick, *Code of Professional Conduct*, c. 9, Commentary 2)(c)i).
75 FLSC, questionnaire response, question 5.1, January 18, 2007.
76 *Professional Code*, R.S.Q., c. C-26, s. 86.01(12). The *Professional Code* is the parent legislation governing the Quebec professional system. In consequence, the Bureau's recommendation that follows applies to all professionals, not only lawyers and notaries,
including pharmacists, accountants and optometrists, which other chapters of this study cover.
77 A contingency fee agreement is an agreement between a lawyer and a client whereby a lawyer is only paid when there the legal matter concludes successfully for the lawyer's client. The fee is based on a percentage of the award.
78 *Legal Profession Act,* R.S.Y. 2004, c. 134, s. 68(3).
79 *Solicitors Act*, R.S.O. 1990, c. S.15, s. 28.1(3).
80 British Columbia, Legal Profession Act, S.B.C. 1998, c. 9, s. 67(5); New Brunswick, *Law Society Act*, 1996, S.N.B. 1996, c. 89,
s. 83(5); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan,* r. 1502(b).
81 Law Society of British Columbia, *Rules of the Law Society of British Columbia*, r. 8-2.

82 Law Society of New Brunswick, *Contingent Fee Rules*, r. 2(1).

APPENDIX 5

RULE 3 – MARKETING OF LEGAL SERVICES
(redline version)

RULE 3 – MARKETING OF LEGAL SERVICES
("clean" version)

3.01 MAKING LEGAL SERVICES AVAILABLE

Making Services Available

3.01 (1) A lawyer shall make legal services available to the public in an efficient and convenient way.

Commentary

The lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services, by engaging in programmes of public information, education or advice concerning legal matters.

Right to Decline Representation - The lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, the lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another licensee qualified in the particular field and able to act.

When a lawyer offers assistance to a client or prospective client in finding another licensee, the assistance should be given willingly and, except where a referral fee is permitted by rule 2.08(6), without charge

[Amended – June 2007}

Restrictions

(2) In offering legal services, a lawyer shall not use means

(a) that are false or misleading,

(b) that amount to coercion, duress, or harassment,

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover,

(d) that are intended to influence a person who has retained another lawyer for a particular matter to change his or her lawyer for that matter, unless the change is initiated by the person or the other lawyer, or

(e) that otherwise bring the profession or the administration of justice into disrepute.

Commentary

A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering his or her assistance to such a person. Rather, the rule prohibits the lawyer from using unconscionable or exploitive means that bring the profession or the administration of justice into disrepute.

3.02 MARKETING

3.02 (1) A lawyer may market professional services provided that the marketing

(a) is demonstrably true, accurate and verifiable,

(b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive;

(c) is in the best interests of the public and is consistent with a high standard of professionalism.

Commentary
Marketing includes not only advertisements and other similar communications in various media but also firm names, which may include trade names, letterhead, business cards and logos. All are means by which a lawyer may make representations to the public for the purpose of promoting the lawyer's professional services.
Examples of marketing that may contravene this rule include:

a. stating an amount of money that the lawyer has recovered for a client or refer to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases.
b. suggesting qualitative superiority to other lawyers
c. raising expectations unjustifiably
d. suggesting or implying the lawyer is aggressive
e. disparaging or demeaning other persons, groups, organizations or institutions
f. taking advantage of a vulnerable person or group
g. using testimonials or endorsements which contain emotional appeals

Advertising of Fees

(2) A lawyer or a law firm may advertise fees charged for their services provided that:

(a) the advertising is reasonably precise as to the services offered for each fee quoted,

(a) the advertising states whether other amounts, such as disbursements and taxes will be charged in addition to the fee; and

(c) the lawyer adheres to the advertised fee.

3.03 ADVERTISING NATURE OF PRACTICE

General Practice

3.03 (1) A lawyer may advertise that the lawyer is a specialist in a specified field only if the lawyer has been so certified by the Society.

Commentary
Lawyer's advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.
In accordance with s. 27(1) of the Society's By-law 15 on Certified Specialists, the lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist.

In a case where a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm which makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in the other jurisdiction(s) and the certifying jurisdiction, shall not be considered as offending this rule if the certifying authority or organization is identified.
A lawyer may advertise areas of practice, including preferred areas of practice or that his or her practice is restricted to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

[New - October 2003]

3.04 INTERPROVINCIAL LAW FIRMS

Interprovincial Law Firms

3.04 (1) Lawyers may enter into agreements with lawyers in other Canadian jurisdictions to form an interprovincial law firm, provided that they comply with the requirements of this rule.

Requirements

(2) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall comply with all the requirements of the Society.

(3) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that the books, records, and accounts pertaining to the practice in Ontario are available in Ontario on demand by the Society's auditors or their designated agents.

(4) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that his or her partners, associates, or employees who are not qualified to practise in Ontario are not held out as and do not represent themselves as qualified to practise in Ontario.

APPENDIX 6

BY-LAW 7

Made: May 1, 2007
June 28, 2007
September 20, 2007 (editorial changes)
February 21, 2008

BUSINESS ENTITIES

…

PART II
PROFESSIONAL CORPORATIONS

CORPORATE NAME

Prohibition: general

3. (1) The name of a professional corporation shall not include any language that is not expressly permitted or required under this Part or under the provisions of the *Business Corporations Act,* or any regulations made thereunder, that apply to professional corporations.

Prohibition: identical or similar name

(2) A professional corporation shall not use a name,

(a) that is used by another professional corporation; or

(b) that so nearly resembles the name used by another professional corporation that it is likely to confuse or mislead the public.

Names of shareholders or licensees

(3) Subject to subsection (4), the name of a professional corporation may include any of the following:

1. The name of any shareholder of the professional corporation.

2. If the professional corporation is one that is described in clause 61.0.1 (1) (a) or (c) of the Act, the name of any licensee who practises law in Ontario through the corporation.

3. If the professional corporation is one that is described in clause 61.0.1 (1) (b) or (c) of the Act, the name of any licensee who provides legal services in Ontario through the corporation.

Prohibition: shareholder or licensee holding office as member of tribunal

(4) The name of a professional corporation shall not include the name of any of the following persons who hold office as a member of a tribunal or any other office the duties of which are incompatible with the practice of law in Ontario or the provision of legal services in Ontario:

1. Any licensee who, prior to taking office as a member of a tribunal or any other office the duties of which are incompatible with the practice of law in Ontario or the provision of legal services in Ontario, practised law in Ontario or provided legal services in Ontario through the professional corporation.

2. Any shareholder of the professional corporation.

Deceased shareholder or person

(5) A professional corporation may retain in its name the name of a deceased licensee who practised law in Ontario or provided legal services in Ontario through the corporation or a deceased shareholder of the professional corporation.

Use of honorific “Q.C.”

(6) If a professional corporation that is described in clause 61.0.1 (1) (a) of the Act has one shareholder, the one shareholder practises law in Ontario through the professional corporation and the name of the professional corporation is the name of the one shareholder, the professional corporation may include in its name the honorific “Q.C.” properly attributable to the one shareholder of the professional corporation.

Use of phrases “and associates”, etc.

(7) A professional corporation may include in its name phrases such as “and associates” and “and company” if,

(a) in the case of a professional corporation that is described in clause 61.0.1 (1) (a) of the Act, three or more licensees practise law in Ontario through the professional corporation;

(b) in the case of a professional corporation that is described in clause 61.0.1 (1) (b) of the Act, three or more licensees provide legal services in Ontario through the professional corporation; and

(c) in the case of a professional corporation that is described in clause 61.0.1 (1) (c) of the Act, three or more licensees practise law in Ontario or provide legal services in Ontario through the professional corporation.

Use of trade name, *etc*.

(8) The name of a professional corporation may include a descriptive or trade name that is in keeping with the dignity, integrity, independence and role of the legal professions in a free and democratic society and in the administration of justice.

Use of past firm name

(9) Despite any other provision in this section, a professional corporation described in clause 61.0.1 (1) (a) of the Act that is established by two or more licensees licensed to practice law in Ontario as barristers and solicitors who, before the day the professional corporation is established, practised law in Ontario as a partnership, may use as its name the name of the partnership.

Interpretation: name of person

(10) For the purposes of this section, the name of a person means the person's surname and, at the person's option, his or her given names or initials.

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

Copy of Rule 3 – Marketing of Legal Services (redline version).

(Appendix 5, pages 57 – 65)

Re: Amendments to By-Law 7.1 [Operational Obligations and Responsibilities]

It was moved by Ms. Rothstein, seconded by Ms. Tough, that By-Law 7.1 (Operational Obligations and Responsibilities) be amended as set out in the bilingual version of the motion distributed under separate cover.

Carried

BY-LAW 7.1
[OPERATIONAL OBLIGATIONS AND RESPONSIBILITIES]

THAT By-Law 7.1 [Operational Obligations and Responsibilities], made by Convocation on October 25, 2007 and amended on November 22, 2007, January 24, 2008, April 24, 2008 and June 26, 2008 be further amended as follows:

1. Section 20 of By-Law 7.1 is amended by adding the following definitions:

"lawyer" means an individual who is authorized to practise law in a province or territory of Canada outside Ontario;

« avocat » S'entend d'une personne qui est autorisée à exercer le droit dans un territoire ou une province du Canada autre que l'Ontario;

"securities dealer" means a person authorized under an Act of a province or territory of Canada to engage in the business of dealing in securities or any other financial instruments or to provide portfolio management or investment advising services.

« courtier en valeurs mobilières » S'entend d'une personne autorisée en vertu d'une législation provinciale à se livrer au commerce des valeurs mobilières ou d'autres instruments financiers, ou à la prestation des services de gestion de portefeuille et de conseils en placement.

2. The definition of "public body/ organisme public" in section 20 of the By-Law is amended by deleting "public hospital/ un hôpital public et qui est désigné comme administration hospitalière" and substituting "public hospital authority/ une administration hospitalière publique et qui est désignée comme hôpital".

3. Subsection 22 (2) of the By-Law is amended by adding "or a lawyer/ ou avocats" after "another licensee/ d'autres titulaires de permis" whenever it occurs.

4. Subsection 22 (3) of the By-Law is deleted and the following substituted:

Exemptions re certain funds

(3) A licensee is not required to comply with the client identification requirements set out in subsection 23 (2) or the client verification requirements set out in subsection 23 (4) in respect of funds,

(a) paid to or received from a financial institution, public body, company that is not a private company or subsidiary of a public body or company that is not a private company where the financial statements of the subsidiary are consolidated with the financial statements of the public body or company;

Exemptions relatives à certains fonds

(3) Les titulaires de permis ne sont pas tenus de se conformer aux exigences relatives à l'identification des clients visées au paragraphe 23 (2) ou aux exigences relatives aux vérifications visées au paragraphe 23 (4) à l'égard des fonds.

a) versés à ou reçus d'un établissement financier, d'un organisme public, d'une société qui n'est pas une compagnie privée, ou d'une filiale d'un organisme public ou d'une société qui n'est pas une compagnie privée dont les états financiers sont consolidés avec ceux de l'organisme public ou de la société;

(b) paid to another licensee or a lawyer in trust, on the direction of a client;

b) versés en fiducie à d'autres titulaires de permis ou avocats, selon les directives d'un client;

(c) received from the trust account of another licensee or a lawyer;

c) reçus du compte en fiducie d'autres titulaires de permis ou avocats;

(d) received from a peace officer, law enforcement agency or other public official acting in an official capacity;

d) reçus d'un agent de la paix, d'un organisme chargé de l'application de la loi ou de tout autre agent public dans l'exercice officiel de ses fonctions;

(e) paid or received pursuant to a court order;

e) versés ou reçus conformément à une ordonnance de la cour;

(f) paid to pay a fine or penalty;

f) versés pour payer une amende ou une sanction;

(g) paid or received as a settlement in legal or administrative proceedings; or

g) versés ou reçus à titre de règlement d'une procédure judiciaire ou administrative;

(h) paid or received for professional fees, disbursements, expenses or bail.

h) versés ou reçus pour des honoraires professionnels, débours, dépenses ou cautions.

5. Subsection 23 (5) of the By-Law is deleted and the following substituted:

Timing of verification, individuals

(5) A licensee shall verify the identity of an individual mentioned in subsection (1), including an individual mentioned in paragraph 7, immediately after first engaging in the activities described in clause 22 (1) (b).

Moment de la vérification de l'identité des particuliers

(5) Les titulaires de permis doivent vérifier l'identité des personnes physiques visées au paragraphe (1), y compris les particuliers visés à l'alinéa 7, dès qu'ils se livrent aux activités visées à l'alinéa 22 (1) b).

6. Subsection 23 (8) of the By-Law is deleted and the following substituted:

Client verification, non-face-to-face

Vérification des clients lors de transactions qui ne sont pas en face à face

(8) When a licensee is engaged in the activities described in clause 22 (1) (b) and the licensee is not receiving instructions from an individual face-to-face, the licensee complies with the verification requirements set out in subsection (4) if the licensee obtains an attestation from a person described in subsection (9) that the person has seen the appropriate independent source documents.

(8) Lorsqu'un titulaire de permis se livre aux activités visées à l'alinéa 22 (1) b) et qu'il ne reçoit pas ses directives en face à face, le titulaire de permis se conforme aux exigences de vérification des clients visées au paragraphe (4) s'il obtient une attestation de l'une des personnes visées au paragraphe (9) indiquant qu'elle a pu confirmer l'identité du client à partir de documents d'une source indépendante.

7. Section 25 of the By-Law is amended by deleting "October/ octobre" and substituting "December/ décembre".

It was moved by Mr. Wright, seconded by Mr. Lewis, that the motion be amended by deleting the words "immediately after" and inserting the word "before" in subsection 23 (5) on page 11 of Appendix 1.

Lost

ROLL-CALL VOTE

Aaron	Against	Hartman	Against
Aitken	Against	Heintzman	Against
Anand	Against	Henderson	Against
Backhouse	Against	Krishna	Against
Banack	For	Lawrie	Against
Boyd	Against	Legge	For
Braithwaite	For	Lewis	For
Bredt	Against	McGrath	For
Campion	Against	Minor	Against
Caskey	Against	Pawlitza	Against
Chahbar	Against	Potter	For
Conway	Against	Pustina	For
Crowe	For	Rabinovitch	Against
Dickson	For	Ross	For
Dray	Against	Rothstein	Against
Elliott	Against	St. Lewis	For
Epstein	Against	Silverstein	For
Go	Against	Simpson	Against
Gold	Against	C. Strosberg	Against
Hainey	Against	Tough	Against
Halajian	For	Wright	For
Hare	Against		

Vote: 14 For; 29 Against

The Chair agreed to take back to the Committee for consideration the issue of whether "public body" should include an "Indian Band".

Re: Proposed Amendments to Subrule 6.03(9) of the *Rules of Professional Conduct*

It was moved by Ms. Rothstein, seconded by Ms. Tough, that Convocation approve the proposed amendments to Rule 6.03(9)(b) and its commentary, set out in this report at paragraphs 47 and 50 respectively, for publication to obtain input from the professions prior to Convocation's consideration of the proposed amendments.

Carried

Re: Amendments to By-Law 7 [Business Entities]

It was moved by Ms. Rothstein, seconded by Ms. Tough, that Convocation amend By-Law 7 [Business Entities] as follows:

1. Subsection 15 (3) of the By-Law is deleted.

2. Sections 16 and 17 of the By-Law are deleted and the following substituted:

Prohibition against providing services of non-licensee

16. A licensee shall not, in connection with the licensee's practice of law or provision of legal services, provide to a client the services of a person who is not a licensee except in accordance with this Part.

Permitted provision of services of non-licensee

17. A licensee may, in connection with the licensee's practice of law or provision of legal services, provide to a client the services of a person who is not a licensee who practises a profession, trade or occupation that supports or supplements the practice of law or the provision of legal services.

3. Paragraph 1 of subsection 18 (2) of the By-Law is amended by deleting "if other than a licensee who holds a Class P1 licence".

Carried

Re: Amendments to Rule 3 of the *Rules of Professional Conduct*

It was moved by Ms. Rothstein, seconded by Ms. Tough, that Convocation approve the amendments to Rule 3 of the *Rules of Professional Conduct* set out in this report at Appendix 5, to be reported thereafter to Convocation for adoption after review by the Law Society's Rules drafter.

A friendly amendment was made to delete "or expert" in the Commentary under Rule 3.03 (1).

The motion as amended was approved.

It was moved by Mr. Aaron, seconded by Mr. Gottlieb, that the words "or expert" be inserted after the word "specialist" in Rule 3.03 (2).

The motion was deferred to the January 2009 Convocation.

TRIBUNALS COMMITTEE REPORT

Mr. Gold presented the Report

Report to Convocation
October 30, 2008

Tribunals Committee

(carried over from September 25, 2008)

Committee Members
Mark Sandler (Chair)
Alan Gold (Vice-Chair)
Raj Anand
Thomas Conway
Tom Heintzman
Paul Schabas
William Simpson
Joanne St. Lewis

Purposes of Report: Decision

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

COMMITTEE PROCESS

1. The Committee met on September 9, 2008. Committee members Mark Sandler (Chair), Alan Gold (Vice-Chair), Thomas Conway and Paul Schabas attended. Staff members A.K. Dionne, Grace Knakowski and Sophia Sperdakos also attended. Staff member Lesley Cameron attended part of the meeting. This report is carried over from September 25, 2008 Convocation.

PUBLICATION POLICY WHEN HEARING PANELS ISSUE INVITATIONS TO ATTEND

MOTION

2. Where Hearing Panels issue an Invitation to Attend (ITA) to a lawyer or paralegal and dismiss the application once the lawyer or paralegal has attended and received the Panel's advice, the Hearing Panel shall refer in its endorsement, order and any reasons for decision to the fact that the ITA has been issued and occurred, but not to its the content.

3. Past Hearing Panel endorsements or reasons for decision that disclose that the Hearing Panel issued an ITA shall be available to the public.

Background

4. Section 36 of the *Law Society Act* authorizes a Hearing Panel to issue an Invitation to Attend (ITA) as follows:
   a. If an application has been made under section 34, the Hearing Panel may invite the licensee in respect of whom the application was made to attend before the Panel for the purpose of receiving advice from the Panel concerning his or her conduct.

   b. The Hearing Panel shall dismiss the application if the licensee attends before the Panel in accordance with the invitation.

5. Since Convocation approved ITAs in 1970, ITA meetings and the fact that a lawyer has been invited to attend have been treated as confidential on the basis that ITAs are an extension of the Society's confidential investigatory process, rather than being disciplinary in nature.

6. Convocation has periodically affirmed this policy. In June 1990, it adopted the Report of the Discipline Policy Committee, which recommended that selected ITAs be published on a "no-name basis" in hopes that members of the profession would be informed about situations in which misconduct can arise.[1]

7. In June 1997 Convocation rejected a proposal that there might be circumstances when it would be appropriate to disclose information about a lawyer's prior ITAs during a hearing. Convocation precluded the use of information about a lawyer's prior ITAs,

   i. in Hearing Panels' reasons for decision;
   ii. by discipline counsel during hearings;
   iii. in information the Law Society prepares for the Proceedings Authorization Committee; and
   iv. in information the Society prepares for benchers attending an ITA.

8. In January 1998 Convocation again reaffirmed the confidentiality of ITAs.

9. The Proceedings Authorization Committee (PAC) may issue ITAs. The fact of a PAC-issued ITA is not disclosed. In June 2005, Convocation amended its ITA policy of strict confidentiality to permit, in limited circumstances, disclosure of a lawyer's prior ITAs to PAC.

Convocation's Policy of Transparency in the Tribunals Processes

10. In May 2005, Convocation adopted the Tribunals Task Force Report that emphasized the importance of transparent tribunal procedures to maintain public confidence in self-regulation.

[1] The Tribunals Office cannot advise whether an ITA has ever been published on a no-name basis, however, it can confirm that none has been published since February 1999.

11. Convocation continues to focus on transparent tribunal processes. In March 2008, it approved the publication of orders dismissing applications. Prior to this date, reasons for decision where the application was dismissed were published on the CanLII and QuickLaw websites, but the order was not posted on the Tribunal Orders and Dispositions webpage.

Tribunals Office Publication Practices

12. Generally, the Tribunals Office posts,

    a. notification of hearings, including the lawyer or paralegal's name and the alleged particulars, on the Law Society's Current Hearings webpage;
    b. Hearing and Appeal Panel orders on the Law Society's Tribunal Orders and Dispositions webpage.

13. Reasons for decision are published on the CanLII and QuickLaw websites.

Issue Arising from Hearing Panel Endorsements

14. If a Hearing Panel converts a conduct hearing into an ITA, it typically does so during a public proceeding. Although the ITA is conducted in private, the conversion of the hearing into the ITA is done publicly.

15. Usually in these circumstances, the Hearing Panel will endorse the Notice of Application, "Invitation to attend issued. Lawyer[2] attended in accordance with the invitation. Application dismissed."

16. The Notice of Application, including the endorsements, is a public document. Currently, where a Hearing Panel endorses that an ITA is issued and the application is dismissed, the Tribunals Office drafts the order to read, "Application dismissed" without any reference to the ITA. This permits the order itself to remain public, while fulfilling Convocation's policy of confidentiality surrounding ITAs. The order is posted on the Tribunal Orders and Dispositions webpage in accordance with Convocation's March 2008 direction.

17. However, since Notices of Application are public documents, they are produced to the public upon request. This includes Notices of Application in which the panel endorsement refers to an ITA. In these circumstances, the fact that the lawyer been invited to attend does not remain confidential.

Issue Arising from Hearing Panel's Reasons for Decision

18. Unless a Hearing Panel makes an order for non-publication, reasons for decision are published. Where a Hearing Panel gives public reasons for decision that refer to an ITA, however, a conflict arises between the confidentiality surrounding ITAs and Convocation's commitment to transparency in the tribunals process and procedure. Currently, the Tribunals Office does not publish public reasons in which a Panel refers to an ITA.

[2] The reference to lawyers only reflects that until this year paralegals were not regulated.

Committee Discussion

19. There is a distinction between the general Law Society policy that ITAs are considered to be an extension of the Society's confidential investigatory process and the situation in which a PAC authorized hearing is converted into an ITA.

20. In the latter situation, a Notice of Application has already been issued and has appeared on the Law Society's website for the public's benefit. Given the Law Society's commitment to open and transparent regulatory processes, it would be misleading to fail to disclose the Notice of Application that sets out the disposition of the matter. Moreover, given that section 36 of the Law Society Act specifically speaks to the Hearing Panel's authority to issue an ITA and to dismiss the application once the member has attended, the Committee is of the view that the legislation envisions the Hearing Panel referring to the ITA on the public record.

21. The Committee has concluded that where a request from the public is made to the Tribunals Office to produce a Notice of Application or reasons for decisions in a past proceeding it should do so, despite the fact that the Hearing Panel's endorsement or reasons refers to an ITA. The occurrence of an ITA can be disclosed, but the content, such as the advice the Panel gives, should not be disclosed.

22. In the course of its discussion, the Committee also considered whether on a "going forward basis" where Hearing Panels issue an Invitation to Attend (ITA) to a lawyer or paralegal and dismiss the application once the lawyer or paralegal has attended and received the Panel's advice, it should refer to the fact of the occurrence of the ITA, but not the content, in its endorsement and order and in any reasons for decision. In the interests of transparency this is the approach to follow. To do otherwise and simply state that the application is dismissed is to leave an erroneous impression of the outcome of the process. While the fact that the ITA has been issued should be disclosed, no endorsement, order or reasons for decision should refer to the content of the ITA.

23. The Committee provided a memorandum to the Professional Regulation Committee in June 2008 setting out its ITA publication proposal. That Committee did not indicate concern with the proposal.

Re: Publication Policy When Hearing Panels Issue Invitations to Attend

It was moved by Mr. Gold, seconded by Mr. Heintzman, that where Hearing Panels issue an Invitation to Attend (ITA) to a lawyer or paralegal and dismiss the application once the lawyer or paralegal has attended and received the Panel's advice, the Hearing Panel shall refer in its endorsement, order and any reasons for decision to the fact that the ITA has been issued and occurred, but not to its content.

Carried

It was moved by Mr. Gold, seconded by Mr. Heintzman, that past Hearing Panel endorsements or reasons for decision that disclose that the Hearing Panel issued an ITA shall be available to the public.

Carried

It was moved by Mr. Wright, seconded by Mr. Aaron, that paragraph 3 of the motion set out at page 3 be deleted.

Not Put

HERITAGE COMMITTEE REPORT

Professor Backhouse presented the Report.

Report to Convocation
October 30, 2008

Heritage Committee

Committee Members
Constance Backhouse (Chair)
Melanie Aitken (Vice-Chair)
Robert Aaron
Patrick Furlong
Vern Krishna
Gary Lloyd Gottlieb
Laura Legge
Robert Topp

Purposes of Report: Decision

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

COMMITTEE PROCESS

1. The Committee met on October 8, 2008. Committee members Constance Backhouse (Chair), Bob Aaron, Patrick Furlong, and Gary Lloyd Gottlieb attended. Joanne St. Lewis attended part of the meeting. Staff members Deidré Rowe-Brown and Sophia Sperdakos also attended. Staff member Josée Bouchard also attended part of the meeting.

POLICY ON ACCESS TO RECORDS OF HISTORIC DISCIPLINE PROCEEDINGS

Motion

1. That Convocation approve a policy to permit third party access to records of *in camera* discipline proceedings where the member in question is deceased and the request is made no earlier than 100 years after the deceased member's year of birth, as follows:

   a. All requests for access shall be made to Senior Counsel, Legal Affairs.

b. The only documents that will be open to access requests are those that would have been publicly accessible had the discipline proceeding taken place after 1986, when the Law Society changed its policy to open discipline hearings to the public.

c. In considering requests for disclosure, Senior Counsel, or her designate will consider,
- the public interest in access to historically important discipline proceedings;
- the importance of research into the history of the legal profession;
- the statutory obligations on the Law Society pursuant to the Law Society Act;
- any solicitor-client privilege issues;
- the Law Society's responsibility respecting confidential information;
- the right to, or expectation of, privacy of the affected member or any other third parties identified in the documents, whether dead or alive; and
- the importance of transparency and public accessibility.

d. Where Senior Counsel, or her designate, decides that access should be denied, the person making the access request may seek a ruling from a single designated bencher pursuant to amended Rules of Practice and Procedure.

2. That the Rules of Practice and Procedure be amended to reflect the policy.

Background

3. Over the course of the past decades, the Law Society has received research requests for access to historic discipline files. Prior to 1986 all disciplinary hearings were held in camera, and consequently, unless the hearing was held after 1986, requests have been denied.

4. At the October 2007 Legal History Symposium, held at Osgoode Hall to celebrate the Society's 175th Anniversary, legal historians from across Canada came together to speak about the history of the profession. Many of these experts remarked on the unique historical importance of these records, and requested that the Law Society reconsider its policy of denying access to the records it holds.

5. The Heritage Committee undertook to review the policy and to consider whether access might be opened to records of discipline hearings that took place before 1986. Initially, members of the Committee hoped to be able to open all these files to public access. After further study, review of statutory and Convocation policy limitations, and consultation with the Professional Regulation and Tribunals Committees, the Heritage Committee has decided to bring forward a recommendation for more limited reform, that would allow the Law Society to develop some experience with widened public access. Should Convocation pass this new limited access policy, the Heritage Committee will undertake to review the experience under it, to determine whether a more open access policy might be recommended in future.

Access Issues

6. Prior to 1986 Law Society discipline hearings were closed to the public. Because of this, the proceeding record is generally unavailable to researchers or the general public.

7. Since 1986 hearings have been presumptively open to the public. While section 49.12(1) of *Law Society Act* precludes benchers, officers, employees, agents or representatives of the Society from disclosing any information that comes to their knowledge as a result of an audit, investigation, review, search, seizure or proceeding,[1] once information becomes part of the record in the open hearing it may be disclosed to the public.

8. Even under the current Rules of Practice and Procedure a panel may order that a hearing, or part of it, be held in camera and the panel's reasons not be made public where certain conditions exist (Rules 3.01 and 3.02(2)). This occurs in exceptional cases. Pursuant to Rule 3.04(1), following the completion of the discipline hearing, a motion may be made at any time to vary, set aside, or suspend the operation of an order that all or part of a hearing be held *in camera.*

9. Since the rules currently envision changing a panel's *in camera* order, there is no reason in principle not to consider such a change for those hearings held before 1986, particularly older proceedings that are of historic interest.

10. Given the relevance of the issue to both the Tribunals and the Professional Regulation Committees' mandates the Heritage Committee sought their input on its proposal. The consensus in both Committees was that the proposal should go forward.

Re: Policy on Access to Records of Historic Discipline Proceedings

It was moved by Professor Backhouse, seconded by Mr. Gottlieb, that –

Convocation approve a policy to permit third party access to records of *in camera* discipline proceedings where the member in question is deceased and the request is made no earlier than 100 years after the deceased member's year of birth, as follows:

a. All requests for access shall be made to Senior Counsel, Legal Affairs.

b. The only documents that will be open to access requests are those that would have been publicly accessible had the discipline proceeding taken place after 1986, when the Law Society changed its policy to open discipline hearings to the public.

c. In considering requests for disclosure, Senior Counsel, or her designate will consider,

- the public interest in access to historically important discipline proceedings;
- the importance of research into the history of the legal profession;
- the statutory obligations on the Law Society pursuant to the *Law Society Act*;
- any solicitor-client privilege issues;
- the Law Society's responsibility respecting confidential information;

[1] There are exceptions to this that the proposed policy does not affect.

- the right to, or expectation of, privacy of the affected member or any other third parties identified in the documents, whether dead or alive; and
- the importance of transparency and public accessibility.

d. Where Senior Counsel, or her designate, decides that access should be denied, the person making the access request may seek a ruling from a single designated bencher pursuant to amended Rules of Practice and Procedure.

That the Rules of Practice and Procedure be amended to reflect the policy.

Carried

GOVERNMENT AND PUBLIC AFFAIRS COMMITTEE REPORT

Mr. Caskey presented the Report.

Report to Convocation
October 30th, 2008

Government Relations & Public Affairs Committee
In Camera

Note: The first item was deferred from September Convocation

Committee Members
James R. Caskey, Co-Chair
Douglas Lewis, Co-Chair
Laurie Pawlitza, Vice-Chair
Bob Aaron
Marion Boyd
Jack Braithwaite
Chris Bredt
Dow Marmur
Susan McGrath
Judith Potter
Heather Ross
Alan Silverstein
William Simpson

Purposes of Report: Decision

Prepared by the Policy Secretariat
Julia Bass 416 947 5228

LAW SOCIETY COMPLIANCE WITH THE FEDERAL *LOBBYING ACT*

Motion

11. That Convocation establish a policy that benchers communicate with officers and employees of the federal government on behalf of the Law Society only when they have the written authorization of the Treasurer or Chief Executive Officer to do so.

Background

12. On July 2, 2008, the *Lobbying Act* and its regulations came into force.

13. The Act imposes stringent reporting requirements on certain people who communicate with "public office holders" (officers or employees of the federal government) about certain matters. Even something as simple as arranging a meeting between a government official and someone else triggers a reporting requirement. Benchers who communicate with public office holders on behalf of the Law Society are considered "consultant lobbyists" and are subject to the provisions of the Act and its regulations.

14. Benchers who communicate with public office holders on behalf of the Law Society must personally comply with the reporting requirements or be subject to onerous penalties including up to a $50,000 fine or six months imprisonment on summary conviction and a $200,000 fine or two years imprisonment if prosecuted by indictment. Offences under the Act are strict liability.

15. The consequences of an investigation or prosecution of a bencher who is alleged to have failed to comply with the reporting requirements do not affect the bencher alone. The consequential damage to the reputation of the Law Society, and its reputation as a credible regulator in the public interest, could be severe.

16. As a result, the Committee considered it necessary to determine the steps the Law Society should take to ensure that it exercises due diligence in this matter.

Lobbying

17. Lobbying is not defined in the Act. Rather, the Act provides that certain communications between "public office holders" and others must be reported.

Why Does the Act Apply to Benchers?

18. For the purposes of the *Lobbying Act*, benchers are considered "consultant lobbyists." Members of boards of directors who are remunerated (by their organization) and whose duties include communicating with "public office holders" and "designated public office holders" on behalf of the organization must register as consultant lobbyists. Benchers will thus have to register as "consultant lobbyists" by virtue of their role as members of the board of directors of the Law Society. (See *Lobbying Act* Implementation Notice #6 at Appendix 3.)

What are Benchers' Obligations under the Act?

Initial Returns

19. Benchers who undertake to communicate with "public office holders" about specified matters must file a return with the Commissioner of Lobbying within 10 days of giving the undertaking (s. 5(1) *Lobbying Act*).

20. A "public office holder" is any officer or employee of Her Majesty in right of Canada and includes,

    a. a member of the Senate or House of Commons and members of his or her staff;
    b. a person appointed to any office or body or with the approval of the Governor in Council or a minister of the Crown, other than a judge receiving a salary under the *Judges Act* or the lieutenant governor of a province;
    c. an officer, director or employee of any federal board, commission or other tribunal as defined in the *Federal Courts Act;*
    d. a member of the Canadian Armed Forces; and
    e. a member of the RCMP (s. 2(1) *Lobbying Act)*.

21. Benchers must file an initial return when they undertake to communicate, on behalf of the Law Society, with a public office holder with respect to,

    a. the development of any legislative proposal;
    b. the introduction, defeat or amendment of any bill or resolution;
    c. the making or amending of any regulation;
    d. the developing or amending any policy or program;
    e. the awarding of any grant, contribution or other financial benefit;
    f. the awarding of any contract; or
    g. arranging a meeting between a public office holder and any other person.

22. Benchers must include the following information in the initial return:

    a. The bencher's name and business address;
    b. The Law Society's name and business address;
    c. Particulars to identify the subject-matter involved;
    d. The fact that the undertaking does not provide for a contingency fee;
    e. Particulars to identify any relevant legislative proposal, bill, resolution, regulation, policy, program, grant, contribution, financial benefit or contract;
    f. If the bencher is a former public office holder, information about offices held, and which of those offices, if any, qualified the bencher as a "designated public office holder" and the date on which the bencher last ceased to hold such a "designated public office;"
    g. The name of any department or other governmental institution in which any public office holder the bencher expects to communicate with is employed or serves;
    h. The communication technique the bencher uses or expects to use;
    i. Any other prescribed information, which includes the fact that the bencher is a member of the board of directors of the Law Society; and
    j. The name and title of the Law Society's principal representative with whom the bencher deals. (s. 5(2) *Lobbying Act* and s. 5 Reg. 2008 –116)

Monthly Returns

23. Benchers who lobby on behalf of the Law Society will be required to file a monthly return by the 15th day of every month. The monthly return will detail the lobbying activity during the preceding month (s. 5(3) *Lobbying Act*).

24. Monthly returns need not report on all communication with public office holders. They only cover communications specified in paragraph 11 a. to f. above with "designated public office holders" where the communication meets all of the following criteria:

    a. The communication is oral.
    b. The communication is arranged in advance of the communication.
    c. The communication is initiated by a person other than a public office holder, unless the communication relates to the awarding of a federal government grant, contribution, or other financial benefit or the awarding of a federal government contract (s. 6 Reg. 2008-116).

25. Designated public office holders include,

    a. a minister of the Crown or a minister of state and any person employed in the minister's office;
    b. any other public office holder who, in certain departments,

        i. occupies the senior executive position i.e. deputy minister; or
        ii. is an associate or assistant deputy minister or occupies a position of comparable rank;

    c. Chief of the Defence Staff and six other senior officers in the Canadian Armed Forces;
    d. any position of Senior Advisor to the Privy Council Office appointed by the Governor in Council;
    e. Deputy Minister (Intergovernmental Affairs) Privy Council Office;
    f. Comptroller General of Canada; and
    g. anyone else appointed to a position of deputy minister, associate deputy minister, deputy head, associate deputy head or a position equivalent in rank to any of these.

26. Monthly returns must include the following information:

    a. The name and position title of the designated public office holder the bencher communicated with;
    b. The name of the branch/unit and department or other governmental institution in which the designated public office holder is employed or serves at the time the bencher communicated with him or her;
    c. The date of the communication;
    d. Particulars to identify the subject-matter of the communication;
    e. Any corrections to the information in the initial return;
    f. Any additional information that the bencher would have been required to provide at the time of filing the initial return that comes to the bencher's attention after filing the initial return;
    g. The fact that the undertaking has been performed or terminated, if this is so. (s. 5(3) *Lobbying Act*, s. 7 Reg 2008 – 116)

27. If no prescribed communication was made during a month, no monthly return is required. However, a return must be filed at least every six months, even if no prescribed communications have occurred (s. 5(4.2) *Lobbying Act*).

28. All returns must be filed online (s. 7.2(1) *Lobbying Act*).

29. The Commissioner of Lobbying will develop a Lobbyists' Code of Conduct respecting the communication activities and benchers who lobby will be required to comply with that Code (s.10.2 and 10.3 *Lobbying Act*).

Offences and Punishment

30. Knowingly making a false or misleading statement on a return is a hybrid offence, punishable by a fine of up to $50,000 or imprisonment for up to six months or both on summary conviction, and by a fine of up to $200,000 or imprisonment for up to two years or both on indictment (s. 14(1) Lobbying Act).

31. Failing to file a return as required — which includes filing an inaccurate or incomplete return — is a strict liability offence subject to the same penalties (s. 14(1), Lobbying Act).

32. The Commissioner can impose a ban on lobbying of up to two years on anyone convicted of an offence under the Act (s. 14.01 *Lobbying Act*).

33. The limitation period for summary prosecutions is five years after the Commissioner becomes aware of the offence, but no later than ten years after the offence arose (s. 14(3) *Lobbying Act*).

34. The Commissioner may make public the nature of any offence, the name of the offender, and the punishment imposed. (s. 14.02 Lobbying Act) In addition, the Commissioner is required to report all investigations to Parliament (s. 10.5(1) *Lobbying Act*).

The Committee's Deliberations

35. The Committee considered the serious consequences, both to individual benchers and to the Law Society, of contravening the *Lobbying Act*. The Committee considered it particularly important that the Law Society be seen to be exercising due diligence as an organization in ensuring compliance with the Act.

36. Due diligence requires that the Law Society establish internal tracking and record-keeping systems showing its dealings with the federal government. It will also require deciding who communicates with the federal government on behalf of the Law Society.

37. The Committee recommends that Convocation establish a policy specifying that benchers should only communicate with public office holders on behalf of the Law Society with the written authorization of the Treasurer or Chief Executive Officer. This will allow the Law Society to know who must register as a consultant lobbyist, and assist benchers with the reporting requirements. In addition, this will provide a written record in the event that the lobbying activities of the Law Society or any individual bencher on behalf of the Law Society are called into question.

38. If Convocation accepts the recommendation of the Committee, the Committee further recommends that due diligence requires the Law Society to amend the bencher indemnification provisions in section 53 of By-law 3 to limit the indemnification of benchers in the event of non-compliance with the policy.

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

Copy of the Lobbying Act Implementation Notice #6 re: Members of Boards of Directors and Members of Organizations.

(Appendix 3, page 18)

Re: Federal Lobbying Act

It was moved by Mr. Caskey, seconded by Mr. Lewis, that Convocation establish a policy that benchers communicate with officers and employees of the federal government on behalf of the Law Society only when they have the written authorization of the Treasurer or Chief Executive Officer to do so.

A friendly amendment was made to replace the words “federal government” with the words “government of Canada”.

The motion as amended was approved.

It was moved by Mr. Crowe, seconded by Mr. Porter, that the reference to the Chief Executive Officer be deleted.

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LAW FOUNDATION REPORT

Mr. Banack introduced Elizabeth Goldberg, Chief Executive Officer of the Law Foundation and presented the Law Foundation’s Annual Report.

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Report to Convocation
October 30, 2008

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
Rabbi Dow Marmur
Judith Potter
Linda Rothstein
Mark Sandler
Beth Symes

Purposes of Report: Decision and Information

Prepared by the Equity Initiatives Department
(Josée Bouchard, Equity Advisor - 416-947-3984)

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COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones ("the Committee") met on October 8, 2008. Committee members Janet Minor, Chair, Mary Louise Dickson, Avvy Go, Rabbi Dow Marmur, Linda Rothstein, Judith Potter, Mark Sandler and Beth Symes participated. Milé Komlen, Chair of the Equity Advisory Group (the "EAG"), also participated. Staff members Jewel Amoah, Josée Bouchard, Marisha Roman, Rudy Ticzon and Mark Wells attended.

FOR INFORMATION

BENCHER ELECTION 2007 REPORT –
CANDIDATES SURVEY

BACKGROUND

36. In preparation to the 2007 bencher election, a number of candidates asked the Law Society to provide email addresses of members to assist candidates in their campaigning. On October 26, 2006, a report was presented to Convocation recommending that the Law Society not provide the email addresses of members to candidates in the 2007 bencher election, but that the Law Society continue to provide candidates with mailing addresses.

37. The report recognized that providing members' email addresses to candidates would be simpler and cheaper than providing printed labels, and would level the playing field for candidates. However, the report also noted the following reasons for not providing the email addresses of members to candidates:

    a. There is a heightened awareness in Canada of issues surrounding the privacy of information and the duty of companies and organizations to maintain the confidence of certain information they have about their customers and members.
    b. The Law Society has created an expectation among its members that it will keep their information confidential.
    c. If the Law Society were to distribute the database of member email addresses, it would have no control over the use that is made of it. The risk was not limited to the use made of it by the candidate who uses it to distribute campaign material, but extended to the recipients of the material as well. Unless the sender of the original email developed a customized email program, all recipients of the email would have access to the database.
    d. A definitive email list of Ontario lawyers would be highly prized and of significant commercial value. The distribution of members' email addresses to unknown third parties would likely lead to members receiving significant volumes of unwanted emails and inevitable criticism of the Law Society.
    e. Spam has become a worldwide problem. There are estimates that spam accounts from between 75 and 90% of all email sent worldwide. Members of the Law Society are affected by it.

38. A number of benchers voiced their concern about the recommendation that the Law Society not provide email addresses of members to candidates in the 2007 bencher election. Some benchers were of the view that the matter is an equity issue, as the cost

of sending campaign materials by mail is prohibitive and has a disproportionate impact on candidates who cannot afford it. Convocation did not vote on the recommendations, and the matter was referred to the Equity Committee for its consideration.

39. On November 27, 2006, the Committee considered a number of options to assist candidates in the 2007 bencher election and concluded that the status quo, which was to provide access to address labels but not to email addresses of electors, would be maintained for the 2007 bencher election. The decision was based largely on the issues that had been raised in the October 26, 2006 report. The Committee, however, recommended that in the future and in preparation for the next bencher election, the Member's Annual Report ("MAR") should provide members with the option to expressly allow the Law Society to use their email addresses for campaigning purposes. The Committee was of the view that providing access to campaign emailing would reduce the barriers faced by those who cannot afford the exorbitant costs of mailing campaign materials and would provide greater access to electors.

40. On December 8, 2006, Convocation considered the Committee's recommendations and referred the matter back to the Committee for further consideration. More specifically, benchers were of the view that,

    a. every reasonable effort should be made to level the playing field;
    b. candidates from rural areas of Ontario and small firms, and those who do not have high incomes cannot afford the cost of campaign promotion materials and mass mailing;
    c. the Committee should consider whether it is fair for the Law Society to make mailing lists and labels available to candidates;
    d. the Committee should consider whether campaign spending limits should be imposed;
    e. the Committee should consider how to address the issue of name recognition while increasing fairness in bencher election.

41. As a result, in 2007, the Law Society retained the Strategic Counsel to conduct a survey of candidates in the 2007 bencher election to better understand campaign and campaign financing in particular. Findings of the study are presented at Appendix 4 for the purpose of developing strategies to enhance fairness in future bencher elections.

42. Also, in response to requests by benchers that the Law Society ask members to consent to the use of their email addresses for the campaigning purposes, the Law Society included in the 2008 MAR and PAR the following questions:

    a. MAR: During the bencher election, many candidates want to communicate with voters by e-mail. Fill in the oval if you give the Law Society permission to allow the use of your e-mail address for bencher election campaigning purposes.
    b. PAR: During the upcoming election for the members of the Paralegal Standing Committee, candidates may want to communicate with voters by e-mail. Fill in the oval if you give the Law Society permission to allow the use of your e-mail address for election campaigning purposes.

43. On October 8, 2008, the Committee considered the Strategic Counsel report presented at Appendix 4 and decided that,

a. the report should be made public;
b. the report should inform the work of the Governance Task Force and other Law Society committees, task forces and working groups;
c. the report will inform the Committee in developing strategies to level the playing field for future bencher election;
d. the Committee will reconsider the report and develop strategies in the spring of 2009, once data from the MAR and PAR are made available.

EQUITY PUBLIC EDUCATION SERIES CALENDAR
2008 - 2009

Black History Month
In partnership with the Canadian Association of Black Lawyers
Date: February 5, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

International Women's Day
In partnership with the Women's Law Association of Ontario, the Feminist Legal Analysis Section of the OBA, the Barbra Schlifer Clinic
Date: March 5, 2008
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

International Day for the Elimination of Racial Discrimination
Date: March 19, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

National Holocaust Memorial Day
In partnership with B'nai Brith Canada
Date: April 21, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

Asian Heritage Month
In partnership with the South Asian Legal Clinic of Ontario, South Asian Bar Association
Date: May 5, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

National Access Awareness
In partnership with ARCH Disability Law Centre
Date: May 25, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

National Aboriginal Day
Date: June 16, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

Pride Week
In partnership with the Sexual Orientation and Gender Identity Section of the Ontario Bar Association
Date: June 25, 2009
Time: Panel Discussion from 4 to 6 p.m.
Reception: 6 p.m.

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

Copy of the Bencher Election 2007 Candidates Survey, A Report to the Law Society dated September 30, 2008.

(Appendix 4, pages 24 – 62)

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REPORT FOR INFORMATION ONLY
Professional Development and Competence Committee Report

- Lawyers Oath – Call to the Bar

Report to Convocation
October 30, 2008

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
Joanne St. Lewis
Catherine Strosberg
Gerald Swaye

Purpose of Report: Information

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

COMMITTEE PROCESS

1. The Committee met on October 8, 2008. Committee members Constance Backhouse (Vice Chair)(chaired the meeting), Mary Louise Dickson (Vice Chair) Alan Silverstein (Vice Chair), Larry Banack, Jack Braithwaite, Thomas Conway, Marshall Crowe, Aslam Daud, Susan Hare, Paul Henderson, Dow Marmur, Daniel Murphy, Judith Potter, Nicholas Pustina, Heather Ross, Catherine Strosberg and Gerald Swaye attended. Staff members Leslie Greenfield, Lisa Mallia, Diana Miles, and Sophia Sperdakos also attended.

INFORMATION

LAWYERS OATH – CALL TO THE BAR

2. At the Annual General Meeting in May 2008 members brought a motion calling for a change to the oath lawyers take upon call to the bar. The motion passed.

3. The Committee has undertaken an examination of the oath and established a working group to consider a new oath. The members of the working group are Heather Ross (Chair), Susan Hare and Alan Silverstein.

4. The working group has providing preliminary proposals to the Committee and received feedback. The working group will provide a further report to the Committee and the Committee will report to Convocation in November 2008.

CONVOCATION ROSE AT 3:30 P.M.

Confirmed in Convocation this 27th day of November, 2008.

Treasurer