

MINUTES OF CONVOCATION

Wednesday, 29th November, 2000
9:00 a.m.

PRESENT:

The Treasurer (Robert P. Armstrong, Q.C.), Aaron, Arnup, Banack, Bindman, Bobesich, Braithwaite, Boyd, Campion, Carey, Carpenter-Gunn, R. Cass, Chahbar, Cherniak, Coffey, Copeland, Cronk, Crowe, Curtis, Diamond, Divinsky, E. Ducharme, T. Ducharme, Elliott, Epstein, Farquharson, Feinstein, Gottlieb, Hunter, Krishna, Lalonde, Lamont, Laskin, Lawrence, MacKenzie, Manes, Martin, Millar, Mulligan, Murphy, Murray, O'Brien, Ortved, Pilkington, Porter, Potter, Puccini, Rodgers, Ross, Ruby, Swaye, Topp, Wardlaw, White, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

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MOTION - ELECTION OF BENCHERS

WHEREAS Dino DiGiuseppe who was elected from the Northwest Electoral Region on the basis of votes cast by electors residing in that electoral region, has been appointed a judge of the Ontario Court of Justice; and

WHEREAS upon being appointed a judge of the Ontario Court of Justice, Dino DiGiuseppe became unable to continue in office as a bencher, thereby creating a vacancy in the office of bencher elected from the Northwest Electoral Region on the basis of votes cast by electors residing in that electoral region.

It was moved by Ms. Pilkington, seconded by Mr. Bindman,

THAT under the authority contained in By-Law 5, Ross W. Murray, having satisfied the requirements contained in subsections 49 (2), 49 (3) and 52 (1) of the By-Law, and having consented to the election in accordance with subsection 52 (2) of the By-Law, be elected by Convocation to fill the vacancy in the office of bencher elected from the Northwest Electoral Region on the basis of votes cast by electors residing in that electoral region.

Carried

WHEREAS Ross W. Murray, who was elected from the Province of Ontario "B" Electoral Region (the area in Ontario outside the City of Toronto) on the basis of the votes cast by all electors, has been elected by Convocation to fill a vacancy in the office of bencher elected from the Northwest Electoral Region on the basis of votes cast by electors residing in that electoral region; and

WHEREAS Ross W. Murray's election to fill a vacancy in the office of benchers elected from the Northwest Electoral Region on the basis of votes cast by electors residing in that electoral has created a vacancy in the number of benchers elected from the Province of Ontario "B" Electoral Region (the area in Ontario outside the City of Toronto) on the basis of the votes cast by all electors;

It was moved by Ms. Pilkington, seconded by Ms. Curtis,

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

Carried

The Treasurer welcomed Ms. Sandra Rodgers to Convocation.

TREASURER'S REMARKS

The Treasurer expressed with regret the passing of Mr. Frederick M. Cass, Q.C. who was a life Benchers of the Law Society of Upper Canada and the brother of another life Benchers, Ronald Cass, Q.C. The Treasurer remarked on his distinguished career as a former member of the provincial legislature for Grenville Dundas and his service in a number of cabinet positions between 1955 and 1971. During World War II Mr. Cass served in London, the Central Mediterranean and Northwest Europe. He was also the Honourable Colonel of the Stormont, Dundas and Glengarry Highlanders.

The Treasurer extended his sympathy to his family and his brother Ronald Cass.

ANNOUNCEMENT RE: KENNETH MURRAY COMPLAINT

Mr. Gavin MacKenzie, Chair of the Professional Regulation Committee made the following statement:

"Law Society Complaint D73/97 Against Kenneth Murray

In February of 1997, the Law Society issued a Complaint alleging that Mr. Murray was guilty of professional misconduct. The hearing of this Complaint by the Law Society was deferred pending the completion of criminal proceedings against Mr. Murray.

On June 13, 2000, the Honourable Mr. Justice Gravelly of the Ontario Superior Court of Justice found Mr. Murray not guilty of attempting to obstruct justice by concealing videotapes that he removed on his client's instructions from his client's home. At the end of the criminal proceedings, the Law Society obtained and reviewed the evidence and judgment from the criminal trial.

On November 15, 2000, the Proceedings Authorization Committee of the Law Society (Gavin MacKenzie, Eleanore Cronk, Neil Finkelstein, and Niels Ortved) directed that the Complaint against Mr. Murray be withdrawn. That decision followed upon a careful review of all the material relating to the matter. That review included the results of the Law Society's original investigation as well as information that came to light as a result of the criminal proceeding.

Mr. Murray's acquittal by Justice Gravely was the result of a 27-day trial at which the factual and legal issues were thoroughly explored. Mr. Justice Gravely found that Mr. Murray may not have intended to permanently suppress the videotapes. He also found that, having regard to the uncertain state of the law and the divergent opinions of respected members of the profession, Mr. Murray may have believed that he had no duty to disclose the videotapes before trial.

The Proceedings Authorization Committee considered Mr. Justice Gravely's findings to be entitled to considerable deference, and concluded that the public interest would be better served by the clarification of lawyers' professional responsibilities when confronted with such a dilemma than by the continuation of disciplinary proceedings against Mr. Murray.

The Treasurer has recommended that a special committee be appointed to consider the issues raised by the case and to devise a proposed rule of professional conduct to provide guidance to lawyers who may be faced with similar problems in the future. The members of the special committee will include representatives of the Law Society, the Criminal Lawyers' Association, and the Crown."

The Treasurer announced the following composition of the special committee who would report back to Convocation in January 2001:

Gavin MacKenzie (Chair)
Todd Ducharme
The Hon. Sydney L. Robins, Q.C., LSM
Heather Ross
Clayton Ruby
Alan Gold (President, Criminal Lawyers Association)
Paul Lindsay (Ministry of the Attorney General)

REPORT OF THE DIRECTOR OF EDUCATION

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Education asks leave to report:

B.
ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Wednesday, November 29th, 2000:

Gerard-Alexandru Barosan
Penney Jaye Lewis

Bar Admission Course
Bar Admission Course

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

B.1.4. The following candidates have completed successfully the Transfer Examination or Phase Three of the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be called to the Bar and to be granted a Certificate of Fitness at Convocation on Wednesday, November 29th, 2000:

Marc Delorme	Quebec
David Eugene Gruber	British Columbia
Tracy Marcella McManus	Saskatchewan
Sarah Qadeer	Quebec
Andrew Charles Shatto	Saskatchewan

B.2. APPLICATION TO BE LICENSED AS A FOREIGN LEGAL CONSULTANT

B.2.1. The following apply to be certified as a foreign legal consultant in Ontario:

Ruchi Kaushal	New York Shearman & Sterling
Jason Michael Saltzman	New York Skadden, Arps
Saira Khan	New York Shearman & Sterling

B.2.2. Their applications are complete and each has filed all necessary undertakings.

ALL OF WHICH is respectfully submitted.

DATED this the 29th day of November, 2000.

It was moved by Mr. Campion, seconded by Mr. White that the Report of the Director of Education be adopted.

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Education were presented to the Treasurer and called to the Bar and the degree of Barrister-at-law was conferred upon each of them. They were then presented by Mr. Lamont to Madam Justice Denise Bellamy to sign the Rolls and take the necessary oaths.

Gerard-Alexandru Barosan	Bar Admission Course
Penney Jaye Lewis	Bar Admission Course
Marc Delorme	Transfer, Province of Quebec
David Eugene Gruber	Transfer, Province of British Columbia

Tracy Marcella McManus
Sarah Qadeer
Andrew Charles Shatto

Transfer, Province of Saskatchewan
Transfer, Province of Quebec
Transfer, Province of Saskatchewan

MOTION - COMMITTEE APPOINTMENT

It was moved by Mr. Ruby, seconded by Mr. Crowe that Harvey Strosberg be appointed as a member to the Lawyers Fund for Client Compensation Committee.

Carried

MOTION - DRAFT MINUTES OF CONVOCATION

It was moved by Ms. Pilkington, seconded by Mr. Crowe that the Draft Minutes of Convocation of September 21st, 22nd and October 19th, 2000 be approved.

Carried

DISCIPLINE MATTER

Re: George Washington Steven HARRINGTON - Oakville

Mr. Glenn Stuart appeared on behalf of the Society and Ms. Jane Kelly, Duty Counsel appeared on behalf of the solicitor. The solicitor was not present.

Ms. Kelly advised that the solicitor requested an adjournment.

Counsel for the Society opposed the adjournment.

It was moved by Mr. Ruby, seconded by Ms. Ross that the adjournment be denied.

Both Counsel, the reporter and the public withdrew.

It was moved by Mr. Carey, seconded by Mr. Gottlieb that the adjournment request be granted.

The Treasurer ruled the motion out of order by reason of the Ruby/Ross motion.

The Ruby/Ross motion that the adjournment be denied was voted on and adopted.

Both Counsel, the reporter and the public were recalled and informed that the request for an adjournment was denied.

The Discipline matter was adjourned to 3:30 p.m.

REPORT OF THE FINANCE AND AUDIT COMMITTEE

Mr. Krishna presented the Report of the Finance and Audit Committee for approval by Convocation.

Finance and Audit Committee
November 9, 2000

Report to Convocation

Purpose of Report: Decision

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

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on November 9, 2000. Committee members in attendance were Krishna V. (c), Epstein S., Feinstein A., Puccini H., Murphy D., White D., Wright B.. Hunter G. was also in attendance. Staff in attendance were: Saso J., Tysall W., Grady F., White R., Cawse A..

2. The Committee is reporting on the following matters:

Decision

- Long Term Investment Policy
- Member Invoicing.

FOR DECISION

GENERAL FUND AND COMPENSATION FUND
LONG TERM INVESTMENT POLICY

1. The Law Society currently has Investment Policies divided between the General Fund and the Compensation Fund. The Investment Policies of the Law Society were last reviewed in 1996. Since that time there has been changes to such areas as the Law Society's banking arrangements, custodial responsibilities, accounting reserves and cash flows. The current changes envisage unified Investment Policies for both Funds differentiating between long term and short term investments, with short term investments being administered under the current General Fund short term asset mix and policies.

EXECUTIVE SUMMARY

2. The motivations for the changes are to:
- exploit the Law Society's investment assets and core long term component within these assets;
 - comply with prudent investor principles in a business-like and cost effective manner;
 - obtain the benefits of professional investment management at relatively low cost.

3. Recommended changes in implementing a long term policy are:
a) The long term investment policy asset mix be changed as summarised below:

	ENVISAGED LONG TERM POLICY (%)	CURRENT GENERAL FUND POLICY (%)	CURRENT COMPENSATION FUND POLICY (%)
EQUITIES	0 - 20	0	0 - 10
BONDS	60 - 95	0	30 - 70
CASH & SHORT TERM	0 - 20	100	25 - 65

- b) Law Society long term investments be managed by an Investment Counselor and Portfolio Manager;
4. After considering cash flows, \$13,000,000 in the Compensation Fund can be administered under the envisaged Long Term Investment Policy at this time, with the balance being administered as short term funds. All funds in the General Fund are considered to be short term at this time.

ISSUE DEFINITION

6. The Law Society currently administers cash, short term investments, and long term investments ("the Investments") in its General Fund, Lawyers Fund for Client Compensation and some other relatively minor funds.
7. Returns from the Investments are primarily utilised to fund operations, and therefore the appropriate mix of investment returns versus investment risk should be obtained.
8. Executive Limitations states that "the Chief Executive Officer shall not allow Society funds to be invested except in accordance with the Society's Investment Policy".

BACKGROUND INFORMATION

9. Market values of the Investments are summarised below:

DATE	Dec. 31,1997	Dec.31,1998	Dec. 31, 1999
Cash and Short Term Investments - General Fund	\$3.9mill.	\$9.2 mill.	\$8.5 mill
Cash and Short Term Investments - Compensation Fund	\$2.3mill	\$8.8 mill.	\$6.4 mill.
Long Term Investments - Compensation Fund	\$17.5mill	\$14.2mill.	\$13.5mill
TOTAL	\$23.7mill	\$32.2mill.	\$28mill

10. The LPIC Investment Policies were utilised as a resource. For comparison, sister organizations such as the C.I.C.A. and other not for profits which administer endowment and other funds, were polled for their investment policies. The investment mix and policies of short term pool funds administered by financial institutions and mutual funds were also reviewed to assess risk profiles in their short term portfolios.
11. The Trustees Act, recently amended for the Red Tape Reduction Act, was reviewed to incorporate related obligations. The Red Tape Reduction Act replaced the list of prescribed investments with a more subjective, but more onerous "Prudent Investor" principle. This requires an investment methodology based on the standard of care, skill, diligence and judgement that a prudent investor would employ in making investments.

OBJECTIVE

12. The objectives of the Long Term Investment Policy are:
 - a) To formalise investment objectives such that:
 - the real capital value of the Law Society's investments are maintained;
 - a sufficient level of liquidity is maintained to ensure the financing of continuing operations;
 - the Law Society receives an adequate net rate of return on its investments, subject to appropriate market and portfolio risk.
 - b) To ensure that the investment mix is appropriate in terms of size and composition.
 - c) To ensure that any brokers, managers and custodians used by the Law Society are of appropriate quality, and terms for services rendered are optimum for the Law Society.
13. It is difficult to examine Investment Policy objectives in relation to the Law Society's goals and objectives as set out in its Mission Statement and related pronouncements, as the administration of investments is ancillary to core functions. However an effective Investment Policy will facilitate an independent legal profession through the preservation of significant assets of the Law Society, and the provision of financing to supplement membership fees.

OPTION ANALYSIS

14. The range of options can be divided into:
 - investment risk limits, and
 - the level of centralised administration required.
15. Investment Risk

The Law Society's potential investment risk varies from very low, (cash or equivalents) with corresponding low returns, to the other end of the spectrum of high risk speculative investments with potentially high returns. An investment mix of fixed income and conservative equities is preferred.

 - a) General

While there are no specific statutory requirements governing investment administration (the Law Society Act does not address the matter), the nature of the funds implies a fiduciary responsibility.

When the Law Society ran the E & O Fund the Law Society voluntarily decided to adhere to the Trustees Act. It would therefore be appropriate to apply the "prudent investor" principles of the Trustees Act in the administration of Law Society Investments. While this reinforces the requirements of capital preservation, simply parking funds in low risk investments with low returns may not be appropriate in terms of administrative responsibility, and optimising revenues.

b) Fixed Income versus Equity

Historically there have been material core amounts in the Compensation Fund which have had the nature of long term investments. This is expected to continue in the future. The cash and near cash component in the long term investments acts as a bridge to the short term funds maintained to finance operations. Long term balances in the General Fund are not sufficient to warrant a long term allocation at this time.

Law Society investments have been considered to be primarily short term in nature, resulting in only minor exposure to the relatively volatile equity and long term bond markets, and a buy-and-hold style of administration for these long term investments. The envisaged Investment Policy for Long Term Funds and Reserves increases this maximum exposure to equity markets to 20% of Portfolio value (similar to LPIC's equity exposure). The philosophy allows longer durations for fixed income securities, with a more active style of investment management. Accepting a longer term time horizon for a portion of the investments will allow greater exposure to conservative equity investments, as a longer time horizon will reduce the timing risk of market cycles and equity volatility. Equity investment also allows greater geographic and sector diversification, which in a long term portfolio should reduce investment risk. The draft Investment Policy limits equities to the United States and Canadian markets.

16. Administration of Investments

The options for the administration of investments can be classified as keeping it in house, utilising pooled funds, contracting the administration out to a manager, or a combination of these options.

- Administration by Law Society employees
This is the situation that exists at the moment. Virtually all purchases and sales are in fixed income investments, within parameters established by the existing investment policy. Brokers are utilised as agents to identify available investments, and to complete approved transactions. A custodian is utilised to hold script and administer investment income. The existing expertise and staffing is not sufficient for the monitoring, decision making and other administration required by the envisaged long term investment policy.
- Use of pooled funds
Changes in the Trustees Act now permit investments in appropriate varieties of pooled funds. While this would permit appropriate diversification, the costs of this option need to be compared to the use of a portfolio manager, especially if a relatively passive investment style is adopted. Pooled funds may also be less suitable for the tailored investment mix that we are contemplating. Pooled funds facilitate the custodial function.

- Portfolio manager
This is the recommended option for long term funds. At the current time, the use of a portfolio manager is the business-like option to optimise compliance with "prudent investor" principles. Administration costs are likely to be most economical for the type of investment activity, and sufficient flexibility is allowed. Required investment monitoring and feedback will be facilitated. The manager would be separate from the custodian. This choice is facilitated by the opportunity to utilise the Investment Counselors and Portfolio Managers retained to administer the LPIC portfolio of investments (\$240million in market value at December 31, 1999). The Law Society's investments would be in a separate fund from the LPIC funds. By combining with LPIC the Law Society would pay for the Investment Counselor and Portfolio Manager's services on a best tier basis, and obtain the benefits of LPIC's sophisticated monitoring infrastructure.

ETHICAL INVESTING CONSIDERATIONS

17. An ethical investing component was considered because of the Law Society's equity initiatives, because of the mandate to govern in the public interest, and because of the beneficial societal impacts. However any perceived negative impact on portfolio returns may have fiduciary implications. Also, the problems of defining ethical investments can result in problems assessing the results of the ethical program, and finding appropriate bench marks for comparison. Broad definitions of unethical investments can also limit portfolio diversification, although the size and conservative nature of the Law Society portfolio may negate this factor.

EVALUATION MECHANISMS

18. Evaluation measures are included in the Investment Policy. In addition, every three or four years the policy and returns will be reviewed by an independent investment counselor to ensure that the policy is still appropriate, and returns are appropriate when compared to similar institutions and portfolios. The draft Investment Policy has been reviewed by James P. Marshall, Investment Managers, with suggested changes incorporated into the document..

Request of Convocation

The Committee recommends that Convocation approves the Long Term Investment Policy dated November 9, 2000 attached as page 9 of this report.

MEMBER INVOICING

19. The Law Society bills members called to the bar in the first three months of the year for the period from April to December of that year. The Committee recommends a minor change to By-Law 15 to continue this past practice.
20. By-Law 15-2 subsection (11) reads:
"Despite subsection (9), a student member who, after January 1 and before March 31 in a year, is admitted as a member shall pay, in respect of the year in which he or she is admitted as a member, the amount of the annual fee payable by a person admitted as a member on April 1."
21. Applying the above provisions of the current By-Law means new members called in January, February and March only pay from May of that year, providing these new calls with an extra month of free membership.

22. This section of By-Law 15 needs to be amended to avoid ambiguity and clarify that new calls admitted in the months January, February and March are to pay Annual Fees for the period April to December. Changing the bylaw dates from April 1 to March 31 accomplishes this.

Request of Convocation

That By-Law 15 made by Convocation on January 28, 1999 and amended by Convocation on May 28, 1999 and September 24, 1999 be further amended as follows:

Subsection 2 (11) of the By-Law is amended by deleting "April 1/1^{er} avril" at the end and substituting "March 31/31 mars".

STATEMENT OF INVESTMENT POLICY

LONG TERM FUNDS AND RESERVES

1. GENERAL

The Law Society, acting through its Finance and Audit Committee, has adopted the following Statement of Investment Policy governing the management of the Long Term Funds and Reserves ("the Portfolio"). The Portfolio comprises the funds and reserves not required to fund the Compensation Fund and General Fund's short term obligations. The Compensation Fund is a discretionary fund used to compensate member's clients for losses arising from a member's misconduct, and the General Fund finances the Law Society's day to day operations.

2. ACCOUNTABILITY AND RESPONSIBILITY

(a) Convocation

Convocation shall:

- i) review and approve the Statement of Investment Policy
- ii) review the Portfolio's investment returns, and the administration of the portfolio in the context of this policy. This shall be done on at least a quarterly basis.

(a) Finance and Audit Committee

The Finance and Audit Committee shall:

- i) review and recommend approval of the Statement of Investment Policy to Convocation;
- ii) review the Portfolio and monitor its performance;
- iii) review and approve the appointment and continuing retention of the Investment Counselor and Portfolio Manager;
- iv) periodically report to Convocation on the investment returns of the Portfolio, and the administration of the Portfolio. This shall be done on at least a quarterly basis.

(c) LSUC Staff and Management

LSUC management has overall responsibility for:

- i) preparing and recommending changes to the Policy
- ii) recommending the selection of the Investment Counselor and Portfolio Manager, and Custodian;
- iii) monitoring the Portfolio to ensure compliance with this policy;
- iv) periodically evaluating the Investment Counselor and Portfolio Manager, and Custodian;
- v) accounting for Portfolio transactions, particularly ensuring that allocations between the two funds are appropriate.

(d) Investment Counselor and Portfolio Manager

The Investment Counselor and Portfolio Manager directs the business of Portfolio purchases and sales, has full investment discretion subject to the Investment Policy, and has responsibility for:

- i) Managing the Portfolio in terms of this Statement of Investment Policy, and in the best interests of the Law Society;
- ii) Providing written notification to management of the Law Society of any violations of this Statement of Investment Policy;
- iii) Adhering to the best standards of industry practice.

(e) Custodian

The Custodian shall be one of the following:

- i) A bank listed in Schedule I or II of the Bank Act (Canada).
- ii) A trust company that is incorporated under the laws of Canada, and that has shareholders' equity of not less than \$10,000,000.
- iii) A company that is incorporated under the laws of Canada, and that is an affiliate of a bank or trust company referred to above and has shareholders' equity, of not less than \$10,000,000,

and shall:

- iv) store and protect all Portfolio ownership documentation;
- v) execute all Portfolio transactions as directed by the Investment Counselor and Portfolio Manager;
- vi) Collect all income, and
- vii) Provide monthly statements to LSUC.

PHILOSOPHY

The Finance and Audit Committee is of the belief that:

- (a) Superior rates of return over longer time periods will be achieved through active management of a broadly diversified portfolio of high quality securities.
- (b) High-risk securities, which could lead to excessive volatility and the possibility of a reduction in the capital value of the Portfolio in a depressed market, are to be avoided.
- (c) Extreme positions in either individual securities or in an asset class are to be avoided.

In order to establish an appropriate Investment Policy for the Portfolio, the following characteristics of the Law Society, relevant to the Portfolio, are noted.

- (a) The Law Society is the governing body of Ontario's legal profession. Governance of the Law Society is regulated by *The Law Society Act*. The Compensation Fund is maintained to mitigate losses sustained by clients because of the dishonesty of a member of the Law Society. It is a discretionary fund, and claim payments have a maximum of \$100,000.
- (b) The primary revenue source for both the General Fund and the Compensation Fund is member fees which are primarily received in the first four months of the year. Total revenue for the General and Compensation Fund for the year ended December 31, 1999 was \$49.4 million. The Law Society is not subject to income or capital taxes.
- (c) Balances for investments at 31 December 1999 and 1998 were:

CATEGORY	1999 (\$mill)	1998 (\$mill)
General Fund - Cash and Short Term Investments	9.0	9.7
Compensation Fund - Cash and Short Term Investments	6.3	8.8
Compensation Fund - Long Term Investments	13.6	13.5
TOTAL	28.9	32.0

It is therefore apparent that, apart from core balances which are required to meet the operating needs of the General Fund and the Compensation Fund, there is a portion of the portfolio that can tolerate some short term volatility.

OBJECTIVES

The primary objective is to preserve and enhance the real capital base of the Portfolio. This is measured by obtaining a total rate of return in excess of the Canadian Consumer Price Index plus 3% over the long term. The long term will exceed a four year moving average.

The secondary objective is to generate investment returns to assist the Law Society in funding its programs.

The Finance and Audit Committee recognizes that even with the guidelines outlined in this Policy Statement, the investment returns from the Portfolio will vary from year to year reflecting market and economic conditions, levels of inflation, government policies and many other factors which are beyond the control of the Investment Counselor and Portfolio Manager (defined below). These outside factors should not deter the Investment Counselor and Portfolio Manager from exercising due diligence and using his or her best efforts to achieve the long-term primary investment objective for the Portfolio as set out above, and the following benchmarks:

- (a) By asset class,
 - (i) to outperform the appropriate market index return;
 - (ii) to obtain a total rate of return in the top 50% of a sample of funds having similar investment objectives, utilising an independent performance measurement service on a four year moving average.
- (b) To outperform a static benchmark portfolio (consisting of the benchmark of the asset mix ranges noted below) i.e. a portfolio consisting of 87% of the Scotia Capital Universe Bond Index total return, and 13% of the total return of the Toronto Stock Exchange 300 Index and S & P 500, equally weighted, over a four year moving average or complete market cycle.

POLICIES

A. Investment Counsel and Portfolio Manager

To achieve these objectives the Law Society will retain the services of a firm registered as Investment Counsel and Portfolio Manager with the Ontario Securities Commission to manage the investment portfolio on a discretionary basis within the constraints outlined in this document. The Investment Counsel and Portfolio Manager is to be guided by the following:

B. Asset Mix

The following asset mix guidelines, based on market values, constitute the acceptable range of exposure for the various asset classes, which comprise the Portfolio:

% Of Total Fund	Minimum	Mid-Point	Maximum
Cash and Short Term	0%	10%	20%
Bonds	60%	77%	95%
Total Fixed Income	80%	87%	95%
United States and Canadian Equity	5%	13%	20%
Total Equity	5%	13%	20%

C. Diversification

The investment risk of the Portfolio shall be reduced by maintaining a diversified selection of industries and companies which places primary emphasis on longer term growth, and safety of capital. All percentages are based on market values, except where indicated.

Cash and Short Term

- (a) Short-term investments with a maximum term to maturity at purchase of 364 days may be held in the Portfolio when appropriate as an alternative to bond and equity investments.
- (b) Appropriate short-term investments are:
 - (i) Government of Canada and provincial treasury bills.
 - (ii) Bankers' acceptances.
 - (iii) Commercial papers issued by Canadian corporations with a rating of "R1" or better as established by The Dominion Bond Rating Service or equivalent rating by another recognized bond rating service.
- (c) No more than 5% of the total Fund may be invested in the commercial paper securities of any one single issuer.
- (d) Where the Investment Counselor and Portfolio manager operates a pooled money market fund, which meets the requirements set out in (a), (b) and (c), this pooled money market fund may be used as an alternative in order to achieve better rates and liquidity.

Bonds

- (a) Investment in any one security or issuer shall not exceed 10% of the total Bond Portfolio with the exception of Government of Canada and provincial government bonds and their guarantees.
- (b) The Bond Portfolio is not restricted to a minimum or maximum number of issues although, over time, the average number of issues in the Bond Portfolio should be between 10 and 30 individual issues.
- (c) The emphasis within the Bond Portfolio will be on quality, with a minimum rating "A" or better by The Dominion Bond Rating Service or equivalent rating by another recognized bond rating service.

- (d) The bond portfolio may be invested up to a maximum of:
 - i. 100 % in Federal government or Federal government guaranteed bonds,
 - ii 50 % in Provincial government and Provincial government guaranteed bonds,
 - iii 10 % in Municipal bonds; and
 - iv 50 % in corporate issues.
- (e) Not more than 10% of the total market value of the bond portfolio will be invested in securities issued by a foreign issuer, or Canadian issuer in a foreign currency.

Equities

- (a) The intent is to provide a diversified selection of common stocks.
- (b) The market value of any one issuer cannot represent more than 10% of the market value of the total Portfolio, or that equity's weight in the TSE 300 Capped Index or S & P 500 Index, whichever is greater.
- (c) With the exception of rights and warrants, no derivative investments, venture capital financings, non-conventional or mortgage investments will be permitted without the prior written approval of the Finance and Audit Committee.

Other Investments

- (a) Investments in open or closed-ended pooled or mutual funds are permitted provided that the assets of such funds are permissible investments under this Policy.
- (b) Deposit accounts of the custodian, Investment Counselor and Portfolio Manager, or Schedule 1 banks can be used to invest surplus cash holdings.

D. General

(a) Discretion

The Investment Counselor and Portfolio Manager is to have full discretion in the management of the assets of the Portfolio, selecting the appropriate asset mix, and the individual securities, within the guidelines set out herein.

(b) Communications

The Communications process between the Investment Counselor and Portfolio Manager and the Finance and Audit Committee, or Investment sub-committee, is flexible, but as a minimum will include the following:

- (i) A quarterly written summary listing of all portfolio transactions from the Investment Counselor and Portfolio Manager.
- (ii) A complete quarterly portfolio listing.
- (iii) A quarterly written assessment of the North American economies and the financial markets, and impact on the Portfolio.

- (iv) Semi-annual investment meetings with the Investment Counselor and Portfolio Manager. The agenda at these meetings would include an overview of the economy and the outlook for the financial markets, the current investment strategy, and a review of the performance results.
- (v) An annual review of the Statement of Investment Policy and Portfolio quality and diversification guidelines.

Any time that the Investment Counselor and Portfolio Manager is not in compliance with this policy, they are required to advise the Chief Financial Officer of the LSUC immediately, detailing the breach and recommending a course of action to remedy the situation.

- (f) Securities Lending
No lending of securities is permitted.
- (c) Changes to Policy Statement
This Statement of Investment Policy may be changed only by Convocation on the specific recommendation of the Finance and Audit Committee.

November 9, 2000

APPROVED

Treasurer

Chair of Finance and Audit Committee

Re: Long Term Investment Policy

It was moved by Mr. Krishna, seconded by Mr. Crowe that the Long Term Investment Policy dated November 9th, 2000 at page 9 of the Report be adopted.

Carried

Re: Member Invoicing

It was moved by Mr. Krishna, seconded by Mr. Crowe that By-Law 15 made by Convocation on January 28th, 1999 and amended by Convocation on May 28th, 1999 and September 24th, 1999 be further amended as follows:

Subsection 2 (11) of the By-Law is amended by deleting "April 1" at the end and substituting "March 31".

Carried

Convocation took a recess at 10:30 a.m. and resumed at 10:45 a.m. in Convocation Hall.

REQUEST OF THE MERGER COMMITTEE OF CBAO, CDLPA AND MTLA

Re: Motion - Proposed New Organization OBA

The Treasurer introduced the request of the merger committee on the proposed New Organization OBA. He advised that the Motion in the Convocation material had been withdrawn and replaced with the following new motion moved by Mr. Swaye and seconded by Mr. Murray:

“Re: Proposed New Organization OBA

BE IT RESOLVED:

1. That the Law Society obtain the opinion of Ontario lawyers on their support for the creation of the Ontario Bar Association (OBA) based on universal contribution by way of referendum. Such referendum to be held on or before June 30, 2001.
2. That the referendum vote and tabulation of the results be conducted by the Law Society in order to satisfy all members that the vote has been underwritten and conducted in an impartial manner.
3. That a committee be formed, to be composed of representatives of the Law Society, Canadian Bar Association - Ontario, the County and District Law Presidents' Association and the Metropolitan Toronto Lawyers Association to consider, and to report back to Convocation with its recommendations in January 2001, concerning:
 - (a) the wording of the referendum question;
 - (b) the form of the ballot paper, applicable time limits and other procedures to be followed in conducting the referendum;
 - (c) the degree of participation and support for the creation of the proposed organization which should be achieved before proceeding with further consideration of the implementation of collection by the Law Society of OBA membership fees as part of the practice levy on Ontario lawyers;
 - (d) the constitutionality of the collection of the Ontario Bar Association (OBA) fees by the Law Society as part of the annual levy; and
 - (e) any other matters pertaining to the conduct of the referendum.”

Mr. Swaye presented the motion of the proposed new organization OBA for consideration by Convocation.

A debate followed.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

The Treasurer and Benchers had as their guests for luncheon, the following students: Tina Pizzato (New Zealand), Jennifer Friedman and Jonathan Pyser (Toronto) and Sean Biernes (Guelph).

CONVOCATION RECONVENED IN CONVOCATION HALL AT 2:30 P.M.

PRESENT:

The Treasurer, Aaron, Arnup, Banack, Bindman, Bobesich, Boyd, Braithwaite, Campion, Carey, Carpenter-Gunn, R. Cass, Chahbar, Cherniak, Copeland, Cronk, Crowe, Curtis, Diamond, Divinsky, E. Ducharme, T. Ducharme, Elliott, Epstein, Feinstein, Gottlieb, Hunter, Krishna, Laskin, Lawrence, MacKenzie, Manes, Millar, Mulligan, Murphy, Murray, O'Brien, Ortved, Pilkington, Porter, Potter, Puccini, Rodgers, Ross, Ruby, Swaye, Topp, Wardlaw, White, Wilson and Wright.

.....

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IN PUBLIC

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TREASURER'S REMARKS

The Treasurer remarked on the recent appointment of Mr. Dino DiGiuseppe to the Ontario Court of Justice and thanked him for his contribution as Benchers and to the profession.

RESUMPTION OF THE DEBATE ON THE MOTION OF THE PROPOSED NEW ORGANIZATION OBA

It was moved by Mr. Martin, seconded by Mr. Crowe that paragraph 2 of the resolution be amended by adding the words "and that the costs of the referendum be borne by CBAO, CDLPA and MTLA."

Lost

ROLL-CALL VOTE

Aaron	Against
Arnup	Abstain
Banack	Against
Bindman	Against
Bobesich	For
Braithwaite	Against
Campion	Against
Carey	Against
Carpenter-Gunn	For
Chahbar	Against
Cherniak	Against
Cronk	Against
Crowe	For
Curtis	Against
Diamond	For
Divinsky	Against
E. Ducharme	Against
T. Ducharme	For

Elliott	Against
Epstein	Against
Feinstein	Against
Gottlieb	For
Hunter	Against
Krishna	For
Laskin	For
MacKenzie	Against
Millar	Against
Mulligan	Against
Murray	Against
O'Brien	For
Ortved	Against
Pilkington	For
Porter	Against
Potter	Against
Puccini	For
Ross	Against
Ruby	Against
Swaye	Against
Topp	Against
White	Against
Wilson	Against
Wright	Against

30 - Against, 11 - For, 1 Abstention

Mr. MacKenzie moved an amendment to paragraph 3 (c) of the Swaye/Murray motion to make it clear that the referendum not be binding by deleting the words "the implementation of collection by" and inserting the words "of whether" and "should collect" so that the paragraph would then read:

"The degree of participation and support for the creation of the proposed organization which should be achieved before proceeding with further consideration of whether the Law Society should collect OBA membership fees as part of the practice levy on Ontario lawyers;"

The amendment was accepted.

It was moved by Ms. Cronk, seconded by Ms. Elliott that the motion be amended so that wherever the word "referendum" appeared in the resolution that it be deleted and substituted with the words "poll of the entire membership".

The amendment was accepted.

The main motion as amended was voted on and lost.

ROLL-CALL VOTE

Aaron	For
Arnup	Abstain
Banack	For
Bindman	For
Bobesich	Against
Braithwaite	Against

Campion	For
Carey	For
Carpenter-Gunn	Against
Chahbar	Against
Cherniak	Against
Cronk	For
Crowe	Against
Curtis	For
Diamond	Against
Divinsky	Against
E. Ducharme	Against
T. Ducharme	Against
Elliott	For
Epstein	Against
Feinstein	For
Gottlieb	Against
Hunter	For
Krishna	Against
Laskin	Against
MacKenzie	For
Millar	For
Mulligan	For
Murray	For
O'Brien	Against
Ortved	For
Pilkington	Against
Porter	Against
Potter	Against
Puccini	Against
Ross	For
Ruby	Against
Swaye	For
Topp	For
White	Against
Wilson	Against
Wright	Against

23 - Against, 18 - For, 1 Abstention

It was moved by Mr. Wright, seconded by Mr. White that the following resolution be adopted:

RESOLVED that a committee be formed to be composed of three elected benchers, one lay bencher, and one representative of each of CDLPA, CBAO, and MTLA, or such other composition as the Treasurer may determine, to consider and report to Convocation by February 2001:

- a) concerning whether or not mandatory dues collection for the proposed Ontario Bar Association ("OBA") is constitutional by obtaining a declaration from a court of competent jurisdiction or the best alternative means available if obtaining the declaration is not possible including without limitation an examination of the status or outcome of the constitution law challenge on this issue currently underway in British Columbia;

- b) if so, concerning whether or not a referendum, opinion poll or other means ("referendum") should be held on the issue of mandatory dues collection for the OBA;
- c) if so, concerning the manner of conducting the referendum including:
 - i) the wording of the question;
 - ii) the form of the ballot, time limits, and other procedures to be followed in conducting the referendum;
 - iii) the binding or nonbinding nature of the results of the referendum;
 - iv) the cost of the referendum and who should pay for it; and
 - v) any other matters pertaining to the conduct of the referendum.

RESOLVED FURTHER that the committee consider whether mandatory dues collection, if constitutional and if recommended, would be better imposed at the local law association level.

Lost

ROLL-CALL VOTE

Aaron	For
Arnup	Against
Banack	Against
Bindman	For
Bobesich	Against
Braithwaite	Against
Campion	For
Carey	For
Carpenter-Gunn	Against
Chahbar	Against
Cherniak	Against
Cronk	Against
Crowe	Against
Curtis	Against
Diamond	Against
Divinsky	Against
E. Ducharme	Against
T. Ducharme	Against
Elliott	Against
Feinstein	Against
Gottlieb	Against
Hunter	Against
Krishna	Against
Laskin	Against
MacKenzie	Against
Millar	Against
Mulligan	Against
Murray	Against
O'Brien	Against
Ortved	Against
Pilkington	Against

Porter	Against
Potter	Against
Puccini	Against
Ross	For
Ruby	Against
Swaye	Against
Topp	Against
White	For
Wilson	For
Wright	For

33 - Against, 8 - For

An amendment was moved by Mr. Krishna, seconded by Mr. Crowe that if the main motion passed that the Law Society refer the question of universal contribution of dues payable proposed by the OBA be put to a court of the appropriate jurisdiction to determine whether it was within the Law Society's authority and whether it was within the authority of the constitution of Canada.

Not Put

The Benchers returned to Convocation Room.

REPORT OF THE MULTI-DISCIPLINARY PRACTICE TASK FORCE

Mr. Cherniak presented the Report of the Multi-Disciplinary Practice Task Force for consideration by Convocation.

Mr. Cherniak thanked the Committee for the work they had done and extended special thanks to Mr. David Ward and Jim Varro.

Report to Convocation
September 21, 2000*

Multi-Disciplinary Practice Task Force

Purpose of Report: Decision

Prepared by the
Multi-Disciplinary Practice Task Force

* For debate at October 19, 2000 Convocation

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EXECUTIVE SUMMARY

Mandate

In June, 1999 Convocation assigned to the Multi-Disciplinary Practice Task Force ("the Task Force") the mandate to "deal with the issue of a captive law firm model, to study, amongst other things, the questions of control, trading style, management, conflicts of interest and related matters as recommended". The Task Force's mandate arose from Convocation's consideration and adoption of an earlier report on multi-discipline practices in September 1998. In Convocation's view, the structure raised issues discrete from the study of an integrated partnership model, which was the focus of that study, and it authorized a separate Task Force to study those issues.

The Task Force is chaired by Earl A. Cherniak Q. C., and its members are Larry Banack, Kim A. Carpenter-Gunn, W. Niels Ortved, and David A. Ward Q. C. (non-bencher member). George D. Hunter also served on the Task Force until June, 2000. Jim Varro acted as secretary to the Task Force.

Nature of the Affiliated Law Firm and Recent Developments

The affiliated law firm is generally understood to be a law firm separate from but affiliated with another professional services entity, such as an accounting or professional services firm, for the purposes of joint marketing and delivery of professional services. The firms in the affiliation may, to varying degrees, share physical office space and information systems and equipment, and the associated costs. It is understood that the practices of the law firm and the professional services firm, however, are not integrated. The only example of an affiliated law firm to date in Canada of which the Task Force is aware is Donahue & Partners, established in 1996 and affiliated with Ernst & Young. As an operational affiliated law firm, Donahue & Partners understandably was an important focus of the Task Force's review.

The Task Force noted recent studies and reports from a number of other jurisdictions on the subject of multi-discipline practices that dealt with the issue of the affiliated law firm. These included reports from

- The New York State Bar Association (“NYSBA”) (April 2000), which proposed amendments to its Code of Professional Responsibility to require that the relationships like affiliations between lawyers and non-lawyers be limited to other professionals, require that the law firm maintain control of the practice of law, and provide that costs and expenses may be allocated between the lawyers and non-lawyers pursuant to the contractual relationship that governs the affiliation.
- The American Bar Association (“ABA”) (July 2000), whose recommendation adopted by the House of Delegates in July 2000 included a resolution that the Model Rules of Professional Conduct be reviewed and amendments made to assure that there are safeguards for the protection of the profession’s core values relating to strategic alliances and other contractual relationships with nonlegal professional service providers.
- The Law Society of England and Wales (July 2000), which proposed two models as “interim solutions” to the multi-discipline practice question, one similar to the Law Society of Upper Canada’s By-Law 25 scheme, and the other the affiliated law firm model with fee sharing.
- The Law Society of Scotland (January 2000), whose report, approved in June of this year, banning multi-discipline practices included the following statement on a structure that appears to be like the affiliated law firm:

...So long as it is clear to the client at all times the nature, qualifications, and function of the individual professional adviser with whom he is dealing, we see no difficulty in Solicitors sharing [with non-solicitors] premises, computers and other information technology (with appropriate security measures), and even administrative and secretarial support staff.

- The Law Society of British Columbia (June 2000), which commented on the affiliated law firm issue by acknowledging, like Ontario, that that structure raises questions apart from a regulatory scheme for multi-discipline practices where lawyers and non-lawyers seek to integrate their practices, and agreed that the issue should be addressed after separate investigation.

Impetus for the Affiliated Law Firm

In the Society’s 1998 report on multi-discipline practices, “one-stop shopping” was noted as a term used by proponents of multi-discipline practices to capture the essence of integrated service offerings. The inefficiencies of separate and independent practices to address clients’ complex problems were cited in contrast to the efficiencies that were said to be attainable by integration of legal and non-legal services, which also purported to include cost savings and enhanced advice.

There is a view that the impetus for the affiliated law firm is simply a strategy on the part of professional services firms to expand their range of service offerings to include legal services and to promote the legal services as having the benefit of one-stop shopping, while acting for any clients attracted, whether or not they are attracted by the other service offerings of the professional services firm.

In the course of consultations with a number of lawyers working in different practice and employment situations, the Task Force received varying opinions on the demand for the affiliated law firm as a desired structure for the delivery of legal services. Based on this information, it is far from clear that a demand by clients initiated multi-discipline practice developments or in particular the affiliated law firm structure.

Whether or not a demand exists for the affiliated law firm, the important question for the Law Society is what regulation is required, if any, to ensure that the affiliated law firm operates in a manner that protects the core values of the profession in the public interest. In this respect, the Task Force recognizes that there is an important difference between what the public is interested in and what is in the public interest.

Donahue & Partners

The Task Force, through a meeting with and submissions by representatives from Donahue & Partners and Ernst & Young and follow up communications, obtained information about the structure and operation of Donahue & Partners. The following briefly summarizes the non-confidential information the Task Force received orally and in writing from the law firm and Ernst & Young in response to a series of questions provided to the firms by the Task Force. In the following section, Donahue & Partners is referred to as "Donahue", and Ernst & Young is referred to as "E&Y".

- Donahue offers a broad range of business law services. The firm does not have a litigation department, except for specialized litigation services in such areas as tax and employment law. There are no arrangements requiring E&Y to refer its clients to Donahue or *vice versa*. In dealing with clients, the relationship between Donahue and E&Y is explained to clients. Donahue clients are billed by Donahue for the services which it provides. E&Y bills its own clients directly.
- E&Y Canada is a member of E&Y International, Ltd., an "umbrella organization" in which each firm of E&Y, including Donahue, is a member. Donahue pays annual membership dues to E&Y International. There are multiple partnerships in the E&Y organization, but Donahue is a separate partnership.
- With respect to financial arrangements between Donahue and E&Y, certain operating expenses are shared and are calculated on a cost basis.
- Generally, Donahue has established confidentiality procedures which restrict access to Donahue files, prevent access by E&Y to the Donahue client list, and ensure that the confidentiality of both word-processing and accounting systems is protected.
- Generally, Donahue has established a system to conduct a search of Donahue's client list and that of E&Y on a Canada-wide basis for the purpose of conflicts of interest that includes steps to protect client confidences.
- With respect to the control or management of Donahue by E&Y, Donahue is structured as a separate partnership. Professional matters relating to the practise of law and the conduct of the practise of law are controlled by Donahue.
- No person other than a Donahue partner participates in the firm income of Donahue. There is no arrangement or practice between Donahue and E&Y for the sharing of a fee charged by Donahue to a client. There are also no referral fees.
- Donahue indicated that the desired financial arrangement between Donahue and the E&Y entities would be to allow profits to be pooled and distributed to those who are partners in the various entities.
- Physically, Donahue has its own dedicated floor and a portion of a contiguous floor adjacent to a real estate consulting practice conducted by E&Y in the Ernst & Young Tower, Toronto. Donahue has its own reception area on the 17th floor of that building.

Analysis

Defining the Affiliated Firm

The Task Force concluded that the affiliated law firm is a structure that falls outside of By-Law 25 and the model it articulates for multi-discipline practices, including partnerships. In the Task Force's view, an affiliated law firm is one that regularly advertises, solicits or promotes itself jointly with a non-lawyer firm for the offering of legal services and the services of that firm to third parties. While the law firm is an entity separate from the non-lawyer firm and is not controlled by it, the law firm becomes an affiliated firm when services of both firms are regularly offered on a joint basis. Accordingly, the Task Force, for the purposes of this report, proposes the following definition of the affiliated law firm:

A law firm has an affiliation with a non-lawyer firm where the firms regularly join together for the joint promotion and delivery of their respective services to the public.

The Task Force's Approach to A Regulatory Response

In 1998, the Law Society decided upon a model for multi-discipline practice reflected in By-Law 25 that recognized that the core values of the legal profession would be at risk in a partnership with non-lawyers that was not fully subject to the authority and oversight of the Law Society. The policy report which laid the groundwork for that model was clear in its conclusion that the public interest should lead, rather than follow, the regulator's efforts to design an appropriate scheme for multi-discipline practice that includes legal services. The same focus on the public interest has formed the foundation for the Task Force's views on a regulatory response to the affiliated law firm phenomenon.

In determining an approach to the regulation of affiliated law firms, the Task Force proceeded on the basis that there should be no *per se* prohibition of such firms. It determined, however, that any regulatory scheme for affiliated law firms, to be consistent with the principle underlying By-Law 25, should ensure that the affiliation between the law firm and the firm of non-lawyers does not create, in effect, a single partnership in violation of By-Law 25.

The Task Force's view is that because of the legal profession's unique role among professional service providers, the relationships between the affiliated law firm and the non-lawyer entity create the potential for an effect on the core values of the profession. These core values may be summarized as

- independence of the profession and of professional advice to clients,
- solicitor and client privilege, and
- the conflict of interest regime governing lawyers in their professional practices.

Where a law firm is affiliated with a firm of non-lawyers and services are provided jointly by the two firms for a client of the law firm on a "seamless" basis, in the view of the Task Force, the legal regulator, acting in the public interest, must be satisfied that lawyer's services provided to clients of the law firm in the context of the integration with other professional or advisory services will nonetheless respect and reflect the core values. Because there is the possibility of risk to these values as a result of such integration, there is a need for appropriate regulation.

Issues the Affiliated Law Firm Structure Raises For the Public and the Profession

The Task Force believes that the same regulatory issues that are impacted in the multi-discipline partnership setting are "live" in the affiliated law firm. The Task Force identified the following to be the issues that, in the public interest, would require consideration:

- a. Independence
- b. Conflicts of interest
- c. Confidentiality and solicitor and client privilege
- d. Malpractice coverage
- e. Effective regulation

Examination of the Issues

A. Independence

Independence for the individual lawyer is manifested in adherence to a duty ultimately and solely to the client. The lawyer must be independent of outside influences in giving advice to clients.

The Task Force concluded that lawyer independence is at risk of being compromised in an affiliated law firm. For example, there is a danger of a loss of independence by a law firm that recommends a professional services firm with which the law firm is affiliated to perform certain services when the law firm expects reciprocal work from the professional services firm as a *quid pro quo*, or if the law firm, or its partners, share in revenues or profits of the professional services firm.

Control of the Law Practice

The independence of the lawyers in the affiliated law firm, and more broadly, the independence of the legal profession necessary to fulfill its role in our system of justice, requires that control and therefore ownership of the affiliated law firm remain with lawyers. Control is related to the aspect of independence that requires that there be uninfluenced advice from lawyers to clients.

The Task Force believes that in order to be consistent with the fundamental principles reflected in By-Law 25, the affiliated law firm must be *de facto* and *de jure* controlled by lawyers so that the Society can regulate the lawyers in the public interest. *De facto* control can only be determined on a case by case basis. In such circumstances, as a condition of operating as an affiliated law firm, there should be disclosure to the Law Society of the relationships, financial arrangements and other arrangements, including those in respect of the management and control of the law firm, between the affiliated law firm and the non-lawyer firm. Second, it should be a requirement that lawyers in the affiliated law firm disclose all facts affecting their independence to clients. For example, where a professional services firm with which a law firm is affiliated is pooling profits of all its related entities, including the law practice and the partners of each firm have the ability to share in those profits, there is a risk of interference with the lawyers' independence.

The Task Force felt that such relationships should be disclosed at the time of retaining the affiliated law firm to clients whose work crosses over both firms, and that rule 6.04 of the Society's *Rules of Professional Conduct*, which requires lawyers to maintain independent judgment related to legal services notwithstanding involvement in other ventures or businesses, should be amended to encompass this obligation. The disclosure document itself should disclose fully to clients the law firm's relationship with the non-lawyer firm, the "connections" between the two firms, the fact of the separation for regulatory purposes, and any other participation of the lawyers in the non-lawyer firm, as partners and as service providers, as the case may be. Disclosure to clients would only be necessary where the non-lawyer firm provides services to the client of the firm such as where the firms are working together providing or offering to provide joint services to the client.

To ensure the integrity of the lawyers' control of the affiliated firm, the Task Force determined that an appropriate application process should be designed allowing the Society to see all arrangements and agreements with respect to control, ownership, management and fee or profit sharing, to determine, for example, whether the management of the firm's legal practice is controlled by lawyers, and whether law firm profits are shared, directly or indirectly, with non-lawyers.

Non-lawyers Sharing in Law Firm Profits

The Society's *Rules of Professional Conduct* prohibit fee sharing between lawyers and non-lawyers.¹ Fees necessarily are included in profits, as profits are that part of fees remaining after deducting expenses. The Task Force was of the view that non-lawyers should not share in the affiliated law firm's profits. Such sharing would also violate the object and spirit of By-Law 25 as the lawyers and non-lawyers are not and must not be partners in a law firm controlled by the lawyers unless By-Law 25 is complied with.

¹Rule 2.08(9) reads:

A lawyer shall not

- (a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer, or
- (b) give any financial or other reward to any person who is not a lawyer for the referral of clients or client matters.

The non-lawyer firm should not be permitted to share indirectly in either the law firm's profits or revenues whether the sharing takes the form of an inter-firm charges for office space, financing or services at an amount not in accordance with the fair market value of the space, financing or services or by any other means. The Task Force determined, however, that appropriate cost sharing would be acceptable. As long as the cost sharing does not result in *de facto* control by the non-lawyer firm or amount to profit sharing, the cost sharing should be permitted at no more than cost plus a profit that does not exceed reasonable compensation.

B. Conflicts of Interest

The Task Force began with the premise that the law firm and the non-lawyer firm are separate, but are parties to an arrangement that has the potential for conflicts of interest.

The Task Force is of the view that the Society, acting in the public interest, must ensure that "cross-over" clients of the affiliated law firm are protected through disclosure of the affiliation and its effect in terms of work referred from and to the law firm, and of any interests of the lawyers in the non-lawyer firm or its related partnerships or entities as the case may be, as discussed above in the section on independence.

The Task Force was of the view that preservation of the integrity of the lawyer's conflicts regime would mean that the two affiliated firms, based on the definition of the affiliated law firm that the Task Force proposes, should be considered as one firm for the purposes of legal conflicts. Accordingly, the Task Force believes that the lawyers in the affiliated law firm should be required to establish a system to search for conflicts in each firm and agree with the Society to deal with conflicts as if both firms were one, applying to conflict situations the obligations applicable to law firms. The Task Force also believes that the Society should impose a requirement that does not permit lawyers to affiliate with a firm of non-lawyers unless the lawyers have the ability to search for conflicts as outlined above and perform the search. Access to information in the non-lawyer firm would be necessary to properly search for conflicts.

C. Confidentiality and Solicitor and Client Privilege

Where there is an affiliation as described in the report, there should be essentially no physical or electronic access by individuals in the non-lawyer firm to the offices and files of the law firm. Policies should be established about the need for all members of both entities to observe the importance of the confidentiality regime on the legal side.

There may still be risks, however, to the confidentiality of client information. The fact of the affiliation of the firms alone creates a risk that confidential information may inadvertently be disclosed. The risks may be heightened in an environment where a law practice is affiliated with an accounting and auditing practice because as a matter of professional responsibility, the accountant's and auditor's obligations vary considerably from those of the lawyer with respect to the confidentiality of certain client information.

The Task Force concluded that to preserve client confidentiality and privilege, the law firm must carry on its practice entirely within its own separate premises and maintain its documents, records and files, including all electronic data, entirely separate and apart from the files and electronic data of the non-lawyer firm. Those premises could be, of course, in the same building or in close proximity to the non-lawyer firm, to optimize cost sharing.

In addition to requiring appropriate separation both physically and operationally of the law firm and the non-lawyer firm, it should be a requirement that the law firm obtain the informed written consent of a client in any matter after the client has been advised of the possible prejudice to or loss of solicitor and client privilege arising from the working together of both firms on the same matters in respect of which legal advice will be sought and obtained by the client, or where non-lawyer staff of the non-lawyer firm also provide services, including support services, in the affiliated law firm..

Another issue bearing on the question of privilege arises when lawyers move between the law firm and the non-lawyer firm, for example, a professional services entity in providing legal advice to clients on one hand and professional consulting services on the other, for instance, in the tax area. This “cross-over” may impact on solicitor and client privilege and the ability to determine the role of the individual lawyer at a particular point in time, and on the Society’s regulation of the conduct of such a person when there is no physical indication when he or she has made a move between the firms.

The Task Force was of the view that prohibiting the movement of lawyers between the affiliated law firm and the non-lawyer firm was not practicable and would be an unnecessarily strict regulatory requirement. The Task Force believes that disclosure should serve to provide clients with the information they need to decide the manner in which they wish to receive advice from lawyers who move between the firms.

D. Malpractice Issues

The Task Force, in noting that the lawyer in the affiliated law firm would be covered to the extent that he or she is providing legal services, considered whether the cross-over issue discussed above created a problem from a coverage perspective. The question is who is behind the individual giving the advice. The Task Force considered whether it would be appropriate to have law firms only affiliate with firms of non-lawyers who are insured. While the Task Force acknowledged the public interest element to this issue, it did not conclude that it was the responsibility of the Society to ensure that the non-lawyer firm would have particular coverage.

E. Effective Regulation of the Affiliated Law Firm

The discussion above on independence, control, conflicts, confidentiality and privilege has included suggestions for certain aspects of a regulatory scheme for the affiliated law firm. Other issues leading to additional components of a regulatory scheme for the affiliated law firm are addressed below.

Firm Name

The Task Force concluded that there was no reason to amend the current rule on firm names, which generally requires that the law firm name only include the names of Canadian lawyers now or formerly with the firm. It would be misleading to include in the affiliated law firm name a brand name of a non-lawyer entity, because that would lead the public to think that that entity is practicing law or entitled to practice law. Maintaining the current rule will avoid that confusion.

Billing Clients

The Task Force concluded that as the affiliated firms are independent, and as long as the affiliated law firm provides an account for its services which is passed on as a disbursement, that would be an acceptable. The non-lawyer firm in these circumstances should not bill for legal services without showing that the bill came from the separate law firm.

Trust Funds

The regular signing authority for lawyers would apply in an affiliated law firm. If the non-lawyer entity holds client’s property, as the lawyers do not control it, the Task force concluded that this would not be a matter of Law Society regulation.

Impact on the Rules of Professional Conduct

The Task Force has referenced some of the *Rules of Professional Conduct*, to the extent that they are impacted by the proposals of the Task Force’s proposed scheme for regulation of the affiliated law firm. In addition to those already mentioned, the following rules may require amendment to either accommodate features of the regulatory scheme proposed or to create more definitive guidance in respect of certain issues dealt with in the scheme:

- (a) Rule 2.03 - Confidentiality
- (b) Rule 2.03 - Avoidance of Conflicts of Interest
- (c) Rule 2.08(9) - Division of Fees
- (d) Rule 2.09(7)(d) - Mandatory Withdrawal
- (e) Rule 3.02 - Law Firm Name
- (f) Rule 3.03 - Letterhead
- (g) Rule 3.04 - Advertising
- (h) Rule 5.01(3) - Delegation

The Task Force's Proposals

The Task Force believes the affiliated law firm, properly structured and regulated, should be considered as an acceptable vehicle for the delivery of legal services. However, because there is a potential risk to the independence of legal advice free of conflicting interests, and the client should be informed as to the facts so that he or she can choose appropriate counsel, a regulatory response is warranted that seeks to preserve the fundamental nature of legal advice to clients.

The Task Force proposes that

- a. the affiliated law firm be defined in the following terms:

A law firm has an affiliation with a non-lawyer firm where the firms regularly join together for the joint promotion and delivery of their respective services to the public.

- b. affiliated law firms must be owned and controlled by lawyers,
- c. as a matter of assuring control, lawyers in affiliated law firms, as a condition of practice, should be required to disclose fully and completely to the Law Society
 - i. all financial arrangements that exist between the affiliated law firm and its partners and the non-lawyer firm with which they are affiliated, and
 - ii. all agreements and other arrangements that exist between the law firm and the non-lawyer firm with which it is affiliated including those dealing with the management and control of the affiliated law firm,
- d. lawyers in affiliated law firms should be required to make disclosure to clients who retain the affiliated law firm and the non-lawyer firm for the joint provision of services or who are the subject of referral for services between the firms of any arrangements, including those described above in c., that may affect the independence of the lawyer's representation, to permit an informed decision by the client about the retainer,
- e. to facilitate the above, an appropriate application process should be designed whereby information necessary for the Society's review of the arrangements described may be obtained,
- f. the non-lawyer firm should not be permitted to share in the law firm's profits or revenues, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses that do not reflect their fair market value,
- g. an affiliated law firm should be required to establish a system to search for conflicts in both the affiliated law firm and the non-lawyer firm and should be required to deal with conflicts as if both firms were one, applying to conflicts situations the obligations applicable to law firms,

- h. the conflicts search regime should, when appropriate, extend to searches for conflicts in firms affiliated with the law firm that practice outside Canada in circumstances where separate national firms or offices of the non-lawyer firm are treated economically as if they were one firm,
- i. the affiliated law firm should be required to carry on its practice entirely within its own separate premises and maintain its documents, records and files, including all electronic data, entirely separate and apart from the files, documents, records and electronic data of the affiliated firm,
- j. lawyers in affiliated law firms should be required to obtain the informed written consent of the client in any matter where joint services are offered by the affiliated firms after the client has been advised of the possible prejudice or loss of solicitor and client privilege to the working together of both firms on the same matters in respect of which legal advice will be sought and obtained by the client, or where non-lawyer staff of the non-lawyer firm also provide services, including support services, in the affiliated law firm,
- k. in circumstances in which lawyers move between the affiliated law firm and the non-lawyer firm in providing legal advice to clients on one hand and professional consulting services on the other, these lawyers should be required to disclose to clients, before being retained, their role in the firms, provide an explanation of when solicitor and client privilege may or may not attach, and give the client an opportunity to make an informed choice with respect to counsel,
- l. an affiliated law firm should be required to observe and comply with the current rule of professional conduct on firm names in order to ensure that the public is not misled into believing that non-lawyers are practising or are entitled to practise law,
- m. a comprehensive review should be undertaken of and, if required, appropriate amendments or additions should be made to the Society's *Rules of Professional Conduct* and relevant by-laws, to address the obligations and responsibilities outlined above as a matter of implementing the regulatory scheme proposed by the Task Force for the affiliated law firm.

I. MANDATE

- 1. In June, 1999 the Multi-Disciplinary Practice Task Force ("the Task Force") was assigned the mandate to "deal with the issue of a captive law firm model, to study, amongst other things, the questions of control, trading style, management, conflicts of interest and related matters as recommended".²
- 2. The captive or affiliated law firm structure is considered to be one form of multi-discipline practice. A multi-discipline practice may be broadly defined as a business arrangement in which individuals with different professional or service qualifications combine their skills, sometimes to the extent of practising together, to provide advice and counsel to the consumers of these services. Affiliated law practices have sometimes been called "captive" law firms because of the close relationship to the professional services entity with which they are affiliated, but a closer examination of the elements of what might be a "captive" law firm and an "affiliated" one shows that they are different concepts. Used in its proper sense, the term "captive" indicates control or dominance of the law firm despite a semblance of independence. The Task Force, for reasons described in this report, believes that such a law firm would represent too high a risk to the core values of the legal profession and would not be in the public interest. Accordingly, although the term "captive" law firm has gained some measure of common usage, for the purposes of this report, the term "affiliated law firm" will be used.

²Law Society of Upper Canada Transcript of Convocation, September 25, 1998, page 218.

3. The Task Force, in examining the affiliated law firm as a structure for the practice of law, sought to isolate the key regulatory issues and, if necessary, to propose appropriate regulatory parameters within which the affiliated law firm may operate.
4. This report provides Convocation with
 - background information on the study of the affiliated law firm,
 - details of the Task Force's work over the past 15 months,
 - identification and analysis of the primary regulatory issues examined by the Task Force,
 - the conclusions reached by the Task Force, and
 - proposals for Convocation's consideration.

II. BACKGROUND TO THE STUDY

5. The Task Force's mandate arose from Convocation's consideration and adoption of an earlier report on multi-discipline practices in September 1998.³ In that report, the affiliated law firm structure was noted but not explored in detail. In Convocation's view, the structure raised issues discrete from the study of an integrated partnership model, and it authorized a separate Task Force to study those issues. The Task Force is chaired by Earl A. Cherniak Q. C., and its members are Larry Banack, Kim A. Carpenter-Gunn, W. Niels Ortved, and David A. Ward. Q. C. (non-bencher member). George D. Hunter also served on the Task Force until June, 2000. Jim Varro acted as secretary to the Task Force.
6. The affiliated law firm in the general parlance of multi-discipline practices and in much of the literature that the Task Force reviewed is generally understood to be a law firm separate from but affiliated with another professional services entity, such as an accounting or professional services firm, for the purposes of joint marketing and delivery of professional services. The firms in the affiliation may, to varying degrees, share physical office space and information systems and equipment, and the associated costs. It is understood that the practices of the law firm and the professional services firm, however, are not integrated. Later in this report, the Task Force defines with more precision, for the purposes of this report, an affiliated law firm, and distinguishes it from what might be described as a captive law firm.
7. The only example of an affiliated law firm to date in Canada of which the Task Force is aware is Donahue & Partners⁴, affiliated with Ernst & Young. Established in 1996, the Toronto firm has grown to over 80 lawyers and plans to continue its expansion. It also has offices in Calgary and Ottawa, and plans to open offices in Montreal soon. The Task Force understands that other large professional services firms and perhaps others in Canada have been studying similar affiliated law practice arrangements.
8. As an operational affiliated law firm, Donahue & Partners understandably was an important focus of the Task Force's review. Information about the firm appears later in this report.

³This report established a policy on multi-discipline partnerships, and led to the multi-discipline practice model documented in By-Law 25 (April 1999). The by-law appears at Appendix 1.

⁴The firm since April 2000 has identified itself as Donahue Ernst & Young. That name does not comply with the Law Society's Rules of Professional Conduct, and the Society is addressing that issue with the firm. For the purposes of this report, Donahue & Partners, or, as indicated, "Donahue", will be used.

III. OUTLINE OF THE TASK FORCE'S WORK

9. The members of the Task Force held ten meetings, in addition to a number of consultation sessions and information meetings with various groups and individuals.
10. In summary, the Task Force has undertaken the following:
 - a briefing on the previous multi-discipline practice study completed by the Law Society, which resulted in the by-law on multi-discipline practices adopted by Convocation in April 1999 (By-Law 25);
 - review of extensive background information on multi-discipline practices, with a particular focus on studies undertaken in various jurisdictions and by various legal organizations, and information in those studies relevant to the issue of the affiliated law firm;
 - ongoing review of current literature, reports (including press reports) and academic treatments of the subject, including monitoring ongoing initiatives or studies undertaken by other organizations relating to the subject of multi-discipline practices and in particular the affiliated law firm;
 - publication of a call for input to the profession in the *Ontario Reports* and on the Society's website, together with notice of the availability of a background paper (at Appendix 2) on the affiliated law firm structure; a number of copies of the paper were sent to members in response to their requests;
 - through seven consultation sessions, meeting with members of the profession to obtain input on issues relating to the affiliated law firm structure for the practice of law; these sessions in small group formats were held on October 25, 1999 (London), October 27, 1999 (Ottawa) and November 2, 1999 (Toronto); material used at the sessions was adapted from the above-noted background paper;
 - contacting the "Big 5" chartered accounting/professional services firms in Toronto, with a view to meeting with representatives of the firms to discuss the affiliated law firm structure; the only firm that met with the Task Force was Ernst & Young, together with representatives from its affiliated law firm, Donahue & Partners;
 - meeting with corporate and in-house counsel to obtain input from their perspectives;
 - meeting with Thomas Heintzman and Simon Potter of the Canadian Bar Association committee⁵ examining multi-discipline practices, to exchange information and inform them on behalf of their committee on the Society's initiative in the area of affiliated law firms;
 - meeting with the chair of the Ontario Securities Commission, David A. Brown Q.C., to obtain a perspective from the securities regulator on affiliated law firm developments;
 - meeting with Ontario lawyer and businessman Derek Watchorn, working in London, England with a major real estate development company, who has had experience in dealing with lawyers in Europe and indicated a willingness to share his perspective on multi-discipline practice developments there;
 - meeting with lawyers who have worked or are working in the pension and actuarial fields, for their perspective on developments outside of the lawyer/accountant sphere;
 - meeting with lawyers from Hewitt Associates, in response to information received from them on the affiliated law firm model.

⁵The CBA's International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession prepared a report entitled "Striking a Balance", presented to the CBA Annual Meeting in August 1999. The report was debated at the 2000 CBA Annual Meeting and adopted. The report states that no distinction should be drawn between "captive law firms" and fully integrated partnerships (of lawyers and non-lawyers) and also states that there be no requirement of control of multi-discipline practices by lawyers.

IV. NATURE OF THE AFFILIATED LAW FIRM

AFFILIATED LAW FIRM DEVELOPMENT

11. Prior to the establishment of Ernst & Young's affiliated law firm in Ontario, the most significant developments in this area occurred in Continental Europe, England and New South Wales. While there is some variation in the level of integration of the affiliated law firms with the professional services entities, the arrangements are similar.

12. This is not a new phenomenon globally, as noted by the 1998 report of the Society's earlier study of multi-discipline partnerships:

The expansion of accounting firms, primarily the "Big 5" as they now are known, has been attributed primarily to two factors: the maturation of the auditing/accounting services market and globalization, which includes advances in technology and expansion of specialization in service offerings. Consolidation in the profession followed upon these developments, leading to mergers which saw a number of large accounting firms become even larger, resulting in the Big 5 noted above. The huge growth in the business/consulting practices of these firms, now known as professional services firms, led to an expansion which eventually saw them offering legal advice in the business sectors through affiliated law firms. This occurred most rapidly in Europe.⁶

13. As Kent Roach and Edward Iacobucci noted in a paper prepared in 1998 for that multi-discipline practice study, and later published in *The Canadian Bar Review*,

The greatest growth in captive firms has been in London, England. Arthur Andersen affiliated itself with a start-up law firm, Garret & Co. The law firm, which is a separate entity from Andersen, but is associated with them, went from nothing in 1993 to a firm of 145 solicitors in five offices across England in only 3 years. Price Waterhouse is affiliated with the law firm Arnheim & Co. and Coopers and Lybrand helped establish Tite and Lewis in 1997. As an example of the importance of the relationships between the law and accounting firms, Arnheim & Co. earns 30% of its fees from referrals from Price Waterhouse and believes that this figure will increase. Ernst and Young has signalled its intention also to establish an association with a law firm. Significant integration between lawyers and accountants has occurred in the United Kingdom even without the adoption of a regulatory regime specifically designed for and permitting MDPs.

...

The largest law firm in France, Fidal, is part of KPMG. In Spain, while full MDPs are not permitted, a top law firm, J&A Garrigues, merged with Arthur Andersen's pre-existing law firm to form the largest firm in Spain, J&A Garrigues, Andersen Y Cia.⁷

⁶"Report to Convocation, September 25, 1998, The "Futures" Task Force - Final Report of the Working Group on Multi-Discipline Partnerships", page 16.

⁷Kent Roach and Edward M. Iacobucci, "Multidisciplinary Practices and Partnerships: Prospects, Problems and Policy Options", (2000) 19 *The Canadian Bar Review* 1 at p. 12.

14. What was earlier thought to be the arrival of fully integrated legal and professional services practices in Europe - the "full blown" multi-discipline partnership - was in fact the affiliations referred to above.⁸ As the earlier report stated:

While the firms either incorporate or routinely reference the accounting firm's trade name, they appear to exist as separate partnerships of lawyers, that is, the partners in the accounting practices do not appear to be partners in the law practices, or vice-versa. Significant integration of services is accomplished through management arrangements and use of the accounting firm's trading style.⁹

15. The most recent development in North America occurred in Washington, D. C. in November 1999 with the creation of McKee Nelson Ernst & Young, a law firm affiliated with Ernst & Young. According to press articles about the new firm, it was launched with financial assistance from Ernst & Young and plans to market its services to clients with Ernst & Young as a "one-stop shop" for law, accounting and consulting services. The firm started with three partners from the Washington D.C. office of Atlanta-based King & Spalding, and is aiming to expand to 50 lawyers within its first year.

Recent Consideration of the Affiliated Law Firm Structure

New York State Bar Association

16. In April 2000, the New York State Bar Association ("NYSBA") published a report entitled "Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers". The report essentially rejected the notion of multi-discipline partnerships of lawyers and non-lawyers, but provided commentary on other forms of multi-discipline practice, including the interprofessional contractual alliances or relationships between lawyers and non-lawyers. They were described in this way:

What the interprofessional alliance represents is the contractual formalization of a reciprocal relationship where two businesses mutually agree that they can service their clients, and benefit themselves by focusing their referrals on each other to the extent consistent with their professional obligations to their respective clients. A byproduct, but not an insignificant one for purposes of this discussion, is that the allies generally make efforts to cooperate in rendering their respective services to the mutual clients. While some might argue that such arrangements fall within the letter of the ethical prohibitions, they are not pernicious in nature because of the responsibility of each of the allies to utilize its best judgment for its clients in selecting the most appropriate "referee".¹⁰

⁸A notable exception is Germany, which has allowed full partnerships between attorneys, patent lawyers, auditors, accountants, tax advisors and other similar professionals for a number of years. For a detailed analysis of the German experience, see Laurel S. Terry, "German MDPs: Lessons to Learn", (2000) 84 Minnesota Law Review 1547.

⁹"Report to Convocation, September 25, 1998, The "Futures" Task Force - Final Report of the Working Group on Multi-Discipline Partnerships", page 21.

¹⁰"Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers", Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, p. 347.

17. The report references the McKee Nelson Ernst & Young firm noted earlier, and states:

...it has become clear that there are lawyers and law firms who wish to proceed aggressively, perhaps more aggressively than the rules of legal ethics will currently allow, in combining their operations through structures resembling interprofessional strategic alliances, but in reality being something dramatically different from the original concept of combining forces to provide cross-referrals and the integration of professional services.¹¹

18. The NYSBA proposed amendments to its Code of Professional Responsibility to address these relationships. In brief, the proposals require that the relationships be limited to other professionals, require that the law firm maintain control of the practice of law, and provide that costs and expenses may be allocated between the lawyers and non-lawyers pursuant to the contract.

The American Bar Association ("ABA")

19. The ABA's Commission on Multidisciplinary Practice was created in August, 1998 to study the extent to which and the manner in which professional service and other non-lawyer firms are seeking to provide legal services to the public. The Commission's final report was presented to the ABA's House of Delegates at its Annual Meeting in July 2000, where its recommendation to permit fee sharing in an integrated practice between lawyers and non-lawyers was rejected. In its place, the House adopted a recommendation of a number of state bar associations, including the NYSBA, that, *inter alia*, stated that fee sharing with and control of law practices by non-lawyers is inconsistent with the core values of the legal profession.¹²

20. In the course of its study, the Commission touched on the affiliated law firm structure. In early 1999, the Commission prepared an outline of five models for multi-discipline practices. Model 4 was called the "Contract Model" and approximates what the Task Force understands to be an affiliated law firm arrangement. It was described in the following terms:

In this model, a professional services firm would contract with an independent law firm. A typical contract might include terms such as (1) the law firm agreeing to identify its affiliation with the professional services firm on its letterhead and business cards, and in its advertising (e.g., A&B, P.C., member of XYZ Professional Services, LLP); (2) the law firm and the professional services firm agreeing to refer clients to each other on a nonexclusive basis; and (3) the law firm agreeing to purchase goods and services from the professional services firm such as staff management, communications technology, and rent for the leasing of office space and equipment. The law firm remains an independent entity controlled and managed by lawyers and accepts clients who have no connection with the professional services firm.¹³

¹¹*Ibid.* p. 349.

¹²For the full text of the recommendation adopted by the House of Delegates, please see Appendix 3.

¹³ABA Commission on Multidisciplinary Practice, *Hypotheticals and Models*, p. 4.

21. In hearings arranged by the Commission, interested parties were invited to present their views on and experiences with multi-discipline practices. A number of individuals from the "Big 5" accounting/professional services firms attended, and of particular interest were the attendance of two individuals from law firms affiliated with the Big 5 who provided insight into the operations of these firms. They were Gerard Nicolay, managing partner of Coopers & Lybrand Juridique et Fiscal and chair of PricewaterhouseCoopers in Paris, and Neil Cochran, a partner in Dundas & Wilson CS in Edinburgh, Scotland, a law firm in a network of almost 30 law firms associated with Andersen Worldwide.¹⁴
22. The Commission's final report viewed the development of the affiliated law firm, again with reference to the McKee Nelson Ernst & Young firm, as evidence of the "forces of change" facing the profession. The recommendation adopted by the House of Delegates in July 2000 obviously considered this an issue as well, as it included the following:

FURTHER RESOLVED that the Standing Committee on Ethics and Professional Responsibility of the American Bar Association shall, in consultation with state, local and territorial bar associations and interested ABA sections, divisions, and committees undertake a review of the Model Rules of Professional Conduct ("MRPC") and shall recommend to the House of Delegates such amendments to the MRPC as are necessary to assure that there are safeguards in the MRPC relating to strategic alliances and other contractual relationships with nonlegal professional service providers consistent with the statement of principles in this Recommendation.
23. The above resolution was based on the state bars' report which, after noting the NYSBA's report, stated that "the core values of the profession are at risk if side-by-side arrangements result in any ownership in or supervisory right by nonlawyers over the practice of law".

Law Society of England and Wales
24. In July 2000, the Law Society of England and Wales reported that its Council would be considering a progress report from its multi-discipline practice working party on "interim solutions" to the multi-discipline practice question as it considers an approach to lifting the ban on multi-discipline practices in that jurisdiction. Two models are proposed.
25. "Legal Practice Plus" is a model which would allow non-solicitors to become partners in a solicitors' firm, but the business must remain the provision of legal services and services ancillary to legal services. The Law Society would regulate by contract the non-solicitor partners through their agreement to submit to the Law Society's regulatory powers and to observe the rules of conduct. The solicitor partners will be required, by practice rule, to supervise the non-solicitor partners and ensure that they comply with obligations. Ultimate control of the practice would remain with the solicitors who will (except where there are only two partners) be in a numerical majority. This is very similar to the Ontario multi-discipline practice model in By-Law 25.
26. The "Linked Partnerships" model would permit an independent firm of solicitors to link, for example, with an accounting practice with which a fee sharing arrangement may be made. This model would permit a separate solicitors' practice to fee-share with another business. The solicitors must retain control of their practice and the relationship with the linked business must be made transparent to clients. This is an affiliated law firm, with the significant right to share fees.

¹⁴For the text of the remarks of Mr. Nicolay and Mr. Cochran before the ABA Commission, please see Appendix 4 .

Law Society of Scotland

27. In June 2000, the Law Society of Scotland's Council approved a January 2000 report of its Multi-Disciplinary Practices Working Party. The Council endorsed the Working Party's conclusion that the ban on multi-discipline practices, reflected in the following practice rule, be continued:

Rule 4

A solicitor shall not form a legal relationship¹⁵ with a person or body who is not a solicitor with a view to their jointly offering professional services as a multi-disciplinary practice to any person or body.

28. The report based its conclusions on concerns about risks to the legal profession's key principles or core values. The report, however, had this to say about a structure that appears to be like the affiliated law firm:

...we do not envisage that the same fundamental ethical difficulties arise if a Solicitor simply shares costs rather than fees with non-Solicitors. So long as it is clear to the client at all times the nature, qualifications, and function of the individual professional adviser with whom he is dealing, we see no difficulty in Solicitors sharing premises, computers and other information technology (with appropriate security measures), and even administrative and secretarial support staff. Indeed, provided appropriate steps are taken to avoid any confusion on the part of the client, there is nothing in the Rules of the Society to prevent such an arrangement. The Working Party would encourage any of the Society's members interested in exploring the possibility of such cost-sharing arrangements to contact its Professional Practice Department to obtain suitable advice on the necessary safeguards.¹⁶

Law Society of British Columbia

29. The Law Society of British Columbia has recently commented on the affiliated law firm issue by acknowledging, like Ontario, that the affiliated law firm structure raises questions apart from a regulatory scheme for multi-discipline practices where lawyers and non-lawyers seek to integrate their practices.
30. The June 2000 report of the Law Society of British Columbia's Working Group on Multi-Disciplinary Practice, recently presented to the benchers¹⁷, included the following on affiliated or captive law firms:

¹⁵“Legal relationship” is defined as “membership of a partnership, or a joint venture which is not a partnership, or membership or directorship of a corporate body”.

¹⁶Law Society of Scotland Report of the Multi-Disciplinary Practices Working Party, January 2000, p. 6.

¹⁷The benchers at their July 7, 2000 meeting adopted a number of recommendations in the report respecting the regulation of multi-discipline practices.

The issues addressed here do not include an analysis of whether we should attempt to regulate captive law firms that comply with our current rules. There may be merit in applying the rules we design to regulate multi-disciplinary practice to captive law firms. However, in our view, we should address that issue after making a separate investigation of the nature of captive law firms that operate or may operate here, and assessing the impact of applying the MDP rules to them.¹⁸

IMPETUS FOR THE AFFILIATED LAW FIRM

31. The Society's 1998 report on multi-discipline practices commented generally on the impetus for the development of multi-discipline practices as integrated practices of professionals and others. The term "one-stop shopping" was noted as a term used by proponents of multi-discipline practices to capture the essence of these integrated service offerings. The inefficiencies of separate and independent practices to address clients' complex problems were cited in contrast to the efficiencies that were said to be attainable by integration of legal and non-legal services, which also purported to include cost savings and enhanced advice. Further, there was reliance by some, most notably accountants, on the business imperative, which is said to be occurring in the merging legal and accounting needs of business clients, as support for the emergence of a market for integrated services.

32. The 1998 report had this to say about the theory of "one-stop shopping":

While "one stop shopping" has a superficial appeal and certainly bears an obvious message of convenience, the specifics are somewhat more elusive. For clients, it is said that a broadened range of services delivered at a higher level and reduced cost results from the integration of professional skills. Solutions are more rapidly identified, repetitive service steps eliminated and more comprehensive results achieved. Seamlessness is the hallmark. For the service providers, the bottom line is a broadened service offering with an improved competitive position and enhanced profitability. Certainly the current theme is "more work for the lawyer" although the proselytizing in this connection comes largely from other professions seeking to provide legal services on a partnership basis. Ancillary features include a more fulfilling professional experience for all professionals, expanding one's horizons and the development of more efficient management of professional services. Improved competitiveness for lawyers otherwise confined to smaller firms together with enhanced opportunities for specialization are said to be added benefits.¹⁹

33. The affiliated law firm, as noted earlier in this report, is viewed by some as within the realm of multi-discipline service offerings that can provide some of the efficiencies and enhancements described above. Later in this report, the views of Donahue & Partners are provided on the need for this type of firm. Professional services firms which have established affiliated law practices explicitly refer in their marketing material to the "multidisciplinary approach" to legal problem solving. PricewaterhouseCoopers' global law practice, Landwell, for example, promotes its services on the basis of a client demand for this approach. Its website information states:

¹⁸ Law Society of British Columbia Report of the Working Group on Multi-Disciplinary Practice, June 28, 2000, p. 3.

¹⁹ "Report to Convocation, September 25, 1998, The "Futures" Task Force - Final Report of the Working Group on Multi-Discipline Partnerships", p. 27.

Multidisciplinary working has grown from client demand, as organisations face up to the challenges of working in the global market and of complex business and regulatory environments.

...

Clients are asking us for international solutions, provided cost-effectively and addressing the needs of their business. They are also looking for their provider to steer a clear path for them - through regulatory hurdles, project managements issues, and integration with other professional advisers.

²⁰

34. In the course of consultations with a number of lawyers working in different practice and employment situations, the Task Force received varying opinions on the demand for the affiliated law firm as a desired structure for the delivery of legal services. For example,
- one lawyer advised that as a sophisticated user of legal services, the choice comes down to the best lawyer for the job - the person. The decision to engage a lawyer or law firm would not be dictated by the “one-stop shop” idea, but by the best person. It is irrelevant to this lawyer to have a “one-stop shop” for services.
 - another lawyer offered that he is not sure that clients are driving the phenomenon, but he believes the accounting firms would not be doing what they are doing if the clients were not buying the services. In his legal practice, he was aware of some corporate clients who saw the “one-stop shop” as a useful way to purchase services, while others said they were sophisticated enough to choose their own individual advisors.
 - some of the corporate counsel with whom the Task Force consulted indicated that there is no push from the North American corporations for the affiliated law firm, but that it is driven by the accounting firms’ desire to increase business.
 - at the sessions with members from various practice areas, the following opinions were expressed:
 - a. The impetus is from the accounting firms - nothing is coming from the public. Audit work became commoditized in the late 1980s and early 1990s, and profits dropped. To grow, these firms had to expand practices, and they saw the financial opportunity in legal services.
 - b. The issue seems to be driven by sophisticated clients - the big companies - who want to limit legal fees, and who look to the affiliated firm to control the cost.
 - c. There is no sense that there is a client need. If there is no need, but clients think there is a need, the marketplace will dictate whether these firms are successful or not.
 - d. There is a market for this type of service offering to highly sophisticated tax or corporate clients, and there are efficiencies in combining specialists together for specialized services to a fairly narrow market of consumers.
 - e. This development is predominantly about commercial opportunity. Accounting firms are establishing commercial relationships to sell legal services. There is always a gap to be filled with provision of more efficient, better quality legal services.
 - f. The major accounting firms that organize these various professional services as a package have a globalized base. They can manage cross-border situations. One-stop shopping appeals to those who like comprehensive services. Some clients want one source for services, others like the appeal of the individual professionals from various firms.

²⁰Web sites: www.landwellglobal.com/gx/eng/insights/mdps_b_gx.html and www.landwellglobal.com/gx/eng/insights/mdps_home_gx.html

35. The Task Force during its consultations was also informed about a business entity that was contemplating establishing a law firm similar to that of Donahue & Partners. In the proposal for the law firm, generally, no third party legal services would be provided to persons who are not clients of the business entity. It would be a service to the entity's clientele only, which is comprised largely of mid- to large-size companies. However, it was suggested that the law firm could market itself as having lawyers available to provide advice in specific areas of law. Clients would be advised that they would be working with an independent law firm albeit part of the business entity. The firm would function from the same facility the lawyers use now and would do the same work, with the addition of legal opinions.
36. Based on the above, it is far from clear that a demand by clients initiated the multi-discipline practice developments or in particular the affiliated law firm structure. It may be that the creation of a new product, or manner of delivering services, has found favour with a certain section of clientele, and that to that extent, a demand is being fostered.
37. Another view is that the impetus for the affiliated law firm is simply a strategy on the part of professional services firms to expand their range of service offerings to include legal services. In this context, the strategy is to expand the range of services by promoting the legal services as having the benefit of one-stop shopping, while acting for any clients attracted, whether or not they are attracted by the other service offerings of the professional services firm. While full integration may be the desire, regulatory hurdles and the need to carefully read the market's preparedness to forego a separate and independent law practice in favour of integrated advice may be affecting movement in this direction.
38. The example discussed above in paragraph 35 of the business entity's proposal to form a law firm shows the extent to which thinking on the subject has progressed. This type of firm, in the Task Force's view, would be truly "captive" to its founding entity, servicing only that entity's clients. Depending on what in-house lawyers in the business entity now provide to the clients of the business, this may be an issue of form over substance, primarily in respect of whether the business entity is seeking to do, through an affiliated law firm, what it cannot do now, and whether the affiliated law firm would be seen in this context as providing truly independent legal advice to the clientele of the firm of which it is captive.
39. In summary, the Task Force is not able to draw any conclusions based on its information or understanding of the demand for the affiliated law firm, other than that opinion varies on the true nature of a demand and that in certain respects clear client demand may be limited rather than expansive.
40. While there may continue to be a debate on whether public demand exists or whether demand is being created by proponents of these structures, the important question for the Law Society, given these developments, is what regulation is required, if any, to ensure that the affiliated law firms operates in a manner that protects the core values of the profession in the public interest. In this respect, the Task Force recognizes that there is an important difference between what the public is interested in and what is in the public interest.

DONAHUE & PARTNERS

41. The Task Force, through the meeting with and submissions by representatives from Donahue & Partners and Ernst & Young and follow up communications, obtained information about the structure and operation of Donahue & Partners. As the firm has been in existence for almost four years, it was crucial that the Task Force understand the firm's operations and to the extent possible the Task Force used the firm as a basis for an analysis of the regulatory issues.

42. The following is a summary of the non-confidential information the Task Force received orally and in writing from Donahue & Partners and the professional services firm, Ernst & Young in response to a series of written and oral questions put to them by the Task Force. The information is that of the firms alone. The Task Force has not interpreted or otherwise sought independent verification of it.
43. While more detailed information on many of the subjects discussed below was provided to the Task Force by Donahue & Partners and Ernst & Young, the firms considered much of this information proprietary and confidential. As a result, certain subjects in the following section are dealt with in a general way.
44. In the following portion of the report, Donahue & Partners is referred to as "Donahue", and Ernst & Young is referred to as "E&Y".

The Firm's Philosophy

- a. Donahue believes that globalization, e-commerce, the speed of decision-making and the ability to purchase international services are causing clients to look differently at the way they need and acquire legal services. Donahue began its practice as a response to a perceived demand from business clients looking for solutions in an increasingly global and complex marketplace. The firm also believes that if clients are not offered a portfolio of choices, they will move to markets where they are available, and if there are advantages to those services, clients in our market will be at a competitive disadvantage.

The Firm's Practice

- b. The firm offers a broad range of business law services. The firm does not have a litigation department, except for specialized litigation services in such areas as tax and employment law.
- c. Donahue does not exist only to be a corporate legal services provider to E&Y's clients. There are no arrangements requiring E&Y to refer its clients to Donahue or *vice versa*. The E&Y client may be offered the alternative of the services of Donahue, but it is left to make its own decision as to where legal services are procured. There are, however, some products or services which are developed on a joint basis by Donahue with E&Y that are marketed on that basis. In that respect, clients may be requested to utilize the services of those who have developed these products or services.
- d. In dealing with clients, the relationship between Donahue and E&Y is explained to clients in a manner consistent with the above. The utility of using both E&Y and Donahue is something which is positively addressed as a marketing message, but at all times the client is left with the ultimate decision.
- e. Donahue clients are billed by Donahue for the services which it provides. E&Y bills its own clients directly. If a client of E&Y requests that E&Y obtain legal services for the client and Donahue provides the legal services, Donahue bills E&Y which in turn adds the Donahue account to the disbursements which it in turn charges the client.

E&Y

- f. E&Y Canada is a member of E&Y International, Ltd., an "umbrella organization" in which each firm of E&Y, including Donahue, is a member. Donahue pays annual membership dues to E&Y International. Its purpose is to provide an umbrella infrastructure to serve clients on a global basis and professional indemnity insurance for member firms. Related to this is the quality of solutions provided in each country by each member firm and the audit of that quality.

- g. There are multiple partnerships in the E&Y organization in Canada, but Donahue is a separate partnership.

The Global Law Practice

- h. E&Y has over 1250 lawyers in law practices in 40 countries, and most are in western Europe. All of these lawyers are giving advice to clients. The US and UK affiliated law firms began operations in November 1999 and February 2000 respectively. The relationship of each law practice to E&Y varies widely because of the differences in the regulatory structures in each jurisdiction.
- i. According to E&Y, the practices are expanding because clients want firms to be bigger, have more geographic coverage and service capability, and offer better integrated and comprehensive advice from other professional advisors.

Donahue's Partnership Structure, Financial Issues, and Relationship to E&Y

- j. Donahue has entered into a services agreement with E&Y for the provision of the usual types of services that are included in similar forms of agreements with law firms. Within these arrangements between Donahue and E&Y, certain operating expenses are shared and are calculated on a cost basis.

Confidentiality

- k. Generally, Donahue has established confidentiality procedures which restrict access to Donahue files, prevent access by E&Y to the Donahue client list, and ensure that the confidentiality of both word-processing and accounting systems is protected.

Conflicts of Interest

- l. With respect to conflicts with E&Y clients in Canada and how conflicts are searched, Donahue indicated that it could not provide material legal advice or litigation services to any E&Y audit client who is a United States Securities and Exchange Commission ("SEC") registrant. The firm does not consider E&Y audit clients who are not SEC registrants to be conflicted out for the provision of legal services.
- m. Generally, Donahue has established a system to conduct a search of Donahue's client list and that of E&Y on a Canada-wide basis for the purpose of conflicts of interest that includes steps to protect client confidences.

Control of the Law Firm

- n. With respect to the control or management of Donahue by E&Y, Donahue is structured as a separate partnership. E&Y to that extent has, on a theoretical basis, no control over the partnership. Professional matters relating to the practise of law and the conduct of the practise of law are controlled by Donahue.

Financial Arrangements

- o. No person other than a Donahue partner participates in the firm income of Donahue. There is no arrangement or practice between Donahue and E&Y for the sharing of a fee charged by Donahue to a client. There are also no referral fees between E&Y and Donahue with respect to referred business.

- p. Donahue indicated that the desired financial arrangement would be a form of a profit-sharing agreement between Donahue and the E&Y entities which would allow profits to be pooled and distributed to those who are partners of the various entities.

The Offices

- q. Donahue has its own dedicated floor and a portion of a contiguous floor adjacent to a real estate consulting practice conducted by E&Y in the Ernst & Young Tower, Toronto. Donahue has its own reception area on the 17th floor of that building.

Comments on Regulation of Lawyers in Affiliated Law Firms

- r. Donahue and E&Y believe that the challenge for regulation in an affiliated law firm setting, and ensuring the basic values are protected, is met in three ways:
 - i. lawyers in Big 5 firms and multi-discipline practice firms should follow the same rules as other lawyers in respect of the core values,
 - ii. regulators should allow clients who are able to decide what services they want the maximum range of choice, with appropriate disclosure, and
 - iii. regulators should amend the rules to make them fit “real life” situations, for example, in naming a firm; it does not make sense to say that the client can choose a firm but the name cannot reflect the connection of the law practice with another firm.

Donahue made specific suggestions for changes in the *Rules of Professional Conduct* in two areas. The first would be to permit a law firm name that recognizes its affiliation but does not mislead the public. This would include a business or “brand” name for the firm. As noted previously in this report, the Donahue firm, since April 2000 is now using the name “Donahue Ernst & Young”, although this does not conform with the Society’s rules on firm names. The second area relates to fee splitting, and a suggestion was made that the Rules should make it clear that sharing by the affiliated non-lawyer firm in the profits of the law firm appropriately disclosed is a permissible business practice.

V. ANALYSIS

DEFINING THE AFFILIATED FIRM

- 45. One of the first challenges for the Task Force was to define the relationship, *de facto* or otherwise, between the law firm and the non-law firm that gives rise to the affiliated law firm. The example of Donahue led the Task Force to some preliminary conclusions on a definition of the affiliated law firm, although a lack of knowledge of certain aspects of the structure means the definition lacks a degree of precision. The Task Force was also mindful that the nature of the affiliation between firms may vary from entity to entity, ranging from a loose association for marketing purposes at one end of the spectrum, to one that would involve control by the non-lawyer entity to such an extent to be properly described as a captive law firm.
- 46. To the extent that clarification is necessary, the Task Force concluded that the affiliated law firm is a structure that falls outside of By-Law 25 and the model it articulates for multi-discipline practices, including partnerships. The law firm and the firm with which it is affiliated do not, by design, join lawyers and non-lawyers in partnership for the provision of legal services. This feature of the affiliated law firm is of significance in the framing of a regulatory response, as discussed later in this report.

47. The Task Force considered and rejected as features of a definition of an affiliated law firm the aspects of shared control between the law firm and the non-law firm or exclusivity arrangements for the referral of work that may exist between the firms, on the basis that these concepts universally would not be central to the relationship between the affiliated firms.
48. In the Task Force's view, an affiliated law firm is one that regularly advertises, solicits or promotes itself jointly with a non-law firm for the offering of legal services and the services of that firm to third parties. While the law firm is an entity separate from the non-law firm and is not controlled by it, the law firm becomes an affiliated firm when services of both firms are regularly offered on a joint basis. Accordingly, the Task Force, for the purposes of this report, proposes the following definition of the affiliated law firm:
- A law firm has an affiliation with a non-lawyer firm where the firms regularly join together for the joint promotion and delivery of their respective services to the public.
49. This definition, in the Task Force's view, should serve to dispel the notion, implicit in the title "captive law firm", that the affiliated law firm is defined by a controlling linkage established by a non-law firm with a law firm. Based on its knowledge of the affiliated law firm structure, the Task Force believes that it is confusing and misleading to describe such a law firm as "captive" to another entity when that other entity does not control the law firm or its operations.
50. Further, the Task Force's definition is intended to be universal in its application, encompassing potential alliances by large law firms, small firms and sole practitioners.

THE TASK FORCE'S APPROACH TO A REGULATORY RESPONSE

The Public Interest

51. In 1998, the Law Society decided upon a model for multi-discipline practice reflected in By-Law 25 that recognized that the core values of the legal profession would be at risk in a partnership with non-lawyers that was not fully subject to the authority and oversight of the Law Society. The policy report which laid the groundwork for that model was clear in its conclusion that the public interest should lead, rather than follow, the regulator's efforts to design an appropriate scheme for multi-discipline practice that includes legal services:
- It is the view of the Working Group that, in the light of its unique position in society, the legal profession should not adopt MDPs on the basis of being overwhelmed by their commercial attractions, at least not until a demonstrable and legitimate public interest demand outweighs the risks to the profession and the public trust which it holds. For the present, the focus must be entirely on the preservation of a strong and independent legal profession. This is the public interest which by law we are obligated to serve.²¹
52. The same focus on the public interest has formed the foundation for the Task Force's views on a regulatory response to the affiliated law firm phenomenon. The Society's Role Statement codifies the obligation of the Society to "govern the legal profession in the public interest".²² The Commentary to the Role Statement includes the following:

²¹"Report to Convocation, September 25, 1998, The "Futures" Task Force - Final Report of the Working Group on Multi-Discipline Partnerships", p. 29.

²²Law Society of Upper Canada Role Statement, adopted by Convocation, October 27, 1994.

The concept of governance...is central to the role of the Law Society. It conveys the idea that the Society has authority over its members (but always and only in the public interest).

...the public interest will always be paramount in determining the activities, policies and programs of the Law Society. It is only if the profession is seen to be serving the public interest that it will maintain public confidence and command public respect.²³

53. Former bencher David W. Scott Q. C., in writing about the role of the Law Society as regulator of the legal profession in Ontario, commented on the public interest and the Society's relation to it:

...the legal profession is a monopoly. By reason of the pre-eminent and essential role of the profession in a free and democratic society, it is in the public interest that only those qualified to do so be permitted to represent the interests of the citizen in the interpretation and assertion of his or her legal rights.

...The corollary is that where the monopolies are necessary, strict and effective regulation is required. In the words of Cardozo, J., "membership in the bar is a privilege burdened with conditions."

Furthermore, it is also in the public interest that regulation be effected, statutorily, by the profession. Were it otherwise, the state would be in a position, through the regulatory process, to undermine the independence of the bar and thereby compromise its role in protecting the rights of citizens.

...the Law Society is the statutory regulator of the legal profession in Ontario. It is fundamental that we be permitted to continue to regulate ourselves. An essential adjunct of this principle is that we do so in the interest of the public and not merely in the self-interest of the profession.²⁴

A Regulatory Approach

54. In determining an approach to the regulation of affiliated law firms, the Task Force proceeded on the basis that there should be no *per se* prohibition of such firms. It determined, however, that any regulatory scheme for affiliated law firms, to be consistent with the principle underlying By-Law 25, should ensure that the affiliation between the law firm and the firm of non-lawyers does not create, in effect, a single partnership in violation of By-Law 25.
55. The Task Force's view is that because of the legal profession's unique role among professional service providers, the relationships between the affiliated law firm and the non-law entity create the potential for an effect on the core values of the profession. These core values may be summarized as

²³Commentary, Law Society of Upper Canada Role Statement, adopted by Convocation, October 27, 1994.

²⁴David W. Scott Q. C. "A self-regulating monopoly that works in public interest", *Law Times*, January 20-26, 1997.

- independence of the profession and of professional advice to clients,
- solicitor and client privilege, and
- the conflict of interest regime governing lawyers in their professional practices.

56. Where a law firm is affiliated with a firm of non-lawyers, such as a professional services firm, an actuarial firm or a trust company, and where services are provided jointly by the two firms for a client of the law firm on a “seamless” basis, in the view of the Task Force, the legal regulator, acting in the public interest, must be satisfied that lawyer’s services provided to clients of the law firm in the context of the integration with other professional or advisory services will nonetheless respect and reflect the core values. Because there is the possibility of risk to these values as a result of such integration, there is a need for appropriate regulation.
57. In coming to this conclusion, the Task Force was mindful that the regulator risks criticism if it adopts what are viewed as unnecessarily restrictive regulatory provisions, especially if they are seen as “stumbling blocks” to the creative practice of law and to choices for practice structures. Another criticism that has been raised is that, although it may be permitted, the affiliated law firm is seen as an inadequate answer to the demand for multi-discipline practice and the benefit to the public of the efficiencies that affiliation can create. The argument is that such firms do not go far enough to create, for the public, a structure where advantages of scale and scope in the provision of services (including legal) are fully realizable, on the theory that as such efficiencies can be achieved only if the services are in one organization.
58. Consider this quote from a 1999 report prepared for the Big 5 firms:
- ...an affiliated law firm structure does not allow for revenue-sharing across firms. Without a revenue-sharing arrangement, in order to benefit from the arrangement the affiliated law firm and the professional services firm would have to rely on the other reciprocating should one refer work to the other. Should one firm fail to reciprocate with a similar volume or value of referrals, there would be little incentive to continue with such referrals and indeed incentives to “hoard” clients, even though referrals may be more efficient from the client’s perspective. Should the reciprocal arrangement fail, any benefits to integration that remain in the affiliated law firm arrangement would be completely lost.²⁵
59. There is also some sentiment, based on information received by the Task Force from members of the profession, that the marketplace will determine the success or failure of the affiliated law firm and that specific regulation of such firms is not needed.
60. To the extent that there is an expectation by the public, and perhaps more importantly on the part of those who have given the privilege of self-regulation to the professions, that professional regulators will fulfill their mandates to regulate in the public interest, any tension in these respects should be resolved in favour of a degree of regulation that protects the public, facilitates a practice of law that is *attuned* to the marketplace, and does not seek to protect the *status quo* of lawyers or the ways in which they currently organize to practice.

²⁵M. Trebilcock and L. Csorgo, “Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective,” (Charles River and Associates, 1999) at page 17.

61. In summary, the Task Force believes that an appropriate regulatory regime should be created for the affiliated law firm as defined in this report, that responds to the marketplace, and is consistent with the values expressed by Convocation that informed By-Law 25.

ISSUES THE AFFILIATED LAW FIRM STRUCTURE RAISES
FOR THE PUBLIC AND THE PROFESSION

62. In the Roach and Iacobucci paper noted above, the authors' view was that the affiliated firm may address some of the regulatory concerns that are created, for example, by a fully integrated multi-disciplinary partnership of lawyers and other service providers, but would not eliminate all the issues arising from that form of multi-discipline practice:

... A lawyer in a captive firm may be more sensitive to the danger that solicitor-client privilege will be lost by the exchange of information with affiliated professionals in a separate firm than a lawyer who works in an integrated team under the same management with those other professionals. Similarly, the fact that under present rules captive firms cannot generally bear the name of their affiliated accounting firm may also help prevent client confusion about when they enjoy the attributes of a solicitor-client relationship in their dealings with various arms of the larger entity.

Captive law firms might also help contain conflict of interest problems. It could be argued that the captive firm structure will allow the separation of legal work from the audit function... It remains to be seen however, whether courts will attribute to a captive law firm or its affiliated firm clients that are represented by the other entity.

...
The *White Paper* prepared by American lawyers with experience with affiliations between law firms and organizations of non-lawyers acknowledged the value of keeping law firms separate and distinct. ..."[a] separate entity may clarify and enhance the attorney-client relationship by helping the client to distinguish between the role of the consultant and the role of the attorney." Clients would also know that lawyers' insurance, compensation and trust funds obligations apply to the work done by the captive firm, but not the affiliated organization.

Captive law firms, however, do not solve all conflict of interest problems. Both the *White Paper* and the [ABA] Commission on Multidisciplinary Practice suggested that law firms and affiliated organizations should be treated as one organization for the purpose of determining conflicts. The *White Paper* suggested that the law firm, because of its experience with conflicts and access to confidential information, should determine when both it and the affiliated organization should decline work because of a conflict.... It is not clear that smaller captive law firms affiliated with larger accounting or actuarial firms would be able to determine conflicts of interest for the larger organization. At a minimum, a captive firm must be required to inform clients of its affiliations. Again, disclosure of the captive firm's interest in the affiliated organization would allow sophisticated clients such as corporate counsel to evaluate the captive firm's legal advice and attempts at steering.²⁶

²⁶Kent Roach and Edward M. Iacobucci, "Multidisciplinary Practices and Partnerships: Prospects, Problems and Policy Options", (2000) 19 *The Canadian Bar Review* 1 at pp. 55-56.

63. The above excerpt is consistent with the Task Force's view that the same regulatory issues that are impacted in the multi-discipline partnership setting are "live" in the affiliated law firm. The Task Force identified the following to be the issues that, in the public interest, would require consideration:
- a. Independence
 - b. Absence of conflicts of interest
 - c. Confidentiality and solicitor and client privilege
 - d. Malpractice coverage
 - e. Effective regulation
64. A number of issues are intertwined with the above, and include disclosure of arrangements between the firms to the Law Society, firm management, profit sharing, financing of the affiliated law firm, lawyers providing services in both firms, firm name, marketing, promotion and advertising, billing clients, and management of trust funds.

EXAMINATION OF THE ISSUES

A. Independence

65. Independence for the individual lawyer is manifested in adherence to a duty ultimately and solely to the client. The lawyer must be independent of outside influences in giving advice to clients.
66. As was made clear in the previous Law Society multi-discipline practice report, and because of the significant role that the audit and professional services firms have played in the development of multi-discipline practices, the concept of independence as it applies to lawyers is very different from the concept of independence as it is applied to auditors. Auditors are required to be independent of the audit client and even in non-audit functions have a duty to the public, to creditors, to shareholders and perhaps others. Strict rules must be followed in order to preserve independence. Lawyer independence means that the lawyer should be independent of any conflicting outside influences in acting for the client, as the lawyer's obligation of loyalty to the client cannot be compromised by conflicting obligations or the appearance of conflicting obligations to others, subject only to the lawyer's overriding duty to the court.
67. The Task Force concluded that lawyer independence is at risk of being compromised in an affiliated law firm. For example, there is a danger of a loss of independence by a law firm that recommends a professional services firm with which the law firm is affiliated to perform certain services when the law firm expects reciprocal work from the professional services firm as a *quid pro quo*, or if the law firm, or its partners, share in revenues or profits of the professional services firm.

Control of the Law Firm

68. The independence of the lawyers in the affiliated law firm, and more broadly, the independence of the legal profession necessary to fulfill its role in our system of justice, requires that control and therefore ownership of the affiliated law firm remain with lawyers. Control is related to the aspect of independence that requires that there be uninfluenced advice from lawyers to clients.
69. Some have equated the issue of independence in the context of the affiliated law firm to that of in-house counsel employed by a non-lawyer entity, for example, a corporation. In the Task Force's view, this is not an apt analogy, because in that setting the employer is the client. In the affiliated law firm, the law firm is seeking legal work from the public in conjunction with a firm not controlled by the law firm.

70. The Task Force believes that in order to be consistent with the fundamental principles reflected in By-Law 25, the affiliated law firm must be *de facto* and *de jure* controlled by lawyers so that the Society can regulate the lawyers in the public interest. *De facto* control can only be determined on a case by case basis. In such circumstances, as a condition of operating as an affiliated law firm, there should be disclosure to the Law Society of the relationships, financial arrangements and other arrangements, including those in respect of the management and control of the law firm, between the affiliated law firm and the non-lawyer firm. This would permit an assessment of effective control, much as that term is defined in By-Law 25.²⁷ This will also allow the Society to determine that the law firm is an affiliated law firm and not a captive law firm and that the relationships and arrangements do not create a *de facto* or virtual multi-discipline partnership that would offend By-Law 25.
71. Second, it should be a requirement that lawyers in the affiliated law firm disclose all facts affecting their independence to clients. For example, where a professional services firm with which a law firm is affiliated is pooling profits of all its related entities, including the law practice and the partners of each firm have the ability to share in those profits, there is a risk of interference with the lawyers' independence.
72. The *Rules of Professional Conduct* include a provision in rule 6.04 on Outside Interests and the Practice of Law.²⁸ The rule requires lawyers to maintain independent judgment related to legal services notwithstanding involvement in other ventures or businesses. This rule only permits a financial or economic interest if it does not impair the lawyer's independence. The Task Force considered the law relating to fiduciary duties in this context which would require disclosure to the client of such influences. Rule 6.04 currently does not require disclosure to the client.
73. The Task Force felt that such relationships should be disclosed at the time of retaining the affiliated law firm to clients whose work crosses over both firms, and that rule 6.04 should be amended accordingly. The disclosure document itself should disclose fully to clients the law firm's relationship with the non-lawyer firm, the "connections" between the two firms, the fact of the separation for regulatory purposes, and any other participation of the lawyers in the non-lawyer firm, as partners and as service providers, as the case may be.²⁹
74. The Task Force acknowledges that the relationship of some law firms in an affiliation with non-lawyer firms may be such that the effect on the independence or the appearance of independence of the lawyer's judgment would not be in issue. Disclosure to clients would only be necessary where the non-lawyer firm provides services to the client of the firm such as where the firms are working together providing or offering to provide joint services to the client.

²⁷Subsection 4(3) of By-Law 25 reads:

Interpretation: "effective control"

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

²⁸Rule 6.04 appears at Appendix 5.

²⁹Based on information obtained through its consultations, the Task Force learned that some lawyers may move freely between a law firm and, for example, the consulting firm with which it is affiliated for the provision of certain services, such as in tax or other areas. This activity is given further treatment later in the report.

75. To ensure the integrity of the lawyers' control of the affiliated firm, the Task Force determined that an appropriate application process should be designed allowing the Society to see all arrangements and agreements with respect to control, ownership, management and fee or profit sharing, to determine, for example, whether the management of the firm's legal practice is controlled by lawyers, and whether law firm profits are shared, directly or indirectly, with non-lawyers. The application could include a requirement that the firm will establish and maintain a system of adequate disclosure to clients respecting independence issues, as discussed above.

Non-Lawyers Sharing in Law Firm Profits

76. The Society's *Rules of Professional Conduct* prohibit fee sharing between lawyers and non-lawyers.³⁰ Fees necessarily are included in profits, as profits are that part of fees remaining after deducting expenses. Therefore, under the Rules, profit sharing is prohibited.
77. The Task Force was of the view that non-lawyers should not share in the affiliated law firm's profits. Such sharing would also violate the object and spirit of By-Law 25 as the lawyers and non-lawyers are not and must not be partners in a law firm controlled by the lawyers unless By-Law 25 is complied with.
78. The non-lawyer firm should not be permitted to share indirectly in either the law firm's profits or revenues, whether the sharing takes the form of an inter-firm charge for office space, financing or services at an amount not in accordance with the fair market value of the space, financing or services or by any other means. The Task Force determined, however, that appropriate cost sharing would be acceptable, and as noted above, certain arrangements exist between Donahue and E&Y for the sharing of expenses. As long as the cost sharing does not result in *de facto* control by the non-law firm or amount to profit sharing, the cost sharing should be permitted at no more than cost plus a profit that does not exceed reasonable compensation. In summary, the Task Force did not consider it objectionable for there to be a reasonable profit made by the non-law firm for office space, financing or services, with the caveat that the charges are not being disguised as profit sharing.
79. While the Task Force acknowledged that a major part of the strategy of the professional services firms and others in creating the affiliated law firm may be to share in its profits, it believes that notwithstanding that profits cannot be shared, the provision of the services by the law firm jointly with the affiliated entity will enhance the ability of the non-lawyer consultants to increase their business and allow the "seamless" services that are being promoted among the firms as a benefit to the public.

Business Relationships Between the Affiliated Firms

80. It is conceivable, and may indeed be part of the design of the affiliation between a law firm and a non-law firm, that the law firm will provide legal services to the non-law firm. This would create a solicitor and client relationship between the two firms. Depending on the relationship of the lawyers in the law firm to the non-law firm because of the affiliation, certain regulatory provisions in the *Rules of Professional Conduct* may apply.

³⁰Rule 2.08(9) reads:

A lawyer shall not

- (a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer, or
2. give any financial or other reward to any person who is not a lawyer for the referral of clients or client matters.

81. The Task Force discussed earlier in this report circumstances in which the lawyers in the affiliated law firm may form an affiliation with a non-law firm, and participate as partners in the non-law firm and/or its related entities. The example given was a professional services firm with which a law firm is affiliated pooling profits of all its related entities, whether or not including the law practice, where its partners have the ability to share in those profits. Another example is the provision of a start-up loan by the non-law firm to the law firm affiliate.
82. In the above situations, the Task Force's view is that this would amount to doing business with a client in the context of rule 2.06. Rule 2.06³¹ provides guidance to lawyers in this context. The rule includes, among other things, a prohibition on borrowing from clients (except for institutional lenders) and prescribes the obligations on of the lawyer when entering into a business venture with a client that involves guarantees for indebtedness arising because of the venture.
83. To the extent that affiliations between law firms and non-law firms involve the types of relationships described above, the Task Force, as a matter related to its review of the current regulatory landscape, came to two conclusions. First, the lawyers in the affiliated law firms must ensure that they abide by these rules. Second, in the disclosure the Task Force proposes be made by the lawyers in the firm to the Society relating to the affiliation, these matters would be disclosed and should be considered by the Society as a function of its review of information from the law firm.

B. Conflicts of Interest

84. There is significant overlap between the issues of independence and the requirement that legal services be free from conflicts of interest. The issues also intersect with obligations to protect the confidentiality of information received from the client by the lawyer. The issues are significant in the context of the affiliated law firm because of the close relationship that may exist between the law firm and the firm of non-lawyers.
85. The Task Force, in approaching its analysis of the conflicts of interest issue, began with the premise that the law firm and the non-lawyer firm are separate, but are parties to an arrangement that has the potential for conflicts of interest.
86. The Task Force is of the view that the Society, acting in the public interest, must ensure that "cross-over" clients of the affiliated law firm are protected through disclosure of the affiliation and its effect in terms of work referred from and to the law firm, and of any interests of the lawyers in the non-lawyer firm or its related partnerships or entities as the case may be, as discussed above in the section on independence.
87. The New York State Bar Association in its multi-discipline practice report dealt extensively with the issue of conflicts and confidentiality and provided some comment on the affiliated law firm structure. The report states:

...a law firm that subsists on referral from a particular nonlawyer consulting firm, the loss of which would be harmful to the lawyers in the firm, has a strong interest in reciprocation that could tend to convert what would otherwise be a presumption in favour of cross-referrals to the consultants into mandatory or automatic practice that disregards the particular needs of the client. Informed client consent to such a conflict of interest would be essential.³²

³¹Rule 2.06 is found at Appendix 5.

³²"Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers", Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, p. 348.

88. The Task Force agrees with this view.

Imputation of Conflicts

89. The same report also commented on the question of imputation of conflicts between the two firms:

...depending on the nature and extent of the relationship between the participants, it may be necessary and appropriate to treat the law firm and nonlegal professional service firm as a single law firm within the meaning of the Code of Professional Responsibility, just as if the nonlegal professional service firm maintained an "of counsel" relationship with the law firm.

...Once the relationship becomes ongoing... and particularly if it involves more than a mere cross-referral arrangement, the interprofessional alliance more closely approximates a single enterprise in its structure and operation. The principal implication of an of counsel relationship, which may arise in the context of a contractual relationship between the legal and nonlegal service providers, is that client relationships and conflicts of interest are imputed between the participants.³³

90. The Task Force considered whether the partnership or other interest of an affiliated law firm partner in the non-law firm would mean that the conflicts of the affiliated law firm would spread into the non-law firm. If the answer is yes, then the firms must be considered one for the purpose of conflicts, and the question becomes whether the Society must impose, as a matter of public protection, a particular requirement for determination of conflicts unique to the affiliated law firm. The concern is that without such a requirement, there is no presumption that the firm will perform appropriate conflicts searches.
91. The Task Force was of the view that preservation of the integrity of the lawyer's conflicts regime would mean that the two affiliated firms, based on the definition of the affiliated law firm that the Task Force proposes, should be considered as one firm for the purposes of legal conflicts. Accordingly, the Task Force believes that the lawyers in the affiliated law firm should be required to establish a system to search for conflicts in each firm and agree with the Society to deal with conflicts as if both firms were one, applying to conflict situations the obligations applicable to law firms.
92. The system should allow conflicts searches to be made when appropriate in firms affiliated with the law firm that practice outside Canada in light of the current practice, at least in the professional services firms, to treat the nominally separate national firms economically as if they were one.
93. The Task Force believes that the Society should impose a requirement that does not permit lawyers to affiliate with a firm of non-lawyers unless the lawyers have the ability to search for conflicts as outlined above and perform the search. Access to information in the non-lawyer firm would be necessary to properly search for conflicts.

Conflicts in the Context of Legal Services to Audit Clients

94. The Task Force considered whether the Law Society should regulate when the lawyer should or should not provide services to the audit clients of an affiliated accounting and auditing firm. Currently, there is no express prohibition in Canada against an audit firm providing legal services to an audit client. In the United States, the SEC prohibits this as a matter of ensuring auditor independence and, we understand, extends its prohibition to legal services provided by affiliated law firms.

³³*Ibid.* pp. 349-50.

95. The Task Force recognized the public interest element of this question, and that it may have relevance to an affiliated law firm if the firms for these purposes are considered one partnership. In particular, a determination that the law firm imputes to the audit firm knowledge of the law firm and its clients may have a direct bearing on the audit relationship with a common client. Also, if the audit firm has a financial interest in the law firm, legal services performed for the audit client may be considered to compromise auditor independence.
96. Ultimately, the Task Force felt that as the potential for harm falls on the side of the audit firm and that although it raises a point about the nature of the work that may be performed on a joint basis, this was not an issue that the Society should consider for regulation.

C. Confidentiality and Solicitor and Client Privilege

97. Where there is an affiliation as described in the report, there should be essentially no physical or electronic access by individuals in the non-lawyer firm to the offices and files of the law firm. Policies should be established about the need for all members of both entities to observe the importance of the confidentiality regime on the legal side.
98. There may still be risks, however, to the confidentiality of client information. The fact of the affiliation of the firms alone creates a risk that confidential information may inadvertently be disclosed and may warrant an institutional requirement by the Society to ensure that confidences are kept, that all staff (lawyers and non-lawyers) are instructed in confidentiality issues, and that disclosure to the client about the risks is mandatory.
99. The risks described above may be heightened in an environment where a law practice is affiliated with an accounting and auditing practice. As a matter of professional responsibility, the accountant's and auditor's obligations vary considerably from those of the lawyer with respect to the confidentiality of certain client information.³⁴ This was the subject of commentary in the Society's first multi-discipline practice report:

The role of the accountant is dependent upon the accountant's credibility in the eyes of third parties who rely on representations which the accountant makes with respect to the business affairs of clients. The idea that confidential information of interest to third parties could be withheld from public scrutiny by the accountant is foreign to the culture. Thus there can be, from the accountant's perspective, a rejection of the client's commercial interests if the dictates of objectivity require disclosure to the public of information privately received from the client.³⁵

100. The Task Force concluded that to preserve client confidentiality and privilege, the law firm must carry on its practice entirely within its own separate premises and maintain its documents, records and files, including all electronic data, entirely separate and apart from the files and electronic data of the non-lawyer firm. Those premises could be, of course, in the same building or in close proximity to the non-lawyer firm, to optimize cost sharing.

³⁴Rule 302 of the Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario requires a former accountant to advise a successor accountant if suspected fraud or other illegal activity by the client was a factor in the former accountant's resignation or removal.

³⁵"Report to Convocation, September 25, 1998, The "Futures" Task Force - Final Report of the Working Group on Multi-Discipline Partnerships", p. 42.

101. The other option is to rely on an *ad hoc* approach to assurances about confidentiality. The problem with this approach is that an assumption cannot be made that the only firms with which law firms may be affiliated would be professional service firms that have similar confidentiality rules. Even the Big 5 firms are not such firms, as they are internally broken down into a number of separate corporations and partnerships. An affiliated law firm in this sense would be affiliated with every corporation, partnership or other entity of such a professional services firm. Thus, there is a question of the ability of all members of the affiliated non-lawyer firm to dedicate themselves to a particular confidentiality regime that would satisfy the legal requirement.
102. In addition to requiring appropriate separation both physically and operationally of the law firm and the non-lawyer firm, it should be a requirement that the law firm obtain the informed written consent of a client in any matter after the client has been advised of the possible prejudice to or loss of solicitor and client privilege arising from the working together of both firms on the same matters in respect of which legal advice will be sought and obtained by the client, or where non-lawyer staff of the non-law firm also provide services, including support services, in the affiliated law firm.³⁶ If formal disclosure to clients about the linkages between the two firms is mandated, as discussed in previous sections of this report, this risk to solicitor and client privilege may form part of the required disclosure to clients.

The "Cross-Over" Lawyer

103. Another issue bearing on the question of privilege arises when lawyers move between the law firm and the non-lawyer firm, for example, a professional services entity, in providing legal advice to clients on one hand and professional consulting services on the other, for instance, in the tax area. This "cross-over" situation could make the solicitor and client privilege issue so significantly amorphous so as to prejudice the client, as courts may not be able to determine the role of the individual lawyer at a particular point in time. It may also be difficult for the Society to regulate conduct of such a person when there is no physical indication when he or she has made a move to the law firm side from the consulting side and back again.
104. The question is whether the public interest, through regulation, requires a clarification of the role of the lawyer in this circumstance or whether this activity should be prohibited.
105. Prohibiting this activity would require that clear lines be drawn between the practice of law by the law firm and the practice of the non-lawyer firm. Lawyers who provide "lawyer-like" services to clients through the non-lawyer firm would be confined to providing their services in that firm and would not be entitled to declare that they are lawyers in the law firm as the occasion may suit them. If there is a risk of the loss of privilege because of a lack of clarity about the role of the cross-over lawyer, the uncertainty could be removed by requiring that the lawyer stay in one firm or the other.
106. The other way of resolving the issue is through disclosure, requiring the client to receive a caution about the activity. This option would permit the activity as long as the lawyer, before being retained, made full disclosure, including an explanation of when privilege may or may not attach, and gave the client an opportunity to make an informed choice.

³⁶It might be anticipated, for example, that the administrative oversight of the affiliated law firm, not including the management of the legal services, may be provided by non-lawyer staff in the non-lawyer firm with which the law firm is affiliated.

107. The Task Force was of the view that prohibiting the movement of lawyers between the affiliated law firm and the non-law firm was not practicable, and notwithstanding the risks described above, would be an unnecessarily strict regulatory requirement. The Task Force believes that the disclosure described in the above paragraph should serve to provide clients with the information they need to decide the manner in which they wish to receive advice from lawyers who move between the firms.

D. Malpractice Issues

108. The Task Force, in noting that the lawyer in the affiliated law firm would be covered to the extent that he or she is providing legal services, considered whether the cross-over issue discussed above created a problem from a coverage perspective. The question is who is behind the individual giving the advice.
109. The Task Force concluded that for the purposes of claims, the issue is one that should be the subject first of discussion between the lawyer, or the affiliated law firm, and the Society's insurer as matter of coverage³⁷, and second, depending on what is or is not covered, a matter of disclosure to the client.
110. The Task Force considered whether it would be appropriate to have law firms only affiliate with firms of non-lawyers who are insured. The Task Force understands that the larger professional services firms, for example, are self-insured or have very large deductibles. To the extent that joint services are provided in these circumstances, it may be that each firm, if considered to be separate but providing services jointly, would take responsibility for its own malpractice issues. The difficulties arise when there is an issue about the integrity of the separation of the compartments within which the services are provided. There may also be situations where claims are made against the firms as joint tortfeasors or as jointly contractually liable.
111. While the Task Force acknowledged the public interest element to this issue, to the extent that the clients should know that they are dealing with an individual who has liability coverage to cover that person's advice, it did not conclude that it was the responsibility of the Society to ensure that the non-lawyer firm would have particular coverage. Although the Society is effectively sanctioning a type of joint venture, it did not believe that a condition of the affiliation should be that lawyers ensure that the non-lawyer entity has coverage.

E. Effective Regulation of the Affiliated Law Firm

112. The discussion above on independence, control, conflicts, confidentiality and privilege has included suggestions for certain aspects of a regulatory scheme for the affiliated law firm. Other issues leading to additional components of a regulatory scheme for the affiliated law firm are addressed below.

Firm Name

113. The Task Force concluded that there was no reason to amend the current rule on firm names, which generally requires that the law firm name only include the names of Canadian lawyers now or formerly with the firm. It would be misleading to include in the affiliated law firm name a brand name of a non-lawyer entity, because that would lead the public to think that that entity is practicing law or entitled to practice law. Maintaining the current rule will avoid that confusion.

³⁷The Lawyers' Professional Indemnity Company (LPIC) has advised that for lawyers who move between the two firms and who have purchased LPIC coverage, wherever the legal advice is provided, they would be covered by LPIC.

Billing Clients

114. The Task Force considered two perspectives on appropriate billing procedures by the affiliated law firm when jointly providing services with the non-lawyer firm.
115. The first is that the affiliated law firm should always bill clients directly. In such circumstances, it would not be permissible for the accounts of the non-law firm to include as part of its fees the affiliated law firm account, even as a disbursement. Providing one account from the non-law firm may make it appear that the non-law firm is billing for legal services, which is not permitted. Questions that could arise from these circumstances include who is the client, whether the non-lawyer firm is "retailing out" what has been received on a wholesale basis, what if there is negligence in the legal services, who is the lawyer, and if there is an assessment of the account, who is assessed.
116. The second view is that the firms are independent and as long as the affiliated law firm provides an account for its services which is passed on as a disbursement, that would be acceptable. The non-lawyer firm in these circumstances should not bill for legal services without showing that the bill came from the separate law firm.
117. The Task Force determined that the latter view was appropriate. This should resolve the concerns raised above and would ensure that there is transparency in the law firm's billing in the context of the joint delivery of services by both firms.

Trust Funds

118. The regular signing authority for lawyers would apply in an affiliated law firm.
119. If the non-lawyer entity holds client's property, as the lawyers do not control it, the Task force concluded that this would not be a matter of Law Society regulation.

Impact on the Rules of Professional Conduct

120. Reference has been made to a number of the *Rules of Professional Conduct* in this report, to the extent that they are impacted by the proposals of the Task Force for regulation of the affiliated law firm. The Task Force noted additional rules that may require amendment to either accommodate features of the regulatory scheme proposed or to create more definitive guidance in respect of certain issues dealt with in the scheme. The following includes the rules (the texts of which appear in Appendix 5) highlighted by the Task Force for possible review:

(a) *Rule 2.03 - Confidentiality*

The rules on confidentiality may require amendment to include a disclosure obligation to the client on the potential effect that the joint delivery of services by the affiliated firms may have on solicitor and client privilege and confidentiality of client information, to deal with the "cross-over" lawyer situation, and to highlight the effect of staff from the non-law firm working in and providing services to clients of the affiliated law firm.

(b) *Rule 2.04 - Avoidance of Conflicts of Interest*

The rules on conflicts may require amendment to encompass a disclosure obligation to clients specifically dealing with affiliated law firm services. A new rule may be required in respect of the conflicts search facility in the affiliated law firm.

(c) *Rule 2.08(9) - Division of Fees*

The nature of the financial arrangements between the affiliated firms may require treatment in the rule or commentary on fee and profit sharing. It may also be necessary to add commentary for the purpose of emphasizing the prohibition on fee and profit sharing arrangements in the context of the affiliated law firm.

(d) *Rule 2.09(7)(d) - Mandatory Withdrawal*

This rule may require additional commentary to deal with, for example, unresolvable conflicts that may arise in an affiliated law firm *vis a vis* the entity with which the law firm is affiliated.

(e) *Rule 3.02 - Law Firm Name*

It may be necessary to enhance the rule to emphasize that no brand or non-lawyer names are permitted for affiliated law firms.

(f) *Rule 3.03 - Letterhead*

The rule may require amendment to permit notification of a law firm affiliation with a non-law firm on letterhead stationery.

(g) *Rule 3.04 - Advertising*

It may be necessary to deal with joint marketing activity of the affiliated firms, either to emphasize the prohibition on lawyers' name appearing on advertising material offering services other than legal services to the public, or to permit within certain parameters, for protection of the public, this type of activity.

(h) *Rule 5.01(3) - Delegation*

If professional services of the affiliated firms are, to a degree, integrated, a new rule or commentary may be needed on what non-lawyers in the non-law firm can or cannot do in that setting in connection with that part of the services that are legal services.

(i) *Rule 6.04 - Outside Interests and the Practice of Law*

New rules may be required on a lawyer's dual status as partner or associate in an affiliated law firm and as a partner in a non-law firm with which law firm is affiliated concerning the particular independence issues that may raise, and on disclosure to clients of the law firm of the nature of the "outside interest" bearing on the legal retainer.

VI. SUMMARY AND CONCLUSIONS

121. The Task Force believes the affiliated law firm, properly structured and regulated, should be considered as an acceptable vehicle for the delivery of legal services, and is hopeful that this structure will assist the profession in remaining competitive and enhance the options for clients by way of integrated services while protecting the fundamental core values of the legal profession. To the extent that there is a demand, or a perceived demand, for this structure, the Task Force believes that the affiliated law firm will contribute to the choices available in the marketplace through which legal services are provided.

122. The regulatory issues that arise from the nature of the affiliation between a law firm and a firm of non-lawyers, in the Task Force's view, require a response from the Law Society in keeping with its mandate to govern the profession in the public interest.
123. Permitting this form of legal practice by lawyers unassisted by specific instruction or guidance from the Society, in the Task Force's view, is not a reasonable or responsible approach to the issue. There is a potential risk to the independence of legal advice free of conflicting interests. The client should be informed about these facts so that the client can choose appropriate counsel. That, in the Task Force's view, warrants a regulatory response that seeks to preserve the fundamental nature of legal advice to clients.
124. To that end, the affiliated law firm's structure and arrangements with the non-lawyer firm must be transparent to the Society as regulator and, to the extent necessary, to clients, to ensure that clients receive legal services in keeping with the profession's core values. The Task Force believes that the surest way to promote that transparency and ensure its integrity is for the Society to adopt provisions that sufficiently address the issues and monitor compliance with those provisions.
125. The Task Force has suggested that a number of changes be made to the Law Society's regulatory scheme to ensure that the affiliated law firm remains a lawyer-controlled practice of law beyond the parameters of the By-Law 25 model of multi-discipline practice. These changes are based on what the Task Force has learned about the affiliated law firm from experiences in other jurisdictions, written material on the subject and, in Ontario, the review of one firm. In this respect, the Task Force is grateful to Ernst & Young, Donahue & Partners, and in particular its managing partner, Michael Thompson, for their co-operation in the fact-finding phase of the Task Force's work.
126. The Task Force urges Convocation to consider this a first but important step in the regulation of the affiliated law firm. Experience with the structure may in time require reconsideration of the position adopted by the Society for regulation of such firms. For the time being, however, the nature of the affiliation, in the Task Force's view, warrants a careful and considered approach to regulation, in keeping with the obligation of the Society to place the public interest first.
127. Whatever decision is made, further activity will be necessitated by Convocation's conclusions on the subject, and a scheme should be considered by Convocation either for implementation of its decision or further study and research if necessary.

THE TASK FORCE'S PROPOSALS

128. The Task Force proposes that
 - a. the affiliated law firm be defined in the following terms:

A law firm has an affiliation with a non-lawyer firm where the firms regularly join together for the joint promotion and delivery of respective services to the public.
 - b. affiliated law firms must be owned and controlled by lawyers,
 - c. as a matter of assuring control, lawyers in affiliated law firms, as a condition of practice, should be required to disclose fully and completely to the Law Society
 - i. all financial arrangements that exist between the affiliated law firm and its partners and the non-lawyer firm with which they are affiliated, and
 - ii. all agreements and other arrangements that exist between the law firm and the non-lawyer firm with which it is affiliated including those dealing with the management and control of the affiliated law firm,

- d. lawyers in affiliated law firms should be required to make disclosure to clients who retain the affiliated law firm and the non-lawyer firm for the joint provision of services or who are the subject of referral for services between the firms of any arrangements, including those described above in c., that may affect the independence of the lawyer's representation, to permit an informed decision by the client about the retainer,
- e. to facilitate the above, an appropriate application process should be designed whereby information necessary for the Society's review of the arrangements described may be obtained,
- f. the non-lawyer firm should not be permitted to share in the law firm's profits or revenues, either directly or indirectly through excessive inter-firm charges, for example, by charging, inter-firm, expenses that do not reflect their fair market value,
- g. an affiliated law firm should be required to establish a system to search for conflicts in both the affiliated law firm and the non-lawyer firm and should be required to deal with conflicts as if both firms were one, applying to conflicts situations the obligations applicable to law firms,
- h. the conflicts search regime should, when appropriate, extend to searches for conflicts in firms affiliated with the law firm that practice outside Canada in circumstances where separate national firms or offices of the non-lawyer firm are treated economically as if they were one firm,
- i. the affiliated law firm should be required to carry on its practice entirely within its own separate premises and maintain its documents, records and files, including all electronic data, entirely separate and apart from the files, documents, records and electronic data of the affiliated firm,
- j. lawyers in affiliated law firms should be required to obtain the informed written consent of the client in any matter where joint services are offered by the affiliated firms after the client has been advised of the possible prejudice or loss of solicitor and client privilege to the working together of both firms on the same matters in respect of which legal advice will be sought and obtained by the client, or where non-lawyer staff of the non-lawyer firm also provide services, including support services, in the affiliated law firm,
- k. in circumstances in which lawyers move between the affiliated law firm and the non-lawyer firm in providing legal advice to clients on one hand and professional consulting services on the other, these lawyers should be required to disclose to clients, before being retained, their role in the firms, provide an explanation of when solicitor and client privilege may or may not attach, and give the client an opportunity to make an informed choice with respect to counsel,
- l. an affiliated law firm should be required to observe and comply with the current rule of professional conduct on firm names in order to ensure that the public is not misled into believing that non-lawyers are practising or are entitled to practise law,
- m. a comprehensive review should be undertaken of and, if required, appropriate amendments or additions should be made to the Society's *Rules of Professional Conduct* and relevant by-laws, to address the obligations and responsibilities outlined above as a matter of implementing the regulatory scheme proposed by the Task Force for the affiliated law firm.

VII. DECISION FOR CONVOCATION

129. Convocation should decide on the direction it wishes to take to:
- a. adopt the proposals made by the Task Force for the regulation of the affiliated law firm,
 - b. facilitate implementation of the regulatory scheme,
 - c. explore other options as Convocation deems appropriate, or
 - d. direct further study.

APPENDIX 1

BY-LAW 25

Made: April 30, 1999

Amended: May 28, 1999, June 25, 1999 and December 10, 1999

MULTI-DISCIPLINE PRACTICES

Interpretation: "member"

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

Interpretation: practice of law

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

Prohibition against providing services of non-member

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

Permitted provision of services of non-member

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

Partnership, etc. with non-member

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

Same

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

1. The individual is qualified to practise a profession, trade or occupation that supports or supplements the practice of law.
2. In the case of entering into a partnership with the individual, the individual is of good character.

3. The individual agrees with the member in writing that the member shall have effective control over the individual's practice of his or her profession, trade or occupation in so far as the individual practises the profession, trade or occupation to provide services to clients of the partnership or association.
4. The individual agrees with the member in writing that, in partnership or association with the member, the individual will not practise his or her profession, trade or occupation except to provide services to clients of the partnership or association.
5. The individual agrees with the member in writing that, outside of his or her partnership or association with the member, the individual will practise his or her profession, trade or occupation independently of the partnership or association and from premises that are not used by the partnership or association for its business purposes.
6. The individual agrees with the member in writing that, in respect of the practice of his or her profession, trade or occupation in partnership or association with the member, the individual will comply with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's Rules of Professional Conduct and the Society's policies and guidelines.
7. In the case of entering into a partnership with the individual, the individual agrees with the member in writing to comply with the Society's rules, policies and guidelines on conflicts of interest in relation to clients of the partnership who are also clients of the individual practising his or her profession, trade or occupation independently of the partnership.

Interpretation: "effective control"

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

Interpretation: "good character"

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

Responsibility for actions of non-member

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

- (a) the individual practises his or her profession, trade or occupation with the appropriate level of skill, judgement and competence; and
- (b) the individual complies with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's Rules of Professional Conduct and the Society's policies and guidelines.

Application by member forming partnership with non-member

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

Application fee

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

Partnership agreement

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

Consideration of application by Secretary

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

- (a) the conditions set out in subsection 4 (2) have been satisfied; and
- (b) the member has made arrangements that will enable the member to comply with sections 5, 14, 15, 16 and 19.

Requirements not met

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

Time for appeal

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

Committee of benchers

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

Term of office

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

Consideration of appeal: quorum

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

Procedure: application of rules of practice and procedure

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

Procedure: *SPPA*

(2) Where the rules of practice and procedure are silent with respect to a matter of procedure, the *Statutory Powers Procedure Act* applies to the consideration by the committee appointed under section 10 of an appeal made under subsection 8 (2).

Decision of committee of benchers

13. (1) After considering an appeal made under subsection 8 (2), the committee appointed under section 10 shall,

- (a) if it determines that the requirement has been met, approve the member's entering into a partnership with the individual; or
- (b) if it determines that the requirement has not been met, notify the member that the requirement has not been met and that the member may not enter into a partnership with the individual.

Decisions final

(2) The decision of the committee appointed under section 10 on an appeal made under subsection 8 (2) is final.

Filing requirements: partnerships

14. (1) A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law shall submit to the Society for every full or part year that the partnership continues a report in respect of the partnership.

Form 25B

(2) The report required under subsection (1) shall be in Form 25B.

Due dates

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

Changes in partnership

15. (1) A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law shall immediately notify the Secretary when,

- (a) the individual is expelled from the partnership;
- (b) the individual ceases or for any reason is unable to practise his or her profession, trade or occupation;
- (c) the term of the partnership has expired, if the partnership was entered into for a fixed term;
- (d) the partnership is dissolved under the *Partnerships Act*; or
- (e) any agreement that governs the partnership has been amended.

Dissolution of partnership

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

Amendment of partnership agreement

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

Dissolution of partnership: breach of By-Law

16. If a member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law breaches section 5, section 14, subsection 15 (1), subsection 15 (3) or section 19, the Secretary may require the member to dissolve the partnership.

Notice to member of requirement to dissolve partnership

17. (1) If the Secretary requires a member to dissolve a partnership under subsection 15 (2) or section 16, the Secretary shall so notify the member and, subject to subsection (2), the member shall dissolve the partnership.

Appeal

(2) If the Secretary requires a member to dissolve a partnership under section 16, the member may appeal the requirement to dissolve the partnership to the committee of benchers appointed under section 10 if the member believes that there has been no breach of section 5, section 14, subsection 15 (1), subsection 15 (3) or section 19.

Time for appeal

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

Procedure

(4) The rules of practice and procedure apply, with necessary modifications to the consideration by the committee appointed under section 10 of an appeal made under subsection (2) as if the consideration of the appeal were the hearing of an application under subsection 34 (1) of the Act.

Decision of committee of benchers

(5) After considering an appeal made under subsection (2), the committee appointed under section 10 shall,

- (a) if it determines that there has been no breach of section 5, section 14, subsection 15 (1), subsection 15 (3) or section 19, cancel the requirement to dissolve the partnership; or
- (b) if it determines that there has been a breach of section 5, section 14, subsection 15 (1), subsection 15 (3) or section 19, take any of the following actions:
 - (i) Confirm the requirement to dissolve the partnership.
 - (ii) Permit the partnership to continue, subject to such terms and conditions as the committee may impose.
 - (iii) Any other action that the committee considers appropriate.

Decisions final

(6) The decision of the committee appointed under section 10 on an appeal under made subsection (2) is final.

Stay

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

Association with non-member: multi-discipline practice.

18. (1) A member who, under subsection 4 (1), has entered into an association that is not a corporation with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law may refer to the association as a multi-discipline practice.

Partnership with non-member: multi-discipline practice or partnership

(2) A member who, under subsection 4 (1), has entered into a partnership with an individual who is not a member who practises a profession, trade or occupation that supports or supplements the practice of law may refer to the partnership as a multi-discipline practice or multi-discipline partnership.

Insurance requirements: members

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

Form 25A

Application to Enter into a Multi-Discipline Partnership

APPLICATION TO ENTER INTO A
MULTI-DISCIPLINE PARTNERSHIP

TO THE SOCIETY

The applicant named below applies (*or* The applicants named below apply) for approval to enter into a partnership with the individual (*or* individuals) named below.

1. INFORMATION ON APPLICANT(S)

Name: (*If the applicant is a partnership of members, specify the firm name and the name of each partner. If there are two or more applicants, specify the name of each applicant.*)

Address: (*Specify the address at which the applicant, or if there are two or more applicants, at which each applicant, practises law at the time of the application. If an applicant practises law at more than one place, specify the address of each place*)

Telephone number: (*If an applicant practises law at more than one place, specify the telephone number of each place.*)

Fax number(s): (*If an applicant practises law at more than one place, specify the fax number of each place.*)

Contact information: (*If the applicant is a partnership of members, or if there are two or more applicants, specify the name, address, telephone number and fax number of the partner, or applicant, with whom the Society should be speaking and corresponding in respect of the application.*)

Nature of practice of law: *(Specify the areas of law practised by the applicant or applicants and include the proportion of time devoted to each area of law.)*

2. INFORMATION ON INDIVIDUAL(S)

Name(s): *(If there are two or more individuals, specify the name of each individual.)*

Profession, trade or occupation to be practised by individual(s) in partnership with the applicant(s): *(Specify the profession, trade or occupation to be practised by each individual named.)*

Qualifications:

Academic background or learning experience which qualifies the individual to practise the profession, trade or occupation: *(Specify the academic background or learning experience separately for each individual named.)*

Number of years the individual has practised the profession, trade or occupation:

Membership of the individual in professional associations and details of membership:

(Provide the following information for each individual named.)

Current:

Name of each professional association to which the individual belongs at the time of the application:

Contact information (*i.e.*, address, telephone number and fax number) for each professional association to which individual belongs at the time of the application:

Year in which the individual joined each professional association to which he or she belongs at the time of the application:

Is "good character" a requirement of membership in any professional association to which the individual belongs at the time of the application: *(Specify the professional associations to which the individual belongs at the time of the application where "good character" is a requirement of membership.)*

The individual's "standing" as a member of each professional association to which he or she belongs at the time of the application:

Disciplinary action taken against the individual by each association and the reasons for the disciplinary action:

Past:

Name of each professional association to which the individual belonged in the past but to which the individual no longer belongs at the time of the application:

Contact information (*i.e.*, address, telephone number and fax number) for each professional association to which individual belonged in the past but to which the individual no longer belongs at the time of the application:

Period of time during which the individual was a member of each professional association to which he or she belonged in the past but to which he or she no longer belongs at the time of the application:

Reasons why the individual ceased to be a member of a professional association to which he or she belonged in the past but to which he or she no longer belongs at the time of the application:

Was "good character" a requirement of membership in any professional association to which the individual belonged in the past but to which the individual no longer belongs at the time of the application: *(Specify the professional associations to which the individual belonged where "good character" is a requirement of membership.)*

Disciplinary action taken against the individual by each association to which the individual belonged in the past but to which the individual no longer belongs at the time of the application, and the reasons for the disciplinary action:

Information on current practice of profession, trade or occupation:

Place of practice: *(For each individual, specify where the individual currently practises the profession, trade or occupation. Include the address, telephone number and fax number of the place.)*

Information on future practice of profession, trade or occupation:

Continuation of practice: *(For each individual, specify whether the individual will continue to practise the profession, trade or occupation outside of the proposed multi-discipline partnership.)*

Place of practice: *(For each individual, specify where the individual will practise the profession, trade or occupation outside the proposed multi-discipline partnership.)*

3. CERTIFICATE OF APPLICANT(S) AS TO GOOD CHARACTER OF INDIVIDUAL(S)

I (or WE) CERTIFY that, for the following reasons, *(name of individual(s))* is (or are) of good character:

1. ...

2. ...

Date:

(Signature of applicant(s))

4. INFORMATION ON PROPOSED MULTI-DISCIPLINE PARTNERSHIP

Name: *(Specify the firm name under which the proposed multi-discipline partnership will carry on business.)*

Address: *(Specify the address of the premises from which the proposed multi-discipline partnership will carry on business.)*

Telephone number: *(Specify the telephone number of the premises from which the proposed multi-discipline partnership will carry on business.)*

Fax number: *(Specify the fax number of the premises from which the proposed multi-discipline partnership will carry on business.)*

Type of services to be provided by individual(s): *(Provide a detailed description of the type of services to be provided by each individual in the proposed multi-discipline partnership.)*

Information on required agreements between applicant(s) and individual(s): *(Complete this section if the required agreements are not included in the partnership agreement(s).)*

Agreement that applicant(s) to have effective control over individual's practice of profession, trade or occupation: *(For each individual, specify whether the individual has agreed with the applicant(s) in writing that the applicant(s) will have effective control over the individual's practice of his or her profession, trade or occupation in so far as the individual practises the profession, trade or occupation to provide services to clients of the proposed multi-discipline partnership. Attach a copy of the written agreement.)*

Agreement that individual will not practise profession, trade or occupation except to provide services to clients of proposed multi-discipline partnership: *(For each individual, specify whether the individual has agreed with the applicant(s) in writing that, in partnership with the applicant(s), the individual will not practise his or her profession, trade or occupation except to provide services to clients of the proposed multi-discipline partnership. Attach a copy of the written agreement.)*

Agreement that, outside proposed multi-discipline partnership, individual will practise profession, trade or occupation independently of proposed multi-discipline partnership: *(For each individual, specify whether the individual has agreed with the applicant(s) in writing that, outside the proposed multi-discipline partnership, the individual will practise his or her profession, trade or occupation independently of the proposed multi-discipline partnership and from premises that are not used by the proposed multi-discipline partnership for its business purposes. Attach a copy of the written agreement.)*

Agreement to conform with Act, etc.: *(For each individual, specify whether the individual has agreed with the applicant(s) in writing that, in respect of the practice of his or her profession, trade or occupation in partnership with the applicant(s), the individual will conform with the Act, the regulations, the by-laws, the rules of practice and procedure, the Society's Rules of Professional Conduct and the Society's policies and guidelines. Attach a copy of the written agreement.)*

Agreement to be governed by Society's rules, policies and guidelines on conflicts of interest: *(For each individual, specify whether the individual has agreed with the applicant(s) in writing that the individual will be governed by the Society's rules, policies and guidelines on conflicts of interest in relation to clients of the proposed multi-discipline partnership who are also clients of the individual practising his or her profession, trade or occupation independently of the proposed multi-discipline partnership. Attach a copy of the written agreement.)*

Arrangements made by applicant(s) to comply with section 5: *(Specify the arrangements made by the applicant(s) to comply with section 5. If the applicant is a partnership of members, specify the names of the member partners who will be responsible for the partnership's compliance with section 5. If there are two or more applicants, specify the names of the applicants who will be responsible for the applicants' compliance with section 5.)*

Arrangements made by applicant(s) to comply with section 14: *(Specify the arrangements made by the applicant(s) to comply with section 14.)*

Arrangements made by applicant(s) to comply with section 15: *(Specify the arrangements made by the applicant(s) to comply with section 15.)*

Arrangements made by applicant(s) to comply with section 16: *(Specify the arrangements made by the applicant(s) to comply with section 16.)*

Arrangements made by applicant(s) to comply with section 19: *(Specify the arrangements made by the applicant(s) to comply with section 19.)*

I (or WE) CERTIFY that the information contained in this application is correct to the best of my (or our) knowledge.

Date:

(Signature of applicant(s))

Form 25B

Report on Multi-Discipline Partnership

REPORT ON MULTI-DISCIPLINE PARTNERSHIP

REPORT FOR THE YEAR *(SPECIFY CALENDAR YEAR)*
(OR REPORT FOR THE PERIOD (SPECIFY THE PERIOD TO BE COVERED BY THE REPORT IF LESS THAN A FULL CALENDAR YEAR))

1. INFORMATION ON FIRM

Name: *(Specify the firm name under which the multi-discipline partnership carried on business during the year (or other period) in respect of which this report is being submitted.)*

Address: *(Specify the address of the premises from which the multi-discipline partnership carried on business during the year (or other period) in respect of which this report is being submitted.)*

Telephone number: *(Specify the telephone number of the premises from which the multi-discipline partnership carried on business during the year (or other period) in respect of which this report is being submitted.)*

Fax number: *(Specify the fax number of the premises from which the multi-discipline partnership carried on business during the year (or other period) in respect of which this report is being submitted.)*

In any written or verbal communications to persons outside the partnership, does the multi-discipline partnership refer to itself as:

A multi-discipline practice? *(Specify yes or no.)*

A multi-discipline partnership? *(Specify yes or no.)*

List of communications in which the multi-discipline partnership refers to itself as a multi-discipline practice:

List of communications in which the multi-discipline partnership refers to itself as a multi-discipline partnership:

2. INFORMATION ON PARTNERS WHO ARE MEMBERS

Number of partners who are members:

Names of partners who are members:

3. INFORMATION ON PARTNERS WHO ARE NOT MEMBERS

Number of partners who are not members:

Names of partners who are not members:

Profession, trade or occupation practised by partners who are not members:

Types of services provided by partners who are not members:

Qualifications of partners who are not members:

Participation in educational programs, professional training or other programs to improve professional competence: *(For each partner who is not a member, specify any educational programs, professional training or other programs to improve professional competence in which the partner participated during the year (or other period) in respect of which this report is being submitted.)*

Membership in professional associations and details of membership:

(Provide the following information for each partner who is not a member.)

Name of each professional association to which the partner belonged during the year (or other period) in respect of which this report is being submitted:

Contact information (*i.e.*, address, telephone number and fax number) for each professional association to which the partner belonged during the year (or other period) in respect of which this report is being submitted:

Year in which the partner joined each professional association to which he or she belonged during the year (or other period) in respect of which this report is being submitted:

Is "good character" a requirement of membership in any professional association to which the individual belonged during the year (or other period) in respect of which this report is being submitted: *(Specify the professional associations to which the partner belonged during the year (or other period) in respect of which this report is being submitted where "good character" is a requirement of membership.)*

The partner's "standing" as a member of each professional association to which he or she belonged during the year (or other period) in respect of which this report is being submitted as at the end of the year (or other period):

Disciplinary action taken against the individual by each professional association to which the partner belonged during the year (or other period) in respect of which this report is being submitted during the year (or other period), and the reasons for the disciplinary action:

Information on practice of profession, trade or occupation outside the multi-discipline partnership:

Names of partners who are not members who practise their profession, trade or occupation outside the multi-discipline partnership: *(Identify the partners who are not members who, during the year (or other period) in respect of which this report is being submitted, practised their profession, trade or occupation outside the multi-discipline partnership.)*

Types of services provided outside the multi-discipline partnership by partners who are not members: *(Specify separately for each partner who is not a member who practises his or her profession, trade or occupation outside the multi-discipline partnership the types of services the partner provides outside the multi-discipline partnership during the year (or other period) in respect of which this report is being submitted.)*

Place of practice: *(Specify separately for each partner who is not a member who practises his or her profession, trade or occupation outside the multi-discipline partnership, the place where the partner practised his or her profession, trade or occupation outside the multi-discipline partnership during the year (or other period) in respect of which this report is being submitted. Include the address, telephone number and fax number of the place.)*

4. INFORMATION ON COMPLIANCE WITH BY-LAW 25

Arrangements made to permit partners who are members to comply with section 5: *(Specify the arrangements in place during the year (or other period) in respect of which this report is being submitted. Specify the names of the member partners who were responsible for the member partners' compliance with section 5 during the year (or other period) in respect of which this report is being submitted.)*

Professional liability insurance coverage for partners who are not members:

(If the partners who are not members are not insured as one group, provide the following information separately for each partner who is not a member.)

Name of insurance company providing professional liability insurance coverage for partners who are not members:

Policy number:

(The following certification is to be completed by the partners who are members.)

I (or WE) CERTIFY that the information contained in this report is correct to the best of my (or our) knowledge.

Date:

(Signature of partner(s))

APPENDIX 2

Multi-Disciplinary Practice Task Force

THE AFFILIATED OR "CAPTIVE" LAW FIRM

Introduction

The Multi-Disciplinary Practice Task Force is studying the provision of legal services to the public through law practices affiliated with professional service or accounting firms. These law practices have sometimes been called "captive" law firms because of the close relationship to the professional services entity with which they are affiliated. The affiliated firm structure is one form of multi-discipline practice ("MDP"), broadly defined as a business arrangement in which individuals with different professional or service qualifications combine their skills, sometimes to the extent of practising together, to provide advice and counsel to the consumers of these services.

The Task Force is embarking on an intricate examination of issues that the affiliated law firm structure may create for the practice of law. The Task Force is aiming in particular to isolate the key regulatory issues and, if necessary, design an appropriate regulatory scheme within which the affiliated firm may operate.

Background to the Study

On September 25, 1998, Convocation approved the policy proposals presented by the Multi-Discipline Partnership Working Group of the Futures Task Force to permit the partnering of lawyers and non-lawyers in firms controlled by lawyers and which provide legal services only.³⁸

Although the issue of the captive law firm was not dealt with in any substantive way by the Working Group, near the end of its report, it said:

The practice model currently in vogue which is closest to the MDP in its structure is the “captive” law firm referred to earlier in this Report. It is an undertaking said to meet the dictates of the existing regulatory framework. The Working Group’s study has led us to conclude that there are regulatory issues which require independent study with respect to this model... It is recommended that an appropriate vehicle be struck to undertake this study.

Agreeing with this recommendation, Convocation, at the time it approved the Working Group’s report in September 1998, authorized “the striking of the committee to deal with the issue of a captive law firm model, to study, amongst other things, the questions of control, trading style, management, conflicts of interest and related matters as recommended”.³⁹

The Affiliated or Captive Law Firm

The captive law firm in the context of MDPs is generally understood to be a law firm closely affiliated with another professional services entity, such as an accounting firm. They may, to a certain extent, share physical office space and information systems and equipment, and the associated costs. It is understood that the practices of the law firm and the accounting firm, however, are not integrated, and there is said to be no fee sharing.

The only example to date in Canada is Donahue & Partners, affiliated with Ernst & Young. Established in 1996, the Toronto firm has grown to almost 40 lawyers and plans to continue its expansion. It also has an office in Calgary, and plans to open offices in Vancouver and Montreal soon. Other large professional services firms in Canada have been studying similar affiliated law practice arrangements.

There has been significant development in Europe, England and New South Wales with this structure, with some variation in the level of integration of the firms. As Kent Roach and Edward Iacobucci noted in a paper prepared for the Law Society’s previous MDP study,

³⁸On April 30, 1999, Convocation made By-Law 25 entitled “Multi-Discipline Practices” which permits lawyers in Ontario to practice law in an MDP, either in the form of an association of lawyers and non-lawyers or a partnership of lawyers and non-lawyers. Non-lawyers must be qualified to provide services within the practice that relate to the provision of legal services. The by-law permits professionals and non-professionals joining with lawyers in the practice provided that this requirement is fulfilled. Membership of non-lawyers in multi-discipline practices is limited to persons who are actually providing services in the practice.

³⁹Transcript of Convocation, September 25, 1998, page 218.

By far the greatest growth in captive firms has been in London, England. Arthur Andersen affiliated itself with a start-up law firm, Garret & Co. The law firm, which is a separate entity from Andersen, but is associated with them, went from nothing in 1993 to a firm of 145 solicitors in five offices across England in only 3 years. Price Waterhouse is affiliated with the law firm Arnheim & Co. and Coopers and Lybrand helped establish Tite and Lewis in 1997. As an example of the importance of the relationships between the law and accounting firms, Arnheim & Co. earns 30% of its fees from referrals from Price Waterhouse and believes that this figure will increase. Ernst and Young has signalled its intention also to establish an association with a law firm. Significant integration between lawyers and accountants has occurred in the United Kingdom even without the adoption of a regulatory regime specifically designed for and permitting MDP's.

...

The largest law firm in France, Fidal, is part of KPMG. In Spain, a top law firm, J&A Garrigues, merged with Arthur Andersen's pre-existing law firm to form the largest firm in Spain, J&A Garrigues, Andersen Y Cia.⁴⁰

In the same paper, Roach and Iacobucci discussed the captive firm as one option in the range of multi-discipline practice structures. Their view was that the captive firm may address some of the key regulatory concerns that are created, for example, by a fully integrated multi-disciplinary partnership of lawyers and other service providers, but would not solve all the issues arising from multi-discipline practice:

A case can be made that captive firms minimize the problems associated with confidentiality and loss of solicitor client privilege. Robert Brown of Price Waterhouse, for example, has observed that despite a good deal of managerial and administrative integration that captive law firms "usually devote special efforts to preserving client confidentiality - even from the affiliated accounting organization - and in meeting other professional requirements." A lawyer in a captive firm may be more sensitive to the danger that solicitor client privilege will be lost by the exchange of information with affiliated professionals in a separate firm than a lawyer who works in an integrated team under the same management with those other professionals. ... Similarly, the fact that under present rules captive firms cannot generally bear the name of their affiliated accounting firm may also help prevent client confusion about when they enjoy the attributes of a solicitor client relationship in their dealings with various arms of the larger entity. The actual effects of the separate firm structure is ultimately an empirical question. It is possible that clients do not perceive any real differences between dealing with lawyers in a captive firm and others in the affiliated organization, but is also possible that the separate law firm helps demarcate the boundaries of the solicitor client relationship.

Captive law firms might also help contain conflict of interest problems and minimize the situations where lawyers and other professionals will have competing duties by, for example, keeping audit and other reliance services provided by accountants separate from the advocacy and confidentiality duties of lawyers representing clients being audited. ...

⁴⁰Kent Roach and Edward Iacobucci, "Multi-Disciplinary Practices and Partnerships: Policy Options", prepared for the Futures Task Force Working Group on Multi-Discipline Partnerships, September, 1998, p. 10.

Captive law firms, however, do not solve all conflict of interest problems. The White Paper suggests that law firms and affiliated organizations should be treated as one organization for the purpose of determining conflicts and that the law firm because of its experience with conflicts and access to confidential information should determine when both it and the affiliated organization should decline work because of a conflict. This approach may reflect the fact that the authors of the White Paper generally had experience with multidisciplinary alliances that were dominated by law firms. It is not clear that smaller captive law firms affiliated with larger accounting or actuarial firms would be able to determine conflicts of interest for the larger organization. At a minimum, a captive firm must be required to inform clients of its affiliations. The independence of legal advice may also be adversely affected by the captive firm's relation with its affiliated organization. Again, disclosure of the captive firm's interest in the largest organization would allow clients to evaluate the captive firm's legal advice and attempts at steering.

...

A White Paper prepared by American lawyers with experience with affiliations between law firms and organizations of non-lawyers while generally supportive of greater integration in multi-disciplinary practice, nevertheless acknowledged the value of keeping law firms separate and distinct. Its authors suggested several functions that could be served by separate organizational structures. "A separate entity may clarify and enhance the attorney-client relationship by helping the client to distinguish between the role of the consultant and the role of the attorney." Clients would also know that lawyers' insurance, compensation and trust funds obligations apply to the work done by the captive firm, but not the affiliated organization. Captive firms pose some disadvantages. The present rules preclude direct sharing of profits and impose transaction costs by not allowing closer or seamless integration between professional service providers. More importantly from a regulatory perspective, is the concern that captive firms are an expensive and indirect means to circumvent the rules. ...⁴¹

In August 1999, the American Bar Association ("ABA") at its annual meeting in Atlanta considered a report from its Commission on Multidisciplinary Practice. The Commission proposed a model, which would permit an integrated partnership, in a series of recommendations which began with a statement that the core values of the legal profession should be maintained but that the governing rules "should not permit existing rules to unnecessarily inhibit the development of new structures for the more effective delivery of services and better public access to the legal system"⁴². The Commission's Reporter's Notes make it clear that the affiliated or captive law firm model would be included within the definition of multidisciplinary practice proposed by the Commission as "being either an association that includes lawyers and nonlawyers and holds itself out to the public as providing legal services or an arrangement by which a law firm joins with one or more other professional firms to provide services, and there is a direct or indirect sharing of profits as part of the arrangement."⁴³ The ABA after debating the Commission's proposals decided that no change should be made the rules to permit multidisciplinary practice unless further study shows that such changes are in the public interest, without compromising lawyers' independence and loyalty to clients.

⁴¹*Ibid* pp 49-52.

⁴²From Recommendation 1, "American Bar Association Commission on Multidisciplinary Practice Report to the House of Delegates", June 1999.

⁴³Reporter's Notes, Commission on Multidisciplinary Practice, page 3.

A report presented to the Canadian Bar Association ("CBA") at its annual meeting in August 1999 recommended, *inter alia*, that "there be no distinction drawn between MDPs involving "practices", such as Captive Law Firms (CLFs) and fully integrated partnerships". It also recommended that "there be no restrictions on the kinds of services provided by MDPs" and "there be no requirement of control of MDPs by lawyers".⁴⁴ These recommendations are scheduled for policy debate at the CBA's mid-winter meeting next February.

The Federation of Law Societies has also completed a study on MDPs, and reported its findings to its annual meeting in August 1999. While the Federation's study touched on the issue of the captive law firm, the broad recommendations did not specifically address the issues arising from this form of multi-discipline practice.

Issues for Discussion

The Task Force, as noted above, has been mandated to review the regulatory issues that the affiliated practice structure raises. In its discussions to date, the Task Force identified the following to be among those issues which would require consideration:

- marketing and advertising issues, including name association
- independence of lawyers in the affiliated firm
- ownership/control issues, including financial arrangements between the practices
- conflicts of interest, including the manner in which they would be identified by both firms
- confidentiality of client information
- advice to clients on the nature of the affiliation and related disclosure questions
- choice of counsel issues
- consideration of the public interest in allowing clients to purchase legal services where they wish at a particular cost, in contrast to the historical monopoly on the provision of legal services exercised by the legal profession.

In a broader sense, the affiliated law firm structure may raise additional issues for the profession, including:

- whether this type of arrangement will enhance the availability and delivery of legal services to the public;
- whether there is a danger that legal and professional expertise will be concentrated too narrowly, for example, in larger firms for sophisticated clients, at the expense of decreased access for the "person on the street";
- insurance issues;
- whether such arrangements will impact on how lawyers prepare themselves for practice, and the pre-and post-call education that is undertaken as a matter of qualifying and updating knowledge for legal practice;
- the impact on lawyers, depending on the level of affiliation between a professional services firm providing audit services and the law practice, of situations where the independence of the auditor, because of the affiliation, may be compromised;
- the impact on the administration of justice and the importance of a self-regulating independent bar.

⁴⁴ From "Striking a Balance - The Report of the International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession", Conclusions and recommendations, p. 37

September 1999

APPENDIX 3

AMERICAN BAR ASSOCIATION
RECOMMENDATION IN RESPECT OF
MULTIDISCIPLINARY PRACTICE

APPENDIX 4

AMERICAN BAR ASSOCIATION
COMMISSION ON MULTIDISCIPLINARY PRACTICE
TESTIMONY GERARD NICOLAY AND NEIL COCHRAN

APPENDIX 5

SELECTED
RULES OF PROFESSIONAL CONDUCT

2.03 CONFIDENTIALITY

Confidential Information

2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

Commentary

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

Generally, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.

A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

A lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.

Although the rule may not apply to facts that are public knowledge, nevertheless, the lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

In some situations, the authority of the client to disclose may be implied. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non-legal staff, such as secretaries and filing clerks. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, and students the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

A lawyer may have an obligation to disclose information under subrule 4.06(3)(Security of Court Facilities). If client information is involved in those situations, the lawyer should be guided by the provisions of rule 2.03.

The rule prohibits disclosure of confidential information because confidentiality and loyalty are fundamental to the relationship between a lawyer and client and legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, there are some very exceptional situations identified in the following subrules where disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare, and, even in these situations, the lawyer should not disclose more information than is required.

Justified or Permitted Disclosure

- (2) When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.
- (3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

Commentary

A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should "blow the whistle" on his or her employer or client. Although the *Rules of Professional Conduct* make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that his or her duties are owed to the organization and not to the officers, employees, or agents of the organization. The lawyer should therefore ask that the matter be reconsidered, and the lawyer should, if necessary, bring the proposed misconduct to the attention of a higher (and ultimately the highest) authority in the organization despite any directions from anyone in the organization to the contrary. If these measures fail, it may be appropriate for the lawyer to resign in accordance with the rules for withdrawal from representation (rule 2.09).

- (4) Where it is alleged that a lawyer or the lawyer's associates or employees are
 - (a) guilty of a criminal offence involving a client's affairs,
 - (b) civilly liable with respect to a matter involving a client's affairs, or
 - (c) guilty of malpractice or misconduct,

a lawyer may disclose confidential information in order to defend against the allegations, but the lawyer shall not disclose more information than is required.

(5) A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

Literary Works

(6) If a lawyer engages in literary works, such as a memoir or an autobiography, the lawyer shall not disclose confidential information without the client's or former client's consent.

Commentary

The fiduciary relationship between lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person or to the disadvantage of the client.

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule

a "conflict of interest" or a "conflicting interest" means an interest

- (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary

Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate of a lawyer, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there would be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client.

Avoidance of Conflicts of Interest

- (2) A lawyer shall not advise or represent more than one side of a dispute.
- (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary

A client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

While this subrule does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.

Acting Against Client

- (4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter
- (a) in the same matter,
 - (b) in any related matter, or
 - (c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information

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

Commentary

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

(5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if

- (a) the former client consents to the lawyer's partner or associate acting, or
- (b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including
 - (i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,
 - (ii) the extent of prejudice to any party,
 - (iii) the good faith of the parties,
 - (iv) the availability of suitable alternative counsel, and
 - (v) issues affecting the public interest.

Commentary

The term "client" is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

Joint Retainer

(6) Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

- (a) the lawyer has been asked to act for both or all of them,
- (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

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

Commentary

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

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

- (9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

- (a) not advise them on the contentious issue, and
- (b) refer the clients to other lawyers, unless
 - (i) no legal advice is required, and
 - (ii) the clients are sophisticated,

in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary

The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Prohibition Against Acting for Borrower and Lender

(11) Subject to subrule (12), a lawyer or two or more lawyers practising in partnership or association shall not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

(12) Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if

- (a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,
- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,
- (c) the lender is an institution that lends money in the ordinary course of its business,
- (d) the consideration for the mortgage or loan does not exceed \$50,000, or
- (e) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act (Canada)*.

Multi-discipline Practice

(13) A lawyer in a multi-discipline practice shall ensure that non-lawyer partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

Unrepresented Persons

(14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall

- (a) urge the unrepresented person to obtain independent legal representation,
- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer, and

- (c) make clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Commentary

If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

2.06 DOING BUSINESS WITH A CLIENT

Definitions

- 2.06 (1) In this rule

“related persons” means related persons as defined in the *Income Tax Act (Canada)* and “related person” has a corresponding meaning, and

“syndicated mortgage” means a mortgage having more than one investor.

Investment by Client where Lawyer has an Interest

- (2) Where a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, the lawyer, before accepting any retainer

- (a) shall disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later,
- (b) shall recommend independent legal representation and shall require that the client receive independent legal advice, and
- (c) where the client requests the lawyer to act, the lawyer shall obtain the client's written consent.

Commentary

If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching a confidence, the lawyer must decline the retainer.

The lawyer should not uncritically accept the client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrules 2.06(4) or (6).

Certificate of Independent Legal Advice

- (3) A lawyer retained to give independent legal advice shall, before any advance of funds has been made by the client,
- (a) provide the client with a written certificate that the client has received independent legal advice, and
 - (b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

Borrowing from Clients

- (4) A lawyer shall not borrow money from a client unless
- (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or
 - (b) the client is a related person as defined by the *Income Tax Act (Canada)* and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice or independent legal representation.

Commentary

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted.

Whether a person lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is to be considered a client within this rule is to be determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan or investment, the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

(5) In any transaction, other than a transaction within the provisions of subrule (4), in which money is borrowed from a client by a lawyer's spouse or by a corporation, syndicate, or partnership in which either the lawyer or the lawyer's spouse has, or both of them together have, directly or indirectly, a substantial interest, the lawyer shall ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

(6) A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

- (a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives
 - (i) a complete reporting letter on the transaction,
 - (ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and
 - (iii) a copy of the duplicate registered mortgage or security instrument,
- (b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or
- (c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary

ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law:

- (a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof,
- (b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or *inter vivos* trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment, and
- (c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when subrule 2.04 (12) applies, the lawyer may act for both.

Disclosure

- (7) Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

- (8) A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a Lawyer

- (9) Except as provided by subrule (10), a lawyer shall not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.
- (10) A lawyer may give a personal guarantee in the following circumstances:

- (a) the lender is a lending institution, financial institution, insurance company, trust company or

any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent, or child,

(b) the transaction is for the benefit of a non-profit or charitable institution where the lawyer as a member or supporter of such institution is asked, either individually or together with other members or supporters of the institution, to provide a guarantee, or

(c) the lawyer has entered into a business venture with a client and the lender requires personal guarantees from all participants in the venture as a matter of course and

(i) the lawyer has complied with rule 2.04 (Avoidance of Conflicts of Interest) and this rule (Doing Business with a Client), and

(ii) the lender and participants in the venture who are or were clients of the member have received independent legal representation.

2.08 FEES AND DISBURSEMENTS

Division of Fees and Referral Fees

(7) Where the client consents, fees for a matter may be divided between lawyers who are not in the same law firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

(8) Where a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other lawyer may pay a referral fee provided that

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and

(b) the client is informed and consents.

(9) A lawyer shall not

(a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer, or

(b) give any financial or other reward to any person who is not a lawyer for the referral of clients or client matters.

Exception for Multi-discipline Practices

- (10) Subrule (9) does not apply to multi-discipline practices of lawyer and non-lawyer partners where the partnership agreement provides for the sharing of fees and profits among members of the firm.

2.09 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

- 2.09 (1) A lawyer shall not withdraw from representation of a client except for good cause and upon notice to the client appropriate in the circumstances.

Commentary

Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

Optional Withdrawal

- (2) Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

A lawyer who is deceived by the client will have justifiable cause for withdrawal, and the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate a loss of confidence justifying withdrawal. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

Non-payment of Fees

- (3) Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

Withdrawal from Criminal Proceedings

(4) Where a lawyer has agreed to act in a criminal case and where the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer

- (a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause,
- (b) accounts to the client for any monies received on account of fees and disbursements,
- (c) notifies Crown counsel in writing that the lawyer is no longer acting,
- (d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting.

Commentary

A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

(5) Where a lawyer has agreed to act in a criminal case and where the date set for trial is not far enough removed to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act may not withdraw because of non-payment of fees.

(6) Where the lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date when the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

Commentary

Where circumstances arise that in the opinion of the lawyer require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses.

Mandatory Withdrawal

- (7) Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if
- (a) discharged by the client,
 - (b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,
 - (c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,
 - (d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules, or
 - (e) the lawyer is not competent to handle the matter.

Commentary

When a law firm is dissolved it will usually result in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the dissolution. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles here set out, and, in particular, should try to minimize expense and avoid prejudice to the client.

Manner of Withdrawal

- (8) When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.
- (9) Upon discharge or withdrawal, a lawyer shall
- (a) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled,
 - (b) give the client all information that may be required in connection with the case or matter,
 - (c) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation,
 - (d) promptly render an account for outstanding fees and disbursements, and
 - (e) co-operate with the successor lawyer so as to minimize expense and avoid prejudice to the client.

Commentary

The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor lawyer or lawyers to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

Where upon the discharge or withdrawal of the lawyer, the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

Duty of Successor Lawyer

- (10) Before agreeing to represent a client, a successor lawyer shall be satisfied that the former lawyer approves, has withdrawn, or has been discharged by the client.

Commentary

It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

3.02 LAW FIRM NAME

Permissible Names

- 3.02 (1) A law firm name may include only the names of persons who are qualified to practise law in Ontario or in any other province or territory of Canada where the law firm carries on its practice, or who, if retired or deceased, were qualified to practise law in Ontario or in any other province or territory of Canada where the firm carries on its practice.

- (2) A law firm name may consist of or include the names of deceased or retired members of the firm.

- (3) A lawyer who purchases a practice may, for a reasonable length of time, use the words "Successor to ____" in small print under the lawyer's own name.

Restrictions

- (4) The name of a law firm shall not include a trade name, a commercial name, or a figure of speech.
- (5) The name of a law 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 lawyers associated with John Doe in practice or two or more partners of John Doe in the firm.
- (6) When a lawyer retires from a law firm to take up an appointment as a judge or master or to fill any office incompatible with the practice of law, the lawyer's name shall be deleted from the firm name.
- (7) A lawyer or law firm may not acquire and use a firm name unless the name was acquired along with the practice of a deceased or retiring member who conducted a practice under the name.

Limited Liability Partnership

- (8) If a law firm practices as a limited liability partnership, the phrase “limited liability partnership” or the letters “LLP” shall be included as the last words or letters in the firm name.

3.03 LETTERHEAD

Letterhead

- 3.03 (1) Subject to subrules (2) and (3) and rule 3.05, a lawyer's letterhead and the signs identifying the office may only include
 - (a) the name of the lawyer or law firm,
 - (b) a list of the members of any law firm, including counsel practising with the firm,
 - (c) the words “barrister,” “barrister-at-law,” “barrister and solicitor,” “lawyer,” “law office,” “solicitor,” “solicitor-at-law,” or the plural, where applicable,
 - (d) the words “notary” or “commissioner for oaths” or both, where applicable,
 - (e) the words “patent and trade mark agent,” where applicable,
 - (f) a statement that a member of the law firm is qualified to practise law in another jurisdiction,
 - (g) a statement that a member of the law firm is certified by the Law Society as a specialist in a specified field,
 - (h) the phrase “limited liability partnership” or the letters “LLP,” where applicable,
 - (i) the phrase “multi-discipline practice” or “multi-discipline partnership” where applicable,

(j) the addresses, telephone numbers, office hours, and the languages in which the lawyer or law firm is competent and capable of conducting a practice, and

(k) a logo.

(2) A lawyer or law firm that practises in the industrial property field may show the names of patent and trade-mark agents who are identified as such but who are not lawyers.

(3) A lawyer or law firm may place after the names on its letterhead degrees from *bona fide* universities and post secondary 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, and, where the firm is a multi-discipline practice, a list of partners and associates who are non-lawyers identified as such and their designations, if any.

3.04 ADVERTISING

Advertising Services Permitted

3.04 (1) Subject to subrule (3), a lawyer or a law firm may advertise their services or fees in any medium including the use of brochures and similar documents provided that the advertising

(a) is not false or misleading,

(b) is in good taste and is not such as to bring the profession or the administration of justice into disrepute, and

3. does not compare services or charges with other lawyers or law firms.

Advertising of Fees

(2) Subject to subrule (3), a lawyer or a law firm may advertise fees charged for their services subject to the following conditions:

(a) 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,

(b) if fees are advertised, the fact that disbursements are an additional cost shall be made clear in the advertisement,

(c) advertisements shall not use words or expressions such as "from . . .," "minimum," or " . . . and up," or the like in referring to the fees to be charged,

(d) services covered by advertised fees shall be provided at the advertised rate to all clients who retain the advertising lawyer or law firm during the 30-day period following the last publication of the fee unless there are special circumstances which could not reasonably have been foreseen, the burden of proving which rests upon the lawyer.

Restrictions on Advertising

- (3) A lawyer shall not
- (a) permit the lawyer's name to appear as solicitor, counsel, or Queen's Counsel on any advertising material offering goods, other than securities or legal publications, or services, other than legal services, to the public, and
 - (b) while in private practice, permit the lawyer's name to appear on the letterhead of a company as being its solicitor or counsel of a business, firm or corporation, other than the designation of honorary counsel or honorary lawyer on the letterhead of a non-profit or philanthropic organization that has been approved for such purpose by the standing committee of Convocation responsible for professional conduct.

Commentary

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

5.01 SUPERVISION

Application

- 5.01 (1) In this rule, a non-lawyer does not include a student-at-law.

Direct Supervision Required

- (2) A lawyer shall assume complete professional responsibility for all business entrusted to him or her and shall directly supervise staff and assistants to whom particular tasks and functions are delegated.

Commentary

A lawyer who practises alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise.

Where a non-lawyer has received specialized training or education and is competent to do independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

A lawyer may permit a non-lawyer to perform tasks delegated and supervised by a lawyer as long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by Legal Aid Ontario, as long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of Legal Aid Ontario and assumes full professional responsibility for the work. Generally, subject to the provisions of any statute, rule, or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer turns on the distinction between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer, which in the public interest, must be exercised by the lawyer whenever it is required.

A lawyer may permit a non-lawyer to act only under the supervision of a member of the Society. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non-lawyer generally and with regard to the matter in question. The burden rests on the lawyer who uses a non-lawyer to educate the latter concerning the duties that may be assigned to the non-lawyer and then to supervise the manner in which such duties are carried out. A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

Permissible Delegation - The following examples, which are not exhaustive, illustrate situations where it may be appropriate to delegate work to non-lawyers subject to proper supervision.

Real Estate - A lawyer may permit a non-lawyer to attend to all matters of routine administration and to assist in more complex transactions relating to the sale, purchase, option, lease, or mortgaging of land, to draft statements of account and routine documents and correspondence, and to attend to registrations, provided that the lawyer should not delegate to a non-lawyer ultimate responsibility for review of a title search report or of documents before signing, or for the review and signing of a letter of requisition, a title opinion, or reporting letter to the client.

Corporate and Commercial - A lawyer may permit a non-lawyer to attend to all matters of routine administration and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial, and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

Wills, Trusts and Estates - A lawyer may permit a non-lawyer to attend to all matters of routine administration, to assist in more complex matters, to collect information, draft routine documents and correspondence, to prepare income tax returns, to calculate such taxes, to draft executors' accounts and statements of account, and to attend to filings.

Litigation - A lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex matters, to collect information, draft routine pleadings, correspondence and other routine documents, research legal questions, prepare memoranda, organize documents, prepare briefs, draft statements of account and attend to filings. Generally, a non-lawyer shall not attend on examinations or in court except in support of a lawyer also in attendance. Permissible exceptions include law clerks appearing on

- (a) routine adjournments in provincial courts,
- (b) appearances before tribunals where statutes or regulations permit non-lawyers to appear, e.g., Small Claims Court, Coroners' Inquests, as agent on summary conviction matters where so authorized by the *Criminal Code*, and the *Provincial Offences Act* and administrative tribunals governed by the *Statutory Powers Procedure Act*,
- (c) routine examinations in uncontested matters such as for the purpose of obtaining routine admissions, attendance upon judgment debtor examinations and on watching briefs but not the conduct of an examination for discovery in a contested matter or a cross-examination of a witness in aid of a motion,
- (d) simple without notice matters or motions for a consent order before a master, and
- (e) assessments of costs.

Delegation

- (3) A lawyer shall not permit a non-lawyer to
 - (a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer is advised before any work commences,
 - (b) give legal opinions,
 - (c) give or accept undertakings, except with the express authorization of the supervising lawyer,
 - (d) act finally without reference to the lawyer in matters involving professional legal judgment,
 - (e) be held out as a lawyer,

Commentary

A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers, public officials, or with the public generally whether within or outside the offices of the law firm of employment.

- (f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a support role to the lawyer appearing in such proceedings,
- (g) be named in association with the lawyer in any pleading, written argument, or other like document submitted to a court,
- (h) be remunerated on a sliding scale related to the earnings of the lawyer, except where the non-lawyer is an employee of the lawyer,
- (i) conduct negotiations with third parties, other than routine negotiations where the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken,
- (j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose,
- (k) sign correspondence containing a legal opinion, but the non-lawyer who has been specifically directed to do so by a supervising lawyer may sign correspondence of a routine administrative nature, provided that the fact the person is a non-lawyer is disclosed, and the capacity in which the person signs the correspondence is indicated,
- (l) forward to a client any documents, other than routine documents, unless they have previously been reviewed by the lawyer, or
- (m) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do.

Commentary

A lawyer may, in appropriate circumstances, render service with the assistance of non-lawyers of whose competence the lawyer is satisfied. Though legal tasks may be delegated to such persons, the lawyer remains responsible for all services rendered and for all written materials prepared by non-lawyers.

- (4) A lawyer shall not permit a non-lawyer to
 - (a) provide advice to the client concerning any insurance, including title insurance, without supervision,

- (b) present insurance options or information regarding premiums to the client without supervision,
- (c) recommend one insurance product over another without supervision, and
- (d) give legal opinions regarding the insurance coverage obtained.

Collection Letters

- (5) No collection letter shall be sent out over the signature of a lawyer, unless the letter is on the lawyer's letterhead, prepared under the lawyer's supervision, and sent from the lawyer's office.

6.04 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

- 6.04 (1) A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.
- (2) A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

The term "outside interest" covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation, or writing on legal subjects, as well as activities not so connected such as, for example, a career in business, politics, broadcasting or the performing arts. In each case the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.

Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

November 29, 2000

Supplementary Material to the
Multi-Disciplinary Practice Task Force Report
(September 21, 2000 *)

Prepared by the
Multi-Disciplinary Practice Task Force

* Benchers are reminded to bring their copy of the September 21 Task Force report to Convocation.

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INTRODUCTION

1. The September 21, 2000 report of the Multi-Disciplinary Practice Task Force ("the report" and "the Task Force" respectively), in addition to distribution to benchers, staff and the press, was provided to interested members and other parties.
2. Prior to the original date scheduled for Convocation's discussion of the Task Force's proposals (October 19, 2000), benchers and/or Task Force members received correspondence from four organizations and firms, providing comment on the report and in some cases requesting that Convocation's consideration of the report be deferred pending member and public consultation on the proposals. One firm, Donahue & Partners ("Donahue"), now using the name Donahue Ernst & Young, provided extensive comments on the proposals.

3. The correspondence received from Gowlings, The Advocates' Society (including a report from its committee reviewing the Law Society's report) and Deloitte & Touche (with the Task Force chair's response) appears at Appendix A. The letter from Donahue¹ and two pages of comments authored by its counsel, Peter Griffin, which supplement the letter, appear at Appendix B.
4. The Task Force met to discuss the comments and determined that a response was required for the purpose of Convocation's consideration of the report and its proposals. This document contains the Task Force's response on the issues raised in the letters, as itemized in Parts I and II of the next section.
5. While some of Donahue's comments deal with one of the two issues discussed in Part I, and the Task Force responds to them below, the balance of Donahue's comments is dealt with in Part II, as Donahue has commented on most of the proposals in the report.

THE TASK FORCE'S RESPONSES TO THE COMMENTS

Part I - Public and Member Consultations on the Report's Proposals and Issues Concerning the Definition of "Affiliated Law Firm"

Public and Member Consultations on the Report's Proposals

6. Gowlings is of the view that economic, social and technological changes have enormous implications for lawyers. Wrestling with these changes will mean that new forms of organization, strategic partnering and service delivery must be considered and that change must be embraced. The firm believes that member and public consultations are necessary, given that, in their view, the proposals create "far reaching barriers" to new relationships for the benefit of the public and the profession.
7. Deloitte & Touche believes that a broader, open consultative process is necessary because of the important public interest issue with which the study deals. Consultations should involve the public, the profession, consumer groups and representatives of other professions most likely to affiliate with lawyers and law firms. The firm points to the American Bar Association study of multi-discipline practices which involved a series of public hearings.
8. The Task Force noted that to its knowledge, apart from the American Bar Association's Commission on Multidisciplinary Practice, no other legal organization or regulator studying multi-discipline practices or the affiliated law firm has held public consultations or hearings. This would include the Law Society in the context of the Futures Task Force Working Group on Multi-Discipline Partnerships and its 1998 report that led to By-Law 25, the Canadian Bar Association, the Federation of Law Societies, the International Bar Association, the Law Society of England and Wales, and the Law Society of British Columbia.
9. To some extent, clients and potential clients of affiliated law firms have been canvassed on their views of the subject generally, through the meetings between the Task Force and groups of corporate counsel.

¹Benchers received directly from Donahue a copy of its letter dated October 18, 2000 prior to October 19, 2000 Convocation.

10. The Task Force reviewed voluminous published material on this subject, including extensive oral and written submissions of interested parties to the American Bar Association's Commission on Multidisciplinary Practice ("the ABA Commission").
11. With respect to other professions, the Task Force made concerted efforts to arrange meetings with all of the "Big 5" accounting/professional services firms, given their central place in the development of affiliated law practices. Only one - Ernst & Young (with Donahue & Partners) - agreed to a meeting and provided useful confidential and non-confidential information to the Task Force.
12. In the Task Force's view, public consultations at this stage would add little meaningful information to the study or serve to inform the Task Force further on matters that directly bear on the Society's regulatory role in this context. Accordingly, the Task Force believes that deferring Convocation's consideration of the proposals until public consultations are held would not be a sound decision.
13. With respect to member consultations on the report's proposals, the Task Force concluded that such consultations are not necessary. The reasons include the following:
 - a. No such consultations were held on the recommendations of the Futures Task Force Working Group on Multi-Discipline Partnerships which led to By-Law 25. It is difficult to envisage how consultations should be pursued on the proposed affiliated law firm regulatory scheme, which is connected with and may be viewed as an extension of the By-Law 25 scheme.
 - b. While the suggestion was made in the Gowlings letter and in the Griffin comments that a consultation process similar to that undertaken by the task force that structured new *Rules of Professional Conduct* be pursued, the Task Force does not see that process as a valid comparison. The Rules, like the scheme that will arise from the Society's competence initiative, where consultations are in progress, apply to all members. The affiliated law firm issue is discrete, narrow and does not directly affect every member.
 - c. Extensive information was obtained from a broad cross-section of the profession, as documented in the report, during consultations undertaken by the Task Force in the study, and was useful to the Task Force in forming its proposals.
 - d. The Task Force collected and reviewed extensive literature on the subject, including but not limited to law journal articles, newspaper and magazine articles, Internet web site documents, reports of other regulatory bodies and submissions by the public and the profession to the ABA Commission.

Issues Concerning the Definition of "Affiliated Law Firm"

14. Gowlings, The Advocates' Society and Donahue describes the Task Force's proposed definition of "affiliated law firm"² as too broad. Gowlings feels that it will operate to constrain law firms from continuing with existing arrangements and bar new strategies for service delivery. Donahue focusses on the fact that underlying the

²The definition reads:

A law firm has an affiliation with a non-lawyer firm where the firms regularly join together for the joint promotion and delivery of their respective services to the public.

definition, for regulatory purposes aimed at preservation of the core values, is an unsupportable distinction between relationships among lawyers and relationships among lawyers and non-lawyers. None of the respondents offered an alternative definition.

15. The Advocates' Society, while expressing general agreement with the direction of the report, has two specific concerns and one general comment about the definition.
16. The first concern is that the definition appears to catch the common example of the law firm owning or controlling the patent and trademark firm, or other non-law service providers. The Advocates' Society states that if in fact this type of arrangement is already dealt with through the application of By-Law 25, the proposed definition ought to include an interpretation or commentary to explain this.
17. The second concern is that the definition is only intended to apply to "joint services" offered by law and non-law firm providers, but does not clearly indicate this. The Advocates' Society acknowledges that the definition includes the words "joint" and "services", but notes that they do not appear together in the definition. As with the issue above, it suggests that clarification be provided.
18. By way of general comment, The Advocates' Society expressed a sense of uncertainty about the approach to the definition in its entirety, in that the Task Force apparently has adopted marketing activities as the measure by which activity of the affiliated firms is deemed to be permissible or impermissible. In The Advocates' Society's view, the real issue is control, and the need to provide a degree of specificity on what would amount or not amount to control.
19. In the Task Force's view, Donahue's interpretation extends the definition in a way not contemplated or intended by the Task Force. While Donahue claims that the definition leads to the conclusion that lawyers in relationships with non-lawyers cannot be trusted to uphold the core values as would lawyers in relationships with lawyers, despite similar pressures in both types of relationships, the Task Force based its proposals on the fact that non-lawyers who are affiliated with lawyers cannot be regulated by the Society and in the type of affiliation under review are not controlled by lawyers. The imposition of regulation on the lawyers in the affiliated law firm is necessary to ensure that the activities of the non-lawyer firm in the affiliation respect the core values of the profession in an appropriate way.
20. With respect to The Advocates' Society's comments on situations where lawyers control firms or entities of non-law service providers, the Task Force agrees that such arrangements may be subject to a somewhat different regulatory scheme than that outlined in the report, although elements of that scheme may apply. For example, there should be disclosure to the clients of a law firm of its relationship with a consulting firm operated and controlled by the law firm where the clients access the non-law firm's services, whether or not that non-law firm is strictly connected with the practice of law. This is an issue the Society has already addressed with some firms, and is not something that is intended to be the subject of separate treatment in the Task Force's report. Conversely, the relationships between lawyers can be and are regulated by the Law Society.
21. However, if the non-law firm is not strictly connected with the practice of law and is not controlled by the law firm, the report in fact deals with that situation if the firm is affiliated with the law firm under the definition of an affiliated law firm.
22. The Task Force believes the examples above also respond to The Advocates' Society's views on control as the central issue in approaching a definition of an affiliation between lawyers and non-lawyers. While not explicitly incorporating an element of control, the definition inevitably leads to a regulatory scheme that makes lawyers' control of their law practice in affiliations with non-lawyers critical to the preservation of the profession's core values.

23. The Task Force acknowledges that there are many degrees of affiliation, as indicated by Donahue, and a variety of arrangements into which firms may enter that may be captured by the definition. However, the Task Force believes that its definition, in identifying the type of entity that will be subject to regulation, is sound and appropriately focusses on the *regular* promotion and delivery of joint services. The Task Force emphasizes that the rules applicable to the affiliated law firm structure, as proposed in the regulatory scheme, only apply when there are joint service offerings and deliveries of services. The fact that firms may market services jointly does not mean, for example, that both firms must search for conflicts of interests where no joint provision of services occurs.

Part II - The Donahue Submission

24. Dealing first with introductory comments by Donahue in its letter of October 18, 2000, the Task Force provides the following comments:
 - a. Regulation of lawyers in Ontario is premised on the individual rather than the collective. The focus of By-Law 25 on multi-discipline practices, for example, is on the responsibility and obligations of the individual lawyer. The Task Force has approached its task in respect of the affiliated law firm from the perspective of the regulation of the individual lawyer and does not agree that the regulatory scheme runs counter to the concept of individual regulation. The fact that the regulatory scheme proposed for affiliated law firms emanates from the recognition of a significant connection between the law firm and the non-lawyer firm does not translate to a rejection of individual-based regulation. The obligations are still imposed at the lawyer, not the firm, level for the purposes of regulation.
 - b. While Donahue relates a complaint-free experience over its four year existence, the Task Force recognizes at least two circumstances where the *Rules of Professional Conduct* may well have not been observed by the firm:
 - i. The firm name is in breach of rule 3.02, and the managing partner has been served with a notice of application for a Law Society conduct proceeding in this respect;
 - ii. Certain advertisements of the firm jointly with Ernst & Young offend rule 3.04(3)(a) which prohibits a lawyer's name as solicitor or counsel from appearing on advertising material offering services, other than legal services, to the public.
 - c. The claim that the rationale for the Task Force's proposals is a competitive rather than regulatory concern appears to ignore the clear statements in the report that
 - i. The affiliated law firm structure should be permitted as an option for the delivery of legal services and to enhance the choices for the public in accessing legal services,
 - ii. The core values of the profession must be preserved in settings where there is a potential risk to the values,
 - iii. The Society as a regulator has as its chief obligation the protection of the public interest and must fulfill that mandate responsibly,
 - iv. Regulation should not seek to protect the *status quo* of lawyers or the ways they currently organize to practice,
 - v. The proposed scheme is a first step in mapping out a regulatory response to the development of this structure, and may be revisited after a more solid experience is gained by the Society with affiliated law firms.

- d. While Donahue refers to the regulatory structure for multi-discipline practice proposed by the Law Society of British Columbia, the Task Force noted in the report (pages 11 and 12) that the affiliated or "captive" law firm, as British Columbia has called it, was not part of the analysis that led to the its scheme. It specifically left that topic for a separate investigation.
25. The Task Force emphasizes that the ability of lawyers to deliver legal services will be enhanced and not limited by the structure it proposes, consistent with the protections required in the public interest.
26. The Task Force considered the comments made by Donahue in the balance of its letter, dealing *seriatim* with the proposals of the Task Force. In the following text, reference is to the proposals at paragraph 128 on pages 46 through 48 of the report.

Proposal b.

27. Donahue disagrees with the control requirement for the affiliated law firm. The Task Force's view is that the requirement for control of the affiliated law practice by lawyers mirrors the policy adopted in the scheme for multi-discipline practices, including partnerships, in By-Law 25, which the Task Force affirmed in the context of this study. As the report indicates, the control requirement is necessary to protect the independence of the law firm and the advice that lawyers provide to clients, and this is a policy already adopted by Convocation in By-Law 25.

Proposal c.

28. Donahue views the disclosure requirements for the affiliated law firm as discriminatory given that many other relationships in which lawyers may find themselves where similar pressures may operate are not given similar treatment. Included, among others, is the example of the patent and trademark agent practices within some law firms.
29. In the Task Force's view, Donahue strays in some measure from the proposal, which is limited to agreements between the law firm and its affiliate. Using some of the examples,
- unless the affiliate is the landlord, onerous leases would not be disclosed,
 - the level of bank indebtedness would not be included unless the lawyer or law firm is affiliated with the bank,
 - a lawyer sitting on the board of a corporation is not covered in the report, nor would it be even if the law firm and the corporation were affiliated except to disclose the compensation to the director in the latter case,
 - investments in the client entity (public or private) seem unrelated to the issue unless the law firm is affiliated with the client entity.
30. The Task Force, in noting the point that patent and trade mark agents are not expressly dealt with in the report, determined that where a firm of patent and trademark agents is not a law firm, the report should and does deal with that situation if the firm is affiliated with the law firm under the definition of an affiliated law firm.³ The Task Force felt that a similar comment could be made about consulting firms operated by labour law firms,

³The comment that some law firms complying with By-Law 25 have patent and trade mark agents as partners who provide services which "have nothing to do with the practice of law" is ill-informed. Such patent and trade mark agents must supplement and support the practice of law by the law firm in order to comply with By-Law 25.

mentioned by Donahue, where it is even more clear that there should be disclosure to the clients of the labour law firm of the relationship with the consulting firm "operated by" the labour law firm.

31. Where the law firm owns or controls the non-lawyer firm with which it is affiliated, the law may impose on the lawyers the same duties and responsibilities it imposes on lawyers whose employees are not lawyers. Consider the following:

Nonlawyer employees are not themselves subject to the lawyer codes, at least in the sense that no lawyer disciplinary agency has claimed jurisdiction over them. But courts have held that lawyers have full supervisory responsibility to see that the work of all employees is compatible with the requirements of the lawyer codes and with other law.⁴

Employees necessarily and permissibly come into contact with client confidential information in the course of their work, and therefore a lawyer must assume responsibility to assure that it is not disclosed or used in a way that the lawyer could not disclose or use it...The same regard for careful treatment of confidential client information should also be taken when a lawyer employs non-lawyer independent contractors or other services outside the lawyer's firm.⁵

32. Ultimately, the requirement for disclosure to the Society and the client is linked to the feature of control which, as noted above, is a protection for the independence of the affiliated law firm's practice of law.

Proposal d.

33. Donahue's view that the Task Force has not identified how pressures on lawyers in an affiliated law firm are different from lawyers in other relationships is tied to the Task Force's proposal that lawyers in such firms should be required to disclose to clients who retain the affiliated firms for joint services any arrangements that may affect the independence of the lawyers' representation.
34. In the Task Force' view, the requirement for such disclosure by a lawyer as a fiduciary to the client is indisputable. The Task Force also considered that disclosure would likely be required in the other circumstances described by Donahue in comments on this proposal.
35. The Task Force emphasizes that the concept of disclosure is a key element of its proposals, incorporating a scheme whereby the client and the Society may be informed of and understand the relationships between the affiliated law firm and the non-lawyer firm.

Proposal e.

36. With respect to the comments on the application procedure proposed by the Task Force for the affiliated law firm, as explained in the text of the report, the procedure is for the purpose of satisfying the Society that the two affiliated firms are not a *de facto* single multi-discipline partnership that requires compliance with By-Law 25.

⁴Wolfram, Charles W. "Modern Legal Ethics", St. Paul, Minnesota: West Publishing Co., 1986 at p. 892.

⁵*Ibid.*, at p 894.

Proposal f.

37. The comments by Donahue with respect to the prohibition proposed on the non-lawyer firm sharing in the law firm's profits try to draw a distinction between splitting a fee and splitting a profit. Donahue states that the prohibition on fee splitting was to protect the public in circumstances where the independence of the lawyer would be adversely affected by splitting a fee.
38. The Task Force does not see a distinction between splitting fees and splitting profits (profits are what is left over after expenses are deducted from fees) and does not agree with Donahue's attempt to justify the view that law firms could share their profits with non-lawyer firms with which they are affiliated without compromising the core values of the profession. The Task Force noted that the comments seem to acknowledge that there would be a compromise in the core values of the profession through sharing fees with non-lawyers, while drawing a distinction between sharing fees and sharing profits.

Proposals g. and h.

39. The Donahue submission on these proposals repeats an interpretation of the report appearing earlier in its letter, to the effect that the firms which may be affiliated are separate and independent organizations. Donahue then questions why the firms would be treated as one for the purposes of conflicts of interest searches. It submits that if the two entities are separate, no legal conflict, only a business conflict, can arise.
40. The Task Force does not agree that the report takes the position that the affiliated law firms are to be separate and independent. Within the affiliation, the report recommends a requirement for control and ownership of the law practice by lawyers because there may be an issue about the degree of independence that the law firm could maintain in an affiliation, for example, with a much larger, well-funded entity. The report acknowledges that the law firm may wish to share in the profits of the firm with which it is affiliated. In such cases, the Task Force's view is that at a minimum there is an issue about the law firm's separateness and independence. Treating the firms as one for conflicts searches, in these contexts, is appropriate to ensure that the public is protected. Where the two firms act jointly on the same client matter, treating the firms as one for conflicts searches is also appropriate to ensure that the public is protected.
41. In the Griffin comments, examples are given of relationships that would be subject to the conflicts search requirement, creating "impossible" circumstances for the entities. To the extent that the requirement requires clarification, the Task Force's proposal is that the two affiliated firms providing joint services to a client should be considered as one for the purposes of conflicts searches where the lawyers or the law firm have an interest, or participation, in the non-lawyer firm and when the law firm and the affiliated firm are acting jointly on the same matter. This would obviously also apply to two affiliated law firms acting jointly on the same matter, but because both firms are law firms, no special rules are required.
42. Donahue's comments on proposal i., noted below, raise a concern that the report suggests the creation of Chinese walls are inappropriate. The Task Force's comments on this issue are provided at this point as the issue is linked to conflicts and conflicts searches.
43. The Task Force did not intend to suggest that Chinese walls could not be used in the setting of the affiliation. Where conflicts are searched for and found within the law firm and/or the affiliated non-lawyer firm, with the appropriate compliance with rule 2.05 of the *Rules of Professional Conduct* (Conflicts from Transfer Between Law Firms) and client consent, Chinese walls could be erected.

Proposal i.

44. Donahue believes that this proposal is arbitrary and discriminatory because it does not deal with the other space sharing arrangements between lawyers. These would include, for example, loose associations or expense sharing schemes among lawyers as sole practitioners. The argument is that many of the same issues, for example, confidentiality of client information, arise in these lawyer/lawyer relationships.
45. The Task Force acknowledges that there may be issues arising from the above associations and cost sharing schemes that require the attention of the Society in respect of confidentiality requirements.⁶ The Task Force in this respect agrees with the following statement:

Lawyers who do not intend to enter into a partnership or a professional corporation arrangements might still wish to form a loose relationship for temporary or long-term sharing of expenses or for joint work on the matter of a single client... In all such arrangements, the paramount concern must be with the confidentiality of client matters... Thus disclosure of client information to lawyers in a shared office arrangement is permissible only with the prior permission of the affected client.⁷

46. The Task Force, however, believes that issues arising from such arrangements should not be used as a reason not to address lawyer/non-lawyer relationships in the way the Task Force has proposed.
47. The Society regulates all lawyers in any of the lawyer/lawyer relationships, but has no jurisdiction to regulate the non-lawyers in the lawyer/non-lawyer relationships. Thus, in the Task Force's view, a specialized scheme is warranted. Further, the lawyers in loose associations or cost sharing schemes maintain separate practices - the affiliated law firm structure is based on the regular joint delivery of services by lawyers and non-lawyers.

Proposal j.

48. Donahue submits that the type of disclosure required in this proposal, as a matter of consistent regulation, should be required of all lawyers who retain experts or consultants to assist in a client's matter.
49. In the Task Force's view, there is a distinction between the expert or consultant who in the course of a legal retainer is engaged by the lawyer for the expertise warranted for the client's matter, and the joint delivery of services by lawyers and non-lawyers in a retainer with the affiliated law firm and the non-lawyer firm. The former relationship, within a legal retainer only, extends the lawyer's umbrella of confidentiality and, in the appropriate case, the invocation of solicitor and client privilege, to those within the legal retainer. In the latter

⁶Rule 2.03(1) of the Law Society's *Rules of Professional Conduct* requires lawyers to "hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship." Part of the commentary to the rule indicates that "it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm, and to the extent necessary, to non-legal staff...But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees and students the importance of non-disclosure and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence."

⁷Wolfram, Charles W. *"Modern Legal Ethics"*, St. Paul, Minnesota: West Publishing Co., 1986 at p. 891.

relationship, only the lawyer for purposes of the legal services is bound to maintain confidentiality and privilege.

50. The Task Force also believes that the circumstances where a client *separately* retains a number of professionals to assist in a particular matter (accountants, lawyers, consultants, actuaries) can be distinguished from the joint delivery of services by lawyers and non-lawyers who have affiliated with each other. The client may wish all the retained advisers to meet jointly, but each will, it is expected, observe their individual duties to the client. The client may specifically request that disclosure of certain information be made in the presence of all advisers. In such cases, the lawyer may, depending on the information to be disclosed and as the occasion permits, advise the client of the effect of such disclosure, and some lawyers may request a written consent.
51. Where the client has retained a firm of lawyers and non-lawyers jointly, however, and the expectation is, and services are promoted on the basis, that information will be shared for the benefit of the client, the Task Force believes it is essential that the client be informed of the effect of that sharing and be under no illusions about the possible loss of privilege.
52. It is for these reasons that the Task Force considered it appropriate to require disclosure in the circumstances outlined in proposal j.

Proposal l.

53. The Task Force affirms the position in the report with respect to the name of the affiliated law firm. By way of comment on Donahue's submission on this issue, the Task Force would not confine the public to those who are "reasonably informed".

Proposal m.

54. The Task Force leaves for Convocation's consideration the suggestion made by Donahue that, beyond dealing with particular *Rules of Professional Conduct* related to the Task Force's proposals, the Rules be opened up to deal with all matters raised by Donahue, including those beyond the mandate of the Task Force.

CONCLUSION

55. The Task Force, while acknowledging the substance of the above comments of members of the profession, believes that it has addressed all of them and urges Convocation to proceed now with consideration of the report. The discussion of the report and its proposals is an important first step in creating a framework for implementation of the policy decisions that Convocation will make in considering this report.
56. The issues raised by the respondents and the response of the Task Force can be canvassed during the debate. In the Task Force's view, none of the comments of the respondents warrant a deferral of the consideration of the report for the purpose of further deliberations by the Task Force. In particular, the Task Force does not believe that any substantive information useful to the policy discussion will be gained by member or public consultations on the report's proposals.

APPENDIX A

CORRESPONDENCE AND OTHER MATERIAL RESPECTING THE COMMENTS OF GOWLINGS, THE
ADVOCATES' SOCIETY AND DELOITTE & TOUCHE

APPENDIX B

CORRESPONDENCE AND OTHER INFORMATION RESPECTING THE COMMENTS OF DONAHUE & PARTNERS

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It was moved by Mr. Cherniak, seconded by Mr. Ortved that the Report of the Task Force be approved in principle and that a By-Law be prepared.

Carried

Messrs. Campion and Hunter did not vote.

The Treasurer acknowledged Ms. Elliott's contribution to this issue and thanked the committee and Mr. David Ward.

DISCIPLINE MATTER

PRESENT: (seised)

Treasurer, Arnup, Bindman, Campion, Carpenter-Gunn, Cherniak, Coffey, Copeland, Crowe, Diamond, E. Ducharme, T. Ducharme, Gottlieb, Hunter, Lalonde, Laskin, Mulligan, Pilkington, Porter, Potter, Puccini, Ross, Ruby, Swaye, White and Wright.

.....

Re: George Washington Steven HARRINGTON - Oakville

The Secretary placed the matter before Convocation.

Ms. Cronk, Ms. Curtis and Messrs. Bobesich, Feinstein, Millar, Ortved, Topp, Wilson and MacKenzie withdrew from Convocation.

Mr. Glenn Stuart appeared on behalf of the Law Society and Ms. Jane Kelly, Duty Counsel appeared on behalf of the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 20th June, 2000, together with an Affidavit of Service sworn 30th June, 2000 by Marianne Dilillo that she had effected service on the solicitor by registered mail on 29th June, 2000 (marked Exhibit 1). The Report of the Discipline Committee dated 20th June, 2000 together with an Affidavit of Service sworn 11th August, 2000 by Pertrab Singh that he had effected service on the solicitor by registered mail on 4th August, 2000 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Mary Eberts, Chair
Gordon Bobesich
Nora Angeles

In the matter of
The Law Society Act
and in the matter of

Kathryn Seymour
for the Society

GEORGE WASHINGTON STEVEN HARRINGTON
of the City
of Oakville
a barrister and solicitor

Not Represented
for the solicitor

Heard: January 28, April 20, June 13,
August 6, August 10, November 9,
December 2, December 7, 1998,
February 5, February 22, April 8,
April 12, 1999

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

D91/97
D52/98

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE *Law Society Act*;

AND IN THE MATTER OF *George Washington Steven Harrington*, of
the Town of Oakville, a Barrister and Solicitor.

REPORT

Complaint D 91/97 was issued on September 29, 1997. Complaint D 52/98 was issued on April 16, 1998. At the request of the Solicitor, G.W. Steven Harrington, the two complaints were heard together. Hearings before a committee comprised of Mary Eberts, Nora Angeles and Gordon Bobesich were held on January 28, April 20, June 13, August 6, August 10, November 9, December 2, December 7, 1998, February 5, February 22, April 8 and April 12, 1999. Mr. Harrington represented himself. Kathryn Seymour appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct were found to have been established:

Complaint D 91/97

- 2(a) He failed to serve his clients, Christopher and Elizabeth Barrass, in a conscientious, diligent and efficient manner in that he:
- i) failed to keep his clients reasonably informed;
 - ii) failed to answer reasonable requests from the clients for information;
 - iii) failed to complete an estate matter in a timely and appropriate fashion; and
 - iv) failed to answer communications from, and to remit certain required payments to, Revenue Canada, resulting in extensive penalties to his clients.
- 2(b) He failed to provide a substantive reply to the Law Society regarding the investigation of a complaint by Elizabeth Barrass, contrary to Rule 13, commentary 3 of the Rules of Professional Conduct
- 2(c) He failed to serve his client, Juan Pareja, in a conscientious, diligent and efficient manner, in that he:
- i) failed to keep his client reasonably informed;
 - ii) failed to answer reasonable requests from his client for information; and
 - iii) failed to prosecute his clients' claim arising out of a motor vehicle accident in a timely manner.
- 2(d) He failed to reply to the Law Society regarding a complaint by Juan Pareja, contrary to Rule 13, commentary 3 of the Rules of Professional Conduct
- 2(e) He failed to serve his clients, Richard and Elizabeth Szczygielski, in a conscientious, diligent and efficient manner;
- 2(f) He failed to deliver files belonging to his clients, Richard and Elizabeth Szczygielski; and
- 2(g) He failed to account to his clients, Richard and Elizabeth Szczygielski, for monies entrusted to him.

Complaint D 52/98

- 2(a) The Solicitor failed to account for monies held back in a real estate transaction; and
- 2(b) The Solicitor failed to reply to the Law Society with respect to the complaint.

Barrass Matter

Complaint D91/97, Particular 2(a)

The Facts

David Barrass died on January 27, 1991, leaving a will in which he named as his executors his children Elizabeth, then 20, and Christopher, 24. In or around February 1991, these two retained Mr. Harrington to complete the administration of their father's estate. Neither of the Barrass children had any experience in estate matters. They were relying on Mr. Harrington's expertise and assurances that he would handle the task.

Elizabeth Barrass renounced her executorship on or about February 23, 1991, leaving Christopher the sole executor. There never was any conversation, or other communication, in which Mr. Harrington drew it to the attention of Elizabeth and Christopher, or either of them, that her renunciation meant that he was no longer "her" solicitor. The Law Society argued, and it appears from the evidence, that both Elizabeth and Christopher had a reasonable expectation that Mr. Harrington would keep them informed of the progress of this matter, and answer their questions, even though Christopher was the sole executor. On the evidence, it does not appear as if Elizabeth's subsequent requests for information were ever turned away by Mr. Harrington or his staff on the ground that she was not entitled to information, having renounced her executorship. Nor does it appear that Christopher Barrass ever told Mr. Harrington not to communicate with his sister about estate matters.

Letters probate in the estate of David Barrass, with will attached, were issued March 22, 1991. Litigation between various claimants to the estate was settled by the end of 1992 and most of the assets had been distributed to the beneficiaries. By February 1993, Mr. Harrington was reporting by letter to Christopher Barrass that he expected that the work on the estate would be complete within three months, and that it remained only to complete Mr. David Barrass's 1991 personal tax return and the T-3 estate tax returns for 1991 to 1993 inclusive, and obtain a clearance certificate from Revenue Canada. Elizabeth Barrass's evidence at the hearing was also that she understood that after the settlement of the litigation there was little left to complete, and the administration of the estate would be final in a "couple of months". At the time of the hearing in this matter, the estate had still not been finalized.

At the outset of the estate matter in 1991, estate funds were held in an estate trust account over which Christopher Barrass had signing control. It is common ground that as long as the estate held funds in trust that were earning income, it would have an income tax filing obligation. In order to avoid that obligation in respect of 1994, the balance of the estate funds held in the estate trust account as of the end of 1993 - \$44,963.85 - was transferred on February 11, 1994 to Mr. Harrington's trust account, where they would not earn interest. Mr. Barrass noted in his letter of March 8, 1995 to Mr. Harrington that this transfer was made "on your advice that the estate would soon be wrapped up". By the end of February, 1995, there was only \$30,810 standing to the credit of the Barrass estate in Mr. Harrington's trust account, and Mr. Barrass was demanding to know where the missing sum had gone.*

a) Communications from Harrington to Barrass

At this juncture it should be noted that the reporting letter to Mr. Barrass from Mr. Harrington dated February 8, 1993, was one of but a few communications, written or oral, to Christopher Barrass from the Solicitor up to that time (and, indeed, after that time). In his February 8 reporting letter, Mr. Harrington promised that after the completion of all

* The initial sum seems to have been reduced by payments to Steven Harrington for fees, disbursements and GST of \$5,911.75 and \$1,762.83 in 1994 and 1995 respectively, for a total of \$7,674.58, by a payment to Mintz in August 1994 for \$1,498,000 and a partial disbursement of estate funds to Mary Barrass of \$5,000.00 in September, 1994.

the work on the estate, he would prepare a full report, including copies of all correspondence and other estate documents, and a complete summary of all legal fees, disbursements and GST. No such letter had been sent by the time of the hearings into the complaints.

The following is a summary of Mr. Harrington's communications with Christopher Barrass, by year. The summary below does not include the Barrasses' attempts to contact Mr. Harrington, which will be canvassed at another point in these reasons.

1991

Mr. Harrington acknowledges having written two letters to Mr. Barrass. One was returned to him because of insufficient postage. Mr. Barrass eventually received both in December 1991. This year, there were eleven meetings between Mr. Harrington and the Barrasses, including two meetings of all parties to the litigation and their counsel.

1992

Mr. Harrington acknowledges having written only one letter to Mr. Barrass. However, the continuation of the estate litigation is reflected in numerous meetings, including application return dates and a pre-trial.

1993

In addition to the February 8 reporting letter, Mr. Harrington wrote three other letters, all relating to the retainer of Mintz & Partners (hereafter "Mintz") to prepare income tax returns. Mr. Harrington's evidence shows that he also met with Christopher a total of five times.

1994

Mr. Harrington states that two letters were written to Mr. Barrass this year, but admits that he did not receive either of them. Mr. Harrington acknowledges that in this year, he had only two meetings with Mr. Barrass, one in January and one in February. Mr. Barrass's evidence is that he heard nothing from Mr. Harrington after June 1994. In the spring of 1995, when Christopher Barrass finally was able to speak to Mr. Harrington at his home, Mr. Harrington said that he had sent Mr. Barrass a package of information in 1994. It was never received. He said that he would send it again, but did not. Mr. Harrington's evidence is that he also met once this year with Mary Barrass, mother of Christopher and Elizabeth.

1995, 1996

Mr. Harrington admits that he did not send any correspondence to Mr. Barrass in these two years. He met once with the client in 1995, at a "reporting" meeting on May 25, scheduled after pressure from both Christopher and Elizabeth Barrass for information on the file. He provided some documentation at that meeting, and testified that he also reviewed the estate file ledger from 12/03/91 to 24/05/95 at that meeting. There were no meetings following that one. A three-way meeting between Mr. Harrington, the accountants and Elizabeth Barrass was originally scheduled for March of 1995, but cancelled by Mr. Harrington because of a conflicting appearance in court. He was unable to attend a replacement meeting scheduled by Elizabeth Barrass and Mintz, and no other meeting was scheduled.

In addition to the information given above concerning communications from Mr. Harrington, the panel notes that Mr. Harrington acknowledged that it was never his practice to send Christopher Barrass copies of Mr. Harrington's correspondence with third parties concerning the estate. The Law Society did not take the position that a lawyer must copy the client with third party correspondence. Rather, it pointed out that this is a relatively easy way to communicate with the client.

b) Accounts from Harrington to Barrass

Nor, it appears, would accounts rendered to Christopher Barrass have disclosed Mr. Harrington's activities on behalf of the estate. In January 1992 and early 1993, Mr. Harrington would provide to Christopher Barrass interim invoices showing his fee, but not any of the services rendered ("skeletal accounts"), and Mr. Barrass would sign a cheque on the estate bank account. Mr. Harrington acknowledges that someone receiving such an account would not know what services it was for. Christopher Barrass's letter to Mr. Harrington of March 8, 1995 states that Mr. Harrington had not provided any accounts to Mr. Barrass since June 1993.

The evidence at the hearing included the skeletal accounts rendered by Mr. Harrington to Mr. Barrass on May 6, September 10 and December 15, 1992. These covered legal services rendered in 1991 and 1992, plus disbursements and GST, and were for the amounts of \$7,661.46, \$3,867.02 and \$2,1448.28 respectively, or \$14,161.46 in total. Copies of these skeletal accounts, and ultimately more detailed accounts for 1991-1992, were eventually provided to Revenue Canada.

Mr. Harrington received fees (plus disbursements and GST) for 1993, as summarized by Mintz in March 1995, in the amounts of \$3,937.39, \$2,000.00, \$2,493.30, and \$1,198.47 on the dates of February 12, March 30, June 20 and December 1. In his reporting letter to Mr. Barrass on February 8, 1993, Mr. Harrington sets out the calculations for the February 11, 1993 payment, in respect of work done in the period December 11, 1992 to February 10, 1993. He states in his letter of February 8 that he is enclosing a copy of his February 11 account for Mr. Barrass's files. There are no references in the evidence to other 1993 accounts.

The file ledger for the February 11, 1993 billing shows an amount received from Chris Barrass of \$3,937.39 on February 11, although the details of the amount outstanding are slightly higher (totaling \$4,425.59). The discrepancy is not explained; nor does the excess amount show as carried over to a subsequent account. The file ledger also shows a payment from Chris Barrass of \$2,493.30 but on date June 18, 1993. The file ledger also shows a payment of \$1,198.94 from Chris Barrass, on December 21, 1993, twenty days after the date shown in Mintz's letter. There is no record in the file ledger of the \$2,000.00 which the Mintz letter of March 7, 1995 shows the estate paying Harrington on March 30, 1993. There is, indeed, no account activity involving fees shown in the file ledger between February 11 and June 16, 1993. There were no accounts, even in skeletal form, provided after the letter of February 8, 1993.

For 1994 and the first part of 1995, there are no accounts at all, either skeletal or detailed. By this time, the estate funds were in Mr. Harrington's trust account. Mr. Harrington's estate file ledger shows that, at intervals, amounts were charged to the estate by way of "automatic billing", and paid by transfer from the trust account the same date. The amounts charged included fees, disbursements and GST. In 1994, a total of \$5,911.75 was transferred from trust pursuant to these automatic billings, on the dates of February 2, April 6 and 14, May 9 and 16, June 6 and 14, August 25, September 8, October 16 and December 12. In the first two months of 1995, the sum of \$1,762.83 was transferred from trust, pursuant to automatic billings on January 5, 7 and 16, and February 2 and 7.

c) Tax Returns for 1991-1993

In the February 8, 1993 reporting letter to Mr. Barrass, Mr. Harrington offered some information concerning the status of the personal and estate tax returns which still had to be prepared and filed. With respect to the review and filing of the 1991 returns, personal and estate, he stated: "I have forwarded any and all documents and information requested by Mintz & Partners relating to the 1991 taxation year over the past year. I will contact Victoria Ip at Mintz to ascertain her progress and to inquire as to the estimated tax liability for 1991."

With respect to the preparation, review and filing of the 1992 estate tax return, Mr. Harrington advised Mr. Barrass in the February 8, 1993 letter that he had received very little documentation regarding the 1992 taxation year, and stated "As I mentioned in our discussion, perhaps you could gather these documents together and forward them to our office on your next visit. Mintz and Partners will be inquiring about these items in the very near future."

The evidence on the record before the hearing shows that there was actually more – and less – going on with these tax returns than was disclosed in the reporting letter.

With respect to the 1991 tax returns, Mr. Harrington admitted at the hearing that the first letter from his office to Mintz & Partners instructing them to prepare the 1991 estate return was dated April 22, 1992. He also admitted that it was not received by Mintz & Partners until April 30, 1992, the filing deadline. He provided no explanation for the delay in requesting that the tax return be prepared.

Upon receiving Mr. Harrington's letter, Mintz & Partners wrote back on April 30 requesting specific additional information, including a copy of Mr. David Barrass's will. There was a gap of some four and a half months before Mr. Harrington responded to this request, by letter dated September 16, 1992. Mintz & Partners asked again for information by letter dated October 6, 1992, and made a third request by letter dated October 19, 1992.

Mr. Harrington provided a full response to the requests for information only by letter dated January 29, 1993, which was not delivered to Mintz & Partners until February 9, 1993, some 9 months following the original request for information. Significantly, the date of delivery of this January 29 letter was one day after the date of the February 8 1993 letter in which Mr. Harrington advised Mr. Barrass that he had "forwarded any and all documents and information requested by Mintz & Partners relating to the 1991 taxation year over the past year."

The Member suggested at the hearing that there was confusion concerning the retainer of Mintz & Partners, and the role he was to play in providing them with information. Mr. Harrington introduced into evidence a Direction & Appointment signed by Christopher Barrass on April 11, 1991 appointing Mintz & Partners accountants for the purpose of preparing and filing any and all tax returns on behalf of his late father and the estate of his late father. He relied on this to suggest that Mintz had the primary carriage of the tax matters, and had known that this was the case from April of 1991. He suggested that a subsequent letter sent to him at his firm by Mintz dated March 4, 1993 in which it confirmed its understanding of the terms of its engagement as accountants of the estate of David Barrass was unnecessary, and contributed to the delay in completing and filing the returns. He also suggested that the fact that Mintz requested the letter to be countersigned by Christopher Barrass on behalf of the estate placed the onus on Christopher to provide Mintz with documents, to the knowledge of both Mintz and Christopher.

There does not seem to be any evidence suggesting that Mr. Harrington objected contemporaneously to the letter of Mintz dated March 4, 1993. In fact, he forwarded the letter to Christopher Barrass with a covering letter dated March 15, 1993, in which he indicated that this was probably the accounting firm's standard retainer letter. He asked Mr. Barrass to sign the letter and return it with the first installment of the retainer, if he was satisfied with it. This was done. Notably, the Mintz & Partners retainer letter specifically stated that it would prepare returns and financial statements on the basis of information provided by Mr. Harrington. While it specifically referred to the 1991 returns, it also stated that the same terms would apply in the future unless changed in writing. It seems clear from the exchange of correspondence that Mr. Harrington was on notice that he was to be the conduit of information to Mintz. Other letters in his productions, in which he is collecting information from sources or forwarding it to Mintz, seem to have been sent pursuant to this role as a conduit.

The income tax filings for 1991 and 1992 were sent to Revenue Canada under cover of letter dated June 17, 1993. This amounts to a delay of fourteen months in filing the 1991 returns, as admitted by Mr. Harrington at the hearing. He had no explanation for why he had delayed until April 30, 1992, the filing deadline, to request Mintz to prepare the 1991 returns. Nor did he have an explanation as to why he had delayed for nine months in providing Mintz with a copy of David Barrass's will, and answering their other information requests. On the evidence submitted by the Law Society,

including a chronology prepared by Mintz of its involvement in preparing the 1991 and 1992 returns, it appears as if the only part of the delay in filing the 1991 returns which could fairly be attributed to Mintz is about two months that it took, from March 4 to April 22, 1993, to clarify the Mintz retainer and get an estate cheque into their hands for the retainer payment.

This still leaves a delay of some twelve months. There is no satisfactory explanation provided by Mr. Harrington to explain or excuse this delay, which seems to be inordinate, given the rather simple nature of the requests made by Mintz (e.g. for a copy of Mr. Barrass Sr.'s will).

d) Requests from Revenue Canada for Additional Information About Fees

Once the returns had been filed, Mr. Harrington was requested by Revenue Canada to provide additional information. On January 11, 1994, Revenue Canada requested, by letter, that Mr. Harrington provide information about professional fees claimed as a deduction on the Barrass estate returns. It would appear that Mr. Harrington still had not provided the information about his 1992 fees as of April 4, 1995 (the date of a letter from Revenue Canada to Mintz advising that no information had yet been received from Mr. Harrington). He provided the information in a personal meeting with Len Coughlan of Revenue Canada in June, 1995. He never did provide information about his 1993 professional fees.

Mr. Harrington admitted at the hearing that in order to assess the deductibility of legal fees, Revenue Canada required detailed information from him concerning the services in respect of which the fees had been incurred, as only fees incurred in connection with earning income for the estate would be deductible. Mr. Harrington was provided by Mintz on or about March 7, 1995 with information concerning a simple format for providing the fees information Revenue Canada needed, but he did not have his 1993 information together in time for his meeting with Mr. Coughlan on June 1995. Accordingly, as admitted by Mr. Harrington, Revenue Canada simply allowed an arbitrary amount for legal fees with respect to the 1993 estate tax year, in order to settle the file.

Between January 1994 and June 1995, Revenue Canada and Mintz appear to have gone to considerable trouble to get information from Mr. Harrington. Revenue Canada by letter dated January 11, 1994 asked him for vouchers for professional fees in 1991. He replied to this letter by one dated February 15, 1994, promising to see if he could find anything helpful. However, another letter from Revenue Canada to Mr. Harrington dated April 21, 1994 stated that since they had received nothing from him, they intended to reassess the 1991 and 1992 returns.

Mr. Harrington did respond to Revenue Canada by letter of April 28, 1994, but a letter from Revenue Canada dated July 6, 1994 to him recited that the statements he had sent contained no detail of services rendered, and therefore the amounts would not be allowed as a deduction without more information. It allowed fifteen days to make representations. Mr. Harrington requested, by letter of July 8, an extension to August 2, and in November 17, 1994 Revenue Canada wrote to Mintz reiterating the position that the fees would not be an allowable deduction without more information. On January 5, 1995, Mintz advised Revenue Canada, with a copy to Mr. Harrington, that they were trying to get more information from him.

Mintz wrote to Mr. Harrington again on March 7, 1995 asking for more information, and advising that it might be sufficient to provide a general description of the services. This advice was apparently given because, as is recited in this letter, Mrs. Harrington indicated that she would have to search through old boxes to obtain details regarding these invoices. Mr. Harrington produced a letter dated March 19, 1995 enclosing a detailed list of docket entries, but there was no evidence that Revenue Canada had received that letter. On April 4, 1995 Revenue Canada wrote to Mintz that they had not yet received Mr. Harrington's fee information and could not allow the deductions. In May of 1995, Mr. Harrington wrote twice to Revenue Canada requesting a meeting, which was held in June of 1995.

In his evidence at the hearing, Mr. Harrington suggested that Mintz should bear responsibility for the difficulties with the legal fees on the tax returns, because Mintz had originally claimed the professional expenses on an accrual method not allowed by Revenue Canada, and had included in the returns amounts for which it did not at that time have substantiation. These global amounts were the ones in respect of which further information was requested of Mr. Harrington. The gist of Mr. Harrington's position seems to be that Revenue Canada would not have been asking for particulars if Mintz had not provided the unsubstantiated amounts in the first place. Moreover, because the amounts included by Mintz in the tax returns were larger than the amounts eventually found, or estimated, to have been incurred to earn income for the estate, Mr. Harrington suggests that Mintz should be responsible for any greater amount of tax incurred because the initial deductions did not stand up to scrutiny.

This position seems to ignore the inescapable fact that accurate details of Mr. Harrington's fees were required in order to secure the deduction. Mr. Harrington does not say that he would have, or could have, provided accurate fees information to Mintz in time for insertion into the original tax returns. Nor did he do so. The basic problem here really is that Mr. Harrington had not provided to his client the information about the work done in return for these fees, and so did not have it available for Revenue Canada, either at the time of initial filing or when particulars were requested.

Because of Mr. Harrington's practice of not copying Christopher Barrass on his correspondence with third parties, Christopher and Elizabeth Barrass were not advised on a current basis about these problems with the tax returns.

e) Remittance Required for 1991 Terminal Return

In May 1994, some further business took place with respect to the 1991 terminal return for David Barrass. A request for an adjustment to that return was made to include income from an RRSP that was held on the date of death. The amount was excluded on the initial filing of the return, since there was at that time a dispute between beneficiaries of the estate. It was not clear whether the amount in the RRSP would be paid to the second wife of the deceased (and therefore not attract tax) or to the former wife of the deceased (mother of Christopher and Elizabeth). If paid to the former Mrs. Barrass, the amount would attract tax. The funds were eventually distributed to the deceased's first wife and two children, and the amount was therefore required to be taxed in the terminal return.

A T1 Adjustment was prepared for the 1991 terminal return by Mintz & Partners, and sent by letter dated May 24, 1994 to Mr. Harrington for his review and signature. In that letter, Mintz advised that as a result of this adjustment to the 1991 return, there would be an additional balance of tax due of \$29,243.00, excluding interest and penalties. Mintz accordingly advised Harrington in its May 24 letter that, in addition to the \$23,831 previously withheld for taxes on the RRSP, \$5,412 should be paid to the Receiver General for 1991 taxes. In his evidence, Christopher Barrass testified that before he had moved to Vancouver in the middle of May 1994, he had been aware that approximately \$24,000 was set aside for taxes on the collapsed RRSP.

In its May 24, 1994 letter, Mintz also advised Mr. Harrington that it had asked Revenue Canada not to charge interest and penalties on the tax payment for the collapsed RRSP, and gave him a copy of that letter. Mr. Harrington wrote his own letter with a similar request, dated June 2, 1994. Mintz advised Mr. Harrington in its May 24 letter to retain in the estate the sum of \$4,600 until Revenue Canada had determined the question of interest and penalties.

The May 24 letter from Mintz to Harrington was not forwarded by Mr. Harrington to Christopher Barrass. Mr. Barrass received a copy of it only in February, 1995, after Christopher had requested information from Mintz about the status of the estate, not having had any satisfaction in this regard from Mr. Harrington.

Mr. Harrington did not, in fact, forward to Revenue Canada the sum owing for tax as a result of the 1991 Adjustment, as he was advised to do in the May 24 letter from Mintz. As of February 1995, when Christopher Barrass wrote Mr. Harrington, the money was still unpaid. Mr. Harrington paid to Revenue Canada on behalf of the estate the amount of \$29,243.00 only on May 26, 1995, a year after it was to have been paid.

f) Client Attempts to Obtain Information

From 1993 onwards, both Elizabeth and Christopher Barrass were trying to get information from Mr. Harrington about the status of the estate, which they had believed would be completed soon after the conclusion of the litigation at the end of 1992.

Elizabeth Barrass testified that she would attend at Mr. Harrington's office about once a month. She would speak to Mr. Harrington, or to his wife and secretary, Cathy Harrington. She was told not to worry, that matters would be concluded within a couple of months. This pattern of visits and responses endured over the course of 1993 and up to May of 1994. Following Christopher Barrass's move to British Columbia in May of 1994, she would phone or drop by the office, and either would receive no information or be told that matters would be concluded shortly. In June of 1994, Ms. Barrass received a letter from Mintz, dated June 6, answering some questions about the estate which she had put to them. The letter included a chronology of events in the David Barrass estate file, for the period April 29, 1991 to May 10, 1994, which outlined "many starts and stops caused by uneven information flow from Mr. Harrington's office".

In March of 1995, Mr. Harrington cancelled a planned meeting between himself, Elizabeth and Mintz. He was unable to attend the replacement meeting scheduled by Mintz and Ms. Barrass, and no other meeting between them ever took place. It was in this period, between February and April of 1995, that Elizabeth says she telephoned Mr. Harrington's office and left a message demanding a summary of the estate and an accounting, and said that she would be around to the office in a couple of hours to pick up the summary. She received what she described as a rude return phone call from Cathy Harrington stating that it would take a long time to gather the information to report and account to Elizabeth. Having received nothing from Mr. Harrington, Elizabeth decided to complain to the Society, by letter dated May 14, 1995. Mr. Harrington admitted at the hearing that Ms. Barrass's evidence about trying to contact him is accurate.

Christopher Barrass began placing calls to Mr. Harrington's office early in 1995, not having heard from the lawyer since Christopher's May 1994 move to B.C. None of the calls to Harrington's office were returned. Mr. Barrass turned to others for information about the estate, securing from Mintz a copy of its May 24, 1994 letter to Harrington advising him to pay the amount of tax owing on the RRSP income for the 1991 Tax Adjustment, and sequester an additional sum for possible penalties and interest. He also learned from Mr. Coughlan at Revenue Canada that Coughlan was waiting for further information on Mr. Harrington's professional fees for 1991 in order to finish the file, information that had been requested by both Mintz and Revenue Canada and not provided.

In an angry letter to Mr. Harrington dated March 8, 1995, Mr. Barrass complained that his and Elizabeth's repeated phone calls and requests for information to Cathy had produced no information, and Mr. Harrington had cancelled two meetings at which their questions were to have been discussed. He challenged Mr. Harrington about his failure to provide information to Revenue Canada concerning his fees, about a sum of \$14,153.52 missing from the funds held for the estate in Harrington's trust account, about the fact that the estate funds had earned no income while deposited in the trust account for a prolonged period, and about the fact that Mr. Harrington had paid himself fees from the estate funds without providing accounts to Christopher since June 1993, despite requests for these. Mr. Barrass's letter required that Harrington provide to him by March 31 a complete accounting of all monies paid out of the estate funds from February 1994. He also demanded to know why Harrington had not forwarded to him Mintz's letter of May 24, 1994, why the money set aside for the taxes on the RRSP had not been paid to Revenue Canada, and what Harrington was prepared to do to correct this problem. Mr. Harrington has no dockets reflecting attempts on his part to contact Mr. Barrass, and offered no evidence contradicting Mr. Barrass's evidence of his efforts to reach Mr. Harrington.

In her letter of complaint to the Law Society dated May 14, 1995, Elizabeth Barrass notes that as yet no reply to Christopher's March 8 letter had been received. She complained in her letter to the Law Society that Mr. Harrington had caused repeated and unnecessary delays by ignoring requests for information, and that the family had as a result lost interest on the estate funds, and could incur interest and penalties on the tax payable. Their legal and accounting fees were higher than anticipated, and they faced the possibility that they would have to pay back the estate from their legacies instead of having funds left to pay out to her mother. She complained that there was no record of disbursements from the estate account, and that they had been given wrong, or no information, and delayed responses to their requests.

When Mr. Barrass came east for a wedding in May 1995, he met with Mr. Harrington. He testified that he was not satisfied after that meeting. By that time, Elizabeth Barrass had filed her complaint.

g) Present state of Barrass Estate File

At the time of the hearing, Mr. Harrington had not formally been removed as the solicitor for the estate, and he testified that the work on the estate was not yet complete. He had not, accordingly, prepared the final report which he had promised in his February 8 1993 letter to Mr. Barrass. Throughout these hearings, the Law Society took the position that where other means have been used to keep the client informed, a final reporting letter is not required. However, when the lawyer has promised a reporting letter, he should provide one or negotiate some other way of communicating. At the hearing of this matter, Mr. Harrington stated that he still plans to deliver a final report.

As far as the tax matters were concerned, the evidence shows that Mr. Harrington received from Revenue Canada in September 1996 a remittance form showing that the estate owed \$33,909.50 in tax. He wrote a letter dated October 8, 1996 to Revenue Canada asking if it had credited to the estate account the payment of \$29,243.00 made in May of 1995. Mr. Harrington, again, did not copy either of the Barrasses with this correspondence, and Elizabeth Barrass continued to dig for information herself. She was advised by Revenue Canada by letter dated September 5, 1997 that the May 1995 payment had not initially been credited to the 1991 terminal return account, but had been moved over to that account on July 16, 1996. Some deductions in interest costs were made because of Revenue Canada's own delays. However, it appears from the documentation provided to Ms. Barrass by Revenue Canada that the estate still owes more in tax than remains in Mr. Harrington's trust account to its credit.

Mr. Harrington testified that he had received approximately \$27,000 in fees from the estate over four years, his last account having been rendered February 1995. He stated that he has spent thousands of dollars of time since then trying to get the Revenue Canada matter tidied up. The documents tendered at the hearing show that he received from 1991-92 (paid in 1992) the sum of \$14,161.46, for 1993 \$9,629.16, for 1994 \$5,911.75 and for January-February 1995 the sum of \$1,762.83, all sums inclusive of fees, disbursements and GST. Mr. Harrington testified that for the interest and costs incurred because of his delays, he was working without fee, as a way of making it up to the Barrasses. However, he had kept no time dockets of this work, and so it is not possible to tell how many hours he worked for no fee.

At the request of the panel, Mr. Mario Fallico of Mintz & Partners prepared a report showing the costs attributable to Mr. Harrington's delays. He concluded that the costs attributable to the delay in payment of the T1 adjustment tax liability of \$29,243 from May 24, 1994 to May 26, 1995 are interest charges of \$2,562. There is no penalty attached to this delay in payment.

The costs attributable to a reduced professional fee deduction for Mr. Harrington's legal fees were calculated on two different assumptions. In the first, Mr. Fallico assumed that Revenue Canada would have allowed a deduction for legal fees in years 1991 to 1993 inclusive equal to the total amount paid if documentation had been forthcoming; on that assumption, he determined that the costs attributable to the reduced deduction allowed by Revenue Canada are \$5,609. Mr. Fallico's second assumption was that Revenue Canada would have allowed Mr. Harrington's fees in the same amount as it allowed Mintz & Partner's fees. On that basis, the cost of the reduced fee deduction permitted by Revenue Canada would have been \$762.00.

Mr. Harrington submitted a report from Gary S. Burnstein, a chartered accountant, who also testified on his behalf. Although the Fallico report was requested to clarify certain arithmetical matters, Mr. Burnstein's report went beyond these issues. He offered six reasons for the delay in the filing of the estate income tax returns: a delay in retaining Mintz & Partners due to conflict of interest concerns; misdirected tax slips and bank statements despite efforts of Mr. Harrington to have documents directed to the estate; bank statements lost by the executor necessitating replacement statements; the inaccurate records kept by the executor which necessitated that Mr. Harrington reconstruct them; the fact that information requested of Harrington by Mintz was either irrelevant or already in their possession; the request of the copy of David Barrass's will was "curious"; and the fact that the Barrass file was transferred to three or four different accountants at Mintz & Partners.

On cross-examination, it appeared that Mr. Burnstein was not an independent expert witness, since he and Mr. Harrington had referred clients to one another over the previous 8 or 9 years. Moreover, Mr. Harrington had consulted Mr. Burnstein on the Barrass matter itself several times in late 1994 and 1995, specifically with respect to the deductibility of professional fees.

In preparing his report, Mr. Burnstein testified that he had not read the complaint, interviewed either of the Barrasses or read their evidence at the hearing, and had not met with Mintz or reviewed their files. He had met with Mr. Harrington to discuss his handling of the Barrass estate, and based his report on Mr. Harrington's productions and on information provided to him orally by Mr. Harrington. He had not taken any steps to verify independently the information provided by Harrington. Cross-examination revealed that the basis for the six grounds for delay suggested in his report had no secure foundation in Mr. Burnstein's own knowledge. In some cases, his report or his evidence were actually contradicted by the evidence before the panel.

Mr. Burnstein's report addressed the three issues discussed by Mr. Fallico in his report. Cross-examination seriously weakened the basis of Mr. Burnstein's observations on these points. Moreover, he admitted that if the assumptions in the Fallico report on tax costs were proved to be correct, the mathematical calculations and totals set out in that report are correct.

The panel concludes that Mr. Burnstein's report should not carry any evidentiary weight, and does not therefore assist Mr. Harrington. Mr. Harrington's own oral evidence in which he blames Mintz for making the judgement calls that resulted in the tax liability (i.e. they could have filed incomplete tax returns and stopped the clock from running), and the executor for keeping messy records and being unresponsive to reminders to find missing records, are also without foundation in the facts.

Findings of Professional Misconduct

2(a)(i)

The Society's argument on this particular has two branches. Firstly, it argues that Mr. Harrington did not provide interim or final reporting letters, that there was insufficient correspondence to the client, and an insufficient number of meetings. Secondly, it argues that Mr. Harrington was guilty of the professional misconduct of "pre-taking", given that he paid himself out of trust funds without rendering an account, or before rendering an account. It also argues that the form of fee billings was inadequate. It did not "contain a reasonable statement or description of the services rendered" as required by the *Solicitors Act*, R.S.O. 1990, c. S.15, ss. 2(3). It was also contrary to Rule 9, Commentary 5, of the *Rules of Professional Conduct*, in that it did not show clearly and distinctly the items of which the total sum was made up, so as to give the client the opportunity of exercising his or her judgement as to whether the bill was reasonable or not.

As to reporting letters, there was one interim reporting letter, of February 3, 1993. It seems to mark a crucial watershed in this matter. That letter, as shown above, did not actually present the full picture of what was going on with the Barrass tax returns. For example, the reporting letter does not advise Mr. Barrass of Mr. Harrington's lateness in setting in motion the preparation of the 1991 tax returns. Moreover, in a letter sent to Mr. Barrass only one day before he delivered to Mintz (nine months after its request) information it had asked of him for the 1991 returns, Mr. Harrington makes no mention of his delay in responding. In fact, he says that he has forwarded the documents to Mintz without mentioning the time of their delivery.

Thereafter, Mr. Harrington does not report to Mr. Barrass any of the dealings with Mintz or Revenue Canada concerning the requests for information about his professional fees, a lengthy back-and-forth that extended to June 1995. We see from Mr. Barrass's letter of March 1995 that he, too, had been concerned about the absence of accounts from about June 1993. Harrington's practice of not copying Barrass on third-party correspondence also meant that Mr. Barrass had no opportunity to follow the attempts to secure information from Mr. Harrington.

Another sorry milestone in this matter which escaped the client's attention because there were no reporting letters or copies of third-party correspondence was Mr. Harrington's failure to remit the tax payment of \$29,243.00 as advised by Mintz's May 24, 1994 letter.

At the same time as Mr. Harrington was not reporting to the client after February 1993, and not taking necessary steps on the file, he continued to derive income from the estate. From February 1994 he made regular withdrawals from the estate trust account, in his office, without providing any accounts for these billings.

Being without reports from his lawyers on work in progress, whether by way of calls, letters, or in-person meetings, and being without accounts showing the particulars of services rendered, Mr. Barrass was totally without means to become aware of and monitor the nature of services being provided – or not provided. It is, unfortunately, significant that Mr. Harrington's reporting practices deteriorated to nothing while his work on the file was going awry. The silence, no doubt, contributed to the duration of time he was able to avoid the Barrasses' angry attentions about his lack of service on the file, and allowed the problems to ripen to the point where they were costing the estate money.

Given these circumstances, the Society has established professional misconduct with respect to insufficient reporting, and inadequacy of fee billings. The panel has concluded that it should not make a finding of pre-taking in these circumstances because Mr. Harrington did not have notice that this would be specifically at issue, even though the Society did have the knowledge and opportunity beforehand to have put him on such notice.

2 (a)(ii)

The Society's allegation that Mr. Harrington failed to answer reasonable requests from the clients for information is overwhelmingly supported by the evidence. The requests were reasonable in and of themselves, given the confidence that the Barrasses had placed in Mr. Harrington, and the assurances he had given them early in 1993 that work on the estate would be completed quickly. The requests were also reasonable because Mr. Harrington did not himself initiate or maintain sufficient communication about the developments that were prolonging his estimate of time. The Barrasses were entitled to know why something which he thought would be completed relatively quickly was drawing out to months, and then years of additional work. They were also entitled to know the cause for discrepancies in the estate's financial picture, and for its tax liabilities, which are both serious matters for beneficiaries, and for an executor.

It is also clear that Mr. Harrington did not answer the Barrasses' requests. He was shielded from their queries by his wife and secretary, Cathy Harrington. He cancelled meetings that had been arranged. He did not fulfill commitments to write and report to them. He did this even when it should have been abundantly clear to him that the Barrasses had reached the boiling point.

Mr. Harrington really offered no challenge to the Barrasses' evidence on this issue.

2(a)(iii)

The Society alleges that the delays in completing the income tax returns for 1991 to 1993 inclusive, and obtaining the clearance certificate, are sufficiently the responsibility of Mr. Harrington to warrant a finding of professional misconduct. It also alleges that these delays are serious enough to warrant such a finding.

On the evidence, as outlined above, Mr. Harrington indeed bears a substantial share of the responsibility for the delays in completing the estate. His inexplicable delay in asking Mintz to proceed with the filing of the 1991 return, and his further long delay in responding to information requests in connection with the preparation of the return, cannot be laid at the door of either Mintz or the executor, as Mr. Harrington tried to do. He is himself the author of these problems. He did nothing to turn aside the role of information conduit, indeed assumed it and created a reliance interest in his continuing in that role, both in Mintz and in the executor. A similar finding is justified with respect to his lack of timely response to the queries of Revenue Canada about his professional fees. No one else could provide these details. That Mr. Harrington did not have them available to convey to Revenue Canada is attributable to his own record-keeping and billing practices, which were inadequate.

A delay of 14 months in the filing of the estate's 1991 tax returns, including a delay of 9 months in Mr. Harrington's response to simple information questions, is unreasonable. Only two months of the 14 can in any fair sense be attributed to Mintz, and the remaining 12 month delay is both unreasonable, and unexplained by Mr. Harrington.

This particular has been made out on the basis of the delays noted above, without including the delays with respect to provision of fees information or making a payment, which also form the basis for the allegations in particular (iv).

2(a)(iv)

The Society includes in this particular the Member's failure to respond to Revenue Canada's requests for details of the services provided by him in respect of which deductions from income for professional fees were claimed. It also relies upon his failure to remit, for a period of one year, a sum owing in taxes which he had been advised by Mintz to remit.

A delay of approximately one and a half years in providing to Revenue Canada information about his 1991 and 1992 legal services, and the failure ever to provide the required details with respect to 1993 legal services, are unreasonable and lack a satisfactory explanation.

The delay of one year in making a payment on account of taxes after being advised to do so by Mintz in its May

1994 letter concerning the 1991 Readjustment is unreasonable, and lacks any explanation or excuse. Mr. Harrington by then had the estate funds in his trust account, and Christopher Barrass was aware that there would be taxes to pay and that an amount, albeit slightly lower, had been earmarked for these purposes.

Over the course of the evidence relating to this particular, as well as the evidence relating to the previous one, it becomes apparent that Mr. Harrington has a somewhat evasive correspondence style, featuring allegations that he has sent letters which seem not to have been received, or has sent letters on certain dates which were not received when they should have been but inexplicably much later, or has sent letters which, unaccountably, were misdirected. Such a style does nothing to instill confidence in the reasonableness of Mr. Harrington's actions in dealing with his clients or moving along the file.

This conduct amounts to professional misconduct. Although the evidence in the Fallico report supports that finding by showing the costs to the estate of this behaviour, it is not necessary to prove costs in order to support the finding of professional misconduct. The redress of financial loss is not the province of the professional discipline process. Even if the behaviour had been cost neutral, the fact that the Member was so inattentive to his obligations as estate solicitor vis-à-vis the tax authorities, without credible excuse, would support the finding. That the behaviour has also resulted in cost to the estate is an aggravating factor.

Complaint D91/97, Particular 2(b)

The Society alleges that Mr. Harrington failed to provide a substantive reply to the Law Society regarding the investigation of a complaint by Elizabeth Barrass, contrary to Rule 13, Commentary 3 of the *Rules of Professional Conduct*.

Mr. Harrington admits this particular. The panel has found professional misconduct with respect to this particular, based on the evidence of Cathy Riches, Sylvie P. McAuley, and Jennifer Fairclough which the Member agreed could be submitted in affidavit form.

Elizabeth Barrass's complaint dated May 14, 1995 was sent by the Society to Mr. Harrington by letter on May 25, 1995, with a request for a response within two weeks. In telephone calls with the secretary to Catherine Riches of the Law Society on June 21 and June 30, 1995, Cathy Harrington stated, first, that the response was just being drafted, and then that the response had been prepared but not signed. On July 1, 1995, Mr. Harrington faxed to Ms. Riches a letter dated June 20 promising that he would respond to the complaint in July after another meeting with Revenue Canada about the file. Ms. McAuley of the Society wrote to Mr. Harrington on August 23, still having had no response. There had not been any response by October, and Ms. McAuley's secretary phoned and left messages on October 18, 20, and 26 asking Mr. Harrington to phone the Society. On October 26, 1995, Mr. Harrington left a voice mail saying that he was working on a response and would send it shortly. Ms. McAuley's secretary phoned on October 31 requesting the response by November 3, and Mr. Harrington sent Ms. McAuley a letter saying that he would send a response by November 30, 1995. Ms. McAuley sent a confirming fax on November 6.

On February 6, 1996, Ms. McAuley sent a registered letter to Mr. Harrington saying that if he did not respond in seven days, the matter would be referred to Discipline. On February 13, 1996, Mr. Harrington wrote back to say that he had responded fully by way of a letter dated November 26, 1995. He did not attach a copy of the letter. The evidence of the Society was that it never received a copy of the letter. On April 25, 1996, Ms. McAuley's secretary asked Cathy Harrington by phone for a copy of the November 26 letter. No copy was sent. On August 9, 1996 the secretary phoned again; Cathy Harrington phoned back on August 14 and said that she would look into it. On August 19, Ms. McAuley's secretary phoned again and Cathy Harrington said that she would bring it to Mr. Harrington's attention, but he was soon going away on holidays.

On August 23, 1996, Ms. McAuley sent a registered letter to Mr. Harrington, saying that the complaint would be referred to Discipline in seven days if he did not respond. Mr. Harrington wrote a letter dated August 30, 1996 saying he had already responded to the Barrass complaint, and did not have the time to review the file. Cathy Harrington had looked for the letter of November 26 in the computer but it had not been saved. He advised that he was going away for 10 days and would look into the matter when he returned. There was no response to phone messages left at the Harrington office by Ms. McAuley's secretary on September 13 and 18, and no other communication from Mr. Harrington.

In November 1996, authorization was sought.

At the hearing into the complaint, Mr. Harrington included in his binder of productions an unsigned (Exhibit 20, tab 116) copy of a letter dated November 26, 1995 to the Law Society, purporting to respond to the Barrass complaint. This letter was received by the Society the day before the hearing. Mr. Harrington acknowledges that Ms. Merkley did not find it when she conducted her audit of this file in his office.

Pareja Matter

Complaint D91/97, Particular 2(c)

The Facts

Mr. Harrington admits all of particular 2(c). The evidence that establishes this particular is found in an agreed statement of facts, and a document book filed by the Society.

The agreed statement of facts states as follows (references to the document book have been omitted).

5. Juan Pareja and his family were involved in a motor vehicle accident on or about April 16, 1989. CAW Legal Services initially handled the claim and settled the action except for the *Family Law Act* claim of Mr. Pareja's wife's injuries. In addition, settlements had also been reached for two of the three infants. In June 1991, the file, which included medical reports, court pleadings, documents regarding no-fault benefits and wage loss together with the correspondence, was transferred to the Solicitor to complete the settlement of the claims Despite several requests by Mr. Pareja to the Solicitor regarding the status of his case, he was not provided with a satisfactory response.
6. On November 30, 1993, the Pareja's action was dismissed for delay. The Solicitor, believing the matter would settle, did not report this to his clients who had no knowledge or belief that the dismissal had occurred.
7. In or about late 1995, early 1996, the Solicitor wrote to the defendants' solicitors. By letter dated January 8, 1996, they advised that the Solicitor would have to move to set aside the order dismissing his clients' action and that such motion would be opposed. The Solicitor did not bring the required motion and did not report the above correspondence to his clients who had been led to believe by the Solicitor that their action was proceeding.
8. By letter dated August 9, 1996 ..., Mr. Pareja made a complaint to the Law Society regarding the Solicitor's failure to respond to his inquiries about his motor vehicle accident claim.
9. By letter dated September 20, 1996 ..., the Law Society wrote to the Solicitor enclosing a copy of Mr. Pareja's letter dated August 9, 1996 and requested his comments within two weeks. The Solicitor did not respond.

10. On October 11, 1996, the Law Society called the Solicitor and left a message on his voice mail to return the call. The Solicitor did not return the call. On October 18, 1996, the Law Society called the Solicitor and spoke to Cathy, his assistant, and was advised that the Solicitor had arranged a meeting with the complainant and that he would respond by October 25, 1996. On October 30, 1996, the Law Society called the Solicitor and spoke with Cathy. A message was left with her requesting that the Solicitor return the call that day. The Solicitor did not return the call.
11. By registered mail dated November 5, 1996 ..., the Law Society reminded the Solicitor of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on November 7, 1996. The Solicitor did not respond.
12. On November 14, 1996, Mr. Pareja advised the Law Society that he and his wife had met with the Solicitor on Saturday, October 26, 1996, for approximately an hour and a half at which time he had prepared a letter to the Solicitor for the defendant. They discussed changes and the Solicitor advised Mr. Pareja that he would forward a copy of the letter to Mr. Pareja prior to the letter being sent out to the other side. Mr. Pareja had heard nothing further from the Solicitor.
13. By letter dated January 23, 1997 ..., Mr. Pareja advised the Solicitor that he had called his office on a daily basis for the past three weeks without receiving any satisfactory responses from the Solicitor's secretary. Specifically, Mr. Pareja wrote:

"I am writing to you regarding the status of the case your law firm has been handling for us, namely the auto accident we had on April 16, 1989.

To tell you the truth, Mr. Harrington, we don't think our case is going anywhere, particularly after seeing the way things are being handled. Let me be a bit more specific about it: For instance, I have been calling your office almost every day for the last three weeks and up until today, I cannot say I have felt satisfied with one single answer I have received from your secretary. She either does not have anything to say regarding the case, she does not know what to answer; according to her, she has not had a chance to discuss it with you, and so on and so forth. The point is, the lines of communication between your office and us do not seem to be open at all. Everytime I call to see if I can talk to you, you are not in the office at the time, or you are at court, or you simply are not available

Frankly, Mr. Harrington, I can not understand what your firm's reluctance in dealing with our case is. I know that your office must be very busy and that you may be working on other clients' cases, but we are clients as well and as such, we think our case should be dealt with, with as much resolve and determination as anybody else's, and that is definitely not the case here. I really can't understand why; after all, when and if this case is settled, and when we get whatever financial compensation we deserve, so will you; so, it is not like you are working for free here. Another thing that bothers me a lot is the fact that I thought lawyers, the same as doctors, were supposed to have a code of conduct; that is, to treat all of their client's cases in as speedy a way as possible but we surely don't feel like that is happening with us.

Right now, we are at a point where we don't know what else to do, or who else to turn to for help. Every now and then, I ask your secretary if I could speak with you for a couple of minutes but you are not in the office at the moment, or if you happen to be in the office at all, you are seating with a client and you cannot be interrupted; yet as I recall, we have been seating with you discussing our case in a couple of occasions, and, as luck would have it, someone just happens to call asking to talk to you and lo and behold you go ahead and listen to whatever the party on the other line has to say, even for a few good minutes of what happens to be our time with you. So, you see Mr. Harrington, we think some kind of double-standard is being applied to us, for we certainly don't feel like we are getting the same treatment everybody else is getting.

It would be a great relief if our case could be settled as soon as humanly possible so that we can leave this whole episode behind us and get on with our lives, since we very much feel they have been disrupted a great deal. I would appreciate it a lot if you could give us some kind of a definite answer as to what you intend to do in the near future, and also if you could send us copies of any documentation your office sends to the other lawyers. I can tell you something though; up until today, we have not received a copy of the document that your office supposedly sent to the other lawyers, and that was about 2 or 3 months when we met with you in your office and we agreed that you were going to change a line that we didn't think was quite appropriate and that as soon as that was changed, you would be sending that document to them. We are not so sure that such document was ever sent at all. Sorry for sounding so sarcastic but I don't know how else to express our disappointment. Let's hope we can resolve our case soon, and please let us know of any new developments that may arise."

Mr. Pareja did not hear from the Solicitor.

14. In or about July 1997, Mr. Pareja retained CAW Legal Services. On or about July 7, 1997, Guy Paquin of CAW Legal Services requested the file from the Solicitor by July 21, 1997. The file was not delivered by the Solicitor.
15. By letter dated July 30, 1997 ..., Mr. Paquin wrote to the Solicitor and advised that:

"...although the court file is currently in storage, the writer was able to review the index card relating to this action. The index card revealed that you have not brought a motion seeking an order approving the infants' settlements.

Further, we noticed that on November 30, 1993, a registrar's order was made dismissing our clients' action for delay. Enclosed a copy of the said Order dated November 30, 1993.

We also noticed that you failed and/or neglected to bring a motion pursuant to Rule 37.14 of the Rules of Civil Procedure seeking an order setting aside the registrar's order and an order placing this action on the trial list.

Nearly four (4) years have passed since the registrar's order dated November 30, 1993. Upon review of the applicable rule and the supporting caselaw, it is not known whether a motion setting aside the registrar's order and an order placing this action on the trial list shall be successful in its entirety. It is expected, due to the passage of time, that the solicitors for the defendants shall oppose such relief.

Further, our clients shall incur additional legal expenses relating to our attempts to having the said order set aside and obtaining an order placing this action on the trial list.

In light of the above, this letter shall serve as formal notice of our clients' claim(s) against you, which claim(s) shall include solicitor and client costs relating to the above-described motion, damages in the event that the said motion is not successful in its' entirety, pre-judgment interest and costs on a solicitor and client basis.

To assist in the motion in which we shall seek an order setting aside the registrar's order and an order placing this action on the trial list, it would be of great assistance if you could provide the writer with the contents of your file so that we may draft a detailed affidavit in support of the motion, which affidavit shall outline the particulars of this matter. Further, an affidavit executed by you setting out the services rendered by you since you assumed carriage of this matter in or about July, 1991, would be beneficial.

In the event that you are not able to provide the writer with the above by August 15, 1997, may we suggest that you provide the writer with a detailed outline of the services rendered by you since you assumed carriage of this matter and the writer shall prepare an affidavit and forward same to you for your review and execution?

Please be advised that if we do not hear from you by August 15, 1997, it is our intention to proceed with the motion and shall be doing so at your peril. Please attend to the transfer of the contents of our clients' file forthwith. In the event that your practice is very busy at the present time, please contact the writer and we shall make the necessary arrangements to retrieve your file, have its' contents photocopied and return same to you thereafter.

Finally, as time is of the essence, please note that we have forwarded a copy of this letter to Ms. Kathy McDonald, Claims Co-ordinator, Lawyers' Professional Indemnity Company, so that she may provide some assistance in this matter."

16. By letter dated August 18, 1997 ..., the Solicitor advised Mr. Paquin the he would deliver the client's file to him by August 22, 1997. The file was not delivered by the Solicitor.
17. By letter dated August 22, 1997 ..., Mr. Paquin advised the Law Society that:

"...a Notice of Change of Solicitors was filed with the Ontario Court (General Division), Milton, on August 14, 1991. Consequently, Mr. Harrington had carriage of this matter from [that] date to late June, 1997.

As you shall further note from the court index card, a Status Notice was issued, and presumably forwarded to Mr. Harrington, on August 24, 1993. Further, the Order dated November 30, 1993, was issued, and presumably forwarded to Mr. Harrington, on November 30, 1993.

As you shall further note from the court index card, there was no motion brought by Mr. Harrington seeking an order providing the infant settlements, although Mrs. Katherine Batycky had prepared the required materials and provided same to Mr. Harrington on June 17, 1991. In this regard, we refer you to page 3 of Mrs. Batycky's letter dated June 17, 1991.

With respect to the status of this matter, we wish to advise that Ms. Francine Rosenzweig, solicitor with Smith, Lyons, Torrance, Stevenson and Mayer, the solicitors for the defendants, contacted the writer on August 19, 1997, and indicated to me that she had to secure the instructions of her clients regarding this matter. More particularly, she had to ascertain whether Smith, Lyons, was still acting in this matter as their file was closed in early 1994.

Ms. Francine Rosenzweig indicated to the writer that their file was closed in early 1994, following a letter to Mr. Harrington, indicating to him that they had received a copy of the registrar's order dated November 30, 1993, and, as they had not heard from him for some time thereafter, they received their clients' instructions to close their file.

Further, Ms. Rosenzweig indicated that if the firm is instructed by their clients to resume carriage of matter, it is very probable that they shall instruct her to defend our motion to set aside the registrar's order dated November 30, 1993, and to list this action on the trial list.

Finally, on August 18, 1997, we received a letter from Mr. Harrington, in which he indicated that he intended to deliver the contents of the Pareja file to our office on August 22, 1997 (today's date).

Accordingly, this morning, the writer attempted to contact Mr. Harrington to confirm that the file would be delivered to our office on today's date. However, the voice recording at Mr. Harrington's office indicated that his office is closed on Fridays.

The writer is rather sceptical that the file shall be delivered to our office on today's date. Further, the writer is suspicious that the infant settlement funds, which are still be [sic] held by Mr. Harrington, shall not be delivered to our office on today's date. In addition, the writer suspects that Mr. Harrington did not place the infant settlement funds in an interest-bearing trust account from June, 1991, to present; this issue remains to be determined.

We shall keep you advised of further developments as they unfold."

18. By letter dated September 3, 1997 ..., Mr. Paquin advised the Law Society that the file was now being handled by Vince Burns of the firm of McCague, Wires et al., who anticipated that his clients would instruct him to oppose the request to set aside the November 30, 1993 Order. Mr. Paquin further advised that:

"...Mr. Harrington has not referred this matter to L.P.I.C. despite our letter to him dated July 30, 1997, in which we put him on notice of a potential claim against him. It is our understanding that he is required to do so pursuant to the Rules of Professional Conduct."

19. On September 16, 1997, the Solicitor was served with Mr. Paquin's motion materials which included, among other things, a notice of motion requesting an order that the costs of the motion be ordered against the Solicitor personally. The motion was returnable on September 29, 1997.
20. On September 29, 1997, the motion to set aside the order dismissing the Pareja's action was heard by Mr. Justice Jennings. The Solicitor did not attend or respond to the motion whatsoever. His Honour dismissed the motion, ordering costs in the amount of \$2,000.00 to be forthwith payable by the Solicitor personally. Excerpts from His Honour's endorsement are as follows:

"...The Registrar dismissed the action by order dated November 30, 1993 sent to the parties in early December 1993.

S.H. [the Solicitor] did nothing.

By Sept/94 the Defendant's solicitors closed their file.

2 years after the action was dismissed, S.H. [the Solicitor] wrote to the Defendant's solicitors. They advised that S.H. [the Solicitor] would have to move to set aside the Registrar's order, and that an application would be opposed, all by letter dated January 8. 1996.

S.H. [the Solicitor] did nothing

The evidence is that the Plaintiffs made periodic enquiries of S.H. 's [the Solicitor's] office as to the status of their matter, and were advised it was progressing.

In July 1997, they decided to retain their present solicitors. They have not obtained S.H. 's [the Solicitor's] file, but did discover the Registrar's order made in 1993. S.H. [the Solicitor] has never advised the Plaintiffs that their action was dismissed.

...

There has been no explanation of any kind from S.H. [the Solicitor], who has been served with notice of these proceedings. From the material before me, his conduct far exceeds what is politely called "inadvertent", even on the basis of that word encompassing negligence. It would appear that he has deliberately chosen to ignore the order, to ignore the advice given almost 2 years ago that he should move against the order, and worst, that he has deliberately mislead the Plaintiffs as to the true state of affairs....

The real question, then, is whether the extraordinary conduct of S.H. [the Solicitor], as egregious as any experienced by me, and completely unexplained, must be visited on the clients. ...

This is more than inadvertent negligence. As between the two parties, which must be the consequences? The Defendants have behaved properly throughout, attempting to resolve this matter, or move it on to trial. The same cannot be said of the Plaintiffs, albeit in large part because of the willful failure of their solicitor.... "

[emphasis added] ...

21. To date, the Solicitor has not responded to his clients, Mr. Paquin or the Law Society regarding this matter.

Findings of Professional Misconduct

On the basis of the agreed statement of facts and the document book, the panel finds that professional misconduct has been established with respect to this particular.

Complaint D91/97, Particular 2(d)

The Society alleges that Mr. Harrington failed to reply to the Law Society regarding a complaint made by Juan Pareja, contrary to Rule 13, Commentary 3 of the Rules of Professional Conduct.

Mr. Harrington admits this particular. The panel finds it to be established, on the basis of the evidence in the agreed statement of facts (see paragraphs 8 to 11 and 21) and the document book.

Szczygielski Matter

Complaint D91/97, Particular 2(e)

Facts

Richard Szczygielski is an employee of the Ford Motor Company in Oakville, and a member of the CAW. His wife, Elizabeth, is a homemaker. The Szczygielski's have access through the CAW to a pre-paid legal services plan, and Mr. Harrington was from 1987 to 1995 a co-operating lawyer of the CAW plan.

This particular of the complaint relates to three matters handled by Mr. Harrington for the Szczygielski's: finalizing the estate of Mr. Szczygielski's mother; litigation concerning defects in a power boat purchased by Mr. Szczygielski; and the encroachment of a neighbour's boathouse on the Szczygielski's cottage property.

a) The Estate of Annaliese Szczygielski

Mr. Harrington was retained in August of 1991 to complete the estate of Mr. Szczygielski's mother. Mr. Harrington agreed in his cross-examination that this involved filing Letters of Administration for the estate, and dealing with two key pieces of property, namely Mrs. Szczygielski's home and a cottage lot in her name.

With respect to the Letters of Administration, Mr. Harrington acknowledged that any delays in selling estate property would not be cause for delay in filing Letters of Administration, since selling estate property is not a prerequisite to filing Letters of Administration. The two principal issues he had to deal with were obtaining an affidavit of execution from a witness to the will, and having the named executor renounce his right to probate. For Letters of Administration, he would have to file the application, the will, the renunciation, the affidavit of execution, and the valuation of the estate. If a valuation is not available, it is possible to submit with an estimated value, or to leave it blank, and, in either case, provide the details later.

Timing considerations affecting the administration of this estate focused on the proposed increase in probate fees in the province of Ontario, to take effect on June 8, 1992. The fees would triple, from \$5 to \$15 per \$1000 of value, on estates over \$50,000 (which Mrs. Szczygielski's estate was). Mr. Harrington knew of the proposed increases, and admitted that from the time of his retainer in August of 1991 he had 10 months within which to obtain the renunciation, locate the witness and obtain the affidavit of execution.

The named executor of the will was Richard Szczygielski's uncle, Jack Szczygielski. He lived locally in Oakville, had no objection to renouncing the executorship, told Richard that he would do anything necessary, and simply had to sign the renunciation document. Richard Szczygielski's evidence was that his uncle was prepared to sign right away.

Mr. Harrington did not obtain his signature on the renunciation until May, 1992, nine months after being retained. He had no satisfactory explanation for the delay.

The witness to the will of Mrs. Szczygielski whose affidavit of execution was required was a retired lawyer. He was not located until one year and three months after Mr. Harrington's retainer. Although there was some difficulty in locating him, there was also evidence at the hearing that Mr. Harrington did not actually begin looking for him until October of 1992, which was shortly before the Letters of Administration were filed on November 12, 1992. Once he had started to look, it took a month to find the witness.

The Letters of Administration were filed without a valuation. It would appear that a valuation of \$195,000 was later placed on the estate.

By the time the Letters of Administration were filed, the probate fees had increased. Mr. Harrington did not pay these at the time of filing, and indeed did not ever pay them. However, in a note given to the Szczygielski's on November 16, 1992 when the sale of Annaliese Szczygielski's house closed, Mr. Harrington advised that he was holding back \$6000 from the sale proceeds in order to pay probate and legal fees. He admits that he did not apply those funds to pay probate, but applied the full amount for his own fees, disbursements and GST.

Calculated on the pre-June 1991 scale, the probate fees payable would have been \$947. Calculated after the increase, the amount was \$2400.

Mr. Harrington admits that to finalize the estate, he required Letters of Administration, a valuation, a reporting letter to the Szczygielski's, and a clearance certificate from Revenue Canada. The Letters of Administration were filed November 12, 1992. Mrs. Szczygielski's home was sold on November 16, 1992. The other property transaction remaining to do was the transfer of the cottage lot from Richard to Elizabeth Szczygielski.

In order to effect the transfer, Mr. Harrington had to assign a value to the lot, file a transmission application, and register a transfer deed. In conjunction with Mr. Burnstein, Mr. Harrington valued the lot at \$15,000.

The transmission application and supporting affidavit from Richard Szczygielski were executed on May 30, 1994. They were accompanied by a notarial certificate from Mr. Harrington dated January 19, 1993, authenticating the letters of administration. January 19, 1993 was also the date Richard Szczygielski signed the Transfer Deed.

However, the Transfer Deed and the transmission application were both registered on August 19, 1994. This was approximately three years from the time Mr. Harrington was retained, and one year and seven months from the time the notarial certificate and the Transfer Deed were signed.

Mr. Harrington did not offer a satisfactory explanation for the various delays in getting this documentation completed. He testified that "initial attempts" to register the transfer in 1993 were rejected, but he did not provide information about these attempts.

The panel also heard evidence at the hearing concerning a survivorship application with respect to the cottage property. Richard Szczygielski and his father Chester Szczygielski had held this as joint tenants during Chester Szczygielski's lifetime. When Mr. Szczygielski Sr. died in 1988, Mrs. Szczygielski testified that Mr. Harrington volunteered that he would contact the town and ask it to remove Mr. Szczygielski Sr.'s name from the tax bills which were being sent for the property. Her evidence was that she expected that Mr. Harrington could get Mr. Szczygielski Sr.'s name off the tax bills by calling the town; she was not aware of the existence, or the requirement, to complete documentation for a survivorship application in order to reflect that Richard Szczygielski had sole title to the land after his father's death. Mr. Harrington testified that his retainer with respect to Mr. Szczygielski Sr.'s estate had not included any request to complete the survivorship application.

In any event, it had become apparent by 1992 that Chester Szczygielski's name had not been removed from the tax records. Elizabeth in that year brought the matter to Mr. Harrington's attention and asked him to have the name removed. This was not done, and Elizabeth Szczygielski's letter to Mr. Harrington of March 1995 stated that the Szczygielski's had received another tax bill that year bearing Chester Szczygielski's name. Unfortunately, in the interval, the Harrington law office had also sent to the Szczygielski's address, in August 1993, a letter addressed to Richard and Chester with respect to the cottage property. Mr. Harrington testified that he had not seen this letter, and acknowledged that it "probably aggravated them".

Mr. Harrington did not ever contact the town to have Chester Szczygielski's name removed. This was done by Elizabeth Szczygielski, by phoning the town and providing a copy of Chester Szczygielski's death certificate.

Mr. Harrington did have Richard Szczygielski sign an affidavit in support of a survivorship application on March 29, 1994. The Document General for registration purposes was signed by Mr. Harrington nine months later on January 10, 1995. However, the application for survivorship was not registered by Mr. Harrington until October 22, 1996, two years and nine months after Richard Szczygielski had sworn the supporting affidavit. The date of registration was also eight months after Mr. Harrington had received notification from CAW Legal Services that it had been retained by the Szczygielski's and a signed direction from them to provide their files, including the estate file, to CAW Legal Services.

Mr. Harrington's communications to the Szczygielski's about the estate were sparse. He testified that he had delivered to them a letter dated November 2, 1992, enclosing documents for signature. He wrote them a short note dated November 16, 1994 on the closing of the sale of Annaliese Szczygielski's home. This is the only letter from Mr. Harrington which the Szczygielski's say they received. Mr. Harrington testified that he prepared a reporting letter on the sale of the home, dated December 16, 1992. However, he did not mail it, but rather testified it was hand delivered. The Szczygielskis testified that they did not receive it. Mr. Harrington acknowledged that he did not send to the Szczygielski's copies of his third-party correspondence about the estate.

Mr. Harrington promised several times to prepare a reporting letter on the estate matters. The first such promise was in the note of November 16, 1992 when he advised that he had kept back \$6000 of the sale proceeds for probate and legal fees, and would forward them a bill with the report when the estate had been completed.

In her complaint letter to the Society of November 1995, Elizabeth Szczygielski wrote that Mr. Harrington told the Szczygielski's in a meeting in June 1994 that the estate was finalized and a cheque between \$900 and \$1000 would be refunded to them. The estate papers would be ready at the end of June, and he would hold them until the Szczygielski's got back from their holidays. In August 1994, Elizabeth Szczygielski spoke with Cathy Harrington by phone; Mrs. Harrington said that she knew nothing about a cheque, and would check with Mr. Harrington. She did not get back to them. However, as noted in a letter from Elizabeth Szczygielski to Mr. Harrington dated March 17, 1995, Cathy Harrington told them in November 1994 that preparation of statements was underway, and the Annaliese Szczygielski estate matter was the next in line. In her letter to the Law Society, Elizabeth Szczygielski stated that she had left messages with Cathy Harrington for Steven Harrington to call, but got no response, and had finally written the March 1995 letter because she had been in contact with Cathy Harrington on numerous occasions and all she was getting from her was deception.

Mr. Defalco of the CAW wrote to Mr. Harrington in November of 1995 asking him to respond to the Szczygielski's. In a letter dated December 19, 1995, Mr. Harrington wrote to Elizabeth Szczygielski saying that he had not seen her March 1995 letter until recently because it had been placed in the file relating to the boathouse encroachment matter. He promised a reporting letter as soon as he could, and that he would be in touch in mid- to late January, 1996.

Mr. Paul Vayda of CAW Legal Services wrote to Mr. Harrington when he was retained by the Szczygielski's in February 1996. Mr. Vayda stated in this letter, dated February 9, 1996, that the Szczygielski's had advised him that Mr.

Harrington had told them in June 1994 that the estate was finished, and one and a half years had gone by since a report was promised. He insisted that Mr. Harrington should provide within two weeks an accounting and final payment on the estate, or that files and funds for the estate should be transferred to the CAW Legal Services. He warned Mr. Harrington that if this were not done, there would be a report to the Law Society.

Nothing was forwarded by Mr. Harrington before this deadline, and Mr. Vayda made a report to the Law Society. The history of that matter forms the basis for particular 2(f) of Complaint D91/97.

In a June 11, 1996 letter to Mr. Vayda, Mr. Harrington stated that he had virtually completed the estate and would prepare a reporting letter along with the many documents therein. He made a further promise by letter of July 8 to deliver the files.

The estate files were finally delivered by Mr. Harrington on December 1, 1997 at a hearing of the Szczygieski's application for assessment of his accounts in the estate matter. This assessment was being handled by CAW Legal Services for the Szczygieski's and came about when the Law Society's accountant Ms. Merkley sent to Mr. Vayda copies of the accounts which she had found in the estate file during her audit. These accounts had never been provided to the Szczygieski's. They saw them for the first time when they received them from CAW, and upon doing so, instructed that they be assessed. Through the assessment process, Mr. Harrington's accounts were reduced by \$2500. Mr. Harrington's dockets were ordered to be produced for this assessment by July 31, 1997. They were not produced until November 4, 1997, on Mr. Vayda's urging.

(b) Power Boat Litigation Matter

Mr. Harrington was retained in August 1993 in this matter. Mr. Szczygieski had purchased a power boat at the Sportsman's Show, and discovered several defects in it when he began to use it. The manufacturer of the boat was based in Sudbury, and there were problems in having warranty repairs done in the Oakville area.

Mr. Harrington wrote a first demand letter to the boat's manufacturer on or about August 19, 1993. He wrote his second demand letter April 7, 1994, eight months after the first. In the interim, he had rendered an account dated August 28, 1993, but had had no personal or telephone contact with the manufacturer in the eight month interval. He wrote another letter to the manufacturer dated January 11, 1995, nine months after the second follow-up, and a year and a half since the first. At the hearing, Mr. Harrington admitted that when pursuing negotiations on behalf of a client, eight or nine months between letters is a long time.

Richard Szczygieski testified that he went to the Sportsman's Show in 1994, where he saw the manufacturer of his boat. The man told him that he hadn't had any letters from Mr. Harrington, and asked Mr. Szczygieski to get his lawyer to send him something. Mr. Harrington asked Mr. Szczygieski in cross-examination if he remembered Mr. Harrington telling him that Harrington had been in Sudbury and delivered the letter to the manufacturer personally, and Mr. Szczygieski answered no.

Mr. Harrington's evidence was that initially his strategy was to try for a negotiated settlement before bringing an action. However, Mr. Szczygieski testified that at the June 1994 meeting, which was largely about the estate, Mr. Harrington told them that there was a good possibility of a trial of the boat matter in the fall of that year. Mrs. Szczygieski in her complaint letter writes that Mr. Harrington told them that the matter would probably go to court by October of 1994, although she says that the meeting at which this was conveyed was in February 1994. Mr. Harrington testified that he does not recall saying that the trial in the boat matter would be held in November 1994, but admits that the Szczygieski's may have thought that he did. They did tell Mr. Vayda when he started acting for them that Mr. Harrington had told them that he had issued a claim and it was heading for trial.

In fact, the first claim that Mr. Harrington prepared was dated August 20, 1995. He attempted to file it in Oakville, although at the hearing of this matter he testified that he knew that a claim should be brought either in the jurisdiction where the cause of action arises, or in the jurisdiction where the defendant resides. In this case, either Mississauga or Sudbury Small Claims Courts would have jurisdiction. The claim was rejected in Oakville for want of jurisdiction.

Three months later, in November 1995, he updated the claim by changing the date, and tried to file it in Mississauga. He sent someone to Mississauga to file it, and it wasn't done at that time, and so he mailed it to the court sometime in November with a cheque for the filing fee. He testified that Cathy Harrington tried to call the court in December of 1995 or January 1996 to check on it but couldn't get through. Mr. Harrington by letter dated January 16, 1996 was asking the court office if the defendant has been served with the claim, and if so, for a copy of the defence. Three months later, in May 1996, he wrote another letter to the Mississauga court to inquire about the matter, referring to his difficulty in getting information about the fate of the statement of claim because the Mississauga court was one of the ones affected by the OPSEU rotating strike. This was after the February 1996 letter from Mr. Vayda advising he was retained and requiring the file to be transmitted to him.

In October 1996, on Mr. Vayda's advice, the Szczygielski's checked with both the Oakville and the Mississauga Small Claims Courts. They learned that no claim had been filed in either place. Mr. Vayda had still not received the file in November of 1996, and when Ms. Merkley was at Harrington's office doing her audit, she sent Mr. Vayda a copy of the file. Mr. Harrington sent him a letter dated November 27, 1996 stating that the boat file was "apparently lost" in Mississauga after being transferred there, and further delays had been incurred by the fact that the Mississauga court was one of the ones affected by the rotating strike. Mr. Harrington enclosed with this letter a draft new original statement of claim for Mr. Vayda's review. Mr. Vayda finally received the actual file on December 9, 1996. At that time, there was no claim issued.

Mr. Vayda began the action, and settled it just before trial for \$1000.

c) The Boathouse Encroachment Matter

During the Szczygielski's annual summer holiday at their cottage in 1991, they discovered that their neighbour was building a boathouse that appeared to be encroaching on their land. They believe that they retained Mr. Harrington to look into this for them in 1991; he disagrees that it was this early. However, he does admit being retained in 1992.

Mr. Harrington acknowledges that the proper steps to deal with this type of problem include contacting the neighbour to inform him of the encroachment and seek voluntary removal, then to contact the municipality to have a property inspection done to see if there is a bylaw offence and whether the neighbour has a building permit; and then to attend at the Committee of Adjustment to secure an order of compliance.

Mr. Harrington never did contact the neighbour. When the Szczygielski's returned to their cottage in the fall of 1992, they found that the neighbour was still building his boathouse. Mr. Harrington had done nothing on the file since the time of his retainer. Mr. Harrington testified that the neighbour was still building in the spring of 1993.

Mr. Harrington claims that he wrote a letter dated December 14, 1992 to a "Peter" in the Building Department of the Town of Gravenhurst about the encroachment, and a copy of this letter was produced for the hearing. However, there is no Peter in the Building Department of Gravenhurst, as Mr. Harrington admitted at the hearing. He stated then that he had dealt with a Peter in the Burlington building department.

The weight of the evidence on this point was to the effect that the Building Department had not received the December 14 letter, until August 4, 1993. Wanda Speicher, Development Clerk with the Town of Gravenhurst, reviewed the Town's file and produced a memorandum dated July 19, 1993 showing that the only correspondence received from Mr. Harrington up to that date was a letter from him dated May 18, 1993. The July 19 date is significant because that is the date that Elizabeth Szczygielski made a request of the Town for a site inspection, which was conducted on July 21, 1993.

Wanda Speicher's memo reflects that the Town received on August 4, 1993 a fax cover dated July 29, 1993 containing a copy of the December 12, 1992 letter. Mr. Harrington testified that he had tried to send a copy of the December 12 letter by fax on June 18, 1993, but it may not have been received, as he could not find a fax receipt indicating that the June 18 fax had been sent. He refaxed the June 18 fax, under cover dated July 29, which was received on August 4.

At the hearing, Mr. Harrington produced additional documentation on this matter which had not previously been shown to the Society. A fax cover sheet dated October 26, 1993 addressed to Wanda Speicher in Gravenhurst was accompanied by evidence of transmission that day. The fax contained a letter from Harrington to Speicher making reference to being told in August that the inspection revealed that the boathouse was encroaching on the Szczygielski property, and other problems. He recites having requested copies of correspondence and an update from the town, and having received nothing to date, and advises that his clients are presently in his office and he would appreciate hearing from her by phone with an update.

Mr. Harrington's documents also show receipt from Ms. Speicher in December 1993 of copies of correspondence between Ian Sugden the Gravenhurst Senior Planner and the Szczygielski's neighbour concerning the boathouse construction, including an application for a minor variance.

The Committee of Adjustment hearing on the application took place in March of 1994. At Mr. Szczygielski's request, Mr. Harrington attended with the Szczygielski's, driving up with them by car, and appeared at the hearing. Mr. Harrington stated that he believed his personal attendance had had a positive effect on their position, as the variance was not granted. Mr. Harrington rendered two accounts in the matter, one on August 4, 1993 billing CAW \$1160 and the Szczygielski's \$148.73, and a second right after this hearing, on March 31, billing CAW \$440 and the Szczygielski's \$518.77.

Mr. Harrington did not do a final report to the Szczygielski's on this file. He testified that he wanted to see if the neighbour remedied the situation before reporting. However, his March 31 account said it was a final account.

In June 1996, Mr. Harrington wrote to Mr. Vayda that the cottage litigation file was virtually completed, although the neighbour had until the summer to comply with the Town's order about the boathouse. Thus the file remained open. He said that he would close his file and transmit the contents. On July 8, he again promised this file. It had not been delivered by September 1996.

Findings of Professional Misconduct

Professional misconduct has been established on this particular of the complaint, based on the evidence as elaborated above. Mr. Harrington's conduct of all three matters was riddled with lengthy unjustified delays, poor to non-existent reporting, lack of communication with his clients, and patent attempts to stall them and mislead them about what Mr. Harrington was doing. The clients were unable on many occasions to speak with Mr. Harrington or have their calls returned; they were treated rudely by Cathy Harrington.

Mr. Harrington did not respond either to Mrs. Szczygieski's letter of March 1995, or to Mr. Defalco's request to take an interest in his clients. The impenetrability of his consciousness on the issue of client communication is vividly demonstrated by the failure of these initiatives to capture his attention.

Mr. Harrington's approach to correspondence struck us as evasive and calculated, featuring as it did letters allegedly sent (or hand delivered) but not received, faxes which never reached their destination, and court papers which were never filed but then were "misplaced" by the court. There were no formal reporting letters in any of these matters. In the estate and the boat litigation, verbal "reports" about file completion or next steps were inaccurate and misleading. Promises of service were made, repeatedly, and not kept. Given the modest level of complexity in all of these matters, evidenced at least in part by the fact that the clients often stepped in and accomplished things on their own when Mr. Harrington did nothing, these matters should not have taken the years that it took to deal with them. Notably, neither the estate nor the boat litigation were completed when Mr. Vayda became involved in 1996. Ironically, however, Mr. Harrington took it upon himself to take certain steps in both matters after that date, knowing that he was no longer retained.

The dealings between Mr. Harrington and Mr. Vayda, though mentioned to some extent in dealing with this particular in order to complete the history of the files, are material to the allegation of misconduct in particular 2 (f). Given the accumulation of incidents with respect to Mr. Harrington's dealings with the Szczygieski's, his later conduct with respect to the files is not necessary to the finding of misconduct on this particular.

Complaint D91/97, Particular 2(f)

Facts

The Szczygieski's turned to the CAW in the late fall of 1995 as their frustration with Mr. Harrington mounted. In December 1995, he was removed as a co-operating lawyer from CAW Legal Services because of their complaints, and others, including one from the Parejas. In February 1996, CAW Legal Services were retained by the Szczygieski's and Mr. Vayda sent Mr. Harrington a signed Release of Files in February 1996.

At the hearing, Mr. Harrington was taken to the correspondence between himself and Mr. Vayda, and admitted that it was sent and received. He admits to the number of requests for information disclosed therein.

Mr. Vayda's letter of February 6, 1996 demanded the estate and boat files and any other files in Harrington's possession within two weeks, and warned that if he did not receive them, he would report to the Law Society. Mr. Vayda wrote again on March 5, confirming Harrington's commitment in a March 1 telephone call that the files were then being copied by his office and he would deliver them by March 15 or 16. Calls from Mr. Vayda on March 15, 18, and 20 leaving messages were not returned. He warned that if he did not have the files by March 22, he would complain.

Mr. Harrington's letter of March 21 apologized that he had had no time to attend to the files and would begin to send them the next week. Mr. Vayda advised on March 28 that the CAW was filing its complaint.

On May 28, Mr. Vayda advised Cathy Riches of the Society that they had received no files as yet. Cathy Harrington promised Ms. Riches on May 30 that Mr. Harrington would work on the files the next week and that Ms. Riches would receive something by June 7. On June 6, Mr. Harrington told Ms. Riches he would not be sending the files until the next Monday.

Files sent by Mr. Harrington on April 27, May 10 and 15, June 10 and 11 were closed files of no current interest. On June 11, Mr. Harrington promised the estate and boat files soon, but on June 25, Mr. Vayda wrote rejecting his excuses for not delivering these files.

On July 16 Ms. Riches of the Law Society wrote to Harrington advising him of her intention to monitor his compliance with the demand for files. In July and August, Mr. Vayda advised her that he had not received the files. On August 28, Ms. Riches wrote Mr. Harrington that unless the files and funds had been transferred within two weeks, she would refer the matter to the Chair and Vice-Chair of Discipline. On September 26, Mr. Vayda advised her the files had not been received.

Because they could not get the files, Mr. Vayda advised the Szczygielski's to check the Small Claims Court offices in Oakville and Mississauga concerning the boat litigation; in October they did this and discovered that no claim was filed in either place.

An audit of Mr. Harrington's practice was instructed by the Society in the Szczygielski matter, and it was done by Janet Merkley. On October 9, 1996, she asked Mr. Harrington about the boat litigation file, and he told her that he had been unable to locate it but would send it to Mr. Vayda soon. That same day, Ms. Merkley was advised by Mr. Vayda's secretary that the files delivered so far were not current, and not the important ones that were required. The boat litigation files were copied and sent to Mr. Vayda's office, through the intervention of Ms. Merkley, in November 1996.

The estate file and the original of the boat litigation file were finally provided in December 1996. Again, the Law Society's involvement is evident in the delivery of the estate file: the accounts produced to Mr. Vayda by Ms. Merkley prompted an assessment application, and in the course of the assessment, the estate file was delivered.

Findings of Professional Misconduct

Mr. Harrington admitted, and we find that the Law Society has established, that there was professional misconduct on this particular of the complaint. The files were not delivered after a clear demand, deadlines, and a clear communication that the consequences of non-delivery would be a complaint to the Law Society. Serial excuses were given, and these were not plausible. The stalling tactics involved communications that may have been less than totally candid. Ten months elapsed before the key files were rendered up. Both the boat and the estate files were passed over, in the end, through the direct or indirect intervention of the Law Society. Mr. Harrington was aware of the demands, and also that the delay in conveying the files was lengthy.

Complaint D91/97, Particular 2(g)

Facts

a) Estate

At the hearing, the Society reviewed with Mr. Harrington ten statements of account over a period from September 24, 1991 to September 29, 1993, with accompanying trust ledger sheets. The first of these, dated September 24, 1991, for services rendered up to that date, was for \$294.25 fees and GST; it was taken from \$300 held in trust. The trust ledger states that the \$300 had been "received from Mr. Szczygielski for disbursements"; Elizabeth Szczygielski stated in her evidence that she had given Mr. Harrington a cheque for \$300 on August 30, an amount reflected in her cheque register. Mr. Harrington's trust ledger does not refer to Mrs. Szczygielski having provided these funds. The account dated September 24, 1991 was not received by the Szczygielski's, according to their testimony.

The other accounts reviewed at the hearing were

Date	for services to	amount
November 16, 1992	November 16, 1992	\$2,550.39
December 16, 1992	December 16, 1992	513.60
January 8, 1993	January 8, 1993	611.00
January 13, 1993	January 13, 1993	556.40
March 23, 1993	March 23, 1993	535.00
April 22, 1993	April 22, 1993	449.40
August 5, 1993	for disbursements on "CAW account"	148.73
August 10, 1993	August 10, 1993	214.00
September 21, 1993	September 21, 1993	321.00
September 29, 1993	September 29, 1993	107.00

None of the accounts for services listed above contained any specification of the services in respect of which they were rendered. None was a signed copy.

The accounts from November 16, 1992 to September 29, 1993 completely depleted the \$6000 which was held back from the sale of Annaliese's Szczygielski's home, that the November 16, 1992 note on closing said would be applied to fees, disbursements and probate fees. The probate fees were not paid by Mr. Harrington.

These accounts were only provided to the Szczygielski's after the Law Society's examiner Janet Merkley began to attend at Harrington's office. By letter to him dated November 15, 1996, she requested to be supplied with the fee billings for the money transferred from general to trust on those dates. A letter dated December 5, 1996 from Mr. Harrington to Ms. Merkley encloses the accounts. When she received the accounts from Mr. Harrington, she sent them to CAW Legal Services. They were provided to the Szczygielski's, and they instructed their new solicitor, CAW Legal Services, to begin assessment proceedings.

Mr. Harrington did submit a bill to CAW Legal Services for \$350 with respect to the closing of the sale of Annaliese Szczygielski's home. The Szczygielski's acknowledged in their testimony that they had received a copy of this account, but had not received any other accounts from him.

b) Boat Litigation

Mr. Harrington provided an interim account to CAW Legal Services in this matter on August 27, 1993, after sending the first demand letter. The account was for \$680.00 and it did contain a list of services rendered, albeit without dates.

c) Boat House Encroachment

Mr. Harrington rendered two accounts in the boat house encroachment matter. The first dated August 4, 1993 billed CAW \$1,160 and the Szczygielski's \$248.73, and the second, dated March 31, 1994, billed CAW \$440 and the Szczygielski's \$518.77. He acknowledged the Szczygielski's evidence that they had not received any accounts from him, except for the one for \$350 sent to CAW for the sale of the estate home.

d) Improper Transfer of Estate Funds

The accounts for the boat house encroachment matter showed that some of the funds said to be owing from the Szczygielski's on this matter had been taken out of the trust funds referable to the sale of Annaliese Szczygielski's home. The disbursement account of August 5, 1993 for \$148.73 shows that the payment was "Transferred from estate file". The account of March 31 shows that the payment of \$518.77 was "Transferred from (Estate Account)".

The file ledger account for the boat house encroachment matter shows that on August 8, 1993, the sum of \$148.73 was transferred from the estate account (90832) into the boathouse encroachment trust account and then put into the general account. Mr. Harrington admitted in his testimony that he had transferred these funds from the estate account to the boathouse property dispute account.

There is no corresponding file ledger account entry for the March 31 sum of \$518.77 that would confirm that these funds actually were withdrawn from the estate. Mr. Harrington testified that there were no funds left in the estate account by March 1994, and that he "imagines" that the March 1994 account was likely never paid.

Mr. Harrington also admitted in his testimony that the boathouse encroachment matter had nothing to do with the estate litigation, and that he did not obtain the specific authorization of the Szczygielski's to transfer funds from one account to the other. He further acknowledges that if they did not receive copies of the accounts (and they testified that they had not), they would not have known about the transfer.

Findings of Professional Misconduct

The Law Society has established that there is professional misconduct with respect to this particular. The Solicitor failed to account to the Szczygielski's for monies entrusted to him, namely the \$300 initial retainer and the \$6000 held back from the proceeds of sale of Annaliese Szczygielski's home. On the evidence, there were no accounts provided to them with respect to the fate of these funds, or with respect to the work done on the matters to which the funds were applied. The accounts which eventually surfaced during the audit done by Ms. Merkley failed to satisfy the requirements for bills of account, described above in the context of the Barrass matter. For the same reasons as in Barrass, we decline to find pre-taking. We do find, however, that an improper transfer of trust funds occurred with respect to the \$148.73 moved from the estate trust fund to the trust for the boat house encroachment, and then to general, to pay disbursements on that matter.

Eady Matter

Complaint D52/98

This complaint alleges that Mr. Harrington failed to account for monies held back in a real estate transaction, and failed to reply to the Law Society with respect to the complaint.

Particular 2(a)

Facts

Margaret Eady and Ken Gravelle retained Mr. Harrington in 1996 to perform legal services in connection with the sale of their home and the registration of a Vendor-Take-Back second mortgage of \$5,000.00. They gave Mr. Harrington a retainer of \$707, made up of a \$500 fee and disbursements. Ms. Eady testified at the hearing that everything was "normal" until the closing date of May 31, 1996.

a) The Legal Aid Lien

At that time, the lawyer for purchaser George Simpson found a lien on the property for \$450 in favour of the Ontario Legal Aid Plan. This lien had been missed by their lawyer when Ms. Eady and Mr. Gravelle purchased the property from its previous owner George Joseph Legere. Mr. Harrington advised at the closing that he would have to hold \$450 of the purchase price in trust until the lien was cleared up, which would take four to six weeks.

Ms. Eady located in her papers from their earlier purchase of the home a sheriff's certificate which she believed showed that the lawsuit involving Mr. Legere had been settled in 1981. She faxed the certificate to Mr. Harrington's office on the next working day after the closing. She then spoke to Cathy Harrington, who told her that this lien had been overlooked in a transfer of documents to Legal Aid in Toronto, and that they would have to file some paperwork to get the money released. In a second call with Cathy Harrington, Ms. Eady said she was told it would take three to six months to complete the matter because of job cutbacks.

In November 1996, Ms. Eady called the office again and spoke to Cathy Harrington. She found her rude and not helpful. Ms. Eady could not speak directly to Mr. Harrington. In her letter of complaint to the Society, Ms. Eady states that each time she called the office about this matter, Mrs. Harrington told her that Mr. Harrington was busy or not available. Ms. Eady left messages for Mr. Harrington to call her, but he never did. Mrs. Harrington was rude and treated her like a nuisance when she phoned the office.

Ms. Eady did secure a meeting with Mr. Harrington on or about November 22, after the house had been destroyed by fire, and testified that Mr. Harrington told her that registered letters had been sent to Legal Aid about the lien. She also testified that she was told by Cathy Harrington about these registered letters.

In January of 1997, Ms. Eady spoke to Legal Aid in Toronto, in the person of a Ms. Grgurvic, who informed her that they had never received anything from the Harrington office. In his evidence on this complaint, Mr. Harrington denied that he or Cathy had ever told Ms. Eady that the office had sent registered letters to Legal Aid.

Ms. Eady was told by Ms. Grgurvic that this type of situation usually takes about two weeks to clear up. At the first of November 1997, Ms. Eady phoned the Harrington office and told Cathy that if the matter was not cleared up in two weeks, Ms. Eady would file a complaint. On November 15, 1997, Ms. Eady phoned again and was told by Cathy Harrington that the matter was not complete and so she filed a complaint.

On his cross-examination, Mr. Harrington was asked why he simply hadn't sent Ms. Eady a cheque for \$450 after receiving from the Law Society her complaint. He replied that this was a "\$1 million question" but offered no explanation.

The day before she testified at the hearing, Ms. Eady received a reporting letter dated March 31, 1999 from Mr. Harrington concerning the Legal Aid lien matter. In the letter, he enclosed a copy of a report on the sale of the property and a "replacement" trust cheque for \$450, being the funds he had held in trust for the Legal Aid Plan. The letter states that Mr. Harrington had been unaware until advised by Law Society counsel in the course of the discipline matter that Ms. Eady had not received the report, dated July 29, 1998 or the cheque. He says he has no idea why she did not receive the report.

In his "reporting letter" dated July 29, 1998, Mr. Harrington advised that "following several letters and phone calls" his office received written confirmation from Legal Aid that it did not appear that the lien affected the Eady/Gravelle home. The purchaser's lawyer concurred. Then, Mr. Harrington refers in his letter to "other problems which arose with the transaction", namely the cancellation of Mr. Simpson's house insurance, the power of sale proceedings, and the fire (see below). He states that the \$450 was "being held pending the resolution of that problem". In his testimony, Mr. Harrington acknowledged that he never had any discussions with Ms. Eady about holding back the \$450 pending resolution of the fire problems. Ms. Eady testified that she disagrees with this part of the "reporting letter".

To summarize, Mr. Harrington had \$450.00 in his trust account from May 31, 1996 until March 31, 1999. The client received no information from Mr. Harrington about any efforts on his part of clear up the lien situation, a process which Legal Aid advised Ms. Eady should have taken about two weeks. Her requests for information were met with evasion and rudeness. Mr. Harrington offered no explanation for not providing Ms. Eady with the funds, or any reason why they were not forthcoming. His allegation that he provided her with a reporting letter in July 1998, but could not explain why she did not get it, is unsatisfactory.

b) The VTB Mortgage

At the time of the closing, Ms. Eady and Mr. Gravelle had been provided with post-dated cheques for the second mortgage payments. Before the second mortgage was registered, it seems that they, or Mr. Harrington, received confirmation that Mr. Simpson had placed a binder policy on the property, insuring it for its full replacement value.

In August 1996, Ms. Eady received a Cancellation Notice with respect to Mr. Simpson's insurance. She phoned the Harrington office and asked for Mr. Harrington. She was not able to speak with him, but only with Cathy. Ms. Eady testified in the hearing that Cathy told her not to worry, Simpson might be changing his coverage. Ms. Eady also testified that she was not advised at the time that they could take out insurance to cover their interest as second mortgagee. She disagrees with the contents of the "reporting letter" on this point, because it says that Ms. Eady was advised to take immediate steps to reinstate the policy.

Ms. Eady testified that Cathy had told her there was some risk in the position of the second mortgagee and that their best protection was to register the mortgage. She said that she believed that registering the second mortgage would be a "safety net" and oblige to the Bank, as first mortgagee, to advise them of its dealings with the property.

Ms. Eady also disagreed in her testimony with the statement in the "reporting letter" that Ms. Eady would continue her efforts to resolve the insurance issue with Ms. Simpson and contract the Harrington office if she wanted anything further done.

In November, Ms. Eady received a power of sale notice concerning the home. Mr. Simpson had not made payments on the first mortgage. On November 13, the home burned. It was discovered that Simpson's insurance coverage had been cancelled and that the Toronto Dominion Bank had replaced it only to the extent of its interest as first mortgagee. There was no insurance coverage on the second mortgage interest.

Ms. Eady met with Mr. Harrington on November 22, 1995 about the fire problem, and to inquire what would happen about their \$5,000.00. Mr. Harrington told them he would try to pressure the Bank into settling with Ms. Eady and Mr. Gravelle, on the basis of any argument that the Bank had not carried out an appropriate credit cheque on Mr. Simpson. She and Mr. Gravelle never received any settlement from the Bank. Ms. Eady testified at the hearing that she disagrees with the part of the "reporting letter" dealing with the Power of Sale and fire problem.

At the hearing, Ms. Eady testified that she does not blame Mr. Harrington for the loss of their \$5,000.00 second mortgage investment. She did not make a complaint about this aspect. However, she also testified that she made the complaint about the \$450 because she lost the \$5,000.00. It is also evident from her testimony that Ms. Eady was disappointed that Mr. Harrington did not do the things he told them he was going to do, and frustrated at not being able to reach him directly. She was offended at having to deal with Cathy Harrington "and have her so-called expertise lead us down the garden path", as well as with Mrs. Harrington's rudeness.

Findings of Professional Misconduct

On the basis of the evidence discussed above, the panel finds that professional misconduct has been established on particular 2(a), failing to account for monies (\$450) held back in a real estate transaction. The Society argued that this finding should be made because Mr. Harrington (i) failed to account for the \$450; (ii) failed to release the funds in a timely manner and (iii) failed to respond to reasonable requests from the client about the lien. It appears from the evidence that Ms. Eady did know where the \$450 was put, and why, when it was initially held back. However, the prolonged delay in dealing with the problem and the lack of communication about the funds vitiate this initial knowledge. The money was kept far longer than originally communicated. The panel is also troubled by Mr. Harrington's subsequent attempt by way of the "reporting letter" to suggest that Ms. Eady may have later agreed to the hold back of the funds for a different purpose than originally intended, i.e. pending the resolution of matters arising from the fire. The suggestion is disingenuous.

Complaint D 52/98, Particular 2(b)

This particular alleges that the Solicitor failed to reply to the Society about Ms. Eady's complaint. Evidence was provided in the affidavits of Sylvie McAuley and Jennifer Fairclough.

The complaint was received November 14, 1997, and sent by fax to Mr. Harrington by Sylvie McAuley of the Society on December 1, 1997. Ms. Fairclough of the complaints department phoned Mr. Harrington to ask when the Society could expect a reply. The calls were placed January 8 and 12, 1998. On January 8 she spoke to Cathy Harrington, explained the purpose of her call and asked her to have Mr. Harrington return her call as soon as possible. On January 12, she left a message on the answering machine. She received no reply.

By registered letter dated January 20, 1998, Mr. McAuley informed Mr. Harrington that if the Society had not received a written response within seven days, the matter would be referred to the Chair of the Discipline Committee. The registered letter was signed for as received on January 21, 1998. The Society received no response from Mr. Harrington.

The panel finds that the Society has established professional misconduct on this particular.

RECOMMENDATIONS AS TO PENALTY

The majority of the Committee recommend that George Washington Steven Harrington be disbarred. In addition, we recommend that he pay, within one year, the costs of the Society set at \$27,501.23.

REASONS FOR RECOMMENDATION

George Washington Steven Harrington was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on April 7, 1982. He has no previously discipline history.

The Law Society requested that Mr. Harrington be disbarred, arguing that he is ungovernable. That submission rests on Mr. Harrington's conduct as shown in these complaints, for he has no previous discipline record. Moreover, as submitted by Mr. Harrington, he has paid his annual fees and levies appropriately, and done his filings, so that there is no history of non-compliance with the administrative requirements of the Society. In the alternative, the Society asked for a long suspension, of twelve to twenty-four months. The Solicitor should complete the matters indicated as outstanding in the victim impact statements (reporting letters on files, delivery of files, payment or delivery of monies, apology letters), failing which disbarment would occur.

Mr. Harrington argued against the penalty of disbarment, and stated that the cases tendered by the Law Society can be distinguished. He did not abandon his practice, or fail to show up for the hearings, and does not have a discipline record. He submits that he is not ungovernable. As to any other penalty which might be imposed, he stated that he is in the Committee's hands. He offered to be involved in practice advisory, and he said that he was willing to appear in the Bar Admission Course, or at lawyers' meetings, to discuss his situation and serve as an example to others of what not to do, so that he could spare others some of the grief he has caused or gone through.

Mr. Harrington was 45 years old at the time of the hearing, and has three teenaged stepchildren. His wife, Cathy Harrington, is his office secretary. After four years of work at the Ombudsperson's office, he went into private practice in late 1986 or early 1987, in Price & Associates, which had three suburban offices. Shortly thereafter, this practice was closed. He established Harrington, Smith in January of 1990. Most of his clients were with him when he was at Price & Associates, or came by way of referrals; he does not advertise.

David Smith left their association in 1995, and his wife, who worked as a secretary in the practice, also left. Since 1995, Mr. Harrington has continued as a sole practitioner, employing his wife, and a part-time real estate clerk, and using the services of two contract title searchers and process servers. Mr. Harrington has taught law at the Brampton and Burlington campuses of Sheridan College, and at night school at McMaster University. He has worked as a volunteer with amateur football associations, and has served as a legal aid duty counsel.

Since becoming involved in the discipline process, Mr. Harrington has tried to concentrate his practice in the areas of residential real estate, wills and powers of attorney, estates, and criminal law. The latter involves work with adults and young offenders, on legal aid or private retainer. He tries to book one day a week when he is not in court so that he can do his correspondence. He does not do family law or civil litigation.

In February 1997, he filed a proposal in bankruptcy which was approved in May, 1997 and he was still operating under the proposal at the time of the hearing. In spite of being asked in January of 1998 by the CAW Legal Services to put LPIC on notice of the Pareja matter, he did not report until October, 1998, and coverage was declined. An award was made in the Parejas' favour by the Lawyers' Fund for Client Compensation, and Mr. Harrington feels responsible for the sum of \$40,000 outstanding for that compensation.

Mr. Harrington does not have any substance abuse problem. His health is generally good, except for migraine headaches. He had started seeing a counselor by the time of the hearings, to deal with various matters, including the death of a close friend, and the stress of these proceedings. There was no psychiatric or medical evidence tendered at the hearing, relating to the period when the professional misconduct occurred, in an effort to explain the behaviour in light of some then existing medical or psychiatric condition. Mr. Harrington had had ample notice of the Society's request for the disbarment remedy, and was provided with an adjournment for the purposes of assembling character evidence. Although he says that he has served 2100 clients, on 3000 files, since starting his practice, and a lot of people have been satisfied with his services, he produced no character evidence which specifically addressed the client service and other professional issues brought to light by these complaints.

Mr. Harrington stated at the hearing that he was deeply regretful of what he did. He did not set out to anger, frustrate, or upset these clients. He testified that the hearings had been very hard on him, since the preparation of materials has been time consuming and demanding. He has had to balance the demands of the hearing with the demands of sole practice and has found it quite stressful. He promises that he will complete the file transfers, and write reporting letters and written apologies to his clients, where the need for these was reflected in the victim impact statements. He gave the Committee his assurance that regardless of the outcome of the hearing, he will do his best to keep plugging away and improving. He hopes for forgiveness.

In the opinion of the majority of the Committee, the Society has made out the case for disbarring Mr. Harrington, even though he has no prior discipline record and no history of administrative difficulties with the Society.

The clients involved in these complaints were not sophisticated business people. The Barrasses were young and inexperienced, facing family conflict in the wake of their father's death and unsure what to do about his estate. Mr. Szczygielski, a Ford employee, had been rocked by the death within a short time of both of his parents, whose estates he (as an only child) had to deal with. The Parejas, also brought to Mr. Harrington by the CAW connection, had the law brought into their lives by an accident. Ms. Eady, who describes herself as "blue collar" thought that her lawyer, and not her lawyer's wife, should have sorted out what started as a routine house sale and spiraled into a mess.

None of the legal matters involved here was complex. What was required of Mr. Harrington was, at its most basic, service. This is what he promised these clients. This is what he so clearly did not deliver.

In short, these ordinary people with their relatively routine legal files, are the very people that a legal regulatory regime should be protecting. They do not have corporate might or large resources to deploy in order to require service. They are not routine, and therefore, knowledgeable consumers of legal services. All of them were deferential to the lawyer's training and expertise, and recognized their own inexperience and dependance on what they saw as Mr. Harrington's superior knowledge. All were respectful. They were not asking for charity.

The nature and extent of Mr. Harrington's failure to serve these clients is astonishing. Although the matters involved do not appear to be particularly sophisticated, he managed to create many opportunities in each file to let the clients down, or to fail to serve their interests. He did not take necessary steps, sometimes for long periods, and sometimes not at all. The urgings of the clients, and of third parties (like the CAW executive and lawyers) could not get him to move. He did not do things that he promised to do, thus raising and then disappointing expectations. He was unresponsive to the tax authorities' requests, and to the requirements of the litigation process. The prospect of causing financial loss or expense seemed not to get him to move. The threat to report him to the Law Society did not inspire action. Mr. Harrington's conduct sometimes bewildered even himself: he had no explanation whatsoever for not simply paying Ms. Eady her \$450.

Significantly, however, this failure to serve was not merely passive resistance. Mr. Harrington seemed actively to hide from these clients and their requests: there were frequent references in the evidence to Cathy Harrington's gatekeeper function and the rude way she performed it. Action was promised, or described as imminent, and then never materialized. Mr. Vayda described it as stalling. The evidence reflects some quite mysterious problems with Mr. Harrington's correspondence: letters allegedly sent or hand-delivered, which were never received but later appeared in the file, or as attachments to other documents. The letters to the Municipality of Gravenhurst, to Ms. Eady, and to the Law Society of November 26, are examples of these. The accounts found in the files but never sent to clients are others. The pretense of having filed or tried to file papers to commence a Small Claims Court action is another. This is a pattern of evasive conduct, maintained over a number of years and in a number of matters, that raises serious doubts about this lawyer's integrity.

Mr. Harrington left his clients wondering, sometimes for years, what was going on with their matters. He repelled their attempts to reach him by phone. He scanted on correspondence with them. He did not send them accounts, one very simple measure by which accountability can be assured. His silence was taking place at the very times the files

were going awry, and the lack of communication prevented the clients from finding this out. The frequency with which this pattern occurred in the matters encompassed within these complaints seems to rule out the possibility of coincidence. Some of the sums involved in these files are not large, but they are extremely significant to these clients. It is not lost on us that Mr. Harrington was paying himself, in the Barrass and Szczygielski matters, for example, while expenditures which should have been made for the estate were not being made. He could make these choices because the clients had entrusted him with their funds, and his choices betrayed that trust.

The evidence shows that the following stimuli have been inadequate to the task of motivating Mr. Harrington: oral complaints from clients, angry letters from clients, signed directions from clients, a request from a major union to pay attention to his clients, losing an affiliation with that major union as a consequence of not paying attention to clients, requests from other professionals and from government, advice or directions from other professionals including lawyers, court orders, adverse financial consequences to himself or to clients, threats to complain to the Law Society, regular monitoring by the Law Society, and warnings from the Law Society that non-response would lead to discipline proceedings being begun. He provided no answers to the complaints, as he admits in three of the cases; his statement that he had provided an answer in another but it went astray is disingenuous. He did not notify LPIC of the Pareja matter when advised to do so by CAW Legal Services, and lost coverage.

The fact situations involved in these complaints show a lawyer who marches to no drummer but his own. His efforts to stall, evade, and avoid responsibility by blaming others, show that he is aware that there are standards of behaviour; however, he chooses not to follow them. He offers no real reason for his almost fatalistic ignoring of all warnings, requests, and opportunities to correct his behaviour. A governance regime, especially a self-governance regime, simply cannot operate if its members are so unresponsive.

The circumstances of these complaints show that Mr. Harrington is ungovernable, and he should be disbarred.

The Society asked for its costs of the hearing in the amount of \$27,501.23. In the circumstances, the request is reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 20th day of June, 2000

Mary Eberts, Chair

D91/97

D52/98

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE *Law Society Act*;

AND IN THE MATTER OF *George Washington
Steven Harrington*, of the Town of Oakville, a
Barrister and Solicitor.

RECOMMENDATION AS TO PENALTY OF
THE MINORITY OF THE DISCIPLINE COMMITTEE

The Solicitor herein experienced the normal challenges faced by many lawyers and by most single practitioners. The penalty recommended by the majority, in my opinion, is too severe and does not consider the fact that single practitioners today often have practices that include a high volume of lower paying files. The higher volume of such a practice requires a greater amount of the lawyer's time, a larger amount of support staff with the regretful result of the practice often generating a disproportionately modest income. It is difficult nowadays for a single practitioner to make a reasonable income. It is typical for a lawyer to take on more work than he or she can handle well, for fear of the day when there will be a shortage of work. These are not excuses for the Solicitor's conduct but facts of modern life particularly for sole practitioners and, in my opinion, are mitigating factors.

The Solicitor, as well, faced what I consider to be "work paralysis" which seems to be a common factor in these and other discipline matters. Putting things off and not taking the matter "by the horns", hoping it will, perhaps, go away or waiting until time is available. It rarely does and then the passage of time makes the situation worse. There is usually no intent by the solicitor to cause damage or harm.

Barrass Matter

The Solicitor was retained in 1991 and worked on the matter until 1995. This file can be described in the manner set out by Carole Curtis in a decision called *Shaikh* dated March 22, 2000, where the penalty imposed, among other things, was a six-month suspension and an order that the solicitor cooperate in the review of her practice pursuant to section 42 of the *Law Society Act*.

"The Stradek estate sounds like, and probably is, every new lawyers' worst nightmare. Every lawyer in this room has had a file like the Stradek estate. I certainly have, I'm a family law lawyer. The question for all of us is what happens when we have those files and how do we get out of them and how do we handle them? You were a new lawyer, you were about two years out when you got the file, you were practising alone, you were hired by a friend and a colleague, and in many ways you were over your head, in many ways. And you may have also been drawn into what Philip Epstein calls 'the rescuer fantasy' in all of us."

It is also in mitigation worthy to note that it was not the function of the Solicitor here to file the income tax returns in question, given the fact that accountants were retained by the estate. One also wonders why the Solicitor's retainer was not terminated earlier by the clients as opposed to waiting while being unsatisfied with his activity, or lack thereof, for a period of the last two years on an estate the complainant in her May 14, 1995 complaint letter describes as follows; "Understandably, this was a large complicated estate".

It is also significant that no appeal was ever taken from the assessment of Revenue Canada nor were amended income tax returns ever filed. The total loss to the estate was in the area of \$2,562.00, an amount in the small claims jurisdiction. In addition to this, the Solicitor testified that, for the interest and costs incurred because of his delays, he was working without fees as a way of making up to the Barrasses. I think he should be believed on this point. He was clearly in "the rescuer fantasy" here.

Pareja Matter

The Solicitor's lack of action in this matter, in my opinion, was negligence. The clients, however, have been completely compensated by L.P.I.C. and the Solicitor has been punished with \$2,000.00 in court costs. He had not reported the matter to L.P.I.C. but he has not been charged with that offence.

Szczygielski Matter

The matters dealt with here are all, once again, in the jurisdiction of the Small Claims Court. The Szczygielski estate loss was calculated to be \$2,400.00 but the Solicitor's accounts were assessed by the clients and reduced by the amount of \$2,500.00.

The power boat matter was another Small Claims Court matter which was eventually settled with no loss to the clients. The boathouse encroachment matter was the third rather small matter where the clients could have assessed the Solicitor's accounts and then had them perhaps reduced substantially for the Solicitor's non-action. However, this was never done. The Solicitor travelled from Oakville to Gravenhurst for a Committee of Adjustments hearing for he managed to get the matter that far and as well as to be successful at the hearing itself. Total billings here amounted to \$2,267.50 of which clients paid only \$667.50 while the C.A.W. paid the rest. The matter lasted from 1992 to 1994 which, in the circumstances and given the fact that the problem was in Gravenhurst is not "lengthy, unjustified delays warranting disbarment" as suggested by the majority.

Eady Matter

The issue here is the sum of \$450.00. Once again, a matter in the Small Claims Court jurisdiction. The money was properly held back after a real estate transaction to clear up a lien problem. The time involved here is 1996 to 1999. The matter became complicated by a vendor take back second mortgage of \$5,000.00 for which the purchaser stopped paying insurance, and then the burning down of the house upon which the mortgage was registered. The Solicitor attempted to help out these people playing rescuer again but failed to send them an account for all his efforts which would have clearly been greater than the \$540.00 hold back. Although an excessive amount of evidence was heard on these post-sale events, it was quite clear that these matters had nothing to do with the closing and that the Solicitor was not obliged to do anything after closing without compensation. Although the client testified she did not blame the Solicitor for the cancellation of the insurance, the fire and the power of sale, it was those things that triggered her complaint about the hold back.

Given all the above mitigating factors, I do not believe this is a case for the ultimate penalty of disbarment. The Solicitor is a first time offender and has been in practice now some 18 years. The matters complained of do not constitute moral turpitude that is necessary for the ultimate penalty.

I adopt the reasoning set out in the case of *Charles Jellett Publow* dated September 24, 1998, where disbarment was not accepted as the appropriate penalty by Convocation

"For a Solicitor to be found ungovernable, Convocation must be satisfied that the Solicitor will not comply with its lawful processes to the extent that the Solicitor renounces his or her governing body and its right to regulate the solicitor's professional conduct. Although our intuition tells us this Solicitor is ungovernable, and our passions may be incited to find him so, the evidence cannot justify a finding of ungovernability. Although the manner in which the Solicitor chose to communicate his indifference to the Society smacks of ungovernability, it does not cross the line. This Solicitor is saying to us (so far) 'Do with me what you will'. This is in stark contrast to Mr. Dvorak who clearly renounced the Society and its right to regulate his professional conduct. This Solicitor is guilty of professional misconduct for practising while

under suspension and failing to respond in the circumstances enumerated by the Committee. The solicitor has a prior discipline record for which he drew a thirty day suspension. There is no explanation to mitigate penalty. The Solicitor will be suspended for twelve months commencing at the conclusion of the thirty day suspension imposed by the previous Convocation, which suspension was to commence upon the conclusion of the administrative suspension."

The Solicitor says he did not abandon his practice or fail to show up for any of the many hearing days. He is prepared to enter the practice review program and is also willing to appear in the Bar Admission Course or at lawyers' meetings to discuss his situation and serve as an example to others of what not to do in order that he might spare others some of the grief he has caused and experienced.

I found the Solicitor sincere, remorseful and I believe he should be given at least one chance to prove himself and be forgiven. He asks for mercy and should be given mercy. The interest of the public would be adequately protected if the Solicitor was suspended for a period of three months and required to enter the practice review program. Anything beyond this time would be tantamount to disbarment for this single practitioner. It would not be in the public interest or that of the profession to disbar solicitors for conduct as set out in this case.

I am supported in my decision by the April 22, 1999 report of Dr. Sandra Palef which was admitted *in camera* and which outlines the personal difficulties the Solicitor experienced during the time these complaints arose.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 13th day of July, 2000

GORDON Z. BOBESICH

It was moved by Mr. Ruby, seconded by Mr. Swaye that the Report be adopted.

Carried

It was moved by Mr. Swaye, seconded by Mr. Copeland that the solicitor be permitted to resign.

Mr. Stuart advised that he had a motion to present fresh evidence on the issue of penalty.

There were questions from the Bench.

Both Counsel, the reporter and the public withdrew.

Convocation deliberated in camera on whether to hear submissions on the fresh evidence.

Both Counsel, the reporter and the public were recalled.

The Treasurer advised Counsel that the motion that the solicitor be permitted to resign should be addressed and that Convocation would hear submissions on the fresh evidence.

The matter was adjourned to December 15th, 2000 and Counsel was advised to inform Mr. Harrington that the matter commenced today.

The binder of fresh evidence was filed as Exhibit 3 and copies were distributed to the Benchers.

The Treasurer withdrew and Mr. Krishna took the Chair as Acting Treasurer.

REPORT OF THE STRATEGIC PLANNING COMMITTEE

Mr. MacKenzie presented the Report of the Strategic Planning Committee for Convocation's approval.

Report to Convocation
November 29, 2000

Strategic Planning Committee

Purpose of Report: Decision Making

Prepared by the Policy Secretariat

The Committee Process

1. On November 9, 2000, Convocation considered a report of the Strategic Planning Committee that made the following three recommendations:

That the Law Society recruit a Chief Executive Officer whose responsibilities will include the management of the day-to-day activities of the Law Society and the implementation of Convocation's policies.

That the Chief Executive Officer report to Convocation through the Treasurer.

That the Secretary report to the Chief Executive Officer.

2. Following an *in camera* debate, Convocation passed the following motion:

That the report of the Strategic Planning Committee be referred back to the Strategic Planning Committee to consider the feasibility of combining the positions of Chief Executive Officer and Secretary and/or some or all the functions performed by those officers, including the legal and practical implications of so doing and report back to Convocation on or before November 29, 2000.

3. The Strategic Planning Committee met on November 23, 200 to consider Convocation's motion. In attendance were Gavin MacKenzie and Ron Manes, the co-chairs, the Treasurer, George Hunter, Vern Krishna, Barbara Laskin and Marilyn Pilkington. Katherine Corrick attended the meeting as Secretary to the Committee.

The Committee's Deliberations

4. The Committee considered a report detailing the administrative, managerial, and statutory powers and duties of the Secretary of the Law Society of Upper Canada. It considered how these duties are fulfilled at the Law Society of British Columbia and the Barreau du Québec. It also considered a report from 1981 that examined the senior management structure of the Law Society, including the Secretariat. That information is included in this report.
5. Rather than examine the role of the Secretary in isolation, the Committee attempted to identify the optimum conditions for the future of the Law Society to ensure the effective leadership and accountability of the organization. It felt that this was an ideal opportunity, with the departure of the Chief Executive Officer, to re-examine the roles of the senior officials at the Law Society. Convocation has now had five years experience with a management structure that includes a Chief Executive Officer, and is better placed to know as a result of that experience, what qualities and skills it requires of its Chief Executive Officer.
6. The Committee identified the following characteristics of the Law Society that must be taken into account in any discussion about the senior officials of the organization:
 - a. it is governed by a statute, which in some ways defines the roles of the Chief Executive Officer and Secretary;
 - b. it is the largest body of its kind in Canada;
 - c. it has a \$65 million budget;
 - d. it operates a large physical plant that has historical relevance to the legal profession;
 - e. it has a staff of approximately 350;
 - f. it has a number of regulatory functions;
 - g. it is responsible for educating prospective and existing lawyers;
 - h. it runs a client service centre;
 - i. it offers a variety of services to its members;
 - j. it has important relationships to cultivate and maintain with its members, government and the public; and
 - k. its public interest mandate is paramount and must be appropriately fulfilled if we are to remain self-governing.
7. These characteristics require strong, accountable leadership within the organization. Any blurring of the leadership responsibilities translates into weak accountability and lack of stability and credibility.
8. The Committee considered that the following conditions are required to ensure effective leadership and accountability of the organization:
 - a. a single person with significant managerial and administrative expertise must be responsible for the day-to-day activities of the entire organization (the *Law Society Act* refers to this person as the Chief Executive Officer);
 - b. the Chief Executive Officer must be responsible for the implementation of Convocation's policies;
 - c. the Chief Executive Officer must ensure the effective management of the Law Society's regulatory functions; and

- d. the Chief Executive Officer must be able to provide expert advice to Convocation on the challenges confronting the Law Society and profession and participate in the development of policy.
- 9. Following consideration of the matters stated above, as well as the scope of the job currently being performed by the Secretary, the Committee is of the view that the Law Society is simply too large and too diverse in its responsibilities and operations to combine the jobs or some of the functions of the Chief Executive Officer and Secretary.

The Committee's Recommendations

- 10. The Committee is of the view that its recommendations of November 9, 2000 ought to stand with amendments. The amendments are noted in italics.

That the Law Society recruit a Chief Executive Officer whose responsibilities will include managing the day-to-day activities of the Law Society, *including ensuring the effective management of the Law Society's regulatory functions, providing expert advice on the challenges confronting the Law Society and the profession, assisting Convocation to develop policy*, and implementing Convocation's policies.

That the Chief Executive Officer report to Convocation through the Treasurer.

That the Secretary report to the Chief Executive Officer.

- 11. For the assistance of Convocation, the information regarding the duties and responsibilities of the Secretary is set out in full.

The Secretary's Role at the Law Society of Upper Canada

- 12. The Secretary has a variety of roles, which can be generally described as follows:
 - a. Statutory Role - he performs the duties and powers assigned to the Secretary by the *Law Society Act*, its by-laws and regulations, and the rules of practice and procedure - this includes matters such as authorizing audits of a member's records, authorizing investigations into a member's conduct, capacity or competence, and making recommendations to a member whose practice has been reviewed pursuant to the statute;
 - b. Corporate Secretary - he is the custodian of the seal, coat of arms, rolls and records of the Law Society. and minute taker at Convocation. He is responsible for organizing meetings of Convocation, including preparing the agenda and taking the minutes. He is also responsible for organizing and administering the Annual General Meeting and benchers and Treasurer elections;
 - c. General Counsel role - he is generally responsible for the litigation in which the Law Society is involved. He is secretary to the Litigation Committee and is generally the liaison person between outside counsel retained by the Law Society and the litigation committee;
 - d. Managerial role - the responsibilities of this role include the following,

- i. Senior Manager responsible for the core regulatory functions of the Law Society - investigations, discipline, advisory and compliance services, and unauthorized practice;
 - ii. Senior Manager responsible for the research and policy functions of the Law Society;
 - iii. Senior Manager responsible for the Lawyer's Fund for Client Compensation; and
 - iv. Senior Manager responsible for the admissions process, other than the Bar Admission Course - he is responsible for the Call to the Bar Ceremonies, good character investigations, and occasional appearances;
- e. Resource person for the Treasurer, benchers, Law Society staff, and members on all matters related to regulation and professional conduct;
 - f. Information source for and advisor to the Treasurer and benchers; and
 - g. Main support person for benchers and Convocation.
13. A summary of the Secretary's statutory powers and duties is attached at Tab 1. A list of the Secretary's administrative duties is attached at Tab 2.

Some History

14. In 1981, Peat, Marwick and Partners reviewed the Secretariat of the Law Society at the request of Convocation. At that time, the department of the Law Society known as the Secretariat included the following functions:
- a. facilities
 - b. libraries
 - c. legal education
 - d. finance
 - e. errors and omissions insurance
 - f. practice advisory
 - g. audit
 - h. assistant secretaries
15. In 1981, the Secretary reported to the Treasurer, and the directors of the functions listed above, as well as a deputy secretary, reported to the Secretary.
16. Peat, Marwick's report indicated that the administrative and executive management practices of the Law Society had not kept pace with the Society's growth and increasingly complex role that had developed during the 1970s. In 1981, there were 14,000 members, and the Secretariat had a budget of \$4 million and more than 150 staff. Today, the Secretary (the Secretariat, as it was, no longer exists) has a budget of \$15 million and 142 staff.
17. The primary recommendations of the report focused on the reorganization of the Secretariat. Peat, Marwick recommended a structure that included both a position responsible for the overall management of the Law Society, and a position responsible for the discipline and related professional functions. The report indicated that, "the proposed structure provides a clear delineation between the Professional Purposes functions and the executive/administrative management functions."

18. Peat, Marwick recommended the appointment of an Executive Director. This position was described in the report as follows:

The proposed position of Executive Director is the central authority and responsibility [*sic*] for management of the Society's permanent staff functions. He will serve as secretary to the Executive Committee of Convocation [the establishment of which was also recommended by the report] but for no other Standing Committees or, barring exceptional circumstances, for Special Committees. The appointee should preferably be a lawyer, and he must have strong executive leadership and management capabilities; these qualities are paramount. His principal reporting relationship will be with the Treasurer and, through him, Convocation. As such he must have credibility within the Profession and he must be capable of relating to, and dealing directly with senior representatives of the Society, Government, and the Community at large. He must be skilled and effective in providing direction to senior subordinates, assisting them in planning their respective functions, and monitoring and evaluating performance achieved.

19. According to the report, a Senior Director and Secretary - Professional Purposes, who would be responsible for the management and conduct of the discipline, audit and investigation and professional conduct departments, as well as the Department of Education, would report to the Executive Director. Also reporting to the Executive Director would be a Director of Finance and Administration.
20. The goals of the recommended reorganization were to increase administrative efficiency, more clearly define responsibilities and authority, and vest accountability and authority for all of the Law Society's operations in one position.
21. The portion of the Peat, Marwick report that relates to the reorganization of the Secretariat is attached at Tab 3.
22. An *Ad Hoc* Committee of Benchers was appointed to consider the Peat, Marwick Report. The Committee reported to Convocation on May 22, 1981. It endorsed the creation of a position in charge of all of the Law Society's operations separate from the position in charge of the regulatory functions of the Society. The Committee disagreed with the title of Executive Director for that position, choosing instead the title of Secretary, as the *Law Society Act* of the day provided that the Secretary was the chief administrative officer of the Society.
23. The Committee recommended the creation of the position of Deputy Secretary - Professional Purposes. This position would be responsible for counsel, auditors and secretarial support for discipline and professional conduct. This position would report to the Secretary.
24. In addition, the committee recommended that the Bar Admission Course and the Continuing Legal Education Program be separated from the other professional programs, and a Deputy Secretary - Education be appointed to lead those functions.
25. The Report of the *Ad Hoc* Committee was adopted by Convocation. It is set out at Tab 4.

Other Law Societies

26. It is worthwhile examining how other Canadian law societies structure their organizations to provide for the roles and responsibilities assigned to the Secretary of the Law Society of Upper Canada. The structure of the Law Society of British Columbia and the Barreau du Québec were examined as they are the two largest law societies after the Law Society of Upper Canada.

Law Society of British Columbia

27. The Law Society of British Columbia has 10,026 members. It has 125 staff members, not including the staff of the CLE Society of British Columbia, a separate organization responsible for the Bar Admission Course and Continuing Legal Education in the province. Including those staff members, the total staff number is approximately 157.
28. Unlike the *Law Society Act*, the legislation governing the Law Society of British Columbia assigns responsibilities to only one staff member - the Executive Director, who is the chief executive officer of the Society responsible for overseeing the entire operation of the Law Society.
29. The Senior Management Team at the Law Society of British Columbia is led by the Executive Director, who in addition to being responsible for all areas of the Law Society's operation, also acts as an information source for and advisor to the Benchers and President (the equivalent of our Treasurer). He and the President perform the public relations duties for the Society. The following positions report to the Executive Director:
- a. Deputy Executive Director, Discipline and Professional Conduct - responsible for discipline, investigations, complaints and the compensation fund
 - b. General Counsel - responsible for litigation, research and policy unit, legislative drafting including the Rules of Professional Conduct, unauthorized practice
 - c. Corporate Secretary - the main support for benchers, responsible for meeting organization, minutes at bencher meetings, agenda preparation, liaison and communication between benchers and staff, annual general meeting, bencher elections, bencher retreats
 - d. Director of Professional Legal Training and Credentials - responsible for the Bar Admission Course, continuing legal education and the entire admissions process
 - e. Human Resources Manager
 - f. Director, Lawyers Insurance Fund - the equivalent of LPIC
 - g. Chief Financial Officer
 - h. Staff Lawyer, Practice Opportunities
 - i. Director, Statistics and Development - responsible for providing information to the policy and planning process in various departments
 - j. Director of Communications

30. In British Columbia, four different positions perform the functions of the Secretary of the Law Society of Upper Canada - the Deputy Executive Director, Discipline and Professional Conduct, General Counsel, Corporate Secretary, and the Director of Professional Legal Training and Credentials. The Executive Director performs the function of the Chief Executive Officer of the Law Society of Upper Canada.

Barreau du Québec

31. The Barreau du Québec has 18,000 members and 150 staff. It is the second largest law society in Canada.
32. The legislation governing the Barreau assigns responsibilities to the Executive Director, who must manage the administrative affairs of the organization. The legislation permits the Council (the equivalent of Convocation) to appoint a Deputy Executive Director to assist the Executive Director.
33. The Senior Management Team at the Barreau is lead by the Executive Director, who is responsible for the performance of all of the Barreau's operations. The following positions report to the Executive Director:
- a. Deputy Executive Director and Secretary - the main support for benchers, responsible for meeting organization, minutes at bencher meetings, agenda preparation, liaison and communication between benchers and staff as well as the following administrative departments:
 - i. human resources
 - ii. finance
 - iii. information systems
 - iv. archives
 - v. libraries
 - b. Director, Syndic - responsible for discipline, complaints, investigations, advisory services and mediation of fees
 - c. Director, Admissions
 - d. Director, Research and Legislation - responsible for preparing reports for bencher consideration and for the government
 - e. Director, Professional Inspection
 - f. Director, Member Services
 - g. Director, Communications
 - h. Director, Bar Admission Course
 - i. Director, Continuing Legal Education

34. In Québec, four separate positions perform the functions of the Secretary of the Law Society of Upper Canada - the Deputy Executive Director and Secretary, the Director, Syndic, the Director, Admission, and the Director, Research and Legislation. The Executive Director performs the function of the Chief Executive Officer of the Law Society of Upper Canada.

The Roles of the Chief Executive Officer and Secretary

35. The roles of the Chief Executive Officer and the Secretary at the Law Society of Upper Canada, as contemplated by the *Law Society Act* and the Law Society's governance policies, are very different and discrete. The Chief Executive Officer is responsible for administering the day-to-day operations of the entire organization, as well as implementing Convocation's policies. The Secretary is responsible for administering one important part of the organization - the core regulatory functions - under the direction of the Chief Executive Officer.
36. The *Law Society Act* clearly contemplates the existence of both positions and distinguishes their functions. Section 8(1) of the Act provides that the Chief Executive Officer shall manage the affairs and functions of the Society, under the direction of Convocation. Section 8(2) of the Act provides that Secretary shall carry out his or her duties under this Act, the regulation, by-laws and rules of practice and procedure, and such other duties as the Secretary may be instructed to undertake by the Chief Executive Officer.
37. In the two other Law Societies examined, the role of the Chief Executive Officer is similarly stated, and the management roles currently held by the Secretary of the Law Society of Upper Canada are held by four staff members who report directly to the Executive Directors.
38. The main difference between Ontario and British Columbia and Québec, is that the legislation governing Ontario specifically assigns certain powers and duties to the Secretary. The legislation governing the other two law societies assigns responsibilities to only one staff member - the Executive Director.
39. In Ontario, the statutory powers and duties of the Secretary are legislatively mandated. The administrative duties are a function of the current management structure of the Law Society.

Request of Convocation

40. Convocation is asked to approve the following motion:
- That the Law Society recruit a Chief Executive Officer whose responsibilities will include managing the day-to-day activities of the Law Society, including ensuring the effective management of the Law Society's regulatory functions, providing expert advice on the challenges confronting the Law Society and the profession, assisting Convocation to develop policy, and implementing Convocation's policies.
41. Convocation is also asked to approve the following further motion to confirm and clarify the appropriate reporting structure for the Chief Executive Officer:
- That the Chief Executive Officer report to Convocation through the Treasurer.
42. Finally, Convocation is asked to approve the following further motion to confirm and clarify the appropriate reporting structure for the Secretary:
- That the Secretary report to the Chief Executive Officer.

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

- | | | |
|-----|--|---------|
| (1) | A Summary of the Secretary's statutory powers and duties. | (Tab 1) |
| (2) | A list of the Secretary's administrative duties. | (Tab 2) |
| (3) | A portion of the Péat, Marwick report re: reorganization of the Secretariat. | (Tab 3) |
| (4) | The Report of the Ad Hoc Committee. | (Tab 4) |

It was moved by Mr. MacKenzie, seconded by Mr. Manes that paragraphs 40, 41 and 42 set out on page 10 of the Report be adopted as follows:

- "40. That the Law Society recruit a Chief Executive Officer whose responsibilities will include managing the day-to-day activities of the Law Society, including ensuring the effective management of the Law Society's regulatory functions, providing expert advice on the challenges confronting the Law Society and the profession, assisting Convocation to develop policy, and implementing Convocation's policies.
41. That the Chief Executive Officer report to Convocation through the Treasurer.
42. That the Secretary report to the Chief Executive Officer."

Carried

REPORTS NOT REACHED

Report of the Admissions Committee

Admissions Committee
November 29, 2000

Report to Convocation

Purpose of Report: Decision Making

Prepared by the Policy Secretariat

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Admissions Committee ("the Committee") met on November 9, 2000. Committee members in attendance were Derry Millar (Chair), Ed Ducharme (Vice-Chair), John Campion, Tom Carey, Gillian Diamond, Pamela Divinsky, Todd Ducharme, Dean Alison Harvison-Young, Dean Peter Hogg, George Hunter, and Donald Lamont. Staff in attendance were Bob Bernhardt, Josée Bouchard, Katherine Corrick, Susan Lieberman, Charles Smith, and Roman Woloszcuk.
2. The Committee is reporting on the following matters:
Policy - For Decision
 - Articling Credit for Summer Employment
 - 2001 Fees ScheduleInformation
 - Articling Report 2000

POLICY - FOR DECISION

ARTICLING CREDIT FOR SUMMER EMPLOYMENT

1. In September 2000, Convocation directed the Committee to consider whether students should be granted credit toward the articling requirement for summer employment.
2. At its October meeting, the Committee requested the preparation of a report outlining the issues that must be considered in the development of such a policy. The Committee considered the report at its November meeting. The report is set out at Appendix 1 for Convocation's consideration.

Request to Convocation

3. Convocation is requested to consider the report set out at Appendix 1 and, if appropriate, approve one of the following recommendations:
 - a) in the event Convocation establishes a Task Force on the Continuum of Legal Education forthwith, that the issue of articling credit for summer employment be included for consideration by the Task Force.

- b) in the event such a Task Force is not established forthwith, that Convocation direct the Admissions Committee to establish a working group to consider the issue, subject to Convocation's consideration and approval of a budget for undertaking a study of the issue to be provided to Convocation before any work is begun by the working group.

2001 FEES SCHEDULE FOR BAR ADMISSION COURSE

1. Appendix 2 contains the fees schedule for the 2001 Bar Admission Course. The schedule represents a 10% increase in fees as approved by Convocation, as fairly apportioned as is reasonable in the new model of the Bar Admission Course.
2. The Committee has considered the fees and recommends their approval to Convocation.

Request to Convocation

3. Convocation is requested to consider the fees schedule set out in Appendix 2 and, if appropriate, approve it.

INFORMATION

ARTICLING REPORT 2000

1. Appendix 3 contains a report on the Law Society's articling program, including information on its history as well as current procedures. The report contains "tab" references to forms and other documents that are found in *Articling Documents Year 2000*, available on request from the Head of Articling, Susan Lieberman at (416) 947-3422.

APPENDIX 1

POLICY CONSIDERATIONS RELATING TO ARTICLING CREDIT FOR SUMMER EMPLOYMENT

I. PURPOSE OF THIS REPORT

1. On September 21, 2000, Convocation directed the Admissions Committee "to study the question of whether summer employment with an approved principal after the second year of an LL.B.¹ program should count towards the total articling period, to a maximum of four months, and [to] report to the November Convocation, unless the Committee comes forward with a report to Convocation explaining why further time is required."

¹This term includes the J.D. designation now being used for the degree obtained by students at the University of Toronto law school.

2. To properly assess the manner in which this issue should be resolved it is essential to understand the additional issues it raises and to consider the most appropriate process to follow in determining whether articling credit for summer employment should be given.
3. This report,
 - a. sets out a number of issues that must be addressed in the development of a policy permitting articling credit for summer experience gained by students in law firms prior to completing LL.B. requirements;
 - b. discusses time line issues for the completion of the research and study and for reporting to Convocation; and
 - c. recommends the appropriate body to undertake the study of the issue, for Convocation's consideration.

II. BACKGROUND

4. The articling term of the Bar Admission Course follows a teaching phase that stresses skills and professional responsibility. The articling term is intended to train the student to apply practically, the theoretical knowledge acquired at law school, to acquire usable skills, and to develop a sense of "professionalism"- the conduct, aims, or qualities that mark the legal profession. Articling is thus meant to build on the skills and ethical base established in the teaching phase of the Bar Admission Course and to provide the training in action necessary for the student to become qualified as a lawyer.
5. The majority of students who enter the Bar Admission Course have completed law school in Ontario or elsewhere in Canada. In fact, most of these students have completed law school in the same year as they enter the Bar Admission Course.
6. There are, however, a number of applicants who have additional or other qualifications that differentiate them from the "typical" Bar Admission Course candidate.² The Law Society's policies concerning the Bar Admission Course and the articling program contain special considerations for candidates whose particular qualifications and experience justify such an approach, including abridgment of articles.
7. Currently, the provisions concerning abridgments granted on experience other than in articling or practice specifically exclude abridgments based on "summer or part-time experience in law firms or clinical education experiences received before completing the LL.B. requirements."
8. Queen's University Faculty of Law offers three co-operative education programs. Each of these subsumes the articling requirement, as approved by Convocation. Two work periods are approvable for articling credit:
 - a. The first period of four months takes place after the approximate equivalent of second year law school.
 - b. The second period of eight months takes place prior to the last semester of studies.

² Prior to entering the Bar Admission Course, these candidates ("NCA candidates") must fulfil therequirements for a Certificate of Qualification from the National Committee on Accreditation. NCA candidates complete these requirements either at a Canadian law school or through self-study.

III. ISSUES THAT MUST BE ADDRESSED IN THE DEVELOPMENT OF A POLICY FOR PERMITTING ARTICLING CREDIT FOR SUMMER EMPLOYMENT

9. The issues that arise in developing a policy permitting articling credit for summer employment raise a number of questions, including,
 - a. whether this “credit” would be treated as a form of abridgment (sought after the fact) or as a component of the articling requirement (to be approved in advance);
 - b. the impact of such a policy change on the effectiveness of the articling process and on other current articling procedures and policies;
 - c. considerations of fairness to all students and to law firms;
 - d. consistency of approach; and
 - e. the appropriate scope of the application of such a credit.
10. Some of the major questions that would have to be addressed as part of an analysis of the issue of articling credit for summer employment include the following:
 - a. Would such an articling credit be monitored and regulated in a fashion comparable to the existing articling placements, or would students apply retroactively for recognition of the summer work, as is currently done with abridgments?
 - b. Would a “four plus six month” articling experience be more or less valuable in preparing the students for entry into the profession?
 - c. Who would be eligible for “summer articling”?
 - d. If summer employment is to be recognized, should experience in intensive programs and legal clinics also be recognized?
 - e. Would the “summer articling” students be accepted into the Law Society as student members and accorded student-at-law status?
 - f. Could one of the unintended impacts of a policy permitting articling credit for summer employment be systemic discrimination toward students from groups under-represented in the legal profession?
 - g. Would there be two major call periods, in Spring and in Fall?
 - h. How would articling credit for summer employment impact the “50/50” Guideline, and the matching program? If they both disappear as a result of this change, what would be the likely impact upon students from groups under-represented in the legal profession?
 - i. What impact would the development of a policy granting credit toward the articling requirement for summer employment have on the hiring practices of smaller firms?

- j. What impact might articling credit for summer employment have on students' choices of third year courses?
- k. What resource implications might result from the approval of articling credit for summer employment?

Each of these is discussed more fully below.

- (a) *Would such an articling credit be monitored and regulated in a fashion comparable to the existing articling placements, or would students apply retroactively for recognition of the summer work, as is currently done with abridgments?*
11. Approval of articling placements is required at the commencement of articles, as follows:
 - a. Supervising lawyers must be approved by the Articling & Placement Office as principals on the basis of experience, competency and ethical standards.
 - b. An education plan that describes the anticipated articling experience to be provided to that student must be approved by the Articling & Placement Office.
 12. Monitoring features are currently in place for articling placements. These include,
 - a. articles of Clerkship, signed by both principal and students;
 - b. midterm evaluations and final evaluations, submitted by each of the articling student and principal, which compare the actual experience to that set out in the education plan. Where a problem is indicated, the Articling & Placement Office follows up the situation; and
 - c. the Certificate of Service under Articles submitted by the principal and the Student's Affidavit of Service under Articles submitted by the student at the end of the articling period.
 13. If summer employment were to be developed as a component of articling the process would be integrated into the current articling procedural stream (described in paragraphs 11 and 12 above). Treating the approval and monitoring of summer employment in a way similar to that of articling would provide consistency.
 14. The granting of articling abridgments is based on an after-the-fact approach that is geared towards individual assessment. Candidates submit a description of the experience that corresponds to an education plan, testimonials from supervising lawyers and evidence of good standing, where applicable. There is less control of the quality of the experience and of the supervising lawyer. There are no formal documents such as Articles of Clerkship or Principal's Certificate of Service under Articles.
 15. Traditionally someone practising in a non-Canadian common law jurisdiction may receive one month articling credit for each year of experience. Accordingly, if the articling is recognized after the fact, it may be more appropriate to recognize a smaller ratio or maximum. For example, each month of summer employment might equal one-half month of articling credit to a maximum of two months.
 16. If retroactive recognition of the experience is adopted it would be necessary, at a minimum, to formulate clear criteria for acceptance or denial, as well as a process for gathering and assessing the appropriate documentation.
- (b) *Would a "four plus six month" articling experience be more or less valuable in preparing the students for entry into the profession?*

17. The question of whether a single articling period of ten months is more valuable than two periods of four and six months should be studied. Some of the issues raised by this question include:
- a. Is recognition for experience gained during the summer following the second year of the LL.B. appropriate?
 - b. Are the goals of articling achievable at this point, without the benefit of the skills phase of the Bar Admission Course, and after only two years of law school?
 - c. Are the two separate periods of four months and then six months as effective for developing a student's lawyering skills as 10 consecutive months?
- (c) *Who would be eligible for "summer articling"?*
18. Section 3 of By-law 12, made under the *Law Society Act*, provides that students who meet the academic requirements for admission to the Bar Admission Course include those who have graduated from an approved Canadian law program or those who have received the NCA Certificate of Qualification³. In practice, students may be admitted to the Bar Admission Course after all requirements for either an LL.B. or NCA Certificate have been attempted and the results are not yet known. The reason for this practice is that the Bar Admission Course begins before results or transcripts are available.
19. Students who subsequently fail law school or the NCA certification are not permitted to continue in the Bar Admission Course and any "credits" already obtained in either a teaching or articling phase are considered to be in jeopardy until successful completion of the LL.B. or NCA certificate. Upon subsequent successful completion of the LL.B. or NCA certificate, an abridgment may be granted to recognize time worked as articles.
20. A policy for articling credit for summer employment should examine the following questions:
- a. If articling credit is to be recognized for students who have completed their second year of law school, what of the student who fails one or more courses in second year? Is it sufficient only for the student to have attempted Year Two? What enforcement procedures would be required for implementation of this provision?
 - b. NCA students are not enrolled in a three year Canadian law school program and so do not fit this model. At what point will NCA students be permitted to qualify to receive articling credit for summer employment?
- (d) *If summer employment is to be recognized, should experience in intensive programs and legal clinics also be recognized?*

³Section 3 of By-law 12 imposes a ten year time frame after receipt of LL.B. or NCA Certificate. The provisions relating to the "ten year rule" need not be considered in this report.

21. Canadian law schools provide practical, intensive programs⁴, including, for example, hands-on experience in legal clinics. Some of these programs are credit courses; some are voluntary, non-credit programs. These provide learning in a variety of ways, which may include some combination of regular seminars, practical training, lectures, research papers and other assignments and simulated exercises. Supervision is generally provided by practising lawyers, professors or review counsel.
22. Some study of these programs and clinics is required to determine the extent to which experiences gained there might also qualify for articling recognition. Articling recognition of these other work experiences during law school would require the development of adequate controls to ensure that only valid experiences are recognised.
- (e) *Would the "summer articling" students be accepted into the Law Society as student members and accorded student-at-law status?*
23. An articling student is a student member of the Law Society. Currently, a summer student is not. This raises two issues for consideration in developing any policy for granting credit for summer experience:
 - a. Responsibility and discipline:
 - i. The public, profession and administration of justice are accorded some protection from incompetent and unethical articling students because, as student members of the Law Society, they are subject to the Rules of Professional Conduct and may be disciplined by the Law Society. Students who have not entered the Bar Admission Course are not members of the Law Society and are thus not subject to the same rules and potential discipline.
 - ii. The co-operative law programs at Queen's University address this difficulty by having the students agree in writing to be subject to the Law Society's jurisdiction during the placement terms, to the same extent as if they are articling students. They must also agree in writing to co-operate fully with Queen's University and the Law Society in the investigation or resolution of any problems arising during a placement, and acknowledge that the Law Society has the jurisdiction to deny credit for a whole or part of the co-operative placement based on all the relevant circumstances of any student misconduct.⁵
 - b. Rights of Appearance:
 - i. Currently articling students enjoy rights of appearance that are more extensive than those of an agent. For example, students may appear on the following civil matters: contested motions, consent motions, and matters before the Masters and Registrars of the Court of Ontario and before the Registrar of the Court of Appeal for Ontario, including references and assessments of costs; matters brought without notice, provided no substantial rights will be affected; simple contested interlocutory motions before the Superior Court of Justice and the Registrar of the Superior Court of Justice unless the result of such interlocutory motion could be to finally dispose of a party's substantive rights by determining the subject matter in dispute.

⁴In an intensive program, a student is assigned to a lawyer for a semester and instead of attending classes, the student works with the lawyer in a particular specialty, such as criminal law, and attends seminars.

⁵The Law Society of Newfoundland permits up to three months articling credit for summer employment. Section 38(1) of its *Law Society's Act* approves the admission of a student member of the Law Society who "is receiving or has received a degree in law....".

- ii. An issue for determination would be whether summer students would enjoy these same rights of appearance and the impact on the quality of their training if they do not.⁶

Although students in the Queen's co-operative program do not enjoy these rights, the highly specialized placement and the steady academic monitoring that these students are experiencing has been considered an adequate balance.

- 24. A mechanism to ensure adequate investigation and resolution of placement problems must be developed if students are to be given articling credit for summer employment.
- (f) *Could one of the unintended impacts of a policy permitting articling credit for summer employment be systemic discrimination toward students from groups under-represented in the legal profession?*
- 25. The majority of summer jobs are found in Toronto.⁷ Students from outside of Toronto, students wanting smaller firm practice, and students who qualify via the NCA (National Committee on Accreditation) route may find it more difficult to complete a portion of their articles through summer placement than students accepted by large firms for employment in Toronto.
- 26. Although there are no current statistics about the distribution of summer students from groups under-represented in the legal profession, there are ongoing concerns about a lack of representation from equity-seeking candidates. The issue of recognition of summer employment should be examined in this context.
- (g) *Would there be two major call periods, in Spring and in Fall?*
- 27. If credit were to be given for summer employment (up to four months) a student who received such credit would be required to serve an additional six months of articling after law school. If the student began articling immediately following the two teaching phases, he or she would complete the Bar Admission Course requirements at the end of February, and would expect to be called to the Bar sometime that Spring.
- 28. A student who did not article in the summer, would be required to complete ten months of articles, finishing the Bar Admission Course requirements at the end of June, and would expect to be called to the Bar the following September or October.
- 29. The possibility of separate calls may raise difficulties, including the possibility that the earlier call may come to be seen as the more valuable of the two, with the result that students associated with the later call might be less valued as candidates for future employment.
- 30. The impact of having two major calls approximately five months apart for students starting the Bar Admission Course should be examined as part of the assessment of the appropriateness of granting credit toward the articling requirement for summer employment.

⁶The review and possible revision of the Articling Students' Rights of Appearance would involve input from both judges and lawyers, and may take some time to develop.

⁷Currently, Toronto law firms account for more than 300 summer positions and this number will likely increase if articling credit is granted for summer employment.

- (h) *How would articling credit for summer employment impact the "50/50" Guideline, and the matching program? If they both disappear as a result of this change, what would be the likely impact upon students from groups under-represented in the legal profession?*
31. The purpose underlying the 50/50 Guideline is that firms hiring more than five articling students are able to reserve 50% of their articling positions for students who have not "summered" with them. Although this guideline has been in place since 1989, it appears to be observed more in the breach than in practice.
32. The intention of the guideline is to provide opportunities for students to obtain quality articling positions even though they do not summer with a large firm. The guideline was designed to prevent students from feeling pressured to secure their articling positions at too early a stage and to afford them the opportunity to have second year marks count more than first year marks. It provided a second chance for students to obtain quality articles with a large firm. Moreover, the major recruitment for articling students took place in the summer, a time that would not be disruptive to their studies.
33. The matching program is administered on behalf of the Law Society of Upper Canada by an independent contractor, National Matching Services Inc.⁸ Because firms are moving away from the 50/50 guideline and hiring enough summer students to eventually fill all the articling positions, the match for articling students may well be losing its relevance. Still, the match protects a student by providing the student some risk control in being able to rank several firms.
34. A result of the substantive/procedural phase of Bar Admission Course being offered in July and August and the articling term being reduced to ten months is that there is a newly created gap in the supply of articling students over the summer months. One way that firms are dealing with the absence of articling students in July and August is by hiring more summer students.
35. Second year summer recruitment takes place during the school year. When there were fewer positions offered and less importance placed on those positions, this timing was not a great problem. However, with summer jobs increasing in number and in importance as both a guarantee of an articling position and, potentially as fulfilling part of the articling requirement, recruitment during the school year may become frenetic. There is an argument that the process will interfere with law school studies and that students may be less inclined to participate in activities such as moot competitions that conflict with the recruitment period. There could also be a disproportionate impact upon students from groups under-represented in the legal profession.
- (i) *What impact would the development of a policy granting credit toward the articling requirement for summer employment have on the hiring practices of smaller firms?*
36. The articling experiences of students in smaller and regional firms are often very different from those of students recruited into the large firms. Smaller firms surveyed about the length of articles were less supportive of the reduction than the larger firms. As with so many other issues, it will be important to analyze the issue of articling credit for summer employment, keeping in mind regional and practice size issues.
- (j) *What impact might articling credit for summer employment have on students' choices of third year courses?*
37. Anecdotal evidence suggests that students who have had summer employment with a law firm following the second year of the LL.B. tend to reconsider and alter their electives in the final year of the LL.B. in accordance

⁸Using student and firm preference lists, the program administrator employs a computer algorithm to match articling students with firms.

with the areas of law they engaged in while working. There is an issue as to whether they feel they should make such changes to enhance their chances of obtaining an articling position.

38. It is appropriate to consider what impact, if any, the granting of articling credit for summer employment may have on faculties of law.

(k) *What Resource Implications Might Result from the Approval of Credit for Summer Employment?*

39. Bar Admission Course students are tracked and monitored from the time they submit a Bar Admission Course application until they receive their call to the Bar. All applications and other forms must be distributed on a timely basis. Once returned, these applications and forms must be checked manually, entered into the databases and filed. Frequent queries from students, principals and law firms must be answered. If articling credit is given for summer employment, there will be that many more students, likely 500 or more, to track and monitor, and many more applications and forms to check, enter and file. There will also be more queries and issues to sort out.

40. Potential resource implications from the granting of articling credit for summer employment include,

- a. additional staff in the Registrar's Office;
- b. additional staff within the Articling & Placement Office;
- c. if the students are under the supervision of the Law Society, they may have to be instructed, and perhaps examined, in the Rules of Professional Conduct prior to the start of their summer employment, resulting in additional resources needed to develop, administer, and process the instruction and/or examination;
- d. two major calls yearly may lead to significantly increased costs. Much would depend upon the distribution of the students between the call dates and decisions with respect to the number of calls convened outside Toronto; and
- e. to reduce the negative effects on NCA and other historically disadvantaged students, some supports might be recommended to assist them in obtaining positions. These supports would require additional resources.

41. The introduction of a policy for articling credit for summer employment must take into account resource implications.

IV. WHO MIGHT UNDERTAKE THE STUDY OF THIS ISSUE

42. The Strategic Planning Committee of the Law Society is currently considering a number of issues related to the direction the Law Society should take in the coming years.

43. One of the issues it is discussing is ways to enhance the continuum of legal education. In the course of its discussions it has raised, as a possibility, the creation of a Task Force to study this issue. Such a Task Force would potentially have members drawn from the Law Society, the law schools and continuing legal education providers.
44. The Task Force has not yet been established and it is not yet known what the scope of its terms of reference would be. Since articling is part of the legal education continuum it is likely that any full scale study would include an analysis of the articling process.
45. The two most likely bodies to study the issue of granting credit toward the articling requirement for summer employment are,
 - a. the Admissions Committee (through the creation of a working group); and
 - b. a Task Force on the Legal Education Continuum.
46. In assessing which group is the more appropriate choice to study the issue, the following considerations are relevant:
 - a. familiarity with the issues;
 - b. likely scope of the issues to be studied;
 - c. staff resources for undertaking the study; and
 - d. time line for assessing the issues.
47. A working group of the Admissions Committee may have greater familiarity with the issues, at least at the outset, than a Task Force with the membership described above. Similarly, a working group may be able to study the issue and reach conclusions sooner than would a Task Force with a much broader mandate.
48. A Task Force, however, may have more financial and staff resources assigned to it for studying all the issues than is currently available within the Department of Education. The Task Force may have greater ability to consider the issue in the larger context of the goals and direction of legal education. Any decisions made at the working group level might run counter to the overall direction taken by the Task Force.
49. A budget must be prepared for a working group to assess the necessary resources in view of the fact that the issue is more complex than appears at first glance.
50. The Task Force has not yet been approved. A working group of the Committee can be set up by the Committee, with Convocation's direction to do so.

V. POSSIBLE TIME LINE FOR DEVELOPING THE POLICY

51. Regardless of which group is assigned to study this issue there are a number of components that will be essential to any study undertaken. These include,
 - a. consideration of the potential impact of changes based on input from,
 - i. small, medium and large size firms;

- ii. firms in Toronto and in other regions of Ontario;
 - iii. students who have completed the articling requirement;
 - iv. students who have not yet graduated from law school; and
 - v. law schools;
- b. consideration of similar policies in place in other provincial Law Societies (particularly Newfoundland) and the views of the Federation of Law Societies of Canada; and
 - c. additional research that might include legislative and literature reviews, surveys, interviews, or focus groups.
52. There is no information available about when there might be a report on this issue if the matter is studied by a Task Force on the Continuum of Legal Education. The issue's place in the larger context of the continuum of legal education may render it important not to develop the policy outside of that context.
53. If a working group of the Admissions Committee is created to study this issue, adequate research, including the design, distribution, receipt and analysis of some surveys, will in all likelihood require between six and eight months, once a budget has been approved. Surveys could be ready for distribution in the New Year. Receipt and analysis of the surveys would occur through the spring. It is anticipated that a report might be possible to the Committee and Convocation in late spring.

Request to the Committee

54. Convocation is requested to consider this report and, if appropriate, approve one of the following recommendations:
- a) In the event Convocation establishes a Task Force on the Continuum of Legal Education forthwith, that the issue of articling credit for summer employment be included for consideration by the Task Force.
 - b) In the event such a Task Force is not established, forthwith that Convocation direct the Admissions Committee to establish a working group to consider the issue, subject to Convocation's consideration and approval of a budget for undertaking a study of the issue, to be provided to Convocation before any work is begun by the working group.

APPENDIX 2

Proposed
Bar Admission Course
Law Society of Upper Canada

Fees Schedule for 2001
Student Members and Transfer Candidates

7% GST will be applied to these fees

Application for Admission (Non-refundable)	\$125.00
Application for Admission - Transfer Member (Non-refundable)	\$125.00
Application for Admission Late Filing Fee	\$50.00
Bar Admission Course - Skills Phase Tuition Fee	\$2,200.00
Bar Admission Course - Substantive/Procedural Phase Tuition Fee	\$2,200.00
Bar Admission Course - Phase Three Tuition Fee	\$3,275.00
Bar Admission Course - Individual Course Fees	
Barrister Module	\$900.00
Solicitor Module	\$900.00
Professional Responsibility and Practice Management Module	\$500.00
Substantive/Procedural Courses (per course) including Transfer Candidates	\$500.00
Late Filing Fee (Tuition payments, Documentation)	\$100.00
Transfer Examination Fee (Includes materials for six courses)	\$2,500.00
Application for Abridgment	\$125.00
Application for National or International Articles	\$125.00
Call to the Bar Fee	\$210.00
Call to the Bar Fee - Occasional Appearances (reciprocal charge by applicant's provincial or territorial governing body to an Ontario member), or if undisclosed, to the maximum	\$500.00

APPENDIX 3

ARTICLING REPORT, 2000¹

I PURPOSE OF THIS REPORT

1. The purpose of this report is to provide a snapshot of the Articling program and its administration as of October 15, 2000.² This report first provides some notes about the background and history of articling in Ontario. Then it describes the current program and the processes used to monitor the program. Current areas of improvement in the Articling Office's provision of a high quality articling experience are raised at the end of each section under 'Issues'.

II BACKGROUND

2. The objective of the Bar Admission Course (BAC) is to provide lawyers-in-training with the skills, knowledge and sense of professional responsibility required for the initial years of practice, and to assure not only effective service of clients' interests, but a steady, constructive growth of professional character and lawyering ability. The Bar Admission Course consists of a teaching term, with skills assessments and examinations, and an articling term of ten months which includes two weeks vacation.
3. The articling portion of the Bar Admission Course follows a teaching phase that stresses skills and professional responsibility. In fact, a significant feature of both the new and current models of the Bar Admission Course is the importance of the teaching skills phase: both principals and articling students have benefited from the practical skills taught prior to commencing articles.
4. The articling portion is intended to train the student to apply, in a practical way, the intellectual knowledge acquired at law school, to acquire practical skills, and to develop a sense of "professionalism" which encompasses the attitudes and values of the legal profession. It builds on the skills and ethical base established in the teaching phase of the Bar Admission Course and provides the most practical portion of the student's training to become qualified as a lawyer.
5. Articling serves varying functions for different groups within the legal community. From the governing body's perspective, articling must ensure that a lawyer "...so licensed has had the opportunity to obtain the

¹Tab references in this report refer to forms and other documents contained in Articling Documents Year 2000.

²This report examines the articling program prior to the reduction of articles from twelve months (which includes four weeks vacation) to ten months (which includes two weeks vacation). All references are to the twelve month program.

training and experience necessary to meet the requisite standard of professional competence.”³ From the students’ perspective, articling “...is an opportunity to test both the labour market and their skills while gaining experience in the practice of law”.⁴ From the firm’s perspective, articling is an “...opportunity to assess students as potential associates of the firm, while at the same time fulfilling a shared professional responsibility to ensure that new lawyers have been exposed to some real practical experience before their call.”⁵

55. History of Articling in Ontario: Pre-1990 Articling Reform

- a. Articling has been a feature of legal training in Ontario since the Law Society’s earliest days. In fact, “[u]ntil 1819 lawyers were trained by apprenticeship only: five years for barristers and three years for solicitors”.⁶
- b. Prior to the Articling Reform of 1990, a student would submit an application for admission to the Bar Admission Course which would identify the student’s principal. The principal would then be sent a letter signed by the chair of the Legal Education Committee which set out the role and responsibility of the principal and thanked the lawyer. Articles of Clerkship were executed at the commencement of articles and the Principal’s Certificate of Service under Articles and the Student’s Affidavit of Service under Articles were executed at the end of articles. Students were required to complete a Professional Responsibility exam during their articles.
- c. There were no education plans or evaluations. By monitoring “the qualifications of students, the qualifications of principals, mediation mechanisms, review by the Admissions Committee, surveys, the discipline process, and court action”⁷, it was felt that articles as a whole were monitored.

7. History of Articling in Ontario: 1990 Articling Reform

- a. *The Proposals for Articling Reform*, (the *Proposals*) Adopted by Convocation, October, 1990 brought much needed structure to the articling process. The Executive Summary for the *Proposals*⁸ set out the following new procedures for the articling process:

³Graham W.S. Scott, Q.C., “The Articling Component in Legal Education”, Legal Education in Canada: report and Background Papers of a National Conference on Legal Education, Winnipeg, Manitoba, 1985, published by Federation of Law Societies of Canada (1987), pg. 407.

⁴Ibid, pg. 408.

⁵Ibid, pg. 409.

⁶J. Burton, “Articling in Ontario: History and Recommendations for Change to 1985”, Symposium on Articling 1988, Bar Admission Advisory Committee, Law Society of Upper Canada, (1988), pg. 37.

⁷K. Howard, “The Monitoring of Articles”, Symposium on Articling 1988, Bar Admission Advisory Committee, Law Society of Upper Canada, (1988), pg. 143.

⁸*Proposals for Articling Reform 1990*, up-dated June 1994, pg. i.

...To ensure the educational quality of articles, the Articling Director will: approve prospective principals based upon prescribed criteria; restrict principals to a maximum of two articling students; and delineate the skills areas which should be learned as part of the articling process.

Principals must submit Education Plans to the Articling Director for approval. The effectiveness of these plans will be formally evaluated by both principal and student at the mid-term and conclusion of the articling term. The Articling Director may intervene to ensure compliance with the Education Plan, and when any other serious problem arises during articling.

Educational materials to assist principals in the provision of effective articles will be developed...

- b. A model similar to that proposed in the *Proposals* is currently being followed; however, some changes (as will be pointed out where applicable in this report) to the specific processes mentioned have been made since 1990.

III ARTICLING PROGRAM, YEAR 2000

- 8. This section of the report is organized as follows:

- a. Principals (Approval, Renewal, Monitoring),
- b. Education Plans,
- c. Evaluations,
- d. Educational Materials,
- e. Non-traditional Articles,
- f. Professional Responsibility Exam, and
- g. Forms.

Each section describes the topic and sets out issues relating to each of the topics.

- a. PRINCIPALS (APPROVAL, RENEWAL, MONITORING)

- 9. Approval of Principals:

- a. Articling students must be under the supervision of a member of the Law Society of Upper Canada (the principal) who has applied to the Law Society to act as an articling principal and has subsequently been approved.⁹

⁹An exception is made for supervising lawyers of students engaged in national or international articles. In these situations, a supervising lawyer must provide evidence (Certificate of Good Standing) of good standing by his/her governing body.

- b. The application package (Tab 9), consisting of an application form and memorandum outlining the principal's role and responsibilities, is available on the Articling & Placement's website¹⁰ for viewing and/or downloading. Otherwise, a package can be picked up by or faxed to an interested member.
- c. Principals are informed of the following in the application package¹¹:
- i. *Eligibility Criteria:*
- Experience: A member must have been actively engaged in the practice of law for three of the five years immediately preceding the commencement of the relevant articling period.
 - Competency & Ethical Standards: All relevant information, including records maintained by the Law Society in connection with claims, professional standards, compensation fund and discipline, may be considered. Prospective principals with negative history in these areas may be denied the privilege of acting as an articling principal for a period of time.
- ii. *Application Process:*
- In order to be approved, a principal must:
- apply in advance of the commencement of the student's articles
 - complete an application form
 - submit an education plan which:
 - sets out experience to be provided to the articling student in thirteen skills areas, outlined below in the "Skills Development" section.
 - may be based on sample plans available from the Articling & Placement Office, and
 - where the principal's firm has previously submitted an approved education plan, there is no need to submit another plan unless there have been changes to that plan
 - agree to supervise no more than two articling students at any one time.¹²
- iii. *Continuing responsibilities:*
- Teaching: Typically, teaching in the articling context is teaching on the go, by precept and example, with interjected explanations and informal after-the-event discussions and, most importantly, by regular supervision of a student's work with appropriate constructive criticism and comment.

¹⁰The package may be downloaded at www.lsuc.on.ca/services/phase2/Articling.shtml

¹¹ The information about application process and continuing responsibilities has been provided in a written memorandum to all principal applicants as of September, 2000. Prior to that date, communication of these matters was haphazard.

¹²This information was not included in the application package prior to September 2000, resulting in some situations of principals supervising more than 2 students.

- Documents requiring Principal's involvement:
 - Articles of Clerkship, signed by both principal and articling student, setting out the term of the contract. This term is usually 12 months; however, where there is a shorter term (which must be at least 3 months), please attach a letter of explanation. Indefinite terms are not acceptable. Where the student has not completed the first teaching phase of the Bar Admission Course, an acknowledgment of this situation by the principal should also be attached.
 - Mid-term evaluations, completed by each of principal and student, assessing the quality of the articling experience against the objectives set out in the education plan.
 - Examination of Professional Responsibility, mailed to student and principal in early spring with The Certificate of Examination in Professional Responsibility to be signed by principal or his/her designate following review and discussion of the student's written examination.
 - Principal's Certificate of Service under Articles signed by the principal at the end of the articling term confirming completion of the student's articling term, including vacation time.
- d. The Articling & Placement Office processes applications as follows:
- i. Each week, a member of the Articling & Placement Office e-mails a list of new applicants, by name and member number, to the Administrative Compliance Processes Department of the Law Society. This department checks each member's history and status with regards to the following areas:
 - Compensation Fund
 - Discipline (sitsheet, discipline tag, order restrictions, current conduct, past discipline)
 - Forms
 - Investigations
 - Professional Standards/Practice Review
 - Spot Audit
 - Requalification
 - Open complaints
 - Number of closed complaints
 - Trustee activity
 - ii. LPIC checks are not done, nor are LPIC waivers requested of the applicants.
 - iii. Reports are sent to the Articling & Placement Office for each applicant. If issues are raised by any of the above checks, the names of the Law Society's representatives who dealt with or are currently dealing with the situation are provided. The Articling & Placement Office then contacts that person for an opinion as to whether the issue raised is such that the individual in question would not be suitable to act as an articling principal.
 - iv. Where the applicant is considered unworthy of being approved as an articling principal and is already supervising a student, the matter is brought to the attention of the Admissions Committee for a decision.

- e. From Jan. 1 to Oct. 6, 2000, 363 new principals were approved. Since the beginning of August, 2000, the system of principal approvals as described above has been in place¹³. In the two months following the new process, the Articling & Placement Office submitted approximately 130 applications/renewals for checks. Thirty-five of those applications returned with a compliance issue that required further evaluation. In a majority of these cases the issue concerned a Spot Audit of the applicant's firm. The Spot Audit staff advised whether or not the audits were directed or random. When the audits were random, as in most cases, the principal was approved. Five applications require additional response. One principal's situation will be presented at the November Admissions Committee meeting.
 - f. Provided that no issues are raised by the above checks that would affect a lawyer's ability or suitability to supervise an articling experience, an applicant is approved as a principal. The applicant's date of approval and contact information are entered in the Bar Ad database (principals' table), at which time the applicant is mailed a letter of confirmation and a current copy of the "Articling Handbook for Principals and Students"¹⁴.
 - g. A difference to the *Proposals* is that the *Proposals* envisioned an Articling Sub-Committee of the Admissions Committee (then the Legal Education Committee) that would approve principals in the first instance, based upon the recommendation of the Articling Director. This Articling Sub-Committee is not part of the current articling model.
 - h. The Articling & Placement Office monitors Articles of Clerkship to ensure all supervising lawyers are approved principals: Each evening, after office hours, Information Services runs a program that compares supervising lawyers as per the Articles of Clerkship with the Principals approved as per the Principals Table of the Bar Admission Course database. Articling & Placement staff follow-up to ensure that lawyers acting as principals who are not approved properly apply for approval.
10. Renewal of Principals: A lawyer must be approved each year to act as a principal. In 1999, approximately 2000 lawyers were automatically renewed without submitting applications. In Year 2000, in an effort to streamline the process, members were asked to submit a renewal application. As a result, approximately 1300 renewals were processed, reducing compliance checks by approximately 700. Renewals are submitted for the same compliance checks as new applicants. Renewed principals also receive a letter of approval.
11. Monitoring of principals during the Articling Year: There are no current checks being made through-out the articling year. It is hoped that the Law Society's information systems will eventually be able to automatically notify the Articling & Placement Office of concerns affecting on-going principals.
12. Issues
- a. Currently, principals must apply for approval every year. Some consideration is being given to a two year period of approval, with the renewals being staggered over the two year period.

¹³Prior to mid-July 2000, non-lawyer members of the Articling & Placement Office would directly review database information about complaints, discipline, and audit and then refer "problems" to the appropriate Law Society department for further clarification.

¹⁴Prior to July 2000, the Articling Handbook was not sent to newly approved principals until March of the year following approval when the Handbook, along with the Professional Responsibility Exam, were sent to each principal. This delay in receiving the handbook contributed to problems with principals who did not act in accordance with the roles and responsibilities of a principal, as set out in the Handbook. Accordingly, all newly approved principals are now sent the Articling Handbook.

- b. Should the Articling Office automatically submit previously approved principals for renewal and the requisite compliance checks? Or should the principal be required to submit a renewal application, which in Year 2000 reduced the necessary compliance checks by approximately 600, but increased other resources to process the mailing and receipt of the forms?
- c. When there is a “problem” principal, with or without an articling student already being supervised, should the matter go directly to the Admissions Committee? Or, should there be a right of written appeal to the Committee from the decision of the Head of Articling & Placement?

b. EDUCATION PLANS

13. Process:

- a. Since the Articling Reform of 1990 was implemented, all firms taking on an articling student must submit an education plan that describes the anticipated articling experience to be provided to that student. Generally only one education plan per firm is filed with the Articling & Placement Office¹⁵. There is no expiration date for an education plan; and, in fact, firms are advised that their plans may remain in effect until the firm wishes to make a change, at which time the firm should notify the Articling & Placement Office to have the change approved. Although all other documents associated with the articling relationship involve the student and his/her principal, an education plan is filed by and maintained according to firm.
- b. The *Proposals* state the intention “that [adhering to an education plan] will improve the quality of supervision and the quality of interaction between the articling student and the principal ... The Education Plan must meet the objective of demonstrating a sound educational experience. Its purpose is both to promote the quality of articling and to enhance awareness of articling as an educational experience”¹⁶.
- c. Sample education plans (Tab 2) are provided by the Articling & Placement Office. Although these plans were “meant as guidelines only, to assist principals in addressing their minds as to how an Education Plan can be organized”¹⁷, in fact most firms reproduce the samples, making only minor modifications. Education plans can be either in a narrative or checklist format.
- d. An education plan should address the following:
 - i. anticipated experience in terms of the thirteen lawyering skills¹⁸,
 - ii. amount of secretarial support expected, and
 - iii. for large firms: information about rotations, educational seminars, guidance and advice.

¹⁵ A firm might file two education plans where one plan covers the usual rotations of most of the students and a second plan has been tailored to those students who will be specializing in a particular area.

¹⁶ Commentary to Section 6.1 of the *Proposals*.

¹⁷ Ibid.

¹⁸ The thirteen lawyering skills were identified in the *Proposals* as professional responsibility, interviewing, advising, fact investigation, legal research, problem analysis, planning & conduct of a matter, file & practice management, office systems, drafting, writing, negotiation, and advocacy.

- e. When the Articling & Placement office receives an education plan, an administrator reviews the plan, comparing it to the sample plans and reviewing it for the thirteen lawyering skills. A plan does not have to include aspects of every skill. For example, a corporate education plan which provides no advocacy may well be approvable. However, all plans must address professional responsibility and practice management aspects. Where a plan is found to be deficient because it has not included any professional responsibility and practice management aspects or for another reason, the principal is contacted and the problem explained. In these situations, no resistance has been noted in having the principals amend their education plans.
 - f. Like the Articles of Clerkship, the educational plan is to be filed with the Articling & Placement Office within two weeks of the commencement of articles.
14. Issues
- a. Ensuring that each principal files a firm education plan:
Since September 2000, the Articling & Placement Office has maintained a spreadsheet to ensure that all principals who are approved also file education plans with the Office.¹⁹ However, a current review of principal and firm paper files indicates that some principals/firms have not filed education plans. These firms are being contacted. The new Application for Principal Approval, unlike the previous one, sets out the requirement for an education plan as part of the application process.
 - b. Ensuring that each student receives an education plan at the commencement of her/his articling term:

There are currently no controls in place to ensure that each student receives an education plan at the commencement of her/his articling term²⁰. Anecdotal evidence indicates that several students article without having the benefit of knowing what their education plan, if there is one, has provided.²¹ The Head of Articling & Placement, when visiting law schools, has urged Law students to request and review their educational plans. It may be advisable to either return to the practice of having a form filed with the department acknowledging the education plan or to add an appropriate clause in the Articles of Clerkship.
 - c. Ensuring that the education plan is specific to the situation and addresses the educational objectives:

There has been little follow-up in examining these concerns. The thirteen skills categories have not changed since 1990. It may be reasonable to change the itemized skills to blend more seamlessly with the skills taught in the Skills Phase (formerly Phase One) of the Bar Admission Course.
 - d. Renewal of Education Plans:

¹⁹Because of incompatibilities between the Law Society's various databases and the fields of information provided in each database, there has been no adequate means of regularly checking the educational plan database against the approved principals database to ensure that each approved principal has an approved education plan. Support from Information Services has been requested in addressing these deficiencies; it is hoped that after the Oracle system is operating smoothly, necessary changes can be made to ensure better linking and searching.

²⁰Until 1998, both the student and the principal signed a form that was filed in the Articling & Placement Office attesting to the education plan having been received and accepted by both parties.

²¹ A survey being sent to Phase Three students this Fall will try to compile numerical data about students and their education plans.

Currently an Education Plan may continue indefinitely without being reviewed or revised. Accordingly, either the plan might become irrelevant or the educational experience set out and followed might not be reviewed nor improved.

c. EVALUATIONS

15. Process:

- a. Mid-term evaluations (Tab 4) must be completed at approximately the mid-point of the articling term by each of the student and the principal. These evaluations are similar and assess how closely the experience provided to date has matched up to what was outlined in the education plan. Also, there are questions about time spent on routine tasks and secretarial support provided. Only the students, not the principals, are asked to provide an overall rating of the articling experience in terms of unsatisfactory, satisfactory, good, or very good/excellent. This overall rating is to be made in the context of how closely the experience matches that which was promised in the education plan.
- b. The format of the evaluations sets out specific items to be considered for each of thirteen skill areas outlined in the education plan.
- c. It has been consistent over the last several years that 90% of students rate their articling experience as good, or very good/excellent on their mid-term evaluations. All comments are reviewed and significant ones are recorded in a report. Comments from the students who rated their articling experience as either unsatisfactory or satisfactory are summarised in a spreadsheet indicating the firm where they are placed, and the name of their articling principal.
- d. Students who rate their experience as being unsatisfactory are contacted by the Articling & Placement Office to further review the situation and to work out strategies for improving the experience. In some cases, intervention with the principal is required. This intervention is of a positive rather than negative nature. These students are then monitored through follow-up conversations, and a mid-evaluation progress form.
- e. Students are told at Law School talks and during Phase One that should a problem arise during their Articling term, they are to contact the Articling & Placement office immediately for support and advice. Several situations occur each year which require some type of intervention, involving mediation rather than confrontation. Approximately ten such situations have arisen in Year 2000. Sometimes, the resolution involves termination of a particular articling placement.²²
- f. At the end of the articling term, only the student completes a final evaluation. This evaluation is identical to the student's mid-term evaluation and compares the experience provided to that in the education plan. The statistics support the same distribution (90% good or very good/excellent) as for mid-term evaluations.

²²Termination guidelines are provided on p.21 of the Articling Handbook. The termination process involves a full and candid discussion between principal and student, a letter to the Articling & Placement Office explaining the situation and seeking assistance in resolving the issues, and where the matter is not resolved providing one month notice during which the usual articling relationship is maintained.

- g. Where a significant problem is indicated, such as when a firm or principal receives several poor evaluations, that principal/firm is contacted. It is possible that the situation could affect the future approval of a principal.
16. Issues:
- a. Candidness of the evaluations:
 - i. The *Proposals*²³ noted that “students who wish to be re-hired by the firm in which they article may be less than candid on the evaluation form. The Sub-Committee has laboured with this problem and finds no satisfactory answer. It would not be possible to do the evaluation on an anonymous basis, except perhaps in large firms, and it is felt that access to the evaluation forms is restricted to the Law Society staff, then students will more likely accurately reflect on the evaluation forms the nature of their articling experience.”
 - ii. Situations giving rise to less than candid student evaluations, in addition to the “rehire” situation described above, include students who are hoping for a reference and students who are afraid of losing articling credit (because of an inferior placement).
 - iii. A survey to be distributed to all Phase Three students in November 2000 includes some questions about the use of the education plan and the value of the evaluation experience.
 - b. Value of the evaluations:
 - i. Is the current detailed evaluation an adequate assessment of the articling experience? Should the student and principal evaluate the experience on the same basis? What should be the purposes of each of the evaluations? Should the format be changed to provide a more individualistic or general review of the skills? Should the principal be asked to evaluate the student’s performance?
 - ii. One suggestion is to simplify the evaluation so that all the information given can be reviewed by the Articling and Placement Office, recorded, and analysed statistically. Currently much of the information provided by the lengthy evaluation is not even reviewed.
 - c. Timing of the evaluations:
 - i. Currently the mid-term evaluations are required to be submitted by Feb.1; however, often the forms are not received on a timely basis and although a late penalty is authorized, in practice this penalty has never been applied for late-filing of mid-term evaluations. These forms also take approximately two months to fully process. As a result, there has consistently been difficulty in contacting students with problem situations on a timely basis. Is there another process that might be more effective in recognizing and sorting out “problem situations” more quickly?

²³*Proposals*, Commentary to Recommendation 8.2.

d. EDUCATIONAL MATERIALS

17. Process:

- a. The *Proposals*²⁴ stated that principals should receive “adequate materials, including videotapes,... that deal with techniques of effective supervision and components of an effective articling experience, and if principals undertake to review these materials and certify that they have read and understood them, this will meet the educational criteria for principals.” No videotapes nor acknowledgment of having read any training materials has been implemented²⁵.
- b. Principals are supplied with a hard copy of the Articling Handbook (Tab 1), upon approval and also in the Spring.²⁶ Students are given it during Phase One. The Articling Handbook is also available for downloading on the Law Society’s web site.²⁷ It appears to staff of the Articling & Placement Office that frequently neither students nor principals read the Articling Handbook.
- c. The Articling Handbook, updated yearly, describes the responsibilities of principals and students. It provides information about the articling term, required documentation, articulated students’ right to appear before courts and tribunals, appointment of articulated students as commissioners for taking affidavits, termination of articles, summaries of the teaching phases, possible assignment checklists, sample education plan, and report from the Joint Sub-Committee on Sexual Harassment of Articling Students.

18. Issues:

- a. Training:
 - i. Newly approved principals receive little training on how to provide quality articles. In the years since the *Proposals* were adopted by Convocation, there has been much concern about the scarcity of jobs. As a result, more effort and resources have been put forth to secure placements than to train newly approved principals.
 - ii. Where a newly approved principal is reported by the student to be providing a problematic placement, the Head of Articling & Placement will intervene and will engage in one-to-one training of the principal.²⁸

²⁴Commentary to Recommendation 9.1.

²⁵However, since September 2000, an acknowledgment of having read the Memorandum “Application for Approval as an Articling Principal” (Tab 9) has been required.

²⁶See footnote 12.

²⁷Information, forms and memoranda may be downloaded at www.lsuc.on.ca/services/phase2/Articling.shtml.

²⁸This situation has occurred once to date in Year 2000. There appeared to be a dramatic improvement in the quality of the student’s articles shortly after the session. The situation is being monitored.

- iii. Ten years ago, the now readily accessible technology to provide training materials on a web platform was not available. With over four hundred new principals being approved each year, the sending of a video to each principal has not been feasible. However, the provision of some training materials using a web platform might be feasible today.
- b. The Articling Handbook:
 - i. The purposes, content, and distribution of the Articling Handbook should be re-examined to provide a more relevant resource to both principals and students. There should perhaps be several publications created, such as one for principals, one for articling students, one for general information about the articling program. An example of an item that might be considered as general information is the current section²⁹ on withdrawal of articling commitments that is only of value to readers prior to commencing articles (i.e. prior to the receipt of the Articling Handbook). Also, the section on non-traditional articles³⁰ would be more useful read prior to commencing articles.
 - ii. As mentioned in the previous section of this Report, web-base technology offers a new approach to the distribution of information. Currently the Articling & Placement Office has approximately forty items of information and forms posted in English on the Law Society's web site and is actively working on posting these items in French. Many of these items reproduce material currently found in the Articling Handbook.
- e. NON-TRADITIONAL ARTICLES
- 19. Description:
 - a. The term "Non-traditional articles" encompasses abridgments, rescheduled articles (eg. articling prior to the first teaching phase or splitting articles on either side of a teaching phase), national, international, joint, part-time, or assigned articles.
 - b. The approval process varies somewhat for each of these non-traditional articles but the common themes are that there should be written documentation, including an approved education plan and the supervising lawyer's acknowledgement of the arrangement prior to commencement of articles, Articling & Placement Office approval of the supervising lawyer, and documentation signifying completion of the arrangement. Where applicable, certificates of good standing are required.
 - c. Requests are monitored by use of a spreadsheet which tracks the receipt of significant documentation.³¹ In the first six months of 2000, staff processed and/or approved the following:

²⁹Tab 1, pages 21 - 22.

³⁰idem, pages 7, 12 - 14

³¹Tracking spreadsheet has been in effect since August 2000. Prior to that time, tracking was done informally.

- Abridgment applications 31 (1999 - 45)
- Modifications or reschedulings of BAC program 54 (1999 - 26)³²
- Other non-traditional articles 18 (1999 - 20)

20. Issues:

Issues relating to abridgments, national, and international articles are currently reviewed in detail in a separate report.³³ Currently, the forms relating to non-traditional articles are part of a form-streamlining process that was begun Spring 2000.³⁴

f. PROFESSIONAL RESPONSIBILITY EXAM

21. Description:

A professional responsibility exam is mailed to each student in the spring of each year, with the answers being mailed directly to the principals. This "take-home" exam (Tab 8) consists of approximately ten questions which relate to ethical responsibilities of lawyers and avoidance of professional liability. Answers are to be hand-written in the book and must be discussed with the principal (or designate) who then signs a Certificate which attests to the process followed. The questions generally require the student to refer to the Rules of Professional Conduct and the Commentaries and to identify and discuss the professional responsibility issues raised by the facts. The entire exam booklet, with attached certificate, is then submitted to the Law Society. Anecdotal feed-back from students is positive.

22. Issues:

- a. When a student articling in the normal order, after the first teaching phase, the student has had a course on professional responsibility prior to commencing articles. However, those students who article out-of-phase and prior to taking the teaching phase have not had the same exposure to the Rules of Professional Conduct. Requiring some level of training or testing of the Rules of Professional Conduct for those articling out of phase, prior to commencing articles, is currently being considered.
- b. Some students who do not otherwise qualify for accommodation object to the exam being hand-written. Students are asked to hand-write the exam in order to deter cheating, and to keep the exam and certificate together in a convenient way.

³² Increase is due to the transition to the new approved Bar Admissions Course which will permit the two teaching phases to be taken prior to the articling term. As a result of this decision, more applications are being received by students without current articling placements who are requesting to be accorded the same opportunity.

³³ Report is to be included in the November 2000 Admissions Committee Agenda.

³⁴ This review is being done in conjunction with the Administrative Compliance Processes Department of the Law Society as part of a broader streamlining review of forms.

g. FORMS

23. Description:

- a. In addition to the forms mentioned earlier in this report, three significant articling forms are:
 - Articles of Clerkship (Tab 3)
 - Principal's Certificate of Service under Articles (Tab 5)
 - Student's Affidavit of Service under Articles (Tab 6)
- b. The Articles of Clerkship is the contract setting out the responsibilities of the principal and articling student and it must be completed and filed by the student within two weeks of commencing articles. Although there is a reference to fulfilling the requirements of the Education Plan in the Articles of Clerkship form, there is no positive onus on either party for having reviewed and accepted the Education Plan.
- c. The end-of-term documents include the Principal's Certificate of Service under Articles and the Student's Affidavit of Service under Articles which are required to be completed and filed at the completion of the articling period. One of the features of the Principal's Certificate of Service under Articles form is a statement in which the principal attests, "I believe that is a fit and proper person to be called to the Bar and admitted to practice as a Solicitor of her Majesty's Courts of Ontario". The limitations on permitting a student to work outside of the articling arrangement is also addressed in the end-of-term documents. These forms have changed very little since they were adopted in 1942. When a principal feels that (s)he cannot attest to such a statement, a letter is accepted setting out all other aspects required on the form. The matter is then sent to the Investigations Department of the Law Society to determine whether a good character investigation is warranted.

24. Issues:

- a. Although Articles of Clerkship are required to be filed within two weeks of commencement of articles in order not to jeopardize the recognition of any articling portion and to avoid a late-filing penalty, in many cases it is filed later (often by months). Currently Bar Admission Course representatives do not have the authority to waive late filing fees on Articles of Clerkship, although this matter is under review. The Head of Articling & Placement has the authority to recognize articles retroactively and such recognition is usually granted, at least to the more recent of the date when the student registered in the Bar Admission Course or the date the student began working for the lawyer.
- b. Currently the Principal's Certificate of Service under Articles and the Student's Affidavit of Service under Articles cannot be signed until the end of the articling period. In those frequent cases where students take vacation at the end of the articling term, the student must return after the vacation to have these forms signed and executed. Consideration is being made to redesign the forms so that they may be signed at the end of the "active" articling period.

- c. The “fit and proper” clause of the Principal’s Certificate of Service under Articles is currently under review. Advisory Services and the Articling & Placement Office are examining various options that include providing guidelines to understanding the phrase or revision to the wording.
- d. All of these forms are being reviewed in conjunction with the ongoing review and streamlining of forms by the Administrative Compliance Processes Department of the Law Society and by the Articling & Placement Office.

IV CONCLUSION

25. As this snapshot of the articling program indicates, all aspects of the articling program have been reviewed in the last twelve months. The Articling & Placement Office is committed to ensuring that each of the approximately eleven hundred students articling at any given time enjoy a quality articling experience. This report has been written during a period of transition and change of the articling program. Over the last several months, every aspect of the articling program has been examined, issues have been identified, new processes are being developed, and policies are being referred to the Admissions Committee for decision-making. All of the issues identified in this report are currently being studied. Those that involve policy consideration will be brought forward to the Admissions Committee. It is an appropriate time to reflect on the significant reforms introduced in the *Proposals* and in the spirit of the *Proposals*, to review the entire current implementation of the articling program.

Report of the Professional Regulation Committee

Professional Regulation Committee
November 9, 2000

Report to Convocation

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on November 9, 2000. In attendance were:

Gavin MacKenzie(Chair)

Larry Banack (Vice-Chairs)
Heather Ross

Andrew Coffey
Gary Gottlieb
Laura Legge
Ross Murray
Robert Topp

Staff: Lesley Cameron, Scott Kerr, Felecia Smith, Elliot Spears, Richard Tinsley, Jim Varro and Jim Yakimovich.
2. The Committee considered one item in this report at its October 5, 2000 meeting. In attendance at that meeting were:

Gavin MacKenzie(Chair)

Larry Banack (Vice-Chairs)
Heather Ross

Carole Curtis
Patrick Furlong
Gary Gottlieb
Ross Murray
Robert Topp

Staff: Janet Brooks, Margot Devlin, Charles Smith, Elliot Spears, Richard Tinsley, Jim Varro and Jim Yakimovich.

3. This report contains a policy report on amendments to By-Law 21 respecting the role of the Proceedings Authorization Committee in disclosure of information to law enforcement authorities (October 5 meeting), and an information report on file and caseload management in the resolution and compliance, investigations and discipline departments.

I. POLICY

AMENDMENTS TO BY-LAW 21 RESPECTING THE FUNCTION OF THE PROCEEDINGS AUTHORIZATION COMMITTEE IN DISCLOSURE OF INFORMATION TO LAW ENFORCEMENT AUTHORITIES (October 5, 2000 Meeting)

A. INTRODUCTION AND BACKGROUND

4. At the request of the chair of the Committee, following discussion at a meeting of the Proceedings Authorization Committee ("PAC"), the Committee considered whether PAC should be the entity to review and determine requests for Society disclosure of information to law enforcement authorities.

5. As a result of the February 1999 amendments, the *Law Society Act* ("the Act") in section 49.13¹ provides for a
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¹The provisions of sections 49.12 and 49.13 read as follows:

Confidentiality

- 49.12 (1) A benchler, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

Exceptions

- (2) Subsection (1) does not prohibit,
- (a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;
 - (b) disclosure required in connection with a proceeding under this Act;
 - (c) disclosure of information that is a matter of public record;
 - (d) disclosure by a person to his or her counsel; or
 - (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure.

Testimony

- (3) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any document with respect to information that the person is prohibited from disclosing under subsection (1).

Disclosure to public authorities

- 49.13 (1) The Society may apply to the Ontario Court (General Division) for an order authorizing the disclosure to a public authority of any information that a benchler, officer, employee, agent or representative of the Society would otherwise be prohibited from disclosing under section 49.12.

Restrictions

- (2) The court shall not make an order under this section if the information sought to be disclosed came to the knowledge of the Society as a result of,
- (a) the making of an oral or written statement by a person in the course of the audit, investigation, review, search, seizure or proceeding that may tend to criminate the person or establish the person's liability to civil proceedings;
 - (b) the making of an oral or written statement disclosing matters that the court determines to be subject to solicitor-client privilege; or
 - (c) the examination of a document that the court determines to be subject to solicitor-client privilege.

scheme for disclosure of information to such authorities, described as a “public authority”. In brief, the Society must apply to the court for an order for disclosure, and the court may make an order, subject to certain restrictions defined in subsection 49.13(2).

6. Prior to February 1999, the Act was silent on disclosure of information to public authorities. The practice, however, was to refer matters of this nature to the then Discipline Authorization Committee, which would determine the matter pursuant to a policy approved by Convocation in 1993 (please see Appendix 1). The 1993 policy affirmed a policy that had previously been adopted by Convocation in 1989.
7. The PAC by-law (By-Law 21, attached at Appendix 2) does not specifically provide for this function for the PAC. The question for the Committee was, given the process provided in the Act, whether PAC or some other entity or individual was the appropriate body to which requests for disclosure, emanating either from within or outside of the Law Society, should be referred for determination of whether the Society should bring an application to the court.

B. THE COMMITTEE'S VIEWS

8. The Committee concluded in its discussions on this issue in September and October that the PAC would be the appropriate entity for determining whether an application should be made to the courts for disclosure of information to a public authority, for the following reasons:
 - the PAC, since the amendments to the Act, has assumed responsibility for considering these matters and has gained some familiarity with the issues that arise;
 - the PAC is the successor to the Discipline Authorization Committee, to which was entrusted review of these matters; using that committee for this review process worked well and achieved what the policy described above was designed to achieve;
 - having a committee of benchers is preferable to having one bencher (for example the chair of the PAC) or the Secretary, make decisions in this respect.

Amendments to By-Law 21

9. As noted above, By-Law 21 - Proceedings Authorization Committee, does not provide for the function of determining whether an application should be made to the court for disclosure of information to public authorities. Accordingly, if the Committee's proposal is accepted by Convocation, amendments will be required to By-Law 21 to establish the decision making authority of the PAC for this purpose, and to set out a process for determining in what circumstances an application should be made to the court.

Documents and other things

- (3) An order under this section that authorizes the disclosure of information may also authorize the delivery of documents or other things that are in the Society's possession and that relate to the information.

No appeal

- (4) An order of the court on an application under this section is not subject to appeal.

10. Amendments to the by-law reflecting the above are included in a motion appearing in the next portion of this section of the report. The process in new section 14.1 of the by-law includes:
- a quorum requirement for a decision, which is the requirement otherwise applicable to the PAC;
 - factors to be considered when making a determination for an application, which have been taken from the 1993 policy on disclosure of information to the police.

C. DECISION FOR CONVOCATION

11. Convocation is requested to:
- a. Approve the Committee's proposal that the Proceedings Authorization Committee ("PAC") perform the function of determining whether information should be disclosed to a public authority under section 49.13 of the Act, or make such other determination in this respect as Convocation deems appropriate;
 - b. If approving the above, make the required amendments to By-Law 21. The following motion sets out the proposed amendments to the by-law:

THE LAW SOCIETY OF UPPER CANADA

BY-LAW 21

[PROCEEDINGS AUTHORIZATION COMMITTEE]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON NOVEMBER 29, 2000

MOVED BY

SECONDED BY

THAT By-Law 21 made by Convocation on January 28, 1999 and amended by Convocation on February 19, 1999, March 26, 1999 and May 28, 1999 be further amended as follows:

1. Section 4 of the By-Law is revoked and the following substituted:

Function of Committee

4. It is the function of the Committee,
- (a) to review all matters referred to it in accordance with this By-Law or any other by-law and, in respect of each matter, to determine whether any action mentioned in subsection 9 (1) should be taken; and
 - (b) to determine, in any given case, whether the Society should apply to the Superior Court of Justice for an order under section 49.13 of the Act.

2. The By-Law is amended by adding immediately preceding section 5 the heading "REVIEW OF MATTERS REFERRED TO COMMITTEE".

3. The By-Law is amended by adding the following:

APPLICATION FOR DISCLOSURE ORDER

Application by secretary

14.1 (1) On application by the Secretary, the Committee shall determine whether the Society should apply to the Superior Court of Justice for an order under section 49.13 of the Act.

Quorum of Committee

(2) Any two members of the Committee constitute a quorum for the purposes of making the determination under subsection (1).

Factors to be considered

(3) In making the determination under subsection (1), the Committee shall give primary consideration to the extent to which disclosure of information is necessary in order to protect the public and further the administration of justice.

Application of certain sections

(4) Sections 6, 7, 11, 12 and 13 apply, with necessary modifications, to the making of a determination under subsection (1).

4. The French version of the By-Law is revoked.

II. INFORMATION

REPORT ON COMPLAINTS, INVESTIGATIONS AND DISCIPLINE FILE MANAGEMENT AND CASELOADS

12. The Secretary, Richard Tinsley, the Manager of Investigations, James Yakimovich and Senior Counsel - Discipline, Lesley Cameron, reported to the Committee on caseload management in the Resolution and Compliance, Investigations and Discipline Departments. The reports appear at Appendix 3.

13. This is the first of monthly reports that the Committee will be receiving, following Convocation's adoption on October 19, 2000 of the report of The Honourable W. David Griffiths on the Society's complaints, investigations and discipline processes and the Committee's recommendations relating to the report. One of the recommendations was that, to facilitate our monitoring, the Chair should receive monthly reports from the Manager of Investigations and Senior Counsel - Discipline on file management, including information on the progress of specific files. Convocation also accepted the Committee's recommendation that the Committee

receive general information and statistics on file management and caseloads in the departments noted above monthly.²

14. As efforts are made to co-ordinate the preparation of the reports within the three departments, achieve consistency in the format and expand the statistical information, as suggested by the Committee, the reports will provide useful and timely information on the progress of matters through these departments.

APPENDIX 1

1993 POLICY OF CONVOCATION ON DISCLOSURE OF INFORMATION TO POLICE

APPENDIX 2

BY-LAW 21

Made: January 28, 1999

Amended:

February 19, 1999

March 26, 1999

May 28, 1999

PROCEEDINGS AUTHORIZATION COMMITTEE

Definitions

1. In this By-Law,

“Committee” means the Proceedings Authorization Committee;

“outside counsel” means a person appointed under section 49.53 of the Act to represent the Society in any proceeding under Part II of the Act before the Hearing Panel, the Appeal Panel or a court that concerns a benchers or employee of the Society;

“outside investigator” means a person appointed under subsection 49.5 (2) of the Act to conduct an investigation of the conduct or capacity of a benchers or employee of the Society.

“outside reviewer” means a person appointed under subsection 49.6 (2) of the Act to conduct a review of a benchers’ practice.

Establishment of Proceedings Authorization Committee

2. (1) There is hereby established a committee to be known in English as the Proceedings Authorization Committee and in French as Comité d’autorisation.

Composition

- (2) The Committee shall consist of four benchers appointed by Convocation.

²The Chair of the Committee, as a member of the Proceedings Authorization Committee, is not a member of the Hearing Panel and accordingly does not and cannot have adjudicative responsibilities. Information received by the Committee, as reflected in the reports appended to this report, does not itemize specific cases.

Chairs and vice-chairs of certain standing committees

- (3) The Committee must include,
- (a) the chair or a vice-chair of the Professional Regulation Committee; and
 - (b) the chair or a vice-chair of the Professional Development and Competence Committee.

Restrictions on appointments

(4) A benchner who holds office under paragraph 1 or 2 of subsection 12 (1), or under paragraph 1 of subsection 12 (2), of the Act may not be appointed to the Committee.

Term of office

(5) Subject to subsection (6), a benchner appointed to the Committee shall hold office for a term of one year and is eligible for reappointment.

Appointment at pleasure

(6) A benchner appointed to the Committee holds office as a member of the Committee at the pleasure of Convocation.

Chair

3. (1) Convocation shall appoint one member of the Committee who is an elected benchner as chair of the Committee.

Term of office

(2) Subject to subsection (3), the chair holds office for a term of one year and is eligible for reappointment.

Appointment at pleasure

(3) The chair holds office at the pleasure of Convocation.

Function of Committee

4. The Committee shall review all matters referred to it in accordance with this By-Law or any other by-law and, in respect of each matter, shall determine whether any action mentioned in subsection 9 (1) should be taken.

Review of matters: quorum of Committee

5. (1) Two members of the Committee constitute a quorum for the purposes of reviewing a matter and taking action in respect of the matter.

Temporary members

(2) If no two members of the Committee are able to constitute a quorum because three or more members of the Committee are unable for any reason to act, subject to subsection (3), the chair of the Committee may appoint one or more benchners as temporary members of the Committee for the purposes of constituting a quorum, and the temporary members shall be deemed, for the purposes of subsection (1), to be members of the Committee.

Ineligible benchners

(3) The chair shall not appoint as a temporary member of the Committee a benchner who holds office under paragraph 1 or 2 of subsection 12 (1), or under paragraph 1 of subsection 12 (2), of the Act.

Review by telephone conference call, etc.

6. The Committee may meet to review a matter by means of such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously.

No right to participate

7. (1) Subject to subsection (2), no person may participate in the review of a matter by the Committee.

Participation at request of Committee

(2) For the purposes of answering any questions that the Committee might have about a matter referred to it or about actions that may be taken by the Committee with respect to a matter referred to it, the Committee may require one or more of the following persons to participate in a review of a matter:

1. A person who has referred a matter to it.
2. An officer, employee, agent or representative of the Society who is or was involved in an audit, investigation, review, search or seizure relating to a matter.

Referral by Secretary, outside investigator, outside reviewer

8. (1) Subject to subsection (2), during or after an audit, investigation or review, the Secretary, an outside investigator or an outside reviewer, as the case may be, may refer to the Committee a matter respecting the conduct of a member, group of members or student member, the capacity of a member or student member or the professional competence of a member for one or more of the following purposes:

1. Obtaining directions with respect to the conduct of an audit, investigation or review.
2. Obtaining approval or directions for the informal resolution of the matter.
3. Obtaining authorization for the Society to move in an intended proceeding or in a proceeding, if the Hearing Panel has not commenced a hearing to determine the merits of the proceeding, for an interlocutory order suspending the rights and privileges of a member or student member or restricting the manner in which a member may practise law.
4. Obtaining authorization for the Society to apply to the Hearing Panel for a determination of whether,
 - i. a member or student member has contravened section 33 of the Act,
 - ii. a member or student member is or has been incapacitated, or
 - iii. a member is failing or has failed to meet standards of professional competence.

Restrictions on referrals by Secretary, outside investigator

(2) The Secretary, or an outside investigator, shall not refer to the Committee a matter respecting the conduct of a member or student member if the matter is a complaint that has been referred to the Complaints Resolution Commissioner for resolution or review and the Complaints Resolution Commissioner has not yet disposed of the matter.

Referral by elected benchers

(2.1) Subject to subsection (2.2), an elected benchers appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member may refer to the Committee a matter respecting the professional competence of the member for the purpose of obtaining authorization for the Society to apply to the Hearing Panel for a determination of whether the member is failing or has failed to meet standards of professional competence.

Restrictions on referrals by elected benchers

(2.2) An elected benchers appointed under subsection 42 (6) of the Act to review a proposal for an order made to a member shall not refer to the Committee a matter respecting the professional competence of the member except after the benchers has,

- (a) met with the member and the Secretary, as required under sections 11 and 12 of By-Law 24, in accordance with sections 13 and 14 of By-Law 24; and
- (b) refused to make an order under subsection 42 (7) of the Act.

Recommendations for action

(3) A person who refers a matter to the Committee may recommend actions to be taken by the Committee in respect of the matter, and, in making his or her recommendations, the person is not restricted to recommending the actions mentioned in paragraphs 1 to 5 of subsection 9 (1).

Review of matters

9. (1) After reviewing a matter, the Committee may determine that no action should be taken in respect of the matter or, subject to subsections (2) to (4), the Committee may take one or more of the following actions:

- 1. Approve, or give directions for, the informal resolution of the matter.
- 2. Authorize the Society to apply to the Hearing Panel for a determination of whether,
 - i. a member or student member has contravened section 33 of the Act,
 - ii. a member or student is or has been incapacitated, or
 - iii. a member is failing or has failed to meet standards of professional competence.
- 3. Invite a member or student member to attend before a panel of benchers to receive advice concerning his or her conduct.
- 3.1 Invite a member to attend before a panel of benchers to receive advice concerning his or her professional competence.
- 4. Send to a member or student member a letter of advice concerning his or her conduct.
- 4.1 Send to a member a letter of advice concerning his or her professional competence.
- 5. Authorize the Society to move in an intended proceeding or in a proceeding, if the Hearing Panel has not commenced a hearing to determine the merits of the proceeding, for an interlocutory order

suspending the rights and privileges of a member or student member or restricting the manner in which a member may practise law.

6. Any other action that the Committee considers appropriate.

Restriction on authorization of conduct proceedings

(2) The Committee shall not authorize the Society to apply to the Hearing Panel for a determination of whether a member or student member has contravened section 33 of the Act unless the Committee is satisfied that there are reasonable grounds for believing that the member or student member has contravened section 33 of the Act.

Restriction on authorization of capacity proceedings

(3) The Committee shall not authorize the Society to apply to the Hearing Panel for a determination of whether a member or student member is or has been incapacitated unless the Committee is satisfied that there are reasonable grounds for believing that the member or student member is or has been incapacitated.

Restriction on authorization of professional competence proceedings

(4) The Committee shall not authorize the Society to apply to the Hearing Panel for a determination of whether a member is failing or has failed to meet standards of professional competence unless the Committee is satisfied that there are reasonable grounds for believing that the member is failing or has failed to meet standards of professional competence.

Appointment of representative

10. (1) Where the Committee authorizes the Society to apply to the Hearing Panel for a determination of whether a member or student member is or has been incapacitated, the Committee may appoint another member to represent the member or student member in proceedings under Part II of the Act before the Hearing Panel, the Appeal Panel or a court if the Committee is satisfied that,

- (a) the member or student member is unable to participate in the proceedings or is unable to instruct counsel to do so;
- (b) the member or student member is not represented by counsel; and
- (c) the member or student member does not have a guardian, an attorney or a similar person who has authority to represent the member or student member in the proceedings.

Costs

- (2) The costs resulting from an appointment under subsection (1) shall be paid for by the Society.

Decision in writing

11. The Committee shall record in writing its decision on every matter referred to it.

Notice

12. The Committee shall give to the Secretary notice of its decision on every matter referred to it.

Reasons

13. The Committee is not required to provide at any time to any person its reasons for a decision.

Withdrawal of application to Hearing Panel

14. (1) If the Committee authorizes the Society to apply to the Hearing Panel for a determination mentioned in paragraph 2 of subsection 9 (1) but the Hearing Panel has not commenced a hearing to determine the merits of the proceeding, the Society shall not withdraw its application to the Hearing Panel unless the Committee has first authorized the withdrawal.

Request for withdrawal: procedure

(2) A request to the Committee to withdraw an application to the Hearing Panel shall be made by the Secretary or an outside counsel, as the case may be, and sections 5, 6, 7, 11, 12 and 13 apply, with necessary modifications, to the Committee's consideration of the request.

Commencement

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

APPENDIX 3

FILE MANAGEMENT AND CASELOAD STATISTICS FOR RESOLUTION AND COMPLIANCE,
INVESTIGATIONS AND DISCIPLINE TO OCTOBER 31, 2000

Report of the Professional Development and Competence Committee

Professional Development & Competence Committee
November 9, 2000

Report to Convocation

Purpose of Report: Policy - Decision Making
Information

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

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Development and Competence Committee ("the Committee") met on November 9, 2000. Committee members in attendance were Eleanore Cronk (Chair), Earl Cherniak (Vice-Chair), Ron Manes (Vice-Chair) Stephen Bindman, Greg Mulligan, Marilyn Pilkington, Judith Potter, and Bill Simpson. Ron Cass also attended the meeting. Staff in attendance were Scott Kerr, Paul Truster, Sophia Spurdakos, and Ursula Stojanowicz.

2. The Committee is reporting on the following matters:

Policy - For Decision; Information

- Confirmation of Appointment of former Treasurer Susan Elliott, as Law Society nominee to Board of LibraryCo.; Status Report on Implementation of the Libraries Report and Creation of LibraryCo.

Information

- Implementation of the Law Society's Competence Mandate - A Status Report
- Report on Specialist Certification Matters Finalized by the Working Group of the Committee on November 8, 2000 and Approved in Committee on November 9, 2000

POLICY - FOR DECISION; INFORMATION

CONFIRMATION OF APPOINTMENT OF FORMER TREASURER SUSAN ELLIOTT, AS LAW SOCIETY NOMINEE TO BOARD OF LIBRARYCO.; STATUS REPORT ON IMPLEMENTATION OF THE LIBRARIES REPORT AND CREATION OF LIBRARYCO.

1. On September 21, 2000 Convocation approved Dino DiGiuseppe as the Law Society's nominee to the Board of "LibraryCo." The CDLPA nominee to the Board is Michael Hennessy. In October Mr. DiGiuseppe was appointed to the Ontario Court of Justice, necessitating his replacement as the Law Society's nominee to the Board. The Treasurer appointed former Treasurer, Susan Elliott, as the Law Society's nominee.
2. A number of steps have been taken with respect to implementing the Libraries Report and creating LibraryCo. as follows:
 - a) Interviews were held on November 9 with four candidates for the position of managing director for LibraryCo. The interview team consists of Felecia North (Human Resources, Law Society), Janine Miller, Michael Hennessy, Anne Matthewman (Librarian - Metropolitan Toronto Lawyers Association), Peter Bourque (lawyer - Orangeville), and Susan Elliott;

- b) Discussion of a number of tax-related issues relevant to the incorporation of LibraryCo. continues. The Chair of the Law Society's Finance and Audit Committee raised a number of issues, on which an opinion is being sought.
- c) Pursuant to the shareholder structure approved by Convocation in June 2000 LibraryCo has two shareholders - the Law Society (holding the common shares) and CDLPA (holding special shares). A draft shareholders' agreement is being prepared.
- d) Each of the shareholders of LibraryCo. has a single nominee on a nominating committee to select nine of 15 Library Board members. The remaining six board members are to be selected by a number of interested organizations, including both the Law Society and CDLPA. The Board members of LibraryCo. have now been appointed and an informal first meeting of the Board is scheduled for November 15, 2000. The members of the Board are:

Members Selected by the Shareholder Representatives, after direct consultation with MTLA and others

Derry Miller (Bencher)
Greg Mulligan (Bencher)
Richmond Wilson (Bencher)
Judith Potter (Bencher)
Urmaz Suits (North York)
Jennifer Carten (Thunder Bay)
David Ziriada (Windsor/Essex)
Rob Whitmore (Hamilton)
Peter Bourque (Orangeville)

Members chosen by other interested groups as described in the Libraries Report

Susan Elliott (Law Society)
Michael Hennessy (CDLPA)
Janine Miller (Toronto - Law Society staff)
Alan Smith (Mississauga - CBAO)
Karen MacLaurin (Ottawa - OCLA)
Anne Matthewman (Toronto - MTLA)

Request to Convocation

- 3. Convocation is requested to confirm the appointment of Susan Elliott as the Law Society's nominee to the Board of LibraryCo. to replace Dino DiGiuseppe.

FOR INFORMATION

IMPLEMENTATION OF THE LAW SOCIETY'S COMPETENCE MANDATE - A STATUS REPORT

1. In March 2000 Convocation approved for distribution to the profession a document entitled, *Implementing the Law Society's Competence Mandate: A Consultation Document*. Convocation also approved the distribution of a survey to all members and a regional consultation process intended to complement the survey with face-to-face meetings with members of the profession.
2. The regional consultation process has now been completed. It consisted of two components:
 - a) 11 focus group meetings, which took place in Toronto, Sudbury and Kingston; and
 - b) regional consultation meetings in each of eight regions of the province namely:
 - (i) Central East
 - (ii) Central West
 - (iii) Central South
 - (iv) Northeast
 - (v) Northwest
 - (vi) Southwest (2 meetings)
 - (vii) East
 - (viii) Toronto
3. The Treasurer chaired a meeting about implementing the Law Society's competence mandate with a group of newly-called lawyers from around the province with whom he meets on a regular basis.
4. The Committee sought written submissions from a number of legal organizations. The deadline for submissions was October 31, 2000. A number of submissions have been received.
5. On November 2, 2000 the Committee hosted a round table discussion with representatives of a number of regulatory bodies from other professions, namely,
 - a) The College of Physicians and Surgeons of Ontario;
 - b) The Royal College of Physicians and Surgeons of Canada;
 - c) The College of Nurses of Ontario;
 - d) The Royal College of Dental Surgeons of Ontario;
 - e) The Institute of Chartered Accountants of Ontario;
 - f) The Certified General Accountants of Ontario;
 - g) The Ontario Association of Architects; and
 - h) The Professional Engineers of Ontario.
6. Over the next six weeks the Committee will conduct a number of meetings with individuals and organizations to obtain additional input on issues relevant to implementing the Law Society's competence mandate. These will include representatives from a number of organizations that provided written submissions as well as representatives from Legal Aid Ontario's quality assurance department and LPIC.
7. Reports are currently being prepared on the various aspects of the consultation process, described above. The Committee will submit a report to Convocation in January on the outcome of the consultation process and in February will propose an approach for undertaking the next phase of implementing the Law Society's competence mandate, for Convocation's consideration.

REPORT ON SPECIALIST CERTIFICATION MATTERS FINALIZED BY THE WORKING GROUP OF THE COMMITTEE ON NOVEMBER 8, 2000 AND APPROVED IN COMMITTEE ON NOVEMBER 9, 2000

The Committee is pleased to report final approval of the following lawyers' applications for re-certification, on the basis of the review and recommendation of the Certification Working Group.

Civil Litigation	James W. W. Neeb (of Kitchener)
Criminal Law	J. Joseph Kelly (of Kitchener) Michael D. McArthur (of Simcoe) G. Gary McNeely (of Oshawa)

NOTICE OF MOTION

RESOLVED that the deductible for the reinsurance for the Compensation Fund be increased from \$6 million to \$10 million;

RESOLVED further that the Compensation Fund Levy be reallocated by reducing the reinsurance premium by \$27 from \$44 per member to \$17 per member and increasing the amount to be paid into the reserve by the same \$27 from \$30 to \$57.

MOVED BY: Bradley Wright

SECONDED BY:

REASONS OF CONVOCATION

Reasons of Convocation were filed in the matter of Stuart Elliot Rosenthal.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE *LAW*
SOCIETY ACT

Elizabeth Cowie
for the Society

AND IN THE MATTER OF STUART
ELLIOT ROSENTHAL, of the City of
Toronto, a barrister and solicitor

Louis Sokolov
for the Solicitor

October 6, 2000

MAJORITY REASONS OF CONVOCAATION

OVERVIEW

1. A Discipline Committee heard five complaints against Stuart Elliot Rosenthal ["Mr. Rosenthal" or "the Member"]. Based on two Statements of Fact and other admissions by the Member, the Discipline Committee ["the Committee"] found him guilty of professional misconduct and conduct unbecoming a barrister and solicitor. The Committee then heard extensive evidence with respect to the personal circumstances of the Member and the context in which the offences occurred. The Committee unanimously rejected the Society's request that the Member be disbarred and, by a two to one majority, recommended he be suspended for 18 months with the proviso that he should be reinstated to the practice of law only after having satisfied the Secretary of the Law Society that he is fit to practice by producing a psychiatric report from his treating psychiatrist. Ms. Stomp, dissenting as to penalty, would have suspended the Member for a period of two years and imposed further conditions upon his readmission to practice.
2. The Law Society filed a Notice of Disagreement with respect to the Committee's recommendation as to penalty on the basis that the gravity, breadth and ongoing nature of the Member's misconduct required a penalty greater than a suspension. The Law Society sought an order that the Member be disbarred.
3. On March 24, 2000, a Special Convocation met to consider the report and recommendations of the Committee. Convocation, by a majority, decided to increase the suspension imposed on the Member such that he be suspended from the practice of law until January 28, 2003. In addition Convocation imposed the following conditions:
 - (1) That before he resumes the practice of law, he first provide to the Secretary the opinion of a medical doctor regarding his ability to practice especially vis a vis the stage of his rehabilitation from substance addiction;
 - (2) That he be required to continue counselling and rehabilitation as directed by his medical monitors;
 - (3) That he be supervised by another member of the profession acceptable to the Secretary for a period of five years following his reinstatement and continue until the Secretary is satisfied that supervision is no longer required;
 - (4) That he attend as required for all medical treatment as directed by his attending physicians during his period of suspension and for five years thereafter; and
 - (5) That he submit himself to random drug testing during this period of suspension and for a five year period thereafter at the request of the Law society of Upper Canada.
4. The following are the reasons of Convocation.

FACTUAL BACKGROUND

5. Stuart Rosenthal was called to the bar in April, 1985. He practiced as a sole practitioner, in a general litigation practice, the majority of which involved representing plaintiffs in personal injury cases. On June 10, 1990 the Member had dinner with his brother, Hartley, and drove him home. Later that night, his brother, who had a history of depression, committed suicide. The Member blamed himself for what had happened and became severely depressed. He began using heroin almost immediately after the death of his brother. He rapidly progressed from inhaling the drug to using it intravenously. After a relatively short period of time, he developed a serious addiction that ultimately cost several thousand dollars a week to sustain.

6. In 1990, the Member's heroin addiction came to the attention of the Law Society, when the police learned of his heroin purchases in the course of wire-tap investigations of heroin traffickers. At this point the Law Society put co-signing controls on the Member's trust accounts. Starting in 1990 his ability to function as a lawyer degraded over time and he was suspended for non-payment of his Errors and Omissions Levy on December 2, 1994. As his addiction worsened, his standard of practice further degenerated and from December of 1993 to October 29, 1996 he committed a number of criminal offences consisting of various frauds, forging of prescriptions and attempts to obstruct justice, relating to the sentencing of his girlfriend. He provided the Law Society with an undertaking not to practice on January 15, 1997. He has not practiced in fact since December, 1994, when he was suspended for non-payment of his errors and omissions levy.

7. In addition to disrupting the Member's practice, his addiction has exacted a devastating toll on his life. He is separated from his wife, he has been incarcerated, he has incurred debts exceeding one million dollars. He has lost his home, his cottage and he no longer owns an automobile. During the period he was using heroin he descended into hopelessness, despair and extreme depression to the point that he became suicidal.

DECISION OF THE COMMITTEE

8. The Committee heard evidence and submissions on October 29 and November 10 and 13, 1997. On October 29, 1997, based on an agreed statement of facts, the Committee found the Member guilty of professional misconduct with respect to the following particulars of Complaints D187/94 and D99/96:

Complaint D187/94

- 2(a) While he acted as counsel for the plaintiff, David Lunan and the infant plaintiffs, Joshimar Lunan and Jamar Lunan, in a motor vehicle accident claim,
- (i) he failed to reply to communications from the law firm, Iacono Brown, that required a reply, being, letters dated January 22, 1991, January 24, 1991, January 30, 1991, February 19, 1991, March 12, 1991, July 10, 1991, September 5, 1991 and November 20, 1991 and telephone messages left on April 16, 1991, June 20, 1991, November 12, 1991, December 2, 1991 and December 4, 1991;
 - (ii) he delayed in obtaining executed releases from his client pursuant to a settlement agreement which was reached in January 1991;
 - (iii) he failed to fulfill his obligation to obtain an order to finalize the settlement of the action; and
- (b) He failed to provide a reply to the Law Society regarding a complaint by a fellow solicitor, Edward V. Bergereon, despite letters dated November 26, 1993 and May 19, 1994 and telephone calls on March 30, 1994, April 7, 1994 and April 29, 1994.

Complaint D99/96

- 2(a) He failed to honour escrow terms respecting funds resulting from the settlement of an accident claim for his client, Mike Ancio;

- (b) He failed to serve his client, Mike Ancio, in a conscientious, diligent and efficient manner by failing to complete settlement of a claim on behalf of his client as representative for the infant plaintiff, Jesse Ancio;
- (c) He failed to fulfil financial obligations incurred in relation to his practice to:
 - (i) Dr. Vincent Maida in the amount of \$645.87;
 - (ii) Dr. Michael Indech in the amount of \$535.00;
 - (iii) Network Court Reporting Services in the amount of \$1,149.11;
 - (iv) Victory Verbatim Reporting Services in the amount of \$702.19;
- (e) He failed to account to his client, Denis Keane, for retainers received for various legal matters;
- (f) He failed to reply or failed to reply in a meaningful manner to the Law Society regarding complaints by:
 - (i) Mike Ancio despite letters dated June 8 and 12, October 20, 1994 and January 12, 1995 and telephone messages left on July 25, August 24 and September 9, 1994;
 - (ii) David Lunan despite letters dated July 19 and October 20, 1994, January 12, March 17, September 11, and October 25, 1995 and telephone messages left on August 24, September 9, 1994 and October 16 and 20, 1995;
 - (iii) David K. Peachey despite letters dated July 6 and August 25, 1994 and telephone communications on August 5 and 15, 1994;
 - (iv) Michael Indech despite a letter dated August 12, 1994;
 - (v) Charmaine Peddle despite letters dated August 26 and October 20, 1994 and January 12, 1995;
 - (vi) Denis Keane despite letters dated May 17 and October 20, 1994 and January 12, 1995;
 - (vii) Robin Arndt-Pease despite letters dated August 12 and October 20, 1994 and January 12, 1995 and telephone messages on September 12 and 20, 1994;
 - (viii) Michael Code despite letters dated September 8, 1994 and February 7, 1995 and telephone calls on November 16 and 29, 1994;
 - (ix) Frank P. Lento despite letters dated May 12, October 26 and November 30, 1995 and telephone messages left on November 17 and 23, 1995;
- (g) He failed to answer letters dated March 16, April 19 and June 14, 1995 from Vasken Khabayan, a solicitor, requesting the release of David Lunan's file;
- (h) He failed to file with the Law Society within six months of the termination of his fiscal years ending January 31, 1994 and January 31, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*;

- (i) In representing his client, David Lunan and Mr. Lunan's two children, in connection with a claim arising from a motor vehicle accident, he breached an escrow agreement made on or about January 24, 1991, with Lyons, Goodman, Iacono, Smith & Berkow to hold in trust settlement funds of \$9,865.00, in that he released the said funds from trust on February 1, 1991 and again on May 31, 1991; and
- (j) In representing his client, Laila Remtulla, in connection with a claim arising from a motor vehicle accident:
 - (i) he breached an escrow agreement made on or about October 1, 1993, with Lerner & Associates, to hold in trust settlement funds of \$49,650.00, in that he released the said funds from trust on October 13, 1993; and
 - (ii) he failed to comply with the order of Madam Justice Lang of the Ontario Court (General Division) made December 13, 1994, by failing to pay \$1,500.00 into court to the credit of the infants, Irfaan Remtulla and Saira Remtulla, and by failing to pay the costs ordered to be paid by him personally in the amount of \$1,250.00.

9. On October 29, 1997 based on a document relating to the Member's criminal convictions and findings of guilt, the Committee also found the Member guilty of conduct unbecoming a barrister and solicitor with respect to the following particulars of complaints D117/96 and D232/96:

Complaint D117/96

- 2(a) On April 5, 1995, he was convicted of the following offences under the *Criminal Code*:
 - (i) fraud over \$1,000.00;
 - (ii) fraud over \$1,000.00; and
 - (iii) using a forged document.
- (b) On April 12, 1995, he was convicted of the following offences under the *Criminal Code*:
 - (i) fraudulent use of credit card; and
 - (ii) fraud over \$1,000.00.

Complaint D232/96

- 2(a) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 22nd day of September in the year 1995, at the Municipality of Metropolitan Toronto in the Toronto Region did knowingly use a forged document to wit: a prescription voucher for Apo-Diazepam dated September 22, 1995 as if it were genuine, contrary to the *Criminal Code*;
- (b) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 1st day of October in the year 1995, at the Municipality of Metropolitan Toronto in the Toronto Region did knowingly use a forged document to wit: a prescription voucher for Oxycocet, Prednisone and Sulfasalazine dated October 1, 1995 as if it were genuine, contrary to the *Criminal Code*;

- (c) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 6th day of November in the year 1995, at the Municipality of Metropolitan Toronto in the Toronto Region, did knowingly use a forged document to wit: a prescription voucher for Percocet and Diazapan dated November 6, 1995 as if it were genuine, contrary to the *Criminal Code*;
 - (d) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 21st day of December in the year 1995, at the Municipality of Metropolitan Toronto in the Toronto Region being at large on his recognizance entered into before a justice, and being bound to comply with a condition of that recognizance directed by the said justice fail without lawful excuse to comply with the said condition to wit: not enter the premises at 29 Hanley Street or be found within a radius of 500 metres of that address, contrary to the *Criminal Code*;
 - (e) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 9th day of December in the year 1995, at the Municipality of Metropolitan Toronto in the Toronto Region did knowingly use a forged document to wit: a drug prescription as if it were genuine, contrary to the *Criminal Code*;
 - (f) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 9th day of December in the year 1995, at the Municipality of Metropolitan Toronto in the Toronto Region did knowingly have in his possession a drug prescription pad that was adapted and intended to be used to commit forgery, contrary to the *Criminal Code*;
 - (g) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 9th day of December in the year 1995, at the Municipality of Metropolitan Toronto in the Toronto Region did knowingly use a forged document to wit: a drug prescription as if it were genuine, contrary to the *Criminal Code*;
 - (h) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 9th day of December in the year 1995, at the Municipality of Metropolitan Toronto in the Toronto Region did knowingly use a forged document to wit: a drug prescription as if it were genuine, contrary to the *Criminal Code*;
 - (i) On June 27, 1996, the Solicitor was convicted of the criminal offence that he on or about the 15th day of January in the year 1996, at the Municipality of Metropolitan Toronto in the Toronto Region did knowingly use a forged document to wit: a prescription as if it were genuine, contrary to the *Criminal Code*;
10. The Member did not dispute any of the foregoing findings of professional misconduct or conduct unbecoming and the only issue joined before the Committee was the appropriate penalty, that is, whether or not the Mr. Rosenthal's membership should be terminated or whether he might be disciplined by way of a suspension.

11. Prior to the release of the Committee's decision as to penalty, at the request of the Member, Complaint D146/98 was placed before the same Committee. On January 20, 1999, based on an agreed statement of facts, the Committee found the Member guilty of conduct unbecoming a barrister and solicitor with respect to the following particulars of Complaint D146/98.

Complaint D146/98

- 2a) On June 30, 1998, the Solicitor was convicted of the following criminal offences:
- i) that he, during the period from and including the 19th day of September in the year 1996, to and including the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did wilfully attempt to obstruct the course of justice by being a party to preparing a false document for presentation to the Ontario Court (General Division) in an effort to gain an advantage for Valerie Phillips at her sentencing hearing, contrary to the *Criminal Code*;

- ii) that he, on or about the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did wilfully attempt to obstruct the course of justice by counselling Dr. James Dobbin, M.D. Ph.D to refuse to provide information concerning Valerie Phillips to the police who were engaged in an investigation concerning Valerie Phillips with the knowledge and consent of the Court, contrary to the Criminal Code;
 - iii) that he, on or about the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did wilfully attempt to obstruct the course of justice by counselling Dr. James Dobbin, M.D. Ph.D to lie to the police concerning the nature of his relationship with Valerie Phillips, while the police were engaged in an investigation concerning Valerie Phillips with the knowledge and consent of the Court, contrary to the Criminal Code;
 - iv) that he, on or about the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did wilfully attempt to obstruct the course of justice by counselling Dr. James Dobbin, M.D. Ph.D to create false medical records for Valerie Phillips, while the police were engaged in an investigation concerning Valerie Phillips with the knowledge and consent of the Court, contrary to the Criminal Code; and
 - v) that he, on or about the 20th day of November in the year 1996, in the Municipality of Metropolitan Toronto, being at large on his recognizance entered into before a justice, and being bound to comply with a condition of that recognizance directed by the said justice, did fail without lawful excuse to comply with the said condition, to wit: report, in person to the Reporting Centre - 60 Richmond Street East, Toronto, on each and every Wednesday between the hours of 9:00 a.m. and 9:00 p.m. to the officer-in-charge, contrary to the Criminal Code.
- b) The Solicitor was found guilty of the following criminal offences:
- i) that he, during the period from and including the 19th day of September in the year 1996, to and including the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did knowingly make a false document, to wit: a document dated the 17th day of October, 1996 purportedly authored by Dr. James Dobbin, M.D. Ph.D, with the intent that it be acted upon as genuine and did thereby commit forgery, contrary to the Criminal Code;
 - ii) that he, during the period from and including the 19th day of September in the year 1996, to and including the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did attempt to cause the Ontario Court (General Division) to act upon a forged document, to wit: a document dated the 17th day of October, 1996 purportedly authored by Dr. James Dobbin, M.D. Ph.D regarding Valerie Phillips, as if it were genuine, contrary to the Criminal Code;
 - iii) that he, on or about the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did wilfully attempt to obstruct Shawn Genovy, a Police Officer engaged in the execution of his duty to investigate a letter regarding Valerie Phillips, purportedly from Dr. James Dobbin, M.D. Ph.D, dated October 17, 1996, to wit: by counsel line Dr. James Dobbin, M.D. Ph.D to refuse to provide information regarding Valerie Phillips to the police, contrary to the Criminal Code;

- iv) that he, on or about the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did wilfully attempt to obstruct Shawn Genovy, a Police Officer engaged in the execution of his duty to investigate a letter regarding Valerie Phillips, purportedly from Dr. James Dobbin, M.D. Ph.D dated October 17, 1996, to wit: by counselling Dr. James Dobbin, M.D. Ph.D to lie to the police concerning the nature of his relationship with Valerie Phillips, contrary to the Criminal Code; and
- v) that he, on or about the 29th day of October in the year 1996, at the Municipality of Metropolitan Toronto, did wilfully attempt to obstruct Shawn Genovy, a Police Officer engaged in the execution of his duty to investigate a letter regarding Valerie Phillips, purportedly from Dr. James Dobbin, M.D. Ph.D dated October 17, 1996, to wit: by counselling Dr. James Dobbin, M.D. Ph.D to create false medical records for Valerie Phillips, contrary to the Criminal Code.

12. In unanimously rejecting the Law Society's request that the Member be disbarred, the Committee found that, absent mitigating circumstances, the type of misconduct that the Member had been engaged in would normally result in a finding of ungovernability that should result in the termination of his membership through disbarment or being granted permission to resign. The Committee found "significant mitigating circumstances" and enumerated the following:

- (1) The Member's misconduct was connected with his heroin dependency;
- (2) The Member's misconduct did not involve misappropriation;
- (3) Prior to his addiction the Member was an excellent lawyer, a highly intelligent individual who had much to offer and was a great asset to the profession;
- (4) The Member had not taken illegal drugs since November of 1996 and, according to the medical evidence, his prognosis for recovery was good.

The Committee was of the view that the public interest and the interest of the profession would best be served by rehabilitating the Member rather than disbarring him. In the result, the majority of the Committee recommended that the Member be suspended for a period of 18 months following which he could be reinstated to the practice of law only if he has satisfied the Secretary of the Law Society that he is fit to practice law by the production of a psychiatric report from his treating psychiatrist.

13. Ms. Stomp, dissenting only as to penalty, recommended that the Member be suspended for two years and from month to month thereafter until his records with the Law Society are brought up to date. In addition she would have imposed the following conditions on the Member's return to the practice of law:

- (1) That he first provide to the Secretary the opinion of a psychiatrist regarding his ability to practice especially vis a vis the stages of his rehabilitation from substance addiction;
- (2) That he be required to continue counseling and rehabilitation as directed by his medical monitors;
- (3) That he be supervised by another member of the profession who accepts the duty to report to the Secretary any concerns regarding substance addiction as well as performance of his duties as a lawyer; and
- (4) During the term of the conditional sentence and subsequent probation period pursuant to the sentence imposed by His Honor Mr. Justice Humphrey on July 28, 1998, he be restricted from appearing in Court on criminal law matters.

THE LAW

Standard of Review

14. The process by which Convocation determines penalty in a case where a party disagrees with the decision of the discipline committee, while not an appeal, shares several characteristics with an appellate proceeding. It is the review of a decision by a tribunal that has heard evidence, weighed credibility and made factual findings. In this regard Convocation is not at liberty to make findings of fact not made by the discipline committee. Furthermore, Convocation should treat the decision of the discipline committee with deference so long as it has not departed from established principles governing Law Society disciplinary proceedings.¹

General Principles Governing Disciplinary Proceedings

15. The discipline process has three well understood and inter-related objectives, that is, the protection of the public; the preservation of the public's confidence in the legal profession; and the maintenance of high professional standards.² The first two of these objectives are implicated in both complaints of professional misconduct and complaints of conduct unbecoming a barrister and solicitor. Even where the conduct unbecoming occurs in the private life of the member, it can raise concerns about the member's character, honesty and his or her ability or willingness to practice law competently. In such cases a member is disciplined to protect the public from the member.³ The public's confidence in the legal profession is preserved in such cases both by the fact that the member is disciplined and because the disciplinary process is seen by the public to be a fair one that produces a just and appropriate result. The third disciplinary objective, the maintenance of high professional standards, is directed towards issues relating to quality of practice. Therefore, unlike the other two disciplinary goals, it is primarily implicated in cases of professional misconduct because these involve acts performed in lawyers' professional capacity or in connection with their professional status. To a lesser extent, this factor may also be relevant in cases of conduct unbecoming which involve a member's practice in some way.⁴ However, the critical distinction is that the maintenance of high professional standards is not implicated in cases of conduct unbecoming which relate to a member's private life and are completely unrelated to his or her practice.

¹ *Lear v. Law Society of Upper Canada* per MacPherson J. at p. 2 (March 18, 1996, Ont. Div. Ct., File No. 694/94; *Re Staying and the Law Society of Upper Canada (No. 2)* (1979), 25 O.R. (2d) 257 per Griffiths J. at p. 268 (Ont. Div. Ct.)

² MacKenzie, *Lawyers & Ethics, Professional Responsibility and Discipline* at p. 26-1;

³ *Re Coign and Law Society of Upper Canada* (1980), 28 O.R. (2d) 61 per Craig J. at pp. 67 to 68 (Ont. Div. Ct.)

⁴ For example, in *Re Cassie* (report to Convocation adopted June 24, 1983) the member was found guilty of conduct unbecoming following his conviction for conspiring with a client to distribute Valium to persons in custody. In *Re Handelian*, [1992] L.S.D.D. No. 23 the member operated a mortgage brokerage business from his law office and used his law firm letterhead when corresponding with investors and was disbarred for conduct unbecoming as a result of his misuse of investors' funds.

16. The determination of a just and appropriate penalty must serve these three disciplinary objectives and this requires consideration of the gravity of the misconduct and the need for both specific and general deterrence.⁵ Finally, the particular circumstances of the offending solicitor and the context of the misconduct must be taken into account. It is here that factors might be identified that serve to mitigate the severity of the appropriate penalty. One such mitigating factor recognized in our disciplinary jurisprudence is the impact of addiction to alcohol or drugs.

17. While the foregoing principles are easily summarized the application of them, particularly in a case like the present, can be very difficult. This is evidenced in this case by the submissions of counsel and the strong minority opinion of Convocation dissenting as to penalty ("minority opinion") which I have had the benefit of reading. Consequently, prior to dealing with the specifics of this case, some general observations are in order.

Protection of the Public - Specific Deterrence

18. This is significant insofar as any penalty must deter the offending solicitor from offending again. Certainly, where the misconduct is serious enough, the fact that the solicitor is likely to offend again may, in itself, necessitate the termination of the solicitor's membership. In such cases the harshness of the penalty is necessitated by the need to protect the public from a solicitor likely to offend again. Taking such action will also serve the related objective of preserving the confidence of the public in the legal profession. Conversely, where an offending solicitor demonstrably has been rehabilitated the need for specific deterrence can be completely obviated.⁶

Protection of the Public - General Deterrence

19. The theory behind general deterrence is well known, that is, that the detection and punishment of some offending solicitors will discourage other members of the Society from engaging in similar misconduct.⁷ This of course serves to protect both the public as well as the public's confidence in the profession. While the actual efficacy of the theory in society in general has been questioned in the criminal law context⁸, this remains a legitimate objective for the Law Society's discipline process. Indeed, one would expect general deterrence to work better in the more limited context of the Law Society given that our members are trained in the law, they are made aware of the Rules of Professional Conduct, they are required to report regularly to the Society, they are aware of the Society's self-regulatory processes and they are

⁵ *Bolton v. Law Society*, [1993] W.L.R. 512 at 518 (C.A.); *Re Boughner* (report to Convocation adopted on March 9, 1994) at pp. 9-10; In *Re Bradbury* (Report to Convocation dated May 27, 1983) Convocation adopted the report of the Discipline Panel which explicitly indicated that specific and general deterrence were the two functions served by disbarment.

⁶ *Re Helson*, [1996] L.S.D.D. No. 58 at p. 10.

⁷ *Re Bradbury*, *supra*. note 5.

⁸ See for example, *Regina v. Sweeney* (1992), 71 C.C.C. (3d) 82 per Wood J.A. at pp. 98-99 (B.C.C.A.); *Regina v. Edwards* 105 C.C.C. (3d) 21 per Finlayson J.A. at 33 to 34 (Ont. C.A.). It is clear that the penalty phase of a professional discipline hearing is not strictly analogous to a criminal sentencing proceeding given that the pre-eminent focus of the former is the protection of the public interest: *McKee v. College of Psychologists (B.C.)* (1994), 116 D.L.R. (4th) 555 per Finch J.A. at p. 557 (BCCA). Nonetheless, as both specific and general deterrence are recognized in our disciplinary jurisprudence as factors which must be considered in terms of the protection of the public interest, discussions of these principles in the criminal jurisprudence provide helpful guidance with respect to their efficacy in the discipline context.

regularly informed of the result of discipline hearings.⁹ Nonetheless, the limits of general deterrence must be acknowledged. For example, as a sentencing objective it is less significant in situations involving little or no premeditation on the part of the offender¹⁰ or where the offender's judgment is skewed by drug addiction.¹¹ The issue presented by this case is how significant a factor should general deterrence be in cases involving lawyers suffering from alcohol or drug addiction. It is the view of the majority that, in such cases, less weight should be attached to general deterrence for two reasons: First, no penalty we impose in this case will deter all members of the Law Society from becoming enmeshed in substance abuse. Certainly, the criminalization of narcotics has failed to deter people in the broader Canadian society from using narcotics and becoming addicted to them; Second, it is unrealistic to presume that a member labouring under an addiction will be deterred from his addiction or other misconduct by the penalty imposed in this case. The reality is that the addict is focused on feeding his or her addiction, not on reading our discipline decisions. More importantly, an addict who does not seek help despite the often corrosive impact of addiction on his or her life, will not change his or her ways because of the outcome of this case.¹²

The Gravity of the Misconduct and the Relevance of Mitigating Circumstances

⁹ The principal difficulty with the efficacy of general deterrence in society in general is the imperfect information possessed by its members. Not only will many members of society be unaware of the legal prohibitions governing their conduct, but also, in the vast majority of cases, they are unaware of the penalties actually imposed on offenders. Even where individuals possess such information the efficacy of general deterrence will be diminished to the extent that such individuals discount the risk of their detection and apprehension.

¹⁰ This has been recognized in the criminal context in circumstances involving intoxication or intense emotional turmoil. *Regina v. Head* (1985), 10 O.A.C. 87 per Dubin J.A. at p. 89 (Ont. C.A.)

¹¹ In *Regina v. Preston (Sullivan)* (1990), 79 C.R. (3d) 61, Wood J.A., writing for a unanimous five person court wrote:
While I am content to accept, at least for the purposes of this case, that sentences of incarceration can have a deterrent effect in cases of trafficking and trafficking related offences, including importing, where the offender or potential offender is not an addict, I have grave doubts that the same can be said in cases of possession where the offender who is to be specifically deterred, or the potential offender who is to benefit from the so-called general deterrent effect of such a sentence, is addicted to the substance in question. Indeed, Mr. Purdy, in his thoughtful written presentation conceded that:
To speak of deterrence, specific or general, in respect to persons physically and uncontrollably addicted to an illegal substance may not be entirely an exercise in logic.
... But in my view the importance of deterrence, as a factor to be taken into consideration when sentencing an addicted heroin user, must be weighed in light of the illogic inherent in the notion itself. [pp. 71 to 72, emphasis added]

¹² In this regard it is worth noting that Mr. Justice Humphrey in sentencing Mr. Rosenthal cited *Preston (Sullivan)*, *supra*. note 11, with approval and observed, "[The Crown] argues for a deterrent sentence. He wants me to send a message, but the problem is the deterrent must be directed to people like the accused was at the time he committed these offences, a heroin addict who would lie, cheat, steal or do whatever it (sic) was necessary to get the drug they are addicted to."

20. As a general rule there is a direct relationship between the gravity of an offence and the severity of the penalty imposed, that is, the more serious the misconduct, the harsher the penalty that will be imposed. The issue presented in this case is whether, as Counsel for the Law Society contends, there are types of professional misconduct that are so serious that the only possible penalty is termination of membership. Ms. Cowie suggests that in such cases the relevance of mitigating circumstances is extremely limited, that is, they can, at most, lead to the granting of permission to resign rather than disbarment. Indeed, Ms. Cowie went so far as to argue that, in such circumstances, rehabilitation, while laudable, must take place outside of the profession and any evidence thereof is more appropriately dealt with in the context of a readmission hearing. In support of this general proposition Ms. Cowie cited the decisions of *Bolton*¹³ and *Cooper*.¹⁴ Specifically dealing with offences that “strike at the heart of the administration of justice” Ms. Cowie, relying on *Hainsworth*,¹⁵ took the position that the appropriate range of penalty is termination of membership and that mitigation could at most result in a member being given permission to resign.

21. There are several reasons why the categorical approach advocated by counsel for the Law Society must be rejected. First, it is not supported by either *Bolton* or *Cooper*. While it is true that *Bolton* stands for the proposition that mitigating circumstances should be accorded less weight in disciplinary proceedings than in criminal proceedings, the Court nonetheless recognized that such matters “are relevant and should be considered.”¹⁶ As for *Cooper*, it stands for nothing more than the proposition that the rehabilitation of Mr. Cooper had to take place outside of the profession, given the complexity and enormity of his misappropriation. Certainly, *Cooper* does not speak to the relevance of mitigating circumstances to the determination of penalty as the Committee found that there were none in that case.¹⁷ Second, this approach is inconsistent with our disciplinary jurisprudence. One need only consider the many cases of misappropriation, one of the most serious forms of professional misconduct, where the penalty imposed has been something less than termination of membership.¹⁸

22. As for misconduct involving the administration of justice, we agree that such offences are among the most serious offences a lawyer can commit. However, there are two reasons why we cannot accept that the penalty therefore

¹³ *Bolton*, *supra*. note 5

¹⁴ *Re Cooper*, [1991] L.S.D.D. No. 93

¹⁵ *Re Hainsworth*, [1995] L.S.D.D. No. 22

¹⁶ *Bolton*, *supra*. note 5, at p. 519.

¹⁷ *Re Cooper*, *supra*. note 14, at p. 3. Similarly in *Re Silver*, [1995] L.S.D.D. No. 188 at where the member was disbarred for misappropriation the Committee said, “*Save and except in extraordinary circumstances* a solicitor who is convicted of fraud in relation to his clients and sent to jail should be disbarred”. [p. 9, emphasis added] In *Silver*, as in *Cooper*, the Committee noted that there were no extraordinary circumstances that might mitigate penalty. cf. *Re Conrad*, [1996] L.S.D.D. No. 71 at p. 5.

¹⁸ *Re LaChappelle* (report of Discipline Committee dated September 27, 1999); *Re Kierans*, [1998] L.S.D.D. No. 96; *Re Kramer*, [1997] L.S.D.D. No. 81; *Re Stewart* (order of Convocation dated June 27, 1996); *Re Baum*, [1995] L.S.D.D. No. 183; *Re McKay* (order of Convocation dated Sept. 28, 1995); *Re Davies*, [1994] L.S.D.D. No. 47; *Re Horman*, [1994] L.S.D.D. No. 18; *Re Benaiah*, [1993] L.S.D.D. No. 133; *Re Biderman*, [1991] L.S.D.D. No. 94; *Re Mitchnick* (order of Convocation dated October 26, 1989); *Re Milloy* (report adopted by Convocation Feb. 19, 1989); and *Re Reilly* (order of Convocation dated June 22, 1985).

invariably must be termination of membership: First, *Hainsworth* itself does not support such an absolute proposition. In disbaring Mr. Hainsworth the panel said:

The actions of Mr. Hainsworth are totally contrary to the behaviour one would expect of a solicitor. Suborning or counseling perjury and offering an indirect financial benefit to a witness for his false evidence are most serious offences.

Our courts require that the evidence presented before them be truthful. Very serious penalties are imposed for perjury even in minor matters. Perjury is bad enough for lay people. Lawyers with their skill and knowledge know what evidence will be important. They better than anyone else know what false evidence will assist in a case. If lawyers think that it is permissible to fabricate evidence or to have witnesses lie, or system of justice will break down.

...

In our view the behaviour of Mr. Hainsworth is more serious than misappropriation of funds by a lawyer.

...

Generally speaking disbarment is required in these types of cases. *In the absence of any mitigating factors concerning the actions of Mr. Hainsworth, i.e. stress, psychiatric problems, substance addictions, coupled with character evidence, or a proven background of professional excellence and contribution, Mr. Hainsworth should be disbarred.*¹⁹ (emphasis added)

The majority adopts the comments of the discipline committee in *Hainsworth* both with respect to the gravity of this type of offence and with respect to the need to assess such mitigating factors in imposing a penalty. The second reason that we cannot accept that the penalty for misconduct involving the administration of justice must invariably be termination of membership is that this position is clearly at odds with our jurisprudence. There are numerous discipline cases where lawyers who have deceived tribunals, forged court documents or lied to clients have received discipline short of disbarment.²⁰

¹⁹ *Re Hainsworth, supra.* note 15, at p. 10.

²⁰ Lawyers have been suspended for knowingly false submissions to a court or other tribunal: *Re Rovet* (report adopted by Convocation on January 23, 1992) the member received a one year suspension for, among other misconduct, making a false submission to the Labour Board. [However, it is important to note that the penalty in *Rovet* has subsequently been disapproved of: *Re Hainsworth, supra.* note 15, at p. 16 and *Re Donaldson* (report presented to Convocation on June 26, 1992) at pp. 10 to 11]; *Re Dubinsky* (report adopted by Convocation on Sept. 21, 1984) the member received a one month suspension for making false submissions as to sentence to a criminal court; *Re Brooks*, [1996] L.S.D.D. No. 194 the member received a three month suspension for advising and assisting a client in a matrimonial case to conceal assets. Lawyers have been suspended for forging court or other legal documents and deceiving clients: *Re Helson*, *supra.* note 6, the member received a one month suspension for forging his client's signature to a discharge of mortgage and swearing a false affidavit of subscribing witness as to the forged signature; *Re Ianetta* (Reasons of Convocation dated Sept. 28, 1995) the member received a three month suspension for deceiving clients as to his inaction and falsifying an abstract page from the Land Registry Office; *Re MacKay*, [1995] L.S.D.D. No. 173 the member received a two year suspension for preparing false articles of dissolution; *Re Gower*, [1992] L.S.D.D. No. 34 the member received a one year suspension for forging court documents and deceiving clients about her inaction; *Re Farkas* (report adopted by Convocation on March 24, 1983) the member received a two year suspension for forging court documents in order to deceive clients about his inaction; Lawyers have been

23. Finally, the majority rejects the proposition that, in serious cases, evidence of rehabilitation should only be considered in the context of a readmission application. This argument is inconsistent with the fact that our jurisprudence has consistently recognized that disbarment is meant to be permanent with the result that readmission following disbarment is exceptional.²¹ Moreover, it is difficult to understand what is gained by disbaring a member whose rehabilitation at the point of disbarment would make his subsequent readmission likely. This is particularly true when one considers that a readmission hearing is unlikely to be successful unless several years have passed since termination of the membership.²²

24. Having rejected the categorical approach that makes termination of membership mandatory in some cases and relegates evidence of rehabilitation to the readmission process, it is obvious that, in determining the appropriate penalty in any case, consideration should be given to evidence of mitigating factors such as remorse, rehabilitation, etc. This being said it cannot be denied that there are types of misconduct which are so serious that, in most cases, one would expect the offending solicitor's membership in the Society would be terminated. Examples of such offences would include:

- (i) cases of misappropriation or some other situation where a lawyer has abused his or her position of trust with a client in such a manner as to benefit to the detriment of the client²³;
- (ii) cases where a lawyer acting *qua* lawyer abuses the position of trust he or she enjoys with the courts or the administration of justice more generally²⁴; and

suspended for other acts of dishonesty committed in their capacity as a lawyer: *Re Radigan* (report adopted by Convocation on April 23, 1982) the member received a two year suspension for witnessing a forged document, that is, an affidavit of value of the consideration respecting a conveyance to be filed in land registry offices; *Re May* (report adopted by Convocation on January 24, 1985) the member received a one year suspension for conspiring to obstruct justice by fixing traffic tickets; *e Casey*, [1998] L.S.D.D. No. 37 the member received a one month suspension, to follow his administrative suspension, for misleading clients as to the status of their court actions.

²¹ *Re Weisman* (report of Readmission Committee dated January 27, 1997) at pp. 18 and 20; In the earlier case of *Re Cirillo* (report of Readmission Committee dated October 9, 1992) this principle was also applied to members who were applying for readmission after being granted permission to resign.

²² The *Law Society Act* does not specify a minimum period of time which must elapse before a terminated member may apply for readmission. Nonetheless, in *Re Gray* (Reasons of Convocation dated January 25, 1995) at p. 12 Convocation expressed the view that, "as a general rule, an application for readmission should not be entertained for a period of at least three years subsequent to disbarment or resignation." Thus, it would be unusual to readmit until at least three to five years have passed since termination: MacKenzie, *supra*. note 2, p. 26-64.

²³ *Re Cooper*, *supra*. note 14; *Re Silver*, *supra*. note 17; *Re Conrad*, *supra*. note 17, at p. 4; *Re Milrod* (report adopted by Convocation on January 30, 1986) at pp. 7-8;

²⁴ *Re Hainsworth*, *supra*. note 15.

- (iii) cases where a lawyer has been convicted of a serious criminal or quasi-criminal offence especially where the sentence involves a significant period of incarceration.²⁵

But, as already discussed, in all of these categories there are cases where the membership of the offending lawyer was not terminated. Thus, the majority is unable to agree with the general assertion in the minority opinion that, "Most often, mitigation should do little more than reduce the penalty to another within the same range; for example, reducing disbarment to permission to resign or reducing the length of a suspension."

The Mitigating Effect of Alcohol or Drug Addiction

25. It is clear from our jurisprudence that we have recognized that addiction is an illness, not a moral failing that should be punished. Indeed our jurisprudence has dealt with the problem of addiction from a compassionate perspective recognizing that it can explain misconduct and mitigate the penalty imposed, especially where the member has acknowledged his or her wrongdoing and has taken constructive steps towards rehabilitation, even in circumstances where

²⁵ *Re Coles*, [1997] L.S.D.D. No. 175 the member was convicted of tax evasion and sentenced to four years imprisonment; *Re Morra*, [1995] L.S.D.D. No. 171 the member was convicted of conspiring to traffic in cocaine and possession of property obtained by crime and sentenced to six years imprisonment; *Re Nayduk*, [1996] L.S.D.D. No. 68 the member was convicted of aggravated assault and criminal harassment and sentenced to seven years imprisonment; *Re Kay*, [1992] L.S.D.D. No. 42 the member was convicted of robbery and sentenced to three years imprisonment; *Re Conrad, supra.*, note 17, the member was found guilty of fraud, two counts of careless storage of a firearm and assault; *Re Ault*, [1997] L.S.D.D. No. 178 the member was convicted of two counts of fraud over \$5,000; *Re Morgan*, [1998] L.S.D.D. No. 98 the member was convicted of assault and sentence to six months imprisonment for contempt of court; *Re Bankuti* [1998], L.S.D.D. No. 72 the member was convicted of two counts of assault and sentenced to twenty-one days in jail; *Re Hargrave* (report adopted by Convocation on March 21, 1980) the member was convicted of conspiracy to defraud the public and sentenced to seven months imprisonment; *Re Cross* (report adopted by Convocation on April 23, 1982) the member was convicted of two counts of fraud and one count of conspiracy to defraud and fraud and sentenced to a term of imprisonment of two years less a day; *Re Shea* (report adopted by Convocation on January 16, 1976) the member was convicted of manslaughter and sentenced to twelve years imprisonment; *Re Coign* (report adopted by Convocation on Sept. 12, 1979) the member was convicted of a violation of the *Mann Act* (transporting a girl from Canada to the U.S.A. for immoral purposes) and sentenced to two years imprisonment; *Re Ciglen* (report adopted by Convocation on October 16, 1970) the member was convicted of conspiracy to evade taxes and sentenced to two years imprisonment; Having said this there are many cases where lawyers who have been convicted of criminal or quasi-criminal offences have not had their membership terminated: *Re Cassie* (report adopted by Convocation on June 24, 1983) the member received a six month suspension following his conviction for conspiring to distribute Valium to persons in police custody; *Re Telfer* (report adopted by Convocation on January 16, 1981) the member received a one year suspension following his conviction for possession of narcotic [marijuana] for the purposes of trafficking; *Re Coccimiglio*, [1991] L.S.D.D. No. 103 the member received a one year suspension after his conviction for sexual assault of a client and making an indecent proposition to another client; *Re Greening* (May 17, 1974) the member received a one year suspension after his conviction of five counts of making false or deceptive statements on income tax returns; *Re Maloney*, [1991] L.S.D.D. No. 85 the member received a six month suspension after his conviction of four counts of making false or deceptive statements on income tax returns.

termination of the right to practice might otherwise be appropriate.²⁶ The issue raised by this case is how one should assess the significance of such an addiction as a mitigating factor. In other words, how can one meaningfully assess the relevance of addiction to the misconduct of a member?

26. In discussing the issue of nexus, Ms. Cowie for the Law Society expressed concern that some of the Member's misconduct was not "inextricably linked to the drug dependency" and that the Society therefore was not satisfied that "the drug use was the sole cause of the misconduct". The minority opinion would require "a close nexus between the addiction and the misconduct" and suggests that the types of misconduct which demonstrate such a nexus are: (1) misconduct related to neglect of one's practice resulting from drug use; (2) misconduct directed towards obtaining the requisite drug, for example, theft, fraud, forging prescriptions, etc.; and (3) misconduct directed towards concealing one's drug use.

27. The majority is of the view that the approach urged by counsel for the Law Society and that taken in the minority opinion to the definition of a nexus are both too narrow. There is no question that the examples posited in the minority opinion are the most obvious circumstances where it can be said that there is a nexus between the addiction and the misconduct. But to limit the meaning of nexus in such directly instrumental terms would be to ignore the reality of addiction and drug abuse and the devastating, pervasive effect addiction can have on an addict's life. As Dr. Andersons, who was qualified as an expert on addictions and their effects on professionals, testified before the Committee:

Oh, I've had cases that would make you shake your head; from impaired driving charges through to losses of marriage and even up to contracultural sexual behaviours and *people do things that they wouldn't ordinarily do when they're not taking drugs and this is not just over the time they take the drug or drink*. [Vol. II, p. 225, emphasis added]

Therefore, rather than asking merely whether or not the misconduct was instrumentally directed to the drug use, the proper inquiry is whether or not the addict engaged in the misconduct before the commencement of the addiction or after his or her recovery. If he or she did not then, clearly, a nexus may exist between the addiction and the misconduct.

28. The majority also rejects the suggestion that such a compassionate rehabilitative approach is necessarily at odds with the goals of protecting the public and preserving the reputation of the profession. Where the addiction is a factor in the misconduct and the prospects of rehabilitation are good, the public can be protected by a penalty that deals with the root problem, that is, the addiction.²⁷ In such circumstances the penalty should be carefully fashioned to encourage the rehabilitation of the addicted member while monitoring him or her to prevent any relapse.

29. Moreover, in assessing the impact of such a rehabilitative response on the public confidence in the profession it is appropriate to assume that the public can respond to issues of addiction and rehabilitation in an enlightened way.²⁸ Indeed our jurisprudence recognizes that the legal profession, of all professions, has a special responsibility to recognize the salutary effects of true rehabilitation.²⁹ Provided that the profession is open to the possibilities of rehabilitation and that

²⁶ *Re LaChappelle*, *supra*. note 18, at p. 7; *Re Kierans*, *supra*. note 18, at p. 14; *Re Wilson*, [1996] L.S.D.D. No. 187 at p. 24; *Re Graves*, [1995] L.S.D.D. No. 177 at p. 26; *Re MacKay*, *supra*. note 18, at p. 9; *Re Mitchnick*, *supra*. note 18, at p. 13.

²⁷ *Casey*, *supra*. note 20, at p. 16

²⁸ *Ibid*.

²⁹ *Re Weisman*, *supra*. note 21, at p. 21

its processes in this regard are sensible and principled, then the reputation of the profession in the eyes of the public can only be enhanced.

ANALYSIS

Gravity of the Misconduct

30. Ms. Cowie on behalf of the Society takes the position that Complaints D187/94 and D99/96 alone merit disbarment. She makes a similar submission with respect to D117/96 and D232/96 taken together and Complaint D146/98. Her position is that the five complaints taken together *a fortiori* merit disbarment.

31. With respect to Complaints D187/94 and D99/96, it is true that they disclose a pattern of a repeated neglect of the Member's professional obligations to his clients, to other counsel, to persons who provided services with respect to his practice and, perhaps most seriously, to the Law Society itself. There is no doubt that these matters considered cumulatively could lead to disbarment, in the absence of mitigating circumstances. Indeed, his repeated failure to reply to inquiries from the Law Society alone could result in disbarment on the basis of ungovernability. However, it must be noted that none of these breaches were motivated by greed, none of his clients were harmed as a result of his misconduct and he did not misappropriate any client funds. This latter point is significant given Dr. Andersons' evidence that it is not unusual to see addicted lawyers improperly withdrawing trust funds. As Dr. Andersons testified:

In Stuart's case, it is to his credit that he did not divert funds that were untouchable, so to speak and that to me shows that somewhere in all that fog, there's some sort of strength of character that prevented him from actually doing so.

32. With respect to Complaint D117/96, Mr. Rosenthal's fraudulent use of a credit card resulted in a loss of approximately \$10,000 for which restitution was not made. Fortunately, there was no loss involved as a result of Mr. Rosenthal's use of the forged document which involved his changing the amount of a cheque and the name of the payee. Again in the absence of mitigating circumstances, such conduct unbecoming could result in disbarment. However, it must be noted that his fraudulent use of the credit card took place over a relatively short period of time, that is, December 1993 to January 1994. Both the credit card fraud, and especially the alteration of the cheque, lacked any particular criminal sophistication. To his credit Mr. Rosenthal entered a guilty plea to these charges and received a sentence of three months incarceration and three years probation.

33. As for Complaint D232/96, eight of the nine charges involve Mr. Rosenthal's use of forged prescriptions to feed his drug habit. The ninth conviction related to his attendance at the home of his then girlfriend, Valerie Phillips, contrary to the terms of his recognizance. The fact that Mr. Rosenthal was on probation at the time of these offences was an aggravating circumstance. Given the clear nexus to Mr. Rosenthal's addiction, which will be discussed further below, it is less likely that these convictions would lead to disbarment. Again to his credit Mr. Rosenthal entered a guilty plea to all of these charges. Having served fourteen days of pre-trial custody, his sentence was suspended and he was placed on probation for three years.

34. Complaint D146/98 is unquestionably the most serious instance of conduct unbecoming involving as it does his attempt to subvert the course of justice with respect to the sentencing of his girlfriend, Ms. Phillips. All that can be said in relation to this complaint is that the proliferation of charges arose out of a fairly limited sequence of acts. Most important, however, is that fact that, unlike in *Hainsworth* where the deception was performed by the lawyer in his

capacity as counsel, here Mr. Rosenthal's deception was performed in his capacity as a private citizen.³⁰ Indeed, given the clumsy, unsophisticated nature of the offence, one could say that Mr. Rosenthal did not, in committing the offences, draw on his legal expertise. However, there is no question that, absent exceptional circumstances, this Complaint alone could merit disbarment.

35. The minority attaches great significance to the fact that Mr. Justice Humphrey disbelieved the Member's testimony in his own defence at his trial in June, 1998, referring to this as "his worst misconduct".³¹ However, this incident, while extremely serious, was not before the Discipline Committee or Convocation in the form of a complaint of conduct unbecoming. As such it would be entirely inappropriate to discipline the Member as if it was.³² Indeed, counsel for the Law Society did not seek to have the Member disciplined on that basis. Rather, in her submissions to Convocation, Ms. Cowie fairly suggested that this incident could only be used to counterbalance the extensive evidence of rehabilitation led by the Member in mitigation of penalty.

36. The majority is most concerned with the gravity of Complaint D146/98 involving as it does repeated attempts to obstruct the proper course of justice. In this regard we wish to reiterate in the strongest terms what was said in *Hainsworth* about offences against the proper administration of justice. This factor, as well as the cumulative gravity of all five complaints, is why the majority has chosen to increase the period of suspension imposed upon the Member from the 18 months recommended by the Committee.

Nexus Between the Member's Addiction and His Misconduct

37. The Discipline Committee, both majority and minority, found that there was a clear nexus between the Member's addiction and his misconduct. The majority accepted the evidence of Dr. Andersons and summarized its import as follows, "His analysis was that the problems of the solicitor were clearly all connected with his heroin dependency." The minority concurred in this regard observing that, "we too were presented with evidence that led to no other conclusion that all of the prohibited acts of the Member occurred because of his substance abuse." The conclusions of the Discipline Committee were supported by the evidence before them. Therefore, keeping in mind the appropriate standard of review, this finding should not be overturned as the minority opinion urges. Indeed, it is worth noting that this conclusion was shared by Mr. Justice Humphrey who, in sentencing the Member in 1998, made the following findings:

I believe his conduct was fueled by the drug heroin. He has been addicted for years and was so when he committed the offences for which I have found him guilty.

...

The accused fueled by his heroin addiction lead (sic) the life of a criminal

...

I was very disappointed that the accused supposedly in his recovery mode saw fit to plead not guilty and to lie his way out of it, but I suppose recovery is a slow and uncertain process.

38. On the question of nexus, Ms. Cowie fairly conceded that there was a nexus between Mr. Rosenthal's addiction and some of his misconduct. Indeed, complaints D 187/94; D99/96 and D232/96 all demonstrate the close nexus defined

³⁰ That misconduct by a lawyer acting *qua* lawyer is more serious than misconduct by a lawyer acting in a personal capacity has also been recognized in the case of criminal contempt: *Re McKeown* (report adopted by Convocation on March 25, 1983)

³¹ Minority opinion, paragraph 8.

³² It would appear that the minority would discipline the Member for lying before Justice Humphrey. This is most apparent in paragraphs 8, 9, 11, 12, 13 and 23 of the minority opinion.

in the minority opinion as these all occurred during the period of the Member's drug use and relate either to his neglect of his practice or his efforts to obtain narcotics. Therefore, the only real dispute with respect to a sufficient nexus arises with respect to Complaints D117/96 and D146/98. Neither of these satisfies the narrow definition of nexus in the minority opinion as the frauds and attempts to obstruct justice were not done for the purposes of obtaining drugs or concealing drug abuse. But in determining whether or not a nexus exists it is important to note that the particulars of both complaints occurred while the Member was actively abusing heroin and that, prior to his drug use, he had not engaged in any similar misconduct. The nexus becomes apparent in the Member's evidence which the Discipline Committee obviously accepted:

Q: Okay. And can you define, "My addiction was getting worse and worse" for me, please?

A: *I was less and less aware of and concerned with normal, everyday life, and being taken over more and more by - the sole purpose of my life was to use. And if there was a balance between it, the drugs was still becoming far more controlling and important, both in terms of time, energy and - until it became the only thing I cared about or was aware of.*

[Cross-examination of Stuart Rosenthal, Vol. II, pp. 271 to 272, emphasis added]

Q: . . . In April of 1995 do you recall sir, being convicted of two counts of fraud over?

A: Yes

Q: And, as well, of uttering a forged document

A: Yes

Q: Now those convictions did not involve drugs directly in that you weren't forging prescriptions, et cetera?

A: No.

Q: *Did they have anything to do with drugs?*

A: *I don't think I would have done anything of that nature, ever, had I not been on drugs. So yes.*

. . .

Q: And you were attempting to obtain monies by using credit cards that had either been altered or not issued to you?

A: Yes.

Q: And why?

A: *I can't explain why I did anything that I did for, you know - - for the greater part of the time I was on drugs, other than I was on drugs and not thinking clearly and acting extremely foolishly and irresponsibly, without concern for myself, mostly, and also for other people.*

Q: Did you need the money?

A: That wouldn't - - the way I was behaving at the time, I might have had - - I mean, I would do things like that. At times, I didn't - - no actually at the time I didn't need the money. I think the day I was arrested I had - - I believe, if I'm right, you know, five or six thousand dollars cash and that involved a few thousand dollars. So I was just irrational. At that time, I - - I felt horrible about how my life was going and if I seemed to, you know - - you know, I don't know what I was doing. Certainly, I - - I made money by doing it, but I - - had I not been on drugs, I was still earning enough money to live a very reasonable lifestyle.

[Cross-examination of Stuart Rosenthal, Vol. II, pp. 276 to 279, emphases added]

39. The existence of a nexus between the Member's addiction and his misconduct is also powerfully supported by the expert evidence of Dr. Andersons. As discussed above, Dr. Andersons testified that, "people do things that they wouldn't ordinarily do when they're not taking drugs and this is not just over the time they take the drug or drink." Equally significant is Dr. Andersons' evidence that one symptom of drug use is that addicts will lie without remorse to an almost sociopathic extent. Similarly, in his letter to the Committee John Penn, a social worker who works with drug addicts, wrote "Heroin addiction is a serious problem which totally takes over and controls the life of the abuser."

40. With respect to Complaint D146/98 Mr. Penn, in his letter before the Committee described the Member's relationship with Ms. Phillips, his girlfriend and a fellow addict, as "a damaging personal relationship centered on drug use." Dr. Andersons' opinion was that this was likely a co-dependent relationship which "would be a tumultuous very, very sick dynamic that neither one of them could spin out of." Thus, he testified that the Member's attempts to obstruct justice in order to assist Ms. Phillips which form the particulars of this complaint were entirely consistent with his addiction and such a co-dependent relationship.

41. The minority attaches great weight to the fact the Member was disbelieved by Mr. Justice Humphrey when he testified in his own defence some 20 months after he stopped using heroin. However, given the limited use that can be made of this incident, *supra*. paragraph 35, the question of a nexus between drug addiction and his testimony having been disbelieved does not arise.

Protection of the Public - Specific Deterrence

42. The Committee received character evidence both in the form of letters and *viva voce* evidence. This evidence supported the Committee's finding that, prior to his heroin addiction, the Member was an excellent lawyer, a highly intelligent individual who had much to offer and was a great asset to the profession.

43. Perhaps more significantly, the Committee heard medical evidence relating to heroin addiction and the Member's recovery from it. The Member has abstained from drug use since mid-November 1996 and has tested negative for drug use on twice weekly urine tests administered by the Parkdale Community Health Centre. Dr. Andersons testified before the Committee on November 10, 1997 and on January 20, 1999 and, as well, provided Convocation with an updated report dated March 2, 2000. The Committee was properly impressed by the evidence of Dr. Andersons particularly given that his first impression of the Member in 1991 was quite unfavourable and he was initially reluctant to become involved with him when asked to in 1997. Dr. Andersons testified that Mr. Rosenthal presented a stable recovery profile and that his sincerity, emotions and coping skills had all improved. He attached particular significance to the fact that the Member had remained abstinent from drug use, other than the prescribed methadone, despite the considerable stress he was under before, during and after his criminal trial in the summer of 1998. On January 20, 1999, Dr. Andersons estimated that after two years of abstinence from heroin use the relapse rate would be approximately ten percent. In his letter of March 2, 2000, he wrote:

He therefore has a significant depth in a clean and sober lifestyle. We find that in people who have stayed abstinent for two years or longer their relapse rate is substantially reduced to negligible.

Certainly the longer they stay clean and sober the less likely they are to go back to their drug of choice. I would say that the probability of Mr. Rosenthal relapsing is probably less than the average lawyer, who has no known substance abuse problem would have of getting into trouble.

Dr. Andersons also testified that disbarment would have a negative effect on the Member's prospects for recovery as it would be helpful to his recovery to have as a possible goal readmittance to the bar. On January 20, 1999, he clarified this point testifying that, while disbarment might slow the Member's recovery, he believed the Member would recover nonetheless.

44. Dr. Andersons testified that if the Member was permitted to return to practice there should be a number of conditions imposed upon him: (i) regular urine surveillance; (ii) practicing with a partner who could report any abnormalities in his practice; (iii) participation in a structured rehabilitation program; (iv) occasional visits with an addiction specialist; and (v) a yearly psychiatric assessment. As of January 20, 1999, Dr. Andersons testified that he was absolutely confident that the Member was capable of returning to practice. Indeed, he testified that he would use Mr. Rosenthal as his lawyer and said, "if he is able to practice law again, I think he would be a tremendous contributor to the legal profession."

45. The exceptional nature of the character and medical evidence is perhaps most powerfully underscored by the submissions of Ms. Cowie who, despite seeking the Member's disbarment, very fairly made the following submissions before the Discipline Committee:

Mr. Rosenthal presents I submit as a very sympathetic character, as a character who has not only potential for rehabilitation but has actual rehabilitation behind him. He presents as a person who has hit rock bottom, to quote Dr. Andersons, and is on his way back up. He presents through the character evidence as a person who is sincere about his rehabilitation, and sincere about his remorse concerning his actions in the past. He presents as someone who does have something potentially to offer the profession in the future and that is something that must be weighed in to the committee's consideration.

Similarly, in her submissions before Convocation Ms. Cowie said the following:

Mr. Rosenthal is a sympathetic person, he has taken steps to rehabilitate himself. He has successfully rehabilitated himself. He presents as the best possible candidate, to borrow a phrase from another case I did, as a poster boy for rehabilitation . . .

The majority agrees that the character and medical evidence heard by the Committee establishes "significant mitigating circumstances" that justify imposing a lesser penalty than termination of membership - the penalty Mr. Rosenthal's misconduct would otherwise most certainly attract.

46. Given the exemplary nature of the character and medical evidence one might question whether there is any need for specific deterrence in this case. However, as Dr. Andersons testified heroin addiction is a "chronic relapsing disease". Consequently, recovery from heroin addiction is a slow and tortuous process as evidenced by the Member's prior unsuccessful efforts to kick his habit. Therefore, keeping in mind our responsibility to protect the public, the majority agree with Ms. Stomp that further conditions be imposed on the Member. However, we have lengthened the Member's suspension, varied the first three conditions imposed by Ms. Stomp and added conditions relating to continued medical treatment and random drug testing. Both the content and the duration of these terms are onerous. In imposing them we do not seek to punish the Member or belittle the significant progress he has made or his excellent prognosis for recovery. Rather, based on the recommendations of Dr. Andersons, we have included these conditions in order to more effectively

support the Member in his continued recovery. If these terms facilitate the Member's recovery then, given the clear nexus between the Member's misconduct and his addiction, they also will accomplish the goal of specific deterrence. Conversely, should Mr. Rosenthal stumble on the road to recovery and relapse, these same conditions will serve to protect the public by minimizing any resulting harm.

Protection of the Public - General Deterrence

47. The majority is cognizant of the greater difficulties posed by general deterrence when those targeted for deterrence include persons addicted to alcohol or drugs. The evidence of Dr. Andersons made clear two reasons why general deterrence is particularly problematic in cases involving heroin or cocaine abuse: First, these drugs are "exceptionally addictive" and can lead to addiction within a matter of weeks or months after first being used. Second, the drugs lead to an extremely unpleasant withdrawal syndrome making it very difficult to quit using them. However, even accepting its limitations, general deterrence remains a factor that must be addressed in any penalty imposed.

48. The minority seems to be of the view that the only penalty that can accomplish general deterrence is termination of membership. The majority rejects this view. The Member has been under administrative suspension since December 2, 1994 and has not practiced since that time. He provided the Law Society with an undertaking not to practice on January 15, 1997 and has complied with this to the date of this hearing. As a result, the penalty imposed by Convocation will mean that the Member will have been suspended from the practice of law for a period of nine years by the time he is eligible to return to practice. Such a lengthy suspension is a harsh penalty and this fact alone will serve as a significant deterrent for others. Indeed, it is worth noting that if the Member had been disbarred following the initiation of the last complaint he would have been able to apply for readmission as early as 2001.³³ The deterrent effect of the penalty we are imposing will be still greater because of the onerous conditions imposed upon Mr. Rosenthal both during his suspension and the five years thereafter. Finally, the majority commends Mr. Rosenthal's experiences with heroin as a cautionary tale to the profession. It is our hope that knowledge of the havoc wreaked on Mr. Rosenthal's life by his addiction will have a general deterrent effect of its own.

Maintenance Of High Professional Standards

49. Complaints D117/96, D232/96 and D146/98 which involve the Member's criminal convictions, while very serious, cannot be said to undermine high professional standards as they had nothing to do with his practice. Indeed, one of the charges involved in Complaint D117/96 and all of the particulars of Complaints D232/96 and D146/98 involve the Member's behaviour after he had ceased to practice law. So, in determining an appropriate penalty in this case only Complaints D187/94 and D99/96 require a consideration of this disciplinary objective.

50. The majority accepts that Complaints D187/94 and D99/96 arose out of Mr. Rosenthal's addiction to heroin and his resulting neglect of his practice and his professional responsibilities. In so doing it cannot be said that we are undermining high professional standards. We cannot simply turn a blind eye to the fact that some members of the Law Society may suffer from substance abuse that will, in all likelihood, erode their ability to properly discharge their professional responsibilities. The maintenance of high professional standards requires that we clearly and unequivocally underscore the threat substance abuse represents to professionalism. As was said in *Casey* "The Law Society requires a policy of openness where this is not a 'dirty secret' but a problem that has to be dealt with in the public interest."³⁴ It requires that our members understand that if they fall prey to addiction they must as a matter of professional obligation

³³ *Supra.* note 22.

³⁴ *Casey, supra.* note 20 at p. 16

seek help to prevent the deterioration of their ability to maintain the high standards of practice we rightly expect from a barrister and solicitor. Addicted members, rather than hiding their addiction and its corrosive effects, must feel safe to turn to medical professionals, colleagues, support groups such as the Ontario Bar Assistance Program, Narcotics' Anonymous and Alcoholics' Anonymous and even the Law Society for the support and guidance they need. An enlightened, compassionate disciplinary response will make it more likely that other addicted members will seek treatment and co-operate with the Law Society to ensure the public is protected and the member's professionalism remains intact. It is this belief that has motivated the majority to extend the compassion it has to the Member while simultaneously imposing a very significant penalty with onerous conditions.

The Preservation Of The Public's Confidence In The Legal Profession

51. We have lengthened the suspension of the Member to correspond to the term of probation he will serving in relation to the criminal convictions related to Complaint D146/98. We do this out of a concern for the public's confidence in the legal profession as it would be unseemly for the Member to be practicing law while serving a sentence for such a serious criminal offence.³⁵ However, the majority rejects the contention that this disciplinary objective calls for termination of Mr. Rosenthal's membership. In this regard, we note that in our contemporary society there is a greater knowledge of both the nature and prevalence of substance abuse and addiction. This includes an understanding that, while addiction is a disease that can lead to devastating consequences, it is a disease that can be successfully treated. There are numerous examples of recovered addicts who have gone on to make valuable contributions to many walks of life. Therefore, the majority is confident that the public can respond to cases involving addiction and rehabilitation in an enlightened way. The public's confidence in the legal profession will not be undermined simply because the Law Society shows a willingness to permit some reformed addicts who have gone astray to return eventually to the practice of law. This is especially true where, as in this case, there is ample evidence of rehabilitation, the prognosis for the addict's continued recovery is good and the Law Society imposes strict monitoring conditions to ensure the addict's continued abstinence thereby protecting both the public and the profession. In fact, the opposite is true. If the profession were to respond solely in a punitive way to addiction-related misconduct, denying the possibility of rehabilitation and discarding those members whose lives and practices have been ravaged by addiction, its reputation and the public's confidence in the profession could only be diminished.

Todd Ducharme, for the Majority

³⁵

The effect of this increased suspension is to expand the prohibition contained in Ms. Stomp's fourth recommended condition to include all areas of law.

File Nos. D187/94, D117/96, D146/98

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE *LAW SOCIETY ACT*

AND IN THE MATTER OF STUART ELLIOT ROSENTHAL,
of the City of Toronto,
a Member of the Law Society of Upper Canada

DISSENT

1. After a Hearing, a Discipline Committee of the Society found the Member guilty of professional misconduct and conduct unbecoming as set forth in the Agreed Statement of Facts, and recommended a suspension of 18 months upon conditions. The Member did not contest the findings.
2. On March 24, 2000, Convocation, by the narrowest of margins, declined to disbar the Member, but amended the terms of the suspension and conditions as set forth in the Reasons of the Majority.
3. In the opinion of the Minority, both the Discipline Committee and the Majority erred in principle by giving undue weight to the factors advanced in mitigation of penalty and by failing to terminate the Member's membership. Essentially, the Majority found that the Member's heroin addiction was sufficiently mitigating of his misconduct to warrant preserving his membership in the Society.
4. Addiction has been found in several discipline cases to constitute mitigation sufficient to warrant a lesser penalty; however, allowing mitigating circumstances to lessen an otherwise just penalty should be done with caution - the worse the misconduct, the higher the onus should be. Most often, the mitigation should do little more than reduce the penalty to another within the same range; for example, reducing disbarment to permission to resign or reducing the length of a suspension. Where it is sought to reduce a penalty to below the normal range, e.g., from termination of membership to suspension, the mitigating factors should be narrowly construed and compelling.
5. Three cases illustrate the limits of the application of mitigation. In the case of *David Gerard Casey*, the Member was overcome by his alcohol addiction. This led him to neglect his practice to the point of misconduct and he received a one-month suspension with conditions relating to supervision of his practice and medical treatment. He did not engage in financial irregularities or other serious misconduct. He did not attempt to obstruct justice well after taking a last drink.
6. In the case of *Leslie Howard Mitchnick*, the Member misappropriated funds and engaged in other financial irregularities to pay for his cocaine addiction. He was suspended for two years subject to conditions relating to supervision of his practice and medical treatment. He did not engage in other serious misconduct or attempt to obstruct justice well after ending his cocaine use.
7. In the case of *Raymond Lachappelle*, the Member misappropriated \$70,000.00 from the estate of his late aunt to finance his cocaine addiction. The evidence established that he would not have taken the funds but for the addiction, he had ceased his drug abuse on his own before discovery by the Society, and he had become the "poster boy" of recovering cocaine addicts. The evidence further established that he had never engaged in misconduct not directly related to his addiction, had ceased the misappropriations on his own, and had the informed support of the local bar and public in his small town. His behaviour was aberrational and the result of the grip of cocaine. Without the drug, he was and is no more a risk to the public than any other randomly selected member of the Society. He had repaid a substantial amount of the money and undertook to reimburse the Compensation Fund for the balance claimed. He was suspended for three months and agreed to an onerous Monitoring Agreement involving, *inter alia*, numerous scheduled and random blood and urine

tests, tri-weekly reports to his sponsors, deep involvement with Alcoholic Anonymous (there being no local NarcAnon), and regular monitoring of his practice by the dean of his local bar. (1)

8. In these and other cases, there has always been a close nexus between the addiction and the misconduct. No sufficient nexus exists here. In this case, only some of the financial dishonesties were related to the heroin addiction. The Member admitted that he did not always need the money that he took through breaches of his escrow conditions to buy drugs. His attempts to obstruct justice were qualitatively different forms of misconduct unrelated to the addiction, and his worst misconduct occurred some 20 months after he had stopped abusing heroin.

9. Although many addicted people are able to continue to function without resorting to professional misconduct, addiction sometimes does drive a person to steal, lie or commit fraud to get the drug, or to lie to hide the use of the drug. It sometimes makes a person so indolent as to neglect practice obligations. It may even drive a person to attempt by misconduct to avoid criminal sanction in respect of charges brought against him or her. It does not justify a person engaging in deliberate, planned and sustained misconduct unrelated to the acquisition of the drug and the concealment of its use. It does not drive a person to attempt to obstruct justice. This would be true even if the attempts to obstruct justice occurred during the time of the drug abuse; *a fortiori*, it is true when they occur 20 months after the drug abuse has ceased.

10. If the Member's misconduct had had a nexus to the addiction, the Majority may have had justification for its decision. However, the sorts of misconduct driven by addiction are theft, forging prescriptions, and the like, and neglecting one's practice. *Lachappelle* and *Mitchnick* are cases of lawyers whose addiction led them to misappropriate money to feed their habits. *Casey* is a case of a lawyer whose addiction led him to neglect his practice. They deserved, and the facts supported, the leniency extended to them by their respective Committees. The *Lachappelle*, *Mitchnick* and *Casey* cases did not involve other misconduct with no, or only the most tenuous, nexus to the addiction.

11. Addiction is a disease, but it is not a disease that causes or mitigates every form of misconduct. The matter before Convocation is a case of a lawyer who repeatedly turned his back on integrity, on the courts, and on the Society whenever it suited him, whether during a period of drug abuse or during a period substantially removed from the abuse. Heroin use did not drive Mr. Rosenthal to attempt to pervert justice in someone else's court case by preparing a false document, seeking to obtain perjured evidence, and threatening a doctor. Heroin use 20 months beforehand did not drive Mr. Rosenthal to attempt to obstruct justice in his own case by lying repeatedly to Mr. Justice Humphries even after the Court became suspicious.

12. In short, even if it were found that the heroin clouded the Member's judgment through October 1996 with respect to the acquisition and concealment of the drug, it does not excuse his deceitful conduct in his girlfriend's court case in 1996 or his reprehensible conduct before Justice Humphrey in July 1998. There was no, or at least insufficient, nexus between his addiction and his numerous attempts to pervert and obstruct justice.

13. The Minority takes no issue with the Member's pleading not guilty to the criminal charges before Justice Humphries in 1998. Every accused person has the right to put the Crown to the proof; however, that right does not encompass proffering a deceitful defence. Had the Member pleaded guilty and thrown himself on the mercy of the Court, the Member might have demonstrated genuine remorse and earned for himself some leniency later in Convocation. As it was, his defence before Justice Humphries demonstrated no remorse and gave no indication that he had learned any lessons at all from his previous criminal convictions. His lying, preposterous accounts, and incredible explanations, to use the words of Justice Humphries, were inexcusable. This would have been true for any citizen, but it is particularly true for an officer of the Court. Without total trust in lawyers, the administration of justice would be seriously, perhaps fatally, compromised.

14. The issues here are, first, the integrity and reputation of the profession before the courts and in the minds of the public; second, the confidence of the courts and public in the profession; and third, general deterrence of similar misconduct. Failure to disbar in this case sends a message that substance addiction will mitigate virtually every misconduct, not just misconduct directly related to feeding the habit and neglecting one's practice. This is clearly the wrong message.

15. The public will be rightly shocked that Convocation has not terminated the right to practise of a member who deliberately attempts to pervert the administration of justice when the member is not suffering from any current drug abuse or mental disorder.

16. The Courts will be rightly shocked that Convocation has failed to terminate the membership of a lawyer who has so disrespected the judicial process and the bench. The judges and justices of our courts must be confident that the Law Society is sending before them only men and women of the highest integrity.

17. Ms. Stomp of the Discipline Committee recognized this when she recommended in her separate reasons that the Member be restricted from appearing in Court on criminal matters. She pointed out that, in order to maintain the integrity of the profession, it was necessary to distance the Member from the milieu of the criminal courts. Her view is correct, but too narrow. It is an error in this context to make a distinction between the criminal courts and the civil courts; between criminal courts and administrative tribunals; between criminal courts and responsibility for the public's economic interests that are protected by solicitors; in short, between criminal law and the practice of law in general. Civil litigators and solicitors are no less deserving of having their collective integrity protected from dishonest members than are criminal lawyers. Perforce, it is the public whose interests must be protected above all. The milieu this Member should be distanced from is the entire practice of law.

18. The Minority hold this view despite sympathy for some of the Member's history - the death of his brother, for example. However, not every sibling of a suicide resorts to heroin use and professional misconduct, not even the Member's other brother, himself a lawyer in good standing with the Society.

19. The Washington, D.C., Board of Professional Responsibility (BPR), the arm of the D.C. Court of Appeals that handles lawyer discipline, recently recommended that cocaine addiction not be treated as a mitigating factor in discipline proceedings. In earlier cases, the Court had ruled that alcoholism can reduce the punishment in disciplinary cases, and later extended their reasoning to addiction to prescription drugs and to depression. In the recent case, the nine-member BPR unanimously concluded that "from the standpoint of the victimized client, it makes no difference whether the culpable attorney is addicted to cocaine or not." Much of the reasoning for not extending the availability of mitigation to cocaine addiction cases was founded upon the illegality of cocaine versus the legality of alcohol.

20. Our position in Ontario has evolved to be, in essence, that, one, both legal alcohol and illegal substance addictions are essentially medical problems treatable as such and, two, an *informed* victimized client would tend to agree that disbarment need not necessarily follow misconduct stemming from such a problem.

21. At some point, however, a line must be drawn; otherwise, there will be no limits to the type, degree and timing of the misconduct that may be mitigated. Until this case, Convocation's lines, while wider than those in Washington, D.C., had not been set so wide as to mitigate conduct that is patently worse than misappropriation. Persistent and planned obstruction of justice performed bald-faced in front of a judge is worse misconduct than misappropriation because it goes to the heart of what it means to be a lawyer. It goes to the heart of the administration of justice. It goes to the heart of a free and democratic society founded on legal integrity. Most often, funds misappropriated can be recovered by the victim through the Society's Compensation Fund and other means. It is exceptionally difficult for a lawyer to recover his integrity before the courts following a deliberate and sustained perversion of the administration of justice.

22. In this case, too much of the Member's misconduct was outside reasonable limits. His misconduct continued, and even worsened, long after he stopped taking heroin. The majority seems to have accepted the argument that recovery from heroin addiction is a long process and, on that basis, his misconduct should be mitigated. Thus, Convocation has held, in effect, that any misconduct, even misconduct that goes to the very heart of what it means to be a lawyer, is mitigatable provided the member was a substance abuser at some point in his past. This is untenable.

23. The misconducts of the Member where there was insufficient nexus to his addiction reveal much about his true character. In the view of the Minority, the evidence did not establish that the Member is a fundamentally honest person in whom the heroin addiction produced aberrational behaviour; rather, the evidence established that the Member is a fundamentally dishonest person for whom the addiction was merely a symptom and the balance of his misconduct the proof. His misconduct included misuse of escrow funds, breaching undertakings, duping the Society, credit card fraud, forgery, and, worst of all, obstruction of justice including preparing a false document, attempting to procure perjured evidence, threatening a witness, and repeatedly lying to the Court. He has ten criminal convictions, a period of incarceration, and a prior discipline history (albeit for failing to file and failing to reply) to his name. He is a member from whom the public needs the ultimate protection of disbarment.

24. The Minority acknowledges that the Member is recovering from his addiction. He has been taking methadone since he stopped using heroin. While he is to be commended for his apparent ongoing medical rehabilitation, it was not demonstrated that his lawyer's integrity has been, or will be, rehabilitated. There was no evidence, or even a submission, that methadone use should mitigate professional misconduct. His medical recovery does not diminish the enormity of his misconduct in attempting to obstruct justice. Convocation should send an unequivocal message to the profession, to the judiciary, and to the public that such behaviour on the part of the Society's members will not be countenanced. Disbarment is not reserved only for total blackguards, but is imposed whenever the public interest demands it. It is demanded here.

25. The Minority does not recommend disbarment for the Member as a supplementary punishment to his ten criminal convictions, but as a means of preserving for the Society's members public, judicial and professional confidence. As stated in *Bolton v. Law Society* [1993] 1 W.L.R. (C.A.) 512, at 519, that confidence is our profession's most valuable asset. We should guard it jealously.

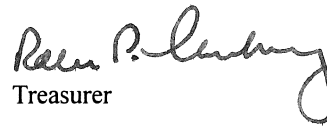
DATED October 6, 2000.

Bradley H. Wright, for the Minority

(1) At the time of this Dissent, the *Lachappelle* decision, written by the undersigned on behalf of a unanimous Committee, may be under appeal by the Society.

CONVOCATION ROSE AT 6:20 P.M.

Confirmed in Convocation this 25th day of January, 2001


Treasurer