

MINUTES OF CONVOCATION

Friday, 26th November, 1999  
8:30 a.m.

PRESENT:

The Treasurer (Robert P. Armstrong, Q.C.), Aaron, Arnup, Backhouse, Banack, Bindman, Bobesich, Boyd, Braithwaite, Carey, Carpenter-Gunn, Chahbar, Cherniak, Coffey, Copeland, Cronk, Crowe, Curtis, Diamond, DiGiuseppe, E. Ducharme, T. Ducharme, Elliott, Epstein, Feinstein, Gottlieb, Harnick, Hunter, Jarvis, Krishna, Lamont, Laskin, Lawrence, Legge, MacKenzie, Manes, Martin, Millar, Mulligan, Murray, O'Brien, Ortved, Pilkington, Porter, Potter, Puccini, Robins, Ross, Ruby, Simpson, Topp, White, Wilson and Wright.

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The reporter was sworn.

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IN PUBLIC

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REPORT OF THE ACTING DIRECTOR OF EDUCATION

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Acting 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 Friday, November 26th, 1999:

Anita Barbara Bapooji	Bar Admission Course
Nina Saira David	Bar Admission Course
Madeleine Margaret Kierans	Bar Admission Course
Winnie Yii Graham	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 Friday, November 26th, 1999:

Radha Devinaigi Curpen	Province of Manitoba
Jennifer Quaid	Province of Quebec
Patrick Vézina	Province of Quebec

ALL OF WHICH is respectfully submitted

DATED this the 26th day of November, 1999

It was moved by Ms. Backhouse, seconded by Mr. Millar that the Report of the Acting Director of Education be adopted.

Carried

MOTION - Role of the Federation of Law Societies of Canada

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the paragraph beginning with the words "Be it resolved...." be amended by adding the words "and in the profession's interest where it does not conflict with the public interest". The paragraph would then read:

"Be it resolved that the mission of the Federation of Law Societies of Canada shall be to assist, as requested, individual law societies to deliver on their mandate to govern the legal profession in the public interest and in the profession's interest where it does not conflict with the public interest by,"

Lost

ROLL-CALL VOTE

Aaron	For
Arnup	Against
Backhouse	Against
Banack	For
Bindman	Against
Braithwaite	For
Carpenter-Gunn	Against
Chahbar	Against
Cherniak	Against
Coffey	Against
Crowe	Against
Curtis	Against
Diamond	Against
DiGiuseppe	Against

E. Ducharme	Against
Epstein	Against
Feinstein	Abstain
Gottlieb	For
Hunter	Against
Krishna	Against
Laskin	Against
Legge	Against
MacKenzie	Against
Manes	Against
Martin	Against
Millar	Against
Mulligan	Against
O'Brien	For
Pilkington	Against
Porter	For
Potter	For
Puccini	For
Robins	Against
Ross	For
Ruby	Against
Simpson	Against
Topp	Against
White	For
Wilson	For
Wright	Against

Vote: 28 Against, 11 For, 1 Abstention

It was moved by Ms. Ross, seconded by Mr. Crowe that the following statement of the role of the Federation of the Law Societies of Canada be adopted by Convocation and communicated to the Board of Directors of the Federation.

#### ROLE OF THE FEDERATION OF LAW SOCIETIES OF CANADA

It is in the interest of both the public and the legal profession that provincial law societies exchange information and deal cooperatively on issues of common concern.

The Law Society of Upper Canada believes that the Federation of Law Societies of Canada has an important and valid role to play in the facilitation of the exchange of information and development of common positions among law societies.

There is not a clear understanding about the role of the Federation of Law Societies by all law societies and the Board of Directors of the Federation of Law Societies.

This lack of understanding is an impediment to the Federation's ability to facilitate an exchange between law societies and the development of common positions.

It is therefore necessary that the role of the Federation of Law Societies be clearly articulated and agreed to by all member law societies.

Be it resolved that the mission of the Federation of Law Societies of Canada shall be to assist, as requested, individual law societies to deliver on their mandate to govern the legal profession in the public interest by,

- 1) promoting the exchange of information among Canadian law societies;
- 2) facilitating the meeting of the executive directors and senior staff of the member law societies;
- 3) identifying the issues of common interest to all law societies;
- 4) preparing, in consultation with the executive directors and senior staff of the law societies, the agenda of the annual meetings of the Federation of Law Societies; and
- 5) when decided so by the member law societies, speaking on issues of national interest once a common position among all members has been developed.

The Federation of Law Societies ought to be composed of the presidents, treasurers and batonniers of the member law societies.

The Board of Directors of the Federation of Law Societies shall be responsible for overseeing the budget of the Federation, supervise the staff of the Federation, and the work of the Federation's committees.

Carried

#### CALL TO THE BAR

The following candidates listed in the Report of the Acting 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 Justice Donald R. Cameron to sign the Rolls and take the necessary oaths.

Anita Barbara Bapooji	Bar Admission Course
Nina Saira David	Bar Admission Course
Madeleine Margaret Kierans	Bar Admission Course
Winnie Yii Graham	Bar Admission Course
Radha Devinaigi Curpen	Transfer, Province of Manitoba
Jennifer Quaid	Transfer, Province of Quebec
Patrick Vezina	Transfer, Province of Quebec

#### EQUITY COMMITTEE - MANDATE

Ms. Ross presented a proposal for the creation of a standing committee to address issues related to Aboriginal Peoples, French-Speaking Peoples, Women and Equity-Seeking Groups.

A debate followed.

It was moved by Mr. Aaron but failed for want of a seconder that Convocation suspend the Carver doctrine of policy governance before voting.

It was moved by Mr. Millar, seconded by Mr. E. Ducharme that the standing committee be called the "Equity and Aboriginal Issues Committee/Comite sur l'equite et les affaires autochtones" as set out in Option #1 of the Report.

Carried

It was moved by Mr. Millar, seconded by Mr. E. Ducharme that the standing committee be called the "Equity and Aboriginal Issues Committee/Comite sur l'equite et les affaires autochtones" and that the mandate set out in the Report be adopted.

Withdrawn

It was moved by Mr. Wright, seconded by Mr. Crowe that the standing committee be called the "Equity Committee/Comite sur l'equite as set out in Option #3 of the Report.

Withdrawn

It was moved by Mr. Aaron but failed for want of a seconder that the standing committee be called the "Equity Committee/Comite sur l'equite as set out in Option #3 of the Report.

Convocation took a brief recess at 10:15 a.m. and resumed at 10:30 a.m.

It was moved by Ms. Pilkington, seconded by Ms. Curtis that the mandate of the committee be amended to read:

- "1) to develop for Convocation's approval, policy options for the promotion of equity and diversity in the legal profession including issues affecting race, nationality and ethnic origins (including Aboriginal peoples and French-speaking peoples) gender, sexual orientation, religion, disability, age and marital status.
- 2) to consult with the Treasurer's Equity Advisory Group, Roti io' ta' -kier, AJEFO, women and equity-seeking groups in the development of such policy options."

Withdrawn

It was moved by Mr. Crowe, seconded by Mr. Wright that the mandate of the committee be amended to read:

- "1) to develop for Convocation's approval, policy options for the promotion of equity and diversity in the legal profession."
- 2) to consult with the Treasurer's Equity Advisory Group, Roti io' ta' -kier, AJEFO, women and equity-seeking groups in the development of such policy options."

Lost

ROLL-CALL VOTE

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

Carey	Against
Carpenter-Gunn	For
Chahbar	For
Cherniak	Against
Coffey	Against
Crowe	For
Curtis	Against
Diamond	For
DiGiuseppe	Against
E. Ducharme	Against
T. Ducharme	Against
Epstein	For
Feinstein	Against
Gottlieb	For
Hunter	Against
Krishna	Against
Laskin	Against
MacKenzie	Against
Manes	Against
Martin	For
Millar	Against
Mulligan	Against
Murray	For
O'Brien	For
Ortved	Abstain
Pilkington	Against
Porter	Against
Potter	Against
Puccini	For
Robins	Against
Ross	Against
Ruby	Against
Simpson	For
Topp	Against
White	For
Wilson	Against
Wright	For

Vote: 17 For, 26 Against, 1 Abstention

It was moved by Mr. Millar, seconded by Ms. Pilkington that the mandate be amended as follows:

- “1) to develop for Convocation’s approval policy options for the promotion of equity and diversity in the legal profession and for addressing all matters related to Aboriginal peoples and French-speaking peoples.
- 2) to consult with the Treasurer’s Equity Advisory Group, Roti io’ ta’ -kier, AJEFO, women and equity-seeking groups in the development of such policy options.”

Carried

It was moved by Ms. Ross, seconded by Mr. Millar that the creation of the Admissions Committee and the Equity and Aboriginal Issues Committee be adopted, that the mandate of the Equity and Aboriginal Issues Committee be amended to conform with the Millar/Pilkington motion and that Stephen Bindman, Todd Ducharme and George Hunter be added as members to the Equity and Aboriginal Issues Committee.

Carried

#### REPORT OF THE FINANCE & AUDIT COMMITTEE - BUDGET

Mr. Krishna presented the Budget and the Committee's recommendation that the total fee per member, after the \$50 discount for early repayment be set at \$1,290.

Finance and Audit Committee  
November 25, 1999

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#### Report to Convocation

Purpose of Report:        Decision Making  
                                 Information

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

#### TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee ("the Committee") met on October 21, 1999. Committee members in attendance were: Krishna, V. (c), Crowe, M. (v-c), Swaye, G. (v-c), Cass, R., Chabar, A., Lamont, D., Epstein, S., Feinstein A., Furlong P., Murphy, D., Puccini, H.(by phone), Wardlaw, J., White, D., Wilson, R., Wright, B. Also in attendance were Armstrong R., and Marroco, F. Staff in attendance were Saso, J., Tinsley, R., Tysall, W., Lalonde, G., Husain, A., Smith, C., Bernhardt, R., Grady, F., White, R., Cawse, A., Corrick, K., Yakimovich, J., Kerr, S., Kanargelidis, V.
2. The Committee met on November 11, 1999. Committee members in attendance were: Krishna, V. (c), Crowe, M. (v-c), Swaye, G. (v-c), Chabar, A., Lamont, D., Epstein, S., Feinstein A., Murphy, D., Puccini, H., Wardlaw, J., White, D., Wilson, R., Wright, B. Also in attendance were Armstrong R., MacKenzie, G., Banack, L., Ross, H., Elliott, S., and Lawrence, A. Staff in attendance were Saso, J., Tinsley, R., Tysall, W., Lalonde, G., Smith, C., Grady, F., White, R., Cawse, A., Corrick, K., Yakimovich, J., S., Kanargelidis, V.
3. The Committee is reporting on the following matters:  
For Decision
  - The 2000 operating budget - under separate cover;
  - Relief and Assistance Fund - attached;
  - A grant of \$2,976.20 to be paid from the J.S. Denison Fund attached, in camera;
  - The third quarter general fund financial statements - attached.

Information

- Law Society catering operations and the Lawyer Referral Service;
- Capital and Technology Fund;
- Lawyer's Feed the Hungry Program.

FOR DECISION

2000 OPERATING BUDGET

4. The 2000 budget process began in June 1999. The budget is prepared on a breakeven basis with the following objectives and assumptions:
  - The budget has been prepared on the basis of "Full Indirect Expense Allocation" consistent with the 1999 Approved Budget.
  - The budget will allow the Chief Executive Officer to comply with Executive Limitations.
  - The budget provides funding to meet new legislative requirements and recent Convocation initiatives.
  - Investment returns estimated at 4.5% (4.0% in 1999).
  - Full fee paying membership projected to be 25,000 for 2000 (24,300 in 1999).
  - Bar Admission Course admission projected at 1,200 students for each phase (1,130 in 1999).
  - Bar Admission Course tuition fee is recommended to increase by 20%.
  - Law Foundation Grants for the Bar Admission Course, County and District Libraries and Archives are assumed to remain at 1999 levels.
  - Osgoode Hall Capital Levy maintained at \$50 per member.
  - A levy of \$25 per member for the Technology Fund.
  - Funding has been provided for the lease of additional space as approved by Convocation in 1999.

Overview

5. Two significant developments in the 2000 operating budget are the reduction in the surplus investment income from the Errors & Omissions Fund and the elimination of the Legal Aid Levy.
6. During the 1999 budget deliberations Convocation approved a one time increase in the County Library Levy of \$79 per member. Subsequent to this, Convocation adopted the principle of universal access and universal funding for County and District Libraries. With the elimination of local fees, a Levy of \$210 per member is recommended.
7. The passing of the amended Law Society Act has placed additional requirements on the Society in its role of professional regulator with the creation a Complaints Review Commissioner. Committees and Task Forces have requested funding in areas as diverse as professional competency initiatives, paralegal studies and strategic planning.
8. This budget raises the funds required to meet the full cost of the Spot and Focussed Audit program initiated in 1998. As part of the 1999 budget process, a surplus generated in 1998 as a result of delayed implementation of the program was used to offset the program's cost in 1999. The 2000 budget includes a surplus of \$350,000 to be carried forward from 1999 for the continuation of the Spot and Focussed Audit program at a combined level of 1400 audits.



9. Operationally, the restructuring of the Society is substantially complete and full implementation is underway. Members and the public will find their interactions with the Society greatly improved with most matters able to be dealt with through an initial telephone contact with the newly created Service Centre. Operating budgets for most departments remain static, without the additional requirements identified in the budget as legislative, Committee or Convocation initiatives. There are several exceptions:
- The Education Department has reduced direct expenses for 2000 and is anticipating an increase in budgeted enrollment from 1,130 students in 1999 to 1,200 for 2000. In addition, the budget includes a 20% increase in the cost of tuition reducing the subsidy, on a full cost basis, for Bar Admission Course to \$30 per member from \$94 in 1999.
  - The Society has expanded the role of technology in its dealings with members and the public. The increased operating budget for information systems is a reflection of the expanding role played by technology in the business of the Society.
  - The Human Resources Department is proposing an increase in its annual operation budget. The budget recognizes the vital role played by staff in the business of the Society and this budget will enable the Society to hire, properly train and retain those most qualified to meet the increasingly complex needs of a knowledge and information based workplace.
  - The budget reflects an increase in the budget for public affairs as our need to communicate with a broad range of stakeholders on the role and value of the Society has been under resourced in the past.
10. The Relief and Assistance Fund was established to assist in reducing the impact of the large increases in insurance premiums required by the refinancing of the Lawyer's Professional Indemnity Company. This budget is based on the abolition of this fund, and the transfer of the fund balance of \$234,000 to a Working Capital Reserve.
11. This budget forms the basis for the full implementation of the Osgoode Hall Capital Fund. This will enable the Society to provide for its future capital requirements in all areas including facilities, technology and equipment. In addition to the Osgoode Hall Capital Fund, this budget proposes a Technology Fund which will be used to assist the Law Society with the replacement or updating of old technology. This costs \$25 per member.
12. The Committee made the following recommendations for amendments at its meeting on November 11, 1999.
- The Committee recommended that the Equity Department budget be maintained at the base amount of \$480,000, without the additional \$270,000 identified in the draft 2000 budget presented to the Committee on November 11, 1999.
  - The Committee recommended that the County and District Library Levy be increased from \$204 to \$210 per member.
  - The Committee accepted the actuary's recommendation that the Lawyers Fund for Client Compensation Levy be reduced by \$43, resulting in the total for this Levy and the fee to finance the costs of the Spot and Focussed Audit Program being set at \$210 per member.

Fee per Member  
Request of Convocation

13. That the total fee per member, after \$50 discount for early repayment is taken, of \$1,290 be adopted.

Relief and Assistance Fund (memorandum attached)

Request of Convocation

14. That the Relief and Assistance Fund be abolished, and the balance of \$234,000 be transferred to a Working Capital Reserve.

Grant of \$2,976.20 from the J.S. Denison Fund (attached) (in camera)

Request of Convocation

15. That the single application for assistance be approved in the requested amount of \$2,976.20.

General Fund Third Quarter Financial Statements (attached)

16. Staff presented a report, projecting a consolidated general fund surplus of \$430,000 for the year ended December 31, 1999. The Committee endorsed the recommendations contained within the report.

Request of Convocation

- That funds be transferred from the Unrestricted Fund to the Project 200 Fund to eliminate the deficit generated in the latter fund in 1999 rather than in 2002;
- That funds be transferred from the Unrestricted Fund to the Legal Aid Levy Fund to eliminate the deficit generated in the latter fund in 1999.
- That the Project 200 and Legal Aid Levy Funds be eliminated at the end of 1999.
- That the residual elements of Project 200, to be completed in 2000, be funded from the operational surplus of the Unrestricted Fund.

FOR INFORMATION

Catering

20. Staff presented a memorandum setting out the costs and revenues associated with the current catering operation. The limited ability of the current catering operation model to break even was discussed. Staff had presented five options for consideration, which were to be expanded upon for a future meeting.

21. Capital and Technology Fund

A memorandum titled "Capital and Technology Replacement and Upgrade Fund" is attached.

Lawyer Feed the Hungry Program

22. The Law Society's role in the program was discussed. The current role of the Law Society as directed by Convocation states that the program will continue at no cost to the Law Society. The current sponsors of the program have identified annual costs of approximately \$150,000. A motion to Convocation, to be made by Nancy Backhouse, and previously circulated to Benchers, proposes that funds to support the program could be donated by members to the Law Society Foundation. An additional amount of \$41,000 per year is required to support the cost of a "check-off" on annual fee invoices to members.

Lawyer Referral Service

23. Staff provided an update on the Lawyer Referral Service which is undergoing an operational review. Alternatives such as a 1-900 number are being considered.

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

- (1) Copy of a Memorandum from Mr. Raymond White, Controller to the Finance & Audit Committee dated November 4, 1999 re: Relief & Assistance Fund - CONFIDENTIAL. (pages 8 - 9)
- (2) Copy of Memorandum from Mr. Raymond White, Controller to the Finance & Audit Committee dated October 12, 1999 re : Relief & Assistance Fund - CONFIDENTIAL. (pages 10 - 14)
- (3) Copy of Schedule 'A' - Staffing Requirements for Grant Programme (With 500 grant applications). (page 15)
- (4) Copy of Schedule 'B' - Staffing Requirements for Loan Programme (With \$500,000 in outstanding loans). (page 16)
- (5) Copy of the General Fund Balance Sheet. (page 18)
- (6) Copy of the Law Society of Upper Canada Unrestricted Fund for the nine months ended September 30, 1999. (page 19)
- (7) Copy of the General Fund Statement of Fund Balances for the nine months ended September 30, 1999. (page 20)
- (8) Copy of the General Fund Statement of Fund Balances projected for the period ended December 31, 1999. (page 21)
- (9) Copy of the General Fund Statement of Cash Flows. (page 22)
- (10) Copy of a Memorandum from Ms. Wendy Tysall to the Chair and Members of Finance & Audit Committee dated November 4, 1999 re: Capital and Technology Replacement and Upgrade Fund. (pages 23 - 25)
- (11) Copy of material - in camera - re: J. S. Denison Fund.

It was moved by Mr. Krishna, seconded by Mr. Crowe that the Law Society adopt for the year 2000 the fee of \$1,290 net of the \$50 discount for early payment.

It was moved by Ms. Backhouse, seconded by Messrs. E. Ducharme and Millar that there be no increase in the Bar Admission Course tuition for the year 2000.

It was moved by Mr. Carey, seconded by Mr. Copeland that Convocation adopt Option V set out on page 9 of the Budget giving the students a reduction in their tuition fee.

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the Law Society establish a Bar Admission Course Bursary Fund to assist student members who suffer financial hardship.

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the Bar Admission Course tuition fees be increased to \$1,000 with \$200 being allocated to a Bar Admissions Course Bursary Fund.

Withdrawn

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the Bar Admission Course tuition fee be increased in future years so that the Bar Admissions Course is self-sustaining by 2002 with increases to the Bar Admissions Course Bursary Fund.

Withdrawn

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

CONVOCATION RESUMED AT 2:10 P.M.

PRESENT:

The Treasurer, Aaron, Arnup, Backhouse, Banack, Bindman, Bobesich, Boyd, Braithwaite, Carey, Carpenter-Gunn, Chahbar, Cherniak, Coffey, Copeland, Cronk, Crowe, Curtis, Diamond, DiGiuseppe, E. Ducharme, T. Ducharme, Elliott, Epstein, Feinstein, Gottlieb, Harnick, Hunter, Krishna, Lamont, Laskin, Lawrence, MacKenzie, Manes, Millar, Mulligan, Murray, Ortved, Pilkington, Porter, Potter, Puccini, Ross, Ruby, Simpson, Topp, White, Wilson and Wright.

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IN PUBLIC

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The Treasurer on behalf of the Benchers and the Law Society extended condolences to the family of Nathan Strauss, Q.C. Mr. Strauss who had been a Bencher since 1962 passed away on November 21st, 1999.

#### RESUMPTION OF THE BUDGET DEBATE

It was moved by Ms. Ross, seconded by Ms. Puccini that Convocation approve an additional \$200,000 to the amount recommended by the Finance and Audit Committee for equity initiatives.

It was moved by Mr. Krishna, seconded by Mr. Crowe that the main motion be amended and that the fee per member be increased to \$1,340 from \$1,290.

REASONS OF CONVOCATION

Reasons were filed in the matter of Alan Murray Zuker.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act;

AND IN THE MATTER OF Alan Murray Zuker of the City of  
Brampton, a barrister and solicitor

MAJORITY REASONS OF CONVOCATION

Glenn Stuart - counsel for  
The Law Society of Upper Canada

Ken McPherson - counsel for the Solicitor

INTRODUCTION

1. The matter relating to Alan Murray Zuker came before Convocation on Thursday, the 24th day of June, 1999. Zuker is 64 and was called to the Bar in 1962. Following a hearing on January 27, 1998, the Discipline Committee found him guilty of misconduct in that he "sexually harassed his client AT in the course of their solicitor/client relationship in 1992 and in 1993 by making unwelcome comments and overtures of a sexual nature to her". The Committee's recommendation as to penalty was that Zuker be suspended for three months and that, thereafter, he undertake in a manner suitable to the Law Society not to attend unaccompanied with any female clients. Counsel for the Law Society urged Convocation to substitute a greater penalty, disbarment.

FACTUAL BACKGROUND

2. The factual matrix underlying the Discipline Committee's finding of professional misconduct is essentially as follows. In December 1991, AT became Zuker's client. As time went by, he became inappropriately personal with her during meetings at his office. For example, after greeting her, he would shut the door to the office, put his hands on her shoulders and draw her close to him. These advances made her uncomfortable and she told him so. But he persisted, telling her that he liked to greet clients this way, particularly the pretty ones. She told him that she did not appreciate his conduct, that he had no cause to become personal, that he was old enough to be her father, and that he should honour and respect his professional obligations. His conduct, however, did not change, except when she brought her four-year-old son with her to the meetings.

3. During one meeting Zuker told AT that he found her attractive, referred to a couch he once had in his office, and told her that he would like to show her a good time on it. She was offended, said that he ought to know better and that he could get into trouble for his actions. His response was that he knew the loopholes and could get himself out of such situations. According to AT, he tried to kiss her and said that he would like to kiss her but did not act on these expressions of interest. He also asked if she had a boyfriend.
4. Before the Discipline Committee AT testified that she became frustrated with Mr. Zuker's lack of progress with her legal problems but that, despite his unacceptable conduct, she continued to retain him for a time because she felt vulnerable, because she trusted him, and because she hoped his behaviour would change if she gave him another chance. Eventually she changed solicitors, not because of Zuker's offensive conduct towards her but because he had done little, she said, to advance her lawsuit.
5. When, about a year after she had terminated her retainer with Zuker, AT lodged a formal complaint with the Law Society, Zuker insisted that she was "lying in all respects" and denied all allegations. The Discipline Committee concluded otherwise and made the following specific determination of fact:
  - (a) he greeted her in an inappropriate physical manner when she entered his office and also when she was leaving by approaching her closely and placing his hands on her shoulders;
  - (b) he tried to kiss her;
  - (c) he hugged her;
  - (d) he inquired about her personal relationships;
  - (e) he made sexually suggestive remarks to her; and
  - (f) he inappropriately commented on her appearance.

The Discipline Committee concluded, based upon the foregoing, that the allegation of professional misconduct had been proven. Convocation readily agrees with this finding.

#### THE DISCIPLINE COMMITTEE'S FINDING AS TO PROFESSIONAL MISCONDUCT

6. In Commentary 1 to Rule 27, sexual harassment is described as "one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature, (i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group....."

Commentary 2 to Rule 27 sets out several examples of the types of behaviour which constitute sexual harassment, including the following:

"sexually suggestive or obscene comments or gestures; unwelcoming queries or comments about a person's sex life; unwelcome sexual flirtations; advances; propositions; requests for sexual favours; unwanted touching."

Zuker's conduct towards his client was abusive in virtually every one of these ways and was, in a word, deplorable.

7. In light of the finding of professional misconduct, the sole remaining issue was whether or not the Committee's recommendation as to penalty -- 3months' suspension, together with terms and costs --was appropriate in all the circumstances.

THE DISCIPLINE COMMITTEE'S RECOMMENDATION  
AS TO PENALTY

8. Counsel for the Law Society urged before Convocation that the Discipline Committee's recommendation as to penalty was inadequate, that the Committee failed to weigh sufficiently Zuker's disciplinary history, and that what was required was disbarment. The relevant aspects of Zuker's history are set out in the Report and Decision of the Discipline Committee in the following terms:

In 1989 the Member was found guilty of the following complaints and reprimanded in Convocation:

D91/88

- 2(a) During the period August to October, 1984, he attempted to engaged in sexual activity with his female client, \_\_\_\_\_
- 2(b) During the years 1981 to 1983, more or less, he attempted to engage in sexual activity with his client, \_\_\_\_\_

D77/89

- 2(a) During the years 1983 to 1985, more or less, he engaged in sexual activity with his client, \_\_\_\_\_

In 1995 the member was found guilty of the following complaint and reprimanded in Committee:

D490/94

- 2(a) In or about December 1988 he misapplied \$14,000.00 more or less belonging to the estate of Pearl Tepperman;
  - (b) In the period October 1982 to December 1988 he failed to maintain a record of assets of the Tepperman estate under his control as required by Section 15 of Regulation 708;
  - (c) During the period August 1988 to January 1990 he borrowed a total of \$67,500 from his client, James Patterson, contrary to Rule 7 of the Rules of Professional Conduct.
9. Zuker's misconduct in relation to AT thus represents a second discrete set of circumstances in which he has been brought before the Law Society for inappropriate behaviour constituting sexual harassment. That the behaviour is recurrent is obviously an exacerbating factor, and one which persuades Convocation that the penalty recommended by the Discipline Committee must be changed to more accurately reflect the Law Society's revulsion for and unwillingness to tolerate such avowedly anti-social behaviour by any of its members.
  10. The Law Society has as its principal duty, of course, to govern the profession in the public interest. Protection of the public and protection of the reputation of the profession are paramount considerations in determining the appropriateness of penalty in all disciplinary matters. But while the Discipline Committee erred in principal on the issue of penalty in this case, it no doubt placed considerable importance upon the following relevant observations made by AT in a letter she wrote to the Law Society dated January 6, 1995;

*"I wish to re-iterate that I did not fire Mr. Zuker because of his sexual misconduct toward me. At no point in my statement did I express that I was dismissing Mr. Zuker for that reason. I dismissed Mr. Zuker because I was dissatisfied with this handling of my legal matters."*

...

*"My intention was simply to bring this matter to the attention of the Law Society, as it is a governing and licensing body for law practitioners and thus the most likely to look into this matter seriously. Even if there is no outcome to all of this, I would still be satisfied in knowing that at least I have had my grievances heard by a higher authority that is empowered to handle this matter with discretion and professionalism. I may not have had that option elsewhere. There are some who would not avail themselves of this democratic right and therefore be left unheard."*

...

*"I do not bear any ill will toward Mr. Zuker; rather my good wishes to him in his continuing law practice..."*

11. In *Robichaud v. The Queen*, [1987] 2 S.C.R. 84, 40 D.L.R. (4th) 577, a case involving allegations of sexual harassment in violation of the Canadian Human Rights Act, LaForest J. observed that statutory prohibitions against discrimination and harassment are intended not to punish anti-social behaviour but to remove it and to redress the socially undesirable conditions.

*"The central purpose of a human rights Act," LaForest noted, "is remedial –to eradicate anti-social conditions without regard to the motives or intention of those who cause them."* LaForest, J. added that the Act *"is not aimed at determining fault or punishing conduct. It is remedial. Its aim is to identify and eliminate discrimination. If this is to be done, then the remedies must be effective, consistent with the 'almost constitutional' nature of the rights protected."*

12. Although Convocation is keenly aware that the sexual harassment against AT was not Zuker's first offence of sexual harassment, it also understands that on the occasion of the first offence the assumption was made that his anti-social behaviour was an aberration and that a reprimand alone was sufficient to ensure against any recurrence.

#### SUBSTITUTION OF PENALTY

13. Given the advantage of hindsight, and given the evolving emphasis in human rights legislation on the prevention and elimination of undesirable conduct and conditions, rather than on fault and punishment, Convocation believes that an appropriate remedy in these circumstances must be one which reflects not only the public's and the profession's abhorrence for the offence but also the importance of remediating the anti-social conditions underlying the offence. The sanction should be severe; it should also include a meaningful corrective or educational component designed to bring home to the offender the offensiveness of the behaviour as well as its devastating effects upon those subjected to it.

14. As noted at the outset, this offender is 64 years of age. Disbarment, for him would likely mean an enforced end to any further gainful employment in or out of the profession. The penalty shall therefore be as follows:

- (a) the member will be suspended for six (6) months, commencing August 1, 1999;



- (b) The member will submit to a plan of supervision, approved by the Law Society, which includes a requirement that he participate in and complete an educational and training program designed to teach increased awareness of and sensitivity to all issues relating to sexual harassment and gender discrimination;
- (c) The member will submit to a plan of supervision, approved and monitored by the Law Society, whereby, following the expiration of his suspension, he shall not under any circumstances in the future meet unaccompanied with any female client;
- (d) The member will pay to the Law Society costs as assessed in the amount of \$2,500.00.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Gerald A. Swaye, Q.C.

Gary Lloyd Gottlieb, Q.C.

Edward W. Ducharme

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act;

AND IN THE MATTER OF Alan Murray Zuker of the City of  
Brampton, a barrister and solicitor

DISSENTING REASONS OF CONVOCATION

Glenn Stuart - counsel for  
The Law Society of Upper Canada

Ken McPherson - counsel for the Solicitor

## BACKGROUND

These reasons for judgment are a dissent to Convocation's decision made 24 June 1999 regarding penalty in this matter. Convocation determined that the lawyer "sexually harassed his client AT in the course of their solicitor-client relationship in 1992 and 1993, by making unwelcome comments and overtures of a sexual nature to her" and that the lawyer was guilty of the professional misconduct set out in complaint D78/98. At Convocation, the lawyer did not dispute the finding of professional misconduct. Convocation decided that the appropriate penalty was the following:

- a. the lawyer shall be suspended from practice for six months, commencing 1 Aug. 1999;
- b. the lawyer shall attend a counselling program approved by the Law Society;
- c. there shall be a plan of supervision approved by the Law Society in which the lawyer undertakes not to attend unaccompanied with any female client at any time in the future;
- d. the lawyer shall pay costs of \$2,500.00.

The discipline panel, on 27 January 1999, heard evidence from the complainant AT and the lawyer, and made a finding of professional misconduct. The discipline panel ordered, over the objections of the lawyer, that the complainant be identified only by her initials. Convocation followed this procedure also.

The discipline panel determined that the evidence supported findings that the lawyer had, on an undetermined number of occasions after April 1992, despite the client's protests;

- a. greeted the client in an inappropriate physical manner when she entered his office and also when she was leaving, by approaching her closely and placing his hands on her shoulders;
- b. tried to kiss the client;
- c. hugged the client;
- d. inquired about the client's personal relationships;
- e. made sexually suggestive remarks to the client's suggestions;
- f. inappropriately commented on the client's appearance.

The discipline panel recommended the following penalty to Convocation:

- a. the lawyer shall be suspended from practice for three months;
- b. the lawyer shall undertake, in a manner suitable to the Law Society, that he will not at any time in the future attend unaccompanied with any female clients;
- c. the lawyer shall pay costs of \$2,500.00.

The Law Society sought disbarment of the lawyer, both at the discipline panel and in Convocation, for a variety of reasons discussed in more detail below, but predominantly related to the lawyer's discipline history of sexually harassing at least three other clients from 1981 to 1985.

## FACTS

The lawyer is 64 years old, was called to the bar in 1962 and has been practicing for 37 years. His practice consists largely of family law. The client hired the lawyer in Dec. 1991 to deal with a restricted mobility clause in a separation agreement that she had signed, as she wanted to be free to look for teaching jobs outside the restricted area (Halton, Peel and Toronto) on her graduation from her Bachelor of Education at York in June 1992.

The lawyer's sexual harassment of her began in approximately April 1992. His actions towards her became inappropriately personal. He shut the office door and put his hands on her shoulders and brought her closer to him. She was uncomfortable with this and pushed him away. She told him that it was unnecessary to greet her as he had already done so on the reception area. His response was that he liked to greet all his clients that way, particularly the pretty ones. She told him that she did not appreciate it, there was no need to become personal, and she reminded him of his professional obligations and that he was old enough to be her father.

In spite of this, the lawyer's conduct did not change. The meetings ended in a similar manner, with the lawyer putting his hands on the client's shoulders and attempting to draw her near, while asking if he could kiss her good-bye. The client again resisted the lawyer's overtures.

After April 1992, there were several meetings. The meetings became less frequent as the client's frustration with the lack of progress grew. The client took her four year old son to some of these meetings, at which time the offensive conduct did not occur.

The lawyer attempted to kiss the client and, on several occasions, he said that he would like to kiss the client. However, the lawyer did not actually kiss the client when he made those comments.

On another occasion the lawyer told the client that he found her attractive and "that he would like to show (her) just how attractive". He had a couch in his office and he told her "that he would like to show (her) a good time on the couch". The client told him "that he should know better than to talk that way and that could get him into a lot of trouble for saying things like that". The lawyer asked the client if she thought, "he was the only one who had tried". The lawyer said, "I'm a lawyer, I know all the loopholes to get myself out of a situation".

The lawyer asked if the client had a boyfriend as, if she was still single, he would like to take her out.

The client was becoming frustrated with the lawyer's inaction on her file and told him about her concerns. The client continued with the lawyer, in spite of his actions:

Because I trusted him and I felt that if I gave him more time and another chance, maybe he might prove himself, his services valuable. At the time, I really needed somebody's help. I was very vulnerable and I really needed his help, and I kept going to him hoping that he would provide that help, and I put my trust in him, but I had no idea that he was betraying my trust in that way and taking advantage of the situation at a time when I really needed a confidante and help.

The client was offered a teaching job in Kasabonika (in northern Ontario) in July 1993 and would be required to move there in Aug. 1993. By this time, she had already been discussing her case with a new lawyer, and she retained another lawyer to complete the variation motion which would permit her to move to northern Ontario.

The client complained to the Law Society on 5 Aug. 1994. The passage of time was due to the fact that she was too far away when she was in northern Ontario and that she did not then know about the complaint procedures.

In his written response to the complaint, the lawyer denied, specifically and in great detail, each and every particular of the client's statement. At the hearing, the lawyer took the position that the overtures were not sexual in nature. The lawyer's position was that the overtures were an attempt to comfort the client.

The lawyer's evidence was that he conducted himself "most professionally" in his meetings with the client, but that it was his nature to be overly caring. The lawyer said he may have been paternalistic to this young woman, and that he never got the impression that she was offended by anything that he said. The lawyer said that he considered the client to be comfortable with his actions as long as she didn't leave his office in response.

The lawyer admitted that he may have tried to hug her or kiss her, but he denied that it was sexually motivated; it was, he said designed to make her feel more at ease. The lawyer admitted this took place more than once, but not on every occasion. The lawyer admitted that the client may have discussed his conduct with him, that he did not take her comments seriously and that after hearing her reaction he did not continue with the conduct. The lawyer did not remember when the client first complained but that it was probably at the end of his dealings with her. The lawyer said that their disagreement was over money.

The discipline panel accepted the client's evidence in preference to that of the lawyer, and found that the lawyer's actions constituted sexual harassment as defined in Rule 27 of the Rules of Professional Conduct, Commentaries 1 (i) and 2 (see Rule 27 attached).

#### THE LAWYER'S DISCIPLINE HISTORY

In 1989 the lawyer was reprimanded in Convocation as a result of a finding of conduct unbecoming a barrister and solicitor in relation to previous sexual misconduct with three other clients:

- a. From Aug. to Oct. 1984, he attempted to engage in sexual activity with his client A;
- b. from 1981 to 1983, he attempted to engage in sexual activity with his client B;
- c. From 1983 to 1985, he engaged in sexual activity with his client C.

When the lawyer was previously found guilty of professional misconduct of a sexual nature, both the discipline panel and Convocation considered the following significant mitigating factors which then existed:

- a. The lawyer was remorseful and admitted his conduct was conduct unbecoming a barrister and solicitor;
- b. The lawyer entered into an Agreed Statement of Facts, which permitted the matter to proceed without "undue or excessive inconvenience or embarrassment" to the client complainants (who did not have to give evidence at the hearing);
- c. The lawyer agreed to the Law Society's request that the names of the client complainants not be released or published; and,
- d. The lawyer provided psychiatric evidence which indicated that the discipline proceedings would act as a strong deterrent to the recurrence of the sexual misconduct.

The discipline panel hearing this matter in Jan. 1999 found that none of the mitigating factors which were present in the 1989 discipline proceeding existed in the current proceeding. As well, the discipline panel found that the psychiatric report may have been in error in suggesting that there may have been a deterring factor from the original discipline proceedings.

In addition, the lawyer was reprimanded in committee in 1995 for professional misconduct for

- a. misapplying \$14,000.00 from an estate;
- b. failing to maintain a record of the estate's assets; and,
- c. borrowing a total of \$67,500.00 from a client between Aug. 1998 and Jan. 1990.

#### THE ESSENCE OF THE SOLICITOR-CLIENT RELATIONSHIP: TRUST

The solicitor-client relationship is premised on an unequivocal trust between the solicitor and the client. This trust is fundamental to the relationship and defines its fiduciary nature. An integral aspect of that trust is the confidence of the client that the lawyer will not abuse his position of relative power over the client. The discipline tribunal in *Nova Scotia Barristers Society v. Rose*, [1996] L.S.D.D. No. 108 at 13 made the following comments.

A solicitor-client relationship is based on trust. Consequently, in any such relationship the solicitor necessarily has a degree of power and influence over the client. The extent of that power is determined by the degree of dependence and vulnerability which is found in varying levels in any such relationship. The level of dependency or vulnerability is characterized by the personal circumstances of the client, including, among other things, the client's age, the client's social and economic status, and the emotional state of the client.

Any breach of a solicitor's obligations in these circumstances is serious and unacceptable. Every client has the right to expect, when seeking advice from a lawyer, that the solicitor is uncompromised by any ulterior motive and that the trust placed in the solicitor will be respected.<sup>1</sup>

The trust between a solicitor and his client can be violated in many ways. It is breached when the lawyer misuses funds entrusted to him by a client. This fundamental trust is also violated by a lawyer who makes unwanted overtures or gestures of a sexual nature to his client. Sexual harassment constitutes a breach of trust. Convocation previously adopted this interpretation in *Patrick Anthony Coccomiglio* Order of Convocation 20 June 1991 (increasing the recommended penalty), and Report and Decision of the Discipline Committee 23 May 1991, at 7.

...[I]t is an important message, to both the profession and the public, that there is a bond of trust between the client and his or her solicitor; that there is a necessity for solicitors, at all times, to be above reproach in their contacts with their clients; and *for a solicitor to use his position of power and trust to satisfy himself or attempt to satisfy himself sexually with a client, even to the extent of asking and accepting a "no" answer. This is unacceptable.*

It is unacceptable because of the vulnerability of the client, especially a female client in these circumstances [involved in divorce proceedings], to feeling that there may not be an option in terms of consenting or not, given the particular situation that a client finds herself in with the solicitor-client relationship and the need to rely on the solicitor's services to reach an end that the client cannot otherwise reach without the solicitor.

The relationship of dependency then is such that the solicitor is in a position to dominate the client in some respect and it simply cannot be acceptable to allow a solicitor, in any way, to breach the relationship in the way that we've found that it was breached [that is, a sexual proposition to a client]. (emphasis added)

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<sup>1</sup>*Nova Scotia Barristers Society v. Rose*, [1996] L.S.D.D. No. 108 at 14

Even before the introduction of Rule 27 (in July 1992), sexual harassment was found to constitute professional misconduct, due to the serious breach of trust which it involves. Misconduct of this nature is a serious breach of a lawyer's professional responsibilities, even when it is an isolated incident involving inappropriate comments and no physical contact by the lawyer.

#### THE NATURE OF SEXUAL HARASSMENT; BREACH OF TRUST AND DISCRIMINATION

Rule 27 expressly provides that sexual harassment of a client, in a professional context, is professional misconduct. The rule defines sexual harassment to include "one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature, when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person". The rule sets out examples of the types of behaviour which constitute sexual harassment, which include "sexually suggestive or obscene comments or gestures, unwelcome inquiries about a person's sex life, unwelcome sexual flirtations, advances, propositions, ...requests for sexual favours, unwanted touching".

Sexual harassment, in the context of a solicitor client relationship, as in the employment context, constitutes an abuse of power which demeans the dignity of its victims and directly contravenes equality guarantees. Chief Justice Dickson, speaking for the court in *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. (4th) 352 (S.C.C.) at 375, made the following comments:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

[Sexual harassment] is ... an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

Any other analysis of the behaviour of the lawyer shows a lack of understanding of equality. Any response by the Law Society to this behaviour which does not send a clear message that it is unacceptable is especially troubling in a profession which is founded on trust, and which has made a commitment to equality.

*In Bannister v. General Motors of Canada Ltd.* (1998), 40 O.R. (3d) 577 (C.A.) at 589-590, Justice Carthy made the following comments (again, in the employment context);

It is not a question of the strength or mettle of female employees, or their willingness to do battle. *No female should be called upon to defend her dignity or to resist or turn away from unwanted approaches or comments which are gender or sexually oriented.* It is an abuse of power for a supervisor to condone or participate in such a conduct. (emphasis added)

A client should not ever be put in a position where she must endure sexual harassment from a lawyer.

While these references to the law derive from the employment context, the principles are applicable in these circumstances: the analysis of the behaviour relates to abuse of power, which connects the analysis to breach of trust.

## WHAT IS THE APPROPRIATE PENALTY FOR REPEATED SEXUAL HARASSMENT?

The lawyer's discipline record, for the previous sexual harassment of at least three other clients, is the most troubling and difficult aspect of this case.

One of the principal objectives of the discipline process is to safeguard the trust placed in members of the profession, and

to maintain the reputation of the solicitor's profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. ... [a member of the public] is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question.

Otherwise, the whole profession, and the public as a whole is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.<sup>2</sup>

It is now well-established that a lawyer who willfully breaches the trust of his clients by misappropriating funds will be disbarred, absent exceptional mitigating circumstances. This result is necessary because the Law Society must express its disapproval in the strongest terms when a lawyer breaches the trust of his clients. In any way, in order to reaffirm the trust which is placed in the profession as a whole.<sup>3</sup>

Sexual harassment constitutes a willful breach of trust by a lawyer which violates the dignity and self-respect, and even the person, of a client. Professional misconduct of this nature must be considered as serious as a willful breach of trust which violates the 'integrity' of the client's money.<sup>4</sup>

It would be a troubling proposition were the Law Society to be more concerned about the way a lawyer treats a client's money, than it is concerned about the way a lawyer treats the client's person, that somehow someone's money is more sacred, more important than someone's self-identity. While this may not have been the intent, that is the message that is sent by the majority decision of Convocation in this case.

Sexual harassment is a more serious breach of trust, and therefore more egregious misconduct, where the client is particularly vulnerable and dependent on the lawyer's assistance, such as in the case of a single mother seeking advice on a custody, access or support matter.

Breach of trust, in any respect, by a lawyer is unacceptable. It can never be tolerated under any circumstances no matter what degree of power and influence may exist. It is especially offensive, however, where there is increased vulnerability or dependency existing with the client relative to the solicitor.<sup>5</sup>

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<sup>2</sup>*Bolton v. Law Society*, [1993] 1 W.L.R. 512 (C.A.) at 518-519.

<sup>3</sup>*Bolton v. Law Society*, *ibid.* at 518-519.  
*Nova Scotia Barristers Society v. Rose*, *supra* at 14, 15

<sup>4</sup>*Gonsalves v. Catholic Church Extension Society of Canada*, [1998] O.J. No. 3404 (C.A.) at para. 15.

<sup>5</sup>*Nova Scotia Barristers Society v. Rose*, *supra* at 13.  
*Patrick Anthony Coccomiglio*, Order of Convocation 20 June 1991, and Report and Decision of the Discipline Committee 23 May 1991, at 7.

The client was a young, single mother, out of work, and still a student, looking for her first teaching job, when she consulted the lawyer. As well, she was a family law client. Unlike clients seeking some other kinds of legal advice, family law clients may be consulting a lawyer for the first time. As well, as there is often a great deal of emotional upset connected to their need for legal advice, family law clients may be less objective than other clients. Family law clients are known to be particularly vulnerable and dependent on their lawyers. This situation is intensified when the client is seeking legal advice with respect to a dispute regarding her children.

Sexual harassment is serious misconduct no matter what the degree. This lawyer has had multiple findings of similar misconduct made against him. He has not been deterred, notwithstanding earlier representations that he might. On the balance of probabilities, there is good reason to believe that the lawyer, if allowed to continue in practice, would engage in similar misconduct. In the circumstances, the termination of the lawyer's membership in the Law Society is required in the public interest.

The sexual harassment this lawyer was previously disciplined for took place from 1981 through to 1985. The discipline hearing for these matters was held in Nov. 1989, and the matter was before Convocation on 23 Nov. 1989. Nevertheless, the lawyer continued in this sexual misconduct, as the findings in the current matter relate to the period of April to Aug. 1991. This lawyer just didn't get it.

The fact that this lawyer, now found guilty of professional misconduct for sexual harassment, has been previously disciplined for similar sexual misconduct shows that the lawyer is not deterred by the sanctions previously imposed on him. The behaviour is flagrant. Clearly, this lawyer does not think there is anything wrong with sexual contact between a solicitor and a vulnerable family law client.

#### WHY ISN'T SUSPENSION WITH TERMS ADEQUATE?

In determining the appropriate penalty in discipline cases, Convocation must bear in mind the need to accomplish the goals of both specific deterrence and general deterrence, that is, a deterrent element in the penalty which will affect the future behaviour of both the lawyer presently being disciplined, and will also influence the behaviour of all other lawyers.

Neither the discipline panel nor Convocation was content with a suspension alone. In fact, the discipline panel noted "we find that a suspension alone would be inadequate protection of the public *because there is little assurance that the member will not re-offend*" (emphasis added).

The prior discipline history of the lawyer is a very serious matter in determining the appropriate penalty. The reprimand of the lawyer in Convocation was delivered prior to the sexual harassment of this client. The lawyer has not responded to the prior discipline and the penalty that was imposed on him. As well, there is a common theme throughout the lawyer's discipline history of breach of trust.

Convocation must find a penalty which will accomplish several goals, to protect the public, to ensure the continued confidence of the public in the legal profession, and to continue to advance sexual equality, among others.

What message is sent (to the bar and to the public) by not terminating this lawyer's right to practice? That a lawyer gets three chances (or four chances) before his right to practice will be taken away? How many times is too many?



26th November, 1999

The terms imposed by Convocation are unenforceable, inappropriate, and in fact, may be outside the jurisdiction of Convocation's authority. Convocation has ordered that the lawyer shall not be alone with female clients, a difficult requirement given that his practice is family law and about 50% of his clients female. How is this requirement to be satisfied? Is the "chaperone" (this is what it sounds like) to be another lawyer (remembering that this lawyer is a sole practitioner)? Is it to be an employee of the lawyer? Surely an employee could not be the person present in the office with the lawyer and his female clients; any suggestion that such an arrangement was workable ignores the realities of the workplace hierarchy and power-structure.

The attachment of this sort of condition is tantamount to a restricted license, a direction that the Law Society has previously been uncomfortable taking out of concern for its authority to do so. No precedent was offered for such a restriction and it is unlikely that there is a precedent. There is likely to be great difficulty figuring out how to structure such a restriction.

In short, the terms of the suspension are unworkable, unenforceable, and neither adequately protect the public nor offer sufficient *"assurance that the member will not re-offend"* (emphasis added).

The penalty most appropriate for this lawyer is disbarment. Penalties short of disbarment reflect neither the gravity of the misconduct nor the Law Society's rejection of the misconduct as behaviour suitable for lawyers.

Carole Curtis

George D. Hunter

Gavin A. MacKenzie

21 September 1999

Convocation was adjourned to Friday, December 10th, 1999 at 9:00 a.m.

CONVOCATION ROSE AT 3:15 P.M.

Confirmed in Convocation this 27 day of January, 2000, 1999

  
Treasurer