MINUTES OF CONVOCATION

Friday, 25th September, 1998
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Aaron, Adams, Armstrong, Arnup, Backhouse, Banack, Bobesich, Carey, Carpenter-Gunn, Carter, R. Cass, Chahbar, Cole, Cronk, Crowe, Curtis, DelZotto, Eberts, Epstein, Farquharson, Feinstein, Finkelstein, Gottlieb, Harvey, Jarvis, Krishna, Lamont, Lawrence, Legge, MacKenzie, Manes, Marrocco, Millar, Murphy, Murray, O'Brien, O'Connor, Ortved, Puccini, Robins, Ross, Ruby, Sachs, Scott, Stomp, Swaye, Topp, Wardlaw, Wilson and Wright.

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The reporter was sworn.

.....

IN PUBLIC

.....

TREASURER'S REMARKS

The Treasurer welcomed The Honourable Sydney Robins on his return to Convocation.

The Benchers were informed that Robert Martin had been hospitalized due to a stroke.

MOTION - REPORTS TAKEN AS READ

It was moved by Mr. MacKenzie, seconded by Mr. Carter that the Draft Convocation Minutes for June 11th, 25th and 26th, 1998 and the Report of the Executive Director of Education and Addendum be adopted.

Carried

Draft Minutes of Convocation - June 11th, 25th and 26th, 1998

(see Draft Minutes in Convocation file)

THE DRAFT MINUTES WERE ADOPTED

Report of the Executive Director of Education and Addendum

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Executive 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, September 25th, 1998:

Elpida Andrea Agathocleous	39th Bar Admission Course
Zainab Fatima Ahmad	39th Bar Admission Course
Ju Yung An	39th Bar Admission Course
Emmanuel Yao Asumang-Adu Asare	34th Bar Admission Course
Sylvie-Émanuelle Bourbonnais	38th Bar Admission Course
Peter Joseph Burns	39th Bar Admission Course
Sudha Chandra	36th Bar Admission Course
Lorne Douglas Clark	39th Bar Admission Course
Marie-Hélène Josée Thérèse Godbout	39th Bar Admission Course
Amadou Omar John	39th Bar Admission Course
Suneeti Kaushal	39th Bar Admission Course
David Grant MacDonald	39th Bar Admission Course
Natasha Anne Miklaucic	39th Bar Admission Course
Roseanne Misale-Trivieri	39th Bar Admission Course
Michele Marie Parkin	39th Bar Admission Course
Preevanda Kaul Sapru	39th Bar Admission Course
Chantal Saxe	39th Bar Admission Course
Thelma Pushparanee Williams	39th 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, September 25th, 1998:

Christopher Bundy	Province of Nova Scotia
Leigh David Crestohl	Province of Québec
Mandi Epstein	Province of Québec
Alaine Christine Grand	Province of Alberta
Nancy Jardine	Province of New Brunswick
Sherri Kreisman	Province of Québec
Donald Conrad MacDougall	Province of British Columbia
Bonnie Lynn McIlmoyl	Province of British Columbia
Joseph Keith Morrison	Province of Newfoundland
Bonnie Elaine Roberts	Province of British Columbia
Gérald Stotland	Province of Québec
Moray Welch	Province of Québec
David Thomas Woodfield	Province of British Columbia

B.1.5. (c) Full-Time Members of Faculties of Approved Ontario Law Schools

B.1.6. The following members of approved law faculties ask to be called to the Bar and admitted as solicitors without examination under sec. 5 of Regulation 708 on September 25th, 1998. They have filed the necessary documents and complied with the requirements of the Society:

Janet Elizabeth Walker	Osgoode Hall Law School, York University.
Bruce Blaikie Ryder	Osgoode Hall Law School, York University.

B.2. READMISSION FOLLOWING RESIGNATION AT OWN REQUEST

B.2.1. The following former members apply for readmission and have met all the requirements in that regard:

Pamela Maureen Clarke	Called:	February 7th, 1992
	Resigned:	June 28th, 1996
Janine Audrey Denney-Lightfoot	Called:	February 7th, 1992
	Resigned:	February 28th, 1997
Mark Overton Dickerson	Called:	February 9th, 1993
	Resigned:	February 27th, 1996
Anne Elizabeth Giardini	Called:	March 30th, 1990
	Resigned:	March 22nd, 1996
Naseem Peter Malik	Called:	February 7th, 1996
	Resigned:	May 29th, 1998
Michael Robert Shapray	Called:	February 21st, 1997
	Resigned:	May 29th, 1998
Vicki Jane Sterling	Called:	April 18th, 1988
	Resigned:	November 29th, 1996

B.3. MEMBERSHIP RESTORED

B.3.1. The following member has given notice that he ceased to hold judicial office and asks to be restored to the Rolls of the Law Society pursuant to Section 31(2) of the Law Society Act:

	Effective date
*George Stephen Ferguson Ontario Court of Justice (General Division)	August 23, 1998

*See also Membership under Rule 50

B.4. MEMBERSHIP UNDER RULE 50

B.4.1. Retired Members

B.4.2. The following members are at least sixty-five years of age and fully retired from the practice of law, and request permission, under Rule 50 made under the Law Society Act, to continue their memberships in the Society without payment of annual fees:

Bernard Clayman	Toronto, ON
*George Stephen Ferguson	Toronto, ON
John Herbert Francis	Toronto, ON
Myer Samuel Levine	Toronto, ON
William Edwards MacDonald	King City, ON
Stewart Ross Mank	Waterloo, ON
George Percy Faribault Plaxton	London, ON
Solomon Spiro	Toronto, ON
Rubin Morris Sugar	Willowdale, ON

* See also Membership Restored

B.5. RESIGNATION - SECTION 12 OF REGULATION 708 MADE UNDER THE LAW SOCIETY ACT

B.5.1. The following members apply for permission to resign their memberships in the Society and have submitted Declarations/Affidavits in support. In all cases the annual filings are up to date. In cases where the member was engaged in the practice of Ontario law for any amount of time, the member has declared that all trust funds and clients' property for which they were responsible have been accounted for and paid over to the appropriate persons. They have further declared that all clients' matters have been completed and disposed of, or arrangements made to the clients' satisfaction to have their papers returned to them, or have been turned over to another lawyer. The Complaints, Audit and Staff Trustees departments all report that there are no outstanding matters with these members that should prevent them from resigning. These members have requested that they be relieved of publication in the Ontario Reports:

1. Christine Gerda Barton of London, Ontario, was called to the Bar on April 20, 1988 practised law in Ontario from December 1993 to July 1996.

2. Cynthia Jean Calvert of Ottawa, Ontario, was called to the Bar on March 20, 1991 and has not practised law in Ontario since September 1994.

3. Joel Norman Cooper of Toronto, Ontario was called to the Bar on April 10, 1964 and has not practised Ontario law since 1973.

4. Mary Louise Graham of Willowdale, Ontario, was called to the Bar on March 19, 1970 and has not practised Ontario law since August 31, 1971.

5. Thomas Bryan Irwin of Toronto, Ontario was called to the Bar on March 19, 1970 and has not practised Ontario law since 1972.

6. Steven Alexander Kennett of Calgary, Alberta, was called to the Bar on March 30, 1990 and has never engaged in the private practice of law in Ontario.

7. Howard Aaron Law of Toronto, Ontario was called to the Bar on April 14, 1988 and has never engaged in the practice of law.

8. Karl Friedrich Leppmann of Denver, Colarodo, was called to the Bar on April 10, 1986 and has not practised Ontario law since June 15, 1998.

9. Gerald Henderson McCracken of Hampton, New Brunswick, was called to the Bar on March 21, 1969 and practised in Ontario as a general counsel in the Federal Department of Justice. He is no longer practising Ontario law. He was called to the Bar in New Brunswick in 1996 and is practising New Brunswick law.

10. John Walter Morgan of Sydney River, Nova Scotia, was called to the Bar on February 5, 1992 and has not practised Ontario law since 1992.

11. Johny Peter Ohnjec of Ottawa, Ontario, was called to the Bar on February 5, 1993 and practised law in Ontario from February 5, 1993 to October 10, 1994.

12. Mary Villemaire Park of Toronto, Ontario was called to the Bar on March 23, 1973 and practised law in Ontario from 1973 to June 10, 1995.

13. Nathalie Marie Josee Picard of Gatineau, Quebec, was called to the Bar on February 16, 1995 and has not practised Ontario law since May 1997.

14. Caroline Marie-Luise Presber of New York, New York, was called to the Bar on February 21, 1997 and has not practised Ontario law since December 31, 1997.

15. Andrea Sharmila Rambeharry of Mississauga, Ontario, was called to the Bar on February 7, 1996 and has not practised Ontario law since January 1997.

16. Carolyn Margaret Ritchie of Vancouver, British Columbia, was called to the Bar on February 16, 1995 and has not practised Ontario law since July 31, 1997.

17. Stella Josephine Savage of Toronto, Ontario was called to the Bar on April 11, 1986 and practised law in Ontario from July 1986 to May 29, 1998.

C.
INFORMATION

C.1. CHANGE OF NAME

C.1.1.	From	To
	Julie Ann Sabodach Baksa	Julie Ann Sabodach Wilson (Marriage Certificate)

Maria Giovanna Colangelo	Maria Giovanna Colangelo-Tassou (Name Change Certificate)
Rosemarie Franca Galli	Rosemarie Franca McCutcheon (Marriage Certificate)
Heather Margaret Robertson	Heather Margaret Robertson Stewart (Birth Certificate)
Helena Maria Szymanski	Helena Maria Patterson (Marriage Certificate)
Marcela Susana Yoker	Marcela Susana Aroca Yoker (Marriage Certificate)

C.2. ROLLS AND RECORDS

C.2.1. (a) Deaths

The following Members have died:

Sean Kevin Mullarkey Nepean	Called: March 30, 1990 Died: March 14, 1994
John Sopinka Ottawa	Called: April 8, 1960 Died: November 23, 1997
John Frederick Evans Toronto	Called: February 8, 1994 Died: May 1, 1998
Elmer David Bell Embro	Called: January 19, 1933 Died: May 13, 1998
Bruce Melvin Underhay Terra Cotta	Called: September 20, 1956 Died: June 18, 1998
Russell Philip Smith Toronto	Called: November 24, 1927 Died: June 25, 1998
William Ross Callow Toronto	Called: June 29, 1950 Died: June 26, 1998
Frank Austin Toronto	Called: June 27, 1957 Died: June 26, 1998
Edwin Hilyard Charleson Ottawa	Called: June 20, 1929 Died: July 5, 1998
Katherine Isobel O'Shaughnessy MacGregor Whitby	Called: April 8, 1987 Died: July 11, 1998

William Fienberg Toronto	Called: June 19, 1930 Died: July 15, 1998
Earl Brian Ward Lindsay	Called: April 17, 1978 Died: July 26, 1998

C.2.2. (b) Permission to Resign

C.2.3. The following member was permitted to resign his membership in the Society and his name has been removed from the rolls and records of the Society:

Walter Kingsley Kirti Wijesinha North York	Called: Permitted to Resign:	March 25, 1966 June 25, 1998

C.2.4. (c) Membership in Abeyance

Upon their appointments to the offices shown below, the memberships of the following members have been placed in abeyance under Section 31 of the Law Society Act:

John Edgar Sexton Ottawa	Called: April 10, 1964 Appointed to the Federal Court of Appeal August 26, 1998
Dennis Rory O'Connor Toronto	Called: March 25, 1966 Appointed to Court of Appeal for Ontario June 11, 1998
Lynda Christine Templeton Milton	Called: April 10, 1986 Appointed to Ontario Court of Justice (General Division) June 11, 1998
Colin Livingstone Campbell Toronto	Called: March 17, 1967 Appointed to Ontario Court of Justice (General Division) June 19, 1998
Wai Line Lily Low Toronto	Called: April 11, 1980 Appointed to Ontario Court of Justice (General Division) June 23, 1998
Antoine De Lotbiniere Panet Ottawa	Called: March 26, 1965 Appointed to Ontario Court of Justice (General Division) June 29, 1998

Stanley Bruce Durno Brampton	Called: April 8, 1976 Appointed to Ontario Court of Justice (General Division) June 29, 1998
Bruce Robert Shilton Newmarket	Called: March 22, 1974 Appointed to Ontario Court of Justice (Provincial Division) July 24, 1998

C.3. LIFE MEMBERS

C.3.1. Pursuant to Rule 49 made under the Law Society Act, the following members have become Life Members of the Society, having been called to the Bar on or before September 16, 1948:

Warner Cox Alcombrack	Bracebridge
William Niles Callaghan	Hamilton
Alphonse Henry Charron	Vanier
John William Corkery	Peterborough
William Anderson Cowan	Toronto
James Donald Dewar	Islington
Vernon Patrick Dunn	Mississauga
John Barber Ebbs	Ottawa
Terence Reid Giles	Nepean
Gregory Joseph Gorman	Ottawa
Samuel George McDougall Grange	Toronto
William Hamilton Grass	Toronto
Joan Elizabeth Heath	Guelph
Mhora Isobel Hollingsworth	Sault Ste.Marie
James Alexander Irvine	Cobourg
Michael Karpluk King	Beamsville
Bruce Martin Kinnear	Keswick
Albert Benjamin Rutter Lawrence	Ottawa
James Bryce Lillico	Peterborough
Gordon Alexander Macartney	Toronto
Fraser William MacDonald	Brantford
Harry Ian Mactavish	Willowdale
John Cameron McBride	Sidney, BC
David Ireland McWilliams	Windsor
Terence Barry Nelligan	London
Mark Merrill Orkin	Toronto
Francis William Park	Ottawa
Spencer Lorne Pearsall	Leamington
Paul Duncombe Read	Brantford
Roy Harold Saffrey	Willowdale

Arthur Britton Smith	Kingston
John Langley Tytler	Toronto
John Anthony Whittingham	Toronto
Charles Lane Wilson	Barrie

ALL OF WHICH is respectfully submitted

DATED this the 25th day of September, 1998

REPORT OF THE EXECUTIVE DIRECTOR OF EDUCATION

25TH SEPTEMBER, 1998

ADDENDUM

B.
ADMINISTRATION

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

B.1.1. Full-Time Members of Faculties of Approved Ontario Law Schools

B.1.2. The following member of an approved law faculty asks to be called to the Bar and admitted as solicitor without examination under sec. 5 of Regulation 708 on September 25th, 1998. She has filed the necessary documents and complied with the requirements of the Society:

Shelley Ann Marie Gavigan	Osgoode Hall Law School, York University.

B.2. READMISSION FOLLOWING RESIGNATION AT OWN REQUEST

B.2.1. The following former members apply for readmission and have met all the requirements in that regard:

Nancy Elaine Lands	Called:	February 25th, 1994
	Resigned:	November 29th, 1996
Murray Allan Shapiro	Called:	April 15th, 1988
	Resigned:	September 27th, 1996
Carolyn Elaine Stewart	Called:	March 20th, 1991
	Resigned:	June 28th, 1996

B.3. MEMBERSHIP UNDER RULE 50

B.3.1. Retired Members

B.3.2. The following members are at least sixty-five years of age and fully retired from the practice of law, and request permission, under Rule 50 made under the Law Society Act, to continue their memberships in the Society without payment of annual fees:

Shireen Erach Hooshangi	Toronto, ON
William Frederick Chartier	Windsor, ON
John Clive McMurchy	Toronto, ON
Arthur Carson Pennington	Toronto, ON

B.4. RESIGNATION - SECTION 12 OF REGULATION 708 MADE UNDER THE LAW SOCIETY ACT

B.4.1. The following members apply for permission to resign their memberships in the Society and have submitted Declarations/Affidavits in support. In all cases the annual filings are up to date. In cases where the member was engaged in the practice of Ontario law for any amount of time, the member has declared that all trust funds and clients' property for which they were responsible have been accounted for and paid over to the appropriate persons. They have further declared that all clients' matters have been completed and disposed of, or arrangements made to the clients' satisfaction to have their papers returned to them, or have been turned over to another lawyer. The Complaints, Audit and Staff Trustees departments all report that there are no outstanding matters with these members that should prevent them from resigning. These members have requested that they be relieved of publication in the Ontario Reports:

(1) Jane Mary Brindle of Regina, Saskatchewan, was called to the Bar on February 26, 1998 and has never engaged in the practice of Ontario law.

(2) Peter Ronald Brown of Columbus, Ohio, was called to the Bar on March 22, 1974 and has not practised Ontario law since January 1, 1996.

(3) Denis Serge Frawley of New York, New York, was called to the Bar on February 26, 1998 and has never engaged in the practice of Ontario law.

(4) Charlene Violet Lonmo of Nepean, Ontario, was called to the Bar on May 29, 1992 and practised law in Ontario from June 1, 1992 to March 31, 1995.

B.5. MEMBERSHIP RESTORED

B.5.1. The following member has given notice that he ceased to hold judicial office and asks to be restored to the Rolls of the Law Society pursuant to Section 31(2) of the Law Society Act:

	Effective date
Edward Saunders High Court of Justice for Ontario	April 15, 1997

C.
INFORMATION

C.1. CHANGE OF NAME

C.1.1.	From	To
	Sonya Lynn Forget	Sonya Lynn Andersen (Name Change Certificate)
	Renee Joanne Marie McBurney	Renee Joanne Marie Caron (Name Change Certificate)

THE REPORT AND ADDENDUM WERE ADOPTED

LPIC 1999 Insurance Program

Mr. Murray presented the annual Insurance Report to Convocation which sets out the status of claims trends, financial results and the expected retirement of the Errors and Omissions Fund deficit in early 1999.

Lawyers' Professional Indemnity Company
September 1998

Report to Convocation

TABLE OF CONTENTS

25th September, 1998

LAWYERS' PROFESSIONAL INDEMNITY COMPANY (LPIC)
REPORT TO CONVOCATION - SEPTEMBER, 1998

INTRODUCTION

1. Since assuming responsibility for the operations of the professional liability insurance program in 1995, the LPIC Board of Directors has each year reported a continuing improvement in claims trends and financial results, including progress on the retirement of the Errors and Omissions Fund deficit. Based on current projections, it is expected that this deficit will be fully retired in early 1999.

2. Through these annual Reports to Convocation, the Board also has reported on initiatives to continue moving the insurance program towards a risk-based model, as mandated by the Insurance Committee Task Force Report ("Task Force Report") in 1994.

3. For 1999, the Board recommends that the transition to a program in which the cost of insurance generally reflects the risk be completed. As is more fully described on the following pages, the Board recommends that revenues from the transaction and claims history levy surcharges – which had been applied to reduce the deficit – be applied as policy premiums starting in 1999.

4. This recommendation is consistent with recent statistical analyses which indicate that both real estate and civil litigation practice represent inordinate exposures, and with a risk-based approach mandated for the insurance program.

SUMMARY OF RECOMMENDATIONS

5. The following are the recommendations made by LPIC's Board of Directors in this Report to Convocation:

(i) The real estate transaction levy surcharge should be continued for real estate transactions for which files are opened on or after January 1, 1999, and these levy revenues should be held and applied solely as premiums for the professional liability insurance program.

(ii) The civil litigation transaction levy surcharge should be continued for civil litigation transactions for which files are opened on or after January 1, 1999, and these levy revenues should be held and applied solely as premiums for the professional liability insurance program.

(iii) The claims history levy surcharge should be continued in 1999 for claims paid (meaning a claim with payment made by the insurer pursuant to a judgment, or by way of repair or settlement of a claim) within the last five years, and these levy revenues should be held and applied solely as premiums for the professional liability insurance program.

(iv) The volume levy surcharge should be discontinued after levy amounts for members' last fiscal year ending in 1998 have been collected.

(v) Revenues from the real estate and civil litigation transaction levy surcharges, and from the claims history levy surcharges, under the 1999 program should be budgeted at $17.5 million for the purposes of establishing the base premium and other budgetary purposes.

(vi) Any revenues from the transaction and claims history levy surcharge revenues that are in excess of those budgeted in a given year should be held in trust for future insurance purposes. These excess revenues should be managed on a revolving account basis and applied as premium under the insurance program in future years. LPIC should report to the Law Society as required on the management of any surplus in such fund.

(vii The base premium should be reduced by $1,000 to $3,650 per insured lawyer for the purposes of the 1999 insurance program.

(viii) The policy coverage and options, as well as premium discounts and surcharges for the 1999 program should remain unchanged from those provided in 1998, other than certain refinements regarding the choice of policy deductible, the deductible and claims history levy surcharge implications for certain escrow closings, and a premium discount for those who promptly e-file their 1999 insurance program application.

(ix) Each lawyer practising in a law partnership (as opposed to practising with other lawyers in association only) should be required to elect the same amount and type of deductible as all other lawyers within the firm.

(x) LPIC management should be provided with the underwriting discretion to allow differing amounts or types of deductibles within a law partnership if the uniqueness of the circumstance requires a more flexible approach.

(xi) As an interim measure, for the purposes of claims reported on or after January 1, 1999, LPIC should not require the payment of the deductible and claims history levy surcharge by members, as a result of a claim in negligence being brought against the member due to the purported breach by opposing counsel of the terms of the Document Registration Agreement during an escrow closing.

(xii) For the purposes of the 1999 program, members who complete and file their 1999 professional liability insurance application form electronically prior to November 2, 1998, should be provided with a premium discount equal to $50 per member.

PART 1 – THE DEFICIT

6. In June 1994, it was recognized that approximately $203.6 million would have to be collected to retire the Errors and Omissions Fund deficit and to fund LPIC's capital.

7. By June 1998, LPIC was fully capitalized and only $34.6 million remained to be collected to retire the Errors and Omissions Fund deficit.

8. Revenues from the remainder of the 1998 transaction, claims history and volume levy surcharges should be sufficient to retire the $34.6 million still outstanding. Once the required funds, the last of which are due at the end of the first quarter of 1999, are received, Law Society members will be able to put the legacy of the Errors and Omissions Fund deficit behind them.

9. In keeping with the 1998 LPIC Report, LPIC's Board confirms that no capital levy on the membership is recommended for 1999. LPIC's capital remains sufficient to underwrite its current premiums and support its outstanding liabilities. LPIC continues to expect to generate sufficient earnings from its current operations to meet its anticipated capital needs going forward.

See Chart - Progress Toward Eliminating E&O Fund Deficit, and Restoring LPIC Capital

PART 2 – RISK RATING & THE LAW SOCIETY/LPIC PROFESSIONAL LIABILITY INSURANCE PROGRAM

The Mandate of LPIC

10. The 1994 Insurance Committee Task Force Report, as approved by Convocation, set out a number of underlying principles which form the basis of the detailed recommendations set forth in that Report. These principles speak to the fundamental nature and mandate of the program, and are summarized as follows[1]:

"The Task Force and Insurance Committee ask that Convocation adopt and approve the principles listed below that underlie our recommendations:

(a) that the Society intends to continue the E&O program;

(b) that LPIC will be operated in a commercially reasonable manner;

(c) that LPIC will not be operated on a "no-fault" compensation basis;

(d) that LPIC must limit some coverage and eliminate other coverage;

(e) that LPIC will move toward a system in which the cost of insurance generally reflects risks;

(f) that LPIC's mandate will be to settle claims fairly and expeditiously;

(g) that LPIC may deny coverage in appropriate circumstances or cancel coverage if deductibles, surcharges, premiums or levies are not paid; and

(h) that some solicitors who have been repeatedly negligent may not be able to afford to practise because they will not be able to afford the cost of insurance."

11. Although members' premiums under the program now in place generally do not reflect the risks, it is clear that the other principles have been achieved. These have been accomplished through the implementation of the specific recommendations of the Task Force Report and the reports of the LPIC Board to Convocation which followed, as well as through the accompanying changes in practices and procedures under the program.

12. Measures, however, were introduced to begin moving the program to one that reflects risk. These included changes in respect of policy coverage, options, base premium and adjustments, and the exemption criteria. These are more fully described in paragraph 39 of this Report.

13. However, the final transition to a program in which the costs of insurance generally reflect the risks has not been made pending the retirement of the deficit and developing an alternative approach to insuring the exposure to claims associated with the practice of real estate. The TitlePLUS initiative is now established and under way with approximately 800 lawyer subscribers.

14. In the view of the LPIC Board, the implementation of risk rating is now appropriate, given the retirement of the deficit anticipated with the collection of 1998 levy filings soon following the first quarter in 1999 and the early successes of TitlePLUS.

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[1] Paragraph 54 of the 1994 Insurance Committee Task Force Report.

A Commitment to Risk Rating

15. The commitment to the transition of the program to one in which the costs of insurance generally reflect the risks was clearly established with the approval of the Task Force Report in 1994.

16. Specifically, the Task Force Report noted that "as a fundamental, shaping principle, the cost of insurance should generally reflect the differences in risk history, differing risks associated with different areas of practice, and differing volumes of practice. But no insurance program can be solely risk-reflective, and there must be some sharing and spreading of risk."

17. Convocation's commitment to this view was reaffirmed with its approval of each of the reports of the LPIC Board of Directors submitted in September 1995, 1996 and 1997. These reports acknowledged the on-going commitment to the transition to a more risk-based program and sought Convocation's approval allowing various specific measures to be taken towards this objective.

18. Ontario practitioners also voiced their approval for this approach, as was evident from the results of the 1995 survey of the profession conducted by LPIC:

- 53% of members felt that premiums should vary with the area of practice (34% did not agree);
- 94% felt that special premiums should be charged based on claims experience (4% did not agree);
- 53% supported special premiums based on the number of legal transactions (33% did not agree); and
- 46% supported special premiums based on the volume of billings (41% did not agree).

Consultation with the Profession in Achieving Risk Rating

19. LPIC struck a consultation committee drawn from the profession to help it determine how best to adapt the 1999 program, given the need to move towards a program that generally reflects risks and the reality that the Errors and Omissions Fund deficit would be retired.

20. This committee was made up of representatives of various volunteer law organizations across the province, including: The Advocates' Society, Criminal Lawyers' Association, The County and District Law Presidents' Association (CDLPA), CBA-O (Civil Litigation, Family Law, and Real Property Sections), Ontario Real Estate Lawyers Association and Canadian Lawyers' Liability Assurance Society.

21. The recommendations of the LPIC Board to convert the claims history and transaction levy surcharges in 1999 to premium revenues reflect the consensus reached by this committee. Resolutions in support of these recommendations have been passed by both the CBA-O and CDLPA, and are attached as Appendix B.

22. Support for this approach was also found in the 1995 survey of the profession which indicated that 53% of the members felt that it makes sense to charge special premiums based on the number of legal transactions (33% did not agree).

The Impact of Risk Rating

23. LPIC first undertook a detailed analysis of the various insurance risks under the program in 1996. The results of this analysis were discussed in the Fall 1996 LPIC Report to Convocation. That analysis indicated that the practice of real estate law represented a disproportionate risk when compared to other areas of practice, with other areas of practice generally representing much reduced exposures.

Risk and Areas of Practice

24. With the benefit of the claims experience under the program in the two intervening years, a detailed analysis of the risk associated with various practice areas has once again been done. The following charts summarize the results of this analysis by percentage of time spent across the profession and by primary area of practice.

See Chart - Analysis of Cost of Claims to Time Spent by Profession in Area of Practice

See Chart - Analysis of Cost of Claims by Lawyer's Primary Arrea of Practice

25. The analysis reaffirms that the practice of real estate continues to represent a disproportionate risk when compared to other areas of practice.

26. The relative exposure relating to civil litigation has grown over the last two years and now represents 33% of the claims reported, approximating that of real estate at 34% of the claims. These changes are discussed more fully in the following section, "Changes in the Risk" and the accompanying charts.

Other Risk Considerations

27. Other aspects reviewed in this risk-based analysis include the exposure based on the size of firm, year of call, geographic location, and prior claims history. The results of this analysis are summarized in the graphs in Appendix A to this report. These results are consistent with those seen in earlier risk-based evaluations and continue to support the levy and premium-based measures adopted in past, such as premium discounts for new practitioners and part-time practitioners, and the claims history levy surcharges, to better reflect the insured risk exposure.

Changes in the Risk

28. As the following charts indicate, the relative risk associated with one substantial area of practice, civil litigation, has increased substantially in this last two-year period. As a percentage of claims, the number of civil litigation claims being reported currently approximates the number relating to the practice of real estate.

See Chart - Distribution of Claim Count, by Area of Practice

See Chart - Distribution of Claim Cost, by Area of Practice

Changes in the Risk: Real Estate

29. The decline in real estate losses reflects changes in both the environment in which lawyers practise and the insurance program. For example, the improved economy of the past few years has fostered a rising real estate market in which losses, if any, are minimized and parties are more inclined to want to see the real estate transaction completed.

30. Similarly, changes to the insurance program itself have served to reduce real estate losses. The decreased costs of claims handling, the introduction of the mortgage brokering exclusion under the program as of January 1995, and the apparent reluctance on the part of many lawyers to now involve themselves in mortgage brokering, have tended to reduce the number and size of real estate-related claims under the program.

31. These statistics largely predate the introduction and use of LPIC's TitlePLUS product or the title insurance products of LPIC's competitors in Ontario. It will take some time before these title insurance developments affect the insurance program, given the shift in type of insurance from a 'claims-made' to an 'occurrence-based' form, and the time that it takes for a real estate related error to manifest itself as a claim. However, the use of title insurance in certain more difficult transactions and the increased awareness of practices and procedures as a result of the debate around title insurance and the implementation of TitlePLUS have likely had a positive impact.

Changes in the Risk: Civil Litigation

32. It is apparent, however, that the nature of claims against civil litigators is changing. Traditionally these claims have tended to arise out of the fact that a limitation period had been missed. These types of claims commonly involve significant indemnity payments, but are generally readily resolved.

33. As the following graph indicates, approximately 60 per cent of civil litigation claims reported now arise out of the general conduct and handling of the matter, rather than missed limitations, with 24 per cent of the claims now arising out of causes such as poor communication with clients, failure to follow clients' instructions and procrastination. Disappointed clients are more likely to look to a lawyer to compensate them for an unexpected loss.

See Chart - Distribution of Civil Litigation Claim Count, by Description of Loss

34. With changes in management and ownership of corporations now commonplace, corporate clients appear more inclined to sue their former counsel and enter into protracted litigation, when in past the firm simply would have lost the corporate client.

35. Although successfully defended to date, claims brought under Rule 57.07 Liability of Solicitor for Costs are also on the rise. Typically, the claimant seeks an order requiring that the solicitor personally pay the costs of the party if the lawyer ". . . has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other fault."

36. The shift towards civil litigation practice being the predominant area of claims exposure is in keeping with the American experience.

Progress To Date Towards Risk Rating

37. Since 1995, LPIC has implemented numerous measures to move towards a more risk-based insurance program.

38. Although each of these many changes represented one more step towards a more risk-based program, they did not suitably address the disproportionate exposure associated with the practice of real estate, and the growing exposure of the practice of civil litigation.

39. Changes adopted by Convocation to date to move the program towards a more risk-based program, include:

(a) The base levy has been adjusted yearly. In 1995, it was increased and made applicable to all practising insured members who did not qualify for exemption from payment of premium. In subsequent years it was adjusted downward – to reflect the changing costs of the program as a whole and to accommodate other premium adjustments that better reflected risk.

(b) The mortgage broker exclusion was introduced – to reflect the inordinately high risk exposure associated with this activity which is not exclusively related to the practice of law.

(c) The premiums for new practitioners were reduced – to reflect the lower risk of members without a prior exposure to claims.

(d) The policy (sub)limit coverage for the innocent party (formerly innocent partner) exposure was reduced – in response to the inordinately high risk associated with this coverage. As well, members who were required or elected to purchase this coverage had to pay an additional premium levy.

(e) Optional innocent party limit buy-up coverage was introduced so that members who felt that they might be at risk could apply to increase the amount of this policy (sub)limit coverage, for an additional premium reflective of the exposure.

(f) Members were offered a choice of the type and amount of deductible, with premiums adjusted to reflect the risk associated with the member's selection.

(g) Members who agreed to restrict their practice to only criminal and/or immigration law (previously "refugee" law) were given the opportunity to reduce their premium – reflecting the lower risk associated with these types of practices.

(h) Members qualifying as part-time practitioners were given the opportunity to reduce their premiums – reflecting the lower risk associated with the practice of members who have chosen to practise part-time. This option accommodates members who for family or other reasons choose to practise part-time, as well as older practitioners who are reducing their practice responsibilities gradually over a number of years.

(i) A 'minimum premium' adjustment was introduced for practitioners who qualified for multiple premium discounts (such as the new practitioner discount, the criminal/immigration lawyer option discount, the part-time practitioner option discount) – to better reflect the exposure of these members.

(j) A choice of premium payment plans and a discount for early premium payment were introduced to better accommodate members' cash flows and recognize the costs of administration and the time value of money. For members changing the status of their practice, the prorating of premiums was changed to a daily basis, from a quarterly basis – to better reflect the member's actual exposure.

(k) A premium surcharge was introduced for those members who fail to provide LPIC with a completed and signed application form when due – to reflect the disproportionately high claims exposure witnessed for this group.

(l) The criteria under which members could claim an exemption from coverage and the payment of premiums and levies under the program were clarified, ensuring for example, that in-house counsel who provide legal services outside of the employer group were not exempted, in keeping with the exposure associated with this type of activity.

(m) For in-house counsel who maintain the practice coverage, the criteria for the part-time practitioner discount were adapted and a limited defence-only coverage was introduced for claims brought against members by their corporate employer – to ensure that these members are afforded suitable protection under the policy at a premium which better reflects their exposure.

(n) A reduced limit run-off coverage was provided, at no charge, to members withdrawn or withdrawing from private practice and to in-house counsel for their services prior to 1996, with the opportunity to apply to increase run-off limit coverage for a premium assessed on a risk basis.

(o) The claims history levy surcharge was increased – to reflect the fact that members with an established claims history are more likely to report claims in the future. Revenues from this levy have been applied directly against the Errors and Omissions Fund deficit to date.

(p) A transaction levy on real estate and civil litigation transactions was introduced, in recognition of the higher risk associated with the related areas of practice of these transactions. Revenues from these levy amounts have been applied directly against the Errors and Omissions Fund deficit to date. Certain title-insured transactions were later exempted from the real estate transaction levy – in that they were unlikely to form the basis of a future claim against members under the program.

(q) A volume levy surcharge was introduced – in recognition of the increased exposure accompanying larger volume law practices. Revenues from this levy have been applied directly against the Errors and Omissions Fund deficit to date.

PART 3 – PROPOSED CHANGES FOR THE 1999 PROFESSIONAL LIABILITY INSURANCE PROGRAM

Introduction

40. The LPIC Board of Directors proposes that the transition of the program to one in which the costs of insurance generally reflect the risk, as recommended in the Task Force Report, be completed with the introduction of the professional liability insurance program for 1999.

41. After consultation with the profession, the LPIC Board of Directors is satisfied that this transition is best achieved by building on the current program and the various steps taken to date to move the program towards a more risk-based structure.

42. The Board proposes that the 1999 program generally reflect the same policy coverage and options, as well as premium discounts and surcharges, as are in place under the 1998 program. However, the sources of premium revenues would be expanded to include revenues from the transaction and claims history levy surcharges, in addition to the base premium. The additional revenues generated from the levy surcharges would result in a substantial reduction in the general base premium amount.

Premium – Revenues and Pricing

The Anticipated Total Loss Costs

43. Premium revenue requirements for the program in 1999 are based on the anticipated total loss costs under the program in the year. The loss cost projections are based on the historical loss experience of the program, with the primary focus being on the loss development in the most recent policy years, with adjustment for any contemplated changes in coverage.

44. Based on the historical loss experience of the program and the general consistency proposed for the policy coverage, LPIC anticipates the total loss costs of the insurance program to be $65 million for the 1999 policy year. As indicated below, this projection is consistent with costs anticipated for 1998 and 1997.

See Chart - Claims Cost of Ontario Program, by Fund Year ($000's)

The Real Estate Transaction, Civil Litigation Transaction, Claims History and Volume Levy Surcharges

(i) Application of the Levy Surcharges

45. The LPIC Board proposes that the real estate and civil litigation transaction levies, which had previously been applied to reduce the deficit, be applied as premiums under the 1999 insurance program, commencing with transactions for which a file is opened by or on behalf of the lawyer on or after January 1, 1999.

46. Revenues from the claims history levy surcharge, also previously applied against the Errors and Omissions Fund deficit, would be applied as premium under the insurance program to the extent invoiced in connection with the 1999 policy.

47. After the collection of revenues from the volume levy surcharge relating to the members' last fiscal year ending in 1998 are applied against the Errors and Omissions Fund deficit (the last of which is due for receipt at the end of the first quarter in 1999), the volume levy surcharge would be discontinued.

48. In particular, the LPIC Board of Directors recommends that:

(a) The real estate transaction levy surcharge be continued for real estate transactions for which files are opened on or after January 1, 1999, and that these levy revenues be held and applied solely as premiums for the professional liability insurance program.

(b) The civil litigation transaction levy surcharge be continued for civil litigation transactions for which files are opened on or after January 1, 1999, and that these levy revenues be held and applied solely as premiums for the professional liability insurance program.

(c) The claims history levy surcharge be continued in 1999 for claims paid (meaning a claim with payment made by the insurer pursuant to a judgment, or by way of repair or settlement of a claim) within the last five years, and that these levy revenues be held and applied solely as premiums for the professional liability insurance program.

(d) The volume levy surcharge be discontinued after levy amounts for members' last fiscal year ending in 1998 have been collected.

(ii) *Budgeting of Levy Surcharge Revenues*

49. Vagaries in the economy generally, and the real estate market specifically, make it difficult to predict with certainty the amount of revenues generated by levy surcharges. Revenues from the real estate transaction levy surcharge may also be affected by the increased use of title insurance, since the lawyer is not obliged to pay the levy for many title-insured residential real estate transactions.

50. LPIC expects to generate a maximum of $26 million in revenues from the transaction and claims history levy surcharges in 1999. Because the first quarter of these revenues relate to 1998 and will be applied against the Errors and Omissions Fund deficit, only 75% – or $19.5 million – of the revenues will be received and available for the 1999 program.

51. However, given the vagaries associated with predicting the economy, LPIC proposes that, for the purposes of establishing the general base premium and other budgetary purposes, the total levy surcharge revenues for the 1999 program be conservatively budgeted at $17.5 million.

52. Any excess revenues from these surcharges collected in 1999 would be held and managed on a revolving account basis and applied as premium under the insurance program in future years. The revolving account would effectively operate as a contingency fund, guarding against any future shortfall in levy revenues and act as a buffer against the need for sudden increases in base premium revenues.

53. Accordingly, the LPIC Board of Directors recommends the following:

(a) Revenues from the real estate and civil litigation transaction levy surcharges, and from the claims history levy surcharges, under the 1999 program should be budgeted at $17.5 million for the purposes of establishing the base premium and other budgetary purposes.

(b) Any revenues from the transaction and claims history levy surcharge revenues that are in excess of those budgeted in a given year should be held in trust for future insurance purposes. These excess revenues should be managed on a revolving account basis and applied as premium under the insurance program in future years. LPIC would report to the Law Society as required on the management of any surplus in such fund.

(iii) *The Application of Taxes*

54. Insurance premiums do not attract Goods and Services Tax (GST). The transaction and claims history levy surcharges, which would be treated as insurance premiums in 1999, would similarly qualify for this tax treatment.

55. Traditionally the transaction levies were considered to be $50 inclusive of all taxes. For 1998, the breakdown of the transaction levies was as follows:

When payable to the Law Society		*If disbursed to clients*	
Surcharge	$43.48	Surcharge	$46.96
GST	$ 3.04	GST	$ 3.29
PST	$ 3.48		
Total	$50.00	Total	$50.25

56. With the transaction levies forming part of insurance premiums in 1999 the breakdown for 1999 is as follows:

When payable to the Law Society		*If disbursed to clients*	
Surcharge	$46.30	Surcharge	$50.00
GST	$ 0.00	GST	$ 3.50
PST	$ 3.70		
Total	$50.00	Total	$53.50

The Base Premium

57. First and foremost, premiums must fund the cost of claims in the underwriting year. Although the loss costs of the insurance program in 1999 are expected to parallel those of 1998 and 1997, the additional premium revenues generated by the transaction and claims history levy surcharges will enable LPIC to substantially reduce the base premium.

58. For 1999 the base premium could be reduced to $3,650, down from $4,650 in 1998 and $5,150 in 1997. This figure is based on the following assumptions:

- 17,200 practising members (full-time equivalents);
- $65 million in anticipated claims costs; and
- $17.5 million in budgeted levy surcharge revenues.

59. Adjustments for investment income, applicable taxes, the various premium surcharges and discounts under the program, and administration costs are also considered.

60. The base premium amount in past years is summarized as follows:

See Chart - Base, Premium by Fund Year

61. The LPIC Board of Directors recommends that the base premium be reduced by $1,000 to $3,650 per insured lawyer for the purposes of the 1999 insurance program.

Policy Coverage, Options, Premium Discounts and Surcharges

62. The Board proposes that the 1999 program generally reflect the same policy coverage and options, as well as premium discounts and surcharges as are currently in place.

63. Except for some refinements related to the choice of policy deductible, and the deductible and claims history levy surcharge implications in respect of certain escrow closings, the policy coverage would remain the same as in 1998.

64. Accordingly, the standard practice and run-off coverages would remain in place, and the innocent party buy-up, part-time practice, restricted area of practice (criminal and immigration law) and premium instalment and payment options, would all remain unchanged.

65. Similarly, the current premium discounts and surcharges, as a percentage of the base premium, would remain unchanged. This would include the new practitioner discount, part-time practitioner option discount, the restricted area of practice option discount, as well as adjustments for deductibles and minimum premiums, and the 'no application form' surcharge.

66. Since these are expressed as a percentage of the base premium, any adjustment to the base premium would proportionately affect the amount of premium discount or surcharge also applied. A lump sum premium discount would, however, be introduced for those who use the new on-line electronic application filing option.

67. Pricing for the innocent party buy-up coverage as well as the early premium payment discount, are expressed in absolute dollar amounts, and as such would not be affected by a change in the base rate.

68. The LPIC Board recommends that the policy coverage and options, as well as premium discounts and surcharges for the 1999 program remain unchanged from those provided in 1998, other than certain refinements described later regarding the choice of policy deductible, the deductible and claims history levy surcharge implications for certain escrow closings, and a premium discount for those who promptly e-file their 1999 insurance program application.

Deductibles

69. Under the current program, subject to some restrictions, members purchasing the practice coverage are provided with a choice of amount and type of policy deductible. The policy premium is adjusted accordingly.

70. LPIC believes that each lawyer practising in a law partnership should be required to elect the same type and amount of deductible as the other lawyers within the law partnership, to ensure consistency in coverage across the law partnership and to ensure that there is no ambiguity in deductible obligations where more than one lawyer in the law partnership is involved in the same claim.

71. This is consistent with the deductible elections made by the vast majority of members practising in law partnerships under the program today.

72. However, LPIC also recognizes that unusual circumstances which require some flexibility arise from time to time.

73. The LPIC Board recommends that:

(a) each lawyer practising in a law partnership (as opposed to practising with other lawyers in association only) be required to elect the same amount and type of deductible as all other lawyers within the firm.

(b) LPIC management be provided with the underwriting discretion to allow differing amounts or types of deductibles within a law partnership if the uniqueness of the circumstance requires a more flexible approach.

Coverage in Respect of Document Registration Agreements

74. Implementation of electronic registration, scheduled for 1999-2000, likely will make escrow closing of real estate transactions the general practice in real estate conveyancing.

75. Under this new system, the actual registration function will be done by only one of the parties, rather than simultaneously by both parties. To realize the full potential of the system, most transactions are expected to close on an escrow basis.

76. A standard form agreement, called the Document Registration Agreement ("DRA"), has been established to standardize escrow closings. It sets out the obligations of the parties regarding the holding in escrow and release of closing documents and money, and the registration of electronic documentation.

77. In the Final Report of the Joint Committee on Electronic Registration of Title Documents – June 1997, the Joint Committee of the Law Society, Canadian Bar Association - Ontario and the Ontario Ministry of Consumer and Commercial Relations, recommended that measures be introduced to encourage the use of the DRA by real estate practitioners, including "...the implementation of some form of insurance protection for lawyers as an added feature under their E&O coverage"[2].

78. Specifically, concerns have been expressed regarding the exposure of members to the payment of the deductible and claims history levy surcharge as a result of a claim in negligence being brought against the member due to the purported breach by opposing counsel of the terms of the DRA during an escrow closing.

79. The LPIC Board recommends that, as an interim measure, for the purposes of claims reported on or after January 1, 1999, LPIC not require the payment of the deductible and claims history levy surcharge by members, as a result of a claim in negligence being brought against the member due to the purported breach by opposing counsel of the terms of the Document Registration Agreement during an escrow closing.

Premium Discount for Electronic Application Form Filing

80. Starting with the 1999 insurance program, lawyers will be able to complete and submit their policy application form electronically though an enhanced, secure LPIC website.

81. To encourage lawyers to use this option, LPIC proposes that lawyers who file their application forms promptly electronically be given a reduction in premium. Encouraging use of the LPIC website as a means of communication minimizes the administration involved in the processing of application forms, and encourages the timely filing of applications.

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[2] Paragraph 9.4.7 at page 35 of The Final Report of the Joint Committee on Electronic Registration of Title Documents - June 1997, dated November 10, 1997, Canadian Bar Association - Ontario Continuing Legal Education.

82. The LPIC Board accordingly recommends that, for the purposes of the 1999 program, members who complete and file their 1999 professional liability insurance application form electronically prior to November 2, 1998, be provided with a premium discount equal to $50 per member.

Achieving Risk Rating

83. As earlier discussed, the Task Force Report concluded that the cost of insurance under the program should generally reflect the risks.

84. Specifically the Report indicated that "... as a fundamental, shaping principle the cost of insurance should generally reflect the differences in risk history, differing risks associated with different areas of practice, and differing volumes of practice. But no insurance program can be solely risk-reflective and there must be some sharing and spreading of risk."

85. This has meant moving the program from one premised upon the principle that the total cost of claims should be borne equally by all practicing members, to a program in which the costs of insurance generally reflect the risk; and achieving this objective without causing substantial dislocation among the bar.

86. As reflected in the recommendations of this report, it is the Board's view that this is best achieved by building upon program changes already introduced and applying the real estate and civil litigation transaction as well as claims history levy surcharge revenues, as premiums. Notably, claims relating to these two areas of practice – real estate and civil litigation – together represent 67.0% of the claims reported and 63.8% of the claims costs under the program.[3]

87. On this basis, the anticipated premiums (including base related premiums, as well as transaction and claims history levy surcharges) and losses by area of practice are summarized as follows:

See Chart - Comparison of Projected 1999 Premium + Levies per Lawyer to Cost of Claims by Primary Area of Practice

88. It is clear, however, that some amount of subsidy is still anticipated for some areas of practice under the program. In particular, it is anticipated that losses would exceed premiums for those whose primary area of practice is corporate/bankruptcy law and for those whose primary area of practice is tax law. Claims, however, relating to corporate/bankruptcy law represent approximately 9.6% of claims reported and 14.2% of claims costs, and only 1.1% and 1.5% for tax law under the program.[4]

89. Appreciating the relatively small amount of the subsidy and limited segment of the claims portfolio relating to these two areas of practice, in the view of LPIC's Board, the costs of insurance under the program would still generally reflect the risks.

90. This approach is consistent with commercial insurance practices, where true risk rating is tempered to reflect the efficiencies in cost and administration.

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[3] See the "Distribution of Claim Count, by Area of Practice" chart on page 15 and "Distribution of Claim Cost, by Area of Practice" chart on page 16 of this Report.

[4] Ibid.

91. Maintaining the current structure of premium discounts and surcharges ensures that such low-risk groups as part-time practitioners, new practitioners, as well as criminal and/or immigration law practitioners continue to benefit from substantial discounts from the reduced base rate premiums, better reflecting the risk associated with their practices.

92. Although it is accepted that the volume (size) of practice is not wholly consistent with determining risk, the transaction levies, by their very nature, would introduce some element of the premium which would reflect the size of practice in these higher risk areas. Premiums would reflect risk history by applying the claims history levy surcharge revenues as premium under the program.

93. Using the transaction levies to offset risk realizes the Task Force Report objective. Risk rating is accomplished while avoiding the substantial dislocation among the bar in these higher risk areas of practice, which would otherwise occur with risk rating.

94. Examples of premiums which would be charged to members depending upon the nature of their practice are summarized in Appendix C of this Report.

PART 4 – PRACTICEPRO: LPIC'S RISK MANAGEMENT PROGRAM

Introduction

95. A year ago, the Board reported to Convocation on LPIC's plans to launch a comprehensive risk management program.

96. This program, it was explained, would build on three information sources: LPIC's own information database; research conducted on LPIC's behalf by Professor Neil Gold, of the University of Windsor Law School; and the experience of risk management programs in other jurisdictions.

97. Based on its analysis of these information sources, LPIC had concluded that a comprehensive risk management program would address several needs including: the need to reduce claims exposure; the need to help lawyers practise more effectively and profitably; and the need to empower lawyers to thrive, not just survive, in a rapidly-changing practice climate.

98. In June of this year, LPIC launched its practicePRO initiative – a "quality-oriented" program for Ontario practitioners.

A "Quality-Oriented" Program for Ontario Practitioners

99. PracticePRO encourages practitioners to be proficient, professional and progressive. PracticePRO embraces the Law Society's definition of competence, particularly as it speaks to ongoing development and emphasizes a better quality of service. The very essence of practicePRO is about change, improvement and excellence. PracticePRO positions LPIC as an aggregator and distributor of information and resources rather than as a developer of these tools, drawing on the expertise and credibility of many facets of the legal profession, including senior expert practitioners, Law Society, CBAO, The Advocates' Society and various other law associations.

The Modes of Communication of practicePRO

100. PracticePRO communicates through the *lpic:news* and on the information highway at its website: practicePRO.lpic.ca. The extensive use of print media reflects today's reality: Most practitioners have not yet reached a comfort level with technology. At the same time, to encourage practitioners to embrace technology, practicePRO makes extensive use of the website as the preferred medium for posting new, practice-oriented information.

The Components of practicePRO

101. PracticePRO has four components:

- Information – to provide a context for change
- Practice Aids – to offer tools for today and tomorrow
- Education – to promote the need to keep learning
- Wellness & Balance – to recognize the human dimension

Information

102. Building awareness – both of the trends and issues that are reshaping the practice and of the risks inherent in practice and how to avoid them – is fundamental to the success of this type of program. LPIC's newsletter, ***lpic:news***, now includes a pull-out, four-page centre spread that focuses on risk management issues and recently featured discussions of the Year 2000 "bug" and how to better manage specific aspects of the lawyer/client relationship. Similarly, portions of the website are dedicated to reviewing specific practice issues – such as Suing Clients for Fees or Acting for Family and Friends – and providing tips on how lawyers can better equip themselves to deal with these types of issues.

Practice Aids

103. A key mandate of practicePRO is to develop tools that provide a "how to" approach to law practice, tackling those practice issues that, based on statistics, potentially expose the lawyer to the risk of a claim.

104. To that end, LPIC has developed two resource booklets, one on *Managing the Lawyer/Client Relationship*, and a second on *Conflict of Interest Situations*. Each contains a general discussion of its topic, and a series of checklists designed to be used by lawyers as reference tools.

105. In June, more than 10,000 of these booklets were mailed, as part of a comprehensive information package, to lawyer groupings that, based on LPIC statistics, represent the highest claims risk: claims-active lawyers; sole practitioners; new practitioners called to the bar in the last year; and one copy to each law firm insured with LPIC.

106. Over the next 12 to 18 months, LPIC also plans to co-venture and promote software-based practice aids that help lawyers run their businesses and provide services in a more practical, efficient way.

Education

107. Research elsewhere has shown that education and ongoing professional development are acknowledged cornerstones of competence and proficiency – two issues that are fundamental to risk management. An important component of practicePRO therefore, is support of education initiatives offered by the Law Society, the Canadian Bar Association, and other professional associations. To impress on new lawyers the importance of insurance and risk management, LPIC has developed course material on these subjects for the Law Society's Bar Admission Course.

Wellness and Balance

108. The fourth component of practicePRO is promoting the concepts of wellness and balance – both essential to a healthy work environment and a successful law practice. LPIC now funds and promotes the Ontario Bar Assistance Program, a confidential lawyer-to-lawyer network for lawyers in need. Through its website, LPIC also is linking lawyers to mentoring, counseling and other services sponsored by a variety of professional organizations.

The Phases of practicePRO

109. PracticePRO has been developed as a long term product under the LPIC liability insurance program. LPIC believes that practicePRO will enhance its ability to reduce premium costs to its insureds and at the same time provide other value-added, supportive features. But lawyers will need time and exposure to the program to understand how practicePRO can work for them.

Phase I – Awareness Building – to learn about risk and the need for change

110. Key to its success – and a fundamental objective for practicePRO this year – is to establish its credibility in the eyes of the lawyers. For this reason, the emphasis this year is on building awareness of the risks of practice, the means of avoiding or minimizing exposures to claims, and also how to adapt to the external environmental pressures of competition, consumerism, globalization and technology.

Phase II – Practice Tools – to help improve the delivery of services

111. As practitioners learn about and embrace practicePRO, it is likely that practitioners will look to LPIC for additional support. In its second phase, practicePRO will integrate practice tools and technology and develop software applications that will assist lawyers in managing practice risks and in continuing to adapt to the changing practice climate.

Phase III – Standards of Excellence – to maximize benefits and minimize costs

112. The third phase of practicePRO will introduce a set of voluntary practice standards which promote excellence – the thought being that excellence is the better risk. These standards will be packaged as an organizational tool to be adopted by a law firm or lawyer under a voluntary accreditation program paid for by the user. As part of its phase III planning, LPIC is reviewing various models of excellence, including well-recognized general concepts such as the Better Business Bureau Program, the Seal of Good Housekeeping Program, and specific law practice certification models such as Lexcel, the Practice Management Standard (PMS) of the Law Society of England and Wales which operates like an ISO 9000 program.

Conclusion

113. It is LPIC's belief that this practicePRO risk management initiative, with its mix of tools and resources, will help practitioners adapt to the changing practice climate and take advantage of the opportunities that this change presents. Moreover, it is anticipated that this initiative will help shape the ways in which lawyers practise, thus addressing the need to influence lawyers' behaviour.

ALL OF WHICH LPIC'S BOARD OF DIRECTORS RESPECTFULLY SUBMITS TO CONVOCATION.

September, 1998

ROSS W. MURRAY, Q.C.
Chair, LPIC's Board of Directors

APPENDIX A

- Distribution of Claims by Area of Practice (graph)
- Distribution of Claims by Geographic Region (graph)
- Distribution of Claims by Firm Size (graph)
- Distribution of Claims by Years Since Date of Call (graph)
- Distribution of Gross Incurred Claims by Number of Claims Reported by Member (graph)
- Distribution of Members by Number of Claims Reported by Member (graph)

(See Appendix A in Convocation file)

APPENDIX B

- Resolutions of the County and District Law Presidents' Association
- Resolution of the Canadian Bar Association - Ontario

(See Appendix B in Convocation file)

APPENDIX C

- Premium Rating Examples

(See Appendix C in Convocation file)

Mr. Heins took questions from the Bench.

It was moved by Mr. Murray, seconded by Ms. Carpenter-Gunn that the Report be adopted.

Carried

THE REPORT WAS ADOPTED

Messrs. Topp and Cole thanked the Treasurer, Board members and the members of the Bar for the work done in reducing the deficit.

LPIC Task Force Report on the Ownership of LPIC

Mr. Finkelstein presented the Report of the LPIC Ownership Committee.

Report of the LPIC Ownership Committee
September 1998

Report to Convocation

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REPORT TO CONVOCATION OF THE LPIC OWNERSHIP COMMITTEE

Members

Neil Finkelstein - Chair
Vern Krishna - Koskie Minsky
Ross W. Murray - Murray Courtis
Harriet Sachs - Dickson, Sachs, Appell & Beaman
Thomas I.A. Allen - Ogilvy Renault
James M. Tory - Tory, Tory, DesLauriers & Binnington
David A. Jackson - Blake, Cassels & Graydon
Wes Voorheis - Voorheis & Co.
Ian D. Croft - The Woodbridge Company Limited
Derek Watchorn - Davies, Ward & Beck

Advisors

Crystal Witterick - Secretary
Malcolm Heins - LPIC
Michelle Strom - LPIC
David Ross - Deloitte & Touche

INTRODUCTION

1. This Committee was appointed by Convocation to examine and report on the relative merits of the Law Society selling all or part of its shareholding in the Lawyers' Professional Indemnity Company (LPIC). The Committee met on April 22 and July 6, 1998 pursuant to its mandate and this report reflects its deliberations and recommendations.

2. LPIC is a wholly-owned captive in the form of an insurance company. LPIC operates as the primary insurer of the Law Society's professional liability insurance program offering insurance coverage directly to members of the Law Society and reinsuring portions of the risk in the traditional reinsurance market. LPIC is incorporated pursuant to the Ontario Corporations Act, and is regulated by the Ontario Insurance Commission.

3. The relative merits of a captive insurance program were considered by Convocation in September 1996 when it reviewed and adopted the report and recommendations of LPIC's Board of Directors. For ease of reference, the relevant sections of the 1996 report and recommendations to Convocation are appended to this report.

4. The Insurance Committee Task Force in October of 1994 also considered the issue. While it is fair to say that their considerations and recommendations were in large measure constrained by the realities of the $154 million deficit, it is useful to quote paragraph 53 of the report:

> "53. Again, then, the Task Force and the Insurance Committee believe that the E&O program should continue, but the question of whether the Society should support a mandatory E&O program is not free from doubt and should be reconsidered as a threshold question in every year, bearing in mind LPIC's experience, the costs of insurance, the coverages available, the deficit, and whether an efficient management structure is functioning." For ease of reference the portions of the Insurance Committee Task Force report which considered the Law Society's ownership of LPIC have been appended."

5. The Ownership Committee concluded that the analysis of both the Insurance Committee Task Force in their October 1994 report and LPIC's Board of Directors in their 1996 report were probative of the issues at hand and that their recommendations and conclusions still current.

BASIC TENETS

6. In considering the potential sale of all or part of the Law Society's interest in LPIC, the Committee accepted the principle that professional liability insurance was to remain a mandatory requirement for lawyers who practiced law in Ontario.

7. It was felt that for the Law Society to abandon compulsory professional liability insurance for its members would, at this time, run counter to public policy and the trend of other professions in this Province who have recently mandated professional liability insurance or are in the process of so mandating (chartered accountants and real estate agents and brokers respectively). Convocation should recall that 80% of its members felt that lawyers should be required to have insurance for their professional activities.

8. The second basic tenet was that pricing of professional liability insurance should reflect risk and that it should be as affordable as reasonably possible in the circumstances. Affordability and availability were the prime reasons that the Law Society became involved in professional liability insurance in the early 1970's. The same reasons also drove the establishment of professional liability programs for lawyers in other provinces.

9. The third basic tenet was that coverage should be as comprehensive as possible. Comprehensive coverage not only benefits members of the Law Society, but as well, protects members of the public from the errors & omissions of lawyers.

10. There is a delicate balance between comprehensive insurance coverage and affordability in a mandatory insurance program. This balance was clearly recognized by the Insurance Committee Task Force at paragraphs 50 and 51:

> "50. On balance, the Task Force and the Insurance Committee conclude that for the greatest protection of the public and the greatest stability over time for the majority of the Society's membership the Society must continue the E&O program.
>
> "51. Our conclusion, however, is not so fundamentally clear as to be unchangeable, because it rests on the assumption that Convocation and the Society recognize the absolute necessity of facing up to certain financial realities. convocation can no longer attempt to deliver a Rolls Royce insurance policy at the cost of a Ford. If convocation cannot accept these realities, it should end the Society's involvement in the E&O program now.

11. The Insurance Committee Task Force then went on to outline the following principles which followed the recommendation at paragraph 53 of the report that the E&O program should continue. The principles recommended and adopted were as follows:

(a) that the Society intends to continue the E&O program;
(b) that LPIC will be operated in a commercially reasonably manner;
(c) that LPIC will not be operated on a "no-fault" compensation basis;
(d) that LPIC must limit some coverage and eliminate other coverage;
(e) that LPIC will move toward a system in which the cost of insurance generally reflects risks;
(f) that LPIC's mandate will be to settle claims fairly and expeditiously;
(g) that LPIC may deny coverage in appropriate circumstances or cancel coverage if deductibles, surcharges, premiums or levies are not paid; and
(h) that some solicitors who have been repeatedly negligent may not be able to afford to practise because they will not be able to afford the cost of insurance.

12. As has been reported, from time to time, to Convocation these principles have formed the basis of LPIC's operations since December of 1994.

ISSUES FOR CONSIDERATION

Available Alternatives

13. In considering the sale of all or part of the Law Society's shareholdings in LPIC, the Committee considered that the following alternatives were the most realistic for the Law Society under the circumstances:

1. Sell 100% of LPIC and fix or review on a mandatory basis E&O Insurance premiums.
2. Sell 100% of LPIC and let the market determine premium levels.
3. Sell more than 50% but less than 100% of LPIC and fix or review on a mandatory basis E&O Insurance premiums.
4. Sell more than 50% but less than 100% of LPIC and let the market determine premium levels.
5. Sell more than 50% but less than 100% of LPIC and guarantee the purchaser a return on its investment in LPIC.
6. Sell less than 50% of LPIC and fix or review on a mandatory basis E&O Insurance premiums.
7. Sell less than 50% of LPIC and let the market determine premium levels.
8. Sell less than 50% of LPIC and guarantee the purchaser a return on its investment in LPIC.

Analysis and Considerations

14. The Committee discussed the alternatives available to the Law Society and the motivation for its considering the sale of all or part of its interest in LPIC. Discussion and analysis of the issues is reflected in the following recount of the Committee's deliberations.

- The most serious issue identified by the Committee was the ongoing conflict that would exist as between the insured members of LPIC and the commercial owners. The commercial owners, whether purchasing all or part of the shares of LPIC would strive to obtain the highest possible margins and profits from the business of LPIC. As a wholly-owned captive LPIC's profits are available for return to the insured members in the form of lower premiums. A third party shareholder would wish the profits for their own shareholders, hence there would be an on-going conflict which would put tension on the relationship as between the Law Society and the third party shareholder.

- The relationship as between the Law Society and the third party shareholder would have to be reduced to a shareholders agreement covering all of the potential issues of conflict as between the two parties and dealing with issues of control and decision making. This would sharply reduce the flexibility that the Law Society presently has as the sole shareholder of LPIC. Issues would likely arise with respect to the breadth of coverage provided to the Law Society's members and claims management. Control of the terms and conditions of coverage and claims management is one of the significant advantages of a captive which advantage could be compromised by third party ownership. In addition, there would be resistance to the expenditure of revenues on risk management initiatives which would have longer benefits for the profession and the insurer.

- It was acknowledged that there was a cost of capital and risk associated with the Law Society's ownership of LPIC. The amount of capital required and the risk factors are somewhat ameliorated by LPIC's current use of reinsurance. The risk factor was amply demonstrated by the Law Society's previous experience with the operations of its errors & omissions fund and ownership of LPIC prior to 1994.

- The property and casualty insurance business is notoriously cyclical. Historically the industry's capacity for risk and pricing has expanded and contracted depending on marketplace conditions. Relinquishing control to a third party shareholder, who would likely be from the property and casualty business, increases the exposure of the insurance program to the cyclical nature of the marketplace. The property and casualty marketplace is currently in what is called a "soft" phase meaning excess capacity is available and pricing is at historically low levels. Inevitably when the market place changes, there will be tensions as between the Law Society and third party shareholder over pricing and coverage.

- The members of the Law Society have paid significant surcharges and premiums in order to pay down the deficit and to return the insurance program to financial health. If the sale of the Law Society's interest in LPIC was to result in any increase in costs to the profession, it would be met with significant opposition. As well the view is expressed that many members of the Law Society would also be concerned about the potential uncertainties in pricing and coverage that may result from a third party owner. This was particularly true of sole practitioners and lawyers practicing in small firms.

- The present operations of LPIC provide full accountability to the profession in that there is full financial disclosure of the operations in a regulated environment. The insurance premiums are used for insurance purposes rather than for the general operations of the Law Society. The Committee felt that as long as the operations of LPIC were clearly delineated from those of the Law Society and that LPIC was operated on a commercial and professional basis that there was a general satisfaction with the arrangement. As well, LPIC's pronounced policy to administer the insurance program in the interest of the lawyers boosted the confidence of lawyers in the operation of their insurance program.

- The Committee recognized that LPIC currently accesses the commercial market through the purchase of reinsurance. The reinsurance arrangements of LPIC presently involve LPIC ceding 50% of its risk to the commercial marketplace. The Committee was advised that LPIC reviews its arrangements on an annual basis in order to determine whether it is getting fair value from its reinsurers and whether the existing arrangements best serve the interest of the program. Accordingly there is participation by the commercial insurance market in the Professional Liability Insurance program. However, the terms and conditions of the market's participation are as negotiated by LPIC. The Committee was advised and agreed that the Law Society's ownership of LPIC put it in a more advantageous position to negotiate insurance arrangements than would exist without the captive. In essence LPIC is able to assume more or less of the insurance program's risk based on its capital structure and the terms and conditions available in the commercial marketplace at the time.

- In analyzing the specific sale alternatives, the Committee observed the following:

Sell 100% - Premiums controlled by LSUC

i.) A purchaser will refuse to pay the full fair value of LPIC because revenues, but not expenses, will be controlled by a third party whose principal interest will be the customers of its business.

Sell 100% - Premiums determined by Market

ii.) A purchaser will pay the full value (or more than full value) of LPIC (having regard for the immediate and tangential profit opportunities), absent strong competition, but the members of the Society will be at the mercy of the purchaser with respect to premiums and will be predictably furious with the Society for fixing LPIC with their money, at substantial expense, so that a third party, and not the members, receive the financial benefits from the sale.

Sell 50% to 100% - Premiums controlled by LSUC

iii.) A purchaser will pay a lower proportion of the fair value of LPIC than it would pay under alternative (i.) because, in addition to the fixed premium disincentive, its ownership position is made even less attractive by the presence of a minority shareholder who represents the customers of the business.

Sell 50% to 100% - Premiums determined by Market

iv.) A purchaser would pay a lower proportion of the full fair value of LPIC because of the same concerns as noted in item (ii.) about the existence of a significant minority shareholding interest in LPIC.

Sell 50% to 100% – ROE Guarantee

v.) A purchaser will pay a price which relates directly to the value to it of the stream of income which is guaranteed by the Society (on a discounted cash flow basis). More importantly, the Society has exchanged a known risk, in the form of LPIC ownership, for another risk, being the obligation to pay a third party a fixed rate of return for the capital which it has received, in a set of circumstances over which it has little or no control.

Sell less than 50% - Premium controlled by LSUC

vi.) A purchaser will pay a still lower proportion of the fair value of LPIC than it would pay under alternative (iii.), because it will have no control over the pricing of premiums, and thus will simply be a provider of capital (initially to the Society in the form of the purchase price for its interest in LPIC, and thereafter to LPIC in conjunction with its need for capital in its ongoing business).

Sell less than 50% - Premiums determined by Market

vii.) A purchaser will pay a still lower proportion of the full fair value of LPIC than it would pay under alternative 4 because of the absence of control over the pricing of premiums.

Sell less than 50% - Guarantee ROE

viii.) As is the case in alternative (v.) above, the purchaser will pay the value of the stream of income, and the Society has exchanged a known risk, in the form of LPIC ownership, for another risk, being the obligation to pay a third party a fixed rate of return for the capital which it has received, in a set of circumstances over which it has little or no control.

CONCLUSION

15. The Committee concluded that the only way the full value of its LPIC shares could be realized would be for the Law Society to relinquish control of premiums to the third party purchaser. Any other arrangements with a potential purchaser would simply amount to an agreed premium pricing structure which would result in the Law Society realizing a value for its shares based upon the present value of the profit stream which the purchaser would be permitted.

16. The Committee concluded that the disadvantages of relinquishing control of LPIC over both its operations, policies and pricing structure far outweighed any advantages of generating capital. In addition, it was felt that the members of the Law Society would not tolerate an increase in premiums or pricing changes that may result from a third party purchaser. Some members expressed the view that the membership would in fact be "outraged" if control of LPIC was relinquished without the appropriate premium protection. The only disadvantage to the existing structure, provided that LPIC is operated on the principles enunciated by the Insurance Committee Task Force, was the risk of capital. It was felt that this disadvantage was outweighed by the advantages and flexibility that the Law Society has in controlling LPIC and negotiating with the commercial marketplace to its advantage and as circumstances permit.

17. Accordingly, the Committee unanimously recommended there be no change in LPIC's ownership.

Neil Finkelstein
Chairman

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

(1) Copy of Report to Convocation September 1996. (Appendix A)

(2) Copy of Insurance Committee Task Force Report 1994. (Appendix B)

The Report originally distributed on a confidential basis was dealt with in public.

It was moved by Mr. Finkelstein, seconded by Mr. Krishna that the Report which recommended that the Law Society of Upper Canada retain ownership of LPIC, be adopted.

Carried

THE REPORT WAS ADOPTED

Mr. Scott asked Benchers to join with him in congratulating Mr. Farquharson on his completing 50 years at the Bar. Congratulations were also extended to Mrs. Legge and Mr. Cass.

CALL TO THE BAR (Convocation Hall)

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

Elpida Andrea Agathocleous	39th Bar Admission Course
Zainab Fatima Ahmad	39th Bar Admission Course
Ju Yung An	39th Bar Admission Course
Emmanuel Yao Asumang-Adu Asare	34th Bar Admission Course
Sylvie-Emanuelle Bourbonnais	38th Bar Admission Course
Peter Joseph Burns	39th Bar Admission Course
Sudha Chandra	36th Bar Admission Course
Lorne Douglas Clark	39th Bar Admission Course
Marie-Helene Josee Therese Godbout	39th Bar Admission Course
Amadou Omar John	39th Bar Admission Course
Suneeti Kaushal	39th Bar Admission Course
David Grant MacDonald	39th Bar Admission Course
Natasha Anne Miklaucic	39th Bar Admission Course
Roseanne Misale-Trivieri	39th Bar Admission Course
Michele Marie Parkin	39th Bar Admission Course
Preevanda Kaul Sapru	39th Bar Admission Course
Chantal Saxe	39th Bar Admission Course
Thelma Pushparanee Williams	39th Bar Admission Course
Christopher Bundy	Transfer, Province of Nova Scotia
Leigh David Cresstohl	Transfer, Province of Quebec
Mandi Epstein	Transfer, Province of Quebec
Alaine Christine Grand	Transfer, Province of Alberta
Nancy Jardine	Transfer, Province of New Brunswick
Sherri Kreisman	Transfer, Province of Quebec
Donald Conrad MacDougall	Transfer, Province of British Columbia
Bonnie Lynn Mcilmoyl	Transfer, Province of British Columbia
Joseph Keith Morrison	Transfer, Province of Newfoundland
Gerald Stotland	Transfer, Province of Quebec
Moray Welch	Transfer, Province of Quebec
David Thomas Woodfield	Transfer, Province of British Columbia
Shelly Ann Marie Gavigan	Faculty, Osgoode Hall Law School, York University
Bruce Blaikie Ryder	Faculty, Osgoode Hall Law School, York University
Janet Elizabeth Walker	Faculty, Osgoode Hall Law School, York University

Report of the Admissions & Equity Committee

Ms. Sachs presented the Report of the Admissions & Equity Committee.

Admissions & Equity Committee
September 25, 1998

Report to Convocation

Purpose of Report: Decision Making and Information

TABLE OF CONTENTS

A. POLICY

RECRUITMENT OF FIRST YEAR LAW STUDENTS, SUMMER 1999

1. On June 26, 1998, Convocation amended the procedures governing recruitment of second year students for summer positions. The Admissions and Equity Committee considered the "*Procedures Governing the Recruitment of Second Year Law Students for Summer Positions in 1999*" (See Appendix A) and submits it for the consideration of Convocation.

2. The Preamble to those procedures states as follows:

> "*These procedures shall not apply to the recruitment of first year law students. The recruitment of first year law students for summer positions in Toronto in 1999 will occur in February, 1999 in accordance with the Procedures for Recruitment of First Year Law Students for Summer Positions in 1999, which will be published in the Fall of 1998*".

3. The draft procedures reflect the structure of February summer student recruitment in prior years as was decided in the Summer Student Recruitment discussion that took place at Convocation in June, 1998.

4. February recruitment has historically taken place during the mid-Winter break week of the majority of law schools. For 1999, that week is the week of February 22 - 26. This coincides with the break week of each Ontario law school except the University of Toronto, which has selected to have its break week from February 15 - 19.

5. As noted in the draft procedures, students unable to be interviewed during the prescribed interview week may apply to the Law Society for exemption to be interviewed early.

Request to Convocation:

6. That Convocation approve the draft *Procedures Governing the Recruitment of First Year Law Students for Summer Positions in 1999.*

FRENCH LANGUAGE EXAMINATION PASSING SCORE

7. Convocation is requested to consider the method for setting the passing score in the French language bar admission licensing examinations, beginning with the fall 1998 examinations.

8. Background:

The norm-referencing method for setting the passing score was considered in detail by the former Legal Education Committee and approved by Convocation in 1996, and was put in place for the licensing examinations beginning in 1996. A summary of the rationale for and explanation of the norm-referencing method is attached.

9. In May 1997 the Advisory Committee on the French Language Bar Admission Course was mandated by Convocation to review the French Language Bar Admission Course to investigate why the 1996 French language examination grades were lower on average than the English language grades, and to make recommendations as warranted.

10. The Advisory Committee was chaired by Brad Wright, and reported to the Admissions and Equity Committee and Convocation in June 1998. Convocation deferred consideration of the Report until October 1998.

11. A number of the administrative recommendations are being implemented by staff, although one recommendation relating to setting the examination passing score requires the direction of Convocation if changes are to be made in a timely manner to the method of setting the passing score in the French language course.

12. The Advisory Committee recommended as follows: "The evaluations of the French Bar Admission Course students should be done by the contrasting-groups method or, alternatively, the criterion-based method, and not by norm-referencing."

13. The Advisory Committee has made this recommendation based on the following rationale, found at page 20 of its Report: "Comparing the small group of French B.A.C. Course students to the large group of English B.A.C. students is inappropriate given the large difference in the size of the two groups and the individual non-critical but cumulative disadvantages faced by the French B.A.C. students such as, inter alia, translated materials, longer text, different resource materials, and cultural and linguistic differences." The Report goes on to say: "A group as small as the French B.A.C. is too small within itself for norm-referencing."

14. The Advisory Committee in making its recommendations consulted with three experts. The summary of information obtained from the experts is included at pages 12 to 19 of the Report. (See Appendix B)

15. The method of setting the passing score for the French language examinations needs to be finalized at September Convocation for purposes of grading French language examinations.

16. In consultation with statistics expert Dr. Carlos Brailovsky, the Education Department proposes a new composite method for evaluating the French exams. (See Appendix C)

Request to Convocation:

17. That Convocation approve the following evaluation method for grading French Bar Admission examinations:

The passing score for each French language examination should be set as the combined average of:

(a) the passing score for the corresponding English language examination
(b) the passing score determined through norm referencing by treating the students writing the French language examinations as a distinct groups and,

(c) a criterion based passing score established by the examination evaluators through the use of the methodology described in paragraph 6 of Appendix C.

Where the Section Heads determine that the French language examination is not comparable to the English language examination, only the latter two scores (b and c) would be averaged.

PILOT PROJECT: FEASIBILITY OF ALTERNATIVES TO WRITTEN BAR ADMISSION LICENSING EXAMINATIONS

18. This item will be reported on at Convocation. Material will be forwarded under separate cover.

B. INFORMATION

STUDENT SUCCESS CENTRE

19. This item will be reported on at Convocation. Material will be forwarded under separate cover.

Student Success Centre
September 25,1998

Report to Convocation

Purpose of Report: Information

Prepared by the Student Success Centre

GOAL OF THE STUDENT SUCCESS CENTRE

The Law Society of Upper Canada, through its Department of Education, is establishing the provision of student support services to reduce the failure among Aboriginal students and to ensure increased academic success for Aboriginal and other students enrolled in the three phase Bar Admission Course program at the Law Society.

While the vision of the student Success Initiative is academic achievement among all students, it must be recognized that, given obvious limitations of finances and human resources, and the changes that Bar Admission Review may prompt, many pilot projects may be developed and implemented with Aboriginal students thereby creating a foundation for services needed for the entire student body within the B.A.C.

B.A.C. PHASE ONE AND THREE - SELF IDENTIFIED ABORIGINAL STUDENTS

1. Phase One of the 40th B.A.C. registered 16 Aboriginal students who self identified within their application to the Bar Admission Course. Three students have deferred Phase One.

2. Phase Three of the 40th B.A.C. registered 13 Aboriginal students who self identified within their application to the Bar Admission Course. Two students have deferred or withdrew from Phase three.

3. There are six Aboriginal students remaining in the Bar Admission Course from previous B.A.C. programs, 38th and 39th, and who are not included in the numbers listed above.

STUDENT SUCCESS KEY INITIATIVES / ACTIVITIES

Highlights:

1. Class Schedules - Self identified Aboriginal students registered in Phase One and Three of the 40th B.A.C. were given the option of being placed in classes with other Aboriginal students as a mechanism to assist in reducing the isolation factor described by many Aboriginal students and to create a more supportive environment for Aboriginal students. In Phase One, three students deferred, leaving a remainder of 13. Eight of the 13 students accepted the option while three declined, and two did not respond. In Phase Three, two students deferred, leaving a remainder of 11. Of the 11 students, eight accepted the option while two declined. One student is participating in the Thunder Bay pilot. Those who declined did express positive feedback to the offer.

2. Peer Support and Mentoring - A program has been initiated to assist all students in the B.A.C. who require additional support in Phase Three. Students currently enrolled in Phase Three have volunteered to assist other students with studying strategies, time management and genuine support. Mentoring is being provided by newly called lawyers who have been successful in the B.A.C. The Mentors will provide exam writing strategy in specific course areas to students in need of extra assistance. A computer program has been designed to host the mentor program for student accessibility. Computers have been purchased for the Student Success Centresat each of the three locations, London, Ottawa and Toronto.

3. Student Success Centres - physical space has been renovated at each B.A.C. office to house PC's, a telephone, bulletins and a student study/review area. This space is open to all students.

4. External Funding Allocation - a proposal was submitted to the Ontario Native Affairs Secretariat for $26,000, and was approved. The dollars are designated for specific Aboriginal programming at the Law Society:

   - Aboriginal Preparatory Program - a mock B.A.C. was held at the end of August 1998 for Aboriginal students. Instructors taught in four course areas, and students were examined on the course material provided. Students were able to view their examinations and discuss their results and appropriate answers with instructors and one faculty member. The students all provided a positive evaluation and felt the process would assist them in the B.A.C.
   - Tutoring - tutors are available to Aboriginal students in Phase Three.
   - Pre and Post Exam Review - review sessions will be available to Aboriginal students before and after they complete each exam. Early return of exams to the Aboriginal students is necessary for the post review; however, only raw scores will be provided as the norm-referenced pass will not be available prior to the next exam sitting.

5. Aboriginal Law Day - curriculum has been developed in three course areas, Business Law, Real Estate and Estate Planning, and will be presented to B.A.C. students on November 3, 1998, by Aboriginal lawyers in the three locations, Toronto, London and Ottawa. The curriculum is on Aboriginal Law as it pertains to the three specific areas and will be examinable. An orientation session is being provided for the instructors teaching in these areas.

6. Royal Commission on Aboriginal People - National Conference - the Law Society is co-sponsoring this conference with the Indigenous Bar Association, Canadian Bar Association and the Law Commission of Canada. The conference is being held at Osgoode Hall in Toronto on April 22, 23 and 24, 1999 and will address Governance, Land Resources and Justice.

7. External Networking - a presentation was done to the Chiefs in Ontario regarding the progress of the Law Society. The Chiefs would like to discuss further how both can work toward promoting success for Aboriginal students in the B.A.C. Letters are being sent to the Ontario Law Schools inviting discussion with the Student Success Centre on how we can partner to develop a preparatory program for the B.A.C. at the Law Schools utilizing specific Aboriginal grant dollars through the Ministry of Education and Training.

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

(1) Copy of the Procedures Governing the Recruitment of First Year Law Students for Summer Positions in 1999. (Appendix A)

(2) Copy of Summary of information obtained from the experts. (Appendix B)

(3) Copy of Method of Setting the Passing Score for the French Language Examination. (Appendix C)

A debate followed.

Re: Recruitment of First Year Law Students for Summer Positions 1999

It was moved by Ms. Sachs, seconded by Ms. Backhouse that the procedures governing the recruitment of first year law students for summer positions in 1999 as set out in Appendix A be adopted.

Carried

Re: French Language Examination Passing Score

It was moved by Ms. Sachs, seconded by Ms. Backhouse that the method of setting the passing score for the French Language examination as set out in Appendix C be adopted.

Carried

Re: Ad Hoc Committee Report

Admissions & Equity Committee
September 25, 1998

Report to Convocation

Purpose of Report: Decision Making

REPORT OF THE ADMISSIONS AND EQUITY COMMITTEE

The following members were in attendance:

Nora Angeles
Nancy Backhouse (Vice-Chair)
Tom Carey
Dean Ronald Daniels
Philip Epstein
Allan Lawrence
Sanda Rogers
Harriet Sachs (Chair)

The following staff members were in attendance:

Bob Bernhardt
Wendy Johnson-Martin
Ian Lebane
Maria Paez Victor
Mary Shena
Alan Treleaven
Roman Woloszczuk

Enclosed with this Report is the Report of the *Ad Hoc* Committee established by the Treasurer to assess the reasons for failure and to make recommendations regarding the people who failed the 1996 and 1997 Bar Admission Course.

The Admissions and Equity Committee has had the opportunity to consider this Report and has reached the following conclusions.[5]

A. The Committee was unanimous in endorsing the structural recommendations set out in Part IV of the Report.

B. The Committee was unanimous in its view that the group of students dealt with in the Report were entitled to a review of their failures.

C. No member of the Committee thought it appropriate to engage in the process of second-guessing the individual assessments which were made by the *Ad Hoc* Committee.

D. The majority of the Committee is recommending to Convocation that it accept all of the recommendations of the *Ad Hoc* Committee. This recommendation is made in light of the following considerations:

   A. the process used was one which the Law Society had used in the past;

   B. substantial changes to address what were identified by the *Ad Hoc* Committee as systemic problems have been made to the Bar Admission Course for 1998 which were not available to this group of students;

   C. the process was credible, convincing and appropriate given the circumstances of the group of students under consideration. In short, as a one-time measure, it was the appropriate way to respond to the Law Society's mandate to ensure that the public is served by competent lawyers while at the same time preventing the erection of barriers that unfairly keep people who are competent from entering the profession after they have come so far.

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[5]One member of the Committee declined to participate in its deliberation because of his opposition to everything about the process.

E. There was a minority view on the Committee that while some process should be put in place for the group of the students under consideration, they could not approve the process that was used. In the the minority's opinion, another process should be put in place with pre-approved and pre-articulated criteria.

The majority agreed that it would have been preferable to have had the opportunity to pre-approve a process with criteria clearly set out in advance. However, the majority accepted that the picture of who had failed was not available until the end of July 1998 and that there was a necessity, if a remedy was going to be granted to a particular student, to deal with the matter urgently because the new Bar Admission Course was scheduled to commence in September of 1998.

All members of the Committee agreed that, regardless of Convocation's decision in respect of any specific recommendation, what was learned by the *Ad Hoc* Committee will be of enormous use as we continue with the process of Bar Admission reform.

REPORT OF THE TORONTO BAR ADMISSION COURSE

ASSESSMENT GROUP

I. BACKGROUND

1. At the end of July, 1998, the last supplemental examinations for the 1997/1998 Bar Admission Course were written. A list was prepared of the students who, despite having been enrolled in the 1996 and the 1997 Bar Admission courses, were still in the system as a result of failures. The list revealed that there were 49 students in the system, six of whom were Transfer students. Of the 43 who were not Transfer students, virtually all were identified as being from groups with special needs and from groups that are currently underrepresented in the legal profession.

2. The pattern revealed by this list was not new. It is a pattern that led to the formation of the Task Force on Examination Performance in September of 1997.

3. Therefore, at the beginning of August, the Treasurer established a small *ad hoc* committee to carry out interviews with students who had failed one or more examinations at either or both of the 1996 and 1997 Bar Admission Course (the "BAC"), and thus still await their call to the bar.

4. The *ad hoc* committee consisted of the two vice-chairs of the Admissions and Equity Committee, Nancy Backhouse and William Carter; Clayton Ruby, bencher; and Mr. Strosberg, Treasurer and Chair. The committee had the important and valuable assistance of Ms. Wendy Johnson-Martin, Edward Ducharme, Ph.D., English and Education, University of Michigan, barrister and solicitor, and, on all issues relating to Aboriginal students, Ms. Jean Teillet, Vice-President of the Aboriginal Lawyers' Association.

5. In requesting the committee to meet with the students, the Treasurer emphasized that the purpose was to try to discover to the greatest extent possible the reasons why the students had experienced such difficulty in meeting the threshold standards for success at the BAC.

6. Alan Treleaven, Executive Director of Education, and the former Director of Education, George Thomson, have both advised that until eight years ago individual students had the right to petition benchers for leave to be called to the bar, notwithstanding that they had not passed all the examinations. During this process, the panels of three benchers reviewed the academic history of the petitioner, his or her background, and any explanations that might have been offered for the failure(s).

7. The policy issue which arises is whether Convocation itself or by delegation to the Admissions and Equity Committee should reinstitute the process of individual assessment for the students of the 1996 and the 1997 BAC, pending the completion of the Bar Admission reform initiative.

8. The committee hoped to answer an important question: Should the determination of competency at the level of the BAC include a system of oral review for those who fail the written components of the BAC? A major underlying premise was, and is, the widely-held belief among educators that students' performances on written examinations are not necessarily the only true measures of their competency. Oral interviews, the committee believed, might lead to greater understanding of why so many of the BAC students, particularly the Aboriginal students and those of visible minority, have failed at the BAC, usually after having successfully completed an undergraduate degree and three years of legal education. However, it is important to make clear that, while the impetus for this project came from the disproportionate failure rates among groups who are currently underrepresented in the profession, once the assessments themselves began, the committee made its decisions on an individual basis, not on the basis of the student's membership in any particular group or race. Indeed, the committee drew no conclusions about group composition. Many Aboriginal and minority students excelled in the BAC.

9. The committee saw its role as entirely adjunct to and complementary of the BAC reform process now underway under the leadership of Ms. Sachs, Chair of the Admissions and Equity Committee and the Bar Admission Reform Task Force.

10. Panels drawn from the committee spent four days in August and September interviewing 36 students, each for approximately one-half hour. At the start of each interview, the student was made to understand that the committee had not been established by Convocation, had no mandate or authority from Convocation, and that whatever report the committee made of its deliberations might not have any practical effect on the student's situation. The work of the committee was, in a word, experimental and each student was admonished at the outset that, the purpose being one of fact-finding, he or she should expect nothing to come of the committee's efforts.

11. A second assessment group of Francophone lawyers, consisting of Carole Chouinard, André Claude and Guy Pratte, interviewed six french-language students in Ottawa on September 8, 1998 and carried out a similar exercise.

12. In conducting its assessment, the *ad hoc* committee asked itself the following questions and considered the following factors:

(1) Had the student attempted each examination? If not, he or she should be required to do so.
(2) Had the student completed his or her articles? If not, he or she should be required to do so.
(3) If the student had failed, was the failure(s) marginal or not?
(4) Were there circumstances that convinced the committee that there were reasons for the failure(s) other than lack of competence?
(5) Was the committee convinced that the student's competence had been otherwise demonstrated?

13. In approaching its task, the *ad hoc* committee agreed that no recommendation would be made unless every member of the committee was convinced that the recommendation would pose no risk to the public.

II. INTRODUCTION

14. The nature of the legal profession in Ontario today invites special attention to the cultural diversities within it. Much has been written lately of the refreshing infusion into our profession of individuals and groups too long excluded: women, ethnic minorities, peoples of Aboriginal origin, and people with disabilities. Those of us in a position of leadership should seize the opportunity to sensitize others, inside and outside the profession, to this cultural diversity. Some important steps have already been taken.

15. Part of the important work now being carried out by at least three committees of the Law Society of Upper Canada has been to awaken us to a number of concerns that have been raised by various student groups about the adequacy of the BAC to meet the special needs of those groups.

16. The Admissions and Equity Committee has been analyzing the Law Society's current licensing process and considering recommendations on how the licensing should operate. In September 1997, Convocation established a Task Force on the Examination Performance of Aboriginal and Visible Minority Students with a mandate to investigate the performance of these students in the BAC and to report on findings and recommendations. A similar subcommittee has been authorized to inquire into the examination performances of students enrolled in the French-language division of the BAC.

17. Even as these committees are waiting to report to Convocation, the Law Society has begun to meaningfully reform the BAC. As of March, 1998, a student who fails an examination is entitled to see and review the failed examination before attempting the supplemental. The time allotted to write all examinations has also been extended by one hour.

18. For the 1998 BAC, the following changes have been made and implemented:

(a) mandatory attendance for Phase III has been abolished;
(b) Aboriginal students have been given an opportunity to take a course prior to the commencement of Phase III to help prepare them for what will be expected of them in Phase III. This course includes the opportunity to write and review a mock examination;
(c) peer-group support and mentoring have been initiated;
(d) a project to provide tutoring before any failures take place is being piloted;
(e) two distant-learning projects are also being piloted—one for a group of students in Thunder Bay and another for a student in Los Angeles.

19. In the interview process, what the committee learned from the students was at once significant and startling. Many of them proved to be extraordinary individuals, full of courage and tenacity and intelligence. In some cases, the students proved to be spectacular illustrations of how the BAC in its ordinary execution does not account for individual emotional, psychological, socio-economic, or cultural circumstances. A few examples will suffice.

20. One of the failed individuals is a lawyer in good standing in another province, having been called to bar there more than 35 years ago. For many of those years the lawyer served as the managing partner at a major law firm in a highly specialized practice. So respected was this lawyer that years after the lawyer's major corporate client moved to Ontario, the client continued to retain the lawyer's services. More than a decade after the client's own move to Ontario, the lawyer was persuaded to relocate to Ontario as well. Although inching toward what the lawyer considered to be the ideal retirement age, the lawyer agreed (reluctantly) to go, and arranged to affiliate with a well-known, highly respected Ontario firm.

21. First, of course, the lawyer had to fulfill the obligations of the BAC and be called to the Ontario bar. Although the lawyer had not written an examination for more than 35 years, the lawyer duly enrolled in and took on all the courses in the BAC, passing six of them, but failing two.

22. The experience of failure can be ravaging in virtually any circumstance, but it is perhaps all the more so when the one who fails is already renowned in the very profession at which the the individual is then judged to have failed. Still, like the other "failures" who came before us to share their experiences, this individual bore the disappointment and feelings of humiliation with remarkable grace and tact, making no excuses. The lawyer accepted responsibility, speaking eloquently, movingly, of the painfulness of the experience, of the feeling of having let down family, colleagues and self.

23. What went wrong on the two examinations? As with virtually every other student with whom we met, the individual could not say with certainty. There was a sense that the examination format itself, mostly short-answer or multiple-choice, was designed primarily to "catch" the unwary reader, to expose what she or he did not know, rather than to discover what she or he did know. This was a major recurrent theme among the students: the questions asked on the examinations tended predominantly to be "convergent" rather than "divergent," eliciting single, dead-end, "correct" answers. The opposite type of question, the "divergent" question, was the one with which the students had had more familiarity in their law schools. Divergent questions tend to call for multiple responses, encouraging students to think in many directions, drawing from them not merely knowledge or facts but also comprehension, application, analysis, synthesis and evaluation. Many of the students acknowledged that, even now, having been granted the opportunity to review their failed examinations they had no genuine sense of what the "correct" answer was that they were expected to give.

24. For this individual the examination questions themselves were a major problem, but there were other issues as well. The two failed subjects, civil litigation and family law, were remote from the individual's everyday experiences in the law. The individual also believed that, after so many years, the individual's prime as a student and writer of examinations had long since passed. Asked what the individual would do in the event of being faced with a litigation or family law matter, the answer was that the individual would do just what had been done for the last 25 or 30 years, decline to proffer any advice and instead refer the matter immediately to a person knowledgeable in the area.

25. Underscoring the poignancy of this individual's predicament is that in this individual's own area of specialization, commercial law, competency is beyond all question. In fact, the individual's in-class contributions to the discourse in the business law course at the BAC were so keen and insightful that the instructors wrote a letter of thanks, after the fact, for the special efforts in class and offering the gratuitous opinion that this individual should have taught the course. The question thus raised for the committee was: Should this person be required to repeat the failed courses and examinations? In the committee's view, this requirement would contribute nothing to what we already know in relation to the larger and more overwhelming question: Is this individual competent to perform legal services in the province of Ontario? The answer to that question, emphatically, is yes. Is this individual likely ever to give advice on issues relating to civil litigation or family law? Emphatically, no.

26. Another student was called to the bar of another province approximately one year ago, having previously obtained an undergraduate degree with an A- average, and an LL.B. with a B average. This student's articles were with a sole practitioner who specialized in real estate, litigation, and family law.

27. Because of the recession, the student moved to Ontario in 1997, and was successful in obtaining an articling position. The articling firm was so impressed that it offered the student a position. The firm has expressed in writing to the committee its strong support and its unqualified belief that the student will make an outstanding contribution to the bar. The student failed one course, business law, by one mark. The firm has confirmed that the student performed exemplary work and is quite knowledgeable in the field of business law. The committee has no doubt that the student is competent in commercial law.

28. Another student, a graduate from an Ontario law school, failed four of eight on the first attempt at the BAC examinations, and then passed two of the four supplementals. The two remaining failed examinations are estate planning and business law. In law school, the student took courses in both areas and passed them. The student acknowledged having difficulty with the narrow convergent-type questions on the BAC examinations.

29. This student also holds a B.A. degree from a Canadian university and would like, when called to the bar, to specialize in securities law. A major complication, and a likely reason for the struggle in completing the BAC, is that the student has yet to complete the articling requirement. The student has only four months of articles, mostly in immigration law with a sole practitioner. Although the student worked for approximately three months with a committee that deals with legal issues, that experience did not count toward the satisfaction of the articling requirement. A further complication is the fact that the student has suffered from a serious medical problem that has required surgery and from which recovery has been slow.

30. This student acknowledged to the committee that the taxation segment of the estate planning course has been a problem, and believes that tutoring would be of benefit in this area. The student's most important need for now, however, is an articling position, preferably one with rotations in business law and estate planning. The committee could not recommend that the student be called to the bar. The committee concluded that the student's failures in estate planning and business law related directly to unfamiliarity with the practical work in these fields. The significance of these failures was underscored by the student's wish to practise in the securities field. Therefore, the committee arranged an articling position with an emphasis on estate planning and commercial law. The student has begun these articles.

31. Another student failed one course, business law, at the BAC. The student's mark on that examination was four marks below the passing threshold. The student is a graduate of an Ontario law school, and split the articling year between a sole practitioner and a community legal services clinic. The student will soon be 35.

32. A member of a visible minority group, this student is in many ways a most remarkable individual. The student was born with a congenital abnormality dealt with by surgery, although the resulting situation was severe physical dysfunction. Beyond all this, the student has other physical problems resulting in poor gross motor hand skills and difficulty in memorizing. Yet, before the committee, the student may well have been the most impressive of all of the students, poised and eloquent in manner and speech, and committed absolutely to making a successful career in the profession of law.

33. The student has shown remarkable strength and courage in overcoming physical and learning disabilities. Once called to the bar, the student intends to practise human rights, employment, and labour law. The student impressed the committee as a careful, thoughtful, articulate individual who will undoubtedly provide clients with competent, professional services.

34. Another student graduated from a leading Canadian law school with a LL.B. in 1996, with a cumulative average of B+. Following graduation, the student articled in another province with a mid-size firm, doing mostly insurance litigation work. Former colleagues confirm that the student was thorough, painstaking and professional. The student handled clients skillfully and well.

35. In early 1997, the student moved to Ontario and took the summer off to prepare for the BAC and for a call to the Ontario bar. The student failed one examination, civil litigation. It was the student's first examination and, ironically, it was in the area of practice the student knew best and with which the student had by far the greatest amount of familiarity. Mr. Strosberg spent considerable time with the student reviewing the rules of civil procedure as well as the examination the student had failed. It seemed clear, as the interview unfolded, that the student knew the subject of civil litigation well and that the student could quite capably articulate orally knowledge of the subject.

36. The five students highlighted here are a representative sample. For all the students, the committee has prepared a short summary and assessment followed by a recommendation. The summaries and recommendations are provided as a Schedule to this report.

IV. SUMMARY AND CONCLUSION

37. Whatever comes of the assessment process undertaken by this committee, it has provided the Law Society with valuable insight into the factors unrelated to competence that produce "failures" in our system. What we learned and our conclusions as to future directions for the Law Society to consider are detailed below.

(1) Reinstate a Discretionary Ability to Grant Relief from Failure

38. There will be some who will contend that in making these recommendations the Committee is vitiating the entire purpose of and justification for formal written examinations. The examinations, after all, are a kind of common denominator, the only foolproof normative device available to the Law Society to determine who should and who should not be deemed competent to perform legal services in Ontario. The examinations, some will say, are the only true way to prevent the BAC from lapsing into subjectivism unrestrained.

39. There is merit in this argument. But equally, there is no need for a system so inflexible that at the end of the day no one has the power to say "I now understand why you failed this examination by 2 or 3 marks and I do not think that this failure in any way reflects on your competence to practise law."

40. In the past our system did provide for discretionary relief. That relief was abolished, partly due to the workload imposed upon Benchers. This committee has experienced the workload firsthand. However, we are unanimous in our view that however wise an objective scheme may be, the ability to grant discretionary relief is required.

Recommendation: We, therefore, recommend that the Admissions and Equity Committee study this issue as part of its Bar Admission reform process.

(2) The Testing Mechanism

41. The following themes emerged in respect of our testing mechanism:

A. For the two Bar Admission Courses in question, we relied for objectivity on the fact that we had a secure examination bank. We now know that this bank was not in fact secure. How much that impacted on the results is impossible to ascertain. However, one consequence of the secrecy required by the examination bank is that students were unable to learn from their mistakes by being able to review their examinations.

Recommendation: This problem was resolved by Convocation in March of 1998. At that time students were given the opportunity to review their examinations.

A number students expressed dismay that though they thought they had done well on their examinations, they did not find out that they had failed until after they had written four examinations. In the opinion of this committee, this is too late. Students, especially students who might have difficulty, need to understand early what they are doing wrong so that meaningful correction is possible.

Recommendation: The Admissions and Equity Committee should explore what mechanisms are available to identify as early as possible the students who are doing most poorly and to implement measures to help them understand what they are doing wrong.

Many students expressed the fact that they had difficulty performing within the time constraints available.

Recommendation: This problem has recently been addressed by allowing for an extra hour on examinations.

Educational Supports: This project was driven by the realization that our "failures" were virtually all from groups who in other educational settings have been recognized to have special needs. Other educational settings have also recognized that groups with special needs do well provided they are given extra support.

Recommendation: For 1998, the Law Society has put a variety of supports in place. The success of these initiatives should be evaluated and further steps taken as appropriate.

Other Testing Mechanisms: Our present system is a "one-size-fits-all" examination system. There is no question that for certain people the examination format itself caused difficulty. This committee does not consider it self-evident that a single method of examination should be the only method of evaluating competence to practise law.

Recommendation: As part of its Bar Admission Course review, the Admissions and Equity Committee should consider piloting other testing mechanisms for evaluating competence—for example, oral examinations

(3) Mandatory Attendance

42. For some students, particularly those with economic problems, the mandatory attendance requirements in Phase III imposed an extra burden, including extra costs for travel and accommodations and lack of flexibility to accommodate part-time employment.

Recommendation: There is no need for further action because the mandatory attendance requirement has been abolished for the 1998 Bar Admission Course.

(4) Distance

43. Even without mandatory attendance, students suffer a disadvantage if they have to travel long distances from their homes to attend the Bar Admission course. They experience isolation from their families, communities and support systems. They also experience increased financial burdens.

Recommendation: The committee notes that two long-distance learning projects are being piloted in the 1998 Bar Admission course. As part of the Bar Admission reform, further distance learning initiatives should be explored, particularly through the expanded use of technology.

(5) Accommodation Policy

44. The Bar Admission Course does have an accommodation policy in place for students who require accommodation because of family status and/or medical disability. This committee felt that some of the students it assessed required more flexible accommodation than had hitherto been made available.

Recommendation: The Admissions and Equity Committee has established a Working Group to review the accommodation policies now in place for the Bar Admission course. The recommendations of this Working Group should be considered by the Admissions and Equity Committee and implemented if appropriate.

(6) Mature Students

45. Virtually every student who fails is older than the norm. Other educational institutions have recognized that mature students have a profound contribution to make, but that they may well require extra support.

Recommendation: As part of its Bar Admission Course reform process, the Admissions and Equity Committee should examine methods for more effectively providing support for mature students.

(7) Financial Assistance

46. The majority of the students assessed had reached this stage after a long struggle with financial adversity. For many the burden was crushing. This committee is concerned that students not be eliminated from the practice of law at this late stage by reason of financial hardship. The Law Society presently has a $40,000 bursary fund for Phase III of the BAC.

Recommendation: The Law Society should examine the feasibility of enhancing this fund, both for Phase I and for Phase III.

(8) Articling

47. Many of the students assessed experienced profound problems obtaining satisfactory articles. It is no accident that students with unpaid, fragmentary, delayed or no articles did not receive the exposure to the practical issues taught by the Bar Admission Course and that was obtained by their more fortunate colleagues. Alas, it is precisely those groups to whom we have made a commitment in recognition of the need for diversity at the bar who suffer most in this regard.

Recommendation: No easy answer exists for this problem. We are conscious that the Placement Director of the Law Society has done her best to assist students in obtaining quality articles. More must be done and we ask the Admissions and Equity Committee to address this issue on a priority basis.

IV. CLOSING NOTES

48. This committee wishes to express how profoundly surprised we were by the diversity, quality, intelligence and strength of the student group that we failed. If these are our "failures", then the future of the profession is very promising indeed.

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

INCAMERA PORTIONS

(1) Interviews with the Students appearing before the Toronto Assessment Group. (Tab 2)

(2) Report of the Ottawa Bar Admission Course Assessment Group. (Tab 3)

It was moved by Ms. Sachs, seconded by Mr. Krishna that the Report and the recommendations set out on pages 14 to 19 of the Report be adopted.

Carried

It was noted that in paragraph 65 of the blue pages, the name was deleted.

The Treasurer thanked Mr. Saso and his staff for their assistance.

THE REPORT WAS ADOPTED

Convocation took a brief recess at 11:15 a.m. and resumed in camera.

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IN PUBLIC

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Motions - Suspensions

It was moved by Mr. Krishna, seconded by Mr. Crowe THAT the rights and privileges of each member who has not paid the Membership Fee, and whose name appears on the attached list, be suspended from September 28, 1998 and until their fee is paid together with any other fee or levy owing to the Society which has then been owing for four months or longer.

Carried

(see list in Convocation file)

It was moved by Mr. Krishna, seconded by Mr. Crowe THAT the rights and privileges of each member who has not paid the Errors and Omissions Insurance Levy, and whose name appears on the attached list, be suspended from September 28, 1998 and until their levy is paid together with any other fee or levy owing to the Society which has then been owing for four months or longer.

Carried

(see list in Convocation file)

Report of the Finance and Audit Committee

Mr. Krishna presented for Convocation's approval the item on the unbudgeted Bar Admission Course expenses related to the Student Success Centres and services for students with disabilities.

Finance and Audit Committee
September 10, 1998

Report to Convocation

Purpose of Report: Decision making

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TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee ("the Committee") met on September 10, 1998. In attendance were V. Krishna (Chair), A. Chahbar, T. Cole, E. DelZotto, D. Lamont, D. Murphy, C. Ruby, G. Swaye, R. Wilson, and B. Wright. Staff members in attendance were J. Saso, W. Tysall, D. Carey, K. Corrick, R. White and R. Woloszczuk.

1. The Committee has one matter that requires Convocation's approval:

- unbudgeted Bar Admission Course expenses related to the Student Success Centres, and services for students with disabilities.

2. A memorandum from the Registrar of the Bar Admission Course is enclosed on pages 4 - 5 detailing the unbudgeted expenses.

3. Based upon the information presented to the Committee and the desire to implement these programs, the Finance and Audit recommends that Convocation approve these additional expenditures for the 1998 year for new Bar Admission Course initiatives and under projected Bar Admission Course expenses which are to be offset by additional Bar Admission Course revenue, an Aboriginal Student Success Grant from the Attorney General, and savings within the General Fund..

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

(1) Memorandum dated September 17, 1998 from Mr. Roman Woloszczuk, Registrar of the Bar Admission Course to the Chair and Members of the Finance and Audit Committee re: New and Under Budgeted Expenditures in 1998 Budget. (pages 4 - 5)

Finance and Audit Committee
September 10, 1998

Report to Convocation

Purpose of Report: Information Only

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TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee ("the Committee") met on September 10, 1998. In attendance were V. Krishna (Chair), A. Chahbar, T. Cole, E. DelZotto, D. Lamont, D. Murphy, C. Ruby, G. Swaye, R. Wilson, and B. Wright. Also in attendance were members of the Professional Development and Competence Committee -- M. Eberts (Chair), M. Adams, K. Carpenter-Gunn, R. Cass, L. Banack, S. Elliott, H. Puccini and H. Ross. Staff members in attendance were J. Saso, W. Tysall, M. Strom, D. Carey, K. Corrick, J. Miller, H. Rosenthal, S. Sperdakos, R. White and G. Zecchini.

1. The Committee is reporting on the following matters:

- a joint meeting between the Finance and Audit Committee and the Professional Development and Competence Committee on the future of the Lawyer Referral Service,
- alternate dates for the Preauthorized Payment Plan,
- unaudited June 30, 1998 financial statements for the General Fund,
- unaudited June 30, 1998 financial statements for the Lawyers Fund for Client Compensation,
- unaudited June 30, 1998 financial statements for the Combined Errors and Omissions Insurance Fund,
- unaudited June 30, 1998 financial statements for the Ontario Legal Aid Plan, and
- unaudited June 30, 1998 Investment report for the General Fund and the Lawyers Fund for Client Compensation.

2. At the joint meeting, the Committees discussed the merits of the Lawyer Referral Service and whether it was a part of the Society's core functions. After much discussion it was determined that to the extent the issue of the Lawyer Referral Service is related to competence it may also be relevant to the Competence Task Force's work and any recommendation for change will be deferred pending the report from the Task Force.

3. The Committee received a request to allow an alternate date for preauthorized payment of membership fees. Attached on pages 10 - 14 is a memorandum from the Society's Chief Financial Officer. The Committee debated the merits of allowing an alternate preauthorized withdrawal date and have determined that the current withdrawal date, the first of each month, be continued.

4. Enclosed on pages 15 - 19 are the unaudited June 30, 1998 financial statements for the General Fund. These were before the Committee.

5. Enclosed on pages 19 - 21 are the unaudited June 30, 1998 financial statements for the Lawyers Fund for Client Compensation. These were before the Committee.

6. Enclosed on pages 22 - 36 are the unaudited June 30, 1998 financial statements for the Combined Errors and Omissions Insurance Fund. These were before the Committee.

7. Enclosed on pages 37 - 47 are the unaudited June 30, 1998 financial statements for the Ontario Legal Aid Plan. These were before the Committee.

8. Enclosed on pages 48 - 56 is the June 30, 1998 Investment Report for the General Fund and the Lawyers Fund for Client Compensation. This was before the Committee.

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

(1) Copy of a memorandum dated August 20th, 1998 from Ms. Wendy Tysall re: Withdrawal Date for Pre-Authorized Payment Plan. (pages 10 - 14)

(2) Copy of the unaudited June 30, 1998 financial statements for the General Fund. (pages 15 - 19)

(3) Copy of the unaudited June 30, 1998 financial statements for the Lawyers Fund for Client Compensation. (pages 19 - 21)

(4) Copy of the unaudited June 30, 1998 financial statements for the Combined Errors and Omissions Insurance Fund. (pages 22 - 36)

(5) Copy of the unaudited June 30, 1998 financial statements for the Ontario Legal Aid Plan. (pages 37 - 47)

(6) Copy of the Investment Report for the General Fund and the Lawyers Fund for Client Compensation. (pages 48 - 56)

It was moved by Mr. Krishna, seconded by Mr. Crowe that the unbudgeted Bar Admission Course expenditures be approved.

Carried

Re: Withdrawal Date for Pre-Authorized Payment Plan

It was moved by Mr. Banack, seconded by Ms. Cronk that Convocation direct the Finance Committee to review the issue of end of the month payments relating to fees.

Carried

THE REPORT AS AMENDED WAS ADOPTED

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

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Adams, Armstrong, Backhouse, Banack, Bobesich, Carey, R. Cass, Chahbar, Cole, Cronk, Crowe, Curtis, DelZotto, Eberts, Epstein, Feinstein, Finkelstein, Gottlieb, Harvey, Jarvis, Krishna, Lawrence, MacKenzie, Manes, Millar, Murphy, Murray, O'Brien, O'Connor, Ortved, Puccini, Ross, Ruby, Sachs, Scott, Stomp, Swaye, Topp, Wardlaw, Wilson and Wright.

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IN PUBLIC

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Report of the Legal Aid Committee

Re: Area Committee Appointments

In addition to the Report an additional list of Area Committee Appointments was distributed to the Benchers.

Legal Aid Committee
September 9, 1998

Report to Convocation

Nature of Report:Information

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The Legal Aid Committee met on September 9, 1998. In attendance were:

Committee members: Bob Armstrong (Chair), Heather Ross (Vice Chair), Tamara Stomp, Allan Lawrence, Rich Wilson, Marshall Crowe, Derry Millar, Tom Carey, Abe Feinstein and Gerry Swaye.

Senior Management of OLAP: Provincial Director Bob Holden, Deputy Directors George Biggar, Ruth Lawson and David Porter, Clinic Funding Manager, Joana Kuras.

Other OLAP Staff: Elaine Gamble, Communications Coordinator and Felice Mateljan, Executive Assistant.

The following items are for your information:

1. Financial Reports - July 1998

The financial reports for July 1998 are attached.

2. Area Committee Appointments

The Committee approved three new appointments to area committees as recommended by the Provincial Director: Almeda Wallbridge in Cochrane and Salvatore Garcea and David James Sherman in Wentworth.

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

(1) Copy of the Ontario Legal Aid Plan Financial Reports - July 1998. (pages 1 - 31)

AREA COMMITTEE APPOINTMENTS

At the August 12, 1998 meeting of the Legal Aid Committee, the Committee approved six new appointments to Area Committees as recommended by the Provincial Director:

Algoma

Murdoch J. Carter, Lawyer

Cochrane

Tom Mills, Layperson

Kenora

Denis Asseiro, Lawyer

Manitoulin & Sudbury

Lisa D'Agostina, Layperson

Waterloo

Patricia MacLeod, Community Legal Worker

Niagara South

John Gillespie, Executive Director, Community Legal Services

THE REPORT WAS ADOPTED

Report of the Legal Aid Committee

Re: Enhancements

Mr. Armstrong presented the Report of the Legal Aid Committee which was distributed to Convocation regarding the Attorney General's response to the proposal to enhance the Legal Aid Tariff.

LEGAL AID COMMITTEE REPORT TO CONVOCATION

RE: ENHANCEMENTS TO THE LEGAL AID TARIFF

The Attorney General has responded to the proposal to enhance the Legal Aid tariff approved by Convocation earlier this year. The Attorney General has made the following counter proposal:

	Nature of Enhancement	Estimated Cost for 1998/99
(1)	Criminal Enhancements	$7.0 M
(2)	Family Enhancements	$5.1 M
(3)	Other Civil Enhancements	$0.2 M
(4)	Abolish Application Fees	$0.9 M
(5)	Add two hours to each criminal, family and other civil certificate issued after April 1998 in addition to the criminal, family and other civil enhancements proposed by Convocation	$3.9 M
(6)	0.5 per hour administration fee for all certificates issued after April 1, 1998	$3.35 M

(7)	Duty Counsel Appearance Fee of $40.00 from April 1, 1998	$2.6 M
(8)	Abolish statutory Deduction after April 1996	$8.9 M
	Total	$31.95 M

For your convenience, we have attached a copy of the enhancements previously approved by Convocation. Items 1, 2, 3, 4 and 8 of the Attorney General's proposal are virtually the same as those approved by Convocation. All of the other proposals are new.

You should also note that the enhancements approved by Convocation included increases which would have benefited the immigration and refugee bar. The current proposal of the Attorney General will benefit the Immigration and refugee bar in regard to items (6) and (8). However, there are no separate enhancements to the tariff for immigration and refugee work and item (5) does not apply to the immigration and refugee bar.

The rationale of the Attorney General for excluding the immigration and refugee bar from part of the above enhancements is that the Provincial Government regards immigration and refugee issues as mattes which should be funded by the Federal Government. The Refugee Lawyers Association strongly opposes the Attorney General's proposal.

The Legal Aid Committee is extremely concerned that immigration and refugee lawyers are excluded from part of the above enhancements and have so advised the Attorney General. However, after careful consideration, the Committee recommends that the proposal be adopted by Convocation on the representation of the Attorney General that he intends to approach the Federal Government to provide the appropriate funding. The Legal Aid Committee believes that the Law Society should work in cooperation with the Refugee Lawyers Association and the Attorney General in approaching the Federal Government to obtain increased Federal funding for this important work.

The Criminal Lawyers Association approves of the Attorney General's proposal and at the same time expresses its concern for the treatment of the immigration and refugee bar. We have not yet been advised of the position of the Family Law Lawyers Association.

September 24, 1998

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

(1) Copy of the enhancements previously approved by Convocation. (pages 1 - 2)

The following motion with an amendment by Ms. Eberts was moved by Mr. Armstrong, seconded by Mr. Finkelstein and Ms. Ross and adopted:

WHEREAS it is essential to the provision of access to justice that adequate legal services be made available to refugee claimants and in immigration matters, regardless of clients' personal ability to pay,

THEREFORE BE IT RESOLVED:

THAT Convocation express to the Minister of Justice of Canada, the Minister of Citizenship and Immigration of Canada and the Attorney General of Ontario its grave concern that Legal Aid services for immigration and refugee work are seriously underfunded in the Province of Ontario.

THAT Convocation direct the Treasurer and the Chair of the Ontario Legal Aid Committee to take whatever steps are necessary to arrange a meeting with the appropriate Federal and Provincial Officials together with representatives of the Refugee Lawyers Association in order to address this serious issue.

Carried

THE REPORT AS AMENDED WAS ADOPTED

CBA-O - Government Relations

A statement was made by Ms. Cronk and by Mr. Scott summarizing the in camera deliberations on the issue of privilege and other aspects of the CBA-O's objections to Bill 53, a Bill to amend the Law Society Act..

Report of Kenneth Howie, Q.C. Concerning Review of Accounts of Outside Counsel Retained by the Law Society in the R.A. Eagleson Discipline Report

Ms. Cronk asked Convocation to receive the Report of Mr. Kenneth Howie, Q.C. and Mr. Ruby's Addendum to page 6, line 12.

REPORT CONCERNING AN AUDIT OF THE
ACCOUNTS OF LOCKWOOD & ASSOCIATES
IN RESPECT OF THE R. ALAN EAGLESON
DISCIPLINE MATTER

ATTACHMENTS

	TAB
Complaint	1
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Accounts and dockets provided by Lockwood & Associates from January 26, 1990 to December 31, 1997	3
Memorandum of David MacDonald to Kenneth Howie re review of dockets dated April 22, 1998	4
Memorandum to file of Kenneth Howie re discussion with Richard Tinsley dated May 4, 1998	5
Letter from Richard Tinsley to Kenneth Howie dated May 4, 1998	6
Letter from Thomas Lockwood to Kenneth Howie dated May 19, 1998 with attachments	7

TERMS OF REFERENCE:

The following are the terms of reference which were provided to me for the purpose of this audit:

"(i) were the services performed by Mr. Lockwood and his associates reasonable and necessary in the circumstances having regard to, among other matters, the nature of the services performed and the time spent; and

(ii) were the matters undertaken by Lockwood on behalf of the Law Society appropriately staffed and resourced, having regard to the number and tenure of the associates and paralegals which he involved in the cases, as applicable, and the responsibilities and roles assigned to them."

WORK DONE FOR THE PURPOSES OF THIS REPORT:

1. an independent review of all of the accounts rendered by Lockwood & Associates resulting in the memorandum of David MacDonald dated April 22, 1998 attached to this report;

2. correspondence and interviews with Richard Tinsley, Secretary of the Law Society and Thomas Lockwood;

3. review of the Complaint and all orders of the Discipline Committees from the time the complaint was laid to the conclusion that ended with the disbarment of Alan Eagleson.

4. letters - Tinsley to Howie and Lockwood to Howie, attached to this report.

TOTAL FEES AND DISBURSEMENTS:

(a)	total fees	$819,657.00
(b)	total disbursements	70,769.31
(c)	total GST	61,885.98
	TOTAL	$952,312.29

HOURLY RATES:

The hourly rates historically from the accounts rendered by Lockwood & Associates broken down for the time period covered by the accounts are as follows:

(a)	Thomas Lockwood	$250.00 per hour
(b)	Associates	$80.00 to $120.00 per hour
(c)	Students	$50.00 per hour
(d)	Assistant	$40.00 per hour

The attachments to this report are self-explanatory and form some of the backup documentation for the report.

HISTORY:

When the original complaint was received by the Society, it became apparent that a high profile Ontario lawyer was being accused of what amounted to significant white collar fraud involving a number of prominent Canadian (and later United States) public sports and other figures.

At the time the complaint was made by Mr. Rich Winter, the then Chair of Discipline, Alan Rock, met with Mr. Lockwood, impressing upon him the necessity for a thorough and, as it turned out, extensive investigation of the complaints. Very quickly the complaints themselves drew instant media attention and it is clear that that media attention never ceased until the ultimate disbarment of Alan Eagleson.

As time went on, more and more complaints and detail of complaints were made and appeared with the result that the investigation that was undertaken became increasingly extensive, complex and expensive.

From the beginning, Mr. Lockwood, at the request of the Society, became involved constantly with the media as the spokesperson for the Society, being called upon to respond to charges in the media and by the media of lack of dedication of the Society to respond to the complaints, and even of charges of cover-up and favouritism to the high profile member of the Society.

The Lockwood dockets demonstrate that those charges by the media were baseless, but would constantly require dealing with the media to blunt those complaints and charges.

It was not until we reviewed the dockets and I met with Mr. Lockwood that I became aware that what should have been police investigation never took place in the early years of the investigation. The complaints clearly involved significant allegations of substantial white collar fraud and the Law Society, through Lockwood, approached the Metropolitan Toronto Police, Ontario Provincial Police and the Royal Canadian Mounted Police with what information was available, requesting those police forces, one after the other, to in fact taken over to investigate the allegations of fraud. The police forces did not become involved in the matter and it was only after some years of the extensive investigation undertaken by the Law Society that the Royal Canadian Mounted Police became involved.

The ultimate involvement of the Royal Canadian Mounted Police was influenced by the fact that the Federal Bureau of Investigation in the United States had become involved in respect of the white collar fraud alleged to have taken place in the United States.

In the result then, the Law Society simply, in order to fulfill its obligation to investigate the complaint, was left alone to undertake the substantial investigation necessary. As the fees and disbursements involved in the investigation became increasingly large, a policy issue I believe arose, or should have arisen, to consider either limiting the investigation or abandoning portions of it simply because the resources of the Law Society were simply not sufficient to undertake the massive investigation of the increasing complaints.

INVESTIGATION:

The discussions which I had with Mr. Tinsley and Mr. Lockwood both confirmed that all of the investigation and other work done by Mr. Lockwood was only done as a result of constant consultation and on the specific instructions from the successive Chairs of Discipline and the Secretary of the Law Society. My audit concludes that no work of significance was initiated without consultation and instructions to Mr. Lockwood.

I have examined very cursorily the enormous briefs of investigation prepared by Mr. Lockwood and there is every reason to believe that the investigation itself was conducted thoroughly and professionally as was requested by the instructions to Mr. Lockwood. I am satisfied that Mr. Lockwood did not generate the work that he did; he simply responded to the demands of the Society.

The only area of investigation which gave me some pause as to whether it was necessary was the monies spent to investigate the issue of the possible extradition of Eagleson to the United States. I found it difficult to understand what that had to do with advancing the investigation and the complaints against Eagleson. I am advised by Mr. Lockwood that at a Discipline Committee Hearing chaired by Clayton Ruby, Mr. Ruby instructed Mr. Lockwood to investigate this issue thoroughly in order to ensure that it was not a red herring designed to delay hearing of the complaints. I took the opportunity to discuss the matter by telephone with Mr. Ruby to test his recollection. He told me that he has an indistinct recollection, except for the fact he was concerned as to whether or not there was any real issue about the extradition, and his best recollection of what he advised Mr. Lockwood was to "find out if it was real".*

No criticism in this report should be inferred from the action of the Discipline Committee and I am therefore satisfied that the monies spent on this portion of the investigation were directed to be done in effect by the Society.

It is clear from the dockets that by far the bulk of the work done by Mr. Lockwood was pure investigation, or investigation related. Appearances before the Discipline Committee were numerous but were not that significant in the totality of the accounts rendered.

HOURLY RATES:

I have confirmed with the Secretary of the Law Society and with Mr. Lockwood that hourly rates for all the persons in the Lockwood firm that docketed, and the slight increases in the hourly rates of lawyers and a law student over the years were pre-cleared each time with either the Secretary of the Law Society, or the different Chairs of Discipline, or both, in advance of the work being continued and ultimately billed.

PERSONNEL:

All work was done by Mr. Lockwood, his juniors and associates, and one law student. There were and are no law clerks employed in Mr. Lockwood's firm.

It would be speculative to suggest that some of the work could have been accomplished by law clerks. The level of expertise of law clerks varies from firm to firm, and I believe it is clear that if highly qualified, highly experienced law clerks had been available, they may well have been able to do some of the investigative work at a lower hourly rate. The extent of the "lower hourly rate" would, I suppose, depend on the level of expertise of the law clerks, if they had existed for that purpose.

I did review the issue about hours that were spent by a lawyer on data input. Mr. Lockwood tells me that the input was sufficiently complex to require the expertise of a lawyer, and I am not prepared to second guess that decision.

DOCKETS:

There is no issue in my audit (without formal assessment) that all work recorded in the dockets (and reflected in the accounts) was done and the time actually spent. Our audit detected no "padding" of dockets. On the contrary, there are significant instances of travel to many places in Canada and the United States where the dockets were limited to eight hours a day, and I am confident, because of the travel incurred, the dockets could justifiably have been somewhat higher.

The necessary travel was pre-cleared with the Law Society and, from my audit, appeared necessary.

There were some "blanket" dockets, for example "study of law", by a junior lawyer for a number of hours. The description in the dockets of work done were incredibly thorough in respect of Mr. Lockwood's dockets and much less so with the junior lawyers. Nevertheless, even the study of law dockets were descriptive enough to satisfy me that there was justification for the law that was studied. It is difficult to be critical of the fact that it took two hours, or four hours or six hours.

CONCLUSIONS:

1. I am unable to criticize the work done by the Lockwood firm. On the contrary, the audit (limited as it has to be) revealed a high level of competence and careful adherence to instructions, constantly updating with (at times) almost daily liaison with the officials at the Law Society, including the Secretary and the various Chairs of Discipline, over the years.

2. I am satisfied that the work reflected in the dockets was done and that the hourly rates applied to the docketed time were appropriate and approved, in any event, in advance by the Society.

3. I am also satisfied, to the extent of the audit conducted, that there were appropriate resources available in the law firm for the work done.

4. While it is understandable that the Law Society in this case should have pulled out all the stops to fulfill its statutory obligation to investigate and discipline one of its members for alleged misconduct, the costs of doing so in this case, in my respectful view, were horrendous. It is obviously a policy decision as to whether or not the Law Society can afford to deal as it did with cases of this type to the extent that it was perceived to be necessary at the outset. I have the strong feeling that once started, the Society was forced into an increasing, very expanding investigation and that it would have been extremely difficult to blow the whistle and stop or limit the investigation.

5. The Law Society obviously attempted (successfully) to fulfill its statutory obligations, particularly to the public, by undertaking the investigation and prosecution. In my view, it may be questionable as to whether the Law Society should retain lawyers to do what turned out to be largely investigative work. For law firm audits, including books and records, the Law Society employs accountants, rather than lawyers. The Law Society may wish to review its policy of retaining outside counsel to do investigative work. Whether the Society should have its own investigative staff, or whether it should employ outside staff, or retain outside resources to supervise, or by arranging for private investigative work to be done, is a policy matter.

6. There is clearly a policy issue as to whether or not outside counsel should take the responsibility for being the spokesperson for the Law Society. In my discussions with Mr. Tinsley, he made it very clear that he felt that Mr. Lockwood's association with the Law Society as senior Discipline Counsel before he returned to private practice made him an excellent candidate to be the spokesperson for the Law Society. Apart from the cost involved in fulfilling that function, the policy issue is, I suppose, whether or not the Law Society should deal with media issues, including discipline issues, through the Society itself, whether it involves discipline counsel, the information department, or otherwise.

7. I am not satisfied that there was a constant review and recognition by either Mr. Lockwood or the Law Society of the burgeoning accounts. The issue is perhaps best put in this way - should the Law Society have in place a system of constant review of accounts with a view to constantly determining what should and should not be done in the investigation and prosecution of complaints in light of the size of the accounts being incurred? There is a policy issue as to whether or not outside counsel retained by the Society have an obligation to deal with this issue and provide advice to the Society on a regular basis as the size of the accounts become apparent. I suppose there may also be an issue about whether or not the Law Society should require constant forecasts from outside counsel with respect to fees and disbursements so that the Law Society can in advance make decisions as to the route that should be pursued in the work being done by outside counsel.

ALL OF WHICH is respectfully submitted

25th June, 1998 Kenneth E. Howie

* ADDENDUM

"Mr. Eagleson's counsel sought an indefinite adjournment so that the Law Society of Upper Canada would delay its proceedings pending a U.S. extradition request that had been made but not acted on by the Department of Justice/Canada. Mr. Lockwood was opposed. The Committee made this request for information through Mr. Lockwood from the Government of Canada so that it would be able to make an informed and fair decision on the adjournment request."

Attached to the Report in Convocation file, copy of:

Copy of letter from Mr. Kenneth Howie to Ms. Eleanor Cronk dated September 22nd, 1998 re: Review of Lockwood Accounts re: Alan Eagleson Our File No. 88/674.

Ms. Cronk advised that it would then go before the Professional Regulation Committee to deal with the policy issues raised by Mr. Howie in his Report.

MOTIONS - Appointments

It was moved by Ms. Cronk, seconded by Mr. Crowe that Mr. Lamont continue as the Law Society's representative on the Canadian National Exhibition Association.

Carried

It was moved by Ms. Cronk, seconded by Mr. Crowe that Messrs. MacKenzie, Banack and Adams be appointed to the Canadian Bar Association-Ontario Council.

Carried

It was moved by Ms. Cronk, seconded by Mr. Crowe that Mr. Murphy be appointed to the CBA National Council.

Carried

Report of the Professional Regulation Committee

Ms. Cronk presented the Report of the Professional Regulation Committee for approval.

Professional Regulation Committee
September 10, 1998

Report to Convocation

Purpose of Report: Decision-Making and Information

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on September 10, 1998. In attendance were:

Eleanore Cronk	Chair
Neil Finkelstein Gavin MacKenzie Niels Ortved	Vice-Chairs
Laura Legge	

Staff: Lesley Cameron, Margot Devlin, Hershel Gross, Scott Kerr, Michael Seto, Felecia Smith, Richard Tinsley, Stephen Traviss, Jim Varro, James Yakimovich

2. This report contains the Committee's

- *policy reports* on:
  - policy issues arising from the Project 200 regulatory redesign, including the ADR systems design report, and
  - revisions to the 1998 Membership Information Form (MIF);
- *information reports* on:
  - the spot audit program in 1998, and
  - the Committee's working group review of issues relating to solicitation, steering and referral fees (Rules 9 and 12 of the Rules of Professional Conduct)

I. POLICY

REVIEW OF POLICY ISSUES ARISING FROM THE PROJECT 200 REGULATORY REDESIGN

Introduction

3. Convocation has approved the general plan for the operational reorganization at the Law Society through Project 200.

4. The Project 200 Professional Regulation Redesign ("Program") Team Report ("the Report") contains the redesign proposals for a reorganization of operational functions of the Society's regulatory departments[1], to be realized in the implementation phase of Project 200.

5. The primary focus of the Program Team was to create a streamlined and fully-integrated process for dealing with the wide range of professional conduct and competence issues which fall within the Society's regulatory mandate.

Policy Considerations

6. At its October 9, 1997 meeting, the Professional Regulation Committee ("the Committee") received from Richard Tinsley and Scott Kerr an overview of the policy issues arising from the Report.

7. Beginning in January 1998, the Committee reviewed a series of discussion papers prepared by staff which provided more detailed information about the policy issues, to assist the Committee in its review and approval at a policy level of the principles behind the redesign, and in turn, to report to Convocation on that review.

8. Once approval has been received, further development of the models within the redesign will proceed, to be assessed, with financial analysis, within the larger implementation scheme of Project 200.

9. In very brief terms, the Committee noted the following:

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[1]Audit & Investigations (which includes the Staff Trustee's office and the Forms Services office), Complaints (which has sub-groupings dealing with intake matters and discipline "track" investigations), Discipline, Practice Advisory Service, Professional Conduct and Professional Standards.

- the Society's regulatory responsibilities are currently carried out within six separate departments, some of which have semi-autonomous sub-groups[2] ;
- the work performed can essentially be divided along functional lines into three categories: advisory, investigative and prosecutorial;
- the redesign proposals attempt to create a process which better organizes the Society's resources to meet its various responsibilities;
- the redesign is largely concerned with the development and implementation of improved work processes;
- the proposals are aimed at addressing problems with current processes identified during the evaluative stage of the project (the "As Is" analysis)[3].

10. Review of the discussion papers concluded in June, and this report provides a summary of the Committee's policy consideration and approval in principle of the proposals to implement the following:

- Consolidation of advisory functions;
- Incorporation of ADR and remedial measures, and increased integration of the Practice Review Programme into the regulatory "mainstream" as a diversion or remedial alternative to discipline;
- Redefining the purpose of authorization meetings;
- Segregation of investigative and prosecutorial functions.

11. The Committee now seeks Convocation's approval of the policy direction outlined in this report and the separate report attached at Appendix 1 entitled *Report of the ADR Systems Design Team* which discusses an approach to ADR in the Society's regulatory processes.

POLICY ISSUES

A. CONSOLIDATION OF MEMBER ADVISORY FUNCTIONS

The Need for Change in the Advisory Functions

12. At present, the Society has one department, Professional Conduct, which was established, in part, to deal exclusively with member ethics inquiries. In practice, however, a number of departments are involved in responding to these inquiries given their overlapping mandates. Many ethics inquiries are handled by the Practice Advisory Service, and by Complaints and even Discipline staff.

13. Inquiries handled by the Practice Advisory Service are treated as "confidential" in the sense that disclosures made by members to Practice Advisory staff will not be shared with other Law Society staff unless the information is of such a nature that its non-disclosure would constitute a breach of the mandatory reporting obligation as set out in Rule 13, Commentary 1 of the Professional Conduct Handbook .

14. Members are not always directed to the intended single source of ethics advice and the potential for inconsistency in the advice given and how the disclosure might be treated is significant.

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[2]The existing departments are: Audit & Investigations (which includes the Staff Trustee's office and the Forms Services office), Complaints (which has sub-groupings dealing with intake matters and discipline "track" investigations), Discipline, Practice Advisory Service, Professional Conduct and Professional Standards. The Compensation Fund office and Policy Secretariat were *not* included in the scope of Project 200.

[3]The details were summarized in the document entitled "Law Society Audit of Internal Operations" received by benchers late in 1997.

15. By consolidating operations along functional lines, it is possible to eliminate these problems. Given the "one-off" nature of most inquiries, advisory functions can be concentrated at the "front end" or intake stage of a single regulatory process.

History of the Practice Advisory and Professional Conduct Departments

Professional Conduct

16. In 1959, Convocation decided that a Professional Conduct Committee should be created to consider ethical questions raised with the Law Society and to make rulings in this area to assist the profession.

17. The Committee's mandate also included authority to "prepare and publish a code of professional conduct and ethics and the rulings with respect thereto under the title 'Professional Conduct Handbook'"[4]. That function now resides with the Professional Regulation Committee, following revisions to the Committee structure in 1996.

Practice Advisory

18. In June 1978 Convocation adopted the Report of the Special Committee on Professional Competence and approved a motion to implement a Practice Advisory Service.

19. The Service was approved on the basis that lawyers who were likely to be the subjects of complaints due to lack of efficient office organization and poor business practices should be assisted by the Society, and that assistance would help to reduce problems of delays, missed filing dates, and failure to communicate adequately with the client.

20. The main feature of the service is the confidential telephone advice line for members of the profession including a mentoring component.

21. Although this programme was originally related to loss prevention rather than to governance, it essentially provides lawyers with a means to confidentially approach the Society, without prejudice, with a view to ascertaining whether a proposed course of action is within the framework of the regulations.

22. By providing access to the Law Society on a confidential basis for assistance in dealing with professional difficulties, the programme helps members to comply and remain in compliance with the Regulations and the Rules of Professional Conduct.

"As Is" Analysis of Society Advisory Functions

23. The project team identified a number of problems with the current design, including:

- multiple intake and handling of advisory matters across at least three departments;
- an absence of consistent procedures for handling inquiries;
- inadequate or sporadic staff training and development in an area which is geared toward the provision of up-to-date and accurate advice to members;
- many routine or repetitive advice inquiries handled by professional staff;
- an absence of a consolidated, accessible database or case tracking system leading to serious information gaps, duplication and inconsistent advice;
- segregation of staff along department lines, leading to caseload and "cycle time" imbalances;
- underutilisation of the Society's website for the purpose of disseminating practice and ethics information to members;

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[4]Section 20 of Regulation 708 under the *Law Society Act*.

- strict application of confidentiality requirements in practice advisory service, where often the issue of confidentiality is a "non-issue", hindering exchange of information and more flexible utilisation of staffing resources;
- uncertainty in other regulatory departments about whether inquiries they receive should be treated as"confidential".

24. Examining the practices of other regulatory bodies disclosed some applicable "best practices" which included expanded use of websites and ethics and trust accounting schools (discussed later in this report).

Features of the Redesign

25. Appropriately trained and properly supervised intake staff would serve as a single "first contact" point for all regulatory functions and will have the authority to perform a variety of advisory roles.

26. To the extent that the advice is neither requested or required on a confidential basis, regular on-line staff will handle the inquiries, subject to transfer to an Advisory Counsel in appropriate cases.

27. For confidential calls, a segregated "Ethics Hotline" will be established. The hotline will exist as a separate phone line for which Advisory Counsel will be responsible. Members who contact the intake operation but who are seeking confidential advice will be routed to counsel responsible for the hotline.

28. Advisory counsel will also be responsible for identifying those issues which should be highlighted for broader consumption by members and for selecting the appropriate tools (ie. the Ontario Lawyers Gazette, the Society's website) for conveying this information.

The Committee's Views

29. The Committee recognized that in the redesign, all existing advisory functions would continue to be provided as an integral part of a consolidated regulatory intake operation.

30. The Committee agreed with the proposals outlined above to consolidate the advisory functions.

B. INCORPORATION OF ADR, PREVENTATIVE AND REMEDIAL MEASURES[5]

Concerns About Existing Procedures

31. The evaluative phase of the project revealed that the Law Society's current regulatory approach which focuses on the punitive sanctions available at the conclusion of the discipline process is out of step with the approach now being taken by other regulatory agencies.

32. Generally, regulators (including those in Canada, Australia, and the U.S.) are attempting to constructively resolve a diverse range of complaints and regulatory breaches through the use of mediation and other forms of alternative dispute resolution (ADR).

33. At the same time, other regulatory agencies have been developing disposition options which are intended to remedy the practical problems which caused the regulator to become involved with the member in the first place.

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[5]See also the separate section on Integration of Practice Review into the Regulatory Processes, *infra*.

34. The Society's current role in alternative dispute resolution is limited to informal or ad hoc procedures which essentially involve the Society's staff in negotiations with members and, in the case of complaints, the public, which are aimed at resolving or reducing the number of issues in dispute. Attempts to resolve minor complaints over the telephone and negotiations leading to agreed statements of fact in discipline cases are two examples of ADR procedures currently in use.

35. The evaluative phase of the project revealed the following characteristics of the Society's current investigative, complaints and discipline processes:

- 80% of all regulatory activity is derived from complaints;
- over 95% of complaints are closed without being referred to the discipline process;
- 60%of all complaints relate primarily to client dissatisfaction with the quality of the legal services provided by the member;
- only 18% of all complaints are currently the subject of any form of mediation; and
- about 50% of all matters authorized for disciplinary action allege a failure to comply with the Society's filing or bookkeeping requirements.

36. The "as is" analysis also indicated that most discipline cases involve "systems" failures, such as Forms and books and records deficiencies, rather than dishonest or dishonourable conduct. Attached as Appendix 2 is a table showing the most frequently authorized discipline particulars (1996 statistics).

37. Despite this fact, the disposition options currently available in the discipline process are largely punitive in nature. The process throughout is adversarial and much of it is focused on whether the allegations of misconduct can be established. While the member will often attribute his or her involvement in the process to personal or practice problems, the process is not geared to ascertaining the causes of a member's problems or developing a constructive response to them.

38. Another limitation of the current regulatory process is that there is no opportunity for the Law Society or the member to respond to the underlying problems which lead to "systems" failures until they have resulted in discipline proceedings or until a lengthy history of complaints, audits and insurance claims triggers a practice review.

39. The practical result is that numerous individual cases are closed at the investigative stage notwithstanding evidence that shows the member is experiencing ongoing difficulties in providing competent legal services to clients or complying with the Society's regulatory requirements.

40. The current limited role of mediation is reflected in a procedure devised to informally resolve complaints over the telephone. But its scope is limited to relatively straightforward matters which, for the most part, do not deal with questions of competence and quality of service. All other attempts at informally resolving regulatory issues are pursued on an ad hoc basis by individual staff on a case by case basis in the absence of any procedural or policy framework.

41. The Society's efforts to assess and remedy service and competence issues are presently concentrated exclusively in the Practice Review Program, discussed later in this report. The program operates independently of other regulatory activities. The program is usually triggered after a member has been the subject of considerable activity (ie. multiple complaints, etc.) over an extended period of time.

Features of the Redesign

42. The proposals call for changes to our regulatory operations which will enable the Law Society to deal more constructively with the most frequently encountered problems such as service complaints, regulatory breaches and minor rule violations. Some of the specific elements include:

- use of ADR to increase our ability to satisfactorily resolve more and different kinds of matters;
- developing remedial options to address specific problems giving rise to complaints, etc.;
- reserving the discipline process for cases involving serious misconduct and for those cases not capable of other appropriate resolution.

ADR

43. A working group composed of benchers and staff was created, in conjunction with the Project 200 ADR initiative, to develop new procedures and policies which will emphasize the use of mediation and other dispute resolution tools in a wide range of situations and to develop remedial solutions for the most frequently recurring practice problems.

44. The ADR Design Team, as it has been designated, codified its objectives (please see Appendix 3), and in pursuit of a design also explored how specific remedial options such as law office management and ethics courses might be incorporated into the redesigned work processes. The Design Team's report (at Appendix 1) was reviewed by both the Professional Development and Competence Committee and the Professional Regulation Committee at a joint meeting on July 17, 1998, given the former Committee's mandate in the area of competence and the manner in which ADR can be used to address, as a remedial measure, competence-related issues with lawyers.

45. The revised Rules of the Discipline Hearing Process, adopted by Convocation in April 1997, did not speak to ADR. Convocation directed that the ADR Design Team examine that issue. As will be noted in its report, the Team recognized that at present, mediation and other ADR techniques are used principally to resolve complaints prior to the authorization of formal discipline proceedings. To the extent that ADR may be included in the hearing process, that is, at the post-authorization stage, it exists at present only in the pre-hearing conference process provided for in Rule 3 of the Rules of the Discipline Hearing Process.[6] As currently conducted, many pre-hearing conferences do not provide a meaningful opportunity for resolving or narrowing the issues.

Ethics School and Law Office Management School (LOMA)

46. Other remedial alternatives proposed as part of the overall redesign, such as the Ethics and Law Office Management Schools, are intended to increase the effectiveness of the ADR proposals.

47. The idea for an ethics school emanates from the State Bar of California. In that jurisdiction, members may be required to attend either through discipline or as a function of admission to the bar. It is a day-long session and covers such things as substance abuse, stress, law office management, recurring problematic substantive areas, relationships, communications and advertising. A true/false examination concludes the session. Instructors are staff members of the bar office.

48. LOMAs exist in a number of U.S. jurisdictions. Members required to attend such a program are given a "crash course" in how to manage the "business" side of a law practice.

49. These initiatives are consistent with the general redesign proposals aimed at providing remedial alternatives to the largely punitive sanctions used in the discipline process and also with the expanded order-making powers given to discipline and competence hearing panels provided for in the legislative reform package.

50. The objective would be to make these programs available at any stage of the regulatory process from intake to discipline and for them to be used as a diversion option, as part of a discipline disposition, or as a means of resolving complaints.

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[6]The Team's fuller discussion of the role ADR should play in the discipline process is included it its report.

Pre-Disposition Reports

51. The redesign proposes use of a pre-disposition report in appropriate cases to assist hearing panels with the penalty portion of hearings and to identify possible terms of a remedial order or undertaking.

52. The intent is to bring greater specificity to any remedial provisions recommended in a disposition.

53. Another purpose of the report would be to supplement the hearing panel's knowledge and understanding of the member so that it is better equipped to make informed, specific penalty dispositions.

54. Essential to the efficacy of such an initiative is the ability to monitor compliance with such orders or undertakings. To that end, the redesign proposes "probation" for members who give remedial undertakings. This involves monitoring compliance of the member with the undertaking by the investigative teams, who will have the authority to refer the matter to the discipline process if the member fails to comply.

55. Establishing alternatives to the strict discipline sanction-based systems currently in place is consistent with attempts throughout the consolidated regulatory process to build in flexibility and increased responsiveness.

Comment on the Legislative Reforms

56. The legislative amendments include provisions which generally allow, as early as the authorization stage, exploration of actions which the proceedings authorization committee, as titled in the amendments, "considers appropriate in accordance with the by-laws.[7]

57. The discipline and competence provisions in the amendments for both orders after a finding and interim orders of suspension or conditions list a wide range of disposition options but also provide that the hearing panel may make "any other order that the Hearing Panel considers appropriate".[8]

58. The legislative reforms also call for the creation of a Complaints Resolution Commissioner[9]. One of the responsibilities of that office will be to ratify, modify or develop resolution proposals on complaints evaluated by staff.

59. The concentration of a majority of the matters amenable to ADR at a single process stage will support the proposed role to be performed by the Commissioner.

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[7]Sub-section 49.20(2) of the *Law Society Amendment Act 1998.*

[8]Sections 35 and 44 of the *Law Society Amendment Act 1998.*

[9]Section 49.14 of the *Law Society Amendment Act 1998* gives Convocation the authority to appoint a person as Complaints Resolution Commissioner in accordance with the regulations. Sub-section 49.15, on the functions of the Commissioner, states:

> The Commissioner shall,
>
> (a) attempt to resolve complaints referred to the Commissioner for resolution under the by-laws; and
>
> (b) review and, if the Commissioner considers appropriate, attempt to resolve complaints referred to the Commissioner for review under the by-laws.

The Committee's View

60. The Committee agreed with the approaches outlined above, and considers them important expansions of and additions to current investigatory initiatives. In particular, both the Professional Regulation and Professional Development and Competence Committees endorse the proposals outlined in the ADR Systems Design Team Report.

61. The Committee believes these initiatives are responsive in a more realistic but responsible way to a large number of the conduct matters the Society deals with and to the needs of both the lawyers and complainants/clients involved in the process.

C. INTEGRATION OF PRACTICE REVIEW INTO THE REGULATORY PROCESSES

62. A joint meeting of the Professional Regulation Committee and the Professional Development and Competence Committee was held in February 1998 to review the policy issues surrounding the integration of practice review into the regulatory processes, given that the mandate of the Professional Development and Competence Committee includes responsibility for the Practice Review Program (PRP).

63. As a means of developing a more remedial approach to matters which are routinely dealt with in the Society's operations, the redesign proposals would redefine the role of practice review by making it one of a range of alternatives available depending on the degree of response needed to address the issues at hand.

64. By doing so, the proposals called into question whether the current segregation of practice review and the information it gathers during the course if its inquiries from other regulatory operations should continue.

65. The Committee reviewed extensive information on policies made by Convocation which formed the basis for the PRP in its current form and how the redesign proposals will affect those policies.

66. The Committee also reviewed information on how other law societies in Canada and other regulatory bodies have structured their practice review programs and the relationship with the regulatory stream.

Impact of Redesign Proposals on Practice Review Policy and Procedure

67. As earlier noted, the redesign proposals call for mediated solutions to most of the cases to be dealt within a single regulatory process. An integral part of many solutions will be provisions aimed at remedying the practice problems which caused the complaint or other regulatory activity involving the member. A range of remedial solutions would be available to choose from, one of which would be Practice Review. Its comprehensive nature would likely place Practice Review at the "high end" of the range of available options.

The Committees' View

68. As reported to February 1998 Convocation, the Committees agreed on and adopted the following statement:

> We endorse in principle a move to a more remedial approach provided that any work done to that end and any proposals emanating from it will reflect an appropriate emphasis on fairness and confidentiality as well as system efficiencies.

69. In keeping with this policy statement, the ADR Design Team was given the responsibility of developing an organizational and function-based structure which incorporates the views of the Committees. As noted above, these proposals are outlined in the ADR Design Team's report, which the Committees propose should be adopted.

D. REDEFINING THE PURPOSE OF AUTHORIZATION MEETINGS

Current Practice

70. Under Regulation 708, the Chair and Vice-Chairs of the Discipline Committee, currently known as the discipline authorization committee, are authorized to consider information "that indicates that a member may have been guilty of professional misconduct or of conduct unbecoming...", after which they may authorize a formal complaint for disciplinary action against a member.

71. The Chair and Vice-Chairs, under authority of the same regulation, may also authorize an invitation to attend (ITA), and in keeping with Convocation's policy, may also dispose of matters by way of a letter of advice (previously known as a letter of caution) to a member.

72. Pursuant to another policy of Convocation, the Chair and Vice Chairs authorize practice reviews based on concerns that a member may be failing to maintain adequate standards of professional competence.

Redesign Proposals and Relevance to the Role of the Chair and Vice-Chairs of Discipline

73. Among the principles applied in developing the redesign proposals, four of them - fully and efficiently utilizing available resources and skills, developing disposition alternatives to the existing discipline sanctions, utilizing existing remedial resources and providing for a more comprehensive approach to the most common discipline charges, and reserving the formal discipline process for serious misconduct cases and for cases not capable of other appropriate resolution - are particularly relevant to the proposals which bear on the role of the Chair and Vice-Chairs of Discipline.

74. In the redesign, increased emphasis is placed on developing remedial solutions at earlier process stages and building more diversity and flexibility into all stages of the regulatory process.

75. Earlier in this report, proposals called for the development of remedial alternatives to augment the array of available discipline disposition options (eg. creating Law Office Management and Ethics "Schools") and for an ADR initiative to respond to the most frequently recurring practice problems on a case by case basis rather than waiting for situations to escalate into discipline cases.

76. These initiatives are intended to be used not only to divert matters which would currently attract a purely punitive disciplinary response but also in situations which would currently result in no action being taken by the Society. The expanded scope of activity and the increased variety of available options will broaden the discretion applied in making decisions.

77. This requires a corresponding expansion in the role of the proceedings authorization group to ensure the appropriate degree of consistency and to protect procedural safeguards.

78. To implement this approach, it is proposed that the proceedings authorization committee or group, in addition to its current responsibilities, also instruct staff on:

- the appropriate utilization of the new remedial options at the investigative stage, and;
- the appropriate circumstances for diverting matters into remedial initiatives that would, in the current process, likely have resulted in discipline proceedings.

Diversion of Discipline Cases

79. In practice, diversion would involve the authorization of:

- specified courses of remedial action (ie. completion of a law office management course), the successful completion of which would conclude the matter, with no further action being taken, and unsuccessful completion of which would cause the matter to be re-considered for further appropriate regulatory action; or
- an alternative disposition subsequent to authorizing a formal complaint but before commencing a hearing.

80. To ensure a degree of consistency, some of the most common "systems" discipline cases (ie. failure file forms, books and records cases, fail to reply) could be specifically earmarked for diversion, subject to certain exceptions. Standard terms or conditions which must be satisfied by the member to avoid a subsequent hearing could also be developed.

81. The result would be fewer formal hearings and a more constructive and timely response to the most frequently recurring types of conduct which now trigger the discipline process.

82. The legislative reforms contemplate significant changes to the role of benchers in authorizing matters, which have been considered in the redesign proposals. The new scheme includes:

- a single proceedings authorization committee for discipline, competence, incapacity and interim suspension proceedings;
- codification of the authority to issue a letter of advice;
- continuation of the authority to authorize ITAs;
- discretion in the proceedings authorization committee to direct "that such other action be taken as it considers appropriate in the circumstances".

Expanded Investigative Role

83. As previously discussed, part of the mandate of the ADR design project was expansion of the scope of investigative activity so that competence issues will be examined more thoroughly on a case by case basis.

84. It is foreseeable that in many cases, while the member's conduct will not warrant the authorization of a formal complaint or any of the other currently available discipline options, some remedial course of action is required to avoid the recurrence or exacerbation of an identified problem.

85. Currently, requests for the authorization of practice reviews are made in response to information that shows that members may be having difficulty in providing competent legal services. While authorization of a practice review may be sought based on information from a single investigation, requests are usually made after the Society has compiled information from a number of investigations. In part, this is attributable to the all-encompassing nature of practice reviews which makes it unlikely that the evidentiary basis to justify a review could be derived from a single matter.

86. The redesign proposals call for the development of a variety of remedial tools in addition to practice review, any of which could be used as circumstances warrant. The new remedial tools that have been proposed to date (ie. the Law Office Management School) are designed to address a specific, identified concern and are of a short, finite duration.

87. It is proposed that authorization be sought by staff in cases where they form the opinion that any of the remedial options that are developed are an appropriate way to dispose of a matter.

88. A more detailed discussion of the role of the proceedings authorizations committee is included in the ADR Design Team's report.

89. In considering the above proposals, of considerable importance is the fact that a single group of benchers is currently responsible for authorizing all matters. This affords an opportunity to expand and diversify the Society's approach to regulatory issues in a way that will best ensure consistency and procedural fairness.

The Committee's Views

90. The Committee agreed with the philosophy of the remedial approach and the need for a reconsideration of the role the authorization group plays in the regulatory stream.

91. It endorses an expanded role of the authorization group, on the understanding that staff clearly indicate, as a matter of its discretion, the choices available in a particular case, and ensure that the remedial approach and compliance with it is not used as a "threat" to a member of possible disciplinary consequences if a remedial initiative is not accepted by a member or otherwise remains unfulfilled.

E. SEGREGATION OF INVESTIGATIVE AND PROSECUTORIAL FUNCTIONS

Current Process

92. At the conclusion of a complaints or audit investigation, where a decision has been made that disciplinary action is required, the investigator will prepare relevant information for the discipline authorization committee's review and after authorization, prepare the file for the discipline counsel who will prosecute the case before a hearing panel.

93. While on occasion, discipline counsel are contacted about issues in the file, this is the exception rather than the rule, and counsel rarely have any involvement in the process until it reaches the hearing stage.

94. The concerns created by this complete separation of functions were reflected in the "as is" analysis of the investigation and discipline streams in the current process, which found that:

- there were inadequate vetting procedures for complaints authorization memoranda to ensure that quality standards required for discipline process had been met;
- the procedure of preparing the disclosure brief after authorization of a formal complaint results in a delay in issuance of the formal complaint by discipline counsel;
- audit authorization memoranda and counsel briefs proceed through two separate reviews - one by the appropriate manager and the other by counsel, discipline investigations;
- authorization memoranda and counsel briefs frequently need to be "recycled" at the review stage in order to correct deficiencies;
- often matters authorized are referred back to an investigator as disclosure requirements are not met and/or the particular authorized has not been substantiated;
- departments change significant procedures without adequate consultation or consideration of what their impact will be on other process stages.

95. As a matter of staff organization/skills and training, the analysis found that:

- "silos" result in clearly segregated departments with resource pools that do not interact;
- over-specialization of process tasks as a result of organization structure limits the flexibility needed to most effectively utilize resources.

96. The above have contributed to inefficiencies in the discipline hearing process, where, for example, matters are required to be intricately reviewed or reworked by discipline counsel and are consequently delayed in the initial stages of the hearing process.

Redesign Proposals

97. For the above reasons, the redesign focused on a way to improve efficiencies and introduce to the process at an appropriately early stage a measure of quality control for the prospective discipline level.

98. The result was the proposed addition of discipline counsel in an advisory capacity to the complement of the new investigative teams as soon as a case is identified as likely to proceed to discipline, or when diversion of a potential discipline case is proposed. This is intended to ensure that quality is achieved and consistently applied standards are adhered to.

99. Although it is not a completely analogous situation, the relationship between police officers and Crown Counsel in the criminal justice system provides some noteworthy parallels to the interaction between Law Society investigators and prosecutors.

100. The Ministry of the Attorney General Crown Policy Manual, in the policy entitled "Police - Relationship with Crown Counsel" quotes Justice G. A. Martin with respect to the mutual independence of the two groups, where police exercise their discretion in conducting investigations and laying charges independent of counsel, and counsel exercise independent discretion in the conduct of the prosecution.

101. The need for mutual co-operation, however, is also noted as a necessary feature of the relationship. In particular:

- in pre-charge situations, the advisory (not directive) role of counsel is exercised;
- in the charging decision-making process, the issue to be addressed by counsel, if the police so request, is whether there are reasonable grounds to support specific charges based on the evidence contained in the investigative brief, with commentary as required on the legal test for the charging threshold.

102. This type of advisory function exercised by Law Society prosecutors would be of assistance in pre-charge situations, although it is recognized that determinations must be made on a case-by-case basis.

Impact of the Proposal on Discipline Counsel

103. This redesign proposal, which expands the usual role of discipline counsel in the process, requires a carefully-conceived structure to ensure that the prosecutorial function is maintained, and does not become tainted by, the investigatory function.

104. In particular, clearly defined functions must be articulated and maintained to protect the independence of counsel.

105. In providing input on this redesign proposal, the Society's discipline counsel indicated that practically speaking, discipline counsel will acquire a degree of decision making authority within the investigation process to the extent that the advice or direction received from counsel will necessarily influence the approach to and outcome of Law Society investigations.

106. While discipline counsel see this type of input as encouraging the avoidance of problems and as preferable to attempting to address problems after authorization, there are potential concerns that must be addressed, as follows:

- issues respecting allegations of reasonable apprehension of bias, which may arise as a result of prosecutors' involvement at the investigatory level;
- the prohibition against counsel acting as counsel and witness in the same case; and
- the principles respecting disclosure and solicitor/client privilege, specifically, whether prosecutors' involvement at the investigatory level could lead to a waiver of privilege.

107. Discipline counsel suggested that strict guidelines clearly defining and separating the investigative and prosecutorial roles should be developed to respond to these concerns, and ensure that such issues do no interfere with the prosecutors' role.

108. For the reasons outlined above, the role of counsel will be strictly limited to that of advisor to the investigatory teams, and may involve exchange of information and ideas on the following issues:

- appropriate remedial options;
- evidentiary questions, witness statements (willsays), etc;
- the nature and sufficiency of disclosure;
- consideration of any experience counsel may have had with the lawyer on the discipline side to date, and its effect on a prospective prosecution;
- drafting of allegations for the formal complaint.

The Committee's Views

109. The Committee agreed that the an advisory role for prosecutors in investigations, on an as needed basis, would be useful in addressing the problems noted earlier which have arisen from time to time with investigatory product.

110. The Committee, however, believes that guidelines or a "protocol" for the involvement of prosecutors in this way is a necessity, given the potential problems that may arise if the scope of the exchange between investigators and prosecutors is not properly established.

SUMMARY

111. The redesign model does not propose to expand or reduce the scope of the regulatory functions currently provided by the Society. Ethics and practice advice, investigations and discipline would all be provided, as they are now, in the redesigned processes.

112. What is being changed is how those functions are "delivered". Instead of multiple processes conducted within a number of departments, the redesign proposes to provide these services in a single more consolidated regulatory process.

113. In considering the new initiatives described in this paper, the Committee's primary focus at the policy level was how these initiatives reflect the principles upon which the Society's regulatory mandate is based, and how fulfilment of that mandate is enhanced.

REQUEST FOR CONVOCATION'S APPROVAL

114. The Committee approves the policy approach from which the redesign proposals and models emanate and seeks Convocation's endorsement of the conclusions in this and the ADR report.

REVISIONS TO THE 1998 MEMBERSHIP INFORMATION FORM (MIF)

A. BACKGROUND

115. Changes are being proposed to the MIF for the filing year 1998, which are explained more fully in a memorandum from Forms Services Manager, Margot Devlin. This memorandum, a draft of the revised MIF for 1998, and the 1997 MIF for comparison purposes are attached at Appendix 4.[10]

116. Convocation's approval of the amended form, on the recommendation of the Committee, is being sought at this stage to allow sufficient time for printing and distribution of the form, and updates to the Society's website for e-filing, to allow members sufficient time to complete and file the form early in 1999.

B. NATURE OF THE CHANGES

117. The majority of changes to the form are intended to provide clarity to the membership on the nature of the information being sought, and clearer instruction on how to complete the MIF, in response to concerns expressed by members when completing the form.

118. Two substantive changes have been made as follows:

a. The first change, documented as the first item in the chart in the above-mentioned memorandum, merges the text of four questions in the 1997 form (included at the request of LPIC) on allocation of legal services for members not in private practice, to two questions. A new question in this respect - *"legal services for outside third parties NOT on your employer's behalf"* - has been added to the 1998 form at the request of LPIC;

b. The second change, proposed after debate at Committee, is to delete the questions appearing on the draft 1998 MIF (p. 2 part B under Occupation Profile), requesting information on average hours of work per week, weeks of work in the calendar year and average billable hours per week. These questions have appeared on MIF since it was introduced for the 1996 filing year.

119. The Committee agrees with the addition of the question described in a. above.

120. With respect to b. above, according to information before Convocation at the time the 1996 MIF was prescribed, the long term objectives of this question were as follows:

> Enhances the Society's ability to analyse work trends within the profession; whether trends develop in relation to full or part time employment, ranges as to hours/weeks worked, including disparities amongst groups or geographical regions
>
> Enhances the Society's ability to react to emerging trends, including deliberations on new membership fee categories to provide relief to members who are not engaged in the practice of law on a full time basis

121. The annual objective was

> consistent with information sought by the Women in the Legal Profession Committee to monitor trends within the profession

122. The origin/background respecting the question was the annual fee form.

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[10]The actual 1998 MIF, as a separate document, will be available at Convocation for review.

123. To date, to the knowledge of the Forms staff, no use has been made of the data collected through these questions.

124. The Committee's concerns were that this information, while of some potential value to the Law Society, should not be obtained through a form which lawyers, by virtue of their membership in the Law Society, are obligated to file. The Committee felt that continuing to include this type of question may encumber an already lengthy form with questions not central to the purpose of the form, relating as it does to a specific aspect of the Law Society's governance mandate. It is suggested that this type of information, if needed, should be obtained through separate studies of the profession by means of instruments such as demographic surveys.

C. THE COMMITTEE'S ROLE IN APPROVING THE CHANGES TO THE MIF

125. The Committee's responsibility, as it has been with the other forms, is to review the required changes and, if it so decides, recommend to Convocation that the form be prescribed in accordance with the rules.

126. By way of procedural explanation, the Law Society forms, including the MIF, are required under section 16 of Regulation 708 which stipulates that the certificates and the report are to be "in the form prescribed by the rules". Rule 56 prescribes the use of the MIF, but as changes are proposed, the amended form must accordingly be "re-prescribed" pursuant to the Rule by Convocation.

127. Pursuant to Rule 1, amendments to the rules can be accomplished in only two ways:

a. By notice of motion given at the Convocation immediately preceding the Convocation at which the motion to amend the rules is made. (Notice has not been given in this case); or
b. By proposal in the report of a committee, followed by a motion in Convocation to adopt the proposal (see the last part of Appendix 4 for the provisions of Paragraph 27 of subsection 62(1) of the *Law Society Act*, Section 16 of Regulation 708, and Rule 1 and part of Rule 56).

128. Under the rules as currently worded, a committee proposal (effectively a recommendation) is the only way to introduce rule amendments to Convocation if notice of the amendment has not been formally given at the previous Convocation.

D. THE COMMITTEE'S RECOMMENDATION

129. The Committee agrees with the changes proposed, as documented in the memorandum from the Forms staff and as otherwise proposed in this report, and recommends the adoption by Convocation of the revised MIF for 1998, through the following motion based on Rule 1 made pursuant to the *Law Society Act*:

> MOVED, pursuant to the authority granted by paragraph 27 of subsection 62(1) of the *Law Society Act,* that the Membership Information Form attached to the Secretary's copy of this motion be prescribed.

Options and Alternatives for Decision by Convocation

130. Convocation must decide whether to:

c. Adopt the recommendation of the Committee and on that basis prescribe the MIF;
d. Prescribe the MIF in another amended or revised format.

II. INFORMATION

REPORT ON THE SPOT AUDIT PROGRAM

A. OVERVIEW

131. At its meeting in April 1998, Convocation approved the conducting of one hundred fifty (150) spot audits, with a completion date of June 30, 1998. One hundred fifty (150) spot audits represents a sample size of about two (2) percent of all Ontario law firms. Four (4) Chartered Accountant firms were retained to conduct the audits. The audits have been completed. A summary of the results are:

- One hundred seventeen (117) law firms or seventy seven and three tenths percent (77.3%) of the one hundred fifty (150) spot audits detected some form of trust accounting records inadequacies or other conduct which requires further investigation. The breakdown is as follows:
  - Seven and three tenths percent (7.3%), or eleven (11) audits, were of a nature which gave rise to a subsequent request to conduct a more in-depth investigation.
  - Seventy and seven tenths percent (70.7%), or one hundred six audits (106), were dealt with by providing administrative guidance
- Instances of trust records inadequacies of a more serious nature, or other conduct which requires further investigation, were found with respect to both sole practice and small partnership firms.
- Where the law firm subject to a spot audit has failed to make its annual regulatory report to the Law Society with respect to its financial affairs, a spot audit of these firms has disclosed a disproportionately higher incidence of trust accounting records inadequacies of a serious nature or other conduct which requires further investigation.
- The average cost for each spot audit is $950.00.
- Ninety nine percent (99%) of the members that responded to a post audit survey report that the auditors were courteous, considerate and helpful.
- All but four (4) spot audits were completed within a one day on-site visitation.

B. THE LAW FIRM SELECTION PROCESS

132. A computer based random selection process was developed to select law firms for spot audit purposes. Law firms were selected by geographic location, and pro rata weighting, of law firms in Ontario. The geographic areas are North Ontario, South Ontario, East Ontario, West Ontario, and the Greater Toronto Area (GTA).

133. In addition to selecting firms on the basis of random selection, eight law firms were specifically selected for a spot audit because the firm (member) failed to file the most recent financial report form with the Law Society in spite of repetitive administrative requests for the making of the report. A total of one hundred fifty (150) audits were conducted, both randomly selected and those that were selected because of the firm's failure to file the financial report.

Firms - Geographic Area

134. The geographic location of selected law firms is as follows:

Chart 1

Geographic Area	Number of Law Firms Randomly Selected	Number of Law Firms Selected Because of Non Filer Status
North Ontario	6	0
South Ontario	12	0
East Ontario	26	0
West Ontario	23	0
GTA (Greater Toronto Area)	75	8
Total	142	8

Firms - by Firm Size

135. Law firms, by size, of which 142 were randomly selected for spot audit, are as follows:

Chart 2

Firm Size	Number of Firms in Ontario
Sole Practitioner	131 Firms (Incl. 8 Failure to File) 87 %
Partnership - 2 to 10 Partners	19 Firms 13.0%

C. SPOT AUDIT FINDINGS

136. Findings with respect to the completed one hundred fifty (150) audits, about 2% of all Ontario law firms, can be summarized as follows:

Chart 3

Finding	Number of Law Firms	Percentage of 150 Law Firms
Trust accounting records inadequacies of a serious nature, or other conduct which requires further investigation, and for which authority was sought from the Chair or a Vice-Chair of the Discipline Committee for authority to conduct an in-depth investigation.	11 (9 sole practice firms and 2 small partnership firms)	7.3%
Inadequacies of a minor nature.	106	70.7%
No inadequacies	33	22%
Total	150	100%

Inadequacies of a Serious Nature

137. The eleven (11) law firms, 7.3 % of the audits conducted, where inadequacies of a serious nature were found, were located geographically as follows:

Chart 4

Geographic Area	Number of Law Firms	Size of Law Firm Sole	Partner
North Ontario	1	0	1
South Ontario	0	0	0
East Ontario	1	1	0
West Ontario	1	1	0
GTA (Greater Toronto Area)	8	7	1
Total	11	9	2

138. The nature of the serious inadequacies or conduct with respect to the eleven (11) firms is outlined at chart 5 as follows:

Chart 5

Nature of Serious Inadequacy or Conduct	Number of Law Firms as Selected Randomly, by Geographic Area	Number of Law Firms as Selected Due to Non Filing Status, by Geographic Area
Failure to maintain trust accounting records for a continuous period in excess of six (6)months.	GTA (3) (2 sole practice and 1 small partnership firms)	GTA (2) (2 sole practice firms)
Significant instances of member pre-taking fees without issuing billing, or immediate pre-taking of fees upon receipt of retainers.	GTA (1) East (1) (2 sole practice firms)	None
Failure to Serve Clients - Rule 2, related to significant instances of failure to register mortgage discharges.	GTA (1), North (1) (1 sole practice and 1 small partnership firm)	None
Failure to keep spot audit appointment, make arrangements for alternate audit date, and failure to produce trust accounting records.	None	GTA (2) (2 sole practice firms)

Discussion

139. Eleven (11) law firms in Ontario, or 7.3% of 150 spot audits, maintained their trust accounting records in a substandard condition or have conducted themselves in a manner which requires further investigation. This finding is an important one because the spot audit detection of issues requiring further investigation (significant instances of pre-taking fees, failure to serve clients, and failure to produce records) will afford the Law Society the opportunity to address the conduct before it results in a complaint from the public.

Inadequacies of a Minor Nature

140. With respect to the one hundred fifty (150) audits completed, seventy and seven tenths (70.7%), or 106 law firms, were found to have trust accounting records inadequacies of a minor nature. The most frequent five (5) minor inadequacies found with respect to the 106 firms are as follows:

Chart 6

Nature of Minor Inadequacy	Number of Firms	Number of Law Firms and Geographic Distribution					Size of Law Firm	
		North	South	East	West	GTA	Sole	Partner
Inactive client trust balances	66	1	6	8	13	39	55	11
Minor instances of pre-taking fees	29	0	8	4	5	12	26	3
Maintaining earned fees in the trust account, contrary to Regulation 708.	27	0	3	5	3	16	26	1
Unreconciled items of a minor nature in the monthly trust reconciliations	23	1	4	1	2	15	20	3
Minor amounts of trust money held to the credit of clients in the law firm's general account records	17	0	3	5	3	6	15	2

141. The frequency of multiple minor inadequacies is as follows:

Chart 7

Frequency of Multiple Minor Inadequacies	Total For the Range	Number of Law Firms	
		Sole	Partner
1 to 3	72	61	11
4 to 5	19	18	1
6 or More	16	15	1

D. SPOT AUDIT COST ANALYSIS

142. The cost to conduct the one hundred fifty (150) audits was One Hundred Forty Three Thousand Dollars ($ 143,000), based on actual costs and estimates received to date. Some final billings have not yet been received. The amounts are distributed as follows:

Chart 8

Geographic Area	Cost of Spot Audits
North	$ 8,000
South	$14,000
East	$27,000
West	$24,000
GTA	$ 70,000
Total	$143,000

E. POST AUDIT MEMBER SURVEY RESULTS

143. In order to measure the effectiveness of the spot auditors and the spot audit program, each audited law firm was asked to complete a survey after the completion of the audit. Eighty one (81) member surveys were returned by the date of this report.

144. With respect to the surveys which were returned to the Law Society, the results are as follows:

Chart 9

Nature of Survey Question	Favourable Responses Number	Favourable Responses Percentage	Unfavourable Responses Number	Unfavourable Responses Percentage
Was the spot auditor courteous, considerate and helpful?	80	99%	1	1%
Do you agree with the policy of making an advance appointment for purposes of conducting a spot audit?	77	95%	4	5%
Do you agree with the policy of receiving an advance listing of the books and records which must be produced on the day of the spot audit?	74	91%	7	9%
Do you agree that being provided with a post audit report which outlines minor records keeping inadequacies, and provides suggested remedies, is helpful?	64	79%	17	21%
Did you find the spot audit process constructive? (By enhancing knowledge of record keeping requirements)	51 Note (1)	63%	30	37%

Nature of Survey Question	Favourable Responses Number	Percentage	Unfavourable Responses Number	Percentage
Do you agree that the spot audit process is an appropriate accompaniment to the lawyer self reporting financial form model?	64	79%	17	21%

Note 1- Nine (9) members had no inadequacies and did not respond in the affirmative on the basis that no improvement was required.

PRELIMINARY REPORT OF THE WORKING GROUP
ON RULE 9 AND RULE 12 ISSUES

A. INTRODUCTION

145. The working group of the Committee[11] examining issues relating to solicitation, steering and referral fees has completed an initial review of the rules and has prepared the following report which raises a number of questions for the Committee's consideration.

B. THE ISSUES

Soliciting

146. Paragraph 4 of Rule 12 addresses the question of soliciting. It reads:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, <u>when a significant motive for the lawyer's so doing is to be retained in a particular matter</u>, except as a public service. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful. All such letters or advertising circulars shall be clearly marked "advertisement" on each page thereof.
> (underlining added)

147. Do the underlined words mean that any approach to a potential client does not constitute soliciting as long as the lawyer can argue that it was not for the purpose of being "retained in a particular matter"?

148. Should there be a prohibition against soliciting in the Rules of Professional Conduct?

149. There has been a long-standing belief amongst some lawyers that lawyers should not solicit professional business. The reality today is that most lawyers (including some who are well established and not just younger lawyers) are expected to bring business to their law firms. How else can this be done but by directly or indirectly trying to attract potential clients to use their legal services?

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[11]Marshall Crowe and staff member Stephen Traviss.

150. The question that has to be addressed is this: what is the possible harm to the public if lawyers were permitted to solicit business from persons and corporations who were not their clients? The risk is that the lawyer seeking the business may not be sufficiently competent to represent the client. Rule 2 on Competence and Quality of Services requires that a lawyer should not undertake the representation of a client unless that lawyer is qualified to do so. Thus there is a provision in the Rules that addresses this concern.

151. An examination of discipline cases during the past 20 years indicates that there are never any prosecutions for soliciting. Some sceptics within the profession believe that the prohibition is pure cant and that solicitation is widespread. Those who support the existence of a prohibition believe that it is unbecoming for lawyers to solicit business. As well, some lawyers believe they have a proprietary interest in their clients although there is no legal justification for this belief.

152. There is no restriction against soliciting in Alberta, British Columbia, Manitoba, Prince Edward Island or Saskatchewan.

153. There would appear to be at least three options available to the Committee:

1. Leave the status quo as it is now; or
2. Remove the prohibition against soliciting altogether by deleting paragraph 4 of Rule 12.
3. Consider a rule similar to what the Nova Scotia Barristers' Society has which allows "initiating contact with a party with the aim of attracting legal work". (See a copy of Chapter 20 which appears at Appendix 5)

Steering

154. Paragraph 5(g) of Rule 12 addresses the question of steering. It reads:

> The lawyer shall not:
> (g) act for or accept a brief from, or on behalf of a member of a club or organization, as for example an automobile club which makes a practice of "steering" its members, provided that a lawyer may assist a community social agency by providing legal advice or service on a gratuitous basis for persons falling within the scope of the agency's activities.

155. The apparent rationale behind the prohibition against steering is that the organization or individual doing the steering might refer the member of the public to a lawyer who was not competent to represent the needs of a member of the public. As was noted with respect to soliciting there is already a requirement that the lawyer not undertake work that he/she is not competent to handle.

156. In addition to the practice of some organizations and members of the public of referring persons to lawyers, most lawyers steer clients on a daily basis to lawyers within their offices and external to their law firms. Moreover, lawyers quite often refer clients to other professionals and businesses (such as brokerage houses, investment advisers, real estate companies) and so on.

157. A member of the profession has written a thoughtful critique of the provision against steering. With his permission, a letter from Harry Herskowitz of the firm Delzotto, Zorzi appears at Appendix 6.

158. The Nova Scotia Barristers' Society does not have a prohibition against steering as is the case with the Law Societies of Alberta, Saskatchewan and Prince Edward Island.

159. The question the Committee has to decide is this: is there any harm in a lawyer referring a client to another lawyer or having work referred to him/her provided the lawyer who is having work referred to him/her is competent to perform the legal services needed?

160. There is a related situation. Some lawyers have a financial interest in an ancillary business and the client needs the services of the ancillary business. The Law Society has taken the position that a lawyer could refer the client to that ancillary business provided that the lawyer inform the client that the lawyer or the lawyer's partners have a financial interest in that business and there are other companies out there doing the same thing and the client has a choice. We have asked lawyers in this situation to obtain written acknowledgement from clients that the lawyer's interest has been disclosed.

161. There would appear to be two alternatives:

1. To leave the status quo as it is, or
2. Remove the prohibition in Rule 12 on steering.

Referral Fees

Present Status in Ontario

162. The Rules of Professional Conduct were amended in 1985 by the Law Society to specifically proscribe referral fees. This is contained in the fourth paragraph of Commentary 7 under Rule 9 (Fees and Disbursements). It is set out below:

> A lawyer cannot give or accept a referral fee to or from a lawyer with respect to the referral of a client. This would also apply to an Ontario lawyer's dealings with a lawyer in another jurisdiction even where that jurisdiction may permit referral fees.

163. Prior to 1985 they were not specifically proscribed but the benchers and staff took the position that fees could only be divided between lawyers on the basis of the division of work on the matter in question.

Rationale for such a Proscription

164. The lawyer who makes the referral will only refer work to lawyers who will give him or her a referral fee. Moreover, the lawyer to whom they refer a client may not be the best lawyer. Some argue that referral fees could add to the cost of legal services.

Paragraph 8 of the Commentary under Rule 9

165. This paragraph reads as follows:

> *Hidden Fees*
>
> The fiduciary relationship between lawyer and client requires full disclosures in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation whatsoever related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such other person or agency.

166. This paragraph seems to permit referral fees as long as the client is informed and can determine if the lawyer gets to keep the fee or hand it over to the client or use it on account of any outstanding fees.

Referral Fees Permitted in British Columbia

167. Paragraph 2 and 3 of Chapter 9 of the Law Society of British Columbia's Rules of Conduct specifically permit referral fees. The relevant paragraphs are set out below:

> *Referral Fees*
>
> 2. A lawyer:
>
> (a) shall not pay any remuneration to a person, other than a member of the Law Society in good standing, in exchange for that person referring a client to the lawyer, and
>
> (b) shall not act for a client where, to the lawyer's knowledge, a person other than a member of the Law Society in good standing was paid any remuneration by the client in exchange for being referred to the lawyer.
>
> 3. A lawyer acting for a client who was referred to the lawyer by another lawyer or by a lawyer in another jurisdiction may pay that other lawyer remuneration for the referral only if, at the commencement of the retainer, the lawyer fully discloses the remuneration to the client and the client consents in writing to its payment.

Charles Wolfram's Text Entitled Modern Legal Ethics

168. Professor Wolfram looks at this subject in a couple of pages in his text. Attached at Appendix 7 are copies of these pages.

> Excerpt from Wolfram's text:
>
> But prohibiting referral would probably have the effect of encouraging marginally competent lawyers to keep cases in an attempt to bumble through. The availability of forwarding fees encourages a lawyer without particular competence in a specialized matter or with a temporary crush of other business in the office to forward a client's matter to a lawyer better equipped to handle it.

California, Illinois and Michigan

169. Referral fees are permitted in these jurisdictions who have been contacted with a view to obtaining their respective rule. To date only the Michigan bar has replied. Subparagraph (e) of their Rule 1.5 permits a division of a fee provided the client is fully informed and consents and the total fee is reasonable. An ethical opinion (R1-234) which discusses the division of fees appears at Appendix 8.

170. There would appear to be two options:

1. to leave the status quo as it is; or
2. delete the prohibition and replace it with a provision that would permit referrals provided three conditions are met:
   - (a) the referral can be justified by the lawyer making the referral (e.g. the lawyer to whom the matter is being referred is competent to handle the legal work); and
   - (b) the client gives his/her express consent (preferably in writing);
   - (c) the fee is a fair and reasonable fee.

C. NEXT STEPS

171. The working group is continuing with its review and will provide a status report on its further work at the Committee's October 1998 meeting. The working group is mindful of the need to liaise with the Rules of Professional Conduct Task Force with respect to any proposals for change emanating from the working group.

APPENDIX 1

REPORT OF THE ADR DESIGN SYSTEMS TEAM
SEPTEMBER 1998

(pages 45 - 102)

APPENDIX 2

COMPLAINTS STATISTICS

(pages 103 - 105)

APPENDIX 3

OBJECTIVES OF THE ADR PROCESS DESIGN PROJECT

Develop procedures for use in the Society's regulatory operations which reflect the fact that only 5% of all matters result in disciplinary action and which will respond effectively to client service and practice management problems. The procedures should emphasize:

1. The use of mediation and other resolution-based applications in a wide range of situations; and
2. The development of remedial solutions for the most frequently recurring practice problems.

Consideration should be given to the following information about the Society's current regulatory operations during the design project:

- the Society's Role Statement which articulates its public interest mandate and its responsibility for maintaining high standards of competence and professional conduct;
- about 80% of all regulatory activity[12] is derived from complaints received either from the general public or from members;
- the Society receives about 4,500 complaints per year;
- over 95% of complaints are closed without being referred to the discipline process;
- about 60% of complaints relate primarily to client dissatisfaction with the level of service provided by a member[13];
- only about 18% of all complaints are currently subject to any form of mediation procedure;

---

[12] Includes volume activity statistics from Audit, Complaints, Discipline, Standards and the Office of the Staff Trustee. Excludes purely advisory functions such as Practice Advisory and Professional Conduct.

[13] Includes complaints such as negligence, delay, poor communication, not following instructions, poor advice, termination of retainer, etc.

- discipline authorizations alleging a failure to comply with Society filing and bookkeeping requirements account for about one half of the roughly 400 cases authorized annually;
- anecdotal evidence suggests that the heavy volume of non-filers and administrative suspensions is attributable to members' serious financial difficulties;

Project participants should also keep in mind the impact that the legislative reform package will have on the Society's regulatory operations. Some of the more significant changes include:

- expanded powers to investigate and remedy professional competence issues;•mandatory participation in practice review;
- a Complaints Resolution Commissioner responsible for resolving complaints when a discipline response is not required.

APPENDIX 4

INFORMATION RESPECTING AMENDMENTS TO THE MIF

PROPOSED 1998 MIF

1997 MIF

STATUTORY PROVISIONS

THE LAW SOCIETY OF UPPER CANADA
FORMS SERVICES DEPARTMENT

TO: Professional Regulation Committee

FROM: Margot Devlin
Manager- Forms Services

DATE: September 2, 1998

SUBJECT: Changes to the Membership Information Form for 1998

Introduction:

With the exception of a change to a question incorporated in last year's form at the request of the Lawyers' Indemnity Corporation (LPIC), none of the proposed changes are substantive in nature. No new questions have been added; nor are there any proposed changes to the questions themselves. Proposed revisions consist of enhancements to provide clarity and better instruction on completion of the form, in response to feedback from the membership.

The following chart summarizes proposed changes.

Page/Area Reference	Nature of Change/Explanation
LPIC initiated question Page 4, Section C, question 4	These questions, initiated by LPIC, were found in the Legal Services Section, page 8, of the 1997 Membership Information Form. This question pertains to Members not engaged in private practice so it was moved to this area for ease of completion by the Members. Further to consultation with LPIC they wish to amend the question as noted on the draft form. The recommendation is the merging of last year's four questions on "real estate services and non real estate services" to two questions on "legal services". A new third question was added to this section on their recommendation.
Page 1 - Area A	Addition of "Status". Status was added as part of the Member's identification section and will be prepopulated.
Page 1 - Area A	Addition of "Year of Call" . Capturing this data as part of the forms data system will permit empirical data analysis based on year of call. This additional information will be "prepopulated" by the Law Society and reported to the member.
Page 1 - Area A	Addition of "Guidance to Member". Instruction has been added to alert Members earlier in the form to the "no change" oval found in Section J at the end of the form.
Page 1 - Area A	To ensure that Members are aware that, to avoid duplication, the information in Section C, question 4 and Section D will be shared with LPIC, this notice has been moved from page 4 (Legal Services Profile) on the 1997 Membership Information Form to this section.
ge 1 - Area B, 1, b)	Addition of "retirement" as a reason for the withdrawal from practice. In those instances in which the Law Society was apprised of the retirement, the information will be "prepopulated" by the Law Society and reported to the member. Inclusion of "retirement" clarifies the relevance of the form for those Members.
Page 2, Area B, 1,e)	To clarify the time period of this question, the words "As at December 31, 1998, were added.
Page 2, Area C,	Instruction was added to this section to clarify which Members were required to answer this section. Members in Private Practice had been responding in this area in addition to the Members not engaged in Private Practice. .
Page 2, Area C, 2	The Regulation requires any Member to file a Private Practitioner Report if they have handled client trust property; this Note is a reminder to Members who have not engaged in Private Practice that the requirement to file applies for everyone who still continues to hold client trust property.
Page 3, Area C, 3	The instruction has been clarified so that employed members will indicate their activities in law through their employment or engagement.
Page 4, Area D	Legal Services Profiles: Instruction was added reminding Members in private practice that they must file a Private Practitioner Report within 90 days of their fiscal year end in addition to the Membership Information Form.
Page 5, Area D	Legal Services Profiles: All the notes are now found together before the "Areas of Practice". Last year the explanations had been split and were found before and after the chart of percentages.

Page/Area Reference	Nature of Change/Explanation
Page 5, Area D	Extensive calls were received in regard to completion of this section. A note was added indicating that the headings found in the Areas of Practice percentage chart were found in the categories which follow. This statement should clarify the layout.
page 8, Area G	Under Private Practice Status, the status section was removed and status has been prepopulated in the Identification, section A.
Page 8, Area G	The Branch office, special services and Pro Bono question have been moved to this section in order to make the Signature section, where they were located last year, more concise.
Page 11 (1997 MIF)	To speed processing the Membership Information Form, the "handwritten" section of the form entitled "Specifics" was deleted from the form and will be included as an insert page.
Page 12 (1997 MIF)	The address change section of last year's form has been deleted. Insertion of the Change of Information Form allows for more timely transfer of this data to our Membership Department for inputting to the Membership database.

Attached hereto are the draft 1998 Membership Information Form, the Notice of Change of Information Form and the 1997 Membership Information Form for comparative purposes.

EXTRACTS FROM THE *LAW SOCIETY ACT*, REGULATIONS AND RULES

EXTRACTS FROM THE *LAW SOCIETY ACT*

RULES

62.—(1) Subject to section 63, Convocation may make rules relating to the affairs of the Society and, without limiting the generality of the foregoing,

....

27. prescribing forms and providing for their use, except the form of summons referred to in subsection 33 (10).

EXTRACTS FROM REGULATION 708

16—(1) Every member who engages in the private practice of law in Ontario shall inform the Secretary in writing of the termination date of his or her fiscal year, and shall file with the Secretary written notice of any change in the fiscal year within one month after the change is made.

(2) Every member shall submit a report to the Society, by January 31 of each year, in the form or forms prescribed by the rules, in respect of the member's practice of law in Ontario during the period of time specified in the form or forms.

(3) In addition to the report required by subsection (2), members shall submit the following reports to the Society:

1. Every member who engages in the private practice of law in Ontario, except a member described in paragraph 2 or 3, shall submit a report to the Society within ninety days after the termination of his or her fiscal year, in the form or forms prescribed by the rules, in respect of the member's private practice of law in Ontario during the fiscal year.

2. Every member who engages in the private practice of law in Ontario exclusively as an employee of a sole practitioner or law firm shall submit a report to the Society by March 31 of each year, in the form or forms prescribed by the rules, in respect of the member's private practice of law in Ontario during the previous calendar year and in respect of the member's employment with each sole practitioner or firm with which he or she was employed during the previous calendar year.

3. Every member who engages in the practice of law in Ontario exclusively as an employee of a corporation which is not a member of the Society or as an employee of an unincorporated association which is not a law firm or a member of the Society shall submit a report to the Society by March 31 of each year, in the form or forms prescribed by the rules, in respect of the member's practice of law in Ontario during the previous calendar year and in respect of the member's employment with each corporation or unincorporated association with which he or she was employed during the previous calendar year.

4. Every member who does not engage in the private practice of law in Ontario but who continues, from his or her private practice of law in Ontario in a previous year, to handle the property of clients as an estate trustee, an attorney appointed under a power of attorney or otherwise, shall submit a report to the Society by March 31 of each year, in the form or forms prescribed by the rules, in respect of each client's property which he or she handled during the previous calendar year.

16.1—(1) The Secretary or the chair or a vice-chair of the Discipline Committee may, at any time and with or without cause, require any member who is required to submit a report under subsection 16(3) to submit to the Society, in addition to the report required under that subsection, a report of a public accountant relating to the matters in respect of which the member is required to submit a report to the Society under subsection 16(3).

(2) The Secretary or the chair or vice-chair of the Discipline Committee who requires the report shall specify the matters to be included in the report and the time within which it must be submitted to the Society.

(3) For the purpose of permitting the public accountant to complete the report, the member shall,

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

(b) produce to the public accountant all evidence, vouchers, records, books and papers which the public accountant may require; and

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

(4) For the purpose of permitting the public accountant to complete the report, the public accountant shall,

(a) be entitled to confirm independently the particulars of any transaction in the files; and

(b) protect any privilege attaching to the documents in the files that he or she examines.

(5) If a member fails to submit the report of a public accountant within the specified time, the Secretary or the chair or a vice-chair of the Discipline Committee may require an investigation of the member's books and accounts to be made by a person designated by him or her, who need not be a public accountant, for the purpose of obtaining the information that would have been provided in the report.

(6) Subsections (3) and (4) apply with necessary modifications to the investigation under subsection (5).

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

(8) The cost of the investigation under subsection (5) shall be paid for by the member in accordance with the rules.

(9) Nothing in this section limits the authority under section 18 of the chair or a vice-chair of the Discipline Committee to require an investigation to be made of the books and accounts of any member or the right of Convocation or the Discipline Committee to institute further investigations or to require the filing of other reports. R.R.O. 1990, Reg. 708, s. 16; O. Reg. 503/97, s. 1.

EXTRACTS FROM THE RULES

PROCEDURES AS TO RULES

1. (1) Where it is proposed to make, amend or revoke any rule and the proposal is not made in the report of any committee which has been adopted by Convocation, the proposal shall not be acted upon unless notice of motion to that effect was given at the Convocation immediately preceding the Convocation at which the motion is made.

(2) Where in the report of a committee it is proposed that a rule be made, amended or revoked, no notice of motion to that effect need be given, but a motion specifying the proposal may be made immediately after the adoption by Convocation of that part of the committee's report.

....

FORMS

56. ...

(2) The report required to be submitted to the Society by a member under subsection 16(2) of the said Regulation 708 shall be in the form of the Membership Information Form which is appended to these rules.

(3) The report required to be submitted to the Society by a member under subsection 16(3) of the said Regulation 708 shall be in the form of the Private Practitioner's Report which is appended to these rules.

(4) The investment authority required to be maintained by a member under paragraph 15.2(1)(a) of the said Regulation 708 shall be in Form 4.

(5) The report on investment required to be maintained by a member under paragraph 15.2(1)(b) of the said Regulation 708 shall be in Form 5.

...

APPENDIX 5

NOVA SCOTIA

CHAPTER 20

"SEEKING BUSINESS"

(pages 140 - 144)

APPENDIX 6

LETTER OF HARRY HERSKOWITZ
DELZOTTO, ZORZI

OCTOBER 1, 1997

(pages 145 - 148)

APPENDIX 7

EXCERPT FROM

MODERN LEGAL ETHICS

BY CHARLES W. WOLFRAM

(pages 149 -153)

APPENDIX 8

STATE BAR OF MICHIGAN

ETHICAL OPINION R1-234

(pages 154 - 156)

Re: Policy Issues Arising from the P200 Regulatory Redesign

It was moved by Ms. Cronk, seconded by Ms. Ross that the Project 200 Regulatory Redesign policy direction be approved.

Carried

Re: ADR Report

It was moved by Ms. Cronk, seconded by Ms. Ross that the ADR Report be adopted.

Carried

Re: Revisions to the Membership Information Form (MIF) for 1998

It was moved by Ms. Cronk, seconded by Ms. Ross that the revised MIF for 1998 be adopted.

Carried

THE REPORT WAS ADOPTED

25th September, 1998

TREASURER'S REPORT

The Treasurer presented his Report regarding the Law Society Foundation.

Treasurer's Report
September 25, 1998

Report to Convocation

The Law Society Foundation

1. The Law Society Foundation is the Society's charitable arm and was incorporated under Letters Patent in 1962.The objects of the Foundation:

   - to receive donations and to maintain funds to foster, encourage and promote legal education in Ontario;
   - to receive donations and to maintain and use funds to provide financial assistance to law students in Ontario, including students in the bar admission course;
   - to receive donations and to maintain and use funds for the restoration and preservation of lands and buildings of historic significance to Canada's legal heritage;
   - to receive gifts of muniments and memorabilia of interest and significance to Canada's legal heritage and to maintain a museum displaying such items; and
   - to receive and maintain a collection of gifts of books and other written materials for use by educational institutions in Canada.

2. The objects of the Foundation as set out are limited and do not give the Foundation the scope to take on a wide range of charitable and pro bono activities.For example the Foundation cannot under its present objects give charitable donation tax receipts for contributions to the 'In From the Cold: program.The Foundation has retained counsel to advise on the drafting of objects which would give the Foundation greater scope but felt that before proceeding to seek an amendment of its objects it should have the approval of Convocation and I ask Convocation to give it's approval to the initiative.

3. The first members of the Foundation were the incorporators of the Foundation, Messrs. Sedgewick, Robinette, Arnup and Wright. Subsequent members appointed on resolution of the Board of the Foundation have had to be benchers, members of the bar nominated by the Treasurer, Deans of Ontario Law Schools or the Director of the Bar Admissio Course. The current members and Trustees of the Foundation are Norman Rogers, Bob Aaron, Ken Jarvis, Richard Tinsley and Alan Treleaven.

4. Given that the Foundation is a creature of Convocation I believe that the members of the Foundation should be appointed by Convocation rather than by election of the current members of the board, as is presently the case. and I ask your approval to direct the Foundation to seek the changes in its letters patent necessary to effect this change and to make any necessary changes in the by-laws of the Foundation. In the meantime, pursuant to the current by-laws, it is my intention to nominate Benchers to be trustees of the foundation in the near future.

It was moved by Mr. Ruby, seconded by Ms. Puccini that the Treasurer direct the Foundation to seek changes in the letters patent for members of the Foundation to be appointed by Convocation and that the Treasurer nominate Benchers to be trustees of the Foundation.

Carried

THE REPORT WAS ADOPTED

The "Futures" Task Force - Final Report of the Working Group on Multi-Discipline Partnerships

Messrs. Armstrong and Scott presented the Final Report on Multi-Discipline Partnerships.

Report to Convocation
September 25, 1998

The "Futures" Task Force -
Final Report of the Working Group on
Multi-Discipline Partnerships

Purpose of Report: Decision

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Introduction

The past few years have seen a trend toward, and in some jurisdictions the realization of, partnerships between members of various professions, including law. These developments were identified by the Law Society as an appropriate subject for in depth review, given the regulatory implications.

The Futures Task Force of the Law Society, through the Working Group on Multi-Discipline Partnerships ("MDPs"), has approached its study of the provision of legal services through MDPs with the ultimate purpose of determining the Law Society's response to these developments in a way that would enhance the competitiveness of legal services offered by lawyers to the public while maintaining an appropriate regulatory scheme for protection of the public interest.

Research initiatives undertaken during the Working Group's 15-month study involved a review of relevant literature, academic treatment of the subject, other jurisdiction's experiences with MDPs, other disciplines' reviews of the subject and a "survey" of the profession on the incidence of referral or business arrangements. The Working Group engaged Kent Roach[1] and Edward Iacobucci [2] to conduct a three-phase study, which included consultations with a broad cross-section of members in practice. The Working Group also organized various discussions sessions with lawyers and accountants.

Defining MDPs

MDPs are defined as partnerships between lawyers and other professionals, or service providers, who combine their skills in providing advice, counsel or other consulting services to clients or consumers, within a structure that includes fee-sharing arrangements and the execution of business activities under a common name. It is the partnership structure which dictates the key regulatory issues for a profession like law and accordingly, the primary focus in this study has been on partnerships.

How MDPs Developed

The early (and current) protagonists for the development of MDPs are the large chartered accounting or professional services firms who see the partnering of lawyers and accountants as the next logical step in the continued globalization and consolidation of professional services. Legal services are considered by them to be one of the offerings which they must make available to service the global reach of the corporations or businesses using the firms, in order to ensure that integrated services meet the demands of clients.

The development is not confined, however, to large firms in urban centres. The Working Group believes that the initiatives realized on the large scale could flow to "main street", involving lawyers and other professionals and service providers in smaller firms or sole practices.

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[1]As of July 1, 1998, Dean of Law, University of Saskatchewan College of Law, Saskatoon.
[2]Professor of Law, University of Toronto Faculty of Law.

The Rationale for MDPs and the Impetus for the Law Society's Study

In the belief that providing services to clients on a particular matter through separate and independent practices is inefficient, the arguments in support of an MDP structure focus on integrated provision of services, sometimes referred to colloquially as "one stop shopping". From this it is said that cost savings, more timely delivery of services and enhanced advice will result.

The self-interest of some non-lawyer professionals, who are highly regarded and rewarded within their own fields, has also contributed to the MDP movement. They seek the status of partner and a share in the profits in the delivery of legal services by their firms.

From the lawyer's perspective, questions have also been raised about incursions by others into the field traditionally occupied by lawyers. In the face of increasing competition for clients, together with increasingly complex issues presented by clients, it is argued by some that more useful service could be provided to clients with the assistance of professionals specializing in other related fields of endeavour.

Another argument in support of MDPs relates to the belief that these developments are inevitable, in reliance on industry consolidation trends and convergence taking place amongst those who require certain business and related services and thus requiring a similar convergence among the providers of those services. Recognition of globalization trends are also causing the legal profession to assess its place in this service sector.

For the legal profession, obviously a major segment of the practice of law is concerned with the interests of the business community and business imperatives. Nonetheless, the range of services offered by lawyers goes far beyond the interest of the business constituency alone. All elements of the profession must be addressed. Not all interests in the profession and the public which they serve "fit" within the scheme of integration and even those that do, do not do so easily, if the legal protection of the client which flows from the lawyer/client relationship is to remain unaffected.

Thus, the MDP linkage for the legal profession is in many respects theoretical. When MDPs are considered as a structure for legal practice, it becomes clear that there are serious questions about protection of the public interest, as a function of the lawyer's unique role in society as confidential advisor and counsel. It is these questions upon which the study has focussed.

Current MDP Developments

The Working Group has reviewed MDP or MDP-like developments in a number of jurisdictions worldwide. New South Wales, Australia and Washington DC both permit forms of MDPs, the former requiring that lawyers control the practice and the latter requiring that the practice involving other service providers be one dedicated to the practice of law. In continental Europe, the "Big 5" accounting firms have established law firms under their trade names and have integrated them with the accountancy/consultancy practices. Some of these firms are the largest in their jurisdictions. In the United Kingdom, a number of firms "captive" to the Big 5, although existing as separate partnerships, have been formed, primarily in London. A similar development has occurred in Canada, where the firm of Ernst & Young established a captive law firm named Donahue & Partners in Toronto, which includes in excess of 20 lawyers. This captive firm is a separate partnership but linkages to the accounting practice exist, including a physical presence within the premises of the accounting firm's offices.

MDPs, the Role of the Lawyer, and the Public Interest

The Law Society's study was premised on the belief that the legal profession should not embrace MDPs, whatever the commercial attractions, until a demonstrable and legitimate demand outweighs the risks to the profession in the public interest. The focus must be on the preservation of a strong and independent legal profession. In response to this approach, the Working Group identified and examined in detail the principal characteristics of the legal profession which establish the public interest imperative of preserving the profession and the services which it offers. Three specific areas are:

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

Privilege

The term "solicitor and client privilege" identifies that impenetrable umbrella of protection afforded information communicated to or by a client to a lawyer. The privilege is the property of the client and the solicitor is solemnly sworn to protect the information exchanged in those communications. It is a core element in the administration of justice and the protection of the rights of the individual in the complex matrix of competing rights and duties in society. Without it, a client could not confide legal secrets to his or her solicitor without running the risk that the latter would be called as a witness in court and compelled to disclose these confidences.

As the discussion relates to MDPs, it is important to note how easily the privilege in respect of particular communications can be lost - by simple disclosure to a third party outside the protective umbrella of the occasion. As the protection of the privilege depends on the maintenance of secrecy, at the moment that secrecy is lost, so the privilege is lost.

The idea mooted by MDP proponents from time to time that "transaction" lawyers and their clients are less in need of the privilege than lawyers in a litigation setting and their clients is a dangerous one. The privilege is as important in the solicitor's office advising in the commercial transaction as it is in more directly litigious circumstances.

Independence

The bar is independent of the state and all its influences. It is an institutional safeguard lying between the ordinary citizen and the power of government. The right to counsel which is inter-related with the law of privilege, depends for its efficacy on independence. In turn, independence requires for its efficacy the untrammelled freedom on the part of the lawyer to interact with, for and on behalf of the client. The key question is whether any such environment could be maintained where the lawyer is but a small part of a larger commercial enterprise, full service in nature, in which inter-professional dependencies are vital to its well being. The notion of such threats to independence also raises concerns for the continued self-regulation of the profession, which has always been regarded as a fundamental requirement if the profession is to be effective in maintaining individual and institutional rights against state action.

Conflict of Interest

Lawyers' conflict rules dictate that not only can they not act for opposing parties in transactions without their informed written consent (or in litigation at all), and certainly when in possession of relevant privileged information, but lawyers cannot act for a particular client, if, when so acting, another client might reasonably question the lawyer's commitment of loyalty to that client's cause.

These rules arise not only from a need to maintain the privilege, from which the conflict regime is shaped and configured, but also by reason of a sensitivity to the risk that the information communicated on occasions of privilege may subconsciously feed the advice which is offered to the client opposed in interest.

The analysis of these unique features of the profession illustrates that lawyers are not simply at one with other professionals and service providers who must serve with due care and skill. The lawyer has a pivotal role in the administration of justice and the upholding of the rule of law. The law has imposed these special responsibilities on the legal profession which must be discharged in the public interest. If lawyers fail to do so, not only is the profession discredited but the values and societal interests which lawyers are charged with protecting are undermined and placed at risk. It is this responsibility that must be weighed when considering the profession's compatibility with MDPs.

Institutional Risks Presented by MDPs

Redefining Privilege

There is no assurance that the courts could or would embark upon the complex process of redefining occasions of privilege to suit the needs of MDPs. Broadening the privileged occasion in the interest of facilitating commercial ventures is an unlikely result. Merely embarking upon the MDP experiment poses serious risks to the stability of the doctrine and the public interest which depends upon it.

There is a real risk that in a fully integrated MDP made up of lawyers and accountants, legal advice otherwise privileged will routinely and carelessly, or even unwittingly but deliberately, be communicated to non-lawyers, thereby undermining the privilege.

It cannot be assumed that a uniform definition of secrecy and confidentiality would motivate the non-lawyer consultant to protect communications with the client. The accounting profession is a good example. In the audit environment, not only would the auditor not share with the lawyer the dictates of secrecy and single-mindedness in respect of information imparted to the auditor by the client, but the auditor's instinct and professional duty would be to the opposite effect. The role of the accountant is dependent upon the accountant's credibility in the eyes of third parties who rely on representations the accountant makes with respect to the business affairs of the client. Thus, from the accountant's perspective, there can be 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. There is concern that the ethical tensions at work between disciplines demanding a primacy in one camp are almost inevitably bound to erode the operative professional principles of the other.

Suggested methods to overcome these problems, in the view of the Working Group, are not practical. Waiver in particular is a totally impractical device. A solicitor offering a waiver to a client in order to facilitate the provision of services might well be criticized on professional grounds. Waiver in advance of communication of the information is an oxymoron from the point of view of the interests of the client. Chinese or fire walls are equally impractical. Both of these so-called solutions place the commercial imperatives ahead of the professional safeguards in a way which cannot be said to be in the public interest.

Risk to Independence and the Role of the Lawyer as Officer of the Court

How can lawyers be expected, in practical terms, where they represent a small minority in the consulting partnership to advise clients realistically to adopt an independent course of action when the lawyer's remuneration depends on a unitary and inter-dependent structure purveying heterogenous professional advice? Is the lawyer's practical freedom to react in the bests interests of the client not likely to be compromised in these circumstances, more so where the enterprise is controlled by non-lawyers?

The notion of independence, which is at the root of reliable advice driven by the interests of the client alone and free of external influences, also impacts directly on the stability of the privilege. Whether, in an historic sense, independence has spawned the privilege, as is suggested by some, or the reverse, it is clear that an independent Bar is essential for its preservation.

Every member of the practising bar is an officer of the institution of the court. The relationship between the lawyer and the court is not confined to the former in the lawyer's capacity as a barrister. The significance of this relationship between the lawyer and the court is underscored when the lawyer's duties as an officer of the court are ranged against the lawyer's duties to the client. The lawyer's first duty is to the courts and the public and not to the client, and where a conflict exists between duty to the client and the duty to the court, the latter must take precedence.

In order to fulfil the heavy responsibilities imposed on lawyers as officers of the court, a meaningful and practical environment of independence is essential. It is always within the framework of this relationship that the commercial interests of the client and the lawyer's interests must give way to the overriding duty to the court. This is not an obligation shared by other professionals. In an environment created and controlled by others unencumbered by this burden, significant stress could be placed on the relationship in the discharge of the lawyer's duties. The duty to serve the court in a manner directly contrary to the economic or commercial interests of the client is difficult enough in the private Bar but would almost certainly result in significant pressure upon independence and duty in the environment of an MDP. Our duties as officers of the court could not possibly be discharged other than in an environment of total independence.

Risk to Integrity of Conflict Regimes

In an MDP, where inter-disciplinary advice would as a matter of course be delivered to the client collectively, the lawyer bound by an entirely different set of conflict rules and in a minority position would be in great difficulty. The idea that this risk might be limited by collective adoption of the most demanding conflicts regime - that of lawyers - might be effective if lawyers were in control, but ineffective if lawyers were not. It is doubtful that one set of rules could apply in any practical sense to a multi-faceted, multi-discipline consultative environment.

Fundamentals of the solicitor and client relationship such as the protection of solicitor and client privilege and the independence of the bar are placed at serious long-term risk by full-blown partnerships between lawyers and heterogenous groups of other professions, including principally accountants. Accordingly, the Working Group has concluded that this type of partnership without more would undermine traditional public interest values, whatever the commercial benefits for the participants themselves might appear to be.

Solutions in the Public Interest

The Working Group has identified five practice models as options for an MDP structure:

1. The acceptance, recognition and regulation of full multi-discipline partnerships;
2. The rejection of the MDP concept and the maintenance of the status quo, namely, the practice of law in partnerships of lawyers only;
3. The acceptance of the New South Wales model, namely, MDPs offering multi-discipline services provided that the partnership is in the effective control of lawyers;
4. The acceptance of the District of Columbia model, namely, MDPs offering legal services only with no specific provisions for control;
5, The recognition, acceptance and regulation of MDPs offering legal services only provided that the partnership is in the effective control of lawyers.

The Working group recommends against the acceptance of models 1 through 4 for the following reasons:

1. The fundamental importance of the privilege to the administration of justice and the threat which is perceived by relationships of this kind, and incompatibility in terms of public duty as between the accounting profession (the principal protagonists for MDPs) and the legal profession leads to the conclusion that MDPs between these groups are incongruent and inappropriate, whatever the business case may be. The convenience of "one stop shopping" in a full-blown MDP must not permitted to overwhelm professional responsibilities of basic sociological importance.
2. Support for the status quo is a statement that improvements in the present practice model are not possible and that there is no potential for useful change. Any such conclusion is superficial and unsupportable.
3. A 'lawyers in control' model is not acceptable because the same risks associated with the full MDP model above would be present, although to a somewhat reduced degree. Control by lawyers would not ensure the preservation of the privilege, the appropriate resolution of conflicts and would not eliminate fundamental differences in the public duties of the professional.

4. The 'practice of law' model would permit professions unrelated directly to law, under the umbrella of the MDP practice, to offer professional services in those separate fields. While this has the effect of overcoming one of the negative features of the New South Wales model (services in fields entirely unrelated to law offered within an MDP), a deficiency in the model resides in the potential that such a firm could be controlled by non-lawyers, a situation which would be completely unacceptable and inconsistent with the public responsibilities vested in the profession.

The model which the Working Group proposes is one which contemplates partnerships between lawyers and nonlawyers where the partnership offers legal services only and is effectively controlled by lawyers. This would eliminate the concerns respecting privilege, conflicts of interest, independence and public duty as the firm would be confined to the delivery of legal services. Adherence to required professional norms in the delivery of such services would be facilitated by the controlling influence of lawyers. The model could permit the delivery of services on a more efficient basis and at lower cost while contributing, within the framework of a law practice, to the broadening of the traditional service base.

With respect to the captive law firm model, which is closest to the MDP in its structure, the Working Group's study has concluded that there are regulatory issues which require independent study with respect to this model, including questions of control, trading style, management of conflicts of interest and related matters. It is recommended that an appropriate vehicle be struck to undertake this study.

MANDATE

1. On April 4, 1997 Convocation approved the terms of reference of the Futures Task Force. The Task Force was struck in response to deliberations within the Professional Development and Competence Committee and the Professional Regulation Committee which identified the need to review and assess a spectrum of issues, including how the Society regulates members, the economic circumstances of members, legal services/marketplace issues including competition for provision of services, practice structures, technology, and access to legal services.

2. The Task Force focussed on "future" issues concerning the practice of law. The rationale was that as the practice of law evolves and changes, here and abroad, the Law Society's rules and regulations should be responsive and should not unnecessarily impede creative practice. Convocation's working group which drafted the terms of reference determined that one topic ready for immediate investigation and discussion was multi-discipline practice.

3. Accordingly, a Working Group of the Task Force was struck to examine the issue of multi-discipline practice, including partnerships (the latter commonly identified as "MDPs"). The members were:

   David W. Scott Q.C. and Robert P. Armstrong Q. C., Co-Chairs
   J. Rob Collins (non-bencher member)
   Marshall A. Crowe
   Heather J. Ross
   Malcolm Heins (LPIC)
   Jim Varro (Staff)[1]

4. The Working Group refined the terms of reference for the purposes of its study, so that the examination of the subject proceeded with a broad focus on the implications of an MDP structure for the practice of law and in particular the regulatory issues it raises. From that flowed the following key issues:

   - how the development of MDPs impacts on the unique role of the legal profession in society;
   - the issue of the inevitability of MDPs;
   - whether the development is in the public interest; and
   - the nature of the profession's regulatory response, if any, to MDPs.

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[1]Staff members Richard Tinsley and Stephen Traviss also participated in and assisted the study from time to time.

5. The ultimate purpose of the study was to determine the Law Society's response to these developments in keeping with the terms of reference, in a way that would enhance the competitiveness of legal services offered by lawyers to the public while maintaining an appropriate regulatory scheme for protection of the public interest.

OUTLINE OF THE STUDY

6. A number of research initiatives were undertaken during the Working Group's 15-month study and included a review of relevant literature, academic treatment of the subject, other jurisdiction's experiences with MDPs and other disciplines' reviews of the subject.

7. The Working Group was assisted in its study by Kent Roach, formerly Professor of Law at the University of Toronto, Faculty of Law and now Dean of the College of Law, University of Saskatchewan, Saskatoon, and Edward Iacobucci, Professor of Law, University of Toronto Faculty of Law. The Working Group is grateful for their thorough academic research and assessment of the subject and insightful commentary on the numerous ethical and regulatory issues relevant to a review of multi-discipline practices. Dean Roach and Professor Iacobucci produced two papers, the short titles of which are the Phase 1 and Phase 3 papers, after two of the three phases of a structured review they undertook for the Working Group.[2]

8. The "field work" portion of the study included a number of discussion sessions and consultations with members of the legal and the chartered accounting professions. The Working Group acknowledges with thanks the participation of these individuals in the study, and expresses its appreciation to them for taking the time to attend discussion sessions and meetings and for their valuable input.

9. Data was collected through a "survey" of the membership on current multi-disciplinary activities (focusing on referrals and business arrangements) by means of the MDP "Form".

Appendices to the Report

10. Extensive information collected during the study and related directly to the text of the report, and in particular the items highlighted above, is included in the following appendices:

Appendix	
1	Report of the Interprovincial Task Force on the Multi-disciplinary Activities of Members Engaged in Public Practice
2	New South Wales Solicitors' Professional Conduct and Practice Rule 40.1
3	District of Columbia Rule of Professional Conduct 5.4(b)
4	Outline of Research Initiatives
5	Memorandum of David A. Ward Q.C.
6	Regulatory Issues Concerning Lawyers and MDPs

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[2]The Phase 1 paper entitled "Multi-Disciplinary Partnerships: A Review of the Literature" was included in the Working Group's February 27, 1998 interim report to Convocation, and appears on the Law Society's website (*www.lsuc.on.ca*). The Phase 3 paper entitled "Multi-Disciplinary Practices and Partnerships: Policy Options" has also been posted on the website.

7 Law Society of Upper Canada Rules of Professional Conduct on Conflict of Interest

8 Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario

9 Discussion Sessions with Practising Members, Employed Members, Accountants and In-house Counsel

10 MDP Form and Data

ANALYSIS

I. THE MULTI-DISCIPLINE PARTNERSHIP

A. A Definition

11. Multi-discipline partnerships ("MDPs") are defined, for the purposes of this study, as partnerships between lawyers and other professionals, or service providers, who combine their skills in providing advice, counsel or other consulting services to clients or consumers. The structure would include fee-sharing arrangements, a natural element in partnerships and the execution of business activities under a common name for all disciplines. While inter-professional services would be jointly offered, the MDP concept also assumes the stand-alone delivery of professional services in each of the disciplines forming part of the multi-discipline environment.

12. While multi-discipline practice may assume a variety of forms, some of which will be discussed in this report, it is the partnership structure which dictates the key regulatory issues for a profession like law or chartered accountancy. Accordingly, the primary focus in this report within the broad topic of multi-discipline practice is on partnerships. So-called "captive" law firms in which partnerships involving one profession are aligned with partnerships involving another, each practising under the same flag, if not the same name, raise an important but somewhat different set of regulatory questions. They are not the focus of this study.

B. The Historical Development of MDPs

(i) Background

13. Multi-discipline *activity* is not a new phenomenon. Historically, clients have relied on experienced and knowledgeable professionals in a variety of disciplines to provide advice and expertise in specific areas of problem-solving. Service providers themselves have for many years acknowledged the benefits of assembling, in a collective sense, the expertise of qualified advisors in meeting client's needs.

14. Multi-discipline *practice* has effectively been carried on by a number of professions, most notably chartered accountants, who years ago expanded their services beyond auditing and accounting to include management consulting, business valuations, information systems and tax advice.

15. Competitive pressures have also influenced the direction the accounting profession has taken. The report of the Interprovincial Task Force on the Multi-disciplinary Activities of Members Engaged in Public Practice[3] ("CA Task Force") discussed this in the following way:

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3 See Appendix 1 for the Report of the Inter-Provincial Task Force on the Multi-Disciplinary Activities of Members Engaged in Public Practice.

> Over the past three decades, the services provided by chartered accountants in public practice have expanded significantly beyond the audit and other "traditional" functions. ...This trend...has enabled the firms to provide valuable new services to the business community and thereby achieve stability and real growth in the face of declining revenue from traditional services.
>
> ...competitive pressures have been steadily mounting. The continuing evolution of information technology, both hardware and software, has made sophisticated financial, mathematical, and informational processes widely available. This has prompted many individuals with other professional training and designations to provide services in areas where chartered accountants once enjoyed a particular competitive advantage.
>
> The recession of the early '90s further compounded these pressures. Coupled with changing methods of doing business, this last cyclical downturn reduced business activity to a point where competition among CAs and other professionals offering similar services has reached unprecedented levels. Increasingly, CAs and non-CAs alike have recognized the synergy and other benefits which can be achieved by establishing multi-disciplinary practices.

(ii) The Accounting Profession and Consultants

16. The expansion of accounting firms, primarily the "Big 5" as they now are known[4], 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.

17. These developments have led to discussions in a number of jurisdictions amongst lawyers and accountants about multi-discipline *partnerships*. The accounting profession apparently sees the partnering of lawyers and accountants as the next logical step in its continued globalization and consolidation of professional services.

(iii) Multi-Discipline Service Offerings

18. While the focus has been on the legal and accounting professions, the issues concerning MDPs are not exclusive to those professions, nor are they exclusive to large, global practices or even large urban centres. The major accounting firms have branches in many smaller communities, and service facilities in the larger centres can be expected to flow to "Main Street" from Bay Street. The study has shown that associations in practice between lawyers and other professionals/service providers, particularly in the form of a variety of referral arrangements, are also taking place in small towns amongst sole and small firm practitioners.

19. Another example in the spectrum of multi-discipline activity is province-wide associations between networks of offices of financial institutions and identified law firms, the latter performing legal services for the clients of the financial institutions but on their behalf.

20. Each of these situations presents particular issues for regulatory attention, bearing in mind the protection of the public, but for the purpose of this report the focus is intended to be upon partnerships between professional groups rather than mere associations. The Working Group sees a quite different set of regulatory issues created by partnerships made up entirely of lawyers engaged in somewhat loose association with other professional groups as opposed to partnerships made up of lawyers and non-lawyers.

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4 Pricewaterhouse Coopers, KPMG, Arthur Andersen, Ernst & Young and Deloitte & Touche.

C. The Rationale for the Existence of MDPs

21. Although lawyers have traditionally and tangentially involved other professions in their practices, some believe that providing services through separate and independent practices is inefficient. A more integrated relationship is advocated if "one stop shopping" is to develop. There has been much discussion in professional literature about the desirability of one stop shopping, with the emphasis upon efficiencies that are said to be attainable by integration of legal and non-legal services. Thus, cost savings, more efficient delivery of services and enhanced advice are said to be the results of integrated service offerings.

22. Some see a market emerging for these integrated services. Others, most notably accountants, rely on the business imperative, which is said to be occurring in the merging legal and accounting needs of business clients.

23. The self-interest of some non-lawyer professionals, who are highly regarded and rewarded within their own fields, has also contributed to the MDP movement. These individuals are not content to be mere employees of law firms, but seek the status of partner and a share in the profits in the delivery of legal services by the firm. A financial interest in and the exercise of management authority over a law firm by a non-lawyer permits non-lawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. Patent and trade-mark agents in the employ of law firms or in satellite partnerships are examples.

24. From the lawyer's perspective, questions have also been raised about incursions by others into the field traditionally occupied by lawyers. Much "legal" work is now being undertaken by accountants, financial institutions and other organizations. This raises questions for another day with respect to the content and limits of legal advice and the legitimacy or otherwise of the presence of non-lawyers in the field. In the face of increasing competition for clients, together with increasingly complex issues presented by clients, it is argued by some that more useful service could be provided to clients with the assistance of professionals specializing in other related fields of endeavour.

25. In this matrix of interests MDPs are urged upon the legal profession on the basis of reducing costs to the client and increasing profits to the service provider.

D. How the Law Society Has Come to Embark Upon a Study of MDPs

26. No doubt fuelled by current discussions about MDPs, some members of the profession in Ontario have expressed the view that MDPs, in some form, might be highly attractive, particularly in terms of enhancement of the lawyers' presence in a highly competitive market place. This is of course a logical extension of information being disseminated about what is happening elsewhere, particularly in Europe.

27. Globalization trends are causing the legal profession to assess its place in this service sector. Professor Harry Arthurs sees this as a key factor in shaping the delivery of legal services in the future. MDPs figure large in the equation:

> ...globalization is likely to have adverse effects on the market for high quality, sophisticated legal services in Canada. No doubt, some Canadian firms will try to offset these effects by "going global", by opening offices abroad. In some cases, this strategy may succeed. However, the comparative advantage of Canadian law firms is based on their affinity to Canadian-based clients, and there are relatively few such clients engaged in global business activities of any scale. Furthermore, the costs of running a foreign practice are formidable, the risks are large, and Canadian firms will have to weigh carefully the advisability of competing with the dominant American and English firms.
>
> What is left, then, by way of strategy options for large Canadian law firms? ...they can move more aggressively into the international sphere... they can form alliances with, or become absorbed into, existing global law firms. ...

> ...At a minimum, it would be surprising if globalization and regional integration did not soon produce pressures for law societies to adopt more liberal attitudes concerning the admission to practise of lawyers from other jurisdictions. At a maximum, many functions now falling within the bar's statutory monopoly over legal practise may in the future be performed by business consultants, real estate agents, tax preparers, paraprofessionals, accountants and other specialists.[5]

28. The Law Society has a responsibility to respond to the professional and regulatory issues which arise, or could arise, in these relationships, not only to facilitate what it regards as appropriate, but to constrain relationships which are not.

(i) The Environment of "Inevitability"

29. There is considerable pressure, both direct and indirect, being applied to regulators to accommodate MDPs, both on the basis of the inevitable globalization of professional service offerings and the economic interest of a beleaguered legal profession. In short, the profession is being told that MDPs are the way of the future, and that it needs to facilitate such institutions in order to remain competitive. Neither of these forces are necessarily driven primarily by concern for the public interest. It is the public interest which must motivate and guide the Law Society. What is happening throughout the world provides the context for our deliberations. If we are to stand true to our public responsibilities, these events should not be permitted to overtake the detached and rational analysis of the regulator.

30. The proponents of the inevitability theory rely on industry consolidation trends and evolution in the world's business markets, with the convergence taking place amongst those who require certain business and related services requiring a similar convergence among the providers of those services. Legal services are considered one of the offerings which must be available to serve the global reach of the corporations or businesses using them in order to ensure that integrated services meet the demands of the clients.

31. Certainly a major segment of the practice of law is concerned with the interests of the business community and business imperatives. Nonetheless, the range of services offered by lawyers does go beyond the interest of the business constituency as such and this element in the profession must not be overlooked. Not all interests in the profession and the public which they serve "fit" within the scheme of integration and even those that do, do not do so easily, if the legal protection of the client which flows from the lawyer/client relationship is to remain unaffected.

32. The recent alliances between accounting and law firms, primarily in the United Kingdom and continental Europe, are justified on this basis, and also in the belief that globalization of businesses, advances in technology, competitive pressures and the need to provide clients with the services they demand are making the integration of these services an inevitable result of the new economy.

33. Without discounting the fact that integrated services at certain levels may be sensible and will work for particular clients in particular situations, the current activity does not provide persuasive evidence of either the inevitability of integrated partnerships of multi-disciplines, including law, or that the theory can ever be fully realized in practical terms.

34. For the legal profession, the MDP linkage is in many respects theoretical. As this report will illustrate, the profession's place in a so-called "inevitable" structure for the provision of services must be assessed against our unique role in society and how that role may be irretrievably affected if we embrace the phenomenon in an uncritical manner.

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5 *Changing World - Challenging Times: Lawyering in Canada in the 21st Century*, 1996 H.W. Arthurs, University Professor and President Emeritus, Osgoode Hall Law School, York University, pp. 11-12.

E. MDP Developments Here and Abroad

(i) Continental Europe

35. Much of the "mantra" of MDPs emanates from continental Europe where it is said that a number of the largest law firms are in reality accounting firms. It has been said that five of the nine largest law firms in the world are accounting firms and that the largest law firms in a growing number of jurisdictions are, or soon will be, accounting firms. Before one concedes that these institutions can, accurately, be described as MDPs, the precise nature of the relationship between lawyer and accountant needs to be determined. Are they "stand alone" law firm partnerships affiliated with separate accounting firms (viz. "captive" law firms), or actual mergers, in a full partnership sense, between accountants and lawyers? If the former, what are the specifics of the associations in terms of control, management of conflicts, service offerings, etc.? As pointed out earlier, each scenario gives rise to differing regulatory issues.

36. The "merger" of law and accounting practices has resulted in the firm of J&A Garrigues, Andersen Y Cia, S.R.C., the largest law firm in Spain, and Archibald Andersen Association d'Avocats in France, both of which are within the Arthur Andersen organization. Fidal, the largest law firm in France, is part of the KPMG organization. Ernst & Young's firm in France is HSD Ernst & Young Societe d'Avocats. 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.

37. An article in *Forbes* magazine in November 1997 on Arthur Andersen's worldwide law network described it this way:

> ... The law firms that join the network agree to pay a share of the cost of Andersen's sophisticated worldwide E-mail system and international voice-mail system that link their lawyers with the Andersen network, and also to pay for elaborate training programs. When legal work is needed on a contract, regulations prevent Andersen from referring a client only to one of its affiliated law firms. But the link through the legal network seems to work, for both sides.
> ...
> Andersen can't share in the fees its legal affiliates earn (billing is direct from law firm to client) but the network pays off in other ways.

(ii) England and Scotland

38. The Law Society of England and Wales' regulatory regime does not permit MDPs, although there is no statutory impediment.[6]

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6 The governing legislation allows the Law Society to prohibit solicitors from entering into unincorporated associations with non-solicitors. Currently, the Law Society's Rules do not permit MDPs.

39. The most significant multi-discipline development in England has occurred between accounting firms and law firms. The associations are limited to ones wherein the law firm, as an independent practice, becomes "captive" to an accountancy or professional services practice. Separate names are used by the law and accounting practices (adoption of the accounting firm's trade name is not permitted), although the association between the two firms can be, and is, recorded on the law firm's letterhead and in other ways. Fee-sharing is not permitted. A number of law firms are now associated with accounting firms in this way, primarily in the City of London. They include Arthur Andersen's affiliation with the law firm Garrett & Co.(throughout the United Kingdom), Coopers & Lybrand's association with Tite and Lewis and Price Waterhouse's relationship with Arnheim & Co. A similar association occurred in mid-1997 in Scotland when the firm of Dundas & Wilson joined the international network of Arthur Andersen legal firms. In mid-1997, the first association of a law firm and an accounting firm outside the "Big 5" occurred when Wycombe Hurd & Co. linked with Hughes Allen, ranked in the top 50 firms of accountants in London.

40. A policy adopted by the Law Society of England and Wales on June 6, 1996 provides that:

- legal services should continue to be provided by authorized persons only,
- the Council should conduct a fresh review of the question of solicitors practising in partnership with non-lawyers,
- the regulatory model for multi-national partnerships (a register kept by the Society and a statutory framework empowering the Society and the solicitors' Disciplinary Tribunal to regulate persons on the register) should be considered a useful precedent for regulating solicitor-led MDPs,
- issues to be addressed include non-lawyer investment, the position of solicitors forming a minority in partnership with non-lawyers, and the implications for solicitors employed by non-lawyers.

41. A survey conducted by the Society's research and policy planning unit in 1996 provided evidence of a growing interest within the profession in multi-discipline partnerships. More than a third of the firms involved were in favour of solicitors forming partnerships with others with slightly more than half favouring a requirement that solicitors should retain effective control of an MDP. Those most interested were firms with fewer than five partners. A more recent initiative by the Law Society involves circulating a further consultation document to the profession on MDPs in the fall of 1998.

(iii) New South Wales, Australia

42. The Law Society of New South Wales ("NSW"), Australia, has, since July 1994, permitted MDPs, under certain conditions. The *Legal Profession Act 1987* allows partnering with other persons who are not lawyers only if the business of the partnership concerned includes business of a kind undertaken by a lawyer. Rule 40.1 of the NSW's Solicitors' Professional Conduct and Practice Rules provides that lawyers must maintain effective control of the legal practice and the delivery of legal services by way of majority voting rights in the partnership. Specifically, not less than 51% of the net income earned by the partnership must be received by lawyers[7].

43. In July 1998, the Policy Department of the Law Society of NSW advised that there are now 11 firms organized as MDPs under NSW's rules and that that number may rise slightly once the practice filings, now due, are reviewed. The non-lawyer partners included consultants and accountants. The practices are largely conducted in Chambers-style operations offering some inter-disciplinary services.

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7 See Appendix 2 for Rule 40.1.

44. In 1994, the restriction on trade names was lifted.[8] Each of the Big 5 accounting firms now has a law firm practising in NSW under the accounting firm trade name. These firms are more in the nature of "captive" law firms as opposed to free-standing MDP's. The Working Group's research would suggest that much of what the firms do is exclusively legal practice, although they may become multi-discipline in the sense that some of the work in the overlap areas between accounting and law may be done in co-operation with the accounting partnership. To the knowledge of the Law Society, the lawyers in the legal practices are not partners in the accounting practices, unless they meet the required qualifications (viz. a lawyer is also an accountant). This confirms information received through Ernst & Young's Toronto office about its Sydney legal practice where, it is said that, although the firm is physically located within the tax division of Ernst & Young's accounting offices, the files and systems are separate from those of Ernst & Young. Among the law firms in Sydney are Arthur Andersen, Coopers & Lybrand (Act) Pty. Ltd., Deloitte Touche Tohmatsu, Ernst & Young Legal Services, KPMG Solicitors and Price Waterhouse.

45. There is a divided bar in NSW and the Rules of the Bar Association preclude participation by barristers in any form of partnership, whomsoever it may be with, in the practice as a barrister.[9]

(iv) Washington, District of Columbia

46. Not unlike NSW, Washington, District of Columbia ("DC") permits a limited form of MDP within a strict regulatory environment. In the 1980's, at the time of its consideration of revisions to the American Bar Association ("ABA") Model Code (later to become the Model Rules), the ABA explored the idea of permitting MDPs. The ABA MDP initiative was defeated, but emerging from the debate, DC adopted a rule which permits a restricted form of MDP practice. Under the scheme, a lawyer may practice law in a partnership, or other form of organization in which a financial interest is held or managerial authority is exercised, with an individual non-lawyer who performs professional services which assist the organization in providing legal services to clients. The key ingredient is that the partnership's sole purpose must be to provide legal services to clients. Non-lawyers "undertake to abide" by the lawyer's rules, and lawyers "undertake to be responsible" for any violations of the rules by non-lawyers.[10]

47. While the Washington DC firm of Arnold & Porter was the first to organize under the DC rule, it apparently no longer includes other disciplines in its practice. A strategic alliance between Price Waterhouse and the law firm of Miller and Chevalier was established in 1997 to provide a level of integrated services to clients, largely in the tax area. As each firm remains independent of the other, this is not the kind of structure contemplated by the DC rule.

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8 Rule 41.2 states:

> A practitioner must not conduct the practitioner's practice solely, or in association with another service provider, under a business name which might reasonably be expected to mislead or deceive a person, seeking the provision of legal or associated services, as to the nature and identity of the provider, or as to the nature and quality of the services offered.

9 NSW Rule 81 states:

> A barrister must be a sole practitioner, and must not practise:
> (a) in partnership with any person;
> (b) as the employer of any legal practitioner who acts as a legal practitioner in the course of that employment; or
> (c) as the employee of any person.

10 See Appendix 3 for District of Columbia Rule of Professional Conduct 5.4(b).

48. Earlier, in 1990, another firm, Mintz Levin Cohn Ferris Glovsky and Popeo, P.C. established a subsidiary known as ML Strategies, Inc. The firm's promotional literature states that ML Strategies Inc. "coordinate[s] the delivery of legal and associated services to clients in need of more comprehensive, multi-discipline capabilities" and "provides clients with a broad range of strategic and tactical services, focussing on matters involving health care, biomedical science and the environment". Again, this structure is not one contemplated by the DC rule. It is more in the nature of an "ancillary business", or a law-related service carried on by a separate entity controlled by lawyers or by lawyers with others.

49. To date, the Working Group's research would suggest that no firms have been formed within the narrow scope of the DC rule. We have been advised that one of the principal reasons is the need to conform to a variety of multi-jurisdictional requirements which has made the DC MDP option somewhat impractical.

(v) Canada

50. There are no MDPs in Canada presently. Canada mirrors the experience in England, given a similar regulatory regime.

51. The most notable development in recent years has been the creation in 1996 of Donahue & Associates (now Donahue & Partners), a partnership of lawyers "captive" to Ernst & Young in Toronto. From three partners upon its formation, it has grown to eight partners, 11 associates and four lawyer employees, a total of 23 lawyers.

52. A representative of Ernst & Young who is also a partner in Donahue & Partners, offered the following information to the Working Group about the law firm's structure and purpose:

- The law firm and the accounting firm are separate partnerships. The law firm is a member of Ernst & Young ("E&Y") International Ltd., which is the umbrella organization of all E&Y member firms worldwide.
- There is a "supplier" relationship between E&Y and Donahue. E&Y supplies the administrative, secretarial and technical support facilities to the law firm. There is physical proximity in that both firms are in the same premises.
- The law firm separately bills and collects its own accounts. There is no fee-sharing between the partnerships.
- One of the reasons for the arrangement is "the competitive imperative on an international scale." To continue to be competitive, so it is said, E&Y had to decide if it wanted legal services in its portfolio of professional services. The formation of the law firm was the result.
- The ultimate goal of the joint partnerships is the sharing of revenue and the utilization of the international accounting trade name.

53. At the date of delivery of this report, other than Donahue & Partners, there have been no other similar developments in Ontario or other Canadian jurisdictions.

F. The Claimed Benefits of MDPs

54. 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.

55. 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.

G. Demonstrable Benefits

56. There is to date no documentary evidence of benefits emerging in practice as opposed to "claims made" about the benefits of an MDP future. Indeed, in NSW there are very few firms that have seized the opportunity to convert to MDP status. The real objective is a future in which accounting firms could practice law under the accounting firm trading style. This speaks of opportunities but not directly to the issue of public interest advantage. One inhibitor in NSW is said to be the high cost of errors and omissions insurance for integrated firms.

57. In 1997, NSW's Professional Regulation Task Force published a report which bemoaned the competitive disadvantages faced by solicitors in NSW and recommended the abolition of the "lawyer in control" provision of the NSW provisions. No doubt much of the competitive challenge flows from attempts on the part of smaller firms to compete with Big 5 accounting/law firms. Whether integration of multi-discipline professional practices should be promoted in order to overcome this competitive disadvantage does not address the public interest.

II. THE ROLE OF THE LAWYER AND THE PUBLIC INTEREST

58. Much of what the Working Group has heard from proponents of MDPs emphasizes the business case for their existence and development. The entrepreneurial logic of business arrangements between inter-dependent professionals practising together in partnership is emphasized. From this, the notion of public interest in one stop shopping and consumer convenience is developed.

59. It is the Working Group's impression that for the present there is relatively little demand for MDPs (at least MDPs involving lawyers) in the North American marketplace. Rather, the idea of consulting firms offering inter-disciplinary advice, including legal advice, is advanced as a marketing tool which will ultimately be converted into a demand on the part of the public for such facilities.

60. 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.

61. 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. The report of the International Bar Association's MDP Committee[11] reflected this public interest focus:

> ...any position taken by the IBA or by other organizations of lawyers must have as its first objective the ready access to justice and legal services for every member of society *together with the preservation of the interests of clients and the public*, rather than the protection of lawyers;...

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11 See Appendix 4 for Outline of Research Initiatives, including commentary on the IBA initiative.

> ...Other professions do not play the pivotal role in the administration of justice and the upholding of the rule of law which the legal profession plays. ...
>
> Regulators...must be made aware of the factors which make *certain of the services provided by the legal profession unique and distinct*, and which necessitate that the regulatory framework for the legal profession be given separate consideration, distinct from that given to other professions.
> (Emphasis added)

62. David A. Ward Q.C., in his written submissions to the Working Group as a guest at one of the discussions sessions, also eloquently and succinctly summarized this view:

> The fundamental question is whether multi-disciplinary practice firms practising law would be in the public interest. I believe the answer is that they will only be in the public interest if legal services to the public can be provided more - or, perhaps, as least as efficiently -
>
> (a) without detracting from the essential characteristics and responsibilities of lawyers;
> (b) without diluting other desirable standards of professional conduct; and
> (c) without interfering with efficient, professional regulation to ensure that these characteristics and standards are maintained.[12]

63. If, upon close scrutiny of the nature of our public responsibilities, MDPs emerged as the preferred area of development, we would be obligated, in the public interest, to pursue them. If they represent a serious risk to the integrity of the profession, we must reject them regardless of their currency elsewhere.

64. What are the principal characteristics of the legal profession which require us to closely consider the public interest imperative of preserving the profession and the services which it offers in the face of MDPs? Three areas merit our specific attention:

- solicitor and client privilege;
- independence; and
- the conflict of interest regime governing lawyers in their professional practices.[13]

A. Solicitor and Client Privilege

65. The expression "solicitor and client privilege" identifies that impenetrable umbrella of protection afforded information communicated to or by a client in the course of giving and receiving legal advice, or communicating about matters in contemplation of litigation, or in the course of exchanging information with the solicitor or the solicitor's or client's agent for the specific purpose of conducting litigious activities.

66. The privilege, which emerges from a qualifying occasion, is, as a matter of law, the property of the client. The solicitor is solemnly sworn to protect the information exchanged on such occasions.

67. "Solicitor and client privilege" is not some fanciful rubric with which solicitors clothe themselves in their own self-interest. They honour its demands because their special status in society requires it. It is a defining element in the solicitor's relationship with the client. The solicitor stands as a trustee for its preservation.

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[12]From the memorandum of David A. Ward Q.C. to the Working Group, November 12, 1997. See Appendix 5 for the full text.

[13]A variety of secondary and largely surmountable issues which would be likely to arise in an MDP environment are discussed in Appendix 6.

68. The jurisprudence has underscored the relationship between solicitor and client privilege and the fundamental attributes of our legal system. It is a core element in the administration of justice and the protection of the rights of the individual in the complex matrix of competing rights and duties in society.

69. The Supreme Court of Canada in *Solosky v. The Queen*[14] at p.833 makes this clear:

> The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice.

70. The law is to the same effect in the United States. In *Upjohn v. United States*[15], the Court placed the privilege in its historical and societal context as follows:

> The attorney-client privilege is the oldest of the privileges...known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and the administration of justice.

71. Messrs. Manes and Silver, the authors of Solicitor and Client Privilege in Canada[16], identified the roots of the privilege in the following language:

> ...solicitor and client privilege can be seen as the crux of an advanced legal system... it protects the integrity of the relationship most vital to the continuing operation of the legal system. In this sense, the law of solicitor and client privilege can be seen to have survival value for the legal system – for it is the law's method of safeguarding itself and its processes in an adversarial system.

72. The law of privilege originated in Tudor times in England and is based upon respect for the oath and the honour of the lawyer who is duty-bound to guard the client's secrets, whether these secrets are communicated as part of the process of securing legal advice or in the course of consultations between the solicitor, the client and their agents in the context of litigation. Thus, as pointed out by a succession of judges, clients could not confide their legal secrets to their solicitors without running the risk that these solicitors would be called as witnesses in court proceedings and compelled to disclose these confidences.

73. It is for this reason that the solicitor-client privilege lies at the very heart of the common law system. Thus preservation and nurturing of the privilege is fundamental to the due administration of justice in our society. It is intimately connected with a much more clearly understood right, the right to counsel. For practical efficacy the latter depends on the former and they are inextricably linked.

(i) Confidentiality

74. Communications protected by solicitor and client privilege must be distinguished from and elevated above communications made merely in confidence. Many professional relationships are rooted in the notion that communications between the professional and the client or patient will be maintained in confidence. The law in most cases will protect this notion of confidentiality by discouraging, and indeed in appropriate cases preventing, unilateral and unwarranted disclosure of confidential information.

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14 *Solosky v. The Queen* (1980), 1 S.C.R. 821 at 833.

15 *Upjohn v. United States* (1981) 449 U.S. 383.

16 Manes and Silver, *Solicitor and Client Privilege in Canada* (Butterworths: 1993, p.1).

75. Lawyers routinely and almost universally receive communications in confidence. But as established by the result in *Solosky*, not all of them are privileged. The occasions, which the law painstakingly defines, are what elevate otherwise professional confidences to the level of privileged communications.

76. Unlike the situation with privilege, confidential communications may be disclosed or may, by order of a court of competent jurisdiction, be ordered to be disclosed, where the public interest so dictates. Even the sanctity of physician-patient communications, and the information attendant upon them, may be the subject of legitimate disclosure where, by reason of the nature of the communication and in accordance with the dictates of the law, it is determined that a private relationship of confidentiality must give way to the greater interest of society at large.

(ii) The Fragility of the Privilege

77. As is often the case with private rights infrequently resorted to, privilege is much misunderstood and frequently discounted in its importance by those with a superficial knowledge of the subject or not currently in need of the protections which the privilege affords.

78. Like the presumption of innocence, the superordinate importance of solicitor and client privilege is discounted until its benefits are required. Preoccupation with freedom of information as a presumed greater interest of society at large is a constant threat to respect for, and protection of, the notion of solicitor and client privilege.

79. From time to time its fundamentals are assailed. In *Swidler & Berlin and James Hamilton v. United States of America*[17], the District of Columbia Court of Appeals concluded, in spite of centuries of rigorously established principle to the contrary, that, subject to the exercise of judicial discretion, the privilege ought to be treated as exhausted upon the death of the client. This in the face of what was seen as a societal interest of greater significance, the pursuit of those allegedly guilty of wrongdoing.

80. The Court of Appeals' decision was ultimately reversed in the Supreme Court of the United States[18] with the traditional position restored. Nonetheless, in spite of being described in the Court of Appeals as one of the oldest established principles in the common law, three judges in the Supreme Court would have narrowed the application to the disadvantage of the solicitor/client constituency.

81. The profession must be sensitive to the fact that the traditional privilege may be targeted from time to time by those equipped with a superficial appreciation of its importance. In a very real sense the legal profession and its members are the custodians of the institution and fundamental to its protection.

(iii) The Loss of the Privilege

82. For the purposes of this discussion, related as it is to MDPs, it is important to remind ourselves how easily the privilege, in respect of particular communications, can be lost. It is lost by simple disclosure to a third party outside the protective umbrella of the occasion, even if communicated only to a single individual and for a narrow purpose. Indeed, only recently the law has developed to the point where it is conceded that privilege can, in appropriate and tightly controlled circumstances, be protected where the communication to third parties was as a result of inadvertence.

83. The protection of the privilege in respect of particular communications depends on the maintenance of secrecy. At the moment secrecy is lost, so the privilege is lost. This emphasizes the policy by which the law of privilege has developed. Only certain narrowly prescribed communications are protected and they only so long as secrecy is maintained.

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17 *Swidler & Berlin and James Hamilton v. United States of America*, 124 F.3d 230.

18 *Swidler & Berlin and James Hamilton v. United States of America*, 118 S.Ct. 2081.

84. Lurking in the background is another aspect of the public interest which, for the greater good, demands disclosure. Disclosure will prevail where the governing conditions no longer apply. It is important to bear this principle in mind in discussing inter-professional relationships, involving as they necessarily will, occasions for exchanges of information with otherwise privileged information being shared by a heterogenous group of people, many of whom will not stand in a solicitor and client relationship with the client.

(iv) Barristers and Solicitors

85. Frequently the necessity for maintenance of the privilege is seen as being appropriately confined to adversarial situations involving the client and counsel. Privilege, so the argument goes, is important for barristers and less important for solicitors. This thinking places the client's rights at very substantial risk and, furthermore, is quite incorrect. The underlying principle does not depend upon consciousness of its operation for efficacy. Routine legal advice to which the privilege applies is sought and received without clients applying their minds to the specifics of the occasion or the protection afforded. Thus the exquisiteness of the notion. It does not depend upon conscious invocation for its application.

86. The idea mooted by MDP proponents from time to time that "transaction" lawyers and their clients are less in need of the privilege is a dangerous one. Transactions frequently spawn disputes in which the invocation of the privilege may become vital. Furthermore, the instinct, on the part of those promoting another agenda, that in the transaction setting the importance of the privilege is reduced, is symptomatic of a lack of sensitivity to the underlying principle that the privilege is that of the client and not of the solicitor. Solicitor and client privilege is as important in the solicitor's office advising in the commercial transaction as it is in more directly litigious circumstances.

B. Independence

87. Emanating from the same root as privilege is the notion of the independence of the institution of the Bar and its particular expression in the independence of the individual lawyer representing a client.

88. The Bar is independent of the State and all its influences. It is an institutional safeguard lying between the ordinary citizen and the power of government. The right to counsel, which as mentioned, is inter-related with the law of privilege, depends for its efficacy on independence.

89. Those who have lived in totalitarian societies have greatest difficulty in adjusting to the idea of the independent counsel whose loyalty is exclusively and exhaustively dedicated to the interests of the client. In our own society, the Legal Aid system which we have so jealously guarded was designed with the independence of the lawyer from Government in mind.

90. Independence requires for its efficacy untrammelled freedom on the part of the lawyer to interact with, for and on behalf of the client. Questions necessarily arise as to whether any such environment could be maintained where the lawyer is but a small part of a larger commercial enterprise, full service in nature, in which inter-professional dependencies are vital to its well-being. Is the lawyer's practical freedom to react in the bests interests of the client not likely to be compromised in these circumstances, more so where the enterprise is controlled by non-lawyers? This precise point was made at the meeting of the American Bar Association in Toronto in August 1998 when a panellist, formerly associated with an MDP, expressed genuine concern about his ability to make independent decisions in the areas of conflicts and privilege in an MDP environment[19].

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19 Albert Dreese of Houthoff Advocaten & Notarissen, Amsterdam/Rotterdam, Panellist: " The Eroding Borders Between Law and Accounting", American Bar Association Annual Meeting, Toronto, August 3, 1998.

91. Furthermore, self-regulation, by which true independence for the practising Bar survives, is surely likely to be placed at great risk in what is largely a commercial enterprise. Self-regulation has always been regarded as a fundamental requirement if the profession is to be effective in maintaining individual and institutional rights against state action.[20]

92. The notion of independence, which is at the root of reliable advice driven by the interests of the client alone and free of external influences, also impacts directly on the stability of the privilege. Whether, in an historic sense, independence has spawned the privilege, as is suggested by some, or the reverse, it is clear that an independent Bar is essential for its preservation. It is simply inconsistent with the notion of solicitor and client privilege that lawyers would have divided loyalties inter-connected with their livelihood with which they would have to cope in determining whether to defend the privilege.

93. Certainly, the idea of the integrity of solicitor and client privilege being dependent upon lawyers who were denied practical independence from governments or their commercial partners would be a hollow notion indeed.

C. Conflicts of Interest

94. The regime which binds lawyers in the resolution of conflicts of interest is shaped and configured by the unique relationship between the solicitor and the client in general and the imperatives of the doctrine of privilege in particular.

95. While the Law Society's conflict rules[21] refer to the importance of protecting confidential communications, the rigidity of their demands make it clear that it is the fragility and importance of privileged information which define their content. Thus, not only can lawyers not act for opposing parties in transactions without their informed, written consent (or in litigation at all), and certainly when in possession of relevant privileged information, further, in defined circumstances, one cannot act for a particular client if, in the course of so doing, another client might reasonably question the lawyer's commitment or loyalty to that client's cause.

96. These rules arise not only from a need to maintain the privilege, but also by reason of a sensitivity to the risk that the information communicated on occasions of privilege may (in a manner inconsistent with the lawyer's duty to the client) subconsciously feed the advice which is offered to the client opposed in interest.

D. Summary

97. An analysis of these unique features of the profession make it clear that as lawyers we are not simply at one with other professionals and service providers being guided by a need to serve with due care and skill. The law has imposed special societal responsibilities upon us which we must discharge in the public interest. If we fail, we not only do ourselves discredit but, more important, we undermine the values themselves and place important societal interests at risk. This is the responsibility which must be weighed in assessing our compatibility with MDPs.

III. THE INSTITUTIONAL RISKS PRESENTED BY MDPS

98. MDPs, which are in place in other jurisdictions and which represent the favoured mode of the contemporary service provider, assume that a variety of professionals and other consultative advisors can work together in a partnership setting, individually and collectively advising clients with a variety of multi-discipline needs.

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20 *Jabour v. Law Society of British Columbia,* [1982] 2 S.C.R. 307.

[21]See Appendix 7 for Law Society of Upper Canada Rules of Professional Conduct on conflict of interest.

99. In a society which demands full recognition of solicitor and client privilege and inter-related concepts of independence and client loyalty, are these kinds of relationships, at least insofar as lawyers are concerned, in the public interest? The Working Group has grave reservations that the risks outweigh any perceived advantages.

A. What Are the Risks?

(i) Redefining Privilege

100. There is no assurance that the courts could or would embark upon the complex process of redefining occasions of privilege to suit the needs of MDPs.

101. Traditionally privilege has a particularly circumscribed focus. By reason of the narrow policy considerations which presently support it, a broadening of the privileged occasion in the interests of facilitating commercial ventures is unlikely to receive support from either the courts or the communities which they serve. As pointed out earlier in the *Swidler* case, in far more compelling circumstances, it was placed at very serious risk. There is an important message to be taken from this case.

102. Thus, merely embarking upon the MDP experiment poses serious risks to the stability of the doctrine and the public interest which depends upon it.

(ii) The Inter-Disciplinary Environment

103. Without analysing specific problems in great detail, it will be quite obvious that in the MDP environment, from time to time:

(a) solicitors will be advising clients in several capacities;
(b) other professionals and service providers will be advising clients (with the potential for inappropriately offering legal advice) in what is perceived to be a solicitor-client environment;
(c) legal advice will be given directly and indirectly in the presence of a variety of third party consultants;
(d) from time to time (and indeed some would say more often than not) clients will be unaware as to what protections they are afforded in given situations and their advisors may not be able to offer them useful or reliable advice which is not itself highly speculative on this subject.

104. Quite obviously, in a fully integrated MDP made up of lawyers and accountants, legal advice otherwise privileged (but not protected on the basis of litigation privilege) will routinely and carelessly (or even unwittingly but deliberately) be communicated to non-lawyers, thereby undermining the privilege.

105. An illustration resides in the legal principle that in certain narrowly confined circumstances, and on rare occasions, the court will extend the privilege to client communications where clients genuinely believed that they were communicating with a solicitor when they were not. It is a virtual certainty that in the MDP environment this doctrine will be abandoned, as to extend it to MDPs would be to create an open-ended privilege, quite clearly contrary to the public interest.

106. Furthermore, in the case of litigation, the privilege may, in certain circumstances, be extended to communications with third parties who are working under the direction of the solicitor or the client and are thus within the umbrella of the privilege. One can assume that any attempt to extend this notion to MDPs would be unsympathetically received by the courts as an unwarranted extension of a special interest.

107. It is the opinion of the Working Group that any attempt to extend the doctrine to MDPs is likely to have the opposite effect and to undermine its strength.

(iii) The Credibility and Objectivity of the Accountant

108. One cannot assume, in the case of any particular consultant, professional or otherwise, or any particular occasion, that a uniform definition of secrecy and confidentiality would motivate the consultant to protect communications with the client.

109. The accounting profession is a good example, not only because its members represent particular protagonists for the development of MDPs, but also because of their professional attitude and obligations to secrecy. In the audit environment, not only would the auditor not share with the lawyer the dictates of secrecy and single-mindedness in respect of information imparted to the auditor by the client in the course of preparing the audit, but indeed the auditor's instinct and professional duty could be to quite the opposite effect.

110. 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[22]. 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.

111. In this analysis, the polar opposites of the professional duties of the accountant and the lawyer are apparent. The accountant, at least as auditor, is open, objective and preoccupied with the interests of third parties where the public may rely on the accountant's audit advice and disclosure. The lawyer is private, subjective, and focussed entirely on the interests of the client, rising to the level of secretiveness in respect of the advice which the lawyer gives to the client. In partnerships, wherein information is presumed to be shared between partners[23], the realty of these contradictory professional responsibilities becomes apparent. While both of these situations and their related communications admit of exceptions, the fundamental imperative of each is not just inconsistent but incompatible one with the other, in each case, for sound, sociological and public interest reasons.

112. This analysis demonstrates, in the first place, why multi-discipline partnerships involving accountants and lawyers raise fundamental compatibility questions but also, and significantly, why the governing bodies of the accounting profession, in the Interprovincial Task Force Report[24] have recommended that MDPs, to the extent that they involve accountants, be controlled by accountants. Thus the reason why there is concern that the ethical tensions at work between disciplines demand a primacy in one camp which is almost inevitably bound to erode the operative professional principles of the other.

(iv) Waiver

113. The problems outlined in this section of our report have been recognized by many proponents of MDPs. On the subject of privilege, they suggest an environment in which potential problems might be overcome by the utilization of client waivers. Further, in a rather ill-defined way, Chinese or fire walls are offered as a basis for overcoming inter-professional contamination threatened by these relationships.

114. In the view of the Working Group, waiver is a totally impractical device with which to confront these problems. Indeed, a solicitor offering a waiver to a client in order to facilitate the provision of service might well be criticized on professional grounds.

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22 See Appendix 8 for Rule 302 of the Rules of Professional Conduct of the ICAO which 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.

23 see *Dockrill v. Coopers & Lybrand Chartered Accountants*, [1994] N.S.J. No. 43 (N.S.C.A.) (QL).

24 See Appendix 1 for the Report of the Inter-Provincial Task Force on the Multi-disciplinary Activities of Members Engaged in Public Practice.

115. In terms of "informed consent," the client would be quite incapable of agreeing to a waiver until the information had been communicated to the solicitor, by which point the damage might well have been done. Furthermore, the MDP's capacity to preserve the sanctity of privileged information (a capacity which flows automatically in conventional relationships) could never be determined in advance of events unfolding in an MDP environment. Waiver of solicitor and client privilege in advance of communication of the information is an oxymoron from the point of view of the interests of the client.

116. Fire walls are equally impractical. For example, their adoption in the migrating lawyer context are very narrowly circumscribed, establishing isolation of the lawyer and the solicitor and client records in a way that would undermine the purpose of the MDP collectivity in the first place.

117. The creation of a regime of multi-discipline partnerships based on the idea that privilege will be waived and fire walls will be erected is simply to place the commercial imperative ahead of professional safeguards in a way which surely could not be said to be in the public interest.

(v) Risks to the Independence of the Bar

118. Unlike the risks associated with protecting and nurturing privilege, the risks to independence are somewhat more esoteric but no less real. As pointed out by Gavin MacKenzie[25], the multiplicity of duties to which the lawyer is subject "requires his... freedom from all influences... especially his personal interest" whether the matter is non-contentious or litigious.

119. How can the lawyer be expected, in practical terms, in the situation in which the lawyer represents a small minority in the consulting partnership, to advise the client realistically to adopt an independent course of action when the lawyer's remuneration depends on a unitary and inter-dependent structure purveying heterogenous professional advice? One stop shopping is presumably intended to mean what it says.

(vi) The Lawyer as an Officer of the Court

120. Finally a unique and complicating feature of the lawyer's role is that of the situation as an officer of the court. Every member of the practising Bar is an officer of the institution of the court. This responsibility can only serve to impose added pressures on one's personal independence within an MDP controlled by non-lawyers.

121. The relationship between the lawyer and the court is not confined to the former in the lawyer's capacity as a barrister. The common law has always insisted upon the role of members of the Bar as officers of the court. Thus, the Code of Conduct of the Bar of England and the jurisprudence and Codes of Conduct in virtually all common law jurisdictions including the United States establish this relationship either directly or by necessary implication. The courts have considered the lawyer as "in a sense an officer of the state, with an obligation to the courts and to the public no less significant than his obligation to his clients."[26] The lawyer's duty to the court established under Rules of Professional Conduct in our jurisdiction are fundamentally to the same effect.

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25 Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Carswell: Toronto, 1993) s.27.3, p.27-6.

26 7 *Corpus Juris Secundum,* Attorney & Client, p. 801

122. The significance of this relationship between the lawyer and the court is underscored when the lawyer's duties as an officer of the court are ranged against the lawyer's duties to the client. The lawyer occupies a dual position which imposes dual obligations. The lawyer's first duty is to the courts and the public and not to the client. Wherever there is a conflict between duty to the client and the duty to the court, "the former must yield to the latter."[27] While not expressly so-stated in our Rules of Professional Conduct, the articulated duties to the court are such that it is obvious that the same fundamental principle rooted in the common law applies. This is because the office of the lawyer is indispensable to the administration of justice and is fundamental to the welfare of the court and the respect accorded it in society.

123. In order to fulfil the heavy responsibilities imposed on lawyers as officers of the court, a meaningful and practical environment of independence is essential. It is always within the framework of this relationship that the commercial interests of the client and the lawyer's interests must give way to the overriding duty to the court. This is not an obligation shared by other professionals. In an environment created and controlled by others unencumbered by this burden, significant stress could be placed on the relationship in the discharge of the lawyer's duties. The duty to serve the court in a manner directly contrary to the economic or commercial interests of the client is difficult enough in the private Bar but would almost certainly result in significant pressure upon independence and duty in the environment of an MDP. Our duties as officers of the court could not possibly be discharged other than in an environment of total independence.

124. Furthermore, the indirect impact of activities inconsistent with the lawyer's role should not be overlooked. The public interest is unlikely to be best served where the co-venturer lawyer, while not directly involved in, is nonetheless indirectly affected by, activities inconsistent with the lawyer's professional duty. It would seem obvious that any attempt within the framework of an MDP to isolate or distance the lawyer from activities at odds with the lawyer's particular professional obligations would be bound to amount to a superficial solution to an insurmountable problem.

(vii) Risks to the Integrity of Conflict Regimes

125. As pointed out above, by reason of the nature of privileged information and the special protection afforded it in the client's interest, the lawyer's model of a conflict regime is entirely different from others. This does not imply ethical superiority, simply that quite different interests are at risk.

126. In an MDP environment, the existence of which depends on inter-disciplinary advice delivered to the client collectively, the lawyer bound by an entirely different set of conflict rules and in a minority position would be in an intolerable position. The suggestion that this risk might be eliminated by collective adoption of the most demanding regime (that is to say lawyer's) might be effective if the lawyer were in control, but would certainly be ineffective if the lawyer were not. The idea that in a multi-faceted, multi-discipline consultative environment, the consortium would be guided by an impractical and more often than not inapplicable set of rules is surely highly doubtful.

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27 *supra.*, p.802

127. Further, there are fundamental differences between conflict regimes. The accountants have rules which contemplate acting on the basis of disclosure alone[28], situations which lawyers would consider impermissible. Where the accountant could act, the lawyer could, and should, not act. Furthermore, what is contemplated is advice, not advice and consent. Here the onus is on the client whereas there it is on the lawyer. The fundamental dichotomy in these regimes was well illustrated at the 1998 American Bar Association Annual Meeting where General Counsel to the American Institute of Certified Public Accountants, commenting on what he regarded as a far too narrow set of conflict rules governing lawyers and speaking of accountants, said "our clients want us because we act for their competitors."[29]

128. All of this makes eminent good sense when professional imperatives are considered. Lawyers are not permitted to act in situations of conflict; accountants are permitted to act in equivalent situations. The result is that the accountant frequently is concerned with the protection of the new client, the lawyer with the protection of the existing client.

129. Further, the governing accountant's rule (Rule 204.4) which requires accountants to disclose influences or conflicts which might impair their objectivity or judgment not only is at odds with the lawyer's much more stringent test, but could require the accountant to disclose information to one client which was received in confidence or on an occasion of privilege from another.

B. The Institutional Risks – Summary

130. While the case for convenience to the client from a commercial standpoint can probably be made, and while the case for economic advantage to the consulting profession can easily be made, the substantive public interest in the administration of justice and predictable and reliable relationships between solicitor and client makes the case extremely difficulty to justify. Fundamentals of the relationship such as the protection of solicitor and client privilege and the independence of the Bar are placed at serious long-term risk by full-blown partnerships between lawyers and heterogenous groups of other professionals, including principally accountants.

131. This conclusion is no adverse reflection on other professions, nor is it intended as an elevation of the legal profession. It is a statement of fundamental differences which, if they were to go unrecognized, would place our basic solicitor and client institutions at risk in a manner that would not serve the public interest.

132. Where there is certainty presently, there would be uncertainty hereafter, both in terms of the protection, extension and indeed the very existence of solicitor and client privilege and the management of conflicts from the point of view of the protection of the client.

133. As for independence, the risk to this traditional value would be equally elevated.

134. Finally, in particular situations involving auditors and professionals engaged in third party reliance advice, the ethical constraints governing lawyers and members of these groups are so fundamentally at odds as to make collectivity a practical impossibility.

135. The Working Group has concluded that partnerships of multi-discipline professionals, without more, would undermine traditional public interest values, whatever the commercial benefits for the participants themselves might appear to be.

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28 See Appendix 8 for the Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario.

29 American Bar Association Annual Meeting, *supra.*, Richard I. Miller, General Counsel and Secretary to the American Institute of Certified Public Accountants (AICPA).

IV. SOLUTIONS IN THE PUBLIC INTEREST

136. The task of the Law Society is to develop a practice model which will meet the needs of the public for independent, reliable and effective legal representation first and the business and practice needs of the profession second. The optimum solution is one which meets the needs of both constituencies. The Working Group has identified five practice models as options as follows:

(a) the acceptance, recognition and regulation of full multi-discipline partnerships; or
(b) the rejection of the MDP concept and the maintenance of the status quo, viz. the practice of law in partnerships of lawyers only;
(c) the acceptance of the New South Wales model, viz. multi-discipline partnerships offering multi-discipline services provided that the partnership is in the effective control of lawyers;
(d) the acceptance of the District of Columbia model, viz. multi-discipline partnerships offering legal services only with no specific provisions for control;
(e) the recognition, acceptance and regulation of multi-discipline partnerships offering legal services only, provided that the partnership is in the effective control of lawyers.

Option (a): The Acceptance, Recognition and Regulation of Full Multi-Discipline Partnerships

137. The Working Group recommends against this option. In our view, considerations of the fundamental importance of the privilege to the administration of justice and the threat to its integrity presented by relationships of this kind, incompatibility in terms of public duty as between the accounting profession (the principal protagonists for MDPs) and the legal profession, the former governed by duties of objectivity and disclosure, the latter by duties of confidentiality and allegiance and the incompatibility of regimes for the resolution of conflicts of interest as between the two professional groups, lead to the conclusion that multi-discipline partnerships between these groups are incongruent and inappropriate, whatever the business case may be for such relationships. The societal role of the lawyer is more than that of a consultant, amendable and adaptable to a family of consultants working in a partnership setting. The lawyer has custodial duties and responsibilities in maintaining our system of administration of justice which are of overriding importance to the public. The convenience of "one stop shopping" must not be permitted to overwhelm professional responsibilities of basic sociological importance. The notion, mooted in some quarters, that these partnerships might be accommodated by lawyers offering clients the option of waiving traditional solicitor and client relationships in the interests of what is perceived to be a more seamless delivery of legal advice, is not only contrary to the public interest but would lead to a complete breakdown of the role of the profession in society.

Option (b): The Maintenance of the Status Quo

138. While this remains an option for the Law Society, its recommendation assumes that there is no potential for improvement in the delivery of legal services to the public worthy of consideration. As will appear hereunder, improvements in the present practice model which could have the effect of reducing costs and enhancing the delivery of legal services quite clearly exist and are worthy of consideration. Support for the status quo is a statement that improvement in the present practice model is not possible and there is no potential for useful change. Any such conclusion would obviously be superficial and unsupportable. Convocation is urged to reject this alternative.

Option (c): Acceptance of the New South Wales Model

139. The defining characteristic of this model is the control of the resulting partnership (MDP) by those members who are lawyers. This requirement was no doubt adopted on the basis that control by lawyers would ensure that the partnership undertaking would not be at odds with the professional imperatives of the legal profession. This model presumes that non-lawyers in partnership with lawyers within the umbrella of the partnership would engage in their own practices. Accountants would conduct audits and offer purely accounting advice. Psychologists would engage in their clinical practices, seeing patients, etc. All of this would be supplementary to the joint delivery of legal services. In other words, the New South Wales model contemplates that there will be non-legal professional services as well as legal services delivered to the public from under the same umbrella with a requirement for control of the affairs of the MDP by the lawyers.

140. In the view of the Working Group, this model is unacceptable because essentially the same risks associated with the full MDP model (discussed under (a) above) would be present, although perhaps to a somewhat reduced degree. In short, the mere fact that lawyers were in control would not ensure the preservation of the privilege, in an inter-professional environment, the appropriate resolution of conflicts and would not eliminate fundamental differences in the public duties of the professional to the public.

141. It is not surprising that in New South Wales there has been little enthusiasm for this type of arrangement. Lawyers aside, what other professionals would be interested in offering their own professional services with lawyers controlling their activities in exchange for the opportunity to offer joint services? Furthermore, where the undertaking is the delivery of one's own services, the need to control one's own destiny is a defining feature. It is for this reason that the Canadian Institute of Chartered Accountants has tentatively given approval to the development of MDPs within the accounting profession, but only on condition that such multi-discipline partnerships would be controlled by the accountant component therein.

Option (d): District of Columbia Model

142. This model does not insist on control by the lawyers in a multi-discipline setting, but does require that the undertaking of the MDP must be confined to the delivery of legal services. This has the effect of overcoming one of the negative features of the New South Wales model, namely, the prospect that professions unrelated directly to the legal profession would, under the umbrella of a multi-discipline practice, offer professional services in an entirely unrelated field. It is this prospect which, in our view, creates some of the significant risks to the integrity of legal institutions.

143. The research conducted by the Working Group has been unable to identify any practice in the District of Columbia which incorporates this multi-discipline model. One reason relating to jurisdictional governance has been offered, but apart from that, other substantive reasons for this are unclear. It is possible that the model has limited practical business efficacy. A deficiency resides in the potential that such an institution could be controlled by non-lawyers. A multi-discipline partnership devoted to the delivery of legal services and presumably made up of a mixture of lawyers and non-lawyers could be controlled by non-lawyers. This would be completely unacceptable and inconsistent with the public responsibilities vested in the profession. The idea of the lawyer discharging public responsibilities in accordance with conditions imposed by non-lawyers would be obviously incongruous. In the opinion of the Working Group, this model has neither practical efficacy nor is the alignment in terms of control realistic.

Option (e): Multi-Discipline Partnerships Offering Legal Services Only With the Partnership in the Effective Control of Lawyers

144. In the opinion of the Working Group, this is the model which should be accepted and developed by Convocation. In the first place, all of the concerns with respect to privilege, conflicts of interest, independence, public duty, etc., would be eliminated as the service offering would be confined to the delivery of legal services. Furthermore, adherence to required professional norms in the delivery of such services would be guaranteed by the controlling influence of lawyers. It is a reasonable expectation that this model could well deliver services on a more efficient basis and at lower costs while at the same time contributing, within the framework of a law practice, to a broadening of the traditional service base.

145. For example, the Working Group has in mind partnership alliances between lawyers and paralegals maximizing professional fulfilment and enhancing public service. The opportunity for lawyers to attract paralegals into their partnerships would undoubtedly result in reduction in the costs in the delivery of services and would make this para-profession a much more attractive alternative than it presently is with far greater scope.

146. Paralegals aside, there are other professions which deliver legal services to the public in accordance with statutory schemes such as patent and trade-mark agents who have long been inhibited by the inability of their lawyer colleagues to receive them into their partnerships. These traditional categories aside, there are undoubtedly others such as psychologists and social workers in family law practices, forensic investigators in criminal practices, accountants and others in litigation practices, etc., who could benefit the public by close alliance. Such partnerships would be premised on the responsibility of the lawyer for adherence to professional standards by non-legal partners (as is presently done in the case of staff) and would undoubtedly lead to a regime of adherence by partnerships as well as individuals to professional standards for discipline purposes. The distinction with this model would be that these professionals and para-professionals would be engaged in supporting the delivery of legal services only and would thus not be in an environment likely to attract conflicting standards and duties which might otherwise arise in the conduct of their own professional practices.

147. The Working Group recommends the adoption of this model by Convocation and urges the establishment of an appropriately supported working group to develop a regulatory regime to accommodate it.

Commentary on the Captive Law Firm

148. 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, including questions of control, trading style, management of conflicts of interest and related matters. It is recommended that an appropriate vehicle be struck to undertake this study. Cooperation from the profession, including those involved in such enterprises who were particularly helpful to the Working Group in our deliberations, can be expected.

DECISION FOR CONVOCATION

149. In concluding that there is merit to facilitating a form of multi-disciplinary practice through a partnership model, the hope is that this will enable the profession to remain competitive and enhance what can be offered to clients by way of integrated services while ensuring that the fundamental nature of legal practice remains untainted.

150. Changes to the Law Society's regulatory scheme will be required if the proposed model of a lawyer-controlled practice of law with integrated and selected professional/consultancy practices is to be permitted, and should be done with care to ensure that the dedication to regulation in the public interest continues.

151. This Report has explored a number of options for the provision of multi-discipline services which would include the practice of law. The conclusions reached by the Working Group may be considered one option for debate. If other options are to be explored, that exercise should proceed with full consideration given to the comprehensive material presented in this study, including all background research and data, much of it found in the appendices to the Report.

152. Whatever decision is made, further activity will flow from the decision made by Convocation, and a plan of action should be considered by Convocation either for implementation of the option chosen or further study and research if necessary.

153. Accordingly, Convocation should decide on the direction it wishes to take to:

e. adopt the model for multi-discipline services as proposed by the Working Group,
f. facilitate implementation of this model,
g. explore other options, or
h. direct further study.

APPENDICES

APPENDIX 1

REPORT OF THE INTERPROVINCIAL TASK FORCE ON THE MULTI-DISCIPLINARY ACTIVITIES OF MEMBERS ENGAGED IN PUBLIC PRACTICE

(pages 59 - 114)

APPENDIX 2

NEW SOUTH WALES
SOLICITORS' PROFESSIONAL CONDUCT AND PRACTICE RULE 40.1

40. Multi-disciplinary Partnerships

40.1 A practitioner who conducts a legal practice in partnership with other persons who are not practitioners holding New South Wales practising certificates, entitling them to practise on their own account, or in partnership, whether or not the partnership provides, or offers to provide, other services in addition to the legal services provided by the practice, must ensure that:

40.1.1 the New South Wales practitioners who are members of the partnership maintain effective control of the legal practice and the delivery of legal services and have majority voting rights (or, in the case of a sole practitioner, at least equal voting rights) in the affairs of the partnership;

40.1.2 the partnership conducts the legal practice and delivers the legal services which it provides, in compliance with the Legal Profession Act, the Regulations made thereunder and these Rules;

40.1.3 the partnership conducts any other professional practice, business or delivery of services which it undertakes in association with its legal practice in a manner that is consistent with, and does not restrict, its compliance with the Legal Profession Act, the Regulations and these Rules in relation to the delivery of legal services, and which avoids any conflict between the interest of any client to whom legal services are delivered, and any other interest which a member of the partnership may have or be required to serve;

40.1.4 the services offered by the partnership are accurately and fairly represented to clients and potential clients;

40.1.5 the partners are identified and their qualifications to perform the services offered by the partnership are accurately represented;

40.1.6 not less than 51 per cent of the income accrued due to the partnership after deduction of the expenses incurred in earning that income is received by

(i) those partners who are practitioners holding unrestricted New South Wales practising certificates, or practitioner-corporations formed, or recognised, as a practitioner-corporation under the Act; or

(ii) persons who are relatives, as defined by section 172g(3) and (4) of the Act, of those partners who are natural persons holding unrestricted New South Wales practising certificates; or

(iii) the trustee of a trust of which the only beneficiaries or potential beneficiaries are persons referred to in paragraphs (i) or (ii).

APPENDIX 3

DISTRICT OF COLUMBIA
RULE OF PROFESSIONAL CONDUCT 5.4(b)

A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) the partnership or organization has as its sole purpose providing legal services to clients;

(2) all persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;

(3) the lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under rule 5.1;

(4) the foregoing conditions are set forth in writing.

COMMENT:

[1] The provisions of this Rule express traditional limitations on sharing fees with nonlawyers. (On sharing fees among lawyers not in the same firm, see Rule 1.5(e).) These limitations are to protect the lawyer's professional independence of judgment. Where some one other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] Traditionally, the canons of legal ethics and disciplinary rules prohibited lawyers from practising law in a partnership that includes nonlawyers or in any other organization where a nonlawyer is a shareholder, director, or officer. Notwithstanding these strictures, the profession implicitly recognized exceptions for lawyers who work for corporate law departments, insurance companies, and legal service organizations.

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

[4] This Rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(l), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

[5] Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

[6] Nonlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization. Lawyers having direct supervisory authority over nonlawyer assistants are held responsible only for ethical misconduct by assistants about which the lawyers actually know.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the Rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counselling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

[8] Paragraph (b) does not permit an individual or entity to acquire all or any pan of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

[9] The term "individual" in subparagraph (b) is not intended to preclude the participation in a law firm or other organization by an individual professional corporation in the same manner as lawyers who have incorporated as a professional corporation currently participate in partnerships that include professional corporations.

[10] Some sharing of fees is likely to occur in the kinds of organizations permitted by paragraph (b). Subparagraph (a)(4) makes it clear that such fee sharing is not prohibited.

APPENDIX 4

OUTLINE OF RESEARCH INITIATIVES

1. Chartered Accountants' 1995 MDP Study

The Working Group reviewed the study on MDPs completed in Canada by the chartered accountants (CAs) resulting in a report which discussed, in conceptual terms, a CA version of a regulatory scheme for MDPs. This report from the Interprovincial Task Force on the Multi-disciplinary Activities of Members Engaged in Public Practice appears at Appendix 1.

2. Information Brief

In the summer of 1997, as a first step in gaining a greater understanding of MDPs and the issues they create, the Working Group directed staff to prepare a brief which provided historical and current information on a number of initiatives in the area worldwide, together with some of the academic opinion critiquing the structure.

The information brief included a wide-ranging review of questions and issues related to MDPs previously dealt with at a number of different levels, including:

- the arguments for MDPs,
- commentary on ethical/professional regulation issues (including solicitor/client privilege and confidentiality, solicitation, independence, advertising, insurance)
- business/marketplace responses
- experiences of other jurisdictions.

3. Ward Bower

In seeking the expertise of those who had considered the subject in depth, the Working Group arranged a meeting in June 1997 with Philadelphia legal consultant and Chair of the International Bar Association Standing Committee on MDPs, Ward Bower.

Mr. Bower indicated that the momentum to MDPs on a worldwide scale is increasing. He believes that legal services have become commoditized, and that as a function of the saturated market for legal services, the choice for professional service is based on price. He sees those such as in-house counsel, who choose legal services for a company, using the legal services capability of the "Big 5" rather than a law firm, because it is cheaper and faster.

He believes that although the knee-jerk reaction worldwide is that this is a battle between lawyers and accountants, it is really a matter of a rift within the legal profession. Those lawyers who work for the Big 5 those who support those lawyers are pitted against those who see the movement as a fundamental violation of legal ethics.

In responding to MDPs, his view is that if the profession stands its ground, there may be a problem in justifying the profession's business efficacy as it exists today. Resisting the trend to MDPs may be seen as a manoeuvre by the profession which is fundamentally uncompetitive.

4. Other International/Canadian Initiatives

The Working Group paid particular attention to MDP developments in other jurisdictions and to the specific initiatives of other organizations.

Internationally, these included developments in New South Wales, England and the District of Columbia.

The International Bar Association ("IBA") initiative was also reviewed. The IBA's MDP Committee released its final report to the IBA President after the IBA's New Delhi meeting in November 1997. The report was scheduled for presentation to the IBA's Council at its June 1998 meeting in Vienna. The report contained the following recommendations:

- Regulators must be made aware of the factors which make certain of the services provided by the legal profession unique and distinct, and which necessitate that the regulatory framework for the legal professional be given separate consideration, distinct from that given to other professions. In the process, these regulators and authorities should be made aware of the problems and risks inherent to the integrated co-operation between lawyers and non-lawyers, including MDPs and the threat which co-operation may pose to the upholding of the rule of law.
- Regulators should be encouraged to provide and to maintain rules on the integrated co-operation between lawyers and non-lawyers. These rules could range from prohibiting MDPs, to regulating MDPs in such a way as to eliminate the risk of undermining the lawyer's independence, giving rise to conflicting interests, and eroding confidentiality and client privilege. Elements of such rules might be

    i. A requirement to clearly disclose to regulatory and disciplinary authorities and to the public, the manner in which integrated co-operation with non-lawyers is effected, and the interests represented in the organization concerned;
    ii. Submission of the entire organization in question, including its non-lawyers, to the regulatory and disciplinary authority for the legal profession;
    iii. A requirement of clear notice to clients as to the limitations inherent to forms of integrated co-operation, and the risks attaching thereto;
    iv. Precise rules on the avoidance of conflicting interests - for example, excluding the possibility of combining auditing services with consultancy services or legal representation; and clear rules on the restriction of access to confidential information;
    v. Rules setting out the maximum degree of ownership and/or voting control which lawyers must hold in MDPs.

- A permanent committee on MDPs should be established within the IBA to monitor, consult and advise, and to consider further policies which regulatory authorities could emulate.

In Canada, the Working Group liaised with the following groups:

Law Society of Alberta

The Law Society of Alberta completed a preliminary review of the subject of the MDPs in 1995. Of interest to the Working Group was Alberta's "issues brief" which highlighted a broad spectrum of regulatory and governance issues relevant to MDPs and the practice of law.

Federation of Law Societies

The Federation has undertaken a national study of MDPs, and is closely following the Law Society of Upper Canada's study. Recent initiatives noted by the Working Group include the Federation's receipt of preliminary responses to the issue of MDP development from each province. The Federation's review continues after its consideration of the subject at its August 1998 meeting in St. John's, Newfoundland.

Canadian Bar Association ("CBA")

In early 1998, the CBA began an initiative to review emerging professional issues, including developments in the area of multi-disciplinary practice. A project was begun specifically for the study of MDPs, under the umbrella of the CBA's International Practice of Law Committee. The Committee developed a policy framework on MDPs for discussion at the CBA annual meeting in August 1998. In mid-July 1998, members of the Law Society's Working Group met with the CBA Committee to discuss common issues and the need for a strategy in dealing with the issue nationally.

American Bar Association ("ABA")

In August 1998, the ABA Commission on Multidiscplinary Practice was created, and was directed to "study and report on the extent to which and the manner in which professional service firms operated by accountants and others who are not lawyers are seeking to provide legal services to the public". The Commission is scheduled to report at the 1999 ABA Annual Meeting in Atlanta. The Working Group has liaised with the chair of the Commission and will be monitoring this initiative.

5. Discussion Sessions with the Profession and Others

A series of discussion sessions with lawyers, selected by the Working Group, were held in London, Ottawa and Toronto in November and December 1997. These discussions were based on material distributed to attendees in advance of the sessions which highlighted certain regulatory issues and questions.

These sessions were augmented by two Working Group sessions with chartered accountants and in-house counsel from the represented accounting firms, a meeting with representatives from the Canadian chartered accountants' committee charged with implementing the recommendations from the CA Task Force report noted earlier, and a meeting with a small group of corporate counsel from large Canadian corporations.

Information from these sessions is summarized in Appendix 9 to the report.

6. Engagement of Research Consultants

The Working Group determined that a focussed study of the ethical and regulatory issues for the Law Society and the profession was necessary. To this end, the Working Group engaged Kent Roach[30] and graduate student (now Professor) Edward Iacobucci of the University of Toronto Faculty of Law, who mapped out a 3-phase study as follows:

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[30]Formerly Professor of Law, University of Toronto Faculty of Law and as of July 1, 1998, Dean of the College of Law, University of Saskatchewan, Saskatoon, Saskatchewan.

Phase 1 Through a literature review and examination of current regulatory regimes, identification of problems, potential problems and advantages.

Phase 2 Through "field work", application of the preliminary data from Phase 1 to various segments of the profession for input on the issues as a means of verifying the problems/advantages. This stage would lead to the formation of policy options and recommendations for the third phase.

Phase 3 Assuming there are advantages to MDPs, an examination of whether, if any of the identified problems were to be surmounted, they would affect the independence or unique position of lawyers with clients, followed by a determination of if or how the issues could actually be addressed. This would include a review of potential regulatory options for MDPs, and their strengths and weaknesses.

The Phase 1 paper reviewed the extensive and growing literature on the subject of multi-disciplinary legal practice, and was a prelude to the consultation phase and an assessment of regulatory options with respect to MDPs. The Phase 2 consultations with Dean Roach, separate from the discussion sessions noted above, were completed in March 1998 with a group of lawyers selected by the Working Group, defined by practice area and based on a document containing questions prepared by Dean Roach.

After completion of Phase 2, the data was reviewed and led to an intricate examination by the Working Group of the regulatory options in conjunction with Dean Roach and Professor Iacobucci's Phase 3 conclusions, included in a second paper which was reviewed by the Working Group when it assessed regulatory options for forms of an MDP practice.

7. The MDP "Survey"

In an effort to obtain some empirical data about the current level of multi-disciplinary activity among Ontario lawyers, a survey was drawn by the Working Group and distributed to members of the Law Society with the Society's Forms mailing in early 1998. The survey included questions about referral or business arrangements between lawyers and other service providers.

This data, details of which appear in Appendix 10, provided some indication of the nature and occurrence of relationships between lawyers and non-lawyers in serving clients.

APPENDIX 5

MEMORANDUM OF DAVID A. WARD Q.C.
NOVEMBER 12, 1997

(pages 125 - 141)

APPENDIX 6

REGULATORY ISSUES CONCERNING LAWYERS AND MDPs

Insurance

The broad question is the effect the practice of law by a lawyer in an MDP would have on coverage and liability insurance premiums. In New South Wales, non-lawyer partners in an MDP can obtain professional indemnity cover from the Law Society's insurer, LawCover, if the partnership wants the cover to extend to these partners. The example given is solicitors giving tax advice as part of their practice. In this case, any accountant partners will be covered for this activity, but the same accountants doing audit work will not be covered as this is not normally part of a solicitor's practice.

For Ontario lawyers, the Lawyers' Professional Indemnity Company (" LPIC") would be required to address at least two issues concerning an MDP: risk and vicarious liability. LPIC has expressed a dedication to moving to a risk-based scheme. There is potential for a diverse range of services offered by an MDP which may require significant variances in the insurance premiums for the practitioners within the firm. Experience ratings attributed to lawyers and other MDP partners could make risk assessment an intricate undertaking for the insurer.

Vicarious liability and shared responsibility for client claims may translate to the unintended exposure of lawyers to claims against non-lawyers in an MDP. If the primary retainer is with the lawyer, but the client is advised that other professionals will contribute to the work on the matter, would the lawyer ultimately be responsible for the entire work product and thus for any negligent performance on the part of the other professionals?

Some jurisdictions, including Ontario, are seeking to move towards a limited liability scheme which would limit the personal malpractice liability of partners to matters in which they have had personal involvement or have played a direct supervisory role. The chartered accountants have been successful in seeing a bill introduced in the Ontario legislature for limited liability partnerships (LLPs) in this respect, and the Law Society has included provision for LLPs in its legislative reform bill. While LLPs may solve part of the problem, the issue of the individual lawyer's responsibility within the MDP, and LPIC's response to it, remains an open question.

Regulation of Lawyers and Professional Responsibility

While lawyers in MDPs would remain accountable to the Law Society for their breaches of ethical rules, the real issue is whether lawyers should be accountable for ethical breaches by non-lawyer partners. The District of Columbia's approach makes lawyers vicariously responsible for breaches by non-lawyer partners. But would lawyer partners exercise the same sort of supervision over other partners as they would over junior lawyers or employees in a law firm?

Rule 16 of the Law Society's Rules of Professional Conduct requires that the lawyer exercise the required level of supervision over such staff and maintain professional responsibility for the delegated work. The commentary contemplates non-lawyers, such as law clerks, performing "matters of routine administration" and not licensed professionals providing other professional services. The rule requires that every law office, including a branch office of the law firm, be effectively supervised by a lawyer. Rule 19 states that "The lawyer should assist in preventing the unauthorized practice of law". The Commentary to the Rule recognizes that non-lawyers, while having skills that may assist lawyers, "are immune from control, regulation, and, in the case of misconduct, from discipline by the Society". It also affirms the need for direct supervision through lawyers' assumption of "complete professional responsibility for all business entrusted to them".

The supervisory duty on the lawyer in an MDP may be onerous, particularly if, as some writers have suggested, the individual non-lawyer is much more likely, inadvertently or intentionally, to engage in the unauthorized practice of law if in partnership with a lawyer.[31] The temptation to engage in unauthorized practice may be particularly strong if the non-lawyer has some legal training.[32] Examples are disbarred lawyers or graduates of law schools unable to pass bar examinations who may become non-lawyer partners in an MDP.

Another issue relates to the Law Society's special regulatory powers respecting trust funds. The question is how the Law Society would continue to regulate, within an MDP, lawyers' trust fund obligations, given the Society's peculiar combination of empowerment to require and enforce an accounting regime for trust funds.[33]

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[31] Cindy Carlson, "Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms" (1993-94) 7 Georgetown Journal of Legal Ethics 593.

[32] *Ibid* p. 615.

[33] There are a number of regulatory requirements for books, records and accounts of members:

(i) Subsection 7(2) of Regulation 708 under the *Law Society Act* requires a bankrupt lawyer to obtain the written permission of Convocation or the Discipline Committee to accept trust funds from clients.

The issues relate to:

- whether a firm designated as an MDP, and not considered a law firm, would be permitted and/or would agree to assume responsibility for protecting trust funds received from clients or others on behalf of clients in respect of legal services;
- the basis upon which financial retainers for legal services to be performed are delivered to an MDP, whether on an exclusive basis or in tandem with funds for other purposes/services;
- the financial record-keeping facility at the firm;
- the accessibility of trust funds to other non-lawyer partners;
- the existence of compensation schemes for loss of trust funds as a result of the dishonesty of partners in an MDP (as opposed to liability for negligence).

Summary

While none of the above may be insurmountable, or fatal to the implementation of an MDP, they warrant mention if only to emphasize the practicality of some of the issues presented by a new practice structure, and as a reminder that regulatory issues may bear directly on the choices to be made when different forms of multi-discipline practice are considered.

APPENDIX 7

LAW SOCIETY OF UPPER CANADA
RULES OF PROFESSIONAL CONDUCT ON
CONFLICT OF INTEREST

(ii) Subsection 14(1) requires a lawyer to deposit trust funds received from a client in a trust account "to be kept in the name of the member or in the name of the firm of which he or she is a member or by which he or she is employed". "Member" is defined for this section as including a firm of members, and is thus limited to lawyers.

(iii) Subsection 14(9) states that funds drawn from trust for payment of fees and disbursements shall be drawn only by a cheque in favour of the lawyer or by transfer to another bank account (but not a trust account) in the lawyer's name.

(iv) Subsection 14(10) states that a trust cheque cannot be signed by a person other than a member except in "exceptional circumstances" and when the person to whom such authority has been delegated is bonded.

(v) Subsection 15(1) requires, among other things, that a lawyer must keep a separate client trust ledger for every client on whose behalf trust funds have been received and disbursed.

(vi) Subsection 16(2) requires lawyers to prepare and file annually with the Society the prescribed forms respecting trust accounts and other financial matters.

Rule 5

Conflict of Interest

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.

COMMENTARY

Guiding Principles

1. A conflicting interest is one which would be likely to affect adversely the lawyer's judgment on behalf of, or loyalty to a client or prospective client, or which the lawyer might be prompted to prefer to the interests of a client or prospective client.1

2. The reason for the Rule is self-evident; the 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 compromising influences.2

3. Conflicting interests include but are not limited to the financial interest of the lawyer or an associate of the lawyer, and the duties and loyalties of the lawyer to any other client, including the obligation to communicate information.3

Disclosure and Consent

4. The Rule requires adequate disclosure to enable the client to make an informed decision about whether to have the lawyer act despite the presence or possibility of the conflicting 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 which 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 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.

5. Before the lawyer accepts employment for more than one client in a matter or transaction, the lawyer must advise the clients concerned that the lawyer has been asked to act for both or all of them, that 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 that, if a conflict develops which cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely. If one of such clients is a person with whom the lawyer has a continuing relationship and for whom the lawyer acts regularly, this fact should be revealed to the other or others with a recommendation that they obtain independent representation. If, following such disclosure, all parties are content that the lawyer act, the latter should obtain their written consent, or record their consent in a separate letter to each. The lawyer should, however, guard against acting for both sides where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise or their interests, rights or obligations will diverge as the matter progresses.4,5

6. If, after the clients involved have consented, an issue contentious between them or some of them arises, the lawyer, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of the Rule if the lawyer attempted to advise them on the contentious issue. In such circumstances the lawyer should ordinarily refer the clients to other lawyers. However, if the issue is one that involves little or no legal advice, for example, a business rather than a legal question in a proposed business transaction, and the clients are sophisticated, the clients may be permitted to settle the issue by direct negotiation in which the lawyer does not participate. Alternatively, the lawyer may refer one client to another lawyer and continue to advise the other if it was agreed at the outset that this course would be followed in the event of a conflict arising.

Where the Lawyer's Interest in Conflict

7. The same basic considerations apply where the conflicting interest arises not by reason of the lawyer's duties or obligations to another client but by reason of the financial or other interest of the lawyer or the lawyer's associate. For example, the lawyer, or a family member, or a law partner might have a personal financial interest in the client 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.6

Investment by Client where Lawyer has an Interest

8. It is undesirable for a lawyer to represent anyone with respect to the investment by such person in a corporation or other entity in which the solicitor has an interest, other than a corporation or other entity whose securities are publicly traded. At the very least the lawyer must insist that the client receive independent legal advice where the corporation is not publicly traded. If such investment be by way of borrowing from the client, the transaction may fall within the requirements of Rule 7.

9. (a) If the client elects to retain independent legal representation, the lawyer so retained shall act in all respects as though such lawyer were the client's own lawyer in connection with the transaction in question.
(b) The lawyer giving such independent advice must, prior to any advance being made on the investment in question, provide the client with a signed certificate in writing (with a copy thereof sent to the original lawyer and signed by the client) which must include at least the following:

(i) that the certifying lawyer has explained to the client the latter's right to independent legal representation and that the client has expressly waived such right and elected to rely on the representation of the original lawyer;

(ii) that the certifying lawyer has explained the legal aspects of the transaction to the client, that the client appeared to understand the advice given, and further that the certifying lawyer has informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view.

(c) If the client elects to waive independent legal representation but rely on independent advice only, the giving of independent advice by a lawyer to an investor in the above circumstances, once undertaken, imposes a high duty upon the lawyer giving such independent advice and is an undertaking not to be lightly assumed or merely perfunctorily discharged.

10. In cases referred to in paragraphs 7 and 8 above, the lawyer who is asked to act must, before accepting the employment, 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. If the lawyer does not choose to make such disclosure or cannot do so without breaching a confidence, the lawyer must decline the employment. If, following such disclosure, the client requests the lawyer to act, the latter should obtain the client's written consent or record such consent in a letter to the client. However, the lawyer should not uncritically accept the client's decision to have the lawyer act in such circumstances. It should be borne in mind that, if the lawyer accepts the employment, 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 employment should be declined.

Lawyer as Arbitrator

11. The Rule will 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 sui juris and who wish to submit the dispute to the lawyer.7

Trust Funds

12. The Rule does not purport to apply to situations in which the lawyer is holding funds or property of the client in trust. In all such cases the lawyer should abide by the applicable rules of law and of the Society.

Acting against Former Client

13. A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or when the lawyer has obtained confidential information from the other party in the course of performing professional services. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person, and where such confidential information is irrelevant to that matter.

Duty to Unrepresented Person

14. The lawyer should not undertake to advise an unrepresented person, but should urge such a person to obtain independent legal advice and, if the unrepresented person does not do so, the lawyer must take care to see that such person is not proceeding under the impression that such person's interests will be protected by the lawyer. If the unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this Rule.

Errors and Omissions Claims

15. The introduction of compulsory insurance imposes additional obligations upon a lawyer. However, such obligations must not impair the relationship and duties of the lawyer to the client. The insurer's rights must be preserved. There may well be occasions when a lawyer believes that certain actions or failure to take action have made the lawyer liable for damages to the client when in reality no liability exists. Further, in every case a careful assessment will have to be made of the client's damages arising from the lawyer's negligence. Many factors will have to be taken into account in assessing the client's claim and damages. As soon as a lawyer becomes aware that an error or omission may have occurred which may reasonably be expected to involve liability to the client for professional negligence, the lawyer should take the following steps:

1. The lawyer should immediately arrange an interview with the client and advise the client forthwith that an error or omission may have occurred which may form the basis of a claim by the client against the lawyer.

2. The lawyer should advise the client to obtain an opinion from another independent lawyer and that in the circumstances the first lawyer might no longer be able to act for the client.

3. Concurrently, the first lawyer shall inform the Lawyers' Professional Indemnity Company (LPIC) of the facts of the situation.

4. The lawyer must bear in mind that in order to fulfill all duties to the client, the insurer and the profession, the lawyer must co-operate to the fullest extent and as expeditiously as possible with the Society's adjusters in the investigation and eventual settlement of the claim.

5. Upon settlement of the client's claim, the lawyer must make arrangements to pay that portion of the client's claim that is not covered by the insurance, forthwith upon completion of the settlement.

Law Firms

16. For the sake of clarity, the foregoing paragraphs are expressed in terms of the individual lawyer and that lawyer's client. However, it should be understood that the term "client" includes 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.

Burden of Proof

17. Generally speaking, in disciplinary proceedings under this Rule the burden will rest upon the lawyer of showing good faith and that adequate disclosure was made in the matter and the client's consent was obtained.

Rule 29

Conflicts Arising as a Result of Transfer Between Law Firms

Definitions

(1) In this Rule:

"client" includes anyone to whom a member owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them;

"confidential information" means information obtained from a client which is not generally known to the public;

"law firm" includes one or more members practising,

(a) in a sole proprietorship,
(b) in a partnership,
(c) in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners,
(d) as a professional law corporation,
(e) in a government, a Crown corporation or any other public body, and
(f) in a corporation or other body;

"matter" means a case or client file, but does not include general

"know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case;

"member" means a member of this Society, and includes an articled law student registered in this Society's pre-call training program.

Application of Rule

(2) This Rule applies where a member transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring member or the new law firm is aware at the time of the transfer or later discovers that,

(a) the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring member actually possesses relevant information respecting that matter.

(3) Subrules (4) to (7) do not apply to a member employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by that Attorney General or Department of Justice.

Firm Disqualification

(4) Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter
unless,

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm establishes, in accordance with subrule (8), that,

(i) it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including,

(A) the adequacy of the measures taken under (ii),
(B) the extent of prejudice to any party,
(C) the good faith of the parties,
(D) the availability of alternative suitable counsel, and
(E) issues affecting the national or public interest,

(ii) it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur.

Transferring lawyer disqualification

(5) Where the transferring member actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client,

(a) the member should execute an affidavit or solemn declaration to that effect, and

(b) the new law firm shall,

(i) notify its client and the former client, or if the former client is represented in that matter by a member, notify that member, of the relevant circumstances and its intended action under this Rule, and

(ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

(6) A transferring member described in the opening clause of subrule (4) or (5) shall not, unless the former client consents,

(a) participate in any manner in the new law firm's representation of its client in that matter; or

(b) disclose any confidential information respecting the former client.

(7) No member of the new law firm shall, unless the former client consents, discuss with a transferring member described in the opening clause of subrule (4) or (5) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

Determination of compliance

(8) Anyone who has an interest in, or who represents a party in, a matter referred to in this Rule may apply to the Society or to a court of competent jurisdiction for a determination of any aspect of this Rule.

Due diligence

(9) A member shall exercise due diligence in ensuring that each member and employee of the member's law firm, and each other person whose services the member has retained,

(a) complies with this Rule; and

(b) does not disclose,

(i) confidences of clients of the firm, and

(ii) confidences of clients of another law firm in which the person has worked.

COMMENTARY

1. Application of this Rule

The purpose of the Rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

a. Lawyers and support staff

This Rule is intended to regulate members of the Society and articled law students who transfer between law firms. It also imposes a general duty on members to exercise due diligence in the supervision of non-lawyer staff, to ensure that they comply with the Rule and with the duty not to disclose,

- confidences of clients of the member's firm; and
- confidences of clients of other law firms in which the person has worked.

[b. Government employees and in-house counsel

The definition of "law firm" includes one or more members of the Society practising in a government, a Crown corporation, any other public body and a corporation. Thus, the Rule applies to members transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.] [NOT YET IN EFFECT]

c. Law firms with multiple offices

The Rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous that each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

d. Practising in association

The definition of "law firm" includes one or more members practising in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners. This recognizes the risk that lawyers practising in association, like partners in a law firm, will share client
confidences while discussing their files with one another.

2. Matters to consider when interviewing a potential transferee

When a law firm considers hiring a lawyer or articled law student ("transferring member") from another law firm, the transferring member and the new law firm need to determine, before transfer, whether any conflicts of interest will be created.

Conflicts can arise with respect to clients of the firm which the transferring member is leaving, and with respect to clients of a firm in which the transferring member worked at some earlier time. During the interview process, the transferring member and the new law firm need to identify, firstly, all cases in which,

i. the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client;

ii. the interests of these clients in that matter conflict; and

iii. the transferring member actually possesses relevant information respecting that matter.

When these three elements exist, the transferring member is personally disqualified from representing the new client, unless the former client consents.

Second, they must determine whether, with respect to each such case, the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client.

If this element exists, then the transferring member is disqualified unless the former client consents, and the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the public interest.

In this Rule, "confidential" information refers to information obtained from a client which is not generally known to the public. It should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

In determining whether the transferring member possesses confidential information, both the transferring member and the new law firm need to be very careful to ensure that they do not, during the interview process itself, disclose client confidences.

3. Matters to consider before hiring a potential transferee

After completing the interview process and before hiring the transferring member, the new law firm should determine whether a conflict exists.

a. Where a conflict does exist

If the new law firm concludes that the transferring member does actually possess relevant information respecting a former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, then the new law firm will be prohibited, if the transferring member is hired, from continuing to represent its client in the matter unless,

i. the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

ii. the new law firm complies with subrule (4)(b), and in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

If the new law firm seeks the former client's consent to the new law firm continuing to act it will, in all likelihood, be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring member is hired.

Alternatively, if the new law firm applies under subrule (8) for a determination that it may continue to act , it bears the onus of establishing the matters referred to in subrule (4)(b). Again, this process must be completed before the transferring person is hired.

An application under subrule (8) may be made to the Society or to a court of competent jurisdiction. The Society has developed a procedure for adjudicating disputes under this Rule, which is intended to provide an informal and economical procedure for the speedy disposition of disputes.

The circumstances enumerated in subrule (4)(b)(i) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (B) to (D) are self-explanatory, clause (E) addresses governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

b. Where no conflict exists

If the new law firm concludes that the transferring member actually possesses relevant information respecting a former client, but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client, then,

- the transferring member should execute an affidavit or solemn declaration to that effect; and
- the new law firm must notify its client and the former client/former law firm "of the relevant circumstances and its intended action under the Rule", and deliver to them a copy of any affidavit or solemn declaration executed by the transferring member.

Although the Rule does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring member acting for the new law firm's client in the matter because, absent such consent, the transferring member may not act.

If the former client does not consent to the transferring member acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring member did in fact possess confidential information which, if disclosed, may prejudice the former client.

A transferring member who possesses no such confidential information, by executing an affidavit or solemn declaration and delivering it to the former client, puts the former client on notice. A former client who disputes the allegation of no such confidential information may apply under subrule (8) for a determination of that issue.

c. Where the new law firm is not sure whether a conflict exists

There may be some cases where the new law firm is not sure whether the transferring member actually possesses confidential information respecting a former client which, if disclosed to a member of the new law firm, may prejudice the former client.

In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring member.

4. Reasonable measures to ensure non-disclosure of confidential information

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur:

> a. where the transferring member actually possesses confidential information respecting a former client which, if disclosed to a member of the new law firm, may prejudice the former client; and
>
> b. where the new law firm is not sure whether the transferring member actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring member did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" which will be appropriate or adequate in every case. Rather, the new law firm which seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures". For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm or a legal aid program may be able to argue that, because of its institutional structure, reporting relationships, function, nature of work and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled: *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

In cases where a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client which, if disclosed to a member of the new "law firm", may prejudice the former client, the interests of the new client (i.e., Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of subrule (4)(b), particularly clause (E).

GUIDELINES

1. The screened member should have no involvement in the new law firm's representation of its client.

2. The screened member should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the prior representation with the screened member.

4. The current client matter should be discussed only within the limited group which is working on the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened member any documents relating to the current representation.

7. The measures taken by the new law firm to screen the transferring member should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a member, that member, should be advised,

(a) that the screened member is now with the new law firm, which represents the current client, and

(b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

10. The screened member's office or work station and that of the member's secretary should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened member should use associates and support staff different from those working on the current client matter.

[New - October 1995]

Notes

Rule 5

1. Cf. CBA-COD 5; CBA 3(2), 3(7); Que. 3.05.04; B.C. B-1, B-2 B-9(b); N.B. C-9; IBA B-7; ABA-MR 1.7, 1.8, 1.9; ABA DRs 5-101(A), 5-105; Orkin at 98-101.

2. Cf. ABA EC 5-1.

3. "A solicitor must put at his client's disposal not only his skill but also his knowledge so far as it is relevant . . . What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has . . ." Spector v. Ageda (1971), [1971] 3 All E.R. 417 at 430 (Ch.D.), Megarry J. "Applying this [dictum of Cozens-Hardy M.R. in Moody v. Cox (1917), 2 Ch. 71] to a simple circumstance which arises in every conveyancing transaction, does a solicitor acting for both parties disclose the previous purchase price to the purchaser . . .? If he does there may be a breach of duty . . . This example alone faces a solicitor with an unanswerable dilemma, which may only be resolved by his refusing to act for one . . . or . . . possibly stepping back from a situation in which both clients really need positive advice." Article in 1970 Law Soc. Gaz. 332. And see thirteen "Examples of Difficulties&qu ot; there listed. In Cornell v. Jaeger (1968), 63 W.W.R. 747 (Man. C.A.) a solicitor's failure to disclose his personal interest in a property was held to amount to fraud where that interest was clearly to the detriment of his client.

4. "Notwithstanding that [the solicitor] had acted for the plaintiff and had been introduced to the defendants by the plaintiff and acted for both the plaintiff and (R) while they were negotiating the purchase . . . he divorced himself from his responsibilities . . . and acted for the defendants while they acquired the property . . . and, after the writ was issued . . . acted for both defendants . . . I refer to Bowstead on Agency: `It is the duty of a solicitor . . . (8) not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage . . .' This is a principle of ethical standards which admits of no fine distinctions but should be applied in its broadest sense, and it makes no difference whether the solicitor was first acting for two parties jointly who subsequently disagreed and became involved over the subject-matter of his joint retainer, or acted for one party with respect to a matter and took up a case for another party against his former client about the same matter." Sinclair v. Ridout & Moran (1955), O.R. 167 at 182-83 (H.C.), McRuer C.J.H.C. [Emphasis added] And see article, Knepper, "Conflicts of Interest in Defending Insurance Cases" (1970) 19 Defense L.J. 515 and "Guiding Principles", ibid., at 540-44.

5. Common "multiple client" situations where there is real danger of divergence of interest arising between clients include the defending of co-accused, the representation of co-plaintiffs in tort cases or of insureds and their insurers, the representation of classes or groups such as beneficiaries under a will or trust and construction lien and bankruptcy claimants. See for examples Orkin at 100. [Leave to appeal granted] ". . . by reason of the same solicitor appearing for R and D, and it being apparent that there was a conflict of interest between R and D, each one blaming the other for the injuries of the children, he should not have acted for D after having acted for R." R. v. DePatie (1971), 1 O.R. 698 at 699 (H.C.).

6. Cf. Alta. 34 and B.C. B-13: ". . . in a number of instances of professional misconduct . . . the borrowing of money by [the lawyers] in question has been a factor leading to the . . . misconduct . . . [A lawyer] should not borrow money from his clients save in exceptional circumstances, and in that case the onus of proving that the client's interests were fully protected by the nature of the case or by independent advice will rest on [the lawyer] . . . [Attention is called to] the various transactions and dealings that the courts have held to be improper or reprehensible conduct in violation of these principles, and which, in addition to their consequences at law, constitute professional misconduct."

7. Cf. ABA EC 5-20. 8. "The appellant had for many years been the respondent's solicitor, and a quarrel . . . brought about a rupture . . . . It was then . . . that the appellant by his letters to the wife incited her and improperly encouraged her to prosecute an action . . . thus stirring up a litigation against the respondent." Sheppard v. Frind (1941), [1941] S.C.R. 531 at 535, Tashereau J. "The solicitor acting for the defendant . . . drew the mortgage and advised the said defendant on the effect thereof. Later the same solicitor acting for the mortgagee bank brought action against his former client based on a claim arising out of and related to that mortgage. Solicitors should not so conduct themselves even with the knowledge and consent of all parties . . ." La Banque Provinciale v. Adjutor Levesque Roofing (1968), 68 D.L.R. (2d) 340 at 345 (N.B.C.A.). 9. Cf. Or kin at 127-28. "In every case where there is the least doubt . . . as to whether the other party is capable of protecting himself, it is the duty of [the] solicitor . . . to see, if possible, that the other party is adequately represented; and, in the absence of such independent representation, it is the duty of the Court to scrutinize . . . to see whether . . . there has been any overreaching or unconscionable dealing." Chait & Leon v. Harding (1920-21), 19 O.W.N. 20 at 21 (H.C.), Orde J. "It was [the solicitor's] duty to see that the infirm person was adequately protected or had independent advice. If [he] regarded himself as the adviser of the aged plaintiff, he should have insisted that proper arrangements protecting [him] were entered into . . . " Finney v. Tripp (1922), 22 O.W.N. 429 at 430 (H.C.), Middleton J.

APPENDIX 8

RULES OF PROFESSIONAL CONDUCT OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF ONTARIO

100 - GENERAL

101	Compliance with bylaws, regulations and rules
102.1	Conviction of criminal or similar offences
102.2	Reporting disciplinary suspension, expulsion or restriction of right to practice
103	False or misleading applications
104	Requirement to reply in writing

200 - STANDARDS OF CONDUCT AFFECTING THE PUBLIC INTEREST

201	Maintenance of reputation of profession
202	Integrity and due care
203.1	Professional competence
203.2	Co-operation with practice inspections and conduct investigations
204.1	Objectivity: audit engagements
204.2	Objectivity: review engagements
204.3	Objectivity: insolvency engagements
204.4	Disclosure of conflicts
205	False or misleading documents and oral representations
206	Compliance with professional standards
207	Informing clients and associates of possible conflicts of interest
208	Unauthorized benefits
209	Improper use of confidential information
210	Confidentiality of information

100 -- GENERAL

101 Compliance with bylaws, regulations and rules

Members and students and, where applicable, professional corporations shall comply with the bylaws, regulations and rules of professional conduct of the Institute as they may be from time to time and with any order or resolution of the Council or officers of the Institute under the bylaws.

102.1 Conviction of criminal or similar offences

(1) A member or student who has been:

(a) convicted of an offence of fraud, theft, forgery or tax evasion, or is convicted of an offence of conspiring or attempting to commit such offences; or

(b) found guilty of violating the provisions of any securities legislation; or

(c) convicted of any criminal or similar offence for conduct in or relating to their professional capacity, or for conduct in circumstances where there was reliance on their membership in or association with the Institute; or

(d) discharged absolutely or upon condition after pleading guilty to or being found guilty of an offence described in (a), (b) or (c) above shall promptly inform the Institute of the fact of the conviction, finding of guilt or discharge, as the case may be, when the right of appeal has been exhausted or expired.

(2) This rule of professional conduct applies in respect of an event which occurs after the 10th day of June, 1991.

102.2 Reporting disciplinary suspension, expulsion or restriction of right to practice

When, through the disciplinary process of another provincial institute:

(a) a member is suspended or expelled from membership in that institute; or

(b) a member's right to practice is restricted by that institute, the member shall promptly inform the Institute of the fact of the suspension, expulsion or practice restriction.

103 False or misleading applications

A member or student or any person who applies to become a member or student shall not sign or associate himself or herself with any letter, report, statement or representation relating to his or her application for admission or re-admission to membership, or relating to his or her application for registration or re-registration as a student, which he or she knew, or should have known, was false or misleading.

104 Requirement to reply in writing

A member or student shall promptly reply in writing to any letter from the Institute in which a written reply is specifically required.

200 -- STANDARDS OF CONDUCT AFFECTING THE PUBLIC INTEREST

201 Maintenance of reputation of profession

.1 A member or student shall conduct himself or herself at all times in a manner which will maintain the good reputation of the profession and its ability to serve the public interest.

.2 Notwithstanding any other provisions of the bylaws or these rules of professional conduct, in the event a member or student is charged under Rule 201.1 on account of an offence referred to in Rule 102, when a certificate of conviction or certified copy of the original information or indictment with respect to the offence set out in Rule 102 is filed with the discipline or appeal committee, there is a rebuttable presumption the member or student charged failed to maintain the good reputation of the profession and its ability to serve the public interest.

.3 Notwithstanding any other provisions of the bylaws or these rules of professional conduct, where a member is charged under Rule 201.1 on account of being suspended or expelled or having a restriction placed on the member's right to practice through the disciplinary process of another provincial institute, and a certified copy of the other provincial institute's disciplinary decision and order is filed with the discipline or appeal committee, there is a rebuttable presumption that the member charged failed to maintain the good reputation of the profession and its ability to serve the public interest.

202 Integrity and due care

A member or student shall perform his or her professional services with integrity and due care.

203.1 Professional competence

A member shall sustain his or her professional competence by keeping informed of, and complying with, developments in professional standards in all functions in which the member practices or is relied upon because of his or her calling.

203.2 Co-operation with practice inspections and conduct investigations

A member or student shall co-operate with officers, servants or agents of the Institute who have been appointed to arrange or conduct:

(a) a practice inspection; or
(b) an investigation on behalf of the professional conduct committee.

204.1 Objectivity: audit engagements

A member engaged as an auditor to express an opinion on financial statements or on financial or other information shall hold himself or herself free of any influence, interest or relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity.

204.2 Objectivity: review engagements

A member engaged to conduct a review of financial statements or financial or other information and to issue a review engagement report shall hold himself or herself free of any influence, interest or relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity.

204.3 Objectivity: insolvency engagements

A member engaged in the public practice of acting as a trustee in bankruptcy, a liquidator, a receiver, a receiver-manager or any other aspect of insolvency practice, shall hold himself or herself free of any influence, interest or relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity.

204.4 Disclosure of conflicts

A member engaged in the practice of public accounting or any related function, in providing professional services other than those specifically provided for in Rules 204.1 or 204.2 or 204.3, shall disclose any influence, interest or relationship which, in respect of the engagement, would be seen by a reasonable observer to impair the member's professional judgment or objectivity and such disclosure shall be made in the member's written report or other written communication accompanying financial statements or financial or other information and the disclosure shall indicate the nature of the influence or relationship and the nature and extent of the interest.

205 False or misleading documents and oral representations

A member or student shall not

(a) sign or associate himself or herself with any letter, report, statement, representation or financial statement which he or she knows, or should know, is false or misleading, whether or not the signing or association is subject to a disclaimer of responsibility, nor
(b) make or associate himself or herself with any oral report, statement or representation which he or she knows, or should know, is false or misleading.

206 Compliance with professional standards

A member engaged in the practice of public accounting shall perform his or her professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the CICA Handbook.

207 Informing clients and associates of possible conflicts of interest

A member engaged in the practice of public accounting or the public practice of a function not inconsistent with public accounting shall inform his or her clients or associates in such practice of any business connections, any affiliations, and any interests of which they might reasonably expect to be informed but this does not necessarily include disclosure of professional services the member may be rendering or proposing to render to other clients.

208 Unauthorized benefits

A member or student shall not, in connection with any transaction involving a client or an employer, hold, receive, bargain for, become entitled to or acquire any fee, remuneration or benefit without the client's or employer's knowledge and consent.

209 Improper use of confidential information

A member or student shall not take any action, such as acquiring any interest, property or benefit, in connection with which he or she makes improper use of confidential knowledge of a client's affairs obtained in the course of his or her duties.

210 Confidentiality of information

.1 A member or student shall not disclose or use any confidential information concerning the affairs of any client, former client, employer or former employer except:

(a) when properly acting in the course of his or her duties;
(b) when such information should properly be disclosed for purposes of Rule 211 or Rule 302;
(c) when such information is required to be disclosed by order of lawful authority or, in the proper exercise of their duties, by the Council, the professional conduct committee or any subcommittee thereof, the discipline committee, the appeal committee, or the practice inspection committee; or
(d) when justified in order to defend himself or herself or his or her associates or employees, as the case may be, against any lawsuit or other legal proceeding or against alleged professional misconduct or in any legal proceeding for recovery of unpaid professional fees and disbursements, but only to the extent necessary for such purpose.

.2 A member engaged to perform a particular service may contract for the services of a person not employed by the member to assist in the performance of that service, provided the member first obtains the written agreement of that person to carefully and faithfully preserve the confidentiality of any information acquired for the purposes of the engagement and not to make use of such information other than as shall be required in the performance of such services.

211 Duty to report breach of rules of professional conduct

A member shall bring to the attention of the professional conduct committee any apparent breach of these rules of professional conduct or any instances involving doubt as to the competence, reputation or integrity of a member, student or applicant, provided that this rule shall not apply to

(a) a trivial matter, or
(b) a member exempted from this rule for the purpose and to the extent specified by Council, or
(c) a member who is under a specific legal requirement imposed by or pursuant to statutory authority which would preclude the disclosure of confidential information.

212.1 Handling of trust funds and other property

A member or student who receives, handles or holds money or other property as a trustee, receiver or receiver/manager, guardian, administrator/manager or liquidator shall do so in accordance with the terms of the engagement, including the terms of any applicable trust, and the law relating thereto and shall maintain such records as are necessary to account properly for the money or other property; unless otherwise provided for by the terms of the trust, money held in trust shall be kept in a separate trust bank account or accounts.

212.2 Handling property of others

A member or student in the course of providing professional services shall handle with due care any property entrusted to him or her.

213 Unlawful activity

A member or student shall not knowingly lend himself or herself or his or her name or services to any unlawful activity.

214 Fee quotations

A member shall not quote a fee for any professional services unless requested to do so by a client or a prospective client, and no quote shall be made until adequate information has been obtained about the assignment.

215 Contingency fees and services without fees

215.1 A member engaged in the practice of public accounting or a related function shall not offer or agree to perform a professional service for a fee payable only where there is a specified determination or result of the service, or for a fee the amount of which is to be fixed, whether as a percentage or otherwise, by reference to the determination or result of the service, where the service is:

> (a) one in respect of which professional standards or rules of conduct require that the member hold himself or herself free of any influence, interest or relationship which, in respect of the engagement, impairs the member's professional judgment or objectivity or which, in the view of a reasonable observer, would impair the member's professional judgment or objectivity; or
> (b) a compilation engagement.

215.2 Rule 215.1 does not apply to a professional service for a fee fixed by a court or other public authority or to a professional service as a trustee in bankruptcy, a liquidator, a receiver, a receiver-manager or any other aspect of insolvency practice.

215.3 Other than in respect of an engagement described in Rule 215.1, a member engaged in the practice of public accounting or a related function may offer or agree to perform a professional service for a fee payable only where there is a specified determination or result of the service, or for a fee the amount of which is to be fixed, whether as a percentage or otherwise, by reference to the determination or result of the service, provided:

> (a) the fee arrangement does not constitute an influence, interest or relationship which impairs or, in the view of a reasonable observer, would impair the professional judgment or objectivity of the member or a partner of the member in respect of an engagement described in Rule 215.1(a); or
> (b) the fee arrangement is not one which influences, or in the view of a reasonable observer would influence, the result of a compilation engagement performed by the member or a partner of the member for the same client; and
> (c) the client has agreed in writing to the basis for determining the fee before the completion of the engagement.

215.4 A member engaged in the practice of public accounting or a related function shall not represent that he or she performs any professional service without fee except services of a charitable, benevolent or similar nature.

216 Payment or receipt of commissions

Other than in relation to the sale and purchase by a member of an accounting practice, a member engaged in the practice of public accounting or a student while employed by a member engaged in the practice of public accounting shall not directly or indirectly pay to any person who is not an employee of the member or who is not a public accountant a commission or other compensation to obtain a client, nor shall the member or student accept directly or indirectly from any person who is not a public accountant a commission or other compensation for a referral to a client of products or services of others.

217.1 General advertising

A member may advertise, but shall not do so, directly or indirectly, in any manner

(a) which the member knows, or should know, is false or misleading, or
(b) which contravenes professional good taste or fails to uphold normal professional courtesy, or
(c) which makes unfavorable reflections on the competence or integrity of the profession or any member thereof, or
(d) which includes a statement the contents of which the member cannot substantiate.

217.2 Endorsements

A member engaged in the practice of public accounting shall not

(a) endorse, other than in expressing a considered professional opinion in the course of an engagement, or
(b) consent to or allow the use of the member's name, or the name of the firm or organization with which the member is associated, in the public promotion of any commercial product or service of others.

218 Retention of documentation and working papers

A member shall retain for a reasonable period of time such working papers, records or other documentation which reasonably evidence the nature and extent of the work done in respect of any professional engagement.

300 -- RELATIONS WITH FELLOW MEMBERS AND WITH NON-MEMBERS ENGAGED IN PUBLIC ACCOUNTING

301.1 Obtaining or attracting clients

A member engaged in the practice of public accounting shall not adopt any method of obtaining or attracting clients which tends to bring disrepute on the profession.

301.2 Solicitation

A member shall not directly or through a party acting on behalf of and with the knowledge of the member solicit any professional engagement which has been entrusted to another member engaged in the practice of PUBLIC ACCOUNTING or who carries on a business or practice which constitutes a related function.

302 Communication with predecessor

302.1 A member shall not accept an engagement with respect to the practice of public accounting or the public practice of a function not inconsistent with public accounting, where the member is replacing another member or public accountant, without first communicating with such person and enquiring whether there are any circumstances the member should take into account which might influence the member's decision whether or not to accept the engagement.

302.2 The incumbent member shall respond promptly to the communication referred to in Rule 302.1.

302.3 A member responding to a communication pursuant to Rule 302.2 shall inform the possible successor if suspected fraud or other illegal activity by the client was a factor in the member's resignation, or if, in the member's view, fraud or other illegal activity by the client may have been a factor in the client's decision to appoint a successor.

303 Co-operation with successor

303.1 A member shall upon written request of the client supply on a timely basis reasonable information to the member's successor about the work done or being assumed.

303.2 A member who is a predecessor on an engagement shall co-operate with the successor, recognizing the client's interests are paramount, and shall transfer promptly to the client or, on the client's instructions, to the successor, all books, documents, and other property belonging to the client which are in the member's possession.

304 Joint engagements

A member who accepts any engagement jointly with another member shall accept joint and several responsibility for any portion of the work to be performed by either; no member shall proceed in any matter within the terms of such joint engagement without due notice to the other member.

305 Communication of special engagements to incumbent

A member engaged in the practice of public accounting shall, before commencing any engagement for a client of another member who is the duly appointed auditor or accountant, first notify such auditor or accountant of the engagement, unless both

(a) the client makes an unsolicited request, evidenced in writing, that such notification not be given; and
(b) the CICA Handbook does not recommend in respect of the engagement that the member notify or contact the duly appointed auditor or accountant.

306 Responsibilities on accepting engagements

306.1 A member who accepts an engagement, whether by referral or otherwise, from a client of a member who has a continuing relationship with that client shall not take any action which would tend to impair the position of the other member in the ongoing work with the client.

306.2 Responsibilities on referred engagements

A member who receives an engagement for services by referral from another member shall not provide or offer to provide any additional services to the referring member's client without the consent of the referring member; the interest of the client being of overriding concern, the referring member shall not unreasonably withhold such consent.

400 -- ORGANIZATION AND CONDUCT OF A PROFESSIONAL PRACTICE

401 Misleading practice names prohibited

A member, or, where permitted, a professional corporation, shall not engage in the practice of public accounting, or in the public practice of any function not inconsistent therewith, under a name or style which is misleading as to the nature of the organization (proprietorship, partnership or, where permitted, corporation) or the nature of the functions performed.

402 Practice as a sole proprietor

A member engaged in the practice of public accounting as a sole proprietor, or, where permitted, a professional corporation, shall practice under the member's own name and, where permitted in special circumstances by the Council, may, with the predecessor's written authorization, practice under the name of a predecessor sole proprietor or, on a temporary basis, some other predecessor firm name as well as under the member's own name.

403 Firm names

(1) Subject to the provisions of Rule 403(2), any public accounting firm name shall be limited to:

(a) the names of professional colleagues who are or were previously partners of the public accounting firm or any predecessor firm, provided that the number of names used does not exceed the number of partners currently active with the firm,
(b) the names of persons who have practiced as public accountants in Canada or any other country, provided each person named practiced with the public accounting firm or any predecessor firm and the person or his or her legal representative has authorized the use of the name,
(c) part or all of the name, including a non-personal name, of the international partnership of which the public accounting firm is a partner or affiliate, provided that the name has been approved by the Council and the term "& Co." or appropriate similar wording may be used where the number of partners currently active with the public accounting firm exceeds the number of names used in the firm name.

(2) Notwithstanding the provisions of Rule 403(1), a public accounting firm may use an additional name, including a non-personal name, to meet the international needs of clients, if the additional name is

(a) part or all of the name of the international partnership of which the public accounting firm is a partner, or affiliate, or
(b) part or all of the name of a foreign-based partner or affiliate name provided the registered name of the public accounting firm in Ontario is clearly and prominently associated with the additional name in the signature of any report or any other communication and the Council has given its approval to the use of such additional name.

404.1 Use of descriptive styles

The practice of public accounting shall be carried on under the descriptive style of either "chartered accountant(s)" or "public accountant(s)";regardless of the functions actually performed, the use of either descriptive style, in offering services to the public, shall be regarded as carrying on the practice of public accounting for the purposes of these rules of professional conduct.

404.2 Operation of members' offices

(a) Each office in Ontario of any member or firm* of members engaged in the practice of public accounting shall be under the personal charge and management of a member who is a public accountant and who shall normally be accessible to meet the needs of clients during such times as the office is open to the public.

(b) A member shall not operate a part-time office except in accordance with such terms and conditions established by Council.

*Members are referred to the bylaws definition of "firm" as meaning a partnership.

404.3 Proprietary interest with non-members

Each office in Ontario of any firm engaged in the practice of public accounting and composed of one or more members sharing proprietary interest with other public accountants who are not members shall practice under the style of "public accountants" and shall be under the personal charge and management of a member or other public accountant who shall normally be in attendance in such office during such times as the office is open to the public.

405 Association with firms

A member shall not associate in any way with any firm practicing as chartered accountants in Ontario unless:

(a) all partners resident in Ontario are members,
(b) at least one partner is a member, and
(c) all the partners are professional colleagues* or professional corporations provided each such corporation is recognized and approved for the practice of public accounting by the provincial institute in the province concerned.

*Members are referred to the bylaws definition of &professional colleague"as a member or a member of a provincial institute.

406 Member responsible for a non-member

A member engaged in the practice of public accounting or a related function who is associated with a non-member in such practice shall be responsible to the Institute for any failure of such non-member, in respect of such practice, to abide by the rules of professional conduct of the Institute, and in the application of this rule, the other rules are deemed to apply to such non-member as if he or she were a member engaged in the practice of public accounting.

407 Office by representation

A member shall not hold out or imply that the member has an office in any place where the member is in fact only represented by another public accountant or a firm of public accountants and, conversely, a member who only represents a public accountant or a firm of public accountants, shallot hold out or imply that the member maintains an office for such public accountant or such firm.

408 Practice of public accounting in corporate form

A member shall not be associated in any way with any corporation engaged in Canada in the practice of public accounting, except to the extent permitted in clauses (1), (2), and (3) of this rule:

(1) A member or the member's firm

(a) may be the auditor(s) of the corporation,
(b) may be the appointed accountant(s) to prepare the financial statements of the corporation, (c) may give tax advice to the corporation with respect to the financial affairs of the corporation.

(2) A member, other than a practicing member, may be associated with a corporation which provides taxation services involving advice and counseling in an expert capacity provided such services are only a small part of the corporation's activities.

(3) A member may be associated with a professional corporation engaged in the practice of public accounting in a province other than Ontario if the corporation is recognized and approved for such practice by the provincial institute in the province concerned and the corporation does not engage in the practice of public accounting in Ontario. Without limiting the generality of the foregoing, a corporation shall be deemed to be engaged in the practice of public accounting even though the corporation provides a public accounting service only to another member or to a public accountant.

409 - 419 Reserved for future use

420 Practice of related functions

(1) A member engaged in the practice of a related function shall adhere to the rules of professional conduct, and the rules of professional conduct shall apply to such member as if the related function were the practice of public accounting.

(2) For the purpose of the rules of professional conduct, a related function shall be any member's business or practice that is cross-referenced to

(a) the member's public accounting practice, or
(b) another business or practice that is cross-referenced to the member's public accounting practice, whether carried on through an organization separate from the member's public accounting practice or as a separate department or division of such practice.

(3) In respect of clause (2), "cross-referenced" means

(a) any reference in the advertising or promotional or other material of the member's public accounting practice that is made to any other business or practice of the member; or
(b) any reference in the advertising or promotional or other material of any other business or practice of the member that is made to

(i) the member's public accounting practice; or
(ii) any business or practice of the member that is referenced in any advertising or promotional or other material of the member's public accounting practice; or

(c) any use of a name or logo or any possession of features or characteristics by any business or practice of a member which, in the view of a reasonable observer, would imply that an association or relationship exists between such business or practice and the member's public accounting practice; or any other business or practice of the member to which there is any reference made in the advertising or promotional or other material of the member's public accounting practice.

(4) A member may associate with a related function as a proprietor, as a partner or as a director, officer or shareholder of a corporation and may associate with a non-member for this purpose.

(5) A related function shall not be designated "chartered accountant(s)" or"public accountant(s)".

(6) A related function designated as "management consultant(s)" or"trustee(s) in bankruptcy" shall be carried on under a personal name or names or under a corporate derivative of any such personal name or names.

421 Related function shall adhere to rules of professional conduct

Any member engaged in the practice of public accounting who is associated as a proprietor or partner of a related function business, or as a director, officer or shareholder of a corporation carrying on a related function, shall be responsible to the Institute for any failure of the related function business or corporation or any non-member associated with either of them, to abide by the rules of professional conduct as if such related function business, corporation or non-member were a member engaged in the practice of public accounting.

APPENDIX 9

DISCUSSION SESSIONS WITH PRACTISING MEMBERS, EMPLOYED MEMBERS, ACCOUNTANTS AND IN-HOUSE COUNSEL

1. Sessions with Lawyers in Practice/Business

As noted elsewhere in this report, a total of nine discussion sessions with lawyers were held in November and December 1997 in Toronto, Ottawa and London. Thirty-one lawyers selected by the Working Group from a mix of large and small firms attended the sessions which were facilitated by one or more members of the Working Group. One session was held specifically for lawyers employed in large chartered accounting firms or their management consulting practices.

The discussion focussed on questions prepared by the Working Group and provided to the participants in advance of the session. The lawyers who participated in the sessions provided thoughtful and insightful commentary and raised important questions about the development of MDPs and how the legal profession might respond to them.

The information from the sessions was used in conjunction with the results of Phase 2 of Dean Roach's study (discussed in more detail below), and ultimately as key information in the analysis of the issues undertaken by the Working Group in Phase 3. The following are the highlights of the discussion.

Current Multi-Disciplinary Practice/Affiliation Trends

At present, associations between lawyers and other professionals are essential and very far advanced. The "status quo" MDP activities include actuarial firms which are an example of MDPs existing in substance, rather than form. They provide good service to clients at a reasonable cost, avoiding the expense of involving an outside firm of lawyers and duplication of work and communication issues. Patent and trade mark agents with law firms are another example. They share referrals and the economic success of affiliation.

Anecdotally, it appears that the estates practices of lawyers in private practice do not differ much from what the in-house lawyers with trust companies or trust branches of the banks do. However, there is little, if any, understanding among consumers of the relationships between them, the in-house lawyers and the corporate entities for whom they work.

There are business trends which see the formation of consortiums through retainers with various professions on behalf of the client. In these arrangements, the services are provided within a defined area and a level of expertise and the profits are shared.

Some law firms currently have difficulty attracting talent, for example in tax practice, and must constantly compete with foreign law firms and investment bankers, investments houses, accountants, etc. and others giving *de facto* legal advice.

In part, it is the client demand for one stop shopping, which is developing internationally, that drives the move to MDPs. The value to clients in an MDP setting is the opportunity to brainstorm on issues with a lawyer using a "team" approach with a variety of professionals/disciplines in one location. In this sense, MDPs will make it easier for some clients to access a range of services. An added benefit should be that the overall cost paid for a number of services should be less than what the client would pay for the individual services. For lawyers, one of the main attractions of an MDP is having one set of overhead costs for the provision of various professionals services.

While closer relationships among professionals and other service providers might be advantageous and desirable, and pressures may come for closer arrangements, there are problems which will have to be addressed.

Legal Practice
There are questions about whether the manner in which services may be held out in an MDP somehow controls the client's rights. One concern is that if lines are blurred respecting the professional responsibilities of lawyers, that could make it difficult for lawyers to argue the necessity of a legal profession and the public interest protections

There is a fundamental difference in the responsibility to clients on the part of a lawyer and the duties of other professionals. In some respects, the legal profession is quite unique - one example is the imperative for criminal lawyers which is different from all others. Defining what legal services and legal practice are is necessary. The argument is that if there is no clear vision of what the solicitor/client relationship is and what the legal services are that the Law Society can regulate to the exclusion of others, then lawyers cannot sell the proposition that there is a public interest in having lawyers maintain independence.

If all the ethical questions are eliminated and the cost of legal services is the only criteria, MDPs will enhance the availability and delivery of legal services. But, for example, if confidentiality and the traditional responsibilities of a lawyer to a client are removed, what is left is not really "legal services".

A key question is whether, when a client receives advice from an MDP that includes lawyers, that advice is legal advice. The manner in which a client comes to an MDP may be important. For example, is it with the expectation that he or she is getting accounting advice with the other expertise added as a sideline?

Size of Firm, Firm Structure, Organization and Who to Partner With
For the public, there is uncertainty as to whether there will be a huge change for the majority of people who use legal services as a result of MDP developments.

For small firms, to an extent, MDPs are desirable in allowing them to compete, and although they cannot compete for the international work, there are benefits to the linkages.

For large firms, there is a tremendous capital and economic base that the accounting firms could bring to the practice of law through MDPs, given the worldwide presence of the accounting firms, and the tremendous competitive force they create. In this sense, if there is world-wide competition and lawyers are not involved in MDPs, it means that they cannot compete in a world market. While an independent, ethical profession is necessary, and this is the other side of the competition question, the question is what type of profession will remain if the number of lawyers becomes insignificant *because* of competition?

It might be important to know the size of the constituency that uses the big firms. Are MDPs really for a small segment of the business community? Will they want to do real estate and family law? In the short term, maybe not. But it may be appropriate to find out what impact MDPs might have on segments of the legal profession and the public. The current focus, admittedly, is on the business client side, and it is not known whether it will transcend to all areas of practice.

The principles and concerns respecting MDPs, however, are the same for large or small firms. The impact on lawyers in a small community may be felt if there is an accountant with national or international associations, and the question arises as to which professional advisor deals with the client's legal issue. Would it be the local lawyer or the accounting firm's head office in Toronto or Montreal where there is a lawyer?

To some degree, the legal marketplace "sections" are quite disconnected from each other. Smaller firms are presenting themselves as "cost-effective". The mid-level firms are "all things to all people", and that is harder to do. The "niche" firms can create their own market. Technology firms target the high tech companies.

Some individuals are intimidated by the large firms. If that is true, there will always be a need for small firms and sole practitioners, but it depends on type of practice. There are people who still want the small firm because they feel they get better service - the "personal touch". At the sole practitioner level, MDPs may happen because there is consumer demand for it. In effect, lawyers are doing this now, informally, when clients are sent to, for example, an accountant for certain work, as a result of networking among professionals. There are some advantages for sole practitioners. For example, it is sometimes difficult in smaller communities to obtain appraisals, in a litigation file, because accountants are reluctant to go to court. But if there was ready access to a person like this, it would be an advantage. It would work both ways - work could come from accountants too.

Big firms would only be attractive to sophisticated clients. It would be in those clients' interest to have MDPs, where for example intellectual property services are provided with other things. Further, if MDPs improve the ability of clients to afford services, that is also a benefit for consumers.

To attract the same calibre of professional as in accounting and law firms, or others, partnership must be offered, on the theory that this would allow firms to attract better people with an impetus to practice, and an inclination to bring in business. However, a formal partnership may not be required to achieve the type of practice envisaged through MDPs.

MDPs may have to be confined to certain areas of practice. In this context, the difference between barristers and solicitors is noted, and the need for an identifiable constituency where the public can go to "unburden" itself to an independent advisor and counsel. However, it is also recognized that the "public" for the purposes of lawyers may be different for different areas of law.

There are more benefits for solicitors than barristers in MDPs, although benefits to the public for a family law practitioner to partner with others, ie. therapists, psychologists, is not discounted. However, the issue of the independence of the advisors is a question.

Business of Law
From a certain client's perspective, the MDP structure makes good business sense, as long as the client still has the option to go outside the firm to consult a professional of choice.

In assessing the moves of the accountants to date, it would appear that MDPs are inevitable because of the accountant's size, expertise, finances, client base - if those clients want certain services, the accountants will perform them, or if they are not available in the jurisdiction, clients will go offshore to get them. Accountants will provide legal services as part of the whole client service - and it could be through strategic alliances or partnership.

There is a danger in focusing only the business side of things. As MDPs are largely business driven, there is a risk of contamination to the profession and the peculiar role of the lawyer, in the interest of achieving some business objective.

There is the consumer of the law of the economy and the consumer of the law of the individual rights - this may be the simple division for the clientele of any professional service. From the business client's perspective, the former will want MDPs.

An important question is whether the profession would be able to continue to protect individual rights in an MDP given the business imperative and the public who wants that. Part of the professional obligation must be preserved whether MDPs happen or not.

Conflicts
Using linkages with accounting firms as an example, the fact is that large accounting firms act for a multitude of clients. With the potential interaction of significantly sized law and accounting firms, conflicts will multiply substantially, and this will impose huge restraints on the availability of legal services to the public. At present, there are separate entities within a professional service firm's (partnership) umbrella - an accounting practice, and separate management consulting, insolvency and management companies. How are conflicts resolved in this structure? What if one of the entities is acting for a client and the MDP partnership of accountants and lawyers is acting for an opposing party?

Another example is where there is an audit partner in an MDP, which is counsel to a bank and the law partners have confidential information about the bank. All partners have the knowledge in the partnership and the audit partner may be under a duty to disclose while the law partners must keep it confidential.

It is possible that if the client consents to the disclosure that may solve the problem. But such a blanket disclosure may not be obtainable from the client and it may not be enough to avoid the entire conflict question to say the consent of the client is obtainable.

Conflict issues between the professionals and their duties must be dealt with outside the structural issues of the relationships between the professionals.

Independence
The independent bar must be defined and a determination made on how it might be contaminated by these relationships.

In an MDP, how would a lawyer determine to whom the duties are owed? It would be difficult to provide independent advice and have the sense of independence, free from obligations between the partners. On the client side, there could be confusion, especially among unsophisticated clients, as to who among the professionals have loyalty to whom.

But arguably, the independence of the profession need not necessarily be threatened because of MDPs. The question is what would cause the erosion of the ability of the lawyer to act independently because he or she has other partners? The lawyer should still exercise his or her capabilities as he or she always would.

If independence is defined in terms of avoiding bias in advice as a result of consequences of something around or influencing the lawyer, independence is not impaired because of the MDP. Independence in this sense is impacted by surroundings, and the influences that come to bear as a result of those surroundings. For example, the one-person firm may have one significant client that supplies 90% of the work - there is bias in that situation because of the importance of that client to the lawyer's financial well-being.

In a law firm, where there are many different practice units, advice may be impacted by the remuneration scheme - independence may be challenged or biassed by the necessity to keep the clients. In an MDP, those issues are not very different and may be a smaller problem, because one client would not be so significant in a large MDP where, depending on the structure of the practice, there may even be less threat of bias.

Control
How is control of the partnership defined? It may be a question of who controls the professional response to the client.

Part of the issue of control is deciding where the lawyer's responsibilities start and end. Are the clients' expectations met concerning the various rights and protections in a legal retainer? If lawyers control the firm, they and everyone else in the firm through them would be subject to regulation by a regulator. The law firm must be made accountable if non-lawyers are contributing in an important way to the firm's business.

Alternatively, there should be a shared responsibility in the control of an MDP. The question then becomes what is the practice of law. The merging of the professions makes it difficult for the governance issue, given the grey areas which may not fall within one profession or another.

The issue of control could be a form over substance issue. If the Law Society maintains its current approach to governance of its members, and accountants do the same, control is not an issue. If lawyers are subject to disciplinary rules of the Law Society, the question is why that would change because lawyers practice with accountants. Whether the firm is controlled by lawyers or accountants in this sense does not matter.

Insurance
It is possible that a new type of insurance would have to be created for the MDP entity. The cause of the loss in an MDP may be greyer. It may also be appropriate to explore how insurance may drive the consideration of MDPs, and the circumstances where, for example, partnership may not be possible because insurance is not available for some partners at a commercially viable rate.

Privilege
In an MDP practice, the question was raised as to how a lawyer would separate legal services and put a privilege on it? While there are problems with the privilege issue, it is recognized that privilege is not regarded as a marketing tool for legal services.

Regulation
The Law Society should look systematically at the ethical issues arising from other professionals, so that their regulatory schemes and the degree of mismatch with that of the Society can be determined. Once they are identified, some agreement should be reached, with the possibility of parallel, hybrid or complementary regulations. For example, conduct rules could be made applicable to firms, not just individual lawyers (the CAs have drafted a "firm" code of conduct).

However, what is wrong for the lawyer may not be wrong for another professional or service provider. Further, if partnerships will only apply to regulated professionals, the next question is whether the regulation of those professionals will satisfy the Law Society and its standards for lawyers. This could require an ongoing review of the regulatory schemes.

Another option would be to form an umbrella organization covering those professions in MDPs, as an adjunct to the individual regulatory bodies themselves. The health professions could be an example of the way to go with regulated professions.

Self-Interest
If MDPs are opposed, that decision must withstand the scrutiny from the legal profession's self-interest perspective. That issue involves the economies of the practice of law as opposed to service to the public. If the issue is approached strictly from the legal profession's "self-preservation" viewpoint, that is a position that will not succeed.

Ultimately, the development of MDPs should not be fought, but managed.

2. Sessions with Chartered Accountants

In March, 1998, the Working Group invited chartered accountant representatives from the large accounting firms, and their in-house counsel (where the position exists), to attend a discussion session similar to that described above for lawyers in practice.

Two sessions were held in March 1998, at which a total of nine CA partners and in-house counsel attended. The discussions derived from the document used for the lawyers' discussion sessions, modified to reflect issues more germane to both the accounting and the legal profession.

While much was discussed during the sessions, the following information provided by the attendees was of particular interest to the Working Group:

- A globalization trend means that clients want uniform service throughout the world, and the global connection is through the CA firms. For lawyers, one way to become global is to link up with international firms.
- The Big 5 are forced to consider MDPs just to stay competitive.
- Consulting and tax are growing and audit work is declining, and that is a function of marketplace forces and global events. As a way for firms to facilitate the solutions clients want, multi-disciplinary practice is what the market demands.
- What an MDP for means for clients is convenience, one-stop, and a brand name for international business transactions. Client problems are multi-faceted and clients will see value if services are provided in one place.
- There are issues of concern respecting privilege, conflicts and control of an MDP;
- With respect to solicitor/client privilege, protections may be required to maintain privilege and confidentiality, or limit access to information. It is a "business environment" issue, but may require some regulatory change.
- Conflicts will call into question the restraints that have to be imposed from the business point of view.
- MDP firms will have to discuss the issue of control. Individual practice control is not the issue - the question is whether the individual professional meets the standards of the profession. Control can be dealt with with co-operation. Special regulation for MDPs may be required, but that issue is not insurmountable. Business and regulatory constraints may have to apply in certain situations.
- Allowing a law practice with a CA firm to "brand the name" goes to the issue of flexibility.
- The revenue sharing rules should also be changed. This would be required by both accountants and lawyers.
- In the realm of the key issue for lawyers (the objectivity of accountants) and the issue for accountants (the advocacy function of lawyers), the question is whether a partnership is feasible. Could lawyers practice in an MDP firm and maintain privilege and confidentiality where the audit partner is bound by rules of disclosure?
- There is a need to find a framework for multi-disciplinary practice. The preference is partnership, but if it is not permitted, Donahue & Partners-type arrangements must be created.
- Regulation of members in an MDP is a serious issue. It is problematic for MDPs if there are partners who are not regulated. Both the Law Society and the Institute of Chartered Accountants have rules and co-ordination is required and likely doable, in a way that will preserve the regulatory framework. Ultimately, it is an issue of trying to meet the needs of the public.

3. Session with ICAO Representatives on the Interprovincial Committee to Harmonize the Rules of Professional Conduct

In April, 1998, the working invited two representatives of the chartered accountants' Interprovincial Committee to Harmonize the Rules of Professional Conduct ("the Committee"), which has taken on the task of assessing the responses from the provincial institutes in Canada to the 1995 report of the CA Interprovincial Task Force on the Multi-Disciplinary Activities of Members engaged in Public Practice.

The reaction from the provincial institutes was given to the Committee to propose how the recommendations could be implemented. The Committee then looked at the 1995 report and developed proposals for implementing the recommendations which were sent to the institutes for comment.

The Committee is in the process of putting revised proposals to implement the recommendations to the provincial institutes, with a targeted date for response in the fall of 1998. The responses will be assessed at its fall meeting, after which final recommendations can go to the provincial institutes. The Committee is aiming to report to allow any bylaw changes for consideration in June 1999, when the ICAO holds its Annual General Meeting.

The following is a summary of the exchange of information at the session with the Committee representatives:

MDP Ownership/Control Issues
The task force report recognized that with respect to ownership, the profession has *de facto* MDPs - there are non-CAs who are essentially partners, but the firms are structured so that there are CAs in one partnership, and non-CAs in a sister partnership.

The general feeling is that control of public accounting firms should be in the hands of CAs, and there are those who believe that that should apply to the whole group called an MDP.

Structuring a public accounting firm within an MDP to be controlled by CAs is an option, but if it's part of an MDP as a whole, how could CAs have absolute control when others, conceivably, have a large interest in it?

Those who want control by CAs say that if the governing body of the MDP doesn't come from the CA profession, the professional "root" could be subject to influences which could take the firm in undesirable directions.

In jurisdictions like the US and the UK, where non-CA ownership has been recognized, there is a mandatory 75% rule for the CA component. Therefore, if the firm is a CA firm, it must abide by this rule. In the UK, however, a firm could choose *not* to call itself a CA firm.

Principles and concepts only have been developed by the Committee on what must be applied to the admission and ownership issues involving non-CAs as part of the structure. Accordingly, ownership issues are not in the "package" of recommendations. This will take some time, at law, to do and therefore, as it is not a priority, the Committee has not become too specific with implementation. The membership can vote on the principle but it will be affected by the legislative changes required.

Right now, for most firms in Canada, the control issue is academic because non-CAs are in a minority.

"Restricted Practices"
There would be certain law services for an audit client that an MDP firm could not accept, under current or anticipated rules governing the CA. Influences on objectivity is one issue, and legal counsel involved in the management of the client (allowed by lawyers but not accountants) is another. Confidentiality is another area. If a partner in an MDP has access to confidential information that would not normally be available to the auditor, there is a presumption that as a partner, the auditor has access to it. There is a perceived loss of objectivity in that case. Liability issues may also flow from that.

This is a potential conflict for an MDP. There is a suggestion that these situations would not be allowed, and that there would have to be restrictions on the work for any audit client.

The Committee has not arrived at the point where it is specifying the particular engagements which would not be permitted, but the point is that there is certain work that could not be done for audit clients in an MDP. This may be expanding given the movement now to assurance engagements for non-financial issues (eg. quality assurance).

It appears that there would not be full legal counsel in an MDP for an audit client.

Regulatory Scheme
Strong representations were made in response to the issue that the profession shouldn't expect all rules to apply to the MDP or that they would apply to all engagements. But certain rules should apply - for example, those on objectivity, which would be necessary for any situations involving an audit. Those rules would also apply to any other member of the firm involved in the audit.

The contingency fee issue is a case in point. The rule was loosened to permit contingency fees for CAs but there can still be no contingency fees charged for services impacting on audit services. Another example is that there could be no financial interest in the audit client by any individual working in the firm performing the audit.

Most firms believe that having the rules apply to both the firm and the sister partnerships is the right thing to do. In discussions on this issue, there is no reluctance to do this.

It is safe to say that the recommendation in the task force report that all third party reliance work must be subject to the CA rules is going too far (recognizing that that is almost everything CAs do).

One of the problems is that many of the CA statutes prohibit MDPs [as noted above], and therefore the law would have to change to permit them. That is something the Committee will examine down the road.

The view of the task force, when the report was written, was that the issue was being dealt with in the context of CA firms providing other services besides public accounting. The message from the major firms is that they are professional services firms that happen to include CA services. They are moving to this latter model now.

The CA requirement for non-CAs is that they would have to abide by the rules of their own professional body. Any conflicts between those rules and CA rules may be more in terms of what the non-CA could do if not part of the MDP. It would not be so much saying "under our rules, you can't do that" as going to the restriction question.

The reason for wanting the partnership structure for multi-disciplinary practice is that the firms object to having to jump through administrative and legal hoops to accomplish the situation. The other reason is that they don't like the idea of members finding ways to get around the rules - it undermines the structure to have rules that everyone is breaching. It's also a question of not complying with the spirit of the rules.

The CA rules make members responsible for non-members. Right now, firms cannot be disciplined but the institute wants the right to discipline firms. In BC and Alberta, legislative amendments are underway to provide for this.

There is an expectation that non-CAs would agree to be bound by CA rules, although they may need a restructuring. One idea is a tiered approach, where some rules apply to all members of the firm, some only to CAs, etc.

Objectivity/Independence of the CA (see also The Public Interest, below)
The objectivity requirement of a CA extends to determining what a note to a financial statement should say notwithstanding whether it's in the client's economic interest. There may be a problem between the lawyer and the accountant arguing about this type of disclosure issue. The other point is that the issue may not arise or may not be anticipated until both are involved in a particular matter for the client.

While there is an expectation of independence and objectivity for the auditor giving a report on financial statements, there is not the same expectation for the lawyer's opinion.

Moving the audit function into a separate partnership would probably not be acceptable to the profession, and has been raised before (the profession in Germany, it is believed, has gone this route).

The Public Interest
The question of whether MDPs are in the public interest has been answered affirmatively. There are some services that are a "fit" with CA services, like financial planning. Another way of looking at it is that it hasn't been put to them that it's contrary to the public interest. The point is that something shouldn't be prevented unless there's a reason to do so.

Although the corporate trend is to a broad cross-section of professional advisers, and not one firm, the problem is that clients don't just need one type of service. It's more efficient for the client to deal with one firm. The "shopping" concept, however, is also supportable, and some clients will want to shop around.

Control of the firm by CAs protects the objectivity and independence requirements of the CA. If control had to be given up to accomplish the MDP structure, the task force would not have recommended that MDPs were in the public interest. Reliance on that was an important part of the CA position. There is a need to preserve integrity and this leads to the control aspect.

The objectivity rules are written in terms of an "appearance". It won't "look" like control by a CA in a firm if there are others in the firm who have some control or influence the control.

The major firms think differently about this issue. The Big 6 see it in the context of other professions/disciplines, more so than with the legal profession, when it comes to control.

Direction of the CA Committee
The Committee is likely to report that MDPs should be accommodated with appropriate regulation. How far it goes is the question. Limits have to be discussed, as well as the legislative changes required.

4. Session with In-House Counsel

In June 1998, members of the Working Group, with the assistance of the Executive Director of the Canadian Corporate Counsel Association, facilitated a discussion session with a small group of in-house corporate counsel from large Canadian/multi-national corporations. Although arranged late in the study, the Working Group felt that it would be helpful to hear from lawyers in this particular area of practice, as none of the earlier discussion sessions or consultations focused on corporate counsel.

The counsel expressed a variety of views on the development of MDPs and the response of the profession. On one hand, some saw it as a natural evolution among, for example, the large accounting firms to incorporate a legal services branch into their professional services firms. Some saw the "one stop" approach as beneficial to certain clients, and the efficiencies of having a number of disciplines come together on an issue or transaction.

On the other hand, the choice of counsel was a very important factor, and several of the counsel indicated that they make and would continue to make decisions on which lawyers to retain based on their known expertise in a particular area. One counsel in particular stated that he did not see any advantage to retaining a multi-discipline firm of various service providers, which may include lawyers.

Two general questions raised by the counsel were
- what is the consumer demand for multi-disciplinary services, and
- what are the advantages to the consumer?

5. Roach/Iacobucci Study Phase 2 Consultations

The March 1998 consultation sessions held by Dean Roach involved seven meetings with lawyers to obtain the views of a cross-section of the legal profession concerning regulatory problems and options associated with MDPs. In all, 15 lawyers attended.

The consultations included members, chosen by the Working Group, from a variety of practice areas, including family law, criminal law, real estate, labour law, pension law, tax, civil litigation, intellectual property, and immigration. A lawyer working as a mediator was also interviewed.

The consultations were based on a series of questions prepared by Dean Roach which each participant received in advance of the meetings. They touched on the following issues:

- How is the profession being affected by alliances with other professionals such as accountant, actuaries, engineers, etc?

- Should MDPs be limited to associations with other regulated professions or include others such as real estate brokers, mediators, patent and trade mark agents, immigration consultants, private investigators?
- Are the problems associated with MDPs greater for some professions as opposed to others?
- Do MDPs present special problems concerning conflicts of interest? If so, are they amenable to regulation? Is relying on waivers by clients satisfactory? Are conflicts problems limited to litigation or more pervasive?
- Do MDPs present special problems concerning confidentiality and solicitor and client privilege? If so, are they amendable to regulation? Is relying on waivers by clients satisfactory?
- Do MDPs present special problems concerning insurance? If so, are they amenable to regulation?
- Would the existence of an MDP compromise the independence of legal advice and of the legal profession? More than other pressures?
- Would the existence of an MDP compromise the profession's ability to regulate itself?
- What should the Law Society's response be to these developments?
- Is the status quo (ie. rules concerning fee splitting, steering, use of trade names, conflicts and confidentiality) effectively prohibiting MDPs? Is it acceptable?
- Should MDPs be allowed? If so, what are the arguments for and against requiring lawyers to be in control of the partnership?

The responses of lawyers who attended these consultations were incorporated in the analysis of the issues in the Roach/Iacobucci Phase 3 paper. The following general thoughts emerged:

- Most lawyers thought some alliance with other professionals was not only inevitable, but traditional and desirable in that clients achieved the best results if professionals worked together closely and in co-operation;
- The distinction between multi-disciplinary "partnership" and "practice" became crucial (there was no consensus on partnerships as a practice structure), but there was comment that the Society should not focus so much on the partnership distinction when reviewing multi-disciplinary activity. The necessity for the distinction was questioned by some lawyers, who noted that there were other ways to engage in revenue sharing and management power short of partnerships;
- Large firm lawyers in the business law areas acknowledged the effect of the globalization of services, and how transnational corporate clients seek centralized services in a small number of global markets. In their view, this would undoubtedly have an effect on the provision of legal services such as tax and corporate advice, and is something that the accountants have already recognized;
- Some smaller firm lawyers saw MDPs as limiting access to a larger pool of clients, in that the informal referral arrangements respecting clients between small firms of various professionals, which is advantageous, could be threatened;
- There was diversity of opinion on whether lawyers should partner with unregulated service providers. Many lawyers said it was not realistic to limit the scope of MDPs to self-regulating professions, and trends where non-professional service providers come together to provide services to the public were noted. It was recognized that lawyers' ethical obligations and conduct schemes may conflict with the business imperatives of others;
- In the conflicts area, there were perceived differences between the professional culture of lawyers and other professionals, focussing particularly on accountants, (although there was acknowledgement that many of the ethical standards of lawyers and accountants were similar). A consensus appeared to form that accountants indeed treat conflicts much differently than lawyers;
- There was skepticism expressed by a number of lawyers about the effectiveness of waivers as a way to deal with conflicts;
- Many lawyers agreed that it is very easy to lose solicitor/client privilege. They saw this as the issue which sets lawyers apart from others, and again, there was skepticism about waivers to solve the issue of privilege;
- The independence of the profession was of serious concern in an MDP structure, and was discussed in tandem with issues about the continuation of self-regulation of the profession;
- Many lawyers expressed the view that the LSUC should continue to regulate lawyers within an MDP;
- The views of lawyers on MDPs varied depending on the area of practice - there was fairly even consensus among barristers that MDPs for their types of practices were neither inevitable or desirable;
- While concerns about insurance were noted, it did not emerge as a large practical problem for lawyers in an MDP. There was virtual unanimity that LPIC should not insure an MDP, but should be confined to lawyers.

APPENDIX 10

MDP FORM AND
DATA

As noted elsewhere in this report, as part of its research into current multi-disciplinary activity among Ontario lawyers, the Working Group designed a questionnaire which was sent to all members of the Law Society as part of the fiscal 1997 package of Law Society forms required to be filed each year.

The MDP Form, as it has been called, was to be completed by members on a voluntary and anonymous basis as a one-time response. Its purpose was to obtain, for the Working Group's review, basic data on the level of referrals and business arrangements between lawyers and other service providers and with whom lawyers engage in those arrangements.

Nearly 9600 forms were returned to the Law Society. This translates to a response rate of about 33%, given the total membership of approximately 28,600.

A copy of the form and the data, primarily in chart form, appears later in this Appendix. The following are some highlights drawn from the data:

- about 4300 members in private practice indicated that they did not maintain any form of referral arrangements with other service providers, and about 6300 members indicated that they did not provide legal services jointly with other service providers to clients;
- about 2770 members in private practice indicated that they maintain forms of referral arrangements with other service providers, and about 760 members indicated that they provide services jointly with other service providers to clients;
- Of those members who maintain referral arrangements or provide joint services to clients with others, of the nine practice areas listed on the form, corporate/commercial lawyers, wills/estates lawyers and real estate lawyers, in that order, recorded the highest incidence of referral arrangements or joint service initiatives;
- when practice status was considered, the above statistics varied slightly in some cases, with the order as follows:

  i. For partners and associates, the highest levels of referrals were among corporate/commercial, civil litigation and wills/estates lawyers;
  ii. For sole practitioners, the highest levels of referrals were among wills/estates, real estate and corporate/commercial lawyers;
  iii. For employees, the highest levels of referrals were among civil litigation corporate/commercial, and wills/estates lawyers;
  iv. For partners, the highest levels of joint services were among corporate/commercial, real estate and wills/estates lawyers;
  v. For associates, the highest levels of joint services were among corporate commercial, civil litigation and wills/estates lawyers;
  vi. For employees, the highest levels of joint services were among corporate/commercial, civil litigation and (a tie) employee/labour - family/matrimonial lawyers.

- a significant majority of the referral arrangements are with accountants, followed by real estate brokers and financial planners in second and third places (with slight variation for associates, where the last two categories were switched);
- with the exception of sole practitioners, the statistic for lawyers' joint services with others varied slightly from the above referral arrangement information when practice status was considered, in that:

  i. For partners, the services were provided with accountants, real estate brokers and trustees in bankruptcy;
  ii. For associates, the services were provided with accountants, financial planners and "other";

  For employees, the services were provided with accountants, doctors and patent/trademark agents;

- for non-practising lawyers who otherwise provide legal services through their employment/engagement, about 1200 indicated that clients of their offices did not directly access their legal skills, while 738 indicated that direct access occurred.
- the areas of law where this access occurred most frequently were corporate/commercial law, administrative law and employment/labour law
- the offices (where the members whose skills are accessed) where the access most frequently occurs were those providing the services of accountants, "other", and engineers.

Analysis
The small window into the legal profession's current multi-disciplinary activity obtained through the MDP Form confirms a reasonably solid level of referrals among members and other service providers.

Of the roughly 8000 private practitioners who responded, about one third indicated that they maintained some form of referral arrangements with others, most notably (and as expected) with accountants. The activity crossed solicitors' and barristers' work, and there was only slight variations in statistics for the various practice categories (eg. partnership, sole practice, etc.).

A significantly smaller number of respondents (about 760) indicated that business arrangements with others were entered into to provide multi-discipline services to clients. What is not known is whether this is a result of the current restrictions within the regulatory regime, a desire on the part of lawyers to remain in control and independent, or a combination of both.

MULTI-DISCIPLINARY PARTNERSHIPS AND THEIR IMPACT ON THE FUTURE OF THE LEGAL PROFESSION
A Request for Information from the Profession

Members are requested to complete, on a voluntary and anonymous basis, the questions on this form. A separate envelope to ensure the anonymity of members is provided for return of the completed form to the Law Society Task Force studying multi-disciplinary partnerships.

EXPLANATORY NOTES:

The past few years have seen a trend toward, and in some jurisdictions the realization of, partnerships between various professions. A Task Force of The Law Society is studying the provision of legal services through multi-disciplinary partnerships or practices (MDPs). MDPs are defined as business arrangements in which individuals with different professional or service qualifications practise together (in partnership or association) and combine their skills in providing advice and counsel to the consumers of these services.

The broad questions for the Task Force have been:

- Is the movement to MDPs inevitable?
- If it is inevitable, how does the legal profession respond?
- What should the profession's regulatory response be to MDPs? Should limits on the structure be imposed, and if so, how?
- What is the role of the Law Society in dealing with MDPs?

The Task Force is examining the practical problems and issues that the structure of MDPs may cause for the practice of law. This examination will continue for a number months, and result in a defined set of issues that will assist the Task Force in determining whether MDPs are workable and, if so, the regulatory framework within which MDPs could operate. The Law Society plans to make recommendations before the end of 1998 on the feasibility of multi-disciplinary partnerships or practices.

Other than anecdotal information, there is no data about current multi-disciplinary activity in the legal profession. The following questions are designed to collect this information which will be used only for the purposes of the Task Force's study.

Questions 1 and 2 (Section A) are directed to members in private practice and seek information on the extent of permitted activities which have a multi-disciplinary component.

Questions 3 and 4 (Sections C and D) are directed to two categories of members not engaged in private practice. Question 3 seeks information from those members who use their legal skills in a non-practice situation to assist clients of their employer or the service providers with whom members are engaged. Question 4 seeks information from lawyers who do not provide legal services, but may be employed or engaged in the provision of services with non-lawyer professionals or other service providers.

INSTRUCTIONS:

If you are a member ENGAGED IN PRIVATE PRACTICE, please complete SECTIONS A AND B.

If you are a member NOT ENGAGED IN PRIVATE PRACTICE but PROVIDE LEGAL SERVICES in the course of your employment or engagement, please complete SECTIONS B AND C.

If you are a member NOT ENGAGED IN PRIVATE PRACTICE AND DO *NOT* PROVIDE LEGAL SERVICES in the course of your employment or engagement, please complete SECTION D.

If you require assistance or have any questions on the completion of this form, please contact the Law Society by:

1) E-mail to LSFORMS@LSUC.ON.CA
2) Fax to (416)947-7623
3) Telephone to the Policy Secretariat, (416)947-3434.

Given the anticipated large volume of telephone calls to the Law Society due to this peak filing period, members with E-mail or fax facilities are urged to contact the Law Society by these methods rather than by telephone.

SECTION A - For members engaged in private practice only:

Please indicate your current status:

O a sole practitioner. O a partner of a law firm.
O an employee of a law firm. O an associate practising in the manner of an employed lawyer.

1. Do you maintain formal or informal regular referral arrangements with other non-legal professionals or service providers? Yes O No O

If answered "Yes", are these services provided by:

O Accountants
O Actuaries
O Arbitrators
O Architects
O Chiropractors
O Computer Consultants
O Employment Counsellors
O Engineers
O Family/Marriage Counsellors
O Financial Planners
O Insurance Agents/Brokers
O Investment Counsellors
O Land Developers
O Lobbyists
O Mediators
O Medical Doctors
O Mortgage Brokers
O Patent Agents/Attorneys
O Physiotherapists / Rehabilitation Specialists
O Private Investigators
O Psychiatrists
O Psychologists
O Real Estate Brokers
O Social Workers
O Trustees in Bankruptcy
O Urban Planners
O Other - please specify _____

2. Do you provide, on a regular basis, legal services to clients through a formal or informal business arrangement jointly with other professions and/or non-legal disciplines where those services are also available to clients?Yes O No O

If answered "Yes", please answer question 5 below.

SECTION B - For members engaged in private practice and members not engaged in private practice but who provide legal services in the course of their employment or engagement:

Please indicate your area(s) of practice:

O ADR/mediation services
O Administrative law
O Civil litigation
O Corporate/commercial law
O Criminal/quasi criminal law
O Employment and labour law
O Family/matrimonial law
O Real estate law
O Wills and estate law

SECTION C - For members not engaged in private practice but who provide legal services in the course of their employment or engagement:

3. Are your legal skills (as distinct from legal services) directly accessed by clients or consumers of your employer or the office of your engagement? Yes O No O

If answered "Yes", please answer question 5 below.

SECTION D - For members not engaged in private practice who do *not* provide legal services in the course of their employment or engagement:

4. Do you work in an environment which employs or provides the services of two or more professions and/or disciplines to the public? Yes O No O

If answered "Yes", please answer question 5 below.

TO BE COMPLETED IF YOU ANSWERED "YES" TO ANY OF QUESTIONS 2, 3 OR 4:

5. Are these services provided by:

O Accountants
O Actuaries
O Arbitrators
O Architects
O Chiropractors
O Computer Consultants
O Employment Counsellors
O Engineers
O Family/Marriage Counsellors
O Financial Planners
O Insurance Agents/Brokers
O Investment Counsellors
O Land Developers
O Lobbyists
O Mediators
O Medical Doctors
O Mortgage Brokers
O Patent Agents/Attorneys
O Physiotherapists / Rehabilitation Specialists
O Private Investigators
O Psychiatrists
O Psychologists
O Real Estate Brokers
O Social Workers
O Trustees in Bankruptcy
O Urban Planners
O Other -please specify _____

Summary of Data Received From the MDP Form

Appearing below are the general responses received from lawyers to the four questions included on the MDP Form. Following the general responses are four charts which break down the data according to practice area and status of practice (partner, sole practitioner, employee, associate). The practice area titles are abbreviated, but can be determined from a comparison with the titles appearing in full on the Form (under Section B).

When reviewing the data, and in particular the total number of lawyers in a specific category, it must be remembered that a responding lawyer may be carrying on a practice in more than one area of law.

Section A - For members in private practice:
Question 1
Do you maintain formal or informal regular referral arrangements with other non-legal professionals or service providers?

Yes 2775 No 4359

Question 2
Do you provide, on a regular basis, legal services to clients through a formal or informal business arrangement jointly with other professions and/or non-legal disciplines where those services are also available to clients?

Yes 767 No 6299

Section C - For members not engaged in private practice but who provide legal services in the course of their employment or engagement:
Question 3
Are your legal skills (as distinct from legal services) directly accessed by clients or consumers of your employer or the office of your engagement?

Yes 738 No 1190

Section D - For members not engaged in private practice who do not provide legal services in the course of their employment or engagement:
Question 4
Do you work in an environment which employs or provides the services of two or more professions and/or disciplines to the public?

Yes 377 No 876

(Attached are graphs from pages 196 - 206)

.....

A preliminary issue was discussed on whether this matter should be adjourned to permit further time for consideration.

Mr. Armstrong did not take part in the debate because the request for deferral was made by counsel for Ernst & Young a client of his law firm.

No motion for an adjournment was made and the matter proceeded.

It was moved by Mr. Scott, seconded by Mr. Armstrong that (1) the Report be adopted (2) the Committee continue to facilitate the implementation of Multi-Discipline Partnerships with the Professional Regulation Committee and (3) that Convocation strike a task force on the issue of captive law firms.

Carried

ROLL-CALL VOTE

Adams	For
Armstrong	For
Banack	For
Carey	For
Chahbar	For
Cronk	For
Crowe	For
DelZotto	Against
Finkelstein	For
Gottlieb	For
Harvey	For
MacKenzie	For
Manes	Against
Millar	For
Ortved	For
Puccini	For
Ross	For
Ruby	For
Scott	For
Stomp	Against
Swaye	For
Wilson	For
Wright	For

Vote 20 - 3

The Treasurer thanked the Committee for all their hard work.

THE REPORT AS AMENDED WAS ADOPTED

Report of the Lawyers Fund for Client Compensation Committee

Mr. Ruby presented the Report of the Lawyers Fund for Client Compensation Committee for information only regarding the 1999 levy recommendation.

The Lawyers Fund for Client Compensation Committee
September 25, 1998

Report to Convocation

Purpose of Report: Information

TABLE OF CONTENTS

EXECUTIVE SUMMARY

1. The Committee is recommending that the 1999 levy for the Lawyers Fund for Client Compensation be set at $205 for full fee paying members. While the Fund actuary has recommended that the current levy ($245) be maintained, the Committee has decided to reduce the levy by $40 in order to reduce the overall annual fee paid by members. The reduction in the levy will mean a loss in revenue of $950,000 but a reduction of only $500,000 in the actuary's recommended reserve of $9 million because the reserve is currently estimated to be $9.5 million ($500,000 more than required). The Committee is confident in making this recommendation due to a small downward trend in both the number of claims and the amount of claims that have been noticeable since the beginning of the year. If these favourable trends reverse, the levy will once again have to be raised in the year 2000.

2. As a result of the Law Society adopting the 'Self Reporting Model' of annual financial reporting by the private practitioner, the use of licenced public accountants is no longer a requirement. To ensure on-going compliance with the regulations concerning the maintenance of books and records, earlier this year the Law Society established the Spot and Focussed Audit Programme. Approximately 300 spot audits have been performed to date and a summary of the findings is attached to this report. The focussed audit programme is just getting started. While the impetus for this programme came from the Lawyers Fund for Client Compensation Committee, it is the view of the Treasurer that the Professional Regulation Committee is best suited to continue the responsibility of overseeing the programme. The Committee accepts that suggestion.

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Lawyers Fund for Client Compensation Committee ("the Committee") met on September 9, 1998. In attendance were:

Clayton Ruby (Chair)
Nancy Backhouse
Thomas Cole
Paul Copeland
Gordon Farquharson
Gary Lloyd Gottlieb
Harriet Sachs
Vern Krishna (Chair, Finance and Audit Committee)

Staff: John Saso, Jim Yakimovich, Sara Hickling, Maria Loukidelis, David McKillop, Evan Shapiro and Heather Werry.

2. This report contains:

- a report on the financial status of the Lawyers Fund for Client Compensation including a recommendation for the 1999 Fund levy;
- a report on the focussed and spot audit programme introduced following the adoption of the 'Self Reporting Model' of annual financial reporting to the Law Society by the private practitioner.

A. REPORT ON THE FINANCIAL STATUS OF THE LAWYERS FUND FOR CLIENT COMPENSATION AND 1999 LEVY RECOMMENDATION

Assessment of the Financial Status of the Fund

3. As at August 31, 1998, the Fund had outstanding gross claims of $33.1 million. The maximum grant available to claimants, as established by Convocation, is $100,000. Once this limit is applied to the gross claims inventory, the maximum potential pay out falls to $14.3 million.

4. The current balance of the Fund is $23.8 million. If the Fund were to pay each claim on file up to the appropriate limit (for a total cost of $14.3 million), the remaining balance would be approximately $9.5 million. This is the Fund's uncommitted cash balance or reserve.

5. In order for the Fund to be left with a balance of only $9.5 million, it would have to pay in full each and every claim on file up to the appropriate limit. This is not a realistic scenario in view of the fact that many claims are denied as being wholly without merit, do not fall within Convocation's guidelines for payment or are paid at less than the amount claimed even with limits applied. The Fund's actuary, Craig Allen, has recommended that the Fund maintain a reserve of $9 million.

6. Attached for the information of Convocation is a bar graph (Appendix 1) which reveals that claims with limits applied have been declining steadily since March 1998 when the maximum potential payout was $16.6 million (currently $14.3 million). The number of open claims has also declined rapidly from a January 1998 high of 354 to the August 31st figure of 274. The table marked as Appendix 2 also reveals that 12 month results as at June 30th from 1997 to 1998 show marked declines in the number of claims received and the gross and at limits values of those claims.

Declining Trends & Actuary's Levy Recommendation

7. While these trends are encouraging, they are of an insufficient scope and length to satisfy the actuary that his future predictions should be altered in any significant way. In order to maintain a $9 million reserve and meet grant and administrative expense obligations as they arise in 1999, the actuary is recommending that the 1998 Fund levy of $245 be maintained for 1999.

The View of the Finance and Audit Committee

8. At the invitation of the Chair, Vern Krishna, Chair of the Finance and Audit Committee, attended the meeting to add his own perspective as well as that of his Committee on the issue of the 1999 Fund levy.

9. The Finance and Audit Committee and its staff have reviewed the situation and are of the opinion that the annual levy could be reduced from $245 to $205 without significant risk to the financial integrity of the Fund. They point to the small favourable trends which have already been discussed. In fact, such a move would reduce levy income by only $950,000. This would maintain the reserve at approximately $8.5 million compared to the actuary's recommendation of $9 million.

10. Other factors were also discussed which would tend to indicate the lower levy could be prudently set:

i) a positive economic outlook should mean fewer claims in the near future;
ii) a small recent increase in short term interest rates will lead to some increased investment income;
iii) fewer members are now involved in investing funds on behalf of clients (because there is no LPIC coverage for mortgage brokering activity);
iv) stable real estate prices;
v) capital has been drawn away from the private mortgage market due to attractive rates of return in the stock market;
vi) Law Society initiatives designed to reduce the risk of losses in private mortgage investing (Forms 4 and 5, focussed auditing programme).

DISCUSSION

The Committee's View

12. The Committee is encouraged by the trends and environmental factors mentioned above in terms of the future demands that may be made on the financial resources of the Fund. The Committee voted to support the reduction of the levy from $245 to $205 for 1999 but wish it to be made clear to both Convocation and the profession that this lower levy may not be sustainable in the future if these positive trends should take a turn for the worse. If claims increase and economic factors deteriorate, it may be necessary to once again increase the levy and in effect "replace" the $40 next year.

13. The $205 levy for 1999 is a recommendation of the Lawyers Fund for Client Compensation Committee. The final decision by Convocation, in accordance with sound financial practice, should not be made except as part of the 1999 budget which will be determined by Convocation in November 1998.

B. REPORT ON THE SPOT AND FOCUSSED AUDIT PROGRAMME

14. At its meeting of October 27, 1997 Convocation adopted the 'Self Reporting Model' of annual financial reporting to the Law Society by the private practitioner. Under this model the role of the public accountant has become optional such that members now have the ability to prepare the necessary filings themselves.

15. To ensure on-going compliance with the Regulations concerning maintenance of books and records, the Society has undertaken a programme of spot and focussed audits. Members currently pay $75, as part of the Lawyers Fund for Client Compensation Levy, to cover the costs of the auditing programme. This levy is in addition to the $245 members paid for the 1998 Fund levy.

The Spot Audit Programme

16. At its meeting in April 1998, Convocation approved the conducting of 150 spot audits with a completion date of June 30, 1998. These audits represented a sample size of approximately 2% of all firms in Ontario. The audits were not conducted by Law Society staff. Rather, 4 chartered accounting firms were retained to undertake the task.

17. At the completion of the initial 150 spot audits, a further 150 were authorized with a completion date of September 30, 1998. Of those 150 audits, 75 will be pure spot audits while the remaining 75 will concentrate on members who have failed to file the Private Practitioner Report.

18. The almost 300 spot audits performed thus far represent only 4% of all Ontario firms. There are currently 7226 firms registered with the Law Society. With 150 audits being performed per quarter or 600 audits annually, if this level of audit activity is maintained, it would take in excess of 12 years to visit each firm.

Responsibility for the Auditing Programme

19. During the meeting, the Committee was asked to recommend to Convocation the future level of spot audit activity. As part of the discussion, the issue was raised whether the Lawyers Fund for Client Compensation Committee was even the appropriate committee to make such a determination. Some members were of the opinion that the Professional Regulation Committee was the appropriate committee to run the programme while others felt the Lawyers Fund for Client Compensation Committee was more suited to the task.

The Focussed Audit Programme

20. Distinct from the spot audit programme is the focussed audit programme. These audits are undertaken on the basis of a member fitting a risk profile which has been approved by Convocation. The first focussed audits were commenced in June of 1998. These audits are performed by Law Society staff as opposed to outside accounting firms. Only a few of these audits have been completed to date.

DISCUSSION

21. The Committee has asked the Treasurer to determine which committee will be responsible for the on-going monitoring of the Spot and Focussed Programme. The Chair has entered into discussions with the Treasurer, the Chair of the Professional Regulation Committee and the Chair of Finance and Audit. The Treasurer suggests that responsibility for the programme be assigned to the Professional Regulation Committee so that a more comprehensive supervision of the audit staff can be effected in a single committee. The Lawyers Fund for Client Compensation Committee was willing to undertake that task, but accepts this suggestion.

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

(1) Copy of a bar graph. (Appendix 1)

(2) Copy of a Table re: Year to Year Claims Comparison: 1997 and 1998. (Appendix 2)

Re: Spot and Focussed Audit Programme

It was moved by Mr. Ruby, seconded by Mr. MacKenzie that the responsibility for the programme be assigned to the Professional Regulation Committee.

Carried

MOTIONS

The following Motions were deferred:

Amendment to Rules Re: Government and Public Affairs Committee
Amendment to Rules Re: Division of Fees

Report for Information

Report of the Professional Development & Competence Committee

Professional Development & Competence Committee
September 25, 1998

Report to Convocation

Purpose of Report: Information

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Development and Competence Committee ("the Committee") met on September 10, 1998. Committee members in attendance were Mary Eberts (Chair), Larry Banack (Vice-Chair), Mike Adams, Kim Carpenter-Gunn, Ron Cass, Susan Elliott, Helene Puccini, and Heather Ross. Staff in attendance were Janine Miller, Paul Truster, and Sophia Sperdakos.

2. The Committee is reporting on the following matters:
(Information)

- Report of the ADR Systems Design Team
- A report on new applications and recertifications as certified specialists approved in Committee on 14 May, 1998

Information

REPORT OF ADR SYSTEMS DESIGN TEAM

1. A joint meeting of the Professional Development and Competence Committee and the Professional Regulation Committee was held on July 17, 1998 to review the revised report of the ADR Systems Design Team. At the conclusion of the meeting it was agreed that the report reflected the views of the two committees, subject to some further revisions. Those revisions have been made and the Professional Development and Competence Committee recommends the approval of the report and its recommendations.

2. The report is being presented to Convocation for its consideration by the Professional Regulation Committee.

INFORMATION REPORT ON SPECIALIST CERTIFICATION NEW APPLICATIONS AND RECERTIFICATIONS APPROVED IN COMMITTEE ON MAY 14, 1998

1. The Professional Development and Competence Committee is pleased to report the Committee's approval of the following lawyers for certification:

Civil Litigation:	Robert Zochodne (of Oshawa)
Labour Law:	Ann Burke (of Toronto) Frances Gallop (of Toronto) Douglas Gray (of Toronto) Donald Jarvis (of Toronto) Carolyn Kay-Aggio (of Toronto) Wallace Kenny (of Toronto)

2. The Professional Development and Competence Committee is pleased to report the Committee's approval of the following lawyers for recertification for an additional five years:

Civil Litigation:	Gerald Taylor (of Waterloo)
Family Law:	Gerald Sadvari (of Toronto) Patrick Schmidt (of Toronto)

3. The Professional Development and Competence Committee approved the appointment of a new member Heather Smith (of Ottawa) to the Environmental Law Specialty Committee.

4. The Professional Development and Competence Committee approved the appointment of a new member Diane Cornish (of Ottawa) to the Intellectual Property Law Specialty Committee.

5. The Professional Development and Competence Committee approved the appointment of two new members Francine Van Melle (of Oakville) and Lorne Wolfson (of Toronto) to the Family Law Specialty Committee.

ORDERS

The following Orders were filed:

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Helen Bernice Shaw, of the Town of Fergus, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 5th day of March, 1998, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Helen Bernice Shaw be suspended for a period of one month commencing May 1, 1998 and continuing thereafter until she has made her filing.

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Paul Willliam Hudson, of the City of Mississauga, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 30th day of October, 1997 in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Paul William Hudson be suspended for a period of three months commencing at the conclusion of the current administrative suspension and continuing thereafter until he complies with the requirements of the Law Society to produce his books and records and complete his filings. Convocation further orders that the Solicitor pay costs in the amount of $1,437 payable within twelve months of the date of this order.

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Joel Emmanuel Tencer of the City of Toronto;

AND IN THE MATTER OF an Application for Readmission to the Law Society of Upper Canada.

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Admissions Committee dated the 28th day of November, 1997 in the presence of Counsel for the Society, the Applicant not being in attendance but represented by J. Douglas Crane, Q.C., wherein the Application for Readmission was denied and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that the Application of Joel Emmanuel Tencer for readmission to the Law Society of Upper Canada be denied.

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;
AND IN THE MATTER OF David Clyde Magambo Koma, of the City of Kingston, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 14th day of January, 1998 in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that David Clyde Magambo Koma be suspended for a period of one month, such suspension to be served concurrently with the suspension ordered by Convocation on January 25, 1996.

DATED this 23rd day of April, 1998

"G. MacKenzie"
Acting Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Richard Gillespie Matthews, of the Town of Whitby, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 12th day of March, 1998 in the presence of Counsel for the Society, the Solicitor being in attendance but not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Richard Gillespie Matthews be reprimanded in Convocation.

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Mark Hansher Fromkin, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 11th day of March, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Brian Greenspan, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Mark Hansher Fromkin be suspended for a period of one month commencing May 1, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Alice Dianne Custance, of the Township of Russell, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 24th day of October, 1997, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Alice Dianne Custance be suspended for a period of one month commencing at the conclusion of her administrative suspension and continuing thereafter until she has made her filings.

DATED this 23rd day of April, 1998

"G. MacKenzie"
Acting Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Bonnie Esther Turner Derby, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 11th day of March, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Morris Manning, Q.C., wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Bonnie Esther Turner Derby be suspended for a period of three months commencing June 1, 1998 and continuing indefinitely until she fully responds to the Law Society with respect to the Complaint matter, makes her outstanding filings, and produces all of the books and records which she is required to maintain under Regulation 708, to the satisfaction of the Law Society. Convocation further orders that she pay costs to the Law Society in the amount of $1,000 on or before May 31, 1998, and that upon her reinstatement, she enrol in, and co-operate with, the Practice Review Program, the cost of her participation in that Program to be borne by the Solicitor at the rate of $50 per hour of the Reviewer's time, up to a maximum of $1,400.00.

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF David Gordon Bryce, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 23rd day of February, 1998, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that David Gordon Bryce be suspended for a period of one month commencing as of the date of this Order and continuing thereafter until his filings are completed to the satisfaction of the Law Society.

DATED this 23rd day of April, 1998

"G. MacKenzie"
Acting Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Robert Wesley Kew, of the Village of Warkworth, a Barrister and Solicitor (hereinafter referred to as "the Solicitor)

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 25th day of November, 1997, and the Report and Decision of the Discipline Committee dated the 23rd day of February, 1998 in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that in relation to Complaint D86/97 Robert Wesley Kew be suspended for a period of one month commencing at the conclusion of his administrative suspension and continuing thereafter until his filings are made. With respect to Complaint D298/97 Convocation orders that the Solicitor be suspended for a period of one month, such suspension to be served concurrently with the one month suspension imposed for D86/97 and to continue indefinitely until he produces his books and records.

DATED this 23rd day of April, 1998

"G. MacKenzie"
Acting Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Andrew Guy Edward Goddard, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 13th day of February, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Duty Counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Andrew Guy Edward Goddard be reprimanded in Convocation.

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Mary Brenda Dagenais, of the City of Ottawa, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 27th day of November, 1997, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Mary Brenda Dagenais be suspended for a period of one month commencing at the conclusion of her administrative suspension and continuing thereafter until she has made her filings.

DATED this 23rd day of April, 1998

"G. MacKenzie"
Acting Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Laurie Ann Dupuis, of the Town of Napanee, a Barrister and Solicitor (hereinafter referred to as "the Solicitor"

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 25th day of November, 1997, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Laurie Ann Dupuis be suspended for a period of one month commencing at the conclusion of her administrative suspension and continuing thereafter until she has made her filings.

DATED this 23rd day of April, 1998

"G. MacKenzie"
Acting Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF James Allan Millard, of the City of Etobicoke, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 23rd day of February, 1998 in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that James Allan Millard be suspended for a period of one month commencing as of the date of this order and continuing thereafter until he has made his filings to the satisfaction of the Law Society. Convocation further orders that the Solicitor pay costs of the Law Society in the amount of $1,500 payable prior to his reinstatement.

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

25th September, 1998

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Peter Frederick Piroth, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 18th day of August, 1997 in the presence of Counsel for the Society, the Solicitor not being in attendance but represented by John Rosen, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Peter Frederick Piroth be given permission to resign his membership in the said Society, and thereby be prohibited from acting or practising as a barrister and solicitor, and from holding himself out as a barrister and solicitor

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Kimberley Anne Smith, of the Town of Newmarket, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 21st day of January, 1998 in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Kimberley Anne Smith be given permission to resign her membership in the Law Society within thirty days, failing which, that she be disbarred.

DATED this 23rd day of April, 1998

"G. MacKenzie"
Acting Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Kent Richard Christopher Peel, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 23rd day of February, 1998 in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Duty Counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Kent Richard Christopher Peel be reprimanded in Convocation.

DATED this 23rd day of April, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

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IN CAMERA

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IN CAMERA Content Has Been Removed

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IN PUBLIC

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8. That these limitations on the Solicitor's practice continue until such further order of Convocation.

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF David George Heeley, of the City of Peterborough, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 15th day of April, 1998, in the presence of Counsel for the Society, the Solicitor not being in attendance but represented by Duty Counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that David George Heeley be suspended for a period of twelve months, such suspension to commence at the conclusion of his current administrative suspension

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

25th September, 1998

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Thomas Lyons Docherty, of the Town of Leamington, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 21st day of February, 1998, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Thomas Lyons Docherty be suspended for a period of one month as of the date of this Order and from month to month thereafter until he has complied with the following:

1. Completed his filing to the satisfaction of the Law Society;
2. Produced his books and records to the satisfaction of the Law Society;
3. Made full payment to F. D'Alimonte in the sum of $1500 and to the Law Society in the sum of $1500; and
4. Paid $800 into trust.

DATED this 28th day of May, 1998

"R. Topp"
Acting Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Shannon Howard Martin, of the City of Ottawa, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 1st day of April, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by James O'Grady, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Shannon Howard Martin be suspended for a period two months commencing August 1, 1998, and that he pay Law Society costs in the amount of $1,000 in instalments of $250 payable on the 1st and 15th of September and October 1998.

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Peter Guy Martin, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 15th day of April, 1998, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Peter Guy Martin be suspended for a period of one month, such suspension to commence at the conclusion of his current administrative suspension.

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Alan Stanley Franklin, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 2nd day of September, 1997, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Barry B. Swadron, Q.C. wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Alan Stanley Franklin be disbarred as a barrister, that his name be struck off the Roll of Solicitors, that his membership in the said Society be cancelled, and that he is hereby prohibited from acting or practising as a barrister and solicitor and from holding himself out as a barrister and solicitor.

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Irving Kirshenblat, of the City of North York, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 23rd day of February, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Duty Counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Irving Kirshenblat be suspended for a period of one month commencing June 8, 1998 and continuing from month to month thereafter until the filings are completed to the satisfaction of the Law Society.

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Stanley Charles Ehrlich, of the City of Vaughan, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 1st day of April, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance but not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Stanley Charles Ehrlich be suspended for a period of two months and two weeks, on the following conditions:

1. That commencing on his return to practice he will maintain the books and records as required by the Law Society Act and Regulations;

2. That if the Solicitor employs a bookkeeper or accountant he will personally supervise and review his or her work at least on a monthly basis;

3. That he will in time implement on his return to practice a new bookkeeping system approved by the Society; and

4. That he will enrol in the Bar Admission Course for accounting and use his best efforts to complete it.

CONVOCATION further orders that the suspension commence on July l, 1998, unless the Secretary of the Law Society, in writing, changes the date to accommodate the Solicitor's obligations to the court and his client.

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Michael Brian Delman, of the City of Ottawa, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 25th day of November, 1997, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Michael Brian Delman be suspended for a period of thirty days and thereafter from month to month until his filings are completed in full, such suspension to commence at the conclusion of his current administrative suspension.

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Tibor Istvan Bankuti, of the City of Mississauga, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 15th day of April, 1998, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct and conduct unbecoming a barrister and solicitor, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Tibor Istvan Bankuti be granted permission to resign his membership in the said Society, and thereby be prohibited from acting or practising as a barrister and solicitor, and from holding himself out as a barrister and solicitor.

DATED this 28th day of May, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Patrick Daniel Lennon, of the City of Hamilton, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 16th day of June, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Alan D. Cooper, wherein the Solicitor was found guilty of professional misconduct, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Patrick Daniel Lennon be suspended for a period of one year commencing as of the date of this order, and that upon his reinstatement he enrol and participate in the Practice Review Programme in accordance with the terms of his undertaking dated June 3, 1998, and pay the costs of that programme up to but not exceeding $750.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Barrie William Carlyle, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 6th day of February, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Duty Counsel, wherein the Solicitor was found guilty of professional misconduct, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Barrie William Carlyle be suspended for a period of six months commencing as of the date of this order, such suspension to run concurrently with any administrative suspension; and, that as a condition of resuming practice he enroll in the Practice Review Programme.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Abdurahman Hosh Jibril, of the City of Etobicoke, a Barrister and Solicitor (hereinafter referred to as the Solicitor"

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 12th day of May, 1998, in the presence of Counsel for the Society, the Solicitor not being in attendance and not represented by counsel, wherein the Solicitor was found guilty of professional misconduct, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Abdurahman Hosh Jibril be suspended for a period of sixty days commencing as of the date of this order, and from month to month thereafter until his filings are up to date to the satisfaction of the Secretary, and his books and records are brought up to date and produced to the satisfaction of the Secretary of the Law Society.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Gerardus Ysaak Wilfred Heddema, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 23rd day of February, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Laurie Galway, wherein the Solicitor was found guilty of professional misconduct, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Gerardus Ysaak Wilfred Heddema be reprimanded in Convocation.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Walter Kingsley Wijesinha, of the City of North York, a Barrister and Solicitor (hereinafter referred to as "the Solicitor"

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 23rd day of February, 1998, in the presence of Counsel for the Society, the Solicitor not being in attendance but represented by J. David Hobson, Q.C. wherein the Solicitor was found guilty of professional misconduct, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Walter Kingsley Wijesinha be granted permission to resign his membership in the said Society, and thereby be prohibited from acting or practising as a barrister and solicitor, and from holding himself out as a barrister and solicitor.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

25th September, 1998

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Alex Borman, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 15th day of April, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Duty Counsel, wherein the Solicitor was found guilty of professional misconduct, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Alex Borman be suspended for a period of two months commencing July 6, 1998, and that within the two month period: a) he enroll in the Practice Review Programme; and b) produce a psychiatric report confirming that he has entered a continuous course of therapy sufficient to enable him to carry on the active practice of law. Failing the fulfilment of either condition the suspension shall continue indefinitely until both conditions are met.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Danny Branoff, of the City of Windsor, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 20th day of May, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Jane Kelly, wherein the Solicitor was found guilty of professional misconduct, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Danny Branoff be suspended for a period of one month commencing July 25, 1998 and pay the Law Society costs in the amount of $2,500 on or before October 25, 1998.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Thomas George Richards, of the City of Toronto, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Committee of Convocation dated the 21st day of May, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance but not represented by counsel, wherein the Solicitor was granted relief from the Order of Convocation dated September 26, 1996, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that the suspension order of September 26, 1996 is hereby terminated and that the Solicitor's suspension ceases as of the date of this Order and that he be reinstated on the following conditions:

1. That he provide the Law Society with monthly reconciliations for his Trust and General accounts and copies of his Trust and General receipt and Disbursement journals before the end of the next following month, for a period of one year and thereafter as long as it may be determined appropriate by the Secretary;

2. That he participate in the Practice Review Programme and comply with any recommendations made in the course of his involvement with the Programme.

CONVOCATION ORDERS pursuant to Regulation 708 that the sum of $4,164.21 be repaid to the Solicitor.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Brian Richard Madigan, of the City of Mississauga, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER FOR INTERIM SUSPENSION

CONVOCATION of the Law Society of Upper Canada, having read the Affidavit of Anita McCann, sworn the 18th day of June, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Douglas Crane, Q.C., and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that Brian Richard Madigan be suspended as of the date of this Order, such suspension to continue indefinitely until the final disposition of Complaint D96/98 by Convocation.

DATED this 25th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"K. Corrick"
Acting Secretary

Filed

25th September, 1998

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE Law Society Act;

AND IN THE MATTER OF Donald Kenneth Iatzko, of the City of Windsor, a Barrister and Solicitor (hereinafter referred to as "the Solicitor")

ORDER

CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Discipline Committee dated the 21st day of May, 1998, in the presence of Counsel for the Society, the Solicitor being in attendance and represented by Duty Counsel, wherein the Solicitor was found guilty of professional misconduct, and having heard counsel aforesaid;

CONVOCATION HEREBY ORDERS that the Solicitor's right to practise law be subject to the following conditions for two years:

1. That he practise only as an employee of Mr. Donald Tait unless otherwise permitted by the Secretary of the Law Society, or subject to a further order of Convocation;
2. That all correspondence from the Law Society to the Solicitor be copied to Mr. Tait;
3. That he provide the Secretary of the Law Society with a medical report quarterly;
4. That he attend a physician designated by the Law Society if required by the Secretary of the Law Society;
5. That he execute a general release authorizing the Secretary of the Law Society to receive medical information about himself as the Secretary requires.

DATED this 26th day of June, 1998

"H. Strosberg"
Treasurer

(SEAL - The Law Society of Upper Canada)

"R. Tinsley"
Secretary

Filed

REASONS OF CONVOCATION

The following Reasons were filed:

25th September, 1998

REASONS OF CONVOCATION

Re A Solicitor

Kathryn Seymour - Counsel for The Law Society of Upper Canada

Charles Mark, Q.C. - Counsel for the Solicitor

INTRODUCTION

The report and decision of the Discipline Committee in this matter dated December 12, 1997 was considered in Convocation on March 26, 1998. Although initially Convocation adopted the report of the Discipline Committee, after deliberating Convocation rescinded its adoption of the report. Convocation asked counsel to make submissions on the question of whether the allegation in the Complaint - that the Solicitor failed to comply with the Income Tax Act by failing to report income in connection with accounts rendered to a client - amounts to professional misconduct or conduct unbecoming a barrister and solicitor in circumstances in which there has been no finding in either the criminal courts or the civil courts of a violation of the Income Tax Act. Convocation drew counsel's attention to the decision of Justice Baynton of the Saskatchewan Court of Queen's Bench in Stromberg v Law Society of Saskatchewan (1996), 132 D.L.R. (4th) 470.

The matter was thereupon adjourned, and was brought back on before Convocation on May 28, 1998. At that time, the Solicitor's counsel requested that the hearing in Convocation be held in camera. (A similar request had been made before the Discipline Committee, which concluded that the hearing there should be in public). Convocation denied the request, but informed counsel for the parties that in the event that Convocation were to decide that the allegation in the Complaint does not amount to professional misconduct or conduct unbecoming a barrister and solicitor, it would not disclose the Solicitor's identity in its reasons.

Convocation reserved its decision on whether the allegation in the Complaint amounts to professional misconduct or conduct unbecoming a barrister and solicitor on the evidence before the Discipline Committee. For the reasons that follow, Convocation has concluded that it does not.

THE FACTS

On March 22, 1994 the Law Society received a letter of complaint from the Solicitor's former wife. In her letter, the Solicitor's former wife levelled a number of complaints against the Solicitor, most of which related to matrimonial litigation between them.

After reviewing the complaints and corresponding with the Solicitor and his counsel, the Law Society concluded that all but one of the allegations made against the Solicitor were either unfounded or outside the Law Society's jurisdiction. The remaining allegation was that the Solicitor had failed to disclose certain income to Revenue Canada.

The Solicitor acknowledged that between December 1987 and January 1991 he suppressed his receipt of fee income from a company for whom he acted by not recording the fees in his accounts receivable ledger and not depositing the moneys received in his firm account. The Solicitor also acknowledged that he did not report these fees, which were in the total amount of $75,217 on his income tax returns for the years in question.

The Solicitor stopped suppressing his receipt of these fees at the beginning of 1991 because he realized that the irregularity of suppressing revenue would be compounded if he also failed to remit goods and services tax on those amounts, as he was then obliged to do.

By letter dated December 12, 1994, the Solicitor informed Revenue Canada that it had come to his attention that he had earned income in the 1988, 1990 and 1991 taxation years which had not been reported on his returns. He also informed Revenue Canada at this time that he had instructed his accountant to prepare amended returns for those years.

By letter dated January 20,1995 the Solicitor's accountant filed amended tax returns for the four years in question. The Solicitor's accountant requested that all penalties and interest be waived in accordance with Revenue Canada's voluntary disclosure rules.

The Solicitor has not been charged with any offence under the Income Tax Act for his failure to disclose this income on his original tax returns. He has not been fined or assessed any penalties.

THE COMPLAINT

The only allegation in Complaint D143/96 is that the Solicitor is guilty of professional misconduct or, in the alternative, conduct unbecoming a barrister and solicitor, in that "he failed to comply with the Income Tax Act ... by failing to report income earned in the amount of $75,217 in connection with accounts rendered to [a client] between 1988 and 1991.

ANALYSIS

In the Stromberg case a member of the Law Society of Saskatchewan was alleged to be guilty of conduct unbecoming a lawyer in that he assisted an identified person to breach section 121 of the Criminal Code (frauds on the government) and attempting to conceal the breach. A second allegation i the complaint was that the member entered into a scheme whereby the involvement of the same identified person was disguised and misrepresented in order to avoid public knowledge of the person's possible breach of section 121 of the Criminal Code.

Justice Baynton quashed the complaint on the ground that the disciplinary proceedings initiated by it were ultra vires. In doing so, he applied the decision of the Supreme Court of Canada in Starr v Ontario (Commissioner of Inquiry) (1990), 68 D.L.R. (4th) 641, in which the Court held that a commission of inquiry established under the authority of provincial legislation cannot be used to investigate the commission of specific criminal offences by a named person.

The Supreme Court of Canada has consistently upheld the constitutionality of provincial commissions of inquiries with broad powers of investigation which may incidentally impinge on the federal criminal law power. If the net effect, or pith and substance, of an inquiry instituted under provincial authority, however, is the determination of whether or not a specific crime has been committed by a specific person, then it infringes the exclusive jurisdiction of the federal government over criminal law and procedure.

The fact that conduct that constitutes professional misconduct or conduct unbecoming a barrister and solicitor may also constitute a crime is not in itself a bar to disciplinary proceedings respecting that conduct: see Imrie v Institute of Chartered Accountants (Ontario) (1972), 28 D.L.R. (3d) 53 at 55 (Ont. H.C.); and Rosenbaum v Law Society (Manitoba) (1983), 150 D.L.R. (3d) 352 (Man. Q.B.). A person may be answerable in both the criminal courts and in professional discipline proceedings for the same conduct: R. v Wigglesworth [1987] 2 S.C.R. 541. Thus, for example, on the basis of the same incident a lawyer may be found guilty of professional misconduct for misappropriating client funds held by the lawyer in trust, and may also be found guilty of theft as defined in the Criminal Code by a court of criminal jurisdiction. Moreover, a lawyer who has been found guilty of a criminal offence by a court of competent jurisdiction may on the basis of such a conviction be disciplined under the Law Society Act for conduct unbecoming a barrister and solicitor.

It does not follow, in Convocation's opinion, that either a discipline committee or Convocation has jurisdiction under the Law Society Act to embark upon an inquiry into the question of whether a specific person (including a member) has committed an offence created by a federal statute duly enacted pursuant to powers exclusively reserved to the federal Parliament by our Constitution.

Thus, in the Stromberg case, the Saskatchewan Court of Queen's Bench quashed a complaint of conduct unbecoming a lawyer that alleged what was in pith and substance the commission of the very act prohibited by the Criminal Code. While acknowledging that the determination of the dominant feature or focus of a proceeding is not always straightforward, Justice Baynton made the following observation in his reasons for judgment (at page 201):

> The potential for a constitutional challenge increases if the description of the misconduct parallels the definition of a criminal offence, especially if the misconduct does not appear to have an "unprofessional" underpinning independent of its definition as an offence under the Criminal Code. In other words if the misconduct is "unbecoming" because it constitutes a crime, then the potential for challenge is significant.

It is the formal complaint that sets out what the Discipline Committee must consider and decide. The allegation in the complaint is the primary determinant of the scope and focus of the proceedings. In the Stromberg case, Justice Baynton expressed the applicable principle as follows (at page 211):

> ...a disciplinary proceeding begins to go off the rails when it approaches the matter on the basis that the conduct is unprofessional because it constitutes a criminal offence not yet determined by the criminal courts. It goes completely off the rails when its net effect is to investigate and determine whether the lawyer has engaged in conduct which is directly or indirectly characterized as a specific criminal offence. It has by then usurped the exclusive domain of the federal government and the criminal courts over criminal law and procedure, a head of power clearly assigned pursuant to the division of powers in the Constitution to the federal government.

Justice Baynton also observed that if conduct is characterized as "unbecoming" because it constitutes a specific crime not yet determined by the courts, the dominant feature and focus of the proceeding is likely to encroach upon exclusive federal jurisdiction. "[If] the dominant feature and focus of a proceeding is professional discipline," Justice Baynton held, "the professional misconduct can be investigated and determined without characterizing it, directly or indirectly, as a criminal offence." (At page 209).

A similar admonition may be found in the judgment of Cory, J. (as he then was) in Stevens v Law Society of Upper Canada (1979), 55 O.R. (2d) 405 (Div. Ct.). No constitutional issue was raised in that case. The Court commented unfavourably, however, on the practice of particularizing complaints of professional misconduct or conduct unbecoming a barrister and solicitor as if they were counts in a criminal indictment. At page 409 Justice Cory stated that if possible, professional misconduct complaints should avoid using the wording of the Criminal Code.

In the present case the allegation in the Complaint is cast as a failure to comply with the Income Tax Act. Unlike the Complaint in the Stromberg case, the Complaint in the present case does not specify the section of the Act that the Solicitor is alleged to have violated. It is nevertheless clear not only from the reference in the Complaint to the Solicitor's "failing to report income" but also from the record as a whole that the case put against the Solicitor was that he committed an offence under the Income Tax Act. In its factum the Law Society relied upon a statement by the Solicitor's counsel that "...what I am about to admit on my client's behalf is an offence under the Income Tax Act." In its report the Discipline Committee cited as a comparable case "of particular note" on the issue of penalty a decision of Convocation in which a member was suspended for three months after he was convicted in the criminal courts of four charges of making false or deceptive statements in his income tax returns for four separate years. Convocation has concluded that the essence of the allegation against the Solicitor in the present case is that though Revenue Canada chose not to charge him with an offence under the Income Tax Act, the Solicitor is nevertheless guilty of professional misconduct or conduct unbecoming a barrister and solicitor because he committed an offence under that statute by failing to report income.

A complaint of professional misconduct or conduct unbecoming a barrister and solicitor under the Law Society Act is not among the means by which an investigation may be carried out to determine whether a person has committed a criminal offence. In the present case, what is alleged in the complaint is in essence that the Solicitor committed an offence under a statute duly enacted by the federal government that contains offences created pursuant to Parliament's exclusive jurisdiction over criminal law. Just as the discipline proceedings initiated by a similar complaint in the Stromberg case were found for this reason to be ultra vires the Law Society of Saskatchewan, in Convocation's opinion the present proceedings are ultra vires the Law Society of Upper Canada.

The fact that the Solicitor has acknowledged having failed to report the income in question, in Convocation's opinion, is irrelevant to the constitutional issue raised. If, as we have found, the determination of the allegation in the Complaint is beyond the Law Society's jurisdiction for constitutional reasons, the law Society cannot acquire jurisdiction as a result of the Solicitor's admission, which is merely a matter of evidence.

The Law Society does not, of course, condone the conduct of members who fail to report income received from clients to Revenue Canada. On many occasions, lawyers who have been found guilty of offences under the Income Tax Act in the criminal courts have been found guilty of conduct unbecoming a barrister and solicitor by reason of those findings; some have been disbarred. No such findings have been made by the courts in the present case, and it is not for the Law Society to determine whether an offence under the Income Tax Act has been committed.

Convocation's determination in the present case is confined to the specific allegation submitted to the Discipline Committee in complaint D143/96. We have found that the disciplinary proceedings initiated by that allegation encroach upon the exclusive jurisdiction of the federal government over criminal law. A complaint of professional misconduct or conduct unbecoming a barrister and solicitor that is caste in such a way as to avoid framing the proceedings as a breach of a statute enacted under the exclusive authority of Parliament would not be vulnerable to the same determination. Convocation makes no comment on whether the conduct disclosed in the report of the Discipline Committee could be the subject of such a complaint.

Dated at Toronto this 14th day of July, 1998

Gavin MacKenzie

W.D.T. Carter

Robert Topp

D194/93

THE LAW SOCIETY OF UPPER CANADA

In the matter of The Law Society Act and in the matter of	]	
	]	Michael Brown and Janet Brooks for the Society
William D. Gray	]	
of the City of Toronto	]	
	]	Roger Smith for the Solicitor
a Barrister and Solicitor.	]	Heard: December 12, 1995.

REASONS OF CONVOCATION

I. BACKGROUND

1. On August 12, 1993, Complaint No. D194/93 was issued against William Donald Gray alleging that he was guilty of professional misconduct.

2. The Complaint was heard before a Discipline Committee (the "Committee") on April 18 and 19, 1994. The Committee heard *viva voce* evidence from five witnesses including the Solicitor. Two document books were put into evidence. The Solicitor was represented by counsel. The Reasons of the Committee were released on June 15, 1994. The Solicitor was found guilty of professional misconduct with respect to the following particulars:

a) He failed to serve his client, Gladys Castro, in a conscientious, diligent and efficient manner in respect of matrimonial proceedings for which he was first retained in October, 1986;

b) In February, 1990, he divulged confidential information relating to his client, Gladys Castro, without her authority, to opposing counsel in matrimonial proceedings.

3. The Committee accepted the joint submission of counsel that the Solicitor be suspended for a period of 60 days and pay $2,000.00 in costs to the Society.

4. Convocation adopted the report of the Committee and accepted the joint recommendation and ordered the suspension commence on February 1, 1996.

5. At the opening of the proceedings before Convocation, the Solicitor requested that the matter be adjourned sine die, to wait the outcome of pending civil litigation between the Solicitor and his former client. The same request had been made by the Solicitor at the Convocation held in September, 1995 and had been denied. Convocation refused to reopen the decision that the matter not be adjourned pending the outcome of the civil action between the Solicitor and his former client.

6. The Solicitor also raised an issue of bias in that the Bencher who authorized the subject complaint had sat on a previous discipline matter involving the Solicitor. The Solicitor also raised the bias issue with regard to one of the members of the Committee who had sat on both discipline matters. Convocation took no formal vote on the issue of bias, the consensus being that there was no merit to the argument.

II. FACTS GIVING RISE TO THE COMPLAINT

7. The facts giving rise to this Complaint are set out in the Decision of the Committee. Set out below are the Findings of the Committee.

Finding

> The misconduct allegations against the Solicitor were strenuously and aggressively defended during the course of a two day hearing before the Committee. Particular 2(a) arose out of the representation provided by the Solicitor to Gladys Castro during the course of interim support proceedings brought by her husband, Jose Castro. Particular 2(b) arises out of actions taken by the Solicitor when responding to the complaint made to the Law Society which resulted in the allegation of professional misconduct contained in paragraph 2(a).

The findings of the Committee are based to a significant degree on credibility assessments on the evidence of Ms. Castro and the Solicitor. For the reasons set out in this decision, we generally accepted the evidence of Gladys Castro, and where it conflicted, rejected the evidence of the Solicitor. We found the Solicitor's evidence on important issues to be evasive, inconsistent and generally not worthy of belief.

Failure to Serve Client

The Solicitor's position, as expressed by his counsel Mr. Smith at the outset of these proceedings is that Mr. Gray was following his client's instructions to the letter throughout the handling of her matrimonial matters and that her instructions on occasion were given contrary to his advice. Mr. Smith described Mrs. Castro as the author of her own misfortunes.

We did not find that the evidence supported the Solicitor's position. We do not propose to review all of the evidence or all of the failings of the Solicitor but we will touch on the ones we find most significant in establishing that the Solicitor failed to serve his client in a conscientious, diligent and efficient manner.

Gladys Castro was married in Chile in 1969. She moved to Canada in September 1974 and at the times relevant to these matters was operating a janitorial service business in Toronto. Ms. Castro testified that she first went to see Mr. Gray concerning her business matters in 1984, and that she consulted with Mr. Gray concerning her matrimonial problems in 1986. She testified that it was on Mr. Gray's advice that she signed a document in English and Spanish, entitled (in English) Affidavit. The Affidavit is attached as Exhibit "A" to these reasons. The purported effect of this document was to transfer the condominium apartment in Chile to Mr. Castro in exchange for Ms. Castro receiving Mr. Castro's "rights and services he has with company Hi Rise Janitorial Services Limited". Mr. Gray testified that he was not retained by Ms. Castro in October of 1986 concerning her matrimonial problems and that he was not consulted regarding the Affidavit (Exhibit "A"). Mr. Gray's evidence was that he first met Ms. Castro in November of 1987 three or four days before he did her affidavit in response to an interim motion for support brought by her husband.

The Committee was not persuaded on a balance of probabilities that Ms. Castro had consulted Mr. Gray prior to the time that the Affidavit (Exhibit "A") was prepared. The Committee however rejects Mr. Gray's testimony that he was first consulted by Mrs. Castro in regard to her matrimonial problems in the latter part of November of 1987. The Solicitor at page 5 of his letter to the Law Society on February 13, 1990 stated as follows:

(h) It should be noted that several lawyers contacted the writer prior to Mr. Peterson; it was Mr. Peterson who actually commenced court proceedings on behalf of Mr. Castro in the month of November 1987.

As well the following appears in the transcript of December 18, 1987 when Ms. Castro was cross-examined on her affidavit sworn November 26, 1987.

By Mr. Peterson (Counsel for Mr. Castro)

Q. Okay, my last question before I leave this topic is this (Affidavit, Exhibit "A") was signed by Mrs. Castro and Mr. Castro. Does Mr. Castro at any time have independent legal counsel when this contract was entered into?

Mr. Gray:

A. I'm not aware whether he did or not. There's been so many different lawyers.

Transcript, Cross-Examination held December 18, 1987, p. 4, II.9-13
Tab 4, Document Book, Particular (a)

On the 21st day of December, 1988 Mr. Justice Eberle ordered Ms. Castro to produce a number of documents concerning Hi Rise Janitorial Services Ltd. Mr. Justice Eberle's order contains the following paragraph:

> 2. This Court orders that the solicitor for the Applicant is prohibited from disclosing to the Applicant, Jose Emilio Castro, or any other person except Jack Marmer, C. A., any information that may reveal the names, addresses or phone numbers of the clients of Hi Rise Janitorial Services Ltd.

Ms. Castro testified that she had no meeting with Mr. Gray prior to the cross-examination on her affidavit for the motion for interim support. She said Mr. Gray told her to say I don't know and that Mr. Gray would answer for her. Mr. Gray did not examine her husband on his affidavit. Ms. Castro testified that several times she asked what the proceedings would cost. She testified that Mr. Gray said don't worry don't worry. She never gave any money to Mr. Gray and even on Mr. Gray's testimony there was no financial arrangement made between the Solicitor and Ms. Castro. Ms. Castro did not attend the motion before Master Peppiatt.

The motion for interim support came on before Master Peppiatt on the 25th day of March, 1988. Master Peppiatt's endorsement is as follows:

> The Applicant is in need of financial assistance if he is to obtain separate accommodation. The parties agree that he should leave the matrimonial home and indeed the Respondent has threatened "to make arrangements to have him removed". His proposed expenses are reasonable although I have deducted the items for vacation, gifts and support of his brother which are not the responsibility of the Respondent. I have also taken into account the (word indecipherable) allegation that his income was reduced by reason of a few months vacation and I have attributed to him an income of $30,000.00 per annum.
>
> I am satisfied that the Respondent has the ability to pay. She and her counsel have taken the position that they have no obligation to place before me any information as to her true financial situation. Mr. Gray says the order of Eberle J prevents the Master from being given such information, a position which I charitably describe as ridiculous.
>
> I therefore draw the inference that the Respondent has substantial income. There will be an order for interim support of $2,500.00 on April 1, 1989 and $1,800.00 on the first day of each succeeding month.

> It is apparent that Applicant will need professional assistance in valuing the business and will likely encounter obstacles. I therefore order a payment of $2,000.00 to Marmer & Penner for this purpose with leave to apply further.

On the day of the motion the Solicitor sent to Ms. Castro a short letter explaining what had occurred before Master Peppiatt. That letter, dated March 25, 1988 is attached as Exhibit "B" to the Committee report. The final paragraph of that letter is as follows:

> Obviously the Master has made an error in awarding spousal support to your husband as well as ordering interim disbursements in view of the fact that you are deeply indebted. You will have to appeal this matter; or in the alterative wait until your husband tried [sic] to enforce the Master's interim order. At that time you will be able to establish inability to pay.

Ms. Castro testified that she called Mr. Gray after receiving that letter and that Mr. Gray suggested that she wait until the motion to enforce the support order. We find the advice given to Ms. Castro at this time was wholly inadequate. At a minimum she should have been advised that in addition to a motion to enforce the support order, her husband could enforce the order against her house and against her interest in Hi Rise Janitorial Services Ltd. The Solicitor should have clearly instructed Ms. Castro in regard to the necessity of appealing Master Peppiatt's order and at a minimum should have obtained instructions, preferably in writing, from Ms. Castro that she did not wish to appeal Master Peppiatt's order.

Mr. Castro sought enforcement of the order of Master Peppiatt in the family court. Show cause proceedings were commenced by service of a motion on Ms. Castro on June 7, 1988. The motion was heard before His Honour Judge James on July 12, 1988. Ms. Castro testified that she received a call from the Solicitor two or three days before the hearing before Judge James. The Solicitor told her to bring her house bills and to meet him at his office in order that he might photocopy the bills. She testified that she did not bring her personal tax return and offered to arrange to have it brought from her office. She testified that Mr. Gray said that would not be necessary. She testified that she had no discussion with Mr. Gray about what might happen at the hearing. Mr. Gray said "I will be with you and don't worry".

Mr. Gray's evidence on these points is that he explained to Ms. Castro on June 14 what the application was about. He explained to her that the final outcome could be jail but that that was highly unlikely. He testified that prior to July 12 his view was that you would never go to jail on a show cause hearing if you were a woman, that there were many other steps that would have to be taken. He testified that he first heard about the missing tax return was when Ms. Castro was on the stand. Later in his testimony Mr. Gray said that he was not aware her 1987 tax return had been prepared when she was on the stand at the show cause hearing. That evidence was contradicted by reference to page 6 of the Solicitor's letter to the Law Society dated February 13, 1990. In that letter Mr. Gray wrote concerning preparing Ms. Castro for the show cause hearing:

> She was also to bring with her a copy of her 1987 Income Tax Return, which she said she had at home. The writer is not able to ascertain whether Mrs. Castro deliberate [sic] or inadvertently left her copy of her 1987 Income Tax Return at [sic] prior to coming to the family court on the; 2th [sic] day of July, 1988. He never told her not to worry about having this tax return before the court.

To put it mildly the show cause hearing did not go well for Ms. Castro. The transcript of that show cause hearing was before the Committee. The following are the oral reasons of His Honour Judge James:

> Master Peppiatt made an order on March 28. There has been no appeal of the order, there has been no review of the order. The order obligates Gladys Castro, the Respondent, to make payments of $1,800.00 on the first day of each month, beginning with a payment of $2,500.00 on April 1, 1988, and $2,000.00 on account of an interim disbursement payable forthwith.
>
> The total arrears as of this date are $9,900.00
>
> Mrs. Castro gave her evidence. I am satisfied that the $700.00 payment from her husband to her is on account of his use of the home and for food. It is not a support payment. If it were a support payment, it would certainly confuse the issues. I am convinced that it isn't. I am also convinced that there is nothing different in the income flow from her business since the 25th of March, 1988 then for the period - I gather from the financial statement relative to her fiscal period - December 31, 1987. She has given me no reason to believe that since the date of Master Peppiatt's order she has fallen on poor financial times relative to her company.
>
> I will enforce the order against her. The total amount to enforce is $9,900.00. I commit her to jail for 30 days, unless the sum, or sums totalling $9,900.00 are paid to this Court.

Ms. Castro testified that that was her first notice that the $9,900.00 had to be paid.

The transcript of the hearing before Judge James continues as follows:

Mr. Gray:	Is she allowed a time frame on that?
The Court:	Well ...
Mr. Peterson:	Your Honour, the time frame here has been ... this has been going on since November, and not one dime has been advanced. Unless my friend is willing to negotiate some sort of advance payment for Mr. Castro to get out of that house, I really must protest anything beyond five days.
The Court:	Relative to the opportunities that she would have had and the fact that today's order should have come as no surprise to her, in these circumstances I am prepared - to give her time provided that within that time she undertakes in a clear and unequivocal manner to pay the amount, otherwise the order is forthwith.
Mr. Gray:	I can't give that undertaking on behalf of my client.
Mr. Peterson:	Sorry, Your Honour, I am a little hard of hearing.

Mr. Gray: I cannot give that undertaking on behalf of my client.
Mr. Peterson: You cannot give the undertaking?
Mr. Gray: I cannot give that undertaking on behalf of my client.
The Court: I heard you correctly.
Mr. Gray: Yes.
The Court: The order is forthwith.

Ms. Castro was taken by a guard to a room on the second floor. The Solicitor came to her and asked her whether she would authorize him to publicize her situation on television and newspapers. Ms. Castro was handcuffed, put in a van and transported to the jail. She was sick and taken to the health facility at the jail. She was fingerprinted, photographed, her clothes were taken and she was put in a cell with three other women, a prostitute, an illegal immigrant and a woman convicted of assault. She spoke to Mr. Gray on the phone and he said he could do nothing for her until the following week. Her family tried to get her another lawyer.

At this point Mr. Gray appears to have done rather efficient work on behalf of Ms. Castro. He obtained an ex parte order from Mr. Justice Potts on the 14th of July and Ms. Castro was released from custody on the 15th of July, 1988. The order of Mr. Justice Potts required Ms. Castro to proceed with her appeal of the order of Judge James and that such appeal be pursued with all due diligence. The Notice of Appeal filed by Mr. Gray on behalf of Ms. Castro is dated the 21st day of July, 1988.

After Ms. Castro came out of jail she did not go home, where her husband was still living. Mr. Gray attempted before Mr. Justice Walsh to get the husband excluded from the home but was unsuccessful in that application.

Ms. Castro sought out another lawyer, Ernest Singer, to assist her with her matrimonial problems. Mr. Singer agreed to attempt to negotiate a resolution of her difficulties but he declined to go on the record as her solicitor for the appeal from the order of Judge James.

The Solicitor did not pursue the appeal with due diligence nor did he take steps to be removed as solicitor of record.

Mr. Peterson, the solicitor for Mr. Castro, served Mr. Gray with a motion returnable on the 2nd day of February, 1989 to dismiss the appeal. In response to that motion Mr. Gray filed the transcript of the show cause hearing with the court and on January 24 wrote to Mr. Peterson and advised him that the transcript had been filed. In his letter Mr. Gray included the following paragraph:

> Note that you have set down a Motion returnable on the 2nd day of February, 1989; if you would telephone Mary Smith (Ms.) at 965-0580 and inform her that the motion is to be withdrawn the matter will proceed in the ordinary course.

Concerning the motion to dismiss the appeal of the order of His Honour Judge James, Mr. Gray testified that he was served with the motion on January 19, 1989. His recollection was that he phoned Mr. Peterson asking for an adjournment. He testified he phoned Mr. Singer on January 20 and left a message. He took no other steps to notify Mr. Singer or Ms. Castro of the pending motion to dismiss the appeal. Mr. Gray testified that he was not concerned about the motion to strike the appeal. There were other files he was looking after. It was not his file after September 1989. He didn't know specifically why he did not attend on the motion that day. He must have had serious other commitments. Mr. Gray was not able to attend on the motion but sent another solicitor, who had been practising for nine years, to appear on the motion.

The court endorsement on the motion heard February 2, 1989 is as follows:

> In my view, the Respondent has disobeyed the order of Potts J. There has been no attempt to pursue the appeal with due diligence. The materials filed on the appeal, other than the Notice itself, were only filed in response to this motion. It has taken court orders to move the Applicant's case forward at every step. I find this to be contemptuous behaviour. The appeal is dismissed pursuant to Rule 61.12. A warrant is to issue for the Respondent.

On February 2, 1989 Mr. Singer was out of the country. He left for Florida on January 31. On February 2 his office became aware of the order dismissing the appeal. Mr. Singer had a discussion with his partner and his partner sent Ms. Castro's file, and Ms. Castro, to another solicitor, Esther Lenkinski.

We wish to make one last comment concerning Mr. Gray's evidence.

In his testimony before us, Mr. Gray said he did not go to the jail to meet with Ms. Castro when he was preparing the material to have her released after the warrant issued by Judge James. That evidence was in accord with the evidence of Ms. Castro.

However at page 7 of Mr. Gray's letter to the Law Society he stated the following:

> The writer met with Mrs. Castro at Metro West Detention Centre to have her go over the material that would be used in an ex parte Motion in the Supreme Court of Ontario so as to secure her release form [sic] Jail.

It was Mr. Gray's position that all of the delay tactics, refusal to cooperate with the court, refusal to pay money, refusal to provide information, was done on the express instructions of Ms. Castro, and that she understood the process and potential consequences of the course of conduct that she was following. Mr. Gray was asked whether he had written instructions to that effect. He responded that he never took written instructions from a client. We do not accept his evidence that he was instructed in the manner that he testified to. We would expect that a competent solicitor, in attempting to carry out such instructions, fraught with danger, would have clear explicit written instructions from the client for the solicitor's protection.

These days we frequently hear of obscenely high fees in matrimonial matters, fees for clients of modest means exceeding $100,000.00. It is interesting to note that when the file was turned over to Esther Lenkinski the total fee charged by Mr. Gray including disbursements was $1,000.00. At no time had he discussed the cost of his services nor had he received a financial retainer from Ms. Castro. One wonders how he continues to operate his practice.

We have no difficulty in finding that the Solicitor failed to serve his client, Gladys Castro, in a conscientious, diligent and efficient manner in respect of her matrimonial proceedings.

Divulging Confidential Information

A letter of complaint concerning the conduct of the Solicitor was sent to the Law Society by Catherine Binhammer of Fasken, Campbell, Godfrey on the 15th of December, 1989. The Society forwarded that letter to the Solicitor and by letter dated February 13, 1990 he replied to the Society. The Solicitor's letter is attached as Exhibit "C".

Mr. Gray sent a copy of his nine page reply to the Society to Edmund Peterson, the solicitor for Mr. Castro. The Solicitor's letter to the Society contains a great deal of information concerning his client, none of which should have gone to Mr. Peterson. Mr. Peterson was called as a witness on behalf of the Solicitor. Mr. Peterson confirmed that there were a number of things in the letter to the Society that he was not aware of prior to reading the Solicitor's letter to the Society.

The Solicitor testified he sent the letter to Mr. Peterson because Mr. Peterson was his best witness. We find that explanation hard to believe. Judging by the lack of remorse for what befell his client, and judging by the Solicitor's attitude toward his ex-client as exhibited at this hearing, we believe we are being charitable to the Solicitor to regard his actions in sending his letter to Mr. Peterson as an oversight of his obligation to maintain solicitor/client privilege concerning information received from his client.

We find that the Solicitor, in February 1990, divulged confidential information relating to his client Gladys Castro without her authority to opposing counsel in matrimonial proceedings.

Prior Discipline

In 1984 the Solicitor was reprimanded in Committee on an allegation of professional misconduct that he failed to answer and to produce the material and information requested in the letter sent by the Law Society Audit Department.

In November of 1989 the Solicitor was suspended for a period of 60 days by Convocation on five separate counts of professional misconduct: (a) failing to reply to correspondence from the Law Society regarding a complaint made against him by another solicitor; (b) breaching his written undertaking to the Society concerning co-signing controls on his trust account, failing to deposit all trust monies into the trust

account, and maintaining another trust account in a different financial institution unknown to the Society; (c) breaching the written undertaking to other solicitors to hold the sum of $1,000.00 in trust; (d) failing to honour an agreement to protect fees of another solicitor, the agreement having been made to allow the transfer of files of a client; (e) failing to maintain books and records as required by the regulation made pursuant to the Law Society Act.

III. REASONS AND CONCLUSION OF CONVOCATION

8. When this matter was decided by Convocation, the policy of Convocation with respect to the findings of fact and recommendations as to penalty made by Discipline Committees was as follows:

> A Discipline Committee's findings of fact and recommendations as to penalty should be accepted by Convocation unless:
>
> a) The Discipline Committee made an error in principle;
>
> b) The Discipline Committee's finding on recommendations as to penalty is manifestly wrong; or
>
> c) The Discipline Committee lacked jurisdiction.

9. In the opinion of Convocation, the Committee made no error with respect to its findings of professional misconduct nor in its adoption of the joint submission as to penalty.

10. The Committee made findings as to credibility. These findings were open to the Committee to make on the evidence before it. The Committee had the opportunity to see and hear the witnesses; Convocation did not have that opportunity. Convocation was not going to re-try the issue of credibility.

11. The Solicitor's position before the Committee and before Convocation was that the Solicitor had been instructed by his former client to refuse to provide financial information and to not pay her husband under any circumstances. The Committee rejected this position on the evidence before it. It was open to the Committee to reject that position and find that the Solicitor had not been so instructed. We agree with the findings of the Committee on this issue.

12. This was a matrimonial proceeding in which the husband was seeking interim support. The financial position of the parties including the Solicitor's client was key to the determination of the issue of support on the motion before Master Peppiatt. As noted above in the reasons of the Committee, on December 21, 1988, Mr. Justice Eberle ordered the Solicitor's client to provide to the solicitor for the husband certain financial information requested by him. Paragraph numbered 2 of the Order provided that the husband's solicitor could not disclose the financial information to the husband or anyone else except the accountant retained on behalf of the husband. The formal Order stated as follows:

> 2. This Court orders that the solicitor for the Applicant is prohibited from disclosing to the Applicant, Jose Emilio Castro, or any other person except Jack Marmer, C.A., any information that may reveal the names, addresses or phone numbers of the clients of Hi Rise Janitorial Services Ltd.

The Solicitor took the position that this Order prevented him from providing any financial information to Master Peppiatt on the motion for support before him.

13. As noted above, Master Peppiatt said that Solicitor's position was "a position which I charitably described as ridiculous". We do not understand how the Solicitor could have taken that position under any circumstances.

14. Because there was no material before him as to the client's financial position, Master Peppiatt made an Order dated March 25, 1988 providing for interim support and interim disbursements in favour of the husband.

15. The Solicitor, after this Order was made, did not tell to the client that she had to appeal the Order awarding spousal support and interim disbursements if she wished to challenge it. He stated as follows in his letter to her dated March 25, 1988:

> You will have to appeal this matter; or in the alternative wait until your husband tried [sic] to enforce the Master's interim Order. At that time you will be able to establish inability to pay.

16. Again, how a solicitor serving his client conscientiously could make the statement that the client could wait until her husband tried to enforce the Order to raise the issue of her ability to pay is beyond us. It is simply another example of the Solicitor's failure to serve his client.

17. Again, when the client's former husband sought to enforce the Order of Master Peppiatt, the Solicitor, in our view, seriously let down his client. The Solicitor did not meet with the client and prepare her for the show cause hearing. The client offered to arrange to have her personal income tax returns brought from her office. The client testified before the Committee that the Solicitor told her that that was not necessary.

18. At the show cause hearing on July 12, 1988, His Honour Judge James made an Order enforcing Master Peppiatt's Order. As noted above, the Solicitor asked for some time for his client to pay the arrears of $9,900.00. The solicitor for the husband did not object to the client having five days to arrange for payment. The Court was prepared to give the client time to pay provided that she undertook in a clear and unequivocal manner to pay the amount in the Order forthwith. The Solicitor immediately said "I can't give that undertaking on behalf of my client". The Solicitor did not seek some time to speak to his client to ascertain whether she would give the undertaking to pay the money within five days in order to avoid going to jail. He simply said he could not give the undertaking on her behalf. The Solicitor should have made the request to the Court to allow him a few minutes to speak to his client to obtain instructions.

19. While the Solicitor was able to have his client released from jail quickly, if the Solicitor had acted in a "conscientious, diligent and efficient manner", the client would not have been in jail in the first place.

20. The Solicitor's laissez faire attitude towards this matter continued with respect to the appeal from the Order of His Honour Judge James. As noted in the Committee's reasons:

> Concerning the motion to dismiss the appeal of the Order of His Honour Judge James, Mr. Gray testified that he was served with the motion on January 19, 1989. His recollection was that he phoned Mr. Peterson asking for an adjournment. He testified he phoned Mr. Singer on January 20 and left a message. He took no other steps to notify Mr. Singer or Ms. Castro of the pending motion to dismiss the appeal. Mr. Gray testified that he was not concerned about the motion to strike the appeal. There were other files he was looking after. It was not his file after September, 1989. He didn't know specifically why he did not attend on the motion that day. He must have had serious other commitments. Mr. Gray was not able to attend on the motion but sent another solicitor, who had been practising for 9 years to appear on that motion.

21. On February 2, 1989, the appeal was dismissed for delay. A warrant was directed to be issued for the client.

22. While Mr. Gray sent a bill for $1,000.00, the Committee found that the Solicitor had never discussed the cost of his services nor had he received a financial retainer from the client. Given the "service" provided by the Solicitor to the client, it is difficult to understand why any account was sent.

23. It is clear that the Solicitor failed to serve his client in a "conscientious, diligent and efficient manner in respect of her matrimonial proceedings". As noted above, it was open to the Committee to make the findings that it did. There is no basis to interfere with those findings.

24. With respect to the finding on particular 2(b) that the Solicitor had divulged confidential information, the finding of the Committee was clearly right. The Solicitor was clearly wrong to send a copy of his letter dated February 13, 1990 to the Society responding to the client's complaint to the solicitor for the husband.

25. The Solicitor clearly did not meet the requirements of Rule 2, Competence and Quality of Service, and his failure to do so had a serious impact on his client.

Date: September 8, 1998.

W. A. Derry Millar

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CONVOCATION ROSE AT 4:25 P.M.

Confirmed in Convocation this 23 day of October , 1998

Harvey T. Strosberg

Treasurer