MINUTES OF CONVOCATION

Thursday, 21st March, 2002
9:00 a.m.

PRESENT:

The Treasurer (Vern Krishna, Q.C., FCGA), Aaron, Arnup, Banack, Bindman, Braithwaite, Campion, Carey, Carpenter-Gunn, Chahbar (by telephone), Coffey, Copeland, Crowe, Diamond, Divinsky, E. Ducharme, T. Ducharme, Feinstein, Finkelstein, Go, Gottlieb, Hunter, Lamont, Laskin, MacKenzie, Marrocco, Martin, Millar, Minor, Mulligan, Murphy, Murray, O'Brien, Ortved, Pilkington, Porter, Potter, Puccini, Robins, Ruby, Simpson, Swaye, Wardlaw, White and Wright.

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The reporter was sworn.

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TREASURER'S REMARKS

The Treasurer thanked all the staff that participated in organizing the Call to the Bar ceremonies held in February. A list of the staff involved was distributed to Convocation and the names are as follows:

Toronto Staff

Ann-Marie Darlington, Betty De Bartolo, Candida Stensrud, Cathy Ouellet, Cheridan Eygelaar, Cindy Pinkus, Debbie Bryan, Deidr9 Rowe Brown, Elizabeth Covino-Biljak, Ellie Rosen, Ian Lebane, Junalin Gavina, June Gavina, Kanae Li, Leah Daniels, Maria Roy, Michelle Pacheco, Nancy Martin, Nathan Robichaud, Patricia Gyulay, Robert Ralph, Roger Fisher, Roman Woloszczuk, Sean Hoornweg, and Susan Lieberman.

London Staff

Carolyn Hoare and Kate Virtue.

Ottawa Staff

Chantal Ladouceur, Dagmar Janssen, Diane Van Bergen, Monique Guibord, Annie Lafleur, Brigitte Rochon and Natalie Michaud.

The Treasurer advised that Mr. Ross Murray would be stepping down as Chair of LPIC at the Annual Meeting. The Treasurer thanked Mr. Murray who has served as Chair of LPIC for 5 years.

The Treasurer noted with sadness the recent passing of The Honourable Willard Z. Estey at the age of 82. Justice Estey had a very eclectic and wide career in the law. He was a corporate lawyer. He was chief adviser to conglomerates such as Gulf and Western. He was a leading litigator and worked in aboriginal law. He was a former Bencher and a Doctor of Laws degree was conferred upon him. Justice Estey was appointed to the Ontario Court of Appeal in 1973, Chief Justice of High Court, Supreme Court of Ontario in 1975, Chief Justice of Ontario in 1976 and Justice of the Supreme Court of Canada from 1977 to 1988.

The Treasurer described Justice Estey as a very distinguished jurist, a wonderful contributor to the legal profession, a wonderful family man and a great Canadian.

The Treasurer had extended condolences on behalf of Convocation to the family of Justice Estey and received an acknowledgment from them.

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Mr. Hunter rose on a matter of privilege to announce that Mr. David Scott, a former Bencher had been elected as President-elect of the American College of Trial Lawyers.

DIRECTORS, BAR ADMISSION REPORT

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Directors, Bar Admission ask 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 Thursday, March 21st, 2002:

Christine Louise Anderson	Bar Admission Course
Kuljit Kaur Bhamra	Bar Admission Course
Sze Mui Chung	Bar Admission Course
Andrew Cameron Styffe Crane	Bar Admission Course
Amit Dror	Bar Admission Course
Jason Anderson Evans	Bar Admission Course
Eleni Fotinos	Bar Admission Course
Sidoney Lee Howden	Bar Admission Course
Baljinder Singh Hundal	Bar Admission Course
Alan Harvey Jaffee	Bar Admission Course
Kathleen Anne Laverick	Bar Admission Course
Catherine Elizabeth Mathias	Bar Admission Course

Helen Nolan	Bar Admission Course
Shauna Jennette Pemberton	Bar Admission Course
Mario Ruggiero	Bar Admission Course
Daljeet S Saini	Bar Admission Course
Roger Simion Shallow	Bar Admission Course
Carrie Lynn Sheppard	Bar Admission Course
Michael Smith	Bar Admission Course
Lisa Ann Summers	Bar Admission Course
Sutheat Tim	Bar Admission Course
Lisa Marie Will	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 Thursday, March 21st, 2002:

Robert Michael Fabes	Province of British Columbia
David Philip Owen	Province of British Columbia

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

B.2.1. The following apply to be certified as supervised foreign legal consultants in Ontario:

Kavita Tankha	State of New York Hodgson Russ LLP
Robert Arthur Normandeau	State of New York Skadden, Arps, Slate, Meagher & Flom LLP

B.2.2. Their applications are complete and they have filed all necessary undertakings.

ALL OF WHICH is respectfully submitted

DATED this the 21st day of March, 2002

It was moved by Mr. E. Ducharme, seconded by Mr. Mulligan that the Directors, Bar Admission Report be adopted.

Carried

CALL TO THE BAR

The following candidates listed in the Directors, Bar Admission Report were presented to the Treasurer and called to the Bar. They were then presented by Mr. Lamont to Chief Justice Patrick J. LeSage to sign the Rolls and take the necessary oaths.

Christine Louise Anderson	Bar Admission Course
Kuljit Kaur Bhamra	Bar Admission Course
Sze Mui Chung	Bar Admission Course
Andrew Cameron Styffe Crane	Bar Admission Course
Amit Dror	Bar Admission Course
Jason Anderson Evans	Bar Admission Course
Eleni Fotinos	Bar Admission Course
Sidoney Lee Howden	Bar Admission Course
Baljinder Singh Hundal	Bar Admission Course
Alan Harvey Jaffee	Bar Admission Course
Kathleen Anne Laverick	Bar Admission Course
Catherine Elizabeth Mathias	Bar Admission Course
Helen Nolan	Bar Admission Course
Shauna Jennette Pemberton	Bar Admission Course
Mario Ruggiero	Bar Admission Course
Daljeet S. Saini	Bar Admission Course
Roger Simion Shallow	Bar Admission Course
Carrie Lynn Sheppard	Bar Admission Course
Michael Smith	Bar Admission Course
Lisa Ann Summers	Bar Admission Course
Sutheat Tim	Bar Admission Course
Lisa Marie Will	Bar Admission Course
Robert Michael Fabes	Transfer, Province of British Columbia
David Philip Owen	Transfer, Province of British Columbia

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The Treasurer announced that the Law Society Medal would be awarded to the following recipients:

Lincoln M. Alexander, P.C., O.C., Q.C., of Hamilton
David I. Bristow, Q.C. of Toronto
Harvey M. Haber, Q.C. of Toronto
Professor Hugh Lawford of Kingston
Marshall Crowe of Ottawa
John McCamus of Toronto
Dr. Julien Payne, Q.C., LL.D., F.R.S.C. of Ottawa

MOTION – Draft Minutes of Convocation

It was moved by Mr. Wright, seconded by Mr. Bindman that the Draft Minutes of Convocation of February 20th, 2002 be approved.

Carried

MOTION – Appointment to LPIC Board of Directors

THAT Donald White be appointed as a member to the LPIC Board of Directors.

Carried

MOTION – Appointment to Law Society Appeal Panel

It was moved by Mr. Wright, seconded by Mr. Bindman –

THAT, pursuant to section 49.29 of the *Law Society Act*,

(1) Frank Marrocco be removed from the Law Society Appeal Panel;

(2) Derry Millar be appointed to the Law Society Appeal Panel for a term beginning March 21, 2002 and ending May 21, 2003; and

(3) effective March 22, 2002, Derry Millar be appointed as chair of the Law Society Appeal Panel.

Carried

FINANCE & AUDIT COMMITTEE REPORT

Mr. Ruby presented the Finance & Audit Committee Report for approval by Convocation.

Finance and Audit Committee
March 21, 2002

Report to Convocation

Purpose of Report: Decision
Information

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

TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee ("the Committee") met on March 7, 2002. Committee members in attendance were: Ruby C. (c), Epstein S. (vc) Cass R., Chahbar A., Coffey A., Divinsky P., Pilkington M., Porter J., Swaye G., Topp R., White D., Wright B.. Bencher Wilson R. also participated by teleconference. Staff attending were Heins M., Tysall W., Strom M., Grady F., Cawse A..

The Committee is reporting on the following matters:

Decision

X Osgoode Hall Restoration

Information

X 2003 Budget Process, Operational Reviews

X Performance of Long Term Investments

X Reserve Policy

FOR DECISION

OSGOODE HALL RESTORATION
MAIN FLOOR RENOVATION

1. A memorandum detailing a request for the allocation of funds to expand the scope of renovations to the main floor, primarily the main reception and lobby areas, is attached (page 4) supported by background from the architect. The Committee noted that this was an integral part of our stewardship of the building.

   Convocation is requested to approve the allocation of funds for improvements to the lobby and reception area as set out in the attached memorandum.

FOR INFORMATION

2003 BUDGET PROCESS
OPERATIONAL REVIEWS

2. A selective system of operational reviews are an integral part of the 2003 Budget Process approved by Convocation in January 2002. The operational reviews will comprise examinations of program delivery, templates of evaluation and benchmarking to gain assurance that selected programs are achieving Convocation's mandate.

3. The programs recommended by Law Society senior management for operational review for the 2003 budget are the Customer Service Centre, the Lawyers Fund for Client Compensation, LibraryCo Inc and the Great Library. A memorandum setting out more details of the program reviews for these four programs is attached (page 9).

INVESTMENT PERFORMANCE

4. Ms. Lisa Caswell, a Principal at Perigee Investment Counsel discussed the performance of the Law Society's long term investments which are managed by Perigee. The Committee discussed the merits of having an independent review of the investment manager's performance. Staff will report back on the frequency of this review, who will carry it out and expected costs.

RESERVE POLICY

5. A discussion on the development of a reserve policy was commenced by the Committee including the merits of reserves and their appropriate quantum. This discussion will continue at the April Committee meeting when the financial statements and surplus are finalized, and allocation values will be determined more precisely. A policy recommendation will be placed before Convocation in May.

LAW SOCIETY OF UPPER CANADA

TO: Chair and Members of the Finance and Audit Committee

FROM: Wendy Tysall

DATE: March 8, 2002

SUBJECT: Main Floor Renovation

The main reception area renovation was budgeted in 2001 and only preliminary design work was undertaken. The budget established in 2001 was $160,000 and $13,717 was spent.

The scope of work originally contemplated for this project has been expanded to include renovations to the following: the stairway adjacent to the main entrance vestibule; the Client Service Centre; the Hall of Honour; the large open area adjacent to the Male Barristers' robing room; the main south hallway; the 2nd floor hallway of the Benchers' Wing and the Bencher Wing stairway from the attic to the basement.

The flooring, lighting and wall finishes for all areas are overdue for replacement and upgrading. In addition there are several accessibility issues to be addressed as part of this project. These include improved lighting and replacement of the main reception desk to provide for wheelchair accessibility. The work contemplated in the Client Service Centre will create a new complaints window and will also address accessibility issues that exist in its current configuration. The Law Society also provides wheelchair accessibility for the Provincial Court of Appeal.

E.RA. Architects Inc, a firm engaged for other LSUC restoration projects, has provided a detailed plan for the scope of the proposed main floor renovation. Attached is a letter from Scott Weir of E.R.A. elaborating upon their design approach and strategy to renovate and upgrade these areas while respecting the heritage aspects of Osgoode Hall. This project is a continuation of work that has included the bencher wing facade restoration, the bencher wing interior stabilization and restoration and the ongoing restoration of the historic perimeter fence. Upon approval to proceed, a competitive bid process will be undertaken to obtain the best possible pricing. Attached at Schedule B is a summary of the architects' estimated cost of the project totaling $493,000.

The carry forward budget from 2001 is approximately $146,000. The 2002 capital budget for projects funded from the Capital and Technology Fund, includes a contingency amount of $110,000, which could be utilized to fund this project. In addition, the $200,000 budget proposed for flooring/ceiling/walls was intended for work now within the scope of this project including flooring replacement on the 2nd floor of the Benchers' Wing, the main south hallway, the Hall of Honour and stairways in the main entrance and Benchers' Wing.

The remaining $37,000 could be funded from uncommitted monies available in the Capital and Technology fund. The balance of the fund at the end of 2001 is $2.492 million. With completion of the capital program approved for 2002 including additional funds required for this project, the uncommitted fund balance at the end of 2002 is estimated at $910,000. The balance will be available to fund future capital requirements of the Society.

The Committee is asked to recommend to Convocation that this project be approved as outlined in the report from E.R.A. and that funds be provided as follows:

2001 approved carry-forward	$146,000
2002 approved Capital Budget contingency	$110,000
2002 approved flooring/walls/ceiling	$200,000
Allocation from Capital and Technology Fund uncommitted balance	$37,000
Total funding	$493,000

LAW SOCIETY OF UPPER CANADA
DEPARTMENT OF FINANCE

TO: The Chair and Members of The Finance and Audit Committee

FROM: Wendy Tysall

DATE: February 28, 2002

SUBJECT: Programs proposed for operational review

Convocation adopted a 2003 budget process that included the selection of several Society programs to undergo an operational review as part of the annual budget process. This would involve a review of all programs over a three-year cycle. The Senior Management Team (SMT) of the Society has reviewed the Society's programs and is making the following recommendations. The three operational areas proposed for program review are:

- The Client Service Centre
- The Great Library (includes records management and archives) and County Libraries combined with the business plan for LibraryCo.
- The Lawyers Fund for Client Compensation

2002 Approved Departmental Budgets

Client Service Centre	$3,483,620
Great Library	2,831,050
LibraryCO	5,408,000
Lawyers Fund for Client Compensation	8,742,000

These programs combined represent approximately 42% of the Society's $1,618 fee in 2002.

The recent senior level changes to the Society's core regulatory functions, professional development and competence and potential changes to the Bar Admission Course prompted SMT to recommend these programs for operational review for the 2004 budget cycle. It was the opinion of the Senior Management Team that the process would be best suited to operational areas that have had some relative stability in the recent months and were visible services of the Society to its members and the public. The Senior Management Team believes the proposed program areas meet these criteria.

The operational review will comprise examinations of program delivery, templates of evaluation and benchmarking to gain assurance that selected programs are achieving Convocation's mandate. It is anticipated that the reviews will be undertaken over the next few months and presented to the Finance and Audit Committee in late spring.

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

(1) A copy of a letter from Scott Weir, E.R.A. Architects to the Law Society dated March 8, 2002.
(pages 6 - 7)

(2) A copy of Schedule B – "Scope of Work".
(page 8)

Re: Osgoode Hall Restoration

It was moved by Mr. Ruby, seconded by Mr. T. Ducharme that the Report be adopted.

Carried

Items for Information Only

2003 Budget Process, Operational Reviews
Performance of Long Term Investments
Reserve Policy

TASK FORCE ON THE CONTINUUM OF LEGAL EDUCATION REPORT

Mr. E. Ducharme introduced the Interim Report of the Task Force on the Continuum of Legal Education that would come back to Convocation in May for debate.

Dean Alison Harvison Young of Queen's University and President of the Council of Ontario Law Deans addressed Convocation.

Task Force on the Continuum of Legal Education
March 21, 2002

Interim Report to Convocation

Purpose of Report: Information and Discussion

Task Force Members

Edward Ducharme, Chair
George Hunter
Barbara Laskin
Gregory Mulligan
Niels Ortved

TABLE OF CONTENTS

EXECUTIVE SUMMARY AND REQUEST TO CONVOCATION

1. In July 2001, the Task Force on the Continuum of Legal Education received Convocation's approval to focus its initial efforts on that part of the continuum within the direct jurisdiction of the Law Society, namely, the period between law school graduation and the Call to the Bar. Our inquiry was not confined, however, to the Bar Admission Course and articling process. We understood that any thoughtful consideration of the post-law school, pre-call phase would require an understanding of what precedes and follows it. We thus took the King's advice to the White Rabbit to "begin at the beginning and go on till you come to the end: then stop." So we began by looking into the history of legal education in Ontario, and along the way we observed as well the many different approaches to licensing in other jurisdictions.

2. Although we have not yet "come to the end," we wish to present for Convocation's consideration an interim report that proposes a fundamental change in the way we currently ready candidates for their Call to the Bar. Our recommendations are based on two premises:

    a. that the licensing process currently in place at the Law Society of Upper Canada reflects a reality that dates back to (and, in some respects, pre-dates) the model of legal education instituted forty-five years ago; and

    b. that, since then, changes in the teaching and practice of law, as well as changes in society at large, have been so profound that it is not possible to render our system truly contemporary by continuing to tinker with it. Major reform is indicated.

3. The principal features of the reformed system we recommend are as follows:

a. The Law Society will no longer teach substantive law and procedure in the BAC. Instead, it will focus on its regulatory obligation to establish a licensing process that ensures candidates demonstrate pre-determined standards of competence and an understanding of professionalism, including ethics, in the practice of law.

b. Although the Law Society will no longer teach substantive law, it will continue to prepare and provide the Reference Materials for the subjects on which the candidates will be examined. The Reference Materials have a long tradition of excellence and are useful both for the purposes of the licensing examinations and, subsequently, in practice. These invaluable materials are developed with the cooperation of the bar and address important issues relevant to the practice of law. The current nexus between the Reference Materials and the examinations will continue so that candidates for admission will know what is expected of them in the examinations.

c. Licensing examinations, developed for the Law Society by professional educators, will test basic legal skills and analytical capabilities.

d. The Law Society will continue to teach professional responsibility as part of its many-pronged approach to nurturing the ethical values upon which the honour of the profession depends.

e. There will be greater flexibility built into the system, with licensing examinations and the professional responsibility course offered three times a year.

f. The Law Society will renew its commitment to the articling process and will seek ways to foster creative innovation, reinforce the mentorship aspect of articling and encourage collaboration among small or rural law firms to provide students with the opportunity for a meaningful articling experience.

g. The redesigned licensing process will continue to reflect the Society's firm commitment to the goal of improved access to, as well as equity and diversity within, the legal profession.

4. These are the essential elements of the proposed reform. The sections that follow elaborate on the rationale for each and offer an initial outline of how the new system will work. We have consulted in a preliminary fashion with the Law School Deans who support the direction and have expressed their willingness to assist as required in its development.

Request to Convocation

5. In Part VI of the report we ask that Convocation:

a. approve the Task Force's continued development of the direction set out in this report; and

b. permit the Task Force to seek input from legal organizations, law schools, BAC section heads and faculty and students on the direction set out in the report.

6. If Convocation approves this continued work by the Task Force, the Task Force proposes to return with its final report in June 2002.

INTRODUCTION

7. Forty-five years ago, in the winter of 1957, the benchers of the Law Society of Upper Canada approved an historic arrangement with the universities, the effect of which was to inaugurate a boldly new and different system of legal education in Ontario. Much of that system, once so fresh, remains with us still. A key feature of the agreement was that each participating university would provide a three-year Bachelor of Laws program containing twenty-three compulsory subjects.

8. By 1969, the number of law schools in Ontario had grown to its present total, six. In the same year, a Committee of Law Deans renegotiated with the Law Society the list of subjects enumerated as compulsory and reduced it from twenty-three to seven. The remaining subjects, augmented by conflict of laws and labour, were to be made available to the students within the three-year LL.B. program but students were no longer compelled to study them.

9. The seven compulsory subject were these:

   a. Civil Procedure;
   b. Constitutional Law of Canada;
   c. Contracts;
   d. Criminal Law and Procedure;
   e. Personal Property;
   f. Real Property; and
   g. Torts.

10. In 2002, the universities continue to provide three-year law degree programs, the students seeking entry to them must still complete a minimum two years of university undergraduate education, and the same seven courses remain compulsory.

11. Although much of the old system endures, much has changed, too. Over time, the law schools have provided more and more courses, usually as options, within which the emphasis is upon advocacy and the acquisition of practical skills, rather than upon substantive legal knowledge alone. The law schools have long maintained, of course, that their primary purpose is not to be a technical training school, but to educate students in the law and to demonstrate law's immutable connections to the basic problems confronting society. Still, as the information set out in Appendix 1 (skills taught in law schools) discloses, the law schools now provide numerous opportunities for students to learn the skills essential to the tasks performed by lawyers, skills such as interviewing, negotiating, legal research and writing, and trial advocacy.

12. It is trite to say, in 2002, that the profession is different, larger, and more diverse than it was in 1957. In all that time, however, the BAC has changed little in its essential character despite many reviews and reforms. For example, in June 1988, a sub-committee of the Legal Education Committee, chaired by James M. Spence, Q.C.,[1] delivered a report to Convocation entitled, "The Teaching Term of the Bar Admission Course: A Critical Assessment and Proposals for Change". One of the proposals for change was to shift the focus from the teaching of substantive and procedural concepts in the core areas of law to the teaching of skills and transactional learning. The BAC was later revised to provide for more skills-based instruction, but the teaching of substantive law and procedure continued much as in the past. Convocation later authorized several additional reviews, all of which are briefly summarized in Appendix 2 to this Report.

13. Convocation set us to our task nearly a year ago. During that time, we have studied and reflected upon the many modifications to the BAC in recent years, and the reasons for them. During that time, too, we have come to see that other forces are emerging, the long-term implications of which may well be life-altering for many in the profession, including those about to enter it.

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[1] now the Honourable Mr. Justice Spence of the Superior Court of Justice.

14. These new developments are many and varied. Computer and information technology have already transformed the way many lawyers practice. They have had and will continue to have an equal effect on how students study and learn. Indeed, technology-enhanced learning has progressed with such spectacular speed that medical students, for example, can now simulate surgical procedures interactively in courses delivered wholly on-line. At Queen's University a highly acclaimed M.B.A. program uses video-conferencing combined with residential classes and customized Intranet programs.

15. In our own profession, building upon initiatives undertaken first in the Inter-Jurisdictional Practice Protocol and then by the western provinces, a National Task Force on Mobility is poised to recommend seamless, full, and permanent mobility for all lawyers in the common law provinces, and perhaps also in Quebec. If this happens, and in the Task Force's view such change is inevitable, there will also be pressure to remove all remaining unnecessary barriers to a lawyer's Call to the Bar, irrespective of the province in which the individual achieved the law degree. Underlying the drive to increased mobility of lawyers is the developing consensus across Canada that it is in the public interest to remove all artificial or unnecessary barriers to practice and to affirm, as a matter of trust and faith, that each province's regulatory process is as good as any other.

16. In October, 1999, as part of the Law Society's Hockley Valley Retreat, Madam Justice Rosalie Abella of the Court of Appeal of Ontario shared with benchers her perspective on the state of the profession. She said that, in her view, there exists today, "a professional environment where the consensus about what it means to be a professional has broken down... ." She also asked whether or not the present BAC was the most reasonable and efficacious way to gauge the competency of a newly educated lawyer. She noted:

> In his masterful 1991 diagnostic study on how we teach lawyers to be professionals, Professor Brent Cotter reactivated the haunting and persistent refrain sung by decades of young lawyers -- why do we have articling and bar admission courses? Whose interests does this pedagogical gauntlet really serve? It has for too long survived the establishment of the university law schools whose absence was the original rationale for its existence. Is there really an evidentiary foundation for concluding that this is the most reasonable way for the Law Society to ensure that people entering the profession have the requisite educational arsenal of knowledge and skill?[2]

17. The Task Force posed these same questions, and in this interim report has outlined the framework of an answer.

PART I: THE LICENSING PROCESS

18. A defining feature of self-regulation in the legal and other professions is the licensing process, the process by and through which candidates for admission to the profession demonstrate that they have met pre-determined standards of competence. The licensing function is at the core of the Law Society's mandate to regulate the profession in the public interest.

19. Lawyers are called to the bar with an unrestricted right to practise in any area of law they choose, on the basis that they:

    a. are of good character;

    b. have demonstrated the knowledge, skills, and attitudes necessary to provide legal services; and

    c. understand and will apply their professional responsibility to provide services only in those areas in which they are competent.

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[2]From an address delivered to a bencher planning session on October 14, 1999 and reprinted in the *Ontario Lawyers Gazette*, November/December, 1999.

20. The Law Society addresses post-call competence in several ways including:

    a. the promulgation to the profession of a definition of the competent lawyer, now encoded in the Rules of Professional Conduct (Appendix 3);

    b. the creation and dissemination of professional development programs and materials to help lawyers maintain and enhance their competence and a recently introduced minimum expectation for professional development;

    c. the maintenance of a Specialist Certification program;

    d. the provision of Advisory Services to guide and assist lawyers with respect to the Rules of Professional Conduct and issues of practice management; and

    e. the enforcement of remedial or disciplinary provisions for those who do not provide competent service.

21. The question of competence in a profession is best understood contextually. No one reasonably expects a law school graduate or a person who has had a few weeks' study at a bar admission course to be a specialist. The lawyer's competence ought to be presumed to increase with time and experience. And the reality is that almost immediately upon their Call to the Bar, many lawyers begin to focus their practices upon a limited number of areas of law. Few hold themselves out as competent in all or even many areas.

22. In the life journey of the practising lawyer, the Call to the Bar is a single step. The Law Society's role at this moment is to ensure that the lawyer is competent to take that step. But an entire career lies ahead, and the lawyer is obliged to be competent all along the way. The definition of the "competent lawyer" in Rule 2 of the Rules of Professional Conduct requires focus on the lawyer at various points in his or her evolution as a professional.

23. The Law Society's regulatory objective with respect to the lawyer's competence at the time of the Call to the Bar can rightly be premised on the understanding that competence is not static, and that the lawyer's competence on the day of call will change and grow from the moment the lawyer begins to practice. The assessment of competence at call is a snapshot only, to be enhanced by post-call supports and regulatory structures and by the lawyer fulfilling the obligation to continue to update his or her skills and knowledge.

24. When the Law Society calls candidates for admission to the bar it should be satisfied that the candidates:

    a. are of good character;

    b. are educated in specified areas of substantive and procedural law and skills, as a result of law-school education;

    c. are appropriately experienced in explicitly defined skill areas by virtue of their law school and articling experiences;

    d. are knowledgeable, as demonstrated by examination, about the ethical rules they must follow and the standards of professionalism they are expected to uphold:

    e. have demonstrated, by examination, requisite levels of comprehension of substantive and procedural law, as well as analytical and other professional skills;

    f. are capable of serving the public within self-acknowledged skill limitations in accordance with the Rules of Professional Conduct;

g. have demonstrated, through examination, the requisite skills to manage a law office so as to properly serve the public and meet their obligations under the *Law Society Act*, By-laws and the appropriate provisions of the Rules of Professional Conduct with respect to financial and other responsibilities; and

h. are prepared and committed to undertake post-call education and study to maintain and enhance competence over time within their areas of practice.

25. The Law Society has traditionally assumed that it must teach knowledge and skills, then test the candidates in substantive law particularly to ensure that they possess the requisite competence levels for their Call to the Bar. Pre-call learning was once viewed as virtually the last opportunity for instilling knowledge and attitudes in a formal setting. Teaching at the bar admission level seemed to be essential to ensure that the captive audience represented by bar admission students "learned" what the profession considered essential for them to know. The Task Force believes that if this approach was once necessary, it no longer is so.

26. The framework of legal education and the profile of the legal profession and its needs have changed a great deal since the BAC was developed and implemented. Even today, the BAC continues to reflect the Law Society's longstanding determination to inculcate students, before their Call to the Bar, with the substantive law knowledge, skills and values they will need to practice law. But this approach is restrictive in the sense that the teaching is offered to the students once only, within a period of a few months, and under the pressure of having to write and pass eight examinations.

27. We believe that a better, broader approach to legal education is one founded on the notion, so central to the Law Society's competence mandate, that lawyers are first and foremost professionals and must commit themselves to career-long professional development and learning. Our proposal, far from abandoning the importance of legal education, seeks only to shift and widen the focus from pre-call competence to ongoing post-call competence and learning.

PART II: THE CHANGING LANDSCAPE OF LEGAL EDUCATION

28. The time has come for major reform of the BAC consistent with the Law Society's core mandate as regulator and licensor. In arriving at this perspective, we considered carefully the long history of legal education in the province (summarized in Appendix 4) and the many reforms of the bar admission course, especially since 1988 (Appendix 2).

29. As can be seen from Appendix 4, the Law Society's commitment to legal education arose out of the mandate it was given at its creation, when there was no other body to pass on legal knowledge and skills to new members of the profession. But the remarkable "New Deal" of 1957 meant that the old system, an apprenticeship system focused primarily upon articles, was about to give way to the new one that placed its emphasis upon formal education in a university setting. The BAC was born of this transition. But while the university-based legal education system has grown and changed significantly over decades, the Law Society has continued to make assumptions about what law schools teach (or do not teach) and about its own capacity to bridge the perceived gap in legal education in the two concentrated teaching phases of the BAC.

30. As the Task Force considered the issues raised in Appendix 2 (BAC reforms) we made the following observations, all relevant to the BAC's future:

a. For the Law Society, the 1957 arrangement signalled an end to the primacy of the apprenticeship system. It gave the universities primary responsibility for the students' formal legal education. In 1957, the arrangement was new and untested. Although the Law Society has reformed the BAC since then, particularly in 1990 in response to many of the recommendations in the Spence report, the fundamental rationale for the program has not changed.

b. When the BAC model was introduced, CLE was almost non-existent. A tradition of teaching substantive law grew out of a need to provide as much information as possible at the pre-call stage, because post-call learning was not so pervasive, specialized, and accessible as it is today.

c. By virtue of the particular evolution of formal legal education in Ontario, there exists in the profession an imperfect understanding of the legal education and training Canadian law schools provide and are capable of providing.

d. The substantive law portion of the BAC is premised upon a pedagogical approach of dubious value: the rapid-fire offering of specific subjects and examinations within a very short time. Despite many reforms to the BAC since 1988, students are still required to "cram". The learning skill or technique they are thus most likely to rely upon is memory more than, say, understanding and synthesis.

e. LPIC and Law Society complaints statistics show that the problems lawyers encounter do not stem primarily from substantive law deficiencies, but from practice management and client relationships issues. The necessity to re-teach substantive law at the BAC is not proven.

f. Law schools have greatly expanded the teaching of practical skills and have done so more thoroughly or intensively than is possible in the BAC. In many cases the skills taught in the law schools form part of the mandatory curriculum. Appendix 1 shows examples of the skills components of the curricula of the six Ontario law schools.

g. Adult learning principles of self-motivation and willingness to learn, upon which skills training is based, may be difficult to apply in a BAC setting where the Call to the Bar rather than learning for its own sake is the primary motivator.

h. The articling process, which candidates for Call to the Bar continue to regard as valuable, can be enriched by the Law Society being imaginatively open-minded to innovative or non-traditional approaches and by working to promote greater consistency and relevance of articles.

i. The overall legal education process (beginning with law school and continuing through the Call to the Bar) is still longer and more expensive than necessary.

j. The range of approaches to licensing that now exist make it unrealistic to suggest there is only one correct way to prepare candidates for the Call to the Bar and that it is necessary to "teach" at the licensing stage to ensure competence in practice.

k. Countless reforms to the BAC over the past dozen years all designed to "get it right" may point to the impossibility of doing so when the Law Society is also the licensor and regulator. Running a "school" and presiding over a licensing process may not be compatible goals.

31. These observations lead us to conclude that further "tinkering" with the current BAC model should stop and that a new model, one in keeping with the Law Society's core function as licensor and regulator, should take its place.

PART III: A NEW APPROACH

32. Law schools teach; the Law Society licenses. The Law Society is not well-suited to perform a primary teaching function, nor should it continue to try, given the sophisticated and internationally-recognized quality of legal education in our Ontario (and other Canadian) law schools.

33. For the most part, other provinces do not re-engage candidates, during the bar admission process, in the learning of general principles, procedures and substantive law. Much greater reliance is placed upon their law school experience in the achievement of knowledge and skills. Nova Scotia, for example, teaches no substantive law. It gives the candidates for admission the materials upon which they will be tested and sets and administers licensing examinations based upon these materials. The American bar admission process consists entirely of licensing examinations. Appendix 5 illustrates in summary fashion the American approach.

Post-Call Competence

34. The Task Force's views have to some extent been shaped and guided by the Law Society's new, increased commitment to supporting members in their efforts to maintain and enhance their competence, *post-call*. The Law Society is currently developing a number of initiatives that focus on the importance of lawyers' commitment to lifelong learning. The Competence Model approved by Convocation in March 2001 is a professional development model, the essential component of which is the professional's commitment to maintaining and enhancing competence throughout his or her career. Continuing legal education, practice tools and guidelines, focused practice reviews, and the specialist certification program all rest upon the same premise: that lawyers must never stop learning and must design or tailor that learning to their specific work or practice.

35. So, as we have noted earlier, the competence of a lawyer at the moment of call is like a snapshot, an arbitrary freezing in time, almost immediately replaced by a greater level of competence as the new lawyer gains experience and takes part in post-call education and learning. Bar admission is by no means the last, or even the best, opportunity to educate the profession. The Task Force believes that the Law Society's post-call approach to enhancing member competence is a much more effective stage at which to focus its efforts, particularly because members can customize their professional development efforts to those areas most relevant to their needs.

36. In pursuit of its efforts to enhance career-long learning and to make it as affordable and accessible as possible, the Law Society has begun to provide more electronic learning and to build partnerships for enhancing delivery of CLE throughout the province.

37. Still, the Task Force believes that the Law Society has a critical role to play in pre-call education in two areas:

    a. the acquisition and application of skills in the articling experience; and

    b. the inculcation of professional responsibility and practice management principles.

Articling

38. Articling provides a critical opportunity for candidates for admission to the bar to observe and participate in the practical application of skills, ethics and professional values, in a relatively low-risk environment. Because the candidate is under supervision, the public interest is protected while the learning process is advanced. This is superior to the American model in which no such apprenticeship exists, and in which many lawyers are admitted to the bar without ever having worked in a legal environment.

39. Law schools, as we have noted, have expanded their repertoire of skills courses and programs. Especially in the areas of legal writing, drafting and research, legal reasoning and analysis, problem-solving and advocacy, they provide critical education to virtually all students. This instruction provides a valuable introduction to students of the practice skills that will, in most cases, be the underpinning of the articling experience.

40. In articling there is a direct, practical and perceivable relationship between skills and their application. A well-run and supervised articling experience will effectively guide the candidate from theory to practice. Articling students build upon and begin to apply the substantive law knowledge and skills to which they are introduced in law school.

41. Despite admitted problems with the quality of some articles, articling students reveal time and again in surveys an appreciation of this feature of their pre-call experience. Appendix 6 contains the 2001 articling student survey. The acquisition and application of skills are essential components of a legal education and, in our view, should continue to be part of students' education prior to call. Once called to the Bar, lawyers are then expected to build upon this foundation, honing and expanding their knowledge and skills over time.

42. Having noted the importance of articling, we nonetheless believe there are ways in which the process can be improved and made more flexible, to better reflect the changing legal landscape and the increasingly varied nature of legal practice, including the following:

    a. *the pre-approval of joint articles*. Currently, although there is authority to approve a student changing articles in mid-stream, a process has not been developed to encourage and promote such an approach in appropriate circumstances. Pre-approval of joint articles would allow for the creative matching of different experiences. Moreover, in smaller centres where firms cannot take on the full-term commitment of a student they might be able to "share" students, making it possible for more students to work outside the large urban centres. Such an approach could also enhance the viability of mentoring across the province. Lawyers who specialize, or who practise in smaller or rural firms, could be encouraged to work conjointly so that their articling students are assured sufficient resources and variety of tasks to prepare them for the general practice of law;

    b. *the increased development of co-operative law degree programs, the same as or similar to those in existence at Queen's university*. There is a need to develop a policy governing approval of co-operative placements during law school as part of the articling requirement, but we are impressed with the value and relevance of such programs;

    c. *the development of optional CLE programs directed at articling students*. Even now there is an annual program, Excelling at Articles, offered by the OBA. We think that consideration should be given to expanding programs of this kind to provide students with additional supports and a wide range of reference tools they can apply both in their articling term and after. The Law Society could play an important role in the design and creation of such programs; examples of such an approach already exist in other provinces. The excellent example of the practitioners who devote so much of their time to the current teaching component of the BAC could be followed in the recruitment of teachers/mentors to help provide this service. Such programs will be particularly helpful for students working in smaller communities or for sole practitioners, where there may not be as much opportunity for hands-on supervision by their principal;

    d. *the provision of training for principals and mentors should they wish to avail themselves of the opportunity*. There are expectations placed on those who become principals, yet very little organized opportunity to develop the particular skills to be a successful mentor. More training in what is involved in being a mentor or a principal could enhance the articling process.

43. There are undoubtedly many other ways in which the articling experience can be made richer, for students and principals alike. The suggestions we have set out here are illustrative only and are intended to underscore our view that the practical apprenticeship phase of the licensing process can and should evolve to meet the changing reality of legal practice and experience. By introducing greater flexibility into the articling program, we believe that a greater number of students will benefit from the practical opportunities and experiences only articling can provide in the licensing process.

Professional Responsibility

44. The commitment to ethical action and professional responsibility in the public interest is the very foundation from which the legal profession draws its authority and strength. Without the constant nurturing of these values it would not be possible to continue to affirm the principles that justify self-regulation.

45. The Law Society's Role Statement provides, in part, as follows:

> *The Law Society of Upper Canada exists to govern the legal profession in the public interest by,*
>
> *ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence, and professional conduct; and*
>
> *upholding the independence, integrity and honour of the legal profession....*

46. The commentary to the Role Statement points out that many provisions of the *Law Society Act* arise from the Society's obligation to uphold integrity and honour, for example:

a. the requirement that candidates for admission be of good character;

b. the power to prepare and publish a code of professional conduct and ethics; and

c. the duty to investigate complaints regarding conduct and competence and, where necessary, to impose sanctions on members who fail to honour their obligations.

47. It is a core function of the Law Society to develop, approve and enforce Rules of Professional Conduct. As the profession's regulator, the Law Society's constant challenge is to ensure that its members uphold the integrity of the profession. When lawyers fail to adhere to the Rules, the Law Society is obligated to respond resolutely and decisively to protect the public.

48. The values of professionalism, ethics and integrity must begin to be taught immediately upon the student's entry into law school. Law schools have the first opportunity to engage the future lawyer in an analysis of the profession's ethical responsibilities and have long recognized the importance of their role in developing this aspect of professional values. Their involvement in the teaching of professional responsibility over the three years of law school is a critical phase in the development of ethical lawyers.

49. The issue of how best to deliver this aspect of legal education has been the subject of many internal law school discussions, internal Law Society discussions and discussions between the laws schools and the Law Society, and, indeed, it was the subject of a 1991 report by W. Brent Cotter entitled *Professional Responsibility Instruction in Canada: A Coordinated Curriculum for Legal Education*. The debate centres mostly around the question of whether professional responsibility ought to be taught as a "stand-alone", obligatory course in law school or integrated into all the substantive law courses and studied within the context of particular substantive law areas.

50. The Task Force believes that little will be accomplished in continuing this debate. It matters less to us how the law schools teach the subject of professional responsibility than that they do teach it. The teaching of professionalism and ethics should continue to be an important component within the three-year law degree program. Regardless, however, of how the law schools approach the teaching of professional responsibility, it remains essential for the Law Society to provide its own additional instruction as part of the post-law school licensing process. This is so because professionalism and ethics are the soul and centre of our profession, because every lawyer is accountable for and responsible to abide by the Rules of Professional Conduct, and because a breach of this obligation may result in the imposition of sanctions.

51. The Law Society's instruction should continue to emphasize those features of professional responsibility and practice management that are of particular concern to the Society including:

a. principles of self-governance;

b. a lawyer's duty to the public;

c. civility and professionalism;

d. identification and application of the Rules of Professional Conduct, with particular emphasis upon conflicts, confidentiality, ethical advocacy, and avoidance of discrimination and harassment; and

e. service to clients, including practice management.

A New Direction

52. Having regard, to the considerations discussed in this report, the Task Force has developed a proposed general framework for the Law Society's admission requirements, the main components of which are examinations and Reference Materials.

Examinations

53. For the reasons discussed above, the Law Society would no longer teach substantive law and procedure. The Law Society would teach one course in professional responsibility, ethics and practice management.

54. Candidates for admission to the bar would be required to write licensing examinations. The objective of the licensing examinations would be to assess basic legal skills and analytical capabilities.

55. The current approach of assessing separately eight substantive areas would be discontinued and replaced with the following:

a. a barrister's examination focusing on advocacy-related areas;
b. a solicitor's examination focusing on solicitor-related areas; and
c. a professional responsibility and practice management examination.

56. The Law Society would offer the professional responsibility and practice management course and the licensing examinations at three prescribed times during the year, so that candidates could sit for them before, during, or after articling. Licensing examinations would be developed and designed by professional educators either on staff at the Law Society or retained specifically for that purpose. The examination sitting preceding articling would be scheduled so as to permit a study period following completion of the three-year law degree program.

Reference Materials

57. Although the Law Society would no longer teach substantive law and procedure, it would continue to prepare and provide the Reference Materials for the subjects on which the candidates will be examined. The Reference Materials have a long tradition of excellence and are useful not only for the purposes of the licensing examinations but also for practice. These invaluable materials are developed with the cooperation and substantial assistance of members of the bar and address important issues relevant to the practice of law.

58. Currently, in the BAC, attendance is not mandatory. A significant proportion of the students already do not attend lectures or seminars and yet are able to successfully complete the current examinations. In our view, the success of students on the examinations, despite their non-attendance at lectures, is due in part to the fact that there is a direct link between the Reference Material content and the examination content, so that candidates for admission are not faced with unknown subject matter. In addition students are provided with sample questions and answers as guides to their study.

59. In the current BAC, the eight examinations are closely connected to the Reference Materials. The licensing examinations should continue to be based upon these materials. It is possible, of course, that if the Law Society stops teaching substantive law in the BAC, private corporations or schools similar to those in the United States may try to step in. We consider this unlikely so long as the Law Society continues to provide excellent Reference Materials and continues to test based upon those materials.

60. To further assist candidates in accessing Ontario-specific law and key statutes the Law Society would maintain an electronically accessible library. This resource could be enhanced by the inclusion of other materials addressing substantive and procedural law and skills, some of which could be authored and maintained with the assistance of organizations such as the Advocates Society and the OBA.

61. If the general framework described here is adopted as the Law Society's model for licensing, the bar admission process would consist of the following components:

a. graduation from an approved Canadian common law school, or approved equivalent;

b. successful completion of the articling requirement;

c. successful completion of the Law Society course on professional responsibility and practice management; and

d. successful completion of the Law Society licensing examinations.

PART IV: EQUITY IMPLICATIONS OF THE NEW APPROACH

62. In developing its approach to the licensing process the Task Force has paid particular attention to the Law Society's commitment to a legal profession that is representative of the diverse Ontario population. As the licensing authority for the province's lawyers, the Law Society must be committed to an admission process that is both reliable as a measure of entry-level competence and free of unreasonable barriers to admission for all groups in the profession, especially those candidates for admission from groups currently under-represented in the legal profession. In other words, the Law Society must demonstrate and be seen to demonstrate commitment to a reliable, fair, open, and equitable accreditation process.

63. The extent to which an accreditation process is open and accessible depends upon a number of factors, among the most important of which are:

a. the cost and duration of the admission process; and
b. the nature of the course content and examination system.

Cost and Duration of the Current Program

64. In our view, the cost and the duration of the current bar admission course can only be seen as an impediment to admission for a significant proportion of candidates, particularly those from groups under-represented in the legal profession. The costs to students of the BAC are substantial. Traditionally and currently, students who have secured jobs at large and even mid-size firms have their BAC tuition paid and are often paid a salary while taking the course.[3] For these students, the length of the course and its cost are irrelevant. The opposite is true, however, for those who are employed by small firms or who have not yet secured employment. In the Law Society's experience, candidates from groups traditionally under-represented in the profession tend to make up a disproportionately high percentage of this group. Moreover, the cost burden to candidates for admission is exacerbated by the spiraling costs of undergraduate and law school tuition.

[3]Whereas in the past the BAC took place after articling and students had often been asked to return for permanent employment with their firms upon Call to the Bar, most students now take the BAC before articling.

65. Although the number of locations in which the BAC is offered has increased, there are still students who must take jobs away from their homes and families, finding or maintaining accommodations away from their permanent residences. For those with family responsibilities and debt loads from law school this geographic reality adds a further burden. In addition, given that most students now take the BAC during the summer months, there are further implications for those with children who are out of school during this period.

66. The length of the process also creates lost opportunity costs that cannot be precisely calculated. For each month that a self-supporting candidate is not called to the bar and not working, the burden increases. As well, economic burdens create additional personal and family pressures that may have an impact on candidates' ability to complete the licensing requirements successfully.

67. The Law Society has recognized the economic pressures that some students face and has had a long history of bursaries and loans to assist. In 2001, Convocation created a fund of approximately $615,000 and paid $171,000 in grants to students. For the fiscal year 2002, Convocation approved the addition of $100,000 to the balance remaining in the fund. While it is to the Law Society's credit that it assists as it does, the degree of need has persuaded us of how important it is to assess whether the cost implications and duration of the course are necessary to ensure that those called to the bar demonstrate entry-level competence. It is our view that the gains afforded by the BAC are exceeded by the financial burdens the BAC imposes. Possible budget implications of the proposed model are discussed in Part V, below.

Nature of Course Content and Examination System

68. In 1997, the Law Society considered the steps it could take to address a disproportionately high failure rate among those candidates from groups traditionally under-represented in the legal profession. As a result of the analysis it introduced a whole host of support mechanisms to assist candidates in overcoming unreasonable barriers to their Call to the Bar. The Task Force considers that this is a proper and reasonable role for the regulator to have assumed and to continue to assume in the proposed system. The current infra-structure is valuable, well-developed and beneficial to those who have used it; it should continue to exist. Services under the system include the following:
    a. Tutoring;
    b. Tutorials on examination writing;
    c. Mentoring, where available by lawyers recently called to the bar;
    d. Extended time to complete examinations;
    e. Use of special equipment such as a personal computer;
    f. Use of private rooms;
    g. Examinations in alternative forms such as audiotape, Braille, text to speech; and
    h. Use of readers or scribes in the examination setting.

69. Examination development should likewise reflect the same commitment to an open and accessible process.

70. In considering the bar admission process and the efficacy of changes to it, the Task Force has borne in mind the goal of increased access to and diversity in the legal profession and has developed its recommendations in the belief that these goals are by no means peripheral. They must play an integral part in the development of the approach if the legal profession in Ontario is to be representative of the citizenry who rely upon the profession's services.

PART V: BUDGET IMPLICATIONS

71. The Task Force has not yet completed a detailed analysis of what the proposed new approach would be likely to cost. Until such time as Convocation approves a direction, it is difficult to develop a meaningful analysis of new costs.

72. Nevertheless, at our request, staff in the Education and Finance Departments have done some preliminary analysis of the probable budget implications of a model similar to that described in this report. This work covers four topics:

a. Operational savings;
b. Changes in the attribution of indirect costs;
c. Possible savings in lease costs arising from the reduced need for space; and
d. Possible revenue implications of the program changes.

Operational savings

73. Staff of the Education Department have made a preliminary estimate of how much it would cost to run the model envisaged in this report; a summary is provided at Appendix 7.It does not assume any initial reduction in the cost of examinations. This is because while there would be three licensing examinations rather than eight, those three would be offered three times yearly. The Student Success Centre is also assumed to remain at the current level. The total implications of these operational changes are a budget reduction of approximately $1.32 million, or about 24% of the current operations cost. This does not reflect additional savings or revenue implications discussed below.

Indirect Costs

74. All Law Society programs also bear a proportion of Law Society 'overhead' costs. This covers items such as bencher expenses, human resources (allocated in proportion to the number of staff), finance and communications (allocated in proportion to budgeted expenses), facilities (allocated in proportion to the square footage of the department), and other smaller items such as insurance.

75. In the short term, the reallocation of these costs from a particular program will result in those costs being allocated to other existing programs. Over time, there could be reduction in actual indirect costs. However, costs could increase in some other areas. For example, the electronic delivery of materials and creation of a virtual library may result in cost increases to areas such as information systems.

Leasehold Savings

76. A detailed space analysis has not been conducted. However, it is possible that the reduction in space required for teaching purposes would remove the need for leasehold space at 393 University Avenue and 1 Dundas Street West. This could represent a saving of up to $270,000 per year if the University Avenue premises can be subleased (the lease runs to April 2005).

Ottawa Savings

77. Under the new model, the Ottawa building owned by the Law Society would probably no longer be required, resulting in investment income of about $67,000 per year from the proceeds of sale. In addition, building operating expenses of $195,000 would be saved. Limited office and class space would have to be rented at an estimated cost of $100,000 resulting in a net operating benefit of about $162,000.

Revenue Implications

78. At present, the BAC is funded by the tuition fees of $4,400 per student, a contribution from the membership of approximately $49 per full-fee paying member, and a grant from the Law Foundation of Ontario of about $1.3 million. No predictions of possible student or member fee changes have been undertaken.

79. The year 2001 saw the financial impact of what is known as the "double cohort". Because the revenues of a BAC cohort precede the expenses, significant changes in the BAC model may initiate an impact analogous to a "half cohort" where costs are incurred at the back end of a particular BAC model without sufficient revenues coming in from the new model.

80. The Law Foundation has already notified the Law Society that existing funding may decrease by as much as $300,000 per year as a result of diminishing investment returns. A change in the BAC model may mean that the grant from the Law Foundation would be reviewed in its entirety. Any change in Law Foundation funding would require a policy decision from Convocation as to whether members or students should make up the shortfall.

81. It is also possible that Law Foundation funding might be available for some of the technological advances proposed in the provision of materials. The Law Society has substantially completed Phase 1 of the three-phase Technology Enhanced Learning project which has the objective of improving computer and video-assisted learning. The Law Foundation provided $1.3 million funding for Phase 1. The future direction of this project is uncertain.

Conclusion

82. The net financial impact of contemplated changes to the BAC depends on whether cost savings are passed onto students or members. In the past, Convocation adopted a policy that students should pay the full cost of the "non-discretionary" parts of the BAC, which would mean most savings would be passed on to the students. In contrast,"discretionary" parts of the BAC such as the French program, the Student Success Centre and tutoring have been seen as part of the Law Society's equity initiative and thus not funded by the students. These areas may see an increase in activity under the proposed model.

PART VI: REQUEST TO CONVOCATION

83. This interim report provides Convocation with a framework for a new direction in the Law Society's approach to the licensing process. In the Task Force's view, it focuses on the features with which the Law Society should concern itself and leaves other essential components of the legal education process where they more appropriately belong. It tells candidates, the law schools and the profession where each level of responsibility lies and it does so without blurring lines.

84. Convocation is requested to:

a. approve the Task Force's continued development of the direction set out in this report; and

b. permit the Task Force to seek input from legal organizations, law schools, BAC section heads and instructors, and students on the direction set out in the report.

85. If Convocation approves this continued work by the Task Force, the Task Force proposes to return with its final report in June 2002.

APPENDIX 2: REFORMS TO THE BAC SINCE 1988 (Summary Table Follows)

1. From its inception, the Law Society has concentrated much of its energy and resources on legal education. To some degree, that focus shifted to the law schools after 1957, but wrestling with the difficult issue of how best to prepare lawyers for practice has been no less a significant component of the Law Society's attention since that date.

2. Both the former Legal Education Committee and the current Admissions Committee have expended enormous time and energy, over decades:

   a. reviewing the goals of the BAC;
   b. proposing reforms;
   c. implementing reforms;
   d. reconsidering earlier decisions;
   e. determining appropriate methods of evaluation;
   f. determining appropriate pass rates and evaluating implications of failure rates;
   g. evaluating the efficacy of articling;
   h. considering cost issues;
   i. considering equity issues;
   j. implementing different modes of delivery for the program; and
   k. assessing appropriate course content.

3. The Chart at the end of this Appendix illustrates the major shifts and "reforms" that have occurred to the teaching term of the program since the early 1980s.

4. In the period between its inception in 1957 and the late 1980s when the Spence Sub-committee proposed major change the BAC remained essentially unchanged.

5. In 1988 when the Bar Ad Reform Subcommittee reviewed the BAC, the teaching term was approximately four months, following twelve months of articles. This was a reduction from the six month course that ran earlier in the decade. A summary of the content of the BAC in 1987-88 is attached at the end of this Appendix.

6. It is worth setting out the concerns about the program that were highlighted in the Executive Summary of the Spence report:

   1. The design of the Course does not reflect an agreed upon definition of what equips beginning lawyers to practise law competently, nor does it build upon a clear understanding of the knowledge and abilities students have acquired prior to entry into the Course.

   2. There is insufficient emphasis upon the lawyering and other skills needed for the competent practice of law.

   3. The overall length of the Course has a detrimental effect upon the educational environment.

   4. The knowledge students require is still taught in the teaching term through methods that are not always effective and consume too much of the available time for instruction.

   5. Students are not well prepared for the articling experience.

   6. *Insufficient attention has been given to how the Continuing Legal Education Program can assist new lawyers to acquire the knowledge needed for practice.*

7. The Spence model was predicated on the view that the Bar Admission Course's emphasis on teaching substantive law was unnecessary and should be substantially reduced, giving way instead to skills training, the teaching of professional responsibility and practice management, and transactional learning. Efforts to reduce the substantive components of the course were not entirely successful. For this and other reasons Convocation authorized another review of the BAC in December 1993 that considered issues and presented a report in April 1995, which Convocation approved for consultation.

8. The report affirmed the importance of the teaching of professional responsibility and practice management, and skills and transactions, but reiterated that although the students must pass licensing examinations to demonstrate entry-level competence the Course should not focus on teaching substantive law and procedure. To some degree it anticipated passage of a mandatory continuing education program and included proposals for post-call learning for the newly-called lawyer in such a regime. The 1995 proposals were not adopted.

9. Another review of the BAC followed, this time to address the issues raised in the 1993 review and 1995 report as well as additional issues arising from concern with equity issues, the impact that a new definition of competence should have on the course, and funding. This review resulted in a discussion document for consultation in February 1998. It proposed a skills teaching program followed articling, followed by a licensing examination self-study period and examinations. In December 1998, a further consultation document was prepared with three options for discussion:

   the status quo;
   the 12-week summer school model (from the February 1998 discussion paper);
   a skills-focused model.

10. In February and March 1999, Convocation considered and approved further proposals for change to the BAC, flowing from the consultations on the December 1998 report. The model approved is the basis of the current program, which was implemented for the spring 2001 BAC class. The first fall session, for those who elected to split the teaching portion, will run in September 2002. The current program integrates skills with transactional learning, but continues to have the attendant weaknesses of a "cram" course identified in the program since the 1990s with respect to the substantive law portions.

11. In addition to the detailed "reform" proposals that Convocation has considered since 1990, there have been numerous changes to specific policies within the BAC to address areas of concern, or complaint or to ameliorate policies that have been determined not to advance the goals intended.

12. So, for example, bar admission examinations have undergone many changes since the1980s in terms of format and passing grade. The passing standard has included:

    a. a percentage grade;
    b. pass/fail/honors;
    c. percentage pass of 60%;
    d. norm-referencing;
    e. a separate marking scheme for French language examinations to address problems engendered by applying norm-referencing to such a small group;
    f. a capped norm-referencing pass standard;
    g. aegrotat standing; and
    h. "borderline group methodology" and Angoff methodology.

13. The format of the examinations has been relatively stable since 1996, but underwent changes before that time from open-book, to closed-book to essay questions, to drafting questions, to short-answer and multiple choice.

14. Similarly, the appeal process within the BAC has varied as follows:

1993-95	written appeal based on review of failed paper and marking guide;
1995	no appeal, but re-grade based on reviewing examination without notes, in supervised room;
1996	a re-grade possible if exam received a grade within 10 marks of the pass; there was no further appeal;
1998	students permitted to review failed exams and marking guide. Students could request re-grade if received grade equal to or greater than 80% of the pass. In fact all failed exams were routinely re-graded;
1999	re-introduction of right to appeal.

15. In addition there have been numerous changes made over a number of years to policies related to the following:

a. accommodation of special needs;
b. mandatory versus voluntary attendance;
c. location of teaching centres; and
d. course delivery.

These reviews have been engendered by changing educational approaches. They have also reflected the growing expectation that the licensing process should not be “one-size-fits-all”, but should address differing learning needs and requirements.

SUMMARY OF THE CONTENT OF THE BAR ADMISSION COURSE - 1987-88
(excerpted from the Spence Subcommittee Report)

Substantive Materials Given	Substantive Areas Taught &Examined	Skills Programs	Other Programs
	Civil Procedure	Practice Skills:	The Business of the Practice of Law
Civil Procedure	Family Law		
Family Law	Business Law	Mandatory:	Legal Aid
Business Law	Real Estate	Interviewing/ Counselling	Money Management
Real Estate	Criminal Procedure	Drafting	Alternate Careers
Criminal Procedure	Estate Planning and Administration	Recognizing and Dealing with Ethical Problems	Women in the Practice of Law
Estate Planning and Administration	Creditors' & Debtors' Rights	Negotiation	
Creditors' & Debtors' Rights	Accounting		
Basic Tax }	Public Law	Optional:	
Computer Accounting} taught	Multiple Options:	Trial Advocacy	
Public Law	Residential Tenancies	Criminal Advocacy	
Business of the Practice of Law	Exceptional Client	Legal Writing	
Profession of Law	Workers' Compensation	Computer Skills	
	Employment Law		
	Profession of Law		

SUMMARY OF THE CONTENT OF THE BAR ADMISSION COURSE 2002

Substantive Courses and Examinations	Skills taught and/or Assessed
Accounting Business (Corporate, Tax, Insolvency) Civil Litigation Criminal Estate Planning and Administration Family Professional Responsibility and Practice Management Public Real Estate	Agreement drafting Affidavit drafting Civil litigation advocacy (motion argument; appeal factum writing) Criminal advocacy (sentencing submission) Examination for discovery Examination of witnesses at trial Interviewing Legal research Negotiation Opinion letter Statutory analysis

APPENDIX 3: DEFINITION OF THE COMPETENT LAWYER (RULE 2.01(1)

In this rule

"Competent lawyer" means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate course of action,

(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including,

- (i) legal research
- (ii) analysis
- (iii) application of the law to the relevant facts,
- (iv) writing and drafting,
- (v) negotiation,
- (vi) alternative dispute resolution,
- (vii) advocacy, and
- (viii) problem-solving ability,

(d) communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client,

(e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,

(f) applying intellectual capacity, judgment, and deliberation to all functions,

(g) complying in letter and spirit with the *Rules of Professional Conduct*,

(h) recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,

(i) managing one's practice effectively,

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and

(k) adapting to changing professional requirements, standards, techniques, and practices.

APPENDIX 4: A BRIEF HISTORY OF LEGAL EDUCATION IN ONTARIO

1. The current Bar Admission Course has its roots in the complex history of legal education in the province of Ontario. The long and sometimes difficult transition from a preparatory system focused primarily on reading law and articling in law offices to one that placed emphasis on professional education in a university setting continues to have repercussions today. The BAC evolved out of that transition and the fundamental assumptions underpinning it remain largely the same today.

2. Since its establishment in 1797 the Law Society of Upper Canada has been involved in the qualification process for those wanting to become lawyers. Although initially the sole elements of training were reading law and apprenticeship, examinations were soon added. After examinations were introduced as an element of the training regime, some lectures followed, but for many years they were provided intermittently and without any settled curriculum or coherent approach. Whereas other provinces in Canada had, by the 1880s, established a legal education system through their universities, the Law Society declined to follow that path.

3. In 1889, the Law Society founded a law school at Osgoode Hall under the direction of Convocation. Those holding a university degree attended a three-year program at Osgoode Hall involving a few hours of classes, with most of the day spent reading law and apprenticing in a law office. Those without a university degree were required to apprentice for two years before attending the three-year program at Osgoode. This approach remained unchanged for many years despite the emergence of innovative approaches to legal education in the United States, including, for example, the "case" method of instruction and despite the endorsement of this approach by the Canadian Bar Association and western Canadian Law Societies. Although the University of Toronto established a law school, the Law Society did not give credit toward the admission process to graduates of that program.

4. The first serious challenges to Convocation's authority over education occurred in the 1920s and 1930s. These challenges were based on the increasingly-held view that the education of the professions should be done in universities. Critics charged that the notion of law as a "trade" that could best be taught by those already in it was limited and limiting. Legal education, they insisted, must not be simply about learning existing rules of practice, but about the principles, context, and science of the law. Over time, these views gained increasing favour, not only outside the Law Society, but also within it where, for example, Cecil (Caesar) Wright, Dean of Osgoode Hall Law School, became a strong proponent of reform.

5. Still, a majority of benchers continued to believe that university education would be too theoretical and research-oriented to be of use to most candidates seeking to practise law. During this period, however, the increasingly uneven nature of students' articles weakened the argument that practical education made for the best lawyers. The Law Society's response was to cut back on the class lecture component of the program so as to enhance articling, rather than opt to approve university-based legal education. Nonetheless, the push for fundamental reform, including the abolition of articling, continued unabated.

6. Following the Second World War, the issue of who should control legal education and what that education should involve came to crisis, intensified by the significant increase in numbers of those seeking admission to the bar and the attendant pressures on the capacity of the Law Society to accommodate them.

7. In 1949, a Law Society Committee examining legal education acknowledged that the system was troubled, but controversy arose out of the nature of the Committee's recommendations. In response to recommendations with which the faculty of Osgoode disagreed, Dean Wright and most of the faculty resigned. Wright became the Dean of the law school at the University of Toronto and sought to have the provincial government remove authority for legal education from the Law Society.

8. The legal education issue had become a serious problem for the Law Society and the profession. After the faculty resigned, Convocation approved a new approach by introducing a four-year program consisting of two years of full-time study, followed by one year of office work, and one year combining lectures and articling.

9. When the University of Toronto asked that its three-year degree be counted as the equivalent of the two-year study program at Osgoode, the Law Society accepted. The resulting shorter route to call through Osgoode (four years instead of five) worked against the University of Toronto program, because candidates wanted to be called to the bar as quickly as possible. The University's subsequent requests for its graduates to be exempted from three of the four required years were rejected, reflecting the Law Society's continuing concern that the university's degree did not adequately prepare candidates to practise law.

10. By the mid 1950s, however, the Law Society's rationale for exercising control over legal education and its will to do so in the face of over-burdened resources had dissipated. Over several years, discussions took place with the universities. In 1957, the Law Society and the universities negotiated a "New Deal" in legal education.

11. Pursuant to the agreement, any university could develop a three-year LL.B. program. The pre-requisite for admission to the LL.B. program would be two years of undergraduate education. The Law Society would recognize these degrees, provided the LL.B. program followed certain criteria for curriculum, staff and libraries. Graduates wishing to practice law would serve a twelve-month period of articles. To supplement articles there would be a post-LL.B. training program in substantive law, at Osgoode Hall, supervised by law school faculty and practising members of the profession.

APPENDIX 5:UNITED STATES LICENSING REQUIREMENTS

Generally

1. In the United States, law students usually complete a three-year law degree, then are required to pass licensing examinations in the state or states in which they wish to be called to the bar. There is no articling requirement and no further mandatory pre-call legal education. Licensing examination preparation courses exist in many states, but their primary goal is to facilitate the candidates' passage of the licensing examinations, not educate those about to be called to the bar.

2. Legal education in the United States has had a long history of being taught in a university setting. The legal profession is not governed by self-regulating regulatory bodies, but by the courts. Thus the bar has never "directed" legal education as has been the case in Ontario. Articling and bar admission programs have not played a role in the education of American lawyers and there is no suggestion that they will in the future.

3. Generally speaking, candidates for admission to the various state bars write examinations that consist of some or all of the following[4]: the multi-state bar examination (MBE), the multi-state essay examination (MEE), the multi-state professional responsibility examination (MPRE) and the multi-state performance test (MPT):[5]

    1. The MBE consists of 200 objective multiple choice questions to be answered over a six hour period. The areas tested include constitutional law, contracts, criminal law and procedure, evidence, real property and torts. All states and jurisdictions use the MBE, except Louisiana, Washington and Puerto Rico.

[4]Washington state is one of the few jurisdictions that does not use any of the multi-state examinations, but administers its own tests and covers more substantive law, local to Washington state. For more information see www.wsba.org

[5]A number of states have developed their own essay and performance test examinations. Passing scores vary with each state.

2. The MEE consists of three one hour essay questions. The questions are designed to measure the applicant's ability to analyze legal issues arising from fact situations. The areas of law covered are agency and partnership, commercial paper, conflict of laws, corporations, decedents' estates, family law, federal civil procedure, sales, secured transactions and trusts and future estates. Fifteen states use the MEE. A number of states, such as California, have their own essay examinations.

3. The MPRE consists of 50 multiple choice test items covering a wide range of professional responsibility principles, often relying on the ABA Model Rules of Professional Conduct. All states and districts except Maryland, Puerto Rico, and Washington state use the MPRE.

4. MPT questions are designed to test an applicant's ability to understand and apply a select number of legal authorities in the context of a factual problem. Each question consists of a file and library, with instructions advising the applicant what task(s) should be performed. Twenty-nine states use the MPT. Others have developed their own tests.

California

4. Eligibility to take the bar examination in California is not limited to J.D. or LLB graduates of American Bar Association-approved law schools, but is open as well to those whose legal study is through:
   1. non-ABA approved in-state schools approved by the state authority;
   2. unapproved in-state schools;
   3. law office study; and
   4. correspondence course.

5. Applicants who obtain their legal education by attending unaccredited schools, correspondence courses or law office study must take an examination after their first year.

6. The California Bar Examination consists of the General Bar Examination (GBE) and the Attorneys' Examination (AE). The GBE has three parts: six essay questions, the MBE and two performance tests (PTs), written over three days. The AE consists of six essay questions and two PTs from the GBE. California also administers the MPRE.

7. The subjects covered in the MBE are: Constitutional Law, Contracts/Sales, Criminal Law/Procedure, Evidence, Real Property, and Torts. The subjects covered in the essay examination are: Civil Procedure, Corporations, California Community Property, California Professional Responsibility, Remedies, Trusts, California Wills & Succession, plus all MBE subjects.

8. The examinations typically result in a relatively high failure rate for those writing for the first and even subsequent times. The pass/fail statistics for the February 2001 sitting, indicating an overall pass rate on the GBE for first-time takers of 52.5 %, 29.4 % for repeaters, and 37.3% overall. The total number writing the February 2001 GBE was 4,488.

9. California is a mandatory CLE state. Lawyers are required to take 25 hours per 3-year period including 4 hours ethics, 1 hour substance abuse/emotional distress, and 1 hour of elimination of bias.

Illinois

10. Eligibility to take the bar examination in Illinois is limited to J.D. or LL.B graduates of American Bar Association-approved law schools.

11. The Illinois Bar Examination consists of a 12-hour two-day examination. Day One covers the Illinois Essay Exam (three 30-minute essay questions, one 90-minute MPT and the MEE. Day Two is the 6-

hour 200 question MBE. Candidates must also pass the MPRE, which can be taken during law school.

12. Subjects covered on the MBE examination are constitutional, contracts/sales, criminal law and procedure, evidence, real property, and torts. Subjects covered on the essay exam are agency, commercial paper, conflicts, corporations, equity, family, federal jurisdiction and procedure, civil procedure, partnerships, personal property, sales, secured transactions, suretyship, trusts and future interests, and wills.

13. In 2001 the pass rate for first time takers of the Examination was 83% and all takers 79%. The higher first and second time high pass rate may reflect the fact that Illinois only permits graduates from ABA accredited schools to take the examination.

14. Illinois is not an MCLE state.

Massachusetts

15. Eligibility to take the bar examination in Massachusetts is not limited to J.D. or LL.B graduates of American Bar Association-approved law schools. Graduates from non-ABA approved in-state schools are eligible.

16. The Massachusetts Bar Exam is a two-day exam. Day 1: Multi-state Bar Exam (MBE). Day 2: ten essay questions. Candidates are also required to take the MPRE.

17. Subjects covered on the MBE are: Constitutional Law, Contracts/Sales, Criminal Law/Procedure, Evidence, Real Property, and Torts.

18. Subjects covered on the essay examination are : Agency, Commercial Paper, Consumer Protection, Corporations, Domestic Relations, Federal Jurisdiction, Mortgages, Massachusetts Practice & Procedure, Partnerships, Professional Responsibility, Secured Transactions, Trusts, Wills, plus all MBE subjects.

19. In winter, 2001 the pass rate for first time takers was 68% and for all takers was 52%.

20. In summer, 2000 the pass rate for first time takers was 79% and for all takers 73%.

21. In summer,1999 the pass rate for first time takers was 80% and for all takers was 74%.

New York

22. Eligibility to take the bar examination in New York is not limited to J.D. or LL.B graduates of American Bar Association-approved law schools. Law office study is permitted after successful completion of one year at an ABA-approved law school. Graduates of non-ABA approved law schools can write the examination if they have at least five years active and continuous practice within the last seven years in some other state or states.

23. The New York Bar Exam is a 2 day exam. Day 1: One MPT question (worth 10%), five New York essay questions (worth 40%) and 50 New York multiple-choice questions (worth 10%). Day 2: MBE (worth 40%). Candidates must also pass the MPRE.

24. The MBE covers the following subjects: Constitutional Law, Contracts/Sales, Criminal Law/Procedure, Evidence, Real Property, Torts. New York portions of the examination cover Agency, Commercial Paper, Conflict of Laws, Corporations, Domestic Relations, Equity, Estate Taxation, Federal Jurisdiction, Future Interests, Insurance (No Fault), Mortgages, New York Practice & Procedure, New York Professional Responsibility, Partnership, Personal Property, Secured

Transactions, Trusts, Wills, Workers' Compensation, plus New York distinctions for all MBE subjects.

25. In the July 2001 sitting of the examination, of the 9194 applicants examined, 6475 or 70.4% passed the examination. Of the 5136 applicants taking the examination for the first time, 4089 or 79.6% passed.

26. In the July 2000 sitting of the examination, of the 8,896 applicants examined, 6,006 or 67.5% passed the examination. Of the 7,356 applicants taking the examination for the first time, 5,516 or 74.9% passed.

27. New York has recently become a mandatory CLE state. During each of the first two years after call, newly admitted attorneys must complete 16 CLE hours including three in ethics, six in skills, and seven in practice management. Thereafter, all New York attorneys must complete 24 CLE hours every two years.

APPENDIX 6

ARTICLING STUDENT FEEDBACK REPORT 2001

Articling & Placement Office
Bar Admission Department
Law Society of Upper Canada
December 10, 2001

Articling Student Feedback Report

Report Highlights

- Survey 2001 provides a positive snapshot of the articling experience. 94% of respondents rated the articling experience favorably, indicating that the articling program prepared them “well enough” or “very well” for the practice of law. In Survey 2000, only 80.7% of respondents gave this rating.

- 63.7% of students articling in the 2000-2001 articling term (Survey 2000 – 18.6%) responded to this survey, representing a significant increase over the response rate of the previous year’s survey.

- 70% of respondents (Survey 2000 – 48%) indicated that they had been provided with an education plan. Preliminary review of final evaluations for the articling term 2000 – 2001 indicates that over 90% of students received education plans by the time they completed their final evaluations, suggesting that changes made pursuant to comments received from respondents to the Survey 2000 were effective.

- 64% of respondents (Survey 2000 - 51%) consider that the current evaluation process is adequate, indicating that changes made pursuant to comments received from respondents to the survey administered in 2000 were effective.

- The majority of students-at-law perceive themselves as receiving practical training (66.4%), in relevant legal skills (63.5%), from a helpful principal (53.1%). 52.8% of respondents rated the broad experience of their articling placements positively.

- Significant decreases were noted in the percentage of students identifying areas of weakness in their articling placements. 20.8% (Survey 2000 – 29.4%) of respondents were concerned about the amount of routine tasks at their articling placement and 19.3% (Survey 2000 – 28.9%) about their lack of exposure to business.

- The percentage of respondents reporting incidents of discriminatory incidents decreased by over 50% (Survey 2001 - 14.2%; Survey 2000 - 29.4%), suggesting that efforts by the APO and Equity Initiatives Department to ensure equity in the experiences in articling students have been effective. (Survey 2001 – 56.5% indicated no discrimination and 29.3% did not respond; Survey 2000 – 45.6% indicated no discrimination and 25.0% did not respond.)

- Non-traditional placements (joint, part-time, international, national, abridged, split) continue to provide valuable options and flexibility for Bar Admission Course students. Approximately 5% of students took advantage of these options in the 2000-2001 articling term.

Articling Student Feedback Report

Report Highlights

I. Introduction:
Purpose
Background

II. Demographic Information
Background
Gender
Self-identified Group Membership (mature, disabled, visible minority, gay/lesbian, Aboriginal, Francophone)

III. Articling Placement Information
Background
Traditional (12 month consecutive full time) and 'non-traditional' articling terms
Education plans
Rating of the articling experience, as compared to the experience anticipated in education plan
Overall rating of the articling experience
Effectiveness of current evaluations

IV. Relevance of Articling to Career/Practice
Background
Preparation Strengths
Preparation Weaknesses

V. Treatment of Articling Students
Background
Incidence of discriminatory experiences

VI. Conclusion

Appendix 1: Survey Questions

Appendix 2: List of Tables

I. Introduction:

1. Purpose

a. Each year the Articling & Placement Office ("APO") conducts an anonymous survey of Bar Admission Course ("BAC") students to solicit information about their articling experiences. The survey questions and response data have been assembled into this, the Articling Student Feedback Report[1], with discussion and recommendations. The APO administers surveys, such as this one, to ensure that articling processes remain relevant, to assess student satisfaction and to identify areas for improvement.

2. Background

a. The survey upon which this report ("Survey 2001") is based was distributed to students of the 43rd BAC during the latter half of their articles (Spring 2001) with the end-of-term documents. The previous year's survey of the 42nd BAC ("Survey 2000") was given to students during Phase 3, after articling had been completed. The change was made for two reasons. The first was that by including the survey as part of the final articling documents it was hoped that more students would complete it. Secondly, it was thought that the information being solicited would be fresher in the students' minds.

b. The fact that the APO received a response rate of 63.7%, a very high response to any APO administered survey, would seem to bear out the first reason for the timing change mentioned above. The APO received 735 responses from 1153 students enrolled in the 43rd BAC. By comparison, the response rate for Survey 2000 was 18.6%.

c. Because of the Survey 2000 low response rate, the data in Survey 2000 has been further analysed for validity. Distributions of gender, age, self-identification with membership groups, and type of articling placement indicate that the data is reasonably valid as compared to the whole population of the 42nd BAC. The exceptions are that higher percentages of females and Francophones responded to the survey than appeared to be representative of the 42nd BAC.

d. The articling phase is the longest of the BAC's three phases. In September 2000 Convocation reduced the length of the articling term from 12 months to 10 months, effective January 1, 2001. The respondents to this survey were the final BAC class required to complete the 'old' 12 month requirement.

e. The quality of training that students receive varies greatly and depends largely on the student's relationship with his/her articling principal. By requiring the approval of principals and education plans, which outline the training that a principal will provide, it is hoped that an acceptable level of both quality and exposure to skills will be achieved. In addition, students complete midterm and final evaluations comparing the actual experience to that anticipated in the education plan. The midterm evaluation is intended to refocus both the student's and principal's attention on accomplishing the education plan's goals[2].

II. Demographic Information

[1] The previous year's report, based on the 42nd BAC, was titled 'Employment Survey Report'.

[2] A report (the "OISE Report") entitled 'Options in the Evaluation of Articling Experiences', commissioned by the APO, was completed in September 2001 by Doug Hart, Ph.D., from University of Toronto's Ontario Institute for Studies in Education. The report studied the current articling evaluation forms and presented options for ensuring an efficient and valuable evaluation process in the future.

3. Background

a. Demographic indicators, discussed below, are collected for various reasons. The first is to ensure that the demographic makeup of the survey respondents is similar to that of the BAC class as a whole, which in turn validates the response data. Second, having demographic information can help to identify trends or experiences that have developed within the articling program as a whole that may correlate to specific groups of the BAC class. Third, cross-tabulation of this information provides additional and important insights into the data.

b. Three questions were included in the survey relating to demographic information about the 43rd BAC class in general and the survey respondents specifically.

i. what is your gender?
ii. What is your age?

c. Denote any of the following groups of which you consider yourself a member: Francophone, Disabled, Visible Minority, Gay/Lesbian, Aboriginal, Mature, Other

4. Gender: Response Data

a. Of the 735 survey respondents, 397 indicated that they are female, 335 indicated male and 3 chose not to respond. The percentage of females exceeds that of males.

b. Table 1: Gender Distribution

Gender	Survey 2001 #	Survey 2001 %	43rd BAC (%)	42nd BAC (%)	41st BAC (%)
Female	397	54.2	51.5	51.3	49.6
Male	335	45.8	48.5	48.7	50.4
Total[1]	732	100.0	100.0	100.0	100.0

[1] 'No responses' (3) were not included.

5. Gender: Discussion

a. This question is useful in validating the survey responses. The new database that is in use for the 44th BAC class, those students entering the BAC in 2001, does not record or track gender information. In future, this survey may be the only source for this information.

b. The survey response data represents a slightly larger gender gap than that within the class as a whole. This suggests a somewhat greater response rate or inclination to respond to this survey among females.

c. This data was cross-tabulated with the Treatment of Articling Students data in Section V following.

6. Self-identified Group Membership: Response Data

a. Table 2: Age Distribution

Age Groups	Survey 2001 #	Survey 2001 %	Survey 2000 %
20 - 25 years	101	13.8	8.4
26 - 30	493	67.3	67.5
31 – 35	77	10.5	9.4
36 – 40	28	3.8	7.4
Over 40	34	4.6	7.4
Total[1]	733	100.0	100.0

[1] 'No responses' (2001 – 2; 2000 - 1) not included.

b. Table 3: Self-identified Group Membership Distribution

Demographic Group[1]	Survey 2001 #	Survey 2001 %	43rd BAC %	42nd BAC %
Francophone	39	5.3	-[2]	-[2]
Disabled	7	1.0	2.0	1.1
Visible Minority	134	18.2	16.1	14.5
Gay/Lesbian	10	1.4	1.2	0.7
Aboriginal	11	1.5	1.8	1.2
Mature	59	8.0	4.9	-[1]
Other	25	3.4	-[1]	-[1]

[1] Survey respondents could choose more than one response.
[2] These groups were not available choices on the applicable application.

7. Self-identified Group Membership: Discussion – General

a. Age data collected through this survey is available empirically from the BAC applications. Unfortunately, the database is difficult to manipulate for such information and the resources that would be required were not justifiable within the context of this report.

b. The number of respondents who indicated 'Francophone' (39) compares favourably with enrollment in the 2000 French BAC Phase 1 Course (34).

c. 'Disabled', 'Gay/Lesbian' and 'Aboriginal' groups, taken individually, have historically constituted a small percentage of the BAC class. Consequently, a small change in the absolute number of students within these groups each year can cause large relative fluctuations when comparing one year to the next on a percentage basis.

d. To verify and evaluate the data from this survey, the data has been compared to that which was collected on the BAC application. The percentage of respondents who self- identified on the survey is reasonably reflective of the BAC application data, except where otherwise noted below.

8. Self-identified Group Membership: Discussion - Disabled

a. Twenty-four students identified as a 'person with a disability' on the BAC application. However, only 7 survey respondents have identified as 'Disabled', which is lower than would be expected with such a high response rate to the survey. This discrepancy may be explained by the slightly different but possibly significant difference in phrasing between the survey and the BAC application. The BAC application used the phrase 'Persons with a disability' whereas the survey used the term 'Disabled'. Respondents may have interpreted 'Disabled' more restrictively (i.e. physical disability) whereas the BAC application phrasing may have been considered more expansively to include learning or mental disabilities. Future articling surveys will use the term "persons with a disability".

9. Self-identified Group Membership: Discussion – Age Distribution and Mature Group data

a. In the voluntary disclosure category dealing with age (Mature), there were more 'mature' respondents in the survey (59) than in the entire 43rd BAC class (57). This discrepancy likely occurred because the BAC application further defined the Mature label to be 'over 40' whereas the survey did not include this 'over 40' specification. Survey respondents made a subjective decision on the meaning of 'Mature' that included ages below 40 and cross-tabulation of the age data with the 'mature' disclosure confirms this. Of the 59 students who identified themselves as 'mature', only 24 (41%) were 'over 40'. Sixteen of the 'mature' respondents were 36-40, 18 were 31-35 and one was 26-30. Therefore, high percentages of the students who are either 31-35 or 36-40 considered themselves 'mature' but did not indicate such on the BAC application due to the 'over 40' definition that accompanied the designation.

b. The application for the 45th BAC has been amended to remove the "over 40" qualification and it is that an increased number of 'mature' students will self-identify on their BAC applications in 2002.

10. Self-identified Group Membership: Discussion – Comments

a. Twenty-five respondents indicated that they are members of the group 'other'. Nineteen of those 25 provided a comment/definition with their response, many of which had a similar basis and can be grouped or categorized according to the following table.

Table 4: Self-identified Membership Groups Categorization of Comments.

Category	Survey 2001 #
Religious	4
Gender	2
Parental status	3
Ethnic minority	8
Distinct comments[1]	2
Total	19

[1] These two comments did not fall within any of the other categories. One comment was 'foreign trained lawyer' while the other was expanding on an existing question response choice (gay/lesbian to gay/lesbian/bisexual)

b. A number of respondents feel strongly about identifying specific cultural or ethnic characteristics of themselves. Future surveys might include additional categories to capture this information. No 'other' choice was available on the previous year's survey.

c. Future surveys should ensure consistency in phrasing between the BAC application and the

survey if the survey data is to be compared in any way to the BAC application data. Otherwise a conscious decision has to be made to evaluate and examine the survey data independent of other sources.

III. Articling Placement Information

11. Background

a. Options are available to students to modify their articling term to enable alternate scheduling and/or varied practical experience. Collectively, the possible articling modifications are referred to as 'non-traditional' placements, where a 'traditional' placement would refer to consecutive months of full-time service with one employer/principal.

b. Firms/Principals must submit and receive approval by the APO of an education plan that outlines the experience that a student can expect to receive. It is expected that the Firm/Principal will in turn provide the student with the education plan. In response to Survey 2000 which indicated that about one half of articling students were not receiving a copy of their education plan, the APO has been emphasizing the importance of the education plan, in communications and publications, since that survey result was compiled.

c. Students complete articling evaluations at the midpoint and end of the articling term. These evaluations provide an opportunity for students to compare their articling experience with what was anticipated in the education plan, and are intended to be submitted independently by the student without being seen by the principal. As anecdotal evidence suggested that some principals were pressuring students to prepare the evaluations together prior to submission, questions about ratings were included in this anonymous survey.

d. This year's survey posed five questions that related to the specific articling experience that the students undertook and their evaluations of the experience. The five questions asked were:

i. In what type of traditional (12 month consecutive full time) or non-traditional articling experience did you participate (Traditional, Joint, Part-time, International, National, Abridged, Split)?
ii. Have you been provided with your education plan?
iii. How would you rate your articling experience as compared to the experience anticipated in your education plan?
iv. Overall, how would you rate your articling experience?
v. Do the current forms provide an adequate system for review during the articling experience?

12. Traditional/Non-traditional Articling - Response Data

a. Table 5: Types of Articling Placements

Placement Type	Survey 2001 #	%	43rd BAC
Traditional [1]	695	94.6	-
Joint	4	0.5	0.8
Part-time	0	0.0	0.4
International	5	0.7	1.3
National	6	0.8	0.6
Abridged	11	1.5	2.8

Split	17	2.3	1.9

[1] Traditional' placements are not tracked.

13. Traditional/Non-traditional Articling - Discussion:

a. The APO approves non-traditional arrangements that provide a student with sufficient training and supervision within the same skill areas as required by traditional placements. In the spirit of enabling flexibility and alternate options to today's BAC students, the APO is proactive in developing acceptable education plans for non-traditional placements.

b. Overall, there are 90 students, from a total class of approximately 1150, using the available non-traditional options. This represents a significant proportion (7.8%) of the class who may have otherwise been unduly delayed in receiving their call and/or missed a valuable learning experience, and/or been unable to find a 'traditional' placement with which to fulfill the articling requirement.

14. Education Plan: Response Data

a. Table 6: Provision of Education Plan

Provision of Education Plan	Survey 2001 #	Survey 2001 %	Survey 2000 %
Yes	517	70.3	47.2
No	204	27.8	52.8
Totals[1]	721	100.0	100.0

[1] 'No-responses' were excluded (2001 – 14; 2000 - 11)

15. Education Plan: Discussion

a. Survey 2000 suggested that more than half of articling students were not receiving education plans. Anecdotal evidence had suggested such a problem, which prompted the APO to include the question in the survey.

b. The results of Survey 2000 caused the APO to undertake numerous initiatives and implement changes to improve the distribution of education plans to students. Following is an outline of the initiatives and changes undertaken:

- physical review of all APO articling firm and principal files to identify if there was an approved education plan in place
- informing all approved articling principals (2000/01) without education plans on file with the APO that their renewal as a principal (2001/02) was contingent upon the submission of an acceptable education plan
- inclusion, in the letter of confirmation of approval/renewal as a principal, of a paragraph outlining the importance of the education plan, the need to provide the student with a copy, and the necessity to submit any new or revised plans to the APO for approval
- expanded explanations/descriptions relating to education plans in the revised Articling Handbook 2001, and increased emphasis on their importance

- sample education plans posted on the APO's web site

- commencement of initiative to develop relevant education plans for clerkships at various levels of provincial and federal courts
- APO materials distributed to students included suggestions/encouragements that they should be asking for copies of the education plan

c. The response outlined in Table 6 indicates that the APO initiatives have had a significant positive impact on the number of students who have received a copy of the education plan. The number of students reporting that they were not provided with the education plan has dropped from 52.8% to 27.8%. Preliminary review of final evaluations for the articling term 2000 – 2001 indicates that over 90% of students received education plans by the time they completed their final evaluations, suggesting that changes made pursuant to comments received from respondents to the Survey 2000 were effective.

d. In 2001, the APO's physical review of its principal and firm files identified 218 principals without education plans. Only those principals who submitted new plans were approved as principals, resulting in an additional 100 principals who submitted plans. It is expected that the number of students who are not provided with an education plan will decrease further, as a direct result of this APO initiative.

16. Rating of Articling Experience as Compared to Experience Anticipated in Education Plan: Response Data

a. Table 7: Rating of Articling Experience, as Compared to Education Plan

Rating, as Compared to Education Plan	Survey 2001 %	43rd BAC Mid-term Evaluation %	43rd BAC Final Evaluation %	Survey 2000 %
Very Good/Excellent	56.6	54.7	59.1	48.2
Good	34.0	34.0	30.6	28.7
Satisfactory	7.8	10.0	8.6	18.2
Poor/Unsatisfactory[1]	1.6	1.3	1.7	4.9
Totals[2]	100.0	100.0	100.0	100.0

[1] The surveys' lowest rating was labeled 'poor' whereas the evaluations used the label 'unsatisfactory'. For the purposes of this report it is assumed that the two categories are equivalent.

[2] The total for the surveys are based on those respondents who indicated that they had received their education plan, with Survey 2001 adjusted for 33 respondents who indicated that they had no education plan but gave a rating, despite the question's phrasing. The totals for the evaluations are based on all evaluations that have been submitted by the 43rd BAC students.

17. Rating of Articling Experience as Compared to Experience Anticipated in Education Plan: Discussion

a. Encouragingly, articling students have consistently indicated high levels of satisfaction with the articling experience, as compared to their education plans. On each of Survey 2001 and the two articling evaluations for the 43rd BAC, approximately 90% of respondents indicated ratings of 'good' or better.

b. As stated earlier, during the articling term students are required to complete a midterm and a final evaluation, which include an overall rating scale that is very similar to the response choices on the survey. Table 7 shows that there is little variation in the numbers when each category is compared, except for the higher number of students who indicate a poor/unsatisfactory experience in Survey 2000, which may be connected to the lower response rate of that survey.

18. Overall Rating of Articling Experience: Response Data
    a. Table 8: Overall Rating of Articling Experience

Overall Rating	Survey 2001 #	%	Survey 2000 %
Very Good/Excellent	429	58.6	47.5
Good/Satisfactory	282	38.5	47.5
Poor	21	2.9	5
Totals[1]	732	100.0	100.0

[1] 'No Responses' not included (2001 – 3; 2000 – 7)

19. Overall Rating of Articling Experience: Discussion
    a. Survey 2001 included a typographical error, which resulted in the categories 'good' and 'satisfactory' being transposed. Therefore, the data in Table 8 is presented as a combined 'Good/Satisfactory' rating.

    b. 97% of respondents (2000 – 95%) provided a positive rating for their articling experience.

20. Adequacy of Articling Evaluation: Response Data
    Table 9: Adequacy of Articling Evaluation Process

Adequacy of Evaluation Process	Survey 2001 #	%	Survey 2000 %
Yes	468	63.7	50.5
No	246	33.5	40.7
No Response	21	2.8	8.8
Totals	735	100.0	100.0

21. Adequacy of Articling Evaluation: Discussion – General
    a. 63.7% of respondents (2000 – 50.5%) were satisfied with the evaluation process.

    b. In 2001, the APO undertook a major inquiry relating to the evaluation process. Doug Hart, Ph.D., a consultant from the University of Toronto's Ontario Institute for Studies in Education was retained to research and prepare a report, entitled *Options in the Evaluation of Articling Experiences*, to examine evaluations in the context of models for professional training. It is intended that the APO's evaluation forms and processes will now be examined for possible revision in light of the report's findings.

    c. Articling Handbook 2001 was revised to include more information about evaluations. The APO's web site was also updated in 2001, which increased awareness of the evaluation process and afforded additional access to the evaluation forms. Several of these changes/initiatives took place since the distribution of Survey 2001 and it is hoped that they will improve the effectiveness of the evaluation

process for subsequent BAC students.

d. The APO has also been working with the various Provincial and Federal Courts to develop evaluation forms that are specific and relevant to the clerkship experience. Previous evaluations were largely inapplicable to court clerkships. These new evaluations will also be in use by the 44th BAC students.

22. Adequacy of Articling Evaluation: Discussion of Comments

a. Overall, 200 comments were received from students in relation to this question on the evaluation process. The challenges faced in trying to revise the evaluation process are illustrated in these comments. For every comment criticizing one aspect of the process, there is another comment expressing the opposite opinion. There seems to be little consensus among students themselves concerning the best process/method for evaluating the articling experience.

b. Several comments touched on more than one topic. The comments were categorized into the following groups, with the number of comments for each category in brackets:

- Form design criticisms (57)
- Evaluations considered helpful as a communications tool (48)
- Criticisms of the evaluation process (22)
- Merits of qualitative evaluation vs. quantitative evaluation (18)
- Confidentiality, or lack of it, in completing evaluations (13)
- Timing of the process (12)
- Comments related to education plans (8)
- Unconstructive or off-topic comments (22)

c. Survey 2000 recorded a number of comments from court clerks complaining that the evaluation forms were not relevant to their experience. As noted above, the APO has undertaken to develop relevant forms for courts. As a result, there was a decrease in comments on this topic.

d. Considering that the comments criticizing the forms' design are largely contradictory and the second largest comment category relates to positive comments, the outstanding issues do not appear to be viewed as problems by large portions of the BAC class.

e. Confidentiality concerns are being addressed as part of the privacy review being undertaken by the Law Society.

f. Many of the process criticisms relate to the students' lack of knowledge about the results or follow-up procedure that occurs after the evaluations are submitted. The Articling Handbook 2001 was revised to explain the process. A similar explanation may be added to the evaluation form itself to increase awareness.

IV. Relevance of Articling to Career/Practice

23. Background

a. The Articling Program is intended to provide BAC students with practical skills training in areas that are considered essential to the practice of a lawyer. Therefore, it is important that the APO determine whether or not articling students feel that the training they received was valuable and will assist them in performing the duties and responsibilities of a lawyer.

b. Students were asked the following three questions:

i. How do you feel articling prepared you for the area of law you intend to practice?
ii. What, if anything, was it about the articling component of the BAC that did not prepare you for the area of law you intend to practice?

iii. What aspects of articling did you find the most helpful?

24. Preparation Strengths: Response Data

a. Table 10: Rating of Articles as Preparation for Practice of Law

Rating as Preparation for Practice of Law	Survey 2001 #	%	Survey 2000 %
Not at all	7	1.0	2.5
Not very well	36	5.0	16.8
Well enough	356	49.0	51.3
Very well	328	45.0	29.4
Totals[1]	727	100.0	100.0

[1] No Responses (2001 – 8; 2000 – 7) were not included.

b. Table 11: Most Helpful Aspects of the Articling Experience

Most Helpful Aspect (s)	Survey 2001 #	%	Survey 2000 %
Good practical training	488	66.4	61.3
Principal helpful	390	53.1	55.9
Learned relevant skills	467	63.5	61.8
Broad experience	388	52.8	Not listed
Other	50	6.8	14.7

25. Rating of Articles as Preparation for Practice of Law: Discussion of Table 10

a. 94% of respondents (2000 – 80.7%) felt that articling has prepared them either ‘well enough’ or ‘very well’ for the area of law that they intend to practice. This indicates that the articling program is fulfilling its mandate of providing practical legal training to students-at-law.

b. Cross-tabulation of respondents who participated in a ‘non-traditional’ articling placement and this data indicated that 42 of 43 respondents felt that they were prepared ‘well enough’ or ‘very well’. This indicates that, far from compromising a student’s practical training/preparation, non-traditional options result in a high level of satisfaction with legal preparedness, in the students’ opinion.

c. Cross-tabulation of respondents without an education plan and this data indicated 71% of respondents who indicated that they were ‘not at all’ prepared and 47.2% of respondents who indicated that they were not well prepared were not provided with an education plan, compared to 30% overall who did not receive their plans. The APO is continuing efforts to ensure that students are provided with their education plans.

26. Most Helpful Aspects of the Articling Experience: Discussion of Table 11

a. The high response rate on this question further confirms that the goals of the articling program are being met. The majority of students-at-law perceive themselves as receiving practical training (66.4%) in relevant legal skills (63.5%) from a helpful principal (53.1%). 52.8% of respondents rated the broad experience of their articling placements positively.

b. Although just over half of the respondents (2001 - 53.1%; 2000 – 55.9%) indicated that their principal's help was one of the most helpful aspects of their articling experience, given the significant role that the principal is intended to fulfill, this percentage raises concerns. The articling program has followed an apprenticeship type model of training. However, if almost one half of respondents (in 2001 and 2000) have not ranked their principals' helpfulness as a strength of the articling experience, this issue should be reviewed in greater depth. Future surveys may include additional questions to further explore this matter. Other professional training models, as identified in the OISE Report, might also be further examined in the articling context (see Paragraph 21.b. above).

c. 'Other' comments provided generally elaborated on responses already chosen and thus were not useful. It would be reasonable to eliminate the 'other' response in future surveys.

27. Preparation Weaknesses: Response Data

a. Table 12: Weaknesses of Articling in Preparation for Practice of Law

Area of Weakness[1]	Survey 2001 #	Survey 2001 %	Survey 2000 %
Too many routine tasks	153	20.8	29.4
Not learning business aspect	142	19.3	28.9
Too much time on research	104	14.1	18.1
Plan to practice in another area	89	12.1	14.2
Experience not broad enough	82	11.3	Not listed
Lack of communication w/ principal	72	9.8	Not listed
Experience not practical enough	72	9.8	15.2
Other	59	8.0	15.7

[1] 'No responses' were not included (2001 – 265). Respondents were able to choose more than one response.

28. Preparation Weaknesses: Discussion

a. Survey 2001 response distribution was relatively even across the seven specific categories, with 'too many routine tasks' and 'not learning business aspects' receiving the highest responses. 470 respondents account for 773 responses, with many of the respondents choosing more than one category.

b. The data in Table 10 indicates that 43 respondents (7 'not at all' + 36 'not very well') felt they were not adequately prepared for practice by articling. Therefore, of the 470 respondents who indicated weaknesses in this question, over 90% did not feel that the weaknesses were significant enough to have compromised their overall preparation for practice.

c. 'Too many routine tasks', chosen by 20.8% of the respondents was the most frequent response to this question, as it was on last year's survey. However, last year the percentage of respondents choosing this category was significantly higher at 29%. Routine tasks are specifically addressed by most education plans, which generally specify that a student will only be expected to perform such tasks 'on occasion'. The phrase 'routine tasks' as stated on the survey without context or definition is open to interpretation.

d. The APO revised 2000 - 2001 articling evaluation forms to incorporate additional questions and ask for more detail with respect to 'routine tasks' as a result of the high percentage of respondents who indicated too many routine tasks on Survey 2000. Those revisions may account for some of the decrease from last year to this year as students may now have a better understanding of what constitutes a 'routine task'.

e. 19.3% of respondents indicated that they were 'not learning business aspects'. This group includes students who work for government ministries, agencies, corporate legal departments and large firms. Typically, these students receive less training in business aspects than those in small to mid-size legal firms.

f. All categories have shown decreases since Survey 2000 was administered.

g. 'Other' comments provided generally elaborated on responses already chosen and thus not useful. It would be reasonable to eliminate the 'other' response in future surveys.

h. Through revisions of the Articling Handbook, web-site material and other documents and forms, the APO encourages better communication between students and principals. Clarification of routine task expectations is continuing.

i. The APO is also considering the development of a web-based learning module to address business aspects.

V. Treatment of Articling Students

29. Background

a. While it is hoped that all articling students will receive an experience that is free from harassment and/or discrimination, the APO is aware that some students are subjected to unacceptable behavior during their placements. The APO uses this survey to try to quantify and qualify the treatment that students receive, from their principals or any other people that they come in contact with during their articling term.

b. With an anonymous survey, such as this one, it is hoped that disclosure of this information is maximized. Students might not feel the same apprehension that accompanies a survey with identifying information.

30. Treatment of Articling Students: Response Data

a. Table 13: Treatment of Articling Students: Distribution

Treatment	Survey 2001 #	Survey 2001 %	Survey 2000 %
Insensitivity, prejudice, discrimination	46	6.3	14.7
Slurs, demeaning remarks	31	4.2	8.3
Favoritism	52	7.1	11.3
Channeling	35	4.8	6.4
No discrimination	415	56.5	45.6
No response	215	29.3	25.0
Totals[1]	794	108.0	111.3

[1] Students could select more than one response

b. Table 14: Treatment of Articling Students: Categorization of Comments

Category	# of Comments
Favouritism or unfair distribution of work	20
Channeling into undesired area of law	9
Prejudicial remarks (ethnic or race related)	24
Rude or demeaning treatment and remarks	32
Sexist remarks and jokes	15
No discrimination	51
Comments not related to the question	15
Total comments[1]	166

[1] The categorized comments do not equal the number of comments received as some comments raised more than one point and were categorized in more than one group.

31. Treatment of Articling Students: Discussion

a. It is difficult to interpret 'no responses' in survey results and to know if the respondents did not want to answer, missed the question, had nothing to say on the topic or did not understand the question. To improve this question's response rate, the APO will restructure some questions for next year's survey.

b. The percentage of respondents reporting incidents of discriminatory incidents decreased by over 50% (Survey 2001 - 14.2%; Survey 2000 - 29.4%).

c. The response data from the discrimination question was cross-tabulated with the gender question data. Female respondents experienced a disproportionate amount of discriminatory treatment. Three times more female respondents than male respondents chose the following categories: Insensitivity, prejudice, discrimination; Slurs, demeaning remarks; Favoritism. Also, a number of comments related to sexist remarks or behavior.

d. Treatment during articles was also cross-tabulated with the age question data. Generally, responses in each of the treatment response categories were approximately equally distributed across the various age ranges, except for a disproportionate percentage of insensitivity/prejudice noted by the 'over 40' respondents.

e. Articling Handbook 2001 includes a revised section entitled "Identifying and Responding to Harassment and Discrimination" prepared by the Law Society's Equity Department. This material is currently being revised for posting on the APO web-site as a stand-alone memorandum, which will also include summer students. Joint efforts of the APO and Equity Department continue to address issues of discrimination and harassment.

VI. Conclusion

32. Survey 2001 provides a positive snapshot of the articling experience. 94% of respondents rated the articling experience favorably, indicating that the articling program prepared them "well enough" or "very well" for the practice of law. In Survey 2000, only 80.7% of respondents gave this rating.

33. The survey's response rate of 63.7% (Survey 2000 – 18.6%) of students articling in the 2000-2001 articling term and demographic comparisons to the profile of registrants in the BAC support a high degree of validity of the data.

34. 70% of respondents (Survey 2000 – 48%) indicated that they had been provided with an education plan. Preliminary review of final evaluations for the articling term 2000 – 2001 indicates that over 90% of students received education plans by the time they completed their final evaluations, suggesting that changes made pursuant to comments received from respondents to the Survey 2000 were effective.

35. 64% of respondents (Survey 2000 - 51%) consider that the current evaluation process is adequate, indicating that changes made pursuant to the comments received from respondents to Survey 2000 were effective.

36. The majority of students-at-law perceive themselves as receiving practical training (66.4%), in relevant legal skills (63.5%), from a helpful principal (53.1%). 52.8% of respondents rated the broad experience of their articling placements positively.

37. Significant decreases were noted in the percentage of students identifying areas of weakness in their articling placements. 20.8% (Survey 2000 – 29.4%) of respondents were concerned about the amount of routine tasks at their articling placement and 19.3% (Survey 2000 – 28.9%) about their lack of exposure to business.

38. The percentage of respondents reporting incidents of discriminatory incidents decreased by over 50% (Survey 2001 - 14.2%; Survey 2000 - 29.4%), suggesting that efforts by the APO and Equity Initiatives Department to ensure equity in the experiences in articling students have been effective. (Survey 2001 – 56.5% indicated no discrimination and 29.3% did not respond; Survey 2000 – 45.6% indicated no discrimination and 25.0% did not respond.)

39. Significant decreases were noted in the percentage of students identifying areas of weakness in their articling placements. 20.8% (Survey 2000 – 29.4%) of respondents were concerned about the amount of routine tasks at their articling placement and 19.3% (Survey 2000 – 28.9%) about their lack of exposure to business.

40. Non-traditional placements (joint, part-time, international, national, abridged, split) continue to provide valuable options and flexibility for Bar Admission Course students. Approximately 5% of students took

advantage of these options in the 2000-2001 articling term.

41. Future surveys will be revised to improve the quality of responses in certain of the questions. In November 2001, the APO participated in a survey design and development seminar to learn to better structure and design surveys and questions.

42. Looking forward, the APO will undertake the following initiatives to address the issues raised by this survey:

- Review the OISE Report, *Options in the Evaluation of Articling Experiences*, in the context of the professional training of future lawyers,
- Revise certain aspects of the survey on which this report is based,
- Continue to revise, create and clarify articling related information for inclusion in the Articling Handbook 2002, APO web-site, other documents, forms and communications, and
- Continue to work with the Equity Department to identify and address issues of harassment and discrimination.

APPENDIX 1

2000-2001 Articling Term: Employment Survey

The Articling and Placement Office is interested in collecting data on the quality of the articling experience. The following survey has been developed for this purpose. We ask that each student complete the survey and return it to the Articling and Placement Office with the end of term articling documentation (surveys will be separated upon receipt to maintain student=s anonymity).

The Law Society=s Admission Committee is committed to ensuring that legal services are provided by and for members of minority groups under-represented in the profession. In addition, the Ontario Human Rights Code prohibits discrimination on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, gender, sexual orientation, age, marital status, family status, or handicap. Further, the Law Society=s Accommodation policy for the Bar Admission Course reflects the spirit and intent of the Human Rights Code. To support these objectives, the Admissions Committee is interested in gathering statistics on the composition of the Bar Admission Course class.

1. What is your gender?

□ Male □ Female

2. What is your age?

□ 20-25 □ 26-30 □ 31-35 □ 36-40 □ Over 40

3. Denote any of the following groups of which you consider yourself a member.

□ Francophone
□ Aboriginal
□ Disabled
□ Mature
□ Visible Minority
□ Other _____
□ Gay/Lesbian

4. In what type of traditional (12 consecutive, full-time months) or 'non-traditional' articling experience did you participate? (You may choose more than one option.)

□ Traditional □ International □ Abridged
□ Joint □ National □ Split
□ Part-time

5. Have you seen or been provided with your Education Plan?

□ Yes □ No

6. How would you rate your articling experience as compared to the experience anticipated in the Education Plan?

□ No Education Plan □ Very good/Excellent □ Satisfactory
□ Good □ Poor

7. How do you feel articling prepared you for the area of law you intend to practice?

□ Not at all □ Well enough
□ Not very well □ Very well

See over ×

8. What, if anything, was it about the articling component of the Bar Admission Course that did not prepare you for the area of law you intend to practice? (You may choose more than one option.)

□ Plan to practice in another area □ Not learning business aspects
□ Too much time on research □ Experience not practical enough
□ Too many routine tasks □ Experience not broad enough
□ Lack of communication with principal
□ Other_____

9. What aspects of articling did you find most helpful? (You may choose more than one option.)

□ Good practical training
□ Principal(s)/supervising lawyer(s) was/were helpful
□ Learned relevant skills
□ Broad experience
□ Other _____

10. Do you think the current articling evaluations (mid-term and final) provide an adequate system for review during the articling experience? (Please comment.)

□ Yes □ No

_____
_____

11. During your articling placement did you experience any of the following? (You may choose more than one option.)

□ Insensitivity, prejudice or discrimination by staff or other articled students based on matters not related to competence
□ Discriminatory or prejudicial slurs and demeaning remarks
□ Discrimination or favouritism in work assigned by employer

□ Channelling into area of law that was not of interest
□ No discrimination

12. If you selected any of the above (in Question 11), please describe your experience.

_____

_____

_____

_____

13. Overall, how would you describe the quality of your articles?

□ Poor □ Good □ Satisfactory □ Very good/Excellent

ιThank you for completing this questionnaireι

Please return to: Articling and Placement Office, The Law Society of Upper Canada, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M4P 1S9, Fax: (416) 947-3403.

Appendix 2
List of Tables

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

(1) Examples of Practical Legal Skills Taught at Ontario Law Schools, in Relation to Current BAC Courses. (Appendix 1, pages 33 – 38)

(2) Chart Summarizing BAC Changes. (pages 42 – 46)

(3) Budgetary Implications of the Changes. (Appendix 7, page 80)

SPECIAL COMMITTEE ON LAWYER'S DUTIES WITH RESPECT TO PROPERTY RELEVANT TO A CRIME OR OFFENCE

Mr. MacKenzie presented the Special Committee's Report for discussion only. The matter is expected to come back to Convocation in April or May.

Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence
March 21, 2002*

Report to Convocation

Purpose of Report: Discussion

Prepared by the Policy Secretariat

* for discussion at April 25, 2002 Convocation

TABLE OF CONTENTS

INTRODUCTION

1. The Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence, in accordance with Convocation's mandate, has prepared a proposed rule and commentary.

2. The Committee is requesting that Convocation review the proposal and approve the rule and commentary in its present form or as amended by Convocation as an addition to the *Rules of Professional Conduct*.

3. The members of the Committee are benchers Gavin MacKenzie (chair), Stephen Bindman, Todd Ducharme, Niels Ortved, The Hon. Sydney Robins, Heather Ross and Clayton Ruby, as well as Alan Gold (president of the Criminal Lawyers Association), Paul Lindsay (Director, Crown Law Office - Criminal, Ministry of the Attorney General) and Tony Loparco (president of the Ontario Crown Attorneys' Association). The Committee is grateful to Paul Perell of Weir & Foulds in Toronto, for his assistance in drafting the proposed rule and commentary.

4. This report includes

- an explanation of the process followed by the Committee
- discussion of the central issues the Committee identified
- discussion of the input received from lawyers and the public on the draft of the proposed rule and commentary, released for comment in March 2001
- comment on the scope of the rule and commentary and the language of certain provisions

THE COMMITTEE'S PROCESS

First Steps

5. The Committee was appointed on November 29, 2000 following the withdrawal of a professional misconduct complaint against lawyer Kenneth Murray of Aurora. The Committee was charged with examining lawyers' ethical duties in connection with property relevant to a crime and devising a rule to address the relevant professional conduct issues.

6. The Committee has met on twelve occasions. Prior to its first meeting, the Committee reviewed extensive material that included existing rules and standards in other jurisdictions and academic writing and case law on the subject. The Committee thanks Austin Cooper Q. C. and Ian Scott, the defence counsel and Crown counsel respectively in *R. v. Murray* (in which a charge of attempting to obstruct justice was dismissed), for making information from their files available for this review.

7. The Committee was fortunate to receive permission from Justice Michel Proulx and David Layton (a criminal lawyer now practising in Vancouver) to review a chapter on lawyers' duties with respect to incriminating physical evidence from their then unpublished book, *Ethics and Canadian Criminal Law*, which has since been published by Irwin Law. This material provided a very useful discussion of the

subject.

8. Alberta is the only jurisdiction in Canada thus far to adopt a rule on lawyers' duties with respect to property having potential evidentiary value. The Committee also reviewed the rules of several United States state bar associations and the standards for defence counsel adopted by the American Bar Association.

9. Using this information as a starting point, the Committee began to "scope out" the rule and was assisted in this respect by a detailed list of issues prepared by Alan Gold, which was of great help to the Committee in its efforts to address those issues in a clear and enforceable rule and explanatory commentary.

The Issues

10. The issues that the Committee identified and attempted to address included the following:
- the role of the lawyer as advocate and the lawyer's duties to the client and the administration of justice;
- the fundamental importance of solicitor-client confidentiality and privilege in the relationship between and a lawyer and client in situations in which the lawyer learns of or is asked to receive property relevant to a crime or offence;
- the distinction between the lawyer acquiring information about property and the lawyer acquiring possession of such property;
- the possibility that the lawyer's duty may vary depending on whether the evidence is inculpatory, exculpatory, or partially inculpatory and partially exculpatory;
- the possibility that the lawyer's duty may vary depending on the nature of the property (for example, whether the rule should apply only to the instrumentalities or proceeds of crime, as suggested in some American authorities, or whether it should apply to all property (including documents, electronic communications, and computerized information) relevant to a crime);
- the possibility that the lawyer's duty may vary depending on whether the crime or offence to which the property is relevant is the subject of an existing charge, or investigation, or is undetected;
- the circumstances requiring, and the timing and method of, disclosure of property to law enforcement authorities;
- the necessity and scope of, and the lawyer's method of seeking, advice from senior counsel or the Law Society on issues respecting possession and disclosure of property.

The March 22, 2001 Draft

11. On March 22, 2001, the Committee presented a report to Convocation with a proposed rule and commentary recommended by the majority of the Committee. The report also quoted a proposed rule recommended by two dissenting members of the Committee who represent the Ministry of the Attorney General and the Ontario Crown Attorneys' Association, whose submission to the Committee is attached as Appendix A. As recommended by the Committee, Convocation directed the Committee to make its report including the proposed rule and commentary widely available to the public and the profession for written comments.

13. The Committee was attempting to accomplish two purposes with the March 22, 2001 proposed rule and commentary. First, the Committee proposed a mandatory rule that could be enforced through discipline proceedings if breached. Second, the Committee proposed an extensive commentary to provide guidance to lawyers in the multitude of circumstances in which issues may arise. The proposed commentary was designed to draw to the lawyer's attention the many distinctions and factors that should be taken into account, and provide advice on the approach the lawyer should adopt, when confronted with issues relating to property relevant to a crime.

14. This model would be consistent with the Law Society's current *Rules of Professional Conduct*, which came into force on November 1, 2000.

Call For Input And The Response

14. The proposed rule and commentary (including the explanatory report provided to Convocation on March 22, 2001) were made available to the public and the profession through the Society's web site and a notice in the *Ontario Reports*. A press release was also issued to the media commenting on the mandate of the Committee and the availability of the proposed rule and commentary for public comment. Selected legal organizations and the Attorney General of Ontario, David S. Young, received a written request for comment on the proposed rule and commentary.

15. A number of organizations and individuals both within and outside the profession responded to the call for input. The Committee received over 25 letters or e-mail communications. Most contained thoughtful comments on the proposed rule and commentary. [1] The Committee publicly thanks all those who responded to the call for input.

16. Many of those responding (including the Attorney General and various chiefs of police) expressed concerns about certain sections of the proposed commentary that would permit the lawyer to maintain temporary possession of property relevant to a crime or offence in certain defined circumstances. These respondents preferred the approach taken by the Law Society of Alberta in its rules of conduct, which is reflected in the position of the two members of the Committee who represent the Ministry of the Attorney General of Ontario and the Ontario Crown Attorneys' Association. The Attorney General's submission is attached as Appendix B. Other respondents (including the Advocates' Society) preferred the approach recommended by the Committee, though they also made constructive suggestions for ways in which the proposed rule and commentary might be improved.

17. The Committee assessed the input against the Committee's proposal and the key issues originally identified by the Committee. This led to revisions to the March 22 proposals, which are discussed in the next section of the report.

SCOPE OF THE PROPOSED RULE

Revisions Following Review of Submissions

18. Revisions to the March 22, 2001 proposals recommended by the Committee were both substantive and structural, and include the following:

    (i) expanding the rule with text from the commentary, thereby converting elements of guidance and advice to mandatory obligations,

    (ii) reorganizing the concepts in the rule so that they are set out in a more logical sequence,

    (iii) clarifying the circumstances in which a lawyer may take or keep temporary possession of property relevant to a crime or offence for use at trial, by specifying that the lawyer may do so only where the lawyer determines that to do so may prevent a wrongful conviction and that this use of the property would be significantly diminished if the property were disclosed to law enforcement authorities, and

[1] A list of the organizations and individuals responding to the call for input and their responses is available through the Law Society's Policy Secretariat upon request.

(iv) adding a requirement that a lawyer who proposes to take or keep temporary possession of property either for testing or for use at trial may do so only if the lawyer promptly seeks and receives authorization from a committee of the Law Society that the lawyer should be permitted to do so.

These revisions respond to concerns expressed in submissions received by the Committee, including the submission of the Attorney General. The third and fourth revisions, in particular, respond to submissions that a lawyer should be permitted to take or keep temporary possession of property relevant to a crime or offence for use at trial, if at all, only in narrowly defined circumstances, and that the decision should not be made exclusively on the basis of the subjective judgment of the particular lawyer involved in the case.

19. The authors of a number of submissions (including the Ontario Association of Chiefs of Police and several other police services), argued that a lawyer should never be permitted to retain possession of property relevant to a crime for purposes of testing or for use at trial, but rather should be required to turn the property over to law enforcement authorities in every case.

20. The majority of the committee concluded that such an approach would fail to recognize the extensive range of circumstances in which issues can arise in this area, the fundamental importance of the independence of the bar, and the important role of defence counsel in preventing wrongful convictions. Although it was the *Murray* case that gave rise to the creation of the Committee, the Committee was mindful of the fact that any rule and commentary adopted by Convocation would apply to a vast array of other situations. It is not difficult to conceive of circumstances, for example, in which a lawyer may be given a document that exposes the falsity of a Crown witness's evidence but which, if turned over to law enforcement authorities, would enable the Crown witness to tailor his or her testimony in such a way as to make the lawyer's client vulnerable to a wrongful conviction. In such cases (which the Committee expects would be rare) to permit the lawyer to retain the document for use at trial would, in the Committee's view, advance rather than obstruct the cause of justice.

21. Again, if the Committee's proposal is accepted, the lawyer would be permitted to retain the document temporarily for use at trial only if a committee of the Law Society established for the purpose were to authorize the lawyer to do so.

Rules of Other Jurisdictions

22. In addition to responding to the issues raised in the submissions, the Committee examined more closely the rules of other jurisdictions.

23. Most codes of professional conduct are silent on the subject of lawyers' duties with respect to property relevant to a crime. As mentioned above, Alberta is the only Canadian jurisdiction that has thus far adopted a rule on the subject. Rule 20 of Chapter 10 of the Law Society of Alberta's *Code of Professional Conduct* reads as follows:

A lawyer must not counsel or participate in:

(a) the obtaining of evidence or information by illegal means;

(b) the falsification of evidence;

(c) the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value; or

(d) the concealment of property having potential evidentiary value in a criminal proceeding.

Commentary

Lawyers must uphold the law and refrain from conduct that might weaken respect for the law or interfere with its fair administration. See Chapter 1, *Relationship of the Lawyer to Society and the Justice System*. A lawyer must therefore seek to maintain the integrity of evidence and its availability through appropriate procedures to opposing parties. The word "property" in paragraphs (c) and (d) includes computerized information.

….

Paragraph (d) applies to criminal matters due to the danger of obstruction of justice if evidence in a criminal matter is withheld. While a lawyer has no obligation to disclose the mere existence of such evidence, it would be unethical to accept possession of it and then conceal or destroy it. The lawyer must therefore advise someone wishing to deliver potential evidence that, if possession is accepted by the lawyer, it will be necessary to turn the evidence over to appropriate authorities (unless it consists of communications or documents that are privileged). When surrendering criminal evidence, however, a lawyer must protect confidentiality attaching to the circumstances in which the material was acquired, which may require that the lawyer act anonymously or through a third party.

There is no equivalent obligation of disclosure with respect to evidence in a civil proceeding in light of the extensive discovery process provided by the Rules of Court. However, it is improper to block disclosure of documents or other evidence duly requested pursuant to rules of production or practice.

24. The approach adopted in the Alberta rules differs markedly from the approach adopted in the American Bar Association Criminal Justice Section Standards. Standard 4-4.6 on Physical Evidence reads as follows:

(a) Defence counsel who receives a physical item under circumstances implicating a client in criminal conduct should disclose the location of or should deliver that item to law enforcement authorities only: (1) if required by law or court order, or (2) as provided in paragraph (d).

(b) Unless required to disclose, defense counsel should return the item to the source from whom defense counsel received it, except as provided in paragraph (c) and (d). In returning the item to the source, defense counsel should advise the source of the legal consequences pertaining to possession or destruction of the item. Defense counsel should also prepare a written record of these events for his or her file, but should not give the source a copy of such record.

(c) Defense counsel may receive the item for a reasonable period of time during which defense counsel: (1) intends to return it to the owner; (2) reasonably fears that return of the item to the source will result in destruction of the item; (3) reasonably fears that return of the item to the source will result in physical harm to anyone; (4) intends to test, examine, inspect, or use the item in any way as part of defense counsel's representation of the client; or (5) cannot return it to the source. If defense counsel tests or examines the item, he or she should thereafter return it to the source unless there is reason to believe that the evidence might be altered or destroyed or used to harm another or return is otherwise impossible. If defense counsel retains the item, he or she should retain it in his or her law office in a manner that does not impede the lawful ability of law enforcement authorities to obtain the item.

(d) If the item received is contraband, i.e., an item possession of which is in and of itself a crime such as narcotics, defense counsel may suggest that the client destroy it where there is no pending case or investigation relating to this evidence and where such destruction is clearly not in violation of any criminal statute. If such destruction is not permitted by law or if in defense counsel's judgment he or she cannot retain the item, whether or not it is contraband, in a way that does not pose an unreasonable risk of physical harm to anyone, defense counsel should disclose the location of or should deliver the item to law enforcement authorities.

(e) If defense counsel discloses the location of or delivers the item to law enforcement authorities under paragraphs (a) or (d), or to a third party under paragraph (c) (1), he or she should do so in the way best designed to protect the client's interests.

25. The Committee considered both the Alberta rule and the ABA Defence Standards to be helpful in formulating its own rule. The majority of the Committee concluded, however, that both the Alberta approach and the ABA Defence Standards' approach could be improved upon.

26. The concerns of the majority about the Alberta rule and commentary may be illustrated by an example. If a client wishes to obtain a lawyer's advice about the effect of a document and forwards it to the lawyer as an e-mail attachment, and the document "has potential evidentiary value in a criminal proceeding", the lawyer would appear to have a duty under the Alberta rule to turn over the document to the authorities; the rule does not seem to allow lawyers to return property to its source. The lawyer's duty would seem to be to turn over such a document to the authorities whether the document is exculpatory or inculpatory.

27. Such a rule, in the view of the majority, would discourage persons from seeking legal advice and representation and would tend to undermine the independence of the bar by transforming lawyers into agents of the state.

28. At the same time, the Committee had concerns about certain features of the ABA Defence Standard. Specifically, paragraph (c) (4) of the Standard, which would allow defence counsel to receive and retain property whenever they intend to "use the item in any way as part of defense counsel's representation of the client", could in some circumstances permit defence counsel to retain property for an extended time – as in the *Murray* case itself – without any independent review of the effect of doing so on the administration of justice.

Discussion of Particular Provisions

The Rule

29. The following is the revised proposed rule on property relevant to a crime or offence, as recommended by the Committee. The proposed rule and commentary in their entirety are set out in Appendix C.

Rule 4 – Relationship to the Administration of Justice

4.01 THE LAWYER AS ADVOCATE

Property Relevant to a Crime or Offence

4.01(10) A lawyer shall not take or keep possession of property relevant to a crime or offence, except in accordance with this rule.

(11) A lawyer may take temporary possession of property relevant to a crime or offence only where:

(a) it is necessary to do so to prevent the alteration, loss or destruction of the evidence,
(b) it is necessary to do so to prevent physical harm to any person,
(c) the client or the person possessing the property instructs the lawyer to promptly arrange for the property to be disclosed or delivered to the Crown or law enforcement authorities,
(d) the lawyer reasonably believes it is in the interests of justice that the property be examined or tested before it is disclosed or delivered to the Crown or law enforcement authorities, and the property may be examined or tested without altering or destroying its essential characteristics, or
(e) the lawyer reasonably believes that a wrongful conviction may be prevented if the property is first disclosed at trial, and this use of the property would be significantly diminished if it were disclosed to the Crown or law enforcement authorities before the trial.

(12) A lawyer may take or keep temporary possession under subrule (11) (d) or (e) only if the lawyer has been authorized to do so by a committee of the Law Society established by the Treasurer to decide whether the lawyer may take temporary possession. The lawyer must seek such authorization promptly.

(13) A lawyer who takes or keeps possession of property relevant to a crime or offence shall not
(a) counsel any alteration, concealment, loss or destruction of the property,
(b) alter, conceal, lose, or destroy the property, or
(c) deal with the property in a manner that there are reasonable grounds to believe would
(i) obstruct justice, or
(ii) risk physical harm to any person.

(14) A lawyer who takes or keeps property relevant to a crime or offence shall give up possession of the evidence as soon as practical and only in accordance with subrules (11)(d) or (e), (15) or (16).

(15) A lawyer in possession of property relevant to a crime or offence may return the evidence to its source only if the lawyer is satisfied on reasonable grounds that the evidence will not be
(a) altered, concealed, lost or destroyed or
(b) used to cause physical harm to any person.

(16) Subject to subrules (10) – (15), a lawyer in possession of property relevant to a crime or offence shall disclose or deliver it to the Crown or law enforcement authorities as soon as practicable in all the circumstances.

30. The rule deals with the lawyer's actual possession of property. The lawyer's knowledge of the existence of property relevant to a crime or offence does not usually raise the difficult issues associated with physical possession of the property, such as whether the property must be turned over to law enforcement authorities. As the commentary makes clear, information communicated to the lawyer by the client about property is generally protected by solicitor-client privilege and the lawyer's duty of confidentiality and must not be disclosed.

31. The rule's underlying theme is avoidance of conduct that may amount to an obstruction of justice. In a broader sense, the rule enshrines lawyers' obligations as key players in the proper administration of justice. The commentary, discussed below, recognizes the possible tension between these duties and the lawyer's duties of confidentiality and loyalty to the client.

32. The thrust of the rule and commentary is that lawyers generally should not accept or retain property relevant to a crime or offence. The rule recognizes that in some circumstances, the lawyer does not have a choice, for example where the client simply leaves the property at the lawyer's office. The rule provides that lawyers may take or keep property relevant to a crime or offence only in very limited circumstances and even then temporarily.

33. The purposes for which such property may be retained temporarily are as follows:

- To prevent the destruction of the property
- To prevent physical harm to any person
- To make arrangements to transfer the property to authorities pursuant to instructions
- To examine or test the property
- To prevent a wrongful conviction by making use of the property at trial

34. The Committee's discussions focussed on the merits of the fourth and fifth of these purposes.

35. The main concern expressed by the Crown counsel on the Committee and by a number of law enforcement agencies who made submissions, is that the lawyer's possession of the property, either for testing or for use at trial, and the timing of the lawyer's disclosure of the property, could impinge on the effectiveness of the investigation by the authorities and on the ability of the Crown to prosecute any charges laid that might arise out of the investigation. The circumstances may be aggravated, for example, if the property exculpates another accused, but is held by the lawyer until the trial of his or her client.

36. The Crown counsel on the Committee expressed concern that the lawyer's possession of the property may inappropriately affect a whole series of investigatory and prosecutorial decisions that are made at various stages of the proceedings up to and at trial, and that public confidence in the administration of justice would not be enhanced by allowing defence counsel to retain possession of property relevant to a crime or offence for testing or for use in the defence even temporarily, and even in the narrow circumstances referred to in the proposed commentary.

37. The Crown counsel also suggested that lawyers who receive property relevant to a crime or offence should never be allowed to return the property to its original source or location, but should rather be required to turn over the property to law enforcement authorities in every case.

38. The rule and commentary proposed by the Crown counsel (which are based in part on the applicable rule and commentary in the Law Society of Alberta's *Code of Professional Conduct*, and which in the Crown's counsels' view are consistent with the law as articulated in *R. v Murray* (2000), 48 O.R. (3d) 544 (S.C.J.)) are set out in Appendix A.

39. The majority of the Committee preferred to include in the proposed rule provisions that would allow a lawyer in certain defined circumstances to take or retain temporary possession of property relevant to a crime or offence for the purpose of non-destructive testing or for use in the client's defence. In all such cases the rule would require the lawyer promptly to obtain authorization from a committee of the Law Society that the lawyer should be permitted to retain temporary possession for such a purpose. The Committee's view was informed by the following considerations:

a. The retention of the property in some circumstances may be necessary to establish the client's innocence or to raise a reasonable doubt about the client's guilt, for example, by exposing the falsity of evidence on which the Crown relies;
b. In some cases the disclosure of the property by defence counsel may enable a witness who has falsely implicated the accused person to tailor his or her testimony with a view to securing a wrongful conviction;
c. The proposed rule and commentary make it clear that the circumstances in which a lawyer may retain temporary possession of property for use in the client's defence will be rare, and will be limited to circumstances in which the lawyer reasonably believes that a wrongful conviction may be prevented and that this use of the property would be significantly diminished if it were disclosed to law enforcement authorities;
d. The permissibility of defence counsel retaining temporary possession for non-destructive testing or for use in the defence is recognized by the American Bar Association Standards for Criminal Justice, which expressly allow counsel to retain property for a reasonable time where defence counsel "intends to test, examine, inspect or use the item in any way as part of defence counsel's representation of the client.";
e. As for whether lawyers should be required in every case to turn over to the authorities property relevant to a crime or offence, the Committee observed that such a requirement may discourage clients from seeking legal advice. Allowing lawyers to return the property to the client where they harbour no reasonable fear that the property will be altered, destroyed or used to cause physical harm to any person makes it no less likely that the evidence will see the light of day and has the advantage of ensuring that the client receives proper legal advice;
f. The requirement that the lawyer promptly seek authorization from a committee of the Law Society recognizes, in a way the Crown proposal does not, the wide range of circumstances in which problems in this area may arise. There is a significant difference, for example, between a situation in which a murder suspect leaves a bloody knife on a lawyer's desk, on the one hand, and a situation in which a client provides a document to a lawyer that may expose the client to a prosecution for a provincial offence if it were provided to law enforcement authorities.

40. The Crown counsel on the Committee also expressed concern that the proposed rule and commentary recommended by the majority could potentially permit a recurrence of what occurred in the *Murray* case. In the view of the majority, this concern is without substance.

41. It is important to keep in mind what actually occurred in the *Murray* case. Defence counsel, Mr. Murray, on the instructions of his client, took possession of videotapes that were relevant to crimes of which his client was accused. He did not disclose the existence of the videotapes for approximately 17 months, at which point he was replaced as defence counsel. On the advice of senior counsel, Mr. Murray then sought the advice of a committee of Law Society benchers established for the purpose. The accused's trial was imminent. The Law Society committee advised Mr. Murray to disclose the existence of the videotapes to the trial judge, Associate Chief Justice (now Chief Justice) LeSage. Chief Justice LeSage directed that the videotapes be turned over to the accused's new counsel (not to the Crown). The accused's new counsel in turn disclosed the videotapes to the Crown, and they were introduced into evidence at trial. The central problem in the case was that the videotapes were not disclosed in a timely way. As a result of the advice of the Law Society, direction of the trial judge, and the decision of new counsel, the videotapes were eventually disclosed.

42. Under the rule and commentary recommended by the majority Mr. Murray would not be allowed to retain possession of the videotapes for such an extended time. If he were to claim a reasonable belief that a wrongful conviction would be prevented if the videotapes were first disclosed at trial – a requirement of the proposed rule - he would be required under the proposed rule promptly to seek authorization from a Law Society committee. There is no reason to believe that the Law Society committee would come to a different conclusion than did the Law Society committee in the *Murray* case itself, that the videotapes should be disclosed.

The Commentary

43. The commentary to the proposed rule is organized into the following sections:

A. Introduction
B. Information Distinct from Possession
C. Types of Property
D. The Lawyer's Duties With Respect To Property Relevant to a Crime or Offence
E. Where Disclosure to Authorities is Required
F. Advising the Client
G. Seeking Advice and Authorization

A. Introduction

44. The Introduction describes the factors the lawyer must take into consideration before deciding to take or keep possession of such property, including the need to fulfill duties of loyalty and confidentiality to the client and to observe duties to the administration of justice. Particular mention is made of the general obligation not to obstruct the course of justice. The Introduction also makes it clear that a lawyer is never *required* to take or keep possession of property relevant to a crime or offence from a client or any other person.

B. Information Distinct from Possession

45. The commentary distinguishes between the lawyer's possession of property and knowledge of it. The commentary focusses on circumstances in which the lawyer is asked to take possession, and the obligations flowing from the lawyer's decisions.

C. Types of Property

46. This section confirms that the rule applies to all property, including original documents and documents that are electronically stored or formatted.

D. The Lawyer's Duties With Respect To Property Relevant to a Crime or Offence

E. Where Disclosure to Authorities is Required

47. Section D complements the portion of the rule that discusses how lawyers should deal with property relevant to a crime or offence. Section E is devoted to the circumstances in which lawyers have duties to disclose such property to law enforcement authorities.

48. According to the rule, lawyers are not to accept or retain such property except in very limited circumstances and even then only temporarily. The commentary, in discussing circumstances in which the lawyer has a duty to disclose the property to law enforcement authorities, advises lawyers to retain independent counsel to make the disclosure anonymously to protect the confidentiality of information about the source of the evidence.

49. The commentary elaborates on matters relating to the purposes for which such property may be retained temporarily and the lawyer's obligations in handling the property, including the point at which the lawyer gives up possession.

F. Advising the Client

G. Seeking Advice and Authorization

50. These two sections relate to the advice that a lawyer should provide to a client when asked to take or keep property relevant to a crime or offence. The Commentary advises lawyers to seek the advice of experienced counsel or the Law Society with respect to the handling of the property or any other issues connected with it, but reiterates that a committee of the Law Society established for the purposes described in the rule *must* be approached by the lawyer for authorization before the lawyer takes or keeps property relevant to a crime or offence for testing or for use at trial.

51. The Commentary emphasizes that lawyers should keep a written record of the advice.

SUMMARY

52. The drafting of rules of professional conduct by its nature is an intricate exercise that calls for a delicate balancing of duties that sometimes conflict. The Committee's mandate not only illustrated the difficulty of that task, but also presented unique challenges as a result of the context in which the need for guidance in this problematic area arose. The extraordinary circumstances were set against the background of significant public interest in the events leading up to the formation of the Committee and decisions in both the courts and at the Society which called out for clear guidance. The themes appearing in the rule and commentary were, as noted above, the subject of significant debate among Committee members. This was not unexpected, given that the issues involved the need to ensure the integrity of the administration of

justice, the fundamental nature of the solicitor and client relationship and the right of all persons to

independent counsel.

53. The Committee as a whole recognizes the impossibility of anticipating all situations in which the rule and commentary may apply in future. The Committee expects that the efficacy of the rule will be tested only when issues falling within its ambit are dealt with on a case by case basis.

54. The primary objective of the proposed rule and commentary is to provide substantive guidance to lawyers in keeping with the Society's role to govern the profession in the public interest. The Committee urges Convocation to adopt the proposals as amendments to the Society's *Rules of Professional Conduct*.

DECISION FOR CONVOCATION

55. Convocation is asked to approve the proposed rule and commentary, and amend the Law Society's *Rules of Professional Conduct* to add the rule and commentary appearing at Appendix C as rule 4.01(10) through (16) and related commentary.

APPENDIX A

SUBMISSION OF THE ONTARIO CROWN ATTORNEYS' ASSOCIATION

CROWN DRAFT -- TONY LOPARCO, PAUL LINDSAY March 2, 2001

The Lawyer's Duties With Respect to Physical Evidence of Crime

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Proposed Rule

1. A lawyer shall not counsel or participate in:

(a) the obtaining of evidence or information by illegal means;

(b) the falsification of evidence;

(c) the destruction of physical evidence relevant to an offence, the alteration of such evidence so as to affect its evidentiary value, or the removal of such evidence from a crime scene;

(d) the concealment of physical evidence relevant to an offence;

(e) the possession or concealment of property obtained or derived directly or indirectly from the commission of an offence.

2. A lawyer shall:

(a) advise the client that it is the lawyer's duty to turn over to the authorities any property within the ambit of Rule 1 that comes into the lawyer's possession;

(b) immediately turn over to the authorities any property within the ambit of Rule 1 that comes into the lawyer's possession.

NOTES

- This rule is not intended to affect communications or documents which otherwise come within the ambit of solicitor-client privilege.
- This rule is intended to cover all forms of property, including documents, which may have evidentiary value in a criminal or *quasi*-criminal investigation or proceeding, whether commenced or not.
- Paragraph 1 (c) is not intended to interfere with the testing of evidence or the release of court exhibits as authorized by the *Criminal Code* or other federal or provincial statutes.
- When turning over evidence coming within this rule to the authorities, the lawyer must nevertheless take appropriate steps to protect the client's confidences and preserve solicitor-client privilege, which may involve the lawyer acting through another lawyer.

Why is a new rule being formulated?

There is a need to formulate a crystal clear rule in response to concerns expressed by Mr. Justice Gravely in *R. v. Murray* that the present rules of professional conduct are not clear, and in response to public concerns arising from the *Murray* case.

What are the purposes of new rule?

- To draft a "black letter" rule that can be enforced through discipline if breached.
- To give guidance to lawyers who need to address the dilemma of potentially conflicting duties, *i.e.* duty to client vs. duty to administration of justice.

How best to achieve this goal?

Formulate a rule as clear and simple as possible. This addresses the complaint that the Law Society gives no real guidance in situations of ethical conflicts.

This proposed formulation has the great advantage of being clear and simple, since it does not leave discretion in vaguely defined circumstances. It makes it clear that lawyers should not take possession of property that has potential evidentiary value. If such evidence nevertheless comes into the lawyer's possession it must be turned over to authorities in a manner that best protects the client's interests, without interfering with the due administration of justice.

Advantages of the proposed rule:

- The proposed rule is largely based upon Chapter 10, Rule 20, of the Alberta Code of Professional Conduct, and the Commentaries thereunder. There is no indication that the Alberta rule has unduly interfered with the relationship between lawyers and their clients. It is submitted that in the absence of compelling reasons justifying a different position, there is no good reason for Ontario to formulate a rule that justifies not turning evidence over to the authorities when the Alberta rule so requires. A rule which is based upon an

  American model is not one which is likely to instill public confidence in the administration of justice, given the very different legal and social environments in which our two systems operate.

- Easy to understand and comply with.

- No ethical dilemma, as rule is mandatory rather than discretionary.

- Client is fully aware of implications of turning items over to the lawyer.

- Administration of justice is enhanced by virtue of the fact that evidence of crime used for investigative or prosecutorial decision-making is not secreted by lawyers or is not otherwise placed out of the reach of the authorities by lawyers.

- Sophisticated criminals could never use lawyers as a repository of “contraband”.

- Counsel can never be accused of obstructing justice or contravening s.354 of the Code.

- Counsel does not risk becoming a potential witness if continuity of evidence becomes an issue.

- Investigative and prosecutorial decisions will be made with more comprehensive information, resulting in lesser likelihood of miscarriages of justice and enhanced public confidence in the due administration of justice.

- If rule were to permit withholding of evidence until after trial commences, trials could be delayed or mistrials declared to permit Crown testing or recall of witnesses to address new evidence or to conduct further investigation.

- Does not offend duty of loyalty and confidentiality to client.

- Problems with the Previously Formulated Draft Rule:

- Previously drafted rule might have effect of not preventing obstruction of justice. The previous draft gives inadequate consideration to the effect that the withholding of evidence, *even temporarily*, might have on the course of justice.

As Justice Gravely indicated at paras. 106-108 of the *Murray* decision, the failure to disclose the tapes in that case not only tended to obstruct the police in their duty to investigate the crimes, but also impacted throughout on the series of prosecutorial decisions being made as the case was proceeding to trial. In this connection, Justice Gravely commented as follows:

> *On the face of the evidence Murray's action in secreting the critical tapes had the tendency to obstruct the course of justice at several stages of the proceedings.*
>
> *The tapes were put beyond the reach of the police who had unsuccessfully attempted to locate them. Secreting them had the tendency to obstruct the police in their duty to investigate the crimes of Bernardo and Homolka.*

> *The impact of the absence of the tapes flowed through into the ability of the Crown to conduct its case throughout. Quite apart from, and in addition to, the possible impact of the tapes on the outcome of the Homolka proceedings, as Blacklock J. pointed out in his reasons for committal at the Preliminary Inquiry, "A whole series of prosecutorial decisions are being made as a case proceeds along to trial". One of those prosecutorial decisions occurred when, without knowledge of the tapes, Crown counsel approached Murray with a resolution offer which Murray recommended to his client. [Emphasis added.]*

Justice Blacklock's comments at page 17 of the his Reasons for Judgment on the preliminary inquiry are also most instructive:

> *I agree that the notion that incriminating physical evidence may be held to the point of trial is troubling for reasons other than those set out in Fairbank. A whole series of prosecutorial decisions are being made as a case proceeds along to trial that the strength of the case relates to. Decisions are made about judicial interim release, the form of the indictment upon which the Crown and the Court will proceed is determined, whether or not to enter into plea negotiations, what position to take in those negotiations. If counsel are entitled to hold incriminating physical evidence to the point of trial, on the basis that to do so furthers in any measure a defence tactic counsel could presumably permit all these key decisions to be made knowing that it had taken out of any potential zone of discovery, significant incriminating physical evidence which would impact on those decisions.*

- The previous draft rule does not achieve objective of being a clear rule that can be enforced through discipline proceedings if breached. That proposal continues to put counsel at risk of criminal prosecution because the judgment call on the part of counsel might result in an assessment that counsel's action had in fact tended to obstruct, pervert or defeat the course of justice, contrary to section 139 of the *Criminal Code*.

- If evidence is immediately handed over the authorities, examination or testing of evidence will normally be performed by the Crown and all results of testing will be disclosed to the defence; if the Crown declines to conduct testing or otherwise does not agree to reasonable defence testing, defence has ability to request the Court to order production of the evidence and, pursuant to s. 605 of the *Criminal Code*, the defence may seek a court order for the release of the evidence for scientific testing.

- With respect to the suggestion that it would be appropriate to withhold disclosure of evidence in order to test the credibility of witnesses at trial by surprising them with evidence relating to the crime, we offer the following observations:

- If evidence is wholly inculpatory, then the only purpose of keeping it would be to prevent the Crown from using it. This is not a valid reason for defence to be able to keep evidence for any period of time. If evidence is exculpatory, the administration of justice is not impaired by turning it over to the Crown ahead of time. If evidence might be both inculpatory and exculpatory and this is the basis for withholding evidence until the close of the Crown's case, the issue arises as to what degree of exculpatory use is required in order to justify the retention of the evidence; and who makes the decision. It is submitted that a belief that there is some peripheral or collateral use that can be made of the evidence to test a witness's credibility or ability to perceive is insufficient to justify conduct which otherwise has the effect of obstructing justice. If this were not so, then Mr. Murray's justification for suppressing the tapes would be appropriate in the future. Clearly, this is not what Justice Gravely found.

- With respect to taking temporary possession of evidence to avoid future harm; to prevent the destruction of the evidence; or to make arrangements to transfer the evidence the authorities, obviously these purposes do not obstruct justice and could be included in a proposed rule if it is felt that these situations are not adequately covered.

APPENDIX B

SUBMISSION OF THE ATTORNEY GENERAL OF ONTARIO

Attorney General *The Hon. David S. Young*
Minister Responsible for Native Affairs

Procureur général *L'hon. David S. Young*
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May 28, 2001

Secretary, Special Committee on Physical Evidence
Policy Secretariat
Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
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Dear Sir/Madame:

I would like to thank you for the opportunity to comment on proposed rule 4.01(10) relating to lawyers' duties with respect to physical evidence of crime. I have grave concerns about the rule proposed by the majority of the Special Committee which I believe is inconsistent with the criminal law relating to obstruction of justice, is incompatible with the due and proper administration of justice, and will only serve to undermine the public's confidence in the legal profession.

The proposed rule purports to permit lawyers to participate in the concealment of evidence for lengthy periods of time, in some instances forever. There are three major aspects of the proposed rule which cause greatest concern.

First, the proposed rule would allow a lawyer to secrete evidence from the appropriate authorities until after the trial had commenced and the Crown had closed its case, solely for the purpose of permitting the defence to maximize the tactical effectiveness of the evidence at trial. This use of evidence is not consistent with Justice Gravely's decision in *R. v. Ken Murray* (2000), 48 O.R. (3d) 544. Justice Gravely stated at p. 570:

> Once he had discovered the overwhelming significance of the critical tapes, Murray, in my opinion, was left with but three legally justifiable options:

a. Immediately turn over the tapes to the prosecution, either directly or anonymously;
b. Deposit them with the trial judge; or,
c. Disclose their existence to the prosecution and prepare to do battle to retain them

> I am satisfied that Murray's concealment of the critical tapes was an act that had a tendency to pervert or obstruct the course of justice. [Emphasis added.]

Justice Gravely's judgement on this point should come as no surprise, since by holding on to the evidence until trial a lawyer is effectively concealing that evidence for that period of time. What the proposed rule fails to take into account is that even temporary concealment of evidence of crime can have the effect of obstructing the course of justice. That a rule of professional conduct of the Law Society of Upper Canada would purport to sanction such conduct is nothing short of scandalous. For example, the proposed rule would allow a lawyer to conceal physical evidence from the authorities even though the lawyer knows that the Crown is conducting plea discussions with a co-accused and that the physical evidence of crime would affect the outcome of those discussions. In short, it might allow a repeat of the *Bemardo* situation, in which the Crown was obliged to conduct plea discussions without knowledge of the existence of the most important physical evidence implicating the accused. As Justice Gravely indicated at pages 566 and 567 of his judgment, the failure to disclose the tapes in that case not only tended to obstruct the police in their duty to investigate the crimes, but also impacted throughout on the series of prosecutorial decisions being made as the case was proceeding to trial. In this connection, Justice Gravely commented as follows:

> On the face of the evidence Murray's action in secreting the critical tapes had the tendency to obstruct the course of justice at several stages of the proceedings.
>
> The tapes were put beyond the reach of the police who had unsuccessfully attempted to locate them. Secreting them had the tendency to obstruct the police in their duty to investigate the crimes of Bernardo and Homolka.
>
> The impact of the absence of the tapes flowed through into the ability of the Crown to conduct its case throughout. Quite apart from, and in addition to, the possible impact of the tapes on the outcome of the Homolka proceedings, as Blacklock J. pointed out in his reasons for committal at the Preliminary Inquiry, "A whole series of prosecutorial decisions are being made as a case proceeds along to trial. One of those prosecutorial decisions occurred when, without knowledge of the tapes, Crown counsel approached Murray with a resolution offer which Murray recommended to his client. [Emphasis added.]

Justice Blacklock's comments at page 17 of his Reasons for Judgment on the preliminary inquiry in *R. v. Murray* are also apposite:

> I agree that the notion that incriminating physical evidence may be held to the point of trial is troubling for reasons other than those set out in Fairbank. A whole series of prosecutorial decisions are being made as a case proceeds along to trial that the strength of the case relates to. Decisions are made about judicial interim release, the form of the indictment upon which the Crown and the Court will proceed is determined, whether or not to enter into plea negotiations, what position to take in those negotiations. If counsel are entitled to hold incriminating physical evidence to the point of trial, on the basis that to do so furthers in any measure a defence tactic counsel could presumably permit all these key decisions to be made knowing that it had taken out of any potential zone of discovery, significant incriminating physical evidence which would impact on those decisions.

Given the clear pronouncements by Justice Gravely and Justice Blacklock on this point and the inherent logic of their position, the proposed rule is most problematic, as it purports to permit a lawyer to do that which the courts have said cannot be done. The implementation of this rule permitting defence counsel to hold on to incriminating evidence, for tactical reasons, until after the Crown's case is closed would not instill public confidence in the administration of justice. To the contrary, I am forced to observe that such a rule would bring the administration of justice into disrepute.

My second major concern is that the proposed rule would purport to allow a lawyer to retain physical evidence of crime in order to conduct scientific testing. The difficulty with this is that the proposed rule, once again, fails to consider the adverse effects that even temporary concealment of the physical evidence of crime could have on the administration of justice. The proposed rule also fails to recognize that the defence is not prejudiced by immediately handing over the evidence to the authorities. Any examination or testing of evidence that the Crown performs will be disclosed to the defence. If the Crown declines to conduct testing, or otherwise does not agree to reasonable defence testing, the defence has the ability to request the Court to order production of the evidence and, pursuant to s. 605 of the *Criminal Code*, the defence may seek a court order for the release of the evidence for scientific testing.

My third major concern with the proposed rule is that it would allow a lawyer who took possession of evidence of crime to return the evidence to the original source. This would, in effect, allow the lawyer to participate in the permanent concealment of evidence of a criminal offence. For example, it appears that if the item was originally hidden or buried in some remote location, then the proposed rule would allow the lawyer to rebury the evidence. The spectre of an officer of the court participating in the concealment of evidence in this manner would certainly shock the sensibilities of the community and would only serve to lower public confidence in the legal profession and in the due administration of justice.

The proposed rule is surprising in that it is contrary to past opinions rendered by the Law Society's *ad hoc* "smoking gun" committee. One such opinion involved the famous "bloody shirt" case. In that case a person was wanted for murder and entered a lawyer's office with blood on his shirt. The lawyer instructed the client to remove the shirt, which he did, and then placed the shirt in the client's file. The lawyer started to worry about his actions, retained another counsel who approached the Professional Conduct Committee. The advice received from the Committee was:

> You should not have taken the shirt. It is a piece of physical evidence. Not only that, what you saw with your eyes as opposed to what you heard with your ears, is not privileged so that you may be a witness now in this case. Our advice to you is that you must withdraw from the case and you must turn the shirt over forthwith to the Crown Attorney.

The proposed rule is also contrary to the rule promulgated by the Law Society of Alberta. I am unaware of any suggestion that Alberta's rule has hampered the role of defence counsel. It would appear that the proposed rule is based upon an American model that is not likely to instill public confidence in the administration of justice, given the very different legal and social environments in which our two systems of law operate.

The proposed rule would do a great disservice to the legal profession. The Courts have routinely held that it is a criminal offence for anyone to conceal evidence of crime: *R. v. Lajoie* (1989), 47 C.C.C. (3d) 380 (Que. C. A.); *R. v. Lavin* (1992), 76 C.C.C, (3d) 279 (Que. C.A.) and *R. v. Akrofi* (1997), 113 C.C.C. (3d) 201 (Ont. C.A.). In attempting to formulate a rule regarding the retention of physical evidence of crime, the Law Society must ensure that the rule it enacts is consistent with the law. Any rule that is inconsistent with the criminal law is of no force or effect and *ultra vires* the Law Society, since, as you know, the Law Society is a provincial body which cannot amend federal criminal law. A lawyer who follows the proposed rule and retains physical evidence of crime until trial, or who conducts scientific testing without the knowledge of the authorities, or who returns the physical evidence of crime to its source, may still run the risk of being charged with a criminal offence.

I support the rule proposed by the Crown members of the Special Committee which states that physical evidence of crime that comes into a lawyer's possession must immediately be turned over to the authorities. This proposed rule has many advantages: it is consistent with the criminal law; it is easy to understand and comply with; it poses no ethical dilemma to the lawyer, as the rule is mandatory rather than discretionary; investigative and prosecutorial decisions will be made with more comprehensive information, resulting in a reduced possibility of a miscarriage of justice; and ultimately, and most importantly, it serves to instill public confidence in the legal profession and in the administration of justice.

By way of summary, I am absolutely opposed to the rule proposed by the majority of the Special Committee. In my role as the chief law officer of the Crown, I am very concerned that this proposed rule gives no weight to the legitimate demands of the administration of justice that lawyers not become secret repositories of evidence of crimes. All right thinking members of the public will be appalled to discover that this proposed rule totally ignores the significant damage that can be caused to the administration of justice by any delay in handing over physical evidence of crime to the authorities. In many cases, defence counsel will have no information concerning what steps an investigation or a prosecution may be taking and is in no position to gauge what damage delayed disclosure or non-disclosure might have on the conduct of an investigation or prosecution. It is simply unacceptable that the Law Society of Upper Canada would purport to permit lawyers to arrogate to themselves the decision as to when, or even whether, it is in the best interests of the administration of justice to disclose to the appropriate authorities physical evidence of crime which is in the lawyer's possession. There can be no doubt that it is in the public interest that investigative and prosecutorial decisions are made with all available evidence and information. That the Law Society might promulgate a rule that permits lawyers to secrete evidence that would have an adverse impact on those decisions and which might result in miscarriages of justice is intolerable and would only serve to bring the administration of justice into disrepute.

Thank you again for this opportunity to comment on the proposed rule. I sincerely hope that the Special Committee and Convocation will reconsider the possible implementation of the rule proposed by the majority of the Special Committee and will find favour with the rule proposed by the Crown members of the committee.

Yours truly,

David Young,
Attorney General and
Minister Responsible for Native Affairs

c.c. Robert Armstrong, Q.C.
Treasurer, Law Society of Upper Canada

APPENDIX C

PROPOSED RULE OF PROFESSIONAL CONDUCT 4.01(10) – (16) AND COMMENTARY

Rule 4 - Relationship to the Administration of Justice

4.01 THE LAWYER AS ADVOCATE

Property Relevant to a Crime or Offence

4.01 (10) A lawyer shall not take or keep possession of property relevant to a crime or offence, except in accordance with this rule.

(11) A lawyer may take temporary possession of property relevant to a crime or offence only where:

(a) it is necessary to do so to prevent the alteration, loss or destruction of the evidence,

(b) it is necessary to do so to prevent physical harm to any person,

(c) the client or the person possessing the property instructs the lawyer to promptly arrange for the property to be disclosed or delivered to the Crown or law enforcement authorities,

(d) the lawyer reasonably believes it is in the interests of justice that the property be examined or tested before it is disclosed or delivered to the Crown or law enforcement authorities, and the property may be examined or tested without altering or destroying its essential characteristics, or

(e) the lawyer reasonably believes that a wrongful conviction may be prevented if the property is first disclosed at trial, and this use of the property would be significantly diminished if it were disclosed to the Crown or law enforcement authorities before the trial.

(12) A lawyer may take or keep temporary possession under subrule (11) (d) or (e) only if the lawyer has been authorized to do so by a committee of the Law Society established by the Treasurer to decide whether the lawyer may take temporary possession. The lawyer must seek such authorization promptly.

(13) A lawyer who takes or keeps possession of property relevant to a crime or offence shall not

(a) counsel any alteration, concealment, loss or destruction of the property,

(b) alter, conceal, lose, or destroy the property, or

(c) deal with the property in a manner that there are reasonable grounds to believe would

(i) obstruct justice, or

(ii) risk physical harm to any person.

(14) A lawyer who takes or keeps property relevant to a crime or offence shall give up possession of the evidence as soon as practical and only in accordance with subrules (11)(d) or (e), (15) or (16).

(15) A lawyer in possession of property relevant to a crime or offence may return the evidence to its source only if the lawyer is satisfied on reasonable grounds that the evidence will not be

(a) altered, concealed, lost or destroyed or

(b) used to cause physical harm to any person.

(16) Subject to subrules (10) – (15), a lawyer in possession of property relevant to a crime or offence shall disclose or deliver it to the Crown or law enforcement authorities as soon as practicable in all the circumstances.

COMMENTARY

A. Introduction

A lawyer who takes from a client or other person property relevant to a crime or offence confronts difficult ethical issues and choices – and competing professional duties. This commentary is intended to assist lawyers who, in making decisions in the best interests of their clients, must also address their duties to the administration of justice.

A lawyer owes duties of loyalty and confidentiality to his or her client and must act in the client's best interests by providing competent and dedicated representation. These duties, which are fundamental to the administration of justice, among other things, encourage the client to be completely candid with the lawyer, who then can provide the best possible legal advice and representation, which is particularly important in the criminal law context where the reputation and liberty of the client may be at risk. The duties of loyalty and confidentiality must be fulfilled in a way that reflects credit on the legal profession, and inspires the confidence, respect and trust of clients and the public.

The lawyer also owes duties to the administration of justice, which require, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice. These duties must be observed in the context of our adversarial system of justice, in which the state bears the burden of proof and an accused's lawyer is not allowed, unless the client permits, to assist in the proof of the crime or offence.

It is in this context that a lawyer's responsibilities under subrules 4.01 (10) – (16) should be considered. Under these rules, a lawyer is never required to take or keep possession of property relevant to a crime or offence and generally should not take or possess such property. However, in certain limited circumstances, is it permissible for a lawyer to take or keep such property temporarily. These rules also address how a lawyer should give up possession of property relevant to a crime or offence that he or she temporarily possesses.

B. Information Distinct from Possession

This rule applies where the lawyer takes or keeps property relevant to a crime or offence. It does not apply where the lawyer is merely informed of property in the possession or control of the client or other person. In those circumstances, the lawyer will ordinarily have a duty to keep confidential the information disclosed by or on behalf of the client (see rule 2.03.) Even where the lawyer is asked by or on behalf of the client to take or keep property relevant to a crime or offence, such information communicated by or on behalf of the client (as contrasted with the property itself) will ordinarily be confidential. The duty of confidentiality will also ordinarily apply to information about property communicated orally or in writing by or on behalf of the client (such as the location of the property) as well as information communicated by the client's actions (such as the fact that the client has possession or control of property). The lawyer's actions in viewing the property, without more, will ordinarily be confidential, as will any advice the lawyer provides to the client with respect to the property, as long as the lawyer does not counsel or participate in any alteration, concealment, loss or destruction of it.

Where the lawyer refuses to take possession of the property, the lawyer should be careful not to counsel or participate in the alteration, concealment, loss, or destruction of the property. The lawyer may provide legal advice concerning obstruction of justice and about how the handling of incriminating evidence may show consciousness of guilt to allow the client to make an informed decision on what is in the client's best interests. Subject to the qualifications of this rule (for example, the qualification about preventing physical harm to others) what to do with the property is the client's decision, as the client will have to face the consequences of the decision.

If the client leaves with the property, the lawyer's observations of the property and the client's possession of it will usually be confidential under rule 2.03. Nevertheless, the lawyer's knowledge may affect his or her ability to act as defense counsel. For example, if the lawyer learns that the client intends to testify that he or she never had possession of the property that the lawyer observed in the client's possession, the lawyer could not lead the client's evidence and would have a duty to withdraw from the representation in accordance with rule 2.09 (7)(b) if the client insists on giving this testimony.

C. Types of Property

This rule applies to all types of property relevant to a crime or offence including original documents and documents that are electronically stored or formatted.

D. The Lawyer's Duties With Respect to Property Relevant to a Crime or Offence

Where under rule 4.10 (11)(d), the lawyer takes or keeps the property to examine or test it, the examination or testing must be genuinely for the purpose of the client's representation and not devised to aid in a ruse or to avoid disclosure of the property to the Crown or law enforcement authorities.

The lawyer should be satisfied that the person performing any test is reputable, and the lawyer should keep a record of the test and its observations and results. Where the testing method could alter or destroy the essential characteristics of the property, temporary possession is not authorized under rule 4.01(11)(d) and the lawyer should either (a) notify the Crown or law enforcement authorities so that the lawyer and the Crown may agree on a suitable testing process or apply to the court for directions or (b) give up possession of the property in accordance with the rule. The lawyer should give up possession of property kept for examination or testing as soon as is practicable.

Where under rule 4.10 (11)(e), the lawyer keeps the property to make use of it at trial, the evidence should be disclosed to the Crown at trial, generally before the close of the Crown's case. If the property is not disclosed until after the close of the Crown's case, the lawyer should not oppose the Crown's case being reopened.

Where the lawyer keeps temporary possession in any of the permitted circumstances, the lawyer should safeguard the property to ensure that it is not altered (for example by deterioration) or destroyed.

Where the lawyer takes possession of property relevant to a crime or offence but is not permitted to keep temporary possession of it, the lawyer should make arrangements for the property to be returned to the client or other source or disclose or deliver it to the Crown or law enforcement authorities in accordance with the rule as soon as practicable.

E. Where Disclosure Should be made to Authorities

When a lawyer discloses or delivers property relevant to a crime or offence to the Crown or law enforcement authorities, the lawyer has a duty to protect the client's confidences, including the client's identity, and to preserve solicitor and client privilege. This may be accomplished by the lawyer retaining independent counsel (who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer), to disclose or deliver the property.

F. Advising the Client

Before taking possession of property relevant to a crime or offence, the lawyer should advise the client that

(i) the lawyer cannot be used as a means of altering, concealing, losing, or destroying the property,

(ii) communications made for the purpose of altering, concealing, losing or destroying the property are not protected by solicitor and client privilege,

(iii) the lawyer may take possession of the property only in exceptional circumstances, and only then temporarily, and may be required to disclose or deliver the property to the Crown or law enforcement authorities,

(iv) law enforcement authorities may seize the property by means of a valid search warrant, regardless of whether the property is kept by the client or the lawyer, and

(v) if the client chooses to keep the physical evidence,

(A) the client cannot alter, conceal, lose, or destroy the property without committing a criminal offence,

(B) the lawyer cannot lead the client's evidence if the client proposes to testify that he or she never had possession of the property,

(C) if the client persists in the instructions described in (B), the lawyer will be required to withdraw as the client's counsel subject to the rules about criminal proceedings and the direction of the tribunal (see subrules 2.09 (4) – (9)), and

(D) any evidence of alteration, concealment, loss, or destruction of the property that can be proved by the Crown may be incriminating evidence.

The lawyer should prepare a written record of all communications and actions taken by him or her respecting property relevant to a crime or offence. The record should be kept in the lawyer's file. If the lawyer takes or keeps property in accordance with the rule, the lawyer should keep the property in the file or record in the file the location of the evidence.

G. Seeking Advice and Authorization

A lawyer who is asked to take or does take property relevant to a crime or offence should generally seek the advice of senior counsel or the Law Society. The lawyer is *required* by the rule promptly to obtain the authorization of a committee of the Law Society established by the Treasurer before taking or keeping temporary possession of the property for testing or for use at trial. The lawyer should document all communications and dealings with respect to the property for the purposes of obtaining authorization including making a record of any advice obtained from senior counsel or the Law Society.

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EQUITY & ABORIGINAL ISSUES COMMITTEE REPORT

Mr. Copeland presented the Equity & Aboriginal Issues Committee Report for Convocation's approval.

EQUITY AND ABORIGINAL ISSUES COMMITTEE/COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES
March 21, 2002

Report to Convocation

Purpose of Report: Decision Making and Information

Prepared by the Equity Initiatives Department

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** The full report is available from Geneva Yee (416-947-3300 ext. 2153) in the Equity Initiatives Department.*

TERMS OF REFERENCE/COMMITTEE PROCESS

The Committee met on Thursday, March 7, 2002 from 5:00 - 7:00 p.m. in the Secretariat Boardroom. In attendance were: Paul Copeland (Chair), Derry Millar (Vice-Chair), Stephen Bindman, Brad Wright, Judith Potter, Janet Minor, Gary Gottlieb, Tom Carey and Andrew Pinto (Chair, Equity Advisory Group).

Staff present were: Charles Smith, Josée Bouchard and Rachel Osborne.

The following items are brought to Convocation:

For Decision-Making:

Model Policy on Harassment and Discrimination for Law Firms

Motion on Impact of Increasing Law School Tuition Fee

For Information:

Discrimination and Harassment Counsel Year-End Report, January - December 2001

FOR CONVOCATION DECISION-MAKING

MODEL POLICY ON DISCRIMINATION AND HARASSMENT

1. The Equity Initiatives Department has prepared for release a *Model Policy on Harassment and Discrimination for Law Firms*. This policy is based on the Law Society's own *Workplace Harassment and Discrimination Prevention Policy and Procedures* as well as a review of contemporary case law concerning discrimination and harassment. The proposed policy has been reviewed by several groups and endorsed by the Equity Advisory Group, which includes representatives from Women's Law Association-Ontario, the Advocates' Society, the Canadian Association of Black Lawyers and individuals who have expertise in human rights law.

2. The Law Society has, over the years, produced several model policies for law firms to assist them in developing policies and programs aimed at promoting equity and diversity in all aspects of the legal profession, eg., employment and services**.** Some of these model policies include: *Guide to Developing Flexible Work Arrangements*, *Developing Equity Policies*, *Personnel Policy on Sexual Harassment* and *Guide to Developing a Policy for Law Firms Regarding Accommodations Requirements*.

3. The *Bicentennial Report on Equity Issues in the Legal Profession* has noted the importance of developing model policies for the profession. The current policy is proposed to address issues related to harassment and discrimination within legal workplaces, particularly as it affects matters related to employment and services.

4. Consistent with the Law Society's *Workplace Harassment and Discrimination Prevention Policy*, the *Model Policy on Harassment and Discrimination* can be used by law firms of all sizes and covers a number of issues, including:

- Why Law Firms Need Written Policies
- Legal Requirements and Professional Responsibilities
- How to Limit a Law Firm's Liability
- What Should Be Included in a Policy
- Effective Implementation and Review of the Policy

5. The proposed policy had been submitted to Convocation for its February 20, 2002 meeting. At that time, benchers offered technical amendments to the policy, additions to some of the issues addressed in the policy and suggestions on the presentation of the policy. These changes have been incorporated into the current proposed version and are in bold in the Appendix. The proposed policy has also been restructured so that the model policy is at the beginning of the document and the historical information, including the case law review, is placed at the end of the document. The proposed policy also includes a section specifically addressing medium-sized and small law firms.

6. Following this reformatting and upon approval of the model policy by Convocation, the Equity Initiatives Department and Communications Department will work to develop a user-friendly print and online version of the policy for dissemination. The final product will then be promoted to the legal profession through notices in the Ontario Reports, via Internet, at public education activities and through mailings to legal associations across Ontario.

The Committee requests that Convocation adopt the proposed Model Policy.

MOTION ON INCREASING LAW SCHOOL TUITION FEE

7. The Committee discussed this issue at both its February 6, 2002 and March 7, 2002 meetings. At both meetings, the Committee was unanimous in bringing this issue to Convocation for decision-making. The matter was deferred by the Committee from February to enable the Treasurer to speak with the law school deans about this matter and to discuss this matter with them.

8. Following the February Convocation, the Committee has received numerous e-mails and correspondence requesting that the Committee raise this issue with Convocation. These were received from the Equity Advisory Group, recent calls to the bar and others. In addition, the Committee has received copy of a complaint submitted to the Ontario Human Rights Commission by the Black Law Students Association of Canada in cooperation with the African Canadian Legal Clinic. These submissions are included in Appendix 2..

9. Based on the report included in the Appendix 2 and the aforementioned submissions to the Committee, the Committee has drafted a motion for Convocation's consideration.

10. Whereas the Law Society of Upper Canada has responsibility for the entry of individuals from all backgrounds into the practice of law in Ontario

11. Whereas the Law Society has been concerned for many years regarding the accessibility of the legal profession to all who may be interested in pursuing a legal career

12. Whereas the Law Society has been concerned about the social diversity of the legal profession in Ontario and has established policies, program and services to encourage, promote and develop a legal profession that is reflective of the Ontario population

13. Whereas the increasing tuition fees for entry into and continuance through legal education up until the call to the Bar has been a concern of the Law Society for some time

14. Whereas the recent efforts of law schools in Ontario to increase tuition fees may have serious consequences to the goals and objectives of the Law Society and weigh against its interests in developing a legal profession that is reflective of the Ontario population

15. It is therefore resolved that Convocation:

a. convey to all law schools in Ontario and to the Ontario government the Law Society's deep concerns over the high risk that the continuing increase in law school tuition fees will:

i) unfairly limit access to law school education to those who are economically advantaged and those eligible for financial aid;

ii. erect unnecessary barriers to diversifying those engaged in legal education and those seeking a career in law;

iii. reduce the number of new lawyers willing to practice in smaller communities or take on engagements in public interest law in government, legal aid clinics, poverty, human rights and equity law because of the debt load at the time of their call

iv. encourage Legal Aid Ontario, other legal associations (eg., the Canadian Bar Association, CDLPA and representatives from interested legal associations and groups) to take action similar to the Law Society and be open to work with the Law Society in addressing this matter in the future, if required;

b. establish a working group comprised of representatives of the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones, the Admissions Committee, the Emerging Issues Committee, the Access to Justice Committee and the Government Affairs Committee to:

i) meet with the law school deans to discuss joint strategies aimed at dealing with the deregulation of tuition fees for post-graduate education;

ii) work with the law schools in examing the demographic impact that may result from the increasing tuition fees so as to monitor any changes and to make recommendations, if required

FOR CONVOCATION INFORMATION

DISCRIMINATION/HARASSMENT COUNSEL YEAR-END REPORT

16. The Law Society of Upper Canada's Discrimination/Harassment Counsel, Ms. Mary Teresa Devlin, has submitted her year-end report for January - December, 2001. A summary of this report is at Appendix #3.

APPENDIX 1

THE LAW SOCIETY OF UPPER CANADA

PREVENTING AND RESPONDING TO WORKPLACE HARASSMENT AND DISCRIMINATION: A GUIDE TO DEVELOPING A POLICY FOR LAW FIRMS

March, 2002

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INTRODUCTION

The Law Society of Upper Canada has for several years provided to law firms the benefit of its experience in the area of devising working protocols. The firms have assisted the Society in formulating this Guide which includes a model policy for dealing with harassment and discrimination within law firms[1]. We encourage you and your firm to adapt and adopt it for your firm. The support of the profession on such matters has been most encouraging and we believe that this document will be of real value. Staff at the Law Society are available to assist in the development of a policy for your law firm either by telephone or by attending at your offices. We share with you the belief that while this issue may have come a long way, we must be ever vigilant and sensitive, and we hope that this tool will be of assistance to you.

The Ontario *Human Rights Code*[2] (the *Code*) and Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the *Rules of Professional Conduct*[3] prohibit harassment and discrimination in the workplace and in the delivery of services. The following introductory material summarizes relevant background studies, discusses law firms' legal and professional responsibility to prevent and respond to workplace harassment and discrimination, and lists some of the benefits to law firms of having a written policy to address these issues. This Guide also discusses how to effectively implement and review such a policy and provides a precedent that firms can utilize on to design their own policy.

WHY LAW FIRMS NEED WRITTEN POLICIES

The Ontario Human Rights Commission has stated that "[t]he best defence against human rights complaints is to be fully informed and aware of the responsibilities and protections included in the *Code*.[4]" It is now well established that the adoption of effective harassment and discrimination policies and procedures and the design and delivery of education programs for employees and members of employment organizations such as law firms have the potential of limiting harm and consequently reducing liability of employers[5].

It is advantageous to a firm to adopt written policies for a number of reasons:

17. Written policies encourage respect for the dignity of all staff and members of the law firm.

18. Written policies show that the firm's management takes seriously its legal and professional obligations.

19. Written policies remove much of the discretion and bias that can otherwise play a part in decision-making about individuals.

20. Written policies clearly set out the nature of comment and conduct which will not be tolerated in the workplace, as well as the preventative, remedial and disciplinary actions that may be taken to address workplace harassment and discrimination.

21. Written policies provide procedures for handling complaints about harassment and discrimination, and encourage prompt resolution of workplace harassment or discrimination.

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[1] Although this Guide refers to law firms, it may be of assistance to other organizations such as legal aid clinics.
[2] R.S.O. 1990, c. H.19.
[3] Adopted by Convocation of the Law Society of Upper Canada on June 22, 2000, effective November 1, 2000.
[4] *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 41.
[5] For example, see *Ferguson* v. *Meunch Works Ltd.* (1997), 33 C.H.R.R. D/87 (B. C. H. R. T.).

22. Written policies on equity issues encourage respect for and acceptance of staff and members of the law firm from a diversity of groups, such as those protected under the *Ontario Human Rights Code* and the *Rules of Professional Conduct*. I.e. In the context of employment and the delivery of services, the *Human Rights Code* protects against harassment and discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.

23. The existence of written policies allows the firm to communicate its commitment to equity principles to people outside the firm, such as prospective recruits and clients.

24. Written policies minimize the risk of workplace harassment or discrimination and of harm to individual employees, as well as the risk that the firm will be held liable for such unlawful harassment or discrimination.

25. Written harassment and discrimination policies may provide the necessary focus for education programs on preventing and responding to workplace harassment and discrimination.

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The pages which follow are a precedent for a policy which firms may adapt for their own use. In some cases, a firm may wish to add details or examples from the endnotes to the actual text of its own policy.

The precedent addresses the most common situation: a firm composed of partners, associates, and other staff or a professional corporation, not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy, and possibly to the collective agreement.

The policy on Preventing and Responding to Workplace Harassment and Discrimination is simply that: a precedent. It is intended to provide guidance, rather than to represent the ultimate or ideal policy. A firm will need to design its own policy, tailoring the recommended model to its own circumstances.

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MODEL POLICY FOR [THE FIRM]
PREVENTING AND RESPONDING TO WORKPLACE
HARASSMENT AND DISCRIMINATION

STATEMENT OF PRINCIPLES

1. [The Firm] is committed to providing a working environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere which promotes equal opportunities and prohibits discriminatory practices.

2. Harassment and discrimination in employment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability are illegal. Harassment and discrimination are prohibited by the *Human Rights Code*[1] and by Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the Law Society of Upper Canada *Rules of Professional Conduct*[2].

3. Harassment and discrimination are offensive, degrading and threatening. [The Firm] has adopted this workplace policy to make clear that harassment and discrimination will not be tolerated in our firm. Regardless of seniority, individuals found to have engaged in behaviour constituting harassment or discrimination may be severely disciplined.

4. [The Firm] recognizes that proper education and training of staff and members of the firm is important in developing a workplace free from harassment or discrimination. All staff and members of the firm should understand what constitutes harassment and discrimination, that it is harmful to individuals and to firm productivity, and that it is strictly prohibited.

5. [The Firm] recognizes that its staff and members may be subjected to harassment or discrimination by individuals who are not staff or members of the firm, such as clients, others who conduct business with the firm, opposing counsel, court personnel or judges. The firm considers such harassment or discrimination as unacceptable and acknowledges its responsibility to support and assist an employee or member of the firm subjected to such harassment or discrimination [The Firm] will do all it can to ensure that the behaviour stops.

6. It is the responsibility of all staff and members of the firm to raise concerns about discrimination and harassment. It is also the responsibility of staff and members of the firm to respond to, or not condone, discrimination or harassment. The firm encourages staff and members to report incidents of harassment or discrimination.

7. The firm has the duty to accommodate differences that arise from the protected grounds up to the point of undue hardship. Requests for accommodation may be made under [The Firm] accommodation policy[3].

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[1] *Human Rights Code*, R.S.O. 1990, c. H. 19 (the *Code*).
[2] *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).
[3] Law firms have a duty to accommodate differences that arise from the protected grounds enumerated in the *Code* and under Rule 5.04 of the *Rules of Professional Conduct*, up to the point of undue hardship. Law firms are encouraged to adopt not only a policy on preventing and responding to workplace harassment and discrimination but also an accommodation policy. The *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, March 2001) and the document entitled *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities, Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001) may provide guidance for law firms in drafting an accommodation policy.

8. Notwithstanding the existence of this policy and even though steps are being taken under this policy, every person continues to have a right to seek assistance from external resources, such as the Ontario Human Rights Commission.

OBJECTIVES

9. The objectives of this policy are:

- To maintain a working environment that is free from harassment and discrimination and in which staff and members treat each other with mutual respect;
- To alert all staff and members of the firm to the fact that harassment and discrimination in the workplace are demeaning practices that constitute a profound affront to the dignity of staff and are an offence under the law;
- To set out the types of behaviour that may be considered offensive and which will not be tolerated by the firm;
- To establish a mechanism for receiving complaints of harassment and discrimination and to provide a procedure by which [The Firm] will deal with these complaints;
- To outline the preventative, remedial and disciplinary actions which may be taken when a complaint of harassment or discrimination has been brought forward and/or substantiated.

10. This policy is not intended to constrain acceptable social interactions between people in the firm[4].

APPLICATION OF POLICY

11. This policy applies to everyone working for [The Firm] or who is a member or an employee of [The Firm], whether part-time, full-time or casual, regardless of their position in the firm, including secretarial, support, professional and administrative staff, articling and summer students, associates and partners. The policy also applies to others in the work context, such as volunteers, co-op students, dependant and independent contractors[5]. [The Firm] will not tolerate harassment or discrimination in the workplace, whether by fellow employees, supervisors, associates or partners. It is also unacceptable for staff and members of the firm to engage in harassment or discrimination when dealing with clients, or other third parties with whom they interact in a professional capacity.

[4] Although the recommended policy restricts itself to a statement that it is not intended to constrain acceptable social interactions, firms may wish to include a paragraph which draws attention to the problems which can arise from such relationships. Relationships which begin as consensual may become harassing, particularly where there is a difference in power between the parties. In such cases, the fact that two people once had a consensual relationship does not exempt them from the harassment provisions; furthermore, if a person is subjected to harassment as a result of the termination of consensual relations, this could be construed as a violation of the policy.

[5] The policy should provide that contractors are covered by the policy and subject to complaints under the policy but also that contractors may file complaints under the policy.

12. This policy covers any employment-related environment including, but not limited to:

the office;
work assignments outside the office;
office-related social functions;
work-related conferences and training;
work-related travel;
in the courtroom; and
telephone communications, faxes or electronic mail.

DEFINITIONS

13. "Harassment" means one or a course of vexatious comment or conduct based on a protected ground enumerated in paragraph 18 of this policy that is known or ought reasonably to be known to be unwelcome. Harassment has the effect of creating a degrading, intimidating, hurtful or marginalizing work environment for the person experiencing it.

14. There may be circumstances where a single incident is serious enough to amount to harassment.

15. Harassment based on any of the protected grounds sometimes appears as a poisoned work environment which is usually defined as comments or conduct that tend to demean a group covered by a protected ground, even if not directed at a specific individual. It describes a situation where offensive behaviour poisons the workplace.

16. Harassment may arise when submission to a vexatious comment or conduct on the basis of a protected ground is made either implicitly or explicitly a condition of employment or when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, matters of hiring, promotion, raise in salary, job security and benefits affecting the employee).

17. "Discrimination" means a distinction, whether intentional or not, but based on a protected ground, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society[6].

18. "Protected grounds" means any of the following personal characteristics: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability[7].

[6]Discrimination includes "direct discrimination" (where an employer adopts a practice or rule which on its face discriminates on a prohibited ground); "adverse effect discrimination" (where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force) and "systemic discrimination" (practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics).

[7] The protected grounds are defined at Appendix A of this policy.

19. "Directing mind" means, for the purposes of this policy, a member or employee of a law firm who performs management duties[8].

20. "Condonation" relates to individuals who "know or might reasonably know" that harassment or discrimination is occurring and take no action to stop the offending behaviour. If an employer or a directing mind knows or ought reasonably to have known that harassment or discrimination is occurring and fails to act promptly to resolve the matter, he or she has "condoned" the behaviour and may be violating the policy.

21. "Threats, reprisals or retaliation" mean harsh comment or conduct, discipline, criticism, ostracism, the stymieing of a person's career, damage to a person's reputation or similar treatment directed toward an individual:

    a. for having invoked this policy;

    b. for having participated in or cooperated in any investigation under this policy; or

    - for having been associated with a person who has invoked this policy or participated in these procedures[9].

    [The Firm] has established this policy to provide staff and members of the firm with an internal method of addressing harassment or discrimination. Any employee or member of the firm who engages in threats, reprisals or retaliation is in violation of this policy. Threats, reprisals or retaliation seriously escalate the situation and will be dealt with accordingly.

22. "Malicious or bad faith complaint" means that a person has made a complaint under this policy that s/he knew was untrue. That is itself a violation of this policy. However, the insufficiency of evidence to prove a complaint does not mean that the complaint was submitted in bad faith. A person who submits a complaint in good faith, even where the complaint cannot be proven, has not violated the policy.

EXAMPLES OF HARASSMENT

23. The following are examples of sexual harassment*:*

    - Sexist jokes causing offence, told after the joker has been advised that they are embarrassing or offensive.

    - Suggestive or offensive remarks[10].

    - Persistent unwanted contact after the end of a consensual relationship.

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[8]The Ontario Human Rights Commission states that, in the case of a corporation, a directing mind who discriminates against or harasses anyone in a manner contrary to the *Code*, or who knows of the harassment or discrimination and did not take steps to remedy the situation, engages the liability of the employer. See pp. 21-24 of this Guide for a discussion of the definition of "directing mind".

[9] The policy should specifically state that threats, reprisals or retaliation will be treated as harassment or discrimination. The absence of this provision could lead to an unwillingness to report. If the firm considers it appropriate, the policy could also state that in cases of harassment or discrimination where there is also threats, reprisals or retaliation against the complainant, more severe disciplinary action will be taken than in the case of harassment or discrimination alone.

[10]In one case, the complainant had endured 14 years of daily degrading comments from a coworker who would make comments such as "the fat cow screwed up again", or who would refer to the complainant and her sister as "the fridge sisters". *Shaw* v. *Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. of Inq.).

- Unwelcome physical conduct, such as regularly caressing an employee's shoulders.
- Propositions of physical intimacy.
- Demands for dates or sexual favours, when you know or ought to know that they are unwelcome.
- Verbal abuse or leering.
- Bragging about sexual prowess.
- Display of sexual and/or offensive pictures, graffiti, cartoons or other materials.
- Delivery of sexual and/or offensive e-mail messages.
- Comments about clothing and physical appearance which are unwelcome or ought to be known to be unwelcome.

24. The following are examples of racial harassment:

- Comments, signs, caricatures, or cartoons displayed in the workplace that depict minority racial or religious groups in a demeaning manner.
- An employer who tolerates racial graffiti and does nothing to stop it.
- Demeaning racial remarks, jokes or innuendoes about an employee told to other employees, and racist, derogatory or offensive pictures, graffiti or materials related to race or other grounds such as ethnic origin[11].
- Delivery of racist and/or offensive e-mail message or exchange of racist and/or offensive message through any form of communication.
- Racial remarks, jokes or innuendoes made about other racial groups in the presence of employees who are members of a racial group may create an apprehension on the part of those employees that they too are targets when they are not present.
- Repeated racial slurs directed at the language and accent of a particular group.

25. The examples referred to in paragraphs 23 and 24 of this policy are also not to be tolerated if they are derogatory based on the following characteristics: ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.

RIGHTS AND RESPONSIBILITIES

[11] A Black man receiving a photocopy of a questionnaire with the head "Employment Application for Niggers" through internal mail. The employer does nothing to remedy the situation. (*Hinds* v. *Canada (Employment & Immigration Comm.)* (1988), 10 C.H.R.R. D/5683 (C. H. R. T.). An employee receiving a phone call in which a customer uses racial slurs and comments such as "I don't know why they let you Hindus work with the public? ". In this case the employee swore back at the customer and was fired. It was held that the employee had been subjected to racial harassment in the workplace and by firing her the employer was condoning the harassment and was liable. The employee should not have been fired (*Mohammed* v. *Mariposa Stores Limited Partnership* (1990), 14 C.H.R.R. D/215 (B.C. Bd of Inq.)

RIGHTS AND RESPONSIBILITIES OF STAFF AND MEMBERS OF THE FIRM

26. Each employee and member of the firm has the right to be treated fairly and respectfully in the workplace.

27. Each employee and member of the firm is responsible for playing a part in ensuring that the working environment is free from harassment and discrimination by not engaging in conduct which may constitute harassment or discrimination. In addition, a member or employee who believes that a colleague has experienced or is experiencing harassment or discrimination is encouraged to notify one of the Advisors appointed under this policy and may file a complaint under this policy[12].

28. Each employee and member of the firm has a responsibility to raise concerns about discrimination and harassment and to co-operate in the investigation of a harassment or discrimination complaint. Each employee and member of the firm involved in an investigation under this policy must maintain confidentiality as prescribed in this policy.

Responsibility of [The Firm]

29. [The Firm] is responsible for:

- preventing and responding to harassment and discrimination on an ongoing basis, whether or not formal written complaints of harassment or discrimination have been brought to the attention of [The Firm];
- making all staff and members of the firm aware of the issue of workplace harassment and discrimination, and the existence of this policy;
- providing staff, members of the firm and clients with information regarding avenues of recourse other than those available under this policy[13];
- appointing one or more individuals to act as internal resources to staff and members of the firm and ensuring that they have the resources to assist them to fulfil their responsibilities under this policy;
- regularly reviewing this policy and its procedures to ensure that they adequately meet the policy objectives;
- responding promptly and seriously to any complaint of harassment or discrimination;
- promptly advising the complainant of any action taken in response to the complaint;
- providing advice and support to persons who are subjected to harassment and discrimination;

[12] Whenever questionable conduct takes place anywhere in the workplace, it could create a poisoned work environment for other staff or members of the firm as well as the individual target of harassment. The recommended policy suggests that the best course is to remind third parties of their obligation to maintain a work environment free from harassment and to "encourage" rather than "require" reporting.

[13] Including information on the services offered by the Discrimination & Harassment Counsel and the right to file a complaint with the Law Society of Upper Canada under the *Rules of Professional Conduct* or with the Ontario Human Rights Commission under the *Human Rights Code*.

- when a complaint of harassment or discrimination is found to have been substantiated, formally acknowledging to the complainant that harassment or discrimination has taken place[14];

- imposing remedial or disciplinary measures when a complaint of harassment or discrimination is found to have been substantiated, regardless of the seniority of the offender;

- maintaining records as required by this policy;[15] and

- doing all in its power to support and assist any member or employee of the firm who complains of harassment or discrimination by a person who is not a member or employee of the firm.

CONFIDENTIALITY

16. [The Firm] understands that it is difficult to come forward with a complaint of harassment or discrimination and recognizes a complainant's interest in keeping the matter confidential.

17. To protect the interests of the complainant, the person complained against, and any other person who may report incidents of harassment or discrimination, confidentiality will be maintained throughout the investigatory process to the extent practicable and appropriate under the circumstances.

18. All records of complaints, including contents of meetings, interviews, results of investigations and other relevant material will be kept confidential by [The Firm], except where disclosure is required by a disciplinary or other remedial process or by criminal law[16].

IMPLEMENTATION GUIDELINES AND STRATEGIES

19. [The Firm] will inform all staff and members of the firm of its policy on preventing and responding to workplace harassment and discrimination. [The Firm] will encourage staff and members of the firm to raise concerns about harassment and discrimination.

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[14] It is important to discuss the result with the person who has been subjected to harassment or discrimination, and to officially acknowledge the validity of the complaint. Failure to acknowledge in this manner frequently results in a continued sense of anger on the part of the person alleging harassment or discrimination against the employer and the respondent, loss of confidence and self-esteem or loss of confidence in the firm or colleagues. In such circumstances, the person alleging harassment or discrimination may be unable to return to the full level of commitment and enjoyment of work previously experienced even if the respondent has been completely removed from the workplace. The complainant might also wish to seek employment elsewhere, costing the firm a valued employee**.** Bringing forward an harassment or discrimination complaint takes courage and this fact should be formally acknowledged by the law firm.

[15]The maintenance of a written record which details the complaint and the outcome of the investigation serves several purposes. It serves as a form of precedent for the firm to ensure that complaints of a similar nature are treated similarly; as a reference should any questions arise concerning the specific complaint; and as a record of prior complaints which may assist in identifying repeat offenders. The maintenance of a written record may also be important in cases where progressive discipline is imposed.

[16] If the policy is to be effective, confidentiality at every stage of the process is vital. The absence of assurances of confidentiality may discourage individuals from using the policy. A statement of confidentiality is meant to protect the complainant, the alleged harasser (at least until a complaint has been substantiated) and the firm. Lack of confidentiality may lead to damaged reputations. An assurance of confidentiality recognizes that reporting an incident can be embarrassing to all concerned and prevents a respondent from being labelled without having the opportunity to respond to a complaint. Clearly, the nature of an investigation will necessitate some exceptions to the rule and a firm should include a statement to that effect in the policy.

20. [The Firm] will ensure that all members and staff of the firm are educated on the content and the scope of the policy.

21. [The Firm] will ensure that information on the services of the Discrimination and Harassment Counsel and how to contact her or him is available to all clients, staff and members of the firm.

22. [The Firm] will ensure that everyone working for [The Firm] or who is a member or an employee of [The Firm] and others in the work context, such as volunteers, co-op students, dependant and independent contractors sign a "Commitment to the Prevention of Harassment and Discrimination at [The Firm]" (included at Appendix E of this policy) acknowledging receipt and understanding of the policy.

23. [The Firm] will review and revise the policy on a periodic basis and will attempt to identify barriers that might affect staff and members identified by personal characteristics listed in the *Code*. The first review will take place one year after the adoption of the policy and will be done at least once a year.

PROCEDURES FOR HANDLING COMPLAINTS (FOR MEDIUM OR LARGE LAW FIRMS)

Advisors

1. Under this policy, [The Firm] will appoint [at least two persons who are staff and/or members of the firm] as Advisors[17] For the purposes of this policy, we will assume that the law firm has decided that Advisors appointed under the policy are not "directing minds". This allows staff and members of the firm who have issues of harassment and discrimination, to discuss those issues with Advisors who can reassure complainants that they will not proceed further without their consent. . Advisors act as internal resources to all staff and members of the firm concerned about possible or actual harassment or discrimination.

[17] The role of Advisor is vital to the successful implementation of a harassment and discrimination policy -- the success of the policy will stand or fall on the choice of persons to fulfil this responsibility.

An Advisor must be highly respected within the firm and must be able to discuss a complaint with the complainant or respondent, regardless of that person's seniority. He or she must be sensitive to the nature and effects of harassment and discrimination, and must be trusted as a person who will observe the principles of confidentiality as prescribed by this policy.

It is recommended that, to the extent possible, there be at least two Advisors under the policy. This will allow for the fact that some complainants may feel uncomfortable about approaching a particular Advisor. It also recognizes that Advisors themselves are not immune from complaints of harassment.
To the extent possible, the law firm should appoint a group of Advisors composed of partners, associates and other staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities.

In appointing Advisors, the law firm should consider the fact that employers have the ultimate responsibility to ensure that the workplace is free of harassment and discrimination. On being made aware of inappropriate comments or conduct, a directing mind has a responsibility to take prompt and effective action to address the situation. An Advisor who is also a "directing mind" cannot abdicate his or her responsibility and may have to pursue a complaint without the complainant's consent. A law firm may deal with this issue in two ways. The policy could specify that:
a "directing mind" of the firm may not be appointed as an Advisor, or
a "directing mind" may be appointed as an Advisor. If this is the case, the Advisor who is also a "directing mind" has the responsibility to inform complainants of his or her obligation to take prompt action on being made aware of inappropriate comments or conduct.

2. Advisors can assist staff and members of the firm by,

*answering questions;
*explaining any aspect of the policy;
*outlining options for remedy;
*helping staff and members of the firm with the implementation of a remedy; and
*helping staff or members of the firm document a complaint for investigation.

3. Advisors are impartial and may provide assistance in resolving issues of harassment and discrimination to any employee or member of the firm. That can include speaking to another employee or member of the firm on behalf of a complainant or respondent, facilitating a solution, between two or more affected parties or assisting a complainant or a respondent through an investigation. Advice provided by Advisors is not and should not be considered as legal advice.

4. Advisors are advocates for a workplace free of harassment and discrimination - they are not advocates for an individual. Advisors maintain confidentiality to the extent practicable and appropriate under the circumstances. They are not investigators under the policy nor are they decision-makers.

5. In carrying out their duties under this policy, Advisors will be directly responsible to [the Equality Committee].

6. The firm will provide an education program for all Advisors on workplace harassment and discrimination and will provide institutional support and assistance for carrying out their responsibilities.

The Equality Committee[18]

7. An Equality Committee will be appointed by [the Management Board of the law firm[19]]. The members of the Equality Committee will be appointed for a term of [3] years, renewable by the [Management Board]. The Equality Committee has [no less than three staff or members of the firm. To the extent possible, the committee should be composed of partners, directing minds, associates, and other staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities.]

[18] The policy provides for the creation of an Equality Committee to deal with complaints of harassment or discrimination. The creation of such a committee provides an avenue for complainants to proceed to a committee of appointees knowledgeable on human rights issues, who represent different sectors of the organization and who have decision-making authority. However, a law firm may find that the handling of complaints by a committee may be intimidating for complainants or that it does not have the resources to appoint an equality committee. Consequently, a law firm may decide to appoint one member of the firm to handle complaints under the policy or give this role to an existing committee. If a firm chooses to give the role to an existing committee or to one member of the firm, the law firm should adapt the language in this policy to reflect this change.

[19]The term “Management Board” will be used in this policy to refer to the group that manages the affairs of a law firm (the group that is equivalent to a board of directors of a corporation). Law firms should adapt the language in this policy to reflect their own organizational structure.

Initial Action by Complainant:

8. A person who considers that she or he, or someone else, has been subjected to harassment or discrimination (hereinafter "the complainant") is encouraged to bring the matter to the attention of the person responsible for the conduct (hereinafter "the respondent")[20]The paucity of complaints obtained about race has been noted by the Canadian Bar Association Working Group on Racial Equality. This is in part based on the lack of appropriate staff representative of and who have the requisite skills in addressing issues of racism. This is further compounded by the view that confidentiality is moot when the numbers within are so limited that there is no anonymity possible. The lone individual is immediately recognizable. See *Racial Equality in the Canadian Legal Profession* (Ottawa: Canadian Bar Association, 2000)..
9. Where the complainant does not wish to bring the matter directly to the attention of the respondent, or where such an approach is attempted and does not produce a satisfactory result, the complainant should seek the advice of an Advisor or of a "directing mind".

Informal Procedure Involving an Advisor:

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[20] A direct approach to the person whose conduct has caused offence is suggested as the first step. Frequently, people are unaware that their conduct is offensive and all that is needed to prevent its repetition is a simple statement that the conduct is unwelcome. The recommended policy recognizes, however, that power and status disparities between the respondent and the complainant may make it impossible or unreasonable for the respondent. Therefore the policy does not make such notice a prerequisite to a complaint.

The policy does not stipulate a time limit for reporting a complaint. Ideally, people who have been subjected to harassment and discrimination will report the matter promptly. It should be drawn to the attention of all staff and members as part of the educative process that the longer they wait to report an incident, the more chance there will be that witnesses will be unavailable and/or witnesses will not remember the events.

However, it should be noted that fear of retaliation or embarrassment may cause a person to wait until the harassment or discrimination becomes unbearable before reporting the incident. The very act of having to report harassment or discrimination may also add to the individual's distress.

It has been shown, in the context of sexual harassment, that:

> [...] many women feel uncomfortable, embarrassed, or ashamed when they talk about personal incidents of harassment. They are afraid that it will reflect badly on their character or that somehow they will be seen as inviting the propositions. When women do speak out, they are often ignored, discredited, or accused of misunderstanding their superior's intentions. Many women attribute their silence to practical considerations. Only 18 per cent of the women in the Working Women United Institute survey stated that they complained about the harassment. The most common reasons given for not reporting the incidents were that they believed nothing would be done (52 per cent), that it would be treated lightly or ridiculed (43 per cent), or that they would be blamed or suffer repercussions (30 per cent).

See Arjun P. Aggarwal and Madhu M. Gupta, *Sexual Harassment in the Workplace*, 3rd Edition (Toronto: Butterworths, 2000).

Research also suggests that most women do not report their experiences of sexual harassment for a variety of reasons ranging from a fear of retaliation or disbelief to a fear of losing her job or making the situation worse. (See Sandy Welsh, "Gender and Sexual Harassment" (1999) 25 Annu. Rev. Sociol. 169).

For these reasons a complaint should not be dismissed simply because it has not been reported in a timely fashion

10. The purpose of the informal procedure is to allow individuals to attempt to develop resolutions to workplace harassment or discrimination with the assistance of an Advisor. Without the consent of the complainant, the Advisor will take no further steps apart from providing information and discussing alternatives.

11. Once a complainant has sought the advice of an Advisor, the Advisor will, where appropriate, provide the complainant with a copy of this policy and advise the complainant of:

    1. the right to lay a formal written complaint under this policy when the respondent is a member or employee of the firm;

    2. the availability of counselling and other support services provided by the firm;

    3. the right to be represented by legal counsel or other person of choice at any stage of the process when the complainant is required or entitled to be present[21];

    4. the right to withdraw from any further action in connection with the complaint at any stage[22];

    5. other avenues of recourse available to the complainant, such as the right to contact the Discrimination & Harassment Counsel, the right to file a complaint with the Ontario Human Rights Commission; or, where appropriate, the right to lay an information under the *Criminal Code*[23]*;* and

    6. any time limits which may apply to such other avenues of recourse.

Outcome of Meeting with Advisor

No further action

12. Where, after discussing the matter, the complainant does not wish the Advisor to take any further action, the Advisor will take no further action. The Advisor should keep a written record of the discussion without disclosing the content of the complaint to any person, including another Advisor. This record will be kept by the Advisor in a locked filing cabinet. The Advisor will also complete the Workplace Harassment and Intake form (Appendix B), a copy of which will be provided to the Equality Committee to assist it in developing strategies to prevent occurrences which lead to complaints.

Discussion with respondent[24]

13. As part of the informal process, the complainant may decide to discuss the issue directly with the respondent, with or without the Advisor, or the Advisor may, with the consent of the complainant, meet with the respondent with a view to arriving at a solution to the situation. The Advisor will keep a written record of what was said to that person.

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[21]The firm should incorporate language into its policy indicating who will bear the cost of legal representation.

[22] The Advisor might indicate to the complainant that even if he or she withdraws from the process, the firm, if it knows or ought reasonably to know of harassment or discrimination, may nevertheless continue to investigate the complaint.

[23] The Advisor should inform the complainant that the Human Rights Commission may, in its discretion, decide not to deal with a complaint when the facts upon which the complaint is based occurred more than six months before the complaint was filed.

[24] The policy might specify that an Advisor, when discussing the issue with a respondent, should also discuss the consequences of speaking widely about the complaint or against the complainant during the complaints process.

14. Where the complainant and the respondent are satisfied that they have achieved an appropriate resolution, the Advisor will make a confidential written record of the resolution. This record will be kept by the Advisor in a locked filing cabinet[25]. The Advisor will follow up to ensure that the solution is working.

Laying of formal complaint

15. Where the complainant decides to lay a formal written complaint, whether or not the Advisor is of the opinion that the conduct in question constitutes harassment or discrimination, the Advisor may assist the complainant to draft a formal written complaint, based on the form provided in Appendix C, which should be signed by the complainant.

Informal Procedure Involving a Directing Mind

16. When a complainant approaches a directing mind of [The Firm], that person assumes the same advisory role as Advisors and in this capacity can answer questions, explain the policy and help staff and/or members of the firm resolve or document a complaint.

17. However, on being made aware of inappropriate comments or conduct, a directing mind should take action, even without the consent of the complainant [26]. That obligation should be made clear to the complainant[27]. The directing mind will keep a written record of what was said to that person and the outcome of the meeting and will also complete the Workplace Harassment and Discrimination Intake form (Appendix B), a copy of which will be provided to the Equality Committee to assist it in developing strategies to prevent occurrences which lead to complaints.

18. Once a complainant has sought the advice of a directing mind, he or she will, when appropriate, advise the complainant of:

    1. the right to lay a formal written complaint under the policy;

    2. the availability of counselling and other support services provided by the law firm;

    3. the right to be represented by legal counsel or other person of choice at any stage of the process when the complainant is required or entitled to be present[28];

    4. the right to withdraw from any further action in connection with the complaint at any stage;

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[25] The law firm may also ask that the Advisor forward any written resolution to the Equality Committee or to the senior lawyer in management. The term "Chair of the firm" will be used in this policy to refer to the senior lawyer in management. In the case of a professional corporation, the senior lawyer in management may have the title of Chief Executive Officer, Chief Operating Officer, Executive Director or an equivalent title. In the case of a Limited Liability Partnership or a Partnership, the senior lawyer in management may have the title of Managing Partner or an equivalent title. Law firms should adopt the language in this policy to reflect their own organizational structure.

[26] When questionable conduct is brought to the attention of a directing mind, the employer is put on notice that a possible violation of the *Code* has occurred. Whether formal action by the employer is appropriate is a function of a number of variables. For instance: Is the behaviour complained of in fact harassment or discrimination pursuant to the definition set out in the policy? Is an informal resolution more appropriate than a formal investigation? In light of these variables the recommended policy outlines possible outcomes when a complainant brings an incident (or incidents) to the attention of a directing mind.

[27] A complainant should be informed of her or his right to contact the Discrimination & Harassment Counsel for confidential advice, even if she or he does not consent to the actions taken by the law firm.

[28] The firm should incorporate language into its policy to indicate who will bear the cost of representation.

5. the fact that even if he or she withdraws the complaint, the firm may nevertheless continue to investigate the complaint[29];

6. other avenues of recourse available to the complainant, such as the right to approach an Advisor under this policy, the right to contact the Discrimination & Harassment Counsel, the right to file a complaint with the Ontario Human Rights Commission; or, where appropriate, the right to lay an information under the *Criminal Code;* and

7. any time limits which may apply to such other avenues of recourse[30].

Outcome of Meeting with Directing Mind

No further action

19. Where, after discussing the matter, the complainant and the directing mind agree that the conduct in question does not constitute harassment or discrimination as defined in the policy, the complainant and/or the directing mind will not proceed further under the policy[31].

Discussion with respondent[32]

20. Where the complainant brings to the attention of the directing mind facts which could constitute harassment or discrimination, the directing mind may, with or without the complainant and with or without the complainant's consent, speak to the person whose conduct has caused offence, in which case the directing mind will keep a written record of what was said to that person and the outcome of the meeting[33].

16. Where the complainant and the respondent are satisfied that they have achieved an appropriate resolution, the directing mind will make a confidential written record of the resolution. This record will be kept by the directing mind in a locked filing cabinet[34]. The directing mind will follow-up to ensure that the solution is working.

[29]Though the complainant should have a right to withdraw from any further action in connection with the complaint at any stage, this does not absolve the firm from the obligation to pursue the complaint to the extent that it is reasonably possible or necessary to do so in the interests of ensuring an harassment/discrimination-free workplace.

[30] The directing mind should inform the complainant that the Human Rights Commission may, in its discretion, decide not to deal with a complaint when the facts upon which the complaint is based occurred more than six months before the complaint was filed.

[31] An argument has been advanced in favour of keeping a confidential record in those cases where no complaint is laid and no action is taken. If, on a later occasion, evidence of further harassment by the same person comes to the attention of the directing mind, the record of the first incident may persuade the directing mind that it is necessary to pursue the matter further.

[32] The policy might specify that a directing mind, when discussing the issue with a respondent, should also discuss the consequences of speaking widely about the complaint or against the complainant during the complaints process.

[33] The law firm will make every effort, if it proceeds without the consent of the complainant, to protect the interests of the complainant by providing notice of discussions with the respondent and opportunities for the complainant to make her or his view known and to respond.

[34] The law firm may also ask that the directing mind forward any written resolution to the Equality Committee or to the Chair of the firm.

Laying of formal complaint

17. Where the complainant decides to lay a formal written complaint, whether or not the directing mind is of the opinion that the conduct in question constitutes harassment or discrimination, the directing mind may assist the complainant to draft a formal written complaint, based on the complaint form provided at Appendix C, which must be signed by the complainant.

Issuing a Formal Written Complaint

18. A formal written complaint under this policy is issued to the Equality Committee.

19. Upon the receipt of the formal written complaint, the Equality Committee will, without delay:

    c. provide a copy of the complaint and of the policy to the complainant and to the respondent; and

    d. advise the complainant and the respondent that he or she has the right to be represented by legal counsel or other person of choice at any stage of the process when he or she is required or entitled to be present[35].

25. The Equality Committee, or, when requested by the complainant or the respondent, one member of the Equality Committee appointed by the committee to handle the complaints process for that complaint (hereinafter "the appointed member")[36], will, within a reasonable time, interview the complainant to document the details of the complaint, what remedy the complainant is seeking and what process under the policy the complainant wishes to pursue[37].

26. The Equality Committee or the appointed member will, within a reasonable time, interview the respondent to document his or her perspective of the events and ascertain, with the agreement of the complainant, if the respondent would be willing to proceed through mediation.

27. When a formal written complaint is filed against a member of the Equality Committee, the member will withdraw from the Equality Committee until such time as the matter is resolved or closed.

Mediation

28. If the Equality Committee or the appointed member and both parties consider that mediation is appropriate, the Equality Committee or the appointed member shall ascertain whether the parties prefer an internal or an external mediation process. If they do not agree, the mediation will be external.

29. If the parties agree to an internal mediation, the Equality Committee or the appointed member will, within a reasonable time, appoint a partner of [The Firm], a directing mind or a senior employee to act as mediator.

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[35] Because of the serious nature of an allegation of harassment and the potential harmful effects on a reluctant complainant or an individual accused of discrimination or harassment, it is essential that the reluctant complainant and the respondent be informed of the right to retain counsel. The firm should indicate to the parties who will bear the cost of such representation.

[36] Because in many cases complainants and respondents would prefer to discuss sensitive matters with one person, it is important to provide that the process may be handled by a representative of the Equality Committee.

[37] In cases where the Equality Committee has appointed a member to deal with a complaint, the appointed member will replace the Equality Committee throughout the complaints process of that complaint.

30. If the parties do not agree to an internal mediation, if an internal mediator cannot be appointed or if an internal mediation has failed, the Equality Committee or the appointed member may proceed, with the consent of the parties, with an external mediation. A neutral, trained mediator selected by the Equality Committee or the appointed member will conduct the external mediation process on behalf of [The Firm]. [The Firm] will bear the cost of mediation.

31. An internal or an external mediator will have the experience and knowledge in the areas which are the subject of the complaint. On the request of a complainant, every effort will be made to have a mediator who is a member of the equality-seeking community of the complainant.

32. Where a resolution is reached through internal or external mediation, a written statement shall be prepared. The statement will contain details of the complaint, the response of the respondent, the agreed upon outcome and a mechanism to ensure appropriate implementation of the outcome. The statement will be signed by both parties and the mediator. A copy of the statement of resolution shall be placed in the respondent's personnel file.

33. The outcome of the internal and/or external mediation, and the statement of resolution, will be reported to the Equality Committee or the appointed member. If the Equality Committee or the appointed member believes that, notwithstanding the satisfactory resolution between the parties, the resolution has not addressed the employer's obligations under the policy, the Equality Committee or the appointed member will consider whether an investigation is warranted.

34. If a satisfactory resolution cannot be reached, the Equality Committee or the appointed member will consider whether an investigation is warranted.

Investigation

35. The Equality Committee or the appointed member may, at any stage of the complaints process, proceed with a formal investigation under the policy. The formal investigation may be performed by members of the firm or by an external investigator.

36. If the Equality Committee or the appointed member believes that an internal investigation is warranted, it shall appoint one or more partner(s), senior lawyers, directing minds or employee[38] of the firm to conduct the investigation.

37. The complainant may, at any time after a formal complaint has been filed, make a request, preferably in writing, to the Equality Committee or to the appointed member for temporary accommodation[39] until the process comes to an end. The Equality Committee or the appointed member will make every effort to reasonably accommodate the complainant.

38. If the Equality Committee or the appointed member believes that an external investigation is warranted, it shall appoint a neutral third party who has expertise in human rights and investigation to act as an external investigator. [The Firm] will bear the costs of such an investigation[40].

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[38] If the firm provides for an internal investigative team, thought should be given to including on the team not only a representative of the managing body but also a person of a similar level of responsibility as the complainant and of the same sex, race, age or other similar personal characteristic.

[39] For example, limiting contacts between the complainant and respondent by relocating the respondent to another area of the workplace or allowing the complainant to report to or to work with someone other than the respondent. Care should be taken to ensure that the complainant does not bear the brunt of the inconvenience of job relocation due to perceptions that their role or work is more disposable than that of the respondent who in this context may often be senior. Care must be taken not to stymie the career development of the complainant as the process unfolds.

[40] The law firm should indicate clearly who will bear the costs of legal representation for the parties.

39. The internal and/or external investigation process will follow accepted principles of fairness, including

- an impartial investigation;
- the right to know the allegation and the defence;
- the right to offer evidence and witnesses; and
- the right to rebut relevant evidence.

40. Whether conducted by an internal or an external investigator, or by an internal investigative team, the investigation will be conducted in confidence. Confidential interviews with relevant parties will be conducted. Both parties will have an opportunity to identify witnesses or others to be interviewed. Any other person who may have information about the incidents may be interviewed[41]The witness statements, signed or unsigned, will be provided, in a sealed envelope, by the investigator to the Equality Committee or the appointed member. The statements will be filed, together with the investigation report, in a sealed envelope. The witness statements are not kept in the witnesses personnel file.

41. The investigation will be undertaken and completed within six months of the appointment of an internal or external investigator, or of an investigative team, unless delays occur in good faith and no substantial prejudice will result to any person affected by the delay.

42. The investigator, or the investigative team, may decide that the matter would best be resolved through voluntary mediation. If that is the case, the investigator[42] will, with the consent of the complainant, the respondent and the Equality Committee or the appointed member, take the role of mediator and the mediation process prescribed in this policy will apply.

43. The internal or external investigator or the investigative team will provide a written summary of findings which will include:

- the allegations of harassment or discrimination
- the facts
- the findings

44. The written summary of findings will be provided to the complainant and to the respondent. The complainant and the respondent will reply in writing within one week of receipt of the summary of findings or other reasonable period as agreed to by the parties or as determined by the Equality Committee or the appointed member.

45. The internal or external investigator or the investigative team will file a formal report, with the Equality Committee or the appointed member, based on the summary of findings and on the replies from the complainant and the respondent. The report may also include recommendations on appropriate resolutions.

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[41] At their request, interviews of staff or members of the firm may occur off site.

Generally, the only person who has access to the witness statement is the investigator. When the investigator provides his or her final report, he or she does not refer to witnesses by name.

[42]In the event that the investigation is done by an internal investigative team, the team will appoint one member of the team to act as mediator.

Action Taken Following Outcome of Investigation

46. The outcome of the investigation will be communicated to the Equality Committee or to the appointed member and to the Chair of the firm. Based on the findings of that investigation, the Equality Committee or the appointed member and the Chair of the firm, in conjunction with the appropriate level of management shall make a decision as to whether the policy has been violated and what action will be taken as a result of the findings.

47. The purpose of this policy is preventative and remedial. If it is determined that an employee or a member of the firm has violated this policy, and depending on the severity of the violation, appropriate consequences will be determined and can include an apology, education, counselling, verbal or written reprimand, transfer, a financial penalty, the suspension with or without pay of the employee or member of the firm or the discharge of the employee or member of the firm[43]. Specific consequences will depend on the nature and severity of the incidents.

48. In the event of an investigation against the Chair of the firm, the outcome of the investigation will be communicated to the Management Board. The Chair of the firm will withdraw from participating in the affairs of the Management Board that relate to the complaint against her or him. Based on the findings of that investigation, the Management Board shall make a decision as to whether the policy has been violated and what action will be taken as a result of the findings.

49. The complainant and the respondent will be informed of the outcome of the investigation, the decision made by the Equality Committee or the appointed member, the Chair of the firm and the appropriate level of management as to whether the policy has been violated and what action will be taken as a result of the findings.

50. Where the investigation results in a finding that the complaint of harassment is substantiated, the outcome of the investigation, and any remedial or disciplinary action, will be recorded in the respondent's personnel file. These written records will be maintained for [ten years[44]] unless new circumstances dictate that the file should be kept for a different period of time[45]. The complaint will not form part of the complainant's personnel file unless so requested by the complainant.

51. The Equality Committee or the appointed member will be responsible for monitoring the situation following harassment or discrimination complaints.

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[43]Law firms should include wording to the effect that suspension or discharge of a partner must proceed in accordance with the provisions of the partnership agreement (or in the case of a professional corporation, the equivalent document).

[44] The Equality Committee or the appointed member could decide the length of time that the file should be kept. In some instances, with the agreement of the parties, part of the settlement of the complaint might include the removal of any notation of the complaint from the respondent's file.

[45] It is suggested that files be maintained for ten years so that proof of any pattern of harassment is available. Since an employee or member of the firm will usually have the right to inspect the contents of his or her own personnel file, it is important, for purposes of protecting the confidentiality of witnesses and others, that details of the investigation and the evidence not be kept in the personnel file. Only the outcome of the investigation should be recorded in the personnel file.

52. If the complainant is not satisfied with the outcome of the investigation or the disciplinary action taken by [the Management Board], the complainant will be reminded of the right to file a complaint with the Ontario Human Rights Commission, and shall be advised of any time limits applicable to making such a complaint[46].

Harassment by Persons Who Are Not Members or Staff of the Firm

53. A member or employee of the firm who considers that she or he has been subjected to harassment by a person who is not a member or employee of the firm should seek the advice of an Advisor, the Equality Committee or a directing mind.

54. The Advisor, the Equality Committee or the directing mind will provide the complainant with support and assistance in dealing with and remedying this harassment. The complaint procedures provided in this policy may be followed.

55. A person who is not a member or employee of the firm who considers that she or he has been subjected to harassment or discrimination by a person who is a member or employee of the firm is encouraged to bring the matter to the attention of the Equality Committee. The Equality Committee will do all it can to ensure that the behaviour stops. The complaint procedures provided in this policy may be followed.

PROCEDURES FOR HANDLING COMPLAINTS
(FOR SMALL LAW FIRMS)

Advisor

1. Under this policy, [The Firm] will appoint one Advisor[47]A law firm may appoint more than one Advisor if necessary. to act as a resource person to staff and members of the firm concerned about possible or actual harassment or discrimination[48]In appointing Advisors, the law firm should consider the fact that employers have the ultimate responsibility to ensure that the workplace is free of harassment and discrimination. On being made aware of inappropriate comments or conduct, a directing mind has a responsibility to take prompt and effective action to address the situation. An Advisor who is also a "directing mind" cannot abdicate his or her responsibility and may have to pursue a complaint without the complainant's consent. It is recommended that small law firms appoint an Advisor who is not a directing mind of the law firm.

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[46]The recommended policy does not provide an appeal process. The procedure will depend upon how disciplinary measures are normally appealed in the particular firm. If there are no internal appeal procedures, a harasser who has been disciplined can take the matter to court. A complainant should be informed of the right to file a complaint with the Ontario Human Rights Commission if dissatisfied with the disposition of the complaint. Where the Human Rights Commission investigates a complaint, the *Human Rights Code* gives to the person investigating the complaint power to request the production of documents. Such documents might include the firm's own investigatory record of the complaint.

[47] Law firms may appoint the Discrimination & Harassment Counsel as the Advisor under the policy. A small law firm with limited staff and/or members might not have the resources to appoint internal Advisors and it might be desirable to rely on the services of the Discrimination & Harassment Counsel. The Discrimination & Harassment Counsel confidentially assists anyone who may have experienced discrimination or harassment by a lawyer or within a law firm. The Discrimination & Harassment Counsel services are provided to the public and lawyers free of charge.

[48] The role of Advisor is important to the successful implementation of a harassment and discrimination policy. An Advisor should be able to discuss a complaint with the complainant or respondent, be sensitive to the nature and effects of harassment and discrimination, and be trusted as a person who will observe the principles of confidentiality as prescribed by the policy.

2. The Advisor can assist staff and members of the firm by,

*answering questions;
*explaining any aspect of the policy;
*outlining options for remedy;
*helping staff and members of the firm with the implementation of a remedy; and
*helping staff or members of the firm document a complaint for investigation.

3. The Advisor is impartial and may provide assistance in resolving issues of harassment and discrimination to any employee or member of the firm. That can include speaking to another employee or member of the firm on behalf of a complainant or respondent, facilitating a solution, between two or more affected parties or assisting a complainant or a respondent through an investigation. Advice provided by the Advisor is not and should not be considered as legal advice.

4. The Advisor is an advocate for a workplace free of harassment and discrimination - he or she is not an advocate for an individual. The Advisor maintains confidentiality to the extent practicable and appropriate under the circumstances. He or she is not an investigator under the policy or a decision-maker.

5. The firm will ensure that the Advisor has the knowledge and skills to fulfill his or her role as Advisor.

Complaints Process

Initial Action by Complainant:

6. A person who considers that she or he, or someone else, has been subjected to harassment or discrimination (hereinafter "the complainant") is encouraged to bring the matter to the attention of the person responsible for the conduct (hereinafter "the respondent")[49].

7. Where the complainant does not wish to bring the matter directly to the attention of the respondent, or where such an approach is attempted and does not produce a satisfactory result, the complainant should seek the advice of the Advisor, of his or her supervisor or of the Chair of the firm[50].

Informal Procedure Involving the Advisor:

8. The purpose of the informal procedure is to allow individuals to attempt to develop resolutions to workplace harassment or discrimination with the assistance of an Advisor. Without the consent of the complainant, the Advisor will take no further steps apart from providing information and discussing alternatives.

9. Once a complainant has sought the advice of the Advisor, he or she will, where appropriate, provide the complainant with a copy of this policy and advise the complainant of:

1. the right to lay a formal written complaint under this policy when the respondent is a member or employee of the firm;

2. the availability of counselling and other support services provided by the firm;

[49] See note 20, *supra* for a discussion on the value of a direct approach to the person whose conduct has caused offence.
[50]The term Chair of the firm will be used to mean the most senior lawyer in management.

3. the right to be represented by legal counsel or other person of choice at any stage of the process when the complainant is required or entitled to be present[51];

4. the right to withdraw from any further action in connection with the complaint at any stage[52];

5. other avenues of recourse available to the complainant, such as the right to file a complaint with the Ontario Human Rights Commission; or, where appropriate, the right to lay an information under the *Criminal Code;* and

6. any time limits which may apply to such other avenues of recourse[53].

Outcome of Meeting with Advisor

No further action

10. Where, after discussing the matter, the complainant does not wish the Advisor to take any further action, the Advisor will take no further action. The Advisor should keep a written record of the discussion without disclosing the content of the complaint to any person.

Discussion with respondent[54]

11. As part of the informal process, the complainant may decide to discuss the issue directly with the respondent, with or without the Advisor, or the Advisor may, with the consent of the complainant, meet with the respondent with a view to arriving at a solution to the situation. The Advisor should keep a written record of what was said to that person.

12. Where the complainant and the respondent are satisfied that they have achieved an appropriate resolution, the Advisor will make a confidential written record of the resolution. This record will be kept by the Advisor[55]. The Advisor will follow up to ensure that the solution is working.

Laying of formal complaint

13. Where the complainant decides to lay a formal written complaint, whether or not the Advisor is of the opinion that the conduct in question constitutes harassment or discrimination, the Advisor may assist the complainant to draft a formal written complaint, based on the form provided in Appendix C, which should be signed by the complainant.

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[51]The firm should incorporate language into its policy indicating who will bear the cost of legal representation.

[52] The Advisor might indicate to the complainant that even if he or she withdraws from the process, the firm, if it knows or ought reasonably to know of harassment or discrimination, may nevertheless continue to investigate the complaint.

[53] The Advisor should inform the complainant that the Human Rights Commission may, in its discretion, decide not to deal with a complaint when the facts upon which the complaint is based occurred more than six months before the complaint was filed.

[54] The policy might specify that an Advisor, when discussing the issue with a respondent, should also discuss the consequences of speaking widely about the complaint or against the complainant during the complaints process.

[55] The law firm may also ask that the Advisor forward any written resolution to the Chair of the firm.

Informal Procedure Involving a Directing Mind[56]

14. When a complainant approaches a directing mind, that person assumes the same advisory role as the Advisor and in this capacity can answer questions, explain the policy and help staff and/or members of the firm resolve or document a complaint.

15. However, on being made aware of inappropriate comments or conduct, a directing mind should take action, even without the consent of the complainant [57]. That obligation should be made clear to the complainant[58]. The directing mind will keep a written record of what was said to that person and the outcome of the meeting.

16. Once a complainant has sought the advice of a directing mind, he or she will, when appropriate, advise the complainant of:

    1. the right to lay a formal written complaint under the policy;

    2. the availability of counselling and other support services provided by the law firm;

    3. the right to be represented by legal counsel or other person of choice at any stage of the process when the complainant is required or entitled to be present[59];

    4. the right to withdraw from any further action in connection with the complaint at any stage;

    5. the fact that even if he or she withdraws the complaint, the firm may nevertheless continue to investigate the complaint[60];

    6. other avenues of recourse available to the complainant, such as the right to approach an Advisor, the right to file a complaint with the Ontario Human Rights Commission; or, where appropriate, the right to lay an information under the *Criminal Code;* and

    7. any time limits which may apply to such other avenues of recourse[61].

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[56] See pp. 21-24 of this Guide for a discussion on the definition of directing mind.

[57] When questionable conduct is brought to the attention of a directing mind, the employer is put on notice that a possible violation of the *Code* has occurred. Whether formal action by the employer is appropriate is a function of a number of variables. For instance: Is the behaviour complained of in fact harassment or discrimination pursuant to the definition set out in the policy? Is an informal resolution more appropriate than a formal investigation? In light of these variables the recommended policy outlines possible outcomes when a complainant brings an incident (or incidents) to the attention of a directing mind.

[58] A complainant should be informed of her or his right to contact the Discrimination & Harassment Counsel for confidential advice, even if she or he does not consent to the actions taken by the law firm.

[59] The firm should incorporate language into its policy to indicate who will bear the cost of representation.

[60] Though the complainant should have a right to withdraw from any further action in connection with the complaint at any stage, this does not absolve the firm from the obligation to pursue the complaint to the extent that it is reasonably possible or necessary to do so in the interests of ensuring an harassment/discrimination-free workplace.

[61] The directing mind should inform the complainant that the Human Rights Commission may, in its discretion, decide not to deal with a complaint when the facts upon which the complaint is based occurred more than six months before the complaint was filed.

Outcome of Meeting with Directing Mind

No further action

17. Where, after discussing the matter, the complainant and the directing mind agree that the conduct in question does not constitute harassment or discrimination as defined in the policy, the complainant and/or the directing mind will not proceed further under the policy[62].

Discussion with respondent[63]

18. Where the complainant brings to the attention of the directing mind facts which could constitute harassment or discrimination, the directing mind may, with or without the complainant and with or without the complainant's consent, speak to the person whose conduct has caused offence, in which case the directing mind will keep a written record of what was said to that person and the outcome of the meeting[64].

19. Where the complainant and the respondent are satisfied that they have achieved an appropriate resolution, the directing mind will make a confidential written record of the resolution. The directing mind will follow-up to ensure that the solution is working.

Laying of formal complaint

20. Where the complainant decides to lay a formal written complaint, whether or not the directing mind is of the opinion that the conduct in question constitutes harassment or discrimination, the directing mind may assist the complainant to draft a formal written complaint, based on the complaint form provided at Appendix C, which must be signed by the complainant.

Issuing a Formal Written Complaint

21. A formal written complaint under this policy is issued to the Chair of the firm.

22. Upon the receipt of the formal written complaint, the Chair of the firm will, without delay:

    a. provide a copy of the complaint and of the policy to the complainant and to the respondent; and

    b. advise the complainant and the respondent that he or she has the right to be represented by legal counsel or other person of choice at any stage of the process when he or she is required or entitled to be present[65].

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[62] An argument has been advanced in favour of keeping a confidential record in those cases where no complaint is laid and no action is taken. If, on a later occasion, evidence of further harassment by the same person comes to the attention of the directing mind, the record of the first incident may persuade the directing mind that it is necessary to pursue the matter further.

[63] The policy might specify that a directing mind, when discussing the issue with a respondent, should also discuss the consequences of speaking widely about the complaint or against the complainant during the complaints process.

[64] The law firm will make every effort, if it proceeds without the consent of the complainant, to protect the interests of the complainant by providing notice of discussions with the respondent and opportunities for the complainant to make her or his view known and to respond.

[65] Because of the serious nature of an allegation of harassment and the potential harmful effects on a reluctant complainant or an individual accused of discrimination or harassment, it is essential that the reluctant complainant and the respondent be informed of the right to retain counsel. The firm should indicate to the parties who will bear the cost of such representation.

23. The Chair of the firm will, within a reasonable time, interview the complainant to document the details of the complaint, what remedy the complainant is seeking and what process under the policy the complainant wishes to pursue.

24. The Chair of the firm will, within a reasonable time, interview the respondent to document his or her perspective of the events and ascertain, with the agreement of the complainant, if the respondent would be willing to proceed through mediation.

25. Where the complaint involves the conduct of the Chair of the firm, the concerned individual will report the incident to the second most senior member of the firm, who shall assume the responsibilities of the Chair of the firm under this policy.

Mediation

26. If the Chair of the firm and both partners consider that mediation is appropriate, the chair shall ascertain whether the parties prefer an internal or an external mediation process. If they do not agree, the mediation will be external.

27. If the parties agree to an internal mediation, the Chair of the firm will, within a reasonable time, appoint a member or staff of the firm to act as mediator.

28. If the parties do not agree to an internal mediation, if an internal mediator cannot be appointed or if an internal mediation has failed, the Chair of the firm will proceed with an external mediation. A neutral, trained mediator selected by the Chair of the firm will conduct the external mediation process on behalf of [The Firm]. [The Firm] will bear the cost of mediation.

29. An internal or an external mediator will have the experience and knowledge in the areas which are the subject of the complaint. On the request of a complainant, every effort will be made to have a mediator who is a member of the equality-seeking community of the complainant.

30. Where a resolution is reached through internal or external mediation, a written statement shall be prepared. The statement will contain details of the complaint, the response of the respondent, the agreed upon outcome and a mechanism to ensure appropriate implementation of the outcome. The statement will be signed by both parties and the mediator. A copy of the statement of resolution shall be placed in the respondent's personnel file.

31. The outcome of the internal and/or external mediation, and the statement of resolution, will be reported to the Chair of the firm. If the Chair of the firm believes that, notwithstanding the satisfactory resolution between the parties, the resolution has not addressed the employer's obligations under the policy, he or she will consider whether an investigation is warranted.

32. If a satisfactory resolution cannot be reached, the Chair of the firm will consider whether an investigation is warranted.

Investigation

33. The Chair of the firm may, at any stage of the complaints process, proceed with a formal investigation under the policy. The formal investigation will be performed by the Chair of the firm or an external investigator.

34. If the Chair of the firm conducts the investigation, he or she shall do so promptly and decide whether or not the complaint is upheld or dismissed and shall implement what remedy or discipline he or she considers appropriate in the circumstances.

35. The complainant may, at any time after a formal complaint has been filed, make a request, preferably in writing, to the Chair of the firm for temporary accommodation[66] until the process comes to an end. The Chair of the firm will make every effort to reasonably accommodate the complainant.

36. If the Chair of the firm believes that an external investigation is warranted, he or she shall appoint a neutral third party who has expertise in human rights and investigation to act as an external investigator. [The Firm] will bear the costs of such an investigation[67].

37. The internal and/or external investigation process will follow accepted principles of fairness, including

- an impartial investigation;
- the right to know the allegation and the defence;
- the right to offer evidence and witnesses; and
- the right to rebut relevant evidence.

38. Whether conducted internally or by an external investigator, the investigation will be conducted in confidence. Confidential interviews with relevant parties will be conducted. Both parties will have an opportunity to identify witnesses or others to be interviewed. Any other person who may have information about the incidents may be interviewed[68].

39. The investigation will be undertaken and completed within six months of the appointment of an investigator, unless delays occur in good faith and no substantial prejudice will result to any person affected by the delay.

40. If the investigator decides that the matter would best be resolved through voluntary mediation, he or she will, with the consent of the complainant, the respondent and the Chair of the law firm, take the role of mediator and the process prescribed in paragraphs 60 to 65 of this policy will apply.

41. The internal or external investigator will provide a written summary of findings which will include:

- the allegations of harassment or discrimination
- the facts
- the findings

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[66] For example, limiting contacts between the complainant and respondent by relocating the respondent to another area of the workplace or allowing the complainant to report to or to work with someone other than the respondent. Care should be taken to ensure that the complainant does not bear the brunt of the inconvenience of job relocation due to perceptions that their role or work is more disposable than that of the respondent who in this context may often be senior. Care must be taken not to stymie the career development of the complainant as the process unfolds.

[67] The law firm should indicate clearly who will bear the costs of legal representation for the parties.

[68] At their request, interviews of staff or members of the firm may occur off site.

Generally, the only person who has access to the witness statement is the investigator. When the investigator provides his or her final report, he or she does not refer to witnesses by name.

42. The written summary of findings will be provided to the complainant and to the respondent. The complainant and the respondent will reply in writing within one week of receipt of the summary of findings or other reasonable period as agreed to by the parties or as determined by the Chair of the law firm.

43. The external investigator will file a formal report with the Chair of the law firm, based on the summary of findings and on the replies from the complainant and the respondent. The report may also include recommendations on appropriate resolutions.

Action taken Following Outcome of Investigation

44. Based on the findings of the investigation, the Chair of the firm in conjunction with the appropriate level of management shall make a decision as to whether the policy has been violated and what action will be taken as a result of the findings.

45. The purpose of this policy is preventative and remedial. If it is determined that an employee or a member of the firm has violated this policy, and depending on the severity of the violation, appropriate consequences will be determined and can include an apology, education, counselling, verbal or written reprimand, transfer, a financial penalty, the suspension with or without pay of the employee or member of the firm or the discharge of the employee or member of the firm[69]. Specific consequences will depend on the nature and severity of the incidents.

46. The complainant and the respondent will be informed of the outcome of the investigation, the decision made by the Chair of the law firm and the appropriate level of management as to whether the policy has been violated and what action will be taken as a result of the findings.

47. Where the investigation results in a finding that the complaint of harassment is substantiated, the outcome of the investigation, and any remedial or disciplinary action, will be recorded in the respondent's personnel file. These written records will be maintained for [ten years[70]] unless new circumstances dictate that the file should be kept for a different period of time[71]. The complaint will not form part of the complainant's personnel file unless so requested by the complainant.

48. The Chair of the law firm will be responsible for monitoring the situation following harassment or discrimination complaints.

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[69]Law firms should include wording to the effect that suspension or discharge of a partner must proceed in accordance with the provisions of the partnership agreement (or in the case of a professional corporation, the equivalent document).

[70] The Chair of the firm could decide the length of time that the file should be kept. In some instances, with the agreement of the parties, part of the settlement of the complaint might include the removal of any notation of the complaint from the respondent's file.

[71] It is suggested that files be maintained for ten years so that proof of any pattern of harassment is available. Since an employee or member of the firm will usually have the right to inspect the contents of his or her own personnel file, it is important, for purposes of protecting the confidentiality of witnesses and others, that details of the investigation and the evidence not be kept in the personnel file. Only the outcome of the investigation should be recorded in the personnel file.

49. If the complainant is not satisfied with the outcome of the investigation or the disciplinary action taken by the Chair of the law firm, the complainant will be reminded of the right to file a complaint with the Ontario Human Rights Commission, and shall be advised of any time limits applicable to making such a complaint[72].

Harassment by Persons Who Are Not Members or Staff of the Firm

50. A member or employee of the firm who considers that she or he has been subjected to harassment by a person who is not a member or employee of the firm should seek the advice of an Advisor, of a directing mind or of the Chair of the firm.

51. The Advisor, the Chair of the firm or the directing mind will provide the complainant with support and assistance in dealing with and remedying this harassment. The complaint procedures provided in this policy may be followed.

52. A person who is not a member or employee of the firm who considers that she or he has been subjected to harassment or discrimination by a person who is a member or employee of the firm is encouraged to bring the matter to the attention of the Chair of the firm, who will do all he or she can to ensure that the behaviour stops. The complaint procedures provided in this policy may be followed.

APPENDIX A
DEFINITIONS OF PROTECTED OR PROHIBITED GROUNDS

For the purposes of this policy:

"Age" means an age that is eighteen years or more.

"Creed or religion" mean a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite. The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.

"Family status" means the status of being in a parent and child relationship.

"Marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage.

"On the basis of a disability" means for the reason that the person has or has had, or is believed to have or have had:

a. any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

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[72]The recommended policy does not provide an appeal process. The procedure will depend upon how disciplinary measures are normally appealed in the particular firm. If there are no internal appeal procedures, a harasser who has been disciplined can take the matter to court. A complainant should be informed of the right to a file a complaint with the Ontario Human Rights Commission if dissatisfied with the disposition of the complaint. Where the Human Rights Commission investigates a complaint, the *Human Rights Code* gives to the person investigating the complaint power to request the production of documents. Such documents might include the firm's own investigatory record of the complaint.

b. a condition of mental impairment or a developmental disability,

c. a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

d. a mental disorder, or

e. an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.

Disability may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all these factors. The focus is on the effects of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment[73].

"Race, ancestry, place of origin, colour, ethnic origin, and citizenship" collectively describe personal characteristics of an individual associated with his or her nationality, race, cultural or ethnic origin.

"Record of offences" means a conviction for,

f. an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked; or

g. an offence in respect of any provincial enactment.

"Same-sex partnership status" means the status of living with a person of the same sex in a conjugal relationship outside marriage.

[73] Case law has found that the term disability includes alcoholism, cancer, AIDS, hypertension, back pains, diabetes, injuries, allergies and asthma, depression and anxiety, cerebral palsy, malformation of fingers and developmental disability.

APPENDIX C

COMPLAINT FORM

Complaint Form under Workplace Harassment
and Discrimination Policy

I _____ working as a _____ in the
(Name of complainant) (Title)

_____ have reasonable grounds to believe that _____
(Department) (Name of respondent)

working as a _____ in the _____
(Title) (Department)

has discriminated/harassed against me in employment on or about

_____.
(Date)

The grounds of discrimination or harassment are:

The particulars are as follows:

Signed at: (place) _____ on: (date) _____

APPENDIX D
RESPONSE FORM

Response Form under Workplace Harassment
and Discrimination Policy

I _____ working as a _____ in the
(Name of respondent) (Title)

_____ have received a complaint signed by _____
(Department) (Name of complainant)

working as a _____ in the _____
(Title) (Department)

alleging that I have discriminated/harassed against him/her in employment on or about

_____.
(Date)

The grounds of the alleged discrimination or harassment are:

I deny the allegations and provide particulars as follows:

APPENDIX E

COMMITMENT TO THE PREVENTION OF
HARASSMENT AND DISCRIMINATION AT [THE FIRM]

I, _____, acknowledge receipt of a copy of [The Firm]'s "Preventing and Responding to Workplace Harassment and Discrimination" policy.

Having read the policy, I am familiar with the internal complaint resolution process established by [The Firm] and indicate my understanding of it.

As a _____(i.e. staff person, volunteer, student, member) of [The Firm], I also agree with the intent to provide a work environment that is free from harassment and discrimination, and which provides for a cooperative, respectful, safe and professional work environment for all staff and members of [The Firm].

Name:_____

Date: _____

Policy provided by: _____

Date: _____

BARRIERS TO EQUALITY IN THE LEGAL PROFESSION

In most professions, there is evidence that equality-seeking groups face serious barriers to equality. The legal profession is no exception. Since 1989, the Law Society of Upper Canada has undertaken and reviewed studies that are indicative of inequality within the profession:

1. Statistics analysed by the Law Society's Special Committee on Equity in Legal Education and Practice in 1990 indicated that visible minorities were seriously under-represented in the legal profession in relation to their populations in Ontario[74].

2. In 1991, the Law Society published a survey of lawyers called to the Bar between 1975 and 1990[75]. Seventy percent of women respondents said they experienced sex discrimination in the course of their work as lawyers. Ten percent of the respondents reported having personally experienced racial or ethnic discrimination in the course of their work as lawyers and seventeen percent reported occurrences of racial or ethnic discrimination against others.

3. A 1992 survey of Black law students, articling students and recently-called lawyers sponsored by the Law Society[76] found that fifty percent of respondents thought they were channelled into particular areas of practice or types of law. Fifty-nine percent of respondents to the 1992 survey believed that certain areas of practice were effectively closed to Black lawyers. The areas of law cited most often as not being open to Black lawyers were corporate/commercial law and related areas of business law such as securities and taxation.

4. In response to complaints from students in 1992, the Law Society conducted a survey of students in 1993 and 1994 concerning inappropriate comments made and questions asked at articling interviews. Students reported that they were asked questions and subjected to offensive remarks concerning age, sex, family status, parenting obligations, sexual orientation, heritage and country of origin, among others.

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[74] Report of the Special Committee on Equity in Legal Education and Practice adopted by Convocation in February 1991.

[75] *Transitions in the Ontario Legal Profession, A Survey of Lawyers Called to the Bar Between 1975 and 1990* (Toronto: Law Society of Upper Canada, 1991).

[76] Felix N. Weekes and A. Elliot Spears, *Survey of Black Law Students, Black Articling Students, and Recently Called Black Lawyers* (Toronto: Law Society of Upper Canada, July-August 1992).

5. The 1993 report of the Canadian Bar Association's Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability*[77] describes the barriers to equality faced by women in the legal profession. It also demonstrates that these barriers are multiplied for women who face additional forms of discrimination on the basis of race, ethnic origin, sexual orientation or disability. The report urges the profession to remove the barriers and, as one way of doing so, recommends the adoption of model employment policies.

6. In 1996, the Law Society published *Barriers and Opportunities Within Law*, a longitudinal study which compared the success of male and female lawyers called to the Ontario Bar between 1975 and 1990. The report once again confirmed the existence of inequality within the legal profession[78].

7. The Law Society Placement Office surveys for the years 1994-1995 through to 1998-1999, and for 2000-2001 of incoming bar admission course students revealed that Aboriginal students, visible minority students and students with disabilities were over-represented among students who were without articling placements as of September of the year in which they would be expected to commence articles.

8. The Discrimination & Harassment Counsel program, established by Convocation in 1999 to provide services to individuals who allege harassment or discrimination by a lawyer, has reported receiving 582 calls, representing 469 individuals, within 14 months of operation. The overwhelming number of calls received were within the mandate of the program[79].

9. In February 2000, the Council of the Canadian Bar Association approved unanimously the report entitled *Racial Equality in the Canadian Legal Profession* which describes significant barriers that prevent people from certain racialized communities from becoming members of the legal profession. It notes that lawyers from racialized communities are often denied opportunities to move up the corporate ladder to partner or senior management positions. The report also examines how "systemic racism permeates the culture of the legal profession, frustrating its best efforts to render justice"[80].

10. In 2001, the Law Society commissioned Michael Ornstein, Director of the Institute of Social Research of York University, to prepare a demographic survey of the legal profession in Ontario[81]. Using the 1996 Canadian Census, the report shows that 7.3 percent of lawyers in Ontario are non-white, compared to 17.5 percent of the population. Although in 1996 30.1 percent of lawyers in Ontario were women, only 7.8 percent of lawyers between 55 and 64 and 18 percent of lawyers between 45 and 55 were women. The report also notes that the mean annual earnings of non-white lawyers and of women is generally much lower than the mean annual earnings of white male lawyers.

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[77] Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

[78] F.M. Kay, N. Dautovich and C. Marlor, *Barriers and Opportunities Within Law: Women in a Changing Legal Profession. A Longitudinal Survey of Ontario Lawyers 1990-1996* (Toronto: Law Society of Upper Canada, November 1996).

[79] Mary Teresa Devlin, *Discrimination & Harassment Counsel Program* (Toronto: Law Society of Upper Canada, December 2000).

[80] Introductory statement by Professor Joanne St. Lewis, Co-Chair of the Working Group on Racial Equality in the Legal Profession in *Racial Equality in the Canadian Legal Profession*, (Ottawa: Canadian Bar Association, 2000) at iii.

[81] Michael Ornstein, Director of the Institute for Social Research of York University, *Lawyers in Ontario: Evidence from the 1996 Census, A Report for the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, January 2001).

In light of the above-noted studies, the Law Society has undertaken initiatives to promote equality within the legal profession, in accordance with its mandate. The position of the Law Society has been summarized in its *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*[82].

MODEL POLICIES DEVELOPED BY THE LAW SOCIETY

In the last decade, the Law Society has adopted a number of model policies to promote equality within the legal profession. In 1996, the Law Society of Upper Canada adopted model policies dealing with workplace equity and flexible work arrangements, the *Guide to Developing a Policy Regarding Flexible Work Arrangements* and the *Guide to Developing a Policy Regarding Workplace Equity in Law Firms*[83]. The policies are adaptations of the model policies created by the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, and are updated and tailored to reflect Ontario human rights legislation and the *Rules of Professional Conduct*[84]The CBA's model policy on alternative work arrangements draws upon two other sample policies: the policy prepared by the American Bar Association's Commission on Women in the Profession, which was published in *Lawyers and Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers* (Chicago: American Bar Association, 1990), and the policy prepared by the Women's Bar Association of the District of Columbia entitled *Guidelines on Alternative Work Schedules*. .

In 2001, the Equity Initiatives Department of the Law Society published a document entitled *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities; Legal Developments and Best Practices*[85] which provides best practices and a legal analysis of the duty to accommodate. The Law Society also adopted a *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements*[86] based in part on the Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances*[87] and *Policy and Guidelines on Disability and the Duty to Accommodate*[88].

Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms is one of a number of model policies developed by the Law Society of Upper Canada. The Law Society is in the process of drafting a model policy on benefits for same-sex couples.

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[82] *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Toronto: Law Society of Upper Canada, 1997).

[83] *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, 1996) and *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, 1996).

[84] The Canadian Bar Association Task Force prepared model policies on alternative (flexible) work arrangements, parental leave, sexual harassment, and workplace equity which were published (August 1993) as Appendix 2 of the *Touchstones Report*, *supra* note 9. The model policy on workplace equity, in particular those parts dealing with recruitment, interviewing and hiring, drew upon the recruitment guidelines prepared by the University of Victoria Faculty of Law (reproduced in *Gender Equality in the Legal Profession* (Vancouver: Law Society of British Columbia, 1992).

[85] *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities; Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001).

[86] *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, March 2001).

[87] *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996).

[88] Approved by the Ontario Human Rights Commission on November 23, 2000 and released on March 22, 2001.

LEGAL REQUIREMENTS AND PROFESSIONAL RESPONSIBILITIES

Studies such as those cited above suggest the existence of discrimination within the legal profession.

Definition of Harassment

Harassment is a form of discrimination. The Supreme Court of Canada has defined sexual harassment in the workplace as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is an abuse of both economic and sexual power. It is a demeaning practice that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being[89].

"Harassment" is defined in subsection 10(1) of the *Code* to mean:

> [...] engaging in a course of vexatious comment or conduct that is known or ought reasonably be known to be unwelcome.

Although the definition implies that harassment will occur only when there is "a course" of vexatious comment of conduct, case law has indicated that "one" comment or conduct may constitute harassment if it is a serious behaviour[90]In *Parsonage* v. *Canadian Tire Corp.* (1995), 28 C.H.R.R. D/42 (Ont. Bd. of Inq.) a manager, while on break in the cafeteria with his colleagues, made a joke with the punch line "there was a nigger in the kitchen". The Board concluded that a single improper and insulting joke, told by employees or supervisors on break does not constitute a violation of the *Code*. However, egregious racial or other threats or comments, even if made only once, could constitute an infringement of the *Code.* (See also *Dhillon* v. *F.W. Woolworth Ltd* (1982) , 3 C.H.R.R. D/743)..

Harassment in employment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or [disability][91] is explicitly prohibited by the following subsections of the *Code*:

> s. 5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or [disability].

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[89] *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284.

[90] Serious forms of harassment, such as physical sexual assault, need not occur more than once to be considered harassment. See Arjun P. Aggarwal, *Sexual Harassment in the Workplace*, 3rd edition (Toronto: Butterworths, 2000) at 140.

In *Hinds* v. *Canada (Employment & Immigration Comm.)* (1988), 10 C.H.R.R. D/5683, the Canadian Human Rights Tribunal determined that Leon Hinds was subjected to racial harassment. Mr. Hinds, a Black man who had been employed with Employment and Immigration for 18 years had received a photocopy of a questionnaire with the heading "Employment Application for Niggers" through the internal mail. The text that followed and the racially derogatory innuendos contained in the document were oppressive. The tribunal determined that the incident amounted to racial harassment.

[91] Although the *Code* prohibits harassment and discrimination based on "handicap" and provides an extensive definition of the term "because of handicap" (see section 10 of the *Code*), the terms "disability" and "person with a disability" will be used throughout this document instead of "handicap" or "handicapped person". Many persons with disabilities prefer the term "disability". In English, the term handicap is considered obsolete.

s. 7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

s. 7(3) Every person has a right to be free from,

i) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

ii) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

The *Code* does not expressly protect against harassment on the basis of sexual orientation but it does protect against discrimination on that basis. Harassment is a form of discrimination[92] and subsection 5(1) of the *Code* may be interpreted to include harassment on the basis of sexual orientation. Further, the Supreme Court of Canada has concluded that human rights legislation that denies equal benefit and protection of the law on the basis of sexual orientation is a violation of section 15 of the *Canadian Charter of Rights and Freedoms*[93]. Denying such benefits under the *Code* would amount to a *Charter* violation.

Harassment is also prohibited by Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the Law Society of Upper Canada's *Rules of Professional Conduct.* Rule 5.03 states:

A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

Rule 5.03 defines sexual harassment as:

one incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature

i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct,

ii) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services,

iii) when submission to such conduct is made implicitly or explicitly a condition of employment,

iv) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, allocation of files, matters of promotion, raise in salary, job security, and benefits affecting the employee), or

v) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment.

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[92] The Supreme Court of Canada has recognized that sexual harassment is a form of sex discrimination. *Janzen, supra* note 22 at 1284.

[93] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 applying the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

Rule 5.04 (Discrimination) of the *Rules of Professional Conduct* not only prohibits discrimination but also harassment based on grounds other than sex. The commentary to Rule 5.04 indicates that:

> In addition to prohibiting discrimination, Rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or [disability].

Although Rule 5.04 of the *Rules of Professional Conduct* does not prohibit harassment or discrimination based on same-sex partnership status, law firms are bound by the *Code* which prohibits such behaviour.

Disrespectful behaviour, offensive comments or actions, not based on one of the protected ground, which demeans an individual or causes personal humiliation is often referred to as *personal harassment*[94]. While personal harassment is not prohibited under the *Code* or the *Rules of Professional Conduct*, law firms may prohibit such behaviour under their policy on preventing and addressing workplace harassment and discrimination.

Abuse of authority occurs when a person uses authority unreasonably to interfere with an employee or a member of the firm. If the abuse of authority is unrelated to one of the protected grounds, it is not prohibited under the *Code* or the *Rules of Professional Conduct.* However, law firms may prohibit such behaviour in their policy on preventing and addressing harassment and discrimination.

Harassment could also be a *criminal act* and result in a charge under the *Criminal Code*, for example if the behaviour is an assault, constitutes hate propaganda or amounts to criminal harassment[95].

Elements of the Definition of Harassment

The following are elements of the definition of harassment:

- The comment or conduct does not have to be intentional.
- Harassment may be a series of conduct or comment that has to happen repeatedly for a period of time[96].
- One serious incident can be harassment[97].

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[94] Personal harassment has been defined by the Treasury Board as:

Harassment is any improper conduct by an individual, that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat.

See: http://www.tbs-sct.gc.ca/Pubs_pol/hrpubs/hw-hmt/hara_e.html

The Law Society of Upper Canada's Workplace Harassment and Discrimination Prevention Policy and Procedures prohibits discrimination and harassment on the basis of other human characteristics such as physical appearance, socio economic background or occupational group. It also considers unacceptable behaviour of any kind that is either physically and/or verbally abusive, demeaning or degrading of any employee.

[95] See for example Part VIII, Offences against the Person, *Criminal Code*, R.S.C. 1985, c. C-46.

[96] For example, one homophobic joke might not be harassment, but persistent homophobic comments may become harassment with time.

[97] For example, see footnote 23.

- A person does not have to object to the behaviour in order for something to be considered harassment. What is relevant is whether the respondent "knew or ought reasonably to have known" that the behaviour was unwelcome. Tribunals have generally adopted the objective standard of the reasonable person. If a reasonable person were to find the behaviour unacceptable, the alleged harasser ought to have known that the behaviour would be unwelcome. However, in the context of sexual harassment, authors have criticized the reasonable person standard because it legitimizes the dominant social norm of the workplace, the male standard[98]. In some sexual harassment cases, tribunals have adopted the reasonable victim standard and have considered whether the reasonable victim would find the behaviour unwelcome[99]. Tribunals have been more willing to adopt a contextualized approach in racial harassment cases, by recognizing that social norms in the workplace are often defined by dominant groups and may, in fact, create poisoned work environments for the non-dominant racialized groups[100].

- Harassment may occur where job benefits or security are conditional on an exchange of a favour[101].

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[98] See Kathleen Gallivan, "Sexual Harassment After Janzen v. Platy: the Tranformative Possiblities" (1991) 49 University of Toronto Faculty of Law Rev. 27; Josée Bouchard, "La personne raisonnable en matière de harcèlement sexuel: une appréciation féministe" (1995) 8 C.J.W.L. 89; Maurice Drapeau, *Le harcèlement sexuel au travail* (Cowansville: Les édititions Yvon Blais Inc., 1991).

[99] *Harris* v. *Omni Data Supply Ltd.* (1987), 8 C.H.R.R. D/4385 (B.C. Bd. of Inq.); *Stadnyk* v. *Canada (Employment and Immigration Commn.*) (Can. 1993) 22 C.H.R.R. D/173 (Can. H.R.T.); affd (1995) 22 C.H.R.R. D/196 (H.R. Rev. T.); affd, unreported, November 15, 1996, Doc. T-698-95 (F.C.T.D.).

Kathleen Gallivan, *ibid.* at 56, suggests the adoption of the reasonable victim:

This standard would first take into account the woman's vulnerability, an umbrella term for a variety of characteristics including her age, her cultural background, her relationship to her employer of co-workers, her relative isolation in the workplace and her position in the workplace hierarchy, her need for the job, and her security in it. In short, it would take account of all the factors that make a woman's resistance to harassment difficult. It would also recognize the various ways in which vulnerable women manifest their profound discomfort with the harassment without expressly telling the harasser to stop. These include such signs of discomfort as nervous laughter, silence, or avoidance of the harasser.

[100] See *Dillon* v. *F.W. Woolworth Co. Ltd* (1982), 3 C.H.R.R. D/743 (Ont. Bd. of Inq.) in which the Board recognized the effect of a racially hostile environment and accepted that the East Indian workers' retaliations were a reflection of how angered and injured they were. In *Francois* v. *Canadian Pacific Ltd.*, (1988), 9 C.H.R.R. D/4724 (C.H.R.C.) a Board held that a workplace poisoned with racist commentary by all workers, irrespective of race, does not allow an employer to ignore the racism. The name calling was unacceptable.

[101] For example, an associate in a law firm asking an assistant to have sex with him and promising a salary raise in return. The threats to withhold rights or benefits may not be overt and law firms should be alert to the more subtle ways in which this may occur.

- The unwelcome comment or conduct does not have to be directed at a specific person for harassment to occur. Comments or conduct that tend to ridicule or disparage a group causing humiliation, insult, apprehension or disruption may *poison the work environment*[102]. A *poisoned workplace environment* exists when conduct or comments tend to demean a group covered by a protected ground, even if not directed at a specific individual. It is the creation of a negative or unpleasant emotional or psychological work environment[103].

Harassment may be verbal[104], physical[105] or visual[106].

Definition of Discrimination

Subsection 5(1) of the *Code* prohibits discrimination in employment:

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences[107], marital status, same-sex partnership status, family status or [disability].

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[102] For example, employees routinely making derogatory jokes and comments about persons of colour.

[103]When considering whether there is a *poisoned work environment*, it is important to consider the context. In *Moffatt* v. *Kinark Child and Family Services*, a Board of Inquiry had to decide whether nasty speculation or rumours, prying and casual gossip about the sexual orientation, health and family life of an employee is harassment or discrimination. The Board observed that:

[D]iscriminatory conditions can be created by derogatory comments which target a person on the basis of their identification with a prohibited ground of discrimination. Comments which are, for example, racist, sexist, homophobic or mocking of a person's disabilities, whether written or oral, whether said directly to an employee or behind their back, can be the basis for a finding of employment discrimination. An isolated remark may not, on its own, create a poisoned work environment; each case requires consideration based on all the circumstances including the nature and frequency of the remarks and the impact on the complainant[...]

The appropriateness of any particular conversation referencing, in a neutral way, directly or indirectly, the sexual orientation of a colleague, will depend on a number of factors, the most significant of which will be the openness of the employee who is the subject of the conversation. Context is also very important. Even a casual friendly inquiry about a partner may be unwelcome if it has the potential to reveal a person's sexual orientation to an unknown and possibly hostile third party. For a gay man or lesbian, a careless reference to their orientation, even by a friend, can have the effect of forcing them "out of the closet" in a situation where they do not feel safe. When a gay man or lesbian has clearly indicated that they do not expect their sexuality to be a topic of conversation, on-going careless references by colleagues to their sexual orientation, even if not individually offensive, may have the cumulative effect of creating an environment in which they feel vulnerable to hostility from others. (*Moffatt* v. *Kinark Child and Family Services* [1998] O.H.R.B.I.D. No. 19, Decision No. 98-019 at par. 211 and par. 215.)

[104] Such as derogatory comments about a person's sexual attractiveness, demeaning jokes, sexual suggestions and innuendo, sexual solicitations. Unwelcome remarks, jokes, innuendos or taunting about a person's racial or ethnic background, colour, place of birth, citizenship or ancestry. Refusing to speak or work with an employee because of his or her racial or ethnic background or because of his or her disability.

[105] Unwanted touching, such as stroking, tickling or grabbing someone, impeding or blocking movement in an attempt to get physically close. Insulting gestures or practical jokes based on ethnic or racial grounds which cause embarrassment or awkwardness.

[106] Derogatory or degrading posters, explicitly sexual images, cartoons, graffiti or the displaying of racist, derogatory, or offensive pictures or materials or the delivery of offensive e-mail.

[107] "Record of offences" is defined in the *Code* as a conviction for a criminal offence for which a pardon has been granted or a conviction under any provincial enactment.

Rule 5.04 of the *Rules of Professional Conduct* provides that law firms have a legal and professional duty not to discriminate (on any of the prohibited grounds enumerated in the *Code* and in Rule 5.04):

> A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Code*), marital status, family status, or [disability] with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other members of the profession or any other person[108].

The fact that there is no intent to discriminate is of no relevance: what counts is the impact that practices, policies and behaviour have on individuals.

For years, courts and tribunals have defined discrimination in terms of "direct", "adverse effect"[109] or "systemic".

"Direct discrimination" exists where an employer adopts a practice or rule which on its face discriminates on a prohibited ground.

"Adverse effect discrimination" means that an employer, for genuine business reasons, adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.

"Systemic discrimination" means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.

Discrimination Resulting from a Rule or Policy and the Duty to Accommodate

The *Code* prohibits adverse effect discrimination resulting from a rule or policy. However, under section 11 of the *Code*, an employer may justify a workplace rule that has the effect of discriminating against a person or group of persons on a prohibited ground, including disability, by showing that the rule is a *bona fide* occupational requirement and that the needs of the person or group cannot be accommodated without undue hardship[110].

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[108] Although Rule 5.04 does not prohibit discrimination or harassment based on same-sex partnership status, law firms are bound by the *Code* which includes such ground.

[109] Adverse effect discrimination has also been termed "indirect" or "constructive" discrimination.

[110] Section 11 of the *Code* imposes a duty to accommodate:

(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Section 17 of the *Code* also creates an obligation to accommodate persons with disabilities. Section 17 states that there is no violation of the right of a person with a disability if that person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right. However, this defence is not available unless it can be shown that the needs of the person cannot be accommodated without undue hardship[111].

When one alleges that a rule or policy is discriminatory, the Supreme Court suggests the following three-step analysis:

> Once a plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a *bona fide* occupational requirement or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:
>
> - it adopted the standard for a purpose or goal rationally connected to the function being performed;
> - it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal ; and
> - the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship[112].

In Ontario, the Court of Appeal has adopted the three-step analysis set out by the Supreme Court of Canada which means that, in cases of *prima facie* discrimination based on disability, an individual may rely on section 11 or 17 of the *Code*. In cases of *prima facie* discrimination based on other grounds, an individual may rely on section 11 of the *Code*. Under either section, to justify workplace related rules or policies, the three steps of the analysis must be satisfied[113].

The commentary to Rule 5.04 of the *Rules of Professional Conduct* also imposes a duty to accommodate:

> The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in Rule 5.04.

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law[114].

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[111] Section 17 of the *Code* imposes a duty to accommodate persons with disabilities:

(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of [disability].

(2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[112] *British Columbia (Public Service Employees Relations Commission)* v. *B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (the *Meiorin* case) at par. 54.

[113] *Entrop* v. *Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont. C.A.).

[114] The *Code* and the *Rules of Professional Conduct* impose a duty to accommodate differences arising from the personal characteristics up to the point of undue hardship. The duty to accommodate is a legal requirement imposed on employers in Ontario, including law firms. Consequently, law firms are encouraged to adopt a policy to prevent and respond to workplace harassment and discrimination and a policy regarding accommodation requirements. The Law Society has published the following documents to assist law firms in developing a policy regarding

Retaliation, Threats or Reprisals

Human rights law not only prohibits harassment and discrimination but also retaliation, threats or reprisals in relation to harassment or discrimination. Complainants and potential complainants are protected against retaliation, threats or reprisals for filing a complaint, assisting in a complaint, or testifying in human rights cases. Further, retaliation, threats or reprisals against a person who exercises her or his right to complain is illegal even if the complaint is unsuccessful[115].

False and Frivolous Accusations

Although false and frivolous accusations of harassment or discrimination occur in rare instances, such false accusations are serious offenses because they may have very serious adverse ramifications for the accused. Workplace harassment and discrimination policies should encourage victims to come forward, but at the same time, should discourage false and fabricated charges against innocent persons.

The insufficiency of evidence to prove a complaint does not mean that the complaint was submitted in bad faith. A malicious or bad faith complaint means that a person has made a complaint that she or he knew was untrue.

Definition of Employment

The *Rules of Professional Conduct* prohibit harassment and discrimination in employment or in professional dealings.

The terms "employer" and "employment" are defined broadly; pursuant to both human rights legislation and the *Rules of Professional Conduct*, employment extends to professional employment of other lawyers, articled students, or any other person, from administrative staff to partners.

Although the *Code* does not refer specifically to volunteers, the Human Rights Commission is of the view that "equal treatment with respect to employment" in section 5 of the *Code* can be interpreted to protect anyone in a work context[116]. This would include volunteers, co-op students and dependent and independent contractors.

The term "employment" covers recruitment, interviewing, hiring, promotion, evaluation, compensation, professional development and admission to partnership.

Members of a firm are also prohibited from engaging in harassment or discrimination when dealing with clients, or other parties with whom they interact in a professional capacity.

Definition of "In the Workplace" or "In the Course of Employment"

To constitute a prohibited conduct in the context of employment under the *Code*, the conduct must take place "in the workplace"[117], or "in the course of employment"[118]. The scope of those terms is not clear. The term "in the course

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accommodation requirements: *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements, supra* note 19 and *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities, supra* note 18. Further, staff of the Law Society are available to assist in the development of an accommodation policy for your law firm either by phone or by attending at your offices.

[115] Reprisals may include social ostracism, the stymying of careers or damage to the reputation. The vulnerability of complainants and the impact on the relation of complainants with colleagues and peers increases when complaints of harassment and discrimination are not dealt with appropriately by law firms.

[116] *Human Rights at Work* (Toronto: Ontario Human Rights Commission, 1999) at 35.

[117] The term "in the workplace" is used in sections 5 and 7 of the *Code.*

[118] The term "in the course of employment" is used in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

of employment" has been interpreted in *Cluff* v. *Canada (Department of Agriculture)*[119] in which an employee alleged that she was sexually harassed in the late evening at a conference. The complainant, a term employee with the Communications Branch at the Department of Agriculture, had become active in the Eastern Canada Farm Writers' Association. She was authorized by her supervisor to organize its annual conference during working hours, provided the work did not interfere with her normal duties. The employer paid her registration fee at the conference. As part of her organizational duties, she was required to host the hospitality suite and, for practical reasons, she was to sleep in the bedroom portion of the suite. She alleges that she was sexually harassed by a senior employee of the Communications Branch of Agriculture Canada between 2:00 a.m. and 3:00 a.m. in the suite. The issue was whether the harassment occurred "in the course of employment" or in "matters related to employment". The Tribunal held, and the Federal Court concurred, that an employee is in the course of employment when, within the period covered by the employment, he or she is carrying out:

- activities which he or she might normally or reasonably do or be specifically authorised to do while so employed;
- activities which fairly and reasonably may be said to be incidental to the employment or logically and naturally connected with it;
- activities in furtherance of duties he or she owed to his or her employer; or
- activities in furtherance of duties owed to the employer where the latter is exercising or could exercise control over what the employee does.

The Federal Court concluded that the complainant's activities in relation to the conference were normal or reasonable adjunct activities from which the Department and the complainant could benefit. The fact that the Department did not control or influence the association was of no consequence. The work undertaken by the complainant was fairly and reasonably incidental to her employment in the Department. However, the Court held that what happened after the hospitality suite closed could not be related to her employment. At some time before 2:00 a.m. and at or shortly after the time the hospitality suite effectively closed, the complainant ceased to be in the course of employment or engaged in matters related to employment[120].

In *Robichaud* v. *R.*[121], the Supreme Court of Canada has recognized that sexual harassment does not only occur in the workplace, and that the phrase "in the course of employment" should be given a broad interpretation and should be understood as meaning "in some way related or associated with the employment".

In *Simpson* v. *Consumers' Assn. of Canada (CAC)*, the Ontario Court of Appeal defined the term "workplace" in the context of harassment. The respondent, an executive director of the appellant association had propositioned a female member of staff during a three-day meeting of the board of directors in Saskatchewan. The incident took place late one evening at the hotel where they were both staying. On another occasion the respondent squeezed another female employee's buttocks while she was bending over. That incident happened at around 11:00 p.m. in the hospitality suite of a hotel in Banff where the CAC was holding its annual general meeting. Finally, while attending a business conference in Quebec, and in the presence of other staff members, the respondent went into the conference hotel's hot tub naked with a secretary who was topless. The Court of Appeal concluded that, although the incidents took place during CAC meetings or retreats held at hotels, they were clearly business meetings, even if they included a social component. Justice Feldman, for the Court, states:

> That the incidents occurred after the official business of the meetings, and, for example, in a hospitality suite, does not mean that they are outside the workplace and therefore outside the employment context. In *Smith* v. *Kamloops and District Elizabeth Fry Society* (1996), 136 D.L.R. (4th) 644 at 654, the British Columbia Court of Appeal held that "[a]n employee's conduct outside the workplace which is likely to be prejudicial to the business of the employer

[119] [1994] 2 F.C. 176 (F.C.).
[120] *Ibid.*
[121] [1987] 2 S.C.R. 84.

> can constitute grounds for summary dismissal." In *Tellier* v. *Bank of Montreal* (1987), 17 C.C.E.L. 1 (Ont. Dist. Ct.), one of the key events constituting sexual harassment occurred at a cocktail party held by a company that was doing business with the bank [...] These CAC meetings, including the social aspects, were perceived by the staff as job related. The people invited were either employees or volunteers of the association, attending a function paid for by the association. In the cases of Sandy Reiter and Julie Glascott, the women were strictly employees of the association and not friends of the respondent. Although these incidents did not take place within the physical confines of the office, they occurred in the context of the work environment[122].

The Canadian Human Rights Commission and the Ontario Human Rights Commission recognize that harassment can take place in the workplace itself, or outside of the workplace in situations that are in some way connected to work. For example, during off-site meetings, business trips, social gatherings taking place off-site, recruitment lunches or dinners with potential articling students or other hiring candidates, end of the year parties and any other event or place related to employment when the employee is present in the course of employment. Harassment will not be tolerated in any work-related place or at any work-related event[123].

Liability of Employer

Employers have the ultimate responsibility for ensuring that their workplace is free of harassment and discrimination. In 1987, the Supreme Court of Canada rendered its decision in *Robichaud* v. *Canada (Treasury Board)*[124] pursuant to the *Canadian Human Rights Act* which established employers' liability for acts of their employees in the course of employment. The decision confirmed that human rights legislation imposes a statutory obligation which requires employers to provide a safe and healthy working environment.

The Court placed the responsibility on those who control the organization and are in a position to take effective remedial action to remove undesirable conditions. The response of an employer will have important practical implications, for example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps.

The *Robichaud* decision recognizes that the employer alone is in a position to enforce human rights in the workplace by implementing policies, creating a healthy work environment, reinstating an employee who has been dismissed, providing benefits to the victims of human rights violations and punishing those who violate human rights laws.

The *Robichaud* decision confirmed that:

1) employers are responsible for the due care and protection of their employees' human rights in the workplace;

2) unless otherwise provided by legislation, employers are liable for the discriminatory conduct of, and harassment by, their agents and supervisory personnel;

3) harassment by a supervisor may be automatically imputed to the employer when such harassment results in a tangible job-related disadvantage to the employee;

4) explicit company policy forbidding harassment and the presence of procedures for reporting misconduct may not be sufficient to offset liability;

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[122] *Simpson* v. *Consumers' Assn. of Canada* (21 December 2001), Toronto C31917 and C31918 (Ont. C.A.)

[123] *Anti-Harassment Policies for the Workplace, An Employer's Guide* (Canadian Human Rights Commission, 1998).

[124] *Supra* note 54.

5) employers will be pressured to take a more active role in maintaining a harassment/discrimination-free work environment;

6) employers' intentions to have effective harassment policies are insufficient. In order to avoid liability, the policies should be functional and work as well in practice as they do in theory[125].

The Ontario *Human Rights Code* makes an employer responsible for any acts or thing done or not done in the course of employment by an officer, agent, or employee for certain discriminatory conducts. However, it exempts the employer from liability in relation to harassment caused by its agents or employees[126].

The Human Rights Commission nevertheless recognizes that employers have violated the *Code* where the employer:

1) directly or indirectly, intentionally or unintentionally infringes the *Code*;
2) constructively discriminates;
3) does not directly infringe the *Code* but rather authorizes, condones, adopts or ratifies behaviour that is contrary to the *Code*[127].

As well, the employer's liability may be engaged in some circumstances where an employee contravenes the *Code* in the course of his or her employment.

A 1993 Board of Inquiry decision, *Broadfield* v. *De Havilland/Boeing*[128], found an employer liable for the acts of its employees for sexual harassment, stating that a significant feature of the case was that the company knew that the complainant would be likely to face resistance from some male employees. The complainant was the first female supervisor at De Havilland/Boeing of Canada Ltd. and she faced ongoing harassment in the form of threats, gender based insults, anonymous obscene phone calls at her home and was shown pornographic magazines by male workers. She reported the harassment to the company which did not react. The Board held that the employer was liable for the sexual harassment. The employer was aware, at the time the complainant became a supervisor, of the potential for harassment and it had an obligation to take the necessary measures to prevent it or to mitigate the effects of the harassment. Once the harassment occurred the company was also liable for the failure to take the appropriate measures to address the issue.

In *Moffatt* v. *Kinark Child and Family Services*[129], an Ontario Board of Inquiry reiterated that an employer is under a duty to take reasonable steps to address allegations of discrimination or harassment in the workplace and that a failure to do so will result in liability under the *Code*. The reasonableness test has been applied to determine quantum of damages, corporate liability in allegations of discrimination and to determine the adequacy of an

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[125] Aggarwal, *supra* note 23 at 264.

[126] Subsection 45(1) of the *Code* states:

For the purposes of the Act, except [...] subsection 5(2), section 7 [...], any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

Subsection 5(2) provides for the right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or [disability].

Subsection 7(2) provides the every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

[127] Ontario Human Rights Commission, *Human Rights at Work*, *supra* note 49 at 30.

[128] (1993), 19 C.H.R.R. D/347 (Ont. Bd. of Inq.).

[129] *Supra* note 36.

employer's investigation into a complaint of discrimination to determine whether a decision to terminate is reprisal[130]. The Board identified six elements that an employer must demonstrate:

23) It is aware that harassment or discrimination is prohibited conduct;
24) A complaint mechanism is in place;
25) It acted with alacrity in handling the complaint;
26) It dealt with the matter seriously;
27) It has met its obligation to provide a healthy work environment; and
28) It met its obligation to inform the complainant of its response.

If an employer fails any of the six elements it necessarily fails the test.

The *Law Society Act*[131] provides that, in Ontario, two or more members may establish a law firm by forming a partnership, within the meaning of the *Partnership Act*, a limited liability partnership within the meaning of the *Partnership Act* or a professional corporation for the purpose of practising law[132].

The Ontario Human Rights Commission states that, in the case of a corporation, a directing mind who discriminates against or harasses anyone in a manner contrary to the *Code*, or who knows of harassment or discrimination and did not take steps to remedy a situation, engages the liability of the employer[133]. The Human Rights Commission provides the following definition of "directing mind":

> Generally speaking, an employee who performs management duties is part of the "directing mind" of a company. Even employees with only supervisory authority may be viewed as part of a company's "directing mind" if they function, or are seen to function, as representatives of the organization. Holding an employer liable for the conduct of an employee who is part of the "directing mind" is consistent with the "organic theory" of corporate liability.
>
> Non-supervisors may be considered part of the "directing mind" if they have *de facto* supervisory authority or have significant responsibility for the guidance of employees[134].

Ontario Boards of Inquiry have defined "directing mind" of a corporation as "generally speaking, whenever an employee provides some function of management, he is then part of the "directing mind"[135].

In applying the human rights definition of "directing mind" in the context of a partnership or a limited liability partnership, it could be argued that all partners perform management duties and have responsibilities that are equivalent to those of a "directing mind" in a corporation. For this reason, the term "directing mind" will be used throughout this document, when referring to those who may engage the liability of the employer and who have a responsibility to take reasonable steps to address allegations of harassment or discrimination.

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[130] See *Jones* v. *Amway of Canada, Ltd.*, [2001] O.H.R.B.I.D. No. 9 (Ont. Bd. of Inq.); *Moffatt*, *ibid.*; *Wall* v. *University of Waterloo* (1995), 27 C.H.R.R. D/44 (Ont. Bd. of Inq.) adopting *Robichaud*, *supra* note 54.
[131] R.S.O. 1990, c.L.8.
[132] *Ibid.* at section 61.
[133] *Human Rights at Work*, *supra* note 49 at 30.
[134] *Ibid.* at 30.
[135] Stra*uss* v. *Cdn. Property Investment Corp. (No. 2)* (1995), 24 C.H.R.R. D/43 (Ontario Bd. of Inq.) at D/50. See also N*araine* v. *Ford Motor Co.* (1996) O.H.R.B.I.D. no. 23; *Fu* v. *Ontario* (1985), 6 C.H.R.R. D/2797 (Ont. Bd. of Inq.); *Shaw* v. *Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. of Inq.).

Harassment or Discrimination by Clients or Customers

Case law has found employers responsible not only for their own acts of discrimination, but also those of their agents and employees. An employer can also be liable for the acts of third parties such as consumers and customers. An employer has a duty to intervene to stop harassment of its employees by third parties. The employer cannot be absolved of its responsibility by showing that it was responding to the real or perceived preferences of customers. In the case of harassment by consumers or customers, the employer has the greatest control over workplace conditions, and it must intervene effectively to stop harassment by third parties. "While an employer may not be able to control the remarks of a customer or consumer, the employer does have control over how it responds to discriminatory conduct in the workplace, regardless of how the conduct occurred. In deciding whether an employer took reasonable steps to eliminate the problem, a tribunal will determine whether an employer acted promptly and effectively in all the circumstances in response to acts of harassment and will assess the appropriateness of its efforts to prevent harassment. An employer will be found liable unless it can demonstrate that it did not consent to the harassment, that it exercised all due diligence to prevent the harassment from occurring, and that it attempted to mitigate the effect of the harassment. In considering due diligence, the nature of the response will be examined. The response should bear some relationship to the seriousness of the incident. The employer must take reasonable steps to alleviate, as best it can, the distress arising within the work environment, to mitigate the effects of discrimination, and to reassure workers that it is committed to a workplace free of harassment"[136].

HOW TO LIMIT A LAW FIRM'S LIABILITY

Employers, including law firms, can take a number of steps to limit their liability[137]:

1. Employers should adopt a comprehensive harassment and discrimination policy, that meets the standards imposed by the Ontario Human Rights Commission, the *Code* and the case law. The policy should include several avenues through which the complaint may be brought to the attention of management and should be distributed to all staff and members of the firm and be widely disseminated.

2. Education programs on harassment and discrimination should be designed and delivered to staff and members of the firm.

3. Employers must be aggressive about implementing the policy. It is not enough to wait for complaints. Directing minds should watch for signs of harassment or discrimination and should take action when they observe it, even if no complaint has been filed. Staff should know that the firm is committed to a harassment and discrimination free workplace, will not tolerate any form of harassment or discrimination in the workplace, and that perpetrators may be discharged. The absence of a formal complaint should not stop the firm from investigating rumours and unofficial complaints[138].

4. The employer's investigation of a harassment or discrimination incident must be prompt, effective, unbiased, and thorough.

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[136]*Clarendon Foundation* v. *O.P.S.E.U., Local 593* (2000), 91 L.A.C. (4th) 105; *Stefanik* v. *Michaud and Spectronic Service Ltd.* (1998), 99 C.L.L.C. 145,007; *Jalbert* v. *Moore* (1996), 96 C.L.L.C. 145, 593; Re *Clarke Institute of Psychiatry and Ontario Nurses' Association* (1996), 54 L.A.C. (4th) 129; *Uzuoaba* v. *Correctional Service of Canada* (1994), 94 C.L.L.C. 16; *Mohammed* v. *Mariposa Stores Limited Partnership* (1990), 14 C.H.R.R. D/215 (B.C. Bd of Inq.).

[137]Taken from Arjun P. Aggarwal, *supra* note 23 at 313.

[138] It is to be noted that significant harm can be caused by inappropriate response by law firms to harassment or discrimination. This can compound the victim's experience of harassment or discrimination, affect the victims's relations with peers or violate privacy interests of the victim. A law firm should make the victim aware of resources available to provide advice, such as the Discrimination & Harassment Counsel.

5. Where allegations of harassment or discrimination are substantiated, strong and prompt remedial action must be taken. The remedial action must be reasonably calculated to end the harassment and may be disciplinary in nature.

HOW TO DRAFT A POLICY FOR SMALL LAW FIRMS[139]

The legal and professional responsibility to prevent and respond to workplace harassment and discrimination and the principles applicable in the effective implementation and review of the policy apply to small law firms. The policy should be supported by management, clear, fair, known and applicable to everyone in the law firm.
As with medium and large law firms, prospective employees and new staff should be informed of the policy. Ongoing education and periodic review of the policy are important.

The difference between small law firms and larger organizations is that smaller organizations will frequently have limited financial resources or the personnel to adopt the same kind of procedures as a larger law firm.

A small law firm should provide staff and members of the firm with accessible information about what specific behaviour is unacceptable, the procedure if they want to complain, the types of remedial or disciplinary actions that may be taken by the firm.

The most senior member of the firm will likely have a central role to play in the administration of the policy, as he or she will be in a good position to be aware of harassing or discriminating situations, take action and set example of appropriate behaviour.

However, it is important that small law firms provide alternate avenues of complaint resolution, such as appointing an Advisor or the Discrimination & Harassment Counsel, to act as resources to staff and members of the firm concerned about possible or actual harassment or discrimination.

WHAT SHOULD BE INCLUDED IN A POLICY

The model policy included in this Guide may be adapted to apply to small, medium or large law firms.

The following sections are equally applicable to small, medium or large law firms: statement of principles, objectives, application of the policy, definitions, examples, rights and responsibilities, confidentiality and implementation guidelines.

However, the model policy provides two different model procedures, the first for large and medium size law firms, the second for small law firms.

Staff of the Law Society are available to assist, by telephone or by attending at law offices, in the development of a policy.

The following is an outline of the elements of a successful workplace harassment and discrimination policy:

Statement of principles: The members and employees of the firm should know that harassment and discrimination are not tolerated in the workplace, and that the law firm will take immediate steps to end instances of harassment or discrimination.

Objectives: Employees and members of the firm should know the objectives to be accomplished by a written policy.

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[139] Based on *Anti-Harassment Policies for the Workplace: An Employer's Guide* (Ottawa: Canadian Human Rights Commission, December 2001).

Application of the policy: The policy should establish clearly who is covered by the policy and what types of relations and environments are covered by the policy. For example, the policy might specify that it applies to everyone working for a law firm and covers any employment-related environment.

Definitions: The policy should provide definitions of concepts such as harassment and discrimination.

Examples: The policy may provide examples of harassment or discrimination.

Rights and Responsibilities: All employees and members of the law firm should know what is expected of them. A section of the policy should spell out the right to be free from harassment or discrimination and the responsibility to raise concerns about discrimination and harassment and to co-operate in the investigation of a harassment or discrimination complaint. Further, the policy should spell out the law firm's responsibility in preventing and responding to workplace harassment and discrimination.

Confidentiality: The policy should spell out clearly the duty of confidentiality.

Implementation guidelines and strategies: The policy should describe the law firm's implementation strategies.

Advisors: The policy should provide for the selection of Advisors who will act as internal resources to all staff and members of the firm concerned about possible or actual harassment or discrimination. The policy should describe the selection process of Advisors and provide an outline of their role. Further, the policy should specify that Advisors will receive appropriate education and institutional support and assistance for carrying out their responsibilities. Small law firms with limited resources and staff may appoint the Discrimination & Harassment Counsel to act as an Advisor. The procedures drafted for small law firms include that option.

Equality Committee: The policy should designate a person or a committee to handle formal complaints of harassment or discrimination. Small law firms may designate a senior member of the firm as the person responsible for handling formal complaints of harassment or discrimination.

Procedures: The procedures should outline clearly the process to be followed when a person considers that she or he or someone else has been subjected to harassment or discrimination. The procedures should include the initial actions that a complainant may take, such as approaching the respondent, an Advisor or a directing mind, the outcome of the initial action and the process for issuing a formal complaint. The policy should, when a formal complaint has been issued, provide that the parties may resort to voluntary mediation. Further, the policy should provide for a formal investigation and describe the formal investigation process including the possible outcomes.

EFFECTIVE IMPLEMENTATION AND REVIEW OF THE POLICY

Establishing a Drafting Committee

The starting point is to establish a committee to draft the policy. The membership of the committee should be diverse. To the extent possible, the committee should be composed of directing minds, partners, associates, and staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities. If there are lawyers or individuals in the firm with expertise in the relevant employment and discrimination law, one or more should be included.

It is most important that the committee include respected staff and members of the firm who appreciate the importance of the issues to be addressed and who will be able to communicate these matters to others within the firm.

The composition of the committee is critical to the credibility of the process and the policies which are produced.

Developing the Policy

Committee members should educate themselves about the applicable law and become familiar with existing firm practices and policies that may be relevant.

A consultative process, which includes diverse staff and members of the firm and others with experience and expertise, should be followed. Harassment and discrimination policies apply to the hiring process and to articling students. Law firms should involve articling students in the consultative process.

The committee should circulate a draft policy throughout the firm for comments. This step is important because it generates support and allows for useful comment. It is important to explain the rationale for introducing such a policy, as well as the effect of the proposed policy on existing arrangements.

Implementing the Policy

The initial presentation of the policy and a clear statement of management support are critical to its success.

Once the policy is adopted, it should be distributed to all staff and members of the firm with a covering memorandum emphasizing the strong support of management.

Individuals charged with implementing and applying the policy, such as Advisors appointed under the policy or directing minds should receive special training to ensure that they are well informed of the specifics of the firm's policy, the law, interviewing techniques and information gathering.

Workshops should be organized to inform all staff and members of the firm about the provisions of the policy and the objectives that it is intended to meet.

The workshops should emphasize the changing demographics of the legal profession and the benefits that can come to the firm from adopting a policy on preventing and responding to workplace harassment and discrimination. The workshops should also stress that the right to be free from harassment or discrimination in the workplace is protected by human rights legislation, and is an important value within Canadian society. It is important that staff and members of the firm understand the negative impact that harassment and discrimination has on the dignity of individuals within the workplace, as well as on workplace productivity.

Factors that may cause opposition within the workplace should be identified, and discussed frankly. One example may be the misconception that such policies outlaw personal relationships between members of the firm, and create a "chilling" anti-social atmosphere. These concerns should be recognized and addressed at the outset through discussion of the purposes and goals of workplace harassment policies.

The initial presentation of the policy combined with a clear statement of senior and managing partners' support are critical to its success.

Communicating the Policy

If the firm has a handbook of policies or if policies are available on the internet, the workplace harassment and discrimination policy should be included. If the firm does not have a handbook of policies, or if it does not make its policies available on the internet, the firm may wish to distribute copies of the policy directly to each staff and member, and/or post copies of the policy in a common area.

The policy should be made available to all prospective members of the firm at the initial interview stage. Such a practice will make a strong statement about the firm's support for the policy and its objectives. Further, the *Human Rights Code* applies to the provision of terms and conditions of employment, recruiting, application forms, interviews and promotions. Firms may also wish to publicize the existence of the policy in their recruitment materials.

Reviewing, Evaluating and Revising the Policy

A committee of the firm should have the responsibility to review and revise the policy on a periodic basis. The committee will also attempt to identify barriers that might affect staff and members of the firm identified by personal characteristics listed in the *Code*. The first review should take place after there has been sufficient time to evaluate its operation.

The mandate of the committee should include an evaluation of whether the policy has been fairly implemented.

The goal of the review process is to ensure that the policy meets the needs of the firm and of its members and employees.

Individual staff and members of the firm should be encouraged to communicate their comments on the policy to the committee, either on an ongoing basis, or during the course of the review.

APPENDIX 2

APPENDIX 3

IMPACT OF INCREASING LAW SCHOOL TUITION FEES

1. At its meetings on March 28th and April 25, 2001, the Equity Advisory Group (EAG) expressed concern regarding the steadily increasing cost of law school in Ontario and the implications this may have for Aboriginal, Francophone and equity-seeking communities. During its June 2001 meetings, EAIC and the Admissions Committee received a report on this issue, and EAIC requested that Law Society staff undertake further research on this matter. This report is intended to update EAIC on the status of this issue.

Background

2. Ontario law schools have increased their tuition fees very substantially in the last few years. There is a concern that this may be having an adverse impact on students from Aboriginal, Francophone and equity seeking groups.

3. Since the deregulation of fees at professional schools in Ontario in 1997, some law schools have increased their fees to over $10,000 per year. The University of Toronto Law School plans to increase its current $12,000 yearly tuition fee to $22,000 in the next five years. Other Canadian law schools have responded to the five-year U of T plan, indicating that pressure will now be on other law schools to increase tuition fees in order to remain competitive. This is a recent phenomenon and there has been relatively little examination of the overall impact on the student population.

4. However, the relationship between access to postsecondary education and socioeconomic status has been made clear by 1998 Statistics Canada data which reveals a "particularly pronounced" gap between high-income families and low-income families in regard to university education participation. That data indicates that, in 1998, 38.7% of youth aged 18-21 years from wealthy families attended university compared to 18.8% of youth from poorer families.[140]

5. A February 2000 research report released by the Canadian Association of University Teachers also concludes that Canadian families have significantly increased their education-related expenditures in recent years largely due to increasing tuition fees. That report states that "the soaring cost of post-secondary education has placed a considerable burden on low- and middle- income households ...[and] if current trends continue, access to post-secondary education will be increasingly divided along income lines".[141]

6. A recent study at the University of Western Ontario showed that, after medical tuition fees were increased from $4,844 to $10,753, the average family income of first year medical students increased from $80,000 in 1998 to $140,000 in 2000. This study led the Ontario Medical Association to call for a freeze on tuition increases at the province's medical schools until accessibility to medical education can be reviewed.

7. While no similar study has been done regarding family incomes of first year law school students, it may be safe to assume that their circumstances are similar to those of medical school students. Certainly, the increase in tuition for law school and medical school is very similar. It is likely, therefore, that the increase in family income for law school students is similar and would be required in order to afford the increase in tuition at law school.

8. This concern has been voiced by the National Professional Association Coalition on Tuition[142] (NPACT) who, in a written submission to the federal government in September 2000, stated that NPACT is "very concerned that high postsecondary tuition fees in professional programs create barriers to access to education and, as a consequence, threaten the supply of professionals required to serve the needs of the Canadian public" (see TAB A)

Comparison with Census Data

9. If the above perspective can be supported, the continuing increase in law school tuition will clearly have a negative impact on Aboriginal peoples and equity-seeking groups (particularly racialized groups, mature students, persons with disabilities and single parents who are predominantly women).

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[140]See Statistics Canada "*Participation in Postsecondary Education and Family Income*", The Daily, Dec 07, 2001 @ www.statscan.ca

[141]See the Canadian Association of University Teachers' Out of Reach: Trends in Household Spending on Education (2000) as cited in *CAUT Communique*, Feb 22, 2000

[142]The National Professional Association Coalition on Tuition (NPACT) is a non-profit, voluntary group established in May 2000 in response to concerns regarding increasing tuition fees at postsecondary educational institutions, and the adverse impact that high tuition fees has on access to education. National professional associations involved in NPACT include: the Canadian Bar Association, the Canadian Dental Association, the Canadian Federation of Students, the Canadian Medical Association, the Canadian Nurses Association, the Canadian Pharmacists Association, Canadian Physiotherapy Association, the Canadian Veterinary Medical Association, and the Royal Architectural Association.

10. According to analyses of recent census data, despite their educational achievements, these groups tend to fall below the Low-Income Cut Off (LICO) more so than others. They tend to be either under-employed, unemployed or reliant on transfer payments more so than other groups and have not been able to translate their educational achievement into increased income and professional success[143].

11. This has historically been the case and there are various reasons for these circumstances including recent immigration status and discriminatory barriers within workplaces, educational institutions and other public spheres. The result of this is lowered earnings for members of these communities which leaves them less able to support the educational advancement of their children, particularly at the post-graduate level, including medical and law school[144].

Possible Implications:

13. As the changes in tuition fees are very recent, there is little available information about the long term implications. However, there are a number of possible effects which may merit monitoring by the Law Society, some of which are identified below.

i/ Will students from lower-income families, including a disproportionate number of students from equity-seeking groups, be excluded from a law school education? Law schools have generally increased, or announced the intention of increasing, the amount of financial assistance available to low-income students and have fund-raising campaigns underway with that objective. However, most have not yet achieved the desired level of support. It is also possible that the announced fee levels may discourage some low-income students from considering law school.

ii/ Will students from smaller communities be discouraged from attending law school, with a resulting decline in access to legal services? (Not many legal practices in smaller towns and cities generate the kind of income necessary to pay down a $50,000 tuition fee debt). Many students from moderate-income families may not qualify for assistance but may still be reluctant to incur such large debt.

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[143] See: Edward N. Herberg, *The Ethno-Racial Socioeconomic Hierarchy in Canada: Theory and Analysis of the Vertical Mosaic*, (1990), *International Journal of Comparative Sociology*, XXXI, 3-4, September-December; Tana Turner: *The Composition and Implications of Metropolitan Toronto's Ethnic, Racial and Linguistic Populations*, (1990) Municipality of Metropolitan Toronto, Multicultural and Race Relations Division, Chief Administrative Officer's Department; and *The Composition and Implications of Metropolitan Toronto's Ethnic, Racial and Linguistic Populations*, (1995) Municipality of Metropolitan Toronto, Access and Equity Centre; K. Pendakur and R. Pendakur, *Earning Differentials Among Ethnic Groups in Canada*, (1996), *Strategic Research and Analysis, Department of Canadian Heritage*; Michael Ornstein *Ethno-Racial Inequality in the City of Toronto: An Analysis of the 1996 Census*, (May 2000) City of Toronto and Centre for Excellence for Research on Immigrant Settlement; and Canadian Council on Social Development *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income*.

[144] A full discussion on barriers to legal education is provided in *At the Foot of the Walls of Jericho: Future Directions for Equity and Diversity in Legal Education*, (2000) Equity Initiatives Department, Law Society of Upper Canada. In terms of specific barriers facing Aboriginal peoples see *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers*, (April 2000) Law Society of British Columbia

iii/ Will graduating law students feel compelled to seek the highest-paying articling positions, and entry-level positions, even when they would have preferred some other field of law? A recent article written in the *Legal Intellingencer*[145] reports that this is in fact the case and that law school education debt dictates career choice. Will this include having the effect of encouraging newly-called lawyers to leave the country in search of the highest possible income?

iv/ Will there be an effect on the number of lawyers willing to work on legal aid certificates? In a November 2001 report, Legal Aid Ontario identified the debt incurred during law school as a threat to the long-term sustainability of Legal Aid Ontario.[146] That report stated that "new, young lawyers who are vital to the certificate program's future can ill afford to consider legal aid certificates". That concern takes on even greater significance given the December 2001 announcement by the U of T Law School to more than double tuition fees over the next five years.

v/ Will the Ontario clinic system have difficulty recruiting legal staff due to the added financial pressures on students, or because the composition of law school enrolment has changed?

Law School Perspectives

14. In terms of operating in a deregulated environment, Ontario law schools have responded to concerns regarding accessibility. According to correspondence received by three Ontario law schools - Osgoode Hall, University of Western Ontario, and the University of Toronto - as well as information received from the websites of the remaining three Ontario law schools - Windsor, Queen's and the University of Ottawa - all six Ontario law schools offer scholarships, bursaries, and awards in varying amounts. Some law schools have made arrangements with banks to provide law students with low- interest lines of credit (Osgoode Hall, University of Toronto), and others have made available short-term emergency loans distributed by the university (Queen's, Windsor**,** University of Toronto).

15. Two of the law schools - Osgoode Hall and the University of Toronto - have established new staff positions to assist in the delivery of financial aid programs to students in response to the 1998 deregulation of tuition fees in professional and graduate programs.

16. Two Ontario law schools, however, have indicated to the Law Society of Upper Canada, that they are supportive of research on the impact of the increasing law school tuition fees and access to legal education. Both Osgoode Hall Law School and the University of Western Ontario's Faculty of Law have offered their support of and participation in any Law Society study on the issue of accessibility.

17. The National Professional Association Coalition on Tuition (NPACT), which has the support of the Canadian Bar Association, also maintains the position that professional schools work with other stakeholders in the tuition fee issue. NPACT believes that high tuition fees have a significant impact on current and future students, as well as on professional services offered to the public. NPACT's position paper identifies the following impacts:

[145]See Nikki Cyter's "*Law School Education Debt Dictating Career Choices*", The Legal Intelligencer, August 6, 2001

[146]See *Legal Aid in Ontario: Tariff Reform Business Case* (November 2001) Legal Aid Ontario

- education for the affluent and a less diverse workforce;
- exacerbating the "brain drain" to the U.S.;
- decreased access to professional services;
- effects on the health and wellbeing of students;
- insufficient public funding and increasing dependence on bank loans;
- previous education debt and accumulative debt;
- decreased pay and potential and limited ability to pay off debts quickly; and
- adverse effects on the Canadian economy.[147]

Issues For Consideration

18. The Law Society has no jurisdiction to deal with law school fees, which are set by the universities on the basis of their financial needs and the funding regime established by the provincial government. In fact, the deregulation of fees for professional schools was part of a new policy approach by the provincial government based on a reduction of provincial funding support for post-graduate professional education. The law schools, therefore, can argue that this issue is beyond their control.

19. However, since access to law as a career is effectively determined by access to law school, considering whether these changes are in the public interest can be regarded as part of the Law Society's mandate to ensure the best possible quality of legal services for the public.

20. The Law Society has been committed to promoting equity and diversity in the legal profession for some time now. In particular, the Law Society has on numerous occasions addressed the issues of equity and diversity in legal education. Most recently, the Law Society has adopted a mentorship program aimed at encouraging high school students from communities under-represented in the legal profession to consider law as a career. As such, it is incumbent on the Law Society to address this matter, particularly given the implications of the Census data and the increasing costs of a legal education.

21. Further, the Equity Initiatives Department recently commissioned a major demographic study of the legal profession, the results of which indicate that the profession in Ontario[148] does not represent the diversity of the population.

Options for Consideration

20. In addressing this item, there have been several initiatives considered by the Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (EAIC), including:

    a) requesting Convocation to convey to the Government of Ontario its concerns regarding the continuing increase of law school tuition fees and the barriers this may pose for diversifying those engaged in legal education and entering the legal profession. Correspondence received from law school deans and most commentary on this matter indicates that the pressure for increasing tuition fees is a result of the Ontario government's deregulation of tuition fees for post-graduate education. Further, most law schools and the Law Society have indicated their interest in promoting diversity in legal education and the legal profession. Based on the preceeding analysis, this objective may be hampered by Government policy. This concern can be conveyed by Convocation through the Government and Public Affairs Committee in the hopes of convincing the Government to re-examine this matter;

[147] See NPACT Position Paper on the Effects of High Tuition Fees, submitted to the Standing Committee on Finance, September 2000. These concerns were again raised in NPACT's November 2001 submission to the Standing Committee on Finance (attached in TAB A).

[148] See Michael Ornstein *Lawyers in Ontario: Evidence from the 1996 Census* (2001) Law Society of Upper Canada

b) seeking an opportunity to meet and discuss this matter with law schools deans to develop joint strategies aimed at dealing with the deregulation of tuition fees for post-graduate education. Given the stated position of law schools on this matter, the Law Society may be able to play a useful role in contributing to and enhancing such approaches, particularly to ensure that: students worthy of entrance to law schools are not denied opportunities to gain a legal education because of financial limitations; and law schools conduct outreach to these communities to assure these students of the above;

c) seeking alliances with Legal Aid Ontario, other legal associations (eg., the CBA, CDLPA and associations representing Aboriginal, Francophone and equity-seeking groups) and representatives of other professional bodies on the above. The Legal Aid Ontario report noted earlier demonstrates the impact of current tuition fees on the ability to attract lawyers to consider working for legal aid. The continued increase of tuition fees will likely exacerbate this situation and may pose considerable difficulties not only in attracting lawyers to work for legal aid but, additionally, to work in areas of public interest law, eg., immigration and poverty law. Such a development would have adverse consequences for legal institutions, large sectors of the population who require these legal services, the conduct of research to assess such issues, the development of appropriate public policy and access to the administration of justice. Further, as such interest exists in other legal associations and professional bodies, the Law Society can add its weight to those already active on this matter;

d) examining the demographic changes amongst students in law school and the Bar Admission Course. The Registrar's office has initiated a voluntary self-identification form for all students entering this year's BAC. It is understood that some law schools have similar forms that are filled out by first year students. It would be useful if this information were uniform so as to be comparable throughout legal education. It would also be useful to ensure that such information is comparable to population data as gathered by Statistics Canada.

21. In considering these initiatives, it must be noted that there is interest from law schools in examining demographic data to assess the impact of deregulation and subsequent tuition fee increases. However, having comparable data can only assist in assessing the level of participation of students in legal education. While it can help in pointing out the increase or decrease in diversity in legal education, it cannot change any patterns that are detected; nor can it provide a proactive approach to ensuring diversity in results.

22. To do the latter will require some action on the part of either the Law Society, law schools and legal associations working together. As the matter of provincial deregulation of fees at professional schools has limited the ability of law schools to deal with this matter, it is likely that the issue needs to be addressed at another level and perhaps with other bodies such as the Ontario Medical Association, which has previously addressed this issue in response to the increasing tuition fees at the University of Western Ontario's medical school, or with the National Professional Association Coalition on Tuition (NPACT). It must also be noted that other legal associations are or may well be interested in this issue.

23. To pursue such an initiative the Committee may wish to request that Convocation adopt all of the strategies noted above and that the Chair of the Committee work with the Treasurer and the Chair of the Government and Public Affairs Committee to coordinate action on this.

APPENDIX 4

APPENDIX 5

DISCRIMINATION & HARASSMENT COUNSEL PROGRAM
ANNUAL REPORT:
JANUARY 1, 2001- DECEMBER 31, 2001

Submitted to
THE LAW SOCIETY OF UPPER CANADA

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Discrimination & Harassment Counsel
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EXECUTIVE SUMMARY

This report covers the activities of the *Discrimination & Harassment Counsel (DHC) Program* from January 1, 2001 to December 31, 2001.

The *DHC Program* was established by the Law Society of Upper Canada as a part-time pilot project in June 1999. It was created in response to a report submitted to Convocation by both the Finance and Audit Committee and the Treasurer's Equity Advisory Group based on a proposal developed by the Equity Advisor to implement the recommendations from the *Bicentennial Report on Equity Issues in the Legal Profession.*

In early 2001 the *Program* was evaluated by independent consultants and based on this evaluation, the *Program* was made permanent in June 2001.

During this reporting period, I received approximately 30 calls per month for a total of 366 calls. This represents a reduction in calls from the last reporting period when I received on average 40 calls per month. March, May, November and December were the most intense months with 40 or more calls per month. September was the slowest month with only 9 calls.

Of the 366 calls, the vast majority (325; almost 90%) were within the mandate of the Program. This represents a significant increase from the last reporting period when 75% of the calls were within the mandate.

Most of the calls continue to deal with sexual and personal harassment (51% combined total). The vast majority of these calls were generated by women. The next two most significant areas were calls regarding discrimination on the basis of disability and race. In these categories, the callers were fairly evenly divided between men and women.

Overall, there has been a decrease in calls. During the last reporting period, 469 individuals generated 582 calls. In this reporting period, 295 individuals generated 366 calls. However, there has been a sharp increase in the percentage of calls within the mandate: almost 90% this reporting period compared to 75% during the last reporting period.

Most of the calls (224 of 366 or 61%) were generated by members of the public. However, there has been in an increase in the number of lawyers contacting the program. Calls from lawyers accounted for 19% of all calls this reporting period compared to 13.5% from the last reporting period. This increase is an encouraging sign that member of the profession are knowledgeable about the Program and are beginning to access the services offered.

Although to date, socio-economic data such as a caller's age, education, income level and race, has not been collected, the available information shows that the majority of the callers are English speaking, female, and members of the public. Typically these women are either clients of lawyers or employees in law firms. Plans are underway to collect more comprehensive data from the callers for the next reporting year (2002)

NUMBER OF CALLS RECEIVED EACH MONTH

Month	Total Calls	Calls w/i Mandate	Calls o/s Mandate
January	35	31	4
February	18	18	0
March	42	35	7
April	32	29	3
May	45	40	5
June	37	32	5
July	23	21	2
August	23	23	0
September	9	7	2
October	23	17	6
November	39	34	5
December	40	38	2
Totals	366	325	41

It should be noted that these figures refer to the number of calls received, not the number of individuals calling. In some instances, particularly where the caller requires ongoing assistance, one person generated several calls. Also, these figures do not refer to the number of outgoing calls made by the DHC in relation to matters within the DHC mandate.

BREAKDOWN OF CALLS WITHIN THE MANDATE

During this reporting period, 325 calls were within the mandate as follows:

a. Sexual Harassment

F: 139
M: 21 (8 were calls from Respondents)

b. Personal Harassment

b. 26
M: 1

c. Discrimination - Age

F: 1
M: 0

d. Discrimination - Disability

F: 13
M: 13

e. Discrimination - Sexual Orientation

F: 0
M: 1

f. Discrimination - Place of Call Outside Ontario

F: 3
M: 0

g. Discrimination - Race

F: 3
M: 5

h. Information

F: 30
M: 13

i. Training/Presentations

F: 20
M: 12

j. Administrative
F: 16
M: 8

OVERVIEW OF TRENDS

- Overall reduction in number of calls (most likely due to less emphasis on promotional activities in this reporting period)
- Increase in the number of calls within the mandate (almost 90% compared to 75% in the last reporting period)
- Callers are predominantly English speaking female members of the public
- Significantly more women than men continue to contact the Program, both among the public and among members of the profession
- Over 40% of the calls deal with sexual harassment; the next most significant areas are discrimination on the basis of disability, personal harassment and racial discrimination
- More calls have been received dealing with discrimination on the basis of race; none of these calls have resulted in formal complaints to the Law Society or to the DHC Program

BUDGET FOR 2001

The budget for 2001 was $100,000.00. These funds have been spent as follows.

Fees	$75,654.35
Disbursements	$13,189.17
GST	$ 6,219.05
TOTAL	$95,062.57

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

(1) Copy of the Workplace Harassment and Discrimination Intake Form.
(Appendix B, pages 53 – 55)

(2) Correspondence Related to Model Policy on Harassment and Discrimination.
(Appendix 2, page 93)

(3) Correspondence and Material Related to Law School Tuition Fee Increases.
(Appendix 4, page 102)

Re: Model Policy on Harassment and Discrimination for Law Firms

It was moved by Mr. Copeland, seconded by Mr. Millar that the Model Policy on Harassment and Discrimination be adopted.

Carried

Re: Law School Tuition Fee Increases

Mr. Copeland sought to determine whether Convocation was interested in studying this issue.

The Treasurer advised that he would appoint a task force to study this issue and ask Finance to allocate funds for it.

A debate followed.

Convocation agreed that staff with the assistance of appointed Benchers would draft the terms of reference and budget for review by the Finance & Audit Committee.

Re: Item for Information Only

Discrimination and Harassment Counsel Year-End Report, January – December 2001

REPORTS FOR INFORMATION ONLY

Professional Regulation Committee Report

Professional Regulation Committee
March 7, 2002

Report to Convocation

Purpose of Report: Information

Prepared by the Policy Secretariat

TABLE OF CONTENTS

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on March 7, 2002. In attendance were:

Gavin MacKenzie (Chair)

Neil Finkelstein (Vice-Chairs)
Heather Ross

Stephen Bindman
Patrick Furlong
Avvy Go
Ross Murray
Marilyn Pilkington
Judith Potter

Staff: Terry Knott, David McKillop, Dulce Mitchell, Charles Smith, Elliot Spears, Jim Varro, Jim Yakimovich.

2. This report contains, and information reports on

- implementation of the summary revocation authority in the *Law Society Act*,
- an education program for Hearing Panel members, and
- file and caseload management and staffing information in the complaints resolution, investigations and discipline departments**.**

IMPLEMENTATION OF THE SUMMARY REVOCATION AUTHORITY

3. The Committee has approved a plan for implementation of the summary revocation authority in s. 48 of the *Law Society Act*. To date, the Society has not exercised the authority to summarily revoke a member's membership in the Law Society.

A. BACKGROUND

The 1999 *Law Society Act* Amendments

4. The amendments to the *Law Society Act* in February 1999 included the Law Society's authority to summarily revoke the membership of a member if the member has been suspended for more than 12 months. Section 48 reads:

> 48. An elected bencher appointed for the purpose by Convocation may make an order revoking a member's membership in the Society, disbarring the member as a barrister and striking his or her name off the roll of solicitors if an order under section 46 or clause 47 (1) (a) is still in effect more than 12 months after it was made.[1]

5. Section 49.32(3) provides an appeal to the Appeal Panel from an order under s. 48.

The February 2000 Policy

6. The Act does not contemplate a hearing or any other process before a member's membership is revoked under s. 48. As noted above, an appeal lies from a decision of the summary disposition bencher to the Appeal Panel.

[1]The two sections mentioned in s. 48 refer to suspensions for non-payment of a fee or levy and suspensions for failure to file (e.g. the MAR, other annual filings).

7. The language used in s. 48 reflects the effect of the order. A member whose membership in the Society is terminated for whatever reason has his or her name struck from the rolls and cannot appear as a barrister before the courts, and thus is disbarred. The same occurs when a member is permitted to resign membership as a discipline sanction, or voluntarily resigns membership outside of the discipline process. This is unique to Ontario, where members are "called to the bar" and sign the rolls, unlike other jurisdictions in Canada where a license to practice law is granted by the regulator.

8. Some benchers were not comfortable with the idea that a member could be disbarred through the operation of s. 48 without the right to make submissions. On February 18, 2000, Convocation adopted the policy that members must be permitted to provide information, orally or in writing, to the summary disposition bencher prior to a summary revocation order being made, and the Law Society must be given an opportunity to respond if it wishes. The relevant excerpt from the Professional Regulation Committee's report to February 2000 Convocation is attached at Appendix 1.

B. ISSUES CONSIDERED BY THE COMMITTEE RESPECTING IMPLEMENTATION OF THE SUMMARY REVOCATION AUTHORITY

1. As noted above, the summary revocation authority, including the process instituted by Convocation's February 2000 policy involving receipt of information from the member subject to summary revocation, has yet to be implemented. The overriding reason is that applying the 2000 policy has the potential to overwhelm certain functions within the Society's administration, given the number of members who are subject to revocation and who could request an opportunity to make a submission.

2. As of October 2001, there are 1,627 members who have been suspended for more than 12 months, and are eligible to have their membership revoked pursuant to s. 48. Of the 1627, 587 have been suspended more than ten years, 374 for more than five years and less than ten, 231 for more than three and less than five, and 435 for more than one year and less than five years. The majority of suspended members are suspended for failing to file the Members Annual Report (MAR). Suspensions for the MAR occur for every year that a member fails to file, as By-Law 17 requires the filing for every year, whether or not a member is suspended.[2]

3. The Committee considered reasons supporting use of the authority and the policy and discussed the effects of not exercising the authority.

4. Reasons in support of using the authority include the following:

   a. <u>It will assist in the Society's efforts to provide transparency as to who is and who is not entitled to practice law.</u>

      Suspended members remain members of the Society, albeit with rights and privileges suspended. The summary revocation authority would operate to address in an uncomplicated way situations where members fail to remedy the issue that led to the suspension, and effectively restore some certainty around the status of a member. The twelve month period is designed to be long enough for the member to deal with issue of suspension, but short enough so that the public interest is not compromised by any risks associated with an ongoing suspension.

[2] Subsection 2 (1) of By-Law 17 reads:
Every member shall submit a report to the Society, by March 31 of each year, in respect of the member's practice of law and other related activities during the preceding year.

b. It will alleviate the financial burden of "carrying" these members.

Ongoing costs are incurred by the Society in keeping many suspended members suspended. Carrying these members on the rolls year after year costs at least $12,000 a year in postage alone (and this assumes they all reside in Ontario, which is not the case). This includes the cost of postage for mailing the MAR (suspended members must still file the MAR each year), two notices that must be delivered prior to a suspension order in the event that the MAR is not filed for the current year, and the delivery of the suspension order by registered mail. Other expenses are associated with these members, including the telephone calls that must be made to them prior to suspension.

c. It will deal with concerns arising from administration of the Lawyers Fund for Client Compensation.

Claims arising from the practice activities of suspended members (where the claimant is unaware that the lawyer is suspended) will be considered by the Fund, unlike claims arising from the activities of former members. This is because the Fund is available for the dishonesty of members of the Society, and suspended members remain members in this context. As the number of member suspensions in excess of 12 months grows, the exposure for the Fund, depending on the activities of suspended members, is potentially significant.

d. It addresses circumstances of ungovernability.

It is difficult not to conclude that members who have been suspended for over five or ten years have little interest in membership in the Society. Applying the summary revocation authority to many of these members would likely not have a great impact on them. Other members are suspended and remain suspended because they essentially will not recognize the Law Society's regulatory authority and the requirements that flow from membership. One of those requirements is filing an annual report that Convocation has determined is necessary for regulatory oversight. These members may or may not be an actual risk to the public, but the fact that the risk exists supports the exercise of the authority for those members who do not comply with the mandatory fee and filing requirements.

e. Readmission of those whose membership is revoked under the summary revocation authority is not like an application for readmission for a member disbarred for misconduct

Although a hearing is required pursuant to Subsection 49.42(4) of the Act[3] upon a member's application for readmission, a member who is the subject of a summary revocation order may, without restrictions, apply to the Society to be readmitted to membership, whereupon he or she will again have the right to practise law in Ontario as a barrister and solicitor. Absent intervening complaints or disciplinary issues, the process for readmission after a summary revocation would not involve the same considerations as an application by a former member who was disbarred as a result of professional misconduct. When a member ceases to be a member as a result of a summary revocation order, there is no accompanying finding of professional misconduct or conduct unbecoming a barrister and solicitor.

[3] "If an order made under this Act revoked a person's membership in the Society as a member or student member, the Hearing Panel may, on the application of the person, make an order readmitting the person as a member or student member."

13. If the authority is not exercised, the primary result is that members whose suspensions continue for over 12 months will never have their memberships revoked and will continue to be members, albeit suspended members, of the Society. These members are still entitled to call themselves members of the Society. Suspended members are not entitled to the rights and privileges of membership, but as noted above, they are still required to file the MAR every year and are subject to suspension for failure to do so. This triggers the costs described above.

14. For the public, not revoking memberships may cloud the efforts at transparency as to who is and who is not entitled to practice law. If unauthorized practice of law is the issue, the question becomes one of risk to the public of permitting suspended members to remain suspended. The bulk of the members suspended for a number of years do not engage in the practice of law, and have no interest in doing so. The staff's experience with some members who remain suspended for a number of years is that they no longer wish to have anything to do with and do not want to hear from the Society. The question is whether the suspended members not in the above category pose a risk that the summary revocation authority can address.

C. THE COMMITTEE'S PLAN

15. The Committee determined that it was in the interests of both the public and the profession that the summary revocation authority be implemented now, based on the reasons noted above in support of exercising the authority.

16. The Committee, however, in acknowledging the number of suspended members who *could* make a submission, decided that the authority should be implemented in stages. As such, the Committee determined that the initial implementation phase should involve those members who have been suspended for the reasons described in section 46 or clause 47 (1) (a) of the Act, or the equivalent sections under the Act as it existed prior to February 1999, for seven year or longer.

17. Once experience is gained with this group, the Committee anticipates that the authority will be exercised with respect to other suspended members who are subject to revocation in keeping with the policy. Administrative processes can be responsive, as the need arises, to issues that arise from either smaller or greater numbers of suspended members making submissions.

18. As a matter of Society administration, implementing the authority and the policy will involve

- assigning staff to coordinate receipt of the submissions made by members and the responses made by the Society
- deciding who will respond on behalf of the Society
- if the member wishes to make oral submissions, deciding who will appear on behalf of the Society and how those matters should be scheduled

19. Estimates of the staff and bencher resource requirements and the resulting financial expenditures will obviously be imprecise at this stage. However, in an effort to bring some definition to this aspect of the process, the following are offered as the minimum steps[4] that would be required once suspended members who have received the notice for revocation forward to the Society a written submission or contact the Society to make an oral submission:

[4]These steps would be subject to any requirements that may appear in amendments to the *Rules of Practice and Procedure* for this process, noted later in this report.

Written Submission

a. Intake staff receive and review the submission, and refer it on to the Society counsel who will be designated as the counsel for the purposes of the summary revocation submission and any response thereto. An acknowledgement is sent to the suspended member.
b. Counsel obtains the necessary background information on the suspended member (e.g. the member's file, reasons for suspension, etc.) and makes other inquiries as necessary.
c. Counsel prepares a written response to the submission, which may be reviewed at the managerial level, depending on the internal processes that may be developed.
d. Once the Society's response is finalized, it is sent with the member's submission to the summary disposition bencher for determination. A communication is sent to the member advising of the process and that the disposition by the summary disposition bencher is pending.
e. The summary disposition bencher reviews the material and makes a decision on the matter. If the disposition results in a summary revocation order, the necessary documents are prepared by Society staff and sent to the member.

Oral Submission

a. Intake staff obtain a suspended member's request to make an oral submission to the summary disposition bencher and refer the request on to the Society counsel who will be designated as the counsel for the purposes of the summary revocation submission and any response thereto. An acknowledgement is sent to the member, requesting an outline of the member's oral submission if that has not been provided with the request for an oral submission.
b. Step b. noted above would be followed.
c. Law Society counsel prepares an outline of an oral response to the member's submission which may be reviewed at the managerial level, depending on the internal processes that may be developed.
d. The matter is referred to the hearing co-ordinator for summary revocation matters (oral submissions) for scheduling with the summary disposition bencher and the member. Notice of the date chosen for the matter is sent to the member and the summary disposition bencher, together with an outline of the oral submissions.
e. The meeting between the member, Society counsel and the summary disposition bencher is held, with any necessary Society support staff in attendance. If a summary revocation order is made, the necessary documents are prepared by Society staff and sent to the member.

20. It is impossible to estimate the number of suspended members within the group who have been suspended for seven years or longer who will make a submission. It is likely, however, that upon receiving notice of the proposed summary revocation a number of members will voluntarily resign. There is no requirement under By-Law 14 that a suspended member pay outstanding annual fees or file any outstanding MARs before an application to resign is approved. In effect, resignation is an alternative to being subject to a summary revocation order if the member indeed no longer wishes to be a member of the Society.

21. Additional expenditures will in any event be required to properly resource the summary revocation functions if they are to occur within a reasonable time frame.

Procedural Requirements

22. The Committee determined that procedures would have to be developed for receipt and consideration of the suspended member's submission. Amendments to the *Rules of Practice and Procedure*, which apply to summary orders, would likely be required. This issue will be reviewed by the Committee in the months ahead.

23. Convocation will also be required to appoint a summary disposition bencher for the purposes of s. 48 of the Act.

24. At this stage, the Committee considered it premature to develop criteria upon which benchers may decide to revoke a member's membership.

D. ADDITIONAL ISSUES FOR CONSIDERATION

25. A suggestion was made the Act should be amended to substitute another word for "disbarring" in s. 48, to reflect the fact that the revocation effectively cancels the member's membership in the Society. The Committee considered that while this may be a possibility at some future time, it is unlikely to be pursued in the short term. Accordingly, the Committee suggests that this issue be added to those that may be addressed with the Attorney General at some future date as amendments to the Act.

26. The Committee also determined that an examination of the need to require suspended members to file the MAR every year should be undertaken. If amendments to By-Law 17 are made so that members are not suspended each year for failing to file the MAR (the "first" suspension would remain until the filings are made), this will have a significant impact on the number of suspensions that occur each year, as the majority of the ongoing suspensions relate to the MAR. The Committee felt that the regulatory consequences of such an amendment should be carefully considered, and as such will be reviewing this issue at a future meeting.

BENCHER EDUCATION PROGRAM FOR HEARING PANEL MEMBERS

27. Planning is continuing for the bencher education program on adjudicative roles benchers fulfil on the Hearing Panel. Appendix 2 contains the latest proposed agenda for the program, including the educational topics for the sessions. Comments from benchers on the proposed program are invited, and may be referred to the chair of the Committee, or Larry Banack, Janet Minor or Avvy Go, who are also on the planning working group.

28. Further information about the program will be provided as plans are finalized. The projected date for the program is the spring of 2002.

FILE AND CASELOAD MANAGEMENT AND STAFFING INFORMATION IN THE COMPLAINTS RESOLUTION, INVESTIGATIONS AND DISCIPLINE DEPARTMENTS

29. Senior regulatory staff reported to the Committee on caseload management in the Complaints Resolution, Investigations and Discipline Departments. The reports appear at Appendix 3**.** These reports are prepared monthly for review by the Committee as part of its monitoring function respecting file management. The Committee receives general information and statistics on file management and caseloads in the departments noted above.[5] The reports in this report cover the period to the end of February 2002.

APPENDIX 1

EXCERPT FROM PROFESSIONAL REGULATION COMMITTEE REPORT TO FEBRUARY 18, 2000 CONVOCATION

I. POLICY

[5]The chair, as a member of the Proceedings Authorization Committee, is not a member of the Hearing Panel and accordingly does not and cannot have adjudicative responsibilities. Information received by the Committee, as reflected in the reports appended to this report, does not itemize specific cases.

MEMBERS' REPRESENTATIONS TO THE SUMMARY DISPOSITION BENCHER

A. BACKGROUND

3. The Committee has been reviewing an issue that arose in discussion at Convocation early last year, which led to the adoption of rules of practice and procedure and by-laws in January 1999. The issue relates to the summary revocation process under section 48[6] of the *Law Society Act* ("the *Act*") and the question of whether a member has a legal right to make representations to the summary revocation bencher, and, if not, whether such an opportunity should be extended to members in any event.

4. The Committee directed research on the legal issue. This report discusses the conclusions reached by the Committee.

B. SCOPE OF THE ISSUE

5. At its June 1999 meeting, the Committee reviewed a memorandum prepared by Elliot Spears that dealt with the process to be followed in the making of summary revocation orders, and specifically with the issue of the process becoming a "hearing". The provisions of the *Statutory Powers Procedure Act* ("the *SPPA*") and the provisions of the *Law Society Act* dealing with rules of practice and procedure relative to the authority of the *SPPA* were reviewed.

6. After considering this information, the Committee decided that it would be appropriate to discuss the full range of options for member representations. Ms. Spears prepared a further memorandum considered by the Committee at its February 2000 meeting, which focussed on the question of granting a member the opportunity to be heard prior to the Society's exercise of the authority under section 48 of the *Act*. Her research included a review of the statutes governing other law societies in Canada and other professions in Ontario as well as the principles of natural justice and the scheme of our *Act.*

7. The Committee considered the matter in the context of how the Society's legislative scheme distinguishes between those processes that require a hearing and those that do not. The statutory process for summary revocation orders falls within the latter category. The Committee also considered, however, whether some other means of permitting a member to bring information to the attention of the summary revocation bencher should be made available.

C. THE COMMITTEE'S VIEWS

8. The Committee agreed that the scheme in the *Act* for summary revocation orders does not contemplate that the process resulting in a summary revocation order will include an opportunity to be heard as, for example, is provided in conduct, capacity or competence proceedings.

9. The Committee considered that there may be a middle ground between the process provided for in the *Act* that allows for the full rights of a hearing and a summary revocation process that provides to members no right to make representations. The language of section 48 uses the discretionary "may" rather than the mandatory "shall" in describing the authority of the elected bencher.

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[6]Section 48 reads:
An elected bencher appointed for the purpose by Convocation may make an order revoking a member's membership in the Society, disbarring the member as a barrister and striking his or her name off the roll of solicitors if an order under section 46 or clause 47 (1) (a) is still in effect more than 12 months after it was made.

10. The Committee concluded that a member should be permitted to provide a submission, either in writing or orally, to the summary revocation bencher upon notice to affected members that their membership in the Society may be revoked in accordance with the *Act* and that the matter will be before the elected bencher for that purpose. This would not be in the nature of a hearing, but would provide a means for a member to place information before the bencher prior to the revocation.

11. The Committee concluded that fairness requires that members be given an opportunity to make a submission. It would create an opportunity for information to be made available that perhaps was not previously considered by the Society relevant to the lawyer's suspended status. The Committee felt that a lawyer, if he or she wishes, should be permitted to provide some response to the Society after notice of the prospective revocation of membership, in that it may be the last opportunity for the lawyer to deal with issues related to the circumstances that led to the point of revocation. The Committee expects that most suspended members who are subject to a summary revocation order after the 12 month suspension are unlikely to avail themselves of the opportunity to provide a submission, for example, because they have left Ontario or are pursuing other careers. Because other members may wish to make a submission, for example, to advance compassionate reasons why their membership should not be revoked, the Committee concluded that that opportunity should exist.

12. The Committee was also of the view that if a member is permitted to make a submission to the summary revocation bencher, the Law Society should be permitted, if it so chooses, to respond to the submission. For example, there may be situations where the information provided to the bencher is inaccurate or incomplete, and that, to maintain the integrity of the process, the Society's response is required.

13. If Convocation agrees with the approach proposed by the Committee, the form of notice to members who are subject to a revocation order will require amendment, to include notice of the opportunity to make oral or written submissions to the summary revocation bencher.

14. The Committee also directed that staff monitor and report on how many members avail themselves of the opportunity to make a submission, should Convocation accept the Committee's recommendation. The Committee recognizes that an assessment may have to await a period of up to two years, given the timing of the notices of suspension and revocation.

D. DECISION FOR CONVOCATION

15. Convocation is requested to:
    a. Either approve or reject the Committee's recommendation that members be permitted to provide information to the summary revocation bencher prior to an order being made, with the Law Society having an opportunity to respond if it wishes to do so; or
    b. Adopt an amended proposal as Convocation in its discretion deems appropriate.

APPENDIX 2

PROPOSED AGENDA FOR BENCHER EDUCATIONAL PROGRAM OR HEARING PANEL MEMBERS

DRAFT

Judge and Be Judged
Effective Decision-Making for the Hearing Panel

Description of the Program

The program is designed for all Hearing Panel members, including elected benchers and appointed benchers. The program is divided into two parts:

Part 1: The first evening session provides guidelines for effective judicial decision-making. Speakers will include experienced Judges and/or Adjudicators with expertise in the conduct of disciplinary hearings.

Part 2: The afternoon session on the following day will address contemporary issues and look at strategies for improving panel effectiveness and designing and implementing process changes.

Following this program, other educational activities will be developed for members of The Hearing Panel.

Educational Objectives

The educational objectives are to ensure that all Hearing Panel members:

- enhance their knowledge and skills to adjudicate effectively;
- employ fairness in proceedings and consistency in decision making; and
- enhance their knowledge and the skills to appropriately apply the *Rules of Professional Conduct* and to integrate contemporary issues of law into decision-making, eg. equality guarantees.

Proposed Agenda

Part 1: Being Judicial

5:30 p.m. - 6:00 p.m. *Cocktail*

Welcome and Overview of Program: Larry Banack

6:00 p.m. - 7:30 p.m. *Dinner*

7:30 p.m. - 9:00 p.m. *Judge and Be Judged*

Chair Gavin Mackenzie

Guest Speakers: (to be determined)

Part *2: Contemporary Issues*

Part 2 will consist of one workshop to address contemporary issues of law relevant to the hearing panel. The workshop will include an interactive panel discussion with experts.

2:00 p.m. - 2:15 p.m. *Welcoming remarks:* Gavin Mackenzie

2:15 p.m. - 3:30 p.m. *Workshop: Fact Finding and Credibility: the Role of Hearing Panel Members*

Chair: *(to be determined)*

Guest Speakers: *(to be determined)*

The workshop will assist members in meeting the challenge of fact-finding and determination of credibility between the parties. The workshop will also consider how unfounded myths and stereotypes should be discounted when assessing credibility. It will include a review of jurisprudence relating to credibility and the admissibility and relevance of similar fact evidence.

3:30 p.m. - 4:30 p.m. *Group Discussion in Camera: Improving panel effectiveness and moving forward*

Chair*:* *Larry Banack and Gavin Mackenzie*

Group discussion on future direction of The Hearing Panel, evaluation of educational program and development of further educational initiatives.

Materials

The resource materials provided for the training session will include two binders.

The Education Program binder will include the following:

- Course outline of the education Program
- Objectives of the program
- Bios of instructors and guest speakers
- Secondary materials, such as articles on natural justice and evidence
- Exercises
- Checklists
- Sample decisions
- Bibliography of relevant materials to effective adjudication
- Resource list

The Hearing Panel Binder consists of the necessary documents for effective adjudication, including:

- *Rules of Practice and Procedures*
- Relevant legislation
- Relevant case law and/or hearing panel decisions
- Relevant forms
- Sample oath

APPENDIX 3

FILE AND CASELOAD MANAGEMENT AND STAFFING INFORMATION IN THE COMPLAINTS RESOLUTION, INVESTIGATIONS AND DISCIPLINE DEPARTMENTS

THE LAW SOCIETY OF UPPER CANADA
COMPLAINTS RESOLUTION, COMPLAINTS REVIEW AND TRUSTEE SERVICES

MEMORANDUM

TO: Professional Regulation Committee

FROM: David McKillop
Manager, Compensation Fund, Resolution and Trustee Services

DATE: February 28, 2002

RE: Management Report - Complaints Resolution, Complaints Review and Trustee Services

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The purpose of this memorandum is to provide information about matters in the Complaints Resolution, Complaints Review and Trustee Services (Unclaimed Trust Fund) departments for the month of February 2002.

COMPLAINTS RESOLUTION

Summary of Results for February 2002

Complaints in Unit as at January 31/02	1,799
Complaints Reopened During Month	30
Complaints Resolved/Closed During Month	302
Complaints Transferred to CSC & Investigations During Month	18
New Complaints Received During Month	152
Complaints in Unit as at February 25, 2002	1,661
Average Age of Active Complaints (in days)	276

Comparative Results

The following graphs reveal comparative results for a) Complaints Opened and Closed in Period, and b)Number of Open Files in Unit; for the months August 2001 to February 2002 inclusive.

Complaints Resolution – Complaints Opened & Closed in Period

(See Graph in Convocation file)

Number of Open Complaint Files

(See Graph in Convocation file)

Number of Active Files as at February 25, 2002 by File Type

Type of File	Number of Active Files
Complaint	1,544
Bankruptcy	73
Discipline Costs, Panel Orders & Undertakings	44
Practice Windup	0
TOTAL ACTIVE	1,661

Discipline Costs

As at February 28th 2002 outstanding costs awarded totalled $148,363.40. Of that amount, payment of $116,626.73 is being actively pursued. The remainder of $31,736.67 is not currently being pursued as the Members concerned are under suspension. Suspended Members are monitored bi-annually to determine whether there has been a change in their status to that of practising Member and, if so, the cost award is pursued.

The total amount received in February 2002 was $5,050.00.

COMPLAINTS REVIEW

As at February 28, 2002, there were 54 files in the Complaints Review process. Further information on these 54 files is found in the following chart.

Request for Hearing Received	15
Hearings Pending	15
Hearing Held, Further Investigation Ordered	15
Hearing Held, Awaiting Decision	6
Files To Be Closed	3
TOTAL	54

Members of the Committee may note a large increase in the number of complaints in the Complaints Review Process since January 2002 when it was reported 37 complaints were in the system. The reason for the increase is that it has not previously been reported the number of Complainants who have requested Review but the file has yet to be forwarded by the investigator to the Complaints Review Coordinator (see 'Request for Hearing Received' in the above chart). Once a file is received by the Coordinator, it is counted in the 'Hearings Pending' category. Tracking files in the 'Request for Hearing Received' category allows management to ensure there are no unreasonable delays in the period between the Law Society receiving the request for Review and the file being transferred to the Coordinator in order to set a date for hearing.

The 54 files relate to complaints originally received by the Law Society in the following years:

1996	2
1997	3
1998	5
1999	9
2000	9
2001	22
2002	4
TOTAL	54

TRUSTEE SERVICES (THE UNCLAIMED TRUST FUND)

The adoption of an amendment to by-law 31 by Convocation in May 2001, enabled the Law Society to proceed with its Unclaimed Trust Fund initiative. This program enables lawyers to submit unclaimed trust funds that they have held for at least two years to the Law Society. Members of the public will be able to check with the Law Society to determine if they are entitled to make a claim.

The Trustee Services department is responsible for the administration of the Unclaimed Trust Fund. The following details the operation of the program since inception.

Applications For Payment Of Unclaimed Trust Funds To Law Society Received From Members

February 2002	Cumulative
25	165

Applications From Members Pending Determination (additional information required)

February 2002	Cumulative
19	52

Applications From Members To Transfer Trust Funds To The Law Society Approved

February 2002	Cumulative
58	101

Applications From Members Rejected

February 2002	Cumulative
8	12

Amount of funds received:

February 2002	Cumulative Amount
$ 18,681.25	$ 36,616.56

Investigations Department Management Report

TO: Gavin MacKenzie, Chair, Professional Regulation Committee

FROM: James Yakimovich, Manager, Investigations

DATE: February 28, 2002

RE: Management Report - Investigations Department -February 2002

Summary of Results for the Month:

Change in Total Case Numbers (More than one investigation may be open against a member)	Net Decrease of 25 member cases
Number of Members Under Investigation	188 (Jan = 198)
Cases Completed/Closed in February	52 * (Jan = 46)
Cases Older Than One Year Outstanding	29

At February 27, 2002, the department carries an investigation inventory of 291 member cases and 22 Unauthorized Practice cases, for a total of 313 investigation cases.

Member Case Inventory

(See Graph in Convocation file)

* The 52 member investigation cases completed/closed in February reflect an average case age of seven (7) months from inception of the investigation to the date the investigation stage is completed or the file was closed without a referral to PAC.

Cases Older Than One Year

The number of cases older than one year is twenty nine (29) (January = 30 cases). The case inventory in this category is dynamic in that each month files are completed and additional ones are added to the list. In February, 9 files reported in the January report were completed. The completion of 9 files demonstrates a "turnover" rate of about 1/3 the January files.

The following chart provides a summary of action plans associated with the 29 cases:

Planned Result	Total
Awaiting PAC Review	0
Pre-PAC Drafting Agreed Statement of Facts	2*
Close or Referred to PAC in March	15
Close or Referred to PAC in April	5
Further Investigation Necessary-Target Beyond April	7
Totals	29

* The two investigation cases that were being concluded in this manner will be before PAC in March.

Complaints Files Associated With Investigation Cases

At February 25, 2002, six hundred eighty eight (623) complaints files are associated with the investigation cases reported on page one of this report. The chart tracks the volume of complaints and their age in "days outstanding". The days outstanding calculation includes time associated with the file while it was in departments other than the Investigations Department.

Month	Number of Complaints Files	Average Age of Complaints Files
December 2001	694	357 Days Outstanding
January 2002	688	345 Days Outstanding
February	623	364 Days Outstanding

Unauthorized Practice Investigations

The non-member case investigations for unauthorized practice are in addition to the member investigations reported above. The chart that follows depicts the number of cases open.

(see graph in Convocation file)

Outstanding Discipline Department Requests

A monitoring system is in place with respect to requests made of investigators for disclosure materials and for additional investigation work. The following information pertains to February 2002.

Requests Outstanding at End of February = 5

DISCIPLINE DEPARTMENT
MEMORANDUM

TO: Professional Regulation Committee

FROM: Lesley Cameron
Senior Counsel - Discipline

DATE: February 28, 2002

RE: *Discipline Department Information*

The purpose of this memorandum is to provide information about matters in the discipline process for the month of February, 2002.

Total Matters in Discipline Process

Attached as Chart 1 is a list of the number of each type of file carried by the Discipline Department at February 28, 2002. As can be seen from Chart 1:

1. 147 matters are pending hearing or appeal;

2. 35 conduct applications have been authorised for prosecution by the Proceedings Authorisation Committee, but have not yet been issued;

3. 86 conduct applications have been issued and are in the discipline process: 49 are before the Hearings Management Tribunal with no hearing date set; 37 have hearing dates set or the hearing is underway; 4 are adjourned sine die;

4. 5 appeals are pending before the Law Society Appeal Panel;

5. 2 judicial reviews are pending before the Divisional Court.

Aging of Matters Authorised but not Issued

Of the 35 files authorised for prosecution but in which the conduct application had not yet been issued as of February 28, 2002, 12 were authorised more than 3 months ago.

Attached as Chart 2 is a summary of the age and carriage of these 12 files. As can be seen from Chart 2, of these 12 files:

i) 7 are between 3 and 6 months old, meaning that between 3 and 6 months has elapsed since authorisation;

ii) 3 are between 6 and 12 months old; and

iii) 2 are over 1 year old.

Of the 2 files over 1 year old, the first required the Law Society to bring an application for search and seizure under section 49.10 and the Law Society is waiting for a third party (a bank) to produce records. The second file has been authorised for non disciplinary resolution but remains on the list pending the successful completion of this resolution.

The Chair of the Professional Regulation Committee and the Acting Secretary have been provided with the names of the files, a description of the nature of the allegations in each file and a brief status report on each file in this category.

Historical Comparison

Attached as Chart 3 is a summary of the age and carriage of matters which were authorised for prosecution by the Proceedings Authorisation Committee, but in which the conduct application had not yet been issued as of the end of various months beginning in August of 2000. Chart 3 includes the information summarised in Chart 2, but adds figures from previous months for comparison purposes. As can be seen the number of files authorised but not issued has increased slightly this month. This is a reflection of 3 vacancies in the department: 1 departure in late November, another effective February 28, 2002 and a third maternity leave. Interviews are being scheduled for these positions.

Chart 1

Matters in Discipline Process as of February 28, 2002	
Discipline Providing Assistance to Investigations	24
Conduct Applications Authorized But Not Issued	35
Conduct Applications Issued Hearing Date Not Set	49
Conduct Applications Issued Hearing Date Set or Hearing Started	37
Conduct Applications Issued Adjourned Sine Die	4
Non-Compliance Applications Issued Hearing Date Not Set	0
Non-Compliance Applications Issued Hearing Date Set or Hearing Started	2
Capacity Applications Authorized But Not Issued	0
Capacity Applications Issued Hearing Date Not Set	1
Admission Hearings	8
Readmission Hearings	1
Reinstatement Hearings	3
Appeals to Law Society Appeal Panel	5
Appeals/Judicial Reviews Divisional Court	2
Total Matters	171

Chart 2

Conduct Applications Authorized For Prosecution but not Issued as Conduct Applications as of February 28, 2002			
	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
Law Society Counsel	7	3	1
Outside Counsel	0	0	1
Total	7	3	2

Chart 3

CONDUCT APPLICATIONS AUTHORISED FOR PROSECUTION BUT NOT ISSUED AS CONDUCT APPLICATIONS				
Month	Carriage	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
August 31, 2000	Law Society Counsel	14	5	15
	Outside Counsel	0	0	1
	Total	14	5	16
October 31, 2000	Law Society Counsel	14	3	5
	Outside Counsel	9	1	5
	Total	23	4	10
November 30, 2000	Law Society Counsel	12	2	2
	Outside Counsel	9	1	5
	Total	21	3	7
December 15, 2000	Law Society Counsel	9	2	2
	Outside Counsel	4	3	4
	Total	13	5	6
January 31, 2001	Law Society Counsel	11	4	1
	Outside Counsel	2	6	4
	Total	13	10	5
February 28, 2001	Law Society Counsel	7	2	1
	Outside Counsel	0	5	4
	Total	7	7	5
March 30, 2001	Law Society Counsel	6	1	0
	Outside Counsel	0	4	3
	Total	6	5	3

April 24, 2001	Law Society Counsel	6	2	0
	Outside Counsel	0	3	3
	Total	6	5	3
May 31, 2001	Law Society Counsel	6	3	0
	Outside Counsel	0	1	5
	Total	6	4	5
June 30, 2001	Law Society Counsel	5	3	1
	Outside Counsel	0	0	5
	Total	5	3	6
July 31, 2001	Law Society Counsel	5	5	1
	Outside Counsel	0	0	3
	Total	5	5	4
August 30, 2001	Law Society Counsel	4	5	0
	Outside Counsel	0	0	2
	Total	4	5	2
September 30, 2001	Law Society Counsel	6	4	0
	Outside Counsel	0	0	2
	Total	6	4	2
October 26, 2001	Law Society Counsel	2	3	1
	Outside Counsel	0	0	2
	Total	2	3	3
November 30, 2001	Law Society Counsel	5	0	1
	Outside Counsel	0	0	1
	Total	5	0	2

December 31, 2001	Law Society Counsel	4	0	1
	Outside Counsel	0	0	1
	Total	4	0	2
January 31, 2002	Law Society Counsel	6	0	1
	Outside Counsel	0	0	1
	Total	6	0	2
February 28, 2002	Law Society Counsel	7	3	1
	Outside Counsel	0	0	1
	Total	7	3	2

Professional Development & Competence Committee Report

Professional Development & Competence Committee
March 21, 2002

Report to Convocation

Purpose of Report: Policy - For Decision

Prepared by the Policy Secretariat
(Sophia Sperdakos 947-5209)

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Committee met on March 7, 2002. Committee members in attendance were Earl Cherniak (Chair), Kim Carpenter-Gunn (Vice-Chair), Barbara Laskin, Janet Minor, Greg Mulligan, and Helene Puccini. Bill Simpson (Vice-Chair) attended part of the meeting. Staff in attendance were Diana Miles, Dulce Mitchell, Elliot Spears, Ursula Stojanowicz, and Sophia Sperdakos.

2. The Committee is reporting on the following matters:
Policy - For Decision

- Reconsideration of Policies Respecting Confidentiality of Practice Reviews and of Certain Rules Relating to Competence Hearings

POLICY - FOR DECISION

RECONSIDERATION OF POLICIES RESPECTING CONFIDENTIALITY OF PRACTICE REVIEWS AND OF CERTAIN RULES RELATING TO COMPETENCE HEARINGS

Executive Summary

In accordance with Convocation's direction in February 2002, the Committee has again reviewed the 1999 policy on confidentiality of practice reviews. The Committee, with the exception of one of those members who participated in the meeting, recommends that the Law Society adopt the following approach:

- The fact that a member is in practice review will not be disclosed outside the Law Society.
- The terms of a proposal order made in a practice review will only be disclosed outside the Law Society if the terms limit a member's rights and privileges.
- The fact that a competence proceeding has been authorized by the Proceedings Authorization Committee ("PAC") against a member will continue to be disclosed only to the complainant(s) in the proceeding.
- Where a tribunal in a competence proceeding suspends or limits a member's rights and privileges the terms of the order and the decision will be public and disclosed upon request.
- The Complaints Review Commissioners will be entitled to advise a complainant that they intend to request that a member be directed into practice review, but not to disclose that a member is in practice review.
- Communications between the practice review department and other departments within the Law Society will be permitted, allowing for the flow of information and where, appropriate, its use in proceedings or resolution of matters affecting members.

REQUESTS TO CONVOCATION

Issue	Request to Convocation

a. Should the confidentiality policy with respect to practice reviews cease to apply to internal communications within the Law Society?	Convocation is requested to consider whether, • to accept the Committee's recommendation and reverse its September 1999 policy so that confidentiality of practice reviews would cease to apply with respect to internal Law Society communications, permitting the free flow and use of information among regulatory departments and in proceedings; or • continue the policy. • Convocation is further requested to consider whether, in the event it recommends revoking the policy of confidentiality with respect to internal communications, the decision will apply to, • practice reviews currently ongoing; or • those commenced after the policy is changed, as recommended by the Committee.

b(i) What should the policy be with respect to external communications and specifically, should the fact that a member is in practice review be confidential or public?	Convocation is requested to consider whether the fact that a member is in practice review should, • be made public; or • not be made public, as is recommended by the Committee.
b(ii) Should the terms of a proposal order be confidential or public?	Convocation is requested to consider whether, • only a proposal order that limits a member's right and privileges should be made public, as is recommended by the Committee; or • all proposal orders should be made public. • Convocation is further requested to consider whether, in the event it decides that a proposal • order that limits a member's rights and privileges should be public, • such information should be released only on request, as is recommended by the Committee; or • the Law Society should publish such information. Convocation is further requested to consider whether, if such information should be made public only on request, this decision should be reviewed in September 2003, as is recommended by the Committee.
c. Should the fact that a competence hearing has been authorized be made public generally or to the complainant(s) only, as is currently the case?	Convocation is requested to consider whether the fact that a competence proceeding has been authorized, • should continue to be made known to the complainant(s) only, as is recommended by the Committee; or • should be made available to members of the general public and the profession. • If the information should be made public, which is not the Committee's recommendation, Convocation is further requested to consider whether it should be made available, • on request only; or • through the Law Society publishing such information.

d. Under what circumstances should the order in a competence proceeding be public?	Convocation is requested to consider, whether in professional competence proceedings where a tribunal suspends *or limits* the member's rights and privileges, the order and the decision should be public, as is recommended by the Committee. If the answer is yes, whether the Law Society should, • publish the information, as the Committee proposes, or • simply make it available to those members of the public who inquire about members' status. • If the Law Society should publish the information, whether it should do so, • before the expiry of the period for filing an appeal from the decision, as the Committee proposes, or • after.
e. Should Complaints Review Commissioners (CRCs), in appropriate circumstances, inform a complainant whose complaint is not being proceeded with that a member is in practice review or that the CRCs are requesting that the member enter practice review?	Convocation is requested to consider whether, as is recommended by the Committee, the CRCs should, in appropriate circumstances, be free to indicate to a complainant that they will be requesting that a member be ordered into practice review, provided that, at the same time, they advise the complainant of, a) the confidential nature of practice reviews; b) the reasons for such confidentiality; and c) that as a result of the policy the complainant will not be entitled to know if the review has been directed.

Background

1. On September 24, 1999 Convocation approved a recommendation of the Professional Development and Competence Committee with respect to practice reviews as follows:

> *...under no circumstances, save and except where Rule 13, Commentary 1 is applicable [now Rule 6.01 (3) revised],or where an order to participate in practice review is made against a member or an undertaking to participate in practice review is given by the member,*[1] *will any information obtained solely in the course of, or as a result of, a practice review be disclosed, accessed, or used, either directly or indirectly, to initiate or further a conduct proceeding or be admissible as evidence in a conduct proceeding.*

2. At the same time, Convocation approved the following steps to provide organizational support for the remedial approach of the practice review process:
There should be,

[1]The orders and undertakings referred to relate to those obtained in the context of a discipline hearing (See paragraph 27 - 29 of the Committee's report to Convocation, September 24, 1999(Appendix 1)). At the time the original policy was introduced practice reviews were only mandatory if they were ordered or agreed to as part of a discipline proceeding. The language of the current legislative provisions regarding practice review is that a review is "directed" by the Chair or Vice-Chair of the Professional Development and Competence Committee. The direction to participate is not an order within the meaning of the current policy.

a. a separate structure and separate staff resources dedicated to practice review;

b. a physical location that promotes the separateness of practice reviews from investigative approaches;

c. appropriate staff training throughout the organization to ensure understanding of the remedial nature of practice reviews; and

d. *an effective communications strategy, embodied in the Law Society's overall strategy on competence issues, that will enhance members' belief in and trust of practice reviews.*

3. The effect of the Committee's September 1999 recommendation is to continue to limit what information can flow from the practice review process to other regulatory departments that deal with *conduct*. The original policy was introduced at a time when there was no legislative authority to compel members to participate in the practice review program. The policy does not preclude communication of information learned in a practice review that is relevant to a capacity proceeding or an audit. From a practical perspective, however, since the same staff handle conduct and capacity investigations and interact with audit staff, it is difficult to separate the approach to information. The Committee is of the view that from a regulatory perspective this cannot be justified.

4. The recommendation had potential implications for the public interest, as will be described later in this report. It also had staffing and financial implications for the conduct of competence hearings, including whether it would be appropriate for the staff of the discipline department who prosecute conduct and capacity hearings to handle competence hearings.

5. In 1999 the Committee was concerned about the possible impact of continuing the practice review confidentiality policy. Accordingly, it recommended that Convocation review the recommendation in two years.[2] As the transcript shows, Convocation did not debate the merits of the policy in detail, as the matter would be returning for further discussion.

6. The Committee returned to Convocation in February 2002 with a report setting out the issues for consideration in reviewing the policy on confidentiality of practice reviews. The Committee was of the view that the confidentiality policy with respect to internal communications within the Law Society should be reversed. It recommended, as well, a number of changes regarding the external communication of information related to proposal orders and competence proceedings.[3]

7. Convocation tabled the report until March 2002 and requested additional information, including,

   a. an overview to the various regulatory streams authorized in the *Law Society Act*;

   b. how practice reviews currently operate and the practical implications of the policy;

   c. copies of the transcript of the Convocation debate on the confidentiality policy on September 24, 1999, as well as the Committee's September 24, 1999 Report to Convocation (provided at Appendix 1); and

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[2]Transcript, September 24, 1999, pages136 and 137.

[3]The lay bencher on the Committee, speaking from the perspective of the Complaints Review Commissioners was of the view that such information should be public and that Complaints Review Commissioners(CRCs) should be able to tell a complainant that the member is in practice review or that the CRCs are requesting that the member be directed to participate in a practice review. Since the report was tabled the Committee has again considered this issue and has amended its proposal somewhat. See the discussion at paragraphs 83-96.

d. how other regulatory bodies address the issues of confidentiality of practice reviews (provided at Appendix 2).

8. This revised Report to Convocation provides the information requested, as well as a further consideration and analysis of the issues before Convocation in February 2002. The issues Convocation is being requested to consider are:

a. Should the confidential policy with respect to practice reviews cease to apply with respect to internal communications within the Law Society?

b. What should the policy be with respect to external communications and specifically,

i. should the fact that a member is in practice review be confidential or public?
ii. should the terms of a proposal order be confidential or public?

c. Should the fact that a competence hearing has been authorized be made public, generally, or to the complainant(s) only, as is currently the case?

d. Under what circumstances should the order in a competence proceeding be public?

e. Should Complaints Review Commissioners (CRCs), in appropriate circumstances, inform a complainant whose complaint is not being proceeded with that a member is in practice review or that the CRCs are requesting that the member enter practice review?

The Regulatory Streams of Competence, Conduct, Capacity and Audit

9. Before addressing each of the issues, and to place the discussion in context, it is useful to outline the framework of the regulatory streams of competence, conduct, capacity, and audit.

10. Pursuant to the *Law Society Act*, the Law Society has the authority and the obligation to:

audit the financial records of a member or group of members for the purpose of determining whether they comply with the requirements of the by-laws. Section 49.2	investigate a member's or student member's conduct where information has been received "suggesting that the member may have engaged in professional misconduct or conduct unbecoming a barrister and solicitor". Section 49.3 (1)	investigate a member or student member's capacity where there are "reasonable grounds for believing that the member or student member may be or may have been incapacitated". Section 49.3(5)	review a member's practice where there are reasons to believe that a member is failing or has failed to meet standards of professional competence. Section 49.4

11. In all four circumstances the member *is required* to:

a. permit the Law Society to enter the member's business premises during business hours;

b. produce and permit examination of the documents that relate to the matters under audit, investigation or review; and

c. provide information that relates to the audit, investigation, or review (those who work with the member must also provide information).[4]

A member's failure to co-operate could, itself, amount to professional misconduct.

12. With respect to conduct, capacity, and practice review matters the Law Society has authority to apply to the courts for an order of search and seizure, where urgency requires such an order or because use of the authority described in paragraph 11, above, is not possible, is not likely to be effective, or has been ineffective.[5]

13. Law Society staff, benchers, or agents who obtain information in the course of investigations, audits and practice reviews, whether from documents, from those who work for or with the member, or from the member, can disclose such information only in specified circumstances, most notably in connection with the administration of the *Law Society Act*, regulations, by-laws or Rules of Practice and Procedure or in connection with a proceeding under the Act.[6] This means that, for the purposes of Law Society proceedings,

a. documents and information the member is required to provide in a practice review can be disclosed and relied upon for a proposal order or in a competence hearing;

b. documents and information the member is required to provide in a conduct investigation or an audit can be disclosed and relied upon in a conduct hearing; and

c. documents and information the member is required to provide in a capacity investigation can be disclosed and relied upon in a capacity hearing.

14. The fact that members are statutorily required to provide information that can ultimately be used in a regulatory proceeding against them is a central feature of the self-regulatory regime. No matter advances to a proceeding without the authorization of the Proceedings Authorization Committee ("PAC"), of which there are four members (the Chair or Vice-Chair of the Professional Regulation Committee, the Chair or Vice-Chair of the Professional Development and Competence Committee, and two other benchers).

15. With respect to investigations and audits, information learned during the course of one type of investigation, that may be relevant to a different type of regulatory matter, may be disclosed internally and where appropriate, put in evidence before a Hearing Panel. So, for example,

a. if, in the course of a conduct investigation, there are reasonable grounds for believing that the member (or student member) may be or may have been incapacitated, an incapacity investigation can ensue, and the incapacity issue addressed, including, if necessary commencing an incapacity proceeding if PAC so authorizes; and

b. if, in the course of a spot audit, information suggesting a member may have engaged in professional misconduct or conduct unbecoming a barrister or solicitor, as contemplated by section 49.3 (1), emerges, a conduct investigation can ensue and the conduct issue addressed including, if necessary commencing a conduct proceeding if PAC so authorizes.

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[4]Sections, 49.2(2), 49.3(2) and (6), and 49.4(2).
[5]Section 49.10
[6]Section 49.12(2), subject to 49.8.

Keeping in mind the remedial focus of spot audits, when, in the context of an audit, information emerges that raises conduct issues of which investigations staff are told, they undertake a new investigation, rather than relying upon the information obtained from the spot audit.

16. Staff involved in conduct investigations, capacity investigations and audits are free to raise issues with one another where relevant. Pursuant to the current confidentiality policy affecting practice reviews, however, there are limitations on the exchange of information possible among practice review staff and other regulatory staff. These limitations and the Committee's discussion of the difficulties they create are set out below.

The Practice Review Process

17. Prior to 1999 the Law Society had no authority to compel a member to participate in practice review. All practice reviews were voluntary. Amendments to the *Law Society Act* in February 1999 gave the Law Society the authority to conduct a review of a member's practice for the purpose of determining if the member is meeting standards of professional competence as defined in section 41 of the Act. Such a review occurs only where directed by the Chair or Vice-Chair of the Professional Development and Competence Committee. In particular, if the Chair or Vice-Chair is satisfied that there are reasonable grounds for believing that the member has failed or is failing to meet standards of professional competence he or she must direct the review. Practice reviews are, therefore, only conducted on the practices of members who have demonstrated competence-related deficiencies, and for all practical purposes are not voluntary.

18. The Law Society conducts "focused" not "random" practice reviews. In essence the reviews are "for cause". As such, the Law Society's scheme differs significantly from professions such as accountancy, medicine and dentistry that conduct random reviews of the entire profession (a certain percentage per year).

19. The focused practice review program was initiated in 1986 to address a gap in the Law Society's approach to members' service-related deficiencies. Prior to the introduction of the program there was no process to deal with members against whom numerous competence-related or service-related complaints were made that ultimately did not pass the threshold test for the commencement of a conduct (formerly discipline) proceeding. Lay benchers, in their role as Complaints Review Commissioners, frequently expressed concern that the Law Society could not address what, individually, might be minor complaints, but which taken cumulatively suggested incompetence that was harmful to the public interest.

20. The Law Society's decision to seek, as part of the legislative amendment package, legislative authority to conduct practice reviews so as to be able *to require* certain members to participate was part of its goal to enhance its competence mandate and better protect the public and the profession-at-large from practitioners who demonstrate serious competence-related deficiencies.

21. Practice review is resorted to when a member's behaviour demonstrates service-related deficiencies that put into question the member's ability to serve the public. In most instances conduct or capacity investigations in relation to complaints have already been done, and revealed that incompetence is the problem, either instead of, or in addition to, conduct or capacity issues. In fact, there are occasions in conduct proceedings when it becomes clear the member should be in practice review and the Hearing Panel so orders.

22. Typically, practice reviews are directed against a member who has accumulated a large number of complaints over a number of years. For example,

    a. Between late fall 2001 and February 2002, 17 practice reviews have been directed by the Chair of the Professional Development and Competence Committee. The members' complaints history range from 1 complaint (referred from spot audit program) to 117 complaints, with the average number of complaints against a member being 25.

b. Of 33 lawyers who accumulated 15 or more complaints against them between 1999 and 2001 the average was 22 complaints. Twenty-one of those members were, or continue to be, in practice review.

23. In April 2001, the Committee provided Convocation with a chart outlining the practice review process, the authority for the steps in the process, and the time guidelines to be followed. The chart is set out at Appendix 3 and illustrates the following:

a. Once the practice review is directed staff determines the most appropriate approach based on the type and severity of complaints and the member's Law Society profile and interviews the member, providing him or her with the practice checklist that will be used by the practice reviewer. The purpose is to develop an approach most likely to address and correct the member's specific deficiencies. The member is encouraged to take steps to begin to make practice improvements before the reviewer comes to the office.

b. The reviewer will visit the member's office and meet with the member to discuss the issues. As part of the remedial focus, the practice reviewer selected does not come from the same geographic area as the member, but does practice the same type of law.

c. Following the reviewer's visit or visits the reviewer prepares a report that will set out whether, in the reviewer's opinion the member has failed or is failing to meet standards of professional competence, and the recommendations with respect to the member's practice. As set out in paragraph 35 if, in the course of the review, information is learned that comes within Rules 6.01(3) of the Rules of Professional Conduct or within other exceptions to the confidentiality policy, it must be disclosed. The practice reviewer's recommendations are directed at practice improvements the member can make to enhance service to clients and the effectiveness of the practice. Appendix 4 contains an excerpt from a practice reviewer report, setting out recommendations for improvement.

d. The Director of Professional Development and Competence may choose to include the recommendations in a proposal order. The member is sent the order and asked whether he or she is in agreement with the terms. Where the member agrees, the proposal order is sent to a bencher for consideration. The bencher may refuse to make the order, modify or sign it.

e. If the member does not agree with the proposal order, the Law Society must determine whether to seek authorization from PAC for a competence hearing or do nothing further. If the matter proceeds to a competence hearing, the information learned in the practice review is admissible in evidence.

24. If PAC authorizes a competence proceeding against a member a wide range of orders can be made against the member, most of which are intended to improve the member's practice. There is also authority to intervene to restrict a member's practice or even to suspend a member. These possible orders are set out in section 44 (1) of the Act as follows:

1. An order suspending the rights and privileges of the member,

i. for a definite period,

ii. until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Secretary, or

iii. for a definite period and thereafter until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Secretary.

2. An order that the member institute new records, systems or procedures in his or her practice.

3. An order that the member obtain professional advice with respect to the management of his or her practice.

4. An order that the member retain the services of a person qualified to assist in the administration of his or her practice.

5. An order that the member obtain or continue treatment or counselling, including testing and treatment for addiction to or excessive use of alcohol or drugs, or participate in other programs to improve his or her health.

6. An order that the member participate in specified programs of legal education or professional training or other programs to improve his or her professional competence.

7. An order that the member restrict his or her practice to specified areas of law.

8. An order that the member practise only,

i. as an employee of a member or other person approved by the Secretary,

ii. in partnership with and under the supervision of a member approved by the Secretary, or

iii. under the supervision of a member approved by the Secretary.

9. An order that the member report on his or her compliance with any order made under this section and authorize others involved with his or her treatment or supervision to report thereon.

10. Any other order that the Hearing Panel considers appropriate.

25. The recommendations made by practice reviewers and incorporated in proposal orders will often mirror the type of orders that may be made in a competence hearing. Once entered, a proposal order is enforceable in the same way as any other Law Society order, including the provisions that a Hearing Panel may suspend a member where there is a breach of the terms.

The Issues for Convocation's Consideration

a. Should the confidentiality policy cease to apply with respect to internal communications within the Law Society?

26. The Committee's 1999 Report to Convocation contains a discussion of the Committee's analysis of the reasons for and against maintaining the policy of confidentiality.

Remedial Nature of the Program

27. One of the reasons given in September 1999 for continuing the policy of confidentiality under the mandatory program was the remedial nature of the competence components of the legislation and a belief that members would co-operate better if the remedial nature of the program were emphasized and demonstrated through the confidentiality provision.

28. In keeping with Convocation's direction to consider the practical implications of the policy and return to Convocation following August 2001, the Committee has considered the reasoning underlying the original policy. The competence provisions of the legislation are different from the conduct provisions in that, whenever possible, they seek to encourage a member to improve the manner in which he or she practises and correct deficiencies, rather than punishing a member for conduct unbecoming a barrister and solicitor or for professional misconduct.

29. In the Committee's view, the structure of the program and its philosophy, the training of practice reviewers, the staff approach to members, the physical separation of the department from other regulatory departments, and the focus of reviews on improving practice management all clearly point to the remedial nature of the program. Given that the Law Society is not required to conduct a practice review before it seeks authority to commence a competence hearing, the fact that its emphasis is on practice reviews, not hearings, demonstrates its commitment to the remedial approach. *Nothing in the Committee's recommendations with respect to the confidentiality policy would alter this emphasis and approach*. Practice review staff would continue to operate the program from the perspective of identifying practice weaknesses and providing recommendations and assistance to the member to correct the deficiencies.

30. In the Committee's view, then, the remedial components of the program are demonstrated by,

    a. the manner in which practice reviewers and Law Society staff interact with the member, by providing suggestions and guidance for improvement. This is demonstrated in the practice review process set out in Appendix 3;

    b. the extent to which members are given the opportunity to improve their practices and, to some degree, have a say in the plan for improvement;

    c. the member's ability to refuse a proposal order; and

    d. the wide range of recommendations available to address the member's deficiencies.

31. In this report the Committee is seeking to further enhance the remedial focus of practice reviews by,

    a. not disclosing in external communications the fact that a practice review is being conducted (section b(i) below); and

    b. not disclosing terms of a proposal order or competence finding that does not limit the member's right to practice (section b(ii) below).

32. As well the Committee is proposing that the fact that a competence hearing has been authorized should continue to be disclosed only to complainants (section c below).

Regulatory Nature

33. Although the remedial nature of practice reviews is clear and is demonstrated by the way the program operates, it is also true that the competence provisions, of which practice review is a component, exist as part of the regulatory structure and, as such cannot be said to exist outside the Law Society's mandate to regulate in the public interest.

34. The regulatory features of the practice review program are illustrated by the fact that,

    a. there is legislative authority to direct a member to participate in a practice review;

b. practice reviews are treated as part of the regulatory structure, in the same manner as investigations and audits with respect to such features as,

i. the obligation on the member to provide documents and information; and
ii. the Law Society's ability to seek an order for search and seizure.

c. a formal procedure is set out in the legislation, which must be followed;

d. once entered, a proposal order is enforceable in the same way as any other Law Society order, including the provisions that a Hearing Panel may suspend a member where there is a breach of the terms; and

e. where a member refuses to consent to a proposal order it is open to the Law Society to seek the authorization of PAC to commence a competence proceeding.

These regulatory provisions exist to ensure that the process is transparent and the results can be used to further the Law Society's regulatory mandate in the public interest.

Implications of Policy

35. A close analysis of the confidentiality policy reveals that there are a number of instances in which information learned in a practice review could or must be disclosed for purposes of a conduct investigation or a proceeding against a member. Table 1 sets out the information that can and, in some cases, must be disclosed.

Table 1: Practice Review Information that can (or must) be disclosed
1. Information coming within Rule 6.01(3) of the Rules of Professional Conduct, which reads as follows, must be disclosed: (3) A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege, (a) the misappropriation or misapplication of trust monies, (b) the abandonment of a law practice, (c) participation in serious criminal activity related to a lawyer's practice, (d) the mental instability of a lawyer of such a serious nature that the lawyer's clients are likely to be severely prejudiced, (e) any other situation where a lawyer's clients are likely to be severely prejudiced. An exception to the confidentiality policy - could be used to initiate or further a conduct proceeding
2. Information that suggests that there may be reasonable grounds for believing the member may have been incapacitated. An exception to the confidentiality policy -could be used in a capacity proceeding pursuant to the Act.
3. Information learned in a practice review where the review has been ordered by the Hearing Panel in a conduct proceeding or where the member has signed an undertaking to participate. An exception to the confidentiality policy -could be used to initiate or further a conduct proceeding
4. Information learned in a practice review may be used in a competence proceeding against a member, with a wide range of orders possible including restrictions on practice and suspension. Could be used to initiate or further a competence hearing pursuant to the Act.
5. Information the member consents to be disclosed to another regulatory department. Could be used to settle the matter.

36. Based on these exceptions to the policy, it is the Committee's view that the reversal of the confidentiality policy would not undermine or alter the remedial nature of the program. In fact, the remedial nature of the program is confirmed by the fact that despite these already existing exceptions to the confidentiality policy practice review staff have rarely had to resort to former Rule 13 or Rule 6.01(3). This is because the overwhelming nature of issues they and practice reviewers encounter are competence-related, not conduct-related. As is apparent from an examination of Appendix 2 the experience of other law societies, where there is no internal confidentiality policy, is similar.

37. The Committee believes that the more common negative implication of the current confidentiality policy with respect to internal communications is that in circumstances in which a member in practice review is faced with new complaints or proceedings, the Law Society may be unable to develop a regulatory solution that addresses all the relevant circumstances. In the Committee's view internal communications among Law Society departments is essential.

38. If there continues to be a prohibition against exchanges of information within the Law Society, unnecessary proceedings or investigations against members and potentially flawed resolutions cannot be avoided. For example:

a. There will continue to be situations in which information obtained in a practice review, which could shed light on the underlying causes of a new complaint against the member, cannot be revealed to help fashion an appropriate remedy for both the new complaint and the member's regulatory dealings overall. Given that lawyers in practice review have multiple complaints (often more than 20) it is not unreasonable to expect that during the course of a practice review new complaints may arise. Under the current policy there is no ability to determine if the practice review is addressing the underlying cause(s) of such complaint.

   So, for example, the investigation of a new complaint about inappropriate use of trust funds may be undertaken, when the practice review might already have revealed that the problem is not dishonesty but a lack of proper staff and systems in place to ensure compliance with the Law Society Act and By-laws. The result is that the member is further embroiled in Law Society proceedings, the Law Society is investigating for indicia of dishonesty and the remedial goal of the practice review may be undermined because a separate stream is operating despite the member's co-operation with the practice review.

   PAC recently authorized a conduct proceeding against a member who is in practice review. PAC was not entitled to know the status of the practice review, the nature of the member's participation, whether the member was making efforts to improve, or the relevance of the new complaint to issues being addressed in the review. Had PAC been aware of this information, the conduct proceeding might not have been authorized.

b. The opposite scenario is also possible. A member may have been in practice review for some time as a result of many, many complaints and made certain assurances in the course of the practice review about changed practices and behaviour. In fact, the member may not be co-operating or may knowingly fail to reveal that new problems have arisen with which he or she is not dealing. A new complaint may be received that in and of itself may not be sufficient to warrant a PAC authorization for a conduct hearing, but PAC considers issuing an invitation to attend and proposing that the member co-operate and correct the inappropriate behaviour. If PAC were entitled to know about the lengthy nature of the practice review, the member's lack of cooperation or the failure to reveal new problems to the practice reviewer PAC might well take a course different from an invitation to attend.

c. Hearing Panels in conduct proceedings may make decisions regarding a member based on incomplete information, because discipline counsel are unable to gain information about the practice review and share it, as needed, with the Hearing Panel.

d. Discipline counsel negotiate agreed statements of fact and undertakings without knowing whether knowledge of factors in the practice review would change the result.

39. In the Committee's view the impact of maintaining the confidentiality provisions so that information about practice reviews cannot be shared with other regulatory departments within the Law Society is antithetical to the inclusion of the program in the mandatory regulatory framework of the1999 legislative amendments.

40. Looking at the issue from the public's perspective, it is difficult to justify a regulatory structure in which one department cannot obtain information about a member from another department and Hearing Panels may not have all relevant information.

41. Moreover, the impact of the confidentiality policy on resources should not be under-estimated. One of the implications of the confidentiality policy may be that outside counsel will have to be hired to conduct competence hearings arising out of practice reviews. This is because,

a. counsel in the discipline department would not be permitted to handle practice review files in which information might be learned that could be used to initiate or further a conduct proceeding; and

b. it is unlikely there will be sufficient numbers of competence hearings to justify hiring staff counsel specifically to do such hearings.

42. Hiring outside counsel has serious cost implications for the Society and, by extension, for the membership at large, and should only be done when other alternatives are not available or appropriate. Clearly, since staff in the discipline department handle capacity hearings, they would be capable of handling competence hearings if the confidentiality policy were reversed. It is estimated that it would not be unusual for outside counsel fees to average about $25,000 per file. If the Law Society conducts six proceedings a year, this would amount to $150,000 per year in outside counsel costs.

43. As indicated elsewhere in this report, nothing in the Committee's recommendations with respect to the confidentiality policy would alter the remedial focus of the program. Practice review staff are not part of the Investigations or Discipline Departments. They are part of the Professional Development and Competence Department. They operate the program from the perspective of identifying practice weaknesses and providing recommendations and assistance to the member to correct the deficiencies. They are not seeking to shift members in practice review into the conduct stream. Their purpose is to enhance members' competence so as to lessen or eliminate their involvement with regulatory processes.

Other Jurisdictions

44. Convocation requested information concerning the practices of other jurisdictions. Inquiries were made of seven other Canadian law societies all of which permit the internal sharing of practice review information and the use of such information in discipline proceedings, where necessary (See Appendix 2). Alberta sends a confidentiality statement to all members involved in practice review. While emphasizing the remedial focus of the program and that information should not be disclosed outside the Law Society the statement provides:

> Information acquired in the course of Practice Review proceedings is accessible to all departments of the Law Society and may be referred to other departments. The information is to be used only in relation to Law Society proceedings where the lawyer in question is the subject of the proceedings, and for no other purpose. (full statement set out at the end of Appendix 2)

45. In British Columbia a member is ordered into practice review by the Practice Standards Committee. Information learned in practice reviews may be shared within the Law Society. Where there are recommendations to restrict the member's practice rights the matter proceeds to discipline. In practice, few referrals to discipline are made because the remedial focus of the program results in alternate routes being taken. As seen on the chart, this appears to be the experience in most jurisdictions where the fact that such information can be shared has not resulted in the practice review process being used as a discovery process for the conduct stream.

46. The experience of these other law societies further persuades the Committee that open communication among departments within a law society does not undermine the remedial goals of practice review, does not undermine member willingness to cooperate with efforts to improve their competence, and is important to effective self-regulation in the public interest.

47. The College of Physicians and Surgeons, the Royal College of Dental Surgeons of Ontario and the Institute of Chartered Accountants of Ontario all have random peer assessment or practice inspection programs. These are not "for cause" reviews as is the case in the Law Society's practice review program. Through these programs members of the profession are randomly chosen to have their practices assessed. There is no disclosure of information from the inspection or assessment to the discipline branch. Yet, even in these "random" programs, if the inspection or assessment reveals a failure to maintain professional standards that is serious enough, the matter is to be reported to the disciplinary branch for an investigation. Although not informed of the particular issue, the discipline stream is alerted to the fact that the member's conduct is being questioned so that it can conduct an investigation if it chooses.[7]

Committee's Recommendation

48. Having considered the implications of the continued application of the practice review confidentiality policy with respect to internal Law Society communications, the Committee remains of the view that the policy should be reversed to permit the free flow and use of information within the Law Society and in proceedings so that the most effective results can be obtained both in the members' and the public's interest.

49. The Committee is of the view, however, that such change in policy should apply on a "going-forward" basis, so as not to affect those practice reviews currently underway where the members were advised of the existence of a confidentiality policy.

50. The Committee also recommends that the Law Society provide members with a confidentiality policy document along the lines of that provided by the Law Society of Alberta.

Request to Convocation

51. Convocation is requested to consider whether,

    a. to accept the Committee's proposal and reverse its September 1999 policy so that confidentiality of practice reviews would cease to apply with respect to internal Law Society communications, permitting the free flow and use of information among regulatory departments and in proceedings; or

    b. continue the policy.

52. Convocation is further requested to consider whether, in the event it recommends revoking the policy of confidentiality with respect to internal communications, the decision will apply to,

[7]The approach used by the Law Society's investigations department to "re-investigate" information revealed during a spot audit has some similarity to the approach used by these professions.

a. practice reviews currently ongoing; or

b. those commenced after the policy is changed, as recommended by the Committee.

b(i). What should the policy be with respect to external communications and specifically, should the fact that a member is in practice review be confidential or public?

53. Pursuant to section 49.12(1) in Part II of the Act,

> A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, *review*, search, seizure or proceeding under this Part. [emphasis added]

54. The Law Society does not disclose to the general public *the fact* of an investigation. This is in part because many possible results may flow from such an investigation, including a determination that no further action should be taken against the member. A practice review is also considered to be an investigation into a member's practice and is included under the provisions of section 49.12. As such, if the fact that an investigation is taking place is not disclosed it is arguable that the fact that a practice review is underway should also remain confidential from the general public.

55. The Committee accepts this analysis and is of the view that the fact that a member is in practice review should not be disclosed to the public. The practice review process involves an analysis of the member's practice and results in recommendations to improve competence-related deficiencies, all in the public interest. As such, the member is under some scrutiny during this period, even if the public is not notified of the fact of the practice review. Moreover, the results of a practice review may be that no recommendations or only minor recommendations for improvement are suggested, yet the consequences to the member may be far more serious if the fact of the investigation is made public.[8]

Request to Convocation

56. Convocation is requested to consider whether the fact that a member is in practice review should,

a. be made public; or

b. not be made public, in accordance with the Committee's proposal.

b(ii). Should the terms of a proposal order be confidential or public?

57. As described above, following the completion of a practice review, recommendations may be made to the member and may be included in a proposal order. If the member accepts the terms of the proposal order it is then presented to a single bencher, appointed by the Chair of the PD&C Committee, to be reviewed and finalized. Once made the order is enforceable in the same manner as any other Law Society order. In the event of a breach of the order a Hearing Panel may suspend the member.

[8]In its February report the Committee indicated that the lay bencher on the Committee raised a concern about this issue on behalf of the CRCs. She indicated that if a practice review cannot be disclosed for the reasons set out above, then the CRC would not be able to advise a complainant, whose complaint is not being pursued by the Law Society, that steps are being taken to address the quality of legal services provided by the member, through a practice review. As will be seen in the discussion in section (e) the lay bencher's concerns have now been somewhat addressed so that she does not oppose the proposal to not disclose to the public the fact that a member is in practice review.

58. Currently, there is no policy as to whether the fact of the proposal order, or its terms, should be public.

59. Proposal orders may contain a wide range of provisions for improvement of a member's practice, ranging from suggestions for better filing and tickler systems, or attendance at CLE, for example, to much more significant provisions that, for example, restrict a member from practising in certain substantive areas, or require a member to practise only in association with others.

60. In considering whether information concerning the proposal order should be public it is important to balance the remedial component of the program with the need to ensure the public is protected. In the Committee's view, if the recommendations are directed at improving the management of the practice or the nature of the members' approach to clients, without limiting the member's right to practise, such information can properly remain confidential. The public interest is protected by,

    a. the fact that a proposal order has been agreed to in order to address deficiencies;

    b. the efficient and appropriate time line provided to the member by the end of which the member is to have addressed the deficiencies;

    c. the ongoing monitoring of the member's progress under the terms of the order; and

    d. the remedies available to the Law Society if the member is unwilling or unable to improve.

    Because no limitations have been placed on the member's right to practise, it must be assumed that the deficiencies are not so severe as to endanger the public.

61. If, on the other hand, the members' rights and privileges are limited by virtue of the order it is the Committee's view that it would be contrary to the public interest not to reveal that fact to a member of the public or another lawyer inquiring about the member's standing with the Law Society. Such limitation or restriction goes fundamentally to the member's competence to provide legal services. Through disclosure of limitations or restriction, if members of the public in need of a family lawyer, for example, contact the Law Society to inquire about a particular lawyer they can be told that he or she is restricted from practising family law.

62. In practice, such a "balancing approach" would mean that in response to inquiries about a member's practice, where the proposal order does not limit the member's rights, the Law Society would simply indicate that there are no limitations on the member's rights and privileges. Where such limitations exist they would be disclosed.

63. The final issue in this regard is whether the Law Society should publish the fact that there are limitations on the member's right to practise, as is done where there is a finding of professional misconduct or conduct unbecoming a barrister and solicitor. The alternative is to take a more passive approach, simply responding to inquiries should they be made.

64. There is a distinction between a conduct hearing (or even a competence hearing) and a proposal order, in that at the conclusion of a hearing a finding is made against the member, whereas this is not the case with the proposal order, which is a consensual process. The member is co-operating with a process designed to ameliorate practice deficiencies and, as such, the more passive approach may be in the public interest, to encourage that co-operation. Moreover, since the member is under scrutiny during the term of the proposal order there is less likelihood, in any event, that the member will breach the restrictions.

65. The Committee is of the view that where limitations are placed on the member's right to practise, that information should be public. As to whether the Law Society should publish the names of such members or simply provide the information to a member of the public or the profession who contacts the Law Society, the Committee is of the view that for a period of 18 months the Society should take the more passive approach, reviewing the decision at the end of that time. In this way, there is an opportunity to assess the implications of the passive approach.

Request to Convocation

66. Convocation is requested to consider whether,

    a. only a proposal order that limits a member's right and privileges should be made public, as is recommended by the Committee; or

    b. all proposal orders should be made public.

67. Convocation is further requested to consider whether, in the event it decides that a proposal order that limits a member's rights and privileges should be public,

    a. such information should be released only on request, as is recommended by the Committee; or

    b. the Law Society should publish such information.

68. Convocation is further requested to consider whether, if such information should be made public only on request, this decision should be reviewed in September 2003, as is recommended by the Committee.

c. Should the fact that a competence hearing has been authorized be made public generally, or to the complainant(s) only, as is currently the case?

69. With the authorization of PAC the Law Society may apply to the Hearing Panel for a determination of whether a member is failing or has failed to meet standards of professional competence. A request for authorization could occur either where a member has refused to co-operate with the practice review or consent to a proposal order following a practice review, or in circumstances where there has been no practice review. The Rules of Practice and Procedure make provision for how competence proceedings should proceed. Appendix 5 contains section 3.04.1 of the Rules of Practice and Procedure.

70. Given that practice reviews and competence hearings will in most instances arise out of a series of complaints or competence-related problems, a complainant may not be readily identifiable. To the extent that there is a complainant or complainants, however, the Rules of Practice and Procedure require that after the member is served with the application, the Society shall, where practicable, inform a complainant of the fact of the application.

71. Convocation elected to treat professional competence and capacity proceedings differently from conduct proceedings in the Rules of Practice and Procedure. Unlike conduct hearings where, in the normal course, the proceedings are public, competence and capacity proceedings are to be held in the absence of the public. One of the reasons for the approach as it relates to competence is that the goals of the competence provisions are remedial rather than punitive and as such the content of the proceeding should not be open to the public.

72. Perhaps even more importantly, information relied upon in a competence hearing may arise not just from individual complaints, but from the revelations made in the course of a practice review that reveal competence-related deficiencies in a number of areas and with respect to a wide range of client files. As such there may be issues of protecting solicitor-client privilege that make the *in camera* nature of the proceedings critical.

73. It is not clear, however, whether this confidentiality should extend to *the fact* of a proceeding having been authorized.

74. In assessing whether or not to make public the fact that a competence hearing has been authorized the following factors are relevant:

    a. Unlike a practice review, the competence hearing is not an investigation. Rather, it is the consequence of an investigation and has only come about because PAC, whose members are all benchers, is satisfied that there is sufficient evidence to go forward.

    b. By and large competence proceedings are engendered not by single incidents, but by a course of continuing conduct that demonstrates serious and ongoing competence-related deficiencies and an inability or unwillingness to rectify the problems.

    c. It may be argued that the remedial character of competence proceedings is illustrated by pre and post-hearing features, not by the hearing *per se.* The practice review process has important remedial features, designed to assist a member to improve his or her practice and thereby avoid a competence hearing. If a member is found to have failed to meet standards of professional competence after a hearing the remedies available to Hearing Panels are broad and largely remedial in nature. Thus, making public the fact of a competence hearing may not interfere with the remedial nature of the process.

    d. In and of itself it cannot be argued that a member's reputation is potentially less harmed by the fact of a conduct proceeding being made public as opposed to a competence proceeding. No finding against the member has yet been made in the conduct hearing, yet the fact of the proceeding is nonetheless revealed to a member of the public who asks. Moreover, the Law Society regularly forwards information about upcoming conduct hearings and the conduct allegations against members to approximately 70 media outlets.

    e. Despite all these factors, however, Convocation must have perceived a difference in the nature of competence proceedings, that resulted in a decision that they be held *in camera*. Arguably, in keeping with that approach the extent to which information about the process is made available generally should be less than that done in conduct proceedings. This could mean that either no information is given to the public (as is the case with capacity proceedings) or information is provided if a member of the public or the professions seeks it out, but is not generally published for the public's or the profession's information.

75. The Committee is of the view that so long as competence hearings are to be held *in camera*, information about the fact that a competence hearing has been ordered against a member should continue to be made known to the complainant(s) only. It would make little sense, in any event, to publish the fact of the competence hearing, but then not allow anyone to observe it, as must be the result under the current rules.

Request to Convocation

76. Convocation is requested to consider whether the fact that a competence proceeding has been authorized,

    a. should continue to be made known to the complainant(s) only, as the Committee proposes; or

    b. should be made available to members of the general public and the profession.

77. If the information should be made public, which is not the Committee's recommendation, Convocation is further requested to consider whether it should be made available,

    a. on request only; or

    b. through the Law Society publishing such information.

d. Under what circumstances should the order in a competence proceeding be public?

78. If Convocation agrees with the view that where a proposal order limits a member's rights and privileges that fact should be made public, then it is inconsistent to continue to have Rule 3.04.1(6) of the Rules of Practice and Procedure, which leaves it in the discretion of the tribunal to determine which aspects of the order should be made public and which aspects should be revealed to the complainant(s). It is arguable that there is an even greater responsibility to make known to the public limits on a member's rights after an adjudicated decision in a competence hearing than there is with respect to a proposal order, which is a consensual document.

79. Even capacity proceedings do not follow the approach used for competence hearings. Instead, where the Hearing Panel makes an order suspending *or limiting* the members' rights, the order is a matter of public record, but the reasons shall not be made public.

80. If Convocation agrees that these types of orders should be public, another issue is whether the orders should be published, or whether the information should simply be made available upon request. Given that a finding against a member will now have been made it is difficult to contemplate how the public interest is served unless the order is published, as is the case with conduct orders.

81. Further, given Convocation's decision in January 2002 that orders in conduct proceedings should be published in the *Ontario Lawyers Gazette*, without waiting for the disposition of any appeal, the Committee is of the view that the procedure for competence orders should follow the same approach.

Request to Convocation

82. Convocation is requested to consider,

    a. whether in professional competence proceedings where a tribunal suspends *or limits* the member's rights and privileges, the order and the decision should be public, as is recommended by the Committee;

    b. if the answer is yes, whether the Law Society should publish the information, as the Committee proposes, or simply make it available to those members of the public who inquire about members' status; and

    c. if the Law Society should publish the information, whether it should do so before the expiry of the period for filing an appeal from the decision, as the Committee proposes, or after.

e. Should Complaints Review Commissioners (CRCs), in appropriate circumstances, inform a complainant whose complaint is not being proceeded with that a member is in practice review or that the CRCs are requesting that the member enter practice review?

83. As mentioned in section b(i) above, the Complaints Review Commissioners have raised the issue of whether they should be able to indicate to complainants whose complaints are not being proceeded with that,

a. the member against whom they have complained is in practice review; or
b. that the CRCs will be requesting that the member be directed into practice review.

84. The original practice review process was developed, in part, as a result of concerns expressed by lay benchers that there was a gap between the threshold necessary to authorize a discipline proceeding against a member and situations in which the competence-related deficiencies of a lawyer were interfering with his or her ability to provide proper service to the public.

85. The complaints review process is designed to provide an additional examination of the way in which a complaint has been addressed by the Law Society. Among the steps the CRCs can take is to request that, even where the individual complaint is not founded, the member be directed into a practice review to address competence-related deficiencies.

86. The Committee's January 2000 policy, reported to Convocation for information, respecting the process that should be followed when CRCs wish to request that a member be considered for practice review, is as follows:

a. The CRCs will be provided with information on how the process for mandatory practice review operates;

b. Where a CRC is considering a request for a practice review, the CRC will notify staff and a member profile will be prepared with a staff recommendation on whether the request should go forward to the Chair or Vice-Chair of the PD&C Committee.

c. On the basis of the profile and staff recommendation the CRC would determine whether he or she wishes the request for a practice review to go forward. If the CRC and the staff agree that it should not go forward, the matter is at an end.

d. If the CRC considers that the request should go forward, but the staff disagrees, the Secretary will make the request to the Chair or Vice-Chair of the PD&C Committee, with the reasons for and against the request being set out in the material, and indicating that the request comes from the CRC.

e. *The Chair or Vice-Chair will then determine whether he or she is required to direct a practice review in accordance with the Act and by-laws.*

87. A member is most commonly directed into practice review when the Chair or Vice-Chair of the Professional Development and Competence Committee is satisfied that there are reasonable grounds for believing that the member has failed or is failing to meet standards of professional competence, within the meaning of the Act. The Chair's decision is based upon a profile of the member setting out the reasons for which the review is sought. If the information satisfies the test the Chair *must* direct the review.

88. Currently, because of the confidentiality policy, the CRCs are not able to tell the complainant either that they will be making a request that the member be directed into practice review, or that the member is already in the program.

89. As expressed by the lay bencher on the Committee on behalf of the CRCs, the complaints process is designed to protect the public and must be meaningful. Members of the public must have confidence in the self-regulatory process. Since practice review is an integral part of the Law Society's regulatory framework there should be some mechanism for informing complainants of it.

90. If Convocation agrees with the view set out in section b(i) above, that the fact that a practice review has been directed should not be public, then it would be inconsistent for CRCs to reveal to complainants that the member is in a practice review. If Convocation agrees with the Committee's view set out in section b(ii) above that where a proposal order limits a member's rights and privileges it should be made public, the CRCs could reveal this to the complainant.

91. Initially, the lay bencher on the Committee was of the view that the fact of a practice review should be public at least to the extent that lay benchers could inform complainants that a member is in practice review. The majority of the Committee was of the view that the CRCs should not disclose either the fact that a member is in practice review or the fact that the CRCs are requesting that a member enter practice review. The Committee has re-considered this issue and is in agreement that a middle ground can be found to provide some information to the complainant.

92. The Committee, including the lay bencher, recommend to Convocation that where the CRCs intend to request that a member be directed into a practice review they be entitled to inform the complainant of that fact. It is true that the fact of a "request" from the CRCs for a member to enter practice review does not necessarily mean the review will be directed. The CRCs would, in appropriate circumstances, inform a complainant,

a. of the existence of the practice review program;

b. that they intend to request that the member be directed into the practice review program;

c. that practice review is a confidential process and the reasons for the confidentiality; and

d. that as a result of confidentiality, if the member is directed into practice review that fact will not be disclosed to the complainant or anyone else outside the Law Society.

This information could be included in the correspondence the CRCs send to the complainant.

93. Although complainants may continue to have concerns about the results regarding their particular complaint, it will be important to be able to reveal an additional process that may be invoked to improve the member's overall service to the public.

94. If pursuant to the Committee's recommendations in paragraphs 76 and 82 above,

a. a competence hearing is ordered; or
b. a proposal order that limits a member's rights to practice is entered into;
some disclosure could be made to complainant, in accordance with those provisions.

95. It is hoped that as the practice review process continues to improve, becomes more stream-lined, is activated at an earlier stage of complaints about a member, and is concluded more expeditiously, it will have a trickle down effect that will result in fewer members demonstrating serious competence-related deficiencies over a lengthy period of time.

Request to Convocation

96. Convocation is requested to consider whether, as is recommended by the Committee, the CRCs should, in appropriate circumstances, be free to indicate to a complainant that they will be requesting that a member be ordered into practice review, provided that, at the same time, they advise the complainant of,

a. the confidential nature of practice reviews;

b. the reasons for such confidentiality; and

c. that as a result of the policy the complainant will not be entitled to know if the review has been directed.

APPENDIX 5: RULE 3.04.1 OF THE RULES OF PRACTICE AND PROCEDURE

Professional Competence Proceedings

3.04.1 (1) A proceeding shall, subject to subrules (2), (5), (6) and (7), be held in the absence of the public if it is a proceeding in respect of a determination of whether a member is failing or has failed to meet standards of professional competence.

(2) At the request of the person subject to the proceeding, the tribunal may order that the proceeding be open to the public.

(3) Unless the proceeding before the tribunal is open to the public as provided by subrule (2), an application for a determination of professional competence shall not be made public by the Society except as required in connection with a proceeding except as provided for in the Act, and except as provided for in subrule (3.1).

(3.1) After the member is served with the application, the Society shall, where practicable, inform a complainant of the fact of the application.

(4) Where the hearing of an application for a determination of professional competence has been open to the public in accordance with subrule (2), the decision, order and reasons of the tribunal are a matter of public record.

(5) Where the hearing of an application for a determination of professional competence has been closed to the public, and where the tribunal has made an order suspending the member's rights and privileges, the order and the decision of the tribunal are a matter of public record.

(6) Subject to subrule (7), where the hearing of an application for a determination of professional competence has been closed to the public, and where the tribunal has made an order limiting the member's rights and privileges, the tribunal shall determine what aspects of the order shall be made public in order to protect the public interest.

(7) Where the hearing of an application for a determination of professional competence has been closed to the public, the Society shall, where practicable, inform a complainant of the tribunal’s decision as to whether the application was established and the tribunal shall determine which aspects of the order shall be made available to a complainant.

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

(1) Transcript from Convocation Debate on Practice Review (September 24, 1999) and PD&C Committee Report to Convocation (September 24, 1999).

(Appendix 1, pages 38 – 46)

(2) Use of Practice Review Information in other Jurisdictions.

(Appendix 2, pages 60 – 64)

(3) Time Guidelines for Practice Review.

(Appendix 3, pages 65-68)

(4) Practice Review Recommendations.

(Appendix 4, pages 69 – 74)

CONVOCATION ROSE AT 12:45 P.M.

The Treasurer and Benchers had as their guests for luncheon Mr. Ian Scott, Q.C. and Mr. David Scott, Q.C.

Confirmed in Convocation this 25th day of April, 2002

Treasurer