

MINUTES OF CONVOCATION

Thursday, 22nd May 2003
9:00 a.m.

PRESENT:

The Treasurer (Vern Krishna, Q.C., FCGA), Aaron, Arnup, Backhouse, Banack, Bindman, Bobesich, Bourque, Boyd, Campion, Carpenter-Gunn, Caskey, Cass, Chahbar, Cherniak, Coffey, Copeland, Curtis, Ducharme, Epstein, Feinstein, Finkelstein, Finlayson, Gottlieb, Heintzman, Hunter, Laskin, Lawrence, Legge, MacKenzie, Marrocco, Martin, Millar, Murphy, Murray, O'Brien, Patillo, Pawlitza, Porter, Potter, Robins, Ross, Ruby, St. Lewis, Silverstein, Simpson, Swaye, Symes, Wardlaw, Warkentin and Wright.

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The reporter was sworn.

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IN PUBLIC

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TREASURER'S WELCOME

The Treasurer welcomed the following newly elected Benchers to Convocation: Constance Backhouse, Peter N. Bourque, James R. Caskey, Alan D. Gold, Thomas G. Heintzman, Tracey O'Donnell, Laurie Pattillo, Laurie Pawlitza, Alan G. Silverstein, Beth Symes and Bonnie Warkentin.

The Treasurer congratulated lay Benchers Messrs. Chahbar and Coffey on their reappointments and welcomed the following newly appointed Benchers: Andrea Alexander, Anne Marie Doyle, Paul Dray, Dr. Sy Eber, Dr. Richard Filion and Dr. Allan Gotlib.

NOTICE OF MOTION

It was moved by George Hunter, seconded by Heather Ross that:

WHEREAS self-governance is a privilege bestowed upon the legal profession in consideration of the public interest in an independent bar.

AND WHEREAS the integrity of self-governance is enhanced by the appointment and participation of Lay Benchers.

AND WHEREAS Convocation recognizes the particular and significant contributions of those six Lay Benchers whose terms are now completed.

BE IT RESOLVED THAT Convocation expresses its profound gratitude for the tremendous work, interest, energy and stimulation brought to its various affairs by:

Stephen Bindman of Ottawa
 Gillian Diamond of Toronto
 Pamela Divinsky of Toronto
 Seymour Epstein of Toronto
 Robert Lalonde of Chelmsford
 Barbara Laskin of Ottawa

We are in their debt.

We wish them well.

Carried

Best wishes and recognition of their long service to Convocation were extended to Mr. O'Brien on his 94th birthday and Mr. Arnup who will turn 92 on May 24th.

The Treasurer and Benchers expressed thanks to the Communications Department for the outstanding job in the production of the Law Society's Annual Report. Special thanks went to Lucy Rybka-Becker, Lisa Reilly and Perry Lim.

The Treasurer thanked those staff involved with the Benchers election which included Mary Shena, Mirka Adamsky-Rackova, Dana Campbell, Bruce Hobson and the scrutineers, Larry Calzavara, Nathalie Boutet, Kathleen Lickers, Marvin Huberman, Roger Rowe, Larry Birnbaum, Elizabeth Silcox, Lou Radomsky, Alison MacKay, Elliot Spears, Dulce Mitchell, Julia Bass and Jim Varro.

The Treasurer also recognized the excellent work of the senior management of the Society and thanked the following for their loyal service: Malcolm Heins, Jose9 Bouchard, Laura Cohen, Terry Knott, Diana Miles, Zeynep Onen, Lucy Rybka-Becker, Erik Sorenson and Wendy Tysall.

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT & COMPETENCE

Re: Candidates for Call to the Bar

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Professional Development and Competence asks leave to report:

B.

ADMINISTRATION

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

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates have completed successfully the Bar Admission Course, filed the necessary documents, paid the required fee, and now apply to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, May 22nd, 2003:

Gladys Aghimien	Bar Admission Course
Mary Elizabeth Gelinus Boushel	Bar Admission Course
Luiza-Brindusa Cruceru	Bar Admission Course
Robert Sol Greenfield	Bar Admission Course
Jessica Anne Hendriks	Bar Admission Course
Rajesh Albert Itwar	Bar Admission Course

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

B.1.4. The following candidate has completed successfully the Transfer Examinations or the teaching terms of the Bar Admission Course, filed the necessary documents, paid the required fee, and now applies to be Called to the Bar and to be granted a Certificate of Fitness at Convocation on Thursday, May 22nd, 2003:

Alona Colina Mercado

Province of Manitoba

ALL OF WHICH is respectfully submitted

DATED this the 22nd day of May, 2003

It was moved by Mr. Hunter, seconded by Mr. Millar that the Report of the Director of Professional Development & Competence be adopted.

Carried

DRAFT MINUTES OF CONVOCATION

It was moved by Ms. Curtis, seconded by Mr. Bindman that the Draft Minutes of Convocation of April 25, 2003 be confirmed.

Carried

MOTION – APPEAL PANEL APPOINTMENTS

It was moved by Mr. Wright, seconded by Mr. Finkelstein that the following Benchers be appointed as members of the Appeal Panel:

Derry Millar (Chair)
John Champion
Kim Carpenter-Gunn
Abdul Chahbar
George Finlayson
Julian Porter
Ross Murray

Carried

MOTION – COMMITTEE APPOINTMENTS

It was moved by Ms. Curtis, seconded by Ms. Ross that the following Committee appointments be approved:

ACCESS TO JUSTICE COMMITTEE

Ronald Manes, Chair
Marion Boyd, Vice-Chair
Larry Banack
Paul Copeland
Charles Harnick
George Hunter
Derry Millar
Ian Scott

CONTINUUM OF LEGAL EDUCATION TASK FORCE

George Hunter, Chair

EMERGING ISSUES COMMITTEE

George Hunter, Co-Chair
Earl Cherniak
Susan Elliott
Abraham Feinstein
Allan Lawrence
Harvey Strosberg

EQUITY & ABORIGINAL ISSUES/L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES COMMITTEE

Paul Copeland, Chair
Derry Millar, Vice-Chair
Gary Gottlieb
Judith Potter
Bradley Wright

FINANCE & AUDIT COMMITTEE

Clayton Ruby, Chair
Ronald Cass
Abdul Chahbar
Andrew Coffey
Neil Finkelstein
Laura Legge
Allan Lawrence
Gavin MacKenzie
Julian Porter
Harvey Strosberg
Gerald Swaye
Robert Topp
Bradley Wright

Audit Sub-Committee

Bradley Wright, Chair
Neil Finkelstein, Vice-Chair
Abdul Chahbar
Allan Lawrence

GOVERNMENT RELATIONS & PUBLIC AFFAIRS

Frank Marrocco, Chair
John Campion, Vice-Chair
Marion Boyd
Abdul Chahbar
Andrew Coffey
Paul Copeland
Charles Harnick
Allan Lawrence
Julian Porter
William Simpson
Michelle Strom, LAWPRO

HERITAGE COMMITTEE

Patrick Furlong
Allan Lawrence
Derry Millar

INTER-JURISDICTIONAL MOBILITY COMMITTEE

Derry Millar, Chair
Gavin MacKenzie, Vice-Chair
John Campion
Abraham Feinstein
George Hunter

LAW FOUNDATION OF ONTARIO

Ron Manes, Chair
Larry Banack
Bradley Wright

LAWYERS FUND FOR CLIENT COMPENSATION COMMITTEE

Robert Topp, Chair
Larry Banack, Vice-Chair
Abdul Chahbar, Vice-Chair
Robert Aaron
Andrew Coffey
Gerald Swaye

LITIGATION COMMITTEE

Kim Carpenter-Gunn, Co- Chair
Julian Porter, Co-Chair
Larry Banack
Earl Cherniak
Neil Finkelstein
Ronald Manes
Frank Marrocco
Clayton Ruby
Gerald Swaye

ONTARIO LAWYERS GAZETTE ADVISORY BOARD

Julian Porter, Chair
Robert Topp, Vice-Chair
Bradley Wright

PROCEEDINGS AUTHORIZATION COMMITTEE

Earl Cherniak, Chair
Todd Ducharme
Neil Finkelstein
Heather Ross

PROFESSIONAL DEVELOPMENT, COMPETENCE & ADMISSIONS COMMITTEE

Earl Cherniak, Chair
Kim Carpenter-Gunn, Vice-Chair
George Hunter, Vice-Chair
William Simpson, Vice-Chair
Gordon Bobesich
Carole Curtis
Todd Ducharme
Susan Elliott
Abraham Feinstein
Daniel Murphy

PROFESSIONAL REGULATION COMMITTEE

Todd Ducharme, Chair
Carole Curtis, Vice-Chair
Neil Finkelstein, Vice-Chair
Judith Potter, Vice-Chair
Heather Ross, Vice-Chair
Robert Aaron
John Champion
Patrick Furlong
Gary Gottlieb
Holly Harris

Robert Martin
 Derry Millar
 Ross Murray
 Joanne St. Lewis
 Roger Yachetti

SUMMARY DISPOSITION BENCHER

Todd Ducharme

Carried

CALL TO THE BAR (Convocation Hall)

The following candidates listed in the Report of the Director of Professional Development & Competence were presented to the Treasurer and called to the Bar. Mr. Swaye then presented them to Madam Justice Joan L. Lax to sign the Rolls and take the necessary oaths.

Gladys Aghimien	Bar Admission Course
Mary Elizabeth Gelinus Boushel	Bar Admission Course
Luiza-Brindusa Cruceru	Bar Admission Course
Robert Sol Greenfield	Bar Admission Course
Jessica Anne Hendriks	Bar Admission Course
Rajesh Albert Itwar	Bar Admission Course
Alona Colina Mercado	Transfer, Province of Manitoba

TREASURER'S REMARKS

The Treasurer provided an overview of the operations and role of the Law Society, as well as the role of Benchers.

The Treasurer expressed his gratitude to Katherine Corrick, head of the Policy & Legal Affairs Department and Secretary of Convocation whom he described as an active senior staff member and a valuable resource.

Mr. Arnup addressed Convocation about the history of the Law Society.

REPORT OF THE FINANCE & AUDIT COMMITTEE

Mr. Ruby presented the Law Society's quarterly financial statements and described the budget development process.

Finance and Audit Committee
 May 8, 2003

Report to Convocation

Purpose of Report: Decision
 Information

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

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Finance and Audit Committee (Athe Committee@) met on May 8, 2003. Committee members in attendance were: Ruby C. (c), Crowe M. (v.c.), Epstein S. (vc), Chahbar A., Coffey A., Lawrence A., Porter J., Wright B.. Staff attending were Heins M., Grady F., White R., Cawse A..
2. The Committee is reporting on the following matters:

Decision

X Osgoode Society Funding

Information

X Law Society General Fund Unaudited Financial Statements for the First Quarter
X Lawyers Fund for Client Compensation Fund Unaudited Financial Statements for the First Quarter
X Investment Compliance Reports
X Process for 2004 Budget

FOR DECISION

OSGOODE SOCIETY FUNDING

6. At Convocation in April 2003 a motion on funding for the Osgoode Society was referred to the Finance and Audit Committee for assessment prior to returning to Convocation for final approval. The Osgoode Society has requested the Law Society to contribute to the publication of a book titled "An Illustrated History of Osgoode Hall". The requested contribution from the Law Society is:

- The purchase of 500 books for approximately \$27,000. These books would then be resold from the Law Society's virtual store or used as prizes or gifts.
- A grant of \$7,500 to pay for some of the illustrations in the book.
- The sharing of illustrations and drawings from Law Society Archives without charge.

Most of the funding can be allocated in the 2004 budget. The Committee concluded that the financial implications and publication specifications were acceptable, approved the expenditures and requested Law Society management to monitor publication quality at the later stages of the production process.

The Committee recommends that Convocation approves the financial support of \$27,000 and \$7,500 detailed above, and the in kind contribution from Law Society Archives.

FOR INFORMATION

LAW SOCIETY OF UPPER CANADA GENERAL FUND UNAUDITED FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2003

7. The interim financial statements of the General Fund for the first quarter of 2003 were reviewed by the Committee who recommends that the statements be received by Convocation for information (page 5).

LAWYERS FUND FOR CLIENT COMPENSATION
UNAUDITED FINANCIAL STATEMENTS FOR THE QUARTER ENDED MARCH 31, 2003

5. The interim financial statements for the Lawyers Fund for Client Compensation for the first quarter of 2003 were reviewed by the Committee who recommends that the statements be received by Convocation for information (page 9).

INVESTMENT COMPLIANCE REPORTS

6. Investment Compliance Reports for the quarter ended March 31, 2003 for the General Fund and the Lawyers Fund for Client Compensation are attached at page 11. The Reports confirm there are no breaches in compliance.

PROCESS FOR 2004 BUDGET

7. A memorandum on the 2004 budget process is attached (page 18).

LAW SOCIETY OF UPPER CANADA
DEPARTMENT OF FINANCE

TO: The Finance and Audit Committee
FROM: Wendy Tysall
DATE: April 22, 2003
SUBJECT: 2004 Budget Process

Background

At this time of the year the Committee turns its attention to the development of the Society's annual budget. There are a variety of methods and options the Society could employ in the determination of its annual membership levy. However, the development of the annual budget is much more than a fee setting exercise. The budget process determines the allocation of resources to support the operations of the Society.

Options

A common approach to budgeting has been to look at the current year budget as a base or minimum starting point, and increase or decrease that base by some factor. This method of budgeting has increasingly gone out of style in favour of more active budgeting processes such as current Law Society practice.

Law Society Practice

The Society employs a hybrid budget process that includes some of the characteristics of the base budgeting approach as well as characteristics of a budgeting technique referred to as Zero Based Budgeting (ZBB). To clarify, ZBB is a method of budgeting that requires proponents of discretionary expenditures to continually justify every expenditure. For every planning period the starting point for each budget line item is zero. The intention is to avoid incremental budget creep, duplications and non-essentials.

The Law Society has applied the ZBB philosophy, but not to every activity, every year. While embracing the philosophy, the Law Society like many other organizations, has adopted a hybrid form of ZBB for the following reasons:

- This assessment of activities “from scratch” is very comprehensive, detailed and therefore expensive. It takes a lot of employee time to prepare. Repetition of the exercise throughout the Law Society each year would render the budget process unproductive and not cost effective.
- In for-profit organizations ZBB is typically applied to discretionary expenditures such as research and development which are far more “one off” and non-repetitive than most of the Law Society’s activities. Most of the Law Society’s operations intended to fulfill its mandate do not vary much from year to year, so if other circumstances are relatively stable it would be inappropriate to complete a comprehensive ZBB exercise for every activity, every year. However, the Finance and Audit Committee does not assume the propriety of any expenditure when it assesses the proposed budget.

This is the basis for the rotational operational reviews which are in place at the Law Society. Three or four activities have been selected each year, the mandate or output of the activity has been defined and then resources to meet that output have been assessed. For instance for the 2003 budget, the Compensation Fund, the Great Library and the Customer Service Centre were assessed.

This rotational review of selected departments has the benefits of:

- Restricting a sense of entitlement to cost increases
- Allowing a more meaningful, focused, analytical cost containment
- Increasing discipline in budget development
- Limiting resistance as the onerous and exhaustive examination of costs is not imposed every year in the absence of changing circumstances
- Reducing the length of the budget process
- Increasing benchner understanding of a few specific activities each year.
- Increasing the accountability of management for the programs underlying the financial information contained in the annual budget.

The Society’s annual budget is prepared by management based on the strategic direction established by Convocation. The budget process begins in the spring or early summer with presentations of program operational reviews to the Finance and Audit Committee for areas selected on a rotational basis. The actual budget is drafted over the summer, reviewed and amended by senior management as required and presented to the Finance and Audit Committee in September for detailed questioning, review and recommendation to Convocation. Convocation reviews, debates and ultimately approves the budget in October.

The process Convocation has adopted includes the selection of several Society programs to undergo an operational review as part of the annual budget development. This now involves a careful review of all Society operations over a three year cycle.

In 2003 operational areas reviewed were:

- The Client Service Centre
- The Great Library and County Libraries combined with the business plan for LibraryCo.
- The Lawyers Fund for Client Compensation

These three areas represent over 40% of the total budgeted expenditures of the Society.

The reviews of these program areas were well received by the Committee and we recommend this process continue in 2004. The reviews have included detailed presentations on the operational intent of programs and services offered by the functional areas, human and fiscal resources employed and descriptions of operational processes. Past expenditures are carefully reviewed. Future expenditures are carefully questioned. The process has been a service to the membership as resources have been directed to the core functions of the Society and membership fees have been significantly reduced in each of the last two years, by \$164 in 2002 and \$129 in 2003.

2004 Budget Process

It is recommended that the following operational areas undergo the review process as part of 2004 budget deliberations:

- Professional Development and Competence
- Communications

These two areas represent an additional 20% of the Society's budgeted expenditures.

In addition, the Information Systems department presented the Committee with an overall review of its operations, its strategic direction and anticipated resource requirements for 2004 at its March meeting. The Human Resources department underwent an internal control review conducted by Deloitte and Touche as part of a continuing review of the Society's control processes, the results of which were presented to the Audit Sub-Committee at its March 2003 meeting and to the Finance and Audit in April 2003. Included in this review was the Finance department's payroll processes. Financial processes will continue to undergo further control reviews by Deloitte and Touche over the course of 2003. In combination these areas represent an additional 10% of budgeted expenditures. In total therefore, by the end of 2004, programs utilizing approximately 70% of the Society's fiscal resources will have undergone operational reviews or systems audits over the last two years.

It was the opinion of the Senior Management Team that the process for 2004 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. For the 2005 budget cycle, the Senior Management Team is recommending Professional Regulation and Policy and Legal Affairs for operational review.

It is intended that the operational reviews for the 2004 budget be completed and presented to the Finance and Audit Committee in September 2003 with the draft budget.

The election of a new Treasurer will take place in June and certainly the budget will need to be mindful of policy initiatives he or she might wish to undertake. Other important issues the Committee might want to consider during budget deliberations include:

- Use of surplus funds. The Working Capital Reserve Fund policy proscribes options for surplus funds greater than two months operating expenses. In 2002, Convocation, on the recommendation of the Finance and Audit Committee, transferred approximately \$4.0 million of surplus funds to the Capital Fund for the renovation of the north wing.
- Utilization of investment income from the E&O fund surplus. This was budgeted at \$2.6 million in 2003. The actual payment from the fund was \$3.0 million. We are awaiting the appropriate budget estimate for this revenue in 2004.

The Senior Management Team will begin development of detailed program budgets over the summer for presentation to Finance and Audit Committee in September for review and recommendation to Convocation.

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

- (1) Copy of the interim financial statements of the General Fund for the quarter ended March 31, 2003.
(pages 5 – 8)
- (2) Copy of the interim financial statements for the Lawyers Fund for Client Compensation for the quarter ended March 31, 2003.
(pages 9 – 10)
- (3) Copy of the Investment Compliance Reports for the quarter ended March 31, 2003 for the General Fund and the Lawyers Fund for Client Compensation.

(page 11 - 17)

Re: Osgoode Society Funding

It was moved by Mr. Ruby, seconded by Mr. Epstein that Convocation approve the financial support of \$27,000 and \$7,500 to the Osgoode Society for the publication of a book titled "An Illustrated History of Osgoode Hall" and the in kind contribution from Law Society Archives.

Carried

Mr. O'Brien abstained.

Convocation unanimously expressed its gratitude to Mr. Ruby for his supervision of the finance portfolio for the past two years.

Items for Information Only

First Quarter Financial Statement for the General Fund and Compensation Fund
Investment Compliance Reports
2004 Budget Process

REPORT ON FEDERATION OF LAW SOCIETIES OF CANADA MEETING

Mr. Hunter presented the Report on the Federation's meeting and outlined the topics discussed including governance changes, access to legal information and litigation intervention up-dates.

Convocation
May 22, 2003

Report on Federation of Law Societies of Canada

Purpose of Report: Information
 Decision

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

REPORT ON SEMI-ANNUAL MEETING OF THE FEDERATION OF LAW SOCIETIES OF CANADA

Request to Convocation

1. Convocation is requested to approve the Report.

Background

2. The Federation of Law Societies of Canada held its semi-annual meeting in Quebec City from May 1 to 3, 2003. Appendix 1 contains background information on the Federation for the assistance of newly elected benchers.
3. This report provides Convocation with a synopsis of the main topics discussed at the meeting. These were:
 - a. Access to legal information and CANLII (a workshop)

- b. Committee updates
 - c. Governance changes – approvals
 - d. Litigation intervention up-dates
 - e. Emerging issues
4. The CEOs of all law societies also met to discuss issues of national interest to law society administrators.

Access to Legal Information

5. All law societies have recognized the critical importance of ensuring that members have ready access to the information and research they need to serve clients and address legal issues as they arise. At a workshop led by Malcolm Heins, Janine Miller (Director of Libraries – Law Society of Upper Canada), Barbara Campbell (Director of Libraries – Nova Scotia Barristers' Society), Richard Margetts, Q.C. (CANLII President) and Allan Fineblit, Q.C. (CEO, Law Society of Manitoba), the delegates and panelists discussed a number of general issues related to legal information and CANLII's role specifically. The discussion addressed:
- a. Future trends in law library services;
 - b. Current library services;
 - c. What legal information lawyers look for now and what will they need in the future; and
 - d. The role of CANLII and possibilities for expanding its services and use.
6. The law societies confirmed their commitment to CANLII and the importance of ensuring that CANLII be publicized as widely as possible so that increasing numbers of members of the profession use it as a valuable research tool.

Committee Updates

7. The following committees provided updates on their work since the last meeting:
- a. National Mobility Task Force (Professor Vern Krishna, Q.C., FCGA, Chair)
 - b. National WTO Committee (Trudy Brown, Q.C., Chair)
 - c. National Copyright Committee (Robbie MacKeigan, Q.C., Chair)
 - d. Committee on Regulation of Non Professionals (Francis Gervais, Chair)
 - e. CANLII (Janine Miller, Project Manager)

Federation Governance Changes

8. Historically, the Federation was a vehicle through which the Law Societies exchanged information. In more recent years, the Law Societies have agreed that there are areas where the Federation can, and should, take a leading role in matters that have national and international scope. As a result of that, the work of the Federation has increased substantially.
9. The Federation continually addresses a number of issues associated with the legal profession in Canada including MDPs, GATS and WTO, copyright of legal materials, national continuing legal education materials, legal aid, mobility and regulation of lawyers in Canada and internationally, money laundering and issues related to professional regulation and the independence of the legal profession.
10. To facilitate the Federation's ability to function efficiently and expeditiously, the member law societies have been engaged in discussions over a number of years to streamline the Federation's operating structure and by-laws.
11. Appendix 2 contains the Federation President's Summary of the Proposed Governance Changes, dated April 2, 2003. At the Federation meeting on May 3, 2003 the Law Society of Upper Canada voted in favour of the proposed governance changes, which were approved unanimously by delegates from all law societies.
12. The delegates then approved in principle the proposed by-laws set out at Appendix 3. These by-laws must now be approved by Industry Canada to ensure compliance with requirements for not-for profit corporations. The process takes approximately six weeks. The delegates were in agreement that flexibility

in the by-laws is important to allow the governance structure to evolve without having to return to Industry Canada for changes each time. As such the by-laws have been left general in certain places.

13. Once the By-laws have been formally approved and are in full force and effect the current Federation Board will be replaced by the new Federation Council. George Hunter will serve as the Law Society of Upper Canada representative. The new Council will then carry on with further refinement of the governance structure.
14. The delegates also considered a Resolution on Unanimity, set out at Appendix 4. It was approved as an interim measure pending execution and delivery, in advance of the November 2003 Federation meeting, of an agreement acceptable to all law societies. The Resolution reflects the current voting convention.
15. The delegates also considered the issue of the rotation of the presidency of the Federation in the new governance structure. In 1994 the Federation adopted a policy for rotation of the presidency. Over time the delegates came to view the policy as too rigid.
16. At the meeting on May 3, 2003 the delegates approved a nine-year flexible rotation proposal. Under the rotation plan the Council would choose the president, based on representation from the following regions: Quebec, Western Provinces, Ontario, Atlantic Provinces, and the North. A president from the North would serve for one year during years five through nine. Each of the other four regions would be represented for two one-year terms during the nine years. Any region could waive its place in the rotation or, with the consent of the Federation members, defer to another year.

Litigation Intervention Updates

17. The Federation has been involved in a significant number of successful court proceedings and interventions in recent years, including but not limited to the challenge to provisions of the money-laundering legislation and the interventions before the Supreme Court of Canada in *Lavallee* (challenge to section 488.1 of the *Criminal Code* dealing with search and seizure of client files in lawyers' offices) and *Ryan v. The Law Society of New Brunswick* (appeal from a decision of the Court of Appeal of New Brunswick on the appropriate basis for interference with a discipline decision of a law society).
18. Maurice O. Laprairie, Q.C., Chair of the President's Task Force on Money Laundering Legislation provided an update on the challenge to the legislation, the state of negotiations regarding regulations, the recommendations of the international-based Financial Action Task Force (FATF) on money laundering and the Federation's submissions to FATF.

Emerging Issues

19. A number of emerging issues were discussed, including the possible development of a National Code of Conduct and the regulation of law firms. The Barristers' Society of Nova Scotia provided an overview to proposed legislation in Nova Scotia that would provide for regulation of law firms. There will be further discussion of these issues in November.
20. The delegates also discussed the issue of the independence of the legal profession and the loss or reduction of such independence in a number of jurisdictions around the world.

APPENDIX 1

BACKGROUND INFORMATION ON THE FEDERATION OF LAW SOCIETIES OF CANADA

The Federation of Law Societies is the umbrella organization for the fourteen Canadian law societies; including the Chambre des notaires of Quebec. Each law society governs the legal profession within its respective province or territory.

Historically, the Federation was a vehicle through which the Law Societies exchanged information. In more recent years, the Law Societies have agreed that there are areas where the Federation can, and should, take a leading role in matters that have national and international scope. As a result of that, the work of the Federation has increased substantially.

The Federation continually addresses a number of issues associated with the legal profession in Canada including MDPs, GATS and WTO, copyright of legal materials, National continuing legal education materials, legal aid, mobility and regulation of lawyers in Canada and internationally, money laundering and issues related to professional regulation and the independence of the legal profession.

The Federation carries on its activities through a Board and a number of committees. It is also the Government of Canada's designated representative for the legal profession with respect to implementation of the NAFTA provisions relating to legal services.

The Federation is a member of the International Bar Association and the Union internationale des avocats. An Executive Director and Secretary-Treasurer staff the Head Office of the Federation, in Montreal.

Member law societies contribute annual funding to the Federation.

The Federation's web site is www.flsc.ca.

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

- (1) Copy of the Federation President's Summary of the Proposed Governance Changes, dated April 2, 2003.
(Appendix 2, pages 8 – 11)
- (2) Copy of the proposed by-laws approved in principle.
(Appendix 3, pages 12 – 26)
- (3) Copy of a Resolution on Unanimity.
(Appendix 4, page 27)

It was moved by Mr. Hunter, seconded by Mr. Millar that the Report be adopted.

Carried

The Treasurer thanked Mr. Hunter for the time and effort he has devoted to the Federation of Law Societies of Canada on behalf of the Law Society.

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IN CAMERA

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IN PUBLIC

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CORRECTION TO APRIL 25, 2003 DRAFT MINUTES

The following correction was made to the April 25th, 2003 Draft Minutes under the heading of Treasurer's Remarks:

“.....a book illustrating the history of the Law Society..... “

should read -

“.....a book illustrating the history of Osgoode Hall.....”

LL.D. CANDIDATES

The Treasurer announced that Convocation will confer upon the following individuals the honorary Doctor of Laws degree at the calls to the Bar in July 2003: Roberta Jamieson, Dean Peter Hogg and Professor Michael Trebilcock.

REPORTS FOR INFORMATION ONLY

Continuum of Legal Education Task Force Interim Report

Continuum of Legal Education Task Force
May 22, 2003

Interim Report to Convocation

Purpose of Report: Information

Prepared by the Policy Secretariat
(Julia Bass 416-947-5228
Sophia Sperdakos 416-947-5209)

INFORMATION

1. In April 2002 the Task Force on the Continuum of Legal Education submitted an interim report to Convocation with a proposed new framework for admission to the Law Society of Upper Canada.
2. Convocation authorized the Task Force to seek input from lawyers, legal organizations, law schools, and BAC section heads, faculty, and students on the direction set out in the report.
3. In November 2002 the Task Force returned to Convocation to advise that its consultation process was ongoing and that as a result of issues raised in the preliminary consultation process it was important to conduct additional research and study. The Task Force indicated it would return to Convocation in the spring with a further interim report and time lines.
4. In April 2003 the Task Force provided a further progress report and set out a time line for the coming months. The Task Force advised Convocation that it had directed two research projects as follows:
 - a. The PERFORMANCE ASSESSMENT GROUP was retained to report on a sound testing methodology for a new licensing system for the Ontario legal profession that utilizes the currently existing BAC materials.
 - b. Professors Julie Macfarlane and John Manwaring were retained to study the ramifications of the Task Force's proposed recommendations, including whether skills training should be maintained, how to design the most effective skills training program and how the professional responsibility course could best be offered.
5. The Task Force indicated that once the studies were completed and the Task Force had analyzed them and considered the implications for the proposed model it provided to Convocation in April 2002, it would return to the groups and individuals with which it consulted in the first phase of its process to seek their further input.
6. The consultants have now completed their reports, which the Task Force is providing to Convocation for information at this time. The PERFORMANCE ASSESSMENT GROUP report, entitled "Establishing a Standardized, Reliable, Valid, Fair and Defensible Licensure Program", is set out at Appendix 1. Professors Macfarlane and Manwaring's interim report entitled "Interim Report on Skills Training and Professional Responsibility" is set out at Appendix 2.
7. Convocation is also being provided with a report prepared by Diana Miles, Director of Professional Development and Competence, entitled "Scheduling of the Proposed Licensing Program and the Enhancement of the Articling Process", set out at Appendix 3.
8. The Task Force is of the view that it is important for Convocation to have these reports for information at this time, as the reports will be used in the consultation process. Convocation will have the opportunity to discuss the reports in full when the Task Force returns with its recommendations.

9. As indicated in its report in April 2003, following the consultations the Task Force will prepare a final draft report taking into account the additional information and consultation input. It will provide an information session to benchers in the autumn of 2003. It will then revise the draft report if necessary and provide the final report to Convocation by December 31, 2003.

Appendix 1

Report on Establishing a
Standardized, Reliable, Valid, Fair and Defensible Licensure Program

Report prepared for the Law Society of Upper Canada
Task Force on the Continuum of Legal Education

Prepared by:
The PERFORMANCE ASSESSMENT GROUP INC.

May 2003

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EXECUTIVE SUMMARY OF PROCESS

1. Identification of Competencies
Competencies required to fulfill the requirements of the profession are identified.
2. Development of Blueprint Document
The Blueprint document provides the purpose and scope of the examination, the process by which decisions are made, the content to be assessed, the structure of examination, the context of examination and how the examination is scored.
3. Examination Development
Questions are developed based on the previously defined and validated competency profile and the Blueprint document.
4. Question Validation and Test Fairness
The questions are validated and undergo a test fairness/sensitivity review by individuals representing various minority interests.
5. Pilot Testing
New examination content is experimentally tested.
6. Assessment Tool Review
A committee approves the examination.
7. Translation and Finalization of French Version
Use of bilingual subject matter experts, accredited translators, and a Translation Review Committee of fluently bilingual lawyers to validate.
8. Final Review and Printing
Assessment tool is finalized and printed.

9. Administration Process
Identification and development of activities required for candidates to write the examination such as nature of the information to be provided to candidates and accommodations.
10. Assessment Tool Scoring Protocol
Identification of procedures involved in the scoring process, pass mark or test scores and feedback for candidates.
11. Design of Implementation Process
12. Development of Data Collection and Analysis Framework

INTRODUCTION

The PERFORMANCE ASSESSMENT GROUP has been contracted by the Law Society of Upper Canada (LSUC) to “review the current BAC and, in the context of establishing a licensing examination system, report back on a sound... testing methodology for a new system that utilizes the currently existing BAC materials.” (source: LSUC RFP document).

Based on the report of the *Task Force on the Continuum of Legal Education* (March 2002), the Law Society of Upper Canada (LSUC) has proposed a new licensing system whereby the LSUC focuses primarily on developing and administering the licensure program while limiting or eliminating its current “teaching” role in the process. As a result, the PERFORMANCE ASSESSMENT GROUP’S report will present a psychometrically sound step-by-step approach to the development of a competency-based licensure program.

To support the PERFORMANCE ASSESSMENT GROUP’S analysis and recommendations, a strong emphasis has been placed on *The Standards for Educational and Psychological Testing* (1999) (hereafter referred to as *The Standards*) published by the American Educational Research Association (AERA), the American Psychological Association (APA) and the National Council for Measurement in Education (NCME). Other sources have been consulted in writing this report including the National Organization for Competency Assurance (NOCA) and The Council on Licensure, Enforcement and Regulation (CLEAR); however, there is no more important source of test development requirements than *The Standards*. According to AERA et al (1999):

The purpose of publishing the Standards is to provide criteria for the evaluation of tests, testing practices, and the effects of test use. Although the evaluation of the appropriateness of a test or testing application should depend heavily on professional judgment, the Standards provides a frame of reference to assure that relevant issues are addressed (p. 2).

As suggested in the quote above, *The Standards* is a document designed to be a supplement to, rather than a surrogate for, professional judgment. One reason for the need to rely on professional judgement is that *The Standards* were written to cover a wide variety of types of tests and assessment programs. As such, *The Standards* does not provide separate treatment of examinations defined for different purposes such as credentialing (licensure/certification), employee selection, psychological assessment, or educational assessment (although there are some subsections that apply particularly to these applications). Rather, *The Standards* provides guidance for all types of testing applications. As a result, it can be a complicated matter to determine which “standards” apply specifically to licensure. In writing this report, the PERFORMANCE ASSESSMENT GROUP has made efforts to guide the LSUC through the “standards” that are relevant to the needs of licensure.

An appropriate use of *The Standards* would be to identify the most essential guiding principles for a reliable, valid and defensible licensure process; however, the details regarding how those principles can best be realized will always be based on professional judgement. The PERFORMANCE ASSESSMENT GROUP has endeavoured to provide expert judgement in all aspects of this report so the LSUC will clearly understand not only what the goals of a new licensure program must be, but also the activities to be undertaken to achieve those goals.

According to The Standards:

...high quality licensure and certification programs result from a well-defined process for ensuring assessment programs are reliable, valid, and defensible. Test development is the process of producing a measure of some aspect of an individual's knowledge, skill, ability, interests, attitudes, or other characteristics by developing items and combining them to form a test, according to a specified plan (p. 37).

A few key terms require elaboration to assist the reader in interpreting the remainder of this report. *Reliability* refers to consistency in measurement. There are many ways to estimate reliability (internally, over time, over different forms of the examination, across different scorers); however, the key concept is that a result must be repeatable if it is to have any meaning. If a grocer's food scale provides three varying estimates of weight for the same piece of produce on three different occasions, the scale is not reliable (and probably not legal for trade...). If an examination provides widely varying estimates of an individual's performance, it becomes impossible to determine if that person's performance is actually above or below the pass mark that indicates minimal competence.

One of the most important concepts in obtaining reliability is *standardization*. Although the above quote from *The Standards* does not refer to standardization as a core goal of assessment programs, it is impossible to obtain a reliable assessment without considerable standardization in many phases of the licensure process. Standardization largely refers to the extent to which candidates are treated in a uniform manner. For example, if two candidates are asked to write the same examination, that is an example of standardized treatment; however, if one candidate is given more time to complete the examination than the other, then their treatment has not been standardized (unless, for example, extra time was provided to offer an equitably standardized opportunity to a visually impaired candidate). If the candidate who was given more time is asked to complete the examination again during a shorter timeframe and obtains a different score the result of the examination may be judged to be unreliable, but the reliability obtained may be due to lack of standardization.

Standardization and reliability are hallmarks of examination development; however, the ultimate goal is *validity*. A valid examination is one that measures what it purports to measure. It is possible to have a perfectly reliable examination that is not valid. To return to the example of the grocer's scale, one might envision the scepticism of a customer who is presented with a peach that is found to weigh exactly 30 kg on three occasions and yet otherwise appears to resemble a normal 100 gm piece of fruit (another reason why the scale is not legal for trade...). Consistent measurement is not a guarantee of valid measurement; however, it is a necessary prerequisite.

Validity requires efforts to build an assessment program that zeros in on a well-defined target. As with reliability, there are many types of estimates of validity (predictive, concurrent, construct, content), but ultimately, validity refers to the accuracy of the inferences that can be drawn based on the results of licensure assessment (minimally competent versus not) and the usefulness of these inferences for the purpose of making a decision (confer versus withhold the credential). For licensure examinations, the most important type of validity is based on content. *Content validity* requires establishing a series of well-documented logical links between the domain of work and examination content. Each stage of the examination development process must be associated with valid requirements that are the result of thoughtful decisions made by qualified decision makers. Whenever possible, multiple checks and balances should be introduced to ensure accuracy.

It is safe to say that all licensure program sponsors want a *defensible* assessment program. A legally defensible program is one that provides reliable and valid assessments. Two of the key components of legal defensibility are the *reasonableness* of the assessment requirements established and the extent to which the program sponsor and its agents can be deemed to have imposed those requirements in *good faith*. Assessment programs must be based on having the right people involved (e.g., content experts and testing experts) and having everyone involved acting in the best interests of the ultimate goals of the program (e.g., protecting the public, respecting the rights of candidates, etc.).

Beyond technical defensibility is the issue of *fairness* and *the perception of fairness*. Challenges to licensure processes do not result from the concerns of test developers that a content domain has not been fully defined; they result from candidates who believe they have not been treated fairly. Sometimes candidates may be accurate in believing an examination is unfair. For example, examinations with culturally loaded questions may disadvantage minority members. In other cases, candidates may perceive an injustice that can be shown to be unwarranted based on the evidence. Non-technical issues such as the information provided to candidates, responsiveness to candidate

inquiries, opportunities for candidates to voice their feedback, prompt results reporting, feedback to candidates, and appeal and rewrite policies can all influence candidate perceptions of fairness. Examinations should be fair and appear to be fair to candidates above and beyond the technical requirements for standardization, reliability and validity.

The Standards, are largely concerned with the technical requirements of examinations (reliability, validity and defensibility); however, the reality is that most program sponsors are also concerned with the *practicality* of their assessment programs. Development and maintenance costs can be considerable as reliable and valid examinations require substantial resources, both time and financial. In terms of reliability, all other things being equal, a longer examination will tend to be more reliable than a shorter examination; however, the additional costs of developing test items may eventually provide diminishing reliability returns while development costs tend to be more fixed for each new item produced. Furthermore, the cost of the assessment to be borne by candidates may become prohibitive to those who have yet to enter the profession if they are compelled to pay for the development and maintenance of these additional items. As a result, practicality concerns may dictate a shorter, but still adequately reliable, examination. In a related matter, as examination length increases, a point may be reached where candidates become fatigued and the validity of the resulting assessment may actually decline.

Practicality concerns underscore the fact that the goals of *The Standards* represent ideals to which assessment programs should aspire, but may not be fully able to attain. The requirements of *standardization, reliability, validity, fairness, defensibility, and practicality* will be considered in relation to various phases in the licensure examination development process.

From a test development perspective, the key phases of a licensure program can be summarized under the following six major headings that will be used to structure the remainder of the report:

1. Competencies
2. Blueprint/Test Specifications
3. Examination Development
4. Administration Process
5. Scoring and Results Reporting
6. Examination Life Cycle

The above topic areas will be examined in detail following industry best practices. The PERFORMANCE ASSESSMENT GROUP will make recommendations for the development of a new standardized, reliable, valid, fair/defensible and practical licensure system and compare this system with the LSUC's current BAC process. Each topic area will be explored in relation to *The Standards* and other relevant industry sources.

The body of this report will outline best practice requirements of a sound licensure program. Specific excerpts from *The Standards* will appear in grey text boxes throughout the report to further emphasize the importance of the activities under discussion. When appropriate, the PERFORMANCE ASSESSMENT GROUP will provide specific details regarding recommended approaches for addressing the best practice requirements of testing while adhering to the intent of *The Standards*. The PERFORMANCE ASSESSMENT GROUP's recommendations will appear in white text boxes at the end of relevant sections of the report.

One final note should be made regarding the terminology used in this report. In considering the scope of this report, it is important to note a distinction can be made between "tests" and "assessments". A "test" commonly refers to a single discrete tool used to make inferences regarding a characteristic of individuals (e.g., achievement in relation to a narrowly defined content domain). An "assessment program" generally refers to a broader process that uses multiple sources of information to inform a final inference (e.g., the achievement of minimal competence) and a resulting decision (e.g., to confer or withhold a credential). The licensure process is appropriately considered an

“assessment program” as examination information is supplemented with other sources of candidate data including assumptions about their standardized academic preparation and other factors related to their eligibility to write the examination(s) and to practice within Ontario. This report will refer to the “licensure” or “assessment” program in the broader sense, to encompass the multiple examinations required by the LSUC as well as other supplemental licensure decision-making information. In areas of the report where the focus is on the best practices related to individual examinations, the report will refer to the “test” or the “examination”.

COMPETENCIES

Competencies form the most basic building blocks of an examination and in turn a licensure program. Any content valid assessment **MUST** be based on the results of a competency study. Competencies refer to the knowledge, skills, abilities, attitudes and judgments required to safely and effectively fulfill the requirements of a profession. One of the critical decisions at the outset of developing an assessment program is to target the level of practitioner at which the assessment is directed. For the purpose of licensure, the level is that of the entry-level practitioner.

COMPETENCY DEVELOPMENT

One of the most critical early decisions in the process of developing competencies is to identify the people who will define the competencies (Harvey, 1991). This task involves identifying subject matter experts who will bring a comprehensive and valid perspective to competency identification. Subject matter experts should be chosen who have experience in the profession that is both current and extensive enough to ensure familiarity with the core demands presented at entry-level.

Methods for collecting information on competencies range widely. Among the more common methods include consulting archival data, the use of one-on-one interviews, questionnaires, and technical conferences with subject matter experts (also called content experts). A competency development study is sometimes also referred to as a “job analysis”; however, job analysis tends to be a broader concept that may involve the collection of additional information to serve a variety of purposes (e.g., job descriptions, employee selection, placement or outplacement, performance appraisal, compensation, training, succession planning, etc.). Typically a full job analysis includes the identification of tasks and responsibilities in addition to competencies, and may focus on characteristics of organizations as well as jobs and individuals (Harvey, 1991). For the purpose of licensure, a competency development study, rather than a job analysis is required.

According to Browning et. al., (1996), there are nine (9) primary objectives in the development of a relevant competency profile:

- 1) Assessing the relevancy of the existing competencies (if available) and identifying new competencies;
- 2) Assessing the appropriateness of each competency with respect to entry-level requirements;
- 3) Determining major categories of competencies and assessing whether some competencies are better presented as subcategories of existing competencies;
- 4) Identifying the appropriate level of accomplishment desired for each competency (e.g., outcome statements).
- 5) Conducting a review of the competencies based on practice setting to ensure the competencies required of entry-level lawyers is comprehensive across all practice settings;
- 6) Determining the extent to which each competency needs to be supervised by a lawyer;
- 7) Examining how competencies relate to the primary areas of legal practice and whether or not the outcomes vary based on practice setting;

- 8) Developing a Glossary that identifies key terms/definitions that will make the competencies easier to understand;
- 9) Clarifying how program development relates to the competencies.

The importance of conducting a comprehensive competency development study for the purpose of developing a competency profile for a profession cannot be understated. Competencies form the foundation of all subsequent examination development activities and, if developed properly, significantly contribute to the standardization, reliability, validity, fairness, defensibility, and even the practicality of any licensure program.

Competencies are used to determine what must be tested and the types of assessment tools used. Once competencies are established, they are used as the basis for test specifications (Blueprints), to provide direction to test content developers so their efforts are not wasted when writing items (e.g., by writing items that are either not valid or not required), as a way of verifying that the items comprising an examination are valid and representative of practice. The test items on an examination may vary, but they are always linked to the competencies. The competencies provide consistency (enhancing reliability) and a valid, fair, and therefore defensible supporting structure to the entire assessment program. The impact of competencies will be further discussed elsewhere in this report under related activities.

The Standards are largely silent in relation to competency development and validation studies as the document focuses on the specifics of test development; however, *The Standards* presupposes that a valid definition of the content domain to be tested already exists by the time an assessment program is undertaken. The excerpts from *The Standards* below are directly relevant to both the competency development and competency validation phases of pre-assessment.

Standard 13.3

When a test is used as an indicator of achievement in an instructional domain or with respect to specified curriculum standards, evidence of the extent to which the test samples the range of knowledge and elicits the processes reflected in the target domain should be provided. Both tested and target domains should be described in sufficient detail so their relationship can be evaluated. The analyses should make explicit those aspects of the target domain that the test represents as well as those aspects that it fails to represent (p. 145).

Standard 14.8

Evidence of validity based on test content requires a thorough and explicit definition of the content domain of interest. For selection, classification, and promotion, the characterization of the domain should be based on job analysis (p. 160).

Standard 14.10

When evidence of validity based on test content is presented, the rationale for defining and describing a specific job content domain in a particular way (e.g., in terms of tasks to be performed or knowledge, skills, abilities, or other personal characteristics) should be stated clearly (p. 160).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

As suggested above, a competency profile forms the backbone of any standardized, reliable, valid, fair, defensible and practical assessment program. Clearly, a requirement in adopting the recommendations of the Task Force Review will be the development of a comprehensive competency profile for each of the two new LSUC licensure examinations.

The PERFORMANCE ASSESSMENT GROUP recommends each competency development study should involve a facilitated subject matter expert (SME) technical conference (Competency Development Committee) to review archival data (e.g., existing guidelines and standards for the profession, BAC curriculum learning objectives), identify the assumptions underlying the population to be assessed, and to develop a framework for organizing the competency profile and to generate an initial draft of the competencies. Subject matter experts should include academics; experienced practitioners representing different legal specialties, sizes of practices, and who supervise new lawyers; and some exceptional, but relatively newer members of the profession who are closer to the experience of being an entry-level practitioner, but who have had a sufficient opportunity to experience the full cycle of practicing in their new role (e.g., two years of experience). Each Competency Development Committee meeting will require approximately five days and would represent the first step in the competency development studies.

Should the LSUC decide not to move in the direction proposed by the Task Force, the PERFORMANCE ASSESSMENT GROUP strongly recommends the LSUC immediately initiate a process of ensuring there are comprehensive competency profiles for all existing examinations.

COMPETENCY VALIDATION

Once the competency statements have been developed, they will require validation by a cross section of lawyers from across Ontario. Validation ensures members agree with the purpose and scope of the competencies and permits additional refinements to be made prior to using the competencies as the basis for future examinations (or BAC curriculum content).

Typically, surveys and focus groups are used for competency validation purposes. Each method has particular strengths and limitations. Focus groups tend to provide input from a small number of individuals; however, the input obtained tends to be rich, semi-structured, and likely to illuminate oversights and to capture rationales for individual and group reactions to the competency profile. Focus groups can also provide early insights into members' perceptions of the assessment program as a whole and can illuminate concerns and misinformation at a stage when these can still be proactively and inexpensively addressed by the program sponsor.

Surveys tend to be suitable for collecting the structured input of a large number of individuals. They are most appropriately used when the goal is to obtain reactions of members to an established set of competencies that are in (or close to) their final form. Surveys also encourage the participation of many individuals and are desirable when buy-in must be obtained from a large audience. Some of the key activities in a competency validation survey typically include:

- developing the survey and rating scales (e.g., importance, frequency, criticality);
- determining a survey sampling plan;
- creating a data analysis plan;
- pilot testing the survey;
- developing survey follow-up plans;
- receiving the returned surveys;
- analyzing the survey results; and
- preparing a report for the LSUC summarizing the findings of the analysis.

The development of a validated profile(s) is an ongoing endeavour. According to Thomas and Schenuneman (1998), maintaining test validity requires that job analysis/competency profiling studies "...be repeated every few years with the interval dependent on how rapidly a job role may be changing" (p. 81).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

A competency development study is incomplete without validation. If the competencies are not valid, no claim of validity or defensibility can be made for the resulting assessment program. Given the strengths and limitations of each validation approach, the PERFORMANCE ASSESSMENT GROUP recommends a combination approach to harness the strengths and compensate for the weakness of each.

The first phase of validation would be a series of focus groups (three to five facilitated sessions of one day duration, attended by 5 – 7 content experts). Participants would receive the draft competency profile at least one week before the meeting along with a structured protocol for conducting their review and providing input. During the focus groups, the facilitator would lead discussions and collect both standardized data (based on the mailed protocols) and rich qualitative data arising from the discussions. Participants would be expressly asked for their opinions of the overall process in addition to specific recommendations for the competencies.

The second phase of the validation effort would be a membership survey. By conducting the survey after the focus group sessions, the elements comprising the content of the survey will provide a more polished representation of the final competency profile. Following the focus groups, the competencies would be refined and a survey developed to collect quantitative data regarding their criticality/importance to the practice of law at entry-level and the frequency with which they are performed. These ratings will become critical for determining how the competencies should be validly represented on the resulting examinations. A broad sample of lawyers from across Ontario would be asked to participate. A large sample would be required as the response rate for such surveys may not exceed 20%. The sample would be stratified by demographic variables determined to be important by the LSUC and the competency development committees. The survey will provide the LSUC with empirical validation of the competencies and will complement the rich qualitative results arising from the focus group process.

Following the validation survey, the competency development committee will be presented with the results and will make any final adjustments to the competency profile(s). The results of the study will go on to inform the next phase in assessment program development – the development of test specifications (Blueprints).

As the two proposed new licensure examinations will contribute to the decision to confer or withhold a license to practice law in Ontario, each planned examination should adopt the same competency validation strategy to enhance the standardization of the process.

BLUEPRINT/TEST SPECIFICATIONS

The foundation of all examination development activities starts with a *Blueprint* document. In general, the Blueprint document provides: a summary of the purpose and scope of the examination; the process by which all key decisions have been made; the content to be assessed (i.e., what is tested); the structure of the examination (the method(s) by which the content is to be tested); the context of the examination (the situations within which the content is to be tested); and how the examination will be scored. The Blueprint is essentially the "recipe" that outlines all the

ingredients for the examination and the relative proportions of each so that what is being assessed, as well as the testing experience for the candidates, are standardized as much as possible.

Blueprint documents typically serve the following purposes:

- ensuring the relevance of each examination by indicating links to the competency profile;
- maximizing the functional equivalence of alternative forms of each examination;
- providing direction for content developers when writing new items for each examination;
- facilitating evaluations of the appropriateness/effectiveness of each examination by content experts and various assessment program stakeholders; and
- aiding candidates in preparing to write the examination (when the blueprint has been made public).

According to CLEAR (1993, p. 7), the following five questions should be asked concerning a blueprint document:

1. *Has a job analysis been conducted?*
2. *Does the job analysis include specific or detailed activities required for competent performance in the occupation or profession at the entry level?*
3. *Have test specifications been developed to reflect the results of the job analysis?*
4. *Is a logical weighting of the content areas reflected in the specifications?*
5. *Does the selected test format reflect the results of the job analysis?*

A competency-based Blueprint document advances the above purposes by definitively stating what will be assessed, for what purpose, to what extent, with what assessment tools, in what contexts, to what standards, and provides documentation of the processes leading to each of these decisions.

Standard 3.1

Tests and testing programs should be developed on a sound scientific basis. Tests developers and publishers should compile and document adequate evidence bearing on test development (p. 43).

Standard 6.2

Test documents should be complete, accurate, and clearly written so that the intended reader can readily understand the content (p. 68).

A comprehensive Blueprint document contains five types of information involving purpose/process, content, structure, context and scoring of the assessment. The recommendations of the PERFORMANCE ASSESSMENT GROUP can be found at the end of the Blueprint/Test Specifications section.

PURPOSE/PROCESS

This first section of the Blueprint provides important documentation of the purpose of the assessment program and the methodology used to develop the contents of the Blueprint document. Unlike the sections that follow which consider each element in the overall assessment program separately, process information generally concerns the

assessment program as a whole or methodology that applies to all elements. Despite its global focus, process information is a key component for establishing the content validity of each assessment tool comprising the overall assessment program.

1. A clear statement of the purpose of the assessment program

The purpose of the assessment program drives everything from: the marketing of the program; the content structure and context of the assessment; the standard setting process; the method of delivery; the scoring of the results; appropriate uses of these results; and the nature of the feedback presented to candidates. Most importantly, the purpose of the assessment program drives the uses that can be legitimately made of the examination results.

The purpose of the overall assessment program must be clearly defined so all stakeholders clearly understand the meaning of the credential or decisions made. Without a clear definition of the purpose of the assessment program, the potential exists for the examination results to be misused.

For licensure/registration, the objective of the assessment program is to divide candidates into two groups (minimally competent and not minimally competent) for the purpose of making a single pass/fail distinction that is ultimately linked to the goal of public protection. It is this single distinction (pass/fail status) that will eventually be communicated to candidates. Assessment programs designed to make pass/fail decisions are not constructed to yield reliable and valid information at all points across a competence continuum from complete incompetence to mastery or “expert status”. As a result, licensure examination results are not suitable for the purpose of “rank ordering” individuals (e.g., for use in employee selection).

Standard 3.2

The purpose(s) of the test, definition of the domain, and the test specifications should be stated clearly so that judgments can be made about the appropriateness of the defined domain for the stated purpose(s) of the test and about the relation of items to the dimensions of the domain they are intended to represent (p. 43).

2. A definition of the candidate target population

The population to be assessed is generally defined by the eligibility criteria for admission to the assessment program. As mentioned in the introduction, an assessment program typically uses more than just examination results to inform inferences regarding the competence of candidates. In addition to such professional criteria as education and experience requirements, the population should also be defined in terms of geographic location, expected levels of ability, reading proficiency, numerical fluency (if applicable), language, and international professional preparation.

Reading level is a key variable as it can directly affect assessment performance for reasons that may be unrelated to the definition of minimal competence. Unless otherwise dictated by occupational analyses, required reading levels should be minimized through the use of simple grammar, vocabulary and sentence structure.

Standard 6.4

The population for whom the test is intended and the test specifications should be documented. If applicable, the item pool and scale development procedures should be described in the relevant test manuals. (p. 69).

Standard 9.8

In employment and credentialing testing, the proficiency level required in the language of the test should not exceed that appropriate to the relevant occupation or profession (p. 99).

3. The methodology employed for all key examination activities

The procedures used to establish all decisions required for examination development should be documented in sufficient detail so that reviewers of the Blueprint can assess the appropriateness of the examination development procedures. The level of detail presented should be sufficient for another testing professional to replicate all key activities in a new program or to update the existing assessment program. Process documentation is a critical component of the overall defensibility of the assessment program and specifically in supporting a content validity defence. Sometimes process documentation is found in related examination documents (e.g., technical manuals) rather than in the Blueprint document itself.

Methodology documentation does not necessarily appear as a separate section within the Blueprint document; rather, it is often integrated into each section in which a process was employed in order to arrive at a required decision.

Standard 3.3

The test specifications should be documented, along with their rationale and the process by which they were developed. The test specifications should define the content of the test, the proposed number of items, the item formats, the desired psychometric properties of the items, and the item and section arrangement. They should also specify the amount of time for testing, directions to the test takers, procedures to be used for test administration and scoring, and other relevant information (p. 43).

4. Qualifications of the content experts involved

A chain of logical content linkages supports the content validity of an assessment program. Each link in the content validity chain must be strong enough to support the other links. These links include a clearly defined purpose, validated competencies, representative sampling of the competencies and other variables for assessment, self-checking processes on item development and approval, a criterion referenced standard, standardized scoring procedures (especially for scoring involving expert judgement), and documented decision making. A critical component of any defence based on content validity is having qualified individuals (subject matter experts) involved in each assessment program activity.

Standard 1.7

When a validation rests in part on the opinions or decisions of expert judges, observers, or raters, procedures for selecting such experts and for eliciting judgments or ratings should be fully described. The qualifications, and experience, of the judges should be presented. The description of procedures should include any training and instructions provided, should indicate whether participants reached their decisions independently, and should report the level of agreement reached. If participants interacted with one another or exchanged information, the procedures through which they may have influenced one another should be set forth (p. 19).

CONTENT

Content variables involve the essential nature of what is being measured by the items comprising the examination(s). They specify the competencies (or standards or learning objectives) to be assessed and define how these competencies will be sampled and in what relative percentage ranges. The relative importance of each competency (“competency weighting”) is established through content expert input to ensure the examination(s) measures those competencies having the greatest impact on public protection and the effectiveness of lawyers. More specifically, the Blueprint document specifies the percentage of questions in each version of the examination that will be derived from each competency. Competency categories and cognitive domains may also be identified and weighted.

When content variables call for percentages of the examination to be allocated to different variables, these are typically expressed as ranges (e.g., 30 - 50%) to allow for an examination to be compiled successfully when numerous content percentage ranges must be met simultaneously.

1. The competencies to be assessed

Competency profiles may be used for a variety of purposes in addition to licensure assessments, including: curriculum development, training, job descriptions, performance appraisals, employee selection, career planning, and the design of compensation programs. The competencies specifically identified for licensure assessments may be a subset of the entire competency profile if the profile was not developed solely with licensure in mind. A group of content experts responsible for Blueprint development generally make the final decision regarding the competencies to be assessed. For licensure the competencies chosen are generally those that:

- a) have the most direct impact on public protection (i.e., those that have the greatest potential for negative consequences to the client if performed improperly);
- b) influence minimally competent practice at entry level; &
- c) can be measured reliably and validly within the practicality constraints of the examination(s) and assessment program.

The entire list of competencies relevant to the purpose of the assessment program should be included in the competency profile along with any categorization framework used for the purpose of weighting those competencies for assessment.

2. Competency Weightings

Competencies are weighted to determine the extent to which they will be represented on the examination(s). Every competency is not necessarily included on every version of the examination(s); however, competency weightings ensure the competencies that are the most important to the purpose of the assessment program are assessed more thoroughly.

Competencies typically receive their overall representativeness on the examination through a combination of weightings based on criticality/importance/frequency ratings from the competency validation process.

There are two general approaches for weighting examination competencies:

- having a committee of content experts determine the relative weight of each competency; &
- conducting a validation survey to assess each competency for importance (or criticality) and frequency.

Generally, as previously described, surveys are used to validate an overall competency profile and to determine a relative hierarchy among the competencies within the entire profile. The validation survey may be used to establish

this relative hierarchy or the survey may inform the discussions of content experts who have the final say in arriving at the competency hierarchy.

When competencies are equally allocated to different criticality/importance/frequency ratings, it is easy to weight the items to achieve an equitable balance of items per competency (i.e., the most critical/important/frequent required competencies have more items appearing on the examination(s), per competency, than those of lesser criticality/importance/frequency).

Ordinarily a four-variable classification system works well when there are close to equal numbers/percentages of competencies in each group. For illustrative purposes, consider the following four-variable classification based on ratings of criticality and frequency.

	A) More Frequently Performed	B) Less Frequently Performed
1) More Critical	1-A	1-B
2) Less Critical	2-A	2-B

In the table above, “1-A” competencies would be chosen to represent the largest percentage of examination content as these comprise the most critical and most frequently performed competencies. The next largest percentage of examination content would go to “1-B” competencies (more critical but less frequently performed), followed by “2-A” (less critical but more frequently performed) and finally “2-B” competencies (less critical and less frequently performed) would receive the lowest representation on the examination. Subject matter experts would determine the exact percentage ranges for each competency classification.

Standard 1.6

When the validation rests in part on the appropriateness of test content, the procedures followed in specifying and generating test content should be described and justified in reference to the construct the test is intended to represent. If the definition of the content sampled incorporates criteria such as importance, frequency, or criticality, these criteria should also be clearly explained and justified (p. 18).

Standard 14.14

The content domain to be covered by a credentialing test should be defined clearly and justified in terms of the importance of the content for credential-worthy performance in an occupation or profession. A rationale should be provided to support a claim that the knowledge or skills being assessed are required for credential-worthy performance in an occupation and are consistent with the purpose for which the licensing or certification program was instituted (p. 161).

Comment: In tests used for licensure, skills that may be important to success but are not directly related to the purpose of licensure (e.g., protecting the public) should not be included (p. 161)

3. Competency Categories

Competencies may also be considered for inclusion in the assessment based on the categorizing framework used to organize the competencies. This is particularly important whenever candidates are to be provided feedback on their performance organized by each competency category. For such feedback to be meaningful, the number of competencies actually measured in each competency category must be sufficiently high to provide reliable results. Competency categories containing large numbers of competencies or highly weighted competencies (i.e., several questions addressing each competency) will generally be most suitable for providing candidates with meaningful feedback. Therefore, the decisions made regarding competency weightings can affect the feedback that may be provided to candidates. Whether or not feedback will be provided to candidates based on competency categories, the categories to be assessed may be documented to assist readers in understanding the scope of what is to be measured by the assessment program.

4. Cognitive Domain Weightings

To ensure that competencies are measured in a way that taps differing levels of cognitive processing, each examination question is typically classified into a cognitive taxonomy such as the one below first proposed by Bloom (1956). The categories are arranged in increasing order of cognitive complexity, but are not independent as each higher category also requires the ability to function at all lower categories.

1. Knowledge – recall of factual material in similar form to that in which it was presented during instruction.
2. Comprehension – translation, interpretation, or extrapolation of a concept into somewhat different form than originally practiced or presented.
3. Application – solving new problems through the use of familiar principles or generalizations.
4. Analysis – breaking down a communication or problem into its component elements by using a process that requires recognition of multiple element, relationships among these elements, and/or organizational principles.
5. Synthesis – combining elements into a whole by using an original structure or solving a problem that requires combination of several principles sequentially in a novel situation.
6. Evaluation – employment of internal (self-generated) or external criteria for making critical judgments in terms of accuracy, consistency of logic, or artistic or philosophical point of view.

Several other cognitive taxonomies exist; however, Bloom's has been the most successful and widely adopted. While a useful theoretical framework, Bloom's taxonomy can be difficult to use for the purpose of developing examination content as the lines can become blurred between adjacent cognitive domains and yet test content must be able to be clearly categorized into one distinct domain. For this reason, many test developers have adopted modifications of Bloom's taxonomy resulting in the following three-category system.

Knowledge/Comprehension (KC)

The ability to recall facts, policies, procedures, standards, research findings, etc. (e.g., being able to cite ethical guidelines when asked to do so).

Application (AP)

The ability to apply knowledge/comprehension in a straightforward applied situation (e.g., recognizing the appropriate procedure to employ when faced with a routine (uncomplicated) situation).

Critical Thinking (CT)

The ability to apply knowledge/comprehension in complex applied situations. Requires analytical problem solving in addition to knowledge and application (e.g., selecting and prioritizing appropriate interventions when faced with a series of pros and cons; recognizing the relative importance of conflicting pieces of information and arriving at a conclusion requiring sound clinical judgment).

Many test item developers believe an “application” or “critical thinking” question is automatically more difficult than a straight knowledge/comprehension question; however, this is not necessarily the case. Knowledge/comprehension questions can be targeted to measure obscure facts or information that can be very difficult for candidates to recall. A further complication is that critical thinking questions are difficult to write and therefore more expensive to produce. Furthermore, all competencies can be measured at the knowledge/comprehension level, but not all competencies are amenable to critical thinking questions. Despite these caveats, all three cognitive levels are generally considered to be important to incorporate into most licensure assessments.

If competencies are to be measured at various levels of cognitive complexity, the rationale for this decision should be documented along with the process used to make this decision.

Standard 1.8

If the rationale for a test use or score interpretation depends on premises about the psychological processes or cognitive operations used by examinees, then theoretical or empirical evidence in support of those premises should be provided. When statements about the processes employed by observers or scorers are part of the argument for validity, similar information should be provided (p. 19).

Comment: If the test specification delineates the processes to be assessed, then evidence is needed that the test items do, in fact, tap the intended processes (p. 19).

STRUCTURE

Structure variables include those characteristics that determine the general design and appearance of the examination. They define the format and presentation of the examination questions, the length and duration of the examination, how often the examination is to be administered, and special functions of examination questions (e.g., anchor items for the purpose of equating different forms of the examination or determining item characteristics). As with content variables, when structure variables require percentages to be allocated, these are also expressed as ranges (e.g., 40 - 60%).

Determining the number of times an examination is to be administered each year requires a consideration of what is fair to the candidates versus the increase in costs to the LSUC. It is reasonable to speculate that providing unsuccessful candidates with more than one opportunity to write the examination each year reduces some of the pressures associated with the inability to join the workforce that accompanies an unsuccessful licensure attempt.

The tool(s) chosen for assessment (e.g., types of tests or test item formats), rather than the competencies that need to be assessed drives many assessment programs. This is almost always a mistake. Assessments of competence should be driven by the underlying determinants of competence, not by the assessment tool(s).

EXAMPLE

A couple retires and decides to see the world. They know many travelers buy camper trailers so they buy a camper trailer as a tool to facilitate the goal of world travel. The camper trailer may be a good tool to accomplish SOME of what the couple wanted (local & national travel), but will NOT accomplish the entire goal of world travel. The tool must be chosen to meet the breadth of the assessment goal(s); otherwise, goals must be modified to meet the limitations of the tool.

On the other hand, some vehicles can actually take a traveler everywhere they want to go, but not very well. If one's goal is limited to regional travel, an air-conditioned tour bus can travel the streets in a small country. En route, the traveler may learn some useful facts and see some landmark sights, but won't gain a very deep understanding of the experience of actually living in the region. Some tools can provide considerable assessment breadth (e.g., multiple-choice items), but may lack depth in measuring certain competencies (e.g., interpersonal skills). Again, the tool must be consistent with the depth of the assessment goal(s); otherwise, once again the goals must be modified to meet the limitations of the chosen tool.

In practical terms, the goals of assessment cannot be set in isolation of a consideration of the assessment tools available. Every examination is necessarily imperfect and limited by technology, time, and the resources available to the sponsor of the assessment program. Therefore, the most reasonable strategy is to consider the goals of the assessment program concurrently with the tools available and to have these two important elements influence and be influenced by each other.

When more than one assessment tool comprises the assessment program, the Blueprint document should also contain a table indicating which assessment tools will be used to measure which competencies. This table will illustrate not only the competencies assessed by the overall program, but also provide an indication of the competencies receiving coverage that overlaps across tools.

Standard 14.13

When decision makers integrate information from multiple tests or integrate test and nontest information, the role played by each test in the decision process should be clearly explicated, and the use of each test or test composite should be supported by validity evidence (p. 161).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

As suggested above, the type of assessment tools to be chosen and the characteristics of the items and response formats used are largely dependent upon the competencies to be assessed. Therefore, specific recommendations as to the direction the LSUC should take can only be determined at the completion of the competency development and validation phase of the test development cycle.

In general though, the process usually begins with determining the competencies that can be effectively assessed through the multiple-choice format, followed by an exploration of alternative item formats to determine their feasibility in terms of measurement properties, amount of testing time required, scoring requirements and costs for the remaining competency assessment. A common example includes the use of short answer questions to assess candidates' logical reasoning skills or structured interviews for the assessment of communication and interpersonal competencies that cannot be effectively assessed through multiple-choice testing.

The discussion that follows in the next section illustrates some of the options available to the LSUC.

1. Item and Response Formats

The selection of an appropriate item format for licensure assessment is critical to the success of the program. A key issue revolves around the acceptance of the assessment format by the legal and student community. It is reasonable to expect that candidates will be more likely to readily accept an item format with which they are familiar (e.g., multiple-choice or short answer) than one with which they have had limited experience.

A second important consideration is that the item format selected produces reliable and valid results from both a global perspective (overall pass/fail), and for each of the desired diagnostic feedback categories (if any).

Finally, to facilitate the administration and scoring of the examinations, it may be desirable to select an item format that can be computer-based and objectively scored through either scanning and/or computer applications.

Multiple-Choice Items

The basic multiple-choice format involves presenting one clear problem or task to candidates in the form of a question that must be answered by choosing the appropriate option from a short list provided (a "selected" response format). Multiple-choice items are well suited to most licensure examinations for several reasons. First, this item format is well known and accepted by most candidates. Second, a large number of multiple-choice items can typically be generated to address a wide range of competencies, and to address even large numbers of competencies with more than one item each. Multiple-choice items can also be developed to measure the competencies across a variety of levels of cognitive complexity (e.g., knowledge/ comprehension, application or critical thinking). Because a large number of multiple-choice items are typically used, this form of assessment tends to be highly reliable. Finally, multiple-choice items are easily and objectively computer scored and can provide fast and reliable diagnostic feedback when sufficient items are assigned to subcategories of interest.

Disadvantages of multiple-choice items for licensure include the fact that they assess recognition of information rather than recall. In addition, while multiple-choice items can be written to address any competency, they may not always provide good measures of some competencies of importance to the legal profession (e.g., those involving interpersonal skills, writing skills, or oral communication). Finally, multiple-choice items only permit a single correct response. There may be many competencies for lawyers requiring more complex responses than can be assessed with even well constructed multiple-choice items.

Multiple-choice items can vary in the number of options provided (typically three to five) and the general presentation of the "stem" (the question posed to candidates). In the interests of standardization and fairness to

candidates, a single format should be chosen for all multiple-choice items. In this way candidates' performance is not confounded with test item format. For example, the PERFORMANCE ASSESSMENT GROUP has noted that on examinations where the number of multiple-choice options vary from three to five, candidates will occasionally select non-existent options on their computer scored response forms. This occurs because candidates fall into a "response set" in which they become used to associating the last option on the response sheet with the last option for the question. The result is that candidates may select option "5" when only four (4) options are presented in the item.

Open-Ended, Machine-Scorable Items

Open-ended items require candidates to generate their own responses (form "constructed" responses). Open-ended items typically require greater cognitive processing compared to simply recognizing correct responses. These types of items are excellent for posing mathematical questions where the correct response can be entered on a numerical grid to indicate numerical responses that can be computer scored. Unfortunately, the capability of computer scoring even short narrative responses is limited at this time.

Performance-Based Items

Performance-based items are sometimes referred to as non-objective tests, authentic assessments, constructed response items or performance assessments. Included in this form of assessment would be short-answer "Key Features" questions, narrative responses (essays or full writing assessments), portfolios, interviews and simulated or observed performances. The primary challenge for performance-based items is developing the scoring protocol for raters as opposed to developing the items themselves. Whereas objective items are developed around clearly definable scoring decisions, performance-based items are typically created to elicit complex human behaviours, often requiring more than one correct response imbedded within multiple competencies. As a result, these behaviours require judgments by human scorers or evaluators. This fact requires that test developers invest considerable time in the design of both the stimuli (i.e., prompts, tasks or items) and the scoring "rubrics" or protocols (i.e., the rules and guidelines for scoring) for those stimuli. It is imperative that these rubrics be validated along with the questions. Furthermore, the greatest expense for performance-based items tends to involve the scoring process. Potential scorers (subject matter experts) must be recruited, trained, and evaluated in terms of their ability to follow the scoring protocols. These expenses need to be balanced against the added assessment value obtained with this important form of assessment methodology.

PERFORMANCE ASSESSMENT GROUP ANALYSIS

Regardless of the item formats eventually selected by the LSUC, the PERFORMANCE ASSESSMENT GROUP strongly suggests an emphasis on ensuring a high degree of standardization. Multiple-choice and short answer items should use a consistent format and should be professionally developed to avoid susceptibility to "testwiseness" strategies (approaches allowing candidates to determine the correct response without having mastered the competencies being tested). Item formats that must be scored using the judgement of subject matter experts should be designed in such a way to allow judges to bring that judgement to bear in an efficient manner and to minimize subjectivity. Scoring protocols must be detailed, readily interpretable and reflect the consensus of groups of subject matter experts. Above all, the item formats chosen must be appropriate for the competencies to be assessed.

2. Item Presentation

Written examination questions can be presented as INDEPENDENT items (the text provided is used to answer one question) or as CASES that are typically associated with five or six questions that are answered based on the same case information. Cases are typically much more difficult to develop properly than independent items and it generally takes candidates longer to answer six case-based questions than six independent questions. This can have implications for time limits for the examination(s). On the other hand, because a single case text will apply to several questions, cases present the opportunity of incorporating a larger amount of situational information, which can become particularly useful when it is important to assess Critical Thinking skills.

3. Examination Length, Duration, Breaks, and Aids

Decisions about the length of the examination should include a consideration of the number of competencies, the total amount of time candidates should be writing, the number of examination books, the break time candidates should have between books, time provided to review/check responses, and any aids permitted. Examination aids may include a decision about allowing Francophone candidates to have copies of both the French and English (written) examination(s) for comparison during the administration. This decision may be made as a courtesy to the Francophone candidates; however, it must be balanced against the knowledge that having both forms of the examination may require additional reading time for the Francophone candidates for which they cannot be given additional administration time (to maintain standardization between Francophone and Anglophone candidates).

4. Percentage of new content to appear on new versions of the assessment

When new versions of the examination are planned (e.g., to be administered in subsequent years) there is usually a need to have these versions vary somewhat from the original examination so candidates do not come to remember the assessment content. When candidates become familiar with examination content, their resulting scores may be contaminated by this knowledge and the examination ceases to be a pure assessment of competence/performance. In order to ensure consistency across various forms of the examination, a core percentage of questions is typically selected to remain constant from one version to the next (questions with superior item characteristics). Additional questions are added that did not appear as “operational” (i.e., used to make decisions regarding competence) on the last administration of the examination (either newly “experimentally tested” questions or test questions from older, but valid, versions of the examination).

While there are no clear standards as to how much new content is required for each administration, licensure examinations in Canada typically incorporate between 25% and 50% new content on each “new” version of the examination. According to Thomas and Schenuneman (1998), test developers should “introduce new items into the examination as frequently as possible to keep items from becoming overexposed” (p. 81) and to “replace items (or the entire test) as rapidly as possible if a copy of the test is lost and a security breach is suspected” (p. 82).

Five important criteria influence the extent to which new content needs to be introduced.

- 1) the number of candidates writing the examination;
- 2) the number of administrations per year;
- 3) the extent to which the legal profession changes;
- 4) the failure rates and rewriting policies; and
- 5) the number of items that can be experimentally tested before becoming “operational”.

As the number of candidates writing the examination increases, the security risks to the content of the examination also increase. Therefore, there is a need to introduce new content to ensure candidates are competent to practice as opposed to relying on previously identified questions.

5. Experimental questions

Closely tied to decisions of the percentage of “new” content on subsequent versions of the assessment tool is the issue of experimental questions. These are test questions that are included on versions of the examination for the purpose of gathering statistical information, but are NOT used in calculating candidates’ scores. The number, or percentage range, of experimental questions is another Blueprint variable to be specified. The exact number to be selected will depend on several factors, including: threats to examination security, administration time limits, resources available to develop experimental content each year, and the number of forms of the examination.

6. Forms of the examination

The number of forms of each examination must also be considered. Most assessment programs specify a minimum of two forms of the examination (English and French). Larger assessment programs may specify multiple English forms of the examination that differ only in the experimental items included. When multiple forms of the examination are used, it becomes possible to assess many more experimental items each year for inclusion on subsequent versions of the examination.

Standard 3.3

The test specifications should be documented, along with their rationale and the process by which they were developed. The test specifications should define the content of the test, the proposed number of items, the item formats, the desired psychometric properties of the items, and the item and section arrangement. They should also specify the amount of time for testing, directions to the test takers, procedures to be used for test administration and scoring, and other relevant information (p. 43).

Standard 3.6

The type of items, the response formats, scoring procedures, and test administration procedures should be selected based on the purposes of the test, the domain to be measured, and the intended test takers. To the extent possible, test content should be chosen to ensure that intended inferences from test scores are equally valid for members of different groups of test takers. The test review process should include empirical analyses and, when appropriate, the use of expert judges to review items and response formats. The qualifications, relevant experiences, and demographic characteristics of expert judges should also be documented (p. 44).

Standard 3.18

For tests that have time limits, test development research should examine the degree to which scores include a speed component and evaluate the appropriateness of that component, given the domain the test is designed to measure (p. 46).

CONTEXT

Context variables qualify the content domain by specifying variables related to the legal contexts in which the assessment questions will be set (e.g., types of clients, client culture, client legal requirements and the occupational environment of the lawyer). As with content and structure variables, when contextual variables call for percentages of the examination questions, these are expressed as ranges (e.g., 10 - 30%). The following contextual variables are a sample of what might be considered for inclusion in licensure examinations for lawyers. Please note that the specific context variables of interest to be chosen for a new LSUC licensure process might include any or none of these variables, as they are presented for illustrative purposes only.

1. Client type

Clients may be defined as including: individuals, families, groups, populations, communities, organizations, etc. If statistical data are available, these should be used to determine the specifications for types of clients. Otherwise, the informed opinions of a group of subject matter experts (representing all applicable jurisdictions and types of practice) should be used to set these percentage ranges in good faith.

2. Client age and gender

The use of client age and gender ensures that the individual clients described in the examination(s) represent the demographic characteristics of the population encountered in practice. Again, any available statistics that might address this breakdown should be consulted in allocating percentage ranges. In the absence of valid documentation, expert consensus may be used in good faith.

3. Occupational environment

Characteristics of the occupational environment can be specifically outlined and formally weighted on the examination(s) or a statement can be made to indicate that the characteristics of the occupation (e.g., sole practitioner environment), as stated in the assumptions section of the competency profile, are only specified on the examination(s) when such information is required in order to provide guidance to candidates.

4. Client culture

While an examination probably would not test candidates' knowledge of specific values, beliefs and practices linked to individual cultures, many examinations for licensure measure awareness, sensitivity, and respect for cultural values, beliefs, and practices. The Blueprint document can either specify cultural issues (i.e., with percentage ranges) or a statement can be made to the effect that "cultural issues are integrated within the examination without introducing cultural stereotypes". Please note that the latter statement can only be made if there is evidence to support this claim.

SCORING

As part of the Blueprint document, it is essential that a description of the methods used for scoring items and for deriving reported scores be clearly documented. When test questions are differentially weighted, the rationale for the chosen weightings should be documented. Finally, the mechanisms for obtaining raw scores, scaled scores and diagnostic scores should also be documented along with the method used to determine the passing score. Typically, the scoring of multiple-choice and short answer (Key Features) items is straightforward; however, interviews, written assessments, and simulations may require more complex scoring protocols.

Standard 3.13

When a test score is derived from the differential weighting of items, the test developer should document the rationale and process used to develop, review, and assign weights. When the item weights are obtained based on empirical data, the sample used for obtaining item weights should be sufficiently large and representative of the population for which the test is intended. When the item weights are obtained based on expert judgment, the qualifications of the judges should be documented (p. 46).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

A comprehensive blueprint document is the most essential component of any licensure program. A structured Blueprint document provides a detailed, step-by-step, account of why the examination(s) should be deemed a standardized, reliable, valid, fair, and defensible component of a licensure assessment program. As is evidenced in this section, a tremendous amount of resources and expertise are required to develop a licensure examination that meets current testing standards. Even more effort is required to accurately and succinctly record these steps in a comprehensive Blueprint document. Even one neglected step can undermine an entire licensure program.

The PERFORMANCE ASSESSMENT GROUP recommends the establishment of a Blueprint Development Committee for each of the two proposed LSUC licensure examinations. These committees should comprise subject matter experts with intimate knowledge of the area of law to be addressed by the examination(s) in question and should include academic, practitioner (different types and sizes) and bilingual representation. Each group will need to meet with a test development expert for five days to define each Blueprint document.

In the event that the Task Force recommendations are not adopted, the LSUC should ensure that comprehensive Blueprint documents are in place for each existing BAC examination.

EXAMINATION DEVELOPMENT

Based on the previous section, the Blueprint document should clearly identify the types of assessment tools (e.g., written examinations) and examination item formats to be developed. This decisions must be made by subject matter experts based on an analysis of the competencies and the feasibility of different formats in terms of such factors as the number and experience of the candidates to be tested, measurement properties of the item formats, amount of testing time required, scoring requirements and costs.

QUESTION DEVELOPMENT

Question development must be based on the previously defined and validated competency profile using the parameters specified in the Blueprint document. In this way, examination content developers are directed to write only those questions that will measure the previously established and validated competencies and other parameters to be assessed. The experience of the PERFORMANCE ASSESSMENT GROUP has been that when content developers are not provided with structure regarding what items must be produced, their default behaviour is to write questions that address issues of personal importance to themselves, that reflect their own areas of strengths and that are consequently easy for them to write. While it is desirable for subject matter experts to write about what they know well, this situation inevitably leads to developing questions that are not needed for the examination or the item bank (too many questions of a certain type, addressing too few competencies, addressing only one type of client or legal requirement or only the knowledge/comprehension cognitive domain, etc.). The result is an unbalanced bank of questions that does not further the goal of being able to develop an examination that meets all the Blueprint parameters. In fact, even when content developers are provided with specific direction based on the Blueprint, it can be quite challenging to ensure these directions are followed to the letter and individual biases do not enter inadvertently.

There are numerous published criteria for developing rigorous examination questions depending on the format chosen during Blueprint development. For example, according to Thomas and Schenuneman (1998, p. 54), multiple-choice examination items should be reviewed in relation to five criteria. In the opinion of the PERFORMANCE ASSESSMENT GROUP, these recommendations are neither exhaustive or exclusive to multiple-choice items and are provided as an overview of some of the core considerations in developing multiple-choice questions:

- *Do items measure content and cognitive skills that are specified in the blueprint?*

- *Is the material up to date?*
- *Is the stem clear and the question focused? (Modifications may be suggested by the reviewer)*
- *Is the key correct and will it be correct under different conditions of practice?*
- *Are the distractors plausible and contain no cues indicating the correct answer or permitting elimination of some options?*

Regardless of the item format selected, there should be an increase in the number of questions incorporated in each version of the examination to ensure acceptable levels of reliability and validity. Furthermore, for reasons of security, content currency, and examination enhancement, it is imperative that new content be continually developed for future versions of each examination.

PERFORMANCE ASSESSMENT GROUP ANALYSIS

The PERFORMANCE ASSESSMENT GROUP strongly recommends a group development and review approach. Specifically, bringing together groups of 5 to 7 subject matter experts for 3 to 5-day meetings facilitated by a measurement expert. Prior to each meeting, item developers should be provided with a comprehensive training package on how to develop effective questions, based on the test item format selected. During the meeting, the participants should receive professional training from a measurement expert on all facets of question development. This training should be followed by individual or small group question development and a facilitated group review of the developed questions. During the review process, characteristics of effective items should be continuously reinforced. Relevant textbooks and articles should be made available for participants to consult during the development and review process. This process is then repeated throughout the course of the 3 or 5-day session.

A 5-day content development session will typically produce between 40 to 75 multiple-choice or short answer questions including the scoring protocol. The exact number will depend on several factors including the examination content development experience of the participants, the cognitive level at which the items are addressed, and the number of participants. A smaller number of narrative, interview or performance based items will be developed with scoring protocols in the same timeframe depending on the complexity of the performance to be assessed.

QUESTION VALIDATION

Just as it is important to validate the competency profile, question validation is an essential part of building a defensible licensure program based on a content validation strategy. Part of the question validation process begins with rigorous question development procedures involving subject matter experts in a facilitated group review process. This group is in the best position to determine links between the questions and individual competencies, the cognitive domains being targeted, the rationale for correct and incorrect responses and the references substantiating the correct responses.

A second validation phase typically involves external subject matter experts who are asked to respond to the newly developed questions as if they were a test and who provide detailed feedback on their personal experience with the new test questions.

According to Downing and Haladyna (1997), the answers to the following questions form the basis for gathering evidence for question validity:

1. *How is the item content systematically related to the test specifications? Is there documentation relating item content to the test specifications?*
2. *Is there evidence of consistent classification of the item by content domain and by cognitive behaviour?*

3. *Are item writers qualified based on their content expertise?*
4. *How well have items writers been trained to the task of item writing?*
5. *Have items been edited according to written editorial guidelines?*
6. *Are item editors qualified for this task? What is the experience of the editors with respect to test item editing?*
7. *Has the scoring key been validated by a consensus of experts in the field using all empirical data available?*
8. *Have the test items been subjected to a review of their adherence to well-established item-writing principles? Has item relevance to the field been reviewed and documented?*

PERFORMANCE ASSESSMENT GROUP ANALYSIS

Following a comprehensive editorial review, the items should be sent to approximately 10-15 practicing lawyers and educators from across Ontario representing all areas of practice. The primary responsibility of these “item appraisers” would be to ensure the appropriateness of each question for the entry-level lawyer, to approve the identified correct response, and to provide recommendations for improving the questions where necessary. In order to ensure a consistent and valid approach to the appraisal process across all reviewers, an appraisal training package should be developed that will train the reviewers on terminology, item construction, and item appraisal. Recommendations made by the item appraisers should be entered into the item bank for review and consideration by an oversight committee charged with the final approval of the examination (often referred to as the Examination Review Committee).

To protect the security of the questions all reviewers should be required to sign a waiver agreeing to secure the materials at all times and to not discuss the content of the questions to any party other than the LSUC or its test developer.

TEST FAIRNESS ASSESSMENT

Absolute fairness to every examinee is impossible to attain, if for no other reasons than the facts that tests have imperfect reliability and that validity in any particular context is a matter of degree. But neither is any alternative selection or evaluation mechanism perfectly fair. Properly designed and used, tests can and do further societal goals of fairness and equality of opportunity (The Standards, p. 73).

The focus of *The Standards* in relation to fairness “is on those aspects of tests, testing, and test use that are the customary responsibilities of those who make, use, and interpret tests, and that are characterized by some measure of professional and technical consensus” (AERA et. al., 1999, p. 73)

According to *The Standards*, there are four principal ways of defining fairness (p. 74).

- Lack of bias: no construct-irrelevant components that result in a question functioning differentially for subgroups of test takers;
- Equitable treatment in the testing process: providing all test takers with similar opportunities to perform and just treatment throughout the testing process;
- Equality of outcomes in testing: meaning overall passing rates for subgroups would be equal; however, this outcome is not supported in the testing literature; &

- Opportunity to learn: applies to educational achievement tests when the tester is responsible for setting the curriculum to be tested and must assure that the content tested is included in the content being taught. Thus the test taker must have had the opportunity to learn what is to be tested.

As a result, coupled with the external review, there may be the requirement to conduct statistical analyses with different subgroups of test takers (sample sizes permitting) to ensure fair and defensible licensure examinations.

Standard 7.4

Test developers should strive to identify and eliminate language, symbols, words, phrases, and content that are generally regarded as offensive by members of racial, ethnic, gender, or other groups, except when judged to be necessary for adequate representation of the domain (p. 82).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

In addition to question validation efforts, the PERFORMANCE ASSESSMENT GROUP recommends that all LSUC examination questions undergo a test fairness/sensitivity review by 3-5 individuals representing various minority interests. The purpose of this review is to ensure the items do not include negative stereotypes and do not disadvantage candidates from a particular group or background. As with the question validation participants, orientation materials should be developed that clearly defines participants' roles and responsibilities and provides a systematic introduction to the review task. All comments received from the test fairness participants should be entered into the item bank for review and consideration by the group of content experts ultimately responsible for approving the content appearing on the final version of the examination (often referred to as the "Examination Review Committee").

PILOT TESTING

All new examination content should be experimentally tested before it is used to make licensure decisions. Items are experimentally tested by their inclusion on various forms of an examination. While experimental items do not contribute to a candidate's score, they are statistically analyzed and modified where necessary. The greater the number of forms of an examination, the more items that can be experimentally tested prior to becoming operational.

Both new questions and substantially modified questions should be pilot tested prior to "operational" use on an examination. The pilot study sample should be as similar as possible to the population for whom the questions are intended. Modified questions include those that have been altered to offer a reasonable accommodation to candidates with special needs (e.g., large print or Braille, translated items, administration by a "reader", etc) or changes that reflect a shift in assessment technologies (e.g., moving from a paper and pencil examination to one that is computer administered).

Standard 3.7

The procedures used to develop, review, and try out items, and to select items from the item pool should be documented. If the items were classified into different categories or subtests according to the test specifications, the procedures used for the classification and the appropriateness and accuracy of the classification should be documented (p. 44).

Standard 3.8

When item tryouts of field tests are conducted, the procedures used to select the sample(s) of test takers for item tryouts and the resulting characteristics of the sample(s) should be documented. When appropriate, the sample(s) should be as representative as possible of the population(s) for which the test is intended (p. 44).

Standard 10.3

Where feasible, test that have been modified for use with individuals with disabilities should be pilot tested on individuals who have similar disabilities to investigate the appropriateness and feasibility of the modifications (p. 106).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

Following the question validation process, new questions should be pilot-tested with a cross sample of entry-level lawyers to obtain both qualitative and quantitative feedback. The number of pilot test participants required will depend on the test and item formats chosen, the representativeness of the pilot test sample and variability of performance in the sample. In order to obtain meaningful results, a stratified random sample is recommended, representing, for example, all regions of Ontario, all working environments for direct practitioners, and key areas of specialization.

Once the program has been established, questions can be experimentally tested within the operational examination as described above. Even with the current BAC examination system, new questions could be experimentally tested provided candidates are informed that some questions are experimental, that administration timeframes are adjusted to accommodate the additional questions and that measures are taken to protect the security of the new experimental questions.

EXAMINATION APPROVAL

After the examination has been compiled and reviewed against the Blueprint parameters, the final step in the review process involves examination approval by an oversight committee sometimes referred to as the “Examination Review Committee”. Included in the examination approval process is a question-by-question review of the examination and the recommendations obtained from the question validation process (e.g., item appraisal, and test fairness review comments, and any editorial review.). It is the responsibility of the Examination Review Committee to:

- assess the comments made by the item reviewers and make changes to the items where necessary;
- establish the content validity of the questions (e.g., reflects the competencies);
- ensure the examination meets the Blueprint parameters;

- verify the situations presented in the examination reflect current practice;
- confirm the situations presented in the examination reflect the changing role of lawyers; and
- determine the order of the questions appearing on the examination.

In addition, the Examination Review Committee typically approves all the questions that will appear on the examination experimentally and may make recommendations regarding the types of information that will be provided to candidates and other aspects of the licensure program. In many cases the members of the Blueprint Development Committee subsequently become the members of Examination Review Committee.

Standard 3.11

Test developers should document the extent to which the content domain of a test represents the defined domain and test specifications (p. 45).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

It is recommended that there be two Examination Review Committees (one for each new licensure examination) and that each Examination Review Committee be composed of 6 to 8 lawyers from across Ontario representing academics as well as all areas of practice and both official languages. As with the competency development group, the Blueprint development group and the content developers (item writers), the subject matter experts chosen must have experience in the profession that is both current and extensive enough to ensure familiarity with the core demands presented at entry-level. The Examination Review Committee normally meets for five days in a session facilitated by a measurement expert to consider and approve each operational and experimental question and to set the pass mark (see next section).

STANDARD SETTING AND PASS MARKS

A premise of content-valid licensure examinations is that the examinations must measure an explicitly specified content domain (i.e., the competencies required for the safe and effective practice of lawyers). The procedure used to set the standard for licensure must be one that provides an indication of whether or not candidates have achieved a sufficient level of mastery of this content domain to be considered minimally competent to practice.

An important distinction must be drawn between the *standard* for a credential and the *pass mark* (or *cut score*) that must be attained on an examination. The *standard* refers to the underlying level of ability required by candidates in order to be judged minimally competent. As such, the standard is thought to be a stable concept that changes only with major changes in the profession affecting the entry-level practitioner. The standard is therefore a concept that is relevant to the assessment program and speaks to such issues as eligibility requirements as well as test scores. The *pass mark* reflects the numerical score (raw score or percentage correct) that candidates must achieve on a particular form of a test in order to pass. As a result, the pass mark is a concept that is relevant at the level of examinations. This distinction will become important as we discuss options for setting the standard and pass mark.

In general, two broad categories of standard setting procedures exist: *normative* and *absolute*. The normative approach to standard setting makes pass/fail decisions by evaluating the relative performance of candidates (e.g., by specifying that the top 90 percent of the candidates will pass). Drawbacks of the normative approach include the following:

1. they guarantee that some examinees will pass or fail regardless of their level of demonstrated ability. When a cohort of candidates is particularly strong, some will have to fail. Even more disconcerting from a licensure perspective is that when a cohort of candidates is weak, many of them will pass and practice in Ontario;
2. they are considered by the public and candidates as a means for controlling the economics of the workforce by predetermining how many will enter based on such factors as the availability of work or otherwise protecting the interests of those who are already credentialed; and
3. they cannot accommodate improved ability levels of the candidate population over time; therefore, the meaning of a credential may depend on when the examination was passed.

Using a normative approach, the *standard* changes from year to year because it is based on the characteristics of the sample of candidates. Therefore, the standard finds its meaning in the relative abilities of a particular group of test takers. Furthermore the effective *pass mark* changes from year to year because it is based on allowing a pre-determined number of candidates to pass and fail. Even if the same examination is administered and scored each year, the point that separates the percentage of candidates who will be allowed to pass will move. This changing pass mark has less to do with the absolute ability of the candidates than with their relative ability within a particular cohort. A truly minimally competent candidate in a strong cohort year would be wise to wait for a weaker cohort year before challenging their licensure examination. For all the reasons previously stated, the normative approach has consistently been cited as inappropriate for licensure examinations.

Absolute standard setting methods establish the standard a priori, typically through consultation with subject matter experts. Absolute standard setting methods can either be based on *policy directives* or *criterion-referenced*. Policy directive standards (e.g., establishing a pass mark of 70% for all examinations) can be unfair to candidates because they do not consider: a) the difficulty level of the program, course or a specific test; b) the ability level of the candidate population; or c) the level of performance actually required for acceptable performance in a practice setting. A policy directive standard may be appropriate for an education program because a single decision (pass/fail) is not the main focus of such programs. Rather, students are arranged on a continuum of performance from the most to the least competent. This is not the goal of a credentialing examination. Such examinations are designed to be most accurate at the decision point (pass/fail).

In the case of policy directive standard setting methods, the *standard* for the credential can be seen to change from year to year based on the content of the examination (when examination content is difficult the standard may be high; when it is easy the standard is lowered). What does not change is the *pass mark*, which is set at a fixed rate every year. A pass mark of 70% may be easy to attain one year and difficult the next. Once again, the meaning of the credential may depend more on when the examination is written than on the competence of the candidates. For these reasons policy directive standards (and pass marks) are not appropriate for licensure and tend not to be used by professional licensure/certification examination developers.

The second type of absolute standard is referred to as a criterion-referenced standard. Criterion-referenced standards are directly linked to acceptable professional practice and are based on an evaluation of the content of a specific examination as determined by subject matter experts. In addition to the expert ratings, a variety of relevant data may be carefully considered to ensure the pass mark examinees will be required to achieve is valid and fair. This can include information on the preparation of new graduates, data on the performance of examinees on previously administered examinations, and pertinent psychometric findings. Based on all of this information, a point is set on a measurement scale that represents the minimum acceptable standard.

In the case of a criterion-referenced method, the *standard* is based on the requirement to practice safely at entry-level and does not change from year to year. Changes in the standard are only brought about by changes in the profession affecting the entry-level practitioner. The *pass mark*, however, invariably changes from year to year because it is based on the specific content of that year's examination. When examination content is relatively difficult a lower pass mark will ensure the underlying standard for the credential has been attained. When examination content is relatively easy, a higher pass mark will be required in order to demonstrate the same level of underlying ability required for the credential. In this way the meaning of the credential remains the same from year to year, but the pass mark changes directly with examination content.

The criterion-referenced standard is heavily dependent on the expertise of these content experts whose job is to identify not only a *pass mark* (cut score) for the examination, but also a *standard* for the credential itself. Criterion referencing is widely acknowledged to be the most appropriate and most fair method of setting standards for credentialing examinations (Browning et. al., 1996).

Setting a pass mark for an examination involves setting a standard of performance that will be used to make decisions about an individual's level of competence and thus their eligibility to practice law in Ontario. Pass marks are based on the judgment of informed subject matter experts. They are determined through a rational discussion of the field of practice as well as an awareness of the consequences involved when high stakes decisions are made.

The determination of a pass mark may appear, on the surface, to be a technical matter; however, at its core, a pass mark represents an informed judgment of acceptable and unacceptable performance. This assertion is succinctly discussed in *The Standards*:

In... a professional licensure examination, the cut score represents an informed judgment that those scoring below it are likely to make serious errors for want of the knowledge or skills tested. Little evidence apart from errors made on the test itself may document the need to deny the right to practice the profession. No test is perfect, of course, and regardless of the cut score chosen, some examinees with inadequate skills are likely to pass and some with adequate skills are likely to fail. The relative probabilities of such false positive and false negative errors will vary depending on the cut score chosen. A given probability of exposing the public to potential harm by issuing a license to an incompetent individual (false positive) must be weighted against some corresponding probability of denying a license to, and therefore disenfranchising, a qualified examinee (false negative). Changing the cut score to reduce either probability will increase the other, although both kinds of errors can be minimized through sound test design that anticipates the role of the cut score in test use and interpretation. Determining cut scores in such situations cannot be a purely technical matter, although empirical studies and statistical models can be of great value in informing the process (pp. 53 – 54).

The Standards go on to state:

Cut scores embody value judgments as well as technical and empirical considerations. Where the results of the standard-setting process have highly significant consequences, and especially where large numbers of examinees are involved, those responsible for establishing cut scores should be concerned that the process by which cut scores are determined be clearly documented and defensible. The qualifications of any judges involved in standard setting and the process by which they are selected are part of that documentation. Care must be taken to assure that judges understand what they are to do. The process must be such that well-qualified judges can apply their knowledge and experience to reach meaningful and relevant judgments that accurately reflect their understandings and intentions. A sufficiently large and representative group of judges should be involved to provide reasonable assurance that results would not vary greatly if the process were replicated (p. 54).

Finally, according to Thomas and Schenuneman (1998, p. 69), evidence for the validity of the standard dictates that the following information should be included in the documentation for the standard setting study:

- *The purpose of the standard setting study*
- *Foundation of the assessment (job analysis, content validity evidence)*
- *Clear definitions of key constructs (e.g., minimal competence, proficient/qualified, borderline)*
- *Documentation of how the participants in the standard setting procedure were selected and trained*
- *The qualifications of the participants in the standard setting study*
- *Description of the training of the judges and the procedures used to conduct the standard-setting study*
- *Evidence that the participants in the standard setting study understood the method and applied it correctly*
- *Documentation of adjustments made to participants, judgments, recommended cut scores*
- *Documentation of individual responses, group responses, and measurement error*
- *Evidence from external sources that the standard is reasonable and appropriate*

PERFORMANCE ASSESSMENT GROUP ANALYSIS

While several approaches to setting absolute standards exist in the testing community, the PERFORMANCE ASSESSMENT GROUP recommends the use of the Angoff method. The Angoff method has been recognized as defensible by the U.S. Supreme Court (Biddle, 1993), has been studied extensively by researchers, and is being used extensively by practitioners in setting the pass marks on licensure and certification examinations. In upholding the use of the Angoff method, the U.S. The Supreme Court noted:

...it (the Angoff method) identifies normal expectations of acceptable proficiency within the workforce” (Biddle, 1993).

The Angoff method requires expert judges to discuss the issues involved in determining a pass mark and to evaluate the examination by using a well-defined and rational procedure. The Angoff method is based on the concept of the borderline or minimally competent candidate. The minimally competent candidate can be conceptualized as the candidate possessing the minimum level of knowledge and skills necessary to perform at a licensure level. This candidate performs at a level “on the borderline” between acceptable and unacceptable performance. It is essential that each judge arrive at a clear and specific definition of the minimally competent candidate.

The Angoff method requires the judges to independently rate each item in the examination in terms of the minimally competent candidate. For each item, each judge answers the question: “In your opinion, what percentage of minimally competent candidates will answer this item correctly?” Alternately phrased, “Given 100 minimally competent candidates, how many will answer this item correctly?” The judge then indicates the appropriate percentage on the rating form and proceeds with the next item.

Once all the judges have rated each question on the examination, the ratings are collated and tabulated. The ratings for every question should fall within a pre-specified range of agreement. If the range of the ratings is greater than the pre-specified range, the judges providing the extreme ratings are asked to explain their rating rationales. Other judges are also encouraged to explain why they rated the item as they did. Once the discussion has ended, all the judges re-rate the question and the average rating is calculated for each item and then for the total examination. This results in a percentage value that is the percentage score expected to be achieved by the borderline candidate.

A number of factors contribute to the successful implementation of the Angoff method. An effective training session is essential in orienting the judges to the concept of the minimally competent candidate. In addition, discussion and modification of extreme ratings help ensure that a defensible and valid cut off score is established.

For candidates wishing to appeal their failing status, the PERFORMANCE ASSESSMENT GROUP recommends a process whereby, for a fee, the candidate’s examination is rescored. Multiple-choice items would be hand scored by the LSUC or its testing agency. Short answer questions would be rescored by one or more trained LSUC assessors who had not previously been assigned to score the candidate’s examination. To protect the

security of the examination, the candidate would not be permitted to observe the rescoring process. The importance of ensuring the security of examination content during the appeal process cannot be overstated and measures to protect examination security are a common industry practice. The primary reasons for this are two-fold. First, permitting candidates to see the examination would require 100% new content on each new version of the examination. This would result in significant costs to the LSUC. Second, and of greater importance, over time the ability of item writers to develop new and effective test questions will be severely limited.

LANGUAGE/TRANSLATION

Test development requirements of standardization, reliability, validity, fairness, defensibility and practicality apply to all components of a licensure program. Nowhere is this more important than in the development of versions of examinations in both official languages.

Two types of processes can be taken to produce English and French forms of an examination. The first involves parallel development, the second translation. In parallel development, all examination development activities are carried out in both English and French. Parallel examination development typically begins after Blueprint development. A single set of competencies are developed for the profession and validated and a single Blueprint document is developed that outlines a single set of test specifications. From that point forward, all activities are conducted in parallel. French and English question developers work separately to develop items addressing the blueprint. There are French and English question validation sessions as well as French and English Examination Review Committees. The result is two separate examinations that address the same competencies and other Blueprint parameters meeting the same relative percentage weightings, but with different test items.

Advantages of parallel test development include the assurance that every candidate will write an examination that was developed in their official language of choice (fairness as well as the perception of fairness or *face validity*) and a strong defence against charges of discrimination based on official language. Disadvantages of parallel tests include threats to practicality given the considerable expense involved in parallel development, which must often be passed on to candidates (perhaps resulting in perceptions of unfairness by some), compromises in standardization, and the perception that standards are not equal and reflect poorly on the credential. Finally, even with such a rigorous and expensive process, it may still be necessary to include translated content on the examination in order to ensure a core of identical questions on both the English and French versions for the purpose of equating the pass marks.

Translated examination development generally involves having the major development activities carried out in English with translation occurring once the English version of an examination has been approved and the pass mark set. Advantages of translated examinations include practicality due to financial and time savings, standardization of the experience of Anglophone and Francophone candidates, and eliminating the need to equate the results of two forms of the examination administered in the same year. Disadvantages of translation include the perception of some candidates that any translation is inevitably a compromise, and the resulting increased likelihood of a challenge based on those perceptions.

Nowhere in the above discussion was the term validity used. To-date, the PERFORMANCE ASSESSMENT GROUP is aware of no persuasive evidence to conclude that inferences of competence based on the results of a professionally translated and validated examination are more or less valid than those arising from a fully parallel examination development process.

Standard 9.1

Testing practice should be designed to reduce threats to the reliability and validity of test score inferences that may arise from language differences (p. 97).

Standard 9.7

When a test is translated from one language to another, the methods used in establishing the adequacy of the translation should be described, and empirical and logical evidence should be provided for score reliability and the validity of the translated test's score inferences for the uses intended in the linguistic groups to be tested (p. 99).

Standard 9.9

When multiple language versions of a test are intended to be comparable, test developers should report evidence of test comparability (p. 99).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

The PERFORMANCE ASSESSMENT GROUP proposes a well documented English to French translation process. As part of this process, each Examination Review Committee should include in its terms of reference the requirement for at least one bilingual Francophone member to ensure Francophone perspectives are addressed when questions are reviewed and revised. Similarly, other committees used to develop or validate examination content or the competencies upon which the examinations are based should include bilingual subject matter experts.

Upon finalization of the English version of each LSUC examination (examination approval), they should be sent to a professional accredited translator for translation. The translator chosen should be one who is intimately familiar with legal terminology. Upon completion of the translation, a Translation Review Committee consisting of 3-5 fluently bilingual lawyers should conduct a final review of the translation. The duration of this review will depend on the length and format of the examination, but would be expected to be a minimum of two days for a new examination. This group should review both the English and French versions of the examination, item by item and the scoring key.

The French Review Committee will have the overall responsibility for making any modifications to the French version of the examination, but will NOT have the authority to make changes to the English version (minor errors may be noted and corrected by a testing professional or the chair of the Examination Review Committee). A lexicon of French and English technical terminology should be created and maintained by the professional translator and Translation Review Committee and this lexicon should be updated on a regular basis. Following the review by the Translation Review Committee, the LSUC may wish to involve a second translator to make and proof read the final edits.

ITEM BANKING

Item banking software is essential for tracking the contents of the item bank, providing feedback to examination content developers on the Blueprint parameters, and in determining the match between the Blueprint specifications and the examination that must be approved by the Examination Review Committee. The item bank must be flexible enough to permit easy tracking and retrieval of items by numerous "keywords" representing Blueprint parameters and should support a wide variety of item formats. Fortunately, there are a number of reliable electronic item banking systems available that offer the security and flexibility required for licensure examinations.

Standard 8.6

Test data maintained in data files should be adequately protected from improper disclosure. Use of facsimile transmission, computer networks, data banks, and other electronic data processing or transmittal systems should be restricted to situations in which confidentiality can be reasonably assured (p. 88)

PERFORMANCE ASSESSMENT GROUP ANALYSIS

Like the LSUC, the PERFORMANCE ASSESSMENT GROUP uses the Performance Evaluation Technologies (PET) system plus the Logic Extension Resources (LXR-TEST) item banking system. Either system can be used with excellent results; however, the PET system has many flexibility advantages and can be customized for a wide variety of item types and report generation capabilities. Technical support for the PET system has also been found to be excellent.

EXAMINATION SECURITY

The integrity of a licensure program depends upon, in large part, the fair and impartial assessment of candidates. Maintaining the security of an examination, as well as the assessment program is necessary to support the program's integrity. Both actual security and the perception of security must be demonstrated to avoid the financial loss that comes with a breach in examination content during development or administration. In addition to financial losses, a security breach on a licensing examination may result in candidates being licensed without possessing the required level of competence, with negative consequences for the public interest.

Standard 5.7

Test users have the responsibility of protecting the security of test materials at all times (p. 64).

Standard 11.7

Test users have the responsibility to protect the security of tests, to the extent that developers enjoin users to do so (p. 115).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

While it is beyond the scope of this report to discuss all aspects of examination security during the development phases, the following main topics should be addressed and policies developed within any licensure program:

- *Criteria for employees, consultants and proctors;*
- *The application and review process;*
- *Training employees, consultants and proctors;*
- *Office access restriction;*
- *Establishing log-on restrictions and passwords;*
- *Shipping secure materials;*
- *Storing secure materials;*
- *Managing the secure printing of examinations;*
- *Non-secure transmissions (email, facsimile);*
- *Receiving secure materials; and*
- *Destroying secure materials.*

ADMINISTRATION PROCESS

Examination administration includes all the activities required for candidates to write the examination. Key activities for licensure examinations include the nature of the information to be provided to candidates (before and during administration), security concerns unique to the administration process, and the extensive area of testing accommodations and fairness.

INFORMATION PROVIDED TO CANDIDATES

Typically, candidates are presented with information about licensure assessments well in advance of writing an examination. It is the responsibility of the credentialing body to provide examinations that adhere to professional standards for test development and administration, thereby enhancing the legal defensibility of its actions. In order to enhance standardization, it is imperative that all candidates receive the same information. The primary reason for disseminating information to candidates in advance of the examination is to enable them to maximize their performance, that is, to demonstrate their true ability.

Candidate information should include descriptions of the test, the administration process, the scoring and score reporting process and any appeal processes. Candidate information should also address the confidentiality of results and the uses of those results. More established licensure programs may expand on this candidate information by providing material contained in the Blueprint document or by adding sample examination questions or even practice tests structured according to the Blueprint parameters.

Standard 3.2

The instructions presented to test takers should contain sufficient detail so that test takers can respond to a task in the manner that the test developer intended. When appropriate, sample material, practice or sample questions, criteria for scoring, and a representative item identified with each major area in the test's classification or domain should be provided to the test takers prior to the administration of the test or included in the testing material as part of the standard administration instructions. (p. 47).

Standard 5.5

Instructions to test takers should clearly indicate how to make responses. Instructions should also be given in the use of any equipment likely to be unfamiliar to test takers. Opportunity to practice responding should be given when equipment is involved, unless use of the equipment is being assessed (p. 63)

Standard 8.1

Any information about test content and purposes that is available to any test taker prior to testing should be available to all test takers. Important information should be available free of charge and in accessible formats (p. 86).

Standard 8.2

Where appropriate, test takers should be provided, in advance, as much information about the test, the testing process, the intended test use, test scoring criteria, testing policy, and confidentiality protection as is consistent with obtaining valid responses (p. 86)

Standard 8.3

Those who have a legitimate interest in an assessment should be informed about the purposes of testing, how tests will be administered, the factors considered in scoring examinee responses, how the scores are typically used, how long the records will be retained, and to whom and under what conditions the records may be released (p. 114).

Standard 14.16

Rules and procedures used to combine scores on multiple assessments to determine the overall outcome of a credentialing test should be reported to test takers, preferably before the test is administered (p. 162).

With respect to the actual administration of the examination, all effort should be made to standardize the delivery of the examination and the conditions in which the candidates write the examination. Irregularities in the administration process must be recorded to document any possible threat to standardization. *The Standards* provide clarity regarding these important points.

Standard 3.19

The directions for test administration should be presented with sufficient clarity and emphasis so that it is possible for others to replicate adequately the administration conditions under which the data on reliability and validity, and, where appropriate, norms were obtained (pp. 46-47).

Standard 5.1

Test administrators should follow carefully the standardized procedures for administration and scoring specified by the test developer, unless the situation or a test taker's disability dictates that an exception should be made (p. 63).

Standard 5.2

Modifications or disruptions of standardized test administration procedures or scoring should be documented (p. 63).

Standard 5.4

The testing environment should furnish reasonable comfort with minimal distractions (p. 63).

Standard 7.12

The testing or assessment process should be carried out so that test takers receive comparable and equitable treatment during all phases of the testing or assessment process (p. 84).

TEST ADMINISTRATION SECURITY

All the provisions to protect examination security during development need to be exercised during the administration process. Examinations must be shipped by secure traceable means and every copy of the examination must be accounted for at all times. On administration day, efforts must be taken to ensure candidates are not given the opportunity to obtain results by illegitimate means. This may mean requiring photo identification to verify each candidate's identity, seating candidates to prevent cheating, having candidates sign confidentiality agreements specifying sanction for disclosing examination content and otherwise exercising diligence while proctoring the examination.

Standard 5.6

Reasonable efforts should be made to assure the integrity of test scores by eliminating opportunities for test takers to attain scores by fraudulent means (p. 64).

Standard 5.7

Test users have the responsibility of protecting the security of test materials at all times (p. 64).

Standard 8.7

Test takers should be made aware that having someone else take the test for them, disclosing confidential test material, or any other form of cheating is inappropriate and that such behaviour may result in sanctions (p. 88).

Standard 11.7

Test users have the responsibility to protect the security of tests, to the extent that developers enjoin users to do so (p. 115).

TESTING ACCOMMODATIONS AND FAIRNESS

The role of ensuring an examination is fair to all candidates who write it is of critical importance for any licensure program. Credentialing bodies must pay particular attention to candidates with special needs by offering reasonable accommodations regarding the examination administration process. Such accommodations may involve compromises to standardization intended to extend fairness and defensibility through equal opportunity. Such accommodations do not relieve the credentialing organization from the obligations to ensure a reliable and valid assessment of competence.

The use of test modifications in large-scale testing is different, however. Large-scale testing is used for purposes such as ...credentialing, licensure, and employment. In these contexts, a standardized test usually is administered to all test participants... While test takers should not be disadvantaged due to a disability not relevant to the construct the test is intended to assess, the resulting accommodation should not put those taking a modified test at an undue advantage over those tested under regular conditions (The Standards, pp. 104-105).

Fortunately, *The Standards* provides clear direction related to testing accommodations and fairness. The relevant standards have been compiled and listed below to provide the LSUC with clear and considerable direction for moving forward in this important area.

Standard 5.1

Test administrators should follow carefully the standardized procedures for administration and scoring specified by the test developer, unless the situation or a test taker's disability dictates that an exception should be made (p. 63).

Standard 5.3

When formal procedures have been established for requesting and receiving accommodations, test takers should be informed of these procedures in advance of testing (p. 63).

Standard 7.12

The testing or assessment process should be carried out so that test takers receive comparable and equitable treatment during all phases of the testing or assessment process (p. 84).

Standard 9.11

When an interpreter is used in testing, the interpreter should be fluent in both the language of the test and the examinee's native language, should have expertise in translating, and should have a basic understanding of the assessment process (p. 100).

Standard 10.1

In testing individuals with disabilities, test developers, test administrators, and test users should take steps to ensure that the test score inferences accurately reflect the intended construct rather than any disabilities and their associated characteristics extraneous to the intent of the measurement (p. 106).

Standard 10.2

People who make decisions about accommodations and test modification for individuals with disabilities should be knowledgeable of existing research on the effects of the disabilities in question on test performance. Those who modify tests should also have access to psychometric expertise for so doing (p. 106).

Standard 10.3

Where feasible, test that have been modified for use with individuals with disabilities should be pilot tested on individuals who have similar disabilities to investigate the appropriateness and feasibility of the modifications (p. 106).

Standard 10.4

If modifications are made or recommended by test developers for test takers with specific disabilities, the modifications as well as the rationale for the modifications should be described in detail in the test manual and evidence of validity should be provided wherever available. Unless evidence of validity for a given inference has been established for individuals with the specific disabilities, test developers should issue cautionary statements in manuals or supplementary materials regarding confidence in interpretations based on such test scores (p. 106).

Standard 10.6

If a test developer recommends specific time limits for people with disabilities, empirical procedures should be used, whenever possible, to establish time limits for modified form of timed tests rather than simply allowing test takers with disabilities a multiple of the standard time. When possible, fatigue should be investigated as a potentially important factor when time limits are extended (p. 107).

Standard 10.10

Any test modifications adopted should be appropriate for the individual test taker, while maintaining all feasible standardized features. A test professional needs to consider reasonably available information about each test taker's experiences, characteristics, and capabilities that might impact test performance, and document the grounds for the modification (pp. 107-108).

Standard 10.11

When there is credible evidence of score comparability across regular and modified administrations, no flag should be attached to a score. When such evidence is lacking, specific information about the nature of the modification should be provided, if permitted by law, to assist test users properly to interpret and act on test scores (p. 108).

SCORING AND RESULTS REPORTING

Ultimately, the purpose of licensure is to make decisions regarding whether or not to award a coveted credential to candidates. All the work that has gone into developing competencies, drafting a Blueprint document, developing and validating items, approving examinations, setting standards and pass marks and producing examinations in both official languages eventually comes down to scoring examinations, using the results to make decisions and communicating those decisions to candidates. Key activities in this section include the procedures involved in the scoring process, an analysis of the subject matter experts responsible for scoring items that cannot be computer scored, adjustments to the pass mark or test scores, and feedback for candidates.

SCORING PROCESSES

One of the greatest threats to the standardization, reliability, validity, fairness and defensibility of any performance-based item format is the potential for bias and error in the scoring process. Unlike objective multiple-choice examinations, performance-based assessments require professional judgment in the scoring process. With the introduction of judgment comes the potential for bias and scoring error. There are two prominent strategies for reducing the threat of bias and error. First, it is imperative that the scoring key is comprehensive and clear. During the scoring process, the quality of each scoring key needs to be carefully considered by subject matter experts in light of the responses provided by candidates. In the event that a viable response has been provided by a candidate, this response needs to be considered by a group of subject matter experts and, if deemed acceptable, included in a revised version of the scoring key.

A second important element involved in ensuring a reliable and valid scoring process is to score the examinations using a group of subject matter experts that can meet to share their rating experience. Group scoring sessions permit discussion, debate and enhance consensus among content experts. Together, the group members can explore all the elements of a correct response and borderline responses can be identified and resolved. Furthermore, if the group identifies a valid candidate response that was not included in the original scoring protocol, this information will be communicated immediately to all of the raters and all previously scored items can be reviewed to ensure all candidates benefit equally from the scoring change.

To ensure the reliability of the scoring process, pairs of raters should be randomly assigned to independently score the same candidate's responses so inter rater reliability can be established. If a rater is identified as producing unreliable ratings, they should be removed from the scoring process.

Following the scoring process, an item analysis must be conducted and poorly performing questions removed from the examination. The two primary indices used for conducting an item analysis include item difficulty and item

discrimination indices (the extent to which each question differentiates between high and low performers). Finally, borderline scores should be examined for accuracy and perhaps rescored by an independent rater. Some licensure programs go so far as ensuring that two subject matter experts score every examination requiring rater judgement and every possible pair of scores is assessed for consistency.

Standard 2.1

For each total score, subscore, or combination of scores that is to be interpreted, estimates of relevant reliabilities and standard errors of measurement or test information functions should be reported (p. 31).

Standard 2.14

Conditional standard errors of measurement should be reported at several score levels if constancy cannot be assumed. Where cut scores are specified for selection or classification, the standard errors of measurement should be reported in the vicinity of each cut score (p. 35).

Standard 2.15

When a test or combination of measures is used to make categorical decisions, estimates should be provided of the percentage of examinees who would be classified in the same way on two applications of the procedure, using the same form or alternate forms of the instrument (p. 35).

Comment: When a test or composite is used to make categorical decisions, such as pass/fail, the standard error of measurement at or near the cut score has important implications for the trustworthiness of these decisions. However, the standard error cannot be translated into the expected percentage of consistent decisions unless assumptions are made about the form of the distributions of measurement errors and true scores. It is preferable that this percentage be estimated directly through the use of a repeated-measurements approach if consistent with the requirements of test security and if adequate samples are available (p. 35).

Standard 3.9

When a test developer evaluates the psychometric properties of items, the classical or item response theory (IRT) model used for evaluating the psychometric properties of items should be documented. The sample used for estimating item properties should be described and should be of adequate size and diversity for the procedure. The process by which items are selected and the data used for item selection, such as item difficulty, item discrimination, and/or item information, should also be documented. When IRT is used to estimate item parameters in test development, the item response model, estimation procedures, and evidence of model fit should be documented (p. 45).

Standard 3.14

The criteria used for scoring test takers' performance on extended-response items should be documented. This documentation is especially important for performance assessments, such as scorable portfolios and essays, where the criteria for scoring may not be obvious to the user (p. 46).

Standard 3.22

Procedures for scoring and, if relevant, scoring criteria should be presented by the test developer in sufficient detail and clarity to maximize the accuracy of scoring. Instructions for using rating scales or for deriving scores obtained by coding, scaling, or classifying constructed responses should be clear. This is especially critical if tests can be scored locally (p. 47).

Standard 3.23

The process for selecting, training, and qualifying scorers should be documented by the test developer. The training materials, such as the scoring rubrics and examples of test takers' responses that illustrate the levels on the score scale, and the procedures for training scorers should result in a degree of agreement among scorers that allows for the scores to be interpreted as originally intended by the test developer. Scorer reliability and potential drift over time in raters' scoring standards should be evaluated and reported by the person(s) responsible for conducting the training session (pp. 47-48).

Standard 3.24

When scoring is done locally and requires scorer judgment, the test user is responsible for providing adequate training and instruction to the scorers and for examining scorer agreement and accuracy. The test developer should document the expected level of scorer agreement and accuracy (p. 48).

Standard 5.9

When test scoring involves human judgment, scoring rubrics should specify criteria for scoring. Adherence to established scoring criteria should be monitored and checked regularly. Monitoring procedures should be documented (pp. 64-65).

Standard 14.15

Estimates of the reliability of test-based credentialing decisions should be provided (p. 162).

RATER ANALYSES

As suggested above, while scoring for multiple-choice questions is very straightforward, there are some significant challenges involved in ensuring the scoring for performance-based assessments (e.g., short answer, essay) is reliable and valid. Without a reliable and valid scoring process, the entire examination is rendered invalid, no matter how well it was designed and administered. As suggested above, comprehensive scoring protocol development and training are critical components for effective performance-based assessment scoring. But good systems are not enough. Even the most comprehensive scoring protocol can be mismanaged by certain individuals and, as a result, it is imperative to continuously assess the quality of the raters and, where necessary, retrain or terminate those raters whose performance has been determined to be substandard.

To this end, it is recommended that a comprehensive study be initiated to determine the most effective process for training raters for the scoring of performance-based assessments and an ongoing evaluation process be conducted to ensure only the most reliable and valid raters participate in the scoring process.

Standard 2.10

When subjective judgment enters into test scoring, evidence should be provided on both inter-rater consistency in scoring and within examinee consistency over repeated measurements. A clear distinction should be made among reliability data based on (a) independent panels of raters scoring the same performances or products, (b) a single panel scoring successive performances or new products, and (c) independent panels scoring successive performances or new products (pp. 33-34).

Standard 3.25

The process for selecting, training, and qualifying scorers should be documented by the test developer. The training materials, such as the scoring rubrics and examples of test takers' responses that illustrate the levels on the score scale, and the procedures for training scorers should result in a degree of agreement among scorers that allows for the scores to be interpreted as originally intended by the test developer. Scorer reliability and potential drift over time in raters' scoring standards should be evaluated and reported by the person(s) responsible for conducting the training session (pp. 47-48).

Standard 3.24

When scoring is done locally and requires scorer judgment, the test user is responsible for providing adequate training and instruction to the scorers and for examining scorer agreement and accuracy. The test developer should document the expected level of scorer agreement and accuracy (p. 48).

POST-HOC ADJUSTMENTS TO THE PASS MARK OR TEST SCORES

The issue of adjusting the pass mark or a candidate's score following the administration of an examination is an extremely serious one for a licensing program. As suggested above, relying on norm-referenced approaches for setting the standard of a licensure examination cannot be defended, and any adjustments to a criterion-referenced standard due to a poor success rate is similarly indefensible. The rationale behind any licensure program is public protection. It should not be a system designed to control the number of lawyers entering the profession, be it political or economic. The authors of *The Standards* make this point perfectly clear when they state:

Some credentialing groups consider it necessary, as a practical matter, to adjust their criteria yearly in order to regulate the number of accredited candidates entering the profession. This questionable procedure raises serious problems for the technical quality of the test scores. Adjusting the cut score annually implies higher standards in some years than in others, which, although open and straightforward, is difficult to justify on the grounds of quality of performance. Adjusting the score scale so that a certain number or proportion reach the passing score, while less obvious to the candidates, is technically inappropriate because it changes the meaning of the scores from year to year. Passing a credentialing examination should signify that the candidate meets the knowledge and skill standards set by the credentialing body, independent of the availability of work (p. 158).

Enhancements to the passing rate to circumvent negative candidate reactions are also untenable. Evidence may be accumulated that suggests a pass mark was set too high or too low, and in these cases, if such evidence can be validated, any deficiencies must be addressed. That being said, an unexpected success rate in and of itself is not enough to justify post administration adjustments to the pass mark.

Following the recommendations for test development and administration outlined in this report should reduce the risk of a legal challenge of a licensure examination. More to the point, an examination developed in good faith by attempting to adhere to *The Standards* should result in a standardized, reliable, valid, fair and defensible examination that does not require post hoc adjustments to the pass mark. Even if the passing rate differs from the rate obtained on previous versions of the examination, attempts to challenge the validity of the results can be effectively and forcefully countered with the documentation recommended within this report.

Standard 4.17

The level of performance required for passing a credentialing test should depend on the knowledge and skills necessary for acceptable performance in the occupation or profession and should not be adjusted to regulate the number or proportion of persons passing the test (p. 162).

Standard 15.9

The integrity of test results should be maintained by eliminating practices designed to raise test scores without improving performance on the construct or domain measured by the test (p. 168).

FEEDBACK FOR CANDIDATES

There is no single prescription for the most appropriate type of feedback to provide to candidates. With respect to licensure, there is a strong argument to be made for simply providing the pass/fail decision. By including an actual score (raw score or standardized), there is a risk that the score could be used for other intended purposes such as attempts to gain employment or entry into post-graduate programs. Worse still, the score could become a stigmatizing label. Because licensure examinations are designed to discriminate performance at the level of minimal competence, their value is questionable for “rank ordering” candidates along the full continuum of competence. Should such a ranking be desired, different examinations would need to be designed that discriminate among the better performing candidates. By simply providing a pass/fail decision, such potential misuse can be avoided.

Beyond pass/fail status, there is the potential issue of providing diagnostic feedback to unsuccessful candidates. Given that unsuccessful candidates will not be seeking employment as lawyers, it seems reasonable that efforts be made to provide these candidates with diagnostic feedback so they can focus their future preparations in areas requiring the greatest need for improvement. That being said, it is imperative that there be sufficient data (i.e., examination questions) to ensure reliable and valid feedback on each of the reported diagnostic categories.

For some examinations, only unsuccessful candidates receive such feedback, while for others all candidates receive diagnostic information. This may seem like a violation of the principle of standardization; however, it is one that is often observed for two reasons: validity and practicality. A candidate who is unsuccessful often has questions regarding where they went wrong and how they can prepare themselves for a second licensure attempt. As such, diagnostic information related to examination results will likely be much more useful and valid for unsuccessful candidates. In addition, there are costs associated with providing diagnostic feedback (considerable costs for examination formats that cannot be scored by computer). These costs can be prohibitive if all candidates are to receive such feedback.

Whether feedback to candidates involves a simple pass/fail decision or a more comprehensive diagnostic approach, four important caveats must be observed. First, feedback must be accurate. Considerable harm can be done to a licensure program by reporting inaccurate results due to administrative oversight. Second, feedback must be timely. Candidates have invested a lot in their preparations for licensure and deserve to know their results in a timely manner. Third, feedback must be standardized. The previous discussion of who receives diagnostic feedback aside, all candidates should be provided with exactly the same information so some are not left with either an unfair

advantage, or disadvantage, compared to others. Again, standardized feedback is particularly important for unsuccessful candidates who may write the examination again at a later date. Finally, results must only be reported to the candidate. Personal letters addressed to the candidate are appropriate; telephone calls are not. Other individuals may have an interest in the candidate's results (parents, employers, friends, etc.); however, licensure assessments demand complete confidentiality of results.

Standard 1.10

When interpretation of performance on specific items, or small subsets of items, is suggested, the rationale and relevant evidence in support of such interpretation should be provided. When interpretation of individual item responses is likely but is not recommended by the developer, the user should be warned against making such interpretations (p. 19).

Standard 8.5

Test results identified by the names of individual test takers, or by other personally identifying information, should be released only to persons with a legitimate, professional interest in the test taker or who are covered by the informed consent of the test taker or a legal representative, unless otherwise required by law (p. 88).

Standard 8.8

When score reporting includes assigning individuals to categories, the categories should be chosen carefully and described precisely. The least stigmatizing labels, consistent with accurate representation should always be assigned (p. 88).

Standard 11.6

Unless the circumstances clearly require that the test results be withheld, the test user is obligated to provide a timely report of the results that is understandable to the test taker and others entitled to receive this information (p. 114).

Standard 11.15

Test users should be alert to potential misinterpretations of test scores and to possible unintended consequences of test use; users should take steps to minimize or avoid foreseeable misinterpretations and unintended negative consequences (p. 116).

PERFORMANCE ASSESSMENT GROUP ANALYSIS

Without knowing the structure and content of the future LSUC licensure examinations, it is impossible to advise the LSUC regarding the nature of the feedback to be provided to candidates (pass/fail versus diagnostic information). Lengthy multiple-choice examinations may well provide the opportunity for reliable diagnostic feedback; however, narrative response items generally will not. As previously discussed, to protect the security of the examination, candidates cannot be provided with details regarding their answers to specific questions. Valid examination questions are difficult and expensive to develop and contribute greatly to the LSUC's mandate of public protection. Equally important, feedback must be based on a reliable sample of questions. Incorrect answers to one or two questions will not be reliable and valid indicators of performance on a competency.

The PERFORMANCE ASSESSMENT GROUP urges the LSUC to exercise caution when communicating results turnaround times to candidates or committing itself to an ambitious timeframe. Unforeseen complications can arise in testing (e.g., results being withheld due to technical problems or investigations of testing irregularities). Such complications can affect the scoring of even the most objective of item formats (e.g., multiple-choice). When examination formats requiring the judgement of subject matter experts are used (e.g., narrative response formats) reliable and valid scoring will require a considerable time commitment. Candidates' need for timely results reporting must always be tempered by the LSUC's absolute imperative of ensuring those results are accurate.

EXAMINATION LIFE CYCLE

The activities in the life of a licensure process repeat on a continuous cycle. Once the program is well established, most of the activities are repeated for maintenance and to ensure security. In addition, licensure programs typically need to come under periodic review on a regular cycle. This cycle may be one that has been agreed upon by subject matter experts (e.g., a 5-year cycle) and documented in the Blueprint; however, change may be necessitated based on profound changes in the profession that cannot be anticipated.

As stated in *The Standards*:

Practice in professions and occupations often changes over time. Evolving legal restrictions, progress in scientific fields, and refinements in techniques can result in a need for changes in test content. When change is substantial, it becomes necessary to revise the definition of the job, and the test content, to reflect changing circumstances. When major revisions are made in the test, the cut score that identifies required test performance is also re-established (p. 157).

According to Thomas and Schenuneman (1998, p. 83), factors that would influence the decision to update a credentialing examination (including competencies, blueprints, test content, scoring rules and standards) include the following:

- *Job role changes*
- *Product changes*
- *Test exposure*
- *Possible security breaches*
- *Results of item analyses or other data analyses*
- *Changes or growth in size of candidate population*

With respect to the extent to which the legal profession changes over time, the LSUC and its members are in the best position to address this question. A profession that undergoes rapid change will require more new content compared to one that remains relatively stable over time.

Whenever a candidate is permitted to rewrite a licensure examination, there is the risk that a subsequent passing score is due to previous experience with the content of the examination rather than competence. Consequently, as the number of candidates rewriting the examination increases, so do the risks to the integrity of the examination and to the LSUC's ability to meet its mandate to protect the public.

Standard 3.25

A test should be amended or revised when new research data, significant changes in the domain represented, or newly recommended conditions of test use may lower the validity of test score interpretations. Although a test that remains useful need not be withdrawn or revised simply because of the passage of time, test developers and test publishers are responsible for monitoring changing conditions and for amending, revising, or withdrawing the test as indicated (p. 48).

Comment: Because credentialing is an ongoing process, with tests given on a regular schedule, new versions of the test are often needed. From a technical perspective, all versions of a test should be prepared to the same specifications and represent the same content (p. 157)

PERFORMANCE ASSESSMENT GROUP ANALYSIS

The Performance Assessment Group strongly recommends yearly maintenance of all licensure examinations as well as a predetermined cycle for review of the competencies and blueprint. The exact life cycle of the LSUC examinations can only be determined based on the judgement of the subject matter experts comprising either the Blueprint Development Committee and/or the Examination Review Committee.

CAVEATS ON THE USE OF THE STANDARDS

The Standards outlines a number of caveats to be observed in its use to assess the appropriateness of an examination or assessment program. The following five cautions should be exercised when using *The Standards*.

- 1) Evaluating the acceptability of a test or test application does not rest on the literal satisfaction of every standard in this document, and acceptability cannot be determined by using a checklist (p. 4).

The Standards call for the use of professional judgment based on psychometric knowledge, behavioural science as well as knowledge of the types of “standards” applicable to the type of assessment program. The PERFORMANCE ASSESSMENT GROUP has made every attempt to bring this expert perspective to bear on the contents of this report.

Adherence to *The Standards* involves the extent to which the underlying intent of each standard has been satisfied, the alternative assessment processes that were readily available to be adopted by the test developer, and any existing research or experiential evidence that might speak to the feasibility of meeting the standard.

- 2) When tests are at issue in legal proceedings and other venues requiring expert witness testimony it is essential that professional judgment be based on the accepted corpus of knowledge in determining the relevance of particular standards in a given situation. The intent of the Standards is to offer guidance for such judgments (p. 4).

Any legal or other challenge of an examination or assessment program is likely to involve comparisons of the examination or program against *The Standards*. Even so, it is not mandatory that adherence to every standard be part

of such a challenge. Experts in test development will be called to testify and to use expert judgment in determining which standards are core to the nature of the legal challenge.

- 3) Claims by test developers or test users that a test, manual, or procedure satisfies or follows these standards should be made with care. It is appropriate for developers or users to state that efforts were made to adhere to the Standards, and to provide documents describing and supporting those efforts. Blanket claims without supporting evidence should not be made (p. 4).

The Standards outline the best practices that should theoretically apply to examinations or assessment programs; therefore, claims can never be made that a tool or program “meets or exceeds” *The Standards*. In some cases a standard may represent an ideal that cannot be attained in practice. The PERFORMANCE ASSESSMENT GROUP has endeavoured to provide the LSUC with an evaluation of standards that can and should be applied fully in the context of an assessment program for the purpose of licensure.

- 4) The Standards are concerned with a field that is evolving. Consequently, there is a continuing need to monitor changes in the field and to revise the document as knowledge develops (p. 4).

The PERFORMANCE ASSESSMENT GROUP works with a wide variety of clients with various types of assessment programs and makes efforts to keep abreast of changes in *The Standards* and assessment technologies. As a result, we have brought this same scope of knowledge to bear on this report.

- 5) Prescription of the use of specific technical methods is not the intent of the Standards. For example, where specific statistical reporting requirements are mentioned, the phrase “or generally accepted equivalent” always should be understood (p. 4).

The PERFORMANCE ASSESSMENT GROUP has applied the intent of *The Standards* to the current evaluation of a new licensure program for the LSUC. This report has been limited to an assessment of how the intent of *The Standards* can be met, or is already being met, by a standardized, reliable, valid, fair and defensible licensure program for the LSUC. In determining whether or not the intent of any particular standard has been met, a critical factor will always be if actions have been taken in good faith, using due diligence and involving people who are qualified whenever key decisions are to be made.

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APPENDIX 2

Interim Report on Skills Training and Professional Responsibility

Report prepared for the Law Society of Upper Canada Task Force on the Continuum of Legal Education

Prepared by:

Dr. Julie Macfarlane and Prof. John Manwaring

May, 2003

EXECUTIVE SUMMARY

Background

1. The *Report of the Task Force on the Continuum of Legal Education (March 2002)* proposes a new licensing system to replace the current Bar Admission Course (BAC) program. The proposed licensing system focuses primarily on developing and administering licensure examinations while limiting or eliminating the current teaching component of the BAC.

2. The proposed licensing system is a component of a continuum of professional development activities seen in relation to both earlier (for example, graduation from law school) and later (for example, seeking specialist certification several years into practice) stages of competency development.

The Issues

3. In their Report, Dr. Macfarlane and Professor Manwaring address the following issues:
 - a. Assuming the Law Society adopts the Task Force's recommendations, should skills training continue to form a part of the Law Society's licensing requirements?
 - b. Assuming the Law Society adopts the Task Force's recommendations, should Professional Responsibility teaching and learning continue to form a part of the Law Society's licensing requirements?

Law Society's Competence Mandate

4. The Law Society is obligated to ensure the competency of licensed practitioners. This includes elements of knowledge, skills and attitudes. The Law Society also wishes to achieve the highest possible professional and ethical standards. For a self-governing profession such as law, issues of professional ethics and the responsibilities of its members of the profession to their clients, to the legal system and to the public at large are vital to its reputation for integrity and competence.
5. Dr. Macfarlane and Professor Manwaring believe that course-based instruction is the best way to attain the goal of training members of the profession who strive to achieve the highest possible professional and ethical standards and to ensure that students called to the Bar are appropriately experienced in explicitly defined skills areas.
6. Dr. Macfarlane and Professor Manwaring propose two course-design options which appear to carry forward the goals of the Law Society in relation to skills, professional responsibility and practice management training.

Proposed Options

Preferred Option

7. The preferred option has three components:
 - a. *An orientation meeting* between Articling Principal and student to consider what tasks the student may be asked to do and what she should ideally be able to do during the course of articling. The Articling Education Plan would assume that the student has opportunities to learn and practice office management skills, time management, organizational skills and practice management, and to work collegially as part of a team.
 - b. *A skills-focused course of four weeks*, undertaken after law school and prior to the articling period, would aim to prepare students to undertake the tasks that might typically be required during articles. Ethical issues would be integrated into each skills and transaction-based exercise.

The course could be structured as follows:

Week One:	Interviewing, counselling and client communication
Week Two:	Writing (opinion letters, memos) and drafting (contracts, litigation documents)
Week Three:	Negotiating and ADR representation
Week Four:	Advocacy including trial preparation and management strategies

A Problem-Based Learning (PBL) teaching approach is recommended. PBL enables the constant integration of substantive and ethical issues into simulations and practice exercises and is

interactive and participatory. Students would work together in small groups or “firms” and be required to handle files from the first meeting with the client to the end of the trial.

Assessment would be via pass/fail criterion-based exercises that would determine if the student member has achieved the defined level of competency in each of the four skill areas

- c. *Skills development during articling:* During articling, students would be expected to continue to work on enhancing their skills in the enumerated areas and in particular on those functions and tasks most important in their own articling experience.

Alternate Option

- 8. This model would follow the same plan set out in the “preferred” option but would include a fourth element which enables some assessment of students post-articling and prior to their Call to the Bar. The preferred approach to this fourth element would be to bring students together at the end of the articling process for an intensive training program. This would be structured as a 72 hour PBL exercise. Instructors should be recruited widely to observe students and provide on-going feedback and supervision.

Report

We have been asked to provide an Interim Report setting out our work and thoughts to date regarding the following questions which are before the Task Force:

- 1. Should skills training continue to form a part of the Law Society’s licensing requirements?
- 2. Should Professional Responsibility teaching and learning continue to form a part of the Law Society’s licensing requirements?

This report follows the staged work outline provided to the Law Society in March 2003 and comprises Stages One (Development of Supporting Data) and Two (Development and Evaluation of Options) of that model. Stage Three (Implementation Proposal) will be forthcoming in our Final Report, following the input of the Task Force.

Introduction: a Model of Competency

The basis of the analysis and proposals in this Interim Report is a contemporary model of competency for legal practitioners. As an introduction to this Interim Report, we shall describe this model, its antecedents and its implications for the Law Society’s approach to legal education and its licensing responsibilities. In this introductory section we shall provide some useful comparable models for the teaching and learning of both professional skills and Professional Responsibility. We shall also relate this model of competency to a three-stage continuum model of competency which we believe to be consistent with the thinking of the Task force about the elements of lifelong professional development.

Changing times for professional legal services

The introduction of competency-based education and training, which has had an increasing influence on all areas of professional education over the past decade, has historically been tied to public dissatisfaction and a perceived need to raise “standards” (see generally, Burke (ed) 1989, teachers in US and Ontario). The legal profession is no exception to this trend. The pioneering work in developing taxonomies of professional legal competencies, and teaching models to support and evaluate these, has emerged in each case from a crisis of public confidence in the profession and the heightened motivation of the profession to act to maintain their reputation and status (for example Harrison, 1984).

The development of standards or educational “outcomes” which are tied to competency also reflects a widespread reorientation in how professional education is delivered and evaluated. Many professional disciplines, law included, are confronting a practice reality in which the volume of new information produced and disseminated – whether via research, technological advances, or developments in legal precedent – rapidly renders the knowledge base of

professional training programs out-of-date. An appropriate response is for professions to describe their expertise in terms of key competencies, rather than identified by a fixed knowledge base (for example, Munro, 2000, Schon, 1983 & 1987)

Historically, the legal profession has not been outstandingly successful, in ensuring the competence of its members (for example, during the 1990's insurance premiums for members of the Law Society rose exponentially in order to cover the rising numbers of successful claims against negligent solicitors). There is a growing awareness that the legal profession needs to do more to enhance the public's perception of its competency and integrity. In 1982, Gold proposed the following definition of competency: "A lawyer is competent if he (sic) has demonstrated capacity to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question". Almost 20 years on, this approach to competency appears somewhat self-serving. The expectations of many of the users of legal services are less deferential than they once were (Macfarlane, 2002). Exponentially rising legal costs and the challenge from other professionals has changed the market for legal services and placed a premium on stronger, sharper and more assertive definitions of professional competency – what it is that lawyers uniquely offer their clients (Earncliffe Group, 1999).

All indications are that today's Law Society wishes to aspire to a standard of competency which is more genuinely responsive to changing client needs and expectations. The Report of the Second Competence Task Force, approved by Convocation in 1999, adopted a set of principles for developing and enhancing the Law Society's competency mandate. This included "(T)he need for the Law Society to adopt a pro-active and wide-ranging approach to its competence mandate"; and "(E)mphasis on the importance of the definition of the "competent lawyer" as the underpinning of standards or guidelines and competence-related activities."

Models of professional competency

Models of competency developed for professional application characteristically include elements of knowledge, skills and attitudes. In addition, more sophisticated and complex models attempt to integrate relevant judgment and experience, and professional ethical conduct into this model. Competence is widely understood to be the ability or capacity to bring all these components of professional behaviour together into practice – described as "practical knowing". Complex notions of competency also include the notion of self-assessment and reflection – for example, discerning why a particular approach is or is not appropriate in any given case, the capacity to anticipate and to plan (Patterson, 1987), the capacity to respond to the unexpected or unfamiliar (Schon, 1983, 1987) and the ability to recognize one's own limitations (Maughan, 1996).

The Law Society's model of competence is contained in Rule 2.01 of the Rules of Professional Conduct, and it will be used as a touchstone for this Report and its proposals. The elements of competency set out in Rule 2.01 include a series of professional skills (at 2.01(1)(c)) some of which (legal research, analysis, application of the law to relevant facts, writing and some drafting) are taught via substantive law school education and shall be tested in substantive examinations administered by the Law Society (LSUC Licensure Program Report to the Task Force, 2003). Others listed (for example, negotiation, ADR, advocacy) are taught to some limited extent at law school (almost always on an elective basis). In addition, the definition at Rule 2.01(1) includes elements that place responsibility on the Law Society that extends beyond the assumption that a student has completed an LLB program. These include the competencies in client communication (at (d)); and note that this area forms the basis of a significant proportion of client complaints to the Law Society, LPIC 1997), judgment (at (f)), ethical behaviours (at (g)), recognising one's own limitations (at (h)), continuous knowledge enhancement and self-improvement (at (j)) and adaptation (at (k)).

The Law Society's model of competency shares many features in common with those developed by other professional bodies charged with the regulation of the legal profession. For example, the widely publicized MacCrate Report in the US (MacCrate, 1992) articulates a very similar group of skills (problem-solving; legal analysis and reasoning; legal research; factual investigation; oral and written communication; counseling; negotiation; understanding the procedures and dispute resolution; organizing and managing legal work; and recognising and resolving ethical dilemmas). In the 1980's the Law Society of England and Wales was one of the first professional legal associations to adopt a model of competence following a research study which analysed the tasks and functions of lawyers in practice (Economides & Smallcombe, 1991). The skills identified – add – remain the basis of the definition of competency for the solicitors branch of the profession.

Some of these comparable models from other jurisdictions adopt a more explicit values orientation, for example in relation to the qualities of legal professionalism. For example, the ABA Committee on Professionalism defines professionalism as: recognizing the broader implications and meaning of your work; courtesy and respect; high quality services at fair cost; truthfulness and candor; valuing interests of clients and others; diligence and punctuality (ABA Committee on Professionalism, 1996). This approach is resonant of the discussions of the Task Force (especially at paras 47 and 48 of the Interim Report), and the wider discussion of the importance of nurturing professionalism (for example at the Law Society's Hockley Valley Retreat in October 1999). It is noteworthy that in the same vein MacCrate ties the ten core generic professionals skills it articulates (above) to four central values: providing competent representation; striving to promote fairness and justice (public responsibility); striving to improve the profession; and professional self-development.

What is common to these models?

Before moving on to consider what are the implications of a competency-based model for licensing and regulation by the Law Society, it is useful to note what all these models have in common.

- a. A competency-based approach tries to reduce the traditional dichotomy between knowledge/skills. Competency approaches assume that knowledge and skills take their life from one another – that legal knowledge without professional skills, and skills without an adequate substantive knowledge base, are both inadequate models of professional competency and client service.
- b. A competency-based approach assumes that a competent practitioner is one who is able to integrate knowledge, professional skills and appropriate ethical behaviours.
- c. A competency-based approach assumes that teaching can enhance practice and skills can be improved through learning. It further assumes that the traditional “sink-or-swim” model of legal training is haphazard and unreliable, and lacking in public accountability
- d. A competency-based approach assumes that skills learning takes place over the course of an entire professional career, and that a propensity for lifelong learning can be enhanced through the professional culture.

The Continuum of legal education and “thresholds”

The goal of competency-based legal education and training is the protection of a minimal standard of competence for those wishing to enter legal practice, that both maintains the integrity of the profession and ensures that client needs are adequately met. Setting entry standards that exclude the incompetent from joining seems to be a legitimate - even essential - goal for any self-regulating profession.

Assuming a continuum of learning and professional development as the Task Force has articulated, a key question for the Law Society in determining its role in relation to licensing regulation is what is the appropriate standard to set for entrants to the profession i.e. upon the Call to the Bar. Other professional bodies (for example the Bar Vocational Council of England and Wales) are explicit about the limited but nonetheless specific level of competence to which entering students should be prepared and evaluated. Conceiving of professional development in terms of a continuum does not mean that standards – at various stages - do not exist. Instead it means that these standards can be more clearly defined and seen in relation to both later (for example, seeking specialist certification several years into practice) and earlier (for example, graduation from law school) stages of competency development. This approach is consistent with the notion of a continuum of competency, which could be understood as having three stages:

- a. Stage One (post LLB, pre-articling). This centres on the mandatory requirements in the LLB
- b. Stage Two (Call to the Bar). This is a critical threshold for this Report and is analysed further below.
- c. Stage Three (Continuing Education). This threshold or series of thresholds relate to any future requirements of CLE, qualification for specialist certification etc.

A threshold standard for the Call to the Bar

Applied to Stage Two (Call to the Bar), an appropriate threshold standard would be as follows.

A student admitted to the Bar must be able to demonstrate that:

- a. he/she possesses a baseline of skills and knowledge to enable the adequate performance of the tasks likely to face him/her as a newly admitted member of the Bar:
 - i. fundamental substantive legal knowledge – including knowledge of the Rules of Professional Conduct - which is demonstrated by earning an LLB and passing the licensing examinations; and
 - ii. minimal competency – for example the knowledge of and the demonstrated ability to apply at least one model for practice – in the enumerated professional skills; and
 - iii. demonstrated awareness and responsiveness to professional ethical behaviours
- b. he/she has developed the foundations for future practice, including a commitment to continued self-growth (in professional skills, ethical sensibilities, and the acquisition of legal knowledge) .

The following two sections describe the issues, assumptions and options within each of the two questions we have been asked to address, that is – how should the Law Society address licensing issues in relation to (a) professional skills and (b) Professional Responsibility? In each case, this discussion relates to and reflects the competency-based model described in this introductory section.

The final section of this Interim Report presents two proposals – one “preferred” and the other “alternative” – which are in our view the most responsible and supportable responses to these two questions. Both the “preferred” and the “alternative” proposal embrace an integrated approach to the teaching and learning of professional skills and Professional Responsibility, which is why they are presented jointly.

Issue One

Should skills training continue to form a part of the Law Society’s licensing requirements?

Stage One Development of Supporting Data

In turning now to a consideration of the first of the two critical questions we have been asked to report on, our starting assumptions are as follows:

1. The *quid pro quo* of professional self-regulation is public accountability. This is the “bargain of self-regulation” (Schneider, 1985) – professional autonomy in exchange for public accountability.
2. The Law Society of Upper Canada (henceforth the Law Society) is obligated under the Law Society Act (1999, R.S.O) to ensure the competency of licensed practitioners. In keeping with widely accepted models of professional competency (see further discussion below), this includes elements of knowledge, skills and attitudes (ie professionalism and ethical behaviour). The Law Society’s own model - set out in Rule 2.01 of the Rules of Professional Conduct – includes elements of knowledge, professional skills and professional behaviours and ethics.
3. While the Interim Report of the Task Force embraces and promotes the principle of lifelong learning for legal practitioners, it also accepts that the licensing process constitutes a threshold (not a final point) of competency. In relation to professional skills, the Interim Report of the Task Force states that (at para 24a.) “When the Law Society calls candidates for admission to the Bar it should be satisfied that the candidates...are appropriately experienced in explicitly defined skills areas by virtue of their law school and articling experiences.”
4. The discharge of this obligation as licensor requires that the Law Society not only oversee but also assess the competency of prospective practitioners. We assume that the Law Society would not promote a model in which simply “showing up” (to articles, to class) was deemed evidence of competency. Instead, fair and accurate evaluations of competency should be made before admitting an individual to the Bar. Furthermore, fair and accurate assessments will provide the necessary motivation to student learners, and raise the confidence of the public in the legal profession. We recognize, however, that the timing of this assessment presents a special challenge given the momentum to move students from articling into paid employment (see below).

5. Assessment of prospective practitioners may take many forms. It is essential that, whatever form of assessment is adopted, it is a valid, reliable and accurate system and that it is seen as creating a real threshold of knowledge and skills that future lawyers must pass.
6. If the Law Society is to assess knowledge-based and skills-based competency it must also take some responsibility for the enhancement of these competencies. This need not be limited to traditional classroom teaching but may include a variety of methods to support skills and knowledge development, including weekend courses, in-house training during articles, and a formalized model for mentoring. At least some attendance must be mandatory (see below).
7. Arguments for the enhancement of professional skills via specific teaching supports are different from those that might be advanced for the enhancement of knowledge-based competencies. However it would appear from the discussions that have surrounded the proposed reforms to the BAC that these two elements have sometimes been conflated. In contrast, the Report assumes that different arguments and conditions exist for the teaching and learning of each of the three elements of professional competency – knowledge, skills and professional behaviours and ethics.
8. Since 1957, the law schools have taught legal knowledge, analysis and reasoning and a case can be made for this as an adequate teaching base for admission to the Bar.
9. However, while students of law have already received three years of instruction in legal knowledge in law school, the development of the professional skills required by a practicing lawyer is presently only minimally addressed in law school education. While reference has been made by the Task Force (Appendix 1 of the Interim Report) to the development of skills-based courses in Ontario law schools, aside from first year Legal Research and Writing programs which focus almost entirely on the development of legal knowledge in an applied context, these courses are elective rather than mandatory courses and are generally taken by a small minority of students. This point has already been made by a number of those responding to the Interim Report. Few if any students graduating from Ontario law schools will have been able to take electives in all or even most of the professional skills enumerated in Rule 2.01. Therefore it is our assumption that further preparation for the conduct of professional tasks and functions is therefore necessary at the licensing stage to bring students up to an acceptable level of skills competency.
10. The articling process has a critical role to play in the enhancement of the professional skills of prospective practitioners. It can provide a laboratory for the practice and development of professional skills in a supportive, supervised environment. However, it is also assumed that the quality and nature of articling experiences vary widely and that in order to provide students with both adequate and equal baseline of competence in the professional skills enumerated in Rule 2.01, further teaching support must be envisaged outside articles.

Skills education and the licensing threshold in Ontario

The implication of all the above discussion and analysis is that the Law Society should continue to provide some type of formal training and assessment in professional skills if it is to fulfill its competency mandate. What should that provision look like?

What skills?

Beginning with the list of enumerated skills in Rule 2.01:

- i. one important addition to this list (comparing it with the skills presently taught on the present BAC and other professionals skills programs) is client interviewing (implied by client communication skills in (Rule 2.01 (1) d));
- ii. we assume that the requirement of adequate skills in legal writing, analysis and legal research is satisfied by testing in law school and by the licensing examinations.

This leaves a list of core professional skills as follows:

1. Drafting (contracts, litigation documents)

2. Interviewing, counseling and client communication
3. Negotiating and ADR representation
4. Advocacy (including pre-trial and trial strategies : exam for discoveries, preparation and examination of witnesses)
5. Organisational skills: file management, time management, delegation and supervision.

Teaching commitment and related structural issues

There are a wide range of models for the teaching of professional legal skills by professional bodies, ranging from year-long taught and assessed courses (for example, the Bar Vocational Course (for barristers) and the Law Society Program (for solicitors) in England and Wales, the Law Society of Victoria, Australia) to much shorter intensive skills courses (for example the Law Society of New Zealand 13 weeks, the Western Australia Law Society, 5 weeks, the Professional Legal Training Course presented by the Law Society of British Columbia, 10 weeks). Some programs integrate skills teaching into substantive courses (for example the Bar Vocational Council; Ontario has moved increasingly toward this model), while others adopt a “stand-alone” model of intensive skills-building workshops. Most US states (New Jersey being an exception) provide no formal teaching at all in professional skills.

There are a number of related structural issues which must be seen alongside these choices. Unlike Ontario, most US states now have mandatory continuing legal education. Some jurisdictions place restrictions on practice immediately following the Call to the Bar. No such restrictions exist in Ontario. Finally, Ontario requires eight months of articling to be completed before the Call to the Bar.

The potential of articling to enhance skills development

There is no doubt that articling provides a significant opportunity for skills practice and enhancement in a real-life but “safe” setting. We strongly believe that the potential for the learning of professional skills in this setting has not been fully realised and have a number of proposals on how this might be achieved (below).

However, the unequal character of articling experiences and the largely uncontrollable nature of the quality of mentoring in these settings- sometimes excellent and sometimes absent – means that relying entirely on articling to provide adequate skills preparation and assessment to meet a competency threshold upon Call to the Bar is inappropriate. We shall return to this discussion below under “Options”.

Teaching and learning methods

Experience elsewhere of skills teaching is not limited to full-time formal classroom instruction. Other teaching and learning tools include on-line instruction (for example at the National Judicial Institute), weekend workshops for articling students (Bar Vocational Council of England and Wales), and CLE programs designed specifically for articling students. Another possibility discussed further below is the enhancement of the Education Plans adopted and followed during articles to include specific identification of skills development objectives and perhaps some type of assessment.

What are the challenges of including skills training in formal licensing requirements?

These include, but are not limited to, ensuring relevancy (because of the wide range of student articling experiences and future aspirations), relating skills education to student work in articling and thereafter; addressing workload issues for students during articles; developing credible and practicable assessment processes; inserting assessment hurdles into the process of training at times that meet the needs and interests of both students and practitioners; and costs. A number of these issues are discussed further below under our “preferred” and “alternate” proposals.

Stage Two : Development and Evaluation of Options

If professional skills education is to continue to form a part of the Law Society's licensing requirements, where in the continuum of legal education should it take place?

Criteria for Evaluating Proposals

The above discussion leads to a number of criteria for the evaluation of options for skills teaching as part of the licensing process .

The proposal adopted should:

1. ensure the Law Society meets its obligation to license only those practitioners who meet a threshold standard of competency in the professional skills enumerated in its own competency model. This obligation includes a means of assessing how far students have met this standard (para 4 Assumptions above);
2. have clearly articulated objectives. The fundamental objective is to enable student members to have attained a threshold standard of competency in the enumerated skills prior to their Call to the Bar;
3. offer student members the necessary support to achieve the objectives via an effective teaching and learning process, whether this occurs in a formal course, during articling, in CLE courses for articling students, in on-line programs, or other means;
4. offer students the opportunity for supervised practice and feedback in preparation for meeting this standard of competency;
5. ensure that these opportunities are provided to all students without unfair variation and different and uneven experiences;
6. provide for fair and effective mechanisms for assessment in the enumerated skills;
7. clearly and consistently relate entry stage (Stage Two : above) training and evaluation to a model for a continuum of learning and an expectation of on-going learning;
8. enhance the public accountability and reputation of the Law Society and its members;
9. facilitate a professional climate in which the aim is the nurturing of excellence, and not simply meeting the thresholds.

Options

There are a wide-range of approaches which the LSUC could use for the teaching and learning of professional skills. In this section we will briefly describe a number of approaches which assume that the existing BAC will be abolished and replaced with an examination-based system for the assessment of substantive law competence. We do not describe these options in detail but rather seek to identify the range of options which we considered in arriving at our conclusions (below).

1. the Law Society could eliminate all formal teaching and support for the learning of professional skills, along with the skills assessments;
2. the Law Society could eliminate all skills education as above in (1), but move towards a model of mandatory post-call CLE;
3. the Law Society could provide optional training and assessment in professional skills pre-Call and tie these to stated restrictions on the licence to practice;
4. the Law Society could eliminate the substantive teaching programs of the BAC but retain the skills program and its assessment in some modified form;
5. the Law Society (without formal teaching or teaching support) could assess all students in the enumerated skills at the end of articling and as a threshold to a Call to the Bar;
6. the Law Society could provide a variety of optional teaching supports to students including on-line resources, weekend workshops, prior to final post-articling skills assessment;
7. the Law Society could promote Education Plans for articles that require students to identify skills they wish to enhance from the enumerated list and provide for assessment by their Principal;
8. the Law Society could use private trainers to either teach and/or assess the enumerated skills post-articling;
9. the Law Society could ask the Ontario law schools to provide compulsory skills training for all students as part of mandatory LLB requirements

Issue Two

Should Professional Responsibility teaching and learning continue to form a part of the Law Society's licensing requirements?

Stage One Development of Supporting Data

In considering this question our starting assumptions are as follows:

1. The Law Society wishes to achieve the highest possible professional and ethical standards. For a self-governing profession such as law, issues of professional ethics and the responsibilities of its members of the profession to their clients, to the legal system and to the public at large are vital to its reputation for integrity and competence. If the public does not have the perception that the legal profession is striving to achieve the highest possible standards of professional responsibility, the reputation of the profession, which is already battered, will suffer even more. Appropriate teaching and learning about professional responsibility would demonstrate to the public that the Law Society takes seriously its obligation to ensure that lawyers are of good character and aim for the highest professional standards.
2. The Law Society has an obligation under the Law Society Act *RSO 1990*, c. L.8, par. 27(2) to ensure that applicants "... for admission to the Society ... be of good character." The Act also prohibits professional misconduct or conduct unbecoming a barrister or solicitor. (par. 33(1))
3. The Law Society has adopted the Rules of Professional Conduct in order to provide guidance to the profession regarding its obligations to clients and to society in general. However, dealing with the ethical issues which arise in the practice of law requires more than an application of these Rules. Firstly, the Rules do not attempt a complete codification of the standards of Professional Responsibility and therefore may not deal with the issues with which a lawyer is confronted. Secondly, the Rules set out base-line standards which provide useful guidance but do not resolve many of the issues faced by practitioners. Ethical issues are often complex and ambiguous. They take us by surprise arising in situations where they are not obvious and predictable. It is necessary to struggle to find an answer which is acceptable within one's own ethical framework as well as the Rules. Empirical research suggests that the great majority of lawyers do not consult the *Ontario Professional Conduct Handbook* for guidance (Wilkinson, Walker & Mercer, 2000). They may well seek help from colleagues, mentors and personal advisors (spiritual or secular) or resolve such ethical dilemmas through the application of their personal ethical frameworks. Teaching and learning limited to the Rules would be insufficient for achieving the high standards expected of a self-regulating profession.
4. The issue of good character is sometimes approached as if character is set in stone. While not denying the importance of family and childhood experience in the development of good character, we believe that the profession has the obligation to foster good character through a professional culture that values and rewards ethical behaviour and through training that ensures that lawyers who strive to act ethically and professionally have the skills necessary to do so. A lawyer is not competent if he or she is not ethical. Acting ethically is a skill intimately tied to the skills set out in Rule 2.01 of the Rules. Lawyers must be able to recognize and resolve ethical dilemmas. Lawyers need to be equipped with sophisticated tools for handling the ethical issues with which they will be confronted throughout their careers.
5. Professional Responsibility is the orphan of legal education. Professional Responsibility principles and issues are only minimally addressed in law school programmes. In an ideal world, ethical issues would be integrated into every course in the law curriculum. (Cotter, 1992) Students would have multiple opportunities to grapple with them under the guidance of their professors and practitioners. Unfortunately ethical issues are either addressed tangentially and in passing in the rush to cover the material in substantive law courses or analyzed in depth in optional courses taken by a minority of students. To the extent that issues are dealt with in legal education, they are often discussed outside the context of real-life practice. In the previous section on skills training we stressed the uneven approach to the teaching of skills in Canadian law faculties. The failure of the law faculties to deal with legal ethics is even more striking. Several authors

have sharply criticized both Law Society and the law faculties for their neglect of professional responsibility. (Arthurs, 1998, Dodek, 2000) The Law Society cannot assume that student members come to the articling experience with an adequate understanding of ethical issues.

6. Education in Professional Responsibility must also deal with practice management principles. The articling student who has just completed his or her law degree will have at best minimal exposure to issues concerning the management of a law practice. Even those who would like to take an optional course in this area are unlikely to find much available.
7. Given the minimal exposure law graduates will have had to ethical and practice management issues, the obligation of the Law Society to ensure the competency of licensed practitioners must include training in the principles of Professional Responsibility and practice management. The Law Society's obligation in this respect includes both teaching and assessment in some form.
8. Currently the teaching and learning of Professional Responsibility are integrated into the structure of the Bar Admissions Course and assessed through examinations. This approach will no longer be viable if the Law Society opts for a licensing system. There will either be an examination in Professional Responsibility and Practice Management that forms part of the new licensure examination system or these issues will be integrated into the two proposed examinations (Barrister and Solicitor). However, in our view, an approach to legal ethics based solely on a licensure examination would be woefully inadequate because student members join Law Society with little or no training in the area. Furthermore, even if students were thoroughly versed in the rules of professional conduct at law school (which they are not), from a purely academic perspective they would have little notion of how to apply these to the practice situations they might encounter.
9. Because the standards of Professional Responsibility have to be higher than the minimum standards set out in the Rules of Professional Conduct – the profession should aim for the highest possible ethical standards - teaching must be interactive and involve an exchange of views and perspectives. Assessment of Professional Responsibility through examinations involving short answers or multiple-choice questions is inadequate because this approach does not allow for complexity and ambiguity. Nor does it equip student members with the tools necessary to develop their own ethical frameworks and reason through problems to propose acceptable solutions. As we stressed in the section on Models of Competency, student members must develop the capacity for self-assessment and critical reflection on their own practice or approaches so that they can decide if, in a particular context, an plan of action is appropriate and plan strategies for client representation that are ethical and effective.
10. As with skills in the competency-based approach, ethical learning takes place over the course of an entire professional career. The propensity for ethical behaviour can be enhanced through the professional culture. The challenge is to develop a training model which will encourage the development of a commitment to continued self-reflection and growth throughout the lawyer's career.
11. There are many ways to offer training in both Professional Responsibility and practice management which are worthy of exploration. These include weekend courses during articles, in-house training during articles, a formalized model for mentoring through the articling contract, and a modified BAC model which focuses on the development of the skills necessary to ensure that the practitioner meets the high ethical standards expected of a member of the Law Society.
12. While the Law Society may reasonably want to reduce the costs associated with the BAC, this goal may sometimes conflict with competing goals of ensuring that student members meet the criteria of entry-point competency in Professional Responsibility and practice management.

Stage Two

Development and Evaluation of Options

If Professional Responsibility training is to continue to form a part of the Law Society's licensing requirements, where in the continuum of legal education should it take place?

Criteria for Evaluating Proposals

The above discussion leads to a number of criteria for the evaluation of proposals for teaching and learning of Professional Responsibility and practice management.

The proposal should:

1. provide for appropriate content. Assuming that the Law Society aims for the highest possible ethical standards and that ethical issues often require decision-making in grey zones where there are no simple answers, student members must both learn the Rules of Professional Conduct and have the opportunity to grapple with complex and ambiguous ethical issues which reflect the real-life problems of practising lawyers. The content of the training should emphasize issue identification and pre-emption rather than problem-solving;
2. ensure that time is devoted specifically to issues related to practice management which are closely related to issues of professionalism and skills. The Law Society rightly strives to reduce the number of complaints made against lawyers. LawPRO data suggests that complaints often arise because of communication issues (e.g. failure to follow instructions or failure to communicate promptly with clients). Complaints relating to conflict of interest make up nearly 10% of the total. This data clearly links Professional Responsibility, practice management and skills;
3. have clearly articulated objectives. The fundamental objective is to enable student members to make both the Rules of Professional Conduct meaningful for themselves and to enable them to develop their own ethical frameworks that are fully integrated into their practice frameworks;
4. use appropriate teaching methods which enable the student members to achieve the objectives. Given the need to grapple with ethical issues in conditions of uncertainty so that student members can identify and articulate their own ethical frameworks on the basis of the Rules of Professional Conduct, the teaching methods used must be interactive. They should involve an exchange of views and perspectives, use simulated files and situations to focus the discussion, and focus on ambiguous situations (for example, the Bernardo tapes case as well as situations in which conflicts of interest may arise) in which the lawyer is called on to decide a course of action in the absence of a clear rule;
5. provide for appropriate and fair assessment. Given that the Rules of Professional Conduct provide base-line standards of professional conduct and that many of the ethical issues lawyers must face cannot be decided through a simple application of the Rules, the assessment tools must reflect the objective of enabling the student member to develop her own ethical framework that is fully integrated into her practice framework. Assessment tools must evaluate knowledge of the Rules but more importantly allow student members to explain and apply their own personal ethical frameworks. The approach to assessment will enable the Law Society to link the teaching and learning about Professional Responsibility and practice management to the statutory requirement that those admitted to the profession be of good character. Given this aspiration, assessment of Professional Responsibility solely through examinations focussed on application of the Rules would be inadequate. (It should be stressed, however, that knowledge of the Rules of Professional Responsibility will also be assessed either in the context of the licensure examinations or by means of a licensure examination in Professional Responsibility alone. This aspect of the assessment of the testing of knowledge of the Rules of Professional Responsibility will not be covered in the report which focuses on the training of student lawyers during their articling year.);
6. ensure that the opportunities for learning and demonstrating achievement of objectives are provided to all student members without discrimination, unfair variation, or different and uneven experiences;
7. clearly and consistently relate the entry stage (or Stage Two, above) training and evaluation to a model for a continuum of learning and an expectation of on-going learning;
8. enhance the public accountability and reputation of the Law Society and its members;

9. facilitate the creation of a professional culture in which the aim is the nurturing of excellence, and not simply the meeting of thresholds of competency in ethical behaviour.

Options

There are a wide-range of approaches which the Law Society could use for the teaching and learning of Professional Responsibility and practice management. In this section we will briefly describe a number of approaches which for the most part assume that the existing BAC will be abolished and replaced with an examination-based system for the assessment of substantive law competence. We do not describe these options in detail but rather seek to identify the range of options which we considered in arriving at our preferred options.

1. The existing Bar Admission substantive courses could be abolished while retaining a stand-alone course in professional responsibility to be taken either at the beginning or the end of the articling period. The length of the course would have to be determined but it would likely last one week. This course which would focus solely on the Rules of Professional Conduct and on ethical dilemmas. This course would actively involve the student members in the analysis of ethical problems and issues and require them to propose appropriate strategies for dealing with those issues in the context of legal practice. Assuming that Law Society adopts the proposal for skills training, practice management integrated into the pre-articling skills program;
2. As a variation on option 1, the Law Society could create a shorter course - two or three days - which would focus solely on the Rules of Professional Conduct;
3. The teaching of legal ethics, the Rules of Professional Conduct and practice management could be integrated into a pre-articling skills course. Both lawyering skills and ethics would be taught simultaneously using problem-based learning (PBL) techniques (such as model files and simulations);
4. The Law Society could rely solely on on-line resources for the teaching of Professional Responsibility and practice management. The current BAC Professional Responsibility materials could be made available in electronic format on the Internet. Student members would teach themselves the material. There would be no teaching. The student members would be required to pass on examination similar in format to the present examination;
5. All formal training and evaluation in legal ethics and practice management could be abolished and professional responsibility training could be incorporated into the contract made between student and Principal for articles. The Articling Principal would oversee Professional Responsibility training during the articling period and would have to attest to the student member's character as a condition of admission to the profession. As a variation on this option, practice management could be taught in the pre-articling skills course and then assessed by the Principal as part of education plan agreed to at the outset of articling;
6. Assuming that there will be skills training and assessment prior to the beginning of article, it would be possible to build ethical issues into the skills training and ensure that skills assessments raise ethical issues which the student member would have to identify and analyse. In this model there would be no separate teaching relating to legal ethics and practice management;
7. Professional Responsibility training could be based on the CLE model of weekend and/or in-house workshops. Student members would be required to participate in a specific number of such workshops during articles. The purpose of these workshops would be to facilitate the exchange of experiences between practitioners and articling students. One such workshop could focus on practice management issues in particular;
8. The Law Society could rely exclusively on a licensing examination without any instruction. This examination could be limited testing knowledge of the Rules of Professional Conduct or include assessment of the ability to identify and resolve ethical dilemmas more generally;
9. All training and assessment in Professional responsibility could be eliminated;

10. The Law Society could ask the Ontario Law Schools to provide compulsory training in Professional Responsibility and practice management as part of the mandatory LLB requirements.

Not all of these options are mutually exclusive. For example, regardless of the form of training chosen, the Law Society could require that student members successfully complete an examination on the Rules of Professional Conduct as part of licensing process prior to admission to the Bar.

There are some significant constraints to the development of an “ideal” model here which need to be acknowledged. One is the extent to which the Law Society anticipates costs in relation to the new program; however this is not a matter for us. It appears to us however that with careful planning on the basis of sound educational principles the Society could offer a coherent quality teaching component for pre-Call students, albeit at a cost below that of the present BAC.

Another important constraint is the resistance that both students and employers are likely to offer to a pass/fail assessment of post-articling skills competencies which occurs shortly before the commencement of regular employment as an Associate. We understand that for economic reasons, students and employers alike require a degree of certainty at this late stage of the articling process. However, we are concerned that the Society can credibly argue that it fully assesses a range of competencies *following* articling and *before* students are called to the Bar. Thus in our “alternate” option set out below we suggest that further thought be given to accomplishing this objective by moving up the assessment of competencies to a later stage in the articling process, and /or developing competency assessments which provide feedback on areas of weakness, even if this does not include “failing” a student at this late stage.

Many of the options identified above are not acceptable because they do not provide student members with an opportunity to grapple with complexity and ambiguity in a context resembling real-life practice. Reliance on a licensing examination (option 8) or exclusive use of on-line resources (option 4) would not create opportunities for exchange and discussion with other students and with practitioners. Nor would they provide a context for the hands-on practice of skills under the watchful eyes of instructors and practitioners who can provide constructive feedback which would facilitate improvement. Other options such as the articling contract model (option 5) and the CLE model of week-end workshops (option 7) provide an opportunity for exchange and debate but they would not, at least on their own, provide opportunities for effective assessment of student learning. It would be necessary to supplement them with an examination or other type of assessment which may not be the best way to measure attainment of the objectives for the learning activity given that the two take place at different times and in different contexts.

Conclusions

In this final section, we shall propose two options (differentiated as “preferred” and “alternative”) which appear to us to carry forward the goals of the Law Society in relation to skills, Professional Responsibility and practice management training. For the reasons outlined above, we believe that course-based instruction in this area is the best way to achieve the goal of training lawyers who strive to achieve the highest possible professional and ethical standards.

“Preferred” option

Our preferred option has three components.

1. *An orientation meeting between Articling Principal and student*

A post-hire, pre-articling meeting between student and Articling Principal would consider what tasks the student may be asked to do and what she should ideally be able to do during articling.

The Education Plan should specify what skills the student will particularly work on throughout the articling contract. The student would attend the four-week skills program (below) with this information, and could choose to focus on areas that may not be as fully supported by his or her articling experience.

In addition, each Education Plan should assume that the student will have opportunities to learn and to practice office management skills, time management, organisational skills and practice management, and to work collegially as part of a team. These skills could be finally “assessed” – in the sense of enabling the Principal to “sign off” the student as competent to a threshold standard however articulated – by the Principal. In addition, Practice Management is also to be assessed in a pre-Call licensing examination.

2. *An initial skills-focused course of four weeks*

This four-week course would replace the present BAC Stage One course and would aim to prepare students to undertake the tasks that might typically be required of them during their articles. Attendance would be compulsory for all student lawyers in Ontario. This proposal does not specify content but assumes that this will relate directly to the enumerated skills, with the exception of Practice Management (see above). Course content might also be further elaborated based on a simple survey of articling principals asking “what do you expect your students to be able to do – both supervised and unsupervised – during articling?” Ethical issues would be integrated into each skills and transaction-based exercise (this was the model of the former Professional Legal Training Course at the City University of Hong Kong, and the Professional Legal Training Program for the Law Society of British Columbia. See also Cotter, 1992 and Macfarlane et al, 1992).

A possible structure for an intensive course would look as follows :

Week One	Interviewing, counselling and client communication
Week Two	Writing (opinion letters, memos) & Drafting (contracts, litigation documents)
Week Three	Negotiating and ADR representation
Week Four	Advocacy including trial preparation and management strategies

The teaching approach that we propose for this course would be Problem-Based Learning (PBL), with parallel skills and ethics teaching seminars. PBL enables the constant integration of substantive and ethical issues into simulations and practice exercises. Students would work together in small groups or “firms” and be required to handle files from the first meeting with the client to the end of the trial. (This could be a single file for the whole course or several files raising different issues.) Because PBL requires active participation, attendance would be compulsory.

Ethical issues, requiring a thorough understanding of the Rules of Professional Conduct, a fully developed personal ethical framework and a clear understanding of the principles of practice management, would be built into the case or “file” handled by the firm. This model would cover the required content while best meeting our objective of enabling “... student members to make both the Rules of Professional Conduct meaningful for themselves and to enable them to develop their own ethical frameworks that are fully integrated into their practice frameworks.” It would also present student members with these problems in a context which closely resembles “real life”, which is a significant motivating factor in adult learning.

The teaching method would be interactive and participatory so that students could develop their skills as well as a greater sensitivity to the ethical dimensions of the practice of law through simulation, experimentation and discussion. PBL recognizes that skills cannot be learned in the abstract but must be practised to be mastered. It recognises that while some professional situations can be handled on a fairly rote basis, many others are unique and demand careful analysis and a measured response (Schon, 1983). This method also takes into account the complex and ambiguous nature of ethical issues and permits the student members to develop their own ethical frameworks which are fully informed by the Rules of Professional Conduct (see also above).

Assessment would be via pass/fail criterion-based exercises which would determine if the student member has achieved the defined level of competency in each of the four skill areas (Writing & Drafting, Interviewing, counselling and client communication; Negotiation and ADR representation; Advocacy) as well as practice management and legal ethics. Professional Responsibility would be integrated into the skills assessment exercises in the same way as it is integrated into the PBL files and exercises. While this Interim Report does not address the details of appropriate assessment mechanisms, one option is to ensure that identification and management of the “embedded” professional responsibility issues is made a “threshold” for passing each of the skills assessments. Testing of the content of the Rules of Professional Conduct would also take place via the licensure examinations.

(see discussion above). This approach would guarantee that we are actually testing knowledge of the Rules of Professional Responsibility *and* the ability to deal with ethical issues throughout the entire course.

Assessments should be focussed and short so that they provide students with a clear idea of the extent to which they have achieved the desired level of competency in the areas taught in the course. These assessments could be repeated if the student failed. Students who fail would have the possibility of repeating the failed tests but if he or she cannot successfully demonstrate mastery of the skills to the desired level, he or she would not be admitted to the Bar. Defining and holding to a defined standard is important to ensure that the assessment of skills is a credible benchmark, and not simply an automatic rite of passage for students.

3. *Skills development during articling*

During articles, students would be expected to continue to work on enhancing their skills in the enumerated areas and in particular on those functions and tasks most important in their own articling experience. Ideally their Principal would monitor this development, provide regular and supportive feedback which could reflect the criteria used for the skills assessment pre-Call (see below), and take responsibility for a final “sign-off” in the area of practice management (see above). While we are recommending at this stage only for a Principal “sign-off” in relation to practice management, this list of skills mentored and “signed-off” by a Principal might conceivably be expanded in the future where appropriate.

This proposal would meet the criteria outlined in both the skills and professional responsibility sections of this report because it would provide a pedagogically sound learning experience for student members which would ensure that they achieve the defined levels of competence required for the articling experience. The course would:

1. help to ensure the Law Society meets its obligation to license only those practitioners who meet a threshold standard of competency in the professional skills enumerated in its own competency model and contribute to the enhancement of the reputation of the Law Society and its members.;
2. have clearly articulated objectives relating to both the attainment of a threshold standard of competency in the enumerated skills and the development of skills in identification and resolution of ethical issues;
3. be interactive and participatory so that students will have the opportunity, in a supportive and structured environment, to develop knowledge and skills necessary to achieve the defined objectives;
4. provide students with opportunities for supervised practice and feedback to ensure that they have a full opportunity to meet the defined standard of competency;
5. provide for fair and effective mechanisms for assessment of student learning;
6. ensure that the opportunities for learning and demonstrating achievement of objectives are provided to all student members without discrimination, unfair variation, or different and uneven experiences;
7. take into account the fact that student members are unlikely to have taken courses which cover all the skills as well as professional responsibility during their legal studies;
8. facilitate the creation of a professional culture in which the aim is the nurturing of excellence, and not simply the meeting of thresholds of competency in skills or ethics.

The most serious limitation of this model, however, is that it does not provide for a final assessment of student skills competencies immediately prior to the call to the Bar. In this model, aside from those skills mentored and ‘signed-off’ by the Principal, students are not actually assessed post-articling, which we have proposed as an important competency threshold. While the four week skills course would ensure that students begin the articling experience with a defined level of competency, it does not determine whether those students have developed a further level of competence necessary to the practise of law *at the time* of their admission to the profession.

We recognize that there have been issues raised to a final set of post-articling assessments (although we note that this is the model employed by many other professional accreditation bodies). However, we consider this issue to be an important one and therefore we have set out below an ‘alternate’ proposal which would maintain some form of post-articling assessment.

“Alternate” option

This model would follow the same plan set out in the “preferred” option (see above), but would include a fourth element which enables some assessment of students post-articling and prior to their Call to the Bar.

Our preferred approach to this fourth element would be to bring students together again for an intensive training program run over a single weekend. This would be structured as a 72 hour PBL exercise (this could be run Fri-Sun). Instructors should be recruited widely to observe students and provide on-going feedback and supervision. In addition to the work as part of a team or firm, each student would be required to conduct the following for final assessment (pass/fail) purposes:

- a. a short piece of drafting
- b. a negotiation
- c. a client interview
- d. a piece of advocacy

If structured as pass/fail, this assessment could determine whether a student is considered qualified to be called to the Bar. Alternatively, and perhaps less controversially, students would receive a report card following their assessments (above) identifying their areas of weakness in the opinion of their practitioner-evaluators. This information could then be systemically recorded and related to a commitment to particular continuing legal education programs to be taken by the student during the first 12-24 months of their associate position.. Reported weaknesses would not disqualify an otherwise successful student from being called to the Bar.

We would be happy to answer any questions that the Task Force may have regarding this Interim Report, and to respond to any comments.

Julie Macfarlane, John Manwaring, May 2003

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Appendix A

This appendix contains a sampling of course descriptions dealing with legal ethics. It provides an idea of the approach currently taken in Ontario law faculties to the teaching of professional responsibility.

University of Windsor Faculty of Law

98-939 The Legal Profession

This course will provide opportunity to examine the legal profession and its Rules of Professional Conduct, legal education, professionalism, competence, discipline as well as the role of the lawyer in society. Emphasis will be given to the role of the legal profession and the Law Society as well as lawyers' obligations to the community, the courts, their clients, the profession, other lawyers and themselves. As well, consideration may be given to factors to be considered by legal professionals in the selection of career options, principal areas of practice, specialization and achievement of professional self-fulfilment. The students will be expected to question and challenge established assumptions and to examine critically all aspects of the practice of law, the administration of justice and legal education. A significant amount of time will be devoted to issues of ethics and professional responsibility. Students will be required to participate in simulations and other small group methods to explore these issues. (3 credits)

University of Western Ontario

327. The Foundations of Canadian Law:

An introduction to our rich legal tradition that provides the background for the study of law. Topics covered may include legal history; the common law tradition; modern elements of the legal system; responsible government and the rule of law; federalism; the position of the Aboriginal Peoples within the legal system; and the impact of race, gender, and economics on the law. Two credits, one term.

408. Professional Discipline Law:

The course exposes students to the field of professional discipline. It deals with the concepts of discipline, professional misconduct, incompetence, and the constitutional and administrative frameworks within which complaints of professional misconduct are processed. Prerequisite: Administrative Law. Two credits, one term.

455. The Legal Profession:

The history, traditions, organization and responsibilities of the legal profession. The lawyer's functions and the legal rules and ethical considerations involved in various facets of the lawyer's practice will be examined. The Canons of Ethics will be considered in detail, in relation to practical situations. Two credits, one term.

Osgoode Hall Law School, York University

Legal Profession

The course will focus on specific topics including the composition, ethos, work and regulation of the legal profession; stratification of the profession; access to the profession; access to legal services; the lawyer-client relationship; professional competence; professional conduct; accountability; specialization; and challenges facing the legal profession and legal education. The profession will be examined from a variety of perspectives: sociological, political, economic, ethical and institutional.

(This course is open to upper-year students and serves as first year optional perspectives course. The maximum enrollment is 50 with a limit of 10 upper-year students.)

Criminal Law II: Ethical Issues Facing Criminal Lawyers

This advanced course will explore at a theoretical and practical level many of the ethical issues that face criminal lawyers. The writings of David Luban, William Simon and Munroe Freedman will be used to provide the theoretical framework. Part of the theoretical journey will include an assessment of whether (and how) the rules of ethics should be different for criminal lawyers. Practical issues explored will include competence to practice, interviewing clients, limits on presenting a false defense, decision making, client perjury, third party production orders, disclosure of physical evidence and conflicts of interest. Ethical issues surrounding the prosecution of criminal offences will also be explored. Problem solving exercises will be an integral part of the format of the course.

(maximum enrollment – 25)

University of Toronto

Legal Ethics: Dominant Paradigms and Critical Perspectives (362hs)

This course aims at exploring the concept of legal ethics; analyzing critically the determination and enforcement of ethical standards in legal practice; and discussing salient ethical issues in the delivery of legal services. This course will first explore the concept of legal ethics. In this section, we will deal with questions such as: What is covered by the term 'legal ethics'? What is the conceptual basis for the determination of ethical norms in the profession? And how are ethical theories reflected in and/or impacting on professional norms? A second section of the course will look more concretely into how ethical norms are determined by the legal profession and by others involved in the delivery of legal services. This will involve a discussion of the value and enforceability of professional codes; the need for ethical debate and the possibility of ethical consensus; the desirability of public involvement in the determination of professional norms; and the individual and collective responsibilities of lawyers in dealing with ethical issues in legal practice. The third and most extensive part of the course will consist of an exploration of some of the most salient ethical issues raised in legal practice and in the provision of legal services. Concrete issues which can be discussed include: conflicts of interest; confidentiality and disclosure; duties to protect third parties and the public at large; representation of the 'reprehensible' client; exploitation of procedure; availability of legal services; access to the profession for women and members of minority groups.

The course will rely on strong student participation and group discussion of hypothetical cases. Depending on the number of students, small group discussion will be organized to encourage debate on these cases. Guest lecturers will also be invited to address particular ethical issues confronted in their practice.

Evaluation

Class participation (15%) and three short analytical and critical notes of approximately 10 pages, each in response to a different assignment (85%). Each assignment will be distributed two weeks before the due date. Students will be asked to draw on course readings, class discussions and additional sources. A limited number of students may fulfill the extended paper requirement in this course.

Queen's University

Law 334 – Legal Ethics

A seminar exploring how we might conceive the ethical obligations of a lawyer. Questions addressed include: what a lawyer should do; what a lawyer should be; whether it is possible to be a lawyer and a good person.

University of Ottawa

CML 3376 - Professional Responsibility

Competence and practice standards, conflicts and confidentiality, misconduct and discipline, rules and ethics. Current issues. Institutions and committees of the Law Society of Upper Canada and how they govern and regulate lawyers.

CML 3776 - Responsabilité professionnelle

Les normes de compétence et les normes d'exercice de la profession juridique: les conflits d'intérêts et le secret professionnel; le manquement professionnel et la discipline; les règles déontologiques. Problèmes actuels en matière de responsabilité professionnelle. Les institutions et les comités du Barreau du Haut-Canada et les règles et règlements en vertu desquels ils régissent la conduite des membres du Barreau.

First Year courses where ethical issues may arise :

First year courses such as Public Law (Queen's) Legal Process (U of T, Windsor) Legislation (Ottawa) or the Foundations of Canadian Law (UWO) may well provide opportunities for the discussion of legal ethics in the first year curriculum.

Upper-year Courses :

While course names may vary from faculty to faculty courses in areas such as advanced legal research, advocacy, alternate dispute resolution, negotiation, client interviewing and counseling, clinical courses, mediation clinics, mooting, and practicum may provide opportunities to discuss issues relating to professional responsibility in the context of skills development. Other courses such as Women and the Law, Legal Philosophy, and Legal Theory also provide opportunities for such discussions.

APPENDIX 3

Report on Scheduling of the Proposed Licensing Program and the Enhancement of the Articling Process

Report prepared for the Law Society of Upper Canada Task Force on the Continuum of Legal Education

Prepared by:
Diana Miles, Director, Professional Development & Competence

May, 2003

The Licensing Program

Discussion Paper

The Task Force on the Continuum of Legal Education (Task Force) is requesting input from stakeholder groups with respect to the scheduling of the proposed licensing program and the enhancement of the articling process under the new regime of licensing that has been presented in this consultation package.

The options for scheduling of the licensing program and improvements to articling supports that are set out in this discussion paper are examples of how the processes may be developed. Suggestions for revision and improvement are requested.

The Proposed Licensing Process

Approved law course	+	4 weeks skills and professional responsibility training and assessments	+	Articling [substantive examinations held during articling term]	+	Call to the Bar
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A) Scheduling the Articling Term: Assumptions

Skills and Professional Responsibility Program

- a) Skills program including assessments is four (4) weeks in length;
- b) Skills program begins mid May;
- c) Students are entitled to undertake each assessment three (3) times to achieve a passing grade;

- d) Supplementary assessments will occur in September and January each year;
- e) Supplementary assessments and preparation time will be completed on the student's own initiative and schedule;

Substantive Examinations

- f) There are two (2) substantive examinations: Barristers examination and Solicitors examination. Examinations will also test issues of professional responsibility;
- g) Study materials for the examinations are provided to students mid May (concurrent with the start date of the skills program);
- h) Examinations are held three times per year: July, October and February;
- i) The Barristers and Solicitors examinations may be taken in the same examination period or separately in different examination periods;
- j) Students receive one (1) uninterrupted week (5 business days) of study time prior to writing each examination. Students also receive at least two (2) business days to write each exam, one free day and one writing day. In total, students will receive two (2) weeks (10 business days) of study time and one (1) week (5 business days) to write the examinations. Students and Principals will agree on the timing of the study weeks and examination sittings in the Articling Contract. Study time is an estimate only and cannot be confirmed until the competencies to be tested and the examinations to test those are developed.
- k) The designated study time and examination writing time will be in addition to the number of weeks of articling, but will comprise a component of the articling term in the Articling Contract;
- l) Students are entitled to write each examination three (3) times to achieve a passing grade;
- m) Supplementary sittings of the examinations (rewrites) will occur at the same time as the scheduled examinations: July, October and February;
- n) Supplementary examination writing and required study time will be completed on the student's own initiative and schedule;
- o) Four (4) weeks of vacation entitlement is included in each articling term separate from the required uninterrupted study and examination writing weeks and will be set out in the Articling Contract.

B) Proposed Length of Articling

Options:

1. 44 weeks (10 months)
2. 52 weeks (12 months)

C) Review of the Articling Term Options

Option 1:

44 week articling term + 2 weeks study + 1 week examination writing = 47 weeks

Scheduled Activity	Approximate Dates (using 2003/04 calendar year)
Law school completed	April 30
Skills program begins	May 19
Skills program ends	June 13
Available to begin articling (allows one week between skills program and start date)	June 23
Examinations will be held	July 7 – 11 October 27 – 31 February 23 – 27
47 week articling term ends	May 15
Call to the bar	June 1 – 10

Issues/benefits for Option 1:

- Sufficient time between end of articling term and call to the bar to allow for flexibility in start and end dates of articling term.
- Students may begin to practice in June.
- Call to the bar is at a convenient time when all students, families and friends are available to attend.
- Potentially five (5) weeks where there may be no overlap between articling students coming and going.

Option 2:

52 week articling term + 2 weeks study + 1 week examination writing = 55 weeks

Scheduled Activity	Approximate Dates (using 2003/04 calendar year)
Law school completed	April 30
Skills program begins	May 19
Skills program ends	June 13
Available to begin articling (allows one week between skills program and start date)	June 23
Examinations will be held	July 7 – 11 October 27 – 31 February 23 – 27
55 week articling term ends	July 10

Call to the bar	September 8 – 18 (2004 has a late Labour Day)
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Issues/benefits for Option 2:

- Potentially three (3) weeks where there is an overlap between articling students coming and going.
- Sufficient time between end of articling term and call to the bar to allow for flexibility in start and end dates of articling term.
- September date for the call to the bar is easier to implement. July and August are problematic from the perspective of administration, scheduling and availability of students, families and friends.
- Call to the bar is delayed to September. Potential delay is as much as eight (8) weeks if the student completes articles at the earliest date possible and dependent on the timing of the Labour Day statutory holiday. Restricts student ability to begin practising immediately.

D) Articling Program Enhancements

There are many opportunities for the Law Society to assist articling students and articling Principals to achieve a highly satisfactory articling term. One of these is to provide a variety of enhanced services and learning supports to assist in supplementing articles. Supports would fill potential learning gaps that may arise in articling placements with firms or departments of differing sizes and practice focuses.

Attached at Appendix 1 is an example of the supplementary learning supports that the Task Force is considering. Input from stakeholder groups on the proposed supports and suggestions and for further supports is requested.

When providing input, please refer to the articling goals and objectives set out in the sample Education Plans attached at Appendix 2. Emphasis should be placed on the type and focus of supports that would enhance articling, fill perceived gaps in learning and assist in leveling the articling experience across the province.

APPENDIX 1

Enhancing the Articling Experience - Potential Supports for Students

Tool/Product	Electronic Delivery	Other Delivery
Skills Development		
Provide easily accessible role-plays of skills program tasks (interviewing, negotiating, etc.) as a refresher on the e-Learning site and by video tape	X	X
Connect student with a skills mentor (skills instructors) designated as ongoing support		X
Maintain an online forum (discussions, Questions & Answers, etc.)	X	
Make available precedents and supplemental materials related to skills development	X	X

Partner with local and regional law associations to host Q & A days		X
Provide useful links	X	
Provide task-specific tutoring		X
Tape skills programs and make available on e-Learning site and by video tape	X	X
Substantive/Procedural Development		
Continue to supplement the e-Learning site to provide self-study on demand web casts, supplementary documents, precedents, checklists, etc.	X	X
Establish, identify, and make known to students throughout the province the liaisons for registry offices, court registrars, etc.	X	X
Facilitate the establishment of a mentor database and assist students to connect with mentors		X
Create CLE programming suitable for articling and early practice stages	X	X
Create and provide precedents and checklists	X	
Work with Principals and firms to assist in facilitating practical training experiences (e.g., arrange for a corporate student to go to court)		X
Professional and Personal Development		
Provide learning sessions, quick access information and links to mental health and stress relief sites such as OBAP	X	
Provide materials and/or seminars on expectations in the work force, dealing with difficult people, taking direction, eliciting quality feedback, etc.	X	X
Offer CLE programs on the business aspects of law firms targeted to articling students and new lawyers	X	X
Provide placement support for new calls	X	X
Facilitate mentoring relationships to assist with professional and personal management issues		X

Supplementary information for articling enhancement discussion, including:

- a) Sample Education Plan (Checklist Format)
- b) Draft Education Plan (Narrative Format)
- c) Sample Education Plan – Small Firm
- d) Sample Education Plan – Large Firm

SAMPLE EDUCATION PLAN (CHECKLIST FORMAT)

The following draft education plan is one example of what an articling education plan might look like. It was drafted with a law firm setting in mind. However, we recognize that students article in a variety of settings in the public and private sectors (for example, with the government or the courts). Plans drafted by those articling employers will necessarily be unique to the setting, however, they should address a substantial number of the 13 skills areas set out in the following sample draft plan.

A Principal developing an education plan may borrow from what follows to whatever degree is appropriate. However, it is not expected that this sample plan will be copied and used exactly as set out below. The Principal will be expected to fulfil whatever is set out in the plan.

As a suggestion, each skills area below has been divided into basic and optional groupings. The basic grouping represents the minimum objective of the articling experience (i.e. all students will receive this experience). The optional grouping represents experience that the student may or may not receive, depending upon factors such as the student's ability, availability of appropriate work, and time available. Please do not assume that the basic groupings below represent the Law Society's view on the minimum standards for articles. Principals who decide to produce a plan in this format may have basic groupings that are either more or less extensive, depending upon each Principal's practice. A Principal might decide not to set out basic and optional groupings, but in such a case the plan should not be a long list of things that the student may or may not do during articles. It must fairly represent the experience that the student can expect to receive.

PLEASE NOTE: For articling employers of two or more students, one copy of the education plan may be filed to address the experience expected to be provided to all students, if the employer expects each student will receive the same experience.

IMPORTANT: Please remember to indicate the number of lawyers within the firm as well as the level of secretarial support available to the articling student(s) during their articles. This question is indicated in each sample education plan under the "Secretarial Support" heading.

1. PROFESSIONAL RESPONSIBILITY

BASIC

- the basic duties and responsibilities of a lawyer will be taught through firm seminars and routine discussions with lawyers on individual files.
- discuss client confidentiality.
- explanation and demonstration of system used to avoid conflicts of interest.
- explanation and demonstration of tickler system.
- explanation of how fees are set and billed out, and how this is explained to clients.

- use of trust and general accounts.
- discuss appropriate response when asked by a client to do something that would involve a breach of professional conduct rules.

OPTIONAL

- when appropriate, discuss courses of action that could potentially lead to a breach of professional conduct rules, and identify proper means to avoid such a breach.
- discuss proper approach to advertising and business development.
- observe appropriate delegation of work to non-lawyers.

OTHER (Specify) _____

2. INTERVIEWING

BASIC

- discuss proper interviewing techniques.
- attend with lawyer on initial interviews with new clients.
- observe interviews with witnesses.
- prepare witness statements or affidavits for signature based on interview.

OPTIONAL

- interview clients or witnesses.
- interview consultants, experts, employees of various governmental agencies or ministries.
- prepare clients or witnesses for trial or other examination.

OTHER (Specify) _____

3. ADVISING

BASIC

- discuss proper legal counselling techniques.
- prepare memo for lawyer giving basis for advising client.
- generate options and remedies for client.
- attend with lawyer at meetings with clients in which the client is advised and counselled concerning remedies and options, and instructions are received.
- draft opinion letter to client outlining options and remedies.
- prepare memo to file or other record of advice given to client.

OPTIONAL

- advise client under supervision of lawyer.

OTHER (Specify) _____

4. FACT INVESTIGATION

BASIC

- review documentary evidence (e.g. client's personal or internal files, corporate minute books, files maintained by government or administrative bodies such as the OMB).
- conduct searches under various public records systems (e.g. land titles; PPSA; corporate searches, etc.).
- observe examinations for discovery or in aid of execution, or cross-examinations on an interlocutory matter.
- assist lawyer in interviewing clients or witnesses.
- prepare summary of transcripts.
- assist in the follow-up to examinations for discovery.
- attend a creditors' meeting.
- attend disclosure meeting between defence and crown.
- attend with lawyer at pre-trial conference before a judge.

OPTIONAL

- arrange for, prepare, and conduct examinations for discovery or in aid of execution,

- or cross-examination on an interlocutory matter.
- arrange for and attend examination of judgment debtor.
- interview clients and witnesses.

OTHER (Specify)_____

5. LEGAL RESEARCH

BASIC

- become familiar with research materials and facilities available (e.g. firm library, local law library, inter-firm lending arrangements, computer search databases).
- research a point of law and report verbally to lawyer.
- prepare memorandum of law

OPTIONAL

- prepare critique of or response to opponent's pleadings/factum.

OTHER (Specify)_____

6. ANALYSIS OF PROBLEMS

BASIC

- discuss client's problem with lawyer and generate options and strategy.
- prepare written report of options and strategy based on student's research and investigation.

OTHER (Specify)_____

7. PLANNING AND CONDUCT OF A MATTER

BASIC

- formulate plan with lawyer for conduct of various matters.
- discussion of effective communication with clients and other lawyers.
- discussion of various cost and time saving techniques.

OPTIONAL

- assessment of various options in light of client's needs and financial resources.
- prepare draft reporting letters to client.

OTHER (Specify)_____

8. FILE AND PRACTICE MANAGEMENT

BASIC

- learn basic file and record keeping practices.
- learn procedure for opening and closing files.
- prepare a case plan or checklist for a new file.
- learn how to document a file (records of telephone calls, etc.)
- learn how to organize a file.
- learn how to use time docketing system.
- learn how to keep client informed of progress of matter.
- become familiar with billing practices.
- become familiar with tickler system (follow-ups and limitation dates).

OTHER (Specify)_____

9. OFFICE SYSTEMS

BASIC

- learn trust and general account procedures.
- learn process for recording expenses and disbursements.
- become familiar with precedent files.

OTHER (Specify) _____

10. DRAFTING

BASIC

- learn proper usage of precedents _____
- pleadings _____
- notices of motion _____
- orders _____
- offers to settle _____

- retainers _____
- correspondence _____
- notices of appeal _____
- affidavits _____
- bills of costs _____

OPTIONAL

- factums _____
- judgments _____

- agreements _____
- opinion letters _____

OTHER (Specify) _____

11. WRITING

BASIC

- discussion of methods for improving accuracy and clarity of expression in the legal context. _____
- memoranda _____
- reports _____

- letters _____

OPTIONAL

- speeches _____
- articles _____

- texts _____
- opinion letters _____

OTHER (Specify) _____

12. NEGOTIATION

BASIC

- discussion of negotiation techniques and strategy. _____
- observation of negotiations. _____
- review and discuss success of negotiations with lawyer. _____

OPTIONAL

- conduct negotiation of small claims court matters alone (under guidance of lawyer). _____

OTHER (Specify) _____

13. ADVOCACY

BASIC

- discuss advocacy techniques. _____
- observe advocacy in a variety of circumstances:
 - motions _____
 - trials _____
 - pre-trial conferences _____
 - assessments of costs _____
 - cross-examinations on affidavits _____

- applications _____
- tribunal hearings _____
- references _____
- discoveries _____

- attend assignment court. _____
- attend on uncontested and consent motions. _____
- attend on status hearings. _____
- attend on judgment-debtor examination. _____

OPTIONAL

- attend on contested motions. _____
- conduct simple tribunal hearing. _____

- conduct Provincial Court (Civil Division) trial (i.e. Small Claims).
- attend on Crown Wardship Applications (note: student attendance permitted in exceptional cases only).
- attend on references.
- attend on assessments of costs.
- attend on passing of accounts in estate matters (subject to discretion of Judge of Ontario Court (General Division)).
- attend on trial of a provincial offence matter.
- attend on trial of a summary conviction matter.

OTHER (Specify) _____

SECRETARIAL SUPPORT:

Please indicate the level of secretarial support available to the articling student(s) during their articles.

- ☐ secretarial support is available to the student(s)
☐ secretarial support is available at the firm
☐ no secretarial support is available to the student(s)
☐ no secretarial support is available at the firm

_____ please also indicate the number of lawyers within the firm

Legal Experience in the Thirteen Lawyering Skill Areas
1. PROFESSIONAL RESPONSIBILITY The applicant has experience with: complying with a formal code of professional conduct that addresses basic duties, responsibilities and ethical practices such as conflicts of interest, client confidentiality, proper approaches to business development, appropriate delegation of work, and withdrawal of services. The applicant has practice in: using a system to avoid conflicts of interest, a tickler system, setting and billing of fees and explanations to clients, and uses of trust and general accounts.
2. PLANNING AND CONDUCT OF A MATTER The applicant has experience with: making legal services available in an efficient and convenient way that commands respect and confidence and is compatible with the integrity and independence of the profession. The applicant has practice in: communicating effectively with clients, lawyers and others; applying resource-saving techniques; providing legal options in light of needs and financial resources; developing plans for conduct of various matters; and drafting reporting letters.
3. OFFICE SYSTEMS The applicant has experience with: maintaining effective and efficient office systems. The applicant has practice with: precedent file system, process for recording expenses and disbursements (including reimbursement procedures), computer software packages available (e.g. word processing databases, CanLaw, QuickLaw, WestLaw).
4. FILE AND PRACTICE MANAGEMENT The applicant has experience with: basic file and record-keeping practices, procedures for opening and closing files, documenting/organizing a file (ie. recording phone calls). The applicant has practice with: time-docketing system, method of keeping client informed about the progress of matter, tickler system re follow-ups and limitation dates, client retainer and/or payment schedule, billing practices, prepared case plan or checklist for a new file.
5. INTERVIEWING The applicant has experience with: proper interviewing techniques and conducting interviews of clients, witnesses (including experts), and consultants. The applicant has practice with: preparation of clients or witnesses for trial or other examinations or meetings, preparation of statements or affidavits based on interview, initial interview with new clients, interviews with witnesses or clients.
6. FACT INVESTIGATION The applicant has experience with: investigating facts for the purpose of serving legal needs. The applicant has practice with: reviewing documentary evidence (e.g. client's personal or internal files, corporate minute books, files maintained by government or administrative bodies), conducting searches under various public

record systems, interviewing clients/witnesses/consultants, following-up of examinations for discovery (e.g. preparation of list of undertakings), preparation of summary of transcripts of evidence.
7. LEGAL RESEARCH The applicant has experience with: legal research materials and facilities (ie. firm library, local libraries, interfirm lending arrangements, precedents, computer search databases), researching points of law, and preparing reports and written memoranda of law. The applicant has practice with: critique or responses to opponent's pleadings/factum.
8. PROBLEM ANALYSIS The applicant has experience in: determining client's legal problem and options, strategy development for resolution of client's problem. The applicant has practice with: writing reports based on legal research and investigation.
9. ADVISING The applicant has experience in: proper legal counselling techniques, duties and responsibilities of advising clients, preparing memoranda to advise of available legal options/remedies and/or memoranda to file about advice given. The applicant has practice with: advising clients, client meetings, drafting opinion letters outlining legal options/remedies/ and/or letters confirming instructions received.
10. DRAFTING The applicant has experience with: proper use of precedents. The applicant has practice with: drafting facta, pleadings, notices of motion, orders, offers to settle, judgments, correspondence, affidavits, agreements, opinion letters, retainers, etc.
11. WRITING The applicant has experience in: clear and accurate writing in the legal context. The applicant has practice with: writing documents such as, memoranda, letters, reports, opinion letters, articles, texts, speeches.
12. NEGOTIATION The applicant has experience in: negotiation techniques and strategies. The applicant has practice with: conducting negotiation of legal matters.
13. ADVOCACY The applicant has experience in: advocacy techniques and the basic duties and responsibilities of an advocate. The applicant has practice with: appearing as an advocate in motions, trials and tribunal hearings, and some or all of: applications, pre-trial conferences, references, assessments of cost, discoveries and cross-examinations on affidavits, judgment debtor examinations. Crown wardship applications, and passing of accounts in estate matters, etc.

Articling & Placement
 Education Support Services
 The Law Society of Upper Canada
 Osgoode Hall, 130 Queen Street West
 Toronto, Ontario, M5H 2N6
 Fax 416-947-3403 Email articling@lsuc.on.ca
 Phone 416-644-4888 Toll Free 1-800-668-7380, ext. 4888
 Web site <http://education.lsuc.on.ca>

SAMPLE - SMALL FIRM

EDUCATION PLAN: ARTICLING

1. Name of Student and Residential Address:

2. Name of Principal and Business Address:
3. Principal's Month and Year of Call:
4. Name of Law Firm or other setting in which articling will take place:
5. Number of Lawyers within the firm/company:
6. Date of Commencement of Articles:
7. a) Throughout the year the student will be involved in the following practice areas:

family law
commercial litigation
real estate.

I anticipate that the student will devote 70 per cent of his or her time to family law, 10 per cent to commercial litigation, and 20 per cent to real estate practice. My partner, Jane Doe, solicitor, will supervise the student's real estate work and I will supervise the family law and civil litigation work.

- b) There will be no organized system of rotation through the practice areas as the student will work in all three areas throughout the term of articles.
8. There are some tasks which the student will perform which do not have a significant educational component. The student will do some filing of documents in court, make occasional deliveries, assist with photocopying when we are on a rush matter or assist with other clerical matters. It is anticipated that such non-educational tasks will be performed by the student only occasionally.

9. Secretarial Support:

There is ☐ secretarial support available to the student(s); there is ☐ secretarial support available at the firm; there is ☐ no secretarial support available to the student(s); or there is ☐ no secretarial support available at the firm; during the student(s') articles.

10. Practice Skill Areas:

- a. (i) Interviewing - the student will interview:

clients _____

consultants _____

witnesses _____

other individuals (please specify) _____

- (ii) I anticipate that interviewing will/will not be a significant component of the articling experience.

- (iii) I anticipate that the student will initially observe a lawyer conducting an interview; then will participate with a supervising lawyer in conducting interviews; and finally once the supervising lawyer is satisfied that the student has the ability to do so, will conduct interviews without the direct supervision of a lawyer.

- (iv) Other interviewing plans:

b. Advising

- (i) I anticipate that throughout the articling year the student will/will not actually advise clients.
- (ii) Advising clients will be a significant/insignificant component of the articling experience.
- (iii) At the beginning of the articling term, the student will observe a practising lawyer advising clients; then will advise clients under the direct supervision of a lawyer; and finally will advise clients without the direct supervision of a lawyer.

c. Fact Investigation

In addition to acquiring interviewing skills through obtaining facts from clients, private investigators, etc., I expect the student to develop skills in gathering facts by:

land titles searches	_____
registry office searches	_____
corporate searches	_____
reading transcripts	_____
examining judgment debtors	_____
observing and ultimately conducting cross-examinations and discoveries	_____

d. Legal Research

The student will perform legal research and report to me and to the other lawyers in the firm both verbally and in memorandum form. At the beginning of the articling period, we will review legal research techniques with the student to ensure that she has the necessary skills. If, in my estimation, the student does not possess legal research skills developed to a level to allow her to provide an opinion directly to a client, I will assist the student in developing those legal skills by:

- (i) personally reviewing researching a point of law with the student;
- (ii) assigning a junior lawyer to review legal research skills with the student;
- (iii) providing the student with a copy of our firm's legal research guidelines.

We anticipate that the student will spend * percent (for example, 30 percent) of her time throughout the year engaged in legal research and reporting.

e. Problem Analysis

Throughout the articling term, the student will develop skills in problem analysis by:

- (i) observing an experienced lawyer's initial consultation with a client, then analyzing the client's problem with the lawyer after that interview;

- (ii) eventually taking on responsibility for problem analysis and then discussing that analysis with the supervising lawyer.

f. Planning and Conduct of a Matter

We will involve the student in formulating plans for the conduct of various matters on behalf of clients. There will be special emphasis on the necessity for effective communication with both clients and other lawyers. The supervising lawyers will discuss with the student the best method of achieving an appropriate result for the client in a reasonable time and at an appropriate cost.

For example, our student will be directly involved in real estate matters from the beginning. She will assist in title searches and closings, and will ultimately be responsible for the conduct of routine real estate matters.

g. File and Practice Management

At the beginning of the articling period, the student will be taught our methods of docketing time; use of our tickler system for both follow-ups and limitation dates; note-taking; recording of expenses and disbursements incurred on behalf of clients; and organization of individual files. The student will become familiar with our records management system, including opening and closing files.

We will through example and discussion impress upon the student the importance of keeping the client informed of the progress of a matter by sending copies of all correspondence, incoming and outgoing, to the client, by advising the client of developments in the matter and by reporting to clients at the conclusion of a matter.

The student's telephone conversations with various callers will be monitored in the beginning to ensure proper records are kept of the phone calls and that proper courtesy is observed. We will also ensure that telephone calls are returned in a timely fashion and in accordance with our office guidelines.

h. Office Systems

The student will be familiarized with our banking system, including the use of trust and general accounts. As the supervising lawyer, I will discuss with the student the importance of keeping accurate and up-to-date financial books and records for the practice.

i. Drafting

The student will begin by preparing first drafts of affidavits, separation agreements, various pleadings, etc. These first drafts will be reviewed and amended, with the assistance of the student, by the supervising lawyer. The student will be encouraged to make use of the precedent file which we maintain in our office and the precedents available in the Bar Admission Course materials. The student will draft letters of increasing complexity, including reporting letters to clients and opinion letters. All of the student's work will be reviewed and, if necessary, amended by the supervising lawyer.

j. Writing

I do not anticipate that our student will write any papers or documents other than the legal memoranda, pleadings, affidavits, and correspondence described above.

k. Negotiation

- (i) At the outset of the articling term, the students will observe both telephone and in-person negotiations conducted by the lawyers in the firm.

- (ii) As the student takes on increased responsibility for the carriage of files, especially those dealing with small claims court matters, the student will eventually conduct negotiations alone. However, the student will be instructed at all times to discuss any proposed settlements with the supervising lawyer before seeking instructions from the client.

l. Advocacy

Litigation constitutes a large part of our practice. Our student will accompany the lawyers on motions and will assist on any trials which take place during the year.

As this particular student has been active in the student legal aid project while attending law school, we expect that she will attend alone on small claims court matters from the beginning and will eventually attend alone on relatively simple motions and other appearances in the higher courts.

m. Professional Responsibility

- (i) At the outset of the articling term, I will spend some time with our student pointing out some of the confidentiality, conflict of interest and other ethical issues which may arise in this type of practice in our community.
- (ii) During our discussion following her observation of initial consultations, I will take the opportunity to discuss with the student the duty of confidentiality and the importance of informing clients of solicitor/client privilege.
- (iii) The student will be instructed on the need to recognize potential conflicts of interest. I will show her the details of the system which we use to assist us in avoiding these conflicts.

PLEASE NOTE: For articling employers of two or more students, a single draft education plan may be filed to address the experience expected to be provided to all students, if the employer expects each student will receive the same experience.

SAMPLE - LARGE FIRM

EDUCATION PLAN: ARTICLING

1. THE STUDENT

This is an Educational Plan for [name of Articling Student] (the "Student") who resides at * in the * of * in * of *.

2. THE PRINCIPAL

[Name of Principal] (the "Principal") shall be the Student's Principal. The Principal was called to the Bar of Ontario in [month and year of call].

3. THE FIRM

The Student will serve under Articles of Clerkship at the law firm of [name of firm] located at [address] in the City of [city] (the "Firm"). It is anticipated that many of the partners and associates of this Firm will participate in the education and supervision of the Student. There are [number of lawyers] within the firm.

4. COMMENCEMENT OF ARTICLES

The Student will commence Articles of Clerkship at the Firm on [date].

5. ROTATIONS

Throughout the year the Student will be assigned work by members of the Firm in the following practice areas for the number of months specified:

Practice Area

Number of Months

(as appropriate)

There will be an organized system of rotation through the practice areas listed above. Each lawyer who assigns work to the Student will participate in the supervision, education and evaluation of the Student.

6. EDUCATIONAL SEMINARS

The Student will have the opportunity to attend educational seminars organized throughout the year in which members of the Firm will discuss various legal issues of interest in their areas of expertise. The Student will be given the opportunity to attend selected educational seminars offered by the Canadian Bar Association and other organizations, and the fees for these seminars will be paid by the Firm.

7. GUIDANCE AND ADVICE

One member of the firm will be designated as a mentor for the Student. The Student will be encouraged to approach the mentor to discuss, in confidence, any problems or areas of concern relating to the Student's articling experience.

8. ROUTINE TASKS

The Student will occasionally file documents at courts and administrative tribunals, make deliveries, and assist with photocopying and other clerical matters, when urgency requires.

9. SECRETARIAL SUPPORT

There is ☐ secretarial support available to the student(s); there is ☐ secretarial support available at the firm; there is ☐ no secretarial support available to the student(s); or there is ☐ no secretarial support available at the firm; during the student(s') articles.

9. PROFESSIONAL RESPONSIBILITY

Throughout the articling term, the Student will be given explanations of the professional responsibilities relating to client confidentiality, avoidance of conflicts of interest, and other ethical issues.

10. INTERVIEWING

The Student will participate in client interviews, with or without supervision, and may occasionally interview witnesses, experts, consultants, employees of various ministries or government agencies, and other persons to obtain factual information relevant to the matter being considered.

11. ADVISING

The Student will prepare legal memoranda advising supervising lawyers of the results of research and other tasks performed.

The Student will also assist in the preparation of reporting letters advising clients of the status of various matters, and assist in the preparation of opinion letters to clients.

Opinion letters will in all cases be prepared under the supervision of a partner of the Firm. Depending upon the nature of the matter, the Student may report on matters directly to the client by telephone or by letter after consultation with the instructing lawyer.

12. FACT INVESTIGATION

Other than through interviewing, the Student will develop skills in gathering facts by:

- a) reviewing corporate minute books and other documents pursuant to a "due diligence" review;
- b) reviewing real estate title searches, various corporate searches and PPSA searches;
- c) reviewing trial, examination for discovery and other transcripts;
- d) reviewing client's personal or internal files;
- e) reviewing files maintained by governmental or administrative bodies such as Revenue Canada, the Workers' Compensation Board, city or town councils, the Ontario Municipal Board, and others.

13. LEGAL RESEARCH

The Student will perform legal research and report to the lawyers in the Firm both verbally and in memorandum form. Near the beginning of the articling term, a seminar will be conducted to review legal research techniques. In addition, the Firm's library staff will provide assistance in locating materials and using research tools such as the Canadian Abridgment. Periodically throughout the year, training courses on the use of various computer databases such as QuickLaw, CanLaw, Lexis/Nexis, and Infoglobe will be made available to the Student.

The Student will not spend more than * per cent of his or her time throughout the year conducting and reporting on the results of legal research.

14. PROBLEM ANALYSIS

Throughout the articling term, the Student will develop problem-solving skills by discussing and analyzing clients' problems with lawyers in the Firm. These discussions will attempt to teach the Student how to identify the various options available for resolving problems and how to identify the strategic implications of each option.

15. PLANNING AND CONDUCT OF A MATTER

The Student will be given instruction in the importance of devising a plan for the conduct of a matter that is consistent with the needs and expectations of the client, and the importance of achieving the desired result in a reasonable time and at an appropriate cost.

It will be impressed upon the Student that the client must be kept advised of the progress of the matter and be consulted for instructions when important decisions must be made.

16. FILE AND PRACTICE MANAGEMENT

At the beginning of the articling period, the Student will be taught: the Firm's policies and procedures for docketing time; the proper use of tickler systems; note-taking and record-keeping procedures; methods for recording expenses and disbursements incurred on behalf of clients; and techniques for the organization of

individual files. The Student will be made familiar with the Firm's file and records management system, including the procedures for opening and closing files and the account rendering process.

17. OFFICE SYSTEMS

The Student will be given an introductory seminar explaining various office systems and procedures including: procedures for tracking photocopying, telephone and taxi expenses; procedures for obtaining reimbursements for disbursements on behalf of clients; procedures for arranging overtime secretarial assistance; the organization of the Firm's internal precedent systems; the capabilities and limitations of the Firm's word processing computer system; and others.

18. DRAFTING

The Student will assist in the drafting of various legal documents including affidavits, facta, pleadings, notices, agreements, corporate resolutions, information circulars, prospectuses, wills, and others.

The Student will also draft letters to and on behalf of clients, including demand letters, reporting letters and preliminary drafts of opinion letters.

19. WRITING

The Student may assist lawyers within the Firm with the writing of legal research memoranda, papers, speeches, presentations, or text books on various subjects.

20. NEGOTIATION

Throughout the articling term, the Student will have opportunities to observe and participate in negotiations conducted by lawyers within the Firm.

21. ADVOCACY

It is anticipated that, during the course of the rotation in the Litigation department, the Student will have the opportunity to accompany one or more lawyers in order to observe the conduct of any or all of the following: examinations for discovery, cross-examination on an affidavit, contested motions, Weekly Court applications, trials, and appearances before administrative tribunals.

In addition, the Student will have the opportunity to participate personally in one or more of the following: small claims court trials and pre-trials, contested and uncontested motions, assignment court proceedings, status hearings, Provincial Offences Court trials, and examinations in aid of execution.

22. PROCEDURES FOR EVALUATION AND ASSESSMENT

Upon the completion of each rotation, evaluation forms will be circulated to each lawyer for whom the Student has done work during the course of that rotation. These evaluation forms will request that the lawyer assign a numerical rating to the Student's performance in each of a number of specific categories, and will also provide an opportunity for the lawyer to make general comments concerning the Student's performance and development.

The Student and the Principal will meet together to discuss these evaluations and consider how the information contained in them could best be used to further the development of the Student's skills during the remainder of the articling term.

PLEASE NOTE: For articling employers of two or more students, a single draft education plan may be filed to address the experience expected to be provided to all students, if the employer expects each student will receive the same experience.

Emerging Issues Committee Report

- Status of Issues under Review

Emerging Issues Committee
May 22, 2003

Report to Convocation

Purposes of Report: Information

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

STATUS OF ISSUES UNDER REVIEW BY THE EMERGING ISSUES COMMITTEE

1. At its April 24, 2003 meeting, the Emerging Issues Committee (“the Committee”) completed an assessment of the issues with which it has been dealing roughly within the past year. The exercise served the purposes of confirming the status of certain issues and determining the priority of others. This is in keeping with the mandate of the Committee to “monitor emerging policy issues affecting the Society and the legal profession, to undertake and direct research into such policy issues and to develop for Convocation's approval strategic plans and other proposals relating to such policy issues.”
2. This report is intended to inform Convocation on the results of the Committee's assessment, and provide an overview of the major issues the Committee believes are a priority for the coming year.

Discussion of the Issues and Priorities

3. The chart attached to this report includes current issues before the Committee and those that have been dealt with and concluded, either through the work of the Committee itself or by referral to other committees or task forces. The Committee recognizes that some issues, or components of them, overlap. An attempt has been made, however, to identify and explain discrete issues.
4. The Committee determined that a number of issues should be given top priority, and these issues are designated as such on the chart. The fact that a priority has not been assigned to other issues does not mean that they are of lesser importance. The priority assignment is simply to indicate what should be dealt with first in a substantial list of issues.
5. Accordingly, the following issues, for the reasons explained, should be given top priority, and appropriate resources devoted to their review:
 - a. Balancing career and family
This issue has wide-ranging affects within the profession and a number of components that require consideration. The Committee agrees with the comments of Earl Cherniak, who brought this issue forward, that the changing demographics of the profession, families with two working spouses, the number of single parents and the demands of children all affect the ability of lawyers to balance professional demands, domestic commitments and personal development. As the issue relates to

the well-being of the profession and its ability to provide competent and professional services to the public, it has been identified as a priority.

b. Effects of information technology on the profession

The Committee recognizes the breadth of this topic, and is therefore suggesting that it be made the subject of a task force. A task force, in the Committee's view, can devote the necessary time and resources to determining the Law Society's response, and responsibilities, to the profession as it faces the challenges of an increasingly electronic practice environment.

c. Effectiveness and efficiency of the justice system

The Committee's view was that the gravity of this issue, in particular as it relates to access to justice in the broadest sense, must not be underestimated. As the discussion in the chart indicates, this issue has potentially wide-ranging implications for the profession, including the relevancy of the profession and its ability to maintain its independence.

d. Regulation of the profession

As the chart indicates, this issue is presented in two parts, the first focusing on the responsiveness of the Society's regulation of lawyers to developments within and outside of the profession, and the second relating to the "bigger picture" of self-regulation and the need to protect that privilege. The issue is a priority, as it is related to a key foundational aspect of the profession.

6. Over the summer, the Committee plans to flesh out and further define the priority issues, to facilitate decisions on how best to approach the issues. It is anticipated that the chair of the Committee will discuss with the new Treasurer the suggested approaches, which may involve formation of new task forces or specific referrals to existing committees.

EMERGING ISSUES COMMITTEE
ISSUES LIST
(UPATED MAY 2003)

* indicates matters that are complete or that have been referred to other groups

Major or "Group" Topic	Issues within the Group (where identified)	Comments on the Issues	First Priority (if assigned)	Status/Notes
Balancing career and family		Current demands of a legal career put enormous pressure on the ability to maintain a reasonable family and personal life. Increasing sophistication and demands of clients, the massive and immediate availability of information, and the speed of electronic communication are among the contributing factors to these pressures. The ability to serve clients and advancement within firms are affected by these factors. The issue for the profession is whether it is possible to structure the practice of law to ameliorate the effects of these conflicting pressures.	1	
Effects of information technology on the profession		The subjects include e-filing of court documents, e-reg for real estate transactions, digital signatures, security/encryption issues, confidentiality, provision of legal advice on the Internet and lawyer competence with IT.	1	The suggested approach is to create a task force to examine these issues in depth, with input from the Professional Development, Competence and Admissions Committee, given the educational component.
Effectiveness and efficiency of the justice system	Barriers to making law effective in people's lives Access to justice for the middle class Government funding for the justice system The rule of law	Concerns relate to the risk that certain segments of the population, given the cost of legal services, will become marginalized, negatively impacting on the administration of justice and structure of the legal system. Other issues include the effect on the relevance of lawyers, encroachment on the independence of the profession and procedural rules which perpetuate inefficiencies in the justice system.	1	While the Access to Justice Committee will deal with some of these issues, an approach that will include appropriate examination of the particular concerns expressed must be determined.

	Core values			
Regulation of the profession	<p>Relevancy of ethical rules in a changing legal environment, and the effects of de-regulation and activities of non-lawyers</p> <p>A second part is the rationale for an independent profession related to the core values of the profession, and the need for self regulation of the profession.</p>	<p>Included are the jurisdiction of the regulator and the idea of other organizations' ability to regulate lawyers and do it better</p> <p>One proposal is to articulate the principles behind self-regulation and independence of the profession, for use in a proactive way to regenerate faith within the profession, in the public realm and at the governmental level</p>	1	Policy secretariat staff are addressing the issue in part through a paper on independence of the profession and self-regulation
The lawyer's role in corporate governance		This issue relates to the OSC's inquiry of the Society on the need for enhanced regulation, following the U.S. Securities and Exchange Commission's new rules on attorney conduct.		A committee working group has been formed (the second meeting was held April 24, 2003). The current focus is on the <i>Rules of Professional Conduct</i> .
Core values of the profession	<p>Rule of law</p> <p>Independence of the profession</p> <p><i>raison d'être</i> of the profession and its core values, assertion of the importance of independence and self-regulation</p> <p>Response to laws around international terrorism</p>	Respecting the <i>raison d'être</i> of the profession, the question relates to the Society's role, and more broadly, the Society's efforts in responding to legislative or other initiatives that affect the fundamental values of the profession.		<p>Responses have been provided to anti-terrorism legislation (Bill C-36 through the Federation and Bill C-17 through the Committee)</p> <p>The independence issue is included in the Policy Secretariat initiative described above.</p> <p>A current issue is federal consultations on new regulations under the money-laundering legislation (to be dealt with through a Federation Committee and to be monitored by the Committee).</p>
The Society's role in relation to the International Criminal Bar (ICB)		Following creation of the International Criminal Court (ICC), the ICB was established and is seeking formal recognition from the ICC. A draft code of conduct for ICB counsel is being prepared.		A meeting is to be arranged to obtain information about the creation and purpose of the ICB.
Training of lawyers	Mentoring/training of lawyers and impact of economics	Concerns relate to economically rational approaches to training vs. comprehensive on-the-job training, disparity in litigation		The discussion will focus on possible referral to the Continuum of Legal Education Task Force.

	Cost of legal education	training between large firms in large centers and small firms in smaller locations		
Law Society's role in the Federation of Law Societies		Included are funding for litigation on national issues and the infrastructure to be an effective body.		
Business structure issues	Non-voting equity partners in law firms Ancillary businesses	Both issues relate to profit. Equity partners raise fundamental control and management issues. Ancillary businesses – established to lever off well-known expertise, create additional revenue and offer “one-stop” shopping - require examination of appropriate rules around the structure.		
Image of lawyers/the profession		If issues that negatively impact on the image of lawyers can be identified and assessed, the desired outcome is an improvement in the manner in which lawyers are regarded.		
* The impact of smaller communities not being served by lawyers				This has been subsumed in the mandate of the new task force on small firms and sole practitioners
* Lawyers outside of Ontario subject to Society regulation		The issue arose out of discussion on cross-border provision of legal services and globalization of law.		This issue will be dealt with in discussion on international mobility.
CANLII, copyright litigation and copyright licences				The working group on a Strategy for Legal Information for Ontario Lawyers (PDC&A Committee) is examining some of these issues. The copyright litigation will continue to be monitored through the Emerging Issues Committee.
* Privilege and self-regulation for patent and trademark agents		The Intellectual Property Institute of Canada (IPIC) is seeking the equivalent to solicitor and client privilege for patent and trademark agents and wishes to establish a regulatory college, and has asked for the Society's support.		This has been sent to a working group of the Federation of Law Societies, which held its first meeting April 9, 2003.

* Response to the Ontario Securities Commission on regulation of lawyers before it				The response was sent October 31, 2002. The issue relates to the mandate of the working group on lawyers role in corporate governance (noted above), which will include input from the OSC.
* Survival of the small firm/sole practitioner				A Task Force was established by Convocation (March 27, 2003).

Professional Development, Competence & Admissions Committee Report

▪ Specialist Certification

Professional Development, Competence & Admissions Committee
May 22, 2003

Report to Convocation

Purpose of Report: Information

Prepared by the Policy Secretariat
(Julia Bass 416-947-5228
Sophia Sperdakos 416-947-5209)

INFORMATION

REPORT ON SPECIALIST CERTIFICATION MATTERS FINALIZED BY THE WORKING GROUP OF THE
COMMITTEE ON APRIL 24, 2003 AND APPROVED BY THE COMMITTEE

1. The Committee is pleased to report final approval of the following lawyers' applications for certification, on the basis of the review and recommendation of the Certification Working Group.

Civil Litigation:	R. Douglas Elliott (Toronto) Kevin L. Ross (London) Jamie K. Trimble (Toronto) Paul G. Vogel (London)
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Environmental Law:	Adam Chamberlain (Toronto)
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2. The Committee is pleased to report final approval of the following lawyers' applications for re-certification, on the basis of the review and recommendation of the Certification Working Group.

Civil Litigation:	Bonnie A. Tough (Toronto)
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Family Law:	Bryan Smith (Toronto)
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CONVOCATION ROSE AT 12:25 P.M.

The Treasurer and Benchers had as their guests for luncheon, Bob Rae, Arlene Pearly Rae, Anna Porter and Sandra Rubin.

Confirmed in Convocation this 26th of June, 2003

Treasurer