



**TAB 4**

## **Report to Convocation February 27, 2014**

---

### **Professional Regulation Committee**

#### **Committee Members**

Malcolm Mercer (Chair)  
Paul Schabas (Vice-Chair)  
John Callaghan  
Robert Evans  
Julian Falconer  
Janet Leiper  
William C. McDowell  
Kenneth Mitchell  
Ross Murray  
Jan Richardson  
Susan Richer  
Peter Wardle

**Purpose of Report: Decision and Information**

**Prepared by the Policy Secretariat  
(Margaret Drent (416-947-7613))**

## TABLE OF CONTENTS

### **For Decision**

Alternative Business Structures Working Group Report to Convocation.....Tab 4.1

National Discipline Standards Pilot Project .....Tab 4.2

Pre-Proceeding Consent Resolution Process.....Tab 4.3

### **For Information**

2013 Annual Report of the Complaints Resolution Commissioner.....Tab 4.4

Professional Regulation Division Quarterly Report.....Tab 4.5

## COMMITTEE PROCESS

1. The Professional Regulation Committee (“the Committee”) met on February 13, 2014. In attendance were Malcolm Mercer (Chair), Paul Schabas (Vice-Chair), John Callaghan, Robert Evans, Janet Leiper, Ross Murray, and Jan Richardson. Stindar Lal, Complaints Resolution Commissioner, participated in the meeting. Staff members attending were Zeynep Onen, Jim Varro, Naomi Bussin, Miriam Weinfeld, and Margaret Drent.

## **ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP REPORT TO CONVOCATION**

### **MOTION**

2. That Convocation approve continued exploration of Alternative Business Structures by the Alternative Business Structures Working Group (“the Working Group”), the development of recommended models for firm or entity regulation in the shorter term and related regulatory reforms, including compliance-based regulation, as follows:
  - a. approval of a consultation with the professions and other interested stakeholders on the delivery of legal services through alternative business structures (ABS) based on the four ABS options described at paragraphs 162 to 179 of this Report, and a report to Convocation following the consultation on the results of the consultations and any recommendations;
  - b. approval of the further development of a framework for the regulation of firms, including entities, providing legal services;
  - c. approval of the Law Society’s consideration of the implementation of compliance-based regulation and referral of the issue to the Professional Regulation Committee, with input from the Professional Development and Competence and Paralegal Standing Committees; and
  - d. approval of the Working Group’s consideration of potential revision of Law Society Rules and By-Laws regarding fee-sharing, referral fees, direct supervision and ownership restrictions, with a view to ensuring that they are proportionate to the risk they seek to mitigate and, if appropriate, a referral of proposed revisions to the Professional Regulation and Paralegal Standing Committees.

## **ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP REPORT TO CONVOCATION**

### **EXECUTIVE SUMMARY**

#### **The Working Group**

The Alternative Business Structures Working Group was established by Convocation in September 2012 pursuant to its strategic priorities approved in December 2011.

The Working Group is chaired by Malcolm Mercer and Susan McGrath. Initially the Working Group membership consisted of Susan Elliott, Kenneth Mitchell, James Scarfone, Baljit Sikand, Alan Silverstein, Harvey Strosberg, and Peter Wardle. Since June 2013 Constance Backhouse, Marion Boyd, and Jacqueline Horvat have replaced Baljit Sikand and Harvey Strosberg as members of the Working Group.

The mandate of the Working Group is to explore various possible options available for the delivery of legal services, including structures, financing and the related regulatory processes, and to recommend specific models and arrangements it determines are suitable for the Canadian and Ontario contexts. The full text of the terms of reference is available at **Tab 4.1.2.1**.

#### **The Issues Identified by the Working Group and its Conclusions**

As the Working Group started its examination of the issues raised by alternative business structures (ABS), it became clear early on that the development of alternative business structures in other jurisdictions has necessarily included related issues focusing on changes to the regulation of legal services concerning ethical compliance and complaints. Changes in how legal services were delivered to the public, or how legal practices were structured, necessarily raised issues concerning how fundamental ethical obligations to the public, the courts and the legal services community could be ensured. Based on these early observations, the Working Group's work focused on four related issues:

1. **Alternative business structures (ABS)**

Clients in Ontario are overwhelmingly served by firms that are 100% licensee-owned and that provide only legal services. These firms have limited, if any, external economic relationships except for bank debt and for purchased goods and services. Licensees are required to directly supervise all tasks and functions assigned to non-licensees. This is the traditional business structure in Ontario for the delivery of legal services.

The Working Group extensively reviewed the experience of legal services regulation in other jurisdictions as well as experience of legal services regulation in Ontario and elsewhere. It studied structures within which legal services are delivered, the supply of such services with other consumer services, and options for ownership and financing legal services. The Working Group also reviewed the Ontario and Canadian experience to identify current gaps and risks, with a view to establishing what, if any, reason there is to amend the current regulatory foundation for business structures in Ontario.

Early in its work, the Working Group determined that the term “alternative business structures” may be used to refer to any form of non-traditional business structure, as well as alternative means of delivering legal services and may include, for example,

- (a) alternative ownership structures, such as non-lawyer or non-paralegal investment or ownership of law firms, including equity financing;
- (b) firms offering legal services together with other professionals; and
- (c) firms offering an expanded range of products and services, such as “do it yourself” automated legal forms as well as more advanced applications of technology and business processes.

Conclusion and Recommendation: The Working Group concluded that there are negative consequences inherent in current regulatory limitations on the delivery of legal services in Ontario that could be addressed with the thoughtful liberalization of business structures and the related liberalization of what non-legal services can be provided by entities providing legal services. The Working Group identified four structural and services models as options for consideration as permissible regulatory structures, and for consultation:

- (a) entities that provide legal services only, and in which non-licensee owners are permitted an ownership share of up to 49 percent;
- (b) entities that provide legal services only, and in which there are no restrictions on non-licensee ownership;
- (c) entities which may provide both legal services and non-legal services (except those identified by the Law Society as posing a regulatory risk), and in which non-licensee owners are permitted an ownership share of up to 49 percent; and
- (d) entities which may provide legal services as well as non-legal services (except those identified by the Law Society as posing a regulatory risk), and in which there are no restrictions on non-licensee ownership.

The Working Group recommends that these four models be the subject of consultation with interested groups and individuals prior to a decision as to which is the preferred option for recommendation to Convocation. The four models are described in greater detail at paragraphs 162 to 179 of the report.

## 2. **Firm or entity based regulation**

As part of its consideration of ABS and outcomes based regulation, the Working Group considered the merits of firm or entity based regulation for Ontario. This is a necessary element of effective ABS regulation and it is already permitted in Ontario in part. The *Law Society Act* currently authorizes the full regulation of professional corporations including compliance requirements, investigations and discipline. The Working Group also considers that firm or entity based regulation is advisable whether or not ABS liberalization occurs.

Conclusion and Recommendation: The Working Group recommends that the Law Society seek statutory amendment granting express authority to regulate firms and other entities providing legal services in addition to its current authority to regulate individuals and professional corporations.

### **3. Compliance based regulation**

Significant regulatory change was introduced in Australia beginning in 2001 and in England and Wales in 2007. These changes were introduced at the same time as alternative business structures were introduced in these jurisdictions. The changes introduced in these jurisdictions differed from one another in many ways; however they were alike in that forms of firm or entity regulation were introduced together with regulation with a view to requiring compliance and complaints response from firms where necessary. This is sometimes referred to as ‘compliance based regulation’. A range of regulatory approaches are included in this term, however they have a general common methodology which sets out expected outcomes for firms and individuals and to which they must comply. Generally, in a compliance based approach, the licensees<sup>1</sup> have flexibility in how they meet those objectives (as compared to the proscriptive and detailed rules based regulation found in our primarily complaints driven system).

Conclusion and Recommendation: In conjunction with the implementation of both firm and entity regulation, the Working Group recommends the Law Society give further consideration to the implementation of compliance oriented regulation for existing and alternative business structures and that the issue be immediately referred to the Professional Regulation Committee, with input obtained from the Professional Development and Competence and Paralegal Standing Committees. The Working Group further recommends that compliance based regulation commence with a requirement that licensees and firms have in place a process for responding to complaints.

The Working Group recommends that the issue of compliance based regulation of existing licensees and firms be considered by Convocation to supplement the existing rule based regulation.

### **4. More immediate regulatory improvements**

As part of its work, the Working Group reviewed the regulatory context in Ontario to consider gaps, risks and barriers to innovation and flexibility in the provision of legal services to the

---



public. The Working Group`s research showed that the legal services market in Ontario for retail or consumer services is very competitive. With some geographic and practice area exceptions, there are many lawyers and paralegals available to provide services to clients in areas such as family law, real estate and civil litigation. The Working Group noted however that there are constraints on innovation that prevent the development of more efficient and effective means to provide legal services. Some of these regulatory constraints are legislative and would require a shift in regulatory orientation such as the adoption of an ABS model. This would be a longer term solution to these issues.

However there may also be shorter term solutions. A review of current requirements (rules and by-laws) shows that there may be room for greater flexibility in how practice is organized by lawyers and paralegals and that these changes are within the authority of the Law Society to make. Amendments to some of the current requirements, where appropriate, could provide some greater flexibility to practitioners, permitting them to find more efficient ways to deliver their services to the public.

Conclusion and Recommendation: The Working Group recommends that Convocation authorize Working Group to continue consideration of the fee-sharing, fee-splitting and referral fees, supervision rules, and ownership restrictions in By-Law 7 and elsewhere.

The review of Law Society Rules and By-Laws would be conducted with a view to ensuring that the rules are proportionate to the regulatory risks which they seek to mitigate. Any changes to these rules would require the approval of Convocation.

## **ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP REPORT TO CONVOCAATION**

### **BACKGROUND**

3. The Alternative Business Structures Working Group was established by Convocation in September 2012 pursuant to its strategic priorities approved in December 2011.
4. The Working Group is chaired by Malcolm Mercer and Susan McGrath. Initially the Working Group membership consisted of Susan Elliott, Kenneth Mitchell, James Scarfone, Baljit Sikand, Alan Silverstein, Harvey Strosberg, and Peter Wardle. Since June 2013 Constance Backhouse, Marion Boyd, and Jacqueline Horvat have replaced Baljit Sikand and Harvey Strosberg as members of the Working Group.
5. The mandate of the Working Group is to explore various possible options available for the delivery of legal services, including structures, financing and the related regulatory processes, and to recommend specific models and arrangements it determines are suitable for the Canadian and Ontario contexts. The full text of the terms of reference is available at [Tab 4.1.2.1](#).

### **Research and Consultations: The Working Group's Activities September 2012 to January 2014**

6. The Working Group's work during this period consisted of three distinct activities:
  - a. Research: Included reviews of reports and papers, and in person and teleconference meetings with experts. It also included the analysis of information about business structures and the current status of legal practice in Ontario.

- b. Consultation meetings with licensees: Held in August 2013 to find out the views of the professions generally about the information collected by the Working Group.
- c. ABS Symposium: All day meeting with 70 attendees representing various aspects of the practice of law and legal services to hear from experts and to discuss the relative merits of alternative business structures.

### **Research**

- 7. The Working Group initially embarked on a fact-finding exercise to inform itself on the subject of ABS. This included reviewing and collecting a significant amount of written material including reports and scholarly articles on the subject. At the same time the Working Group met with acknowledged experts on ABS and related subjects, from various jurisdictions including New South Wales, England and the United States. These individuals included academics, practitioners and representatives of the various regulators implementing change. The meetings took place in person as well as by teleconference, and were extensive, based on a pre-determined agenda and questions.
- 8. The meetings conducted by the ABS Working Group are summarized in **Tab 4.1.2.2 of this report**.
- 9. In its June 2013 report, the Working Group set out the results of its research into ABS and the related issues. The following excerpt from the June 2013 report provides useful background for this report.

**Results of Research: Excerpt from First Report to Convocation, June 2013**

Canadian Approaches

10. In Canada, each of the fourteen Canadian law societies regulates their members in the public interest. Certain Law Societies restrict the delivery of legal services to sole practitioners and lawyers practicing in partnership or under the auspices of a professional corporation. It is beyond the scope of this report to review all regulatory practices in Canada; however, the Working Group found that developments in Quebec, British Columbia and Nova Scotia are of particular relevance to the Working Group, and some of these are highlighted below.

Quebec

11. The Barreau du Quebec, aside from traditional forms of practice, permits an advocate to practice law in a limited liability partnership, a professional corporation and a multidisciplinary practice. Regulations require law firms in these practices to provide a detailed undertaking, as follows:
  - a. The entity must ensure that members who engage in professional activities within the firm have a working environment that permits compliance with any law applicable to the carrying out of professional activities.
  - b. The entity must ensure that the partnership, corporation and all persons who comprise the partnership, corporation, or are employed there are in compliance with legislation and regulations.
12. In Quebec, ownership of professional corporations practicing law, for example, is open to members of other regulated professions and to others so long as at least 50% of the voting shares of the professional corporation are owned by lawyers or other regulated professionals.<sup>1</sup>

---

<sup>1</sup> Regulation respecting the practice of the profession of advocate within a limited liability partnership or joint-stock company and in multidisciplinary, RRQ, c B-1, r 9.

Nova Scotia

13. Since 2005, the Nova Scotia Barristers Society has had express statutory authority to regulate law firms. In Nova Scotia:
- a. Complaints may be made to the regulator regarding a law firm for professional misconduct.
  - b. Law firms must designate a lawyer to receive communications from the Barristers Society and assist with investigations.
  - c. A firm found guilty of professional misconduct may be fined, and if a Law Society discipline panel makes an adverse finding against a law firm, the panel may order any other condition as is appropriate; and,
  - d. An inter-jurisdictional law firm must comply with all law firm regulations, and a practicing lawyer may only practice law as a member of an inter-jurisdictional law firm if the firm complies with the Nova Scotia Barristers' Society regulations.<sup>2</sup>

British Columbia

14. The Law Society of British Columbia permits multi-disciplinary practices ("MDPs"). In June 2012, the Society approved rules changes to allow paralegals (supervised by lawyers) to perform additional duties. The Law Society, B.C. Supreme Court and B.C. Provincial Court have also embarked upon a two-year pilot project to permit designated paralegals to appear in court.<sup>3</sup>
15. British Columbia has also given preliminary consideration to alternative business structures. In October 2011, its Independence and Self-Governance Advisory Committee presented *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations*. At that time, this Committee concluded as follows:

---

<sup>2</sup> *Legal Profession Act*, S.N.S. 2004, c. 28.

<sup>3</sup> The term "designated paralegal" in this context refers to a paralegal who can perform additional duties under a lawyer's supervision (see <http://www.lawsociety.bc.ca/newsroom/highlights.cfm#c2663>).

There are many calls for significant changes in the way that legal services are offered. The current model does not seem to be working in a way that allows people who need to access legal advice to obtain it in an affordable way. There will be considerable pressure to adopt new models for the delivery of legal services, and the Law Society as the regulator of lawyers and the body charged with the responsibility of protecting the public interest in the administration of justice in British Columbia must be prepared to give them serious consideration. However, core values of the legal profession and important rights that clients who need legal advice are entitled to expect must not be lost in a rush to adopt new ideas simply because business and competition models argue in their favour. Many of the protections that the legal profession offers clients have been obtained at significant cost over the centuries and to abandon them lightly would be undesirable for all concerned. However, where benefits to the consumer can be attained with proper regulation to ensure that professional values are not lost, the Law Society must develop proper regulation to allow for changes to the profession through which improved access to legal services can be attained.<sup>4</sup>

16. Since the release of the above report, statutory amendments have been made that confer new powers on the Law Society of B.C. to regulate law firms, similar to those available to the regulator in Nova Scotia. The Legal Profession Amendment Act, 2012 (“LPAA”) provides that the Law Society of B.C. may:
- a. receive complaints against law firms;
  - b. investigate law firms;
  - c. commence a discipline hearing against a law firm; and
  - d. if a Law Society discipline panel makes an adverse finding against a law firm, discipline the firm by reprimand, fine, or other order or condition as is appropriate.<sup>5</sup>

---

<sup>4</sup> Law Society of British Columbia, *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations*, October 2011, pp. 21-22.

<sup>5</sup> *Legal Profession Act*, S.B.C. 1998, c. 9.

Australia and New South Wales

17. Australia was an early adopter of ABS regulation. Since 2000, New South Wales has permitted full incorporation as have other Australian states and territories. Legal practices may incorporate under ordinary company law without any restrictions on who may own shares or on what type of business may be carried on.<sup>6</sup> In May 2007, Australia was the first jurisdiction in the world to permit the public listing of a law firm. Slater & Gordon, a national firm listed on the Australian Stock Exchange.<sup>7</sup>
18. The New South Wales regulatory system is based in part on entity regulation. The Office of the Legal Services Commissioner (OLSC), New South Wales may audit Incorporated Legal Practices (ILPs) for their compliance pursuant to the Legal Profession Act 2004 and the Legal Profession Regulations 2005. ILPs are encouraged to complete annual voluntary self-assessments regarding the entity's ethical and management infrastructures. Each ILP must have a "Legal Practitioner Director" who is responsible for implementing "appropriate management systems". This term is not defined in the legislation, although the OLSC has developed ten objectives of a sound legal practice with which ILPs must comply.<sup>8</sup> Failure by the Legal Practitioner to implement appropriate management systems could be the basis of a finding of professional misconduct.<sup>9</sup>

---

<sup>6</sup> Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation", Hofstra University School of Law Legal Studies Research Paper No. 13-02 (2013).

<sup>7</sup> Integrated Legal Holdings became the second listed firm on the ASX on August 17, 2008.

<sup>8</sup> The ten areas are negligence, communication, delay, liens/file transfers, cost disclosure/billing practices/termination of retainer, conflict of interests, records management, undertakings, supervision of practice and staff, and trust account regulations. Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation", Hofstra University School of Law Legal Studies Research Paper No. 13-02, (2013), p. 15.

<sup>9</sup> *Legal Profession Act 2004*, (NSW), s. 140(5).

19. The approach taken by New South Wales is outcomes-based – rather than requiring ILPs to adhere to proscriptive regulations and requirements, regulation is based on their systems. ILPs have the freedom to structure their practices in new and innovative ways that are suitable to them, as long as their systems comply with the ten principles of appropriate management systems.
  
20. In addition, the approach in New South Wales is based on an assessment of the risk posed by each ILP. The requirement to implement and maintain “appropriate management systems” is complemented by a comprehensive risk-profiling program and audit, or practice review program, that is conducted by the Office of the Legal Services Commissioner.<sup>10</sup>

#### England & Wales

21. England & Wales is experiencing rapid changes in how legal services are regulated and provided to the public. Following the Clementi Report, which recommended major reforms to the regulation of legal services in England & Wales, the *Legal Services Act 2007* (“LSA”) was enacted. Under the LSA, the objectives of the regulation of legal services have been broadened. In addition to protecting the public interest and improving access to justice, the regulation of legal services is also founded on objectives such as protecting and promoting consumer interests and competition. The LSA expressly permits the provision of legal services through ABSs in furtherance of these objectives.
  
22. Under the LSA, “legal activities” are regulated by eight separate “approved regulators”. ABSs may be approved by certain approved regulators. The first ABSs were approved by the Council of Licensed Conveyancers in October 2011, and by the Solicitors Regulatory Authority (“SRA”) in early 2012. Since then,

---

<sup>10</sup> Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation”, *supra* note 6 at 11.



the SRA has approved over 100 ABSs.

23. As in Australia, ABSs in England & Wales are regulated in part through entity regulation. For example, in order to be approved by the SRA, ABS applicants generally need to provide the SRA with the following information:
- a. the firm's regulatory history and the type of legal work to be conducted,
  - b. business practices (including policies and procedures, the applicant's proposals to meet the regulatory objectives and proposed governance structure), details of personnel, indemnity insurance, client money (including how the applicant protects client money), and;
  - c. a suitability declaration.

The SRA assesses ABS applicants and maintains the authority to deny ABS licenses.

24. ABSs approved to date have varied in size, structure and expertise. Some of the entities include:
- a. ABSs in which non-lawyer staff have become equity partners.
  - b. ABSs in which family members, including spouses, become part owners of a law firm.
  - c. Co-operative Legal Services ("CLS"), part of the Co-Op Group, the UK's largest mutual business, whose businesses include, among others, a national chain of food stores, banking, insurance, pharmacy, and funeral services. The Co-Op Group operates 4,800 retail outlets, and employs over 106,000 people. CLS currently provides fixed fee legal services in conveyancing, family, wills and probate, personal injury, and employment law.
  - d. Insurance defense firm (Keoghs LLP), which became an ABS and obtained a 22.5% private investment from LDC, a part of Lloyds Banking Group;

- e. Russell Jones & Walker a 425 person, 10 location firm with most of its revenue earned from personal injury matters, which was acquired by Australia's Slater & Gordon, and converted into an ABS; and
- f. Firms combining legal expertise with other expert services, such as an ABS firm providing human resources services together with related legal services.

25. It is important to note that new business structures were introduced in England and Wales as part of regulatory reform that included entity and outcomes-based regulation. The overall objective was to permit greater latitude for regulated entities to organize their delivery of legal services and their business models to permit flexibility to enhance competition. The regulatory model is based on principles and outcomes as requirements set out by the regulator. Firms are required to provide information to the SRA to enable that office to assess the risk posed by the firm to its regulatory objectives.<sup>11</sup> Firms are monitored to determine outcomes, and they are also risk rated to determine the nature of the monitoring. It is still too early to know whether this approach will reduce the number of complaints in England and Wales, and whether it will enhance competition such that access to legal services is improved.

#### The United States

- 26. In the United States, currently, only the District of Columbia permits limited non-lawyer ownership or management of law firms, similar to the Law Society's multi-disciplinary partnership model.
- 27. In 2009, the American Bar Association ("ABA") established the ABA Commission on Ethics 20/20 (the "Commission") to review the ABA Model Rules of Professional Conduct and American models of lawyer regulation in the

---

<sup>11</sup> Jane Hunter, "Outcomes-Focussed Regulation in England & Wales: The Compliance Officer Roles", Quality Assurance Review, Winter 2012, p. 10.

context of the globalization of legal services and technological advancements. In November 2009, the Commission's Preliminary Issues Outline noted that "core principles of client and public protection [can] be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures."<sup>12</sup>

28. The Commission established a Working Group on Alternative Business Structures (the "ABA Working Group") to study this issue. By June 2011, the ABA decided against certain forms of ABSs, including MDPs, publicly traded law firms, and passive non-lawyer investment or ownership of law firms. Although the ABA Working Group continued to consider a proposal to permit non-lawyer employees of a firm to have a minority financial interest in the firm and share in the firm's profits, in April 2012, the Commission announced that it would not propose changes to ABA policy prohibiting non-lawyer ownership of law firms.
29. Despite the current regulatory restrictions in law firm ownership structures, more aggressive efforts are being taken by several U.S. based companies seeking to reshape how certain legal products and legal services are delivered to consumers in the United States and globally. Such private corporate innovators include, for example:
  - a. Rocket Lawyer and Legal Zoom, which are developing websites which combine "do-it-yourself" legal form services and traditional legal services, to serve individuals and corporate clients.
  - b. Axiom Law, which offers in-house counsel legal secondments, legal outsourcing services, and project management expertise, recently obtained a further \$28 million in funding from a growth equity firm.

---

<sup>12</sup>ABA Commission on Ethics 20/20, *Issues Paper Concerning Alternative Business Structures* (April 5, 2011).

30. There are also pressures by traditional law firms seeking to compete in broader legal services markets. For example, the New York firm of Jacoby & Myers commenced litigation in 2011 to challenge regulations in New York, New Jersey and Connecticut prohibiting non-lawyer ownership in law firms. In October 2012, the firm began marketing online legal forms in addition to providing traditional legal services provided by an attorney.

### **Information obtained about Compliance Based Regulation**

31. As part of its research, the Working Group obtained information about compliance based regulation, which has flowed from ABS and entity regulation. A summary of this information is set out below.
32. The term “compliance based” refers to the regulation of law firms and other types of business structures that provide legal services.
33. In Ontario, lawyers and paralegals with whom the Working Group has spoken believe that the Society should carefully examine the potential benefits ABS may offer. One of these may be a reduction in the number of complaints received by the regulator. An analysis of the experience in the jurisdictions which have implemented ABS suggests that this may be one significant benefit.
34. This complaint reduction does not appear to be the result of the introduction of ABSs *per se* but rather the introduction of the entity-level regulation designed to ensure that ABSs provide legal services in a manner reflecting professional values. Two conclusions may be taken from this evidence. The first, independent of whether ABS are permitted, is that entity-based (or firm-based) regulation is a valuable complement to licensee-based regulation. The second is that the existing evidence does not indicate that permitting ABSs creates risk to the public. Indeed, the risk appears to be less than currently exists when introduction of ABSs is combined with entity-based regulation.

35. In England and Wales the *Legal Services Act 2007* created the Legal Services Board (LSB) as a new regulator with responsibility for overseeing the regulation of legal services in England and Wales. The LSB oversees eight approved regulators.
36. The LSB has published a series of reports monitoring the impact of reforms. In 2012, the LSB published a discussion paper on approaches to measuring access to justice. More recently, in October 2013, the LSB published a report assessing changes to competition in the legal services marketplace as a result of the introduction of ABS. This study, conducted between April and August 2013, suggests that alternative business structures have a better record regarding the resolution of complaints about service. During the period 2011-2013, which coincides with the issuance of the first ABS license in March 2012, the number of complaints received by the Legal Ombudsman, or LEO, which is the single organization for all customer complaints, fell by fifteen percent.<sup>13</sup>
37. The LSB's findings are similar to research regarding the impact of the introduction of ABS on complaints in Australia. In New South Wales, Australia, ILPs are required to implement and maintain "appropriate management systems". This term was not defined in the legislation, but the Office of the Legal Services Commissioner (OLSC) of New South Wales identified ten areas to focus regulatory attention. These include negligence, communications, delay, retainer and billing practices, conflicts of interest, management of records and undertakings and the management of books and records.
38. Once the OLSC has received notification that a practice has incorporated, a self-assessment form must be completed. The self-assessment form lists the ten objectives described above. Legal Practitioner Directors are required to rate the

---

<sup>13</sup> Legal Services Board, *Evaluation: Change in Competition in Different Legal Markets: An Empirical Analysis*, October 2013, online at <https://research.legalservicesboard.org.uk/wp-content/media/Changes-in-competition-in-market-segments-REPORT.pdf>.

ILP's compliance with each of the ten objectives listed above. The Legal Practitioner Director then sends the form to the OLSC for review. The OLSC has developed an online portal to enable Legal Practitioner Directors to submit these forms online.<sup>14</sup>

39. The requirement to implement and maintain appropriate management systems is augmented by a comprehensive risk-profiling program and audit (practice review) program conducted by the OLSC. The regulator works with law practices that appear to be experiencing difficulties. The ultimate objective in conducting a practice review is compliance with ethical obligations under the law and ultimately a reduction in complaints.<sup>15</sup>
40. A study conducted in 2008 found that complaint rates for ILPs went down by two-thirds after the ILP conducts the self-assessment. The study concluded that “it appears to be the learning and changes prompted by the process of self-assessment that makes a difference, not the actual (self-assessed) level of implementation of management systems”.<sup>16</sup>
41. A second study, conducted by Professor Susan Fortney of Hofstra University, New York, involved the use of an anonymous online questionnaire which asked ILPs with two or more solicitors to assess the impact of appropriate management systems and self-assessment on these firms. The survey results revealed that the majority of respondents recognized the value of requiring firms to implement and maintain appropriate management systems, as well as to engage in self-

---

<sup>14</sup> New South Wales Office of the Legal Services Commissioner, “Self-Assessment Process”, online at [http://www.olsc.nsw.gov.au/olsc/lsc\\_incorp/olsc\\_self\\_assessment\\_process.html](http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_self_assessment_process.html).

<sup>15</sup> Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation”, Hofstra University School of Law Legal Studies Research Paper No. 13-02 (2013), p. 11.

<sup>16</sup> Tahlia Gordon, Steve A. Mark, and Christine Parker, “Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW”, J.L. & Soc. (2010), Legal Studies Research Paper No. 453.

assessment. Further, the process of self-assessment had a positive impact on firm management, risk management, and client services issues.

42. Professor Fortney concluded that “the results from this study and earlier research should inspire regulators to consider proactive partnerships with lawyers, rather than resorting to the traditional paradigm of reactive complaints-driven regulation of firms”.<sup>17</sup>
43. The Law Society of Upper Canada currently engages in some proactive regulatory activity. An example is practice management review for lawyers and paralegals. Lawyers in private practice who have been practicing between one to eight years may be referred to the program either because of random selection by the Society, re-entry to practice, or as a regulatory response to a pattern of complaints. Paralegals holding a P1 license may also be referred to Practice Management Review.
44. In addition to the Practice Management Program, lawyers may be subject to a spot audit, which addresses financial record-keeping requirements.
45. In Ontario the regulatory scheme is predominantly reactive rather than proactive. Issues are more often identified through complaints rather than audits or reports by licensees. In contrast, in conjunction with the implementation of ABS, other regulators have adopted a compliance-based scheme. Compliance-based regulatory models are characterized by the imposition of mandatory affirmative duties and reporting obligations on professionals and monitoring and audits for compliance, with investigations and discipline in response to complaints.<sup>18</sup>
46. In addition to New South Wales, discussed above, the Solicitors Regulation Authority of England and Wales published a Handbook for Solicitors which took

---

<sup>17</sup> Susan Fortney and Tahlia Gordon, “Adopting Law Firm Management Systems to Survive and Thrive”, *supra* note 6, p. 43.

<sup>18</sup> Adam M. Dodek, “Regulating Law Firms in Canada”, (2012), 90 C.B.R. 383 at 406.

effect on October 6, 2011 and uses an outcomes-based regulatory approach.<sup>19</sup> In Nova Scotia, benchers are considering the appropriateness of an outcomes-focused regulatory scheme.<sup>20</sup>

47. There has been activity in Canada concerning a more proactive approach to the management of ethical and related practice issues. The CBA Ethics and Professional Responsibility Committee has developed an ethical practices self-evaluation tool which may be accessed online.<sup>21</sup>

### **Meetings with Members of the Professions in August 2013**

48. Following its report of June 2013, the Working Group held four consultation meetings with members of the lawyer and paralegal professions in August 2013. These meetings were intended to share the information the Working Group had collected as a result of its research, and to engage in dialogue concerning these emerging regulatory structures in other jurisdictions and their applicability in Ontario. The participants in the consultations included the Law Society's Equity Advisory Group, sole practitioners from a variety of practice and geographic areas, the managing partners or representatives of large and medium sized law firms, and representatives of lawyer and paralegal associations. The full list of these meetings is set at **Tab 4.1.2.2**.

### Results of August 2013 Meetings

49. Participants in these meetings expressed support for the Law Society's study of alternative business structures.

---

<sup>19</sup> Laurel Terry, "Trends in Global and Canadian Lawyer Regulation", Sask. Law Rev. 2013 Vol. 76, p. 179.

<sup>20</sup> Nova Scotia Barristers Society, *Transforming Regulation and Governance in the Public Interest*, online at <http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>, pp. 41-46.

<sup>21</sup> CBA Internet site at <http://www.cba.org/CBA/activities/pdf/ethicalselfevaluation-e.pdf>.



50. Lawyers from sole and small firms in particular indicated that in their view, alternative business structures could enable them to better focus on the practice of law. These lawyers also expressed an interest in enhanced administrative support that could be provided through franchising, as well as other ownership arrangements. They also liked the idea of offering valued employees a share in the firm.
51. Participants from large firms told the Working Group that that there were already extensive efforts underway to outsource legal services to other jurisdictions in order to reduce costs, subject to Law Society supervision rules.
52. The participants in the August 2013 meetings told the Working Group that traditional delivery of legal services, while necessary in some practice areas, is increasingly being replaced or enhanced by other means of delivering legal services. Legal services are being outsourced. Technology is being used to perform certain tasks formerly done by lawyers with faster, less expensive, and more accurate results. Lawyers and law firms are developing processes to bring efficiencies to the delivery of certain legal services.
53. In sharing their observations regarding the Ontario legal services marketplace, the participants in the summer meetings confirmed the Working Group's findings from its review of the literature. Author Richard Susskind describes a continuum of legal services, which he categorizes under five different headings ("bespoke", or customized, "standardized", "systematized", "packaged", and "commoditized").
54. According to Professor Susskind, "bespoke", or customized services are at one end of the legal services continuum. One example of a bespoke service is advocacy in the court room. Commoditized services are at the other end of the continuum; these services are offered online and are easily available in the

marketplace at very competitive prices. Material on legal websites often consists of legal commodities.<sup>22</sup>

55. Some participants in the summer meetings described a process of commoditization of certain legal services in Ontario. Others emphasized the highly bespoke nature of their work, for example certain specialized types of litigation, or criminal law.
56. The Working Group was also told that lawyers, and particularly sole and small practitioners, are spending a great deal of time on project management, law firm management, and supervision, rather than on purely legal tasks.
57. The requirements inherent in the delivery of some areas of law sometimes mean that lawyers must provide both legal services and services ancillary to law (for example, family lawyers told the Working Group that often, they are required to deploy non-legal skills, such as social work, to meet the needs of their clients).
58. Finally, the participants discussed issues with the Working Group regarding non-licensees who are offering various products, such as online legal forms, which may constitute the provision of legal services, despite disclaimers indicating otherwise.

### **The Symposium – October 2013**

59. Together with the Treasurer of the Law Society of Upper Canada, the Working Group hosted a Symposium on alternative business structures in October 2013. The Symposium was a full day meeting attended by lawyers and paralegals with diverse practice areas from different regions of Ontario and representatives of lawyer and paralegal associations. Panels of experts provided presentations on ABS in other jurisdictions, the economic implications of practice structures and

---

<sup>22</sup> Richard Susskind, *The End of Lawyers: Rethinking the End of Legal Services* (Oxford: Oxford University Press, 2010), pp. 28-33, and *Tomorrow's Lawyers; An Introduction to Your Future* (Oxford: Oxford University Press, 2013), p. 25.

examined how ethical issues can be addressed in a changing environment. The purpose of the day was to engender a discussion among those attending as to the relative merits of the various new regulatory approaches to practice structures and legal services emerging in other jurisdictions. A Symposium agenda, including the list of speakers and their presentations is appended to this report at **Tab 4.1.2.3.**

60. The Symposium was an opportunity to exchange views, obtain new information, and examine the subject of ABS and alternative ways of delivering legal services. A significant feature of the Symposium was the presentation of a paper prepared for the Law Society by Professors Edward Iacobucci and Michael Trebilcock analysing current law practice in Ontario in the context of the economic theory of the firm, with a discussion as to the advantages and disadvantages of various models for permitting capital input for law firms or legal practices.
61. The Symposium was also an opportunity to examine how any structural changes to legal practice would affect client services, obligations to the administration of justice, services for clients and ethical obligations relating to these relationships. The Working Group was very interested in the results of these discussions. They clearly identified solicitor client privilege, confidentiality and conflict as central obligations that must be preserved in making any changes. Nevertheless, as those attending worked through various scenarios to test how ethical requirements could be met in alternative structures, they generally concluded that ethical issues are not barriers to making such changes.
62. As described earlier, approximately seventy lawyers, paralegals, representatives of legal organizations and others (including representatives from the Legal Futures project of the Canadian Bar Association as well as regulators and legal technology innovators) participated in this event.

63. The Symposium program included a series of panels on a range of subjects connected to ABS and the changing environment for the delivery of legal services. The panels were moderated by Professor Pamela Chapman of the University of Ottawa.
64. Following the panel presentations, the participants broke out into groups and considered four different ABS scenarios from the perspective of ethics and professional responsibility principles (competence, confidentiality, and conflicts of duty), the potential risks and benefits and appropriate regulatory approaches. Each of the groups reported back to the Symposium as a whole.<sup>23</sup>
65. The following summarizes the presentations of the three panels. The first panel featured Professors John Flood (University of Westminster), Paul Paton (Pacific McGeorge) and Laurel Terry (Penn State). Professor Flood discussed changes in England and Wales since 2007.
66. Professor Terry discussed legal innovation and the theory of “disruptive technologies” and its influence on the legal services marketplace.<sup>24</sup> The theory of “disruptive technologies” is concerned with why, and how, new firms and technologies drive incumbents out of the marketplace. During the symposium, Professor Terry asked the audience to consider whether this theory was applicable to the Canadian legal services marketplace.<sup>25</sup>

---

<sup>23</sup> The symposium was described by Malcolm Mercer in a post on the Legal Ethics Listserv on October 5, 2013.

<sup>24</sup> Ray Worthy Campbell, “Rethinking Regulation and Innovation in the U.S. Legal Services Market” 9 N.Y.U.J.L. & Bus. 1 (Fall 2012) online at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2018056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018056) . Professor Terry published a blog post regarding this article which may be viewed at [http://legalpro.jotwell.com/creative-destruction-and-the-legal-services-legal-education-markets/?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+Jotwell+%28Jotwell%29](http://legalpro.jotwell.com/creative-destruction-and-the-legal-services-legal-education-markets/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+Jotwell+%28Jotwell%29).

<sup>25</sup> The applicability of Campbell’s article to the Canadian legal services marketplace is discussed by Malcolm Mercer in “Utopia, Dystopia and Alternative Business Structures”, November 11, 2013, online at <http://www.slaw.ca/2013/11/11/utopia-dystopia-and-alternative-business-structures/>.

67. Professor Paton discussed the debate in the United States on ABS. He noted that the American Bar Association (ABA) announced in April 2012 that it would not pursue ABS, but the issue appears to still be under discussion based on a recent ethics opinion, published in August 2013 by the ABA Standing Committee on Ethics and Professional Responsibility, suggesting that the debate regarding ABS may be ongoing.
68. The information about the ABA is significant because although regulatory responsibility for U.S. lawyers lies with the judiciary in each of the states, the ABA has an important role in lawyer regulation with the ongoing development and review of its *Model Rules of Professional Conduct*.
69. Under the August 2013 ABA opinion, lawyers who are subject to the *Model Rules* may divide fees with other lawyers or law firms practicing in jurisdictions with rules that permit sharing legal fees with non-lawyers, provided that there is no interference with the lawyer's independent professional judgment.<sup>26</sup>
70. The second panel featured Professors Iacobucci and Trebilcock (University of Toronto), James Peters (Vice-President, New Market Initiatives at Legal Zoom) and Professor Jasminka Kalajdzic (University of Windsor).
71. Professors Edward Iacobucci and Michael Trebilcock discussed the economic implications of ABS and presented a paper they had prepared for the symposium. This paper provided an economic analysis of business structures with respect to the "theory of the firm"<sup>27</sup> and firm capital structure. The paper is at **Tab 4.1.2.4**.

---

<sup>26</sup> ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 464, "Division of Fees with Other Lawyers Who May Lawfully Share Fees with Nonlawyers", August 19, 2013, online at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_464.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_464.authcheckdam.pdf).

<sup>27</sup> Ronald Coase, "The Theory of the Firm" (1937) 4 *Economica* 386.

72. Professors Iacobucci and Trebilcock explained that the theory of the firm considers when it is economically more efficient for an entity to provide goods and services from within the firm and when it is more efficient to access goods and services from third parties in the market place. According to this analysis, expressly limiting what may be supplied by legal practices can create economic inefficiencies, as can effectively limiting the nature of expertise available within the firm. With respect to capital structure, limiting equity investment can constrain firm development and innovation. With debt financing, firm owners are limited by the security that they are willing and able to provide and by the personal risk that they are prepared to assume. In contrast, equity financing permits risk diversion; the potential prospects for the firm, rather than the current business of the firm, becomes more relevant as equity investors share in future growth.
73. During their presentation, Professors Iacobucci and Trebilcock reviewed the advantages and disadvantages of existing business structures. According to the theory of the firm, ABS should lead to greater efficiency because there will be lower transaction costs associated with the provision of complementary services within the firm, rather than referral arrangements between firms. Further, lawyers may benefit from the professional management skills of a non-lawyer owner.
74. The authors explained that some possible disadvantages of non-lawyer ownership include greater transaction and coordination costs within the firm, and a perception that referrals are not as credible because they are internal. From a capital structure perspective, an Alternative Business Structure can be advantageous because the innovation would be less constrained by the limited financial capacity and risk tolerance of the partners. On the other hand, an overly diminished financial stake in the firm can diminish incentives to invest in the firm.
75. There is no optimal structure for legal practice from an economic perspective. Different structures may be preferable depending upon, amongst other things, the

business of the firm, the context in which the firm operates and the strategy pursued by the firm. However, according to Professors Iacobucci and Trebilcock, there are potential gains from ABS that provide an economic justification for liberalization. Lawyers, clients and investors could experience these advantages. Further, greater efficiency and innovation in the delivery of service by lawyers and paralegals should lead to lower fees for clients while permitting profitable practices.

76. Although the focus of their paper was an economic analysis, Professors Iacobucci and Trebilcock noted the access to justice implications of their work.<sup>28</sup>
77. According to Professors Iacobucci and Trebilcock, due to the large number of lawyers and paralegals, the legal services market is highly competitive,<sup>29</sup> so that the liberalization of business structures would not have much impact on the extent of competition, although it could lead to greater economic efficiency.
78. Legal Zoom offers online legal services, including assistance from an attorney on a non-hourly fee basis. James Peters told the audience that in the United States, Legal Zoom is primarily interested in the legal services needs of individuals and small businesses, perceived as distinct from the legal services needs of large corporations. Mr. Peters described the proliferation of legal start-ups that do not

---

<sup>28</sup> The cited work of Gillian Hadfield and Noel Semple provide useful insight into some of these implications.

Gillian K. Hadfield, 2013. "The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law, The Selected Works of Gillian K. Hadfield. Available at <http://works.bepress.com/ghadfield/49>.

Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (July 30, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2303987](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2303987) or <http://dx.doi.org/10.2139/ssrn.2303987>.

<sup>29</sup> See Edward Iacobucci and Michael Trebilcock, "The Competition Bureau's Report on Competition and Self-Regulation in the Canadian Legal Profession: A Critical Evaluation", *Canadian Competition Record*, Winter 2009.

meet regulatory requirements to be a law firm but are increasingly providing services to in-house legal departments as well as to individuals. In the future, according to Mr. Peters, law firms will increasingly be forced to outsource to entities which are not law firms to respond to cost pressures. Mr. Peters observed that lawyers who want to be significant innovators often leave legal practice in order to do so.

79. Professor Jasminka Kalajdzic of the University of Windsor spoke about litigation funding, which she described as a form of ABS already present in Ontario. Litigation funding may in some cases include private sector funding of litigation for profit, but does not include contingency fee arrangements, legal aid plans, or funding provided by liability insurers. The litigation funding arrangements studied by Professor Kalajdzic are used in class actions, personal injury litigation, and commercial arbitration. Currently, these arrangements are unregulated, subject to supervision by the courts.
80. The third panel was comprised of Amy Salyzyn of the University of Ottawa and Noel Semple, post-doctoral research fellow of the Center for the Legal Profession, University of Toronto. Amy Salyzyn provided the symposium with a framework for analysis of the legal ethics implications of the ABSs and discussed entity regulation/ethical infrastructure as regulatory tools.<sup>30</sup> Noel Semple discussed the possible legal ethical advantages and disadvantages of the ABS liberalization.
81. Following the panel presentations, the participants broke out into groups and considered four different ABS scenarios from the perspective of ethics and professional responsibility principles (competence, confidentiality, and conflicts

---

<sup>30</sup> During her presentation, Ms. Salyzyn referred to the CBA's Ethical Practices Self-Evaluation Tool" which may be accessed at <http://www.cba.org/cba/activities/code/ethical.aspx>.



of duty), the potential risks and benefits and appropriate regulatory approaches. Each of the groups reported back to the Symposium as a whole.<sup>31</sup>

## A Summary of the Ontario Context

### Current Law Society Environment

82. In order to put the Working Group's conclusions and recommendations in context, it is instructive to review the current status of key information concerning the regulatory environment in Ontario.
83. In November 2013 there were 46,089 lawyers and 5,623 licensed paralegals in Ontario. The table below describes the practice settings of lawyers and paralegals in private practice.<sup>32</sup>

	Lawyers		Paralegals	
1 Sole	7,090	15%	1,348	24%
2 – 5 small	4,564	10%	621	11%
6-9	1,723	4%	134	2%
10-25	2,626	6%	128	2%
26-49	1,441	3%	64	1%
50-99	998	2%	30	1%
100-149	843	2%	5	0%
150-199	1,046	2%	2	0%
200-249	1,767	4%	5	0%
250 +	839	2%	1	0%
Total in Private Practice	22,938	50%	2,338	42%
Total in Other areas	23,151	50%	3,285	58%
Total Licensees	46,089	100%	5,623	100%
As at November 17, 2013				

84. Attached to this report at [Tab 4.1.2.5](#) is a description of business structures that are currently permitted by the Law Society of Upper Canada. In summary, they

<sup>31</sup> The symposium was described by Malcolm Mercer in a post on the Legal Ethics Listserv on October 5, 2013.

<sup>32</sup> This information was provided by the Corporate Services Department of the Law Society of Upper Canada on November 18, 2013.

include sole practice, partnerships, limited liability partnerships, multi-discipline practices and partnerships and professional corporations. It is important to understand the current available structures as they establish the context for the changes that the Working Group is proposing.

85. It is also important to understand the current legislative framework regarding the regulation of legal services. In 2006 the *Law Society Act* was amended to authorize the Law Society to regulate “legal services” rather than the regulation of lawyers only. This was related to the amendments required for the regulation of paralegals.
86. The term “provision of legal services” was added to the Act for the first time. The legislation provides that “a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objections of a person”. The Act describes various examples of the provision of legal services in section 1(6).
87. Other amendments to the Act at that time provide that the Law Society may audit, investigate and prosecute professional corporations as well as individuals.<sup>33</sup>
88. In the Working Group’s view, these legislative provisions provide the framework that enables and legitimizes a discussion about the structures through which legal services are provided and the regulation of services within them.

#### Current Developments in Ontario

89. As part of its research and consultations, the Working Group learned of various developments suggesting that the impact of ABS is already being felt in Ontario.
  - a. As noted earlier, legal practice is becoming globalized as a result of the merger of Canadian law firms with international law firms. In 2011 and 2012,

---

<sup>33</sup> *Law Society Act*, section 61.0.4(2).

respectively, Canadian law firms Ogilvy Renault LLP and Macleod Dixon merged with the international law firm Norton Rose LLP, and Fraser Milner Casgrain announced the intention to merge with SNR Denton and Salans to form a law firm with 2500 lawyers and 79 offices worldwide.

- b. In addition to significantly expanding the global reach of Canadian law offices, these mergers will likely have a broad impact here in Ontario by heightening awareness of regulatory developments in other countries.<sup>34</sup>
- c. Another factor influencing the current discussion in Ontario is the debate in the United States, where ABS continues to be discussed since the ABA's 2012 announcement that the *status quo* would be maintained. Formal Opinion 464 of the ABA Standing Committee on Ethics and Professional Responsibility, referred to above and issued in August 2013, concluded that fee-splitting in jurisdictions that permit the sharing of fees with non-lawyers was technically compliant with the *Model Rules of Professional Conduct*, since lawyers in U.S. firms would be dividing fees only with lawyers in another jurisdiction. In addition, litigation involving Jacoby & Myers, a law firm that has challenged the restrictions on non-lawyer investment in law firms of the New York State Bar, is ongoing. In August 2013 Jacoby & Myers announced its intention to enter the UK market.<sup>35</sup>
- d. Participants in the Summer 2013 meetings told the Working Group about initiatives at some Toronto law firms to identify particular tasks within a range of legal work and to outsource them to offshore service providers, subject to Law Society supervision rules, in an effort to control costs.

---

<sup>34</sup> Laurel Terry, "Trends in Global and Canadian Lawyer Regulation", *supra* note 19, p. 149.

<sup>35</sup> Dan Bindman, "Ambitious' Jacoby & Myers targets major recruitment drive in race to become UK legal brand", *Legal Futures*, November 8, 2013, online at <http://www.legalfutures.co.uk/latest-news/ambitious-jacoby-meyers-targets-thousands-lawyers-race-become-national-uk-legal-brand>.

- e. During the symposium, Professor Jasminka Kalajdzic described litigation funding as a form of ABS which is already present in Ontario.

## **DISCUSSION AND CONCLUSIONS**

### **Criteria for Analysing and Comparing Options**

- 90. The Working Group's Terms of Reference require that it adopt criteria to evaluate the relative merits of proposals concerning alternative business structures. The criteria were identified based on key principles engaged in any evaluation of ABS including access to justice, public protection and ensuring that regulatory requirements are proportionate to regulatory objectives. It was intended that these criteria provide standards against which to measure the merits of any proposal for change relating to ABS. Clearly not all criteria will apply to all options, or they may apply at different stages of the ABS project, however where relevant, they are of assistance to promote a comprehensive analysis.
- 91. In developing these criteria, the Working Group was guided by the *Law Society Act*, section 4.2 which states:
  - 4.2** In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
    - 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
    - 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
    - 3. The Society has a duty to protect the public interest.
    - 4. The Society has a duty to act in a timely, open and efficient manner.
    - 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular

legal services should be proportionate to the significance of the regulatory objectives sought to be realized.<sup>36</sup>

Working Group Evaluation Criteria

92. The consideration of options for the implementation of alternative business structures is an important exercise with potentially broad and deep implications for legal services in Ontario. As a result, it is important that identified criteria based on fundamental principles be relied upon to assist in such considerations.

The criteria identified by the Working Group are:

- a. Access to justice: Any structural and related regulatory changes concerning alternative business structures should be reviewed to determine their effect on access to justice. Solutions that provide potential improvements for access to justice should be given more weight on that basis.
- b. Responsive to the Public: In promoting access, the new structures and processes should be responsive to the needs of the public for legal services including greater flexibility in cost, location and availability of legal and other services with appropriate quality and adequate financial assurance of legal services.
- c. Professionalism: The fundamentals of professionalism, including independence, confidentiality, avoidance of conflict of interest, and candour should be safeguarded in any move to liberalize ownership and structure.
- d. Protection of Solicitor-Client Privilege: Any change proposed to implement alternative business structures must not jeopardize the protection of solicitor-client privilege.<sup>37</sup>

---

<sup>36</sup> Ibid.

<sup>37</sup> Legislation in New South Wales and England and Wales speaks to the application of solicitor-client privilege in an ABS context. Section 143(3) of the *Legal Profession Act 2004* (New South Wales) provides that the law relating to client legal privilege, or other legal professional privilege is not excluded because an Australian legal practitioner is acting as an officer or director of an LLP. Section 190(4) of the

- f. Promote Innovation: New business structures and processes should be designed to promote innovation which may include, among other things, the adoption of technology and/or other business processes that will enable them to adapt to the legal services marketplace and to better serve the public.
- g. Alignment of requirements with new directions taken: The Law Society's current rules and by-laws should be aligned with the objective to promote innovation and flexibility in the provision of legal services to the public. Rules and other requirements should be proportionate to the significance of the regulatory objectives.
- h. Orderly Transition: The preferred alternative business structures or related solutions options should be amenable to an orderly and thoughtful transition to new regulatory models. Any plan for new structures or service models should be inclusive, responsible, and mindful of any necessary disruptions that may be occasioned.
- i. Efficient and Proportionate Regulation: Any changes should improve the Law Society's ability to effectively protect and promote the public interest in competent and ethical practices, including appropriate responses to client complaints. Restrictions on who may provide legal services should be proportionate to the significance of the regulatory objectives.

---

*Legal Services Act 2007* provides that where an individual who is not a barrister or solicitor provides advocacy, litigation, conveyancing, and probate services, "any communication, document, material or information relating to the provision of legal services in question" is privileged from disclosure in the same way it would have been if the individual had been acting as the client's solicitor.

## Alternative Business Structures – The Working Group’s Conclusions

### Discussion

#### Defining “ABS”

93. As stated earlier, the impetus for the Working Group was the emergence in other jurisdictions of new regulatory models governing alternative means of practicing law and delivering legal services.
94. In Ontario, clients are overwhelmingly served by firms that are 100% licensee-owned and that provide only legal services<sup>38</sup>. These firms have limited, if any, external economic relationships except for bank debt and for purchased goods and services.<sup>39</sup> Licensees are required to directly supervise all tasks and functions assigned to non-licensees.<sup>40</sup>
95. Early in its work, the Working Group determined that the term “alternative business structures” may be used to refer to any form of non-traditional business structure, as well as alternative means of delivering legal services and may include, for example,
- a. alternative ownership structures, such as non-lawyer or non-paralegal investment or ownership of law firms, including equity financing;
  - b. firms offering legal services together with other professionals; and

---

<sup>38</sup> These firms are all sole proprietorships, partnerships and professional corporations. Professional corporations are not permitted to carry on any business other than providing legal services other than related or ancillary activities. The *Rules of Professional Conduct* prohibit direct or indirect fee-sharing with non-licensees other than in a multi-discipline practice (an “MDP”) and in inter-jurisdictional law firms. MDPs must be effectively controlled by licensees and may only provide additional services that support or supplement the licensed activity. Fees may only be shared within an MDP with MDP partners who provide client services.

<sup>39</sup> The *Rules of Professional Conduct* prohibit payment of referral fees to non-licensees as well as prohibiting fee-sharing.

<sup>40</sup> Rule 5.01 of the *Rules of Professional Conduct*.

- c. firms offering an expanded range of products and services, such as “do it yourself” automated legal forms as well as more advanced applications of technology and business processes.
96. This definition is based on our observations of ABS in the jurisdictions in which it is now implemented. In these jurisdictions, the term ABS encompasses a variety of structures. In England and Wales for example, these include the following:
- a. Quality Solicitors, a network of over 200 independent law firms with access to national branding strategies, website support, and buying power;<sup>41</sup>
  - b. Co-operative Legal Services, which provides a range of legal services as part of the member-owned Co-operative Group. The Co-operative Group operates a family of businesses including food, financial services, pharmacy, funeral care, and online electrical as well as legal services.<sup>42</sup>
  - c. Scott Moncrieff and Associates, a virtual law firm whose fifty consultant lawyers work from home on a wide variety of private client matters;<sup>43</sup>
  - d. Natalie Gamble and Associates, a firm with expertise in fertility law offering related services such as donor conception and adoption;<sup>44</sup>
  - e. Winn Solicitors, an accident management firm; its services include compensation, repairs, replacement vehicles, and rehabilitation;<sup>45</sup> and
  - f. Rocket Lawyer, which combines on-line legal document assembly with on-line legal information and advice as well as pre-paid legal service packages.<sup>46</sup>

---

<sup>41</sup> <http://files.qualitysolicitors.com/QualitySolicitors%20Info%20Pack.pdf>, discussed by Edward M. Iacobucci and Michael J. Trebilcock in “An Economic Analysis of Alternative Business Structures for the Practice of Law”, p. 23, September 20, 2013. This paper was commissioned by the ABS Working Group for the symposium held on October 4, 2013.

<sup>42</sup> <http://www.co-operative.coop/legalservices/>.

<sup>43</sup> Legal Futures, “Law Society President embraces ABS status”, online at <http://www.legalfutures.co.uk/latest-news/law-society-president-embraces-abs-status>.

<sup>44</sup> [www.nataliegambleassociates.co.uk](http://www.nataliegambleassociates.co.uk)

<sup>45</sup> <http://www.winnsolicitors.com/>.



97. In Australia, the first jurisdiction to adopt ABS, Slater & Gordon became the first law firm in the world to be publicly listed on a stock exchange on May 21, 2007. The firm employs 1350 staff in 69 locations with a focus on personal injury and class action litigation on the plaintiff side.<sup>47</sup>
98. Other Canadian Law Societies are considering ABS. On October 15, 2013, the Nova Scotia Barristers Society Council considered a report which asks, among other things, whether ABS should be permitted in that jurisdiction.<sup>48</sup>
99. The Working Group has observed that one of the key factors in the development of ABS is the enhanced and, in some cases, the direct use of technology to deliver services in a new way.
100. The Canadian Bar Association Legal Futures Initiative report identifies the following technologies that are transforming the practice of law:
  - a. the proliferation of online dispute resolution (Smartsettle and equibbly.com are two Canadian examples)<sup>49</sup>;
  - b. the development of a technology-enabled marketplace where sellers of legal services can present their offerings, credentials, and fee structures, and buyers can choose the type of services they wish to purchase); and
  - c. intelligent systems/artificial intelligence (ultimately, intelligent systems may be able to offer advice based on comprehensive analysis of data and risk

---

<sup>46</sup> <https://www.rocketlawyer.co.uk/>

<sup>47</sup> Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?", *supra* note 29. Since then, two other firms have been listed on the Australian Stock Exchange.

<sup>48</sup> Nova Scotia Barristers Society, *Transforming Regulation and Governance in the Public Interest*, *supra* note 20, online at <http://nsbs.org/sites/default/files/cms/news/2013-10-30transformingregulation.pdf>, p. 5.

<sup>49</sup> [www.smartsettle.com](http://www.smartsettle.com) and [www.equibbly.com](http://www.equibbly.com).

factors, which could surpass the human capabilities to manage information, resolve issues, and draw conclusions).<sup>50</sup>

Legal Services Regulation should facilitate Innovation

101. The Working Group is of the view that the proliferation of activity in the Ontario legal services marketplace beyond the Law Society's jurisdiction requires thoughtful consideration by the Society, particularly in light of the broad definition of the term "legal services" in the *Law Society Act*. To facilitate access to justice and in the public interest, the Law Society should examine the extent to which the current scheme of the Act encompasses activity in the online legal services marketplace requiring regulatory oversight.
102. The Working Group concluded that generally it is preferable that new business structures emerge in the regulated sphere. This may not always be practically feasible or reasonable. For example some unregulated services are provided from other jurisdictions over the internet. Others involve support services for legal practices and the reach of regulation into these support services may on balance not be cost effective.
103. During his presentation at the symposium, James Peters contrasted the legal needs of corporations with those of individuals and small businesses targeted by Legal Zoom. According to Mr. Peters, there is a growing presence of non-regulated service providers in the U.S. who are able to access sources of capital and expertise to enhance their market share that are not available to lawyers.
104. The emergence of these new unregulated services is an important factor in favour of permitting lawyers and paralegals greater latitude in the way in which they structure and organize their businesses and services. The emerging unregulated

---

<sup>50</sup> CBA Legal Futures Initiative: *The Future of Legal Services in Canada: Trends and Issues*, (June 2013), online at <http://cbafutures.org/trends>, p. 27.

activities have attracted a significant number of clients and this public should be able to access regulated services with similar ease where that is possible.

105. The question of whether and how the Law Society might regulate some of these newer forms of legal services is an question that likely merits further discussion separate and apart from the issue of ABS. This issue has significant policy and resource implications and deserves further consideration.

The Relationship between the Introduction of ABS and Access to Justice

106. The issue of access to legal services has been primarily identified as relating to the cost of these services.<sup>51</sup> One of the key criteria adopted by the Working Group for the evaluation of ABS is whether a specific ABS model promotes access to justice. Having carefully reviewed the emerging evidence from jurisdictions that have implemented a form of ABS, the Working Group considers that the implementation of ABS could afford improvements in access to legal services.
107. While there is not yet clear evidence that the introduction of ABSs materially affects access to justice, there is reason to think that there is real potential for enhanced access. The need for access to justice for individuals arises in two quite different contexts. Individuals face legal issues in day-to-day life for example as tenants entering into leases, testators wanting to deal with their estates, older people wanting to protect their assets and health decisions by powers of attorney and injured persons dealing with private or public income protection. Individuals can also experience a serious legal problem, such as marriage break-down, a major personal injury or a criminal charge.
108. For serious legal issues, the cost of legal services is commonly more expensive than can be afforded even by middle class individuals. Alternative business models may provide lawyers and paralegals with enhanced access to

---

<sup>51</sup> Gillian K. Hadfield, “The Cost of Law: Promoting Access to Justice Through the Corporate Practice of Law”, *supra* note 28, p. 10, in which Professor Hadfield observes that “conventional legal services are simply beyond the means of most Americans”.

technological and business innovation. This can include the ability to partner with a business manager whose contribution may improve the efficiency of the delivery of services and the marketing of those services. With more diversified ownership and greater access to additional capital, a lawyer or paralegal could provide legal services more efficiently through access to specialized technology or support services including for books and records. ABSs may also provide new ways of accessing existing services from lawyers and paralegals.

109. The Working Group's review of the information collected shows that for day-to-day legal needs, individuals are well served in many respects by lawyers and paralegals. It is also clear however that there are gaps and that in many cases significant legal needs not being served. This is sometimes referred to as latent demand for legal services, usually in circumstances where those seeking the services are middle income earners, but the cost of some of the services are beyond their ability to afford. The results of the Working Group's research shows that a second reason members of the public may seek services from the unregulated marketplace is ease of access in terms of hours operation, location or client services. It appears that these unmet legal needs are not effectively serviced by existing business structures whether as a matter of ease of access or cost of service.<sup>52</sup>
110. The Law Society Treasurer, Thomas C. Conway, has identified access to justice as a key priority for the Society.<sup>53</sup> The Action Committee on Access to Justice in Civil and Family Matters recently released a report on this subject (*A Roadmap for Change*).<sup>54</sup> The Law Society, through the Treasurer's Advisory Group on

---

<sup>52</sup> Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds. *Middle Income Access to Justice*, (Toronto/Buffalo/London: University of Toronto Press, 2012), Part 2: "Defining the Problem: What are the Unmet Legal Needs?"

<sup>53</sup> Law Society of Upper Canada, "Access to Justice: Creating a Climate for Change", Treasurer's Blog, *Gazette*, online at <http://www.lawsocietygazette.ca/treasurers-blog/creating-climate-for-change/>.

<sup>54</sup> Online at [http://www.fcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.fcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf).

Access to Justice, has committed to ensuring that the recommendations in this report are realized.

111. As part of the Treasurer's Advisory Group Initiative, the Law Society held a symposium on Access to Justice on October 29, 2013. In an address to the symposium, Chief Justice Anne-Marie Bonkalo of the Ontario Court of Justice noted that fewer and that fewer family lawyers are offering service in important areas such as child protection. Chief Justice Bonkalo also noted the growth of interdisciplinary initiatives such as a program offered by the Community and Legal Aid Services Program at Osgoode Hall Law School and the School of Social Work at York University which offers clients the services of both law students and students of social work.
  
112. A recent study of 259 self-represented litigants in family and civil law matters in Ontario, British Columbia and Alberta reported that the most consistently cited reason for self-representation was the inability to afford to retain, or continue to retain, a lawyer.<sup>55</sup> Eighty-six percent of participants in the survey indicated that they had attempted to access legal advice services in some form. Further, virtually every one of the 14% of participants who neither retained a lawyer to represent them at any stage in their case nor sought free legal advice indicated that their reason for not trying to obtain assistance was concern about the cost.<sup>56</sup>
  
113. In 2009, the Law Commission of Ontario (LCO) embarked upon a study of family justice in Ontario, issuing a final report in February 2013. The LCO noted that members of the public facing family law issues are often confronting other challenges, including financial and mental health concerns.

---

<sup>55</sup> Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants", online at <http://www.representing-yourself.com/PDF/reportM15.pdf>, p. 8.

<sup>56</sup> *Ibid.*, p. 82.

114. In its final report, one of LCO's recommendations was the establishment of multidisciplinary centres in which lawyers would provide service to the public alongside other professionals. In this regard, the report suggested that "the ease of structuring multidisciplinary centres in a way that is truly collaborative may be affected by [Law Society] rules." The report refers to By-Law 7 and Rule 6.10 of the *Rules of Professional Conduct*.<sup>57</sup>
115. This argues in favour of permitting non-legal services to be delivered within the same entity that also delivers legal services. This may well provide ease of access to a combination of expert services which may be customized with the creation of multidisciplinary expertise within the entity offering the services, and economies of scope and scale. These opportunities may enable lawyers and paralegals to harness the power of the existing brand for one service to develop market share for other services and vice versa.
116. In England and Wales, the Legal Services Board announced on September 12, 2012 that it plans to monitor the impact of ABS and other reforms on access to justice using the following measures:
- a. demand for legal services;
  - b. paths to justice (that is, whether individuals take no action in regard to their legal needs, handle them alone or seek legal advice);
  - c. use of legal services (analysis of the ways in which consumers use legal services i.e. do they seek information, advice or representation);
  - d. perception of legal services (that is, whether consumers perceive that legal services are affordable);
  - e. cost of legal services;
  - f. number of agents of delivery (the number of authorized persons compared to the population);

---

<sup>57</sup> Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, Final Report, February 2013, p. 85, online at <http://www.lco-cdo.org/family-law-reform-final-report.pdf>.

- g. scope of delivery (the range of categories of work in which regulated entities report turnover and the proportion of consumers getting advice on clusters of problems from the same providers);
- h. geography of services (proportion of agents of delivery by geographic location and the methods of communication used to interact with clients);
- i. access to the courts (volumes of trials, the number of days sat by judges per trial and the length of time between court proceedings); and
- j. trends in satisfaction with the justice system.<sup>58</sup>

117. An analysis of these measures is forthcoming from the LSB in 2014.

118. Professor Richard Devlin of Dalhousie University suggests that ABS could contribute to access to justice in Canada in various ways, including enabling members of the public to access services more conveniently, by, for example, offering financial and legal services in the same place, as well as enabling the public to access legal services in a manner they may find less intimidating than a lawyer or paralegal's office. He also suggests that the public may also benefit from an increased willingness by practitioners to take on cases perceived as risky because of an enhanced access to capital.<sup>59</sup>

119. While it would be wrong to suggest that ABSs are a panacea, ABSs may play a part in addressing these legal needs. ABSs may also more efficiently serve these legal needs by allowing clients to better access existing legal services together with other needed services such as, for example, social work and psychological services.

---

<sup>58</sup> Legal Futures, "LSB releases plan to monitor impact of ABSs on access to justice", September 13, 2012, online at <http://www.legalfutures.co.uk/latest-news/lsb-releases-plan-monitor-impact-abss-access-justice>.

<sup>59</sup> Richard Devlin, "Access to Justice and The Ethics and Politics of Alternative Business Structures", (2014) 91 Canadian Bar Review (forthcoming).

120. Permitting new models for the delivery of legal services and the practice of law is not the sole, nor likely the most important, solution to issues of access to justice. Lawyers and paralegals will still need to spend time to provide services for their clients, with an attendant cost. ABS models, however, have the potential to enhance access by providing new means of access in addition to the current models, and by providing lawyers and paralegals with additional means to gain efficiency and flexibility, with possible impacts on cost.

Providing Lawyers and Paralegals with more Choice in how their Practices are Structured

121. The substantial majority of firms providing legal services to individuals and small businesses are sole practitioners and small partnerships. Small firms generally serve individuals and small businesses. The main areas of small firm practice are real estate, civil litigation, wills, estates, trusts, corporate and commercial and family.<sup>60</sup>
122. While many lawyers and paralegals no doubt prefer to be the owner/managers of their own small practices, it was clear from the consultations undertaken by the Working Group that many practitioners consider the business and marketing aspects of their practice to be a burden. For them, practicing, even as a sole practitioner, in a structure which facilitated access to business expertise and infrastructure was attractive.
123. Experience in other jurisdictions suggests that sole practitioners and practitioners in small firms may benefit from the advantages associated with participating in a larger entity or organization, including access to technology and infrastructure, the opportunity to share business costs, access to business and other expertise,

---

<sup>60</sup> LSUC *Final Report of the Sole Practitioner and Small Firm Task Force*, 2005, online at <http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf>, particularly paragraphs 36 to 37 and 39 to 41. See also, Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (2013), *supra* note 28.



ethical infrastructure, association with a known brand, and greater market power in dealing with suppliers and other market participants.

124. The discussions at the ABS Symposium suggested that enabling alternative ways to practice including as part of a franchise, or in similar types of affiliations or larger structures may be advantageous for some, and particularly for those who still wish to maintain some elements of a sole practice, while also receiving the supports that a larger organization can provide. Law Society regulatory experience suggests that such supports can be advantageous to clients as well as lawyers.
125. The LSB study published in October 2013 and referred to earlier in this report revealed that ABS firms are more likely to use technology than non-ABS firms. Ninety-one percent of ABS firms surveyed indicated that they had a website to deliver information and other services to clients, as opposed to 52% of non-ABS solicitors' firms. The President of the Law Society of England and Wales has recently commented that, despite the natural fear of the unknown, the Law Society has "discovered that the choice ABS offer is benefiting many of our members ..."<sup>61</sup>
126. The Working Group notes that the introduction of ABS models in other jurisdictions has not necessarily meant that sole and small practices reduced in numbers. In New South Wales, many of the firms taking advantage of ABS were small or sole practices, and remained so within the ABS environment. Nor does the experience in other jurisdictions suggest that introduction of ABSs will transform practice. While considering that introduction of ABSs should facilitate innovation, Professors Iacobucci and Trebilcock also indicated during the October

---

<sup>61</sup> Legal Services Board, *Evaluation: Change in Competition in Different Legal Markets: An Empirical Analysis*, *supra* note 13 at 9 and "Alternative Business Structures: The View from England and Wales", January 7, 2014, online at <http://cbafutures.org/FoL-Blog/Blog/January-2014/Alternative-business-structures-the-view-from-Engl#>

ABS Symposium that, in their view, introduction of ABSs would not cause dramatic change to the way in which legal services are currently provided in Ontario.

127. With respect to non-lawyer ownership, the Working Group notes that new sources of capital may permit a law firm to reorganize or innovate, expand (which may entail a merger with another firm, open a new location, and begin delivery of services in new practice areas). It may also permit a firm to invest in talent (hiring of new legal and non-legal staff). Further, enhanced access to capital would permit lawyers and paralegals to reward long-standing key employees with a share in the firm. Access to new sources of capital could enable licensees to invest in knowledge management and technology.
128. Alternative sources of capital may also enable investments in business process and technological innovations, which may lead to enhanced quality, and may enable a licensee to scale operations, thereby moving away from the billable hour to a new structure. Reliance on outside capital may encourage and enable licensees to professionalize their business processes.
129. Based on the foregoing, the Working Group concludes that ABS would provide practitioners with greater flexibility to seek out the type of business model that most suits their circumstances, and would likely promote greater financial viability for the small and sole practitioners who provide retail services to the public.

Duty to the Rule of Law and Administration of Justice Supersedes Duty to Owners

130. A key component of ABS is partial or complete ownership of the entity by non-lawyers. This raises a question as to how a lawyer or paralegal working within that entity deals with the potentially competing interests of the non-lawyer owners (who are likely primarily seeking profitability) and the duty to clients and the administration of justice.

131. This issue has been addressed in other jurisdictions which implemented non-lawyer ownership. The Working Group particularly notes the approach taken to this issue in New South Wales.
132. During a visit to the Law Society of Upper Canada on July 16, 2012, Steve Mark, former Legal Services Commissioner, New South Wales, described the role of the regulator in that jurisdiction when Slater & Gordon's first public listing. The OLSC worked with the firm to ensure that the prospectus specified a hierarchy of duties according to which the legal practitioner's first duty is to the Court, the second is to the client and the third is to the shareholder. In that case, the interests of clients were protected through the prospectus to inform future share holders. Mr. Mark recommended to the Working Group that it would be preferable that this hierarchy of duties be enshrined in legislation to afford the public full protection.<sup>62</sup>
133. Currently there is some statutory protection for the public and clients in New South Wales. Section 162(2) of the *Legal Profession Act 2004* provides that in the event of an inconsistency between that legislation and that *Corporations Act, 2001*, under which an ILP is established, the *Legal Profession Act 2004* prevails.<sup>63</sup>
134. While the experience over the last decade in Australia should not be taken to demonstrate that there would no regulatory risk if ABSs were permitted in Ontario, it is clear that there have not been any significant regulatory issues arising from ABSs in Australia. The adoption of compliance-oriented entity

---

<sup>62</sup> Steve Mark, "A short paper and notes on the listing of law firms in New South Wales". Online at [http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/notes\\_for\\_joint\\_nobc\\_aprl\\_aba\\_panel.pdf](http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/notes_for_joint_nobc_aprl_aba_panel.pdf).

<sup>63</sup> *Legal Profession Act 2004*, s. 162(2), online at <http://www.legislation.nsw.gov.au/inforcepdf/2004-112.pdf?id=6482819c-be12-4fb9-de1c-f6e1ac7ab25b>, Mr. Mark and Ms. Tahlia Gordon, previously the Research and Projects Manager of the Office of the Legal Services Commissioner, New South Wales, visited the Law Society of Upper Canada on July 16, 2012.

regulation in Australia appears to be part of the reason for this success as does the establishment of the hierarchy of duties.

135. Reframing this hierarchy of duties in terms that could apply in Ontario, an ABS providing legal services should be required (as must lawyers and regulated paralegals) to subordinate the interests of its owners to the interests of its clients and to the interests of rule of law and administration of justice. This is a key tenet of any reform of structures to ensure the legal advice provided is fully independent, and client confidentiality and privilege are protected.

Consideration of ABS models suitable for Ontario

136. The ABS Working Group considered the full range of potential ABS options and noted that the questions for decision are:
- a. whether the Law Society should undertake any change respecting alternative business structures,
  - b. the degree to which non-licensees are permitted an ownership in the entity;  
and
  - c. the extent to which non-legal services may be provided to clients within the entity.
137. In any regulatory environment, entities providing legal services may be subject to strict ownership restrictions, or, as in jurisdictions such as New South Wales or in England and Wales, there may be much less restriction on ownership.
138. The Working Group recognizes that while changes to either ownership rules or to the permitted range of non-legal services can be considered, most potential options would involve the lifting of both ownership restrictions as well as limitations on the type of service which may be offered by the entity.
139. In order to arrive at a set of recommendations concerning alternative business structures and the services they offer, the Working Group considered a range of ABS models.

(i) Should the status quo be maintained?

140. The current Ontario regulatory model permits four types of business structures (sole practitioner, partnership, limited liability partnership and professional corporation). All require full ownership and control by the regulated licensee. There is some limited permission to provide related non-legal services through an affiliation or a multi disciplinary practice.
141. The Working Group concluded that the preponderance of the information available argues against maintaining the *status quo*. Earlier in this report there was a discussion of the advantages and risks attendant on the introduction of ABS in Ontario. Having carefully examined the copious information that the Working Group has available to it, the Working Group is satisfied that there is significant evidence to recommend the introduction of a form of ABS in Ontario.
142. As noted earlier, the introduction of ABS is not a panacea to address issues such as access to justice and the economic viability of legal practice. There is cogent evidence however to show that ABS may well contribute to the development of more accessible, flexible and viable legal services in Ontario. The introduction of alternatives will provide licensees with added options that should promote greater innovation in the provision of legal services, including potentially greater accessibility for the public seeking those services.
143. The Working Group concluded that the existing tight regulatory restrictions on business structures are not justifiable given the lack of evidence that regulatory liberalization will cause harm. This is coupled with substantial evidence that business structure liberalization combined with entity regulation is likely to provide greater flexibility and more options for both licensees and the public.

(ii) Should limited non-licensee ownership be permitted for entities providing legal services?

144. The Working Group considered whether a modest amendment to current ownership restrictions of legal practices in Ontario permitting family members to hold shares in a legal services entity was advisable.
145. In Ontario, physicians and dentists may establish health professional corporations in which family members may be shareholders.
146. In New South Wales and in England and Wales, as a result of the regulatory liberalization of ownership restrictions, many sole practitioners converted to ILPs (incorporated legal practices) in order to enable family ownership in the firm. There has been some discussion of the advantages of seeking legislative amendments to enable licensees to establish a professional corporation in which family members could own shares.
147. The Working Group recognizes that permitting family investment in smaller law firms could have beneficial tax consequences for licensees and their family members. More favourable tax treatment could benefit sole and small practitioners in particular, and might serve as a means of encouraging sole and small practitioners to continue to engage in their practices.
148. Greater tax efficiency by permitting family investment does not do more than reduce the taxes paid by licensees and received by government. These tax savings may, or may not, be passed on to clients. It is certainly arguable that the existing prohibition against family ownership for licensees is unfair. However, merely reducing tax payments does not address the economic and business issues created by restricting business structures. Accordingly, the Working Group does not recommend that ownership liberalization be limited to permitting family investment.

149. The Working Group concluded that any amendment to permit ownership by family members is too limited in scope to be of any significant benefit in the public interest. The Working Group noted however that if only a modest or incremental change to ownership is desired, the better model is to permit ownership of the entity by non-licensees up to 49%, in order to provide greater scope for investment opportunities including by employees.

(iii) Should entities be permitted non-licensee ownership but without any ability to provide non-legal services?

150. The Working Group considered recommending an ABS model with varying degrees of permitted non-licensee ownership which would not be permitted to provide any non-legal services. The advantage of such a model is that it avoids any possible risk related to the provision of non-legal services. As noted earlier, these possible risks include the loss of client confidentiality and privilege, increased risk of conflicts, and the decreased quality of legal services. At the same time, it provides lawyers and paralegals with increased access to investment in their practices to allow them to implement efficiencies.

151. The disadvantage of this approach is that it restricts the ability of lawyers and paralegals to more fully collaborate with other service providers to offer more innovative and comprehensive services to the public.

152. The Working Group questions whether a valid regulatory objective is achieved by restricting the entity to solely providing legal services. MDPs have already combined the provision of legal services and other professional services to establish a limited form of 'one-stop shopping' for consumers of legal and other professional services in Ontario.

153. The Working Group notes that the structuring of an entity which provides only legal services would not provide lawyers and paralegals with sufficient ability to be innovative in developing new ways to provide services to consumers.

154. The Working Group concluded that an ABS model which prohibits the ability to provide any non-legal services is too restrictive, and would be unlikely to achieve the objectives of greater accessibility and flexibility in the provision of legal services. Moreover, the Working Group noted the absence of any demonstrated risk or harm in combining legal and non-legal services so long as appropriate regulatory requirements are in place.

(iv) Should liberalized ownership be permitted together with liberalization of the provision of non-legal services?

155. The Working Group considered various models for liberalizing ownership and the non-legal services provided by the entity.

156. In its deliberations, the Working Group noted that there may be risk in permitting any services without any restrictions on the range of those services. It was noted that there may well be types of services that are inappropriate and likely to increase risk, if provided together with legal services through the same entity. The Working Group considers that effective client representation and protection of our land titles system requires particular examination with respect to legal services involving residential real estate.

157. Accordingly, the Working Group concluded that any liberalization of the provision of non-legal services should include an initial and on-going analysis by the Law Society of restrictions on the provision of non-legal services required on the basis of regulatory risk.



158. As indicated earlier in this report, jurisdictions in which ABS has been implemented, there is a more permissive approach to ownership. In Ontario, only four specified models of ownership are permitted. As noted earlier in this report, in Australia, ILPs do not impose restrictions on individuals who may hold shares in the firm. In England and Wales, the *Legal Services Act 2007* allows non-lawyers to own and run legal businesses.<sup>64</sup>
159. With respect to the services the ABS may offer, the *Legal Profession Act* (N.S.W.) allows an incorporated legal practice to provide any service or conduct any business that the corporation may lawfully provide or conduct, with the exception of a “managed investment scheme”.<sup>65</sup> In England and Wales, entities that have obtained ABS licenses offer a range of services in addition to legal services including human resources assistance, claims handling, rehabilitation management, and access to health professionals.
160. The Working Group concluded that an orderly transition for the implementation of new structures may benefit from an incremental approach to liberalization of ownership. Nevertheless, there was considerable interest by most of the members of the Working Group in models of ABS that include unrestricted ownership.
161. The Working Group recommends consultation on both liberalization of ownership and unrestricted ownership by non-licensees. Partial liberalization of existing Rules would allow the Society to carefully consider whether additional changes are in the public interest, however an incremental approach takes longer, and would no doubt restrict opportunities for innovation and access.

---

<sup>64</sup> Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future*, *supra* note 22, p. 6.

<sup>65</sup> *Legal Profession Act 2004* (N.S.W.), s. 135, online at [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/lpa2004179/s135.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/s135.html). Section 135(3) provides that the regulations may prohibit an Incorporated Legal Practice from providing a service or conducting a business of a kind specified by the regulations.

## RECOMMENDATIONS

### **Alternative Business Structures: the Working Group's Recommendations**

162. Based on its work to date, the Working Group has identified four possible options for alternative business structures reform. The Working Group recommends consultations on these four options before the Working Group makes a final recommendation as to the appropriate model. The consultations will be undertaken with a view to testing the options to establish their suitability for Ontario.
163. **The Working Group recommends focussed as well as generalized consultation with the profession and interested stakeholders. This would include notice and invitation to comment through the Law Society's website and the Ontario Reports, as well as direct communication with all of the stakeholders who were invited to the 2013 consultations and/or the Symposium as well as others.**

### **Option #1: Permitting Up to 49% Ownership by Non-Licensees in Entities Only Providing Legal Services**

164. Under this option, the licensee would maintain majority ownership of the entity, and would be responsible for its provision of legal services. At best, such ownership structure might generate only a near doubling of the equity investment available to the entity.
165. The Working Group noted the doubt expressed by many participants in its summer and fall meetings that arms-length investors would be interested in assuming up to a 49% ownership in a law firm. An outside investor may not perceive sufficient potential growth in the business to justify an equity investment in which the investor may only obtain a minority interest. A doubling of equity capital is unlikely to provide the resources necessary to achieve material innovation in the delivery of legal services. Nevertheless, permitting minority

equity interests for non-licensees would permit key employees to be rewarded by equity participation.

166. The Working Group concluded that, with respect to an entity only providing legal services, a minority ownership rule would likely restrict the interest in outside investment. That said, allowing up to 49% equity ownership by non-licensees is viewed as some improvement over the *status quo*. Some consider, as was the case in Australia and England, that permitting 49% non-licensee ownership provides a cautious first step towards further liberalization.

**Option #2: Entity restricted to providing legal services, but with unrestricted ownership**

167. This option would permit the entity to provide legal services, with unrestricted ownership. Under this option, the entity would only provide legal services, but would be free to seek capitalization in any way it sees fit. The entity could be capitalized through licensee or non-licensee ownership or any combination thereof. Nonetheless, the provision of legal services would remain under the control and supervision of licensees.
168. This option would focus the entity on delivering legal services, and increased capitalization could therefore be directed solely at enhancing the delivery of legal services. As the entity would not offer other non-legal services, the potential risks of conflicts and to confidentiality and loss of privilege which may exist in a multi-disciplinary/service environment are minimal. The requirement that licensees control and supervise the provision of legal services together with entity regulation should effectively ensure independent judgment in the delivery of legal services.
169. The importance of preserving solicitor-client privilege would require that non-licensee owners would not be permitted to access confidential information about the identity of clients and the work being done for them. The ABS entity and the licensees within the ABS would be subject to Law Society Rules and sanctions.

Further, the entity as a whole would be required to identify an individual or individuals, similar to the Legal Practitioner Director in New South Wales, who would be responsible for ensuring compliance by the entity and its owners, directors, officers and employees with the Law Society Rules. In the New South Wales scheme, failure by the Legal Practitioner Director to ensure the regulatory compliance of the entity may be the basis of a finding of misconduct. The Legal Practitioner Director may be sanctioned, or disqualified from further service in this capacity, as a result.<sup>66</sup>

170. However, the Working Group questions whether a valid regulatory objective is achieved in restricting such an entity to solely providing legal services. The Working Group notes that this reflects the status quo in Ontario with MDPs, which would not be very useful.

**Option #3: Entity permitted up to 49% non-licensee ownership and permitted to provide both legal services and non-legal services except those identified as posing a regulatory risk**

171. The Working Group considered the feasibility of permitting up to 49% ownership in an entity, and permitting the entity to provide both legal services and non-legal services except those identified by the Law Society as posing a regulatory risk.
172. As discussed at paragraphs 156 – 157, liberalized ownership may permit increased capitalization to be invested to enhance the delivery of legal services, but restrictions on non-licensee ownership are likely to restrict the amount of interest in outside investment. It is questionable whether this will achieve the innovations which may result from unrestricted non-licensee ownership.
173. Regulators in Australia and in England and Wales, permit unrestricted ownership and few if any restrictions on the pairing of legal and non-legal services. The

---

<sup>66</sup> Ted Schneyer, “Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Legal Practice”, (2009) *Journal of the Professional Lawyer* 13, p. 31.

Working Group is of the view that the experiences of regulators in other jurisdictions will be instructive in identifying areas of regulatory risk.

174. This option is potentially attractive, as compared to permitting only ancillary services, on the basis that the regulator should be careful not to make assumptions about which innovations may prove valuable over time and on the basis that restrictions on what services may be provided should be determined by assessed regulatory risk.
175. It should be recognized that permitting a broader range of services to be offered by an ABS will require attention to the avoidance of conflicts and the protection of confidentiality and privilege simply because a broader range of activities would be permitted to be delivered within the ABS including by non-licensees. However, these matters appear to be capable of being addressed. For example, the law of privilege already addresses the provision of legal and non-legal services by in-house counsel<sup>67</sup> as well as the participation of non-lawyer experts where required for the provision of legal services without loss of privilege.<sup>68</sup>
176. Permitting non-licensees to become owners in an entity without requiring that they be subject to control and supervision by the licensees (as is currently the case with respect to multi-disciplinary partnerships) may encourage further innovation. It is important to note, however, that the entity as a whole would be subject to Law Society requirements.

---

<sup>67</sup> *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 SCR 809, paragraphs 19-21, online at <http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/2144/index.do>

<sup>68</sup> *Barrick Gold Corporation v. Goldcorp Inc.*, 2011 ONSC 1325, paragraph 19, online at <http://www.canlii.org/en/on/onsc/doc/2011/2011onsc1325/2011onsc1325.html>, and *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, paragraph 64, online at <http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc88/2011bcsc88.html?searchUrlHash=AAAAAQALU291dGggQ29hc3QAAAAAAQ>.

**Option #4: Entity permitted unlimited non-licensee ownership and permitted to provide legal services and any other services, except where there is a sufficient regulatory risk identified**

177. The Working Group considered an ABS in which the services provided in addition to legal services would not be subject to restriction, except in circumstances where the Law Society has identified a sufficient regulatory risk. The Law Society would develop criteria governing the assessment of sufficient regulatory risk.
178. The comments made regarding Option #3 regarding the provision of non-legal services and the identification of regulatory risk apply equally to this option. The distinction in Option #4 is that unrestricted ownership by non-licensees will likely increase the entities access to capitalization, as discussed previously in this Report. The experiences of other jurisdictions suggest that regulatory risk resulting from this type of liberalization may be managed.
179. With respect to all of the options described above, the Working Group has concluded that it is unlikely that a more permissive approach to business structures in Ontario will lead to revolutionary change; however, such changes will encourage innovation and the development of new ways to deliver legal services which otherwise will be more likely to emerge in the unregulated, rather than the regulated sphere. The public may be at greater risk if innovation emerges solely in the unregulated sphere outside the Law Society's purview.

**Firm and Entity Regulation: the Working Group's Recommendations**

180. The Working Group has recommended that a form of alternative business structures regulation be introduced in Ontario. In the Working Group's view, this is a long term modification in regulatory approach which requires careful attention to decisions, design and implementation. It should be developed in tandem with the Law Society seeking legislative authority for regulation of entities providing legal services. As noted earlier, several other jurisdictions in

Canada are taking steps to regulate law firms, or have implemented this form of regulation. Legislation in Nova Scotia and British Columbia has already been amended for this purpose. The Barreau du Québec regulates law firms through compliance measures, but not through discipline.<sup>69</sup>

181. In Ontario, there is statutory authority to regulate professional corporations, but not partnerships or sole practices. This results in a gap and imbalance in regulatory authority that should be addressed. Moreover, the regulation of entities or firms provides the Law Society with greater ability to engage in proactive and preventative regulation that can reduce risk for the public. This report has described the results of proactive or compliance based regulation in New South Wales, which demonstrated a marked reduction in complaints for firms.

**Recommendations: Firm and entity regulation**

- 182. The Working Group recommends that the Law Society seek statutory amendment granting it express authority to regulate entities providing legal services in addition to its current authority to regulate individuals and professional corporations.**

**Compliance Based Regulation: the Working Group's Recommendations**

183. The Working Group notes that the Law Society of Upper Canada currently engages in some proactive regulatory activity. An example is practice management review for lawyers and paralegals. Lawyers in private practice who have been practicing between one to eight years may be referred to the program either because of random selection by the Society, re-entry to practice, or as a regulatory response to a pattern of complaints. Paralegals holding a P1 license may also be referred to Practice Management Review.

---

<sup>69</sup> For a further discussion, see Adam Dodek, "Regulating Law Firms in Canada", *supra* note 18, p. 411. Also see Amy Salyzyn, "Regulating Law Practices as Entities: Is the Whole Greater than the Sum of Its Parts?", November 29, 2013, online at <http://www.slw.ca/2013/11/29/regulating-law-practices-as-entities-is-the-whole-greater-than-the-sum-of-its-parts/>.

184. In addition to the Practice Management Program, lawyers may be subject to a spot audit, which addresses financial record-keeping requirements.
185. The Working Group acknowledges that in Ontario the regulatory scheme is predominantly reactive rather than proactive. Issues are more often identified through complaints rather than audits or reports by licensees. In contrast, in conjunction with the implementation of ABS, other regulators have adopted a compliance-based scheme. Compliance-based regulatory models are characterized by the imposition of mandatory affirmative duties and reporting obligations on professionals and monitoring and audits for compliance, with investigations and discipline as a component of the proactive scheme.<sup>70</sup>

**Recommendations: Compliance based regulation**

- 186. In conjunction with the implementation of both firm and entity regulation, the Working Group recommends the Law Society immediately consider implementation of compliance based regulation and refer the issue to the Professional Regulation Committee, with input from the Professional Development and Competence and Paralegal Standing Committees. The Working Group further recommends that compliance based regulation commence with a requirement that licensees and firms have in place a process for responding to complaints.**

**Review of Law Society Rules and By-Laws: the Working Group's Recommendations**

187. In its June 2013 Report, the Working Group noted the existing constraints on business structures that arise from the Law Society By-Laws and *Rules of Professional Conduct*. As set out in the Working Group's June 2013 Report, the Law Society is required to ensure that conduct standards are proportionate to regulatory objectives, and the Working Group believes that existing constraints on business structures should be reviewed.

---

<sup>70</sup> Adam M. Dodek, "Regulating Law Firms in Canada", *supra* note 18 at 406.



188. The principal rules and by-laws governing business structures for the delivery of legal services in Ontario which the Working Group recommends for review are set out in a schedule to this report at **Tab 4.1.2.4**.
189. Several specific rules may be highlighted by way of example:
- a. Rule 2.08(8)(a) provides for an absolute prohibition against directly or indirectly sharing, splitting, or dividing fees with any person who is not a licensee.
  - b. Rule 2.08(8)(b) provides for an absolute prohibition against giving any financial or other reward to any non-licensee for the referral of clients or client matters.
  - c. Rule 5.01(2)(b) requires that a lawyer directly supervise non-lawyers to whom particular tasks and functions are assigned. This requirement may be seen to limit that which may be provided by business and technological processes that are effectively but not directly supervised.
  - d. Sections 16 and 17 of By-Law 7 prohibit licensees from providing services of non-licensed persons except for services that support or supplement the provision of legal services.
  - e. Sections 18, 19 and 20 of By-Law 7 substantially limit partnership between licensees and service providers permitted under sections 16 and 17 including by the requirement that the licensee have effective control over the non-licensee even in respect of non-legal services and that the non-legal services provided be subject to compliance with all Law Society by-laws, rules etc. It is unclear that these limitations are required. As a practical matter, there are only approximately a dozen multi-discipline practices presumably as a result of these tight constraints.
190. The Working Group concluded that these and other related rules should be subject to further study both to encourage innovation and more effective service while protecting professional values.

191. While permitting ABSs as discussed in the paragraphs that follow is an important part of the reform proposed by the Working Group, the Working Group considers that reforms to existing rules could provide flexibility that is achievable in the shorter term. The Working Group recognizes that the development of the regulatory jurisdiction, processes and infrastructure required to support the implementation of the recommendations in this report will take substantial time and effort such that intermediate steps along the path may be appropriate.

**Recommendations: Review of Law Society Rules and By-Laws**

192. **The Working Group recommends that the Working Group be authorized to consider potential revision of Law Society Rules and By-Laws regarding fee-sharing, referral fees, direct supervision, and ownership restrictions and, if thought appropriate, to refer proposed revisions to the Professional Regulation and Paralegal Standing Committees.**
193. **The review of Law Society Rules and By-Laws would be conducted with a view to ensuring that the rules are proportionate to the regulatory risks which they seek to mitigate. Any changes to these rules would require the approval of Convocation.**

**TERMS OF REFERENCE OF THE LAW SOCIETY OF UPPER CANADA WORKING GROUP ON ALTERNATIVE BUSINESS STRUCTURES**

On September 27, 2012, the Working Group reported its Terms of Reference to Convocation.

These Terms of Reference provide that the Working Group will

- (a) inform itself on developments in Canada and abroad on new and existing alternative legal service delivery models and structures, financing arrangements, and the related regulatory process;
- (b) consider these developments in light of regulatory requirements and develop a set of criteria to assess the prioritize these new models and structures. Criteria may include access to the services by the public (access to justice), public protection (risk assessment of various models), and other principles that inform the Law Society's public interest mandate, including the requirement that standards of professional conduct be proportionate to the significance of the regulatory objectives sought to be realized; and
- (c) determine the range of legal service delivery models and financing arrangements that should be explored and examine the existing regulatory constraints on delivery models and financing arrangements;
- (d) create a Work Plan that will include identification of the legal services delivery models and regulatory changes that should be considered by the Law Society for possible implementation based on
  - (i) an initial assessment of their impacts based on the criteria developed earlier;
  - (ii) a high level consultation; and
  - (iii) report the results of its work to Convocation, including, as appropriate, proposals and recommendations for next steps.

**Meetings Held by the Alternative Business Structures Working Group**

**Australia Background Meetings – July 16, 2012 and November 6, 2012**

- Steve Mark, Legal Services Commissioner, New South Wales (by telephone Nov. 6, 2012)
- Tahlia Gordon, Research and Projects Manager, Office of the Legal Services Commissioner, New South Wales (by telephone Nov. 6, 2012)

**England & Wales Background Meeting – December 10, 2012**

- Chris Kenny, Chief Executive, Legal Services Board, England and Wales (by telephone)
- Samantha Barrass, Executive Director, Solicitors Regulation Authority<sup>1</sup> (by telephone)

**United States Background Meeting – January 8, 2013**

- Professor Paul Paton, Professor, and Director, Ethics Across the Professions Initiative, Pacific McGeorge School of Law (by telephone)
- Professor Laurel Terry, Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law, Penn State Dickinson School of Law (by telephone)

**Legal Futures Meeting – February 12, 2013**

- Mitch Kowalski, author of Avoiding Extinction: Reimagining Legal Services for the 21st Century
- Jordan Furlong, strategic consultant and author of Law21 blog

**Meeting with the Equity Advisory Group (“EAG”) – August 14, 2013**

- 12 participants – individual and organizational representatives

**Meeting with Sole Practitioners and Small Firms from Various Regions – August 26, 2013**

- 9 participants

---

<sup>1</sup> Samantha Barrass will become the Chief Executive of the Gibraltar Financial Services Commissioner in February 2014.

### **Meeting with Legal Organizations – August 26, 2013<sup>2</sup>**

The following organizations were represented:

- Association of Corporate Counsel Canada
- County & District Law Presidents' Association
- Criminal Lawyers Association
- Family Lawyers Association
- Ontario Bar Association
- Ontario Trial Lawyers Association
- Paralegal Society of Ontario
- The Advocates Society
- Toronto Lawyers Association

### **Meeting with Large Law Firm Representatives – August 27, 2013**

The following law firms were represented:

- Blake, Cassels & Graydon LLP
- Borden Ladner Gervais
- Dentons Canada LLP
- Gowling, Lafleur Henderson LLP
- McMillan LLP
- Miller Thomson LLP
- Norton Rose Fulbright LLP
- Stikeman Elliott LLP

### **Meeting with Representatives of Law Firms With 25-100 Lawyers – August 27, 2013**

The following law firms were represented:

- Fogler Rubinoff LLP
- Gardiner Roberts LLP

---

<sup>2</sup> The Licensed Paralegal Association of Ontario was also invited to attend, but was unable to participate due to scheduling issues.

- Siskinds LLP
- Thomson Rogers
- Weir Foulds LLP

**ABS Symposium – October 4, 2013**

- 42 participants from firms, legal organizations, and others



# Symposium on Alternative Business Structures for Delivery of Legal Services

## Symposium Agenda

The Law Society of Upper Canada | Barreau du Haut-Canada

*Co-Chairs:* Malcolm Mercer and Susan McGrath

Friday, October 4, 2013

Donald Lamont Learning Centre, The Law Society of Upper Canada, Toronto, Ontario

### 8:00 – 9:00 a.m. REGISTRATION AND BREAKFAST

#### 8:45 – 9:00 a.m. OPENING REMARKS

- Thomas G. Conway, Treasurer, The Law Society of Upper Canada

### Panel 1: Survey of the ABS landscape in England and Wales, Australia, the U.S. and Canada

#### 9:00 – 10:30 a.m.

- Professor John Flood (University of Westminster)
- Professor Laurel Terry (Penn State Dickinson School of Law)
- Professor Paul Paton (Pacific McGeorge School of Law)

### 10:30 – 10:45 a.m. MORNING BREAK

### Panel 2: The effect of regulating business structures on the supply and cost of legal services

#### 10:45 a.m. – 12:15 p.m.

- *Economic Implications of ABS:*  
Professor Edward Iacobucci/Professor Michael Trebilcock (Faculty of Law, University of Toronto)
- *Access to Justice and current issues in litigation financing:*  
Jasminka Kalajdzic, Associate Professor (Faculty of Law, University of Windsor)
- *Innovation in Legal Service Delivery:*  
James Peters, Vice-President, New Market Initiatives, Legal Zoom

### 12:30 – 1:30 p.m. LUNCH

### Panel 3: Can we liberalize regulation and still protect legal ethics?

#### 1:30 – 3:00 p.m.

- Discussion of current regulatory restrictions and alternative approaches to referral fees, fee splitting, supervision, law firm ownership, and whether legal professional corporations should be limited to performing legal services.
- *Facilitator:*  
Professor Pamela Chapman, University of Ottawa Faculty of Law, Common Law Section.
- *Presenters:*  
Amy Salyzyn (J.S.D. candidate, Yale Law School)  
Noel Semple (post doctoral research fellow, University of Toronto and visiting Scholar in Residence, Centre for the Legal Profession, University of Toronto Faculty of Law)

### 3:00 – 3:15 p.m. AFTERNOON BREAK

### 3:15 – 4:00 p.m. WRAP UP

**AN ECONOMIC ANALYSIS OF ALTERNATIVE BUSINESS STRUCTURES FOR THE  
PRACTICE OF LAW**

**Edward M. Iacobucci and Michael J. Trebilcock  
University of Toronto  
Faculty of Law**

**September 20, 2013**

This paper was commissioned by The Law Society of Upper Canada ("Law Society") for the Alternative Business Structures symposium held on October 4, 2013. All opinions expressed in the paper are those of the authors alone and not of the Law Society.

This paper is subject to a copyright licence granted to the Law Society. Any person who wishes to distribute or reproduce this paper in whole or in part should contact the Law Society.



**TABLE OF CONTENTS**

**I. INTRODUCTION..... 2**

**II. THE THEORY OF THE FIRM..... 3**

    a) Theory of the Firm ..... 4

        i) *Lower Transaction Costs vs. Market Pricing*..... 4

        ii) *Relationship-Specific Investments* ..... 6

        iii) *Private Investment in Joint Gains* ..... 8

        iv) *Culture and Reputation* ..... 9

    b) Capital Structure ..... 10

        i) *The Irrelevance Benchmark* ..... 11

        ii) *Debt Financing* ..... 11

        iii) *Equity Financing* ..... 14

**III. ALTERNATIVE BUSINESS STRUCTURES FOR THE PRACTICE OF LAW ..... 16**

    a) Unincorporated Sole Proprietorships ..... 17

    b) General Partnerships ..... 17

    c) Limited Liability Partnerships ..... 18

    d) Professional Corporations ..... 19

    e) Business Corporations with Limited Liability ..... 19

    f) Non-Lawyer Ownership of Corporate Entities Providing Legal Services..... 21

    g) Franchising..... 23

    h) Multidisciplinary Professional Practices..... 23

**IV. THE POTENTIAL ECONOMIC ADVANTAGES OF ALTERNATIVE BUSINESS STRUCTURES..... 25**

    a) Sole Proprietorship..... 34

    b) Partnership ..... 39

    c) Limited Liability Partnership ..... 45

    d) Professional Corporation ..... 48

    e) Business Corporation (Limited Liability)..... 48

    f) Non-Lawyer Ownership..... 50

**V. CONCLUSION ..... 59**

## I. INTRODUCTION

In this Report, we consider the economic advantages and disadvantages of alternative business structures for the practice of law. The question of the form that a legal practice takes undoubtedly engages a wide variety of policy considerations, including ethical questions, that are not necessarily confined to the economic realm. We set these other considerations to the side and focus only on the prospective economic benefits and costs of different structures. Our analysis, then, does not attempt to provide final answers to policy questions associated with alternative business structures, but rather simply offers insights from the realm of economic analysis that may be helpful in reaching an overall policy conclusion about alternative business structures. Of course, economic and non-economic concerns may be related in important ways. For example, to the extent that economic efficiencies from alternative structures lead to lower costs of providing legal services, and lower costs lead to lower prices for buyers of legal services, alternative structures may promote access to justice.<sup>1</sup> Our focus, however, is on the economic considerations, with only occasional reference to other, potentially very important, non-economic policy concerns.

We begin in Part II by discussing economic thinking on two related matters. The first is the economic theory of the firm. This body of thought concerns the question of what economic activities are best situated within a firm, and what economic activities are best situated outside the firm. For example, should an auto manufacturer produce its own sound systems, or should the company buy systems from a third party? This turns out to be a more difficult question than it may initially appear to be. The second issue we discuss in Part II is the economics of capital

---

<sup>1</sup> See, e.g., Gillian Hadfield, “The Price of Law: How the Market for Lawyers Distorts the Justice System” (2000) 98 Michigan Law Review 953. We return to access to justice in the Conclusion.

structure. What considerations affect the economically optimal capital structure (e.g., distribution of equity ownership, the debt-equity ratio) of a firm?

In Part III we outline various business structures that legal service providers might consider adopting. In this section we review not only the kinds of structures that are permissible under Ontario law, but also structures that are not permitted here but are elsewhere.

Part IV builds on the foundation laid in Parts II and III by offering an economic analysis of alternative business structures for legal practice. This section essentially applies the economic analysis of Part II to the array of alternative business structures outlined in Part II in order to gain insight into the economic advantages and disadvantages of different structures. Part V concludes by summarizing, and by touching on the politics of reform, noting that even if liberalization of the choice of form for legal practice led to the demise of certain business structures, it would not necessarily be a bad thing, especially in the longer run, for lawyers at such doomed structures.

## **II. THE THEORY OF THE FIRM**

Ronald Coase posed a deceptively vexing question in a seminal article in 1937<sup>2</sup>: why are some transactions consummated in the market between two separate parties, and why are some transactions consummated within a firm?<sup>3</sup> This question has spawned a host of responses without a single right answer, but with certain strains of thought emerging as prominent pieces of the puzzle. It is essential when attempting to gauge the economic impact of regulatory restrictions on the structure of legal firms to understand as a preliminary matter the considerations that help determine the optimal economic structure of a firm. This section

---

<sup>2</sup> He actually posed the question as an undergraduate student in 1932: see Phillippe Aghion and Richard Holden, “Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?” (2011) 25 *The Journal of Economic Perspectives* 181 at 181.

<sup>3</sup> Ronald Coase, “The Nature of the Firm” (1937) 4 *Economica* 386.

introduces the basic ideas behind the theory of the firm that have emerged in the economic literature.

There is a related question that this section will also canvass. One can crudely think of the theory of the firm as seeking to identify what economic activity will take place within a firm. There is a related question. Assuming that there are a range of passive investors in the firm (not just owner-managers), how is their investment to be structured? For example, how much debt versus equity should a firm issue? This question is also more complex than may meet the eye. This section will review some of the basics of this matter in order to lay a foundation for discussion of the optimal ownership structure of law firms in Section III.

## **a) Theory of the Firm**

### ***i) Lower Transaction Costs vs. Market Pricing***

Coase himself began to answer the question of why some transactions take place within a firm and some outside it by considering a key difference between the transactions.<sup>4</sup> Transactions that arise within the firm result from managerial exercise of authority, while transactions that take place outside the firm rely on contracts and consequential haggling between arm's length parties. There are advantages and disadvantages to each.

To illustrate, consider an example that we will return to throughout the discussion. Suppose there is a car manufacturer, General Motors, that requires sheet metal auto body forms to assemble its cars.<sup>5</sup> It has two basic options at polar extremes. It could itself build a factory capable of producing the sheet metal forms that are necessary for its cars. Or it could instead enter into a contract to buy the forms from an arm's length sheet metal manufacturer. There are

---

<sup>4</sup> Coase, *supra*.

<sup>5</sup> The relationship between GM and Fisher Auto Body is a famous example in the literature on the theory of the firm beginning with the discussion in Benjamin Klein, Robert Crawford and Armen Alchian, "Vertical Integration, Appropriable Rents, and the Competitive Contracting Process" (1978) 21 *Journal of Law and Economics* 297.

a range of options in between these basic possibilities. For example, GM could not vertically integrate the body supplier completely, but could take an equity interest in it, perhaps a minority interest that helps align the economic interests of GM and its supplier. Relatedly, GM and the supplier could form a joint venture of some kind. For example, GM and the supplier could each take a significant ownership stake in an organization, another corporation, or a partnership, that is specifically created to supply GM with auto body forms. These intermediate options, which are neither complete integration nor arm's length contracting, may in certain circumstances optimally resolve the competing economic tensions that arise, and that we will describe, when deciding how best to integrate activities within a form. To illustrate the basic considerations that motivate decisions on firm scope, however, we will focus on the basic choice of full integration or arm's length contracting.

An important advantage of building the sheet metal bodies in-house is that the managers at GM do not need to haggle over price, or over changes in design over time. Rather, they can build the appropriate factory, and hire the appropriate employees with the appropriate instructions to build the metal forms necessary for the cars. Coase observed that building the input in-house reduces transaction costs associated with the production of the metal.

On the other hand, the price mechanism is a vitally important source of information for economic decision-makers. While entering into a contract with a third party for the production of the metal forms may create transaction costs, the price that GM enters into for the metal forms gives GM information about the opportunity costs of using that sheet metal. If the price is \$X per sheet, GM has precise confidence about the opportunity costs of that input in its automobile.

If the sheet metal is sourced in-house, in contrast, it may be much more difficult to discover exactly what the opportunity cost of sheet metal is. For one, GM must attribute

overhead costs to the production of the metal. For another, GM must calculate the opportunity cost of assigning an employee to produce an additional piece of sheet metal rather than some other input, like a windshield. Determining the economic cost of the input is much more difficult when the price mechanism is suppressed in an in-house transaction than when purchased at arm's length.

Thus, Coase identified a trade-off: the firm will weigh the advantages of lower transaction costs against the disadvantages of losing the information provided by the price mechanism, and the boundaries of the firm will be set accordingly. For some matters, the transaction costs of contracting out will exceed the benefits of information provided by the price mechanism, while for others the reverse will be true.

*ii) Relationship-Specific Investments*

Oliver Williamson identified another important consideration in the theory of the firm: the importance of relationship-specific investments.<sup>6</sup> In many longer term economic relationships, parties must make investments that maintain their value only if the relationship continues. To explain, consider again the GM example. Suppose that GM needs sheet metal of certain dimensions and shape to assemble bodies for a particular model of a car. To build that sheet metal body, suppose that specific moulds must be created at significant cost. Now consider a third party, call it Fisher, that vies to supply GM with the specific sheet metal forms. The supplier, before it can sell anything to GM, must build the moulds. The problem Fisher faces is that the moulds are virtually worthless outside the relationship with GM: they are specific to the relationship with GM. The supplier faces a dilemma: build the moulds and then hope GM buys its sheet metal, or do not build the moulds and be incapable of selling these parts to GM.

---

<sup>6</sup> For his best-known work, see Oliver Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (New York: The Free Press, 1975).

The dilemma is made worse by the realization that once it has built the moulds, GM can lowball it on price. Fisher would only want to build the moulds and sell to GM if it anticipated prices for the products that compensate it not only for the per-unit costs of each additional sheet metal form (eg, steel costs, employee's time, etc.), but also for the up-front costs in building the specific moulds. Once Fisher has undertaken the investment in the moulds, however, GM is in a position to offer prices that cover only the variable costs of producing the steel: Fisher would accept because the costs of the moulds is sunk, and Fisher makes more money going forward accepting than rejecting the lowball offer.

Before investing in the moulds, Fisher would anticipate the future "hold-up" problems that result from having made sunk, relationship-specific investments. There are two basic ways of dealing with the so-called hold-up problem. One, before Fisher invests, Fisher and GM can enter into a long-term contract that specifies GM's obligations, including prices and quantity demanded, over time. While such contracts can, and often do in practice, resolve some of the concerns about ex post opportunism by GM, they are not easy contracts to write and enforce. Take something as simple as pricing. Many factors would influence the appropriate market-mimicking price over time, such as the price for raw materials, and demand for the moulded sheets. Long-term, detailed contracts are costly to write and enforce, and may result in prices or other conditions that are out of alignment with other market forces, which may create tensions and disputes.<sup>7</sup>

An alternative option is vertical integration. Rather than GM and Fisher attempting to strike a contract that protects the interests of both parties, they can instead choose to combine their operations within a single firm. The single entity, call it GM-Fisher, can build the moulds

---

<sup>7</sup> See, e.g., Victor Goldberg and John Erickson, "Quantity and Price Adjustment in Long-Term Contracts: A Case Study of Petroleum Coke" (1987) 30 *Journal of Law and Economics* 369.

itself, and simply transfer them to the car construction arm of the entity. This avoids the hold-up problems that sunk, up-front investments otherwise invite. Williamson's analysis provides another important reason why economic activity would be organized within a single firm rather than on the market.

*iii) Private Investment in Joint Gains*

A third theory, attributed in large part to Grossman and Hart,<sup>8</sup> also concerns incentives to invest associated with firm ownership of an asset. This theory concerns incentives to invest in an asset that will enhance the value of the asset. The investments are valuable, but are not susceptible of contracting; efforts could be impossible to verify in court, for example. The asset could be a physical asset, or it could be intangible. Of the latter type, Grossman and Hart provide the example of a customer list. Should the list of an insurance salesperson be owned by an insurance firm, or by the salesperson herself? There is a trade-off in that both the firm and the salesperson can make investments to improve the list, but the incentives to do so vary with ownership of the list. If, for example, the company owns the list, it will have stronger incentives to advertise broadly and grow the list; as the list grows, the company will profit, not the salesperson, because the salesperson would only have access to the list with the company's permission. Conversely, if the salesperson owns the list, she will have stronger incentives to knock on doors in order to grow the list and knows that such investments are profitable to her personally; if the company refuses to compensate for her efforts, she can take the list elsewhere. Grossman and Hart predict that whether the list will be owned by the firm or not will depend on the relative importance of the incentives to make investments in the list. If the insurance provider's incentives matter more to the value of the list, it will own the list. This may in turn

---

<sup>8</sup> See Sanford Grossman and Oliver Hart, "The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration" (1986) 94 *Journal of Political Economy* 691.



affect the boundaries of the firm; a natural implication might be in-house sales staff, for example. On the other hand, if the salesperson's efforts and incentives matter more, it would be more natural to have an independent sales force that owns its customer lists.

*iv) Culture and Reputation*

These theories illustrate the basic economic approaches to firm boundaries that emphasize the gains or losses that result from integrating economic activity within a firm rather than coordinating the activity through a contract between arm's length actors. There are many nuances within this approach, and moreover many theories that do not depend so heavily on the contract-integration divide. Space does not permit development of these alternatives in detail, but one alternative is worth mentioning. The term "firm culture" can be thought of as capturing the informal norms that prevail at the firm,<sup>9</sup> which are independent of formal contracts between different members of the firm, but may interact with these formal contracts. Employees may, for example, have formal contracts with the employer, and informal understandings may inform the enforcement of those contracts. Certain kinds of activity may best be promoted within a certain culture, and mixing cultures, which would be implied by integrating the different activities within a single firm, may not be appropriate. For example, if an individual's output is easily measured, perhaps because quality is easy to discern, and because teamwork is relatively unimportant, it may be suitable for the firm to have an individualistic culture that stresses individual rewards for individual performance. If, however, teamwork is vital to production, such a culture would be inappropriate.

A related consideration that may affect the boundaries of the firm concerns reputation. If a single firm develops a reputation for behaving a certain way, perhaps it is known to provide

---

<sup>9</sup> See, e.g., Ronald Daniels, "The Law Firm as an Efficient Community" (1991) 37 McGill Law Journal 801.

high quality products, for example, there may be a risk to that firm's reputation by extending into other economic activities.<sup>10</sup> Selling a second product may tempt the firm to renege on its reputational commitments because selling the additional product may change the short run gains from "cheating," making this the profitable strategy, not providing more costly high quality. On the other hand, it is also possible that engaging in multiple economic activities may *enhance* the incentives to maintain a good reputation with buyers. If a firm sells different products in different periods of time, for example, then selling multiple products strengthens the commitment to provide high quality: in any point in time, the firm's whole reputation is on the line for the sale of only a subset of products; better to provide high quality and protect the firm's reputation across product lines than to chisel and realize only modest short run gains from selling only a subset of the firm's products.<sup>11</sup>

## **b) Capital Structure**

We have reviewed some of the general theories of the firm, which attempt to explain why some economic activity takes place inside the firm and other activity outside the firm. There is a related, though distinct, question of how the firm structures its financing. That is, given a set of economic activities within a firm, how does the firm finance those activities? In some settings, the theory of the firm and of capital structure are intimately related.<sup>12</sup> If two lawyers form a general partnership, for example, such a decision would affect both the boundaries of the firm, and the capital structure of the firm – there would be two partners that own the equity interest in the firm. But in general the choice of whether to combine economic activities within a firm, and

---

<sup>10</sup> See, e.g., Hendrik Hakenes and Martin Peitz, "Umbrella Branding and the Provision of Quality" (2008) 26 *International Journal of Industrial Organization* 546.

<sup>11</sup> Edward Iacobucci, "Reputational Economies of Scale, with Application to Law Firms" (2012) 14 *American Law and Economics Review* 302.

<sup>12</sup> Michael Jensen and William Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305.

the choice of capital structure of that firm, raise distinct questions. GM may integrate with Fisher, but that does not answer important questions about debt-equity ratios, the concentration of equity ownership, bank debt versus public debt, etc. In what follows, we outline some considerations that influence the optimal capital structure of a firm.

*i) The Irrelevance Benchmark*

Modigliani and Miller (“M&M”) demonstrated that, under certain conditions, including an absence of taxation, perfect competition and perfect information about investments, the choice of capital structure, debt versus equity financing for example, is irrelevant to firm value.<sup>13</sup> The result is not especially important in predicting real world outcomes since the assumptions are not realistic, but it is a helpful benchmark against which to assess why capital structure may affect value in practice. The basic intuition behind the M&M theorem is as follows. A firm will have a certain pattern of cash flows over time, patterns that will not be influenced by capital structure since capital structure simply divides proceeds of economic activity and does not (as a consequence of assumptions of market perfections) affect the proceeds. Capital structure merely divides the cash flows across different investors and does not affect overall value. As Miller observed, the logic of the M&M irrelevance theory is indicated by a famous Yogi Berra observation: when asked whether he wanted a pizza sliced into four or eight slices, he replied eight since he was hungry that night.<sup>14</sup>

*ii) Debt Financing*

In reality, capital structure matters. This is because there is taxation, and because there are information problems that manifest themselves in two ways. Outside investors do not have

---

<sup>13</sup> Franco Modigliani and Merton Miller, “The Cost of Capital, Corporation Finance and the Theory of Investment” (1958) 48 American Economic Review 261.

<sup>14</sup> Dun Gifford Jr., “After the Revolution” CFO Magazine, July 1, 1998: [http://pages.stern.nyu.edu/~adamodar/New\\_Home\\_Page/articles/MM40yearslater.htm](http://pages.stern.nyu.edu/~adamodar/New_Home_Page/articles/MM40yearslater.htm).

as good an information set about the firm's prospects as insider managers, and because outsiders have only imperfect information about their managerial decisions, managers of a firm may be able to make decisions that are valuable from their selfish perspective, but may reduce overall value; this self-interested behaviour leads to so-called "agency costs."<sup>15</sup> In this section, we briefly review some of the key considerations that make the choice of debt financing more attractive to entrepreneurs.

Tax creates an important bias in favour of debt over equity financing. Firms can write off interest payments to creditors, interest which provides creditors with the returns necessary to induce them to invest in the first place, as an interest expense for tax purposes. The returns that are paid to shareholders, such as dividends, in contrast cannot be treated as an expense for tax purposes. There is a structural advantage to debt financing: all things equal, distributions to investors as interest increases the after-tax value of the corporation relative to dividends.

There are also informational advantages associated with debt financing.<sup>16</sup> Suppose that outside investors cannot tell whether a particular enterprise will return \$15 or \$30, but inside managers have good information about the venture's worth. If the firm seeks to sell shares, which results in existing shareholders sharing in the proceeds with new shareholders, new shareholders will be suspicious that the true value is more likely to be \$15, since old shareholders with good information about firm value would be reluctant to share with new if the value were \$30.<sup>17</sup> To avoid suspicion about old shareholders only being willing to sell shares when values are low, old shareholders can instead issue debt. Creditors do not share in the upside of the firm's performance, and thus it will be easier, as a general rule, for them to value

---

<sup>15</sup> Jensen and Meckling, *supra*.

<sup>16</sup> Stewart Myers and Nicholas Majluf, "Corporate Financing and Investment Decisions When Firms Have Information That Investors Do Not Have" (1984) 13 *Journal of Financial Economics* 187.

<sup>17</sup> This logic was originally outlined in George Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism" (1970) 84 *Quarterly Journal of Economics* 488.

the debt even if insiders are better informed typically. In the example, creditors would be willing to lend \$15 without concern, knowing that in either state of the world, they will be paid in full.

Other advantages of debt relate to disciplining managers. Managers, once they no longer hold all the financial stakes in a business, may be tempted to make self-interested, yet value-reducing decisions, such as overconsuming perquisites on the job, empire-building, or avoiding risks that jeopardize their positions. Debt can help discipline managers in different ways. For one thing, debt obligations to pay out steady streams of cash flow may address a manager's temptation to otherwise keep cash in the company, perhaps as a buffer against risk, perhaps to help build empires, or both.<sup>18</sup> For another, the more debt financing there is, the easier it will be for equity ownership to be relatively concentrated, rather than dispersed.<sup>19</sup> A relatively-cash poor entrepreneur that finances an enterprise through debt may be able to retain a significant percentage of shares. Concentrating share ownership in the hands of management, as we discuss further below, tends to provide management with stronger incentives to increase the value of shares. Debt may thus be valuable by allowing such concentration. Finally, creditors may monitor management, which helps reduce agency costs directly, and may reveal information to other monitors such as equity-holders so that they can act to discipline management.<sup>20</sup> For example, if a bank refuses to extend a line of credit, this may signal problems at the firm to other stakeholders.

There are, of course, disadvantages to debt finance. For one, there are bankruptcy costs. If the firm cannot pay its debts, it will enter a bankruptcy or reorganization process, which is costly and will reduce the value of the firm as a result. For another, the presence of debt may

---

<sup>18</sup> Michael Jensen, "Agency Cost of Free Cash Flow, Corporate Finance, and Takeovers" (1986) 76 *American Economic Review* 323.

<sup>19</sup> Jensen and Meckling, *supra*.

<sup>20</sup> George Triantis and Ronald Daniels, "The Role of Debt in Interactive Corporate Governance" (1995) 83 *California Law Review* 1073.

induce excessive risk on the part of managers who are looking to maximize share value.<sup>21</sup> This is because downside risk is shared with creditors, while upside risk is realized by shareholders; creditors have only a fixed claim. To take an extreme case, if a firm owes \$100 in debt, but has only \$5 in assets, a manager might well prefer to invest in a lottery ticket that is a negative expected value investment, but will pay off generously to shareholders in the very unlikely chance it is a winner. A miniscule chance of realizing value for shareholders is better than a zero chance. Debt thus tends to create perverse incentives for shareholders to engage in excessive risk that lowers the overall value of the company.

There is an important qualification to this discussion of the risk-inducing properties of debt: it is premised on limited liability for shareholders. If, for example, equity-holders had unlimited liability for the firm's debt, this would mitigate the incentives to assume excessive risk: if the risky debt does not pay off, equity-holders remain personally on the hook to creditors, which reduces their incentives to take on excessive risk. Limited liability is thus an important consideration in evaluating the economic costs and benefits of different capital structures. Limited liability puts more risk on creditors and less on equity-holders, which may have positive effects if creditors are better able to bear risk, but may also be negative by inviting excessive risk-taking.

### *iii) Equity Financing*

While not all for-profit businesses carry debt (though most do), all for-profit businesses have equity-holders who are the residual financial claimants: they get paid after all other fixed claimants have been paid in full. The economic question with equity investment is therefore not so much whether it should be issued, but how it should be structured.

---

<sup>21</sup> Jensen and Meckling, *supra*.

One question is the extent to which equity should be concentrated or diffuse. There are three basic models with advantages and disadvantages. Equity could be concentrated in the hands of very few investors. This has the advantage of creating strong incentives for these investors to monitor management, since each has a significant stake in the value of the enterprise. It has the disadvantage, however, of exposing these investors to potentially significant risk, which is not desirable all else equal. Concentrated ownership may also be problematic, or at least difficult to achieve, if the principals behind a business require outside capital, and debt financing is problematic.

An intermediate structure would have a controlling shareholder, along with diffuse minority shareholders. Such a structure allows the controlling investor to mitigate some of its exposure to the company's risk by selling minority equity stakes, but maintains the presence of an investor with strong incentives to monitor the company's progress. A further advantage of this structure is that the market in the firm's equity provides information to investors about the performance of management. If, for example, shares in all bank firms but one are rising, this would tend to indicate less than stellar management at the one firm. The problem, however, is that with such structure, management is irreplaceable without consent of the controlling shareholder. Especially where the manager is the controlling shareholder, such consent may not be forthcoming. As a consequence, the controlling shareholder may be able to extract value from the minority without fear of consequence.

A final possibility is widely held equity. This structure creates the most opportunity for risk diversification, since no single shareholder owns a significant percentage of shares. There is also the prospect of forcing underperforming management out, perhaps through a hostile takeover (perhaps invited by underperforming shares), perhaps through a proxy contest. On the

other hand, with no single shareholder owing a significant percentage of the company, there is a danger that there will be little monitoring of management, especially given the costs and therefore relative rarity of proxy contests and hostile takeovers.

### **III. ALTERNATIVE BUSINESS STRUCTURES FOR THE PRACTICE OF LAW**

In a voluntary survey of lawyers in 2009 by the Law Society of Upper Canada, which attracted a response rate of 51 percent, the survey found that of lawyers working in private practice:

- 18 percent reported as working as sole practitioners
- 11 percent report working at firms of 2 to 5 lawyers
- 4 percent reported working at firms of 6 to 10 lawyers
- 4 percent reported working at firms of 11 to 20 lawyers
- 3 percent reported working at firms of 21 to 50 lawyers
- 2 percent reported working at firms of 51 to 100 lawyers
- 4 percent reported working at firms of 101 to 200 lawyers
- 6 percent reported working at firms of 201 or larger<sup>22</sup>

Assuming that that these numbers are broadly representative, it is clear that a disproportionate percentage of private legal practitioners in Ontario operate as sole practitioners or work at small firms. We now set out below the principal business structures that have emerged in Ontario for the provision of legal services, and describe alternative business models that have emerged in jurisdictions beyond Ontario that are presently restricted in this jurisdiction.

---

<sup>22</sup> *Statistical Snapshot of Lawyers in Ontario: From 2009 annual report*, online: The Law Society of Upper Canada <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485403>>.



### **a) Unincorporated Sole Proprietorships**

A sole proprietor or sole practitioner owns and operates his or her professional practice alone in unincorporated form, and is subject to very few formal business registration requirements. As noted above, sole proprietorships remain today a prominent feature of the legal landscape in Ontario, but are not mandated in any context. This is in contrast to the traditional rules that have applied in the UK, and some other jurisdictions, with a divided legal profession of solicitors and barristers (or advocates), where barristers have often been required to operate as sole practitioners (albeit often operating in group chambers, with shared overheads). The UK Office of Fair Trading has been critical of prohibitions on barristers forming partnerships with other barristers, or forming partnerships with solicitors, and recent regulatory changes have liberalized the rules in this respect, including liberalizing the rules pertaining to rights of audience of solicitors in most UK courts and tribunals. Obviously, an unincorporated sole proprietorship, with unlimited liability, entails risks to the personal assets of the sole proprietor from liabilities (such as professional negligence) incurred in the course of his or her legal practice, and can only draw on external sources of debt capital.

### **b) General Partnerships**

Lawyers entering into a partnership with other lawyers may do so under the *Partnership Act*<sup>23</sup>, and indeed historically this has been the most common form of group practice. With a general partnership, every partner in the law firm is liable jointly with the other partners for all debts and obligations of the firm incurred while the person is a partner, including liability for the negligence of other partners. While this obviously entails risks for each partner with respect to errors and omissions of other partners, including risks to personal assets, in principle it creates

---

<sup>23</sup> *Partnership Act*, RSO 1990, c P.5.

strong incentives for mutual monitoring by partners of each other's integrity and competence. Because all partners must be lawyers, the only source of external capital is debt capital (e.g., bank loans). In limited contexts, third party financiers (e.g., hedge funds) may finance litigation undertaken by a law firm in return for a share of any ultimate award or settlement, in effect shifting some of the litigation risks from lawyers and their clients to an external entity.<sup>24</sup> Often general legal partnerships form management companies to hold most assets of the legal practice and hire support staff and provide agreed space and services to the legal partnership as determined by contract (thus shielding assets from partnership liabilities).

### **c) Limited Liability Partnerships**

As of 1998, lawyers in private practice in Ontario have been able to form limited liability partnerships with other lawyers, subject to minimum mandatory errors and omissions insurance coverage, and many law firms have subsequently adopted this legal form. Limited liability partnerships amongst lawyers have now also been widely permitted in many other Canadian and foreign jurisdictions. In the case of a limited liability partnership, a partner can generally still be held liable for his or her own negligent or wrongful act or omission; the negligent or wrongful act or omission of a person under the partner's direct supervision; or the negligent or wrongful act or omission of another partner or an employee of the partnership not under the partner's direct supervision if a) the act or omission was criminal or constituted fraud, or b) the partner knew or ought to have known of the act or omission and did not take the actions that a

---

<sup>24</sup> See Jasminka Kalajdzic, Peter Cashman and Alana Longmoore, "Justice for Profit: A Comparative Analysis of Australian, Canadian, and US third Party Litigation Funding" (2012) 61 *American Journal of Comparative Law* 93; Michael Trebilcock and Elizabeth Kagedan, "An Economic Assessment of Third Party Litigation Funding of Ontario Class Actions" (*Canadian Business Law Journal*, symposium issue, forthcoming).

reasonable person would have taken to prevent it. However, with these exceptions a partner is not liable for the debts, liabilities or obligations of the partnership or any partner.<sup>25</sup>

#### **d) Professional Corporations**

The *Law Society Act*<sup>26</sup> permits the incorporation of legal entities to provide legal services, provided that all the shareholders are members of the Law Society of Upper Canada and also directors of the entity. In Alberta, spouses and children of lawyer-shareholders may own non-voting shares.<sup>27</sup> Family members of physicians and dentists in Ontario also may own shares in a professional corporation.<sup>28</sup> This is not so for lawyers in Ontario. The *Ontario Business Corporations Act*<sup>29</sup> that provides for the creation of professional corporations states that the liability of a member for a professional liability claim is not affected by the fact that the member is practicing a profession through a professional corporation and remains jointly and severally liable with a professional corporation for all professional liability claims made against the corporation while the person was a shareholder. Hence, the risks borne by shareholders in a professional legal corporation are essentially the same as those borne by partners in a general partnership, and are more expansive than those associated with limited liability partnerships. The principal advantage of a professional corporation for lawyers appears to relate to tax liability.

#### **e) Business Corporations with Limited Liability**

---

<sup>25</sup> See Poonam Puri, "Judgment Proofing the Profession" (2001) 15 *Georgetown J. of Legal Ethics* 1.

<sup>26</sup> *Law Society Act*, RSO 1990, c L.8.

<sup>27</sup> See *Legal Profession Act*, RSA 2000, c L.8 s 131(3)(f).

<sup>28</sup> Since January 1, 2006, O. Reg. 665/05 has exempted physicians and dentists from the requirement under the *Business Corporations Act* that the shares in a professional corporation be owned by members of the regulated profession. See [http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_050665\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_050665_e.htm)

<sup>29</sup> *Business Corporations Act*, RSO 1990, c .16.

Ontario does not currently permit ordinary business corporations with limited liability to provide legal services. They are, however, permitted in other professions in Ontario. Professional engineers, for example, can and do form corporations with limited liability in Ontario.<sup>30</sup> Moreover, legal service corporations with limited liability are permitted in other jurisdictions.

A number of US states allow Limited Liability Companies (LLC's). LLC's combine elements of a limited liability partnerships and corporations. Stock in the company is held by lawyers, who may or may not participate in management. States vary in allowing lawyers to form LLC's. The LLC is still subject to vicarious liability, but the owners' personal assets are protected, and individual lawyers are subject in many states to continuing supervisory liability (much as is the case with limited liability partnerships in Ontario).<sup>31</sup>

The Australian states and territories and the UK, in recent reforms, have authorized incorporated legal practices, with full limited liability, and recent estimates suggest that more than 20 percent of all legal practices have now been incorporated as limited liability entities.<sup>32</sup> Shares in these corporations need not be owned exclusively by lawyers (in the case of Australia, typically one director must be a lawyer), although individual lawyers working for such entities remain responsible for compliance with professional codes of conduct and continue to be subject to civil liability for their own errors and omissions, and presumably the corporate entity itself is

---

<sup>30</sup> See, e.g., *Professional Engineers Act* R.S.O. 1990, c. P.28, s. 13: "A corporation that holds a certificate of authorization may provide services that are within the practice of professional engineering."

<sup>31</sup> Larry Ribstein, "Ethical Rules, Law Firm Structure and Choice of Law" (2001) 69 *University of Cincinnati Law Review* 1161 at 1170-1171; See also Bryan Smith, "The Professional Liability Crisis and the Need for Professional Limited Liability Companies: Washington's Model Approach" (1995) 18 *Seattle UL Rev* 557 at 575-576.

<sup>32</sup> In NSW Incorporated Legal Practices make up 18% of all law firms. See Steve Mark, *A short paper and notes on the issue of listing of law firms in New South Wales*, online: Office of the Legal Services Commissioner New South Wales <[http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/notes\\_for\\_joint\\_nobc\\_april\\_aba\\_panel.pdf](http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/notes_for_joint_nobc_april_aba_panel.pdf)> [Steve Mark].

also vicariously liable for errors and omissions of its professional and other employees.<sup>33</sup> The issue of non-lawyer ownership of business entities providing legal services is sufficiently important, recent, and contentious as to warrant separate discussion.

#### **f) Non-Lawyer Ownership of Corporate Entities Providing Legal Services<sup>34</sup>**

The great majority of incorporated legal practices that have emerged in the UK and Australia in recent years with non-lawyer ownership have been small entities where non-lawyer employees or family members become shareholders or managers. In some cases insurance companies or claims adjusters have acquired law firms that were previously on retainer to them. However, there have been a few striking exceptions to the predominantly small scale of incorporated legal practices in these jurisdictions. For example, in Australia Slater and Gordon became the first firm of lawyers to be floated on a stock exchange when in 2004 it issued AUD \$35 million of AUD \$1 shares. Subsequently, Slater and Gordon began acquiring legal practices across Australia, and in 2012 and 2013 acquired significant English personal injury firms.<sup>35</sup> It now employs 1,350 staff in 69 locations, and serves predominantly the civil legal needs of individuals, such as conveyancing, family law, estate law, and plaintiff-side personal injury matters.<sup>36</sup> Two other Australian law firms have now been listed on a stock exchange.<sup>37</sup>

In the case of the UK, Cooperative Legal Services, the legal arm of the Cooperative Group, which includes Britain's fifth largest supermarket chain as well as banking and insurance

---

<sup>33</sup> Steve Mark, *ibid*; *Legal Services Act, 2007* c.29.

<sup>34</sup> This section draws heavily on Frank Stephen, *Lawyers, Markets and Regulation* (Edward Elgar, forthcoming), chap. 8 and Noel Semple, "Access to Justice: Is Legal Service Regulation Blocking the Path?" (Draft Paper, University of Toronto Law School, 2013).

<sup>35</sup> <http://www.legalfutures.co.uk/latest-news/slater-gordon-set-acquire-fentons-extend-reach-uis/print/>.

<sup>36</sup> Stephen, *ibid* at 176; Semple, *ibid* at 28.

<sup>37</sup> Shine Corporate and Rockwell Olivier, ASX, *ASX Welcomes Shine Corporate Limited*, online: <<http://www.asx.com.au/documents/research/shine-corporate-limited-new-listing-media-release.pdf>>; Lawyers Weekly, *Listed Firm Rockwell Olivier launches in OZ*, online: <<http://www.lawyersweekly.com.au/news/listed-firm-rockwell-olivier-launches-in-oz>>.

businesses, was authorized as an Alternative Business Structure in 2012. The Cooperative Group is owned by 6 million consumer members. It provides legal services to individuals, including extensive online advisory services, and plans to open branch offices in many of the 300 offices of Cooperative Bank and the Britannia Building Society, with plans to employ 3,000 lawyers by 2017.<sup>38</sup> Another significant firm in the UK, Riverview Law, which serves commercial law clients, has proposed doubling in size over the next year by hiring up to 100 new employees.<sup>39</sup> BT Law, part of BT Group, a major UK telecommunications and internet service provider, has also been issued an Alternative Business Structures license. BT Law will be associated with BT Claims, the motor claims subsidiary of the group. Several other major brands or chains are expected to be licensed as ABSs in the course of 2013, including the major motoring breakdown and insurance provider, which currently has 16 million members.<sup>40</sup>

In Finland, banks and insurance companies, as well as other private and non-governmental organizations, can provide legal advice to their customers, although they cannot litigate on their clients' behalf. Simple civil matters, particularly in family and property law, are handled by bank lawyers on behalf of their non-business customers.<sup>41</sup>

In various western European jurisdictions, including most prominently Germany, France and Spain, major international accounting firms have acquired legal affiliates, which have in turn acquired a significant share of corporate legal services in these markets. However, this development is more conveniently discussed (below) as a separate business model involving multidisciplinary professional practices in contrast to the other examples of non-lawyer

---

<sup>38</sup> Stephen, *ibid* at 181.

<sup>39</sup> <http://www.legalfutures.co.uk/latest-news/riverview-plots-major-expansion>.

<sup>40</sup> *Ibid*, at 182.

<sup>41</sup> *Ibid*, at 179-180.

ownership of legal service entities discussed above, which all involve the provision exclusively or predominantly of legal services, as opposed to multidisciplinary professional services.<sup>42</sup>

### **g) Franchising**

While not accorded much prominence in contemporary discussions of alternative business structures in the provision of legal services,<sup>43</sup> it is not difficult to imagine the emergence of franchising networks that may be non-lawyer owned. Such networks might grant franchises to owners and operators of local franchise branches (who may also be non-lawyers), and would provide headquarters support in terms of marketing, advisory and research services, somewhat analogously to H&R Block franchises in tax advisory and preparation services. Both the head office of the franchisor and the larger franchise offices might well employ lawyers on their staffs, but may also rely heavily on online and paralegal frontline services. Presumably, lawyers so employed would remain individually responsible for compliance with professional obligations, including supervisory obligations, as well as being subject to civil liability for their own errors and omissions; the franchisor and franchisees would also presumably be vicariously liable for errors and omissions of legal and other personnel employed by them.

An example of independently owned and operated firms working within a branded network is found in the UK with QualitySolicitors.<sup>44</sup> The network promises its over 200 member firms (and growing) access to national branding strategies, as well as other benefits of membership, including website support and buying power, but firms remain independent.<sup>45</sup>

### **h) Multidisciplinary Professional Practices**

---

<sup>42</sup> *Ibid.*, at 92-99.

<sup>43</sup> But see Gillian Hadfield, “The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law” (2012) unpublished, found at <http://works.bepress.com/cgi/viewcontent.cgi?article=1057&context=ghadfield>.

<sup>44</sup> See their website at <http://www.qualitysolicitors.com/>.

<sup>45</sup> See <http://files.qualitysolicitors.com/QualitySolicitors%20Info%20Pack.pdf>.

As noted above, multidisciplinary professional practices have emerged in a number of western European jurisdictions, typically involving international accounting firms acquiring local legal affiliates. By virtue of the *Legal Services Act* of 2007 in the UK, multidisciplinary professional practices may now also qualify for an ABS license.<sup>46</sup> Where legal services are involved, the authorization of the Solicitors Regulatory Authority is required. Some multidisciplinary firms of accountants and lawyers have been approved. In Ontario, in contrast, under Law Society rules adopted in 1999 and 2000, multidisciplinary practices involving lawyers and non-lawyers are subject to two major constraints: first, the lawyer partners must be “in control” of the work undertaken by non-lawyer partners, and second, the services provided by the latter may only support or supplement the provision of legal services. In the case of a law firm that is affiliated with a non-legal entity (such as an accounting firm), the rules require that a legal licensee shall own the professional business through which the licensee practices law; maintains control over the professional business through which the licensee practices law; and carries on the professional business through which the licensee practices law from premises that are not used by the affiliated entity for the delivery of its services, other than those that are delivered by the affiliated entity jointly with the delivery of the services of the licensee. An affiliated law firm cannot share revenues, cash flows, profits, or provide compensation for referrals with the non-legal entity with which it is affiliated.<sup>47</sup> More generally, Law Society rules prohibit fee-splitting between lawyers and non-lawyers outside the exception for multidisciplinary partnerships.

---

<sup>46</sup> Charles Plant, *Our Proposals for Alternative Business Structures*, online: Solicitors Regulation Authority <<http://www.sra.org.uk/sra/news/plant-abs-proposals-speech.page>>.

<sup>47</sup> *Rules of Professional Conduct* Rule 2.08(8), online: Law Society of Upper Canada <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489377>>.



Similar rules have been adopted across a number of Canadian and US jurisdictions.<sup>48</sup> Both recent UK and Australian reforms on non-lawyer ownership of firms providing legal and other professional services stand in sharp contrast to the much more restrictive rules that prevail in North America. While the full or partial integration of accounting, related financial and management consulting, and legal services have attracted most of the attention in policy debates to date, many other combinations of professional practices are readily conceivable, including, for example, real estate agents, surveyors, mortgage financing providers and legal service providers in the provision of bundles of real estate-related services; or lawyers, financial advisors, and family counsellors in the family law area.

#### **IV. THE POTENTIAL ECONOMIC ADVANTAGES OF ALTERNATIVE BUSINESS STRUCTURES**

Part II of our paper reviewed two key economic areas of analysis that relate to organizational structure. First, we discussed the theory of the firm, which concerns the question of what kinds of economic activities will be organized within a firm, and what economic activities will take place outside firm boundaries. Second, we examined the economic advantages and disadvantages of various kinds of capital structures. Part III reviewed different business structures that are permitted within the present Ontario landscape, as well as alternatives that are permissible outside Ontario. In this section we bring the insights of the economic questions discussed in Part II to bear on the question of organizational structure of legal practice discussed in Part III. The goal of the analysis is to gain greater understanding of the potential economic advantages of alternative business structures from a theory of the firm and capital

---

<sup>48</sup> See Michael Trebilcock and Lila Csorgo, "Multidisciplinary Professional Practices: Consumer Welfare Perspective," (2001) 24 *Dalhousie Law Journal*, page 1; Kent Roach and Edward Iacobucci, "Multidisciplinary Practices in Partnerships: Prospects, Problems and Policy Options," (2000) 79 *Canadian Bar Review* at page 1.

structure perspective. In particular, we consider the typical models of firm practice both presently allowed, as well as alternatives that are not permitted in Canada but are elsewhere, with a view to understanding the economic advantages and disadvantages of each.

Before turning to a case-by-case examination of alternative models, we offer a number of preliminary observations. To begin with, from a purely economic perspective, it is not difficult to arrive at the conclusion that the optimal legal approach to the question of alternative structures for legal practice is to be broadly permissive. As is apparent from Part I, there are a host of factors that affect the economic optimality of a given structure, factors that will vary in importance across business contexts, and even conceivably across individuals (some lawyers may be more risk-averse than others, for example). Economics would therefore tend to recommend wide latitude for choice: let the principals in a given practice adopt the model that works best in their circumstances. (As we discuss further below, in making such choices, the principals would have economic incentives to account both for their own preferences but also those of their clients: all else equal, clients would not want to deal with a firm that has a structure that is not good for clients.)

To some extent, therefore, the analysis that follows is unnecessary to establish the policy proposition that, from an economic perspective, there should be no restrictions on the business structures of legal practices. Even if it turned out that in practice individuals continued to voluntarily adopt conventional structures that are presently permitted, this would not be an argument in favour of restricting choice; rather, it would simply be an argument that choice may not lead to radical change or radical improvement in economic performance. The analysis that follows should be understood as providing the affirmative case for liberalization in that it offers concrete reasons to suppose that some particular structures may have advantages over others,

depending on context, which in turn suggests that liberalization would bring economic advantages. In other words, it is not just that there is no economic argument opposed to liberalization, but also that there are reasons to expect economic gains from liberalization. The analysis does not claim to offer precise predictions about what structures would emerge in practice, or what the precise economic gains would be as an empirical matter. Rather, it offers reasons to suppose that liberalization has the potential to bring about real economic gains.

We appreciate, of course, that policy-makers may (and indeed should) consider factors other than economic gains when assessing optimal policy towards business structures. The rule of law has a fundamental role to play in society, and to the extent that business structures affect how lawyers support the rule of law, there are considerations related to the structure of legal practice that extends beyond dollars and cents. In what follows, we offer only a view of the economic costs and benefits of different structures, recognizing that there are other values that the law should take seriously. Our analysis is intended only to offer an input into answering the broad question of whether liberalization ought to be permitted, not an answer to that question.

That said, we note that some of the kinds of ethical considerations that have influenced policy towards business structures fit easily within an economic analysis. Take, for example, basic concerns about who bears liability for negligent legal services. It may be that the legal requirement of a partnership, and consequential personal joint and several liability for partners, including liability for negligence, is designed to promote the ethical performance of the lawyer's obligations. But there is an economic lens through which to view the requirement: clients want to ensure that the lawyer personally has incentives to ensure that the advice she and her partners gives is not arrived at negligently.

There will be economic incentives for a lawyer to adopt a form and liability status that maximizes the joint value of the relationship for lawyer and client. To explain, suppose that lawyers are not required by regulation to adopt a form that leads to unlimited liability for the lawyer, but that unlimited liability and the reassurance it provides is worth \$100 to a client. If the risk that the lawyer faces as a consequence of unlimited liability costs her personally less than \$100, say it costs \$40, she would prefer to have unlimited liability: she can charge the client up to \$100 more having adopted such status, while bearing costs of only \$40. There is a joint gain of \$60 from unlimited liability that will be divided between client and lawyer. On the other hand, if the risk of unlimited liability costs the lawyer \$120, she and the client are jointly better off with limited liability: the maximum price that the client will pay for the lawyer falls by \$100, but better this for the lawyer than incurring costs of \$120 by adopting a partnership and unlimited liability. While it will depend on the circumstances, it is possible that lawyers would have economic incentives to adopt unlimited liability. To the extent that unlimited liability is desirable in promoting ethical behaviour, economics and ethical considerations align with one another.

It is clearly not true, however, that economic actors always have private economic incentives to pursue what amounts to an ethical course of action. For example, there may be weak private economic incentives to fulfill ethical obligations to third parties, such as the courts and the public, since by definition the client is not willing to pay for such conduct. But the example demonstrates two important points. One, ethical considerations may also be relevant for economic decision-makers, especially where they concern the lawyer-client relationship. Two, parties have private incentives to adopt terms in their relationship, including the form of the law firm and corresponding liability features, that maximize joint value. Obviously the form

that a lawyer adopts will affect all clients that it interacts with so the lawyer cannot maximize value from the business form in respect of all clients at all times, but the lawyer has incentives to choose the best form from a value perspective across clients.

Before embarking on the structural analysis, it is also worth observing that the strength of the case for liberalization will depend on other significant institutional questions. To take an example, consider how standardized substantive law is across varying circumstances. One could imagine rules of broad, mechanical application on the one hand, versus narrow standards that depend significantly on all the facts of a particular case, and ultimately on the judgment of a legal decision-maker, on the other hand. Now consider the efforts of a legal services provider to establish a technological means to provide legal advice. If the law is broadly applied and depends on mechanical application of clear criteria, it would be relatively straightforward for a provider to invest in a web-based application that could provide advice.<sup>49</sup> This in turn might call for a certain kind of firm structure that would be suitable for relatively significant investment in technological capital, and less need for human capital (we discuss this further below). On the other hand, if the law is idiosyncratic and depends on an exercise of judgment that may be difficult to predict, technological solutions, and the kinds of structures that are suitable for such solutions, are less likely to emerge in a liberalized environment.

Another, more prosaic consideration that will influence the choice of structure in practice is tax law. Tax law may favour some structures more than others. Incorporation, for example, can in effect allow principal shareholders to defer paying personal taxes on income by allowing retained earnings to accumulate within the corporation without tax at the shareholder level. We cite the tax and the technology examples not because they necessarily have special importance

---

<sup>49</sup> Existing online service providers, such as LegalZoom, tend to focus on less idiosyncratic legal questions, such as incorporating a business, though also offer individualized services where applicable.

but simply because they illustrate the kinds of considerations that will influence the choice of structure. The choices are not made in an institutional vacuum.

As a further observation on the specific question of tax, we in general will not spend much time assessing the tax implications of different business structures. This is not because tax is an insignificant consideration in practice when actors are establishing different business structures. Rather, we focus on non-tax considerations because they are, in our view, more important as a policy matter. Policy should be concerned about real economic gains to society, while tax minimization may not do anything positive for society. For example, it could be that the corporate form would better allow lawyers to minimize their tax bills relative to partnerships, but we would not view this, as a public policy matter, to be an advantage of the corporate form.<sup>50</sup>

There is one final observation that we will make before turning to an economic analysis of particular structures. The case for liberalization of business structures is sometimes said to rest in part on the effect of such liberalization in enhancing competition among legal service providers. In Australia, for example, it was the competition authority that was largely responsible for pressing the case for liberalizing the rules on law firm structures; in the UK, the Office of Fair Trading had adopted a similar stance. In our view, however, the relationship between the rules restricting the structure of permissible legal practice and competition are tenuous.<sup>51</sup> As a preliminary observation, it is important to distinguish between two related, but conceptually distinct restrictions on legal practice. First, there are restrictions on who is authorized to practice law. Second, there are restrictions on the kinds of business structures that

---

<sup>50</sup> As a possible corollary to this point, in our view there is a good argument that tax law should not induce firms to choose one structure over another, but rather should be neutral across forms. See, e.g., Benjamin Alarie and Edward Iacobucci, "Tax Policy, Capital Structure and Income Trusts" (2007) 45 *Canadian Business Law Journal* 1.

<sup>51</sup> See Edward Iacobucci and Michael Trebilcock, "Self-Regulation and Competition in Ontario's Legal Services Sector: An Evaluation of the Competition Bureau's Report on Competition and Self-Regulation in Canadian Professions" (2008).

those who practice law may adopt. It is not difficult to see how these two kinds of restrictions are related to one another, but they should not be elided. They are related most clearly in the case of a multi-disciplinary practice. If there were, for example, no restrictions on who could practice law, then a lawyer and another professional (or non-professional) would be better able to form a business structure in which they both provide services without inviting concern about the unauthorized practice of law. Thus, the demand for alternative business structures would presumably grow if there were no restrictions on who is qualified to give legal advice.

The fact that restrictions on who is authorized to practice law and restrictions on alternative business structures are related does not imply that they raise the same issues. It could be entirely defensible, for example, to maintain licensing restrictions on the practice of law while liberalizing business structures. Some of the economic gains from liberalizing structure may not be realized fully with such licensing restrictions in place, but the benefits of a licensing regime, such as protecting the public from incompetent legal advisors, may justify such an approach.

It is apparent that liberalizing the permitted structures of legal practices does not itself enhance the competitiveness of the legal services market. Consider two states of the world: one in which business structures of legal practice are restricted; and another where they are liberalized. In the illiberal state of the world, there are a certain number of lawyers in a certain jurisdiction that are authorized to practice law. This number does not change with the liberalization of the choice of business structure, which in turn implies that the number of competitors for a particular service is unlikely to change significantly with the choice to liberalize. Indeed, if anything, it is conceivable that traditional restrictions on the structure of legal practice, such as restrictions on equity investment by passive outsiders, tend to keep firms relatively small, and with liberalization it would be conceivable that firms that provide legal

services could become much larger. If legal firms were to grow post-liberalization, it would be conceivable that liberalization could *reduce* competition because of a diminution in the number of firms competing for business.

We would add that, as we have outlined in a different report, we are sceptical that the legal services market in Ontario suffers significantly from an absence of competition.<sup>52</sup> As we observed, there are thousands of lawyers in Ontario seeking to provide legal services, and thousands of law firms as well. In addition, both para-legals and online legal forms providers<sup>53</sup> are plentiful and compete in at least some dimensions with lawyers. The rates for providing certain legal work range considerably, from less than \$100 per hour for certain kinds of basic legal services, to more than \$1,000 per hour for services with more nuance and need for highly specialized human capital. The rates do not vary because of a lack of competition, but rather in large part because certain kinds of human capital are rare, and those who possess certain qualities will realize significant returns to those qualities. Such returns, known by economists as scarcity or Ricardian rents, result whenever a resource is scarce and do not amount to market power. For example, certain hockey players might realize vast scarcity rents, but this is not because there is a lack of competition to become such hockey players.

Indeed, because there are such significant competitive pressures in the existing legal services industry, the liberalization of business structure regulation is more likely to have a positive impact. Given that there is robust competition among firms, any innovation that allows the firm to economize in its provision of services would provide the innovator with returns that they would not realize under the status quo. Other firms will quickly imitate, also in pursuit of rare economic profits, and competition is likely to result in the diffusion of productivity-

---

<sup>52</sup> Iacobucci and Trebilcock, *supra*.

<sup>53</sup> See, e.g., <http://www.lawdepot.ca/contracts/canada/Ontario/>.



enhancing innovation across the legal services market. Because of competition, the fruits of the innovations will typically be passed along to the buyers of legal services. This not only produces the usual creation of consumer surplus, which results when a buyer of a product pays less than her maximum willingness to pay for that product, but also has the potential to enhance access to justice, which may have non-economic positive effects.<sup>54</sup>

A final word on competition. Traditional restrictions on the financing of legal firms prevent firms from going to equity markets or issuing public debt. Firms finance through bank borrowing or partners' equity investment. Some have suggested that firms are likely to suffer from these restrictions in part because the bank lenders will appreciate that they face less competition from other capital sources and can charge higher rates as a consequence.<sup>55</sup> This is conceivably true, but will not be true as a general matter. If the banking sector is competitive, which is highly probable at least for loans to sophisticated law firms who could borrow from a wide range of banks, not just local ones, there will not be room for a given bank to charge supra-competitive rates. Only if there is a lack of competition within banking itself will the confinement of financing to banks result in supra-competitive prices for loans.

The gains that result from opening up financing choices thus do not in general rest on greater competition, but instead from a more suitable capital structure for the firm. Capital structure affects value in a number of ways, and choosing one instrument rather than another has implications for firm value. Liberalizing financing choices would not necessarily have a positive impact on competition, but rather a positive impact from better calibrated capital structures.

With these initial observations as background, we turn now to the economic analysis of different business structures for legal practice. We begin with traditional, and legally

---

<sup>54</sup> See Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (2013).

<sup>55</sup> Semple, *supra*.

permissible, forms, and then consider alternatives. In each case we review the advantages and disadvantages of the form from a theory of the firm and capital structure perspective. We assume initially that lawyers must associate only with other lawyers within the firm and consider the advantages of different forms on this assumption. We then turn to examining the relative merits of multi-disciplinary organizations and firms in which non-lawyers may make financial investments.

### **a) Sole Proprietorship**

The most common form of business practice in Ontario is a sole proprietorship. The sole proprietorship has advantages and disadvantages from a theory of the firm and a capital structure perspective. On the theory of the firm, the sole proprietor has the strongest possible incentives to invest in the value of the firm. She does not share the proceeds of her investment with other members of the firm, and thus realizes fully the fruits of her investment. If, for example, she provided especially good service to a particular client in the hopes of improving the firm's reputation for high quality legal work, she would realize entirely the benefits of that investment and would not have to share it with partners. This enhances the incentives to make such investments. Similarly, any investment in growing the firm's client list is realized by her alone.

Having only one lawyer in the firm also reduces coordination costs within the firm. Coase's analysis of the theory of the firm observed that extra-firm transactions invite haggling and other costs, and observed that these costs are lower within a firm. While this may be true, within-firm costs are not zero, especially where there are multiple equity owners (such as within a partnership) and no single authority that can impose decisions on others within the firm. A sole proprietor thus minimizes intra-firm transaction costs.

There are, however, significant disadvantages of the sole proprietorship from a theory of the firm perspective. For one, clients with legal problems to solve often will have different requirements for specialization from their lawyer. The sole proprietor can either become a generalist to some extent and attempt to provide as wide a range of service as possible, or will play a role simply in referring clients to other specialists. In the latter case, there is a Coasean problem: the sole proprietor may wish to realize some benefit from the lawyer to whom she has referred business, but it may not be straightforward to enter into an arm's length agreement on how best to compensate for such referrals. Moreover, there may be legal restrictions on referral fees. The sole proprietor may settle for an informal reliance on reciprocity to deal with referrals outside the firm, which may not be optimal. At the very least, informal reciprocity may not provide the sole proprietor with strong incentives to invest in the relationship with the outside lawyer, especially where the referring relationship is likely to be asymmetric.

There may also be reputational incentive disadvantages to the sole proprietorship.<sup>56</sup> When performing services as a sole proprietor, the lawyer potentially suffers a reputational loss if she provides low quality advice; on the other hand, she realizes fully the benefits of shirking on service (e.g., saving time, lower exertion, savings on on-line research tools, etc.). In a partnership with other partners, in contrast, when providing services, the lawyer gets a benefit from shirking, but risks a reputational loss to other lawyers in the firm, not just herself, by so acting; outsiders may blame lawyers in the firm generally for poor performance. The relative costs of shirking may therefore be lower for a sole proprietor than a partner. Clients that recognize these incentives may be less willing to deal with a sole proprietor. There is a disadvantage from a reputational theory of the firm perspective to a sole proprietorship.

---

<sup>56</sup> See Iacobucci, *supra*.

Turning to considerations of capital structure, there is one striking advantage of a sole proprietorship from a financing perspective. Because she owns 100% of the equity of the firm, the sole proprietor does not have incentives to make decisions that are good for her as an individual, but bad for equity investors as a whole. She bears entirely the economic effects of her decisions on the value of equity. The incentives to overconsume perquisites, for example, fall away entirely, while they would be more prominent if a decision-maker owned only a small fraction of a firm's equity.<sup>57</sup>

On a related point, within a sole proprietorship, there is obviously no need for equity owners to monitor management to deter self-interested, wasteful decisions. The equity owner *is* the manager. This is itself an advantage of the sole proprietorship because investments in monitoring management are themselves costly.<sup>58</sup> That they are unnecessary in a sole proprietorship is an advantage of the form.

There are, however, significant disadvantages to the capital structure associated with a sole proprietorship. A sole proprietor bears entirely the risk of the firm's performance herself. If, for example, she specializes in an area such as real estate law, there will be significant fluctuations in business that are beyond her control. She would also bear the risk entirely if she were to make a positive net present value, but uncertain, investment. Consider the kinds of investments that are increasingly common in the legal landscape: investments in technology to provide better service to clients. For example, consider investing in a web-based tool that allows the sole proprietor to serve a significantly greater number of clients at significantly lower costs per client in providing advice about a will. There may be a significant capital cost associated with such an investment, and there may be significant risk that the cost will not be recovered if

---

<sup>57</sup> Jensen and Meckling, *supra*.

<sup>58</sup> *Ibid*.

the application fails to catch on with clients. Even good investments in expectation do not necessarily turn out well. The sole proprietor bears all the risk of the investment paying off. Since individuals are typically averse to risk (this is why they buy insurance), the risk associated with sole proprietorships is a disadvantage from a capital structure perspective.

There is a related financing problem that sole proprietors face. Clients may sometimes have valid legal claims, but they are costly to litigate and outcomes are not certain. Lawyers can in effect invest in their clients' claims by adopting a contingency fee arrangement. Such a fee shifts significantly the risk of an unsuccessful suit from the client to the lawyer. This is another kind of risky investment for the lawyer: she gets paid, perhaps handsomely, if the suit is successful, but is not compensated for her costs and efforts at all if the suit is lost. A sole proprietor who accepts a contingency fee arrangement bears the risk of the investment in the lawsuit herself; this is not desirable, all things equal, for a risk-averse individual.

There is also a problem for sole proprietors who are capital-constrained. Suppose that a sole proprietor has a positive net present value investment, such as the web-based application discussed above, but has little capital herself. The only outside funding that is available for a sole proprietor under present legal constraints is bank debt. For many kinds of capital, such debt may be entirely suitable. If the sole proprietor wishes to purchase the real estate where her office is located, for example, bank debt is a common source of financing for such transactions, in part because banks are in a good position to take security that allows them to assess their risks with some accuracy. But for other kinds of investments, bank debt will not be suitable. The business prospects of the risky web-based application is not something that the bank will be in an especially good position to assess, nor would there be much in the way of physical assets to treat as collateral, which would make it reluctant to lend to a capital-constrained sole proprietor.

Moreover, such an investment may have a decidedly uneven pattern of returns, which makes traditional debt financing less appropriate. For example, if the investment fails 90% of the time, but pays off so lavishly 10% of the time that it is worthwhile overall, steady repayment of bank debt may be impossible. Rather, the bank will either receive a payment 10% of the time, or very little 90% of the time. This resembles more of an equity investment than a loan (indeed, the required interest rate to make the loan profitable for the bank despite a 90% failure rate may be so high that it could be usurious), but the bank would not have the same governance levers over the firm associated with typical equity investments, and may not be willing to make such a loan. At the very least, the fact that bank debt almost never finances analogous risky ventures that do not face legal constraints on their financing (venture capital, for example, is typically structured with equity investments) suggests that the requirement that the sole proprietor only raise outside capital through bank debt is costly. This is especially true as the risk of the potential investments the sole proprietor might make increases.

Note that there is an advantage to the sole proprietorship from a debt financing perspective that is the positive flip side of the disadvantages of risk. Sole proprietors are personally liable for all the debts of the practice; there is no separate legal entity and the debt of a sole proprietorship is the debt of the sole proprietor. This liability, while exposing the lawyer to greater risk, has its advantages. For one, unlimited liability mitigates concerns of lenders that the borrower will take on excessive risk. As discussed above, if a firm owes a significant amount of debt to creditors, equity-holders enjoying limited liability may be tempted to exercise their control over the direction of the firm by assuming significant risk: if the risk pays off, equity-holders largely realize the upside; while if the risk fails to pay off, equity-holders impose losses on creditors. With unlimited liability in place, the temptation to assume excessive risk is

mitigated. If a sole proprietor increases the risk of the firm in the face of debt, she herself faces the risk of losing all her personal wealth in paying back creditors.

Of course, the strength of unlimited liability in disciplining the sole proprietor depends on the amount of her personal capital. If she has little in the way of personal assets, then the commitment to pay her personal assets to creditors matters less for her incentives to ensure that creditors are paid (though the commitment will always matter to some extent given that personal bankruptcy is costly, especially for lawyers who may suffer as a professional matter from such an outcome). This implies that concerns about excessive risk because of debt would be more likely to arise in the particular circumstances where borrowing is most important: where the sole proprietor herself has little in the way of capital to contribute.

Another, related advantage of unlimited liability concerns the sole proprietor's clients. Clients will want the lawyer to bear costs from providing services negligently. If the sole proprietor faces unlimited liability, she in effect offers her personal assets as a kind of bond to the client: in the event of malpractice of some kind, the client is able to recover in any civil action from the lawyer's personal assets beyond any required or assumed liability insurance. Unlimited personal liability may not be the optimal way of providing assurance to clients (liability insurance may be more transparent, for example, since clients do not have to determine themselves what the lawyer's personal assets are worth), but it is an advantage of the sole proprietorship, all things equal.

## **b) Partnership**

The legal framework governing legal partnerships is similar to that of sole proprietor, the difference simply resting in the number of lawyers in the firm. The difference in numbers, however, may have significant effects from a theory of the firm and capital structure perspective.

In this subsection, we review the factors discussed in the context of the sole proprietor, noting how the addition of partners affects the analysis.

Consider first the theory of the firm. With a legal partnership, rather than a sole proprietor, responsibility for making investments in the value of the firm (e.g., its reputation, or its client list) is spread across individuals, rather than resting with a single lawyer. Moreover, governance of the firm is spread across lawyers, it being a hallmark of a general partnership that each partner is presumed to have a role to play in management. This increases intra-firm transaction costs. The combination of diffuse incentives to invest in the firm and diffuse authority creates trade-offs. If left to their own managerial discretion, each partner has too little incentive to make investments in the partnership's productivity: she bears the costs of the investment, but shares the benefits with her partners. Centralizing authority, and monitoring the investments of each partner in the partnership, may mitigate the underinvestment problems, but at the same time will consume resources in order to coordinate authority.

In light of the importance of individual investments in the firm's productivity, firms may strive to achieve certain cultures.<sup>59</sup> Such a culture may usefully indicate to each partner (and associate, for that matter) how it is that she is expected to behave, and the existence of such a culture also allows for informal monitoring to ensure that partners are compliant with the norms of the firm. To the extent that a firm is successful in generating such a culture, this reduces the costs of governing the firm, and better ensures that each lawyer has good incentives to make private investments in the value of the firm.

While not insuperable, as the existence of major national and international law (and accounting) firms demonstrates, the difficulties of coordinating governance grow as the firm grows. At the limit, a sole proprietor is able to invest and otherwise make decisions while fully

---

<sup>59</sup> See, e.g., Daniels, *supra*.



internalizing the value to the firm of such choices, and is able to do so without coordination and managerial costs. The more partners that are added to the firm, the less does each partner internalize the value of her investments in the firm, and the more difficult is the firm to manage. Successful firm cultures may mitigate these problems, but such cultures may be more difficult to develop and maintain the larger the partnership.

There are also, however, advantages from a theory of the firm perspective the larger a firm is. Since lawyers tend to be specialized, the more lawyers a firm has, the wider the potential scope of the firm's expertise. To the extent that clients have different kinds of legal problems, a partnership will be able to provide a wider range of services to a client than a sole proprietor.

There is another way of putting this point about specialization. A sole proprietor would often have to refer clients to other lawyers that are able to provide service that she cannot. As noted above, it may not be straightforward for the sole proprietor to realize the value of such referrals. In contrast, partners that in effect refer work to one another are better able to realize the value of such referrals by sharing in the firm's profits.

As a final point on the theory of the firm, partners may be better able to sustain reputations for quality service than sole proprietorships. As discussed, when a partner performs her work, she would realize short run gains from shirking on that work, but would jeopardize the reputations of all lawyers in her firm, whereas a sole proprietor only has her own reputation at stake. As a consequence, there are stronger incentives for the firm as a whole to maintain a reputation for good quality work.

From a capital structure perspective, in general, each additional partner dampens the connection between the partner's efforts on behalf of the firm and the personal profits that she realizes. As the partnership grows, each partner's average percentage equity stake in the firm

falls, which implies that she will in general realize an ever smaller personal return from her efforts to grow the value of the firm. Partnership agreements can be struck in a manner that results in imperfect sharing, but to the extent that costs and revenues are spread across partners, the more partners there are, the weaker the connection between any given partner's efforts and her share of the firm's profits. This, all things equal, dampens incentives for partners to make efforts to maximize the firm's profits, and is thus a disadvantage of the partnership relative to a sole proprietorship from a capital structure point of view. The firm will either suffer from inefficient, self-interested decisions by its partners from time to time, or it will incur expenditures in establishing some sort of governance system that helps discipline partners. Either way, the firm suffers costs as a consequence of the diffusion of equity ownership across partners.

That said, partnerships nevertheless maintain some incentives for performance by allocating equity interests to the partners. Each partner is at least a part-owner of the firm, and as a consequence benefits to at least some positive extent from good performance. This contrasts with other organizational forms, such as corporations, in which managers within the firm need not have any ownership interest at all.

A key advantage of more diffuse equity ownership in a partnership is that partners are better insulated against risk than they are in a sole proprietorship. As Gilson and Mnookin observed, there is little reason to suppose that partners within a firm are all likely to have the same demand for their services at any point in time.<sup>60</sup> Certain specializations will be in higher demand than others at any point in time because of the business cycle; for example, securities lawyers will be in higher demand in boom times, while bankruptcy lawyers will be busier when the economy is slower. By forming a partnership in which partners agree to share annual profits,

---

<sup>60</sup> Ronald Gilson and Robert Mnookin, "Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits" (1985) 37 Stanford Law Review 313.

securities lawyers and bankruptcy lawyers can spread the risk associated with their relatively narrow specialties. In general, one can think of the law firm as allowing lawyers to diversify their risks across the business of the partners as a group. Each lawyer will not suffer from extremes of boom or bust, but rather will share some of the profits of the boom with their partners, while benefiting from their partners' business when their business is weaker. Since individuals tend to be risk-averse, a steady return is better than realizing extremes. This is a significant advantage of a partnership over a sole proprietor.

An offsetting consideration is that sharing across partners may discourage individual lawyers from working as hard as they would if they realized profits for themselves from their efforts. Moreover, a sharing rule may tempt the successful lawyers realizing significant profits to split from the firm and form another firm. These are clearly costs associated with the risk-spreading effect of sharing among partners. Gilson and Mnookin suggest, however, that departing partners would potentially suffer by losing the reputational advantages that partnership at a respected firm provides; this may induce them to stay.<sup>61</sup> In addition, other considerations, such as firm culture,<sup>62</sup> may help respond to the shirking temptations that are associated with sharing. Sharing also avoids the opposite temptation for partners that would arise with individually-based compensation to hoard clients and profits to themselves, even if the client were better served by a different partner.

The pooling of risk that the larger partnership allows also better supports risky investments by the firm. Consider the example of a significant capital investment in a web-based software application for writing a will, or of investing in a client's costly lawsuit by accepting a contingency fee arrangement. Setting aside debt for the moment, a sole proprietor would have to

---

<sup>61</sup> *Ibid.*

<sup>62</sup> Daniels, *supra*

devote her own capital to fund the project, which exposes her to considerable risk even if the project is a good one in expected terms. Partners, on the other hand, are able to share the costs of the project, which reduces their exposure to risk. To take a simple example, suppose that the investment requires \$100,000. Suppose further that each of ten lawyers has \$100,000 that they could invest. If each were a sole proprietor, they would each bear the full risk of the investment. But if the ten lawyers are in a partnership, each can invest \$10,000 in the project, and invest \$90,000 in other, diversified investments. While in both cases they have invested \$100,000 in potentially risky investments, only in the latter case are they diversified. Risk averse investors are better off with diversification, and this is an advantage of a partnership relative to a sole proprietorship.

Another advantage of partnerships relative to sole proprietorships is that there will be more equity capital available with a pool of equity partners to draw upon. The example just discussed assumed that each lawyer had \$100,000 to invest. If the lawyers do not have so much capital to invest, then there is another advantage of partnerships: they are less likely to be capital-constrained. Without equity investment available, the firm would have to borrow from a bank, but, as noted above, risky, illiquid capital investments such as the web-based application are not typically suitable for bank loans. Sole proprietors are more likely to have to forgo positive net present value investments than partnerships.

There is an advantage of partnerships when it comes to debt financing that is similar to that of sole proprietors: partners are jointly and severally liable for the debts of the partnership, which mitigates the incentives that the firm would have to make risky choices after they borrow. If there is limited liability, creditors bear downside risk, which can lead to excessive risk by managers looking out for the interest of equity investors. With unlimited liability, on the other

hand, partners bear downside risk as well as upside, the temptation to invest in risky investments is mitigated, and lenders, anticipating this, may be more willing to lend.

As with the analysis of the sole proprietor, the commitment to lenders that unlimited liability provides depends significantly on the assets that are available from the partners. All else equal, it would be reasonable to expect that a larger partnership of lawyers will have more assets in total available for creditors than a sole proprietorship, which is another advantage of the partnership. Of course, if some partners have fewer assets than others, there may be differing attitudes within the firm itself about risk, which in turn may create governance frictions within the firm. But for a lender, more partners, and thus more assets to back a loan, will be welcome.

Clients may also benefit from unlimited liability of the partnership. They are better assured that if a lawyer at the firm engages in misconduct, and the client sues as a consequence, there will be assets available to compensate them. This is welcome from the client's perspective because the fact that the lawyer's personal assets are at stake is likely to induce the lawyer to take greater care both in her own work and in monitoring her partners. Moreover, the client is more likely to be made whole if there is such a suit because the partnership has multiple lawyers' assets available to creditors, including judgment creditors. The presence of unlimited liability is not necessarily superior to liability insurance, and in fact may be less reassuring to clients given opacity around the partnerships' personal assets, but it does serve as a useful commitment to clients and other potential creditors.

### **c) Limited Liability Partnership**

A key difference between a limited liability partnership and a general partnership is that in the former case, lawyers are not jointly and severally liable for the negligence of their partners. Another is that while the property of the partnership is available to satisfy the

partnership's debts generally, there is limited liability to creditors with respect to the partner's personal assets. We will discuss each feature in turn.

All else equal, the limitations on partner liability are less attractive to clients for two reasons. First, since they do not have personal assets at stake, it lessens the incentives of partners to monitor their partners to ensure that they are providing quality service. Second, it reduces the assets available to compensate clients who have received negligent service (because of this feature, mandatory insurance requirements are in place in Ontario and elsewhere as a professional requirement for forming an LLP). On the other hand, a limited liability partnership has the merit of reducing risk that lawyers are subjected to from their partners' misconduct, over which they may have relatively minimal control, while ensuring that each lawyer continues to stake her personal assets to her own clients. The LLP will be adopted where the gains to the lawyers from lower exposure to risk exceed the losses to clients from having a smaller pool of assets available to compensate for negligence. In such cases, clients may insist on lower fees to compensate for the smaller "bond" that personal assets provide, but lawyers would be willing to offer this discount because the reduction in risk that they enjoy makes it value-enhancing to do so.

Turning to limited liability with respect to creditors other than negligently-served clients, there are again economic benefits and costs for lawyers and creditors. An advantage of limited liability is that the lawyer does not bear the risk of pledging personal assets to creditors. A lawyer has whatever personal assets she has invested in the partnership at risk, but does not have to go further and put all of her personal assets at risk. Individuals are risk-averse, and unlimited liability imposes costs of risk on the lawyer. Within an LLP in which lawyers are not committed

to unlimited liability, the lawyer caps risk and avoids these costs. This is an economic benefit of the LLP relative to a general partnership.

The economic benefit of limited liability may manifest itself in different ways. For example, the lawyer might behave in exactly the same way in making investments, but does not bear as much cost from risk as she would without limited liability. But the lawyer may also be able to invest in intrinsically riskier projects knowing that her personal assets are not at stake when she does so.<sup>63</sup> Consider again the investment in a web-based application. Suppose that the firm has a line of credit for working capital, but cannot obtain bank debt for reasons given above for the application investment. If the firm invests its capital into the application but it fails, thus jeopardizing the firm's ability to pay off its line of credit, a partner in an LLP will not be liable personally on the firm's line of credit. This better encourages the partnership to make the risky investment than would be the case in the face of unlimited liability.

This is not to say that limited liability is therefore optimal. Limited liability simply shifts the risk from the partners to creditors; the question of optimality turns on who is better equipped economically to bear this risk. Creditors will be concerned that, since they do not incur the downside risks of their investments but rather shift them to creditors, lawyers in an LLP will take on more risk than is optimal. Moreover, creditors may not be in a good position to assess the risks that the lawyers take on, which also leaves the creditors vulnerable to uncompensated risk.

Whether limited liability is optimal will depend on the relative costs of risk when borne by the lawyers as opposed to their creditors. Given the economic incentives for lawyers to make value-increasing choices of business structures, it is noteworthy that adoption of the LLP form has become popular in the Canadian landscape in recent years. This is suggestive of its efficiency relative to the general partnership.

---

<sup>63</sup> See, e.g., Hadfield, *The Cost of Law*, *supra*.

#### **d) Professional Corporation**

A professional corporation has the same strengths and weaknesses of the LLP, but for one difference: under the professional corporation in Ontario, the professionals who are also the shareholders remain jointly and severally liable for the damages caused by the firm's negligence. The professional corporation thus combines the joint and several unlimited liability attributes of a general partnership when it comes to liability for negligence with the limited liability attributes of an LLP when it comes to liability for other debts. As noted when discussing the general partnership, unlimited joint and several liability better assures clients of non-negligent service by encouraging partners to monitor one another, and also provides better assurance to clients of being made whole if negligence were to occur. But such liability causes each partner to bear risk over which she may have only limited control, and this is costly for risk-averse individuals. Limited liability for other debts, as discussed in the context of LLPs, also presents trade-offs. An advantage is that partners bear less risk from uncertain investments. A disadvantage is that creditors may not be as well placed to assess firm risks, and moreover by imposing downside risk on creditors, firms that borrow may be inclined to take on too much risk. The professional corporation is a hybrid of a general partnership and an LLP, and its economic merits and drawbacks reflect this combination.

#### **e) Business Corporation (Limited Liability)**

If a sole proprietor is at one end of the organizational spectrum, the business corporation is at the other. In this section, we consider the economic advantages and disadvantages of this form. As with previous discussions, we continue to assume that lawyers must be the equity investors in the firm; we consider below the prospect of non-lawyer, equity investors.



The key difference, and the one that we therefore focus on in this section, between a business corporation on the one hand, and the partnership, LLP and professional corporation on the other, is that the lawyer-shareholders in the corporation are not liable for any unpaid debts of the corporation, including debts to clients who have successfully sued for negligence. This has advantages and disadvantages from a capital structure perspective. An advantage is that the lawyer-shareholders are not exposed to risks over which they may have relatively little control, namely, the risks of fellow lawyers within the firm behaving negligently. Unlike other structures such as an LLP, the lawyer in a corporation is also potentially protected from personal liability for her own negligent actions, the possibility of which would also expose her to costly risk and uncertainty.

We say that the lawyer is “potentially” protected because the limited liability status of a corporation does not necessarily protect individual tortfeasors within the corporation from personal liability for their torts.<sup>64</sup> (We would also note that lawyers would presumably remain subject to professional discipline even if practicing within a corporation.) The difference with a corporation is that the lawyer cannot be held personally liable for the torts committed by the corporation generally. Lawyers’ personal assets are better protected in a corporate structure than in any of the other structures, which mitigates risk that they bear.

The disadvantage of fully limited liability is that clients can no longer rely on the bond that pledging personal assets effectively implies; lawyers with less risk of personal liability may be less inclined to take care. Moreover, lawyers not financially responsible for the misconduct of their colleagues will be less inclined to monitor their colleagues, which may also lead to less care for the client. The risk mitigation benefits must be weighed against the weaker incentives to take care in order to assess the net gains from incorporation.

---

<sup>64</sup> See *ADGA Systems International v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.).

Given the starkest limitation on personal liability that the corporation presents, this is a useful juncture at which to review the implications of insurance. While alluding to the possibility of liability insurance, we have generally treated the prospects of liability in, say, a general partnership as creating risk for lawyers. In reality, lawyers may take steps (and indeed by regulation may be obliged to do so) to mitigate this risk through insurance. This does not eliminate the conclusion that lawyers bear costs if there is potentially personal liability. For one thing, lawyers must pay for liability insurance, which is a cost resulting in part from personal liability. For another thing, insurers may risk rate the particular lawyer. This has other implications. First, the insurer may itself monitor the lawyer to some extent to minimize the chances that the lawyer behaves negligently; this substitutes to some extent for limited incentives to take care that the threat of personal liability would otherwise generate. Second, a lawyer that has an incident on her insurance record may have to pay greater premia in the future, which implies some personal risk associated with negligence. As a final point, insurance contracts will typically include both deductibles and maximum liability for the insurer. This also implies that the lawyer will bear residual risk. In short, liability insurance does not negate the conclusion that personal liability exposes the lawyer to risk that she would not face in a corporate setting.

#### **f) Non-Lawyer Ownership**

We have reviewed the basic structures that law firms may currently adopt, as well as a limited liability corporation, which lawyers in Ontario cannot form. We have restricted the analysis by assuming that only lawyers can own equity in the firm, an assumption that is much less apt in liberal jurisdictions like Australia and the UK. Ontario itself allows for multi-disciplinary partnerships, but imposes important restrictions such as a requirement that lawyers control the firm. In this section we consider the potential economic advantages and

disadvantages of liberalizing rules concerning non-lawyer equity ownership of a law firm. We begin by focusing on the theory of the firm, which discussion can be conducted without significant emphasis on the particular legal organizational form (e.g., partnership or corporation) that the firm with non-lawyer equity-holders adopts. We then turn to capital structure, which will include a more detailed discussion of form.

There are two kinds of non-lawyer ownership worth considering. Non-lawyers may themselves bring professional credentials to the firm, or they may be simply passive, financial investors. The theory of the firm advantages largely arise with the former kind of equity-holder. Allowing non-lawyers to own equity in a firm that includes lawyers has several possible economic advantages. From a Coasean perspective, there are potentially significant savings in transaction costs resulting from non-lawyer equity owners. Take the example of a client that requires both legal and accounting advice on a given matter. If a lawyer and an accountant are equity-owners in the firm, each realizes an economic benefit when the other is retained by a client. This creates economic incentives for one to refer business to the other without complicated referral contracts (even if permitted). Moreover, when working for the same client on a file, it is likely that the lawyer and accountant will be better able to coordinate their actions if they are both within the same firm than if they practice independently.<sup>65</sup> This creates productivity gains, as Coase pointed out, but also in all probability lowers the transaction costs of the client, who is able to engage in one-stop shopping.

Moreover, if the lawyer and accountant both have equity stakes in the firm, this encourages personal investments in general assets of the firm, including its reputation. For example, an ownership stake in the accountant's future billings would encourage the lawyer to

---

<sup>65</sup> See, e.g., Lilla Csorgo and Michael Trebilcock, "Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective" (2001) 24 Dalhousie Law Journal 1.

be especially willing to take extra steps to enhance the reputation of the accountant, through referrals if nothing else. To the extent that multi-disciplinary firms tend to have a larger number of partners, having both the reputation of both accountants and lawyers at stake in the firm's work may also create stronger incentives to maintain a reputation for quality work: more professionals' reputation is in jeopardy when the firm performs its work.

It is worth noting an additional potential gain from adding non-lawyer professionals to a firm that practices law. Non-lawyers may not be themselves a member of a regulated profession, but may simply be professional business managers. There is no reason necessarily to conclude that lawyers will be the best managers of legal practices. An advantage, then, from allowing non-lawyer equity-holders is that it would allow non-lawyers to manage while owning equity stakes in the firm that incentivize them to a good job. This is another theory of the firm advantage of non-lawyer equity ownership: non-lawyer managers may have the ownership stakes that provide them with economic incentives to invest in firm value.

There are clearly potential economies from a theory of the firm perspective in allowing non-lawyer equity investment, but there are potential costs as well. The larger and broader is a firm's practice, the lower the costs of coordinating action outside the firm through contract, but the larger the costs of coordinating within the firm. There could be difficulties in coordinating behaviour across members of the firm as it grows in size and scope, especially if there are cultural differences between different professions. For example, professional managers may not have the same understanding of a lawyer's sense of ethical responsibilities, which could create intra-firm conflicts and consequential costs. Other costs may include a temptation for each member of the firm to refer clients to their own firm's professionals when in fact the client's

circumstances may call for a different provider. That is, some credibility of the referral may be lost if referrals are intra-firm.

It is therefore not necessarily the case that non-lawyer equity ownership leads to economic gains on net, though such ownership clearly allows some expected economic benefits from a theory of the firm perspective.

The next set of issues to consider are the economic costs and benefits of non-lawyer equity ownership from a capital structure perspective. Given the analysis above, the most illuminating context in which to examine this question is one that departs most significantly from the contexts discussed already, which is one in which there are no restrictions on the form or ownership of firms that offer legal services, as in Australia. And the most useful scenario within this context to consider is passive, non-lawyer, financial investment in equity.

Passive investors by definition do not directly affect the nature of the activities within the firm, but may significantly alter the capital structure of the firm and thus affect the firm's performance in carrying on business. There are two prominent advantages of outside equity ownership. First, outside shareholders may provide capital to the firm that would be very difficult to raise from capital-constrained professionals within the firm, or from banks. As discussed above, many investments are not suitably financed with debt. An investment in technology such as the web-based application discussed above is not a good candidate for debt financing: its returns are highly variable and uncertain, and moreover bank lenders may not be in a good position to assess its worth (and there may not be any physical collateral to offer as security). But equity investment in technology start-ups is suitable, and indeed is common. There may be expert investors in the technology space, venture capitalists for example, that are

not only capable of valuing a prospective investment, but once having made the investment may be able to offer management advice, thus adding non-lawyer management skills to the mix.

Outside investors may also be in a position to finance risky investments in lawsuits by a firm that has entered a contingency fee arrangement. A firm may be willing to take on such a fee arrangement, but may not have the capital to finance the suit. Because of a highly variable outcome and uncertain cash flow, as well as a difficulty in valuing the suit, banks may be unwilling to lend. Equity investors may, in contrast, be willing to assume uncertainty in returns, and may either have or develop expertise in valuing such suits. Law firms that would otherwise not be able to finance contingency-fee based lawsuits may be able to do so in the presence of non-lawyer equity investors.

On a related point, even if lawyers or other active professionals within a firm could conceivably raise the capital to pursue a risky investment such as a technological investment in law, or an uncertain lawsuit on a contingency fee, doing so exposes equity-holders to risk. This is especially problematic for sole proprietors and small firms, but even for larger firms, partners may bear considerable risk. In contrast, at the limit, a law corporation could be publicly traded with literally thousands of investors, each with small stakes in the firm. Such investors are much better placed to diversify the firm's risk than the inevitably smaller number of equity-owners at a firm without outside passive investors. This is a feature of potentially great importance in facilitating risky investment by law firms.

Allowing passive non-lawyer investment opens up a range of capital structures that could alter radically the economics of law firm capital structures. We have discussed the theory of the firm benefits of having both lawyer and non-lawyer equity-owners. There may, however, be advantages on net if lawyers were not to own equity at all, and a firm instead is financed by non-

lawyer shareholders. For example, if lawyers have a comparative advantage in providing legal advice and not managing a business, it may be better to have a business owned and managed by non-lawyers, with lawyers serving as employees but not shareholders. Non-lawyer managers may provide the entrepreneurial skills that the firm requires to be successful, while lawyer employees provide the legal expertise.<sup>66</sup> Such a model would be probably most especially suitable for a firm that relied heavily on technological solutions to support the provision of legal advice: non-lawyer entrepreneurs may have the skill set, and finances, to manage and fund the firm, while lawyer employees provide the legal advice that may underpin the development and operation of the technology. To draw an analogy, it is not unusual for technological entrepreneurs to provide a vision and business skills at a tech start-up, while relying on engineer employees (perhaps motivated by stock options) to actually create the technology. This may also be an appropriate model for legal practice: lawyers bring their human capital to the firm, but leave financial capitalization to others who may be better placed to bear the risk of the firm's success, perhaps because they can diversify more easily, perhaps because bearing such risk allocates to them appropriate incentives to manage the business. We observe that such a model has in effect been adopted in Australia at Slater and Gordon, which has a very large complement of lawyer employees, but is publicly traded.

In the context of publicly listed firms, the limited liability associated with a corporation assumes stark advantages relative to other possibilities, such as joint and several liability among shareholders. In the absence of limited liability, the value of a share may depend in part on the identity, and more specifically, wealth, of fellow shareholders.<sup>67</sup> This makes valuing a share

---

<sup>66</sup> See also, Hadfield, *The Cost of Law, supra* (observing that non-lawyers will often have the technological insights necessary for innovation in the legal services market).

<sup>67</sup> See Jensen and Meckling, *supra*; Paul Halpern, Michael Trebilcock, and Stuart Turnbull, "An Economic Analysis of Limited Liability in Corporation Law" (1980) 30 *University of Toronto Law Journal* 117.

costly, and undermines the value of a public listing. Moreover, the separate legal personality of a corporation allows clear “asset partitioning”: the assets of the corporation are owned by the corporation as an independent legal entity, thus avoiding blurry lines between business assets and personal assets of investors.<sup>68</sup>

There are, naturally, economic disadvantages associated with outside equity ownership. Most prominently, lawyers that do not own equity in the firm will not have the same incentives to work to increase the value of the firm as lawyers in a partnership. There is a cost to incentives from diversifying the risk of a firm across passive investors. Indeed, because of this, clients may be reluctant to engage lawyers that do not have a stake in their firm. One possibility to respond to this concern is for a controlling shareholder to emerge that, because of its stake in the firm, has a strong incentive to monitor management to ensure that the lawyers in the firm’s employ are providing service optimally.

Other possibilities include the emergence of hybrid ownership solutions, such as the franchising possibility discussed above.<sup>69</sup> In a franchise, the overall business model and firm reputation (brand) is promoted by a franchisor. The franchisor corporation engages franchisees that have territories in which they provide the franchise system’s product or service under the franchise system’s brand. This system allows a centralized entrepreneurial team to create a business model that they in effect rent to franchisees in exchange for payment, including, typically, a share of the franchise’s profits.<sup>70</sup> The primary advantage of the franchise system over a single entity model of a business with geographically distributed, but centrally owned

---

<sup>68</sup> See, e.g., Henry Hansmann and Reinier Kraakman, “The Essential Role of Organizational Law” (2000) 110 Yale Law Journal 387; Edward Iacobucci and George Triantis, “The Legal and Economic Boundaries of Firms” (2007) 93 Virginia Law Review 515.

<sup>69</sup> For discussion of franchise contracts, see, e.g., Gillian Hadfield, “Problematic Relations: Franchising and the Law of Incomplete Contracts” 42 Stanford Law Review 927.

<sup>70</sup> See QualitySolicitors as an example of a network of independent firms: <http://www.qualitysolicitors.com/>.



outlets, is that the franchisee owns the equity in the franchise, which provides her with incentives to build the value of the local business. The franchisee benefits from the brand created by the franchisor, and the franchisor works to maintain this reputation by monitoring franchises to ensure that they meet the system's standards.

Such a model could be successful in the legal context, just as it has in the tax context as outlined in the H&R Block example alluded to above, and is off to a promising start in the legal context with the QualitySolicitors example from the UK. Local lawyers could own a local franchise to provide legal services, but a franchise system with non-lawyer investors could build the brand and relevant business solutions, such as technology applications that would be available to franchisees and their clients. Moreover, it would be conceivable that the franchisor could help provide capital to fund risky, contingency-fee lawsuits led by a franchisee. Such a system could draw on entrepreneurial experts at the franchisor, who are incentivized through equity ownership to grow the profits of the franchise system as a whole, while allocating equity and profits to local franchisees to promote the local business.

As this discussion has demonstrated, liberalized ownership rules create the potential for the most gains from alternative business structures by creating a potential separation between the financiers of a legal business and the providers of legal advice within that business. While there are potential incentive problems that non-lawyer ownership might create, there are significant gains in raising equity capital to finance investment, and in allowing investors in law firms to diversify risk, that may offset these problems. Moreover, imaginative hybrid solutions, such as franchise systems, could attempt to exploit the benefits of non-lawyer entrepreneurship, while preserving lawyers' incentives to promote their personal practices.

\*\*\*\*

There is no question that legal reform in the UK and Australia has led to interesting and significant innovations in legal structures. Publicly traded law firms, such as Slater and Gordon, and networks of firms, such as QualitySolicitors, are prominent examples of such innovation. Evidence of the impetus to innovate can also be found within the more traditional regulatory framework of the provision of legal services. In North America, LegalZoom offers an innovative combination of online and in-person legal advice, while conforming with the more restrictive sets of rules governing business structures found there.<sup>71</sup> Removing the constraints that presently exist on alternative business structures would undoubtedly invite even further innovation.<sup>72</sup>

However, before concluding this section on the promise of alternative business structures for legal practice, a note of caution is appropriate. As Noel Semple has pointed out, the rules on alternative structures have been very liberal for over a decade in Australia, yet the legal profession has not undergone a radical transformation.<sup>73</sup> There have clearly been innovations, such as the emergence of publicly traded law firms, but many traditional structures remain in place. For example, Semple observes that in New South Wales, where liberal rules have been in place the longest, the number of sole practitioners and small firms has *grown* in the last ten years.<sup>74</sup> In light of this evidence, it would be inappropriate to predict a sweeping revolution from liberalization in Ontario, but the analysis has shown that the potential for economic gains is nevertheless real. Even if only some firms attempt to adopt new models, this could nevertheless be of economic advantage to lawyers, their investors, and ultimately, clients.

---

<sup>71</sup> See <http://www.legalzoom.ca/>.

<sup>72</sup> Hadfield, *The Cost of Law*, *supra* argues that the economics of reducing the cost of legal services for ordinary individuals makes clear that the scale of legal services delivery needs to expand dramatically to justify the fixed costs of investments in marketing, document production, consumer and legal research, information technology and firm management. In turn these functions require an expanded role for non-legal expertise as well as greater scope for diversifying the risks associated with such investments. In her view the limited liability corporation with non-lawyer shareholders is an essential mechanism for realizing economies of scale and specialization in servicing the needs of ordinary individuals.

<sup>73</sup> Semple, *supra*.

<sup>74</sup> Semple, *supra* at 46.

## V. CONCLUSION

One conclusion should be abundantly apparent from this review of the economics of alternative business structures: there is no single structure that is optimal across all contexts.<sup>75</sup> Rather, there are trade-offs with respect to every choice of form and capital structure, and the best resolution of each trade-off depends on the circumstances. The nature of a firm's clients in some cases may best call for a general partnership; in others, a limited liability partnership. The nature of the service provided may in some cases call for a sole proprietorship; in others, a publicly traded corporation. It is overly simplistic, therefore, to favour one form over others from an economic perspective.

The importance of context, however, does not imply that it is impossible to draw any meaningful policy conclusions from the analysis. It is clear that from an economic perspective, there are potential gains from opening up options for business structures and associated capital structures. This itself makes an economic argument in favour of liberalization: even if most legal practices maintain traditional structures, if some firms benefit from innovative models, choice creates economic benefits. It is also fair to conclude that the gains from liberalization are most likely to materialize where a large capital investment is necessary for a firm to realize certain gains. An investment in a client's lawsuit through a contingency fee, for example, may generally be more efficiently financed with outside, financial investors than the handful of lawyers who may prosecute the suit. An investment in technology will also more probably be efficiently achieved by a firm with outside investors than a general partnership.

Liberalization predictably generates economic gains, but the size of these gains cannot be predicted with any certainty. Experience in the UK and Australia suggests that liberalization

---

<sup>75</sup> See, e.g., Iacobucci and Triantis, *supra*.

does invite change, although the pace of change appears to be much more evolutionary than revolutionary, at least to date.

We conclude by making observations about the impact of reform on key stakeholders: lawyers themselves, and clients. These effects would presumably have a significant influence on the politics of reform. As noted in the discussion of competition, changing the rules on alternative business structures does not itself affect the number of lawyers in practice in a given jurisdiction. It may, however, affect considerably the nature of the firms in which the lawyers practice. Individuals with significant economic stakes in existing firms may be threatened by reform. But such a threat to current firm structures should not be elided with a threat to the kinds of lawyers that practice at these firms. For example, consider a small-town sole proprietor with a general practice. Such a lawyer may predict that liberalization would result in a large corporation, perhaps a franchise system, encroaching on her business. Such a development would undermine the value of the equity of an existing lawyer in her sole proprietorship, but would not imply that the lawyer (and others of her type) will be out of business. Rather, the corporation will itself need lawyers, and the sole proprietor may shift from being an owner of her practice to an employee in a larger firm. While there may be short run dislocations in some instances, in the longer run new business models will generally emerge if they are more economically efficient than existing models. Greater efficiency means greater potential gains for lawyers, clients and investors alike. For example, lawyers may prefer simply to practice law rather than run a business; for them, status as an employee may be preferable to status as a sole proprietor. When considering the politics of liberalization, then, it is important not to confuse challenges to existing law firm structures with challenges to existing lawyers. Reform, while it may threaten existing structures, may be welcome both for many clients and for many lawyers.

Moreover, the threat to existing structures should not be exaggerated. Experience elsewhere has demonstrated that liberalization may be entirely consistent with one-person and other small practices. For example, as Semple notes, the number of small firms has increased in the last ten years in New South Wales.<sup>76</sup> Neither theory nor experience suggests that lawyers will necessarily suffer economically under a more liberal regime.

Finally, to return to a point that we raised in the Introduction, our focus has been on the economics of alternative business structures, but economic gains are entirely consistent with the promotion of at least some non-economic values. Access to justice is a matter of concern in Ontario and elsewhere,<sup>77</sup> and high prices for legal services are clearly a major contributor to this concern.<sup>78</sup> If alternative business structures emerge in a liberalized regime, this is likely to reflect the economic gains that they generate. Moreover, given that the legal services market is highly competitive, it is probable that economic efficiencies realized as a result of liberalization would be passed onto clients and prospective clients.<sup>79</sup> It is possible, therefore, that the economic gains that liberalization tends to promote would in turn tend to promote access to justice.<sup>80</sup> In this respect, at least, economic and non-economic social goals are aligned.

---

<sup>76</sup> Semple, *supra* at 46.

<sup>77</sup> See, e.g., Michael Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

<sup>78</sup> See Hadfield, *The Cost of Law*, *supra*.

<sup>79</sup> Again, the market would not become more competitive as a consequence of liberalization; rather, competition would simply tend to push any savings down to clients.

<sup>80</sup> See Semple, *supra*.

**Business Structures for the Practice of Law and the Delivery of Legal Services in Ontario**

The following provisions in the *Law Society Act*, other Ontario legislation, *Rules of Professional Conduct* (version currently in force until October 1, 2014), *Paralegal Rules of Conduct*, and Law Society By-Laws are relevant to business structures.

*Rules of Professional Conduct - Division of Fees, Fee-Sharing, and Fee-Splitting*

1. Described below, the provisions relating to division of fees, fee-sharing and fee-splitting have the effect that:
  - (i) fees may not be shared except within permitted participants in a permitted business structure; and
  - (ii) referral fees are only permitted to be paid to licensed Ontario lawyers and paralegals.
2. Rule 2.08(6) of the *Rules of Professional Conduct* provides that where a client consents, fees for a matter may be divided between licensees (or members of the Law Society of Upper Canada) who are members of the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.
3. Rule 2.08(7) imposes the following restrictions with respect to referral fees:
  - (a) The fee must be reasonable, and cannot increase the total amount of the fee charged to the client; and
  - (b) The client must be informed of the fee, and must consent to it.
4. Rule 2.08(8) of the *Rules of Professional Conduct*, which applies to lawyers, provides that lawyers may not share fees with a non-licensee. It provides as follows:

2.08(8) A lawyer shall not

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

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

5. Rule 2.08(9) limits this broad prohibition to permit fee sharing in certain circumstances:
  - (a) within a multi-disciplinary practice (an “MDP”);
  - (b) between partners of an inter-provincial law firm; and
  - (c) between partners of an international law partnership.
6. Rule 5.01(10), (11) and (12) of the *Paralegal Code of Conduct* (the “Paralegal Rules”) imposes similar restrictions on paralegals with respect to the division of fees, fee-splitting, and referral fees. Paralegal Rule 5.01(12) permits fees sharing between partners in a Multi-Disciplinary Partnership (MDP).

### Ownership Restrictions

#### *Professional Corporations*

7. The ownership and permissible scope of practice of professional corporations is limited by the current regulatory structure. Section 62(0.1)14(iv) of the *Law Society Act* provides that Convocation may make by-laws regarding professional corporations. Section 62(28.1) provides that Convocation may make by-laws governing the practice of law and provision of legal services through professional corporations.
8. Section 3.1(2)(a) of the *Business Corporations Act* (OBCA) provides for the practice of a profession by a professional corporation if an Act so permits.<sup>1</sup> Section 3.2(2) of the Act provides for conditions which a professional corporation must satisfy, including the identity of shareholders. Section 61.0.1(4) of the *Law Society Act* limits ownership of professional corporations practicing law and providing legal services to lawyers and paralegals.<sup>2</sup>

---

<sup>1</sup> *Business Corporations Act*, R.S.O. 1990, c. B16, online at [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90b16\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90b16_e.htm).

<sup>2</sup> *Law Society Act*, R.S.O. 1990, c. L.8, online at [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90l08\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90l08_e.htm).

9. The *Law Society Act* limits all forms of share ownership. Unlike the case of some regulated health professionals,<sup>3</sup> family members of lawyers and paralegals are not permitted to own shares in a professional corporation. Further, lawyers from other jurisdictions may not be shareholders in Ontario professional corporations.
10. As well as limiting ownership of professional corporations, the activities of professional corporations are limited by section 61.0.1(1)(5) (paragraph 3) of the Act which requires that

The articles of incorporation of a professional corporation ... shall provide that the corporation may not carry on a business other than [the practice of law or the provision of legal services], but this paragraph shall not be construed to prevent the corporation from carrying on activities related to or ancillary to [the practice of law of law or legal services], including the investment of surplus funds earned by the corporation.

11. A professional corporation is limited to providing services “related to” or “ancillary to” legal or paralegal practice.

#### *Limited Liability Partnerships*

12. Section 44.2(a) of the *Partnerships Act* provides that a limited liability partnership may carry on business in Ontario for the purpose of practicing a profession if a statute so permits.<sup>4</sup> Section 61.1(1) of the *Law Society Act* provides that subject to the by-laws, lawyers and paralegals may form a limited liability partnership for the purpose of practicing law or providing legal services in Ontario. Section 61.1(1) (d) provides that two or more professional corporations may form a limited liability partnership for the purpose of practicing law in Ontario, providing legal services, or both.
13. Part III of Law Society By-Law 7 (“Business Entities”) regulates the following:

---

<sup>3</sup> Members of the College of Physicians and Surgeons of Ontario and members of the Royal College of Dental Surgeons of Ontario may form professional corporations in which their family members own shares.

<sup>4</sup> *Partnerships Act*, R.S.O. 1990, c. P.5, online at [http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90p05\\_e.htm#BK49](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p05_e.htm#BK49).



- (i) limited liability partnerships (the By-Law imposes insurance requirements on a limited liability partnership and imposes disclosure requirements);
- (ii) professional corporations; (corporate names, certificates of authorization, and information that must be contained in the register of professional corporations required under section 61.0.2 of the Act);
- (iii) multi-disciplinary practices, which will be discussed in greater detail below; and
- (iv) affiliations with non-licensees.

*Multi-Disciplinary Partnerships*

14. Section 62(0.1)32 of the Law Society Act provides that Convocation may make by-laws regarding multi-disciplinary partnerships. By-Law 7 permit a business structure in which non-licensees can be partners with licensees, but only where the licensees are in control and where the services provided by non-licensees are supportive or supplementary to the practice of law or to the provision of legal services. The non-licensee must agree to comply with Law Society rules, policies and guidelines, but the licensee is responsible to the Law Society for any non-compliance with Law Society rules.
15. Currently, there are 13 Multi-Disciplinary Partnerships (MDP) in Ontario.<sup>5</sup> The types of services which are provided by the non-licensee partners in an MDP are as follows:
- i) human resources consulting;
  - ii) advice and assistance with patents and trademarks;
  - iii) public policy advice;
  - iv) translation;
  - v) economic, tax and accounting advice;
  - vi) financial services advice;

---

<sup>5</sup> This information is current to November 2013.

- vii) mortgage broker services;
- viii) chartered accounting services;
- ix) immigration consulting;
- x) U.S.-licensed attorneys with expertise in class action litigation and civil trials; and
- xi) marketing and advertising services.<sup>6</sup>

16. Section 16 of By-Law 7 provides that:

A licensee shall not, in connection with the licensee's licensed activity, provide to a client the services of a person who is not a licensee except in accordance with this Part.

17. Section 17 provides a limited exception to this broad prohibition:

A licensee may, in connection with the licensee's licensed activity, provide to a client the services of a person who is not a licensee who practises a profession, trade or occupation that supports or supplements the licensed activity.

18. The language of "supporting or supplementing" the licensed activity in the MDP By-Law is similar to the language of "relating to or ancillary to" the licensed activity in section 6.0.1(1)(5) of the *Law Society Act* in respect of permitted activities of professional corporations.

19. Section 18 of By-Law 7 regulates partnerships or associations with persons who are not licensees of the Law Society of Upper Canada and who practice a profession, trade or occupation that "supports or supplements" the licensed activity. A licensee may enter into a partnership or association with a professional to permit the licensee to provide the services of the professional to clients. A "professional" is "an individual or a professional corporation established under an Act of the Legislature, other than the *Law Society Act*, the services of whom or which a licensee may provide to a client in connection with the licensee's licensed activity."

---

<sup>6</sup> Lawyers who are partners in an MDP reported the following areas of practice: employment and labour law, workplace safety and insurance law, intellectual property law, litigation, corporate/commercial, administrative law, civil litigation, real estate law, wills/estates/trusts, criminal law, citizenship and immigration, consumer legal services, and tax law.

20. Section 18(2) requires that a licensee who wishes to enter into a multi-disciplinary partnership or association must ensure that the following conditions are satisfied:
  1. the professional must be qualified to practise a profession, trade or occupation that supports or supplements the licensee's licensed activity;
    - 1.1.1 the professional must be of good character;
  2. the professional must agree that the licensee has "effective control" over the practice of the other profession, trade or occupation (the professional must practice the profession, trade or occupation to provide services to clients of the partnership or association);
  3. the professional must agree with the licensee in writing that when acting in partnership or in association, the professional will not practice his or her profession, trade or occupation outside of the provision of services to the clients of the MDP or association;
  4. if the professional provides services other than to clients of the firm/association, the non-lawyer/non-paralegal can only do so from other premises;
  5. the non-lawyer/non-paralegal must agree with the licensee to comply with Law Society rules, by-laws, policies and guidelines;
  6. in the case of partnerships (as opposed to associations), the non-lawyer/non-paralegal must agree with the licensee to comply with the Law Society rules, policies and guidelines on conflicts of interest in relation to clients of the partnership who are also clients of the professional practicing independently of the partnership.
21. According to section 19 of the By-law, while the non-licensee must agree to comply with Law Society rules, policies and guidelines, it is the licensee who is responsible to the regulator for the non-licensee's compliance with Law Society rules.

22. Section 20(1) of the By-Law requires that Law Society approval must be obtained before a licensee enters into partnership with a professional.
23. Rule 6.10 of the *Rules of Professional Conduct* provide that a lawyer in an MDP shall ensure that non-licensee partners and associates comply with these Rules and all ethical principles that govern a lawyer. Rule 3.04(15) of the Paralegal Rules similarly provides that a paralegal in a multi-discipline practice shall ensure that non-licensee partners and associates observe the conflict of interest rule for the provision of legal services and for any other business or professional undertaking carried on by them outside the professional business.

#### *Affiliations*

24. The essence of affiliation is joint service delivery by licensees and non-licensees. Currently there are 49 affiliations in Ontario.<sup>7</sup>
25. Section 62(0.1)31 of the Law Society Act permits Convocation to make by-laws regarding affiliations. Section 31(2) of By-Law 7 provides that
  - a licensee affiliates with an affiliated entity when the licensee on a regular basis joins with the affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity.
26. With respect to the professional business through which licensed services are provided, section 32 of By-Law 7 requires that the licensee
  - (a) own the professional business or comply with the MDP By-Law;
  - (b) maintain control over the professional business; and that
  - (c) the joint business not be carried on from premises from which the non-licensee carries on other business.

---

<sup>7</sup> Information as of November 22, 2013.

27. Section 33(1) of By-Law 7 requires a licensee who agrees to affiliate to immediately notify the Law Society of the affiliation. Further, section 33(2) requires that the notice contain the following information:
1. the financial arrangements between the licensee and the non-licensee; and
  2. arrangements for compliance with Law Society rules, policies and guidelines on conflicts of interest and confidentiality of information with respect of the joint clients.

*Supervision*

28. Rule 5.01(2)(b) of the *Rules of Professional Conduct* requires that a lawyer directly supervise non-lawyers to whom particular tasks and functions are assigned. Rule 8.01(3) of the *Paralegal Rules of Conduct* provides that “a paralegal shall, in accordance with the By-Laws, directly supervise staff and assistants to whom particular tasks and functions are delegated”. By-Law 7.1 governs the circumstances in which a licensee may assign certain tasks and functions to a non-licensee within a law practice.

## FOR DECISION

### NATIONAL DISCIPLINE STANDARDS PILOT PROJECT

#### MOTION

194. **That Convocation approve in principle the attached National Discipline Standards of the Federation of Law Societies of Canada set out at [Tab 4.2.1](#).**
195. The goal of the National Discipline Standards Project is to develop a set of standards against which each Law Society's performance in the area of lawyer discipline can be assessed. There are 21 standards.
196. These standards were the subject of a pilot project which ends in April 2014 and have been modified throughout the pilot project period. The Law Society has been involved in the project since the outset and has been regularly reporting to the Federation about the Law Society's performance on the draft standards. The regular reporting process has contributed to modifications to some of the standards.
197. The Council of the Federation of Law Societies of Canada is scheduled to approve the standards in April 2014, which are to take effect on January 1, 2015. Law Societies are being asked to review and adopt the standards so that they can be implemented by that date.
198. As part of the implementation plan, between April 2014 and January 2015 the pilot project will continue.
199. The Professional Regulation, Paralegal Standing and Tribunals Committees considered the National Discipline Standards Pilot Project at their February 2014 meetings.
200. All three Committees have reviewed the standards and recommend that Convocation approve them in principle.

*Federation of Law Societies  
of Canada*



*Fédération des ordres professionnels  
de juristes du Canada*

## **NATIONAL DISCIPLINE STANDARDS PILOT PROJECT**

### **List of Standards as of January 2014**

#### **Timeliness**

1. **Telephone inquiries:**  
75% of telephone inquiries are acknowledged within one business day and 100% within two business days.
2. **Written complaints:**  
100% of written complaints are acknowledged in writing within three business days.
3. **Timeline to resolve or refer complaint:**  
80% of all complaints are resolved or referred for a disciplinary or remedial response within 12 months.  
90% of all complaints are resolved or referred for a disciplinary or remedial response within 18 months.
4. **Contact with complainant:**  
For 90% of open complaints there is contact with the complainant at least once every 90 days during the investigation stage.
5. **Contact with member:**  
For 90% of open complaints there is contact with the member at least once every 90 days during the investigation stage.

#### **Hearings**

6. 75% of citations or notices of hearings are issued and served upon the lawyer within 60 days of authorization.  
95% of citations or notices of hearings are issued and served upon the lawyer within 90 days of authorization.
7. 75% of all hearings commence within 9 months of authorization.  
90% of all hearings commence within 12 months of authorization.
8. Reasons for 90% of all decisions are rendered within 90 days from the last date the panel receives submissions.
9. Each law society will report annually to its governing body on the status of standards 3, 4 and 5. For standards 6, 7 and 8, each law society will report quarterly to its governing body on the status of the standards.

...../2

## NATIONAL DISCIPLINE STANDARDS PILOT PROJECT

### List of Standards

December 2013

#### Public Participation

10. There is public participation at every stage of discipline; i.e. on all hearing panels of three or more; at least one public representative; on the charging committee, at least one public representative.
11. There is a complaints review process in which there is public participation for complaints that are disposed of without going to a charging committee.

#### Transparency

12. Hearings are open to the public.
13. Reasons are provided for any decision to close hearings.
14. Notices of charge or citation are published promptly after a date for the hearing has been set.
15. Notices of hearing dates are published at least 60 days prior to the hearing, or such shorter time as the pre-hearing process permits.
16. There is an ability to share information about a lawyer who is a member of another law society with that other law society when an investigation is underway in a manner that protects solicitor-client privilege, or there is an obligation on the lawyer to disclose to all law societies of which he/she is a member that there is an investigation underway.
17. There is an ability to report to police about criminal activity in a manner that protects solicitor/client privilege.

#### Accessibility

18. A complaint help form is available to complainants.
19. There is a lawyer directory available with status information, including easily accessible information on discipline history.

#### Qualification and Training of Adjudicators

20. There is ongoing mandatory training for all adjudicators, including training on decision writing, with refresher training no less often than once a year and the curriculum for mandatory training will comply with the national curriculum if and when it is available.
21. There is mandatory orientation for all volunteers involved in conducting investigations or in the charging process to ensure that they are equipped with the knowledge and skills to do the job.



## **CONTINUATION OF THE PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE**

### **MOTION**

#### **201. That Convocation**

- (a) approve continuation of the Pre-Proceeding Consent Resolution Conference pilot project for an additional two years; and**
- (b) direct that the Professional Regulation and Tribunals Committees (the latter in consultation with the Chair of the Tribunal) prepare a report prior to the end of the two year period with recommendations regarding the continuation of the process on a permanent basis.**

### **Overview**

- 202. The Pre-Proceeding Consent Resolution Conference (the “Consent Process”) is an alternative to the regular investigations and hearings stream. The Consent Process was approved by Convocation on January 28, 2010 as pilot project. Changes to the *Rules of Practice and Procedure* required to support the Consent Process were approved by Convocation on January 27, 2011. The 2010 and 2011 Convocation Reports may be found at **Tab 4.3.1** and **Tab 4.3.2**, respectively.
- 203. Reporting on the pilot project was awaiting completion of two cases in the process. In summary, based on the report from the Professional Regulation Division, the Committee has concluded that the Consent Process to be a helpful tool and it is likely to be used with greater frequency in the future.
- 204. No changes are recommended by the Committee to the portion of the Consent Process that occurs prior to authorization by the Proceedings Authorization Committee.

205. The Committee, and the Tribunals Committee, which also reviewed this matter, believes there may be ways to streamline some aspects of the post-authorization Consent Process. For this reason it is recommended that the procedures set out in Rule 29 of the *Rules of Practice and Procedure* be reviewed. Rule 29 may be found at **Tab 4.3.3**.
206. The Committee with the agreement of the Tribunals Committee, recommends that the Consent Process be continued for a further two years. The continuation of the two-year pilot will permit additional study of the post-authorization Consent Process. During that time, both Committees will consider a report containing recommendations regarding whether the Consent Process should be continued on a permanent basis.

#### **Background – Purpose of the Consent Process**

207. The Consent Process begins during the investigation stage and concludes with a Hearing Panel Order. Through the Consent Process, a licensee may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.
208. The goals of the Consent Process were to:
- a. be flexible by providing for negotiations at an early stage for licensees who are interested in making early admissions in aid of a fast outcome that is more certain;
  - b. reduce the time and resources required for full investigation and prosecution of some cases;
  - c. save significant costs for the licensee; and
  - d. continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

#### **Overview of the Consent Process**

209. The policy which includes a description of the Consent Process is set out in the 2010 Report at **Tab 4.3.1** and has also been codified in part in Rule 29 of the *Rules of Practice and Procedure*. A brief overview is set out below.

*Description*

210. The Consent Process may be initiated by the Law Society or the licensee during the investigation stage. Cases are approved for the Consent Process by the Director, Professional Regulation. Once presented to the licensee, he or she has 30 days to accept or reject the agreement, or negotiate changes with the Law Society. The Law Society and the licensee negotiate a tentative agreement on admissions and penalty, and conduct a fast-track investigation before finalizing the agreement.
211. The Director will only approve a case where in her opinion, diversion would fulfill the Law Society's duty to act in a timely, open and efficient manner and its duty to protect the public interest. Additional criteria have been identified in the 2010 Report at **Tab 4.3.1**, page 8 (paragraph 18) including:
  - a. that the licensee is prepared to admit to the allegations;
  - b. there is sufficient jurisprudence on the issue;
  - c. discipline proceedings have not yet been authorized;
  - d. the licensee is cooperating with the Law Society;
  - e. the Law Society has no concerns about the licensee's capacity to engage in the process; and
  - f. the licensee has legal representation or has been advised to obtain independent legal advice.
212. Once the Director is satisfied with the agreement, a Consent Proposal is referred to the Proceedings Authorization Committee (PAC) for authorization.
213. After authorization by PAC, a Consent Resolution Conference is held (Rule 29.02). This meeting is not public (Rule 29.05(3)). The Consent Resolution Conference may accept or reject the Consent Proposal but should accept it unless the Panel concludes that the joint submission on penalty is outside of the reasonable range.
214. Until the Consent Resolution Conference accepts the Consent Proposal, either party may withdraw (Rule 29.06). If the parties withdraw or the Consent Proposal is rejected by

them or the Consent Resolution Conference, the Law Society completes its investigation. The documents created for the Consent Resolution Conference and any statements made at the Consent Resolution Conference are not admissible for the purpose of any subsequent investigation and prosecution of the same allegations (Rule 29.08).

215. Lastly, a Notice of Application is issued and the matter proceeds to a hearing in public before the same members of the Conference panel, composed as a Hearing Panel. The Consent Proposal becomes part of the public record and the Hearing Panel issues an Order in the normal course.

### **Experience with the Consent Process**

216. Two cases have been completed through the Consent Process to date.
217. In the first case, the licensee was granted permission to surrender their licence. No costs were ordered. The misconduct that was the basis for the admissions and the finding was multiple failures to respond to and cooperate with the Law Society, and failure to provide the Law Society with information with respect to the disposition of the licensee's practice.
218. In the second case, the licensee was suspended for one month, was required to continue weekly telephone meetings with a sponsor for a period of two years and was required to pay costs in the amount of \$2000. The misconduct that was the subject of the licensee's admissions, and the basis for the finding, was that the licensee had contravened Rule 6.01 of the *Rules of Professional Conduct* by acting without integrity when the licensee received trust funds totaling \$5,800 from various clients and withheld them from the licensee's employer, appropriating them for personal use.

### *Benefits*

219. Based on information from the Director of Professional Regulation, the Committee has identified benefits from the above two cases. Early agreement increased the level of certainty in the process for both parties. Discipline Counsel was able to consider the strengths and weaknesses of the Law Society's case and to negotiate a fair outcome based

on an agreed set of facts at an early stage in the process. Disclosure was not required, thereby saving time in the investigation and discipline process.

220. The two cases were different substantively, suggesting that the Consent Process may be appropriate in different types of cases.

### *Challenges*

221. The Committee noted that identifying appropriate cases and moving them forward at an early stage in the investigation is a key challenge. The Committee understands that steps are being taken to assist in identifying more cases in future, at an earlier stage in the process.
222. In addition, despite the goal of expediting the investigations/hearing process, the Consent Process is somewhat cumbersome. This is largely because of the two-step process, as the Consent Resolution Conference is scheduled first, followed by the hearing. The requirement to schedule a Conference panel and a subsequent hearing take time, particularly since it is necessary to schedule the same three-member panel. It would be appropriate to explore ways to address this issue in future. For example, it may be possible to include in the Consent Proposal the parties' consent to a single member Hearing Panel.

### **Recommendations and Next Steps**

223. The Committee believes that the goal of providing an alternative to the regular investigations/discipline process is still relevant. In the Committee's view, there have not been enough cases through the Consent Process to fully assess its efficacy. The Committee recommends that Convocation approve the continuation of the Consent Process for an additional two years.
224. The Committee's review of the Consent Process has occurred in the context of its consideration of one of Convocation's current priorities, which is enhancements to Tribunals procedures and processes, including file and case management, to improve

effectiveness and efficiency. Relevant priorities related to Professional Regulation are enhanced case management, discipline diversion and avoidance, expanding matters for which a single adjudicator hearing can be utilized, and exploring written hearings.

225. The Committee continues to study these matters, and there may be other ways to achieve the goals of the Consent Process that are equally effective.
226. Accordingly, the Committee recommends that:
  - a. Convocation approve the continuation of the Consent Process as set out in this report, and
  - b. the processes set out in Rule 29 of the *Rules of Practice and Procedure* (the Consent Resolution Conference and subsequent Hearing) be considered along with the other discipline/tribunals enhancements currently being studied.



## Report to Convocation January 28, 2010\*

---

### Professional Regulation Committee

#### Committee Members

Linda Rothstein (Chair)  
Julian Porter (Vice-Chair)  
Bonnie Tough (Vice-Chair)  
Christopher Bredt  
John Campion  
Carl Fleck  
Patrick Furlong  
Gary Lloyd Gottlieb  
Glenn Hainey  
Brian Lawrie  
Ross Murray  
Sydney Robins  
Baljit Sikand  
Roger Yachetti

**Purpose of Report: Decision**

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

\*Items deferred from December 4, 2009 Convocation

## TABLE OF CONTENTS

### **For Decision**

Pre-Proceeding Consent Resolution Conference.....**TAB A**

Conflicts of Interest Standard for Counsel in Pro Bono Law Ontario’s “Brief Services”  
Programs.....**TAB B**



## COMMITTEE PROCESS

1. The Professional Regulation Committee (“the Committee”) met on January 14, 2010. In attendance were Linda Rothstein (Chair), Julian Porter (Vice-Chair), Christopher Bredt, Patrick Furlong, Glenn Hainey, Brian Lawrie and Ross Murray. Staff attending were Nicole Anthony, Julia Bass, Cathy Braid, Lesley Cameron, Grace Knakowski, Terry Knott, Lisa Mallia, Zeynep Onen, Sophia Spurdakos, Arwen Tillman and Jim Varro.

**PRE-PROCEEDING CONSENT RESOLUTION  
CONFERENCE  
(JOINT REPORT WITH THE PARALEGAL STANDING  
COMMITTEE AND THE TRIBUNALS COMMITTEE)**

**Motion**

2. That Convocation approve the policy for the Pre-Proceeding Consent Resolution Conference for a two-year pilot project.

**Introduction and Background**

3. In April 2009, the Committee began consideration of a proposal for an expedited investigations and hearing process for lawyers and paralegals who admit to conduct allegations against them and agree to a joint penalty to be submitted to a Hearing Panel to obtain an Order. The proposal necessitated discussions with the Tribunals Committee and the Paralegal Standing Committee, and culminated in a joint meeting of the Committees in November 2009.
4. This report includes the Committees' joint proposal for the new process, which is titled the Pre-Proceeding Consent Resolution Conference ("the Conference"), for Convocation's consideration.
5. If approved, amendments to the *Rules of Practice and Procedure* to implement the proposal will be required. These amendments will be presented at a future Convocation.

**Why the Conference is Being Proposed**

6. The Conference is intended to provide lawyers and paralegals with an alternative process to the regular investigations and hearing stream. Through this process, they may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.
7. The proposed process:

- a. is flexible in that it provides for negotiations at an early stage for lawyers and paralegals who are interested in making early admissions in aid of a fast outcome that is more certain;
- b. has the potential to reduce the time and resources required for full investigation and prosecution of some cases in an environment where caseloads that require a discipline response are increasing<sup>1</sup>;
- c. will save significant costs for the licensee<sup>2</sup>; and
- d. with increased efficiencies, will continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

### Cases Suitable for the Process

8. The Conference would be suitable for cases that meet the criteria discussed below, regardless of the nature of the conduct.<sup>3</sup>

---

<sup>1</sup>In 2008, the Professional Regulation Division received 15% more cases than in the previous year, including an approximately 7% increase in conduct allegations. In 2009, this number has increased a further 3% and is expected to rise before the end of the year. The increasing number of lawyers and paralegals licensed in Ontario each year makes it unlikely that there will be an overall decrease in the number of complaints.

As the caseload increases, inevitably there is a related increase in cases that will require a formal response up to and including prosecution. An extensive investment of resources is required for any case that is taken to the Proceedings Authorization Committee (PAC) for either resolution or authorization for prosecution. Cases that are prosecuted require even more extensive investigatory and discipline resources. For example, in a mortgage fraud case, Discipline Counsel typically spend 200 to 400 hours working on each case. In more complex cases, Counsel spend in excess of 400 hours.

<sup>2</sup> Under the current process, where the evidence suggests that an investigation is likely to require authorization for a conduct application, the full investigation and discipline process must be deployed. This is the case even where the lawyer or paralegal who is the subject of the investigation admits to the wrongdoing and is seeking an early conclusion with sanction. There is no alternative fast track process. Although many hearings are streamlined at the hearing stage through Agreed Statements of Fact (ASF), this occurs after the completion of the full investigation (Investigation Report, Authorization Memorandum, witness statements, disclosure completed). In the absence of an ASF, Discipline Counsel must prepare for a fully contested hearing. Moreover, the experience of staff with lawyer complaints is that in cases where a lawyer considers admitting to wrongdoing to complete the matter quickly at the investigation stage, the lawyer's willingness to cooperate is significantly diminished by the time the lawyer reaches discipline. By that point, the lawyer has invested time and resources in the process and is often inclined to resist full engagement in the process.

<sup>3</sup> To elaborate:

Mortgage fraud. The evidence used in a mortgage fraud case is largely documentary. In this type of case, the Society can often be certain that the lawyer's admissions are supported by the evidence, and can assess the appropriate penalty to be proposed to the lawyer and his or her counsel. Given the size of mortgage fraud investigation files, the time saved by not having to prepare the file for disclosure and for hearing, not having to prepare witnesses and forgoing the hearing, are significant.

9. Since the public interest is paramount in the Law Society's regulatory processes, cases of a serious nature and that present a novel issue that should be fully tried at a hearing will not be appropriate for the process. Further, a case will not be appropriate for the process if there is a concern that sufficient facts cannot be included in the record of the hearing resulting from the Conference to satisfy the Law Society's obligation to have a transparent and fair process.
10. There will also be other cases where the public interest requires that there be a full hearing on the merits. The Proceedings Authorization Committee (PAC), which will be involved in approving a case for the process, as described below, will have the opportunity to apply these criteria when reviewing cases that may be suitable for a Conference.

### **Overview of the Process**

11. Lawyers and paralegals would be notified of the availability of the Conference at the start of an investigation. A decision to move a matter to a Conference would be made only after an investigation sufficient to ensure that the regulatory issues are known and complete. The process would be available only where no disciplinary proceedings have been authorized in the case.

---

**Financial transactions.** The evidence used in cases of financial misconduct is often supported by documents. Where documentary evidence is lacking, for example, where a lawyer or paralegal's books and records are not up to date, the lawyer's or paralegal's admissions would assist the Society in completing its investigation and would save the time and resources required for a contested hearing.

**Fail to serve.** Where a lawyer or paralegal fails to serve his or her clients, evidence is obtained from the client file, court documents and from the lawyer or paralegal and clients. Where the lawyer or paralegal does not admit to the allegations, they can take a significant amount of time to prove. If a lawyer or paralegal is willing to admit to a failure to serve his or her clients, consideration should be given to the appropriateness of the consent process.

**Professionalism.** Where allegations of incivility or misleading the court arise out of proceedings, the factual issue of what the lawyer or paralegal said or did may not be in dispute and is often supported by transcripts or documents. However, the lawyer or paralegal often raises a defence justifying his or her conduct, for example, on the basis of the actions of the opposing party or the adjudicator. Investigating and prosecuting these cases is very time-consuming. If a lawyer or paralegal is willing to agree to a discipline outcome and penalty, consideration should be given to the appropriateness of the consent process and the fact that it will result in a public order and record of this conduct.

12. Cases dealt with through the Conference process would result in a Hearing Panel Order or would be returned to the Society for further investigation.
13. If the parties agree on the facts and penalty, after authorization by the PAC, the agreement would be considered at the Conference (a meeting of a three-person panel similar to a pre-hearing conference). If the agreement is approved, the Notice of Application in the matter would be issued and served. The Conference panel would then convene as the Hearing Panel and order the agreed-upon result. Some matters may be heard by a single member of the Hearing Panel, selected from the three panel members who convened for the Conference.
14. If the Conference panel rejects the agreement, the Law Society would resume its investigation.

#### **Pilot Project**

15. As this is a new process, the Committees are proposing a pilot project. The pilot project would provide for a two year review on the anniversary of the approval of the policy by Convocation, at which time it could be continued, amended or ended.

#### **Details of the Conference Process**

16. The following is a narrative description of the steps in the proposed Conference. A diagram following paragraph 36 illustrates the process.

##### Step 1 - Initiating the Conference

17. Either the lawyer/paralegal or the Law Society may initiate discussion about the Conference. The Director, Professional Regulation must approve a case in order for it to be diverted to this process. The Director will only approve a case where, in the Director's opinion, diversion would fulfill the Law Society's duty to act in a timely, open and efficient manner and its duty to protect the public interest.
18. In addition to the general test set out in paragraph 17 above, before approving a case, the Director must ensure that the following criteria are met:

- a. The public interest can be addressed through a consent order. Cases will not be included in the process if they present novel issues, or issues which, for reasons of regulatory effectiveness or transparency, require a full hearing.
  - b. There is sufficient Law Society jurisprudence on the issue of conduct and penalty for the Society to be able to agree to the process (the jurisprudence forms the basis for the Society's agreement to a penalty or range of penalties on the basis of the applicable law and facts);
  - c. Discipline proceedings have not yet been authorized in the matter;
  - d. The lawyer or paralegal is prepared to admit to the allegations made by the Society;
  - e. There is no issue of failure to cooperate with the Law Society; for example, the lawyer or paralegal is responding promptly to the Law Society;
  - f. The lawyer or paralegal agrees to abide by the timeline of 30 days to arrive at an agreement;
  - g. The Law Society has no concerns about the lawyer's or paralegal's capacity to engage in negotiations;
  - h. The lawyer or paralegal understands that the result of the Conference will be a public hearing, although it will be abbreviated, and a public Order;
  - i. The lawyer or paralegal has legal representation, failing which the lawyer or paralegal affirms that he or she has been advised to obtain independent legal advice about his or her rights in the Conference process.
19. The Law Society has the right to decide that a case is not suitable for the Conference where any of the factors listed in paragraphs 17 and 18 above would make it unsuitable or where the Law Society is not satisfied that there has been sufficient investigation to make a determination on the suitability of the process.
20. Other matters may affect the Law Society decision to continue with the process. For example, if new evidence relevant to the subject of the Conference comes to the Law Society's attention, or if allegations of misconduct about the lawyer or paralegal arise after the process has begun, it may not be appropriate for the Law Society to continue

with the resolution of the original matter pending the assessment of the evidence or the outcome of the new investigation.

Step 2 - Diversion into the Conference Process

21. The Law Society and the lawyer or paralegal would negotiate a tentative agreement on admissions and penalty. The Law Society would conduct a fast-track investigation before finalizing the agreement. The Law Society would obtain the lawyer's or paralegal's admissions and such evidence as necessary to satisfy the Law Society that the admissions are accurate and would support a finding of professional misconduct or conduct unbecoming.
22. The consent proposal would be prepared by the Law Society and presented to the lawyer or paralegal. The lawyer or paralegal would have 30 days to accept or reject the agreement, or to negotiate changes with the Law Society. The consent proposal would be based on a standard template that includes the lawyer's or paralegal's admissions and the joint penalty proposal, including an explanation of the basis for the penalty recommendation. The template will include the lawyer's or paralegal's declaration that the information provided is complete and accurate.
23. Where there is no agreement on penalty, the parties may still use the process if there is agreement on a finding of professional misconduct and agreement on the range of an appropriate penalty. In that case, the parties would provide their position on the range of penalty and this will be included in the documentation filed for the Conference.
24. With agreement as described above, the case will proceed to hearing based on the penalty or the range of penalty submitted.
25. If one of the parties is unable to agree to the outcome, the consent process would terminate and the matter would be returned to the Investigation department. The documents prepared in support of the Conference would be excluded from any further proceedings.

Step 3 - Submission of the Consent Proposal to the PAC

26. Upon approval of the agreement by the Director, Professional Regulation, the consent proposal would be presented to the PAC for authorization of a conduct proceeding and authorization to proceed with the Conference.
27. As with all conduct proceedings, pursuant to By-Law 11<sup>4</sup>, section 51(2)), the PAC must be satisfied that there are reasonable grounds for believing that the lawyer or paralegal has contravened section 33 of the *Law Society Act*.
28. If the PAC approves the agreement, the matter would be submitted to a three-person Conference panel for consideration. The Notice of Application would not be issued at this stage.
29. If the PAC is not satisfied to the requisite standard that discipline proceedings are warranted, the consent agreement would fail and the matter would be returned to the Investigation department to proceed in the normal course.

Step 4 - Presentation to a Conference Panel

30. The proposal would be presented at the Conference for approval. The submission would include a draft Notice of Application, a draft Order and the consents from the lawyer or paralegal and the Law Society that if the individuals who convene as the Conference panel accept the proposal, they may subsequently convene as the Hearing Panel to determine the matter. The Hearing Panel would not meet until after the Notice of Application is issued and served.
31. Consistent with the current Convocation policy on joint submissions (attached as **Appendix 1**), the members of the Conference panel should accept the consent proposal unless the panel concludes that the joint submission on penalty is outside the reasonable range, in the circumstances.

---

<sup>4</sup> Regulation of Conduct, Capacity and Professional Competence.

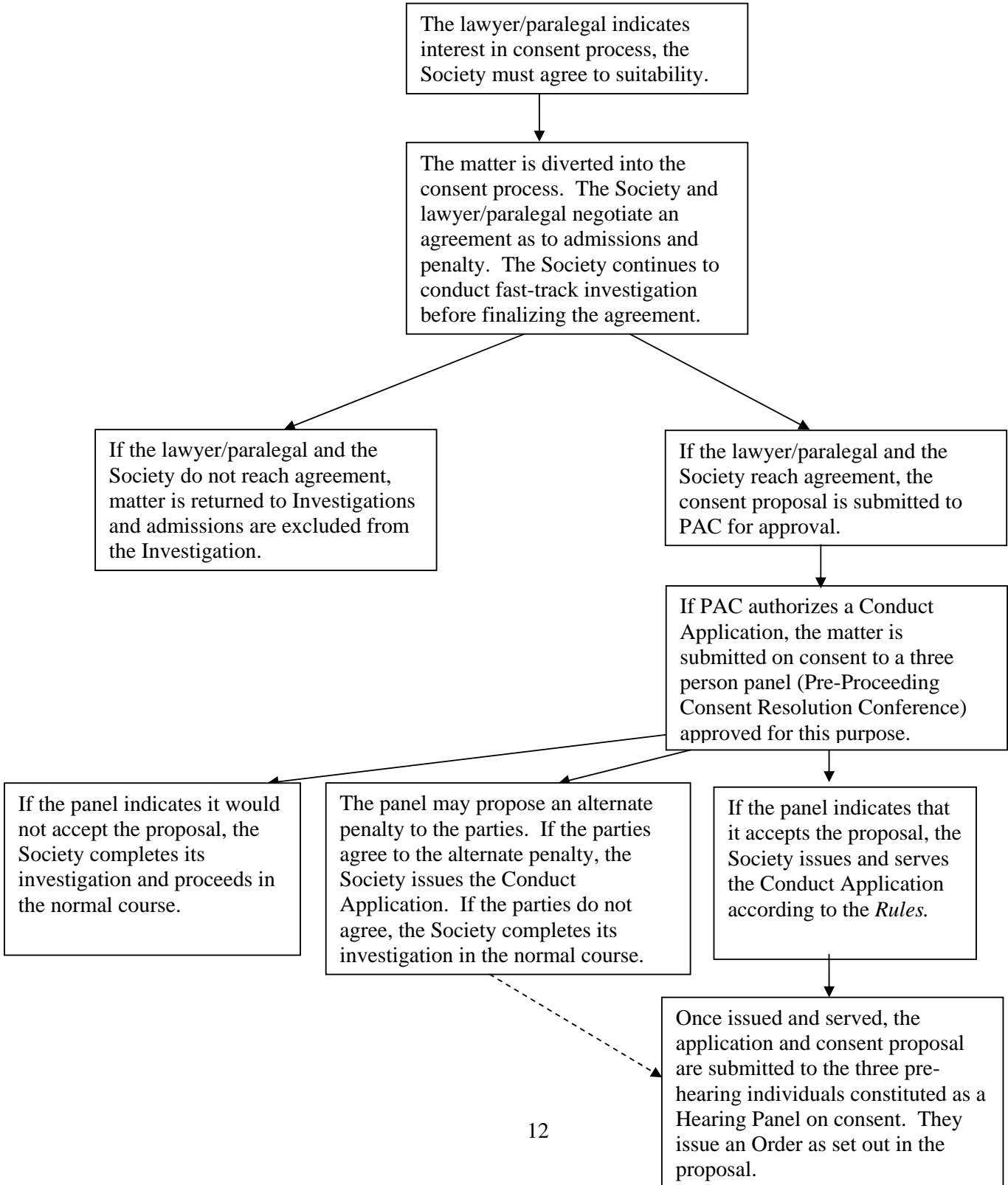


32. Where the Conference panel does not accept the joint submission, the panel may reject the consent proposal, or may give its views to the parties about the case, including penalty. The parties may agree to adopt the Conference panel's views about the case and the penalty the panel proposes. The decision resulting from the Conference is by consent only. If the panel or either party disagrees, the proposal would fail. No costs are to be awarded to either party in a subsequent proceeding for failure to accept an alternate proposal by the Conference panel.
33. If the Conference panel does not approve the proposal, the Law Society would complete its investigation and proceed through the process in the normal manner. The draft agreement and Order are not admissible for the purpose of any subsequent investigation and prosecution of the same allegations.

#### Step 5 – The Hearing

34. If the Conference panel approves the proposal, the Law Society would then issue the Notice of Application. Once issued, the Notice would be served according to the *Rules of Practice and Procedure* and would become a public document.
35. A hearing would be held before the individuals who convened as the Conference panel and who now sit as the Hearing Panel for the purpose of making a determination on the consent proposal. Some matters may be heard by a single member of the Hearing Panel, who would be selected from the three persons who convened for the Conference.
36. The proposal, which includes the lawyer's or paralegal's admissions, would be filed as an exhibit at the hearing to become part of the public record. The Hearing Panel would issue an Order in the normal course. Reasons for the Order are an important component of the public nature of this process.

**PROPOSED CONSENT PROCESS**



**Key Elements of the Process**

37. The following highlights some key elements of this consent process.

Transparency

38. If the proposed agreement is approved by the PAC and at the Conference, it will result in public notice, a public hearing and a public Order. From a public perspective, there is no significant difference between the current process in which matters are resolved through an Agreed Statement of Fact (ASF), and the Conference process. The following chart illustrates the similarities and differences between the two processes.

<b>Current Process</b>	<b>Conference Process</b>
Non-public investigation	Non-public investigation
Non-public, off-the-record settlement discussions	Non-public, off-the-record consent resolution discussions
	Non-public drafting of consent agreement
	Non-public agreement on disposition
Non-public consideration by PAC	Non-public consideration by PAC
<b>Public</b> Notice of Application	Non-public settlement conf.
Non-public Pre-Hearing Conf.	<b>Public</b> Notice of Application
Non-public drafting of ASF	
Non-public agreement on disposition	
<b>Public</b> hearing; revelation of ASF and joint submission on disposition	<b>Public</b> hearing; revelation of consent agreement and joint submission on disposition

39. As illustrated above, the Notice of Application is issued and served following the approval at the Conference, and this is necessary for the following reason. If the Conference panel were to reject an agreement, the proposal would fail, and the Society would complete its investigation. If the Notice was public at that time and the Conference panel rejected the proposal, it would be unfair to the licensee and difficult for the Society to complete its confidential investigation.

40. Once the Notice of Application is issued and served, it becomes public. As with all investigations, new complaints are sometimes received as a result of this public notice. If a new complaint was received after the issuance of the Notice of Application that results from the Conference, that complaint would be investigated separately from the complaint that is the subject of the consent proposal, as is done in the regular discipline stream.

#### Penalties and Mitigation

41. The agreed penalty in the consent proposal must be proportionate. It should reflect penalties imposed in cases with comparable findings, taking into account the costs saved by making the early admission. All penalties would be available in this process, including revocation.
42. There may be a range of possible penalties. A number of factors informing penalty are described in *Law Society of Upper Canada v. Ricardo Max Aguirre*, 2007 ONLSHP 0046 and these are all relevant to the consent process as well. The following factors inform the appropriate penalty to be proposed, with those most relevant to the consent process emphasized:
- a. The existence or absence of a prior disciplinary record;
  - b. *The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others;*
  - c. Whether the member has since complied with his or her obligations by responding to or otherwise co-operating with the Society;
  - d. The extent and duration of the misconduct;
  - e. The potential impact of the member's misconduct upon others;
  - f. *Whether the member has admitted misconduct, and obviated the necessity of its proof;*
  - g. Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct);
  - h. Whether the misconduct is out-of-character, or, conversely, likely to recur.

Three-Member Conference Panel and Hearing Panel

43. The proposed process provides that the same individuals would convene for the Conference and the Hearing Panel, by consent of the parties.
44. This feature of the proposed process resembles the process that may be followed when agreement is reached on facts and issues at a pre-hearing conference before a single panelist and, with the consent of the parties, the single panelist presides at the hearing on the merits. Rule 22.10 (2) of the *Rules of Practice and Procedure* provides that a single panel member may hear a case, on consent of the parties. This is an alternative dispute resolution process which, with adequate protections, is useful for the parties and the tribunal. In the proposed Conference process, rather than a single individual convening for the pre-proceeding Conference, three individuals would convene as the Conference panel.
45. There are two reasons for having a three-person panel at the Conference. First, the agreement of a three-person panel on the outcome between the Society and a lawyer or paralegal would have greater weight. Secondly, if only one member of a three-person panel were to preside at the Conference, the Hearing Panel might reject the agreement that the Conference panel had accepted.
46. At the hearing stage that follows the Conference, in some cases, it may be appropriate for a single member of the Hearing Panel to preside at the hearing. This person would be selected from the three persons who convened as the Conference panel, as he or she would be familiar with the facts and the issues that led to the consent agreement. Similar to the process described in paragraph 44, this person would sit as a single member with the consent of the parties.<sup>5</sup>

---

<sup>5</sup> Ontario Regulation 167/07 (Hearings Before the Hearing and Appeal Panels) provides as follows:

**Proceedings to be heard by one member**

2. (1) Subject to subsection (2), the chair or, in the absence of the chair, the vice-chair, shall assign either one member or three members of the Hearing Panel to a hearing to determine the merits of any of the following applications:

...

### Legal Representation

47. The process is predicated on the lawyer or paralegal having legal representation. The lawyer's or paralegal's admissions and agreement to the proposal are essential to the success of the consent process. While legal representation is not a prerequisite to participating in the Conference, it would be strongly encouraged by the Society. Lawyers and paralegals who participate in the process would be advised by the Law Society to obtain legal advice.

### Timelines

48. Since the Conference is a diversionary, "without prejudice" process, it is not in the public interest to stall the investigation during protracted negotiations and delay. The Committees propose that the timeline for arriving at an agreement be 30 days from the time that the agreement is presented to the lawyer or paralegal by the Law Society. If agreement is not reached in 30 days, the Law Society would resume its investigation.

### Documents and the Record

49. The documents filed before the Hearing Panel should be public in the normal course, with the notation that it is the result of a consent proposal that would also be public as part of the Tribunal record.

### **Tribunals Office's Administration of the Process**

50. Attached at **Appendix 2** is a proposed template prepared by the Tribunals Office for the administration of the process, with particular emphasis on ensuring the process is open and transparent and in keeping with general Tribunals administration.

### **Amendments to the *Rules of Practice and Procedure***

51. To implement the Conference process, amendments to the *Rules of Practice and Procedure* would be required. They would refer to the process as a "pre-proceeding

---

2. An application under subsection 34 (1) of the Act, if the parties to the application consent, in accordance with the rules of practice and procedure, to the application being heard by one member of the Hearing Panel.

consent resolution conference”, and codify the procedural elements of the process described in this report. Consequential amendments to certain Rules may also be required.

52. Amendments to the Rules will be provided at a future Convocation should Convocation agree to the proposal for the Conference.

**CONVOCATION POLICY ON JOINT SUBMISSIONS  
(Discipline Policy Committee Report to Convocation)**

B.1. Joint Submissions of Counsel

B.1.1. The Committee was asked to consider the manner in which the joint submissions of counsel are currently treated by Discipline Panels, in light of the principles adopted by Convocation on March 27, 1992 in respect of joint submissions.

B.1.2. On March 27, 1992, Convocation adopted the recommendations of this Committee which provided, inter alia,

"5(a) Convocation encourages benchers sitting on discipline committees to accept a joint submission except where the committee concludes that the joint submission is outside a range of penalties that is reasonable in the circumstances.

"5(b) If the Committee, after hearing and considering submissions of counsel, does not accept the joint submission as to a particular penalty or as to the shared submission as to a range of penalties, the Committee will be at liberty to impose the penalty that it deems proper and should give reasons for not accepting the joint submission."

B.1.3. Some members of the Committee expressed concern that these principles are not being followed at the Committee level or at Convocation and that a lack of certainty in the process might discourage counsel from entering into Agreed Statements. The Committee noted that where, following negotiations of an Agreed Statement of Facts on the basis of a joint submission as to penalty, the proposed penalty is rejected, it might be appropriate to provide the Solicitor the option of commencing the hearing anew before another Committee.

B.1.4. Your Committee established a Sub-Committee, chaired by Robert J. Carter, Q.C., to consider the present practice regarding joint submissions at both the Committee level and at Convocation, to consider the consequences of the practice and to report to the Committee with recommendations.

...

ALL OF WHICH is respectfully submitted  
DATED this 24th day of February, 1995  
D. Scott, Chair

THE REPORT WAS ADOPTED



**APPENDIX 2**

**Tribunals Offices' Administration of the Proposed Consent Process**

1. Discipline Counsel will request in writing a date from the Hearings Coordinator, Tribunals Office for the Pre-Proceeding Consent Resolution Conference (“the Conference”), and provide a time estimate.
2. The Hearings Coordinator will schedule the Conference date and secure a three person panel as assigned by the Chair of the Hearing Panel.
3. The composition of the Conference panel will mirror the requirements of *Ontario Regulation 167/07* to allow this panel to convert to a Hearing Panel should the parties’ proposal to the Conference panel be accepted.
4. The Hearings Coordinator will advise Discipline Counsel and the lawyer or paralegal of the assigned Conference date and panel. The parties will immediately advise the Hearings Coordinator of any conflicts with the date or panel.
5. If the parties’ proposal is accepted by the Conference panel, the Hearings Coordinator will attend in person at the Conference to facilitate scheduling a hearing date for the Hearing Panel and parties to convene at a future date.
6. If the matter is to be heard by a single member of the Hearing Panel, the members of the Conference panel shall elect one member to preside on the hearing date as a Hearing Panel and will so notify the Hearings Coordinator.
7. The matter will now follow the same protocol applied by the Tribunals Office as in other hearings.
8. In accordance with Rule 9 of the *Rules of Practice and Procedure*, Discipline Counsel will request the Tribunals Office to issue and file the notice of application and will serve it.
9. Once filed, the notice of application will be publicly available.

10. The notice of application will refer to the hearing date scheduled in paragraph 5 above. The matter will by-pass the Proceedings Management Conference (PMC) and go straight to a hearing date.
11. To satisfy transparency requirements, two to four weeks prior to the hearing date, the Tribunals Office will prepare a summary of the notice of application for publication on the Law Society's "Current Hearings" website.
12. During the hearing, the accepted proposal referred to in paragraph 5 above will be marked as an exhibit and thereby form part of the public record. The Hearing Panel will endorse the notice of application to reflect its Decision and Order as set out in the accepted proposal.
13. After the hearing, the Office will
  - prepare any required formal orders from the Hearing Panel's endorsement;
  - deliver the Decision and Order and reasons of the Hearing Panel, if any, to the parties;
  - publish an order summary on the Law Society's "Tribunal Orders and Dispositions" website and in the *Ontario Reports*; and
  - publish the Hearing Panel's reasons, if any on the Canadian Legal Information Institute (CanLII) and Quicklaw databases.
14. The matter will then be closed, catalogued and archived off site.
15. After the matter is closed and on request, it would be made available to the public for viewing or copies of content, unless the Hearing Panel had ordered otherwise in the course of the hearing.

## **CONFLICTS OF INTEREST STANDARD FOR COUNSEL IN PRO BONO LAW ONTARIO'S "BRIEF SERVICES" PROGRAMS**

### **Motion**

**53. That Convocation approve**

- (a) the policy for a new rule in the *Rules of Professional Conduct* that modifies the standard for conflicts of interest for lawyers participating in Pro Bono Law Ontario's court-based brief services programs by permitting a lawyer to provide brief services to a person within such programs unless the lawyer knows of a conflict of interest that would prevent him or her from acting, and**
- (b) the draft of the new rule for review by the Law Society's Rules drafter.**

### **Introduction**

54. Pro Bono Law Ontario (PBLO) has been discussing with the Law Society the challenges PBLO faces in providing brief services to clients through its court-based programs. Many of the lawyers who volunteer for this work are younger lawyers from large law firms that represent large institutional and corporate clients.
55. A major issue affecting the ability of these lawyers to provide the services is the current conflicts of interest regime and the requirements in the *Rules of Professional Conduct*. The Rules require that a lawyer not act where there is or likely to be a conflict of interest. This means that a lawyer cannot represent a plaintiff or defendant where the lawyer's firm acts for or represents the other party in other matters, as this would breach the lawyer's duty of loyalty to that client.
56. To determine if a conflict exists, the lawyers assisting PBLO must have their firms do extensive conflicts searches before agreeing to provide the brief services. This can be very time-consuming, to the point where clients are being denied services because the conflicts checks are pending. PBLO has advised that this affects its ability to provide

access to justice to those for those who access PBLO's programs, and can defeat the purpose of the programs for those most in need.

57. PBLO has requested that the Law Society consider a modification of the conflicts standard for lawyers engaged in these brief services. Two other Canadian law societies have recently adopted rules to this effect.
58. The Committee considered the matter and is proposing that Convocation agree that lawyers performing brief services through PBLO programs may act for a client unless they *know* a conflict exists that would prevent them from acting.
59. If Convocation approves the proposal, the Committee will prepare a draft rule, with the assistance of the Law Society's Rules drafter, Don Revell, to provide the necessary guidance.

#### **Background on PBLO's Law Help Ontario Programs**

60. PBLO operates programs under the banner of Law Help Ontario that assist those who cannot afford to pay for legal services (see **Appendix 3**, which also includes information on other PBLO initiatives).
61. The **Small Claims Duty Counsel Project**, launched in June 2006, provides brief services including legal merit assessments, form-completion assistance and duty counsel to low-income unrepresented litigants appearing before Small Claims Court in Toronto.
62. In late 2007, the **Law Help Centre at the Superior Court of Ontario**, a self-help centre in Toronto, was opened as a two-year pilot project, developed in partnership with the Ministry of the Attorney General and The Advocates' Society. Low-income unrepresented litigants with civil matters for which a legal aid certificate is not available can access basic procedural information, form completion assistance, summary advice and duty counsel services.<sup>6</sup>

---

<sup>6</sup> Information from PBLO in 2007 was that there were more than 15,000 cases brought before the Court in 2006, many of which were brought by a growing number of unrepresented litigants.

63. Individuals must meet financial eligibility requirements to qualify for assistance, and corporations and businesses do not qualify. The Centre does not assist with family law matters, criminal cases, human rights, or other similar cases.
64. The application form to be completed by those seeking these services, attached at **Appendix 4**, offers information on the program, including the following:
- a. the volunteer lawyers will not become their lawyer; the scope of legal services provided is limited to brief services, and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer; and
  - b. the matter must clear a conflicts check, and that if a conflict arises, this means that a lawyer (or law firm) cannot represent the person if the opposing parties are the firm's client.<sup>7</sup>
65. Lawyers who volunteer for these programs must submit an application form to PBLO that requests a variety of information about their qualifications, practice and interests. They must also adhere to the Volunteer Guidelines.<sup>8</sup>

---

<sup>7</sup> Information on PBLO's website about conflicts for Small Claims Court assistance is as follows:

In the legal profession, a lawyer (or law firm) cannot represent you if the opposing parties are also their client. This is commonly referred to as a "conflict of interest." When you apply for assistance, we will confirm that the opposing parties are not being represented by the volunteer lawyer or their law firm. If a conflict of interest exists, regrettably, we will not be able to represent you in court nor offer summary legal advice.

<sup>8</sup> *Volunteer Guidelines*

Pro Bono Law Ontario greatly appreciates the participation of pro bono volunteers. As a volunteer, you agree to adhere to the following guidelines:

1. Abide by the [\*Rules of Professional Conduct\*](#).
2. Treat pro bono clients with the same level of professionalism as paying clients.
3. Stay in touch with the pro bono project coordinator who referred the case to you. The project coordinator will contact you periodically to see how the matter is progressing and to see if you require any additional support such as training and mentoring, access to resources, or will provide a referral list of social service agencies that can assist your client.
4. If you find that you are unable to devote sufficient attention to the pro bono matter assigned to you, contact the project coordinator immediately.

66. These PBLO projects are established pursuant to PBLO's Best Practices Manual for Pro Bono Programs. The Manual includes a number of requisites for the programs covering such things as communication to volunteers about their professional and ethical duties, policies and procedures to identify and address conflicts of interest (it is the *pro bono* lawyer's responsibility to ensure that conflicts of interest do not exist or arise when the lawyer decides to take on a case) and appropriate intake and co-ordination systems.
67. Law Help Ontario has developed its own guidance to lawyers within the current regulatory framework. The following excerpt from the Law Help's 2008 pilot project report, discussed later in this report, explains:

**Scope of Service: Providing Limited Scope Assistance**

Law Help has been developing procedures and best practices regarding the provision of limited scope assistance. An advice module for volunteer lawyers has been developed to address best practices regarding a lawyer's ethical and professional obligations in a court based context where providing limited services, such as appearing on a motion. This advice module (and others) will be posted on the Law Help website as an on-line resource for its volunteers.

Limited retainer forms are in use that recognize the various types of limited scope assistance that may be offered, including single day assistance, multiple day assistance (both under the auspices of Law Help) and a private limited scope retainer between the firm and litigant.

Law Help encourages volunteer lawyers to use these written retainers in circumstances where they are providing services to litigants beyond the standard 30 minutes information and advice session. For example, where they may be drafting (or "ghostwriting") documents or appearing before Superior Court on a motion. In addition, a form is in use that the volunteer

- 
5. Keep track of the amount of time you work on the matter and, when the matter is completed, please let us know what your total commitment was.
6. Inform the project coordinator when the matter is complete.
7. Complete and return surveys or evaluation forms (usually just a few quick questions) to the project coordinator. Your feedback is an important means of improving the quality of our pro bono projects, and can even help PBLO tell the story of the good work being done by lawyers in Ontario.
8. If any problems or questions arise in the course of representing your client, contact the project coordinator immediately.

lawyer may provide to opposing counsel, court staff, and the presiding justice to notify them of the limited role of the Law Help duty counsel service.

**The Manner in Which the Conflicts Issues Arise and PBLO's Efforts to Address the Issue**

68. As noted earlier, PBLO has advised that the current regulatory framework with respect to conflicts of interest has created "barriers" to lawyers' participation in these brief services projects. PBLO explained that these barriers place significant administrative burdens on PBLO's operation of these projects. The concern is that this will threaten their sustainability when serving a high volume of clients, especially in Superior Court.

The Rules in Question

69. The regulatory framework in question includes the *Rules of Professional Conduct* on conflicts of interest:

2.04 (1) In this rule,

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

(a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

(b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

**Avoidance of Conflicts of Interest**

2.04 (2) A lawyer shall not advise or represent more than one side of a dispute.

2.04 (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

70. The Committee learned that approximately 30% of Law Society complaints concern an issue that touches on conflict. The Rules do not specify the types of conflicts checks required or how extensive they need to be to find a conflict. But in response to a complaint, the Law Society would be looking for evidence that the lawyer had an appropriate process in place, and made reasonable efforts in the circumstances to

determine if a conflict exists. Further, the Society would be concerned that once a conflict is identified, the lawyer responded appropriately.

71. From the Law Society's viewpoint, any amendment to the *Rules of Professional Conduct* would have to be consistent with the common law, including recently decided cases concerning loyalty and confidentiality of client information.

#### How PBLO Has Defined the Issue

72. David Scott, Chair of PBLO, wrote to Treasurer Gavin MacKenzie in 2007, just prior to the launch of the Superior Court Law Help Centre, and explained the issue respecting conflicts in PBLO's court-based programs as follows:

One of the Rules of particular interest in a context such as the Law Help Centre is conflicts of interest. PBLO has learned from its other duty counsel projects (for example, the Small Claims Duty Counsel Project) that doing full conflicts screening where pro bono advice is being offered can be extremely challenging given the time-lines, volume and logistics of these settings.

On the one hand, our law firm partners have indicated that the volume of conflict searching required in these settings is administratively burdensome. It should be noted that to date these firms have been large firms with sufficient administrative resources to undertake the additional conflict searches. Mid-size and smaller firms participating in the Law Help Centre will find these requirements even more challenging.

On the other hand, walk-in applicants for our services have had to wait up to three hours to find out whether they can speak with a volunteer lawyer or not, many of them running out of time to obtain services. In fact, PBLO found in the course of administering its Small Claims Duty Counsel Project that 80% of all applicants who were refused services, were denied for conflict of interest reasons.

In other words, the conflict of interest regime, as the firms understand the existing LSUC requirements, has created a real barrier to pro bono participation and has diminished PBLO's ability to improve access to justice for unrepresented litigants and improve the administration of justice for judges, court staff and the legal profession.

73. In 2007, PBLO's proposal was to have the Law Help Centre adopt the following policy:



A lawyer who, under the auspices of PBLO's Law Help Centre, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided is subject to the conflict of interest provisions within Rule 2 of the Rules of Professional Conduct only where the lawyer knows that the representation of the client involves a conflict of interest within the meaning of Rule 2.

74. In March 2008, the Law Society received information about the experience of the Law Help Centre with conflicts of interest. The information was that pro bono counsel were turning away a considerable number of clients on the basis of conflicts of interest.
75. More recent information was received from PBLO this fall, at the request of the Law Society. PBLO confirmed the information disclosed in Mr. Scott's letter:
- a. The amount of time it takes to clear conflicts creates long delays for litigants trying to access legal assistance. Depending on the law firm and conflict checking process, litigants can expect to wait anywhere from 20 minutes to three hours before they can speak with a pro bono lawyer. This issue is compounded by the number of litigants who try to use the centre. Between January and September 30, 2009, the Law Help Centre had over 5800 visitors, nearly all of whom had to wait for a conflicts check to clear before they could receive assistance. The delays multiply and force the centre to turn people away. No available lawyers and running out of time in a day remain the main reasons that people are denied service at Law Help Ontario.
  - b. Conflict checking impedes law firm participation, especially now that the demand from the public is so high. In the past three months, the PBLO has been informed on at least three separate occasions that law firms were cancelling their pro bono appearances because their conflicts departments were being overwhelmed by the volume of names they had to run.<sup>9</sup>

---

<sup>9</sup> In November, 2009, the Law Society received information from PBLO that a lawyer at one firm was unable to continue with duty counsel sessions. The lawyer explained that the conflicts check system at the firm did not allow for quick checks, which caused substantial delays and hindered the volunteer process at the lawyer's last session.

76. Law Help Ontario's one year report (2008) includes a discussion of how PBLO has attempted to manage the conflicts issue to date:

Conflicts of interest continue to present a problem for servicing litigants. However, important strides in identifying the scope of the challenge and developing important institutional support to rectify the issues have occurred. The main problem is that litigants are turned away when a conflict exists or must wait--sometimes up to 3 hours--for conflicts to clear. In addition, some law firms are also reluctant to assist clients if they think the matter may pose a future business conflict. A common problem occurs where large companies or institutions (banks, financial companies, insurance companies, the city, police, etc.) are involved. Most of the larger law firms--the source of the majority of PBLO's volunteers--are conflicted when the lawyer checks with their firm. At least one firm has reported that approximately 80% of such conflicts are affiliated with financial institutions.

The conflicts issue is compounded as the popularity of the projects grows. Law Help now attracts litigants from communities outside of the Toronto area. It is frustrating for litigants who have traveled great distances if they have to wait for half a day, or if they can't be served at all. Where a conflict of interest exists, Law Help staff often give out the Law Help phone number to the litigant so they can call ahead to have conflict checks cleared if they choose to return on another day. This is helpful to the litigant; however, it interrupts front line staff providing direct assistance. It can also be frustrating when the litigant has a question that is procedural (such as a question regarding service of documents), because they still have to clear conflict checks in order to speak to a lawyer.

Law Help tracked the actual number of conflicts for a four month period from March 1 to June 30, 2008. There were 184 conflicts of interest where litigants could not be seen and either had to return, or were not serviced at all. This averages out to 2.3 conflicts per day or 25% of all applicants for assistance during this period.

Recent developments have helped increase access to some extent. In order to decrease the wait time for clients, many participating firms have developed an expedited search process for Law Help. If the name matches a name in their database, the firm deems it to be a conflict. They eliminate the much lengthier checking process.<sup>10</sup>

---

<sup>10</sup> One volunteer lawyer advised the Managing Lawyer at Law Help that their standard firm conflict check could, in some cases, take a couple of days to obtain a result.

Moreover, there is growing institutional concern about the fact that the current commercial, professional and ethical obligations around conflicts have created a barrier to justice for the neediest litigants. PBLO has struck a working group to determine whether a more satisfactory conflicts process can be identified for the provision of brief, pro bono legal services in court-based context. This has resulted in a major bank (RBC) advising its clients that lawyers from law firms that have represented RBC in the past or at present may participate in Pro Bono Law Ontario's court-based pro bono projects--notwithstanding this potential conflict--where a lawyer provides short term, limited legal services to a client in circumstances where neither the lawyer nor the client expects that the lawyer will provide continuing representation in the matter.

77. Lynn Burns, PBLO's executive director, confirmed that a very high percentage of the conflicts arose with large institutional clients, primarily financial institutions, and that not all conflicts are actual conflicts. Many law firms will not assist litigants if there is a business conflict. PBLO has tried to address this by working with some of the major financial institutions to consent to conflicts in the context of court-based pro bono services.
78. In late 2008, Ms. Burns confirmed that the correspondence from RBC was sent to at least 12 law firms advising that it was prepared to waive conflicts on the limited basis described above. She advised that this is the start of what she hopes will be a common decision among all of the major financial institutions.

#### **Other Legal Regulators**

79. PBLO provided information to the Law Society about developments in the United States and Canada.
80. In the United States, a number of the courts and state bar associations have adopted rules to enhance access to justice for the unrepresented and to facilitate pro bono participation in brief services projects, especially those run through an organized assistance program. The common elements of these initiatives are:
  - a. developing comprehensive plans to address the needs of unrepresented litigants, including revising judicial ethics and court procedures;

- b. informed consent on the client’s part regarding the use of limited representation
  - c. use of retainers to limit representation up front;
  - d. adoption of special conflict-of-interest rules in high-volume, public service programs that adhere to best practices.
81. One example is the rules adopted by the Washington State Bar Association (and by the Court, in accordance with the usual practice in many states for lawyer regulation) applicable to this type of representation, which state that a lawyer who is aware of a conflict may not act in providing brief services to a person.
82. Two law societies in Canada have recently amended their rules of conduct to provide a more relaxed standard for conflicts within the narrow scope of brief services retainers. Some of the elements of the Washington rules appear in these new rules.
83. The Law Society of British Columbia adopted a report on the unbundling of legal services<sup>11</sup>, which included Recommendation 15 dealing with pro bono services through court-annexed and non-profit legal clinics or programs (see **Appendix 5** for the text of the Recommendation and discussion). This led to the adoption of the following conflict rules (in Chapter 6) in January 2009:

### **Limited representation**

**7.01** In Rules 7.01 to 7.04, “**limited legal services**” means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a not-for-profit organization with the expectation by the

---

<sup>11</sup> Report of the Unbundling of Legal Services Task Force – Limited Retainers: Professionalism and Practice, April 4, 2008, Law Society of British Columbia. This report was provided to the Committee for information in October 2008, with the following note:

The issue identified in paragraph 9d. above has been the subject of discussion between Law Society staff (through the CEO’s office) and Pro Bono Law Ontario (PBLO), primarily from the perspective of conflicts of interest and the services that pro bono counsel in large firms provide through PBLO’s programs (this issue is addressed in Recommendation 15 of the BC report). These discussions are ongoing and may result in consideration by the Committee at a future date of changes or enhancements to the *Rules of Professional Conduct*.

lawyer and the client that the lawyer will not provide continuing representation in the matter.

[added 01/09]

**7.02** A lawyer must not provide limited legal services if the lawyer is aware of a conflict of interest and must cease providing limited legal services if at any time the lawyer becomes aware of a conflict of interest.

[added 01/09]

**7.03** A lawyer may provide limited legal services notwithstanding that another lawyer has provided limited legal services under the auspices of the same not-for-profit organization to a client adverse in interest to the lawyer's client, provided no confidential information about a client is available to another client from the not-for-profit organization.

[added 01/09]

**7.04** If a lawyer keeps information obtained as a result of providing limited legal services confidential from the lawyer's partners and associates, the information is not imputed to the partners or associates, and a partner or associate of the lawyer may

(a) continue to act for another client adverse in interest to the client who is obtaining or has obtained limited legal services, and

(b) act in future for another client adverse in interest to the client who is obtaining or has obtained limited legal services.

[added 01/09]

84. In June 2009, the Law Society of Alberta amended its conflicts rules (in Chapter 6) to add the following on the provision of short-term legal services provided by non-profit legal service providers:

5.1. (a) A lawyer engaged in the provision of short-term legal services through a non-profit legal services provider, without any expectation that the lawyer will provide continuing representation in the matter:

(i) May provide legal services, unless the lawyer is aware that the clients' interests are directly adverse to the immediate interests of another current client of the individual lawyer, the lawyer's firm or the non-profit legal services provider; and

(ii) May provide legal services, unless the lawyer is aware that the lawyer or the lawyer's firm may be disqualified from acting due to the possession of confidential information which could be used to the disadvantage of a current or former client of the lawyer, the lawyer's firm, or the non-profit legal services provider.

(b) In the event a lawyer provides short-term legal services through a non-profit legal services provider, other lawyers within the lawyer's firm or providing services through the non-profit legal services provider may undertake or continue the representation of other clients with interests adverse to the client being represented for a short-term or limited purpose, provided that adequate screening measures are taken to prevent disclosure or involvement by the lawyer providing short-term legal services.

*Jun2009*

*Commentary*

C.5.1 As noted in Commentary G.1, "firm" and "firm member" are defined broadly for the purposes of this Code and, in particular, this chapter (see *Interpretation*).

For the purposes of this Rule, the term "non-profit legal services provider" means volunteer pro bono and non-profit legal services organizations, including Legal Aid Alberta. These non-profit legal services providers have established programs through which lawyers provide short-term legal services. "Short-term legal services" means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a non-profit organization with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter. It is in the interests of the public, the legal profession and the judicial system that lawyers are available to individuals through these organizations. While a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs or services are normally offered in circumstances which make it difficult to systematically screen for conflicts of interest, despite the best efforts and existing practices of non-profit legal services organizations. Further, the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the consulting lawyer's firm. Accordingly, Rule #5.1 requires compliance with the usual rules which govern conflicts of interest only if the consulting lawyer has actual knowledge that he or she is disqualified as the result of a relationship between an existing or former client and the consulting lawyer, the lawyer's firm or the non-profit legal services provider. In most cases, it is expected that the existence of a potential conflict will be identified through the conflict screening processes employed by non-profit legal services organizations or by the individual lawyer who may identify a

conflict before or at the time of meeting with the client receiving the short-term legal services.

The personal disqualification of a lawyer providing legal services through a non-profit legal services provider will not be imputed to other participating lawyers. If, however, the lawyer intends to represent the client on an ongoing basis after commencing the short-term limited retainer, the other Rules in this Chapter will apply.

The confidentiality of information obtained by a lawyer providing short-term legal services pursuant to this Rule must be maintained. If not, a lawyer's partners and associates in his or her firm, or other lawyers providing services under the auspices of the non-profit legal services provider, will not be able to act for other clients where there is a conflict with the client who has obtained, or is obtaining, short-term legal services. Without restricting the scope of screening measures which may appropriately be undertaken in a particular set of circumstances, the following are some examples of proper measures which may be taken to ensure confidentiality. The lawyer who provided the short-term legal services shall have no involvement in the representation of another client whose interests conflict with those of the client who received short-term legal services from the lawyer, and shall not have any discussions with the lawyers representing the other client. Discussions involving the relevant matter should take place only with the limited group of firm members working on the other client's matter. The relevant files may be specifically identified and physically segregated and access to them limited only to those working on the file or who require access for specifically identified or approved reasons. It would also be advisable to issue a written policy to all lawyers and support staff, explaining the screening measures which have been undertaken.

No consent is required from either the client who received short-term legal services, or the client whose interests may conflict with the client receiving short-term legal services, to allow a lawyer, the lawyer's firm or a non-profit legal services provider to act for any client whose interests conflict with those of the client who has received short-term legal services, provided there has been compliance with Chapter 6, Rule 5.1(b). Rule 5.1(a) does not contemplate that a conflict, of which a lawyer is or becomes aware when engaged in the provision of short-term legal services through a non-profit legal services provider, may be waived by consent.

When offering short-term limited legal services, lawyers should also assess whether the client may require additional legal services, beyond a limited consultation. In the event that such additional services are required or advisable, the lawyer should explain the limited nature of the consultation and encourage the client to seek further legal assistance.

*Jun2009*

### **The Committee's Assessment and Proposal**

85. PBLO's view is that in order to make limited representation projects successful in Ontario, a comprehensive plan to support unrepresented litigants and make sure that the regulatory and ethical framework of the legal profession supports this plan should be developed.
86. In considering the merits of PBLO's request, the Committee believes that an appropriate balance must be struck between the public interest in helping to facilitate representation for litigants and the risks occasioned by a modified standard on for conflicts of interest. The risks include the risk to the volunteer firm's client and the risk that the pro bono client may lose his or her lawyer in the middle of a matter, something that should be fully explained to the clients in the context of such limited retainers.
87. The issue is whether it would be appropriate to change the conflicts standard for lawyers in this setting, narrowly construed to apply to brief services for PBLO's court-based programs. As noted above, two law societies have changed their rules in this way. The Committee also noted that from the perspective of clients of the large law firms, whose counsel provide pro bono services, one large institutional client has confirmed that, notwithstanding a potential conflict, lawyers in the firms that act for the client may participate in PBLO's court-based pro-bono programs.
88. The Committee believes that while the ethical rules should not impede the provision of services, the reduced due diligence standard must be justifiable. In that respect, where mechanisms are in place to ensure a high quality of legal services are provided and the legal services provided are of limited scope and brief duration, a different conflicts screening standard - where lawyers and firms would not need to screen for conflicts before participating in the limited legal services provided by the Law Help Centre – would be acceptable.
89. The Committee agreed that the Law Society should take an approach similar to that taken by the Law Society of Alberta and the Law Society of British Columbia. The committee proposes that Convocation adopt a conflict of interest standard applicable to PBLO brief



services that would permit a lawyer to act in such cases unless the lawyer *knows* of a conflict of interest that would prevent him or her from acting.

Information from LawPRO

90. The views of LawPRO were sought on the Committee's proposal from the risk management perspective.
91. LAWPRO advised that generally it sees two basic types of conflicts claims: conflicts that occur between multiple current or past clients represented by the same lawyer or firm, and conflicts that arise when a lawyer has a personal interest in the matter.<sup>12</sup> Lawyers practicing real estate and corporate commercial law regularly act for multiple clients and/or entities and experience more conflicts claims than lawyers practicing in other areas of law. Litigators have a lower rate of conflicts claims. From a risk management point of view, LAWPRO encourages firms to have a procedure and system in place for checking conflicts at the earliest possible time.<sup>13</sup>
92. In LAWPRO's view, the proposed rule change will not appreciably increase the risk of conflicts claims arising for lawyers participating in Pro Bono Law Ontario's Law Help Ontario program, provided that the rule change narrowly restricts the ability to forego a conflicts check to lawyers providing brief services or advice to clients under this program, and that lawyers not act if there is a known actual or potential conflict. LAWPRO noted that the Law Help Ontario program does not provide assistance on family law matters, criminal cases, human rights or other similar cases, all areas where there is a higher risk of claims in a short-term limited legal services setting.
93. From a broader risk management and claims prevention perspective, LAWPRO notes that it is important that any lawyers providing services through Law Help Ontario or similar

---

<sup>12</sup> Over the last ten years, conflicts of interest claims ranked fifth by count (1,288 claims) and cost (\$5.9 million) or 6.2% of claims and 9.5% of costs, respectively. Conflicts claims are proportionally more costly to defend and indemnify as they tend to be complex and involve multiple parties.

<sup>13</sup> Ideally, the system should be electronic and include more than just client names. A system that includes individuals and entities related to the client, including corporations and affiliates, officers and directors, partners, trade names, etc. will flag more real and potential conflicts.

programs be competent and have current knowledge of the law for any matters on which they are providing short-term limited legal services.

Amendments to the *Rules of Professional Conduct*

94. If Convocation agrees with the Committee's proposal, amendments to the Law Society's *Rules of Professional Conduct* would be required.
  
95. The Committee has prepared a draft of a new rule, the text of which appears on the following pages. This proposed rule would be added to the rule on conflicts of interest (rule 2.04). The proposed rule includes:
  - a. A definition of the type of legal services to which the modified conflict standard applies;
  - b. A knowledge standard for conflicts of interest;
  - c. A requirement to protect confidential information, and establish required screens within a law office;
  - d. Client management requirements; and
  - e. Commentary that explains the need for the rule and that elaborates on some of the requirements.
  
96. The Committee requests that Convocation approve the proposed rule, with any changes it considers appropriate. This draft will then be referred to Don Revell, the Law Society's Rules drafted, for preparation of a final draft of the rule for adoption by Convocation.

**PROPOSED DRAFT SUBRULE AND COMMENTARY ON CONFLICTS OF INTEREST FOR LAWYERS PROVIDING SHORT TERM LIMITED LEGAL SERVICES THROUGH PBLO**

2.04 (X1) In this subrule, “short-term limited legal services” means *pro bono* summary legal services provided by a lawyer to a client through [OR “under the auspices of”] Pro Bono Law Ontario’s Law Help Ontario program for matters in the Superior Court of Ontario and Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

(X2) A lawyer shall not act for a client in providing short-term limited legal services if the lawyer:

- (a) knows or becomes aware of a conflict of interest between the lawyer’s client and another client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario; or
- (b) has or obtains confidential information relevant to a matter involving a current or former client whose interests are adverse to those of the client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario.

(X3) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a client may act for other clients of the law firm whose interests are adverse to the client receiving short-term limited legal services, provided that adequate and timely measures are in place to ensure that no disclosure of the client’s confidential information is made to the lawyer acting for the other clients.

(X4) Where a lawyer knows or becomes aware of a conflict pursuant to this sub-rule, the lawyer shall not seek the client’s waiver of the conflict.

(X5) In providing short-term limited legal services to a client, the lawyer shall:

- (a) prior to providing the legal services, ensure that the appropriate disclosure of the nature of the legal services has been made to the client;
- (b) determine whether the client may require additional legal services beyond the short-term limited legal services; and
- (c) in the event that such additional services are required or advisable, encourage the client to seek further legal assistance.

**Commentary**

Short-term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best

efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in the subrule are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

This subrule applies in circumstances in which the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for the client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

Confidential information obtained by the lawyer representing the client who is receiving short-term limited legal services will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term limited legal services.

Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Subrule (X3) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include:

- having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the client who is receiving or has received short-term limited legal services;
- identifying relevant files, if any, of the client who is receiving or has received short-term limited legal services and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and
- ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

**APPENDIX 3**

**INFORMATION ON PBLO ADVOCACY PROGRAMS**

Law Help Ontario - Superior Court

Law Help Ontario is a court-based, self-help centre for low-income, unrepresented litigants. It operates the Superior Court walk-in centre at 393 University Avenue. The Superior Court program was launched in November 2007 and joined the existing Small Claims Court program, described later in this report, as the two court-based programs.

Law Help Ontario provides a range of services, including general information on rules and procedures of Superior Court, help in filling out court forms, legal advice (30-minute sessions), legal representation at a trial or motion and referral services.

The public is advised that the volunteer lawyers will not become their lawyer. The scope of legal services provided is limited to brief services, and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer.

Individuals must meet financial eligibility requirements to qualify for assistance, and corporations and businesses do not qualify. The Centre does not assist with family law matters, criminal cases, human rights, or other similar cases.

Individuals are also advised that the matter must clear a conflicts check.

Law Help Ontario - Small Claims Court

This service is similar to that described above and operates from 47 Sheppard Avenue East. Law Help provides Duty Counsel who offer limited services to the public on a first come, first served basis.

Duty Counsel Lawyers assist self represented litigants by attending at the trial or motion, helping individuals to identify legal issues relating to their case, providing general information on the rules and procedures of Small Claims Court, and answering general legal questions. If a person only needs legal advice, the meeting with a lawyer will be limited to 30 minutes.

As at Superior Court, the public is advised that the lawyers who volunteer will not become their lawyer. The scope of legal services provided at Law Help Ontario is limited to brief services and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer.

Conflicts are also explained to the effect that a lawyer (or law firm) cannot represent the individual if the opposing parties are also their client, and that after a conflicts check, if a conflict of interest exists, PBLO will not be able to represent the individual in court nor offer summary legal advice.

#### Appeals Assistance Project (The Advocates' Society)

Free legal services are available to eligible unrepresented litigants before the Ontario Court of Appeal (civil and some limited family law matters), the Divisional Court (civil and some limited family law matters) and the Federal Court of Appeal (no criminal appeals).

This project provides pro bono legal advice and representation to qualified unrepresented litigants. The Project will also help those who may choose to represent themselves but may wish to obtain legal advice on whether they have valid grounds on which to proceed.

In order to qualify for the program, the individual must have been refused legal aid, meet financial eligibility guidelines, and have a case that has some reasonable prospect of success.

The Project relies on a roster of qualified volunteer lawyers prepared by The Advocates' Society who represent litigants at the Ontario Court of Appeal, Divisional Court, and the Federal Court of Appeal. These lawyers will represent the individual pro bono but the individual is responsible for any disbursements, such as court fees or photocopying expenses.

When the case has been perfected, the individual must contact the Projects' co-ordinator will conduct a detailed intake to determine eligibility for pro bono representation. If the person qualifies, the coordinator will try to match him or her with a pro bono lawyer. The individual is responsible for contacting that pro bono lawyer chosen to arrange an initial consultation meeting.

The goal of this meeting is to determine if the lawyer will be able to represent the individual and ensure he or she is comfortable with the lawyer. A retainer agreement is signed that outlines the kind of work the lawyer has agreed to do, that the lawyer has waived their hourly billing rate, and that the client will be responsible for disbursements.

The Lawyers on the pro bono roster participate on a voluntary basis and have a right of refusal if they have a conflict of interest, do not have the resources to carry the file, do not believe there is sufficient merit to the appeal, or do not accept the case for any other reason. PBLO does not guarantee pro bono representation or assistance for any applicant. PBLO advises that it may take up to three weeks before notice is received that a lawyer has accepted the case.

#### Child Advocacy Project (The Advocates' Society)

The Child Advocacy Project is dedicated to enhancing access to justice for children by providing free legal services to eligible families who cannot afford a lawyer. Volunteer lawyers, who are members of The Advocates' Society provide assistance on legal issues that impact upon the health and well-being of children and youth. Some programs are set up as partnerships between lawyers and community groups that serve children and youth.

The programs include the Education Law Program and the Family Legal Help Program

The Education Law Program is a free legal service available to low and moderate-income families whose children face challenges to their rights at school. Lawyers help students and their parents understand their legal rights and negotiate solutions when they feel unable to resolve conflicts with school administrators and officials. The volunteer lawyer will provide students and families with advice on their legal rights, intervene on behalf of students with school administrators (by letter, phone or in person) and will represent students at tribunals or hearings.

Each family is assessed on a case-by-case basis, and the case must have legal merit. In many cases, advice on the legal aspects of the problem at hand is all that is needed, and only a few cases go on to full legal representation.



The Family Legal Health Program is a partnership that links health care and legal care to help young children and their families. The first of its kind in Canada, the partnership includes The Hospital for Sick Children (SickKids), PBLO, law firms McMillan and Torkin Manes Cohen Arbus, and Legal Aid Ontario. The model uses legal remedies when appropriate to address issues that adversely impact child health within low-income families. The program aims to improve the health outcomes of low-income paediatric patients and, at the same time, enhance the capacity of health care professionals such as social workers, physicians, nurses and dieticians by incorporating legal advocacy and legal services into clinical practice.

The program recognizes that lawyers are beneficial interdisciplinary partners for health care practitioners treating low-income patients/families whose health may be impacted by complex, socio-economic issues. Through this program, nurses, social workers, and doctors at SickKids have access to legal resources to redress detrimental social conditions and resolve persistent issues that prevent low-income families from focusing their full attention on a sick child. As a result, clinical interventions are more effective and sustainable.

The program has three main areas of activity: advocacy and legal issue training for clinical staff, direct legal assistance to low-income patients/families and systemic advocacy.

Direct legal assistance is provided through access to an on-site Triage Lawyer, who manages an intake process and coordinates cases which are placed with appropriate lawyers from the program's legal network. Services provided are both pro bono and Legal Aid. Pressing legal issues get the attention they require so families can focus their attention on their child's health. Systemic advocacy is tool to effect change on systemic issues that impact the health and wellbeing of present and future patient populations. This can involve policy work and test cases as two effective ways that lawyers can help paediatric clinicians to address the social determinants of child health.

**APPENDIX 4**

**LAW HELP ONTARIO APPLICATION FORM**

# LawHelpOntario

Welcome to Law Help Ontario, a Pro Bono Law Ontario Project.

Law Help Ontario is a self-help centre for low income, unrepresented litigants appearing before Superior Court (limited civil matters – no family, criminal, etc.) Individuals are served on a first come, first served basis; however, priority may be given to litigants with urgent matters.

## APPLICATION FORM

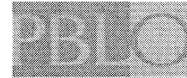
Part A: Your Contact Information:			
<input type="checkbox"/> Male	First Name	Last/Family Name	
<input type="checkbox"/> Female			
Address		City	Province
Postal Code	Home Phone	Work Phone	
Cell Phone	Email Address		
What is your Court File Number? (If you have one)			
I am the Plaintiff/Applicant in this action <input type="checkbox"/>		I am the Defendant/Respondent in this action <input type="checkbox"/>	

Please pick **one** area of law that best describes your situation

- |   |  |
|---|--|
| <input type="checkbox"/> Bankruptcy or insolvency law         | <input type="checkbox"/> Loan or Credit Card Default (other than mortgage default)     |
| <input type="checkbox"/> Condominium                          | <input type="checkbox"/> Medical Malpractice   |
| <input type="checkbox"/> Construction Lien                    | <input type="checkbox"/> Mortgage Default  |
| <input type="checkbox"/> Construction/Renovation dispute      | <input type="checkbox"/> Motor Vehicle Accident  |
| <input type="checkbox"/> Contract law                         | <input type="checkbox"/> Negligence  |
| <input type="checkbox"/> Damage to Property                   | <input type="checkbox"/> Personal Injury   |
| <input type="checkbox"/> Defamation                           | <input type="checkbox"/> Police misconduct   |
| <input type="checkbox"/> Employment Law/Wrongful Dismissal    | <input type="checkbox"/> Professional Malpractice (other than medical)                 |
| <input type="checkbox"/> Insurance (other than motor vehicle) | <input type="checkbox"/> Real Estate litigation/disputes (other than mortgage default) |
| <input type="checkbox"/> Intellectual Property                | <input type="checkbox"/> Wills/Estates   |
| <input type="checkbox"/> Landlord Tenant                      | <input type="checkbox"/> Other _____   |
| <input type="checkbox"/> Lawyer's Invoice Dispute             |  |

<b>Part B: Persons and Companies involved (or potentially involved) in your matter.</b>	
Please list all of the <b>Plaintiffs/Applicants</b> in this matter. (Please include first and last names, company names, and trade names)	Please list the <b>Law Firm</b> that's representing each Plaintiff/Applicant. If they are not represented, write "None"
1.	
2.	
3.	
4.	
5.	
6.	
Please list all of the <b>Defendants/Respondents</b> in this matter. (Please include first and last names, company names, and trade names)	Please list the <b>Law Firm</b> that's representing each Defendant. If they are not represented, write "None"
1.	
2.	
3.	
4.	
5.	
6.	
Please list any <b>other</b> persons or companies that might be involved in your matter. Please include First and last names, company names, and trade names.	Please list the <b>Law Firm</b> that's representing the other parties. If they are not represented, write "None"

If you need additional space, please ask for an additional form. See Additional page attached



**Part C: Financial Eligibility – This section must be completed in order to apply for assistance**

The number of people in my household, including me, my spouse and dependent children is:

- 1    2    3    4    5+

My Marital Status:    Single                       Separated                       Married/Common Law                       Widowed

The primary source of my household income is from one or more of the following sources(s):

- Income assistance from Ontario Works,
- Income assistance from Ontario Disability Support Program,
- Family Benefits Act allowance,
- Old Age Security Pension together with Guaranteed Income Supplement,
- War Veterans Allowance
- Canada Pension Plan benefits

**Please tell us about your household’s employment situation:**

- |   |   |
|---|---|
| <input type="checkbox"/> I am Self Employed | <input type="checkbox"/> My Spouse is Self Employed |
| <input type="checkbox"/> I am Employed      | <input type="checkbox"/> My Spouse is Employed      |
| <input type="checkbox"/> I am Unemployed    | <input type="checkbox"/> My Spouse is Unemployed    |
| <input type="checkbox"/> I am Retired       | <input type="checkbox"/> My Spouse is Retired       |
| My Occupation : _____                       | My Spouse’s Occupation: _____                       |

**Please tell us about your living situation:**

- Own your home. If you own, what percentage of equity do you own? \_\_\_\_\_%
- Rent
- Live with parents
- Other \_\_\_\_\_

**My Household’s Assets:**

- I/we have more than \$3000.00 in liquid assets (This includes RRSP’s, cash/money)
- I/we own additional properties (cottage, rental properties, etc.)

**My Income (Per Month) In Total, from all sources**

- I receive \$ \_\_\_\_\_ per month from an estate or trust
- I receive \$ \_\_\_\_\_ per month from a rental property
- I receive \$ \_\_\_\_\_ per month from salaries/commissions
- I receive \$ \_\_\_\_\_ per month from other investment sources

**My Spouse’s Income (Per Month) In Total, from all sources**

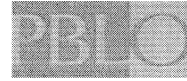
- My Spouse receives \$ \_\_\_\_\_ per month from an estate or trust
- My Spouse receives \$ \_\_\_\_\_ per month from a rental property
- My Spouse receives \$ \_\_\_\_\_ per month from salaries/commissions
- My Spouse receives \$ \_\_\_\_\_ per month from other investment sources

**My Household’s Expenses (Per Month)**

- I/we pay \$ \_\_\_\_\_ in child support payments
- I/we pay \$ \_\_\_\_\_ in spousal support payments
- I/we pay \$ \_\_\_\_\_ in rent/mortgage payments
- I/we pay \$ \_\_\_\_\_ in child care fees

Part D: Demographics		
<b>What was your highest level of education?</b>		
<input type="checkbox"/> Grade School	<input type="checkbox"/> Some University/College	
<input type="checkbox"/> Some High School	<input type="checkbox"/> University Degree/College Diploma	
<input type="checkbox"/> High School Diploma	<input type="checkbox"/> Post Graduate Degree	
<b>Is English your first language?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
Do you need services in another language?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
If <b>yes</b> , what language?		
<b>Which age group do you belong to?</b>		
<input type="checkbox"/> 18 – 24	<input type="checkbox"/> 25 – 34	<input type="checkbox"/> 35 – 44
<input type="checkbox"/> 45 – 54	<input type="checkbox"/> 55 – 64	<input type="checkbox"/> 65+
Part E: Other Questions		
<b>1. How did you hear about Law Help Ontario?</b>		
<input type="checkbox"/> Walking by the office	<input type="checkbox"/> The Internet	<input type="checkbox"/> A Judge or Master
<input type="checkbox"/> Legal Aid Ontario	<input type="checkbox"/> The Law Society	<input type="checkbox"/> Court Staff Member (10 <sup>th</sup> Floor)
<input type="checkbox"/> Another Legal Clinic	<input type="checkbox"/> Friend/Family Member	
<input type="checkbox"/> The Newspaper	<input type="checkbox"/> TV	<input type="checkbox"/> Other _____
<b>2. Is this the first time you tried to get any legal help with this case?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
If <b>no</b> , what other places have you tried to obtain assistance?		
<b>3. Do you currently have a lawyer (or other representative) assisting you with this case?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<b>4. If you answered <i>no</i>, has a lawyer (that was hired or worked on a contingency arrangement) ever assisted you with this case?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
If <b>yes</b> , why is that lawyer not assisting you now?		
<b>5. Why are you representing yourself? <i>Make one selection only</i></b>		
<input type="checkbox"/> I can't afford to hire a lawyer		
<input type="checkbox"/> I could pay some legal fees, but not all		
<input type="checkbox"/> I ran out of money to continue paying my lawyer		
<input type="checkbox"/> I didn't qualify for legal aid, or they said that they couldn't help with my case		
<input type="checkbox"/> I believe that my case is straightforward and I can handle the litigation on my own		
<input type="checkbox"/> I can afford a lawyer, but I don't want to pay a lawyer		
<input type="checkbox"/> I don't trust lawyers		
<input type="checkbox"/> My lawyer had himself/herself removed from my case		
<input type="checkbox"/> Other _____		
<b>6. Have ever you tried using the Lawyer Referral Service?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
If <b>yes</b> , what was the result?		
<b>7. Do you have any other cases pending at the moment?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<b>8. Have you tried to settle or mediate this case without going to court?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<b>9. Does the opposing party have a lawyer?</b>	<input type="checkbox"/> Unsure	Yes <input type="checkbox"/>
<b>10. Is this your first meeting with a Duty Counsel Lawyer at Law Help Ontario?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<b>11. Do you have access to the internet?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<b>12. May we contact you at a later date, and leave a voicemail message, if necessary, to get your feedback about the program?</b>	Yes <input type="checkbox"/>	No <input type="checkbox"/>

LawHelpOntario



**Part F: Acknowledgement & Consent Section**

I **swear/affirm** the information I provided is accurate to the best of my knowledge and belief. I agree to provide financial information and records to Pro Bono Law Ontario, if requested, to confirm the financial information in this application form. I am aware that Pro Bono Law Ontario, its employees, designates, and volunteers may need access to my Court File.

I **authorize** Pro Bono Law Ontario, its employees, designates, and volunteers, to access my Court File for the purpose of administering and evaluating Law Help Ontario and the services offered.

I **authorize** Pro Bono Law Ontario, its employees, designates, and volunteers, to photocopy this application and retain its copy on file for record keeping purposes.

I **authorize** the Pro Bono Law Ontario, its employees, designates, and volunteers to provide any information set out in this application and acknowledgement form (including any document I provide, or will provide in the future, to Pro Bono Law Ontario) to any person volunteering to assist me and any lawyer or law firm that the Intake Coordinator considers may agree to assist me.

I **authorize** Pro Bono Law Ontario, its employees, designates, and volunteers, to send my name, and the names of all of the parties I provided, or will provide in future, to their law firm to verify if conflicts of interest may exist.

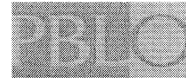
\_\_\_\_\_  
Applicant 1 Signature

\_\_\_\_\_  
Date

Hours: 9:30 am – 4:00 pm, Monday – Friday. We close for lunch between 12:00 – 1:00 pm  
Law Help Ontario is a walk-in centre only. No appointments. We do not accept phone calls, emails, or faxes. You must visit us in person for assistance.

Law Help Ontario  
393 University Avenue  
Toronto, ON M5G 1E6

LawHelpOntario



## ACKNOWLEDGMENT & WAIVER FORM

*This acknowledgment and waiver form is for all applicants of the Pro Bono Law Ontario (PBLO) Law Help Centre seeking assistance at Law Help Ontario located at the Superior Court of Justice at 393 University Avenue, Toronto, Ontario.*

### **Applications for Assistance**

1. I **acknowledge** that all applications for assistance are assessed individually and that assistance can be declined for any reason, as determined by the PBLO Intake Coordinator and/or Duty Counsel Lawyer.<sup>1</sup>
2. I **acknowledge** that clients are not always assisted in the order of arrival.

### **Limited Scope of Duty Counsel Services**

3. I **acknowledge** that the PBLO Intake Coordinator(s) cannot provide legal advice.
4. I **acknowledge** that the Duty Counsel Lawyer cannot replicate the quantity or quality of legal assistance that I might get from a lawyer hired privately to represent me fully in this matter.
5. I **acknowledge** that the Duty Counsel Lawyer can only provide me with a maximum of 30 minutes of legal assistance today. If my meeting is extended longer than 30 minutes, I agree that all terms in this acknowledgement and waiver form remain in effect.
6. I **acknowledge** that I cannot request a meeting with a specific Duty Counsel Lawyer or a Duty Counsel Lawyer that assisted me in the past.

<sup>1</sup> The Duty Counsel Lawyer may only assist by:

- Providing general information on the rules and procedures of the Superior Court of Justice;
- Guiding me on how to complete some court forms;
- Helping to identify the legal issues of my case;
- Helping to understand my legal options based on the information I provide; and
- Speaking to my legal issues at certain kinds of limited appearances, such as motion hearings.

The Duty Counsel Lawyer **cannot**:

- Help me if I already have a lawyer;
- Commission or notarize my court documents, forms, or any other legal documents;
- Act as a commissioner for taking affidavits or a notary public;
- Help me with any legal problems that are unrelated to my Superior Court of Justice civil case;
- Serve or accept service of any court documents;
- Predict or guarantee the outcome of my case or how Judges or Masters will rule; or
- Be responsible for the accuracy of the information I have in any forms or papers I file or use in court.



7. I **acknowledge** that I may reapply to seek further assistance but that the PBLO Intake Coordinator and Duty Counsel Lawyers reserve the right to deny future assistance to me where they deem it appropriate to do so.

***No Ongoing Solicitor-Client Relationship with PBLO or Duty Counsel Lawyer***

8. I **acknowledge** that I am **not** forming an ongoing solicitor-client relationship with PBLO, Law Help Ontario or any of its officers or employees and that I am not forming an ongoing solicitor-client relationship with the Duty Counsel Lawyer or the Duty Counsel's law firm.

9. I **acknowledge** that neither PBLO, Law Help Ontario nor any of its officers or employees or the Duty Counsel Lawyer or the Duty Counsel's law firm has any further duty to look after my legal interests in the matter that I receive assistance with today or any other matters.

***Waiver of Solicitor-Client Privilege to PBLO and Duty Counsel Lawyer***

10. I **acknowledge** that I do not have an expectation of confidentiality concerning any information that is shared with the Intake Coordinator or other PBLO employees and that if I wish to have a confidential consultation, I should consult or retain a private lawyer. I **further acknowledge** that the Law Help Ontario Office is an open concept and that conversations I may have may be overheard by other Law Help Ontario clients, staff, volunteers, and Duty Counsel Lawyers that may represent other parties involved in my case.

11. I **acknowledge** that any information that I share with the PBLO Intake Coordinator or other PBLO employees or that the Duty Counsel Lawyer shares with the Intake Coordinator and staff of PBLO is not protected by solicitor client privilege.

12. I **acknowledge** that any verbal information and any information set out in my application, acknowledgement and waiver form, case disposition form and any other form or document that I provide to, or is prepared by, the Law Help Ontario or the Duty Counsel Lawyer can be:

- stored at Law Help Ontario or another PBLO office;
- reviewed by staff members of PBLO, its employees, designates, volunteers, and other Duty Counsel Lawyers;
- photocopied;
- typed, scanned, transcribed, and stored in PBLO's computer system; and
- uploaded and backed up *via* the internet to a third party data protection service.

***Right to Verify Conflicts of Interest***

13. I **authorize** the Duty Counsel Lawyer to send my name, and the names of all of the parties listed in my application to their law firm to verify if conflicts of interest may exist.

14. I **acknowledge** that the Duty Counsel Lawyer cannot assist me where a conflict of interest is discovered or arises, which makes it inappropriate for the Duty Counsel Lawyer to continue to provide assistance.

15. I **acknowledge** that the Duty Counsel Lawyer is free to act for other clients against me on other unrelated matters in the future, without notice to me.

**Right for PBLO to Retain Documents**

16. I **acknowledge** that any document that forms part of my file may be kept by PBLO for the following reasons:

- administrative record keeping;
- maintaining a database of people served;
- conducting conflict of interest searches;
- assessing the quality of services provided;
- gathering general statistics about Law Help Ontario's clients;
- evaluating types of services utilized; and
- sharing with Law Help Ontario staff or volunteers whom I may visit in the future.

17. I **acknowledge** that Law Help Ontario is a pilot project and, in the future, that I may be contacted by a PBLO representative to answer questions about its value. If contacted, I may refuse to participate.

**Full and Final Release**

18. I **release** PBLO, Law Help Ontario, Duty Counsel Lawyers and all other parties and participating law firms together with all of their respective officers, employees, and volunteers from all claims whatsoever with respect to use of the premises and to advice/services given or advice/services that should or should not have been given at Law Help Ontario.

19. I **acknowledge** that I was able to read and understand all of the contents of this Acknowledgment Form.

\_\_\_\_\_  
Applicant (Print your full name Here)

\_\_\_\_\_  
Law Help Ontario – Form Explained by

\_\_\_\_\_  
Applicant Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

## APPENDIX 5

**EXCERPT FROM “REPORT OF THE UNBUNDLING OF LEGAL SERVICES TASK  
FORCE – LIMITED RETAINERS: PROFESSIONALISM AND PRACTICE”  
(LAW SOCIETY OF BRITISH COLUMBIA)**

**Recommendation 15:**

Because the current conflict of interest rules, and rules regarding duty of loyalty, can create impediments to lawyers providing legal services at court-annexed and non-profit legal clinics or programs, and because of the summary nature of those services and the importance of those service for enhancing access to justice, the *Professional Conduct Handbook* should be amended to encompass the following principles:

1. The recommendations for modifying the conflicts of interest rules apply only to circumstances where a lawyer, under the auspices of a program operated by a court or a non-profit organization, provides short term limited legal services to a client in circumstances where neither the lawyer or client expect that the lawyer will provide continuing representation in the matter (the “Exempted Services”).
2. In circumstances where it is practicable to do so, a lawyer should conduct a conflict of interest search prior to providing Exempted Services;
3. If the lawyer is providing legal services other than Exempted Services, the regular conflicts rules apply;
4. If a lawyer provides Exempted Services the following principles apply:
  - a. The scope of the Exempted Services retainer is limited to the summary services provided through the court-annexed or non-profit program. While the duty of confidentiality and loyalty endure, the lawyer-client relationship terminates at the end of the provision of the Exempted Services;
  - b. If a lawyer is aware of a conflict, the lawyer may not provide legal advice to the limited scope client (“LSC”), but may assess the LSC’s suitability for services provided through the court-annexed or non-profit program and refer the LSC to another lawyer at the program or clinic;
  - c. If a lawyer is not aware of a conflict, the lawyer may provide Exempted Services. As the services are summary in nature and the risk associated with not performing the conflicts search is outweighed by the social benefit of the Exempted Services, the lawyer is not required to check for conflicts prior to, or following, providing the Exempted Services;
  - d. If, at any time during provision of the Exempted Services, a lawyer becomes aware of a conflict, the lawyer must immediately cease providing legal advice or

- services and refer the LSC and the notes taken to another lawyer at the clinic or program. If no lawyer is available, the LSC should be put in touch with a program staff person to coordinate the appointment of a new lawyer;
- e. Privileged information to anyone including other lawyers at the lawyer's firm, save as provided by law. Maintaining the LSC's confidences is an important safeguard in protecting the LSC's information and guarding against the inference that other people at the lawyer's firm possess the confidential information;
  - f. A lawyer who provides Exempted Services should not personally retain notes of the advice given; rather, the court-annexed program or non-profit clinic should be responsible for record keeping.
5. Because the exemption from performing a conflicts search is predicated, in part, on the concept that the Exempted Services are summary in nature, the following rules apply to circumstances where a lawyer has contact with the LSC on subsequent occasions:
- a. If the LSC contacts the lawyer, the lawyer must conduct a conflicts search prior to engaging the LSC in a new retainer;
  - b. If the lawyer has advance notice that the lawyer will be speaking with the LSC on a subsequent occasion, the lawyer must conduct the conflicts search prior to that meeting;
  - c. If the lawyer happens to be assigned the LSC a subsequent time while providing Exempted Services, and in circumstances not captured in 5(b), the lawyer may provide summary legal advice on that occasion but must conduct a conflicts search upon returning to the lawyer's firm.
6. If, following the provision of the Exempted Services, a lawyer becomes aware of a conflict between the LSC and a firm client:
- a. The regular rules for determining whether the lawyer may act for or against the existing client, the LSC, or a future firm client, apply. The Exempted Services will be treated as an isolated event that do not require prior informed consent;
  - b. Despite the duty the lawyer owes to his or her clients, the lawyer must not divulge the confidential information received by the LSC during provision of Exempted Services, and the lawyer must not divulge the existing client's confidential information to the LSC.
7. No conflict of interest that arises as a result of a lawyer providing Exempted Services will be imputed to the lawyer's firm, and the firm may continue to act for its clients who are adverse in interest, or future clients who are adverse in interest, to the LSC.
8. In order to enhance access to justice, individuals who are adverse in interest should be able to obtain legal advice from the same court-annexed or non-profit program regarding their common dispute, provided the program has sufficient safeguards in place to ensure that lawyers who provide Exempted Services to clients opposed in interest do not obtain confidential information arising from the opposing client's consultation. If the lawyers become aware of a conflict within the court-annexed or non-profit program, the clients

must be advised of the conflict and the steps that will be taken to protect the clients' confidential information.

### **2.3.1 Conflicts of interest in limited scope retainers**

A lawyer may provide limited scope legal services as part of the lawyer's regular practice, or through a court-annexed or non-profit legal service provider. The Task Force considered whether:

In order to enhance the delivery of limited scope legal services as a means of increasing access to justice, should the Law Society's Conflicts of Interest Rules be amended for situations where it may not be feasible for a lawyer to systematically screen for conflicts of interest while providing legal services at a court-annexed or non-profit program?

Most jurisdictions that have amended rules to allow for unbundled legal services have relaxed their conflicts of interest rules to facilitate lawyers providing legal services through non-profit and court-annexed limited legal advice programs. The SHC, *Final Evaluation Report*, found that "the availability of legal advice is the area of greatest unmet need identified by the evaluation" (p.74), and that:

The provision of legal advice at the Centre is not possible under the current Law Society Rules concerning professional liability. In addition, it would be necessary to do a conflict check for each client. (p. 61)

As noted, Civil Justice Reform Working Group identified changes to the conflict of interest rules as an important component of encouraging lawyers to engage in *pro bono* work with clinics.

The Task Force believes that a lawyer who, as part of his or her regular practice, provides limited scope legal services is required to conduct the regular searches for conflicts of interest. This is not difficult, as the lawyer should have a conflicts checking system in place that captures conflicts both at the beginning of the representation, and as they arise throughout the course of the retainer. The lawyer in this scenario is presumed to have access to his or her conflicts database when approached by a potential client.

A lawyer who is providing legal services through a court-annexed or non-profit legal services provider will not likely have access to his or her conflict's database at the time of initial contact with the client. Contact may occur over the phone, and/or at an external facility and it is also possible for clients to drop-in. The Task Force has heard from representatives of the Legal Services Society and the SHC, amongst others, that there is a need to relax the current conflicts rules in circumstances where it is not feasible for a lawyer to systematically screen for conflicts of interest (e.g. at a drop-in centre where the lawyer provides limited, summary legal advice, or where the lawyer provides limited legal advice through a duty counsel program). A distinguishing feature of these services is that neither the lawyer nor the client expects that the legal services will be ongoing, although it is possible for a client to be a repeat user of a facility through which the services were provided and this should be taken into account.

### 2.3.2 American models for conflicts of interest in unbundled matters

ABA Model Rule 6.5 has the effect of excusing a lawyer who is participating in a non-profit or court-based program offering limited services from the obligation to check for conflicts of interest prior to providing the limited legal services. However, if the lawyer has actual knowledge of a conflict he or she may not act and the general conflict of interest rules apply, including the rules for imputed conflicts of interest. The rationale behind this approach was a desire to make it less onerous for lawyer to provide services through these programs.

The Task Force considers the approach taken by Washington State to be the most flexible and principled. The Washington State Court Rules: Rules of Professional Conduct, Rule 6.5 reads:

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided:

(1) is subject to Rules 1.7, 1.9(a), and 1.18(c) only if the lawyer knows that the representation of the client involves a conflict of interest, except that those Rules shall not prohibit a lawyer from providing limited legal services sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral of the client to another program;

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter; and

(3) notwithstanding paragraphs (1) and (2), is not subject to Rules 1.7, 1.9(a), 1.10, or 1.18(c) in providing limited legal services to a client if:

(i) the program lawyers representing the opposing clients are screened by effective means from information relating to the representation of the opposing client;

(ii) each client is notified of the conflict and the screening mechanism used to prohibit dissemination of information relating to the representation; and

(iii) the program is able to demonstrate by convincing evidence that no material information relating to the representation of the opposing client was transmitted by the personally disqualified lawyers to the lawyer representing the conflicting client before implementation of the screening mechanism and notice to the opposing client.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

The Washington State approach allows for lawyers who work at, or volunteer their time to, non-profit and court-annexed legal service providers to give limited term legal advice to clients without performing the standard conflicts of interest search. A lawyer who is aware of a conflict may not act for the client, but may still provide limited services sufficient to determine whether the client is eligible under the program and to refer the client to another lawyer. The rule also establishes a framework for determining whether two lawyers providing legal advice through a program can represent clients with conflicts of interest. If, during the course of providing legal advice to the client, the lawyer becomes aware of a conflict of interest the regular conflict rules apply, save that the lawyer could refer the client to a suitable lawyer within the program. If, after the initial consultation, the client desires to retain the lawyer, the lawyer will be required to perform the regular conflicts check.

The Washington State approach, the ABA Model Rule, and other models are intended to encourage lawyers to participate in non-profit and court-annexed legal service programs. The present conflict of interest rules create a barrier to lawyers providing assistance through these programs, and can frustrate access to justice. The Task Force recognizes, however, that it is not sufficient to put a rule in place that only deals with whether the lawyer is aware of a conflict at the time the limited scope legal services are being provided at the court-annexed or non-profit service. The conflicts rules have to address what happens when the lawyer returns to his or her firm and discovers that the firm is representing a client in circumstances that create a conflict between the existing client and the clinic/program client. The rules also have to address what happens in circumstances where the lawyer or his or her firm later wish to act for a person, and such a representation would create a conflict based on the prior limited scope legal work provided through the court-annexed or non-profit service.

### **2.3.3 Examples of how non-profit and court-annexed service providers in British Columbia deal with conflicts**

The delivery of limited scope legal services is already a reality for non-profit and court-annexed legal service providers. The Legal Services Society (“LSS”) has, as a result of budget cuts, had to reduce its services from prior levels. This has required providing services and programs that are limited in scope. The LSS provides legal information, legal advice and legal representation. An individual who is applying for legal aid or receiving legal information is not deemed to be a client. An individual who is receiving legal advice or legal representation is deemed to be a client. Once an individual is a client, no individual adverse in interest may receive legal information (save for written material on display or at hand), legal advice, or legal representation from that office. The individual may seek legal assistance through another office. Each legal aid office is treated as a distinct unit for these purposes.

Criminal duty counsel also provide limited scope legal services. It is less likely, but not unheard of, for a conflict of interest to arise (e.g. co-accused). The Task Force heard from duty counsel, and was advised that the standard practise is to deal with conflicts based on having actual knowledge of the conflict. While duty counsel do not wish to run afoul of the Law Society’s

conflicts rules, they believe their approach provides a practical method that balances the duty to protect a client's interest with making sure as many accused as possible have access to justice.

#### **2.3.4 Justification for amending the conflicts of interest rules for lawyers providing pro bono services at court-annexed and non-profit programs**

The Task Force believes that if firms were to be disqualified from continuing to represent existing clients, or would be shutting the door on potential future retainers that may be lucrative, based on a lawyer of the firm providing legal advice at court-annexed or non-profit clinics, the objectives of increasing access to limited scope legal services could be frustrated. However, the duty of loyalty to a client is a core principle of the lawyer/client relationship, and rules protecting the interest and expectations of clients regarding confidentiality and a duty of loyalty are not to be cast aside or transformed to favour expeditiousness over ethics.

The Task Force considered the potential use of waivers for conflicts of interest, but concluded that such an approach presents several problems. For the waiver to be valid, it would require both the existing client and the new client to waive the conflict, and with informed consent. This would be administratively impractical, and there are some conflicts that cannot be waived in any event. Having a waiver that was only signed by one party would not amount to a true waiver, and while it would serve to alert the client to the concept of conflicts it would do little to resolve the concern. The Task Force is of the view that the better approach would be to clearly limit the scope of the retainer, and to have a mechanism for alerting the client to the concept of conflicts of interest and how conflicts would be handled should they arise. Providing the client with a clear and comprehensible limited retainer form is only part of the equation, however, and the Task Force recognizes that the conflicts of interest rules would have to be amended to create a narrow exemption for the conflict of interest rules. This exemption should seek to balance the competing demands of the duty of loyalty to a client with the increasing need for limited scope legal services at court-annexed and non-profit programs, to assist litigants who may otherwise be self-represented.

The Task Force acknowledges that modifying the Law Society rules that govern conflicts of interest in order to facilitate limited scope legal services at court-annexed and non-profit programs is only part of the equation. The courts have inherent jurisdiction over conflicts before the court. As such, the concern remains that a lawyer who complies with the modified conflict of interest rules will be at risk of being found in conflict when appearing before the court, or that a lawyer from that lawyer's firm will have the conflict imputed to him or her. The Task Force hopes that the judiciary will be mindful of this risk and give due weight to the important public value in litigants of modest means receiving legal advice through court-annexed and non-profit programs, and that some firms will be wary of allowing lawyers to provide such services if the firm risks disqualification with respect to present and future paying clients.

The Task Force limits its recommendations regarding conflicts of interest to situations governing lawyers providing short-term legal advice and/or representation at court-annexed and non-profit programs. The recommendations should not be taken to mean the Task Force approves of a general relaxation of the conflicts of interest rules.





The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

## **Report to Convocation January 27, 2011**

---

### **Tribunals Committee**

#### **Committee Members**

**Mark Sandler (Co-Chair)**  
**Linda Rothstein (Co-Chair)**  
**Alan Gold (Vice-Chair)**  
**Raj Anand**  
**Jack Braithwaite**  
**Christopher Brett**  
**Paul Dray**  
**Jennifer Halajian**  
**Tom Heintzman**  
**Heather Ross**  
**Paul Schabas**  
**Beth Symes**  
**Bonnie Tough**

**Purposes of Report: Decision  
Information**

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

## TABLE OF CONTENTS

### **For Decision**

Pre-Proceeding Consent Resolution Conference: Rules of Practice and Procedure..... **TAB A**

**For Information** ..... **TAB B**

Two Year Review on Non-Bencher Adjudicator Initiative

**COMMITTEE PROCESS**

1. The Committee met on January 13, 2011. Committee members Mark Sandler (Co-Chair), Alan Gold (Vice Chair), Raj Anand, Jack Braithwaite, Christopher Bredt, Jennifer Halajian, Paul Schabas and Beth Symes attended. CEO Malcolm Heins attended. Staff members Helena Jankovic, Grace Knakowski, Denise McCourtie, Elliot Spears and Sophia Sperdakos also attended.

## FOR DECISION

### a) **PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE: RULES OF PRACTICE AND PROCEDURE**

#### **Motion**

2. **That Convocation amend the Rules of Practice and Procedure applicable to proceedings before the Law Society Hearing Panel to implement the pre-proceeding consent resolution conference, as set out in the official bilingual version provided at Convocation, the English version also set out at Appendix 2.**

#### **Background and Information**

3. In April 2009 the Professional Regulation Committee began consideration of a proposal for an expedited investigations and hearing process for lawyers and paralegals who,
  - a. admit to conduct allegations against them; and
  - b. agree to a joint penalty or range of appropriate penalty to be submitted to a Hearing Panel to obtain an Order.
4. The proposal necessitated discussions with the Tribunals Committee and the Paralegal Standing Committee and culminated in a joint meeting of the Committees in November 2009.
5. In January 2010 Convocation approved the proposed policy for a Pre-Proceeding Consent Resolution Conference as a two-year pilot project. The full report Convocation approved is set out at **Appendix 1**.
6. The proposed English amendments to the Rules of Practice and Procedure to implement the policy are set out at **Appendix 2**. The official bilingual version of the proposed rules will be provided under separate cover to Convocation for approval.

**APPENDIX 1**

**PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE  
(JOINT REPORT WITH THE PARALEGAL STANDING COMMITTEE AND  
THE TRIBUNALS COMMITTEE)**

**Motion**

1. **That Convocation approve the policy for the Pre-Proceeding Consent Resolution Conference for a two-year pilot project.**

**Introduction and Background**

2. In April 2009, the Committee began consideration of a proposal for an expedited investigations and hearing process for lawyers and paralegals who admit to conduct allegations against them and agree to a joint penalty to be submitted to a Hearing Panel to obtain an Order. The proposal necessitated discussions with the Tribunals Committee and the Paralegal Standing Committee, and culminated in a joint meeting of the Committees in November 2009.
3. This report includes the Committees' joint proposal for the new process, which is titled the Pre-Proceeding Consent Resolution Conference ("the Conference"), for Convocation's consideration.
4. If approved, amendments to the *Rules of Practice and Procedure* to implement the proposal will be required. These amendments will be presented at a future Convocation.

**Why the Conference is Being Proposed**

5. The Conference is intended to provide lawyers and paralegals with an alternative process to the regular investigations and hearing stream. Through this process, they may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.
6. The proposed process:

- a. is flexible in that it provides for negotiations at an early stage for lawyers and paralegals who are interested in making early admissions in aid of a fast outcome that is more certain;
- b. has the potential to reduce the time and resources required for full investigation and prosecution of some cases in an environment where caseloads that require a discipline response are increasing<sup>1</sup>;
- c. will save significant costs for the licensee<sup>2</sup>; and
- d. with increased efficiencies, will continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

### Cases Suitable for the Process

7. The Conference would be suitable for cases that meet the criteria discussed below, regardless of the nature of the conduct.<sup>3</sup>

---

<sup>1</sup>In 2008, the Professional Regulation Division received 15% more cases than in the previous year, including an approximately 7% increase in conduct allegations. In 2009, this number has increased a further 3% and is expected to rise before the end of the year. The increasing number of lawyers and paralegals licensed in Ontario each year makes it unlikely that there will be an overall decrease in the number of complaints.

As the caseload increases, inevitably there is a related increase in cases that will require a formal response up to and including prosecution. An extensive investment of resources is required for any case that is taken to the Proceedings Authorization Committee (PAC) for either resolution or authorization for prosecution. Cases that are prosecuted require even more extensive investigatory and discipline resources. For example, in a mortgage fraud case, Discipline Counsel typically spend 200 to 400 hours working on each case. In more complex cases, Counsel spend in excess of 400 hours.

<sup>2</sup> Under the current process, where the evidence suggests that an investigation is likely to require authorization for a conduct application, the full investigation and discipline process must be deployed. This is the case even where the lawyer or paralegal who is the subject of the investigation admits to the wrongdoing and is seeking an early conclusion with sanction. There is no alternative fast track process. Although many hearings are streamlined at the hearing stage through Agreed Statements of Fact (ASF), this occurs after the completion of the full investigation (Investigation Report, Authorization Memorandum, witness statements, disclosure completed). In the absence of an ASF, Discipline Counsel must prepare for a fully contested hearing. Moreover, the experience of staff with lawyer complaints is that in cases where a lawyer considers admitting to wrongdoing to complete the matter quickly at the investigation stage, the lawyer's willingness to cooperate is significantly diminished by the time the lawyer reaches discipline. By that point, the lawyer has invested time and resources in the process and is often inclined to resist full engagement in the process.

<sup>3</sup> To elaborate:

Mortgage fraud. The evidence used in a mortgage fraud case is largely documentary. In this type of case, the Society can often be certain that the lawyer's admissions are supported by the evidence, and can assess the appropriate penalty to be proposed to the lawyer and his or her counsel. Given the size of mortgage

8. Since the public interest is paramount in the Law Society's regulatory processes, cases of a serious nature and that present a novel issue that should be fully tried at a hearing will not be appropriate for the process. Further, a case will not be appropriate for the process if there is a concern that sufficient facts cannot be included in the record of the hearing resulting from the Conference to satisfy the Law Society's obligation to have a transparent and fair process.
9. There will also be other cases where the public interest requires that there be a full hearing on the merits. The Proceedings Authorization Committee (PAC), which will be involved in approving a case for the process, as described below, will have the opportunity to apply these criteria when reviewing cases that may be suitable for a Conference.

#### **Overview of the Process**

10. Lawyers and paralegals would be notified of the availability of the Conference at the start of an investigation. A decision to move a matter to a Conference would be made only after an investigation sufficient to ensure that the regulatory issues are known and complete. The process would be available only where no disciplinary proceedings have been authorized in the case.

---

fraud investigation files, the time saved by not having to prepare the file for disclosure and for hearing, not having to prepare witnesses and forgoing the hearing, are significant.

Financial transactions. The evidence used in cases of financial misconduct is often supported by documents. Where documentary evidence is lacking, for example, where a lawyer or paralegal's books and records are not up to date, the lawyer's or paralegal's admissions would assist the Society in completing its investigation and would save the time and resources required for a contested hearing.

Fail to serve. Where a lawyer or paralegal fails to serve his or her clients, evidence is obtained from the client file, court documents and from the lawyer or paralegal and clients. Where the lawyer or paralegal does not admit to the allegations, they can take a significant amount of time to prove. If a lawyer or paralegal is willing to admit to a failure to serve his or her clients, consideration should be given to the appropriateness of the consent process.

Professionalism. Where allegations of incivility or misleading the court arise out of proceedings, the factual issue of what the lawyer or paralegal said or did may not be in dispute and is often supported by transcripts or documents. However, the lawyer or paralegal often raises a defence justifying his or her conduct, for example, on the basis of the actions of the opposing party or the adjudicator. Investigating and prosecuting these cases is very time-consuming. If a lawyer or paralegal is willing to agree to a discipline outcome and penalty, consideration should be given to the appropriateness of the consent process and the fact that it will result in a public order and record of this conduct.

11. Cases dealt with through the Conference process would result in a Hearing Panel Order or would be returned to the Society for further investigation.
12. If the parties agree on the facts and penalty, after authorization by the PAC, the agreement would be considered at the Conference (a meeting of a three-person panel similar to a pre-hearing conference). If the agreement is approved, the Notice of Application in the matter would be issued and served. The Conference panel would then convene as the Hearing Panel and order the agreed-upon result. Some matters may be heard by a single member of the Hearing Panel, selected from the three panel members who convened for the Conference.
13. If the Conference panel rejects the agreement, the Law Society would resume its investigation.

#### **Pilot Project**

14. As this is a new process, the Committees are proposing a pilot project. The pilot project would provide for a two year review on the anniversary of the approval of the policy by Convocation, at which time it could be continued, amended or ended.

#### **Details of the Conference Process**

15. The following is a narrative description of the steps in the proposed Conference. A diagram following paragraph 35 illustrates the process.

##### Step 1 - Initiating the Conference

16. Either the lawyer/paralegal or the Law Society may initiate discussion about the Conference. The Director, Professional Regulation must approve a case in order for it to be diverted to this process. The Director will only approve a case where, in the Director's opinion, diversion would fulfill the Law Society's duty to act in a timely, open and efficient manner and its duty to protect the public interest.
17. In addition to the general test set out in paragraph 16 above, before approving a case, the Director must ensure that the following criteria are met:



- a. The public interest can be addressed through a consent order. Cases will not be included in the process if they present novel issues, or issues which, for reasons of regulatory effectiveness or transparency, require a full hearing.
  - b. There is sufficient Law Society jurisprudence on the issue of conduct and penalty for the Society to be able to agree to the process (the jurisprudence forms the basis for the Society's agreement to a penalty or range of penalties on the basis of the applicable law and facts);
  - c. Discipline proceedings have not yet been authorized in the matter;
  - d. The lawyer or paralegal is prepared to admit to the allegations made by the Society;
  - e. There is no issue of failure to cooperate with the Law Society; for example, the lawyer or paralegal is responding promptly to the Law Society;
  - f. The lawyer or paralegal agrees to abide by the timeline of 30 days to arrive at an agreement;
  - g. The Law Society has no concerns about the lawyer's or paralegal's capacity to engage in negotiations;
  - h. The lawyer or paralegal understands that the result of the Conference will be a public hearing, although it will be abbreviated, and a public Order;
  - i. The lawyer or paralegal has legal representation, failing which the lawyer or paralegal affirms that he or she has been advised to obtain independent legal advice about his or her rights in the Conference process.
18. The Law Society has the right to decide that a case is not suitable for the Conference where any of the factors listed in paragraphs 16 and 17 above would make it unsuitable or where the Law Society is not satisfied that there has been sufficient investigation to make a determination on the suitability of the process.
19. Other matters may affect the Law Society decision to continue with the process. For example, if new evidence relevant to the subject of the Conference comes to

the Law Society's attention, or if allegations of misconduct about the lawyer or paralegal arise after the process has begun, it may not be appropriate for the Law Society to continue with the resolution of the original matter pending the assessment of the evidence or the outcome of the new investigation.

Step 2 - Diversion into the Conference Process

20. The Law Society and the lawyer or paralegal would negotiate a tentative agreement on admissions and penalty. The Law Society would conduct a fast-track investigation before finalizing the agreement. The Law Society would obtain the lawyer's or paralegal's admissions and such evidence as necessary to satisfy the Law Society that the admissions are accurate and would support a finding of professional misconduct or conduct unbecoming.
21. The consent proposal would be prepared by the Law Society and presented to the lawyer or paralegal. The lawyer or paralegal would have 30 days to accept or reject the agreement, or to negotiate changes with the Law Society. The consent proposal would be based on a standard template that includes the lawyer's or paralegal's admissions and the joint penalty proposal, including an explanation of the basis for the penalty recommendation. The template will include the lawyer's or paralegal's declaration that the information provided is complete and accurate.
22. Where there is no agreement on penalty, the parties may still use the process if there is agreement on a finding of professional misconduct and agreement on the range of an appropriate penalty. In that case, the parties would provide their position on the range of penalty and this will be included in the documentation filed for the Conference.
23. With agreement as described above, the case will proceed to hearing based on the penalty or the range of penalty submitted.
24. If one of the parties is unable to agree to the outcome, the consent process would terminate and the matter would be returned to the Investigation department. The

documents prepared in support of the Conference would be excluded from any further proceedings.

Step 3 - Submission of the Consent Proposal to the PAC

25. Upon approval of the agreement by the Director, Professional Regulation, the consent proposal would be presented to the PAC for authorization of a conduct proceeding and authorization to proceed with the Conference.
26. As with all conduct proceedings, pursuant to By-Law 11<sup>4</sup>, section 51(2)), the PAC must be satisfied that there are reasonable grounds for believing that the lawyer or paralegal has contravened section 33 of the *Law Society Act*.
27. If the PAC approves the agreement, the matter would be submitted to a three-person Conference panel for consideration. The Notice of Application would not be issued at this stage.
28. If the PAC is not satisfied to the requisite standard that discipline proceedings are warranted, the consent agreement would fail and the matter would be returned to the Investigation department to proceed in the normal course.

Step 4 - Presentation to a Conference Panel

29. The proposal would be presented at the Conference for approval. The submission would include a draft Notice of Application, a draft Order and the consents from the lawyer or paralegal and the Law Society that if the individuals who convene as the Conference panel accept the proposal, they may subsequently convene as the Hearing Panel to determine the matter. The Hearing Panel would not meet until after the Notice of Application is issued and served.
30. Consistent with the current Convocation policy on joint submissions (attached as [TAB 1]), the members of the Conference panel should accept the consent

---

<sup>4</sup> Regulation of Conduct, Capacity and Professional Competence.

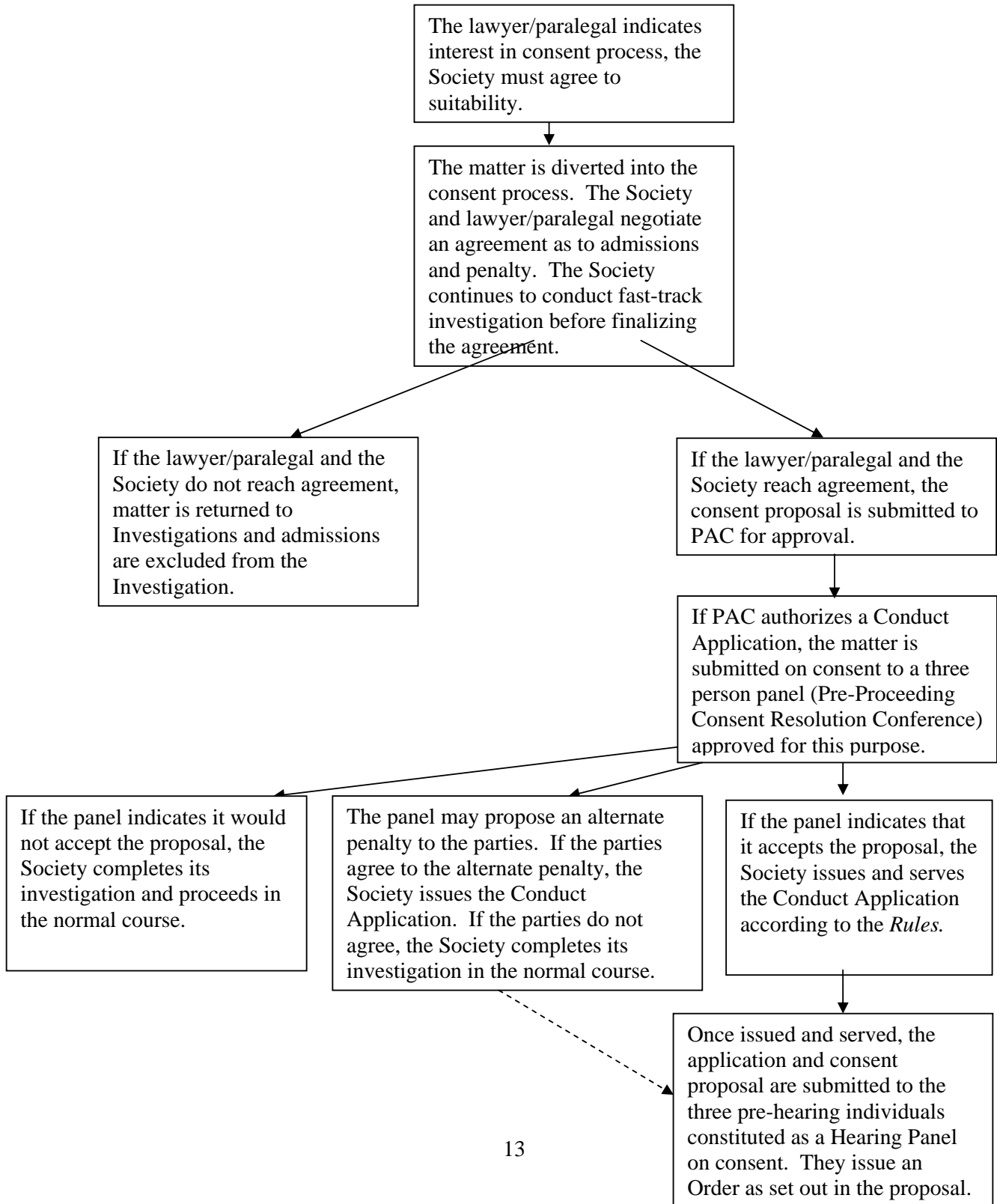
proposal unless the panel concludes that the joint submission on penalty is outside the reasonable range, in the circumstances.

31. Where the Conference panel does not accept the joint submission, the panel may reject the consent proposal, or may give its views to the parties about the case, including penalty. The parties may agree to adopt the Conference panel's views about the case and the penalty the panel proposes. The decision resulting from the Conference is by consent only. If the panel or either party disagrees, the proposal would fail. No costs are to be awarded to either party in a subsequent proceeding for failure to accept an alternate proposal by the Conference panel.
32. If the Conference panel does not approve the proposal, the Law Society would complete its investigation and proceed through the process in the normal manner. The draft agreement and Order are not admissible for the purpose of any subsequent investigation and prosecution of the same allegations.

#### Step 5 – The Hearing

33. If the Conference panel approves the proposal, the Law Society would then issue the Notice of Application. Once issued, the Notice would be served according to the *Rules of Practice and Procedure* and would become a public document.
34. A hearing would be held before the individuals who convened as the Conference panel and who now sit as the Hearing Panel for the purpose of making a determination on the consent proposal. Some matters may be heard by a single member of the Hearing Panel, who would be selected from the three persons who convened for the Conference.
35. The proposal, which includes the lawyer's or paralegal's admissions, would be filed as an exhibit at the hearing to become part of the public record. The Hearing Panel would issue an Order in the normal course. Reasons for the Order are an important component of the public nature of this process.

**PROPOSED CONSENT PROCESS**



**Key Elements of the Process**

36. The following highlights some key elements of this consent process.

Transparency

37. If the proposed agreement is approved by the PAC and at the Conference, it will result in public notice, a public hearing and a public Order. From a public perspective, there is no significant difference between the current process in which matters are resolved through an Agreed Statement of Fact (ASF), and the Conference process. The following chart illustrates the similarities and differences between the two processes.

<b>Current Process</b>	<b>Conference Process</b>
Non-public investigation	Non-public investigation
Non-public, off-the-record settlement discussions	Non-public, off-the-record consent resolution discussions
	Non-public drafting of consent agreement
	Non-public agreement on disposition
Non-public consideration by PAC	Non-public consideration by PAC
<b>Public</b> Notice of Application	Non-public settlement conf.
Non-public Pre-Hearing Conf.	<b>Public</b> Notice of Application
Non-public drafting of ASF	
Non-public agreement on disposition	
<b>Public</b> hearing; revelation of ASF and joint submission on disposition	<b>Public</b> hearing; revelation of consent agreement and joint submission on disposition

38. As illustrated above, the Notice of Application is issued and served following the approval at the Conference, and this is necessary for the following reason. If the Conference panel were to reject an agreement, the proposal would fail, and the Society would complete its investigation. If the Notice was public at that time and the Conference panel rejected the proposal, it would be unfair to the licensee and difficult for the Society to complete its confidential investigation.

39. Once the Notice of Application is issued and served, it becomes public. As with all investigations, new complaints are sometimes received as a result of this public notice. If a new complaint was received after the issuance of the Notice of Application that results from the Conference, that complaint would be investigated separately from the complaint that is the subject of the consent proposal, as is done in the regular discipline stream.

Penalties and Mitigation

40. The agreed penalty in the consent proposal must be proportionate. It should reflect penalties imposed in cases with comparable findings, taking into account the costs saved by making the early admission. All penalties would be available in this process, including revocation.
41. There may be a range of possible penalties. A number of factors informing penalty are described in *Law Society of Upper Canada v. Ricardo Max Aguirre*, 2007 ONLSHP 0046 and these are all relevant to the consent process as well. The following factors inform the appropriate penalty to be proposed, with those most relevant to the consent process emphasized:
- a. The existence or absence of a prior disciplinary record;
  - b. *The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others;*
  - c. Whether the member has since complied with his or her obligations by responding to or otherwise co-operating with the Society;
  - d. The extent and duration of the misconduct;
  - e. The potential impact of the member's misconduct upon others;
  - f. *Whether the member has admitted misconduct, and obviated the necessity of its proof;*
  - g. Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct);
  - h. Whether the misconduct is out-of-character, or, conversely, likely to recur.

Three-Member Conference Panel and Hearing Panel

42. The proposed process provides that the same individuals would convene for the Conference and the Hearing Panel, by consent of the parties.
43. This feature of the proposed process resembles the process that may be followed when agreement is reached on facts and issues at a pre-hearing conference before a single panelist and, with the consent of the parties, the single panelist presides at the hearing on the merits. Rule 22.10 (2) of the *Rules of Practice and Procedure* provides that a single panel member may hear a case, on consent of the parties. This is an alternative dispute resolution process which, with adequate protections, is useful for the parties and the tribunal. In the proposed Conference process, rather than a single individual convening for the pre-proceeding Conference, three individuals would convene as the Conference panel.
44. There are two reasons for having a three-person panel at the Conference. First, the agreement of a three-person panel on the outcome between the Society and a lawyer or paralegal would have greater weight. Secondly, if only one member of a three-person panel were to preside at the Conference, the Hearing Panel might reject the agreement that the Conference panel had accepted.
45. At the hearing stage that follows the Conference, in some cases, it may be appropriate for a single member of the Hearing Panel to preside at the hearing. This person would be selected from the three persons who convened as the Conference panel, as he or she would be familiar with the facts and the issues that led to the consent agreement. Similar to the process described in paragraph 43, this person would sit as a single member with the consent of the parties.<sup>5</sup>

---

<sup>5</sup> Ontario Regulation 167/07 (Hearings Before the Hearing and Appeal Panels) provides as follows:

**Proceedings to be heard by one member**

2. (1) Subject to subsection (2), the chair or, in the absence of the chair, the vice-chair, shall assign either one member or three members of the Hearing Panel to a hearing to determine the merits of any of the following applications:

...



Legal Representation

46. The process is predicated on the lawyer or paralegal having legal representation. The lawyer's or paralegal's admissions and agreement to the proposal are essential to the success of the consent process. While legal representation is not a prerequisite to participating in the Conference, it would be strongly encouraged by the Society. Lawyers and paralegals who participate in the process would be advised by the Law Society to obtain legal advice.

Timelines

47. Since the Conference is a diversionary, "without prejudice" process, it is not in the public interest to stall the investigation during protracted negotiations and delay. The Committees propose that the timeline for arriving at an agreement be 30 days from the time that the agreement is presented to the lawyer or paralegal by the Law Society. If agreement is not reached in 30 days, the Law Society would resume its investigation.

Documents and the Record

48. The documents filed before the Hearing Panel should be public in the normal course, with the notation that it is the result of a consent proposal that would also be public as part of the Tribunal record.

**Tribunals Office's Administration of the Process**

49. Attached at [TAB 2] is a proposed template prepared by the Tribunals Office for the administration of the process, with particular emphasis on ensuring the process is open and transparent and in keeping with general Tribunals administration.

---

2. An application under subsection 34 (1) of the Act, if the parties to the application consent, in accordance with the rules of practice and procedure, to the application being heard by one member of the Hearing Panel.

**Amendments to the *Rules of Practice and Procedure***

50. To implement the Conference process, amendments to the *Rules of Practice and Procedure* would be required. They would refer to the process as a “pre-proceeding consent resolution conference”, and codify the procedural elements of the process described in this report. Consequential amendments to certain Rules may also be required.
  
51. Amendments to the Rules will be provided at a future Convocation should Convocation agree to the proposal for the Conference.

**CONVOCATION POLICY ON JOINT SUBMISSIONS  
(Discipline Policy Committee Report to Convocation)**

B.1. Joint Submissions of Counsel

B.1.1. The Committee was asked to consider the manner in which the joint submissions of counsel are currently treated by Discipline Panels, in light of the principles adopted by Convocation on March 27, 1992 in respect of joint submissions.

B.1.2. On March 27, 1992, Convocation adopted the recommendations of this Committee which provided, inter alia,

"5(a) Convocation encourages benchers sitting on discipline committees to accept a joint submission except where the committee concludes that the joint submission is outside a range of penalties that is reasonable in the circumstances.

"5(b) If the Committee, after hearing and considering submissions of counsel, does not accept the joint submission as to a particular penalty or as to the shared submission as to a range of penalties, the Committee will be at liberty to impose the penalty that it deems proper and should give reasons for not accepting the joint submission."

B.1.3. Some members of the Committee expressed concern that these principles are not being followed at the Committee level or at Convocation and that a lack of certainty in the process might discourage counsel from entering into Agreed Statements. The Committee noted that where, following negotiations of an Agreed Statement of Facts on the basis of a joint submission as to penalty, the proposed penalty is rejected, it might be appropriate to provide the Solicitor the option of commencing the hearing anew before another Committee.

B.1.4. Your Committee established a Sub-Committee, chaired by Robert J. Carter, Q.C., to consider the present practice regarding joint submissions at both the Committee level and at Convocation, to consider the consequences of the practice and to report to the Committee with recommendations.

...

ALL OF WHICH is respectfully submitted  
DATED this 24th day of February, 1995  
D. Scott, Chair

THE REPORT WAS ADOPTED

### Tribunals Offices' Administration of the Proposed Consent Process

1. Discipline Counsel will request in writing a date from the Hearings Coordinator, Tribunals Office for the Pre-Proceeding Consent Resolution Conference (“the Conference”), and provide a time estimate.
2. The Hearings Coordinator will schedule the Conference date and secure a three person panel as assigned by the Chair of the Hearing Panel.
3. The composition of the Conference panel will mirror the requirements of *Ontario Regulation 167/07* to allow this panel to convert to a Hearing Panel should the parties’ proposal to the Conference panel be accepted.
4. The Hearings Coordinator will advise Discipline Counsel and the lawyer or paralegal of the assigned Conference date and panel. The parties will immediately advise the Hearings Coordinator of any conflicts with the date or panel.
5. If the parties’ proposal is accepted by the Conference panel, the Hearings Coordinator will attend in person at the Conference to facilitate scheduling a hearing date for the Hearing Panel and parties to convene at a future date.
6. If the matter is to be heard by a single member of the Hearing Panel, the members of the Conference panel shall elect one member to preside on the hearing date as a Hearing Panel and will so notify the Hearings Coordinator.
7. The matter will now follow the same protocol applied by the Tribunals Office as in other hearings.
8. In accordance with Rule 9 of the *Rules of Practice and Procedure*, Discipline Counsel will request the Tribunals Office to issue and file the notice of application and will serve it.
9. Once filed, the notice of application will be publicly available.

10. The notice of application will refer to the hearing date scheduled in paragraph 5 above. The matter will by-pass the Proceedings Management Conference (PMC) and go straight to a hearing date.
11. To satisfy transparency requirements, two to four weeks prior to the hearing date, the Tribunals Office will prepare a summary of the notice of application for publication on the Law Society's "Current Hearings" website.
12. During the hearing, the accepted proposal referred to in paragraph 5 above will be marked as an exhibit and thereby form part of the public record. The Hearing Panel will endorse the notice of application to reflect its Decision and Order as set out in the accepted proposal.
13. After the hearing, the Office will
  - prepare any required formal orders from the Hearing Panel's endorsement;
  - deliver the Decision and Order and reasons of the Hearing Panel, if any, to the parties;
  - publish an order summary on the Law Society's "Tribunal Orders and Dispositions" website and in the *Ontario Reports*; and
  - publish the Hearing Panel's reasons, if any on the Canadian Legal Information Institute (CanLII) and Quicklaw databases.
14. The matter will then be closed, catalogued and archived off site.
15. After the matter is closed and on request, it would be made available to the public for viewing or copies of content, unless the Hearing Panel had ordered otherwise in the course of the hearing.

APPENDIX 2

THE LAW SOCIETY OF UPPER CANADA

**RULES OF PRACTICE AND PROCEDURE**  
**(applicable to proceedings before the Law Society Hearing Panel)**  
**MADE UNDER**  
**SECTION 61.2 OF THE *LAW SOCIETY ACT***

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 27, 2011

MOVED BY

SECONDED BY

THAT the rules of practice and procedure applicable to proceedings before the Law Society Hearing Panel, made by Convocation on February 26, 2009 and amended by Convocation on June 25, 2009 and June 29, 2010, (the “Rules”) be amended as follows:

**1. The definition of “hearing” in subrule 1.02 (1) of the English version of the Rules is revoked and the following substituted:**

“hearing” does not include a consent resolution conference, a proceeding management conference or a pre-hearing conference;

**2. Rule 25.01 of the English version of the Rules is amended by adding the following subrule:**

**Consent resolution conference: no costs**

(4) Despite subrules (1) and (2), no costs shall be awarded against the Society or the subject of the proceeding based on,

- (a) either party’s refusal to participate or either party’s withdrawal from participation in a consent resolution conference; or
- (b) the fact that a consent resolution conference did not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.

**3. The English version of the Rules are further amended by adding the following Rule:**

**RULE 29**

**CONSENT RESOLUTION CONFERENCE**

**Definitions**

**29.01** In this Rule,

“consent resolution conference” means a conference between the Society and the subject of a potential proceeding, that is conducted by a consent resolution panel, held prior to the commencement of the conduct proceeding for the purposes of settling,

- (a) the decision and order to be made by the Hearing Panel in the conduct proceeding; or
- (b) the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding;

“consent resolution panel” means the panelist or, collectively, the panelists assigned to conduct a consent resolution conference;

“potential proceeding” means a conduct proceeding that has not been commenced;

“subject of a potential proceeding” means the person who will be the subject of a conduct proceeding once it has been commenced.

**Consent resolution conference: when shall be conducted**

**29.02** (1) The chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel shall direct that a consent resolution conference be conducted if the following conditions are present:

1. The Society has obtained the authorization of the Proceedings Authorization Committee,
  - i. to commence a conduct proceeding, and
  - ii. to request the Hearing Panel to direct that a consent resolution conference be conducted.
2. The conduct proceeding has not been commenced.
3. The Society and the subject of the potential proceeding have agreed to,

- i. the decision and order to be made by the Hearing Panel in the conduct proceeding; or
  - ii. the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.
4. The subject of the potential proceeding has consented to participate in a consent resolution conference.
5. The Society has requested a consent resolution conference.

**Who conducts consent resolution conference**

(2) Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted under subrule (1), the chair, or, in the absence of the chair, the vice-chair, shall assign either one or three panelists to conduct the consent resolution conference.

**Request to Tribunals Office**

**29.03** (1) The Society may request a consent resolution conference by submitting a request in writing to the Tribunals Office.

**Information re conditions**

(2) The Society shall include in its written request for a consent resolution conference sufficient information to satisfy the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel of the existence of the conditions set out in rule 29.02.

**Contact information of subject of potential proceeding**

(3) The Society shall also include in its written request for a consent resolution conference the name of the subject of the potential proceeding and her or his address for service, telephone number, fax number, if any, and e-mail address, if any.

**Notice of consent resolution conference: Society**

**29.04** Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted, the Tribunals Office shall send to the Society and to the subject of the potential proceeding notice of the date, time and location of the consent resolution conference.



**Procedure applicable to consent resolution conference**

**29.05** (1) The practices and procedures applicable to proceedings before the Hearing Panel that are set out in Rules 2 to 20 and Rules 22 to 28 do not apply with respect to a consent resolution conference.

(2) Subject to this Rule, the practices and procedures applicable with respect to a consent resolution conference shall be determined by the consent resolution panel conducting the consent resolution conference.

**Consent resolution conference not open to public**

(3) A consent resolution conference shall be conducted in the absence of the public.

**Withdrawing participation in consent resolution conference**

**29.06** (1) At any time before or during the conduct of a consent resolution conference, the Society or the subject of the potential proceeding may withdraw from participating in the consent resolution conference.

**Notice of withdrawal**

(2) Where the Society or the subject of the potential proceeding wishes to withdraw from participating in the consent resolution conference under subrule (1), the withdrawing party shall so notify in writing the other party and the Tribunals Office.

**Settlement at consent resolution conference: commencement of conduct proceeding**

**29.07** (1) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding the Society shall,

- (a) commence the conduct proceeding; and
- (b) notify the Tribunals Office in writing of the fact and general nature of the settlement at the consent resolution conference not later than the day on which the conduct proceeding is commenced.

**Settlement at consent resolution conference: non-application of certain Rules**

(2) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, despite rule 1.01, the following Rules do not apply to the conduct proceeding:

1. Rule 6.
2. Rule 7.
3. Rule 8.
4. Rule 12.
5. Rule 13.
6. Rule 14.
7. Rule 16.
8. Rule 19.
9. Rule 20.
10. Rule 21.
11. Rule 22.

**No settlement at or withdrawal from consent resolution conference: subsequent hearings**

**29.08** Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

- (a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and
- (b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

## INFORMATION

### **b) TWO YEAR REVIEW ON NON-BENCHER ADJUDICATOR INITIATIVE**

#### **Summary**

7. In April 2007 Convocation approved the addition of four non-bencher lawyers and four non-bencher non-lawyers to become members of the Law Society's Hearing Panel. It also directed that two years after implementing the recommendation there be a review for Convocation of the manner in which the non-bencher lawyers and the non-bencher non-lawyers have served as adjudicators.
8. The non-bencher lawyers and non-lawyers were appointed in January 2009. As directed by Convocation the Committee is providing the two year review, for Convocation's information.
9. The Committee has concluded that although it is still early to obtain a full picture of the non-bencher adjudicator initiative, indications are that it,
  - a. enhances the Law Society's ability to effectively adjudicate and manage its hearings process in the public interest,
  - b. has made it possible to provide important human resources to the Hearing Panel; and
  - c. offers an opportunity for non-benchers to play a valuable role in Law Society matters and become more aware of issues related to professional regulation.

#### **Introduction and Background**

10. In April 2007 Convocation approved a number of recommendations of the Tribunals Composition Task Force including,

##### **Recommendation 1**

That Convocation approves the eligibility of,

- a. four non-bencher lawyers, and
  - b. four non-bencher non-lawyer persons
- to be members of the Law Society's Hearing Panel.

**Recommendation 2**

That if Convocation approves recommendation 1, all Hearing Panel members be remunerated on the same basis, except that the non-bencher lawyer and non-bencher non-lawyer members are not required to donate 26 days to the Law Society before being eligible for remuneration.

**Recommendation 3**

That Convocation budget annually an amount not exceeding \$100,000 for the remuneration and expenses associated with adding non-bencher lawyers and non-bencher non-lawyer persons to the Hearing Panel.

**Recommendation 4**

That if Convocation approves Recommendation 1, two years after implementing the recommendation, Convocation authorize a review of the manner in which the non-bencher lawyers and the non-bencher non-lawyer persons have served as adjudicators on the Law Society's Hearing Panel, the results of which are to be reported to Convocation.

11. A process was developed to seek applicants for the adjudicator positions. A notice was placed in the *Ontario Reports* in English and French for lawyer applicants. Copies of the notices are set out at **Appendix 3**. A description of the process followed for both non-bencher lawyer and non-bencher non-lawyer adjudicator appointments is set out at **Appendix 4**. The appointments were made in 2009.

**Scope of this Report**

12. Convocation directed that a review take place after two years of operation of the non-bencher adjudicator initiative. Although it is possible to provide some assessment of the initiative, in the Committee's view there has been insufficient time to fully assess qualitative issues that require the benefit of a longer period. Accordingly, the Committee's report is impressionistic, with a general overview of the initiative over the last two years.

**Use of Non-bencher Adjudicators**

13. In discussing usage of non-bencher adjudicators it is important to note, as well, that in addition to the four non-bencher lawyer appointees and the four non-bencher non-lawyer appointees, the Law Society has on occasion appointed "temporary" panelists (lawyer and non-lawyer) where needed for French

language hearings and temporary paralegal panelists for good character or appeal hearings. The Law Society has authority to do this pursuant to section 49.24.1 of the *Law Society Act*.

14. The issue of French language hearings illustrates one of the benefits of the non-bencher adjudicator initiative in enhancing adjudicative resources. As benchers and lay benchers are elected and appointed, respectively, those able or available to hear French language hearings can vary from time to time. To provide more continuity, three of the four non-bencher lawyer adjudicators and two of the non-bencher non-lawyer adjudicators are bilingual. This reduces the need to use “temporary” panelists. From a public interest perspective it has enhanced resources available to ensure the public and licensees are able to avail themselves of the opportunity to be heard in French.
15. Since Convocation passed the non-bencher adjudicator initiative the Law Society has also been required to populate a significant number of panels to hear paralegal good character matters. This has required extensive use of lay benchers and non-bencher non-lawyer adjudicators as well as temporary paralegal panelists. The non-bencher adjudicator initiative did not include appointments of additional non-bencher paralegal adjudicators. Given that the paralegal good character hearings are currently winding down, the need for additional temporary paralegal panelists may diminish, although this issue may require further discussion in the future.
16. The four non-bencher lawyer candidates and the four non-bencher non-lawyer appointees are sent a hearings schedule, in the same way as bencher adjudicators, and provide their availability to sit on Law Society hearings and other matters. Like all adjudicators they may be scheduled to sit on pre-hearing conferences, hearings, summary hearings, appeals, interlocutory motions, motions in hearings and appeals, short matter dates (hearings estimated by the parties to require less than one day), long matter dates (hearings estimated by the parties to require more than one day) in lawyer and paralegal matters in both English and French.

17. As with all adjudicators the non-bencher adjudicators may be assigned to a matter, with an anticipated time commitment, only to be required to participate for less time because a matter does not proceed or takes less time than anticipated. The reverse may also be true; a matter may take more time than initially anticipated.
18. The non-bencher non-lawyer adjudicators have been used on a number of matters. Their availability has assisted in scheduling hearings over the last two years. The non-bencher lawyers, in particular those who are bilingual, have also had a number of occasions to sit on hearings or otherwise participate.
19. The existence of an additional pool of adjudicators has provided the Chair of the Hearing Panel with additional scheduling flexibility. On occasion these adjudicators have made the difference between being able to schedule a hearing or not when the time commitment involved or the last minute change in scheduling made it impossible to schedule a bencher adjudicator. The availability of additional lay and French speaking adjudicators has also facilitated flexibility in scheduling.
20. The information at **Appendix 5** sets out the number of times a non-bencher adjudicator was assigned to matters in 2009 and 2010 and how much actual participation time this represented.<sup>6</sup> It reveals some unevenness in the use of non-bencher adjudicators, particularly non-bencher lawyers. The Committee is of the view that the non-bencher adjudicators must be given ample opportunity to participate in hearings and matters. The goal of the initiative is to develop additional and experienced adjudicative resources to enhance the operation of the Tribunal. This means that it is important to regularly schedule these adjudicators to participate on panels. Greater effort to do so will be made in 2011.

---

<sup>6</sup> Setting out “no. of times assigned” provides a snapshot of opportunities provided to the non-bencher adjudicator to participate. Often, however, an assigned matter will not proceed, (adjournments, withdrawals, resolutions by ASF, etc.) so the actual participation is reflected in the second number.

**Expenses and Remuneration for Non-Bencher Adjudicators**

21. In 2009 the total expenses and remuneration for non-bencher lawyer and non-bencher non-lawyer appointees was \$87,099.36, representing the use of five non-lawyers and three lawyers. This was the first year of the initiative and occurred before the paralegal good character hearings were underway. In that year an additional \$1,522.02 was spent on two temporary paralegal panelists.

22. From January to November 2010, \$153,642.37 was spent on non-bencher lay adjudicators (approximately 60% of the total), non-bencher lawyer adjudicators (approximately 30% of the total), and temporary lawyer and lay adjudicators (approximately 10% of the total). This includes \$27,615.75 (18%) for French hearings. Specifically, the expenses and remuneration for,

a. non-bencher lay adjudicators were:

Expenses	\$31,439.34	(\$3,125.66 of which was for French hearings)
Remuneration	<u>\$60,274.81</u>	(\$2,300.00 of which was for French hearings)
Total	\$91,714.15	(\$5,425.66 of which was for French hearings)

b. non-bencher lawyer adjudicators were:

Expenses	\$13,455.32	(\$ 4,893.59 of which was for French hearings)
Remuneration	<u>\$31,873.64</u>	(\$12,700.00 of which was for French hearings)
Total	\$45,328.96	(\$17,593.59 of which was for French hearings)

a. “temporary” lawyer and lay adjudicators were:

Expenses	\$ 1,684.45	(\$1,296.50 of which was for French hearings)
Remuneration	<u>\$14,914.81</u>	(\$3,300.00 of which was for French hearings)
Total	\$16,599.26	(\$4,596.50 of which was for French hearings)

2. In November 2010 the Committee reported to Convocation that the \$100,000 limit placed on expenses for non-bencher adjudicators had been exceeded. It noted that given,

- a. the requirements of Regulation 167/07;
- b. the Law Society’s commitment to having lay benchers on all hearings; and
- c. a licensee’s right to a French language hearing,

non-bencher lawyer and non-bencher non-lawyer appointees were necessarily assigned despite the cap having been reached. It noted that in all likelihood additional funds would have to be expended before the end of 2010 and that it was realistic to expect a similar experience and needs in 2011. In the 2011 budget Convocation included an increase to \$175,000.

3. As a regulator of the profession in the public interest the importance of regulatory proceedings being scheduled as expeditiously as possible cannot be over-emphasized. The public in general and complainants in particular, have a right to expect that the Law Society will effectively address the issues of lawyer and paralegal competence, conduct and capacity. The non-bencher adjudicator initiative has provided greater flexibility to the Tribunals process.
4. The Committee also believes that the initiative is providing an additional benefit. Small though the numbers are, a new group of lawyers and lay people are becoming familiar with the Law Society, with the intricacies of professional regulation, the responsibilities that accompany it and the issues that affect lawyers and paralegals. Expanding adjudicative responsibilities beyond benchers strengthens the Law Society's work.

### **Conclusion**

5. The Committee is of the view that the non-bencher adjudicator initiative is proceeding well, has added to the Law Society's capacity to regulate in the public interest and represents an important component of the Law Society's ongoing commitment to transparent, fair, and effective regulatory processes.





The Law Society of Upper Canada exists to govern Ontario's legal profession in the public interest.

The Law Society of Upper Canada encourages applicants that reflect the diversity of Ontario. We appreciate all interest and will directly contact candidates under consideration.

The Law Society of Upper Canada | Barreau du Haut-Canada

### Invitation to Lawyers to apply for Appointment to the Law Society of Upper Canada's Hearing Panel

The Law Society of Upper Canada is seeking four qualified lawyers for appointment to its Hearing Panel. The term of appointment shall be at the pleasure of Convocation.

The Law Society of Upper Canada governs legal service providers in the public interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct. In furtherance of that mandate, the Law Society's Hearing Panel hears cases related to the conduct, capacity and competence of lawyers and paralegals. The Hearing Panel consists of benchers, lawyers, paralegals and public appointees.

This is a part-time position that is remunerated on a *per diem* basis. Reasonable expenses are paid/refunded. Assignment to hearings will be on an *as needed* basis.

Successful applicants must be currently licensed by the Law Society of Upper Canada, be called to the bar for a minimum of ten years, have no disciplinary record in any jurisdiction, and must be able to devote time to the role of an adjudicator. Bilingualism (French/English) is an asset. Consideration will be given to the following qualifications:

- i. adjudicative experience and legal expertise
- ii. commitment to the public interest
- iii. understanding of the role of an adjudicator
- iv. familiarity with administrative tribunals
- v. open-mindedness, empathy and the ability to consider argument
- vi. commitment to preparing timely and reasoned decisions
- vii. willingness to be trained as an adjudicator and to attend mandatory training sessions
- viii. commitment to tribunal standards of procedure, consistency, quality and performance
- ix. good oral and written communication skills

Qualified individuals are invited to send a curriculum vitae **no later than February 14, 2008** to the Human Resources Department, Law Society of Upper Canada, 130 Queen Street West, Toronto Ontario, M5H 2N6; fax 416.947.3448; e-mail [hr@lsuc.on.ca](mailto:hr@lsuc.on.ca).



**Le Barreau  
du Haut-  
Canada  
a pour  
mission de  
réglementer  
la profession  
juridique  
dans  
l'intérêt  
public.**

*Le Barreau du  
Haut-Canada  
encourage les  
candidats et  
candidates  
qui représentent  
la diversité de  
l'Ontario. Nous  
vous remercions  
de votre intérêt  
et contacterons  
directement les  
personnes dont  
la candidature  
sera retenue.*

The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

### **Le Barreau du Haut-Canada invite les avocats et avocates à faire demande comme membre de son comité d'audition**

Le Barreau du Haut-Canada cherche quatre avocats compétents pour faire partie de son comité d'audition. Les conditions de la nomination seront établies par le Conseil.

Le Barreau du Haut-Canada réglemente les fournisseurs de services juridiques dans l'intérêt du public en veillant à ce que les avocates, les avocats et les parajuristes qui sont au service de la population de l'Ontario répondent à des normes élevées en matière de formation, de compétence et de déontologie. Dans le cadre de son mandat, le comité d'audition du Barreau entend des causes portant sur la conduite, la capacité et la compétence des avocats et des parajuristes. Le comité d'audition est formé de conseillers, d'avocats, de parajuristes et de membres du public.

Il s'agit d'un poste à temps partiel qui est rémunéré selon un forfait quotidien. Les dépenses raisonnables sont payées ou remboursées. Les mandats d'audition sont assignés selon les besoins.

Pour être acceptés, les candidats et candidates doivent détenir une licence du Barreau du Haut-Canada, être assermentés depuis au moins dix ans, ne pas avoir de dossier disciplinaire dans aucun ressort et être capables d'accorder du temps à leur rôle de membre du comité. Le bilinguisme (français/anglais) est un atout. Les compétences suivantes seront prises en compte :

- (i) Expérience en arbitrage et expertise judiciaire
- (ii) Engagement envers l'intérêt public
- (iii) Compréhension du rôle d'arbitre
- (iv) Connaissance du fonctionnement des tribunaux administratifs
- (v) Ouverture d'esprit, empathie et habileté à analyser un argument
- (vi) Engagement à préparer des décisions opportunes et raisonnées
- (vii) Volonté de participer à des séances obligatoires de formation d'arbitre
- (viii) Engagement envers les normes de procédure des tribunaux, la cohérence, la qualité et le rendement
- (ix) Bonnes habiletés de communication orale et écrite

Les personnes qualifiées sont invitées à envoyer leur curriculum vitae le **14 février 2008 au plus tard** aux Ressources humaines, Barreau du Haut-Canada, 130, rue Queen Ouest, Toronto (Ontario) M5H 2N6; téléc. 416.947.3448; courriel [hr@lsuc.on.ca](mailto:hr@lsuc.on.ca)

**APPENDIX 4**

**APPOINTMENTS PROCESS FOR NON-BENCHER ADJUDICATORS**

1. The Law Society placed advertisements in the *Ontario Reports* for lawyer applicants. For non-lawyer applicants, it wrote to previous lay benchers and solicited from other regulators the names of lay adjudicators who might meet the Law Society's appointment criteria.

**Lawyer Applicants**

2. The Law Society received 229 applications from lawyers and 13 applications from non-lawyers. Of these, 133 applications were from lawyers inside Toronto and 96 were from lawyers outside of Toronto. There were 153 male applicants, and 76 female applicants.
3. The then Director, Policy and Tribunals read every lawyer resumé. Only those applicants with prior adjudicator experience were selected for further review. This reduced the number to 70.
4. The Director and other designated staff then reviewed the 70 lawyer applicants against the criteria set out in the advertisement, and selected a short list of 27 lawyers.
5. In June 2008, the Director provided the names of all 229 lawyers, including the 70 with adjudicator experience, and the short list and resumé of the 27 short-listed applicants to a bencher working group of Alan Gold, Larry Banack and Bonnie Warkentin.
6. The Working Group met on July 8, 2008 to review the applicants. It selected a short list of 6 lawyers (three from within Toronto and three from outside Toronto).

7. The shortlisted applicants were then vetted for any Law Society regulatory issues, and their references were checked. The remaining members of the working group, Alan Gold and Larry Banack reviewed the shortlist.

**Non-Lawyer Applicants**

8. The Law Society received 13 applications from non-lawyers. The Director reviewed the applicants and provided their resumés to the Working Group in June 2008. The Working Group discussed these applicants at its July 8 meeting, and selected a short list of five applicants. The references of the five applicants were checked.
  
9. Alan Gold and Larry Banack reviewed the applicants following the reference and regulatory checks, and recommended four lawyer and four non-lawyer adjudicators to the Committee for appointment to the Hearing Panel. The Committee reviewed the names and information about their experience and recommends that Convocation invite them to become members of the Hearing Panel.

## APPENDIX 5

**2009 NON BENCHER HEARING PANEL APPOINTEE ADJUDICATOR ATTENDANCE**

<b>Appointee</b>	<b>Lawyer or non-lawyer<sup>7</sup> appointee</b>	<b>Number of times assigned to a hearing panel</b>	<b>Hearing participation (in hours)<sup>8</sup></b>
1	Lawyer	3	13
2	Lawyer	1	7
3	Lawyer	0	0
4	Lawyer	0	0
5	Non-lawyer	12	244
6	Non-lawyer	10	151
7a	Non-lawyer	4	59
7b <sup>9</sup>	Non-lawyer	1	9
8	Non-lawyer	3	21
<b>Totals</b>		<b>34</b> <b>lawyer appointees (4)</b> <b>non-lawyer appointees (30)</b>	<b>504</b> <b>lawyer appointees (20)</b> <b>non-lawyer appointees (484)</b>

<sup>7</sup> In 2009, the four lawyer appointees to the Hearing Panel were Margot Blight, Adriana Doyle, Jacques Ménard and Howard Ungerman. The five non-lawyer appointees were Andrea Alexander, Anne-Marie Doyle, Barbara Laskin, Maurice Portelance and Sarah Walker.

<sup>8</sup> Includes participation for continuation hearing dates.

<sup>9</sup> Non-lawyer appointee adjudicator 7b replaced non-lawyer appointee adjudicator 7a.

**2010 NON BENCHER HEARING PANEL APPOINTEE ADJUDICATOR ATTENDANCE**

<b>Appointee</b>	<b>Lawyer or non-lawyer<sup>10</sup> appointee</b>	<b>Number of times assigned to a hearing panel</b>	<b>Hearing participation (in hours)</b>
1	Lawyer	11	35
2	Lawyer	12	26
3	Lawyer	13	87
4	Lawyer	4	11
5	Non-lawyer	21	255
6	Non-lawyer	17	111
7	Non-lawyer	5	44
8	Non-lawyer	14	81
<b>Totals</b>		<b>97 lawyer appointees (40) non-lawyer appointees (57)</b>	<b>650 lawyer appointees (159) non-lawyer appointees (491)</b>

<sup>10</sup> In 2010, the four lawyer appointees to the Hearing Panel were Margot Blight, Adriana Doyle, Jacques Ménard and Howard Ungerman. The four non-lawyer appointees to the Hearing Panel were Andrea Alexander, Barbara Laskin, Maurice Portelance and Sarah Walker.

**RULE 29**

**CONSENT RESOLUTION CONFERENCE**

**Definitions**

**29.01** In this Rule,

“consent resolution conference” means a conference between the Society and the subject of a potential proceeding, that is conducted by a consent resolution panel, held prior to the commencement of the conduct proceeding for the purposes of settling,

- (a) the decision and order to be made by the Hearing Panel in the conduct proceeding; or
- (b) the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding;

“consent resolution panel” means the panelist or, collectively, the panelists assigned to conduct a consent resolution conference;

“potential proceeding” means a conduct proceeding that has not been commenced;

“subject of a potential proceeding” means the person who will be the subject of a conduct proceeding once it has been commenced.

**Consent resolution conference: when shall be conducted**

**29.02** (1) The chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel shall direct that a consent resolution conference be conducted if the following conditions are present:

- 1. The Society has obtained the authorization of the Proceedings Authorization Committee,
  - i. to commence a conduct proceeding, and
  - ii. to request the Hearing Panel to direct that a consent resolution conference be conducted.
- 2. The conduct proceeding has not been commenced.
- 3. The Society and the subject of the potential proceeding have agreed to,
  - i. the decision and order to be made by the Hearing Panel in the conduct proceeding; or

- ii. the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.
- 4. The subject of the potential proceeding has consented to participate in a consent resolution conference.
- 5. The Society has requested a consent resolution conference.

**Who conducts consent resolution conference**

(2) Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted under subrule (1), the chair, or, in the absence of the chair, the vice-chair, shall assign either one or three panelists to conduct the consent resolution conference.

**Request to Tribunals Office**

**29.03** (1) The Society may request a consent resolution conference by submitting a request in writing to the Tribunals Office.

**Information re conditions**

(2) The Society shall include in its written request for a consent resolution conference sufficient information to satisfy the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel of the existence of the conditions set out in rule 29.02.

**Contact information of subject of potential proceeding**

(3) The Society shall also include in its written request for a consent resolution conference the name of the subject of the potential proceeding and her or his address for service, telephone number, fax number, if any, and e-mail address, if any.

**Notice of consent resolution conference: Society**

**29.04** Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted, the Tribunals Office shall send to the Society and to the subject of the potential proceeding notice of the date, time and location of the consent resolution conference.

**Procedure applicable to consent resolution conference**

**29.05** (1) The practices and procedures applicable to proceedings before the Hearing Panel that are set out in Rules 2 to 20 and Rules 22 to 28 do not apply with respect to a consent resolution conference.

- (2) Subject to this Rule, the practices and procedures applicable with respect to a



consent resolution conference shall be determined by the consent resolution panel conducting the consent resolution conference.

**Consent resolution conference not open to public**

- (3) A consent resolution conference shall be conducted in the absence of the public.

**Withdrawing participation in consent resolution conference**

**29.06** (1) At any time before or during the conduct of a consent resolution conference, the Society or the subject of the potential proceeding may withdraw from participating in the consent resolution conference.

**Notice of withdrawal**

(2) Where the Society or the subject of the potential proceeding wishes to withdraw from participating in the consent resolution conference under subrule (1), the withdrawing party shall so notify in writing the other party and the Tribunals Office.

**Settlement at consent resolution conference: commencement of conduct proceeding**

**29.07** (1) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding the Society shall,

- (a) commence the conduct proceeding; and
- (b) notify the Tribunals Office in writing of the fact and general nature of the settlement at the consent resolution conference not later than the day on which the conduct proceeding is commenced.

**Settlement at consent resolution conference: non-application of certain Rules**

(2) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, despite rule 1.01, the following Rules do not apply to the conduct proceeding:

- 1. Rule 6.
- 2. Rule 7.
- 3. Rule 8.
- 4. Rule 12.

5. Rule 13.
6. Rule 14.
7. Rule 16.
8. Rule 19.
9. Rule 20.
10. Rule 21.
11. Rule 22.

**No settlement at or withdrawal from consent resolution conference: subsequent hearings**

**29.08** Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

- (a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and
- (b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

1. Rule 6.
2. Rule 7.
3. Rule 8.
4. Rule 12.
5. Rule 13.
6. Rule 14.
7. Rule 16.
8. Rule 19.
9. Rule 20.
10. Rule 21.
11. Rule 22.

**No settlement at or withdrawal from consent resolution conference: subsequent hearings**

**29.08** Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

- (a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and
- (b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

**FOR INFORMATION**  
**ANNUAL REPORT OF**  
**THE COMPLAINTS RESOLUTION COMMISSIONER**

227. Part I of By-Law 11, which governs the office of the Complaints Resolution Commissioner, requires that the Complaints Review Commissioner (“the Commissioner”) submit an annual report to the Committee. The Committee must then provide the report to Convocation. The relevant section of the By-Law reads:

**Annual report**

3. Not later than March 31 in each year, the Commissioner shall submit to the Professional Regulation Committee a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the Committee shall lay the report before Convocation not later than at its regular meeting in June.
228. The report of the Commissioner, Stindar K. Lal, is attached as **TAB 4.4.1**.
229. Mr. Lal and one member of his staff attended the Committee’s February 13, 2014 meeting to discuss the report.

# Annual Report of the Complaints Resolution Commissioner

January 1, 2013 – December 31, 2013

Submitted by Stindar Lal, QC/cr  
Complaints Resolution Commissioner

**TABLE OF CONTENTS**

<b><u>A. Introduction</u></b>	3
<b><u>B. Complaints Resolution Commissioner's Functions</u></b>	3
Complaints Resolution Function	3
Complaints Review Function	4
Standard of Review	4
<b><u>C. Composition of the Office</u></b>	5
<b><u>D. Complaints Review Process</u></b>	5
Notice to the Complainant	5
Format of the Review Meeting	5
Location of the In-Person Meetings	6
Processing Requests for Review	7
Review Meeting Schedule	7
<b><u>E. Statistical Information</u></b>	8
Number of Requests for Review	8
Number of Reviews Conducted	10
Format of Review Meetings Conducted	11
Department that Conducted the Investigation	12
Predominant Issues in the Cases Reviewed	14
Results of the Reviews Conducted in 2013	15
Results of the Reviews Conducted in 2012	17
Results of the Reviews Conducted in 2011	18
Director's Response to Files Referred Back to the Law Society in 2013	18
Director's Response to Files Referred Back to the Law Society in 2012	19
Director's Response to Files Referred Back to the Law Society in 2011	20
<b><u>F. Age Tracking of Files Closed in 2013</u></b>	21
In-Person and Teleconference Reviews	21
In Writing Reviews	22
No Jurisdiction Files	22
Files Withdrawn	22
Active Inventory as of December 31, 2013	22
<b><u>G. Conclusion</u></b>	23
 <b><u>APPENDICES</u></b>	
<i>Law Society Act</i>	1
By-Law 11	2
Information Sheet	3
Request for Review Form	4

## **A. Introduction**

The Complaints Resolution Commissioner is appointed by Convocation pursuant to Section 49.14 of the *Law Society Act, R.S.O. 1990, ch. L.8* (hereinafter referred to as the “*Act*”). The role and responsibilities of the Complaints Resolution Commissioner (hereinafter referred to as the “Commissioner”) are set out in Sections 49.14 to 49.19 of the *Act* and are attached to this Report as Appendix 1. The *Act* also outlines the administrative responsibilities of the office of the Commissioner.

Part 1 of By-Law 11<sup>1</sup> (hereinafter referred to as “By-Law 11”), made pursuant to Section 62 of the *Act*, a copy of which is attached to this Report as Appendix 2, elaborates on the role and functions of the Commissioner.

Pursuant to Section 3 of By-Law 11, the Commissioner is required to submit to the Professional Regulation Committee of the Law Society of Upper Canada an Annual Report “upon the affairs of the office of the Commissioner during the immediately preceding year”. I am submitting this Report for the 2013 calendar year. This will be my final Report to the Committee, as my current appointment expires on March 31, 2014.

## **B. Complaints Resolution Commissioner’s Functions**

By-Law 11 provides the Commissioner with two distinct functions, the Complaints Resolution function and the Complaints Review function.

### **Complaints Resolution Function:**

The Complaints Resolution function provides the Commissioner with the statutory authority to perform a formal resolution function. It allows the Law Society, with the consent of the complainant and licensee, to refer a matter to the Commissioner for resolution, prior to the file being investigated or referred to the Proceedings Authorization Committee.

The Commissioner has a broad discretion to determine the process for the resolution function. While the resolution function has been available for implementation since 2007, to date, the Commissioner has only been called upon to perform the review function.

---

<sup>1</sup> By-Law 11 was made May 1, 2007, and was most recently amended May 30, 2013.

**Complaints Review Function:**

By-Law 11 also provides the Commissioner with the authority to review a complaint if a complainant requests that the Law Society refer a reviewable complaint to the Commissioner for review.

Subsection 4 (1) of By-Law 11 identifies those complaints which may be reviewed by the Commissioner. It provides that a complaint may be reviewed if:

- (a) the merits of the complaint have been considered by the Law Society;
- (b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
- (c) the complaint has not been previously reviewed by the Commissioner; and
- (d) the Law Society has notified the complainant that it will be taking no further action in respect of the complaint.

Subsection 4 (2) of By-Law 11 provides that a complaint may not be reviewed by the Commissioner if, in the opinion of the Commissioner, it concerns only the quantum of fees or disbursements charged by a licensee, a licensee's filing requirements, the handling of money and other property or negligence of a licensee.

Subsection 5 (3) of By-Law 11 requires the complainant to request a review within 60 days of being notified of the Law Society's decision to close the file. During 2013, while the office of the Commissioner received a request for review on 301 files, 16 of the requests were received outside the 60 day time period. In each of such instances, the complainant was notified in writing of the Commissioner's lack of jurisdiction to conduct a review. In 2012, there were nine such requests and during 2011, 10 such requests were received.

In some cases, Counsel to the Commissioner and Counsel to the Director of Professional Regulation have been able to work together to resolve issues in advance of a meeting. In other cases, informal resolutions have been achieved after the Review Meeting was completed, eliminating the need to formally refer the matter back to the Law Society.

**Standard of Review:**

By-Law 11 Subsection 7 (2) requires that the Commissioner apply a standard of reasonableness in reviewing the Law Society's investigation of a complaint. This standard of review requires the Commissioner to determine whether the Law Society's consideration of a complaint and its resulting decision to take no further action with respect to the complaint was reasonable. The Commissioner's role is similar to that of an ombudsman in that as an ombudsman, a degree of deference is given to the body which is being overseen. Applying this standard of review, if the Commissioner is satisfied that the decision to close a complaint file is reasonable, no further action is recommended. However, if the Commissioner is not satisfied that the decision arrived at by the Law



Society was reasonable, the complaint will be referred back to the Law Society with a recommendation that the Law Society take further action.

The decision to refer a file back to the Law Society is case specific. It is a decision based on several factors such as the facts relating to a particular complaint, the rationale for seeking a review of the complaint from the Commissioner, the quality of evidence on which the complainant is relying and the reasonableness of the position taken by the Law Society. Therefore, each complaint is unique.

Section 49.19 of the *Act* states “A decision of the Commissioner is final and is not subject to appeal.”

### **C. Composition of the Office**

The office of the Commissioner is currently staffed with one part-time Counsel, who is also responsible for the management of the office and one full-time Counsel. Counsel participate in the reviews, providing the Commissioner with legal advice when required. The office is also staffed with a Senior Coordinator and an Administrative Assistant.

### **D. Complaints Review Process**

#### **Notice to the Complainant:**

Upon being advised by the staff of either the Complaints Resolution Department or the Investigations Department of the Professional Regulation Division that a complaint file is being closed without a referral to the Proceedings Authorization Committee for other action, including disciplinary action, the complainant is notified that the Law Society’s decision to close the complaint may be reviewed by the Commissioner.

#### **Format of the Review Meeting:**

By-Law 11, Subsection 8 (1) provides that the procedures applicable to the review of a complaint referred to the Commissioner shall be determined by the Commissioner.

By-Law 11, Subsection 8 (2) provides that where practicable, the Commissioner will meet with each complainant, and the Commissioner may meet with the complainant by telephone, electronic or other communication facilities in order to allow all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

Until the end of December 2011, all meetings were scheduled as in-person meetings. However, if the complainant was unable or unwilling to attend the in-person meeting, the complainant was provided with the opportunity to participate in a teleconference meeting or alternatively, request a review based on the written materials.

In December 2011, in order to meet the growing demand for reviews, a form entitled the “Request for Review by the Complaints Resolution Commissioner” (the “form”) was introduced. In this form, the complainant is informed of three options for proceeding with a review of a complaint by the Commissioner: an in-person meeting, a meeting by teleconference or proceeding with the review based on the written material contained in the Law Society’s file. In the last option, the complainant often submits detailed written material with the form. Attached to this Report and marked as Appendix 3 is a copy of the form. Also attached and marked as Appendix 4 is a copy of the Information Sheet, which explains the review process to the complainant.

Since the introduction of the form, there has been an increase in the number of requests for review based on the written materials. However, when given a choice, many complainants still prefer to have an in-person meeting, even when advised that the review will proceed more expeditiously if done either by teleconference or in writing.

Since the establishment of the Commissioner’s office, most of the files reviewed were investigated and closed by the Complaints Resolution Department, which department may not have the opportunity to meet with complainant in person. Therefore, a meeting with the Commissioner may be the complainant’s only opportunity to voice his or her concerns in person. A discussion with the Commissioner also allows the complainant an opportunity to ask questions about the Law Society’s process, including the investigation and resulting outcome. For instance, it is often difficult for a lay person to appreciate the difference between a breach of the Rules and a claim in negligence.

In considering the efficiencies of the office of the Commissioner, this office examined the different formats for proceeding with a review meeting. It was noted that since verbally communicating with the Commissioner permits an open dialogue between the complainant and the Commissioner, less detail is required in the Commissioner’s decision letter following an in-person or teleconference meeting. When concluding a review based on the written materials, the Commissioner’s letter requires that the Commissioner recite all relevant facts and address all objections set out in the complainant’s written submissions. In addition, communication from the complainant is more frequent following a review based solely on the written materials, which may be attributable, in part, to the Commissioner’s ability to clarify issues and manage the complainant’s expectations during an in-person or teleconference meeting.

#### **Location of the In-person Meetings:**

Although most in-person Review Meetings have been held in Toronto, in December 1997, to provide greater accessibility to the process for those complainants who reside outside of the Toronto area, Convocation approved the holding of Review Meetings in centers outside of Toronto. Currently, in-person meetings are held approximately once a year in Ottawa and London.

**Processing Requests for Review:**

Upon receipt of a request for review, the office of the Commissioner sends the complainant a letter of confirmation and notifies the investigating department of the request for review. The Professional Regulation Division then provides written notice of the request for review to the licensee. However, pursuant to Subsection 8 (4) of By-Law 11, the licensee who is the subject of the complaint is not entitled to participate in the review process.

The investigating department is responsible for preparing the materials for the review. A bound copy of all relevant materials, referred to as the Complaints Review Index, is prepared for use at the Review Meeting. The Complaints Review Index usually includes the Law Society's closing letter or report, copies of all relevant materials submitted by the complainant and either the licensee's written response or a synopsis of the response. Once the Complaints Review Index is completed, it is reviewed by the office of the Director, and then delivered to the Coordinator at the Commissioner's office. On receipt of the bound materials, the Coordinator schedules the Review Meeting. A letter is sent to the complainant, advising the complainant of the scheduled date, the time, the manner in which the meeting will proceed and, if in person, the place where the meeting will be held. A copy of the Complaints Review Index for the complainant's use during the meeting is also enclosed with the letter. A copy of the Complaints Review Index is also provided to the Commissioner and to Counsel to the Commissioner, for review, in advance of the meeting.

Documents that fall within the confidentiality provisions of Subsection 49.12 (1)<sup>2</sup> of the *Act* are also provided to the Commissioner and Counsel to the Commissioner. The type of information considered confidential includes:

- (a) Law Society record of information relating to the licensee;
- (b) evidence from third parties which is protected by confidentiality or solicitor-client privilege;
- (c) solicitor-client information, when the complainant is not the client or the information is in respect of other clients.

**Review Meeting Schedule:**

Since the establishment of the office of the Commissioner, the growing demand for reviews has been met by an increase in the number of review days and the number of files reviewed on each of the review days.

In an effort to further reduce the waiting time between the receipt of a request for review and the conduct of the Review Meeting, and in order to accommodate the high demand for reviews and the limited resources available, in addition to four review days each

---

<sup>2</sup> 49.12 (1) A benchler, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part.

month with four reviews on each day, reviews based on the written materials were conducted on days not scheduled for review meetings.

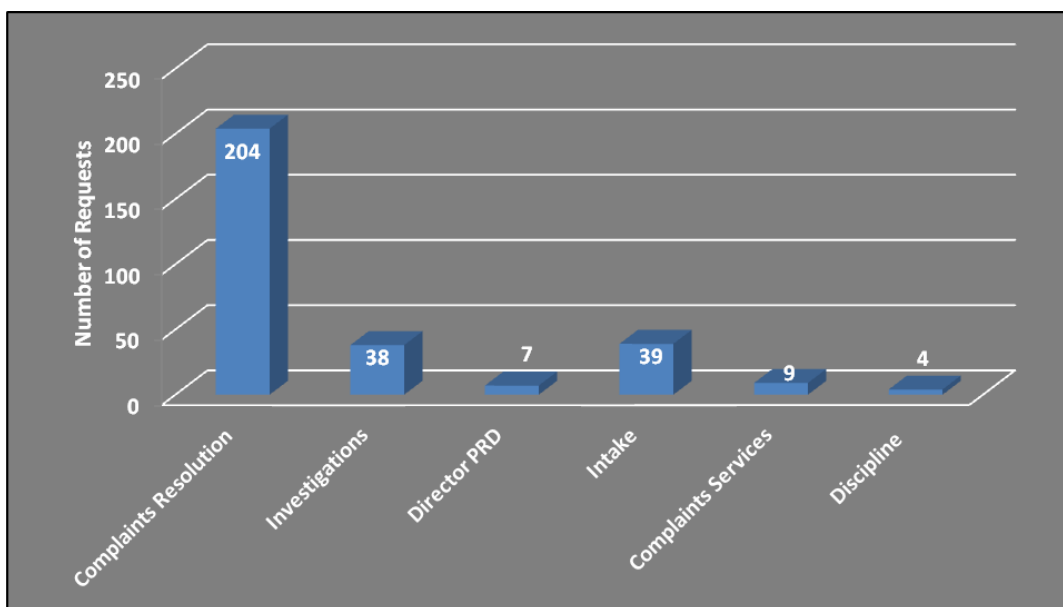
**E. Statistical Information**

What follows is relevant statistical information on the “affairs of the office of the Commissioner” for the current year and for the two previous years, for comparison purposes.

**Number of Requests for Review:**

In 2013, there were 301 requests for review. Table 1 that follows provides a breakdown of the departments from which the requests for review were received.

**Table 1 – CRC Requests Received by Department in 2013**



As indicated earlier in this Report, Subsection 4 (1) of By-Law 11 provides that a review is only available when the merits of a complaint have been considered by the Law Society. This Subsection of the By-Law has been interpreted to mean that the Commissioner can only review those files that have been investigated under the authority set out in Section 49.3 of the *Act*. These relate generally to complaints that have been referred to the Complaints Resolution Department or the Investigations Department and exclude cases that have been closed by Complaints Services, the Intake Department or the Discipline Department.

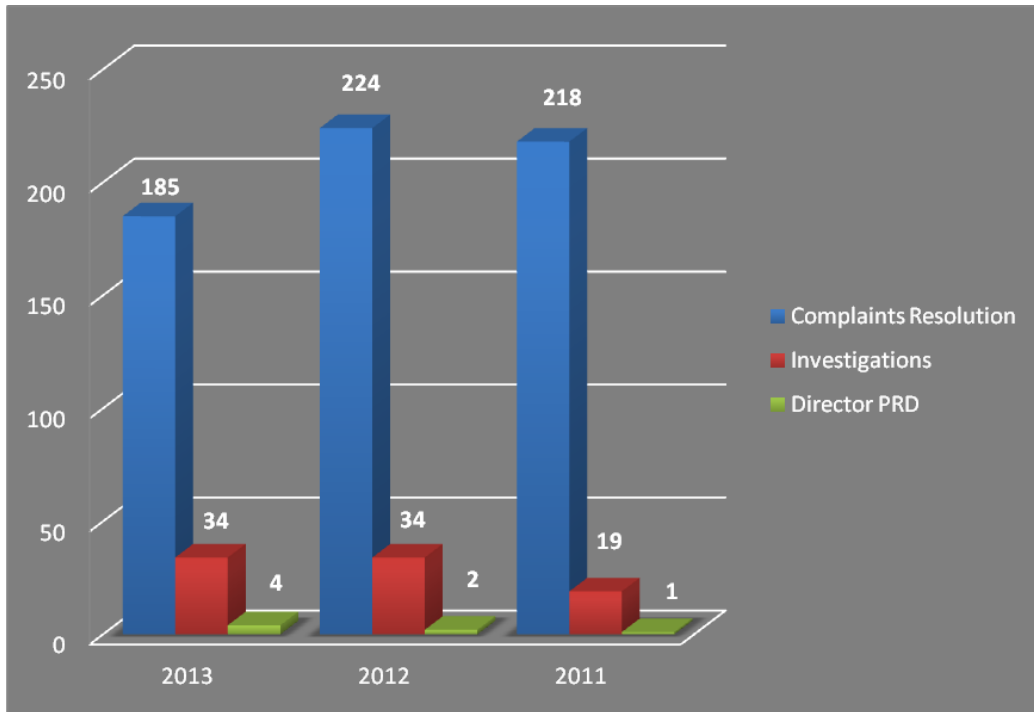
Notwithstanding, as Table 1 indicates, the office of the Commissioner receives a number of requests for review on files closed by Complaints Services, the Intake Department and the Discipline Department. When the office of the Commissioner receives a request for review of a complaint closed by either Complaints Services or the Intake Department, the complainant is advised that the Commissioner does not have the jurisdiction to review the matter and the complainant is referred back to the department that notified the complainant of the file closing, for a further response. The department Manager then reviews the file and if the Manager believes that the file should remain closed, the complainant is so notified. If the complainant still remains dissatisfied, the file is forwarded to the appropriate Director for review. With respect to requests for review from files closed in the Discipline Department, the complainant is advised that a matter which has been referred to the Discipline Department by the Proceedings Authorization Committee cannot be reviewed by the Commissioner.

Table 1 above also includes an additional 26 files for which a request for review was received, but for which the Commissioner did not have the jurisdiction to review. Nineteen of these files were investigated by the Complaints Resolution Department, four by the Investigations Department and three by the Director's office. The Commissioner's lack of jurisdiction arose for a variety of reasons, including the expiry of the 60 day time period for requesting review, the investigation had been discontinued, or the file was with the Proceedings Authorization Committee. In such circumstances, the complainant was notified in writing of the reason for the Commissioner's lack of jurisdiction to review the matter.

After eliminating those files where the request was outside the Commissioner's jurisdiction, the number of requests for review by the Commissioner in 2013 was 223. There were requests for review on 260 files in 2012 and there were 238 requests for review received in 2011.

Table 2 that follows provides a comparison of requests for review received by Department from 2011 through 2013. It does not include those requests where the complaint is outside the Commissioner's jurisdiction to review.

**Table 2 - Comparison of Requests Received by Department from 2011 through 2013**



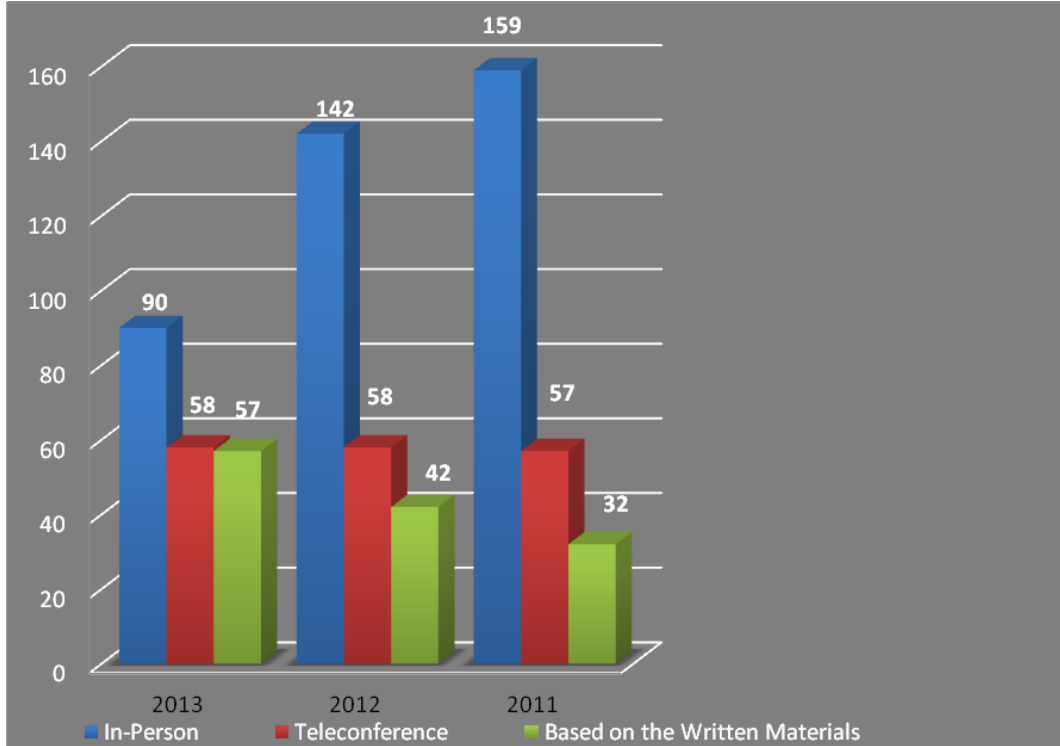
**Number of Reviews Conducted:**

From January 1, 2013 to December 31, 2013, 205 files were reviewed by the Commissioner. During 2012, 242 complaint files were reviewed and from January 1, 2011 to December 31, 2011, 248 files were reviewed.

From the 205 reviews conducted in 2013, 86 of the requests for review were received in 2013, 117 were received in 2012 and two were received in 2011. Of the 242 reviews conducted in 2012, 110 of the requests were received in 2012, 130 of the requests were received in 2011 and two requests were made in 2010. Of the 248 reviews conducted in 2011, 87 of the requests were made in 2011, 146 of the requests were made in 2010, 12 requests were made in 2009 and three requests were made in 2008.

**Format of Review Meetings Conducted:**

**Table 3 – Comparison of Format of Review Meetings Held**



As indicated in Table 3, during 2013, of the 205 files reviewed, 90 (44%) were reviewed in in-person meetings, 58 (28%) were conducted in teleconference meetings and 57 (28%) proceeded based on the written material.

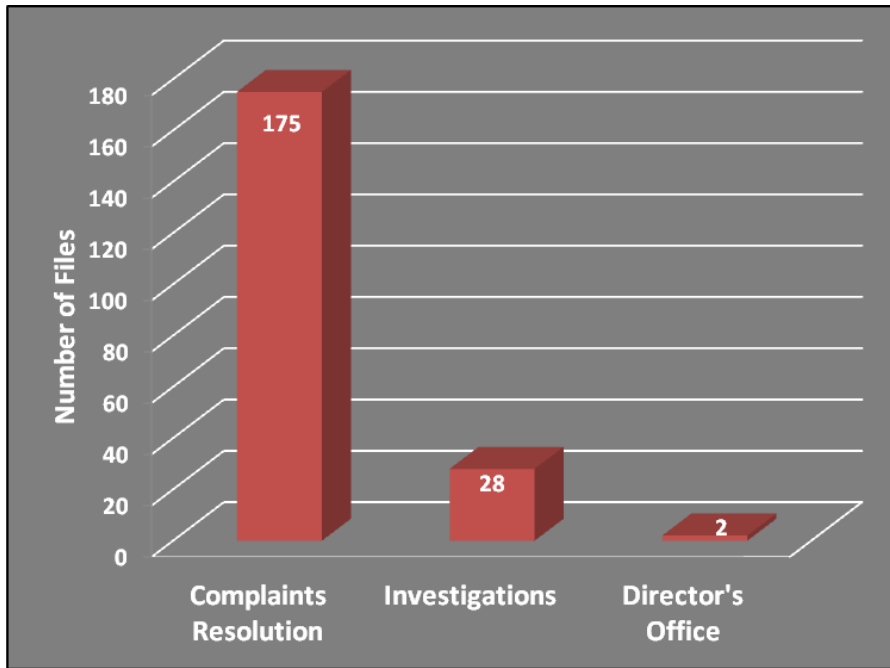
From January 1, 2012 to December 31, 2012, a total of 242 files were reviewed by the Commissioner. There were 142 (59%) in-person meetings, 58 (24%) teleconference meetings and 42 (17%) reviews based on the written materials.

During 2011, of the 248 files reviewed, 159 (64%) proceeded as in-person meetings, 57 (23%) proceeded by teleconference and 32 (13%) file reviews were based on the written material.

**Department that Conducted the Investigation:**

Table 4 that follows identifies the department that conducted the investigation of the files reviewed in 2013.

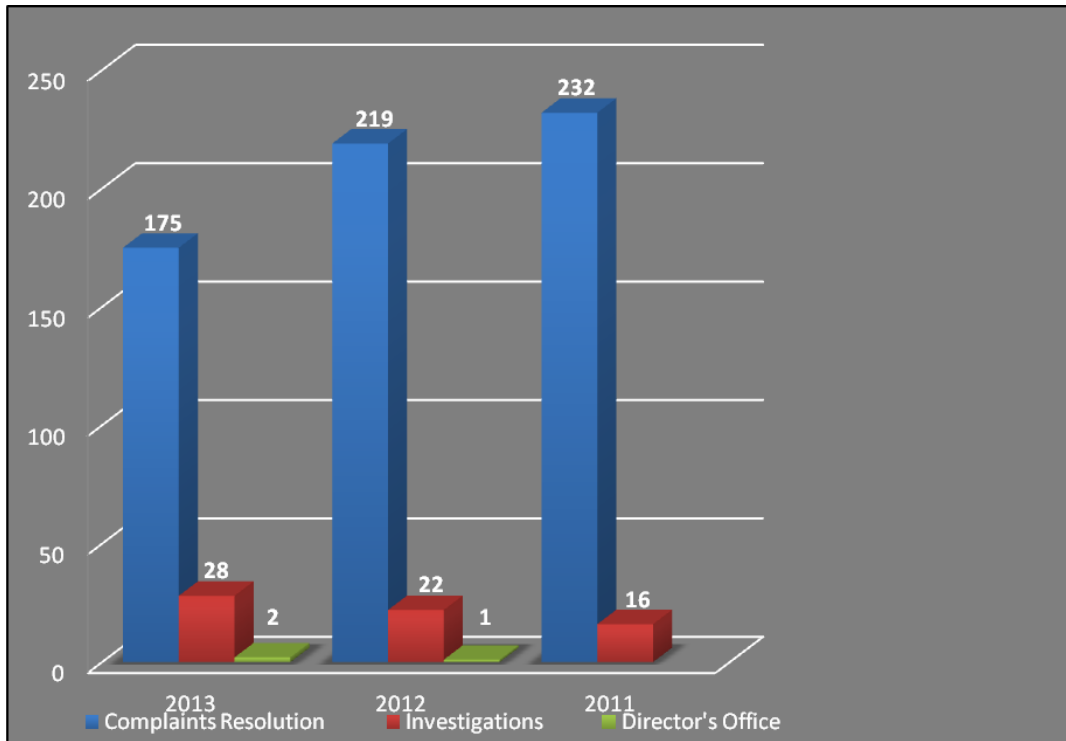
**Table 4 – CRC Reviews Conducted in 2013 by Department**



As Table 4 demonstrates, from the 205 files reviewed in 2013, 175 were investigated by the Complaints Resolution Department, 28 of the files were investigated by the Investigations Department and two files were investigated by the Director’s Office.

Table 5 that follows provides a comparison of the department that conducted the investigation of the files during 2013, 2012 and 2011.



**Table 5 – Reviews Conducted 2013, 2012 and 2011 from Each Department**

As Table 5 demonstrates, from the 205 files reviewed in 2013, 175 were investigated by the Complaints Resolution Department, 28 were investigated by the Investigations Department and two files were investigated by the Director's office.

As Table 5 also demonstrates, from the 242 files reviewed in 2012, 219 were investigated by the Complaints Resolution Department, 22 of the files were investigated by the Investigations Department and one file was investigated by the Director's office.

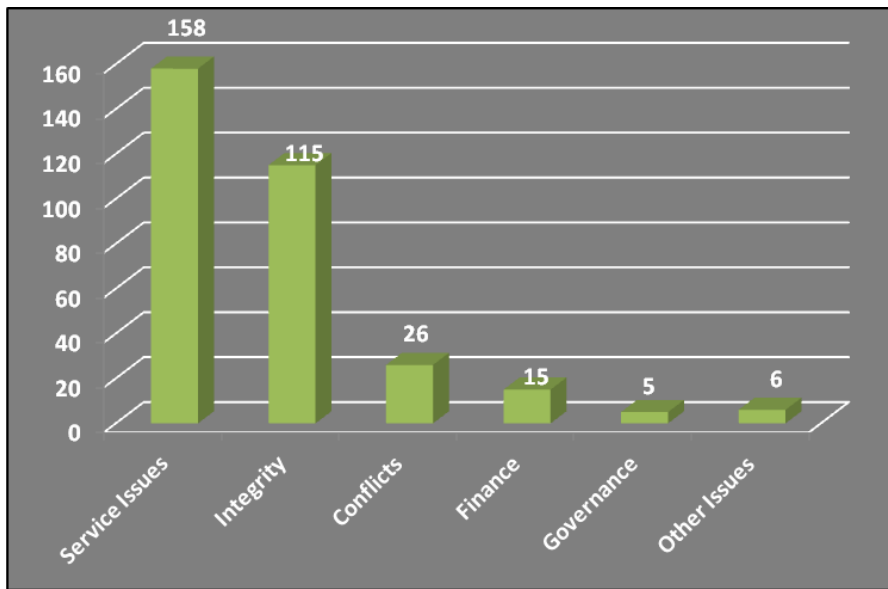
In 2011, from the 248 files reviewed, 232 were investigated by the Complaints Resolution Department and 16 were investigated by the Investigations Department.

**Predominant Issues in the Cases Reviewed:**

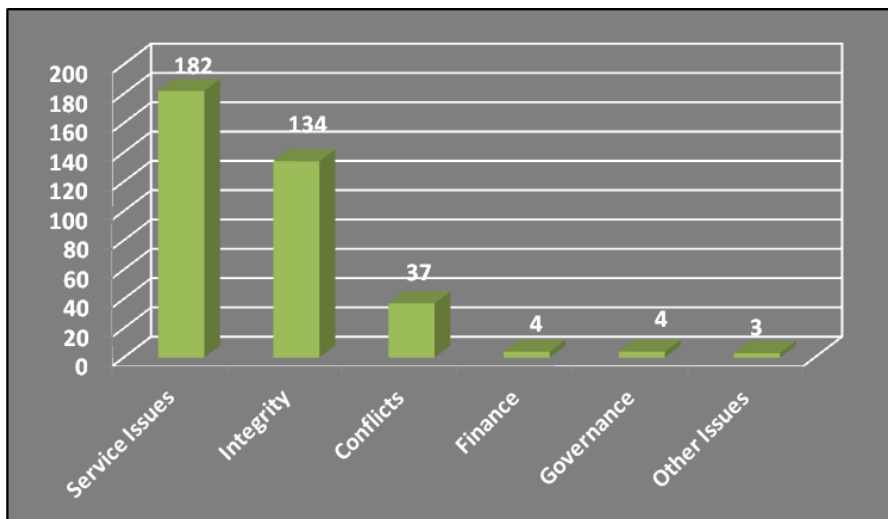
The Law Society identifies the issues raised in each complaint file. Relying on the Law Society’s categorization, Tables 6, 7 and 8 that follow identify the predominant issues identified in each of the files reviewed in 2013, 2012, and 2011 respectively.

The current case management system may record more than one “predominant issue” in each file, resulting in the total number of issues identified exceeding the number of files reviewed.

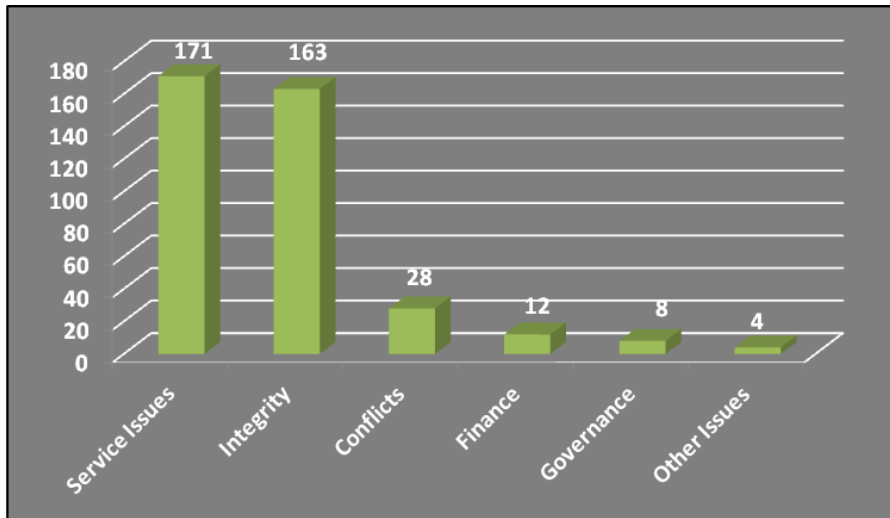
**Table 6 - Predominant Issues Identified in each of the 2013 Files Reviewed**



**Table 7 - Predominant Issues Identified in each of the 2012 Files Reviewed**



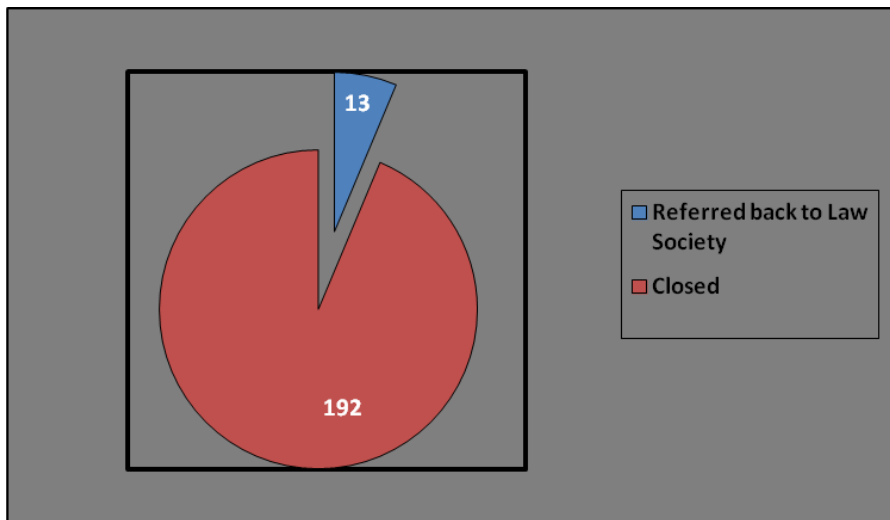
**Table 8 - Predominant Issues Identified in each of the 2011 Files Reviewed**



**Results of the Reviews Conducted in 2013:**

Figure 1 (1) that follows depicts the results of the 205 files reviewed by the Commissioner in 2013.

**Figure 1 (1) - Review Results 2013**



From the 205 files reviewed in 2013, 13 files were sent back to the Law Society. On nine of these files, the Commissioner was not satisfied that the decision to close the matter was reasonable and referred the complaint files back, pursuant to Clause 7 (2) (b) of By-Law 11, with a recommendation for further action. With respect to the remaining four cases, while the Commissioner found the Law Society’s decision to close the complaint

file to be reasonable based on the evidence available to the Law Society at the time of closing the file, the Commissioner referred the file back for either a review of new evidence pursuant to Subsection 7 (1) of By-Law 11 and/or to address practice concerns.

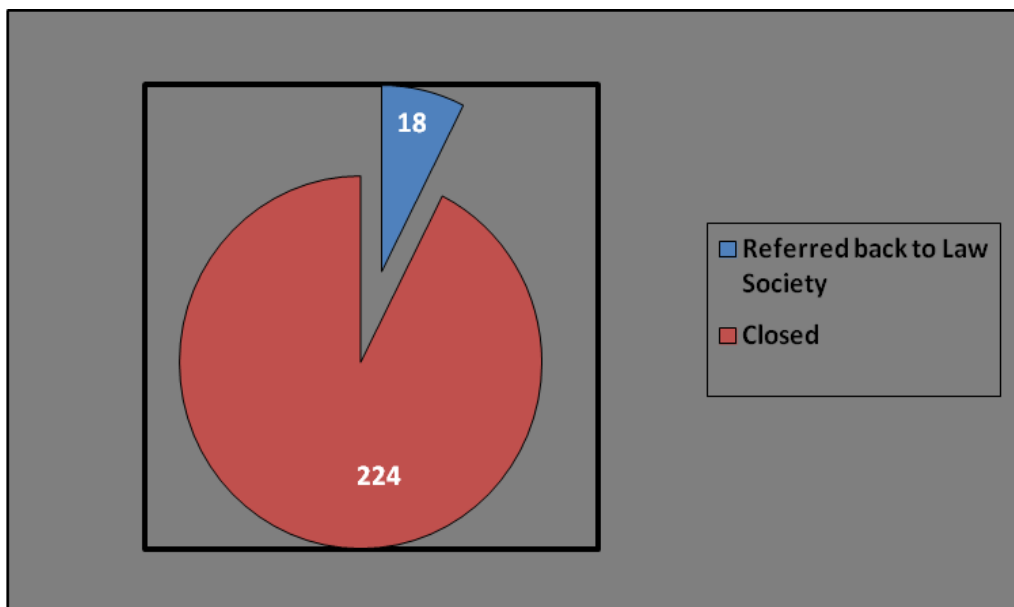
The Commissioner has identified practice issues in order to support the Law Society's efforts to serve the public interest. For example, in one instance, the Commissioner identified concerns regarding the content of the Law Society's closing letter including failing to include the reasons for the outcome. In another instance, a failure to disclose the regulatory action taken was identified. In a third instance, the Commissioner brought to the Law Society's attention a failure to notify the complainant that a witness was interviewed.

In addition, Counsel to the Commissioner and Counsel to the Director have continued to work together to address and improve practices and procedures between the Professional Regulation departments and the office of the Commissioner. Counsel to the Commissioner has also worked on an informal basis with the Managers of the Professional Regulation departments to clarify issues and address concerns, in advance of the Review Meetings. As an example, when additional material was received well in advance of a scheduled Review Meeting, the documents were provided to the department manager and/or the investigator, for consideration before the meeting. Furthermore, when possible, where outstanding issues are identified prior to the Review Meeting, the investigator has addressed the issues prior to the meeting. These mutually cooperative practices and procedures have promoted a more efficient and effective transfer of files and has allowed for greater consistency in the practices and procedures within the review process.

**Results of the Reviews Conducted in 2012:**

Figure 1 (2) that follows depicts the results of the 242 files reviewed by the Commissioner in 2012.

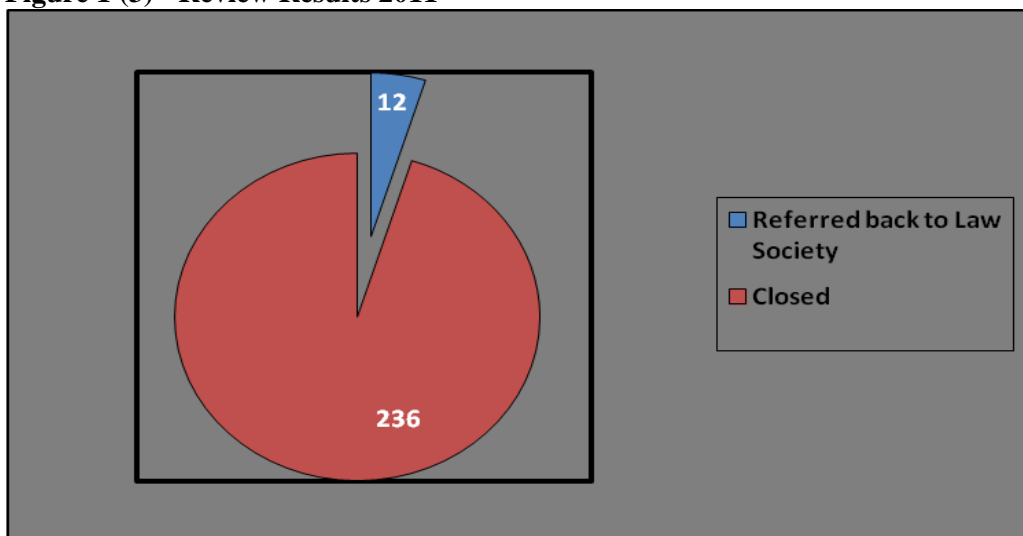
**Figure 1 (2) - Review Results 2012**



As shown in Figure 1 (2), during 2012, from the 242 decisions rendered, there were 18 files sent back to the Law Society, with a recommendation for further action.

**Results of the Reviews Conducted in 2011:**

Figure 1 (3) that follows reflects the results of the Review Meetings conducted in 2011.

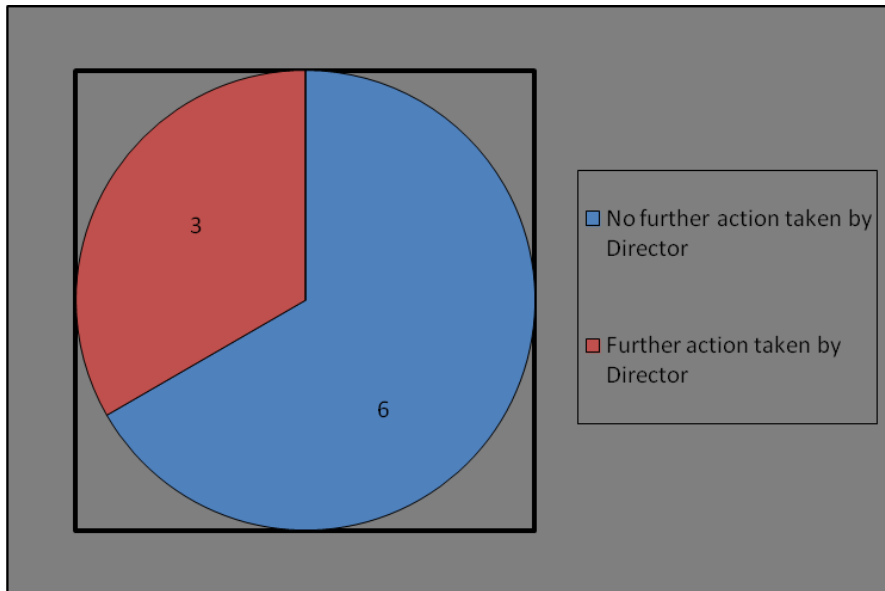
**Figure 1 (3) - Review Results 2011**

As shown in Figure 1 (3), during 2011, from the 248 files reviewed, there were 12 files which were sent back to the Law Society, with a recommendation for further action. There was a 13<sup>th</sup> file referred back in 2011, however, it was a decision rendered in 2011 on a file reviewed in 2010.

**Director's Response to Files Referred Back to the Law Society in 2013:**

Although the Commissioner referred back 13 files to the Law Society, with respect to four of these cases, a response from the Director was not required as the Commissioner referred the cases back for other considerations. Since these four files were sent back to raise practice issues, the response from the Law Society is not depicted.

Figure 2 (1) that follows reflects the Law Society's response to the nine files that were reviewed by the Commissioner in 2013 and referred back to the Law Society pursuant to Clause 7 (2) (b), with a recommendation for further action.

**Figure 2 (1) – Director’s Response to Files Referred Back in 2013:**

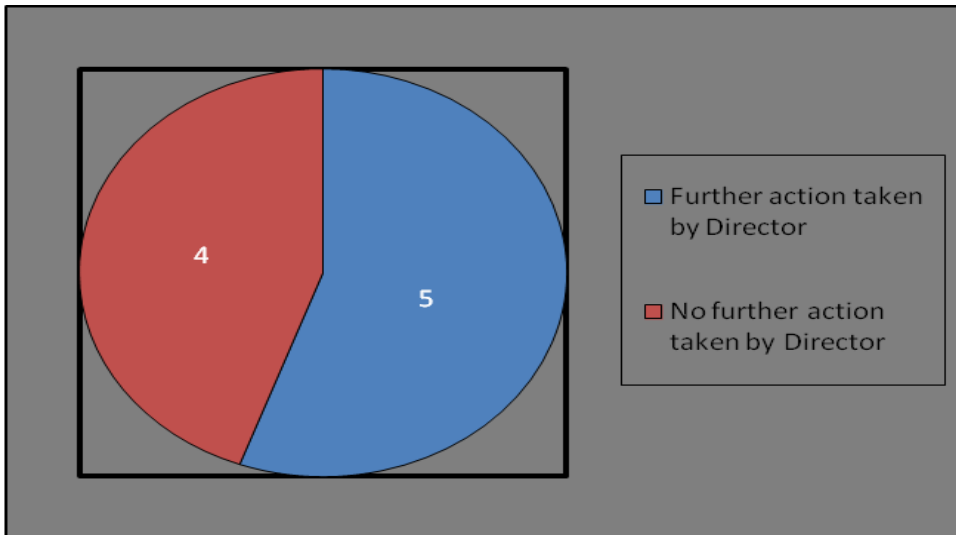
As indicated in Figure 2 (1) set out above, from the nine decisions referred back with a recommendation for further action pursuant to Clause 7 (2) (b) of By-Law 11, the Director agreed to take further action on three of the files and declined to take any further action with respect to the other six files.

**Director’s Response to Files Referred Back to the Law Society in 2012:**

Figure 2 (2) that follows reflects the Law Society’s response to the files that were reviewed by the Commissioner in 2012 and referred back to the Law Society with a recommendation for further action.

From the 18 decisions referred back in 2012, nine did not require a response from the Director as the Commissioner referred the cases back for other considerations, and are therefore not depicted in Figure 2 (2) below. From the nine decisions sent back with a recommendation for further action pursuant to Clause 7 (2) (b) of By-Law 11, the Director agreed to take further action on five of the files and declined to take any further action with respect to the other four files.

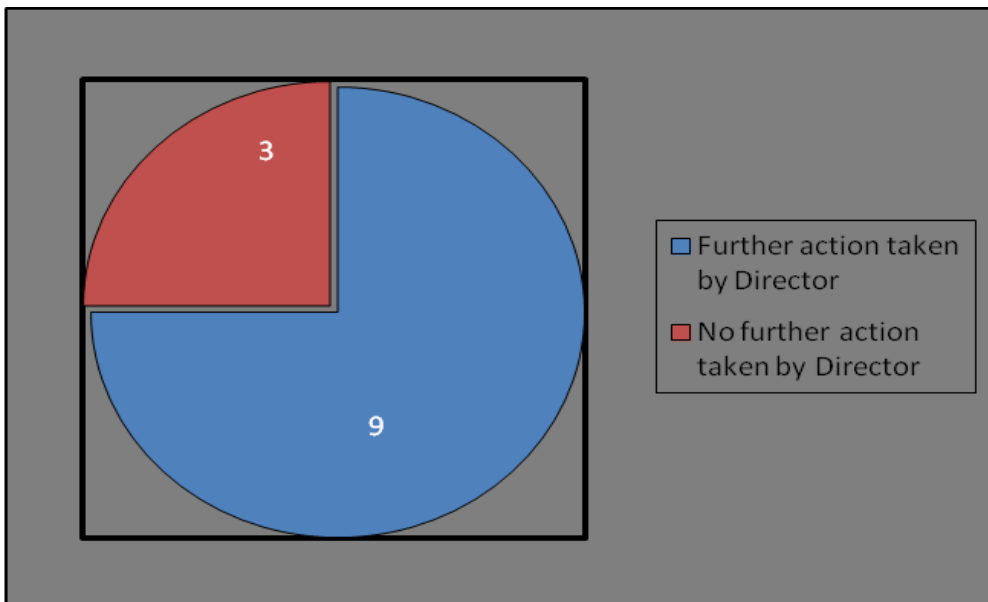
**Figure 2 (2) – Director’s Response to Files Referred Back in 2012**



**Director’s Response to Files Referred Back to the Law Society in 2011:**

Figure 2 (3) that follows, reflects the Law Society’s response to the 12 files that the Commissioner sent back to the Law Society for further action in 2011.

**Figure 2 (3) – Director’s Response to Files Referred Back in 2011**



As depicted in Figure 2(3), in 2011, the Director agreed to take further action on 9 of the files sent back and declined to take any further action with respect to 3 of the files.



**F. Age Tracking of Files Closed in 2013**

Following submission of the Annual Report for the year ending December 31, 2012, the Professional Regulation Committee requested statistical data regarding the average time for advancing a file through the Complaints Review process. What follows is the information gathered in this regard during the 2013 calendar year. As this is the first year that such data has been collected, a comparison with previous years is not available.

The following Table depicts the aging of the files from the date that a request for review was received to the date the file was closed in the Commissioner's office.

**In-person and Teleconference Reviews:**

There were 148 reviews completed by in-person meetings and teleconferences in 2013.

**Average Age**

<b>Average age from the receipt of the request to the date the Commissioner's decision was released</b>	<b>265 days</b>
(a) Average age from the date the request for a review was received to the date the Professional Regulation Department (PRD) was notified of the request	5 days
(b) Average age from the date that PRD was notified of the request to the date the document books were received in the Office of the Commissioner	125 days
(c) Average age from the date the document books were received to the date the review meeting was first scheduled	19 days
(d) Average age from the date the review meeting was first scheduled to the date the review meeting was held	88 days
(e) Average age from the date the review meeting was held to the date the Commissioner's decision was released	28 days

**Median Age**

<b>Median age from the receipt of the request to the date the Commissioner's decision was released</b>	<b>246 days</b>
(a) Median age from the date the request for a review was received to the date PRD was notified of the request	2 days
(b) Median age from the date that PRD was notified of the request to the date the document books were received in the Office of the Commissioner	121 days
(c) Median age from the date the document books were received to the date the review meeting was first scheduled	3 days
(d) Median age from the date the review meeting was first scheduled to the date the review meeting was held	77 days
(e) Median age from the date the review meeting was held to the date the Commissioner's decision was released	26 days

**In Writing Reviews:**

There were 57 reviews conducted based on the written material in 2013.

**Average Age**

<b>Average age from the receipt of the request to the date the Commissioner's decision was released</b>	<b>240 days</b>
(a) Average age from the date the request for review was received to the date PRD was notified of the request	10 days
(b) Average age from the date that PRD was notified of the request to the date the document books were received in the Commissioner's office	127 days
(c) Average age from the date the document books were received to the date the Commissioner's decision was released	103 days

**Median Age**

<b>Median age from the receipt of the request to the date the Commissioner's decision was released</b>	<b>236 days</b>
(a) Median age from the date the request for review was received to the date PRD was notified of the request	3 days
(b) Median age from the date that PRD was notified of the request to the date the document books were received in the Commissioner's office	137 days
(c) Median age from the date the document books were received to the date the Commissioner's decision was released	84 days

**No Jurisdiction Files:**

There were a total of 78 files which were closed on the basis that the Commissioner did not have the jurisdiction to review the file, for a variety of reasons. The average age from receipt of the request to review to the date the complainant was notified of the lack of jurisdiction was 12 days, and the median age was seven days.

**Files Withdrawn:**

With respect to the 11 review files closed before a review was conducted, three of which were withdrawn by the complainant and eight which were withdrawn following a managerial review by the investigating department, the average age was 169 days and the median age was 130 days.

**Active Inventory as of December 31, 2013:**

There were 107 files as of December 31, 2013 in the office of the Commissioner's active inventory. A review had been scheduled for a date in 2014 on 35 files, 72 files were being prepared for review by the Law Society and all decisions on cases reviewed in 2013 were released.

**G. Conclusion**

My experience over the past four years has confirmed that the need for an independent, impartial review of the Law Society's investigations and resulting decision to take no further action with respect to those investigations, has proven essential. The independence of the office has been highlighted by moving the location of the office of the Complaints Resolution Commissioner off site. Questions from complainants regarding the independence of the office have been dramatically reduced since the re-location took place.

I have found my experience over the past four years to have been both challenging and exhilarating. I greatly appreciate the opportunity to assist in achieving the Law Society's mandate to act in the public interest.

## **EXCERPTS FROM THE *LAW SOCIETY ACT***

### **COMPLAINTS RESOLUTION COMMISSIONER**

#### **Appointment**

[49.14 \(1\)](#) Convocation shall appoint a person as Complaints Resolution Commissioner in accordance with the regulations. 1998, c. 21, s. 21.

#### **Restriction**

[\(2\)](#) A bencher or a person who was a bencher at any time during the two years preceding the appointment shall not be appointed as Commissioner. 1998, c. 21, s. 21.

#### **Term of office**

[\(3\)](#) The Commissioner shall be appointed for a term not exceeding three years and is eligible for reappointment. 1998, c. 21, s. 21.

#### **Removal from office**

[\(4\)](#) The Commissioner may be removed from office during his or her term of office only by a resolution approved by at least two thirds of the benchers entitled to vote in Convocation. 1998, c. 21, s. 21.

#### **Restriction on practice of law**

[\(5\)](#) The Commissioner shall not engage in the practice of law during his or her term of office. 1998, c. 21, s. 21.

#### **Functions of Commissioner**

[49.15 \(1\)](#) The Commissioner shall,

- (a) attempt to resolve complaints referred to the Commissioner for resolution under the by-laws; and
- (b) review and, if the Commissioner considers appropriate, attempt to resolve complaints referred to the Commissioner for review under the by-laws. 1998, c. 21, s. 21.

#### **Investigation by Commissioner**

[\(2\)](#) If a complaint is referred to the Commissioner under the by-laws, the Commissioner has the same powers to investigate the complaint as a person conducting an investigation under section 49.3 would have with respect to the subject matter of the complaint, and, for that purpose, a reference in section 49.3 to an employee of the Society holding an office prescribed by the by-laws shall be deemed to be a reference to the Commissioner. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 48 (1).

#### **Access to information**

[\(3\)](#) If a complaint is referred to the Commissioner under the by-laws, the Commissioner is entitled to have access to,

- (a) all information in the records of the Society respecting a licensee who is the subject of the complaint; and
- (b) all other information within the knowledge of the Society with respect to the subject matter of the complaint. 1998, c. 21, s. 21; 2006, c. 21, Sched. C, s. 48 (2).

### **Delegation**

[49.16 \(1\)](#) The Commissioner may in writing delegate any of his or her powers or duties to members of his or her staff or to employees of the Society holding offices designated by the by-laws. 1998, c. 21, s. 21.

### **Terms and conditions**

[\(2\)](#) A delegation under subsection (1) may contain such terms and conditions as the Commissioner considers appropriate. 1998, c. 21, s. 21.

### **Identification**

[49.17](#) On request, the Commissioner or any other person conducting an investigation under subsection 49.15 (2) shall produce identification and, in the case of a person to whom powers or duties have been delegated under section 49.16, proof of the delegation. 1998, c. 21, s. 21.

### **Confidentiality**

[49.18 \(1\)](#) The Commissioner and each member of his or her staff shall not disclose,

- (a) any information that comes to his or her knowledge as a result of an investigation under subsection 49.15 (2); or
- (b) any information that comes to his or her knowledge under subsection 49.15 (3) that a bencher, officer, employee, agent or representative of the Society is prohibited from disclosing under section 49.12. 1998, c. 21, s. 21.

### **Exceptions**

[\(2\)](#) Subsection (1) does not prohibit,

- (a) disclosure required in connection with the administration of this Act, the regulations, the by-laws or the rules of practice and procedure;
- (b) disclosure required in connection with a proceeding under this Act;
- (c) disclosure of information that is a matter of public record;
- (d) disclosure by a person to his or her counsel; or
- (e) disclosure with the written consent of all persons whose interests might reasonably be affected by the disclosure. 1998, c. 21, s. 21.

### **Testimony**

[\(3\)](#) A person to whom subsection (1) applies shall not be required in any proceeding, except a proceeding under this Act, to give testimony or produce any

document with respect to information that the person is prohibited from disclosing under subsection (1). 1998, c. 21, s. 21.

**Decisions final**

[49.19](#) A decision of the Commissioner is final and is not subject to appeal. 1998, c. 21, s. 21.

**BY-LAW 11**

Made: May 1, 2007  
Amended: June 28, 2007  
September 20, 2007 (editorial changes)  
October 25, 2007 (editorial changes)  
February 21, 2008  
April 24, 2008  
October 30, 2008  
January 29, 2009  
October 28, 2010  
April 25, 2013  
May 30, 2013

**REGULATION OF CONDUCT, CAPACITY AND PROFESSIONAL COMPETENCE**

**PART I**

**COMPLAINTS RESOLUTION COMMISSIONER**

**GENERAL**

**Definitions**

1. In this Part,

“complainant” means a person who makes a complaint;

“complaint” means a complaint made to the Society in respect of the conduct of a licensee;

“Commissioner” means the Complaints Resolution Commissioner appointed under section 49.14 of the Act;

“reviewable complaint” means a complaint that may be reviewed by the Commissioner under subsection 6 (1).

**Provision of funds by Society**

2. (1) The money required for the administration of this Part and sections 49.15 to 49.18 of the Act shall be paid out of such money as is budgeted therefor by Convocation.

**Restrictions on spending**

(2) In any year, the Commissioner shall not spend more money in the administration of this Part and sections 49.15 to 49.18 of the Act than is budgeted therefor by Convocation.

**Annual report**

3. Not later than March 31 in each year, the Commissioner shall submit to the Professional Regulation Committee a report upon the affairs of the office of the Commissioner during the immediately preceding year, and the Committee shall lay the report before Convocation not later than at its regular meeting in June.

REVIEW OF COMPLAINTS

**Reviewable complaints**

4. (1) A complaint may be reviewed by the Commissioner if,
- (a) the merits of the complaint have been considered by the Society;
  - (b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
  - (c) the complaint has not been previously reviewed by the Commissioner; and
  - (d) the Society has notified the complainant that it will be taking no further action in respect of the complaint.

**Same**

- (2) A complaint may not be reviewed by the Commissioner to the extent that, in the opinion of the Commissioner, it concerns only the following matters:
- 1. Quantum of fees or disbursements charged by a licensee to a complainant.
  - 2. Requirements imposed on a licensee under By-Law 9 [Financial Transactions and Records].
  - 3. Negligence of a licensee.

**Interpretation: “previously reviewed”**

(3) For the purposes of this section, a complaint shall not be considered to have been previously reviewed by the Commissioner if the complaint was referred back to the Society for further consideration under subsection 7 (1).



**Right to request referral**

5. (1) A complainant may request the Society to refer to the Commissioner for review a reviewable complaint.

**Request in writing**

(2) A request to refer a reviewable complaint to the Commissioner for review shall be made in writing.

**Time for making request**

(3) A request to refer a reviewable complaint to the Commissioner for review shall be made within 60 days after the day on which the Society notifies the complainant that it will be taking no further action in respect of the complaint.

**When notice given**

(4) For the purposes of subsection (3), the Society will be deemed to have notified the complainant that it will be taking no further action in respect of the complaint,

- (a) in the case of oral notification, on the day that the Society notified the complainant; and
- (b) in the case of written notification,
  - (i) if it was sent by regular lettermail, on the fifth day after it was mailed, and
  - (ii) if it was faxed, on the first day after it was faxed.

**Referral of complaints**

6. (1) The Society shall refer to the Commissioner for review every reviewable complaint in respect of which a complainant has made a request under, and in accordance with, section 5.

**Notice**

(2) The Society shall notify in writing the licensee who is the subject of a complaint in respect of which a complainant has made a request under, and in accordance with, section 5 that the complaint has been referred to the Commissioner for review.

**Fresh evidence**

7. (1) When reviewing a complaint that has been referred to the Commissioner for review, if the Commissioner receives or obtains information, which in the Commissioner's

opinion is significant, about the conduct of the licensee who is the subject of the complaint that was not received or obtained by the Society as a result of or in the course of its consideration of the merits of the complaint, the Commissioner shall refer the information and complaint back to the Society for further consideration.

**Disposition of complaint referred for review**

- (2) After reviewing a complaint that has been referred to the Commissioner for review, the Commissioner shall,
  - (a) if satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, so notify in writing the complainant and the Society; or
  - (b) if not satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, refer the complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, and so notify in writing the complainant.

**Disposition of complaint referred for review: notice**

- (3) The Society shall notify in writing the licensee who is the subject of a complaint reviewed by the Commissioner of the Commissioner's disposition of the complaint.

**Referral back to Society: notice**

- (4) If the Commissioner refers a complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, the Society shall consider the recommendation and notify in writing the Commissioner, complainant and licensee who is the subject of the complaint of whether the Society will be following the recommendation.

**Same**

- (5) If the Commissioner refers a complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, and the Society determines not to follow the recommendation of the Commissioner, the Society shall provide the Commissioner, complainant and licensee who is the subject of the complaint with a written explanation for the determination.

**Procedure**

- 8. (1) Subject to this Part, the procedures applicable to the review of a complaint referred to the Commissioner shall be determined by the Commissioner.

**Meeting**

(2) The Commissioner shall, where practicable, meet with each complainant whose complaint has been referred to the Commissioner for review, and the Commissioner may meet with the complainant by such telephone, electronic or other communication facilities as permit all persons participating in the meeting to communicate with each other simultaneously and instantaneously.

**Participation in review: Society**

(3) Other than as provided for in subsections (5) and (6), or unless otherwise expressly permitted by the Commissioner, the Society shall not participate in a review of a complaint by the Commissioner.

**Participation in review: licensee**

(4) The licensee who is the subject of a complaint that has been referred to the Commissioner for review shall not participate in a review of the complaint by the Commissioner.

**Description of consideration, etc.**

(5) At the time that the Society refers a complaint to the Commissioner for review, the Society is entitled to provide the Commissioner with a description of its consideration of the complaint and an explanation of its decision to take no further action in respect of the complaint.

**Requirement to answer questions**

(6) The Commissioner may require the Society to provide information in respect of its consideration of a complaint that has been referred to the Commissioner for review and its decision to take no further action in respect of the complaint, and the Society shall provide such information.

RESOLUTION

**Discretionary referral of complaints**

9. (1) The Society may refer a complaint to the Commissioner for resolution if,
- (a) the complaint is within the jurisdiction of the Society to investigate;
  - (b) the complaint has not been disposed of by the Proceedings Authorization Committee, Hearing Panel or Appeal Panel;
  - (c) the complaint has not been referred to the Proceedings Authorization Committee;

- (d) no resolution of the complaint has been attempted by the Society; and
- (e) the complainant and the licensee who is the subject of the complaint consent to the complaint being referred to the Commissioner for resolution.

**Parties**

10. The parties to a resolution of a complaint by the Commissioner are the complainant, the licensee who is the subject of the complaint and the Society.

**Outcome of Resolution**

11. (1) There shall be no resolution of a complaint by the Commissioner until there is an agreement signed by all parties agreeing to the resolution.

**No resolution**

(2) If there is no resolution of a complaint by the Commissioner, the Commissioner shall so notify in writing the parties and refer the complaint back to the Society.

**Enforcement of resolution**

(3) A resolution of a complaint by the Commissioner shall be enforced by the Society.

**Confidentiality: Commissioner**

12. (1) Subject to subsection (2), the Commissioner shall not disclose any information that comes to the Commissioner's knowledge during the resolution of a complaint.

**Exceptions**

(2) Subsection (1) does not prohibit disclosure required of the Commissioner under the Society's rules of professional conduct.

**Without prejudice**

(3) All communications during the resolution of a complaint by the Commissioner and the Commissioner's notes and record of the resolution shall be deemed to be without prejudice to any party.

**Procedure**

13. Subject to this Part, the procedures applicable to the resolution of a complaint referred to the Commissioner shall be determined by the Commissioner.

# Office of the Complaints Resolution Commissioner



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

## INFORMATION SHEET

This information sheet will help you request a review by the Complaints Resolution Commissioner (the Commissioner).

### REQUEST FOR REVIEW:

The Commissioner, on your request, will do an independent review of the Law Society's investigation and the decision to close your complaint file. If you want to have the Law Society's decision to close your complaint file reviewed by the Commissioner, please complete the attached Request for Review form. Please return the form to the Office of the Complaints Resolution Commissioner following the instructions at the end of the Request Form. **A request for review by the Commissioner must be made in writing within 60 days of the Law Society's notification (the closing letter you received from Law Society staff) that no further action will be taken with respect to your complaint.**

### THE ROLE OF THE COMPLAINTS RESOLUTION COMMISSIONER:

After reviewing a complaint that has been referred to the Commissioner for review, the Commissioner shall:

- If satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, so notify in writing the complainant and the Society; or
- If not satisfied that the Society's consideration of the complaint and its decision to take no further action in respect of the complaint is reasonable, refer the complaint back to the Society with a recommendation that the Society take further action in respect of the complaint, or the licensee who is the subject of the complaint, and so notify in writing the complainant.

### THE COMPLAINTS RESOLUTION COMMISSIONER CANNOT:

- Make a finding of professional misconduct;
- Impose disciplinary penalties;
- Make a finding of professional negligence;
- Award payment of money or other compensation for financial losses;
- Direct a licensee (lawyer or licensed paralegal) to refund fees or disbursements; or
- Conduct a new investigation.

### MEETING WITH THE COMPLAINTS RESOLUTION COMMISSIONER:

As part of the review process, you may be invited to meet with the Commissioner in person or to participate in a conference call. These sessions are informal and involve a discussion of your complaint and the concerns you have with the Law Society's decision to close your file. Your meeting will be scheduled for one hour.

The Commissioner will consider your preference and decide the most appropriate manner for the review meeting to proceed. The Commissioner may also review your file based on the written material only. A review based on the written material only may result in the review being completed sooner.

The Commissioner also has in person meetings, approximately twice per year, in London and Ottawa. If you live in either of these areas and want your matter reviewed by telephone conference instead of an in person meeting, the review by the Commissioner may take place sooner.

Most people prefer to participate in the review meeting on their own. However, you may bring a friend, family member or a legal representative to your review meeting.

Counsel to the Commissioner is a lawyer and will be at the Review Meeting to assist the Commissioner and respond to any legal questions raised by the Commissioner. The Counsel's role is restricted to providing assistance to the Commissioner and he or she cannot give you legal advice.

Neither the lawyer/licensed paralegal who was the subject of your complaint nor the Law Society investigator, will be present at the meeting or during the conference call.

# Office of the Complaints Resolution Commissioner



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

INFORMATION SHEET

## SCHEDULING OF THE REVIEW MEETING:

Your meeting with the Commissioner will be scheduled as soon as possible. However, it may take several months for your review to take place. We appreciate and thank you for your patience.

If you cannot attend the meeting on the scheduled date or have decided not to proceed with your complaint, please notify the Office of the Complaints Resolution Commissioner as soon as possible, so that the time set aside for your meeting can be used productively. If you want your meeting date to be adjourned/rescheduled, the Commissioner may request supporting documentation explaining why you cannot attend the meeting.

## PROVIDING NEW INFORMATION:

To assist you at the review meeting, the Office of the Commissioner will send you a Document Book and correspondence. The Document Book will be sent to you when your meeting date is scheduled. The Commissioner and the Counsel to the Commissioner will also have a copy and will review the Document Book before the meeting.

If you send new material concerning your complaint or you submit written submissions to the Commissioner, please send this material within one month of sending in your Request for Review form. **Please do not send original documents.**

Do not resend copies of documents which have already been provided to the Law Society, as the information contained in the Law Society's file will be provided to the Commissioner in advance of the review meeting. **Resending copies of documents or repeating information already provided to the Law Society may delay the review.**

## DECISION OF THE COMPLAINTS RESOLUTION COMMISSIONER:

The Commissioner will send you the decision in writing within several weeks of when the review has been conducted. If the Commissioner agrees with the Law Society's decision to close the complaint, the Commissioner's decision concludes the matter. There are no further reviews and the decision is final.

## FOR MORE INFORMATION:

If you have any questions about how to request a review by the Commissioner, please contact the Office of the Complaints Resolution Commissioner at the following and we will be pleased to help you:

**155 University Avenue  
Suite 303  
Toronto Ontario  
M5H 3B7**

**Telephone: (416) 947-3442**

**Toll Free Number: 1-866-880-9480 (Ext. 3442)**

**Fax: (416) 947-5213**

**E-Mail: [complaintsreview@lsuc.on.ca](mailto:complaintsreview@lsuc.on.ca)**

Please advise us if, given your needs, you require the Office of the Complaints Resolution Commissioner communications in an alternate format that is accessible or if you require other arrangements to make our services accessible to you.

# Request for Review by the Complaints Resolution Commissioner



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

Before you complete the Request Form, please read the attached “Request for Review by the Complaints Resolution Commissioner Information Sheet.”

If you want a review, you must make your Request for Review **in writing** within **60 days** of the Law Society’s notification (the closing letter you received from Law Society staff) that no further action will be taken with respect to your complaint. If you want a review for more than one complaint, please complete and send a separate Request for Review form for each complaint.

You must send your Request for Review to:  
Office of the Complaints Resolution Commissioner  
155 University Avenue, Suite 303, Toronto, Ontario, M5H 3B7  
Fax: 416-947-5213      Email: [complaintsreview@lsuc.on.ca](mailto:complaintsreview@lsuc.on.ca)

If you have any questions about your request for a review, please call the Office of the Complaints Resolution Commissioner at 416-947-3442 or 1-866-880-9480.

## I. INFORMATION ABOUT YOU (THE COMPLAINANT)

Salutation: Mr. \_\_\_ Ms. \_\_\_ Mrs. \_\_\_ Dr. \_\_\_ Other: \_\_\_

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_

Home Phone Number: \_\_\_\_\_ Cell Phone Number: \_\_\_\_\_

Fax Number: \_\_\_\_\_ Email: \_\_\_\_\_

Please indicate where you want the Document Book (mailed via XpressPost) and other mailed communications about this review to be sent:

Address: \_\_\_\_\_ Unit/Apt.: \_\_\_\_\_

City: \_\_\_\_\_ Province: \_\_\_\_\_ Postal Code: \_\_\_\_\_

What is the best way to contact you from Monday to Friday between the hours of 8:30 a.m. and 4:30 p.m. (select one) :

\_\_\_ Telephone      Telephone Number: \_\_\_\_\_

\_\_\_ Facsimile      Facsimile Number: \_\_\_\_\_

\_\_\_ Email      Email Address: \_\_\_\_\_

Are you a lawyer or licensed paralegal: Yes \_\_\_ No \_\_\_

# Request for Review by the Complaints Resolution Commissioner



## 2. DETAILS OF LAW SOCIETY COMPLAINT MATTER

LSUC File Number: \_\_\_\_\_

• Name of Lawyer/Paralegal: \_\_\_\_\_

• Name of Law Society's Investigator: \_\_\_\_\_

• Date of Law Society's letter notifying you that the file is being closed: \_\_\_\_\_

• What is your relationship to the lawyer/paralegal? \_\_\_\_\_

\_\_\_ Client \_\_\_ Opposing lawyer or paralegal \_\_\_ Other (specify) \_\_\_\_\_

• What area of law/legal services does your complaint relate to? \_\_\_\_\_

\_\_\_ Real Estate \_\_\_ Civil Litigation \_\_\_ Corporate/Commercial/Business \_\_\_ Estates/Wills

\_\_\_ Matrimonial/Family \_\_\_ Administrative/Immigration \_\_\_ Criminal \_\_\_ Other (specify): \_\_\_\_\_

• Are you acting under a Power of Attorney or some other form of authorization? \_\_\_ Yes \_\_\_ No

**If yes**, please provide supporting documentation with this request form.

• If you are complaining about an estate:

Are you a beneficiary? \_\_\_ Yes \_\_\_ No

Are you the Estate Trustee or the Executor? \_\_\_ Yes \_\_\_ No

**If yes**, please provide supporting documentation with this request form.

List any other Complaints you have submitted which are still under investigation with the Law Society or related to this complaint:

File Number(s)	Name of Lawyer(s)/Paralegal(s)
_____	_____
_____	_____
_____	_____



# Request for Review by the Complaints Resolution Commissioner



### 3. PREFERENCE FOR REVIEW MEETING

Please check a box to show your preference for the form of the Commissioner’s review meeting.

**I prefer the review by the Commissioner to occur (Please select only one):**

- In Person\***  
\*Please note that in person meetings take place at the Office of the Complaints Resolution Commissioner.
- By Telephone Conference**  
Telephone number you would like to be contacted at: \_\_\_\_\_
- Based on the Written Materials in this File**  
This option does not involve a meeting with you in person or by telephone conference. Selecting this option may result in the review being completed more quickly. If you want to send written submissions, please send your submissions and any additional documents to the Office of the Complaints Resolution Commissioner within 1 month of sending this request.

### 4. REASON FOR YOUR REQUEST FOR A REVIEW

**Please briefly explain why you want a review by the Commissioner.** Before you complete this section, please review the Information Sheet which explains the Commissioner’s role.

---



---



---



---

### 5. ADDITIONAL DOCUMENTS

Are you attaching copies of any new documents?: Yes \_\_\_ No \_\_\_  
**Please do NOT send originals.**

(Please do not resend copies of those documents which have already been provided to the Law Society of Upper Canada. The information contained in the Law Society’s file will be provided to the Commissioner in advance of the review meeting. **Resending copies of documents or repeating information already provided to the Law Society may delay the review.**)

### 6. SIGNATURE

**Date Signed** \_\_\_\_\_ **Signature** \_\_\_\_\_

**Please send this form and accompanying documents to:**  
Office of the Complaints Resolution Commissioner  
155 University Avenue, Suite 303, Toronto, Ontario, M5H 3B7  
Fax: 416-947-5213 Email: complaintsreview@lsuc.on.ca

If you have any questions about your request for a review, please call the Office of the Complaints Resolution Commissioner at 416-947-3442 or 1-866-880-9480.

Please advise us if, given your needs, you require the Office of the Complaints Resolution Commissioner communications in an alternate format that is accessible or if you require other arrangements to make our services accessible to you.

**FOR INFORMATION**

**PROFESSIONAL REGULATION DIVISION**

**QUARTERLY REPORT**

230. The Professional Regulation Division's Quarterly Report (fourth quarter 2013), provided to the Committee by Zeynep Onen, the Executive Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period October to December 2013.



The Law Society of  
Upper Canada | Barreau  
du Haut-Canada

# The Professional Regulation Division

**Quarterly Report**  
October - December 2013

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

## **The Quarterly Report**

The Quarterly Report provides a summary of the Professional Regulation Division's activities and achievements during the past quarter, October 1 to December 31, 2013. The purpose of the Quarterly Report is to provide information on the production and work of the Division during the quarter, to explain the factors that may have influenced the Division's performance, and to provide a description of exceptional or unusual projects or events in the period.

## **The Professional Regulation Division**

Professional Regulation is responsible for responding to complaints against licensees, including the resolution, investigation and prosecution of complaints which are within the jurisdiction provided under the *Law Society Act*. In addition the Professional Regulation provides trusteeship services for the practices of licensees who are incapacitated by legal or health reasons. Professional Regulation also includes the Compensation Fund which compensates clients for losses suffered as a result of the wrongful acts of licensees.

See Appendices for a case flow chart describing the complaints process as well as a description of the Professional Regulation division processes and organization.

## INDEX

	Page
<b>SECTION 1 – REPORT HIGHLIGHTS</b>	<b>5</b>
<b>Highlights of Quarterly Performance</b>	<b>6</b>
New Cases	6
Case Completion and Case Inventories	6
Investigations (Complaints Resolution & Investigations Departments)	6
Mortgage Fraud Investigations	6
Unauthorized Practice (UAP)	7
Discipline and Hearings	7
<b>SECTION 2 – DIVISIONAL PERFORMANCE DURING THE QUARTER</b>	<b>8</b>
<b>PERFORMANCE IN THE PROFESSIONAL REGULATION DIVISION</b>	<b>9</b>
Graph 2A: Complaints Received in the Division	9
Graph 2B: Complaints Closed in the Division	10
Graph 2C: Total Inventory	11
<b>SECTION 3 – DEPARTMENT PERFORMANCE DURING THE QUARTER</b>	<b>12</b>
<b>3.1 – Intake</b>	<b>13</b>
Graph 3.1A: Input	13
Graph 3.1B: Complaints Closed and Transferred Out	14
Graph 3.1C: Department Inventory	15
Graph 3.1D: Median Age of Complaints	16
Graph 3.1E: Input vs. Output	17
Graph 3.1F: Complaints Closed by Disposition	18
<b>3.2 – Complaints Resolution</b>	<b>19</b>
Graph 3.2A: Input	19
Graph 3.2B: Complaints Closed and Transferred Out	20
Graph 3.2C: Department Inventory	21
Graph 3.2D: Median Age of Complaints	22
Graph 3.2E: Aging of Complaints	23
Graph 3.2F: Input vs. Output	24
Graph 3.2G: Complaints Closed by Disposition	25
Graph 3.2H: Types of Complaints Received	26
<b>3.3 – Investigations</b>	<b>27</b>
Graph 3.3A: Input	27
Graph 3.3B: Complaints Closed and Transferred Out	28
Graph 3.3C: Department Inventory	29
Graph 3.3D: Median Age of Complaints	30
Graph 3.3E: Aging of Complaints – Core Cases and Mortgage Fraud Cases	31
Graph 3.3F: Input vs. Output	33
Graph 3.3G: Complaints Closed by Disposition	34
Graph 3.3H: Types of Complaints Received	35

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

---

<b>3.4 – Unauthorized Practice (UAP)</b>	<b>36</b>
Graph 3.4A: Unauthorized Practice Complaints in Intake	36
Graph 3.4B: Unauthorized Practice Investigations (in Complaints Resolution & Investigations)	37
Graph 3.4C: Unauthorized Practice Investigations: Closing Dispositions	38
Graph 3.4D: UAP Enforcement Actions	38
<b>3.5 – Complaints Review Commissioner</b>	<b>39</b>
Graph 3.5A: Reviews Requested and Files Reviewed (by Quarter)	39
Graph 3.5B: Status of Files Reviewed in each Quarter	39
Graph 3.5C: Decisions Rendered, by Quarter and Active Inventory	40
<b>3.6 – Discipline</b>	<b>42</b>
Graph 3.6A: Input	42
Graph 3.6B: Department Inventory	43
Graph 3.6C: Matters Authorized by PAC	44
Graph 3.6D: Notices Issued	45
Graph 3.6E: Completed Matters	47
Graph 3.6F: Appeals	48
Graph 3.6G: Input vs. Output	49
Graph 3.6H: Types of Complaints Received	51
<b>3.7 – Trustee Services</b>	<b>53</b>
Graph 3.7A: Formal Trusteeships Opened and Closed	53
Graph 3.7B: Client Request Files Opened and Closed by Quarter	54
Graph 3.7C: Client Files Indexed Annually	54
Graph 3.7D: Summary of Applications Made to the Unclaimed Trust Fund	55
Graph 3.7E: Unclaimed Trust Fund Amounts Received	55
<b>3.8 – Monitoring &amp; Enforcement</b>	<b>56</b>
Graph 3.8A: New Matters and Active Inventory	56
Graph 3.8B: Collections	56
Graph 3.8C: Regulatory Inquiries	56
<b>SECTION 5 – APPENDICES</b>	<b>57</b>
Appendix A: A Description of the Professional Regulation Division Work Process	58
Appendix B: Glossary of Case Types Used in the Quarterly Report	61
Appendix C: Glossary of Closing Dispositions Used in the Quarterly Report - Intake	62
Appendix D: Glossary of Closing Dispositions Used in the Quarterly Report - Complaints Resolution and Investigations	63
The Professional Regulation Complaint Process	64
Professional Regulation Organization Chart	65

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

# **SECTION 1**

## **REPORT HIGHLIGHTS**

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

## Highlights of Quarterly Performance

### ***New Cases***

During the three year period starting in 2011 and ending in 2013, there was approximately a 5% increase in the intake of new regulatory cases. The trends were unusual during this period in that the total number of new cases in 2011 was higher than in 2012 which saw a 1.7% reduction. In 2013 however, there was a noticeable increase in new cases with a 5.4% increase when compared to 2012.

When caseload trends are viewed over the long term, there is an increase in new cases at the rate of approximately 2% annually. The pattern through 2011, 2012 and 2013 was anomalous, however the overall result is that by the end of 2013 there was approximately a 2% annual increase on average in each year.

It should also be noted that the rate of increase in new cases was higher in the first half of 2013 and decreased in the second half, with only a 2% increase in new cases over 2012.

Other trends during 2013 are that new complaints against lawyers and paralegal licensees increased (lawyers: 3896 received in 2013 vs. 3820 received in 2012; paralegal licensees: 584 received in 2013 vs. 480 received in 2012). The number of complaints raising issues of unauthorized practice remained stable. (260 received in 2013 vs. 259 received in 2012).

### ***Case Completion and Case Inventories***

During 2013, Professional Regulation completed slightly more cases than were received, and so maintained a relatively stable inventory of complaints. At the end of the year the case inventory of 3066 cases was marginally lower (<1%) than at the end of 2012 (3084 cases).

### ***Investigations (Complaints Resolution & Investigations Departments)***

Complaints Resolution received approximately the same number of new cases in 2013 as in 2012. (1889 received in 2013 vs. 1899 received in 2012). The department completed 1889 cases in 2013 with the result that the inventory of cases under investigation also reduced by 2.8% to 917 from 891 at the end of 2012.

In 2013, the number of new cases referred into Investigations increased by 8.3% (1348) over the number referred to that department in 2012 (1245). In the same period the department completed 1344 cases. At end of 2013 there were 1120 complaint cases under investigation in this department.

### ***Mortgage Fraud Investigations***

In 2013, the Law Society received significantly fewer complaints of mortgage fraud (36 new licensee investigations) than in 2012 (52 new licensee investigations). Professional Regulation also significantly reduced the number of cases under active investigation through closure or referral into discipline. During the year, 65 investigations were completed. As a result, the



The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

department reduced the number of licensees under investigation for mortgage fraud from 83 to 65.

***Unauthorized Practice (UAP)***

In 2013, 260 unauthorized practice (UAP) complaints were received in Professional Regulation, virtually the same as the number received in 2012 (256) and in 2011 (255). Although UAP complaints have not increased in the past three years, they have stabilized at a high rate. Of the 260 new complaints, 197 were referred into Investigations. In the year, that department closed 187 UAP complaints and transferred 14 UAP complaints (relating to 5 non-licensees) to be considered for prosecution. In 2013, 4 permanent injunctions were obtained under section 26.3 of the *Law Society Act*. Two of these orders have been appealed.

***Discipline and Hearings***

The Discipline department receives cases on completion of investigations and prepares them for the Proceedings Authorization Committee (PAC) and if authorized, issues the hearing notice and represents the Law Society at hearings.

During 2013, the department received 301 new cases relating to 152 licensee/ applicants. This was an increase of approximately 12% from the 136 new licensee/applicant matters received in 2012.

In 2013 the PAC authorized 242 matters including 178 hearings, 34 invitations to attend and 27 letters of advice.

In relation to those authorizations, Professional Regulation issued 158 hearing notices. This was an increase from the 115 issued in 2012; and the 134 issued in 2011. In 2013 126 hearings were completed before the Hearing. In the same period 20 appeals were made to the Appeal Panel and 3 appeals and 3 judicial reviews were commenced before the Divisional Court. The Appeal Panel completed 17 appeals in this period.

At the end of 2013 the Discipline department had 541 complaints relating to 204 licensees or applicants in its process.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

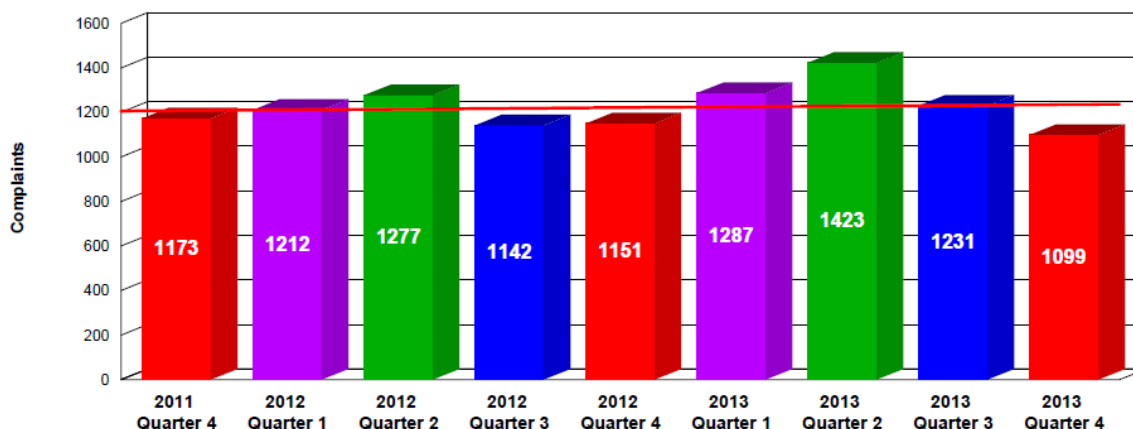
## **SECTION 2**

### **DIVISIONAL PERFORMANCE DURING THE QUARTER**

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

## PERFORMANCE IN THE PROFESSIONAL REGULATION DIVISION

**Graph 2A: Complaints<sup>1</sup> Received in the Division**



For the 12 month period ending December 31, 2013, new complaints received in the Professional Regulation Division increased by 5.4% over the same period ending December 31, 2012. As noted in the chart below, increases were noted in all complaint/case groups.

### Detailed Analysis of Complaints Received in the Division

	Total for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Total for 2013
<b>Complaints against Lawyers</b>	3820	1015	1026	969	886	3896
<b>Lawyer Applicant Cases ★</b>	99	18	67	21	9	115
<b>Complaints against Licensed Paralegals</b>	480	160	152	143	129	584
<b>Paralegal Applicant Cases ★</b>	155	29	121	34	21	205
<b>Complaints against Non-Licensees/Non-Applicants*</b>	228	65	57	64	54	240
<b>TOTAL</b>	4782	1287	1423	1231	1099	5040

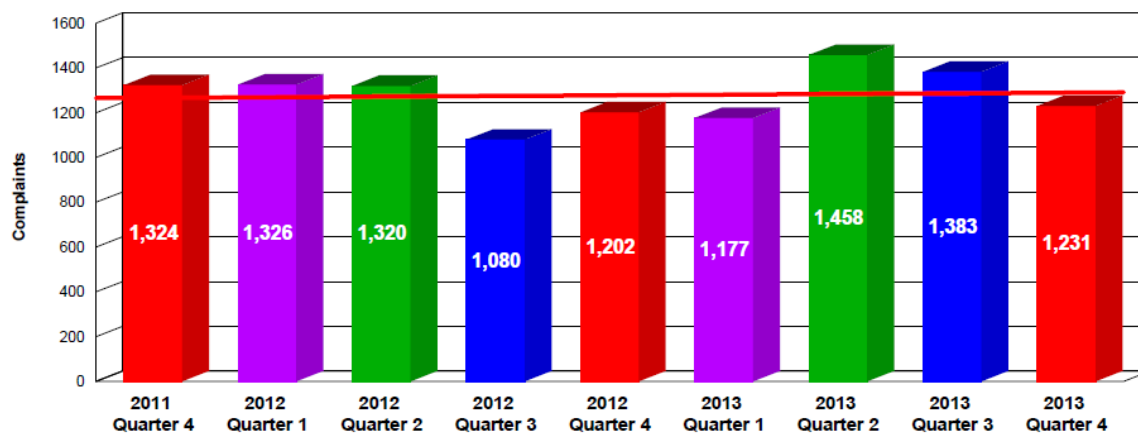
★ Applicant cases include good character cases and UAP complaints

\* For a complete analysis of UAP complaints see section 3.4.

<sup>1</sup> Includes all complaints received in PRD from Complaints Services.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

**Graph 2B: Complaints Closed<sup>2</sup> in the Division (by Quarters)**



The number of cases closed in the 12 month period ending December 31, 2013 increased by 6.5% over the same period ending December 31, 2012. In 2013, the number of closures exceeded the number of new cases received in the Division (5249 vs. 5040).

#### Detailed Analysis of Complaints Closed in the Division

	Total for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Total for 2013
<b>Complaints against Lawyers</b>	3932	946	1118	1101	1009	4174
<b>Lawyer Applicant Cases ★</b>	88	13	64	31	14	122
<b>Complaints against Licensed Paralegals</b>	486	105	127	124	131	487
<b>Paralegal Applicant Cases ★</b>	163	37	83	53	33	206
<b>Complaints against Non-Licensees/Non-Applicants*</b>	259	76	66	74	44	260
<b>TOTAL</b>	4928	1177	1458	1383	1231	5249

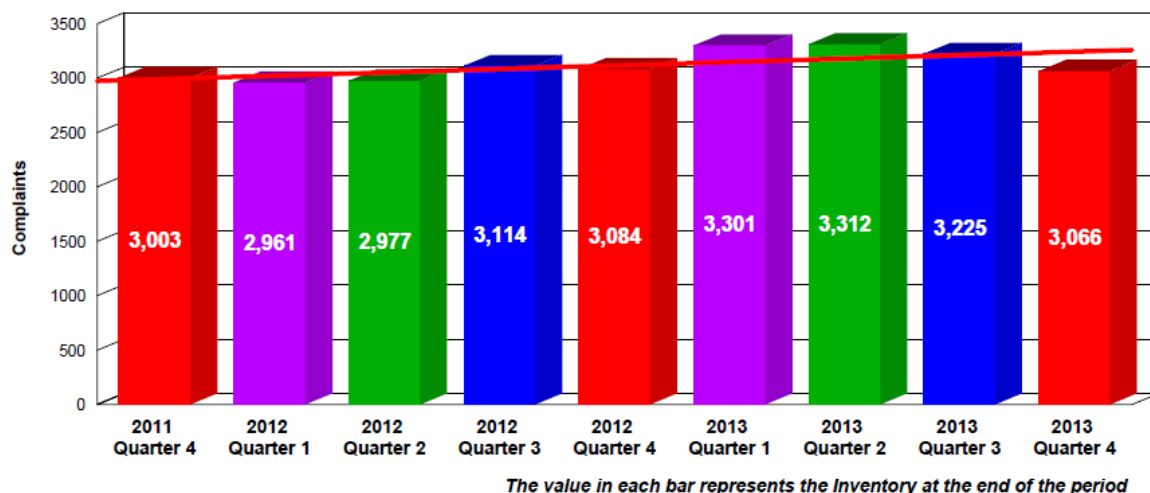
★ Applicant cases include good character cases and UAP complaints

\* For a complete analysis of UAP complaints see section 3.4.

<sup>2</sup> This graph includes all complaints closed in Intake, Complaints Resolution, Investigations and Discipline.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

**Graph 2C: Total Inventory<sup>3</sup>**



The inventory in the Division at the end of 2013 was slightly lower than at the end of 2012 (2066 at the end of 2013 vs. 2084 at the end of 2012). The breakdown of the inventory in the chart below demonstrates that decreases occurred in the inventory of all complaint/cases groups.

#### Detailed Analysis of Division Inventory

	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
<b>Complaints against Lawyers</b>	2546	2711	2656	2575	2449
<b>Lawyer Applicant Cases ★</b>	31	37	39	29	25
<b>Complaints against Licensed Paralegals</b>	322	378	404	427	398
<b>Paralegal Applicant Cases ★</b>	60	55	91	77	67
<b>Complaints against Non-Licensees/Non-Applicants*</b>	125	120	122	117	127
<b>TOTAL</b>	3084	3301	3312	3225	3066

★ Applicant cases include good character cases and UAP complaints

\* For a complete analysis of UAP complaints see section 3.4.

<sup>3</sup> This graph does not include active complaints in the Monitoring & Enforcement Department.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

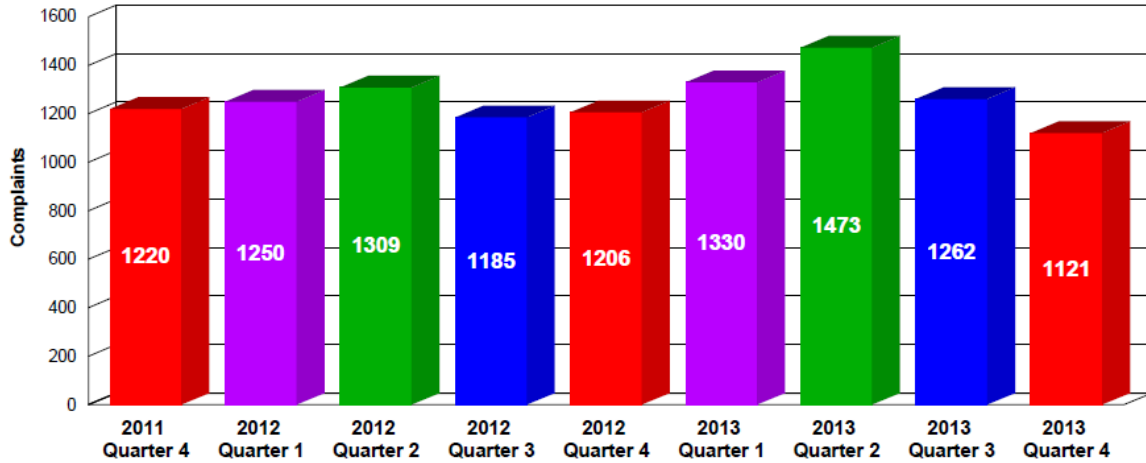
**SECTION 3**

**DEPARTMENTAL PERFORMANCE DURING  
THE QUARTER**

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

**3.1 – Intake**

**Graph 3.1A: Intake - Input<sup>4</sup>**



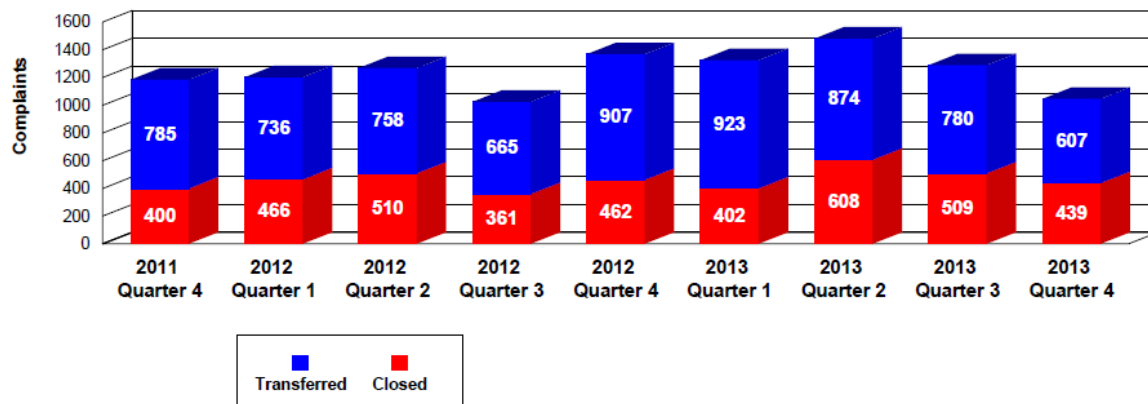
The Intake department processes all new regulatory complaints. In Q4 2013, in addition to the 1099 new cases, Intake re-opened 22 complaints which met the threshold for re-opening a closed matter.

<sup>4</sup> Includes new complaints received and re-opened complaints

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

### 3.1 – Intake

**Graph 3.1B: Intake - Complaints Closed and Transferred Out**



In 2013, Intake closed 1958 cases, which represents an 8.8% increase over the number of cases closed by the department in 2012.

#### Detailed Analysis of Complaints Closed and Transferred From Intake

		Totals for 2012		Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013	
<b>Complaints against Lawyers</b>	Closed	1431	3894	327	425	404	368	1524	3991
	Transferred	2464		737	639	605	486	2467	
<b>Lawyer Applicant Cases★</b>	Closed	61	98	2	45	15	5	67	113
	Transferred	37		17	18	11	0	46	
<b>Complaints against Licensed Paralegals</b>	Closed	138	483	28	39	40	35	142	568
	Transferred	345		108	127	111	80	426	
<b>Paralegal Applicant Cases★</b>	Closed	80	157	13	69	22	10	114	197
	Transferred	77		15	45	18	5	83	
<b>Complaints against Non-Licensees/Non-Applicants*</b>	Closed	89	232	32	30	28	21	111	273
	Transferred	143		46	45	35	36	162	
<b>TOTAL</b>	Closed	1799	4865	402	608	509	439	1958	5142
	Transferred	3066		923	874	780	607	3184	

★ Applicant cases include good character cases and UAP complaints

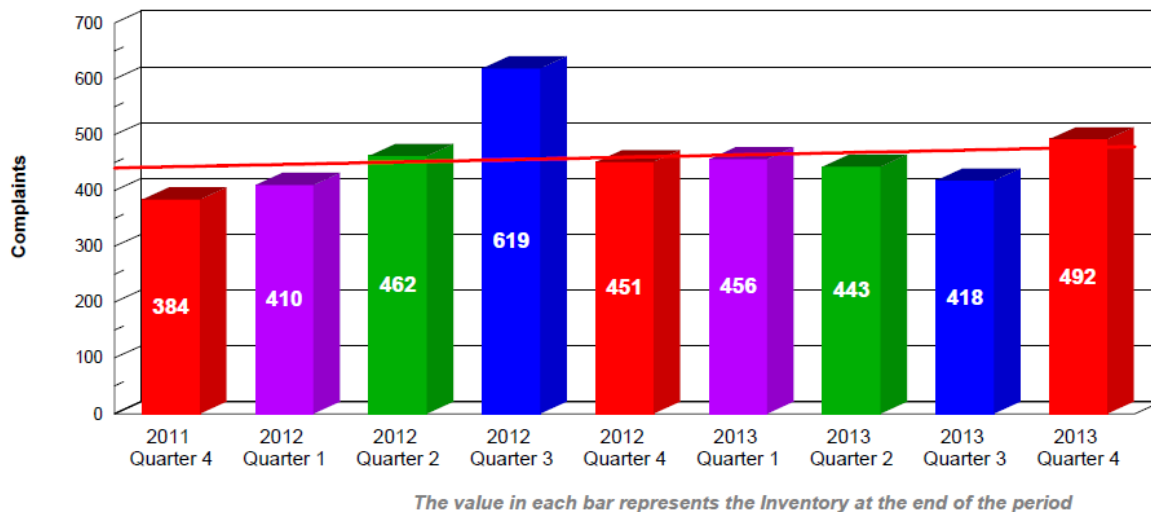
\* For a complete analysis of UAP complaints see section 3.4.



The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.1 – Intake

**Graph 3.1 C: Intake - Department Inventory**



Intake's inventory as at December 31, 2013 was 9% higher than its inventory at the end of 2012. Although the department closed and transferred more cases than it received in 2013 (5142 vs. 5040), the increased inventory is attributable to the re-opening of complaints which met the threshold for re-opening a closed matter.

#### Detailed Analysis of Intake Inventory

	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
<b>Complaints against Lawyers</b>	399	387	384	369	415
<b>Lawyer Applicant Cases ★</b>	2	1	5	0	4
<b>Complaints against Licensed Paralegals</b>	32	56	44	36	54
<b>Paralegal Applicant Cases ★</b>	0	1	6	2	9
<b>Complaints against Non-Licensees/Non-Applicants*</b>	18	11	4	11	10
<b>TOTAL</b>	451	456	443	418	492

★ Applicant cases include good character cases and UAP complaints

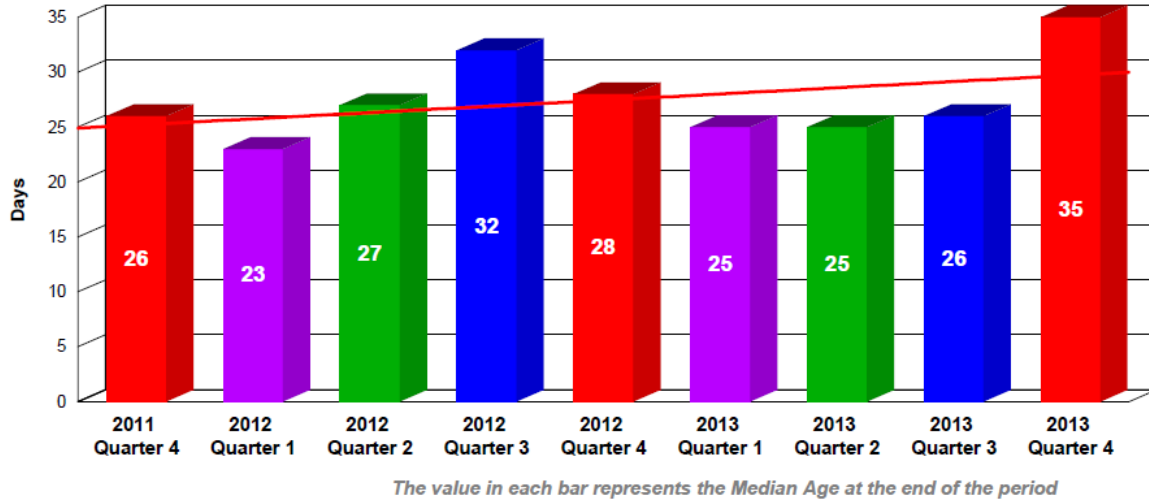
\* For a complete analysis of UAP complaints see section 3.4.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

### 3.1 – Intake

**Graph 3.1D: Intake - Median Age of Complaints**



Intake's median age at the end of 2013 is slightly above the department's 30-day target.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.1 - Intake

**Graph 3.1E: Intake – Input vs. Output**

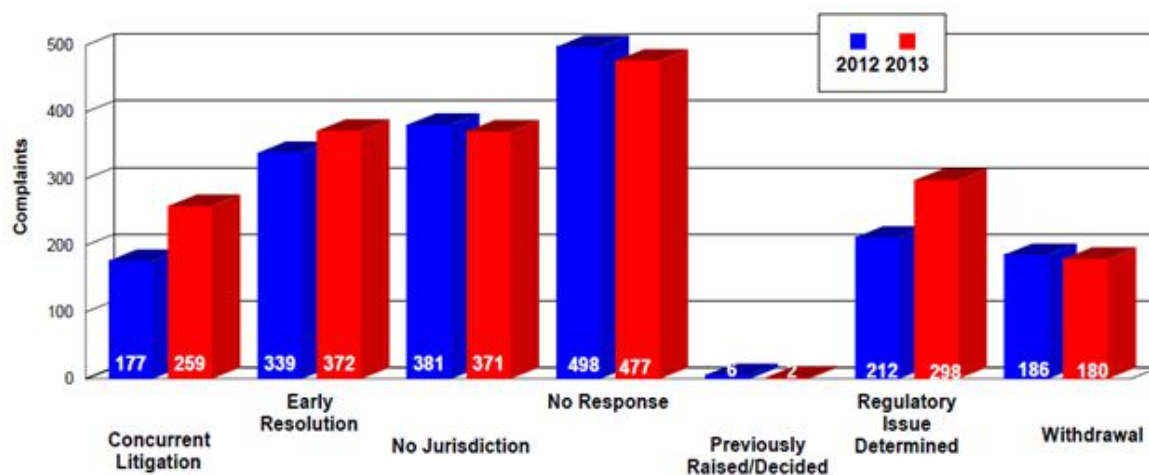
	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Reactivated	47	37	32	43	55	43	49	31	22
Received from CS	1173	1212	1277	1142	1151	1287	1423	1231	1099
Received from Other Departments	0	1	0	0	0	0	1	0	0
<b>Total</b>	<b>1220</b>	<b>1250</b>	<b>1309</b>	<b>1185</b>	<b>1206</b>	<b>1330</b>	<b>1473</b>	<b>1262</b>	<b>1121</b>
	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Closed	400	466	510	361	462	402	608	509	439
Transferred to CR	434	433	404	399	603	524	496	466	366
Transferred to Investigation	344	293	350	255	303	389	374	308	238
Transferred to Other Departments	7	10	4	11	1	10	4	6	3
<b>Total</b>	<b>1185</b>	<b>1202</b>	<b>1268</b>	<b>1026</b>	<b>1369</b>	<b>1325</b>	<b>1482</b>	<b>1289</b>	<b>1046</b>

The Intake Department provides early stage processing and streaming services. The above chart sets out, for the last 9 quarters, (1) the number of complaints reactivated by (as they met the threshold for re-opening a closed matter) and received in Intake and (2) the number of complaints closed by Intake and the department to which files were streamed by Intake.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.1 – Intake

**Graph 3.1F: Intake – Complaints Closed by Disposition**



This graph compares closures of complaints in the Intake Department by the reason for closure in 2012 with 2013. While the number of complaints closed in 2013 and 2012 differ, there was in fact no appreciable difference between the two years when the total number of closed complaints is considered.

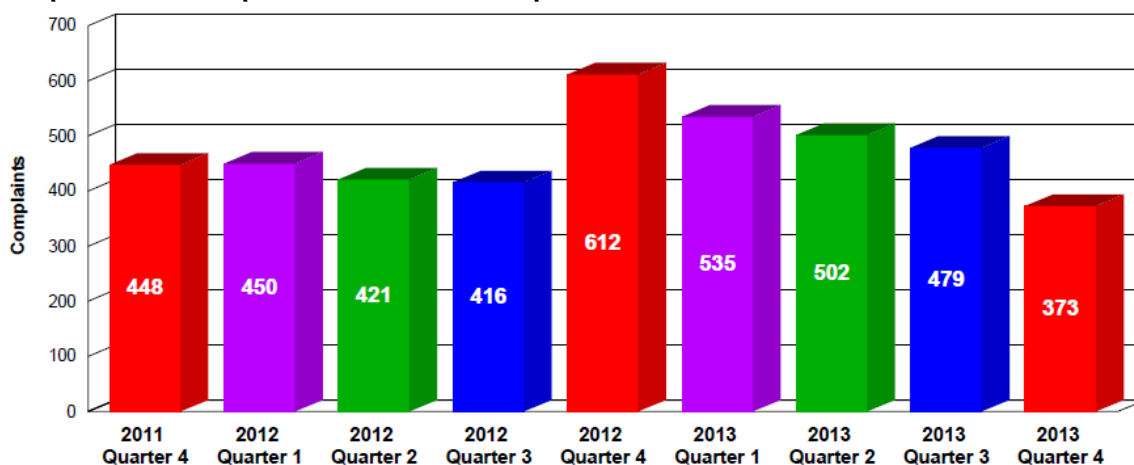
	2012 (% of total cases closed)	2013 (% of total cases closed)
<b>Concurrent Litigation</b>	10%	13%
<b>Early Resolution</b>	19%	19%
<b>No Jurisdiction</b>	21%	19%
<b>No Response</b>	28%	24%
<b>Previously Raised/Determined</b>	0%	0%
<b>Regulatory Issue Determined</b>	12%	15%
<b>Withdrawal</b>	10%	9%
<b>Total Cases Closed</b>	100% (1799 cases)	100% (1958 cases)

A glossary of the individual disposition types included in each of the shown categories is available in Section 4, Appendix C.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

## 3.2 – Complaints Resolution

**Graph 3.2A: Complaints Resolution – Input<sup>5</sup>**



The input of cases into Complaints Resolution in 2013 remained almost the same as the number received in 2012 (1899 received in 2012; 1889 received in 2013).

### Detailed Analysis of New and Re-opened Complaints in Complaints Resolution

	Totals for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013
<b>Complaints against Lawyers</b>	1736	492	443	418	330	1683
<b>Lawyer Applicant Cases★</b>	0	0	0	0	0	0
<b>Complaints against Licensed Paralegals</b>	163	43	59	60	43	205
<b>Paralegal Applicant Cases★</b>	0	0	0	0	0	0
<b>Complaints against Non-Licensees/Non-Applicants*</b>	0	0	0	1	0	1
<b>TOTAL</b>	1899	535	502	479	373	1889

★ Applicant cases include good character cases and UAP complaints

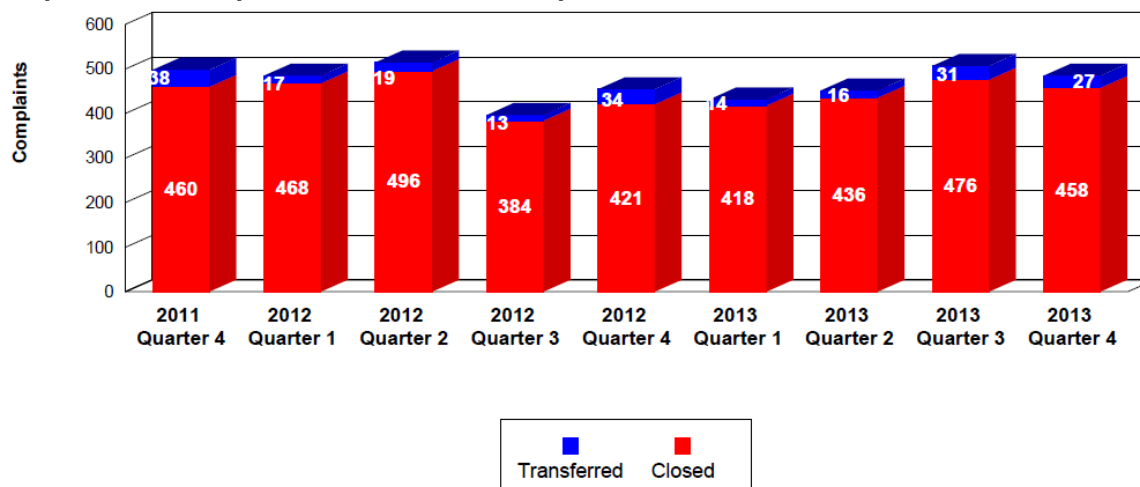
\* For a complete analysis of UAP complaints see section 3.4.

<sup>5</sup> Includes new complaints received into the department as well as complaints re-opened during the Quarter.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.2 – Complaints Resolution

**Graph 3.2B: Complaints Resolution - Complaints Closed and Transferred Out**



The number of cases completed in 2013 by Complaints Resolution (1889) increased by 2% over the number of cases completed in 2012 (1852).

#### Detailed Analysis of Complaints Closed and Transferred From Complaints Resolution

		Totals for 2012		Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013	
<b>Complaints against Lawyers</b>	Closed	1623	1698	379	408	434	405	1626	1709
	Transferred	75		24	14	23	22	83	
<b>Lawyer Applicant Cases ★</b>	Closed	0	0	0	0	0	0	0	0
	Transferred	0		0	0	0	0	0	
<b>Complaints against Licensed Paralegals</b>	Closed	146	154	39	28	42	53	162	179
	Transferred	8		3	2	7	5	17	
<b>Paralegal Applicant Cases ★</b>	Closed	0	0	0	0	0	0	0	0
	Transferred	0		0	0	0	0	0	
<b>Complaints against Non-Licensees/Non-Applicants*</b>	Closed	0	0	0	0	0	0	0	1
	Transferred	0		0	0	1	0	1	
<b>TOTAL</b>	Closed	1769	1852	418	436	476	458	1788	1889
	Transferred	83		27	16	31	27	101	

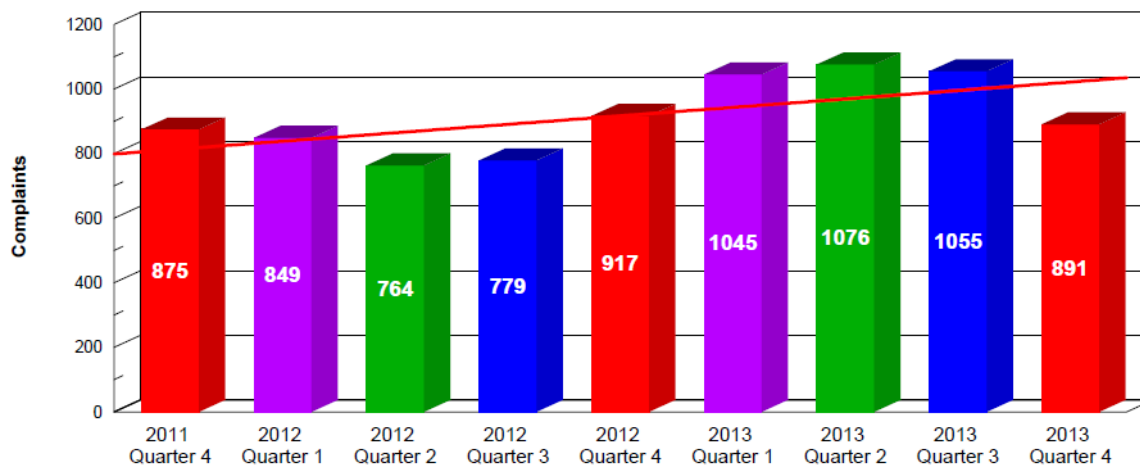
★ Applicant cases include good character cases and UAP complaints

\* For a complete analysis of UAP complaints see section 3.4.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

## 3.2 – Complaints Resolution

**Graph 3.2C: Complaints Resolution – Department Inventory**



*The value in each bar represents the Inventory at the end of the period*

The department's inventory at the end of 2013 was 2.8% lower than at the end of 2012. The inventory continues to consist mostly of complaints against lawyers.

### Detailed Analysis of Complaint Resolution's Inventory

	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
<b>Complaints against Lawyers</b>	830	957	959	928	811
<b>Lawyer Applicant Cases ★</b>	0	0	0	0	0
<b>Complaints against Licensed Paralegals</b>	87	88	117	127	80
<b>Paralegal Applicant Cases ★</b>	0	0	0	0	0
<b>Complaints against Non-Licensees/Non-Applicants*</b>	0	0	0	0	0
<b>TOTAL</b>	917	1045	1076	1055	891

★ Applicant cases include good character cases and UAP complaints

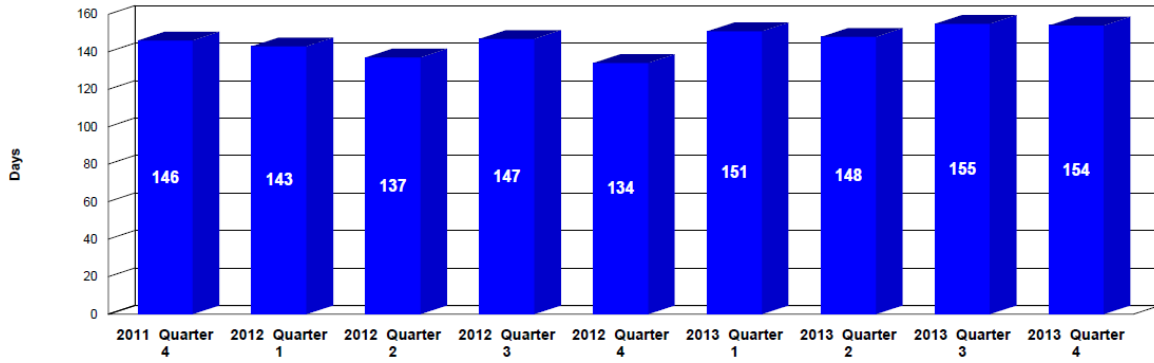
\* For a complete analysis of UAP complaints see section 3.4.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

### 3.2 – Complaints Resolution

**Graph 3.2D: Complaints Resolution - Median Age of Complaints**



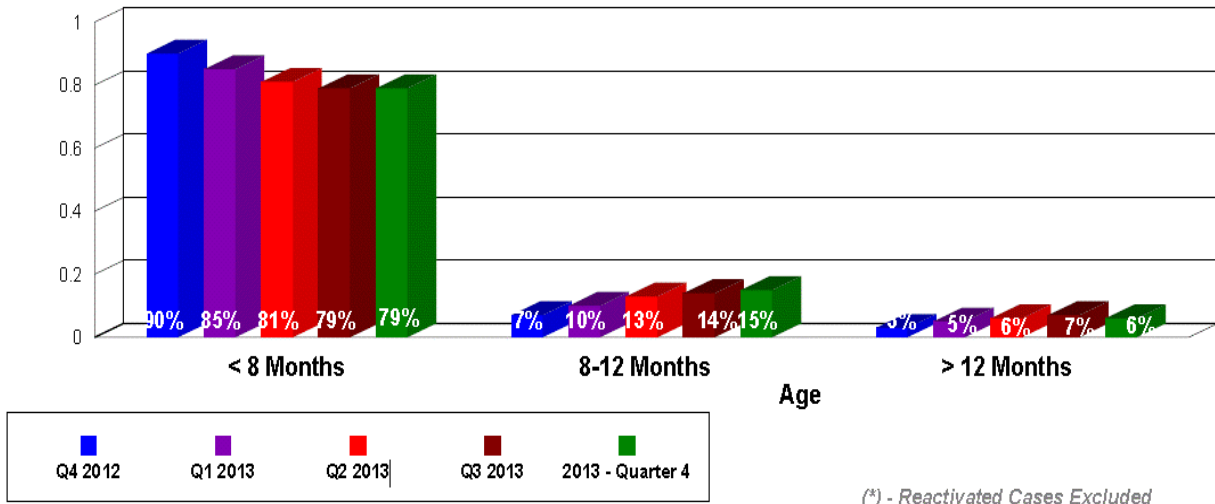
While the median case age of the department's caseload at the end of 2013 was higher than the median age at the end of 2012 (by 15%) and the median age at the end of 2011 (by 5.4%), it is well within the department's target range of between 150-170 days.



The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.2 – Complaints Resolution

**Graph 3.2E: Complaints Resolution – Aging of Complaints**



The above graph sets out the spectrum of aging in the department’s inventory (excluding reactivated cases) at the end of each of the 5 quarters displayed. Excluding reactivated cases, Complaints Resolution’s department inventory was 833 cases involving 762 subjects. The age distribution of those cases was:

Less than 8 months	658 cases involving 600 subjects
8 to 12 months	124 cases involving 119 subjects
More than 12 months	51 cases involving 43 subjects

The goal is to reduce the proportion of cases in the older time frames and increase the proportion of cases in the youngest time frame. However, it is recognized that there will always be cases that are older than 12 months in Complaints Resolution for the following reasons:

- Newer complaints against the lawyer/paralegal are received. In some cases existing cases await the completion of younger cases relating to the same licensee;
- Delays on the part of licensees in providing representations and in responding to the investigators’ requests. In a number of instances, the Summary Hearing process is required;
- Delays on the part of complainants in responding to licensee’s representations and to investigators’ requests for additional information; and
- New issues raised by the complainant requiring additional investigation

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.2 – Complaints Resolution

**Graph 3.2F: Complaints Resolution – Input vs. Output**

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Reactivated	13	14	7	6	4	10	6	6	7
Received from Intake	434	433	404	399	603	524	496	466	366
Received from Other Departments	1	3	10	11	5	1	0	7	0
<b>Total</b>	<b>448</b>	<b>450</b>	<b>421</b>	<b>416</b>	<b>612</b>	<b>535</b>	<b>502</b>	<b>479</b>	<b>373</b>

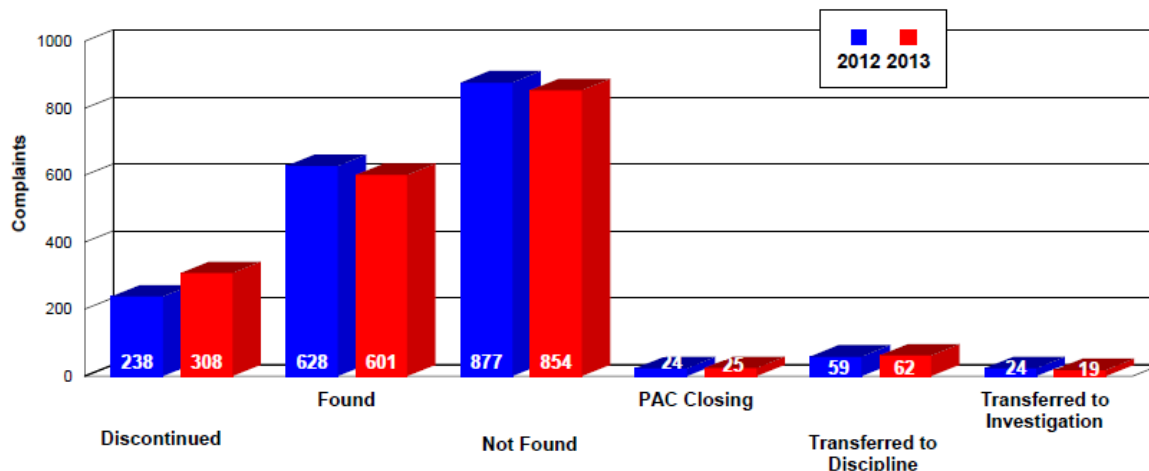
	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Closed	460	468	496	384	421	418	436	476	458
Transferred to Discipline	34	14	12	4	29	9	12	23	18
Transferred to Investigation	4	3	7	9	5	5	4	6	4
Transferred to Other Departments	0	0	0	0	0	0	0	2	5
<b>Total</b>	<b>498</b>	<b>485</b>	<b>515</b>	<b>397</b>	<b>455</b>	<b>432</b>	<b>452</b>	<b>507</b>	<b>485</b>

The above chart sets out, for the last 9 quarters, (1) the number of complaints reactivated by and received in Complaints Resolution from various departments and (2) the number of complaints closed by Complaints Resolution and the department to which files were streamed by Complaints Resolution.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.2 – Complaints Resolution

**Graph 3.2G: Complaints Resolution - Complaints Closed by Disposition**



This graph shows a breakdown of the dispositions for complaints closed in or transferred out of Complaints Resolution for 2012 and 2013. With respect to the closing dispositions, as shown in the chart below, there was no appreciable difference between the two years when the total number of closed complaints is considered.

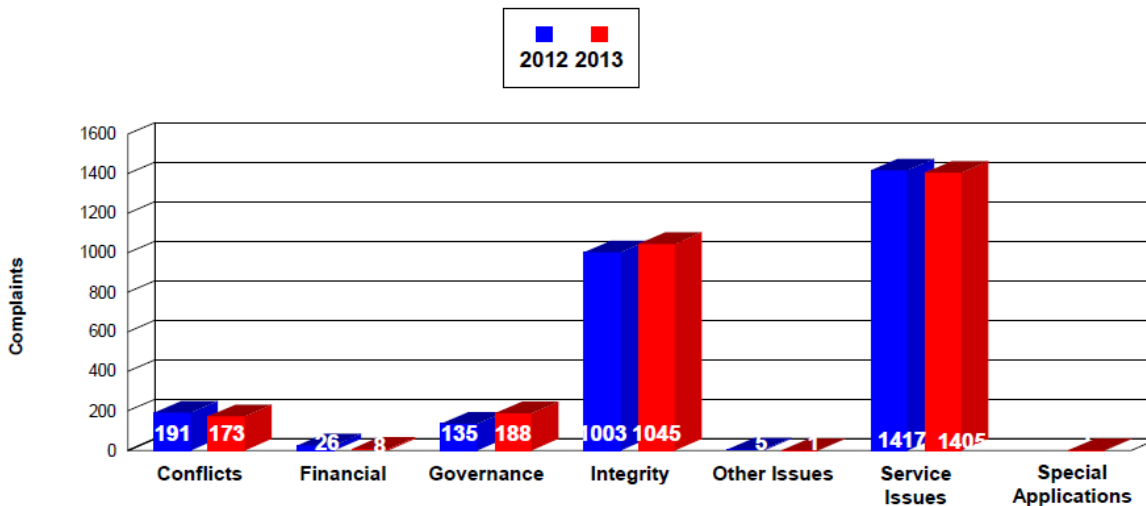
	2012 (% of total cases closed)	2013 (% of total cases closed)
<b>Discontinued</b>	13%	17%
<b>Found</b>	36%	34%
<b>Not Found</b>	50%	48%
<b>PAC Closing</b>	1%	1%
<b>Total cases closed</b>	100% (1769 cases)	100% (1788 cases)

A glossary of the individual disposition types included in each of the shown categories is available in Section 4, Appendix D.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.2 – Complaints Resolution

**Graph 3.2H: Complaints Resolution - Types of Complaints Received**



The above graph displays the specific case types for complaints received in Complaints Resolution in 2012 and 2013. A glossary of the individual issues included in each of the shown case type groups is available in Section 4, Appendix B

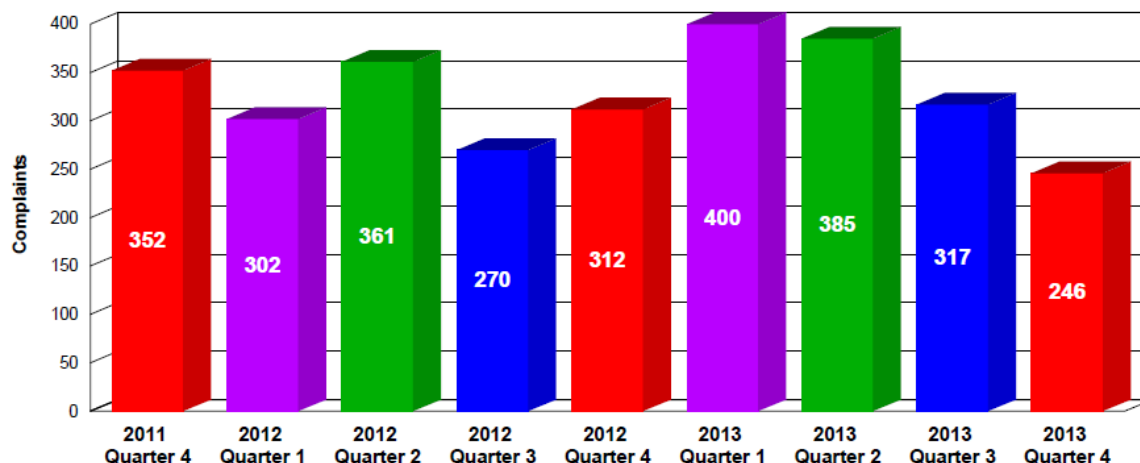
As shown in the following chart, the distribution of complaint types in Complaints Resolution has remained fairly stable in 2012 and 2013. The following chart shows each complaint type as a percentage of all complaint types received in the 2 years.

	2012	2013
Conflicts	10%	9%
Financial	1%	0%
Governance	7%	10%
Integrity	53%	56%
Service Issues	75%	75%
Other Issues	0%	0%

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.3 – Investigations

**Graph 3.3A: Investigations - Input**



The input of cases into the Investigations department in 2013 increased (by 8.3%) from the input in 2012.

#### Detailed Analysis of New and Re-opened Complaints Received in Investigations

	Totals for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013
<b>Complaints against Lawyers</b>	796	254	208	197	164	823
<b>Lawyer Applicant Cases ★</b>	37	18	18	11	0	47
<b>Complaints against Licensed Paralegals</b>	190	67	69	54	40	230
<b>Paralegal Applicant Cases ★</b>	80	15	45	19	6	85
<b>Complaints against Non-Licensees/Non-Applicants*</b>	142	46	45	36	36	163
<b>TOTAL</b>	1245	400	385	317	246	1348

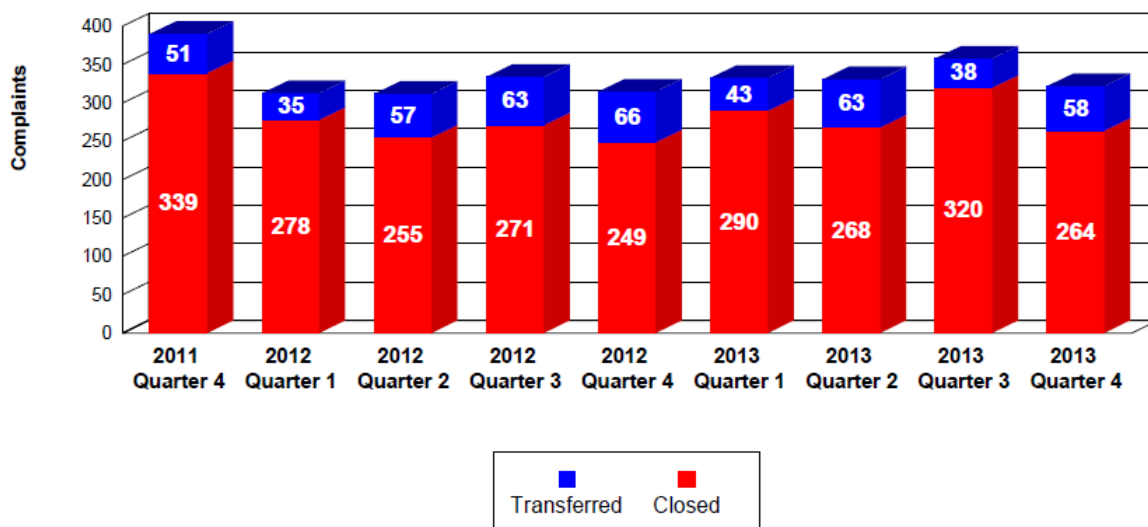
★ Applicant cases include good character cases and UAP complaints

\* For a complete analysis of UAP complaints see section 3.4.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

### 3.3 – Investigations

**Graph 3.3B Investigations - Complaints Closed and Transferred Out**



The number of cases closed/transferred out of the department (1344 cases) also increased from the number completed in the same period in 2012 (1274 cases).

#### Detailed Analysis of Complaints Closed and Transferred Out of Investigations

		Totals for 2012		Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013	
<b>Complaints against Lawyers</b>	Closed	657	815	181	171	194	183	729	875
	Transferred	158		23	45	32	46	146	
<b>Lawyer Applicant Cases ★</b>	Closed	24	27	11	17	14	9	51	52
	Transferred	3		1	0	0	0	1	
<b>Complaints against Licensed Paralegals</b>	Closed	163	206	32	39	39	27	137	175
	Transferred	43		7	17	4	10	38	
<b>Paralegal Applicant Cases ★</b>	Closed	69	69	23	12	31	22	88	95
	Transferred	0		4	1	2	0	7	
<b>Complaints against Non-Licensees/Non-Applicants*</b>	Closed	140	157	43	29	42	23	137	147
	Transferred	17		8	0	0	2	10	
<b>TOTAL</b>	Closed	1053	1274	290	268	320	264	1142	1344
	Transferred	221		43	63	38	58	202	

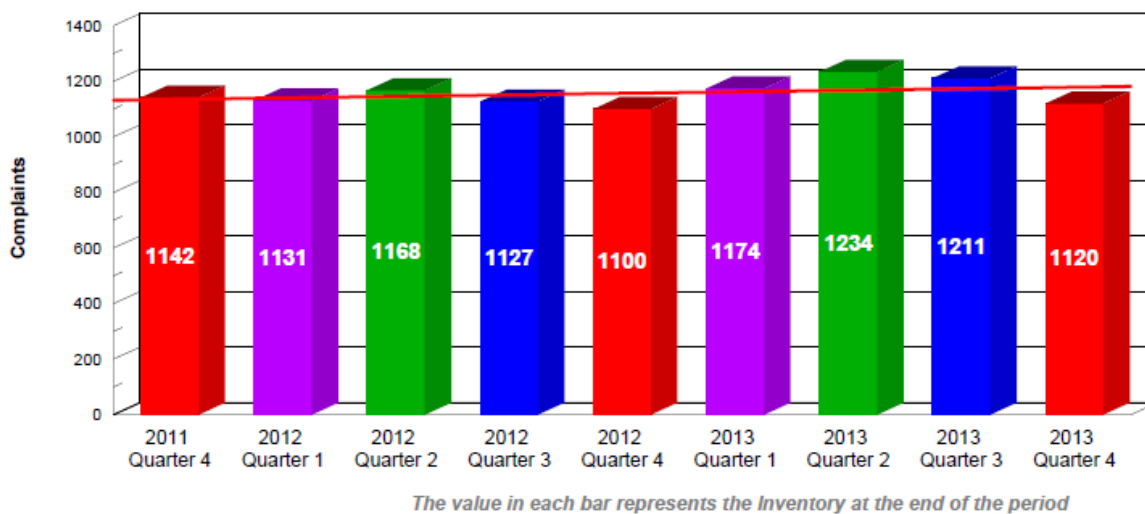
★ Applicant cases include good character cases and UAP complaints

\* For a complete analysis of UAP complaints see section 3.4.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.3 – Investigations

**Graph 3.3C: Investigations – Department Inventory**



The number of cases completed by the department in 2013 (1344) was almost the same as the number of cases received in the department (1348). Investigations' inventory increased slightly (by 1.8%) from 1100 at the end of 2012 to 1120 at the end of 2013.

#### Detailed Analysis of Investigations Inventory

	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
<b>Complaints against Lawyers</b>	796	851	851	837	759
<b>Lawyer Applicant Cases ★</b>	25	31	31	28	20
<b>Complaints against Licensed Paralegals</b>	145	174	186	200	202
<b>Paralegal Applicant Cases ★</b>	43	32	64	52	36
<b>Complaints against Non-Licensees/Non-Applicants*</b>	91	86	102	94	103
<b>TOTAL</b>	1100	1174	1234	1211	1120

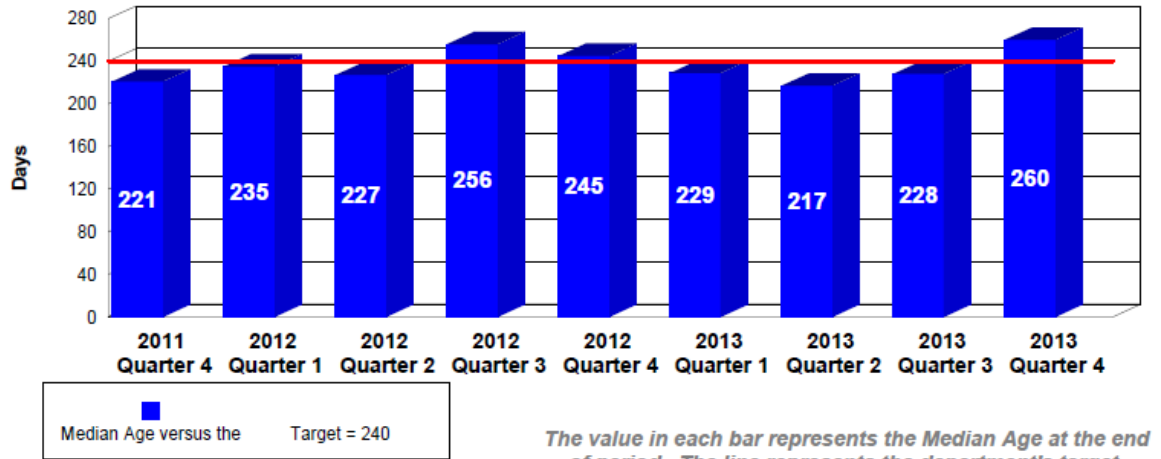
★ Applicant cases include good character cases and UAP complaints

\* For a complete analysis of UAP complaints see section 3.4.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.3 – Investigations

**Graph 3.3D: Investigations - Median Age of All Complaints**



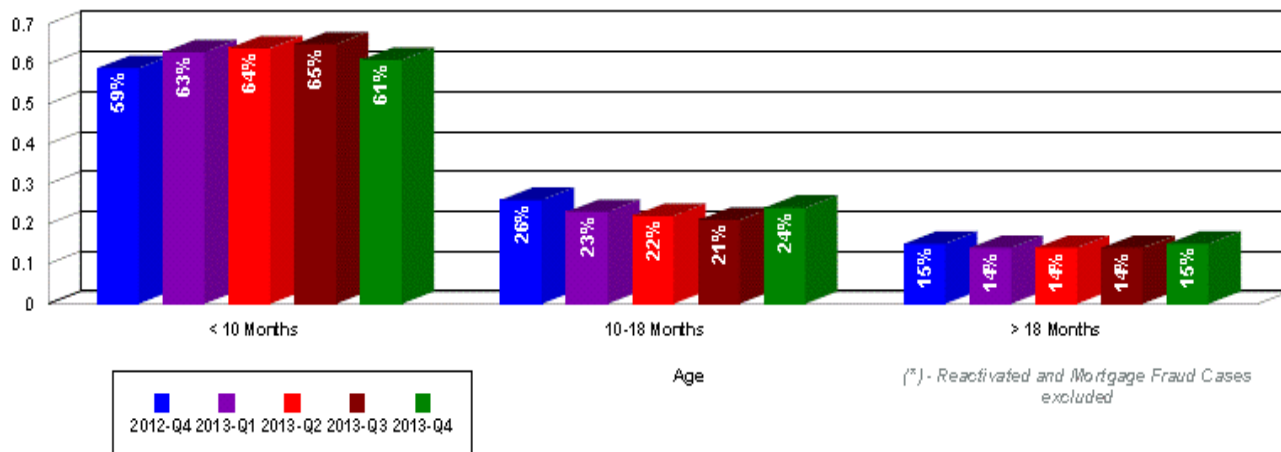
Investigations' median age at the end of 2013 was 6% higher than the median age at the end of 2012, increasing from 245 days to 260 days.



### 3.3 – Investigations

**Graph 3.3E: Investigations – Aging of Complaints**

**(a) Core Cases**



The above graph sets out the spectrum of aging in the department’s inventory (excluding reactivated and mortgage fraud cases) at the end of each of the 5 quarters displayed. The inventory of Investigations at the end of 2013, excluding reactivated and mortgage fraud cases, was 966 cases involving 737 subjects. The distribution of those cases was:

Less than 10 months	591 cases involving 451 subjects
10 to 18 months	228 cases involving 177 subjects
More than 18 months	147 cases involving 109 subjects

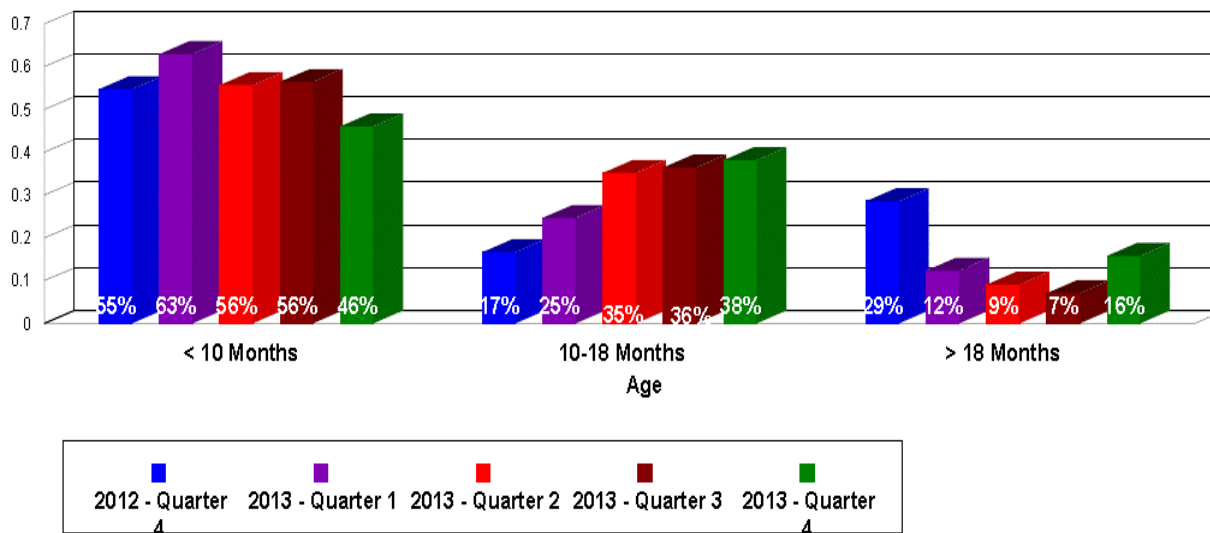
While the department strives to reduce the proportion of cases in the older time frame and to increase the proportion of cases in the youngest time frame, it is recognized that there are cases that are older than 18 months in Investigations for the following reasons:

- The investigator has to wait for evidence from a third party (i.e. not the complainant or the licensee/subject), for example psychiatric evaluation, court transcripts, or a key witness;
- Newer complaints are received against the licensee/subject. In order to move forward together to the Proceedings Authorization Committee, the older cases await the completion of younger cases;
- A need to coordinate investigations between different licensees/subject where the issues arise out of the same set of circumstances (e.g. a complainant complains about 2 lawyers in relation to the same matter);
- Multiple cases involve one lawyer. These investigations are complex and time consuming;
- Where capacity issues are raised during a conduct investigation.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.3 – Investigations

#### (b) Mortgage Fraud Cases



The above graph sets out the spectrum of aging in the department’s mortgage fraud case inventory at the end of each of the 5 quarters displayed. The inventory of mortgage fraud cases at the end of 2013 was 76 cases involving 65 subjects. The distribution of those cases was:

Less than 10 months	35 cases involving 28 subjects
10 to 18 months	29 cases involving 26 subjects
More than 18 months	12 cases involving 11 subjects

As noted above, the department strives to reduce the proportion of mortgage fraud cases in the older time frame and to increase the proportion of cases in the youngest time frame. However, it is recognized that there will always be mortgage fraud cases that are older than 18 months in Investigations for the reasons cited above, particularly:

- When newer complaints against the licensee/subject are received, existing investigations may have to await their completion in order that all the cases can be taken to Proceedings Authorization Committee together.
- There is a need to coordinate investigations between different licensees/subject where the issues arise out of the same set of circumstances (e.g. a complainant complains about 2 lawyers in relation to the same matter).
- There are multiple cases involve one lawyer resulting in greater complexity.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.3 – Investigations

**Graph 3.3F: Investigations – Input vs. Output**

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Reactivated	4	5	4	4	4	4	6	3	4
Received from CR	4	3	7	9	5	5	4	6	4
Received from Discipline	0	1	0	2	0	2	1	0	0
Received from Intake	344	293	350	255	303	389	374	308	238
Received from Other Departments	0	0	0	0	0	0	0	0	0
<b>Total</b>	<b>352</b>	<b>302</b>	<b>361</b>	<b>270</b>	<b>312</b>	<b>400</b>	<b>385</b>	<b>317</b>	<b>246</b>

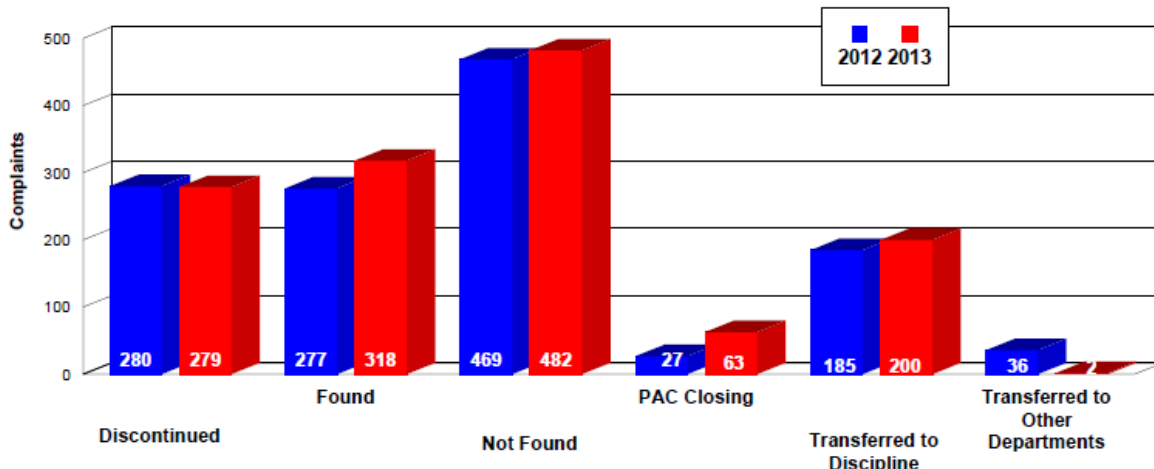
	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Closed	339	278	255	271	249	290	268	320	264
Transferred to Discipline	48	32	45	46	62	42	63	37	58
Transferred to Other Departments	3	3	12	17	4	1	0	1	0
<b>Total</b>	<b>390</b>	<b>313</b>	<b>312</b>	<b>334</b>	<b>315</b>	<b>333</b>	<b>331</b>	<b>358</b>	<b>322</b>

The above chart sets out, for the last 9 quarters, (1) the number of complaints reactivated by and received in Investigations from various other departments and (2) the number of complaints closed by Investigations and the department to which files were streamed by Investigations.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.3 – Investigations

**Graph 3.3G: Investigations – Complaints Closed by Disposition**



This graph shows a breakdown of the dispositions for complaints closed in or transferred out of Investigations for 2012 and 2013. With respect to the closing dispositions, as shown in the chart below, there was no appreciable difference between the two years when the total number of closed complaints is considered.

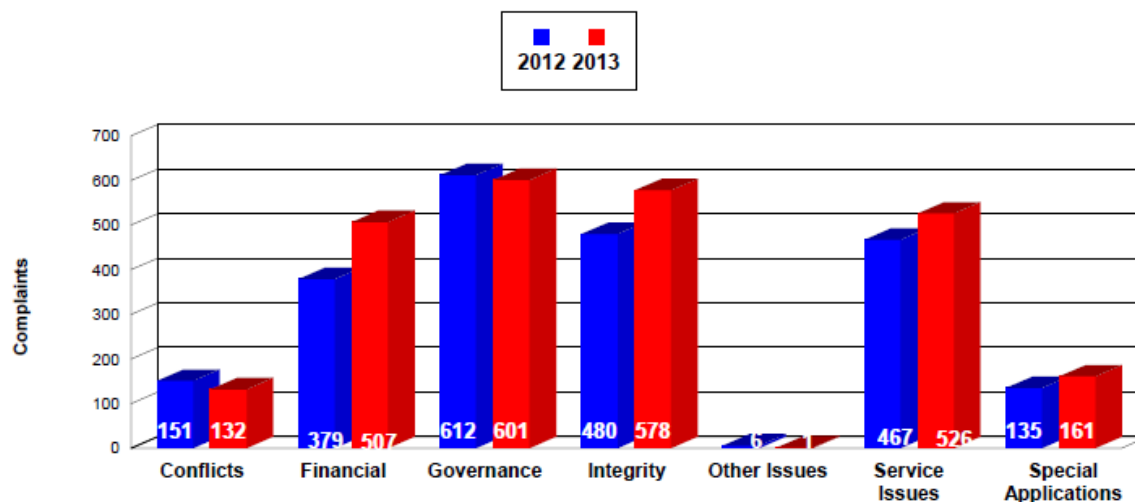
	<b>2012</b> <b>(% of total cases closed)</b>	<b>2013</b> <b>(% of total cases closed)</b>
<b>Discontinued</b>	27%	24%
<b>Found</b>	26%	28%
<b>Not Found</b>	45%	42%
<b>PAC Closing</b>	3%	6%
<b>Total cases closed</b>	100% (1053 cases)	100% (1142 cases)

.A glossary of the individual disposition types included in each of the shown categories is available in Section 4, Appendix D.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.3 – Investigations

**Graph 3.3H: Investigations - Types of Complaints Received**



The above graph displays the specific case types for complaints received in Investigations in 2012 and 2013. A glossary of the individual issues included in each of the shown case type groups is available in Section 4, Appendix B.

As shown in the following chart, the distribution of complaint types in Investigations has remained fairly stable between 2012 and 2013. The following chart shows each complaint type as a percentage of all complaint types received in the 2 years:

	2012	2013
<b>Conflicts</b>	12%	9%
<b>Financial</b>	30%	38%
<b>Governance</b>	50%	45%
<b>Integrity</b>	39%	43%
<b>Service Issues</b>	38%	39%
<b>Special Applications</b>	11%	12%
<b>Other Issues</b>	0%	1%

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.4 – Unauthorized Practice (UAP)

**Graph 3.4A: Unauthorized Practice Complaints in Intake**

Quarter	New	Closed/Transferred			Active at end of Quarter
		Closed	Transfer to CR	Transfer to Inv	
<b>Totals: 2008</b>	337	122	50	168	
<b>Totals: 2009</b>	445	165	86	192	
<b>Q1 2010</b>	94	42	0	76	36
<b>Q2 2010</b>	89	32	0	69	32
<b>Q3 2010</b>	67	32	1	50	29
<b>Q4 2010</b>	80	45	0	54	18
<b>Totals - 2010 (+ POL)</b>	330* (398)	151	1	249	
<b>Q1 2011 (+ POL)</b>	61 (74)	24	0	41	20
<b>Q2 2011 (+ POL)</b>	61 (84)	20	1	54	12
<b>Q3 2011 (+ POL)</b>	70 (80)	27	0	49	28
<b>Q4 2011 (+ POL)</b>	63 (83)	16	1	62	15
<b>Totals – 2011 (+POL)</b>	255 (321)	87	2	206	
<b>Q1 2012 (+ POL)</b>	77(91)	16	0	61	17
<b>Q2 2012 (+POL)</b>	58 (80)	22	0	49	6
<b>Q3 2012 (+POL)</b>	41 (44)	16	0	27	11
<b>Q4 2012 (+POL)</b>	80 (84)	32	0	45	19
<b>Totals – 2012 (+POL)</b>	256 (299)	86	0	182	
<b>Q1 2013 (+POL)</b>	71(93)	29	0	59	11
<b>Q2 2013 (+POL)</b>	60(66)	26	0	51	5
<b>Q3 2013 (+POL)</b>	69 (81)	27	0	46	9
<b>Q4 2013 (+POL)</b>	60(71)	20	0	41	11
<b>Totals – 2013 (+POL)</b>	260 (311)	102	0	197	36

\* In response to the number of UAP complaints being received in the division, a new allegation of “Practising Outside the Scope of Licence” (“POL”) was added to the division’s case management system in Q1 2010. This allows for improved identification of the nature of these complaints. In 2013, complaints alleging practicing outside the scope of licence were received in a total of 51 cases. Prior to Q1 2010, these would have been included in the UAP figures.

As noted in the chart above, in 2013 the Division received 4 UAP complaints more than it did in 2012 (260 vs. 256) and 5 UAP complaints more than it did in 2011 (260 vs. 255).

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.4 – Unauthorized Practice (UAP)

**Graph 3.4B: Unauthorized Practice investigations (in Complaints Resolution and Investigations)**

	New		Closed <sup>6</sup>		Inventory	
	CR	Inv	CR	Inv	CR	Inv
<b>Totals: 2008</b>	52	171	64	126	106	
<b>Totals: 2009</b>	77	187	48	138	168	
<b>Totals: 2010</b>	1	249	28	190	124	
<b>Q1 2011</b>	0	41	0	61	0	104
<b>Q2 2011</b>	1	54	0	56	1	102
<b>Q3 2011</b>	0	49	0	45	1	106
<b>Q4 2011</b>	1	62	0	26	1	139
<b>Totals: 2011</b>	2	206	0	188	140	
<b>Q1 2012</b>	0	61	1	45	0	156
<b>Q2 2012</b>	0	49	0	65	0	140
<b>Q3 2012</b>	0	27	0	41	0	120
<b>Q4 2012</b>	0	45	0	34	0	131
<b>Totals: 2012</b>	0	182	1	185	131	
<b>Q1 2013</b>	0	59	0	62	0	128
<b>Q2 2013</b>	0	51	0	36	0	143
<b>Q3 2013</b>	0	46	0	58	0	129
<b>Q4 2013</b>	0	40	0	31	0	137
<b>Totals: 2013</b>	0	197	0	187	137	

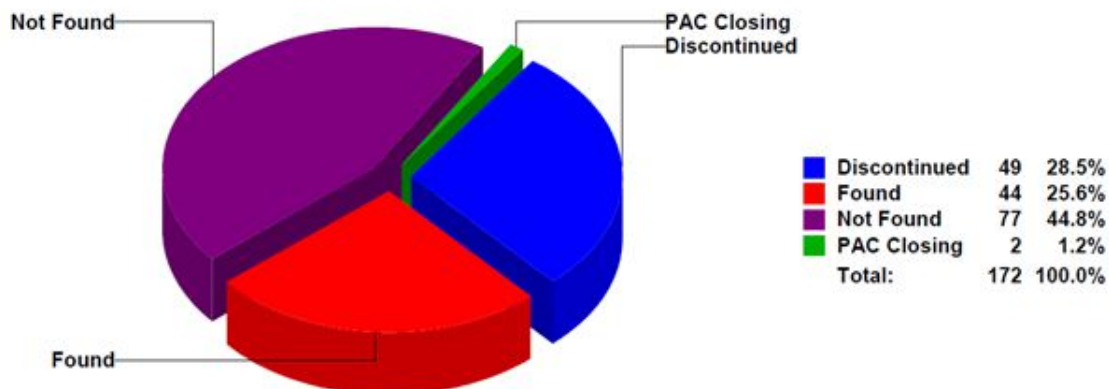
As noted in the chart above, in 2013, a total of 187 UAP cases were completed. The inventory of UAP cases in Investigations increased slightly from 131 cases at the end of 2012 to 137 cases at the end of 2013.

<sup>6</sup> "Closed" refers to completed investigations and therefore consists of both those investigations that were closed by the Law Society and those that were referred for prosecution/injunctive relief.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.4 – Unauthorized Practice (UAP)

**Graph 3.4C: Unauthorized Practice Investigations – Closing Dispositions**



This chart displays the dispositions of unauthorized practice (UAP) investigations closed in Complaints Resolution and Investigations in the quarter:

“Not found” refers to investigations where there was no evidence of unauthorized practice/provision of legal services.

“Found” reflects investigations that were closed by some action to remedy the unauthorized practice such as an undertaking or an injunction.

“Discontinued” investigations were closed without a final determination on the merits of the complaint for reasons such as the withdrawal of the complaint by the complainant.

#### **Graph 3.4D: UAP Enforcement Actions**

In 2013, 2 matters were initiated in the courts, 1 for a permanent injunction and 1 prosecution in relation to a breach of an injunction. Currently, there are 3 open UAP matters (1 seeking a permanent injunction, 2 appeals).

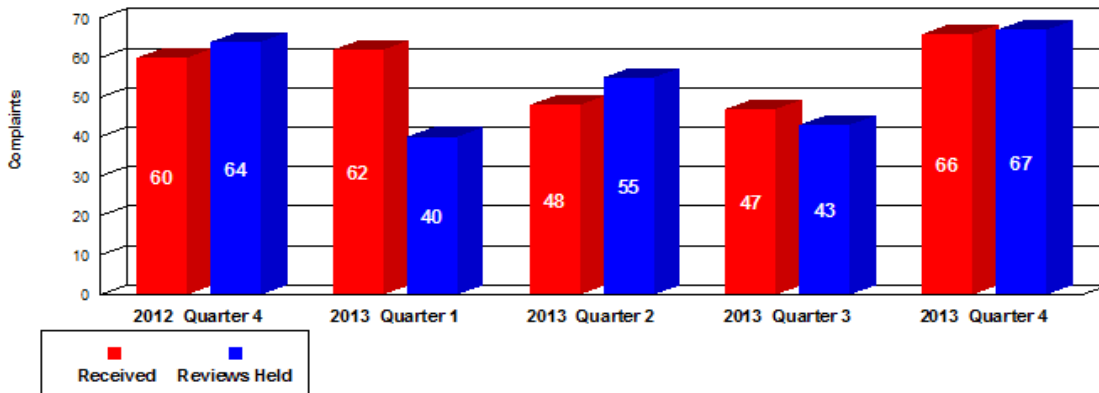
In 2013, orders were obtained in 4 matters prohibiting the respondents from further contravening the provisions of s. 26.1 of the *Act*. Two of the respondents have appealed those orders.



The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.5 – Complaints Resolution Commissioner

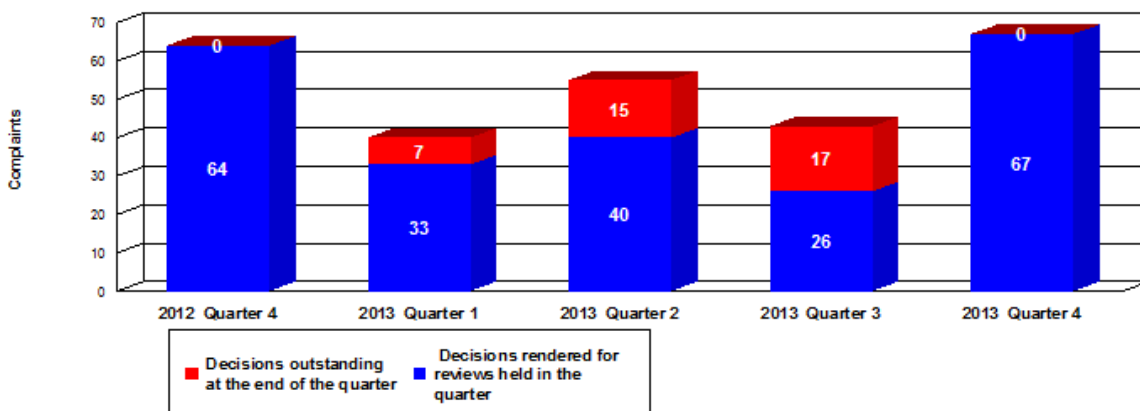
**Graph 3.5A: Reviews Requested and Files Reviewed (by Quarter)**



In 2013, the Complaints Resolution Commissioner received 223 requests for review. This represents a decrease of approximately 15% from the number of requests for review received in 2012 (262). The 223 requests for review were received from 193 complainants and involved investigations of 199 lawyers and 15 paralegals. An additional 52 requests were received (48 for cases closed in Complaints Services and Intake and 4 for matters which were closed in Discipline following a hearing before a Hearing Panel) over which the Commissioner had no jurisdiction.

In 2013, the Commissioner reviewed 205 cases, a 15% decrease from the number of cases reviewed in 2012 (242). Fifty-six (56) of the cases reviewed were conducted in writing.

**Graph 3.5B: Status of Files Reviewed in each Quarter**



While the files may be reviewed in one quarter, the final decision by the Commissioner may not be rendered in the same quarter. In the last quarter of 2013, the Commissioner rendered decisions in all 67 cases reviewed in that quarter. As at December 31, 2013, there were no decisions outstanding.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.5 – Complaints Resolution Commissioner

**Graph 3.5C: Decisions Rendered, by Quarter**

Quarter	Decisions Rendered (# of decisions where review in previous quarter(s))	Files to Remain Closed	Files Referred Back to PRD
<b>Total 2009</b>	194	174 (90%)	20 (10%)
<b>Total 2010</b>	193	160 (83%)	33 (17%)
<b>Total 2011</b>	260	248 (95%)	12 (5%)
Q1 2012	36	32 (89%)	4 (11%)
Q2 2012	50	48 (96%)	2 (4%)
Q3 2012	67	63 (94%)	4 (6%)
Q4 2012	89	81 (91%)	8(9%)
<b>Total 2012</b>	242	224 (93%)	18 (7%)
Q1 2013	40	38 (95 %)	2 (5 %)
Q2 2013	55	49 (89%)	6 (11%)
Q3 2013	43	40 (93%)	3 (7%)
Q4 2013	67	65 (97%)	2 (3%)
<b>Total 2013</b>	205	192 (94%)	13 (6%)

In 2013, the Commissioner rendered 205 decisions, a similar decrease of 15% from the number of decisions rendered in 2012 (242).

Of the 205 decisions rendered in 2013, the Commissioner sent 13 files back to Professional Regulation. In 9 of these cases, the Commissioner was not satisfied that the decision to close was reasonable and referred the cases back with a recommendation for further investigation. With respect to the remaining 4 cases, while he found the Law Society's decision to close the case to be reasonable, the Commissioner referred the cases back for other considerations (e.g. to consider new information provided by the Complainant during the review; to consider an investigation of another licensee; practice issues, etc.).

With respect to the 9 cases referred back with a recommendation for further investigation:

- The Director declined the recommendation in 6 cases
- The Director adopted the recommendation in 3 cases

In addition, with respect to 1 of the 4 matters referred back for other considerations, the Director adopted the recommendation for further consideration given the new information provided by the Complainant during the review meeting.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

**Active Inventory**

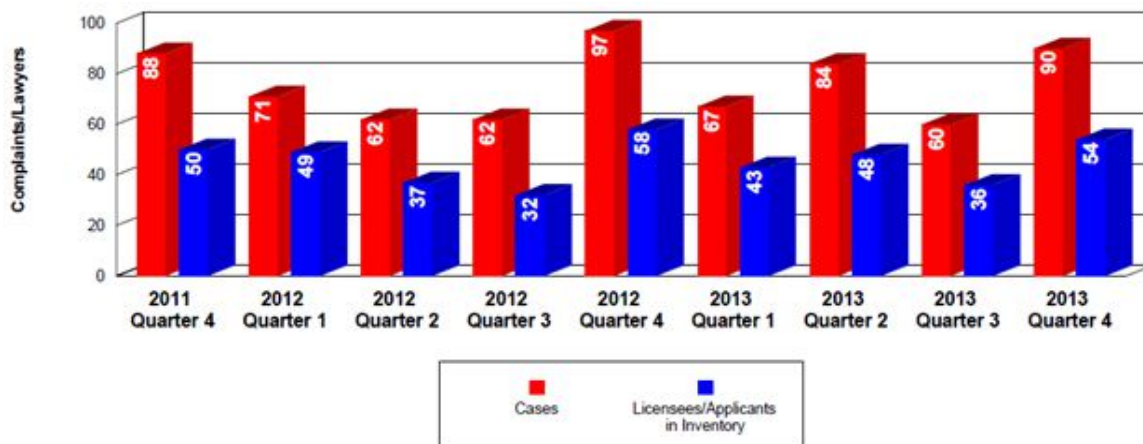
As at December 31, 2013, the Office of the Complaints Resolution Commissioner had an inventory of 107 files (reduced from 123 files at the end of 2012):

Request received; awaiting preparation of CRC materials	72 files
Review Meeting Scheduled	35 files

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.6 – Discipline

Graph 3.6A: Discipline - Input<sup>7</sup>



In 2013, 152 new licensee/applicant matters were received in Discipline, approximately 12% more than were received in 2012. These matters related to 301 cases.

#### Detailed Analysis of New Cases Received in Discipline

		Totals for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013
<b>Lawyers</b>	Cases	226	47	65	50	76	238
	Lawyers	110	29*	36*	27*	43*	114
<b>Lawyer Applicants</b>	Cases	4	1	0	0	0	1
	Lawyer Applicants	3	1*	0	0	0	1
<b>Licensed Paralegals</b>	Cases	56	9	18	8	14	49
	Licensed Paralegals	20	7*	11*	8*	11*	29
<b>Paralegal Applicants</b>	Cases	11	10	1	2	0	13
	Paralegal Applicants	3	6*	1*	1*	0*	8
<b>TOTAL</b>	Cases	292	67	84	60	90	301
	Licensees & Applicants	136	43*	48*	36*	54	152

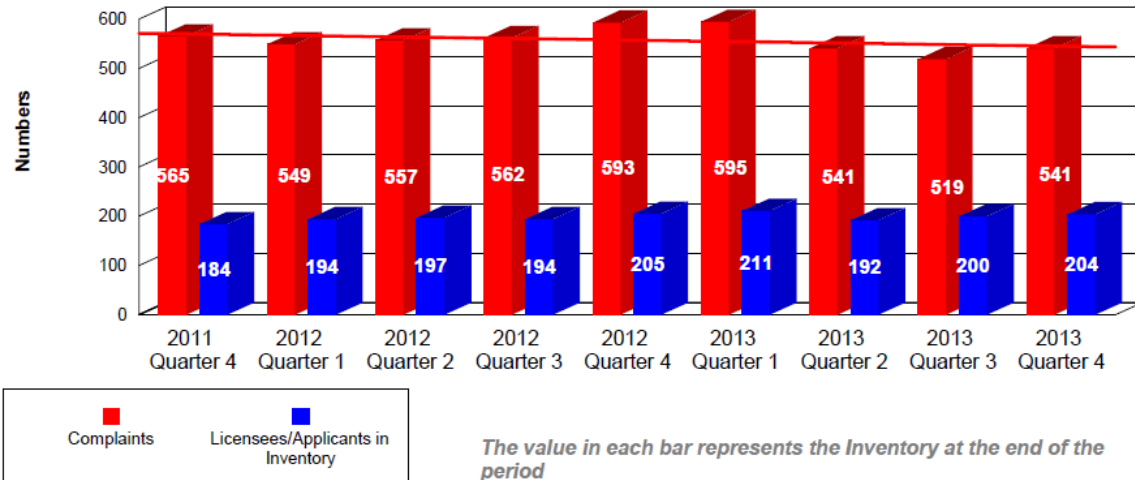
\* The number of new Lawyers and Paralegals cited represents the number coming into the department each quarter. However, there may, in fact, already be cases involving the licensee/applicant in the department.

<sup>7</sup> “Input” refers to complaints that were transferred into Discipline from various other departments during the specific quarter. Includes new complaints/cases received in Discipline and the lawyers/applicants to which the new complaints relate.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.6 – Discipline

**Graph 3.6B: Discipline – Department Inventory<sup>8</sup>**



This graph shows the total number of licensees/applicants and related complaints that are in the Discipline process at the end of each of the last 9 quarters. While the department’s inventory of cases at the end of 2013 was lower (by 9%) than it was at the end of 2012, its inventory of licensees/applicants was the same as at the end of 2012 (204 vs. 205).

#### Detailed Analysis of Discipline’s Inventory

		Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013
<b>Lawyers</b>	Cases	514	508	460	433	458
	Lawyer Applicants	171	176	160	164	169
<b>Lawyer Applicants</b>	Cases	4	5	3	1	1
	Lawyer Applicants	4	5	3	1	1
<b>Licensed Paralegals</b>	Cases	58	60	57	62	60
	Licensed Paralegals	21	20	20	26	26
<b>Paralegal Applicants</b>	Cases	17	22	21	23	22
	Paralegal Applicants	9	10	9	9	8
<b>TOTAL</b>	Cases	593	595	541	519	541
	Licensees & Applicants	205	211	192	200	204

<sup>8</sup> Consists primarily of complaints and lawyers/applicants that are in scheduling and are with the Hearing Panel or on appeal.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.6 – Discipline

**Graph 3.6C: Discipline – Matters Authorized by PAC**

		Totals for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Totals for 2013
<b>Conduct</b>	Lawyer	104 (SH-31)*	35 (SH-5)*	36 (SH-13)*	16 (SH-6)*	34 (SH-12)*	121 (SH-36)*
	Paralegal	21 (SH-12)*	7 (SH-1)*	13 (SH-1)*	10 (SH-4)*	11 (SH-6*)	41 (SH-12)
<b>Capacity</b>	Lawyer	5	-	1	3	-	4
	Paralegal	-	-	-	-	-	-
<b>Competency</b>	Lawyer	-	-	-	-	-	-
	Paralegal	-	-	-	-	-	-
<b>Non-Compliance</b>	Lawyer	-	-	-	-	-	-
	Paralegal	-	-	-	-	-	-
<b>Interlocutory Suspension</b>	Lawyer	2	-	1	1	3	5
	Paralegal	1	-	-	-	-	-
<b>Licensing</b>	Lawyer	3	3	-	-	-	3
	Paralegal	1	1	2	1	-	4
<b>Invitation to Attend</b>	Lawyer	34	5	7	12	7	31
	Paralegal	-	-	1	2	-	3
<b>Letter of Advice</b>	Lawyer	9	1	2	3	18	24
	Paralegal	-	1	2	-	-	3
<b>Regulatory Meeting</b>	Lawyer	3	1	-	1	1	3
	Paralegal	-	-	-	-	-	-
<b>Yearly Totals</b>	Lawyer	160	45	47	36	63	191
	Paralegal	23	9	18	13	11	51
<b>TOTAL</b>		<b>183</b>	<b>54</b>	<b>65</b>	<b>49</b>	<b>74</b>	<b>242</b>

\*The number of Summary Hearings (SH) authorized appears in brackets and is included in the total number of conduct matters authorized in each quarter.

In 2013, PAC authorized 242 matters as compared to 183 matters in 2012.

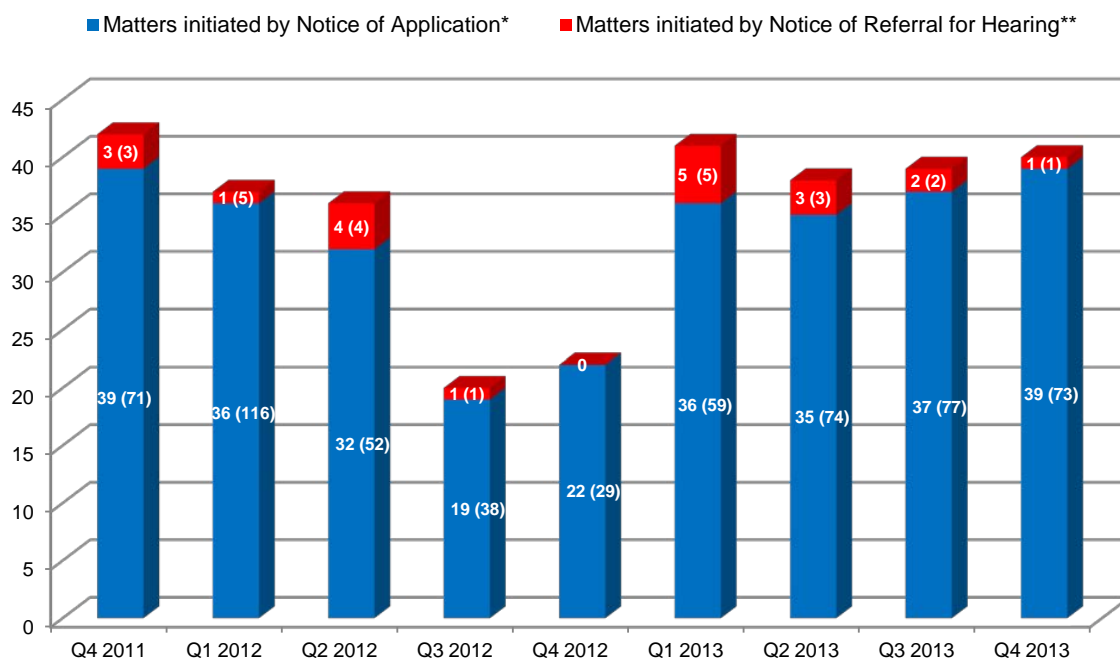
- In relation to matters requiring hearings<sup>9</sup>, PAC authorized 178 matters in 2013, as compared to 137 matters in 2012. This represents an increase of 30% in 2013.
- In relation to matters which were authorized by PAC to proceed with a regulatory response other than a hearing (i.e. by invitation to attend, letter of advice or regulatory meeting), PAC authorized 65 matters in 2013, as compared to 46 matters in 2012. This represents an increase of approximately 40% in 2013.

<sup>9</sup> Including conduct, capacity, competency, non-compliance, interlocutory suspension and licensing matters.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.6 – Discipline

**Graph 3.6D: Discipline - Notices Issued**



\* Matters which are initiated by Notice of Application include conduct, capacity, non-compliance and competency matters. Also included in this category are interlocutory suspension/restriction motions.

\*\* Matters which are initiated by Notice of Referral for Hearing (formerly Notice of Hearing) include licensing (including readmission matters), reinstatement and restoration matters.

The above graph shows the number of notices issued by the Discipline department in the past 9 quarters. The numbers in each bar indicate the number of notices issued and, in brackets, the number of cases relating to those notices. One notice may relate to more than one case. For example, in Q4 2013, 39 Notices of Application were issued (relating to 73 cases) and 1 Notice of Referral for Hearing was issued (relating to 1 case).

	2011	2012	2013
Notices of Application issued	<b>122</b>	<b>109</b>	<b>147</b>
Notices of Application	118	104	142
Interlocutory Suspension/Restriction motions	4	3	5
Notices of Referral for Hearing issued	<b>12</b>	<b>6</b>	<b>11</b>
<b>Total Notices Issued</b>	<b>134</b>	<b>115</b>	<b>158</b>

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

### 3.6 – Discipline

With respect to the 39 Notices of Application<sup>10</sup>/Notices of Motion for Interim Suspension Order which were issued in Q4 2013:

- 26 were issued less than 1 month after PAC authorization;
- 8 were issued between 1 and 2 months after PAC authorization; and
- 1 was issued between 2 and 3 months after PAC authorization; and
- 4 were issued more than 3 months after PAC authorization.

---

<sup>10</sup> Notices of Application are issued with respect to conduct, competency, capacity and non-compliance matters and require authorization by the Proceedings Authorization Committee (PAC).



The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

### 3.6 – Discipline

**Graph 3.6E: Discipline – Completed Matters**

		Q1 2012	Q2 2012	Q3 2012	Q4 2012	Total 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Total 2013
<b>Conduct Hearings</b>	Lawyers	17	16	18	31	82	20	32	18	24	94
	Paralegal Licensees	6	6	4	3	19	4	2	3	9	18
<b>Interlocutory Suspension Hearings/Orders</b>	Lawyers	2	1	1	-	4	-	1	-	2	3
	Paralegal Licensees	-	1	-	-	1	-	-	-	-	-
<b>Capacity Hearings</b>	Lawyers	-	-	1	4	5	1	-	-	1	2
	Paralegal Licensees	-	-	-	-	-	-	-	-	-	-
<b>Competency Hearings</b>	Lawyers	-	-	-	-	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-	-	-	-
<b>Non-Compliance Hearings</b>	Lawyers	-	-	-	1	1	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-	-	-	-
<b>Reinstatement Hearings</b>	Lawyers	2	1	-	-	3	1	-	-	-	1
	Paralegal Licensees	-	-	-	-	-	-	-	1	-	1
<b>Restoration</b>	Lawyers	-	-	-	-	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-	-	-	-
<b>Licensing Hearings (including Readmission)</b>	Lawyer Applicants	-	1	2	1	4	-	2	2	-	4
	Paralegal Applicants	3	1	1	-	5	1	1	1	-	3
<b>TOTAL NUMBER OF HEARINGS</b>	Lawyers*	21	19	22	37	101	22	35	20	27	104
	Paralegals*	9	8	5	3	25	5	3	5	9	22
	<b>TOTAL</b>	<b>30</b>	<b>27</b>	<b>27</b>	<b>40</b>	<b>124</b>	<b>27</b>	<b>38</b>	<b>25</b>	<b>36</b>	<b>126</b>

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.6 – Discipline

#### Graph 3.6F: Discipline – Appeals

The following chart sets out the number of appeals filed with the Appeal Panel, the Divisional Court or the Court of Appeal in the calendar years 2008, 2009, 2010, 2011 and 2013.

Quarter/Year	Appeal Panel	Divisional Court	Court of Appeal
2008	14	8 appeal	
2009	19	1 appeal	3 motions for leave; 2 appeals
2010	27	3 appeals; 2 judicial reviews	4 motions for leave
2011	18	6 appeals; 2 judicial reviews	2 motions for leave
2012	23	4 appeals; 5 judicial reviews	2 motions for leave
2013 1 <sup>st</sup> Quarter	7	1 judicial review	
2 <sup>nd</sup> Quarter	3	3 appeals	
3 <sup>rd</sup> Quarter	5	1 judicial review	
4 <sup>th</sup> Quarter	5	1 judicial review	
Total:	20	3 appeals; 3 judicial reviews	

As of December 31, 2013, there are 13 appeals pending before the Appeal Panel, 5 appeals in which the Appeal Panel has reserved on judgment, 1 appeal before the Appeal Panel that has been adjourned sine die, 4 appeals in which the Appeal Panel has rendered decisions but is still seized on the issue of costs and 1 appeal which the Appeal Panel had sent back for re-hearing however, as the Law Society elected not to re-prosecute the matter, the Appeal Panel is considering the issue of penalty.

With respect to matters before the Divisional Court, there are 6 appeals and 3 judicial review matters pending. There are no matters pending in the Court of Appeal.

In 2013, 17 appeals before the Appeal Panel were completed:

- 2 appeals were abandoned or deemed abandoned;
- In 1 appeal, the Notice of Appeal was quashed;
- 7 appeals were dismissed;
- 7 appeals were allowed or allowed in part.
  - In 3 matters, appeals/cross-appeals were launched by both the licensee and the Law Society:
    - In one of the appeals, the Appeal Panel granted the licensee's appeal, set aside the decision and order of the Hearing Panel and ordered a new hearing before a differently constituted Hearing Panel. As a consequence, the Appeal Panel found it unnecessary to decide the Law Society's appeal against penalty;
    - In another appeal, the Appeal Panel allowed the Law Society's appeal, setting aside the dismissal of one of the particulars by the Hearing Panel, and dismissed the licensee's appeal to set aside the decision and order of the Hearing Panel. A

- new hearing was ordered on certain particulars, however, as the penalty was upheld (revocation), the new hearing did not proceed.
- In the third appeal, the Appeal Panel allowed the licensee's cross-appeal, set aside the decision and order of the Hearing Panel and remitted the matter for a new hearing before a differently constituted Hearing Panel. Given the disposition of the licensee's appeal, the Appeal Panel found it unnecessary to decide the Law Society's appeal.
  - 2 of the appeals were launched by the Law Society
    - In one appeal, the Appeal Panel allowed the appeal in part, ordering that the suspension ordered by the Hearing Panel is not varied but substituting the Hearing Panel's costs order of \$10,000 with a costs order in the amount of \$50,000
    - In the other appeal, the Appeal Panel allowed the Law Society's appeal, setting aside the Hearing Panel's decision to strike or dismiss one of the particulars (3a) and ordering a new hearing, if the Law Society chooses to continue the proceeding, before a newly constituted Hearing Panel.
  - 2 of the appeals were launched by the licensee/applicant
    - In one appeal, the Appeal Panel allowed the licensee's appeal against penalty, reducing (a) the 2 year suspension ordered by the Hearing Panel to 12 months and (b) the requirement that the licensee complete 50 hours of professional development to 25 hours
    - In the other appeal, the Appeal Panel allowed the applicant's appeal and remitted the matter to a differently constituted Hearing Panel for a new hearing.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.6 – Discipline

**Graph 3.6G: Discipline – Input vs. Output**

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Reactivated	2	21	4	5	5	9	2	2	5
Received from CR	0	0	0	4	29	9	12	23	18
Received from Investigation	48	32	39	46	62	42	63	34	58
Received from Other Departments	38	18	19	7	1	7	7	1	9
<b>Total</b>	<b>88</b>	<b>71</b>	<b>62</b>	<b>62</b>	<b>97</b>	<b>67</b>	<b>84</b>	<b>60</b>	<b>90</b>

	2011 Q.4	2012 Q.1	2012 Q.2	2012 Q.3	2012 Q.4	2013 Q.1	2013 Q.2	2013 Q.3	2013 Q.4
Closed	112	86	54	49	65	59	134	74	68
Transferred to Other Departments	0	1	0	0	1	2	3	7	0
<b>Total</b>	<b>112</b>	<b>87</b>	<b>54</b>	<b>49</b>	<b>66</b>	<b>61</b>	<b>137</b>	<b>81</b>	<b>68</b>

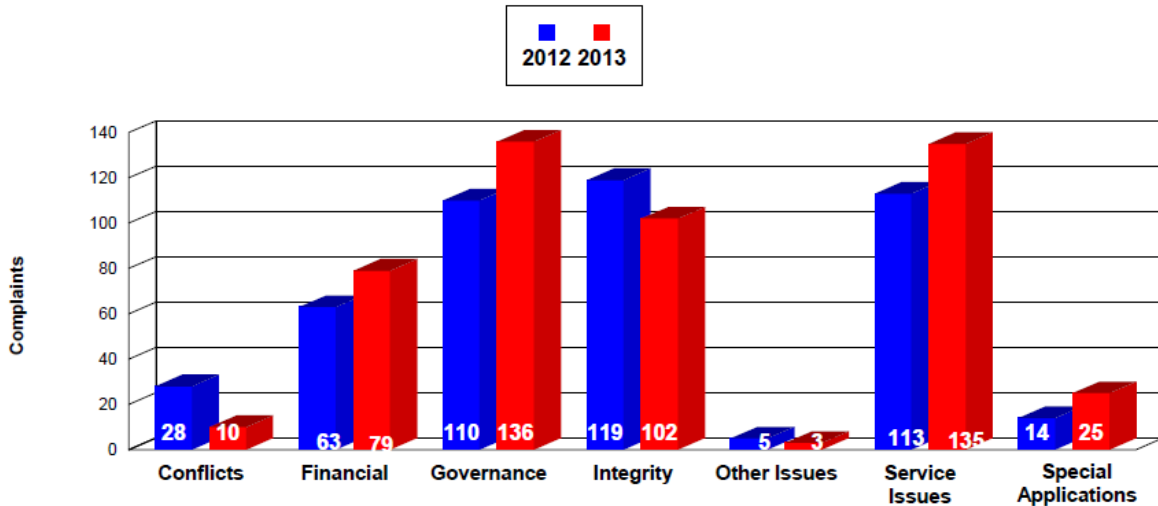
The above chart sets out, for the last 9 quarters, (1) the number of complaints reactivated and received in Discipline from various other departments and (2) the number of complaints closed by Discipline and the department to which files were streamed by Discipline.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.6 – Discipline

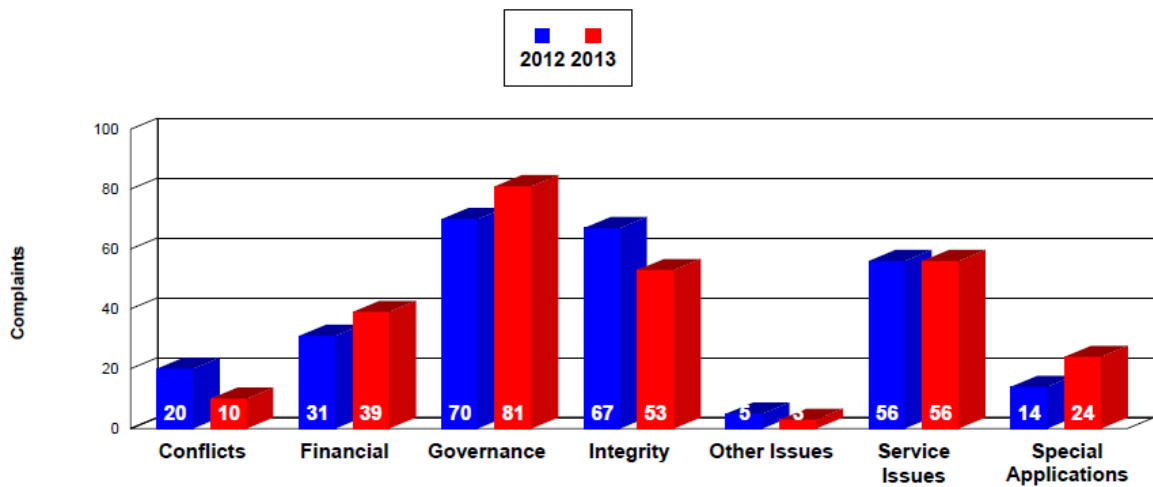
**Graph 3.6H: Discipline - Types of Complaints Received**

**(a) By Cases**



The above graph displays the specific case types for complaints received in Discipline in 2012 and 2013. A glossary of the individual issues included in each of the shown case type groups is available in Section 4, Appendix B.

**(b) By Licensees/Applicants**



This graph shows the breakdown of case types by licensees/applicants. As noted previously, Discipline may receive more than one case per licensee.

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

---

### 3.6 - Discipline

As shown in the graphs on the previous page and the following chart, the distribution of complaint types in Discipline has remained stable in 2013 when compared to 2012.

The following chart shows each complaint type as a percentage of all complaint types received in 2012 and 2013 and the proportion of licensees/applicants receiving each complaint type in the 2 years:

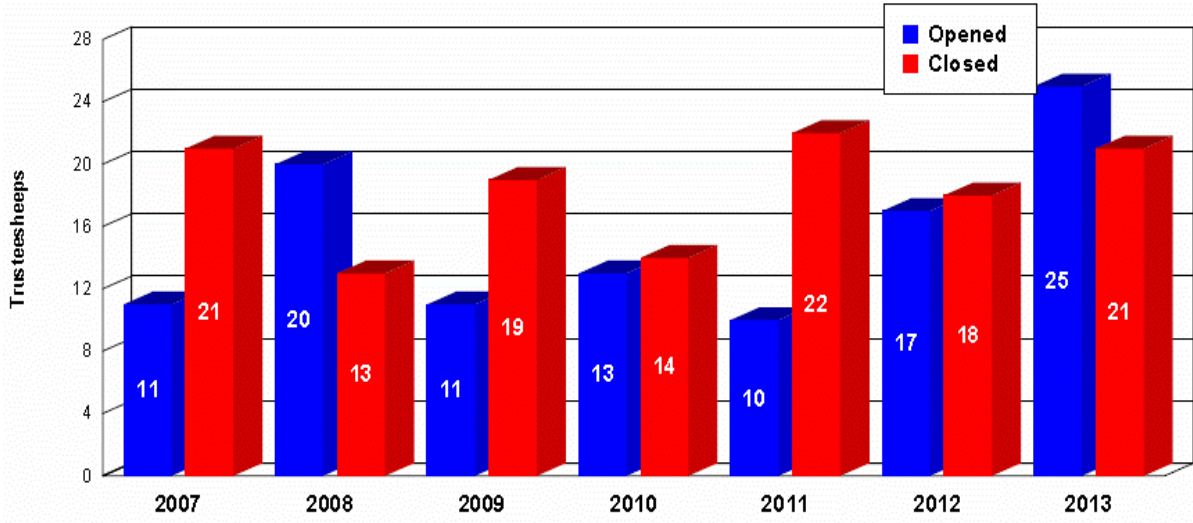
		2012	2013
<b>Cases</b>	<b>Conflicts</b>	10%	3%
	<b>Financial</b>	24%	29%
	<b>Governance</b>	43%	50%
	<b>Integrity</b>	46%	37%
	<b>Service Issues</b>	44%	49%
	<b>Special Applications</b>	5%	9%
	<b>Other Issues</b>	1%	1%

		2012	2013
<b>Licensees/Applicants</b>	<b>Conflicts</b>	15%	7%
	<b>Financial</b>	23%	29%
	<b>Governance</b>	52%	61%
	<b>Integrity</b>	50%	40%
	<b>Service Issues</b>	42%	42%
	<b>Special Applications</b>	10%	18%
	<b>Other Issues</b>	3%	2%

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.7 – Trustee Services

**Graph 3.7A: Trustee Services - Formal Trusteeships Opened and Closed**

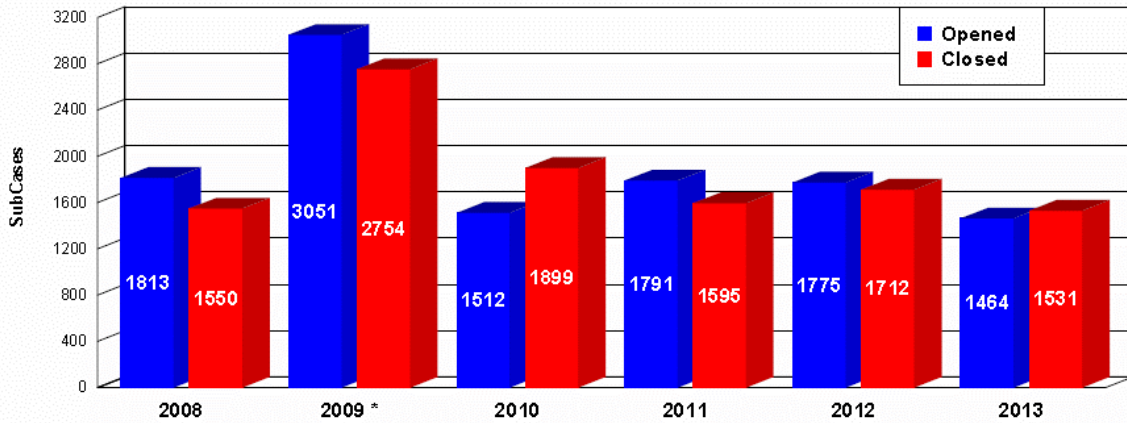


This graph displays the number of formal trusteeships that were opened and closed in the past 7 years. Formal trusteeships are court-ordered.

During 2013, Trustee Services opened 76 files. As of December 31, 2013, a total of 93 active files remained in its inventory, which included 33 active court ordered (formal) and 9 voluntary (informal) trusteeships. The remaining files involve various other matters that Trustee Services deals with on a regular basis, including search warrants and the administration of the Unclaimed Trust Fund.

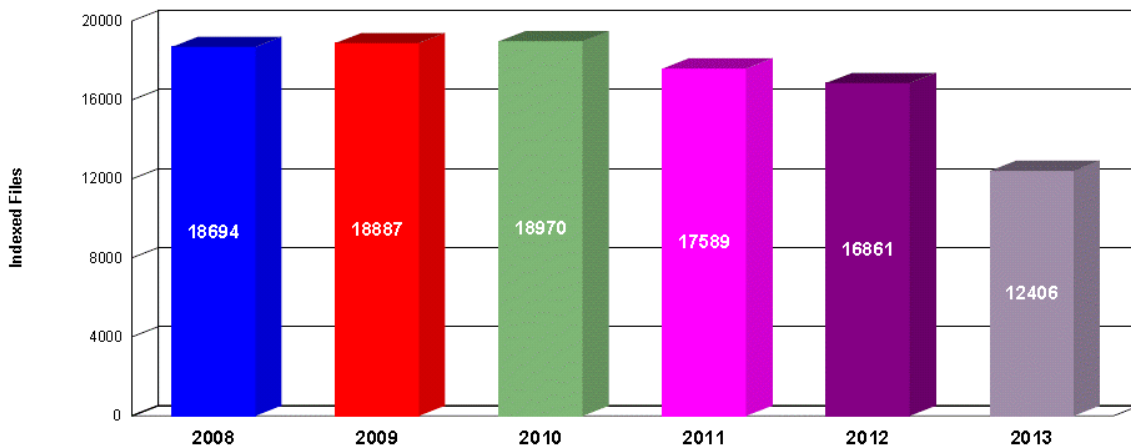
### 3.7 – Trustee Services

**Graph 3.7B: Trustee Services – Client Request Files Opened and Closed, by Quarters**



Trustee Services staff receive and respond to specific client related requests, such as the return of a file or responding to requests for information concerning a professional business. The graph above shows these requests (which are created as sub-cases in the division’s case management system, IRIS) that were opened and closed in the past five years. The higher numbers in 2009 represent a one-time capturing of work in progress as a result of the department’s decision in that year to also record distribution of client funds to specific individuals within the IRIS system. As of December 31, 2013, Trustee Services had 433 active client request files, of which 264 related solely to the distribution of trust funds.

**Graph 3.7C: Trustee Services – Client Files Indexed Annually**



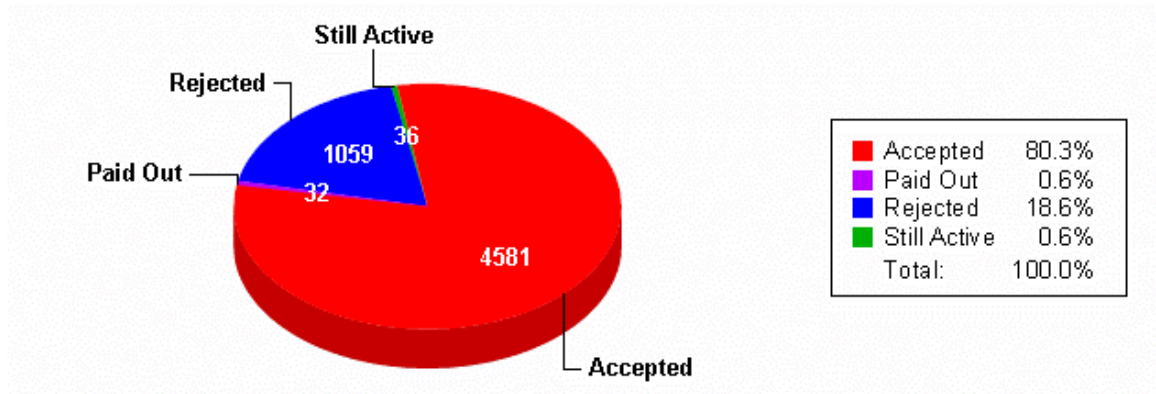
When Trustee Services obtains a formal, court-ordered trusteeship against a licensee or enters into a voluntary trusteeship arrangement with a licensee, client files are retrieved from the licensee’s professional business, indexed and preserved for the benefit of the clients. The above graph displays the number of client files obtained and indexed in the last 6 years. In addition to the indexing of client files, Trustee Services also indexes wills and Powers of Attorneys which are in the licensee’s possession.



The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.7 – Trustee Services

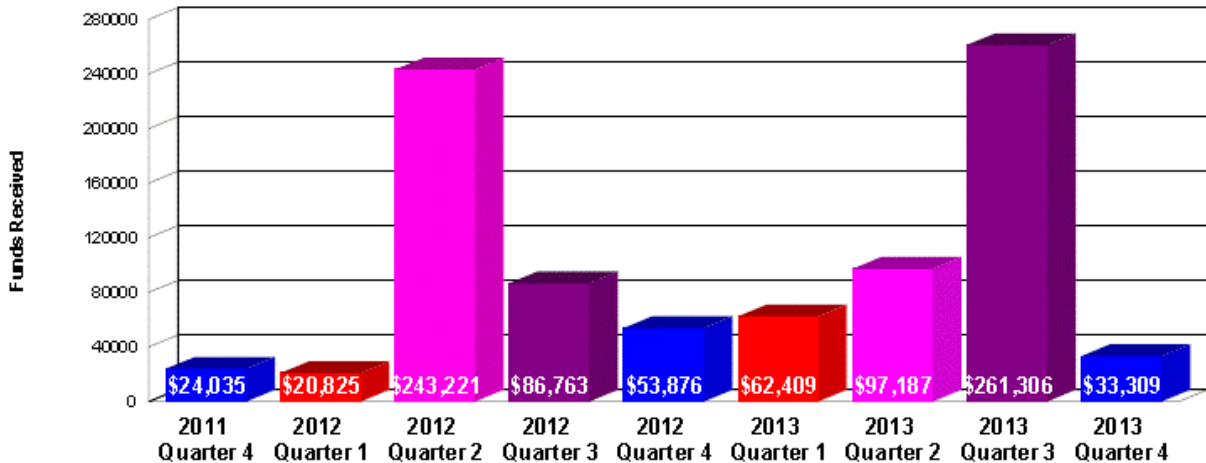
**Graph 3.7D: Unclaimed Trust Fund – Summary of Applications Made**



The Unclaimed Trust Fund (UTF) is a program that enables lawyers to apply to have trust funds they have held for at least 2 years to be taken over and held by the Law Society. This diagram displays the results of applications made to the UTF from its inception on February 1, 1999 to December 31, 2013.

**Graph 3.7E: Unclaimed Trust Fund - Amounts Received**

The graph below shows the amounts received into the UTF for the previous 9 quarters. As of December 31, 2013, a total of \$2,840,955.12 had been received into the Fund since its inception and \$93,498.49 has been paid out, leaving a balance in the Fund of \$2,933,487.31.



The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

### 3.8 – Monitoring & Enforcement

**Graph 3.8A: Monitoring & Enforcement – New Matters**

	Total for 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Total for 2013
<b>Enforcement</b>	29	8	9	7	4	28
<b>Insolvency</b>	29	6	7	10	7	30
<b>Orders</b>	174	31	44	32	40	147
<b>Restitution &amp; Judgments</b>	13	3	1	1	1	6
<b>Undertakings</b>	42	9	9	16	13	47
<b>TOTAL</b>	<b>287</b>	<b>57</b>	<b>70</b>	<b>66</b>	<b>65</b>	<b>258</b>

The above chart sets out the number of new matters opened by the Monitoring and Enforcement Department in 2013. As at December 31, 2013, the department had an active inventory of 1551 cases, broken down as follows:

Enforcement	10 (with an additional 1 in abeyance)
Insolvency	99
Orders	391 (with an additional 237 in abeyance)
Restitution & Judgments	35 (with an additional 2 in abeyance)
Undertakings	305 (with an additional 471 in abeyance)
<b>TOTAL</b>	<b>840</b>

**Graph 3.8B: Monitoring & Enforcement – Collections**

In 2013, the department collected a total of \$331,469.95  
 \$312,347.33 (Discipline Order costs)  
 \$ 15,000.00 (Compensation Fund Recoveries)  
 \$ 4,122.52 (bankruptcy dividends)

**Graph 3.8C: Monitoring & Enforcement – Regulatory Inquiries**

In May 2009, Monitoring & Enforcement took over responsibility for responding to inquiries from the public concerning regulatory matters. The following chart sets out the number of emails/telephone inquiries the Monitoring and Enforcement staff responded to and the number of licensees who were the subjects of those inquiries:

Type of Inquiry		Totals for 2009*	Totals for 2010	Totals for 2011	Totals for 2012	Totals for 2013
<b>Email</b>	<b>Number</b>	1655	4302	2643	3474	3860
	<b>Licensees</b>	2844	5976	3755	4148	4368
<b>Telephone</b>	<b>Number</b>	3193	3575	1097	918	936
	<b>Licensees</b>	3544	3944	1211	970	979
<b>Total Inquiries</b>	<b>Number</b>	4848	7877	3740	4392	4796
	<b>Licensees</b>	6388	9920	4966	5118	5347

\*May 1 to December 31 only

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

## **SECTION 4**

## **APPENDICES**

## APPENDIX A

### A Description of the Professional Regulation Division Work Process

#### Client Service Centre (CSC)

All complaints to the Law Society receive initial processing in the CSC. It is the responsibility of this group of staff to sort these complaints to identify those which may raise regulatory issues, and to forward them to Professional Regulation.

#### Intake

Intake receives all new complaints referred to Professional Regulation. Its function is to review and substantiate the complaints, identify regulatory and risk issues, triage where required, and to provide early resolution where appropriate. Intake also has an important case management function, determining and facilitating the regulatory approach that will best serve the requirements of the case, and ensuring that different investigations concerning the same lawyer are appropriately linked.

#### Complaints Resolution

The role of Complaints Resolution is to investigate and resolve complaints where the allegations indicate less serious breaches of the *Rules of Professional Conduct*. The majority of complaints are resolved, or closed on the basis of an informal regulatory response. Where a significant breach of the rules is shown on investigation, or where the lawyer fails to cooperate in the regulatory process, a prosecution or other response may be sought from the Proceedings Authorization Committee.

#### Investigations

The Investigations Department's primary responsibility is to investigate allegations concerning a licensee's conduct or capacity, which, if made out, are likely to lead to discipline proceedings. Investigations staff includes lawyers, investigators and auditors. On completion of the investigation a complaint is referred to the Procedures Authorization Committee, closed, or resolved. On reviewing any complaint referred to it, the Proceedings Authorization Committee may authorize a prosecution, order further investigation, or authorize an alternative resolution such as an Invitation to Attend. The Investigations Department is also responsible for unauthorized practice cases, contrary to section 26.1 (formerly section 50) of the *Law Society Act*.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

## **A Description of the Professional Regulation Division Work Process (Cont'd)**

### **Complaints Review**

Where a complaint is closed by Law Society staff, the complainant may have the right to a review of that decision by the Complaints Resolution Commissioner. The role of the Commissioner and the complaints review process is established by the *Law Society Act* and Law Society By-Law 11. The Commissioner receives all cases where a complainant wishes to bring a complaint and holds meetings with the complainants. At the end of the process, the Commissioner may confirm the Law Society decision, or recommend further investigation. The Commissioner may also make informal recommendations for improved process.

### **Discipline**

Discipline counsel represent the Law Society before Hearing and Appeal Panels and in the courts when appeals are taken from the decisions of these panels. The department is responsible for the prosecution of a variety of matters including those concerning licensee conduct and capacity, applications for admission to the Law Society, and applications for reinstatement or readmission.

The majority of prosecutions concern issues of licensee conduct based on infractions of the *Rules of Professional Conduct*. The Law Society's discipline counsel issue the application commencing the process, disclose evidence, and represent the Law Society in pre-hearing and hearing processes.

### **Monitoring and Enforcement**

The Monitoring & Enforcement Department is responsible for enforcement of Hearing Panel orders and lawyer undertakings. Monitoring & Enforcement Department activities include enforcing Hearing Panel orders, monitoring undertakings obtained at the completion of matters by other departments within the Division, ensuring that bankrupt lawyers comply with the Law Society's by-laws; enforcing judgments and mortgages obtained by or assigned to the Compensation Fund and responding to regulatory inquiries from the public.

### **Trustee Services**

Trustee Services responds in situations where a lawyer has abandoned his/her practice or has been disbarred or suspended, as well as situations where a sole practitioner has suffered serious health problems and is unable to continue in the practice of law. Through the use of the Law Society's trusteeship powers, staff carry out the Law Society's mandate to protect the public interest by taking possession of the practice, if necessary. The department also provides information and assistance to lawyers and their personal representatives who are closing their practices.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

## **A Description of the Professional Regulation Division Work Process (Cont'd)**

### *Unclaimed Trust Fund Services*

The Law Society has established a program that enables lawyers to submit unclaimed trust funds that they have held for at least two years to the Law Society. Members of the public who believe they are entitled to these funds are able to make claims for these funds. Trustee Services receives lawyer applications to remit funds, investigates the circumstances, and recommends whether the funds should be accepted into the UTF. In a significant minority of cases, Society staff locate the client and the lawyer is then able to return the funds.

### **Compensation Fund**

This fund receives and processes claims from clients who have lost money because of a lawyer's or paralegal's dishonesty. The Fund depends entirely on the lawyer and paralegal fee levies. Staff receive claims and assess their merits based on a set of Guidelines approved by Convocation. The maximum compensation payable under the Guidelines is \$150,000 to any one claimant for claims involving lawyers and \$10,000 per claimant for claims involving paralegals.

### **Office of the Director**

The responsibility of the Director is to oversee all departments within the Division including budget, staffing, technology, issue management and case process including an effective and timely complaints process, and appropriate risk management. This includes coordination and liaison with other divisions of the Law Society and external parties, communications both within the outside the division, development of policy and rule amendment proposals, oversight of case process including the management of significant investigations and prosecutions, and resource management. The Director reports to the Professional Regulation Committee and supports Benchers work on strategic initiatives in licensee regulation.

### **Case Management**

This department's main responsibility is the oversight of Professional Regulation's case management system, the Integrated Regulatory Information System ("IRIS"). Case Management was created in 2008 as a discrete department within the division to ensure in-house control of the quality and integrity of data maintained in IRIS and to allow for ongoing improvements to IRIS. The department is responsible for: the development of qualitative analysis and recommendations regarding file handling, issue management, work process and procedural improvements; the development of reporting structures and the examination and evaluation of reporting requirements for Professional Regulation; and ongoing monitoring of case files to ensure that the Professional Regulation product continues to support the Law Society's mandate to protect the public and maintain public confidence in the legal profession in Ontario. Case Management is also responsible for various divisional projects, including the Discipline History Project and the Reasons Analysis Project.

The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

### APPENDIX B - Glossary of Case Types Used in the Quarterly Report

<b>Case Type Name</b>	<b>Individual Allegations</b>	
<b>Conflicts</b>	Licensee in a Position of Conflict Business / Financial Relations with Client	
<b>Financial</b>	Estate / Power of Attorney Real Estate / Mortgage Schemes Misapplication Misappropriation Pre-Taking Co-mingling / Mishandling Trust Accounts Breach of No-Cash Rule	
<b>Governance</b>	Fail to Maintain Books & Records Practice by Former / Suspended Licensee Relations Prohibited Persons / Fail Prevent UAP UAP by Non-Licensee Fail to Prevent Practise Outside Scope of Licence Practising Outside Scope of Licence Fail to Report Misconduct / Error / Omission Fail to Cooperate with LSUC Practising without insurance / Fee Category Student Investigations Improper Advertising Operating Trust Account while Bankrupt	
<b>Integrity</b>	Conduct Unbecoming outside the Practice of Law Criminal Charges Counseling / Behaving Dishonourably Discriminatory Conduct Sexual Misconduct Direct Communications with Represented Parties Misleading Breach of Orders, Undertaking or Escrow Civility	
<b>Service Issues</b>	Fail to Provide Client Report Fail to Follow Client Instructions Fail to Communicate Fail to Preserve Client Property Fail to Serve Client Withdrawal of Services / Abandonment Fail to Supervise Staff Fail to Account Fail to Pay Financial Obligations Breach of Confidentiality / Fiduciary Duty	
<b>Special Applications</b>	Readmission Admission Capacity Reinstatement – Variation of Order	Reinstatement – Order Fulfilled Restoration Competency from PD&C Interlocutory Suspension
<b>Other Issues</b>	Other Issues	

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

---

## APPENDIX C

### Glossary of Closing Dispositions Used in the Quarterly Report Intake Department

<b><i>Closing Type Category Name</i></b>	<b><i>Closing Disposition category includes:</i></b>
<b>No Jurisdiction</b>	Negligence Fees Non-lawyer / Non-member Mandate
<b>No Response from Complainant</b>	Incomplete complaint submission Failure to provide requested information
<b>Withdrawal</b>	Prior Resolution between Member and Complainant Withdrawal at request of Complainant UAP – Closed by Triage Project
<b>Concurrent Litigation</b>	Concurrent Litigation pending internal to Law Society Process Concurrent Litigation pending external to Law Society Process
<b>Previously Raised, Previously decided</b>	Within LS Process
<b>Regulatory Issue Determined</b>	Not of Sufficient regulatory concern Abuse of Law Society Process Independent resolution between Member and Complainant Exceptional Circumstances Refusal by Complainant to LSUC release information / M Counsel S.49.3 Authorization Denied Referral for Mentoring
<b>Early Resolution</b>	Between Parties Resolution reached by LSUC



The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

---

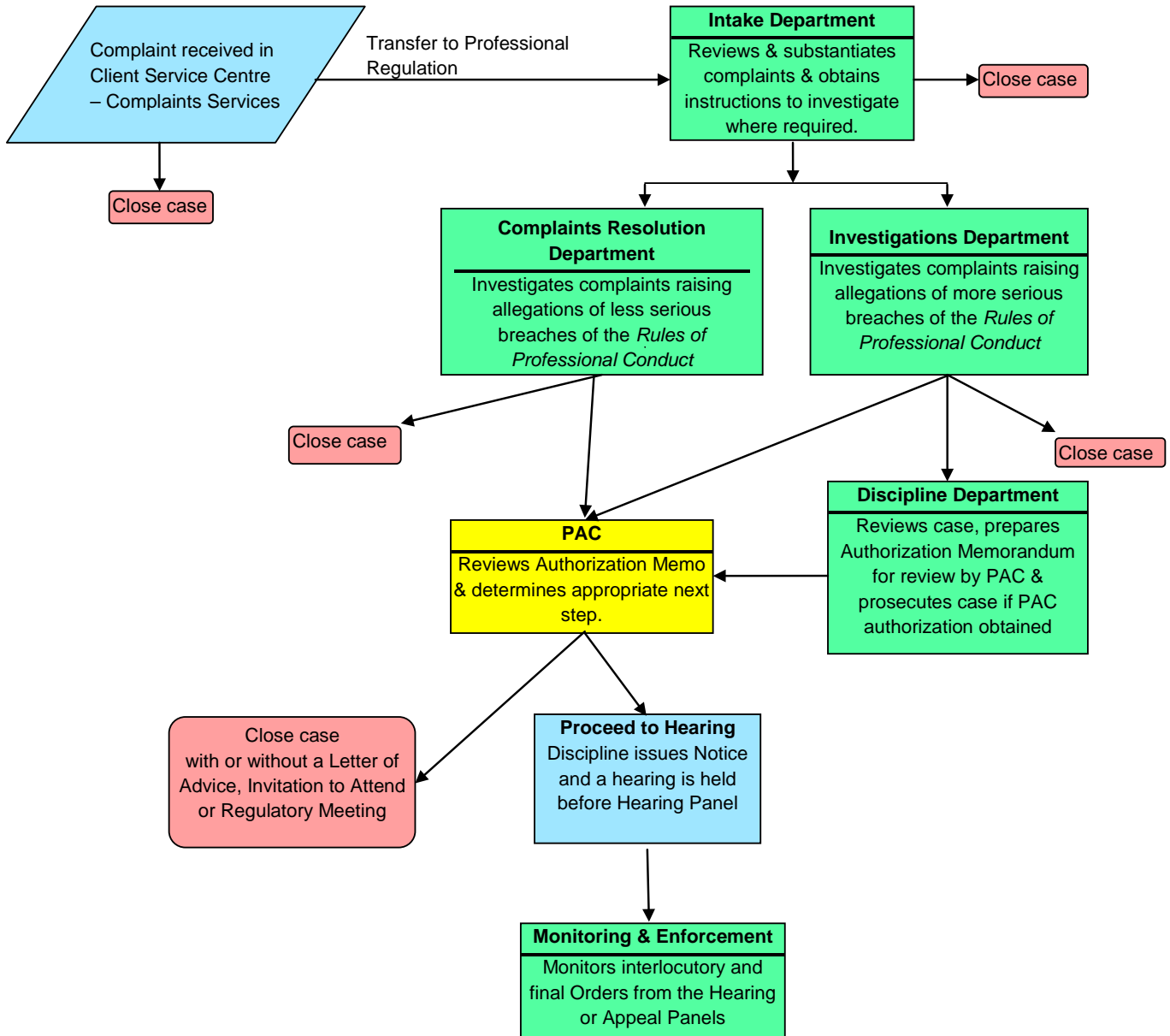
## APPENDIX D

### Glossary of Closing Dispositions Used in the Quarterly Report Complaints Resolution and Investigations Departments

<b>Closing Type Category Name</b>	<b>Closing Disposition Category Includes:</b>
<b>Discontinued</b> (Investigations which have been closed without a final determination on the merits of the complaints.)	Availability - evidence unavailable Availability – information unavailable Availability - subject deceased Availability - witnesses unavailable Concurrent Litigation – External to LSUC Process Concurrent Litigation – Within LSUC Process Concurrent Litigation – Summary Hearing Suspension Decision - exceptional circumstances Decision - malice or abuse of process Decision - not regulatory enough Decision -refusal by complainant for LSUC to release information Decision -resolution from complainant & subject Withdrawn at Complainant’s Request – independent resolution Withdrawn at Complainant’s Request – other UAP – Closed by UAP Triage
<b>Found</b> (A breach was found as a result of an investigation but the file was closed.)	Administrative Resignation of Subject Caution – oral Caution – written Counselling – Referred by Staff Counselling – Referred by Subject Education – Referred by Staff Education – Referred by Subject Education – Staff Provided Mentoring – Referred by Staff Mentoring – Referred by Subject Practice Review – Referred by Staff Practice Review – Referred by Subject Subject Rectified Breach Undertaking – Oral Undertaking – Written
<b>Not Found</b> (No breach found or the complaint was outside the jurisdiction of the Law Society to continue.)	Jurisdiction – Fees Jurisdiction – Negligence Jurisdiction – Other No Breach – Inquiry Completed
<b>PAC Closing</b> (Closed under the direction of the Proceedings Authorization Committee (“PAC”))	Approval of Settlement Closed Invitation to Attend Letter of Advice Regulatory Meeting Undertaking

The Law Society of Upper Canada  
 The Professional Regulation Division  
 Quarterly Report (October 1 – December 31, 2013)

## The Professional Regulation Complaint Process



The Law Society of Upper Canada  
The Professional Regulation Division  
Quarterly Report (October 1 – December 31, 2013)

---

**PROFESSIONAL REGULATION ORGANIZATIONAL CHART**

