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

TAB 5

Report to Convocation
January 23, 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

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

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For Decision

COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on January 9, 2014. In attendance were Malcolm Mercer (Chair), John Callaghan, Robert Evans, Janet Leiper (by telephone), Ross Murray, Jan Richardson (by telephone), Susan Richer, and Peter Wardle. Staff members attending were Zeynep Onen, Naomi Bussin, Josée Bouchard, Lesley Cameron, Jim Varro and Margaret Drent.

Tab 5.1

AMENDMENTS TO THE *RULES OF PROFESSIONAL CONDUCT*

MOTION

2. That Convocation amend Rule 5.04 of the current *Rules of Professional Conduct* and Rule 6.3.1-1 of the *Rules of Professional Conduct* coming into force on October 1, 2014 as set out in this report.

BACKGROUND

3. In 2012, the *Human Rights Code* was amended to specify that every person has a right to equal treatment without discrimination because of gender identity or gender expression. The *Code* was also amended to specify that every person has a right to be free from harassment because of sexual orientation, gender identity or gender expression.[1]

4. Convocation is asked to approve the amendment of the current *Rules of Professional Conduct*, which are in force until September 30, 2014, to reflect these changes. Convocation is also asked to approve the amendment of the Rules amended on October 24, 2013 which will come into force on October 1, 2014, to reflect the Model Code of Professional Conduct of the Federation of Law Societies of Canada.

5. Blackline versions of the current Rules and amended Rules, which take effect October 1, 2014, appear as **Tab 5.1.1** and **Tab 5.1.2**, respectively.

[1] Bill 33, which amended the *Human Rights Code* in 2012, is *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012*, and may be viewed online at http://www.ontla.on.ca/bills/bills-files/40_Parliament/Session1/b033ra.pdf.

5.04 DISCRIMINATION

Special Responsibility

5.04 (1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

[Amended – June 2007, January 2014]

Commentary

The Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

Rule 5.04 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law.

The Ontario Human Rights Code defines a number of grounds of discrimination listed in rule 5.04. For example,

Age is defined as an age that is eighteen years or more.

[Amended - January 2009]

Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

[Amended - January 2009]

Family status is defined as the status of being in a parent-and-child relationship.

Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

[Amended - January 2009]

Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the Criminal Records Act (Canada) and not revoked) or provincial offences.

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

(a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

[Amended - January 2009]

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 5.04, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

[Amended - January 2009]

Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code.

In addition to prohibiting discrimination, rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

[Amended - January 2009, January 2014]

Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 5.04. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

(2) A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

(3) A lawyer shall ensure that his or her employment practices do not offend this rule.

Commentary

Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

[Amended - January 2009]

An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 5.04 unless changing or eliminating the rule would cause undue hardship.

If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario Human Rights Code, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 5.04.

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 5.04, the following obligations arise:

The rule, requirement or expectation must be examined to determine whether it is "reasonable and *bona fide*." If the rule, requirement, or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business.

If the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

SECTION 6.3.1 DISCRIMINATION

Special Responsibility

6.3.1-1 A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario *Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

[Amended – June 2007, October 2014]

Commentary

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

[3] Rule 6.3.1 will be interpreted according to the provisions of the Ontario *Human Rights Code* and related case law.

[4] The Ontario *Human Rights Code* defines a number of grounds of discrimination listed in rule 6.3.1. For example,

[5] Age is defined as an age that is eighteen years or more.

[Amended - January 2009]

[6] Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

[Amended - January 2009]

[7] Family status is defined as the status of being in a parent-and-child relationship.

[8] Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

[Amended - January 2009]

[9] Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the *Criminal Records Act* (Canada) and not revoked) or provincial offences.

[10] The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

[11] There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

(a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

[Amended - January 2009]

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 6.3.1, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

[Amended - January 2009]

[12] Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario *Human Rights Code* requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

[13] A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

[14] Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the *Code*.

[15] In addition to prohibiting discrimination, rule 6.3.1 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

[Amended – January 2009, October 2014]

[16] Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 6.3.1. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

6.3.1-2 A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

6.3.1-3 A lawyer shall ensure that their employment practices do not offend rule 6.3.1-1 and 6.3.1-2.

Commentary

[1] Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario *Human Rights Code* and related equity legislation.

[2] In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario *Human Rights Code*, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

[Amended - January 2009]

[3] An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 6.3.1 unless changing or eliminating the rule would cause undue hardship.

[4] If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario *Human Rights Code*, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

[5] The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 6.3.1.

[6] The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

[7] If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 6.3.1, the rule, requirement or expectation must be examined to determine whether it is "reasonable and *bona fide*". The following must be taken into account:

(a) if the rule, requirement or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business; and

(b) ~~i~~if the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, then the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

[8] The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

[Amended – October 2014]

Tab 5.2

CONTINUATION OF THE PRE-PROCEEDING CONSENT RESOLUTION PROCESS

MOTION

6. That Convocation approve the Pre-Proceeding Consent Resolution Process for an additional two years, and that a report will be provided prior to the end of the two year period containing recommendations regarding the continuation of the conference on a permanent basis.

Overview

7. 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 5.2.1** and **Tab 5.2.2**, respectively.

8. 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.

9. No changes are recommended by the Committee to the portion of the Consent Process that occurs prior to authorization by the Proceedings Authorization Committee.

10. The Committee 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 5.2.3**.

11. The Committee recommends that the consent resolution 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, a report will be prepared containing recommendations regarding whether the Consent Process should be continued on a permanent basis.

Background – Purpose of the Consent Process

12. The Consent Process begins during the investigation stage and concludes with a Hearing Panel Order. Through the Consent Resolution Process, a licensee may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.

13. 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

14. The policy which includes a description of the process is set out in the 2010 Report at **Tab 5.2.1** 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

15. 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.

16. 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 5.2.1**, 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.

17. Once the Director is satisfied with the agreement, a Consent Proposal is referred to the Proceedings Authorization Committee (PAC) for authorization.

18. 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.

19. 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).

20. 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

21. Two cases have been completed through the Consent Process to date.

22. In the first case, the licensee was granted permission to surrender his 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.

23. 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

24. 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.

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

Challenges

26. 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.

27. 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

28. 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.

29. The Committee's review of the consent resolution 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.

30. 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.

31. Accordingly, it is 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.

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

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
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Roger Yachetti

Purpose of Report: Decision

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

*Items deferred from December 4, 2009 Convocation

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For Decision

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 Sperdakos, 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[1];

c. will save significant costs for the licensee[2]; 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.[3]

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[1] 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.

[2] 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.

[3] 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[4], 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.

[4] 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.

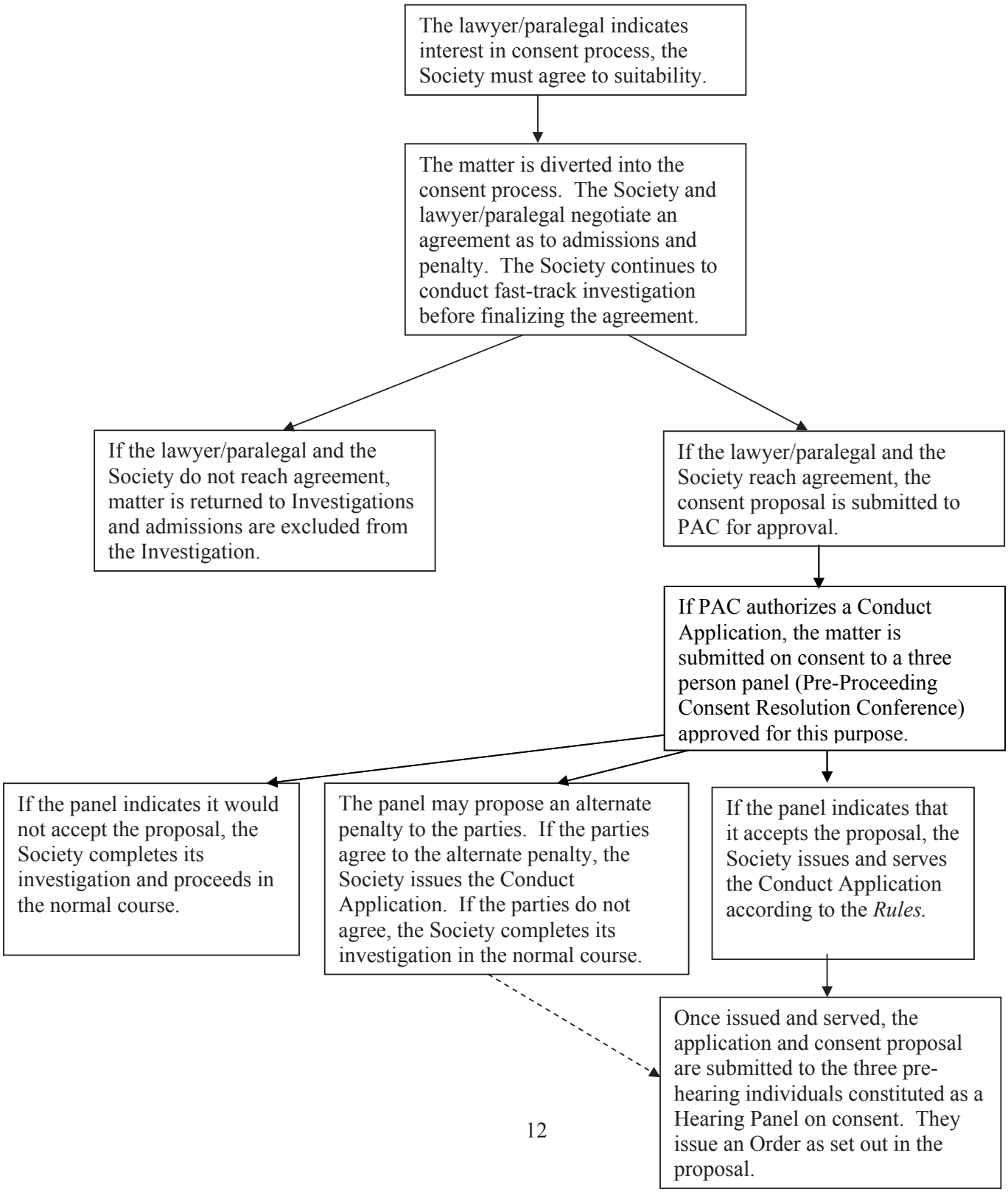
Step 5 – The Hearing

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.

Current Process	Conference Process
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
Public Notice of Application	Non-public settlement conf.
Non-public Pre-Hearing Conf.	**Public** Notice of Application
Non-public drafting of ASF	
Non-public agreement on disposition	
Public hearing; revelation of ASF and joint submission on disposition	**Public** 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.[5]

[5] 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

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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.

APPENDIX 1

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

B.l. 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.l.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.l.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, l995
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.[6]

[6] 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.[7]

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.[8]

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[7] 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.

[8] *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

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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.[9]

[9] 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.[10]

[10] 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[11], 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

[11] 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.[12] 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.[13]

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

[12] 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.

[13] 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 PBLO

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:			
❒ Male ❒ Female	First Name	Last/Family Name	
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 ❒	I am the Defendant/Respondent in this action ❒		

Please pick **one** area of law that best describes your situation

- ❒ Bankruptcy or insolvency law
- ❒ Condominium
- ❒ Construction Lien
- ❒ Construction/Renovation dispute
- ❒ Contract law
- ❒ Damage to Property
- ❒ Defamation
- ❒ Employment Law/Wrongful Dismissal
- ❒ Insurance (other than motor vehicle)
- ❒ Intellectual Property
- ❒ Landlord Tenant
- ❒ Lawyer's Invoice Dispute
- ❒ Loan or Credit Card Default (other than mortgage default)
- ❒ Medical Malpractice
- ❒ Mortgage Default
- ❒ Motor Vehicle Accident
- ❒ Negligence
- ❒ Personal Injury
- ❒ Police misconduct
- ❒ Professional Malpractice (other than medical)
- ❒ Real Estate litigation/disputes (other than mortgage default)
- ❒ Wills/Estates
- ❒ Other _____

Part B: Persons and Companies involved (or potentially involved) in your matter.	
Please list all of the **Plaintiffs/Applicants** in this matter. (Please include first and last names, company names, and trade names)	Please list the **Law Firm** that's representing each Plaintiff/Applicant. If they are not represented, write "None"
1.	
2.	
3.	
4.	
5.	
6.	
Please list all of the **Defendants/Respondents** in this matter. (Please include first and last names, company names, and trade names)	Please list the **Law Firm** that's representing each Defendant. If they are not represented, write "None"
1.	
2.	
3.	
4.	
5.	
6.	
Please list any **other** persons or companies that might be involved in your matter. Please include First and last names, company names, and trade names.	Please list the **Law Firm** 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 ☐

LawHelpOntario PBLO

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:

❒ I am Self Employed
❒ I am Employed
❒ I am Unemployed
❒ I am Retired
My Occupation : _____

❒ My Spouse is Self Employed
❒ My Spouse is Employed
❒ My Spouse is Unemployed
❒ My Spouse is Retired
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

What was your highest level of education?

- ❒ Grade School
- ❒ Some High School
- ❒ High School Diploma
- ❒ Some University/College
- ❒ University Degree/College Diploma
- ❒ Post Graduate Degree

Is English your first language? Yes ❒ No❒

Do you need services in another language? Yes ❒ No❒

If ***yes***, what language?

Which age group do you belong to?

❒ 18 – 24 ❒ 25 – 34 ❒ 35 – 44 ❒ 45 – 54 ❒ 55 – 64 ❒ 65+

Part E: Other Questions

1. How did you hear about Law Help Ontario?

- ❒ Walking by the office
- ❒ Legal Aid Ontario
- ❒ Another Legal Clinic
- ❒ The Newspaper
- ❒ The Internet
- ❒ The Law Society
- ❒ Friend/Family Member
- ❒ TV
- ❒ A Judge or Master
- ❒ Court Staff Member (10th Floor)
- ❒Other _____

2. Is this the first time you tried to get any legal help with this case? Yes ❒ No❒

*If **no**, what other places have you tried to obtain assistance?*

3. Do you currently have a lawyer (or other representative) assisting you with this case? Yes ❒ No❒

4. If you answered ***no***, has a lawyer (that was hired or worked on a contingency arrangement) ever assisted you with this case? Yes ❒ No❒

If ***yes***, why is that lawyer not assisting you now?

5. Why are you representing yourself? ***Make one selection only***

- ❒ I can't afford to hire a lawyer
- ❒ I could pay some legal fees, but not all
- ❒ I ran out of money to continue paying my lawyer
- ❒ I didn't qualify for legal aid, or they said that they couldn't help with my case
- ❒ I believe that my case is straightforward and I can handle the litigation on my own
- ❒ I can afford a lawyer, but I don't want to pay a lawyer
- ❒ I don't trust lawyers
- ❒ My lawyer had himself/herself removed from my case
- ❒ Other _____

6. Have ever you tried using the Lawyer Referral Service? Yes ❒ No❒

If ***yes***, what was the result?

7. Do you have any other cases pending at the moment? Yes ❒ No❒

8. Have you tried to settle or mediate this case without going to court? Yes ❒ No❒

9. Does the opposing party have a lawyer? ❒ Unsure Yes ❒ No❒

10. Is this your first meeting with a Duty Counsel Lawyer at Law Help Ontario? Yes ❒ No❒

11. Do you have access to the internet? Yes ❒ No❒

12. May we contact you at a later date, and leave a voicemail message, if necessary, to get your feedback about the program? Yes ❒ No❒

LawHelpOntario PBLO

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 PBLO

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.[1]

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.

---

[1] 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 Bredt
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)

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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[1];

c. will save significant costs for the licensee[2]; 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.[3]

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[1] 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.

[2] 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.

[3] 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.

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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[4], 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

[4] 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.

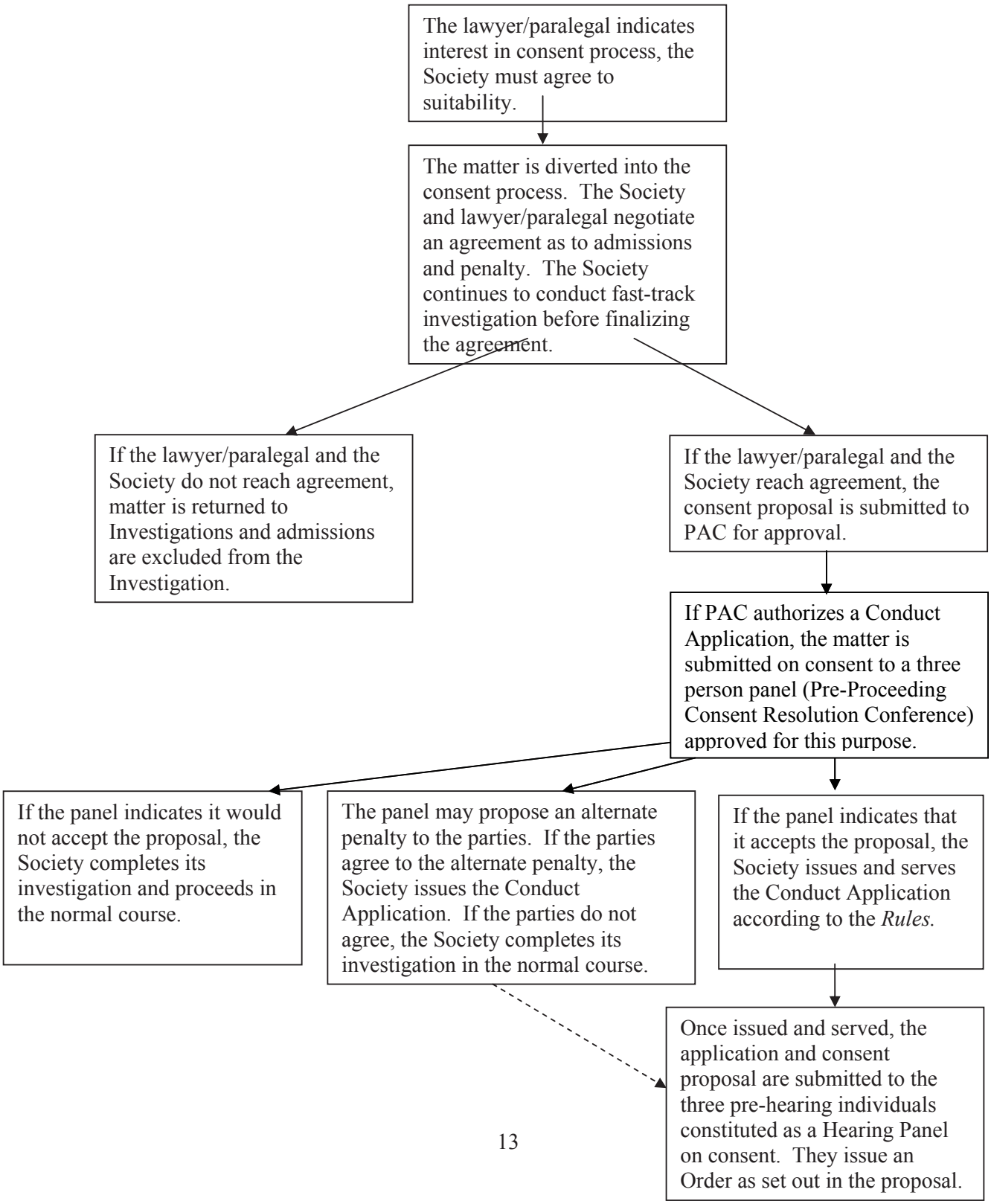
Step 5 – The Hearing

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.

Current Process	Conference Process
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
Public Notice of Application	Non-public settlement conf.
Non-public Pre-Hearing Conf.	**Public** Notice of Application
Non-public drafting of ASF	
Non-public agreement on disposition	
Public hearing; revelation of ASF and joint submission on disposition	**Public** 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.[5]

[5] 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.

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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.

TAB 1

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

B.l. 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.l.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.l.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, l995
D. Scott, Chair

THE REPORT WAS ADOPTED

TAB 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.

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.[6] 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.

[6] 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	$60,274.81	($2,300.00 of which was for French hearings)
Total	$91,714.15	($5,425.66 or 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	$31,873.64	($12,700.00 of which was for French hearings)
Total	$45,328.96	**(**$17,593.59 or 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	$14,914.81	($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.

LET RIGHT PREVAIL

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 exists to govern Ontario's legal profession in the public interest.

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

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.

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*.

LET RIGHT PREVAIL

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 a pour mission de réglementer la profession juridique dans l'intérêt public.

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*

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.

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 resumés 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

Appointee	Lawyer or non-lawyer[7] appointee	Number of times assigned to a hearing panel	Hearing participation (in hours)[8]
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[9]	Non-lawyer	1	9
8	Non-lawyer	3	21
Totals		**34** **lawyer appointees (4)** **non-lawyer appointees (30)**	**504** **lawyer appointees (20)** **non-lawyer appointees (484)**

[7] 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.
[8] Includes participation for continuation hearing dates.
[9] Non-lawyer appointee adjudicator 7b replaced non-lawyer appointee adjudicator 7a.

2010 NON BENCHER HEARING PANEL APPOINTEE ADJUDICATOR ATTENDANCE

Appointee	Lawyer or non-lawyer[10] appointee	Number of times assigned to a hearing panel	Hearing participation (in hours)
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
Totals		**97** **lawyer appointees (40)** **non-lawyer appointees (57)**	**650** **lawyer appointees (159)** **non-lawyer appointees (491)**

[10] 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.