

THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING: Benchers

DATE: Friday, February 27, 2009

PRESENT:

Gordon Turriff, QC, President	David Mossop, QC
Glen Ridgway, QC, 1st Vice-president	Thelma O'Grady
Gavin Hume, QC, 2nd Vice-president	Peter Lloyd
Haydn Acheson	Robert Punnett, QC
Rita Andreone	David Renwick, QC
Joost Blom, QC	Allan Seckel, QC
Robert Brun, QC	Meg Shaw, QC
Leon Getz, QC	Richard Stewart, QC
William Jackson	Ronald Tindale
Patrick Kelly	Art Vertlieb, QC
Stacy Kuiack	Herman Van Ommen
Terence La Liberté, QC	James Vilvang, QC
Bruce LeRose, QC	Kenneth Walker
Jan Lindsay	Dr. Maelor Vallance
	David Zacks, QC

ABSENT:

- Carol Hickman
- Barbara Levesque
- Kathryn Berge, QC

STAFF PRESENT:

Tim McGee	Michael Lucas
Michael Bernard	Bill McIntosh
Barbara Buchanan	Jeanette McPhee
Stuart Cameron	Doug Munro
Su Forbes, QC	Susanna Tam
Jeffrey Hoskins, QC	Alan Treleaven
Howard Kushner	Adam Whitcombe

GUESTS:

- Johanne Blenkin, Executive Director, BCCLS
- Shi-ling Hsu, Associate Dean, UBC Faculty of Law
- Robert Holmes, President, Trial Lawyers Association of BC
- Ron Friesen, Acting-Executive Director, CLEBC
- Jamie Maclaren, Executive Director, Pro Bono Law of BC
- Caroline Nevin, Executive Director, CBABC
- Miriam Maisonville, President, CBABC
- Jane Mundy, Reporter, Lawyers Weekly

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on January 30, 2009 were approved as circulated.

The following resolutions were **passed unanimously and by consent.**

2. *Professional Conduct Handbook Amendment*

Resolved: to amend Chapter 12, Rule 6 of the *Professional Conduct Handbook*, correcting the rule's reference to the *Legal Services Society Act*, as follows:

CHAPTER 12 SUPERVISION OF EMPLOYEES

6. Except as permitted under the *Legal Services Society Act*, section 12, a lawyer must not permit a legal assistant to: ...

3. **Bencher Governance Policies: Audit Committee Mandate, Part 3, F. 3**

Resolved: to adopt the following as the mandate of the Audit Committee in the Bencher Governance Policies (providing for Key Performance Measures review of Law Society operations and programs, deleting two redundant provisions and correcting a number of references):

Audit Committee

(a) The role of the Audit Committee is to assist the Benchers in determining that the financial affairs of the Society are properly managed by the staff of the Society. The Committee's responsibilities are to do the following:

i) **Executive limitations**

- periodically review executive limitations relating to the financial affairs of the Law Society and advise the Benchers if any changes are needed.
- monitor executive performance to ensure that all limitations dealing with the financial affairs of the Law Society are being met or exceptions properly reported.

ii) **Internal controls and reporting**

- review the financial control structure and request any internal audit process deemed necessary.
- provide an annual Audit Committee report to the Benchers.
- review and make recommendations to the CEO and the Benchers relating to any possible conflict of interest situations that come to the Committee's attention.
- ensure that any recommendation made by the external auditors and agreed to by the Committee is properly implemented by the CEO.

- review the Key Performance Measures once a year to ensure the review process is being done and recommend suggested changes to the Benchers.
- institute any special investigations considered necessary and, if appropriate, hire external experts to assist.

iii) **External auditors and reports**

- recommend the selection of the external auditors. (appointed by members at the Annual General Meeting)
- review directly with the auditors their approach and the audit's scope, the financial and any other audit issue results and approve the audited statements on behalf of the Benchers.
- recommend to the CEO any changes in financial reporting as required by changes to the CICA Handbook Rules.
- review the overall performance of the auditors and approve the audit fee and related costs.

iv) **Bencher assignments**

- act on any issues referred to the Committee by the Benchers.

v) **Insurance program monitoring**

- assign one member of the Audit Committee with the specific responsibility for monitoring material developments and changes in this program.
- consider the adequacy of the Executive Limitations relating to this program and recommend to the Benchers any additions, deletions or amendments.

Note: A quarterly report to the Benchers providing a summary of financial and management information relating to the insurance program is provided for in Part 2, B.1.

(b) Authority: Bencher resolutions, April, 1994, January, 1998; February, 2009.

REGULAR AGENDA – for Discussion and Decision

4. President's Report

Mr. Turriff updated the Benchers on the status of the civil rules reform process and referred them to his recent letter to the 'Interested Parties' (the various groups represented at a rules reform summit held on December 9, 2008 and chaired by Past-President John Hunter, QC). Mr. Turriff said his letter affirmed the desirability of further consultation, noted that it is unlikely the Rules Revision Committee will invite such consultation before making its recommendations to the Attorney General, and confirmed the Law Society's readiness to support the rules revision process.

Mr. Turriff reported that he met recently with 2008 Law Society Award winner John McAlpine, QC to discuss ways to support and promote the provision of pro bono legal services by BC lawyers. Mr. Turriff also reported that he met with Peter Ritchie, QC shortly after the Vancouver Sun's publication of remarks by Mr. Ritchie regarding the impact of court fees on litigants.

Mr. Turriff advised the Benchers that his President's speaking tour to commemorate the Law Society's 125th anniversary is underway. On February 24th he delivered a public lecture at the New Westminster Public Library; on February 26th he spoke to students at Douglas College.

Mr. Turriff also reported briefly on various public appearances he made as Law Society President through the month of February 2009.

5. CEO's Report

Mr. McGee referred the Benchers to his written report (Tab 6 of the 2009-02-27 Consolidated Benchers Agenda Package) and advised that it focuses on three matters: management's report to the Benchers on the performance of the organization in 2008 under our Key Performance Measures; the draft 2009 – 2011 LSBC Strategic Plan; and a financial update, including preliminary year-end results for 2008 and TAF revenue and expenses to date in 2009.

CFO Jeanette McPhee briefed the Benchers on the financial update portion of the report. She noted that preliminary year-end results for 2008 show positive variance to budget, both overall and in the revenue categories of membership, PLTC and electronic filing. Ms. McPhee also noted that 2008 expenses show a positive variance, with savings concentrated in the areas of salary savings related to vacancies, interest expense and unused contingency for Bencher spending. Ms. McPhee reported that the value of LIF's investment portfolio declined by 12.5 per cent during 2008, close to our benchmark and reflecting the global market downturn. Ms. McPhee also advised that TAF revenue declined by 28 per cent in the last quarter of 2008 and that while TAF revenue is expected to decline further in 2009, a TAF increase should not be required this year. Mr. McGee noted that while a TAF increase is being considered as one of the Law Society's budgetary options for 2010, significant notice of any such increase would be provided to the profession.

Mr. McGee offered his congratulations to the following Benchers and staff:

- Second Vice-President Gavin Hume, QC for his appointment to the YMCA Canada's Fellowship of Honour
- Lay Bencher Patrick Kelly for receiving a 2009 BC Community Achievement Award
- Bencher Robert Punnett, QC for his 2009 Queen's Counsel appointment
- Tribunal and Legislative Counsel Jeffrey Hoskins, QC for his 2009 Queen's Counsel appointment

- Su Forbes, QC and her Lawyers Insurance Fund colleagues for the recent announcement that LIF's *Beat the Clock* publication has won the Risk and Insurance Management Society's Arthur Quern Quality Award for 2009

6. Report on Outstanding Hearing and Review Reports

The Benchers received a report on outstanding hearing decisions.

STRATEGIC PLANNING AND PRIORITIES MATTERS – for Discussion and/or Decision

7. 2009-2011 Strategic Plan

Mr. McGee presented the draft 2009-2011 Strategic Plan to the Benchers and described its three elements as:

- Definition of the Law Society's principal policy goals and the rationale for them
- Outline of strategies for achieving those goals
- Outline of initiatives for implementing those strategies

The Strategic Plan defines the Law Society's principal goals for the next three years as:

Goal 1: enhancing access to legal services.

Goal 2: enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.

Goal 3: effective education, both of legal professionals and those wishing to become legal professionals, and of the public.

Following a thorough discussion, the Benchers approved the 2009-2011 Strategic Plan in three stages, as set out below.

Goal 1

Mr. LeRose moved (seconded by Mr. Vilvang) that Goal 1 and related Strategies and Initiatives be approved, subject to removing the following passage from the second paragraph of Strategy 1-3:

“Moreover, business models that do not encourage segments of the lawyer population, particularly female lawyers, to remain in practice not only discourage some lawyers from practising law, but cause law firms to lose legal talent, reducing their own effectiveness and further diminishing access to justice. Public confidence in the justice system is enhanced by ensuring that the profession does what it can to retain lawyers, and that the profession at least reflects the general population.”

The motion was defeated.

Mr. Hume moved (seconded by Mr. La Liberté) that Goal 1 and related Strategies and Initiatives be approved, subject to removing the following phrase from the second last sentence of the second paragraph of Strategy 1-3: “and that the profession at least reflects the general population.” The motion was carried.

Goal 2

Mr. LeRose moved (seconded by Mr. Ridgway) that Goal 2 and related Strategies and Initiatives be approved in their entirety. The motion was carried.

Goal 3

Mr. LeRose moved (seconded by Mr. Ridgway) that Goal 3 and related Strategies and Initiatives be approved in their entirety. The motion was carried.

The approved version of the 2009-2011 Strategic Plan is attached as Appendix 1 to these minutes.

Mr. Turriff expressed concern regarding the overlapping nature of the issues being considered by the Access to Legal Services Advisory Committee, the Delivery of Legal Services Task Force, the Equity and Diversity Advisory Committee and the Retention of Women in Law Task Force. He undertook to convene a meeting with the Chairs of those four bodies to discuss ways to rationalize their efforts.

REGULAR AGENDA – Other Matters for Discussion and/or Decision

8. 2008 Key Performance Reporting by the Finance Committee

The Benchers reviewed the 2008 Key Performance Measures report presented by the Audit Committee and agreed that KPM reporting will be included in the Law Society’s 2008 Annual Report.

9. Lawyers Insurance Fund Annual Review

Director of Insurance Su Forbes, QC presented the Benchers with a summary and analysis of the performance of the Lawyers Insurance Program in 2008.

10. *Professional Conduct Handbook* Amendments: Chapter 6, Rules 7.1 to 7.9 and Appendix 5

Mr. Hume briefed the Benchers regarding the Ethics Committee’s report and proposed amendments to the conflict rules set out in Chapter 6, Rules 7.1 to 7.9 and Appendix 5 of the *Professional Conduct Handbook*, highlighting the Committee’s major recommendations. He noted that the proposed amendments are intended to clarify and streamline the rules that permit law firms to continue to act for existing clients in some circumstances, notwithstanding that a lawyer or lawyers transferring into the firm had previously worked in the law firm that represented the opposing side.

Mr. Hume moved (seconded by Mr. Zacks) that the Benchers adopt the various amendments to PCH Chapter 6, Rules 7.1 to 7.9 and Appendix 5 set out in the Committee's report (see pages 1114-1121 of the 2009-02-27 CONSOLIDATED Benchers Agenda Package), and attached as Appendix 2 to these minutes.

The motion was carried.

11. Mirror Imaging Working Group Report

Mr. Hume briefed the Benchers regarding the report of an Executive Committee Working Group on practical and policy issues underlying the creation of mirror images of lawyers' computer hard drives by the Law Society in the course of its discipline process.

Following discussion, the Benchers directed the Working Group to continue its investigation and to return with recommendations for the enforcement of the current Law Society Rules in light of current and foreseeable computer and information technology.

FOR INFORMATION ONLY

12. 2009 Benchers' Retreat Planning Update

Mr. Ridgway updated the Benchers on planning for the 2009 Benchers' Retreat, to be held in Whistler, BC from June 11th to 14th.

13. CBA Report

Ms. Shaw reported to the Benchers on Mr. LeRose's behalf regarding the Canadian Bar Association's 2009 Mid-Winter Meeting, held in Lake Louise from February 20th to 22nd.

IN CAMERA SESSION

14. Discussion of Bencher Concerns

This matter was discussed *in camera*.

WKM

2009-03-22

Appendix 1

The Law Society
of British Columbia



2009 – 2011 Strategic Plan

For: The Benchers

Date: February 27, 2009

Purpose of Report: Decision

Prepared on behalf of the Executive Committee

INTRODUCTION

The principal aim of the Law Society is a public well-served by a competent, honourable and independent legal profession. The Law Society's mandate described in s. 3 of the *Legal Profession Act* is to uphold and protect the public interest in the administration of justice.

In order to develop strategies to discharge the Law Society's mission and mandate, the Benchers have created a process to plan for and prioritize strategic policy development. This process was created to enhance the ability of the Benchers to focus on policy development that would best ensure proper fulfillment of the mandate of the Society, and to optimize staff resources in the development of those policies and strategies.

Through this process, the Benchers have identified three principal goals, and a number of policy initiatives that will achieve those goals. In identifying these goals and strategies, the Benchers have been mindful not only of what the role of the Law Society is in relation to its mandate, but also of what may be achievable within that mandate.

This Strategic Plan is aimed at achieving concrete results that will improve the public interest in the administration of justice. The process has tried to avoid simply identifying issues on which the only action would be to make general comments on matters within the mandate of the Society.

The strategic policy setting process is also to be distinguished from the operation of the Law Society's core regulatory programs, such as discipline, credentials, and practice standards. These programs are fundamental to fulfilling the Law Society's mandate and will always be priorities for the Law Society. The Benchers have established a set of Key Performance Measures against which the performance of the core regulatory programs will continue to be measured on an annual basis.

PRINCIPAL GOALS

The three principal goals of this Strategic Plan are:

1. Enhancing access to legal services.
2. Enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.
3. Effective education, both of legal professionals and those wishing to become legal professionals, and of the public.

These goals are set out below, together with a description of the strategies to pursue the goals and the initiatives being undertaken to implement each one. Collectively, these goals, strategies and initiatives constitute the Law Society's Strategic Plan for 2009 – 2011.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 1: Enhancing access to legal services

Protecting the public interest in the administration of justice requires the Law Society to work toward improving the public's access to legal services. Providing assurance about the competence and conduct of lawyers, who are able to advise clients independently of other interests, is a hollow goal if people cannot afford to retain such lawyers. Developing strategies to improve the public's ability to obtain affordable legal advice is a priority item. The following items were identified as desired outcomes through which the goal of enhancing access to legal services may be achieved.

Strategy 1-1

Increase the public's access to legal services by developing a new regulatory paradigm that may broaden the range of persons permitted to provide certain legal services.

Initiative 1-1

The Delivery of Legal Services Task Force has been created to identify the existing knowledge base and gaps in information that would be required for the Benchers to discuss the substantive policy issues around the scope of practice, develop a plan for acquiring the information that is missing, through (for example) consultations, surveys or other studies. The Task Force will report on the information identification issues to the Benchers in the spring of 2009, at which time the Benchers will be able to determine what steps should follow.

Strategy 1-2

Find ways to reduce the impact of financial barriers to accessing justice.

Initiative 1-2

The justice system and lawyers' services are cost-based services. A variety of factors contribute to a high cost for these services, making them relatively inaccessible to many British Columbians. Evidence suggests, however, that a high proportion of low and middle income British Columbians will face a serious legal problem in the next three year period. Determining ways to reduce the impact of financial

barriers to accessing legal advice will provide a significant benefit, and ought to increase public confidence in the legal system.

The Access to Legal Services Advisory Committee is currently analysing issues relating to costs in the legal system. The deliberations of that Committee and their research and findings will be passed on to the Delivery of Legal Services Task Force for consideration when addressing the substantive mandate of that Task Force.

Strategy 1–3

Improve the retention rate of lawyers in the legal profession.

A high attrition rate combined with a growing population and the continued complexity of legislation, regulation, and common law demonstrates a need to ensure that legally trained professionals will continue to be available to provide legal advice. Moreover, business models that do not encourage segments of the lawyer population, particularly female lawyers, to remain in practice not only discourage some lawyers from practising law, but cause law firms to lose legal talent, reducing their own effectiveness and further diminishing access to justice. Public confidence in the justice system is enhanced by ensuring that the profession does what it can to retain lawyers. The Benchers identified the following two initiatives to accomplish the desired outcome.

Initiative 1–3a

Preparing a business case for the retention of female lawyers in private practice.

Following up on a recommendation of the Women in the Legal Profession Task Force, a task force has been created to prepare a business case for the retention of women in private practice. That work is underway, including the preparation of a business case, and a report will be delivered to the Benchers by June 30, 2009.

Initiative 1–3b

Developing a plan to deal with the aging of the legal profession and the potential regulatory and access to legal services issues that might result.

Aging in the profession is already an issue in many rural communities in the province, and barring unforeseen events, is expected to continue or worsen. It is of less concern at present in larger centres, but this may be expected to change in coming years.

The Equity and Diversity Advisory Committee will review and work to define issues arising in connection with the aging of the legal profession, including the identification of what information on the subject currently exists as well as what information may need to be obtained through external consultation and research, and will make recommendations by the end of 2009 concerning how the issue may be advanced as a strategic priority in the future.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 2: Enhancing public confidence in the legal profession through appropriate and effective regulation of legal professionals.

Public confidence in the ability of the Law Society to effectively regulate the competence and conduct of lawyers is critical in order for the Society to fulfill its mandate. It is also of critical importance in order to maintain the public's right to retain independent lawyers. The Benchers identified several desirable outcomes through which the goal of enhancing public confidence may be achieved.

Strategy 2-1

Effectively regulate those lawyers who have received or who receive a significant number of complaints, but which complaints, individually, are not sufficiently serious to result in formal disciplinary action or referral to the Practice Standards Committee.

Initiative 2-1

Through the Discipline Committee, a staff group has been created to examine a series of projects to reduce the number of complaints that complaints-prone lawyers receive. It is currently anticipated that options will be presented to the Benchers for consideration in early 2009, and if approved, necessary rule changes would be prepared implementation would take place soon after.

Strategy 2-2

Assess possible roles of an oversight or review board for Law Society core functions.

Initiative 2-2

Regulatory oversight or review boards exist in British Columbia in connection with the health professions, and have been created in some foreign jurisdictions in connection with the legal profession. Whether such boards improve public confidence is under debate. Is there a method to enhance the public confidence in the Law Society's decision making processes that does not run contrary to the fundamental constitutional principle of, and public right to, lawyer

independence? This issue is scheduled to form the substantive policy program at the Benchers' June retreat.

Strategy 2-3

Enhance public confidence in hearing panels by examining the separation of adjudicative and investigative functions of the Law Society.

Initiative 2-3

Effective self-regulation requires the Law Society to fulfill its mandate first and foremost in the public interest, and requires public confidence. Recognizing that other lawyer regulatory bodies in Canada and elsewhere address this issue differently than in British Columbia, options for the creation or appointment of hearing panels can be developed for the Benchers to allow for a consideration of whether there are ways to enhance confidence in the processes and decisions of hearing panels.

The topic is currently on the agenda of the Federation of Law Societies of Canada. Ideas that are developed through that body will no doubt inform future discussion on this issue by the Benchers.

Strategy 2-4

Effective data gathering to inform equity and diversity issues.

Initiative 2-4

The Law Society must understand and address systemic barriers faced by members of the public needing legal services and members of the profession on the basis of gender, ethnicity, race, disability and sexual orientation in order to demonstrate leadership in building a more representative profession. However, it is unwise to develop initiatives in the absence of relevant data. Through the Equity and Diversity Advisory Committee, the Law Society will develop strategies for gathering appropriate demographic data on the profession and assess such data to inform the development of initiatives to promote equity and diversity.

Strategy 2-5

Develop and propose legislative amendments to improve lawyer regulation.

Initiative 2-5

Effective regulation and public confidence depend a great deal on having adequate tools to fulfill the Law Society's mandate. The *Legal Profession Act* has not been substantively amended for a decade. Given the particular legislative cycle, 2009 is a year in which the Law Society should consider if any amendments to legislation are needed to improve the Law Society's ability to meet its objects and duties. Together with advice from government relations consultants, the Act and Rules Subcommittee will consider whether any particular amendments are warranted at this time to achieve this outcome.

Strategy 2-6

Prepare a considered response to the Competition Bureau's "Study on Self-Regulated Professions."

In late 2007, the Competition Bureau published its "Study on Self-Regulated Professions", which identified several issues of concern, from the Bureau's point of view, with the regulation of the legal profession. The Federation of Law Societies commissioned an article authored by Professors Iacobucci and Trebilcock that critiqued the Bureau's study, and this has been forwarded to the Bureau. Substantive responses to specific items identified remains a desirable outcome, as described in the following initiatives.

Initiative 2-6a

Reconsidering rules relating to multi-disciplinary partnerships.

Issues relating to multi-disciplinary partnerships have been extensively debated by the Benchers, and therefore a great deal of research and consideration has already been applied to this topic. The Ethics Committee is currently considering the issue and will be presenting its conclusions to the Benchers, likely in the spring of 2009.

Initiative 2-6b

Enhancing lawyer mobility.

Through the Federation of Law Societies, all law societies in Canada have agreed to a National Mobility Agreement which facilitates the mobility of lawyers within Canada. Recently, one of the last items to be considered – mobility between members of the Barreau du Québec and members of common-law law societies – has been addressed. Rule changes will need to be approved to implement the agreement reached on this issue. The Act and Rules Subcommittee will consider appropriate rules and present them to the Benchers for approval.

Initiative 2-6c

Modernising provisions relating to advertising.

Consideration of possible changes to provisions relating to lawyers' advertising is under consideration by the Ethics Committee. Also, through the Federation of Law Societies, draft model rules on advertising are being prepared. The Ethics Committee will make recommendations to the Benchers in connection with these matters in 2009.

Initiative 2-6d

Reconsidering policies regarding referral fees.

A reconsideration of policies regarding referral fees is currently being considered by the Ethics Committee, who will make recommendations to the Benchers in 2009.

STRATEGIC PLAN FOR 2009 – 2011

GOAL 3: Effective public and lawyer education.

This goal may be divided into two parts. One is to ensure that lawyers who provide legal services are competent to do so. The public interest in the administration of justice is significantly diminished if lawyers are not competent, and the Law Society must make efforts either to ensure that lawyers obtain and retain pertinent information to improve, or at least maintain, competence. The other is to ensure that the public understands how the legal system in Canada works, and how concepts that may be less well understood or even taken for granted integrate within the legal system to provide for important public rights.

Past priority initiatives such as the Continuing Professional Development (CPD) initiative, were developed to address the first part of the education goal. Initiatives such as the public forums and the high school education unit on judicial and lawyer independence were developed to address the “public education” part of the goal. The policy development of each of those initiatives are now completed, and they will remain as operational items for the Law Society.

The Benchers have identified the development of the following items as desired outcomes through which the education goal may be accomplished. Each item will be considered by the Lawyer Education Advisory Committee who will, as appropriate, develop initiatives, or options for initiatives, to be considered by the Benchers.

Strategy 3-1

Design and implement a plan to support the mentoring of lawyers.

Initiative 3-1

Mentoring is a time-honoured method through which lawyers can be educated by other lawyers who possess certain relevant skills or experience. When the CPD Program was approved for implementation, “mentoring,” was not included as an approved CPD activity. A promise was made to consider developing criteria for a program that would address the requirements of the CPD program. A mentoring program is expected to be presented to the Benchers for consideration in the spring of 2009

Strategy 3-2

Develop and implement initiatives to more effectively educate lawyers on the topic of professionalism.

Initiative 3-2

Professionalism lies at the heart of lawyering, yet from an education perspective it is not a topic that receives much dedicated attention. Development of initiatives that would focus on the issues of principle and values that inform or underlie specific rules of professional conduct would fill a sizable void in the education options available to lawyers, and would assist lawyers in meeting the requirements of the CPD program. An examination of programs available in other jurisdictions, together with the development of options for such programs in British Columbia, for consideration by the Benchers will be a worthwhile initiative to achieve the goal of effective education.

Strategy 3-3

Develop and implement initiatives to improve advocacy skills for lawyers.

Initiative 3-3

Advocacy is a particular lawyering skill. While it is a skill most commonly associated with barristers, effective advocacy skills are equally relevant to solicitors. Advocacy is however a subject on which there are few dedicated courses available. To achieve the goal of effective lawyer education, the Lawyer Education Advisory Committee will examine initiatives relating to the teaching of advocacy skills and present options to the Benchers for consideration.

Strategy 3-4

Educate the public regarding the legal system on a variety of levels.

Initiative 3-4a

The Law Society is developing an instructional video for use in high schools. This will be completed and rolled-out in 2009.

Initiative 3-4b

The President of the Law Society – Gordon Turriff, QC – will be undertaking a speaking tour across the province during 2009 to commemorate the 125th anniversary of the Law Society. He will address a variety of topics relating to the legal profession and its regulation.

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CHAPTER 6

CONFLICTS OF INTEREST BETWEEN CLIENTS

Conflicts arising as a result of transfer between law firms

7.1 In Rules 7.1 to 7.9:

“client” includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them;

“confidential information” means information not generally known to the public that is obtained from a client;

“law firm” includes one or more lawyers practising:

- (a) in a sole proprietorship,
- (b) in a partnership,
- (c) in an arrangement for sharing space,⁴
- (d) as a law corporation,
- (e) in a government, a Crown corporation or any other public body,⁵ and
- (f) in a corporation or other body;⁶

“lawyer” means a member of the Society, and includes an articled student registered in the Law Society Admission Program;

“matter” means a case or client file, but does not include general “know-how” and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

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Application of Rules⁷

7.2 Rules 7.1 to 7.9 apply when a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client (“former client”),
- (b) the interests of those clients in that matter conflict, and
- (c) the transferring lawyer actually possesses relevant information respecting that matter.

7.3 Rules 7.4 to 7.7 do not apply to a lawyer employed by the federal or a provincial or territorial attorney general or department of justice who continues to be employed by that attorney general or department of justice after transferring from one department, ministry or agency to another.

Firm disqualification

7.4 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in paragraph 7.2(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

- (a) the former client consents to the new law firm’s continued representation of its client, or
- (b) the new law firm can ~~establishes~~, in accordance with Rule 7.8, when called upon to do so by a party adverse in interest, that:
 - (i) it is ~~in the interests of justice~~ reasonable that its representation of its client in the matter continue, having regard to all relevant circumstances, including:
 - (A) the adequacy of the measures taken under subparagraph (ii),
 - (B) the extent of prejudice to ~~any party~~ the affected clients, and
 - (C) the good faith of the ~~parties~~ former client and the client of the new law firm, and

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~~(D) — the availability of alternative suitable counsel, and~~

~~(E) — issues affecting the national or public interest, and~~

- (ii) it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm.⁸

Continued representation not to involve ~~Transferring~~ transferring lawyer disqualification

7.5 If the transferring lawyer actually possesses ~~relevant~~ information relevant to a matter referred to in paragraph 7.2(a) respecting the former client, but that information is not confidential information that may prejudice the former client if disclosed to a member of the new law firm,⁵

~~(a) — the lawyer should execute an affidavit or solemn declaration to that effect, and~~

~~(b) — the new law firm must:~~

~~(i) — notify its client and the former client, or if the former client is represented in that matter by a lawyer, notify that lawyer, of the relevant circumstances and its intended action under Rules 7.1 to 7.9, and~~

~~(ii) — deliver to the persons referred to in subparagraph (i) a copy of any affidavit or solemn declaration executed under paragraph (a).~~

7.6 Unless the former client consents, a transferring lawyer to whom Rule 7.4 or 7.5 applies must not:

(a) participate in any manner in the new law firm's representation of its client in that matter, or

(b) disclose any confidential information respecting the former client.

7.7 Unless the former client consents, a member of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer to whom Rule 7.4 or 7.5 applies.

Determination of compliance

7.8 Anyone who has an interest in, or who represents a party in, a matter referred to in Rules 7.1 to 7.9 may apply to a court of competent jurisdiction for a determination

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of any aspect of those Rules, or seek the opinion of the Society on the application of those Rules.

Due diligence

- 7.9 A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and each other person whose services the lawyer has retained:
- (a) complies with Rules 7.1 to 7.9, and
 - (b) does not disclose:
 - (i) confidences of clients of the firm, and
 - (ii) confidences of clients of another law firm in which the person has worked.

FOOTNOTES:

5. Rules 7.1 to 7.9 apply to lawyers transferring to or from government service and into or out of an in-house counsel position, but do not extend to purely internal transfers in which, after transfer, the employer remains the same.
6. Rules 7.1 to 7.9 treat as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous that each such unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent ~~or to establish that it is in the public interest that it continue to represent its client in the matter.~~
7. Rules 7.1 to 7.9 are intended to regulate lawyers and articulated students who transfer between law firms. They also impose a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff, to ensure that they comply with the Rules and with the duty not to disclose confidences of clients of:
 - (a) the lawyer's firm, or
 - (b) other law firms in which the non-lawyer staff have worked.
8. Appendix 5 to this *Handbook* may be helpful in determining what constitutes "reasonable measures" in this context.

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Issues arising as a result of a transfer between law firms should be dealt with promptly. A lawyer's failure to promptly raise any issues identified promptly may prejudice clients and may be considered sharp practice.

APPENDIX 5

CONFLICTS ARISING AS A RESULT OF TRANSFER BETWEEN LAW FIRMS

Matters to consider when interviewing a potential transferee

1. When a law firm considers hiring a lawyer or articulated student ("transferring lawyer") from another law firm, the transferring lawyer and the new law firm need to determine, *before transfer*, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the firm that the transferring lawyer is leaving, and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

During the interview process, the transferring lawyer and the new law firm need to identify, first, all cases in which:

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client,
- (b) the interests of these clients in that matter conflict, and
- (c) the transferring lawyer actually possesses relevant information respecting that matter.

When these three elements exist, the transferring lawyer is personally disqualified from representing the new client unless the former client consents.

Second, they must determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm.

If this element exists, then the transferring lawyer is disqualified unless the former client consents, and the new law firm is disqualified unless the firm takes measures set out in Rules 7.1 to 7.9 and Appendix 5 to preserve the confidentiality of information. ~~former client consents or the new law firm establishes that its continued representation is in the public interest.~~

In Rules 7.1 to 7.9, "confidential²² information" refers to information not generally known to the public that is obtained from a client. It should be distinguished from

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the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm need to be very careful to ensure that they do not disclose client confidences during the interview process itself.

Matters to consider before hiring a potential transferee

2. After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

(a) **If a conflict does exist**

If the new law firm concludes that the transferring lawyer does possess relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, then the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

- (i) the new law firm obtains the former client's consent to its continued representation of its client in that matter, or
- (ii) the new law firm complies with paragraph 7.4(b), ~~and, in determining whether continued representation is in the interests of justice, the clients' interests are the paramount consideration.~~

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will, in all likelihood, be required to satisfy the former client that it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under Rule 7.8 for an opinion of the Society or a determination by a court that it may continue to act, it bears the onus of establishing the matters referred to in paragraph 7.4(b). Again, this process must be completed before the transferring lawyer is hired.

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An application under Rule 7.8 may be made to the Society or to a court of competent jurisdiction. The Society has a procedure for considering disputes under Rule 7.8 that is intended to provide informal guidance to applicants.

The circumstances ~~enumerated~~ referred to in subparagraph 7.4(b)(i) are drafted in broad terms to ensure that all relevant facts will be taken into account. ~~While clauses (B) to (D) are self explanatory, clause (E) addresses governmental concerns respecting issues of national security, Cabinet confidences and obligations incumbent on attorneys general and their agents in the administration of justice.~~

(b) **If no conflict exists**

If the new law firm concludes that the transferring lawyer possesses relevant information respecting a former client, but that information is not confidential information that may prejudice the former client if disclosed to a member of the new law firm, ~~then:~~

- ~~(i) — the transferring lawyer should execute an affidavit or solemn declaration to that effect, and~~
- ~~(ii) — the new law firm must notify its client and the former client/former law firm “of the relevant circumstances and its intended action under Rules 7.1 to 7.9;” and deliver to them a copy of any affidavit or solemn declaration executed by the transferring lawyer.~~

Although Rule 7.5 does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

The new law firm might, for example, seek the former client’s consent to the transferring lawyer acting for the new law firm’s client in the matter because, absent such consent, the transferring lawyer must not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that there will be no disclosure of the former client’s confidential information to any member of the new law firm. If such measures are taken, it will strengthen the new law firm’s position if it is later determined that the transferring lawyer did in fact possess confidential information that, if disclosed, may prejudice the former client.

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~~A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client.~~ A former client who ~~disputes the allegation of no~~alleges that the transferring lawyer has such confidential information may apply under Rule 7.8 for an opinion of the Society or a determination by a court on that issue.

(c) **If the new law firm is not sure whether a conflict exists**

There may be some cases in which the new law firm is not sure whether the transferring lawyer possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm.

In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

Reasonable measures to ensure non-disclosure of confidential information

3. As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm:
 - (a) if the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and
 - (b) if the new law firm is not sure whether the transferring lawyer possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Rather, the new law firm that seeks to implement reasonable measures must exercise professional judgement in determining what steps must be taken "to ensure that there will be no disclosure to any member of the new law firm."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm or a legal aid program may be able to argue that, because of its institutional structure, reporting relationships, function, nature of work and

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geography, relatively fewer “measures” are necessary to ensure the non-disclosure of client confidences.

~~The Adoption of all guidelines may not be realistic or required in all circumstances, but lawyers should document the reasons for declining to conform to a particular guideline. Some circumstances may require extra measures not contemplated by the guidelines. at the end of this Appendix, adapted from the Canadian Bar Association’s Task Force report entitled *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.~~

~~In cases in which~~ When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new “law firm,” the interests of the new client (i.e., Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of paragraph 7.4(b), ~~particularly clause (i)(E).~~

GUIDELINES:

1. The screened lawyer should have no involvement in the new law firm’s representation of its client.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the prior representation with the screened lawyer.
- ~~4. The current client matter should be discussed only within the limited group that is working on the matter.~~
- ~~5. The files of the current client, including computer files, should be physically segregated from the new law firm’s regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.~~

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- ~~6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.~~
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
- ~~8. Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.~~
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised:
 - (a) that the screened lawyer is now with the new law firm, which represents the current client, and
 - (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
10. Unless to do otherwise is unfair, insignificant or impracticable, The the screened lawyer should not participate in the fees generated by the current client matter.
11. The screened lawyer's office or work station should be located away from the offices or work stations of those working on the matter.
12. The screened lawyer should use associates and support staff different from those working on the current client matter.