The Law Society of British Columbia

Agenda

Benchers

Date: Friday, March 2, 2012

Time: **7:30 a.m.** Continental breakfast
8:30 a.m. Meeting begins

Location: Bencher Room, 9th Floor, Law Society Building

BENCHERS'S OATH OF OFFICE:
At the next regular Benchers meeting attended by a Bencher after being elected or appointed, the Bencher must take an oath of office (in the form set out in Rule 1-1.2) before a judge of the Provincial Court or a superior court in British Columbia, the President or a Life Bencher. Victoria County Bencher Kathryn Berge, QC will take her Oath of Office before the President.

CONSENT AGENDA:
The following matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. If any Bencher wishes to debate or have a separate vote on an item on the consent agenda, he or she may request that the item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Bill McIntosh) prior to the meeting.

1	**Minutes of January 27, 2012 meeting** • Draft minutes of the regular session • Draft minutes of the in camera session (Benchers only)	pg. 1000
2	**Rule amendments to implement the Quebec Mobility Agreement addendum to allow Quebec notaires to be Canadian Legal Advisors; Amendments to Rules 2-23.1, 2-23.2 and others** • Memorandum from Mr. Hoskins for the Act and Rules Subcommittee	pg. 2000
3	**2011 and forward Key Performance Measures – Adjustment to Lawyers Insurance Fund KPM** • Memorandum from the Audit Committee	pg. 3000

REGULAR AGENDA		
4	**President's Report** • Written report to be distributed electronically prior to meeting	
5	**CEO's Report** • Written report	pg. 5000
6	**Review of the Law Society's Draft 2011 Financial Statements** Mr. Vertlieb to introduce as Chair of the Finance Committee Mr. McGee and Ms. McPhee to report • Law Society of BC Draft 2011 Financial Statements (see Appendix A to CEO's Report to the Benchers for March 2012)	pg. 5004
7	**Federation of Law Societies Representative's Report** Mr. Hume to report	
8	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	
GUEST PRESENTATIONS		
9	**Federation of Law Societies: National Admission Standards Report** • Presentation by Don Thompson, QC, Executive Director, Law Society of Alberta and Alan Treleaven, Director of Education, Law Society of BC	
2012 – 2014 STRATEGIC PLAN IMPLEMENTATION		
10	**Strategic Plan Implementation Update** Mr. LeRose and Mr. McGee to report	
OTHER MATTERS For discussion and/or decision		
11	**2011 Key Performance Measures** Ms. Andreone and Mr. McGee to report • Report on 2011 Performance	pg. 11000

12	**New BC Code of Conduct (Conflicts Provisions): Based on Federation of Law Societies Model Code of Conduct** Mr. Getz to report • Report from the Ethics Committee	pg. 12000
13	**Rural Education and Access to Lawyers (REAL) Initiative: Terms of Reference and Criteria for REAL Summer Student Funding Program** Ms. Kerry Simmons and Mr. Treleaven to report • Memorandum from Mr. Treleaven	pg. 13000
14	**Recommendation by Independence and Self-Governance Committee for New Name and Mandate** Ms. Berge to report • Memorandum from the Independence and Self Governance Advisory Committee	pg. 14000
FOR INFORMATION ONLY		
15	**Lawyers Insurance Fund: Program Report for 2011** • Presentation by Ms. Forbes, Director of Insurance	
16	**CBA Midwinter Meeting of Council (February 10 - 12, 2012, Cancun, Mexico): Report by Ms. Berge as the Law Society's Representative to CBA National Council**	
17	**Approval of University of Montreal Law Degree** • Memorandum from Mr. Treleaven	pg. 17000
18	**Report on 2011 Bencher Survey Results** • Report from Mr. van Vianen, Executive Support Administrator	pg. 18000
19	**Record of Bencher Advice to Law Society Members** • Memorandum from Ms. Drozdowski	pg. 19000
IN CAMERA SESSION		
20	**Bencher Concerns**	

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, January 27, 2012

Present:

Bruce LeRose, QC, President
Art Vertlieb, QC, 1st Vice-President
Jan Lindsay, QC 2nd Vice-President
Rita Andreone, QC
Patricia Bond
David Crossin, QC
Thomas Fellhauer
Leon Getz, QC
Bill Maclagan
Nancy Merrill
Maria Morellato, QC
David Mossop, QC
Thelma O'Grady
Lee Ongman
Vincent Orchard, QC
Greg Petrisor
David Renwick, QC
Philip A. Riddell
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Ken Walker
Tony Wilson
Barry Zacharias
Haydn Acheson
Satwinder Bains
Stacy Kuiack
Peter Lloyd, FCA
Ben Meisner
Claude Richmond

David Loukidelis, QC, Deputy Attorney General of BC, representing the Attorney General

Absent: Kathryn Berge, QC

Staff Present:

Tim McGee
Deborah Armour
Robyn Crisanti
Lance Cooke
Su Forbes, QC
Jeffrey Hoskins, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Lesley Pritchard
Susanna Tam
Alan Treleaven
Rosalie Wilson
Adam Whitcombe

Guests:

Chris Axworthy, QC, Dean, Faculty of Law, Thompson Rivers University
Dom Bautista, Executive Director, Law Courts Center

Mark Benton, QC, Executive Director, Legal Services Society
Johanne Blenkin, Executive Director, Courthouse Libraries BC
Mary Anne Bobinski, Dean, Faculty of Law, University of BC
Kari Boyle, Executive Director, Mediate BC Society
Maureen Cameron, Director of Membership, Volunteers and Public Affairs, CBABC
Donna Greschner, Dean, Faculty of Law, University of Victoria
Jeremy Hainsworth, Reporter, Lawyers Weekly
Marc Kazimirski, First Vice-President, Trial Lawyers Association of BC
Jamie Maclaren, Executive Director, Access Pro Bono
Caroline Nevin, Executive Director, CBABC
Rob Seto, Director of Programs, CLEBC
Kerry Simmons, Vice-President, CBABC

OATH OF OFFICE

The Honourable Lance Finch, Chief Justice of British Columbia, administered the swearing / affirming of:

- the President's Oath of Office by the Law Society's President for 2012, Bruce LeRose, QC
- the Vice-President's Oath of Office by the Law Society's First and Second Vice-Presidents for 2012, Art Vertlieb, QC, and Jan Lindsay, QC respectively
- the Bencher's Oath of Office by the Law Society's Benchers for 2012

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on December 2, 2011 were approved as circulated.

The following resolutions were passed unanimously and by consent.

2. (And item 4) Approval of External Appointments and Nominations:

a. to the Hamber Foundation Board of Governors

BE IT RESOLVED:

- to re-appoint Emily Reid, QC to the Hamber Foundation Board of Governors, for a three-year term commencing March 1, 2012; and

- to appoint Mark Killas to the Hamber Foundation Board of Governors, for a three-year term commencing March 1, 2012.

b. to the City of Vancouver Building Board of Appeal

BE IT RESOLVED:

- to nominate Edna Cheung for Vancouver City Council's re-appointment to the Building Board of Appeal for a second three-year term, effective at such date as Vancouver City Council may direct.

3. Approval of Amendment to the Law Society Rules: Adding Proposed Rule 2-68.1 (Inactive Credentials Applications)

BE IT RESOLVED to amend the Law Society Rules by adding the following Rule:

Inactive applications

2-68.1 (1) When the Credentials Committee has ordered a hearing under this division and the applicant has taken no steps to bring the application to a hearing for one year, the application is deemed abandoned.

(2) When an application is abandoned under this Rule, Law Society counsel may apply for an order that some or all of the funds paid under Rule 2-62 as security for costs be retained by the Society.

(3) An application under subrule (2) is made by notifying the following:

(a) the applicant;

(b) the Executive Director.

(4) On an application under subrule (3), the President may order that some or all of the funds deposited as security for costs be retained by the Society, and the remainder, if any, be refunded to the applicant.

(5) The President may designate another Bencher to make a determination under subrule (4).

REGULAR AGENDA – for Discussion and Decision

5. President's Report

Mr. LeRose briefed the Benchers on some of his activities as President in the month of January, including those outlined below:

- attending a Town Hall meeting with Law Society staff
- conducting a briefing of Chairs and Vice-Chairs of the 2012 Advisory Committees regarding implementation of the 2012 – 2014 Strategic Plan
- attending the introductory meeting of the Governance Review Task Force

Mr. LeRose discussed his intention to devote much of his attention and energy as 2012 President to positive communication with the public, lawyers and other Law Society stakeholders regarding the extensive programs and services—ranging beyond professional regulation and discipline—devoted to proactive support and enhancement of lawyers' legal and practice skills.

Mr. LeRose also highlighted the importance of the Law Society governance review to be conducted over the coming year. He thanked the Benchers for their cooperation and support in making time to participate the upcoming interview process, and encouraged them to take full advantage of the opportunity to provide meaningful input. Mr. LeRose noted that he and Mr. McGee intend to provide the Benchers with regular updates on the work of the Governance Review Task Force as the year progresses, and that the task force intends to deliver its report and recommendations to the Benchers in the fall of 2012.

Mr. LeRose concluded by expressing appreciation on behalf of all the Benchers to the Law Society's dedicated staff for the value of their commitment to advancing the Society mandate to protect the public interest in the administration of justice.

6. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (Appendix 1 to these minutes), including the following matters:

a. 2009 – 2011 Strategic Plan Wrap-up

b. Operational Priorities for 2012

   i. Project Leo

   ii. Continued Implementation and Assessment of our 2010 Regulatory Plan

iii. Review of Performance Management Process and How it Ties Into Recognition

iv. Lawyer Advice and Support Assessment Project

v. National Standards and the Federation Task Forces

c. Continuing Professional Development (CPD) Program – Update

d. Indigenous Lawyers Mentoring Program – Update

e. Core Process Review – One Year Later

f. 2011 Employee Survey

7. Federation of Law Societies Representative Report

Mr. Hume reported as the Law Society's FLS Council representative. He referred the Benchers to the written report of Federation President John Hunter, QC, circulated before the meeting. Mr. Hume updated the Benchers on various Council matters, including:

a. Model Code of Professional Conduct

- after several years of deliberation by a number of Federation committees, the Model Code of Professional Conduct is finally complete
- the Standing Committee on the Model Code will be examining the professional conduct issues raised by the unbundling of legal services, on the recommendation of the Federation's Access to Legal Services Committee

b. Territorial Mobility Agreement Extension

- last fall Council agreed to an indefinite extension of the Territorial Mobility Agreement
- at its last meeting Council committed to revisit impediments to applying the National Mobility Agreement to the territorial law societies, within three years

c. National Discipline Standards Pilot Project

- a two-year pilot project has been approve to measure discipline standards applied by Canada's law societies in the areas of timeliness, fairness,

transparency, public participation and accessibility in matters dealing with complaints about and discipline for members of the legal profession

Mr. Hume encouraged the Benchers to contact him any time with their questions on Federation Council matters.

8. Report on Outstanding Hearing & Review Reports

The Benchers received and reviewed a report on outstanding hearing decisions.

GUEST PRESENTATIONS

9. University of British Columbia, Faculty of Law Annual Review

Dean Mary Anne Bobinski delivered a presentation to the Benchers on behalf of the University of British Columbia's Faculty of Law and then took a number of questions.

10. University of Victoria, Faculty of Law Annual Review

Dean Donna Greschner delivered a presentation to the Benchers on behalf of the University of Victoria's Faculty of Law and then took a number of questions.

11. Thompson Rivers University, Faculty of Law Annual Review

Dean Christopher Axworthy, QC delivered a presentation to the Benchers on behalf of the Thompson Rivers University's Faculty of Law and then took a number of questions.

OTHER MATTERS – For Discussion and/or Decision

12. National Discipline Standards

Ms. Armour reported as the Law Society's Chief Legal Officer and member of the Steering Committee for the Federation's National Discipline Standards Project.

Ms. Armour outlined the background and purpose of the project, noting that the National Discipline Standards initiative is part of the following Federation strategic objective for 2010 – 2012:

> ***To develop and implement high, consistent and transparent national standards for Canada's law societies in core areas of their mandates.***

Ms. Armour reviewed a number of the standards being measured in the National Discipline Standards Pilot Project, referring the Benchers to her memorandum at page 12000 of the meeting

materials for details. She noted that the purpose of the pilot project is to test the standards, and that the Law Society is committed to participating in the project.

13. Approval of Final Report and Recommendations of the Cloud Computing Working Group

Mr. Hume reported as Chair of the Cloud Computing Working Group. He reminded the Benchers that at their July 2011 meeting they had approved the report of the Cloud Computing Working Group for purposes of publication as a consultation document. Mr. Hume confirmed that the working group's present report (at page 13002 of the meeting materials) is an amended version of its original report, taking into account feedback received during the consultation process.

Mr. Hume thanked the other members of the working group (2012 President Bruce LeRose, QC, and appointed Benchers Stacy Kuiack and Peter Lloyd, for their hard work on the project. Mr. Hume also acknowledged with thanks the crucial support provided to the working group by Staff Lawyer Doug Munro, in coordinating the group's research and deliberations, and in leading the drafting of its report.

Mr. Hume noted that in framing its report and recommendations the Cloud Computing Working Group's accepted that cloud computing is a global reality, and drew on two perspectives:

- the Law Society's regulation of professional responsibility
- lawyers' responses to the Law Society's regulatory activity.

Mr. Hume described the report's three areas of recommendations as:

- development of guidelines for lawyers to follow – attached to the report, being submitted to the Bs for approval
- proposed revisions to the Law Society Rules noted in the report
- education

Mr. Lloyd moved, seconded by Mr. Kuiack, that the Benchers adopt the Cloud Computing Working Group report and recommendations, as set out at page 13002 of the meeting materials.

The motion was carried.

Mr. Hume advised that the Cloud Computing Working Group intends to develop a simplified checklist for the use of the legal profession.

Mr. LeRose noted that the Cloud Computing Working Group will remain in place as presently constituted until its work has been completed. Mr. LeRose thanked Mr. Hume on behalf of all the Benchers for his dedication and leadership in seeing this complex and challenging matter through to its conclusion.

14. Nominations to 2012 Finance Committee

Mr. LeRose briefed the Benchers, and called for nominations of two elected Benchers (at least one of whom must not be a member of the Executive Committee), and one appointed Bencher (who must be selected by his or her fellow appointed Benchers).

a. Two Elected Benchers

Mr. Vertlieb nominated Mr. Renwick and Ms. Andreone nominated Mr. Maclagan. There being no further nominations, Mr. LeRose declared Mr. Renwick and Mr. Maclagan selected to the 2012 Finance Committee, effective immediately.

b. One Appointed Bencher

Mr. Acheson nominated Mr. Lloyd. There being no further nominations, Mr. LeRose declared Mr. Lloyd selected to the 2012 Finance Committee, effective immediately.

IN CAMERA SESSION

The Benchers discussed other matters in camera.

WKM
2012-02-20

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

January 27, 2012

Introduction

This is my first CEO's report to the Benchers for 2012 and I would like to wish you all the very best for the New Year. I would also like to extend a warm welcome on behalf of all the staff to our new President Bruce LeRose, QC and to both our new and returning Benchers. We look forward to working with all of you in the coming year.

In my first report each year I present management's top five operational priorities for the ensuing year. These priorities, which for 2012 are set out below, have been developed in consultation with the Management Board and have been reviewed and discussed with President LeRose and the Executive Committee. I have also met with Bruce to review his Presidential priorities for 2012, which he will speak to at the Bencher meeting.

I am also attaching a final report on the completion of the 2009 – 2011 Strategic Plan, which has been prepared by Michael Lucas, Director of Policy and Legal Services. You will also see updates on a number of different items below, which will be covered in more detail at the meeting.

1. 2009 – 2011 Strategic Plan Wrap-up

Attached as Appendix 1 please find a document entitled "2009 – 2011 Strategic Plan – Final Report".

This report describes the final status as at December 31, 2011 of every initiative under our former three-year strategic plan. As you will see, some of the initiatives are ongoing and have been carried over by the Benchers into the new 2012 – 2014 Strategic Plan. However, the vast majority have been successfully completed. In sum, over 95% of the initiatives as originally envisaged in the plan are either complete, or ongoing. I believe that is an excellent measure of how productive the Benchers, committees and staff have been in delivering the plan since its adoption at the beginning of 2009.

2. Operational Priorities for 2012

At the start of each year, I outline management's top five operational priorities for the next twelve months. I always emphasize that these do not derogate from our day-to-day responsibility to perform all of our core regulatory functions to the highest standards. However, in each year there are items that require extra attention and focus to ensure success. The top five operational priorities for management in 2012 are as follows:

(a) Project Leo

One of the key recommendations in the 2010 Core Process Review Report was the establishment of an internal working group to design, develop and oversee the implementation of a new information management system for all Law Society operations. The compiling, recording, sharing and safeguarding of information is at the heart of what we do as the regulator of the profession. Today, we have a patchwork of systems and processes, which, while adequate for now, will not serve us well as we seek to be more effective and efficient in the future.

This important project has been given the name Project Leo. The main objective of Leo is the design, procurement and rollout of an integrated information management tool by the end of June 2013.

Project Leo is well underway under the joint executive sponsorship of Adam Whitcombe, our Chief Information and Planning Officer, Jeanette McPhee, our Chief Financial Officer, and Robyn Crisanti, our Manager of Communications and Public Affairs. Robyn is the project leader heading up a cross-organizational project team. By the end of last year, Robyn and her team had designed and completed a rigorous RFP, selected KPMG for IS/IT consulting support, finalized a scope of work and laid out a work plan to take the project through to completion in 2013. There are several important milestones for Leo in 2012 and we will be reporting to the Executive Committee, the Finance Committee and the Benchers as we progress throughout the year.

(b) Continued Implementation and Assessment of our 2010 Regulatory Plan

Throughout 2011 Deb Armour, our Chief Legal Officer, and her team have steadily implemented the features of the new Regulatory Department Plan presented to the Benchers at the end of 2010. This has included the recruitment of new staff with specific targeted skills sets, the restructuring of a number of important reporting relationships, and the adoption of new policies and investigative techniques agreed to by the Discipline Guidelines Task Force in 2011.

In developing the plan, we made a number of operational assumptions about how the changes embodied in the plan would positively impact the outcomes of our regulatory processes. In 2012 we will be focused not only on continuing to implement the plan but also on testing the accuracy of our assumptions and making assessments on its success. We plan to report back to the Benchers on an interim basis at mid-year and at year-end to share and discuss the results.

(c) Review of Performance Management Process and How it Ties Into Recognition

The Law Society's most important asset is its people. One of the most important investments we can make in our staff is to ensure that we properly and effectively set expectations, give guidance and support, provide performance assessment and feedback, and compensate fairly.

We have a comprehensive performance management process today, which involves every employee discussing roles and responsibilities with their manager and receiving an annual performance assessment. Tied to this we also administer an Employee Recognition Program under which employees are eligible for annual cash recognition awards based upon outstanding performance or exceptional contributions.

While our current performance management process has served us well for the past five years it is an area that is rapidly evolving in many external organizations and we want to ensure we are not left behind. Accordingly, we will be undertaking a full review to assess whether our performance management process can be improved to better meet our objectives. Similarly, we will be reviewing our current Employee Recognition Program to assess whether that program is in fact, aiding our efforts of incenting performance, encouraging retention and assisting with recruitment, and how, it too, can be improved.

(d) Lawyer Advice and Support Assessment Project

One of the three major strategic recommendations in the Core Process Review Report was the establishment of an internal working group to make a full assessment of the strengths and opportunities of our current model for delivering member advice and support services.

Underlying this recommendation was the realization that while we are a regulator it is very much in our interests to assist and support members to be aware of, understand, and comply with our regulatory standards. This is also very much in the interests of our members. In other words, an effective and integrated program of member support and assistance is virtuous in the regulatory context because it benefits both the regulator and the regulated.

Today we provide a wide variety of assistance and support to members including online courses for the small firm practitioner , email alerts to the entire profession about current frauds and scams, telephone practice advice about questions of ethics or professional responsibility, and in-house trust compliance seminars, to name a few.

The questions regarding these activities, which we are seeking to answer in 2012, are what is most useful, who can best deliver it and how is it best delivered?

In the fall of 2011, Alan Treleaven, our Director of Education and Practice, delivered a preliminary report of the cross-departmental working group on Lawyer Advice and Support Assessment. The preliminary findings will be shared with the Executive Committee in 2012 with a view to considering several new options for consolidating and expanding the work we do today to support and assist members with all aspects of regulatory compliance.

(e) National Standards and the Federation Task Forces

The Federation has made the work of its task forces on national discipline standards and national admission standards priorities in the Federation's current strategic plan. The Law Society is heavily involved in the work of those task forces through the contributions of several of our senior staff. We will also continue to be involved with the model code as that initiative moves to the education and communication phase across all Law Societies.

In 2012 we should expect a great deal of interest in the launch of a pilot project on national discipline standards. The Law Society will be participating in that pilot project. Deb Armour, who has been a major contributor to the task force, will be reporting more on this initiative during the year. The work on national admissions standards is less advanced but will also be an important topic for us to assess from an operational perspective in 2012.

While the foregoing are our top operational priorities for 2012, management and staff will also be supporting the Governance Review Task Force in 2012 in whatever fashion may be of most assistance.

3. Continuing Professional Development (CPD) Program - Update

I would like to provide a brief update on the statistics for our CPD program as at January 17, 2012. Of the 10,249 lawyers who had CPD requirements to report in 2011, 671 did not report completion end-of-year deadline. As of January 17, 2012

- 134 have now recorded completion;
- 445 have not yet recorded completion and are overdue; and

- 92 lawyers have a non-practicing status or ceased membership; they will be required to complete the CPD requirements if they return to practice.

We have notified all lawyers who have not completed their requirements and advised them about the deadline to complete CPD by April 1, 2012 to avoid suspension.

These results reflect an improvement over 2011, when 723 lawyers did not meet the 2010 requirement by the end-of-year deadline. This is the third consecutive year of improvement in these statistics.

Alan Treleaven will be available at the meeting to discuss these results and the steps being taken to follow up on members with incomplete results.

4. Indigenous Lawyers Mentoring Program – Update

The Law Society has undertaken as one of its strategic initiatives the development of a collaborative mentoring program to support indigenous lawyers in British Columbia.

The Law Society believes that the public is best served by a representative and inclusive legal profession. With this in mind, the mentoring program has three main objectives; first, to enhance the retention of indigenous lawyers in BC, second, to increase the diversity within the profession, and third, to improve access to legal services for indigenous people in BC.

We are fortunate that Ms. Rosalie Wilson has joined the Law Society of BC on contract as the Indigenous Lawyers Mentoring Program Coordinator. Rosalie brings an impressive background and relevant experience to this important project. Although it is still early in the year, Rosalie will update the Benchers on her work and progress to-date.

5. Core Process Review – One Year Later

It has been over a year since the Law Society's Core Process Review Report was presented to the Benchers in December 2010. Based on more than 800 suggestions made by staff during the review process, the report made a number of recommendations, including three major recommendations for improvement in the areas of information access and document management, practice support delivery, and regulatory reform.

The Core Process Review Project was very ably led by Kensi Gounden, who took on the special assignment of Project Leader during 2010. I have asked

Kensi to assess where we are “One Year Later” and to share his findings with the Benchers.

6. 2011 Employee Survey

Ryan Williams, the President of TWI Surveys Inc., will be at the meeting to provide an overview of the results of our 2011 Employee Survey and to respond to any questions.

This year’s survey (our sixth consecutive) was a little different from past years. While we repeated questions on a number of foundational topics, such as relationships with managers and satisfaction with compensation, we added a number of new questions designed to gauge how employees feel about the topics of autonomy, innovation and effectiveness. These are questions that help us understand what we consider our “culture”, and how that culture may help or hinder our efforts to build a strong working environment.

We had an excellent response rate for the survey and I think you will find the results both interesting and encouraging on several fronts.

Timothy E. McGee
Chief Executive Officer

The Law Society of British Columbia

2009 – 2011 Strategic Plan
Final Report

For: The Benchers

Date: December 31, 2011

Purpose of Report: Information

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. Finding ways to reduce the impacts of financial barriers to accessing legal services is of considerable importance and underlies the purpose of this goal. 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 reported on the information identification issues to the Benchers in 2009.

After engaging in additional consultation as may be required, the Task Force will work in 2010 toward making recommendations about whether and how the delivery of competent legal services might be improved in a number of ways. This might be done through increasing public awareness of available legal resources and information or providing greater certainty and reliability regarding the cost of legal services. It might also involve increasing the availability of effective and affordable legal services in areas of greatest public need, including determining under what circumstances people other than lawyers might be allowed to provide legal services in circumstances that are not currently permitted.

Final Status – December 2011

The Benchers approved the Task Force's Final report in October 2010 and this initiative has therefore been completed. Subsequent to the adoption of the Report:

- *The Benchers adopted recommendations of the Credentials Committee regarding expanded roles for articled students, with a September 1, 2011 implementation date;*

- *A Litigation Subgroup was created to liaise with the British Columbia Court of Appeal and the Provincial Court of British Columbia regarding expanded roles for articled students and paralegals. More recently the Family Law Task Force has joined this work to identify the parameters of a potential pilot project for paralegals appearing before the Supreme Court. Consultations with the courts are ongoing.*
- *A Solicitors Subgroup has drafted a set of best practice guidelines for lawyers supervising paralegals and provided it to the Ethics Committee for their consideration. The Ethics Committee has reviewed recommendations in the Report to determine what changes to the Professional Conduct Handbook are necessary and that work continues.*

Note: the continuation of work on the initiatives raised by the recommendations of the Delivery of Legal Services Task Force, are addressed in Initiative 2-1(a) of the 2012 – 2014 Strategic Plan.

Strategy 1–2

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

Initiative 1–2a

The Law Society will approach the Attorney General to discuss potential supplemental funding for legal aid and the justice system through amendments to the *Class Proceedings Act,* the *Civil Forfeiture Act* and the *Unclaimed Property Act*.

Final Status – December 2011

A letter was sent to the Attorney General in this regard raising the possibility with the government of additional funding through the amendments as proposed. This initiative has therefore been completed.

Initiative 1-2b

Alternate Business Structures ("ABSs"), by which legal services are offered through business structures differing from the standard partnership or sole-proprietorship model, have been identified in other jurisdictions as a way of reducing the cost of legal services, thereby increasing the affordability of access to legal services. However, concerns have also been identified that ABSs may adversely affect the core values of the legal profession, including the duty of loyalty to a client.

The Law Society will examine the literature on ABSs and develop a preliminary position concerning the subject.

Final Status – December 2011

The Independence and Self-Governance Advisory Committee has delivered its report on this issue in October, 2011, and this initiative has therefore been completed.

Strategy 1–3

Improve the retention rate of lawyers in the legal profession including, in particular, Aboriginal lawyers and women.

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, including women lawyers and Aboriginal 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 a diversity of lawyers. The Benchers identified the following two initiatives to accomplish the desired outcome.

Initiative 1–3a(i)

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

Following up on a recommendation of the Retention of Women in Law Task Force, a task force has been created to prepare a business case for the retention of women in private practice.

Final Status – December 2011

The business case was adopted by the Benchers in July 2009.

Initiative 1-3a(ii)

The Retention of Women in Law Task Force recommended that the Law Society consider developing a think tank in BC, modeled after the *Justicia* project developed in Ontario, to address methods of improving the retention of women in private practice.

The Law Society will therefore conduct a feasibility assessment of a *Justicia BC* project to determine the level of interest of firms in working together with the Law Society to develop resources to retain and advance women lawyers in private practice.

Final Status – December 2011

A report on the feasibility of a Justicia project was considered and approved by the Benchers in December 2012, and this initiative has therefore been completed. Implementation of the Justicia project was approved and will form a part of the next Strategic Plan.

Note: this initiative is carried forward as Initiative 2-1(b) in the 2012 – 2014 Strategic Plan.

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 in 2010 concerning how the issue may be advanced as a strategic priority in the future.

Final Status – December 2011

While aging of the legal profession continues to be an issue of concern, the Benchers have recognized that it will not be possible to fully analyze the issue and to develop strategies to address it by the end of 2011. The Benchers therefore deferred the matter for consideration to the next Strategic Plan.

Initiative 1-3c

Prepare a business case for enhancing diversity in the legal profession and retaining Aboriginal lawyers in particular.

The Equity and Diversity Advisory Committee will review recent research regarding retention of lawyers from diverse communities, and Aboriginal lawyers in particular, and develop a business case for diversity and the retention of Aboriginal lawyers in British Columbia.

Status – December 2011

The Advisory Committee has developed a case for enhancing diversity and retaining Aboriginal lawyers, founded on recent demographic data which indicate that Aboriginal lawyers are significantly underrepresented in the profession. The case for diversity will also include current best practices related to lawyer retention. The case is currently under review and revision and will be released soon in conjunction with the demographic report on the profession.

Initiative 1-3d

Develop and deliver initiatives to support Aboriginal lawyers and students.

The initiatives will address specific barriers to lawyer retention as identified by research, and will include initiatives to address the lack of access to mentors, networks and role models. The Law Society will also consider what additional resources are needed in order to advance the strategic objective of enhancing the retention of Aboriginal lawyers.

Final Status – December 2011

The Advisory Committee developed a proposal to work with Aboriginal lawyer groups and organizations to build a collaborative mentoring initiative for Aboriginal lawyers throughout BC. Funding was obtained from the Law Foundation. A lawyer was hired in November 2011 to work on the project, beginning with a consultation phase. The initiative is therefore underway and will continue.

Note: The initiative is carried forward as Initiative 2-1(c) in the 2012 – 2014 Strategic Plan.

Strategy 1-4

Developing in collaboration with interested parties a research project, through a suitable agency, of an economic analysis of the justice system in British Columbia in order to better understand in empirical terms the economic benefit of funding justice and the systems that support the rule of law.

Final Status – December 2011

The Law Foundation and the Legal Services Society have retained a consultant to engage in preliminary research into the subject and an initial report is expected in early 2012, at which time the Committee will be better able to identify what role the Law Society might play in further research.

Note: This initiative is carried into the 2012 – 2014 Strategic Plan as Initiative 2-3(a)

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.

Final Status – December 2011

The staff group has identified and is currently working on several projects aimed at reducing the number of complaints that complaint-prone lawyers receive.

The Benchers considered "ungovernability" and referred to the Act and Rules Subcommittee consideration and development of rules and possible Professional Conduct Handbook amendments. Rule 4-35(5) has been passed and changes to the Handbook were completed in November, 2010.

The staff group conducted the early intervention project in conjunction with the Discipline Committee. A Report on that project was made to the Benchers at the July 9, 2010 meeting. The complaint rates of the lawyers in the groups will be compared periodically with the complaint rates of a historically comparable group to determine whether the interventions had any impact on the target groups.

The staff group continues work on developing criteria for referral of lawyers to the Discipline Committee on the basis of their complaints history and referring lawyers who are Practice Standards graduates to the Discipline Committee if the lawyer repeats conduct of concern. The staff group has identified several other projects for consideration including practice reviews for client satisfaction and mentorship considerations. The work of this group is now primarily operational, and it will continue.

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 formed the substantive policy program at the Benchers' June 2009 retreat. The Executive Committee discussed this topic at its September 2009 meeting and determined that the Law Society would best focus on regulatory oversight models that incorporated voluntary external review or review incorporating the Ombudsman's processes. The Committee instructed staff to develop this topic further for presentation to the Benchers at a later date, expected in the spring of 2010.

Final Status – December 2011

The Benchers considered this subject at the 2009 retreat in Whistler. The Executive Committee discussed this topic at its September 2009 meeting and determined that the Law Society would best focus on regulatory oversight models that incorporated voluntary external review or review incorporating the Ombudsman's processes should be developed further. Staff presented a further report to the Executive Committee in May 2010, and were instructed to include a policy analysis of a third model similar to the organizational audit or peer review process the accounting profession utilizes to ensure best practices. A Report to the Benchers examining the models was presented to the Executive Committee in November 2010, from which recommendations were made and presented to the Benchers in March 2011.

The initiative of assessing possible roles of oversight or review boards has been completed. Further consideration about the topic, including policy discussions about how or whether to implement any particular option will continue.

Note: This initiative is carried into the 2012 – 2014 Strategic Plan as part of Initiative 1-2(a).

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 Benchers have created a Task Force to develop models by which the separation of the adjudicative and investigative functions of the Law Society could be accomplished and to make recommendations about which model to adopt.

Final Status – December 2011

The initiative was completed when the recommendations made by the Task Force Examining the Separation of Adjudicative and Investigative Functions of the Benchers were adopted at the July 2010 Benchers meeting. Rule changes and further policy decisions concerning the process of appointments have been approved. Non-lawyer and non-bencher lawyer tribunal members have been identified, training sessions have begun, and several hearings utilizing non-bencher tribunal members have taken place.

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.

Final Status – December 2011

The Equity and Diversity Advisory Committee has completed a demographic report regarding the participation of Aboriginal and visible minority lawyers in BC, based on analysis of 2006 Census data. Based on a promotional plan developed with advice from the Communications department, the demographic report will be released soon in conjunctions with the case for diversity referenced in Initiative 1-3d above, as the two initiatives are very closely linked. The initiative has therefore been completed, and the data gathered will be used for future policy determinations.

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.

Final Status – December 2011

The Benchers approved amendments to the Act *as recommended by the Act and Rules Subcommittee*. *A request for amendments has been made to the Attorney General's Ministry.*

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.

This Initiative has been completed and rules have been passed, to be effective July 1, 2010.

Final Status – December 2011

The Ethics Committee has completed its analysis. The issue was considered by the Benchers in July 2009 at which time the Benchers resolved in principle to permit multi-disciplinary partnerships on the Ontario model subject to the preparation of draft Rules to ensure that important values of the legal profession are not compromised, as well as liability insurance issues. Rules to implement the decision came into effect on July 1, 2010.

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, which is expected happen in early 2010.

Final Status – December 2011

The Barreau du Québec has implemented provisions permitting the mobility of common law lawyers to practise the law of their home province and federal law as members of the Barreau du Québec in Québec, and through the Federation of Law Societies, the rest of the provinces are finalizing reciprocal arrangements with Québec and the preparation of model rules through which to implement that arrangement. The Benchers passed rules to implement this arrangement on April 23, 2010 and they came in to effect July 1, 2010. Reciprocal arrangements have now also been made (as of late 2011) with the Chambre des Notaires du Québec, and rule changes are expected to follow shortly.

Initiative 2–6c

Modernizing 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.

This Initiative was completed in 2009, and new rules and amendments to the Professional Conduct Handbook have been approved.

Final Status – December 2011

The Ethics Committee presented its recommendations on this subject to the Benchers, and the Benchers approved changes to provisions relating to advertising in the Professional Conduct Handbook in May 2009.

Initiative 2–6d

Reconsidering policies regarding referral fees.

The Competition Bureau recommendations concerning referral fees were related to multi-disciplinary partnerships, which have now been addressed by the benchers. A general reconsideration of policies regarding referral fees is currently an item for consideration by the Ethics Committee, who may make recommendations to the Benchers at a later date depending on the outcome of that consideration.

Final Status – December 2011

The Ethics Committee has had this matter on its agenda for consideration, and has debated and made recommendations on fee sharing in the context of multi-disciplinary partnerships. The Committee considered fee sharing in June 2011, and noted that while there may be future merit for reconsideration of the fee sharing rule by the Federation of Law Societies in the context of its continuing review of the Model Code, for present purposes no action on the issue was required at this time.

Strategy 2-7

Re-examine the rules and internal processes of the Law Society relating to complaints, investigations and dispositions of professional conduct and competence matters in order to identify methods to improve the timely, thorough, fair and appropriate disposition of complaints and hearings.

Initiative 2-7

The timely and effective handling of complaints concerning the professional conduct or competence of lawyers resulting in appropriate disposition and sanction (as necessary) is an integral responsibility of the Law Society.

The Law Society will, through a task force designed for this purpose, re-examine Law Society rules and processes for handling complaints and discipline hearings to determine if there are methods by which to improve the timely, thorough, fair and appropriate disposition of professional conduct concerns, including the consistency of decisions and sanctions.

A staff group will also examine operational processes in connection with complaints and hearings to determine if improved operational procedures, staffing resources or the use of technology exist by which improvements to the timely, thorough, fair and appropriate dispositions of complaints and hearings can be made.

Final Status – December 2011

The Discipline Guidelines Task Force presented its interim report to the Benchers on July 9, 2010 in connection with its review and recommendations concerning holding in abeyance the investigation of a complaint.

In September 2010 the Benchers adopted the abeyance policy first presented in the Discipline Guidelines Task Force's interim report to the Benchers on July 9, 2010. In November 2010 the Benchers adopted the

Task Force's recommendations regarding the publication of Conduct Review summaries.

In June 2011, the Task Force presented its final report, in which it recommended that Guidelines to assist the Discipline Committee with its task of evaluating professional conduct matters and directing appropriate disciplinary responses be adopted. The Benchers adopted the Guidelines on June 18, 2011.

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 is now complete, 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.

Final Status – December 2011

The Lawyer Education Advisory Committee developed and presented a mentoring program to the Benchers, which the Benchers adopted at their May 2009 meeting. Rules necessary to implement the program were approved by

the Benchers in November 2009. The program was implemented commencing January 1, 2010.

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.

Final Status – December 2011

The Report of the Professionalism Working Group was presented to the Benchers in December 2010 and the recommendations were approved.

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.

Final Status – December 2011

The report of the Advocacy Working Group was presented to the Benchers with recommendations in December 2010, six of which were accepted. One was referred back for further consideration, and the Lawyer Education

Advisory Committee recommended in its 2011 Year end Report not to pursue it.

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.

Final Status – December 2011

The instructional video has been completed (and was shown to the Benchers in April 2009), as has the Teachers' Guide that accompanies the instructional video. The complete program has been delivered to high schools around the province. Law Society Communications staff are working with the Justice Education Society to further promote the DVD to teachers. In addition, the Law Society has completed a second-print run of 500 additional copies of the resource.

Initiative 3–4b

The 2009 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.

Final Status – December 2011

Mr. Turriff has completed his tour.

Initiative 3-4c

The Law Society will approach the law schools within the Province to enquire about establishing a program in which a presentation takes place early in the school year at which a Bencher and Law Society staff lawyer informs students about access to justice issues and opportunities in order to promote engagement by future lawyers in criminal, family and poverty law, as well as about the possibilities of working in smaller communities.

Final Status – December 2011

The presentation contemplated by this initiative took place at the law faculties of the University of British Columbia and the University of Victoria in the fall of 2011. Thompson Rivers University was not yet ready to introduce this component. Beginning in the 201-2013 academic year, the law faculties at the Universities of British Columbia and Victoria will be eliminating special "Professional Responsibility days" and will instead be introducing mandatory Professional Responsibility courses. Staff will follow up with the law faculties of those universities to ensure that the intent of this initiative is captured in those courses, and will work with Thompson Rivers University as it develops its upper year curricula.

Strategy 3-5

The Law Society will consider qualification standards or requirements for differing types of legal services. Are there some types of legal services that could be offered without the provider qualifying as a lawyer, and if so, what qualifications would be appropriate or required?

Initiative 3-5

The Lawyer Education Advisory Committee will prepare by the end of 2011 a preliminary report to give some context to and direction on the issue.

Status – December 2011

The Lawyer Education Advisory Committee delivered its report on this topic in December 2011, and further work is expected through the next Strategic Plan.

Note: This initiative is carried forward into the 2010-2014 Strategic Plan as Initiative 1-4(b).

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date: February 20, 2012
Subject: **Rules 2-23.1, 2-23.2 et al. -- Québec notaires mobility,**

At the meeting in September, 2011 the Benchers approved the Addendum to the Québec Mobility Agreement with the other law societies. The Addendum had been approved by the Council of the Federation of Law Societies and recommended to each of the member law societies for adoption and implementation.

That agreement would allow members of the Chambre des notaires du Québec to become Canadian Legal Advisors in British Columbia and the other common law jurisdictions on similar terms to those that apply to members of the Barreau du Québec. I attach the materials that were before the Benchers at that meeting, including the text of the Addendum, along with the minute of the discussion. I also attach a copy of the agreement.

The Act and Rules Subcommittee has approved draft amendments to the relevant Law Society Rules. A copy is attached, along with a suggested resolution to make the changes. The Subcommittee recommends the adoption of the resolution.

Because there is a difference in the scope of practice allowed to notaires, as opposed to members of the Barreau, under federal legislation and under the Addendum, the proposed amendment sets out the scope of practice for each in two very similar, but different, subrules. Notaires are not allowed to practise with regard to courts and tribunals except where there is specific statutory authority for them to do so. It was the judgment of the Federation that that ought to be reflected in the Rules implementing the agreement.

Attachments: Bencher materials, including Québec Mobility Agreement Addendum
Bencher minute, September 2011
draft rule amendments, clean and redlined
suggested resolution

Memo

The Law Society of British Columbia 2001

To Benchers

From Lesley Small

Date August 31, 2011

Subject **Addendum to the Québec Mobility Agreement**

The Council of the Federation of Law Societies of Canada has approved an addendum to the Quebec Mobility Agreement (the QMA Addendum). The QMA Addendum can only be implemented with the approval of individual law societies. President Gavin Hume, QC has requested that this matter be considered by the Credentials Committee, which will take place on September 8. The Committee's recommendations will be reported by the Chair, David M. Renwick, QC at the Benchers September 9, 2011 meeting.

Background

In August 2002 the Federation of Law Societies of Canada accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

Eight law societies, including the Barreau du Québec ("the Barreau"), signed the National Mobility Agreement ("NMA") on December 9, 2002. The NMA recognized that special circumstances applicable to the Barreau would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions. The signatories also recognized that the requirement for the Barreau to comply with regulations applicable to all professions in Québec would delay implementation of the NMA with respect to the Barreau.

In 2006, the law societies of all 10 provinces, including the Barreau, signed the Territorial Mobility Agreement, along with the law societies of all three territories. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces, for a five-year period ending January 1, 2012.

The Barreau subsequently implemented a scheme under which members of the law societies of the other provinces and the territories may become members of the Barreau and practise federal law and the law of their home jurisdictions as Canadian Legal Advisors. In 2010, the scope of the NMA was extended to include the provisions of the Quebec Mobility Agreement that the other provincial land territorial law societies reciprocate with the Barreau and implement provisions that permit members of the Barreau to become members of other law societies and practise federal and Québec law in other jurisdictions.

Addendum to the Québec Mobility Agreement

The purpose of the QMA Addendum is to extend mobility rights under the Canadian Legal Advisor ("CLA") regime to members of the Chambre des Notaires. The QMA Addendum is an adaptation of the Quebec Mobility Agreement, but as the Chambre is not a party to the NMA, it is intended as a stand-alone agreement.

As with all CLA's, a member of the Chambre acting as a CLA will not be practising the law of the host jurisdiction. The scope of the practice will be restricted to the law of Quebec, federal law and (where permitted by the host jurisdiction) public international law.

Discussion

If approved, the Law Society Rules will need to be amended to implement the provisions of the QMA Addendum (Rules are already in place in relation the new category of limited membership as a CLA, but those Rules are specific to members of the Barreau). Members of the Chambre des Notaires would hold the status and title in BC of a Canadian Legal Advisor (not as a notaire or notary).

The Memorandum from the Federation of Law Societies of Canada provides clarity around the nature of the notarial profession in Quebec as being equivalent to that practiced by lawyers; the meaning of the word "notary" in the Quebec context; and the distinction between notaries in Quebec and individuals who use a similar title, but do not have the equivalent professional credentials or status, outside of Quebec. The memorandum concludes with a discussion of the implications of the labour mobility provisions of the *Agreement on Internal Trade*.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

MEMORANDUM

FROM: Federation of Law Societies of Canada

TO: Canada's law societies

DATE: July 12, 2011

SUBJECT: Quebec Mobility Agreement and the Chambre des notaires du Québec

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INTRODUCTION

1. The following motion was adopted by the Council of the Federation of Law Societies of Canada on June 6, 2011:

> **WHEREAS** the Quebec Mobility Agreement was executed by all law societies except the Chambre des notaires du Québec on March 19, 2010;
>
> **WHEREAS** the Quebec Mobility Agreement extends the scope of the National Mobility Agreement by facilitating reciprocal permanent mobility between the common law jurisdictions and the Barreau du Québec;
>
> **WHEREAS** the Council of the Federation agreed to consider extending the provisions of the Quebec Mobility Agreement to members of the Chambre des notaires du Québec;
>
> **WHEREAS** the National Mobility Policy Committee has studied the matter and has recommended that the Quebec Mobility Agreement be extended to members of the Chambre des notaires du Québec through an addendum to such agreement;
>
> **RESOLVED THAT** the addendum to the Quebec Mobility Agreement attached as Appendix "A" be approved by Council for submission to member law societies for approval and execution.

2. Canada's law societies are now requested to approve the addendum to the Quebec Mobility Agreement attached as Appendix "A".

BACKGROUND

3. Facilitating the mobility of Canada's legal profession has long been a cornerstone of the national mission and purpose of the Federation of Law Societies of Canada as determined by its fourteen member law societies.

4. The National Mobility Agreement (the "NMA"), the QMA and the Territorial Mobility Agreement ("TMA") collectively provide the blueprint for the mobility regime currently in place across Canada in respect of all of the members of the legal profession who are governed by all of the members of the Federation, with one exception – the Chambre des notaires du Québec (the "Chambre').

5. The inclusion of the Chambre within the national mobility regime will complete the mobility framework for all of the members of the Federation.

6. The unique nature of Quebec's history and legal foundations may elicit questions among those less familiar with the notarial profession in Quebec. One purpose of this memorandum is to provide clarity around (i) the nature of that profession as being equivalent to that practiced by lawyers; (ii) the meaning of the word "notary" in the Quebec context; and (iii) the distinction between notaries in Quebec and individuals who use a similar title, but do not have the equivalent professional credentials or status, outside of Quebec.

7. Paragraphs 8 to 19 provide explanatory material with respect to the structure of the legal profession in Quebec and the division of the legal profession between notaries and advocates, and related matters. Paragraphs 20 to 28 deal specifically with the proposed addendum to the QMA. The memorandum concludes with a discussion of the implications of the labour mobility provisions in the *Agreement on Internal Trade* (the "AIT").

BACKGROUND

Structure of the Legal Profession in Quebec

8. Quebec's legal system is founded on the French civil law system and its institutions. Those institutions are reflected in the division of the legal profession in Quebec between "avocats" (advocates) who are members of and are governed by the Barreau du Québec (the "Barreau") and "notaires" (notaries), who are members of and are governed by the Chambre). What distinguish the two branches of the legal profession in Quebec are their respective areas of exclusive jurisdiction: only notaries may prepare and authenticate certain types of documents, and only advocates litigate. The profession of advocate in Quebec today may be likened to the profession of barrister and solicitor in the rest of Canada, while the profession of notary in many ways resembles that of a UK solicitor.

Legal Education

9. The initial legal education for advocates and notaries is the same; both attend law school for three years to obtain a civil law degree. It is once they have obtained that degree that students choose to become either an advocate or a notary. Those wishing to become advocates must attend bar school and complete the Barreau's requirements for

admission to the bar, including articling and bar exams, while those wishing to become notaries must complete an additional year at one of four designated law faculties (Université Laval, Université de Sherbrooke, Université de Montréal, or the University of Ottawa) to obtain either a Diplôme de droit notarial or a masters degree in law with a specialization in notarial law. Students must then complete a 32-week internship program (akin to articling), and successfully complete the final exam set by the Chambre before applying for admission to the Chambre and the right to practice as a notary.

Roles of Notaries

10. The Quebec *Notaries Act* (the *"Act"*) confers on notaries the status of both public officer and legal advisor. The *Act* also reserves to notaries exclusive jurisdiction to perform certain acts. Section 15 of the *Act* states

> 15. Subject to the provisions of section 16[1], no person other than a notary may, on behalf of another person,
>
> (1) execute acts which, under the Civil Code or any other legislative provisions, require execution in notarial form;
>
> (2) draw up acts under private signature relating to immovables and requiring registration in the land register or the cancellation of such registration;
>
> (3) prepare or draw up an agreement, motion, by-law, resolution or other similar document relating to the constitution, organization, reorganization, dissolution or voluntary winding-up of a legal person or the amalgamation of legal persons;
>
> (4) prepare or draw up the administrative declarations and applications prescribed by the legislative provisions relating to the legal publicity of sole proprietorships, partnerships and legal persons;
>
> (5) give legal advice or opinions;
>
> (6) send a demand letter arising from an act he or she has executed, provided there is no charge to the person to whom it is addressed;
>
> (7) represent clients in any non-contentious proceeding, prepare, draw up or present any related motion on their behalf or uncontested motions in adoption proceedings, for judicial recognition of the right of ownership, for the voluntary partition of property, for the acquisition of the right of ownership by prescription, for registration in the land register or in the register of personal and movable real rights, or the correction, reduction or cancellation of a registration in either of those registers, or for the cancellation of an entry or the filing of a declaration in the register instituted under the Act respecting the legal publicity of sole proprietorships, partnerships and legal persons (chapter P-45) or the correction or deletion of any inaccurate information appearing in that register.

11. In addition to the roles of public officer and legal advisor, notaries have been vested by the Quebec *Civil Code* with a quasi-judicial authority to conduct and conclude

[1] Section 16 of the *Act* provides that the provisions in section 15 do not restrict the rights conferred on advocates under the *Act concerning the Barreau du Québec*.

non-challenged proceedings in matters related to guardianship, curatorship and probate of wills and mandates (enduring power of attorney). In recent years, the *Civil Code* was amended to give notaries the authority to solemnize marriages and civil unions, and to dissolve civil unions when the rights of underage children are not at stake.

12. In the role of public officer, a notary has the power, delegated from the State, to authenticate or certify documents. In concrete terms, the notary has the authority to vest with an exceptionally high level of probative value the private deeds he or she prepares, provided the notary complies with the formalism required by law. This probative value is justified by the duties imposed by the law on the notary when acting as public officer, including the duty of impartial counselling to all parties to the deed. Notaries are prohibited by their *Code of ethics* from being partial to any one party. This duty does not require neutrality from the notary, but it does oblige the notary to enquire into the level of knowledge and understanding of each party and to provide necessary counselling and advice about the applicable law, the implications of the agreement or document in question and the parties' legal options to ensure, to the extent possible, that the parties all understand what they are agreeing to.

Areas of Notarial Practice

13. Quebec notaries may act in all areas of the law except litigation and advocacy[2], although traditionally they work primarily in areas requiring notarial deeds and instruments. In Quebec, mortgages must be drafted by notaries, and the conveyancing of immovables (real estate) and related legal services constitute, on average, 55% of total notarial activities.

14. The drafting of wills, and estates and succession planning also form a significant area of practice for notaries.

15. The establishment, sale, or purchase of a business, the constitution, amalgamation (merger) or reorganization of a company, commercial financing, and trademarks are the daily bread and butter of all notaries practising commercial law.

16. Many notaries have developed expertise in various new legal sectors such as international private law, international adoption, maritime mortgage, intellectual property (copyright), telecommunications law, family and commercial mediation and arbitration, etc.

Notaries Public in Other Jurisdictions

17. Quebec notaries should not be confused with notaries public in other jurisdictions in Canada. As noted above, the notarial profession is one branch of the legal profession in Quebec, with a status equal to that of members of the Barreau. Like advocates, notaries in Quebec receive a full legal education and article before being admitted to the profession. By contrast, notaries public are alternative service providers. They are not lawyers and in most jurisdictions they are not required to undertake any legal education. Although British Columbia does require notaries public in that jurisdiction to complete a master's degree in Applied Legal Studies, this is an 18-month program comprised

[2] There is a limited exception to this general rule: a limited number of federal statutes, most notably, the *Immigration and Refugee Protection* Act, grant Quebec notaries the right to represent parties in litigation matters.

largely of distance education and a curriculum that is much narrower and less intensive than the law school curriculum that Quebec notaries and all lawyers in Canada must complete.

18. The scope of the role of notaries public in British Columbia and elsewhere in the country is also quite circumscribed as compared to the role of Quebec notaries. Perhaps most significantly, legal counseling and the right to provide legal advice are essential parts of the Quebec notary's function, but notaries public in most other Canadian jurisdictions are not permitted to give legal advice at all and notaries public in British Columbia are permitted to do so only within their narrowly prescribed scope of authority.[3]

19. Even the powers of notaries public to draft and authenticate documents are limited in comparison to the powers and duties of Quebec notaries. While notaries public may take affidavits, draft deeds and contracts, and certify documents, the probative effect of certification by notaries public is limited. Unlike certification by a Quebec notary, the notary public's certificate is not deemed to certify or guarantee the facts stated in the document to which it is attached. The probative value of notarial instruments in Quebec, however, is exceptional. A notarial deed or act is rarely invalidated by the courts and has the same probative value as official documents of the Parliaments of Canada and Quebec, the governments of Canada and Quebec and the courts. The exceptionally high probative value of a notarial deed prepared by a Quebec notary is linked to the formalism in contracting and the weight placed on written documents that are hallmarks of the civil law system.

NATIONAL MOBILITY AGREEMENT AND THE CHAMBRE DES NOTAIRES

20. When the terms of the NMA were agreed upon in 2002, the issue of participation in the mobility regime by members of the Chambre was referred to a special working group. That working group identified two stumbling blocks to extending the provisions of the NMA to members of the Chambre, both related to the unique nature of the notarial profession in Quebec and the lack of its counterpart in the rest of the country: the difficulty in establishing reciprocity, and the apparent inability of the common law jurisdictions to grant limited licenses. The implementation by the Barreau of the Canadian Legal Advisor ("CLA") category of membership, and the reciprocal regime contemplated by the QMA, change the mobility landscape. The National Mobility Policy Committee has advised that in its view these changes eliminate both the previously identified barriers to mobility for members of the Chambre.

Reciprocity

21. Since the introduction of the CLA by the Barreau, members of all Canadian law societies outside of Quebec have been able to become members of the Barreau with the right to practice federal law, the law of their home jurisdiction and public international law. Adoption of the QMA and implementation of its provisions in the common law jurisdictions will satisfy the NMA requirement for reciprocity.

[3] Proposals under consideration in British Columbia would increase the scope of practice of notaries public in that jurisdiction, but the resulting scope would remain comparatively limited. If approved, the amendments would expand the types of wills BC notaries public may draft, permit BC notaries public to act in simple probate matters , draft pre-nuptual, co-habitation and separation agreements and incorporate simple companies.

22. While the uniqueness of the notarial profession in Quebec may prevent the Chambre from offering a form of membership that is comparable to the CLA, the National Mobility Policy Committee has concluded that it is not necessary that they do so. The establishment of the CLA regime by the Barreau gives lawyers from elsewhere in Canada the right to practise their profession in Quebec (albeit on a restricted basis) and so confers on them the same benefits that underlie the requirement for reciprocity. In the circumstances the lack of direct reciprocity in the form of membership in the Chambre is not necessary to satisfy the principle of reciprocity established by the NMA.

Limited Licences

23. One of requirements set out in the NMA is that a member may not acquire more rights by transferring to another jurisdiction than she has in her home jurisdiction. It was this requirement, coupled with the unique nature of the notarial profession in Quebec that led the 2002 working group to conclude that the inability of law societies to grant limited licenses presented a barrier to extending mobility rights to members of the Chambre.

24. While the NMA requirement must still be respected, adoption and implementation of the QMA indicates that there is no longer a barrier to granting a limited licence. All signatories to the QMA have undertaken to establish a category of membership – the CLA – that has a restricted scope of practice. Arguably no other category need be established to accommodate members of the Chambre; what is required is an appropriate scope of practice.

25. Members of the National Mobility Policy Committee, working closely with representatives of the Chambre and the Barreau, have drafted language to reflect the scope of the authorized practice of notaries in Quebec. The proposed scope of practice provision is set out below.

SCOPE OF PRACTICE

26. Pursuant to the QMA a CLA is permitted to engage in the following activities:

(1) give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he or she is legally authorized to practise law or involving matters under federal jurisdiction;

(2) prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;

(3) give legal advice and consultations on legal matters involving public international law; and

(4) plead or act before any tribunal, but only with respect to matters under federal jurisdiction.

27. To reflect the existing scope of practice of Quebec notaries it is proposed to define the scope of practice for a member of the Chambre acting as a CLA as follows:

A member of the Chambre des notaires who is granted the status of a Canadian Legal Advisor in any jurisdiction outside of Quebec, may, in his her capacity as a Canadian Legal Advisor:

(1) *give legal advice and consultations on legal matters involving the law of Quebec or involving matters under federal jurisdiction;*

(2) *prepare and draw up a notice, motion, proceeding or similar document intended for use in a case before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations;*

(3) *give legal advice and consultations on legal matters involving public international law; and*

(4) *plead or act before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations.*

28. In considering this proposed scope of practice, it is important to keep in mind that as with all CLAs, a member of the Chambre acting as a CLA will not be practising the law of the host jurisdiction; the scope of practice will be restricted to the law of Quebec, federal law and (where permitted by the host jurisdiction) public international law.

LABOUR MOBILITY AND QUEBEC NOTARIES

29. Amendments to the labour mobility provisions of the AIT introduced in 2008 require mandatory mutual recognition of credentials for members of regulated professions and trades. Given the existence of the mobility scheme established by the NMA and the TMA, these amendments had little impact on the legal profession in Canada. Extending the provisions of the QMA to members of the Chambre is unlikely to change that.

30. In considering whether giving Quebec notaries mobility as CLAs would trigger an obligation for one jurisdiction to recognize notaries public from other jurisdictions it is important to bear in mind exactly what it is that the AIT requires. Pursuant to its provisions, the obligation to recognize credentials applies only if a jurisdiction regulates the occupation in question. Paragraph 1 of Article 706 of the AIT states

> . . . any worker certified for an occupation by a regulatory authority of a Party shall, upon application, be certified for that occupation by each other Party which regulates that occupation without any requirement for any material additional training, experience, examinations or assessments as part of that certification procedure. [emphasis added]

31. For the recognition of Quebec notaries as CLAs to give rise to an obligation to extend the CLA regime to notaries public from other jurisdictions, there would have to be a finding that notwithstanding their different titles, Quebec notaries and notaries public in other jurisdictions are practising the same occupation. In considering this question it is significant to note that the National Occupational Classification ("NOC"), the nationally accepted reference on occupations in Canada prepared and published by Human

Resources and Skills Development Canada, [4] identifies Quebec notaries and notaries public in other jurisdictions as separate occupations.[5] Quebec notaries are grouped with lawyers while notaries public are grouped with paralegals. The different educational, knowledge and skill levels of the two classifications and the differing complexity of the responsibilities performed within them are reflected in the relative skill levels of the occupations, Skill Level A for lawyers and Quebec notaries, Skill Level B for paralegals and notaries public.

32. It must also be recognized that the question of whether Quebec notaries and notaries public are the same or different occupations for purposes of the AIT will not arise in first instance upon extension of the CLA regime to members of the Chambre. In the two years since the changes to the labour mobility provisions of the AIT came into force there has been no suggestion that either Quebec or British Columbia (the only jurisdiction to licence notaries public) must recognize the credentials of notaries from the other jurisdiction. Indeed, while not determinative, this issue was raised with federal and provincial officials in the lead up to the amendments coming into force. Representatives of an ad hoc working group of law society staff were assured that due to the fundamental differences in the occupations mandatory mutual recognition would not be expected.
.

33. Permitting Quebec notaries to practice as CLAs in other Canadian jurisdictions does not change the character of the profession. The fundamental distinction between Quebec notaries and notaries public in other jurisdictions remains. In the circumstances there would seem to be no reason to believe that the experience under the AIT will be any different if Quebec notaries may become CLAs than it has been since the labour mobility amendments came into force.[6]

[4] More information about the National Occupational Classification scheme may be found at: http://www5.hrsdc.gc.ca/NOC/English/NOC/2006/Introduction.aspx

[5] See: http://www5.hrsdc.gc.ca/NOC/English/NOC/2006/Occupations.aspx?val=4

[6] The New West Partnership Trade Agreement between the governments of British Columbia, Alberta and Saskatchewan (the successor to the Trade, Investment and Labour Mobility Agreement between British Columbia and Alberta) also provides for mandatory mutual recognition of credentials. Its provisions mirror those of the AIT, however, and impose no greater or additional obligations.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Quebec Mobility Agreement

Addendum to Extend Mobility Rights to Members of the Chambre des notaires du Québec

FEDERATION OF LAW SOCIETIES OF CANADA

(Date)
(Place)

Introduction

The purpose of this Agreement is to extend the scope of the Quebec Mobility Agreement (the "QMA") in order to facilitate mobility between the Chambre des notaires du Québec (the "Chambre") and law societies in common law jurisdictions, thereby completing the national mobility regime for all members of the Federation of Law Societies of Canada (the "Federation") and both branches of Quebec's legal profession.

Pursuant to the QMA, the Barreau du Québec (the "Barreau") and the provincial and territorial law societies in common law jurisdictions have entered into an arrangement under which members of the Barreau may become members of the other law societies and practise federal and Quebec law as Canadian Legal Advisors. Accordingly, the QMA establishes mobility rights for members of the Barreau in the same manner as those that have been established by the Barreau for members of the other law societies, thereby meeting the reciprocity requirements set out in the National Mobility Agreement (the "NMA").

It is the intention of the signatories to this Agreement that the provincial and territorial law societies in common law jurisdictions implement provisions that will permit members of the Chambre to practise federal and Quebec law in those jurisdictions within the scope set out in this Agreement.

The signatories recognize that,

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,

- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil jurisdictions, and

- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures,

while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Background

In August 2002 the Federation accepted the report of the National Mobility Task Force for the implementation of full mobility rights for Canadian lawyers.

Eight law societies, including the Barreau, signed the NMA on December 9, 2002. The NMA recognized that special circumstances applicable to the Barreau would necessitate additional provisions to implement mobility between the Barreau and the common law jurisdictions. The signatories also recognized that the requirement for the Barreau to comply with regulations applicable to all professions in Quebec would delay implementation of the NMA with respect to the Barreau. The Chambre is not a signatory to the NMA.

In 2006, the law societies of all 10 provinces, including the Barreau, signed the Territorial Mobility Agreement (the "TMA"), along with the law societies of all three territories. The Chambre is not a signatory to the TMA. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces, for a five-year period ending January 1, 2012.

Quebec Mobility

In June 2008, the Government of Quebec enacted a "Regulation respecting the issuance of special permits of the Barreau du Québec", which is stated to be "made in order to facilitate the mobility of advocates." The Regulation provides, *inter alia*, that a member in good standing of a bar of another Canadian province or territory may apply for a "special Canadian legal advisor permit" in Quebec. A person granted such a permit may engage in the following activities on behalf of another person:

(1) give legal advice and consultations on legal matters involving the law of the Canadian province or territory where he or she is legally authorized to practise law or involving matters under federal jurisdiction;

(2) prepare and draw up a notice, motion, proceeding or other similar document intended for use in a case before the courts, but only with respect to matters under federal jurisdiction;

(3) give legal advice and consultations on legal matters involving public international law; and

(4) plead or act before any tribunal, but only with respect to matters under federal jurisdiction.

In March 2010, recognizing the provisions of the Quebec Regulation, the common law governing bodies entered into the QMA with the Barreau to enable its members to exercise mobility in the common law jurisdictions on a reciprocal basis. It was recognized that members of other governing bodies will not be able to exercise the reciprocal right to practise public international law unless they have professional liability insurance coverage that specifically includes such practice.

Recognizing that Quebec's legal system is founded on the French civil law system and its institutions which are reflected in the division of the legal profession in Quebec between advocates, who are members of and are governed by the Barreau, and notaries, who are members of and are governed by the Chambre, it is desirable that mobility rights be extended to members of the Chambre on the basis set out in this Agreement.

THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this Agreement, unless the context indicates otherwise:

"Advisor" means a Canadian Legal Advisor;

"Canadian Legal Advisor" means a member of the Chambre who holds a current Canadian Legal Advisor certificate issued by a common law governing body;

"Chambre" means the Chambre des notaires du Québec;

"common law governing body" means the Law Society or Barristers' Society in a Canadian common law jurisdiction;

"liability insurance" means compulsory professional liability errors and omissions insurance required by the Chambre; and

"Quebec notary" means a member of the Chambre.

General

2. The signatory common law governing bodies and the Chambre will

(a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this Agreement;

(b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this Agreement;

(c) comply with the spirit and intent of this Agreement to facilitate mobility of Quebec notaries in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and

(d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

3. Signatory common law governing bodies and the Chambre will subscribe to this Agreement and be bound by means of the signature of an authorized person affixed to any copy of this Agreement.

4. A signatory common law governing body will not, by reason of this agreement alone,

(a) grant to a Quebec notary greater rights to provide legal services than are permitted to the Quebec notary by the Chambre; or

(b) relieve a Quebec notary of restrictions or limits on the Quebec notary's right to practise, except under conditions that apply to all members of the signatory common law governing body.

Canadian Legal Advisor

5. Signatory common law governing bodies will establish and maintain a program in order to issue Canadian Legal Advisor certificates to qualifying members of the Chambre.

6. Members of the Chambre whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted as equivalent by the Chambre are not qualifying members of the Chambre for the purpose of clause 5.

7. A member of the Chambre who is granted the status of Advisor in any jurisdiction outside of Quebec, may, in his or her capacity as Advisor:

(a) give legal advice and consultations on legal matters involving the law of Quebec or involving matters under federal jurisdiction;

(b) prepare and draw up a notice, motion, proceeding or similar document intended for use in a case before a judicial or quasi-judicial body in a

matter under federal jurisdiction where expressly permitted by federal statute or regulations;

(c) give legal advice and consultations on legal matters involving public international law; and

(d) plead or act before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations.

8. A signatory common law governing body will require no further qualifications for a Quebec notary to be eligible for status as Advisor than the following:

(a) entitlement to practice the notarial profession in Quebec; and

(b) good character and fitness to be a member of the legal profession, on the standard ordinarily applied to applicants for membership.

9. Before granting Advisor status to a Quebec notary qualified under clause 8, a signatory common law governing body will not require the Quebec notary to pass a transfer examination or other examination, but may require the Quebec notary to do all of the following:

(a) provide certificates of standing from all Canadian and foreign governing bodies of the legal profession of which the Quebec notary is or has been a member;

(b) disclose criminal and disciplinary records in any jurisdiction; and

(c) consent to access by the governing body to the Quebec notary's regulatory files of all governing bodies of the legal profession of which the Quebec notary is a member, whether in Canada or elsewhere.

10. A signatory common law governing body will make available to the public information obtained under clause 9 in the same manner as similar records originating in its jurisdiction.

11. A signatory common law governing body must require that a member of the Chambre who is granted the status of a Canadian Legal Advisor continue to maintain his or her practising membership in the Chambre.

Liability Insurance

12. The Chambre will continue to make available to its members who are also Advisors in another jurisdiction ongoing liability insurance with minimum

occurrence or claim limits for indemnity of $1,000,000 and $2,000,000 annual per member aggregate.

Transition Provisions

13. This agreement is a multi-lateral agreement, effective respecting the common law governing bodies that are signatories and the Chambre, and it does not require unanimous agreement of common law governing bodies and the Chambre.

14. Nothing in this Agreement is intended to affect the obligations of any party under the provisions of the NMA, the QMA or other agreements in effect.

Dispute Resolution

15. Signatory common law governing bodies and the Chambre adopt and agree to apply provisions in the Inter-Jurisdictional Practice Protocol in respect of arbitration of disputes, specifically Clause 14 and Appendix 5 of the Protocol.

Withdrawal

16. A signatory common law governing body or the Chambre may cease to be bound by this agreement by giving each other party written notice of at least one clear calendar year.

17. A party that gives notice under clause 16 will immediately notify its members in writing of the effective date of withdrawal.

SIGNED on the ● day of ●, 2011.

Law Society of British Columbia

Per: _____
Authorized Signatory

Law Society of Alberta

Per: _____
Authorized Signatory

Law Society of Saskatchewan

Per: _____
Authorized Signatory

Law Society of Manitoba

Per: _____
Authorized Signatory

Law Society of Upper Canada

Per: _____
Authorized Signatory

Chambre des notaires du Québec

Per: _____
Authorized Signatory

Law Society of New Brunswick

Per: _____
Authorized Signatory

Nova Scotia Barristers' Society

Per: _____
Authorized Signatory

Law Society of Prince Edward Island

Per: _____
Authorized Signatory

Law Society of Newfoundland and Labrador

Per: _____
Authorized Signatory

Law Society of Yukon

Per: _____
Authorized Signatory

Law Society of the Northwest Territories

Per: _____
Authorized Signatory

Law Society of Nunavut

Per: _____
Authorized Signatory

THE LAW SOCIETY OF BRITISH COLUMBIA

IN CAMERA MINUTES

MEETING: Benchers

DATE: Friday, September 9, 2011

PRESENT:

Gavin Hume, QC, President	Jan Lindsay, QC
Bruce LeRose, QC, 1st Vice-President	Peter Lloyd, FCA
Art Vertlieb, QC, 2nd Vice-President	Benjimen Meisner
Haydn Acheson	Nancy Merrill
Rita Andreone	David Mossop, QC
Satwinder Bains	Suzette Narbonne
Kathryn Berge, QC	Thelma O'Grady
Joost Blom, QC	Lee Ongman
Patricia Bond	Gregory Petrisor
Robert Brun, QC	David Renwick, QC
E. David Crossin, QC	Claude Richmond
Tom Fellhauer	Alan Ross
Leon Getz, QC	Catherine Sas, QC
Carol Hickman, QC	Herman Van Ommen
Stacy Kuiack	Kenneth Walker

ABSENT: Richard Stewart, QC

STAFF PRESENT:

Tim McGee	Bill McIntosh
Deborah Armour	Jeanette McPhee
Su Forbes, QC	Alan Treleaven
Jeffrey Hoskins, QC	Adam Whitcombe

***IN CAMERA* SESSION**

7. Quebec Mobility Agreement / Credentials Report

Mr. Renwick briefed the Benchers as Chair of the Credentials Committee. He advised that the Council of the Federation of Law Societies of Canada has approved an addendum to the Quebec Mobility Agreement (the QMA Addendum), the implementation of which requires the approval of the Federation's member law societies. The purpose of the QMA Addendum is outlined in its Introduction (appended to Ms. Small's memorandum to the Benchers, at page 7011 of the meeting materials):

> The purpose of this Agreement is to extend the scope of the Quebec Mobility Agreement (the "QMA") in order to facilitate mobility between the Chambre des notaires du Québec (the "Chambre") and law societies in common law jurisdictions, thereby completing the national mobility regime for all members of the Federation of Law Societies of Canada (the "Federation") and both branches of Quebec's legal profession.
>
> Pursuant to the QMA, the Barreau du Québec (the "Barreau") and the provincial and territorial law societies in common law jurisdictions have entered into an

> arrangement under which members of the Barreau may become members of the other law societies and practise federal and Quebec law as Canadian Legal Advisors. Accordingly, the QMA establishes mobility rights for members of the Barreau in the same manner as those that have been established by the Barreau for members of the other law societies, thereby meeting the reciprocity requirements set out in the National Mobility Agreement (the "NMA").
>
> It is the intention of the signatories to this Agreement that the provincial and territorial law societies in common law jurisdictions implement provisions that will permit members of the Chambre to practise federal and Quebec law in those jurisdictions within the scope set out in this Agreement.

Mr. Renwick noted that at the request of President Hume the Credentials Committee has reviewed and recommends the Law Society's approval of the QMA Addendum.

Mr. Renwick advised that Mr. Lucas has briefed the Committee on a concern arising from the BC government's view, expressed during the discussions in connection with the Agreement on Internal Trade, that there was no equivalent profession in BC to that of Quebec's "notaires". If the Law Society entered into a mobility agreement with the Chambre des Notaires, would it set a precedent that might be used by groups such as Ontario paralegals to advocate for similar treatment? Mr. Lucas then briefed the Benchers on that concern.

Mr. Renwick moved (seconded by Mr. Meisner) that the Benchers approve the QMA Addendum on behalf of the Law Society.

In the ensuing discussion it was noted that Mr. Hume has already raised the suggestion at the Federation Council that the language of the QMA Addendum be amended to confirm that a "notaire" is equivalent to a "lawyer" or a "solicitor" in the context of the QMA Addendum's "Canadian Legal Advisor" provisions.

The motion was carried.

It was agreed that the minutes should reflect the Benchers' view that "lawyer" and "notaire" are equivalent terms for the purposes of the Quebec Mobility Agreement and the QMA Addendum. It was also agreed that Mr. Hume be directed to recommend to the Federation Council that the QMA Addendum's language be revised accordingly.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Canadian legal advisors

Scope of practice

2-23.1 (1) A Canadian legal advisor who is a member of the Barreau du Québec may

(a) give legal advice on

(i) the law of Québec and matters involving the law of Québec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law,

(b) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(c) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.

(1.1) A Canadian legal advisor who is a member of the Chambre des notaires du Québec may

(a) give legal advice on

(i) the law of Québec and matters involving the law of Québec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law, or

(b) where expressly permitted by federal statute or regulation

(i) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(ii) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.

(2) A Canadian legal advisor must not engage in the practice of law except as permitted under subrule (1) or (1.1).

Requirements

2-23.2 (1) A member in good standing who is admitted as a Canadian legal advisor has all the duties and responsibilities of a practising lawyer under the Act, these Rules and the *Professional Conduct Handbook*.

(2) A Canadian legal advisor must

(a) be a member in good standing of the Barreau du Québec or the Chambre des notaires du Québec authorized to practise law in that Province,

(b) undertake to comply with Rule 2-23.1 *[Scope of practice]*, and

(c) immediately notify the Executive Director in writing if he or she ceases to be authorized to practise law in Québec.

Call and admission

Transfer as Canadian legal advisor

2-49.3 (1) Subject to subrule (3), a member of the Barreau du Québec or of the Chambre des notaires du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(c) a certificate of standing from the Barreau du Québec or from the Chambre des notaires du Québec and each other body regulating the legal profession, in any jurisdiction, in which the applicant is or has been a member of the legal profession;

(3) This Rule does not apply to a member of the Barreau du Québec or of the Chambre des notaires du Québec unless he or she has earned a bachelor's degree in civil law in Canada or a foreign degree and a certificate of equivalency from the Barreau or from the Chambre, as the case may be.

PART 3 – PROTECTION OF THE PUBLIC

Division 4 – Professional Liability Insurance

Exemption from liability insurance

3-25 (5) A Canadian legal advisor may apply to the Executive Director for exemption from the requirement to maintain professional liability insurance and pay the insurance fee.

(6) On an application under subrule (5), the Executive Director must grant the exemption, provided the Canadian legal advisor maintains the full mandatory professional liability insurance coverage required by the Barreau du Québec or by the Chambre des notaires du Québec that extends to the Canadian legal advisor's practice in British Columbia.

LAW SOCIETY RULES

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Canadian legal advisors

Scope of practice

2-23.1 (1) A Canadian legal advisor who is a member of the Barreau du Québec may

(a) give legal advice on

(i) the law of Québec and matters involving the law of Québec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law,

(b) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(c) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.

(1.1) A Canadian legal advisor who is a member of the Chambre des notaires du Québec may

(a) give legal advice on

(i) the law of Québec and matters involving the law of Québec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law, or

(b) where expressly permitted by federal statute or regulation

(i) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(ii) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.

(2) A Canadian legal advisor must not engage in the practice of law except as permitted under subrule (1) or (1.1).

Requirements

2-23.2 (1) A member in good standing who is admitted as a Canadian legal advisor has all the duties and responsibilities of a practising lawyer under the Act, these Rules and the *Professional Conduct Handbook*.

(2) A Canadian legal advisor must

(a) be a member in good standing of the Barreau du Québec or the Chambre des notaires du Québec authorized to practise law in that Province,

(b) undertake to comply with Rule 2-23.1 *[Scope of practice]*, and

(c) immediately notify the Executive Director in writing if he or she ceases to be authorized to practise law in Québec.

Call and admission

Transfer as Canadian legal advisor

2-49.3 (1) Subject to subrule (3), a member of the Barreau du Québec or of the Chambre des notaires du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(c) a certificate of standing from the Barreau du Québec or from the Chambre des notaires du Québec and each other body regulating the legal profession, in any jurisdiction, in which the applicant is or has been a member of the legal profession;

(3) This Rule does not apply to a member of the Barreau du Québec or of the Chambre des notaires du Québec unless he or she has earned a bachelor's degree in civil law in Canada or a foreign degree and a certificate of equivalency from the Barreau or from the Chambre, as the case may be.

PART 3 – PROTECTION OF THE PUBLIC

Division 4 – Professional Liability Insurance

Exemption from liability insurance

3-25 (5) A Canadian legal advisor may apply to the Executive Director for exemption from the requirement to maintain professional liability insurance and pay the insurance fee.

(6) On an application under subrule (5), the Executive Director must grant the exemption, provided the Canadian legal advisor maintains the full mandatory professional liability insurance coverage required by the Barreau du Québec or by the Chambre des notaires du Québec that extends to the Canadian legal advisor's practice in British Columbia.

QUEBEC MOBILITY AGREEMENT — NOTAIRES

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. In Rule 2-23.1

(a) By striking "Canadian legal advisor***" in subrule (1) and substituting "***Canadian legal advisor who is a member of the Barreau du Québec***";***

(b) By adding the following subrule:

(1.1) A Canadian legal advisor who is a member of the Chambre des notaires du Québec may

(a) give legal advice on

(i) the law of Québec and matters involving the law of Québec,

(ii) matters under federal jurisdiction, or

(iii) matters involving public international law, or

(b) where expressly permitted by federal statute or regulation

(i) draw, revise or settle a document for use in a proceeding concerning matters under federal jurisdiction, or

(ii) appear as counsel or advocate before any tribunal with respect to matters under federal jurisdiction.***; and***

(c) By striking "under subrule (1)***" in subrule (2) and substituting "***under subrule (1) or (1.1)***".***

2. By rescinding Rule 2-23.2(2)(a) and substituting the following:

(a) be a member in good standing of the Barreau du Québec or the Chambre des notaires du Québec authorized to practise law in that Province,

3. In Rule 2-49-3

(a) By rescinding the preamble and paragraph (c) of subrule (1) and substituting the following:

(1) Subject to subrule (3), a member of the Barreau du Québec or of the Chambre des notaires du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(c) a certificate of standing from the Barreau du Québec or from the Chambre des notaires du Québec and each other body regulating the legal profession, in any jurisdiction, in which the applicant is or has been a member of the legal profession;

(b) By rescinding subrule (3) and substituting the following:

(3) This Rule does not apply to a member of the Barreau du Québec or of the Chambre des notaires du Québec unless he or she has earned a bachelor's degree in civil law in Canada or a foreign degree and a certificate of equivalency from the Barreau or from the Chambre, as the case may be.

4. By rescinding Rule 3-25(6) and substituting the following:

(6) On an application under subrule (5), the Executive Director must grant the exemption, provided the Canadian legal advisor maintains the full mandatory professional liability insurance coverage required by the Barreau du Québec or by the Chambre des notaires du Québec that extends to the Canadian legal advisor's practice in British Columbia.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

Memo

The Law Society of British Columbia

3000

To	Benchers
From	Audit Committee
Date	March 2, 2012
Subject	2011 and Forward Key Performance Measures – Adjustment to LIF KPM

In the December 2, 2011 memorandum to the Benchers regarding the changes to the Key Performance Measures (KPMs), the following LIF KPM should have read as follows:

"Suits under the Insurance Act by claimants are fewer than 0.5% of files closed"

Resolution

BE IT RESOLVED to amend the second LIF KPM to read "Suits under the Insurance Act by claimants are fewer than 0.5% of files closed" as indicated in Appendix A.

Memo

The Law Society of British Columbia

Appendix A

The Law Society of British Columbia		
Mandate	**Bellwether Measures**	
To uphold and protect the public interest in the administration of justice	1. The frequency of complaints 2. The frequency of insurance reports	

Professional Conduct and Discipline		
Goals and Objectives	**KPM**	
• Complaints about lawyers are handled fairly and in a timely fashion • The exercise of the regulatory function by the Law Society is perceived to be fair, consistent and thorough	• At least 75% of Complainants express satisfaction with timeliness	
	• At least 65% of Complainants express satisfaction with fairness	
	• At least 90% of Complainants express satisfaction with courtesy	
	• At least 65% of Complainants express satisfaction with thoroughness	
	• At least 60% of Complainants would recommend someone make a complaint	
	• The Ombudsperson, the Courts and the CRC do not find our process and procedures as lacking from the point of view of fairness and due process	
Custodianships		
Goals and Objectives	**KPM**	
• To provide a more cost effective model that will enhance management and reduction of		

outside service providers, standardize and centralize custodial procedures and administrative services.	• The length of time required to complete a custodianship will decrease under the new program based on comparable historic averages	
	• 90% of clients whose former lawyers are subject to a custodianship are satisfied or somewhat satisfied with the way in which the designated custodian dealt with their client matter	
Trust Assurance		
Goals and Objectives	**KPM**	
• All law firms scrupulously follow the rules relating to the proper receipt and handling of trust funds.	• Long term reduction in the number of financial suspensions issued by Trust Assurance program.	
	• Long term reduction in the percentage of referrals to Professional Conduct department as a result of a compliance audit.	
	• Improved performance on key compliance questions from lawyer's trust report filings.	
Credentials, Articling and PLTC		
Goals and Objectives	**KPM**	
• Successful applicants for call and admission demonstrate entry-level competence	• At least 85% of the students attending PLTC achieve a pass on the PLTC results	
	Students responding to the PLTC course evaluation rate PLTC's value at an average of 3.5 or higher on a 5 point scale: • PLTC helped prepare them to recognize and deal with ethical and practice management issues • PLTC helped increase their knowledge of practice and procedure • PLTC helped prepare them for the practice of law • PLTC helped develop or enhance their lawyer skills	

	Principals responding to the PLTC survey rate PLTC's value at an average of 3.5 or higher on a 5 point scale: • PLTC helped prepare students to recognize and deal with ethical and practice management issues • PLTC helped increase the students' knowledge of practice and procedure • PLTC helped prepare students for the practice of law • PLTC helped develop or enhance the students' lawyer skills	
	Students surveyed on call and admission rate the value of their articles at an average of 3.5 or higher on a 5 point scale: • Articling helped prepare them to recognize and deal with ethical and practice management issues • Articling helped increase their knowledge of practice and procedure • Articling helped develop or enhance their lawyer skills • Articling helped prepare them for the practice of law	
	Principals surveyed on call and admission rate the value of articles at an average of 3.5 or higher on a 5 point scale: • Articling helped prepare the students to recognize and deal with ethical and practice management issues • Articling helped increase the students' knowledge of practice and procedure • Articling helped develop or enhance the students' lawyer skills • Articling helped prepare students for the practice of law	
Practice Advice		
Goals and Objectives	**KPM**	
• Delivering high quality advice and information on matters of practice and ethics to members in a responsive and timely fashion	• At least 90% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale for: 1. Timeliness of response 2. Quality of advice 3. Quality of resources to which you were referred 4. Overall satisfaction	

Practice Standards

Goals and Objectives	KPM	
• Determine whether lawyers referred to Practice Standards meet accepted standards in the practice of law and, where they do not, recommend and monitor remedial measures • Assist lawyers in developing and enhancing their competence and efficiency	• At least two thirds of the lawyers who complete their referral demonstrate an improvement of at least one point on a 5 point scale in any one of the following categories: 1. Office management 2. Client relations and management 3. Knowledge of law and procedure 4. Personal/other.	
	• At least two thirds of the lawyers who complete their referral did so at an efficiency rating of 3 or higher on a 5 point scale in any one of the following categories: 1. Office management 2. Client relations and management 3. Knowledge of law and procedure 4. Personal/other	
	• At least 85% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale for the following programs: a) Small Firm Practice Course b) Bookkeeper Support Program c) Succession and Emergency Planning Program d) Practice Locums Program e) Practice Refresher Course	

Lawyers Insurance Fund

Goals and Objectives	KPM	
• The public is reasonably compensated for lawyer negligence and lawyer misappropriation • Lawyers are reasonably protected against risk of excessive financial loss arising from malpractice.	• Policy limits for negligence and theft, the member deductible, and the premium are reasonably comparable with the 13 other Canadian jurisdictions	
	• Suits under the Insurance Act by claimants are fewer than 0.~~0~~5% of files closed	
	• Every five years, third party auditors provide a written report assessing LIF's claims management as effective	

• Claims are resolved cost-effectively, balancing the interests of the claimant, the insured lawyer, and the membership as a whole.	• Insured lawyers demonstrate a high rate of satisfaction (90% choose 4 or 5 on a 5 point scale) in Service Evaluation Forms	

Memo

The Law Society of British Columbia

Appendix B

The Law Society of British Columbia		
Mandate	**Bellwether Measures**	
To uphold and protect the public interest in the administration of justice	1. The frequency of complaints 2. The frequency of insurance reports	

Professional Conduct and Discipline		
Goals and Objectives	**KPM**	
• Complaints about lawyers are handled fairly and in a timely fashion • The exercise of the regulatory function by the Law Society is perceived to be fair, consistent and thorough	• At least 75% of Complainants express satisfaction with timeliness	
	• At least 65% of Complainants express satisfaction with fairness	
	• At least 90% of Complainants express satisfaction with courtesy	
	• At least 65% of Complainants express satisfaction with thoroughness	
	• At least 60% of Complainants would recommend someone make a complaint	
	• The Ombudsperson, the Courts and the CRC do not find our process and procedures as lacking from the point of view of fairness and due process	
Custodianships		
Goals and Objectives	**KPM**	
• To provide a more cost effective model that will enhance management and reduction of		

outside service providers, standardize and centralize custodial procedures and administrative services.	• The length of time required to complete a custodianship will decrease under the new program based on comparable historic averages	
	• 90% of clients whose former lawyers are subject to a custodianship are satisfied or somewhat satisfied with the way in which the designated custodian dealt with their client matter	
Trust Assurance		
Goals and Objectives	**KPM**	
• All law firms scrupulously follow the rules relating to the proper receipt and handling of trust funds.	• Long term reduction in the number of financial suspensions issued by Trust Assurance program.	
	• Long term reduction in the percentage of referrals to Professional Conduct department as a result of a compliance audit.	
	• Improved performance on key compliance questions from lawyer's trust report filings.	
Credentials, Articling and PLTC		
Goals and Objectives	**KPM**	
• Successful applicants for call and admission demonstrate entry-level competence	• At least 85% of the students attending PLTC achieve a pass on the PLTC results	
	Students responding to the PLTC course evaluation rate PLTC's value at an average of 3.5 or higher on a 5 point scale: • PLTC helped prepare them to recognize and deal with ethical and practice management issues • PLTC helped increase their knowledge of practice and procedure • PLTC helped prepare them for the practice of law • PLTC helped develop or enhance their lawyer skills	

	Principals responding to the PLTC survey rate PLTC's value at an average of 3.5 or higher on a 5 point scale: • PLTC helped prepare students to recognize and deal with ethical and practice management issues • PLTC helped increase the students' knowledge of practice and procedure • PLTC helped prepare students for the practice of law • PLTC helped develop or enhance the students' lawyer skills	
	Students surveyed on call and admission rate the value of their articles at an average of 3.5 or higher on a 5 point scale: • Articling helped prepare them to recognize and deal with ethical and practice management issues • Articling helped increase their knowledge of practice and procedure • Articling helped develop or enhance their lawyer skills • Articling helped prepare them for the practice of law	
	Principals surveyed on call and admission rate the value of articles at an average of 3.5 or higher on a 5 point scale: • Articling helped prepare the students to recognize and deal with ethical and practice management issues • Articling helped increase the students' knowledge of practice and procedure • Articling helped develop or enhance the students' lawyer skills • Articling helped prepare students for the practice of law	
Practice Advice		
Goals and Objectives	**KPM**	
• Delivering high quality advice and information on matters of practice and ethics to members in a responsive and timely fashion	• At least 90% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale for: 5. Timeliness of response 6. Quality of advice 7. Quality of resources to which you were referred 8. Overall satisfaction	

Practice Standards

Goals and Objectives	KPM	
• Determine whether lawyers referred to Practice Standards meet accepted standards in the practice of law and, where they do not, recommend and monitor remedial measures • Assist lawyers in developing and enhancing their competence and efficiency	• At least two thirds of the lawyers who complete their referral demonstrate an improvement of at least one point on a 5 point scale in any one of the following categories: 5. Office management 6. Client relations and management 7. Knowledge of law and procedure 8. Personal/other.	
	• At least two thirds of the lawyers who complete their referral did so at an efficiency rating of 3 or higher on a 5 point scale in any one of the following categories: 5. Office management 6. Client relations and management 7. Knowledge of law and procedure 8. Personal/other	
	• At least 85% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale for the following programs: a) Small Firm Practice Course b) Bookkeeper Support Program c) Succession and Emergency Planning Program d) Practice Locums Program e) Practice Refresher Course	

Lawyers Insurance Fund

Goals and Objectives	KPM	
• The public is reasonably compensated for lawyer negligence and lawyer misappropriation • Lawyers are reasonably protected against risk of excessive financial loss arising from malpractice.	• Policy limits for negligence and theft, the member deductible, and the premium are reasonably comparable with the 13 other Canadian jurisdictions	
	• Suits under the Insurance Act by claimants are fewer than 0.5% of files closed	
	• Every five years, third party auditors provide a written report assessing LIF's claims management as effective	

• Claims are resolved cost-effectively, balancing the interests of the claimant, the insured lawyer, and the membership as a whole.	• Insured lawyers demonstrate a high rate of satisfaction (90% choose 4 or 5 on a 5 point scale) in Service Evaluation Forms	

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

March 2, 2012

Introduction

My report this month includes the annual report to the Benchers on the 2011 Financial Statements, our report on Key Performance Measures (KPMs) for 2011, and updates on several other items.

1. 2011 Annual Financial Statements

A copy of the draft 2011 Annual Financial Statements and Management's report thereon is attached to this report as Appendix A.

The draft statements will be reviewed by the Finance Committee prior to the meeting, and Art Vertlieb, QC, Chair of the Finance Committee, Jeanette McPhee, our Chief Financial Officer, and I will provide additional information and be available to answer any questions. The Audit Committee will be meeting on May 8, 2012 to receive the Report of the Auditors on the Financial Statements and to formally approve the statements for publication and distribution. In accordance with our governance policies, the draft statements are being presented to the Benchers for review and information.

2. 2011 Key Performance Measures (KPMs)

The 2011 Report on the KPMs has been distributed to the Benchers as part of the meeting agenda package. The report and results were reviewed by the Audit Committee at its last meeting and Rita Andreone, QC, Chair of the Audit Committee, will be introducing the report to the Benchers. I will be available together with the members of Management Board to answer any questions.

Overall, there were positive results in 2011 and we met or exceeded our targeted performance in all areas.

3. Continuing Professional Development (CPD) Update

In my January 2012 report, I reported on the number of members with outstanding CPD requirements. The following updates that information as of February 21, 2012.

10,249 lawyers had CPD requirements to complete in 2011, of that number, 671 members did not report completion by the December 31, 2011 deadline.

Since that time:

- 350 have now recorded completion;
- 229 have not yet recorded completion and are overdue; and

- 92 lawyers have a non-practicing status or ceased membership; they will be required to complete the CPD requirements if they return to practice.

Alan Treleaven, Director, Education and Practice, will be available at the meeting to discuss these results and to report on the efforts his department is making to follow up with members with absent or incomplete results.

Overall to date there is a compliance rate of approximately 98% with the CPD requirements for 2011.

4. Governance Review - Update

At the time of writing, an introductory letter from President LeRose, together with an Interview Guide, have been sent to all Benchers, recent past Presidents, selected Life Benchers and senior staff. Interviews with most Benchers and senior staff have now been scheduled as part of the first phase of the Governance Review and other stakeholder interviews will be scheduled in the weeks ahead. We expect approximately 60 individuals will be interviewed as part of Phase 1 of the Governance Review. A preliminary report of findings and observations will be made to the Benchers by Liz Watson at the Benchers' retreat in June. A Governance Review Task Force meeting is scheduled for February 28 (subsequent to writing) and we will provide additional updates at the Bencher meeting.

5. Enterprise Risk Management Plan - Privacy Review

One of the initiatives set out in the Law Society's Enterprise Risk Management Plan adopted by the Benchers last year is a review of our internal privacy policies and practices. Our goal is to be able to say at the conclusion of the review that we have identified any changes or enhancements which would be required to ensure that our approach to privacy issues, including our internal policies and practices, represents "best practice" for comparable organizations.

Jeff Hoskins, QC will lead this review with the assistance of a privacy consultant to be chosen pursuant to an RFP process, which is underway. We expect to complete the review and to be in a position to consider recommendations by midyear.

6. BC Government Green Paper on Modernizing British Columbia's Justice System

President Le Rose has written to Geoff Cowper, QC to express the Law Society's support for the government's Green Paper on modernizing the justice system in BC. In particular, Bruce has indicated that the Law Society has a particular strategic focus on improving access to legal services. We have heard back from

Mr. Cowper, who thanked us for the Law Society's willingness to assist and indicated that a meeting will be arranged shortly.

We note that Mr. Cowper's mandate and review appears to be focused on operational efficiencies particularly in the criminal justice system. While that is not an area specifically set out in our Strategic Plan, we will discuss with Mr. Cowper how we might best be of assistance. Given the tight timeframe for the delivery of his report, we think this approach will be the most useful.

7. Leo Project - Monthly Highlight

Because of the importance of this project to the Law Society's current and future operations, I will be providing you with a brief Leo activity highlight in my monthly Bencher report. Robyn Crisanti and her Leo project team are working very hard and have engaged the entire organization through consultations and informative and interactive web-based communications. Attached as Appendix B to this report is the February 2012 Leo newsletter posted on Lex, our intranet site, which provides highlights of the work completed on the project to date.

8. CSAE Conference for Chief Elected and Chief Staff Officers

President LeRose and I will be attending the CSAE conference in Toronto for Chief Elected and Chief Staff Officers at the end of February. This conference, which is now given several times a year throughout North America, has become the leading educational conference on how Chief Elected and Chief Staff officers can best work together. I have attended past conferences with our Presidents and I continue to find them very insightful and useful. We also use the opportunity to reconnect with our colleagues from several of the other Canadian Law Societies and to compare notes with those from other regulatory and association bodies. Bruce and I can share highlights from the conference at the Bencher meeting.

9. Professional Responsibility – Thank You to Our Teachers

I would like to thank the following Benchers and Life Benchers who recently taught Professional Responsibility to PLTC and UBC first year law students in February 2012.

Anna Fung, QC
Gavin Hume, QC
Bill Maclagan
Thelma O'Grady
Gordon Turriff, QC
Warren Wilson, QC

Timothy E. McGee
Chief Executive Officer

The Law Society of British Columbia

APPENDIX A

Report to the Benchers – March 2, 2012

CFO Financial Report – For the Year Ended December 31, 2011

Attached are the **draft** financial results and highlights for the year ended December 31, 2011. The 2011 financial statements will be finalized during the upcoming year-end audit in March/April and the Audit Committee meeting set for May.

General Fund

General Fund (excluding capital funding and TAF)

Overview

The overall result for the General Fund in 2011 was a deficit of $612,000 due to higher than expected external counsel fees and expenses authorized by the Benchers in 2011 relating to the new regulatory department plan and to costs associated with the establishment of the new hearing panel structure. Additional details are set out below.

Revenue

Revenue was $17,362,000, a positive budget variance of $226,000 (1.3%), due to:

- Electronic filing revenues, positive variance of $130,000
- CPD penalty revenues, positive variance of $100,000

Practicing membership was 10,564, very close to the 2011 budget of 10,575. PLTC revenue was on budget at 385 students.

Expenses

Operating expenses were $18,907,000, a negative budget variance of $659,000 (3.6%).

Of the $659,000 negative variance, $290,000 relates to expenses authorized by the Benchers after the 2011 budget was set.

- Approved hearing panel structure changes – recruitment, travel and training costs for the new hearing panel members - $135,000
- Approved regulatory department plan – increase in staffing costs in last six months of 2011 - $125,000
- Approved Canlii levy increase - $30,000

In addition, with the increased focus on our regulatory mandate and reducing timelines, external counsel fees were over budget by $420,000 due to the following:

- Additional files sent out in fall 2010 and first quarter 2011 due to staffing shortages
- A number of large, complex files, with specific expertise required
- A large number of conflict of interest files
- Two files with court applications
- Increases in external counsel rates to attract senior counsel
- Additional files sent out to close files and reduce timelines

There was $290,000 in savings achieved through a reduction in travel costs and a reduction in the use of paper, stationary, storage and printing through Greenwise initiatives. Offsetting these savings were additional costs of $240,000 related to additional recruiting fees and an increase in the staff vacation accrual.

845 Cambie

The 845 building net results were below budget $113,000, as a major tenant vacated the 835 heritage building during 2011. A search for new tenants is in process.

Net Assets

The General Fund net assets (before capital allocation), is $5.0 million at December 31, 2011. This is considered a reasonable level for net assets, equating to approximately 3 months of operating expenses.

In addition, there is $1.9 million allocated to the Capital Allocation within net assets. These monies are set aside for upcoming building capital projects, which include replacing the fire alarm, the emergency generator, the 845 parking shuttle, the 835 passenger elevator, and the implementation of an electronic document and records management system.

TAF-related Revenue and Expenses

TAF results are positive, with a net result of $18,000 for the year. TAF revenue is $2.3 million, $184,000 below budget. Operating expenses are very close to budget, with a positive variance of $30,000 for the year.

TAF-related net assets are $240,000 at December 31, 2011.

Special Compensation Fund

There was very little activity in the Special Compensation Fund during 2011.

The Special Compensation Fund completed the year with a negative variance against budget due to anticipated recoveries not yet being received. This is only a timing issue as these recoveries are expected to occur in 2012.

Special Compensation Fund net assets are $931,000 at December 31, 2011.

Lawyers Insurance Fund

LIF operating results were very close to budget. Assessment revenue was $13,437,000, $145,000 (1%) ahead of budget. Operating expenses (excluding the claims provision) were $5,594,000, $415,000 (7%) below budget. The savings is a result of two positions being vacant during the year and lower than budgeted professional fees and insurance costs.

The provision for claims liability is $52.9 million at year end, slightly below 2010 levels.

The investment markets were generally down during 2011, and volatility occurred throughout the year. Investment returns for 2011 were 1.3%, slightly below the benchmark of 1.6%, resulting in an increase in investment values and related net assets of $1.1 million.

Net Assets

LIF net assets are $43.8 million at December 31, 2011, with $17.5 million internally restricted for Part B claims.

The Law Society of British Columbia

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Summary of Financial Highlights - DRAFT FOR THE YEAR 2011
($000's)

2011 General Fund Results - YTD December 2011 (Excluding Capital Allocation & Depreciation)

	Actual	Budget	$ Var	% Var
Revenue (excluding Capital)				
Membership fees	14,098	14,086	12	0.1%
PLTC and enrolment fees	966	962	4	0.4%
Electronic filing revenue	726	596	130	21.8%
Interest income	336	375	(39)	-10.4%
Other revenue	1,236	1,117	119	10.7%
	17,362	17,136	226	1.3%
Expenses before 845 Cambie (excl. dep'n)	18,907	18,248	(659)	-3.6%
	(1,545)	(1,112)	(433)	
845 Cambie St. - net results (excl. dep'n)	933	1,046	(113)	-10.8%
	(612)	(66)	(546)	

2011 General Fund Year End YTD December 2011 (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**
2008 Actual	10,035
2009 Actual	10,213
2010 Actual	10,368
2011 Budget	10,575
2011 Actual	**10,564**
2012 Budget	10,787

	Actual Variance
Revenue variance	
CPD penalties	100
Electronic filing revenue	130
Membership revenue	10
PLTC	20
Interest income	(40)
Other	6
	226
Expenses	
Additional external counsel fees	(420)
Regulation - new Staffing Plan - mid year implementation *	(125)
Implementation of Hearing Panels - advertising, selection, training & travel *	(135)
Increased CanLII Levy *	(30)
Increased vacation accrual	(100)
Additional recruiting costs	(140)
Travel savings	100
Savings related to Greenwise initiatives - paper, printing, stationary, file storage	120
Other net savings	71
	(659)
845 CAMBIE	
Leased space vacancy	(90)
Property Tax - Space Reclassification	20
Repairs & maintenance	(43)
	(113)
2011 General Fund Actual Variance	(546)
2011 General Fund Budget	(66)
2011 General Fund Actual	(612)

* Bencher approved

Trust Assurance Program - YTD December 2011

	2011 Actual	2011 Budget	Variance	% Var
TAF Revenue	2,316	2,500	(184)	-7.4%
Trust Administration Department	2,298	2,328	30	1.3%
Net Trust Assurance Program	18	172	(154)	

2011 Lawyers Insurance Fund Long Term Investments - YTD December 2011 *Before investment management fees*

Performance	1.3%
Benchmark Performance	1.6%

The Law Society of British Columbia
General Fund
Results for the 12 Months ended December 31, 2011
($000's)

DRAFT

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Membership fees (1)	15,956	15,947		
PLTC and enrolment fees	966	963		
Electronic filing revenue	726	596		
Interest income	336	375		
Other revenue	1,237	1,116		
Total Revenues	19,221	18,997	224	1.2%
Expenses				
Regulation	7,557	6,686		
Education and Practice	3,247	3,310		
Corporate Services	2,920	2,994		
Bencher Governance	1,493	1,555		
Communications and Information Services	1,964	2,006		
Policy and Legal Services	1,725	1,697		
Depreciation	297	349		
Total Expenses	19,203	18,597	(606)	-3.3%
General Fund Results before 845 Cambie and TAP	18	400	(382)	
845 Cambie net results	386	524	(138)	
General Fund Results before TAP	**404**	**924**	**(520)**	
Trust Administration Program (TAP)				
TAF revenues	2,316	2,500	(184)	
TAP expenses	2,298	2,328	30	1%
TAP Results	**18**	**172**	**(154)**	
General Fund Results including TAP	**422**	**1,096**	**(674)**	

(1) Membership fees include capital allocation of $1.859m (YTD capital allocation budget = $1.861m).

The Law Society of British Columbia
General Fund - Balance Sheet
As at December 31, 2011

($000's)

	Dec 31 2011	Dec 31 2010
Assets		
Current assets		
Cash and cash equivalents	279	177
Unclaimed trust funds	1,848	1,682
Accounts receivable and prepaid expenses	1,131	1,243
B.C. Courthouse Library Fund	678	635
Due from Lawyers Insurance Fund	19,331	17,578
	23,267	21,315
Property, plant and equipment		
Cambie Street property	11,739	12,002
Other - net	1,362	1,372
	36,368	34,689
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	4,040	3,965
Liability for unclaimed trust funds	1,848	1,682
Current portion of building loan payable	500	500
Deferred revenue	17,491	16,014
Deferred capital contributions	70	81
B.C. Courthouse Library Grant	678	635
Deposits	27	20
	24,654	22,897
Building loan payable	4,600	5,100
	29,254	27,997
Net assets		
Capital Allocation	1,872	1,221
Unrestricted Net Assets	5,242	5,471
	7,114	6,692
	36,368	34,689

The Law Society of British Columbia
General Fund - Statement of Changes in Net Assets
For the 12 Months ended December 31, 2011
($000's)

DRAFT

	Invested in P,P & E net of associated debt	Unrestricted	Unrestricted Net Assets	Capital Allocation	2011 Total	2010 Total
	$	$		$	$	$
Net assets - December 31, 2010	7,777	(2,306)	5,471	1,221	6,692	5,575
Net (deficiency) excess of revenue over expense for the period	(974)	(463)	(1,437)	1,859	422	1,117
Repayment of building loan	500	-	500	(500)	-	-
Purchase of capital assets:						
LSBC Operations	380	-	380	(380)	-	-
845 Cambie	328	-	328	(328)	-	-
Net assets - December 31, 2011	8,011	(2,769)	5,242	1,872	7,114	6,692

The Law Society of British Columbia
Special Compensation Fund
Results for the 12 Months ended December 31, 2011
($000's)

DRAFT

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Annual assessment	53	53		
Recoveries	97	250		
Total Revenues	150	303	(153)	-50.5%
Expenses				
Claims and costs, net of recoveries	1	-		
Administrative and general costs	74	80		
Loan interest expense	(26)	-		
Total Expenses	49	80	(31)	-38.8%
Special Compensation Fund Results	**101**	**223**	**(122)**	

The Law Society of British Columbia
Special Compensation Fund - Balance Sheet
As at December 31, 2011

($000's)

	Dec 31 2011	Dec 31 2010
Assets		
Current assets		
Cash and cash equivalents	1	1
Due from Lawyers Insurance Fund	949	895
	950	896
Liabilities		
Current liabilities		
Accounts payable and accrued liabilities	8	14
Deferred revenue	11	52
	19	66
Net assets		
Unrestricted net assets	931	830
	931	830
	950	896

The Law Society of British Columbia
Special Compensation Fund - Statement of Changes in Net Assets
For the 12 Months ended December 31, 2011
($000's)

DRAFT

	2011 $	2010 $
Unrestricted Net assets - December 31, 2010	830	364
Net excess of revenue over expense for the period	101	466
Net assets - December 31, 2011	931	830

The Law Society of British Columbia
Lawyers Insurance Fund
Results for the 12 Months ended December 31, 2011
($000's)

DRAFT

	2011 Actual	2011 Budget	$ Var	% Var
Revenue				
Annual assessment	13,437	13,292		
Investment income	12,841	659		
Other income	31	35		
Total Revenues	26,309	13,986	12,323	88.1%
Expenses				
Insurance Expense				
Provision for settlement of insurance claims	10,883	14,514		
Salaries and benefits	2,235	2,470		
Contribution to program and administrative costs of General Fund	1,516	1,526		
Office	533	657		
Actuaries, consultants and investment brokers' fees	428	482		
Allocated office rent	148	148		
Premium taxes	14	12		
Income taxes	7	3		
	15,764	19,812		
Loss Prevention Expense				
Contribution to co-sponsored program costs of General Fund	713	711		
Total Expenses	16,477	20,523	4,046	19.7%
Lawyers Insurance Fund Results	**9,832**	**(6,537)**	**16,369**	

The Law Society of British Columbia
Lawyers Insurance Fund - Balance Sheet
As at December 31, 2011

($000's)

	Dec 31 2011	Dec 31 2010
Assets		
Cash and cash equivalents	23,720	21,530
Accounts receivable and prepaid expenses	653	1,149
Due from members	72	25
Due from General Fund	-	-
General Fund building loan	5,100	5,600
Investments	102,895	108,287
	132,440	136,591
Liabilities		
Accounts payable and accrued liabilities	1,611	2,709
Deferred revenue	6,813	6,707
Due to General Fund	19,331	17,578
Due to Special Compensation Fund	950	895
Provision for claims	52,876	55,652
Provision for ULAE	7,065	7,618
	88,646	91,159
Net assets		
Unrestricted net assets	26,294	27,932
Internally restricted net assets	17,500	17,500
	43,794	45,432
	132,440	136,591

The Law Society of British Columbia
Lawyers Insurance Fund - Statement of Changes in Net Assets
For the 12 Months ended December 31, 2011
($000's)

DRAFT

	Unrestricted $	Internally Restricted $	2011 Total $	2010 Total $
Net assets - December 31, 2010	27,934	17,500	45,434	42,805
Excess (deficiency) of revenue over expenses for the year	9,832	-	9,832	(2,448)
Changes in unrealized gains and losses during the year:				
Unrealized gains on available-for-sale financial assets arising during the year	1,099	-	1,099	7,359
Realized (gain) on disposal of investments recognized in the statement of revenue and expense	(9,688)	-	(9,688)	(739)
Realized (gain) on pooled fund income distributions in the statement of revenue and expense	(2,883)	-	(2,883)	(1,543)
Net change in unrealized gains and losses on available-for-sale financial assets	(11,472)	-	(11,472)	5,077
Net assets - December 31, 2011	26,294	17,500	43,794	45,434

February 21, 2012
Issue 2

Leo

Information management product demos create excitement

The Leo project team invited project liaisons from each department to participate in information management product demonstrations by *Autonomy* and *Open Text* in early February. These two companies are considered to be leaders in document management software.

For liaisons that had experience with an information management software system at other organizations, this was familiar territory. However, these demos provided many of our liaisons with their first look at how an information management program works.

"The demos helped me to get a better understanding of what the end product will look like."

The liaisons were actively engaged in the demos and had lots of insightful questions for the software presenters. After the two demos, many liaisons summed up how they felt about the implementation of an information management program: "Very excited!"

"Looking forward to putting this in place – actually want it now!"

Here are some of the features of the two software products:

Interface – Systems can be accessed through Outlook and/or Windows Explorer.

Accessibility – Systems have the capability to be accessed from desktops, laptops, the Internet and mobile devices.

Check out/Check in – This process allows users to "check out" documents and work on them knowing that others will not be able to make additional edits until the document has been checked back into the system.

Version Control – Document updates are stored and different versions are easily identified.

Quick Search – Frequently-searched documents can be quickly retrieved.

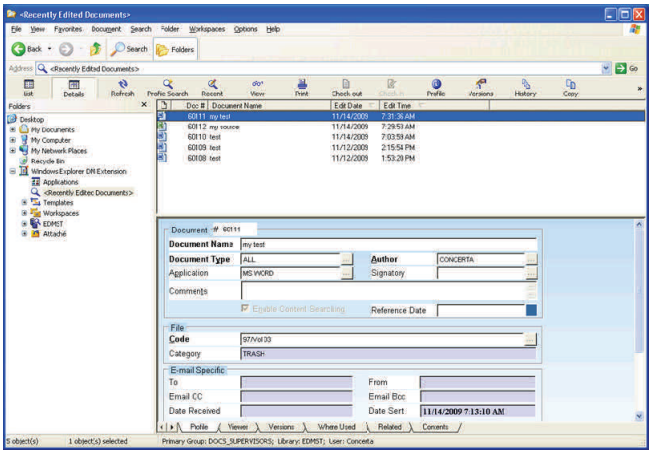
Recent Documents – Recently-used documents can be accessed without using the search feature.

For more details about the information management software products, visit the Project Leo site or talk to your department's project liaison.

Hungry to see what information management software looks like?

Feast your eyes on what an information management software program looks like!

The Project Leo site has been updated to share the knowledge from the information management product demonstrations. Make sure to roam around the site and check out the two products: Autonomy and OpenText.



Screenshot of OpenText start screen

Around the watering hole

- Liaisons have made great progress in determining department needs
- Missed your department information session? Contact a member of the project team to get the information you need
- Important project dates and milestones have been added to the calendar on Lex
- March 31:
  End of Project Phase 2
- April 18:
  Leo Project Room Open House 1-3 pm

What you can do now

- Make sure your electronic file naming conventions follow *Name It* guidelines
- Remove all Law Society related documents from personal folders
- Remove all Law Society related documents from miscellaneous folders and delete the folder
- Work with your liaison to make sure they know your electronic record keeping needs

Where we are on the hunt for a new information management program ...

Phase 1: Plan	Phase 2: Design	Phase 3: Procure	Phase 4: Implement	Phase 5: Pilot	Phase 6: Rollout
Complete	January 4 - March 31, 2012	April 1 - June 30, 2012	July 1 - September 7, 2012	September 8 - December 31, 2012	January 1 - June 30, 2013

Leo project team goes on the prowl to learn how other organizations manage information

In the last few weeks, the members of the Leo team have visited several other organizations with an eye to learn as much as we can about how to implement an information management program.

Not only did the team see other software systems in action, members also got the chance to ask questions about how programs have been rolled out.

"We were particularly interested to hear about 'lessons learned'", explained Robyn Crisanti, project manager. "These folks have been through the experience of launching an electronic document management program and they know what they would do differently if they had the chance."

The team visited the City of Richmond, the City of Vancouver, Powerex and the BC Securities Commission. All have approached information management in different ways, though the team heard similar advice at each location.

"We were particularly interested to hear about 'lessons learned'", explains Robyn Crisanti, project manager

For example, one of the common themes was to make sure that employees were ready for the new program by communicating frequently and providing appropriate training.

"We also heard at each location that we should try not to customize the software that we choose because it can make future upgrades a nightmare," added Robyn.

And as for the different software solutions, "there was no one system that stood out for us," said Robyn. "They all do different things well and it will be up to the team to pick the best one for the Law Society based on the requirements currently being gathered by the project liaisons."

The team may visit other locations in the future, but for now is focused on working with the liaisons to identify the Law Society's information management needs.

CEO introduces Leo to the Benchers

Tim introduced the Leo project to the Benchers at the Bencher meeting on January 27, 2012, stating:

"Project Leo is about transforming how we at this organization record, compile, share and maintain all of the information that we acquire and need to use in terms of doing all our regulatory activities. Today that is done through a patchwork of systems, and software, and processes and protocols which while adequate for today will not serve us well in the future, particularly when we look at our goals. One of our goals is to be a more effective and efficient regulator.

So Project Leo will, between now and 2013, allow us to design and analyze all of our user needs and more importantly to assess what is the best system, software, technology and otherwise, to do those things which I said we absolutely need to do and are at the heart of what we do. That is a big project and it will also necessarily involve significant capital investments at the right time once we know what we need here.

So that is a big priority for us this year."

Ask Leo

Q: Does being more efficient as a result of Leo mean that there could be layoffs?

A: No. Leo is about doing our work more efficiently which will allow us to be more responsive to our stakeholders and meet their expectations for a professional regulator in the public interest.

Q: Is the *Name It* program still in place?

A: Yes. The *Name It* program follows international file naming standards which will make it easier to migrate legacy documents into the new system. The *Name It* program will also continue once the system is rolled out early next year.

Have a question? Ask Leo

Kudos & Thank Yous

Kudos to Rebecca Miller! Rebecca has been helping the Records Department with entering the data from all the one-on-one session needs assessment forms. Her help has been greatly valued by the project team as this information will be used to create the overall needs assessment for the organization.

Thank you to Erika Nicklom who has helped Myshkaa with the one-on-one sessions as well as helping Bernice with information management and metadata research.

A big roar goes to Scott Cameron who has volunteered to be a tester with complex Excel spreadsheets. Scott will work with the team to test his complex spreadsheets in the potential system environments.

Leo Project Organization

Mission

The Leo project is developing a best practices, organization-wide information management program, including policies, procedures, governance and tools, which will allow collaboration, meet our record-keeping obligations and facilitate the Law Society's ability to meet current and future stakeholder expectations for an efficient, effective and innovative regulator.

Vision

Because of Leo, every Law Society employee will play a role in managing and protecting our information – one of our most important assets – and will be empowered to access information and work collaboratively using best practices, all of which will enhance the employment experience and our ability as regulators.

Values

- Collaborative
- Innovative
- Respectful (of users time, knowledge and needs)
- Best practices driven
- Goal oriented
- Committed to quality
- Accountable

The Law Society of British Columbia

Key Performance Measures

Report on 2011 Performance

Presented to Benchers March 2, 2012

The Law Society of British Columbia

Table of Contents

Background

This is the fifth time that the organization has reported on the key performance measures.

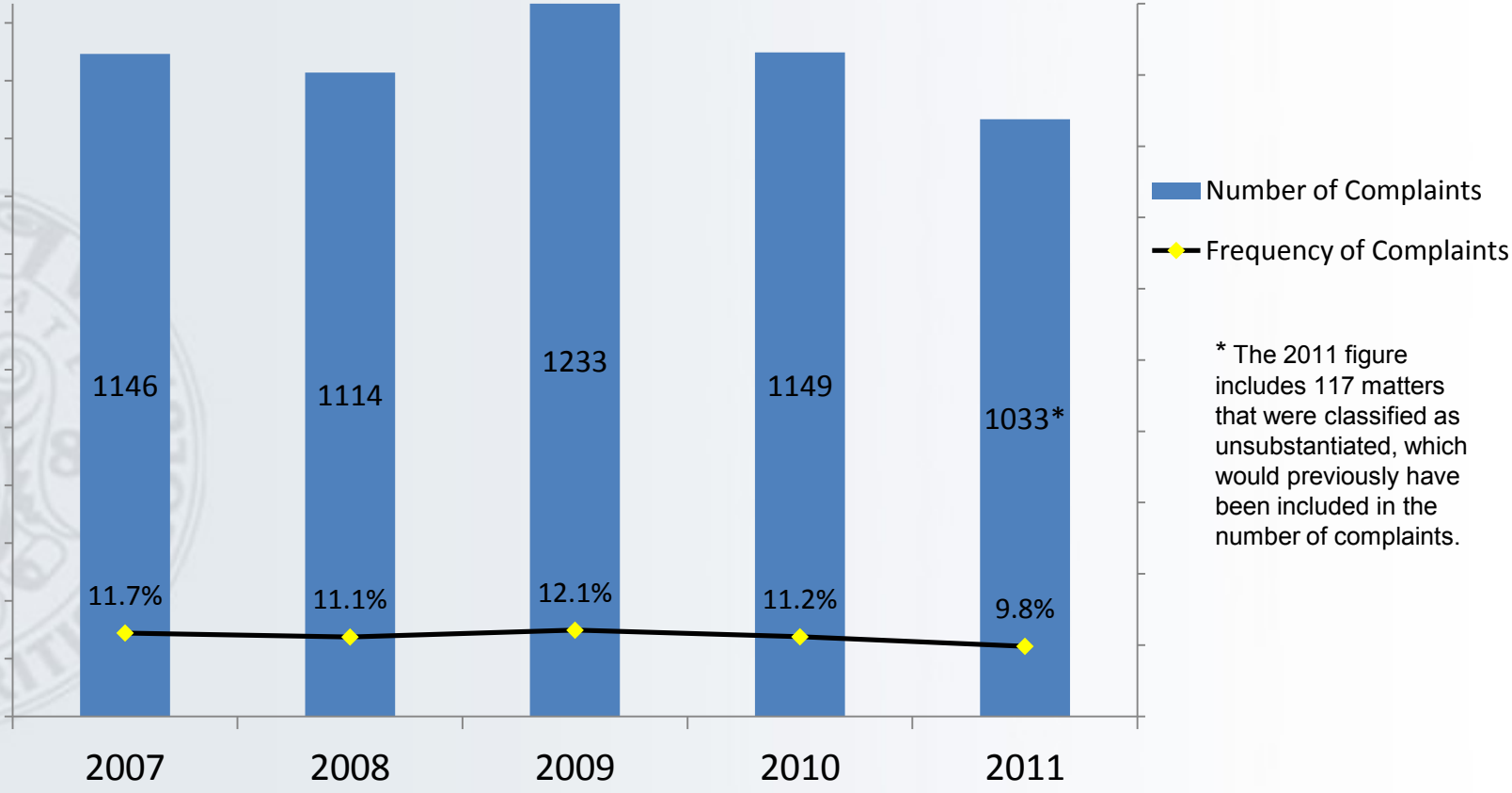
The key performance measures are intended to provide the Benchers and the public with evidence of the effectiveness of the Law Society in fulfilling its mandate to protect the public interest in the administration of justice by setting standards for its members, enforcing those standards and regulating the practice of law.

The Law Society of British Columbia

Bellwether Measures

Frequency of Complaints

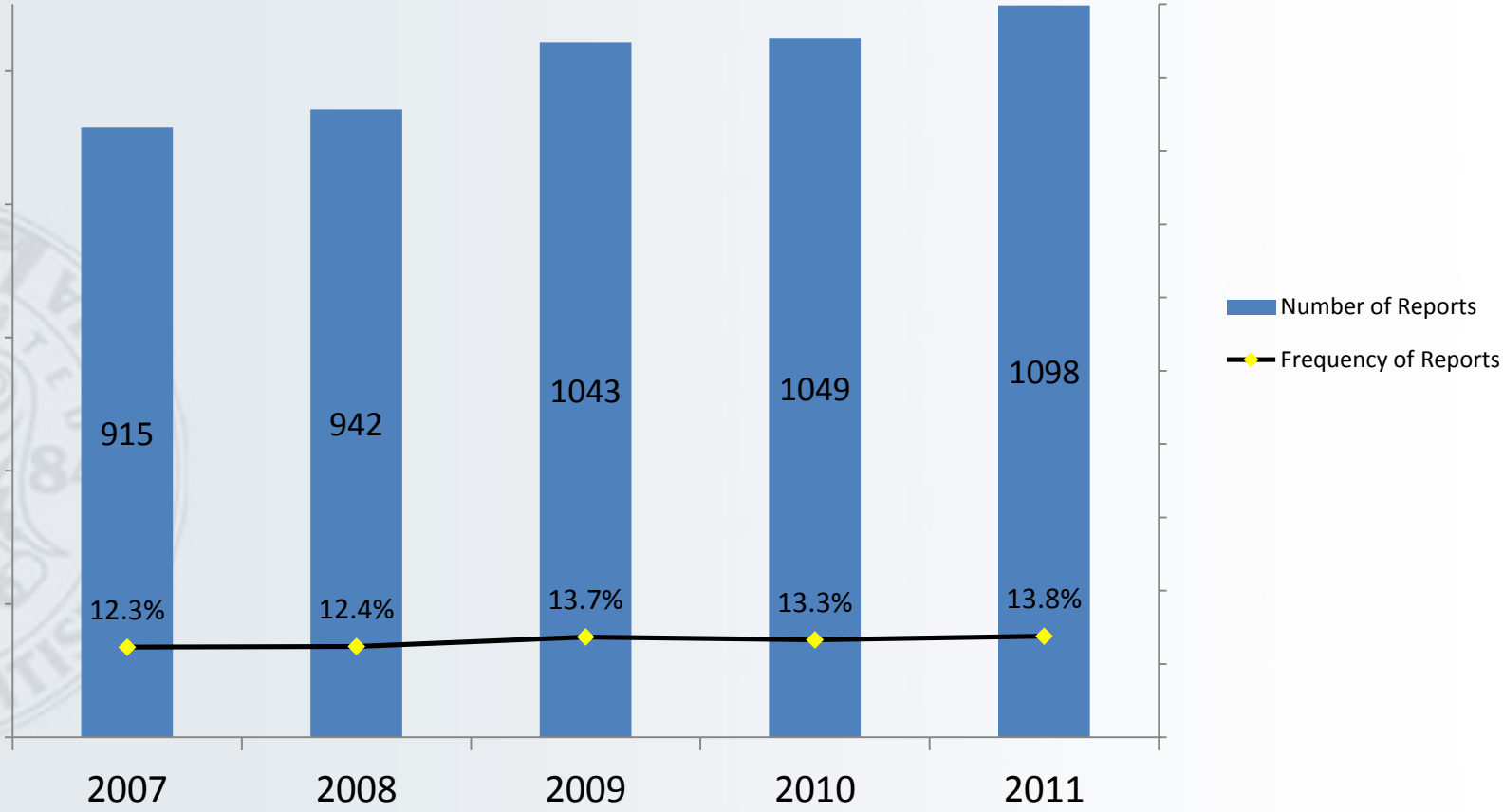
The number of complaints divided by the median number of practising lawyers



* The 2011 figure includes 117 matters that were classified as unsubstantiated, which would previously have been included in the number of complaints.

Frequency of Insurance Reports

The number of reports divided by the median number of insured lawyers



The Law Society of British Columbia

Professional Conduct and Discipline

Department Highlights

- In 2011, the Professional Conduct Department received 916 complaints, and closed 1098, leaving 182 fewer open files at the end of the year than the beginning. The number of open files at the end of the year was the lowest it has been in 10 years by a significant margin.

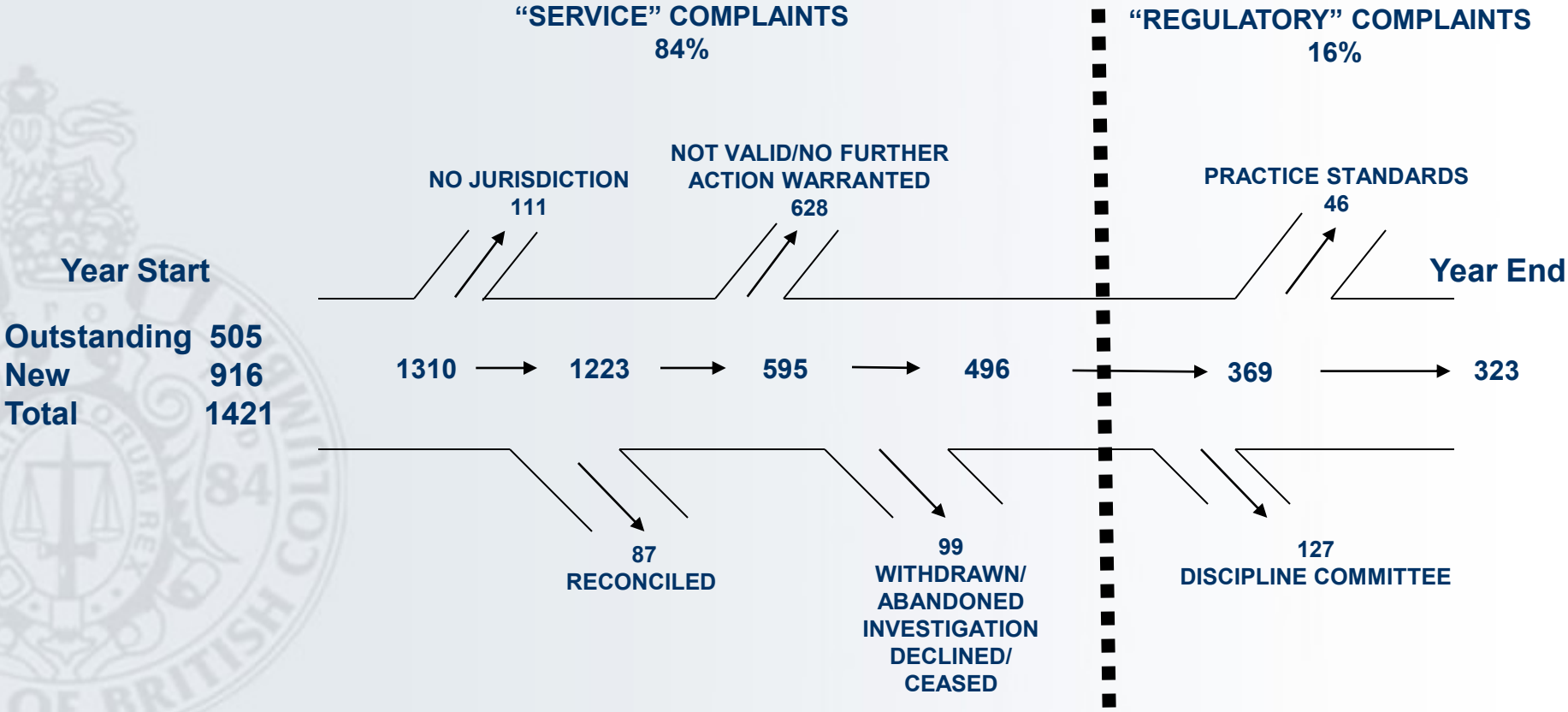
- The Professional Conduct Department also received 117 matters where substantiation was required and not provided – “unsubstantiated complaints”, all of which would have been categorized as complaints in prior years.

- The Professional Conduct Department met or exceeded its Key Performance Measures for all areas. This is the first year since the development of the KPMs that we have done so. We bettered our results compared with last year in three areas and equaled those in one other.

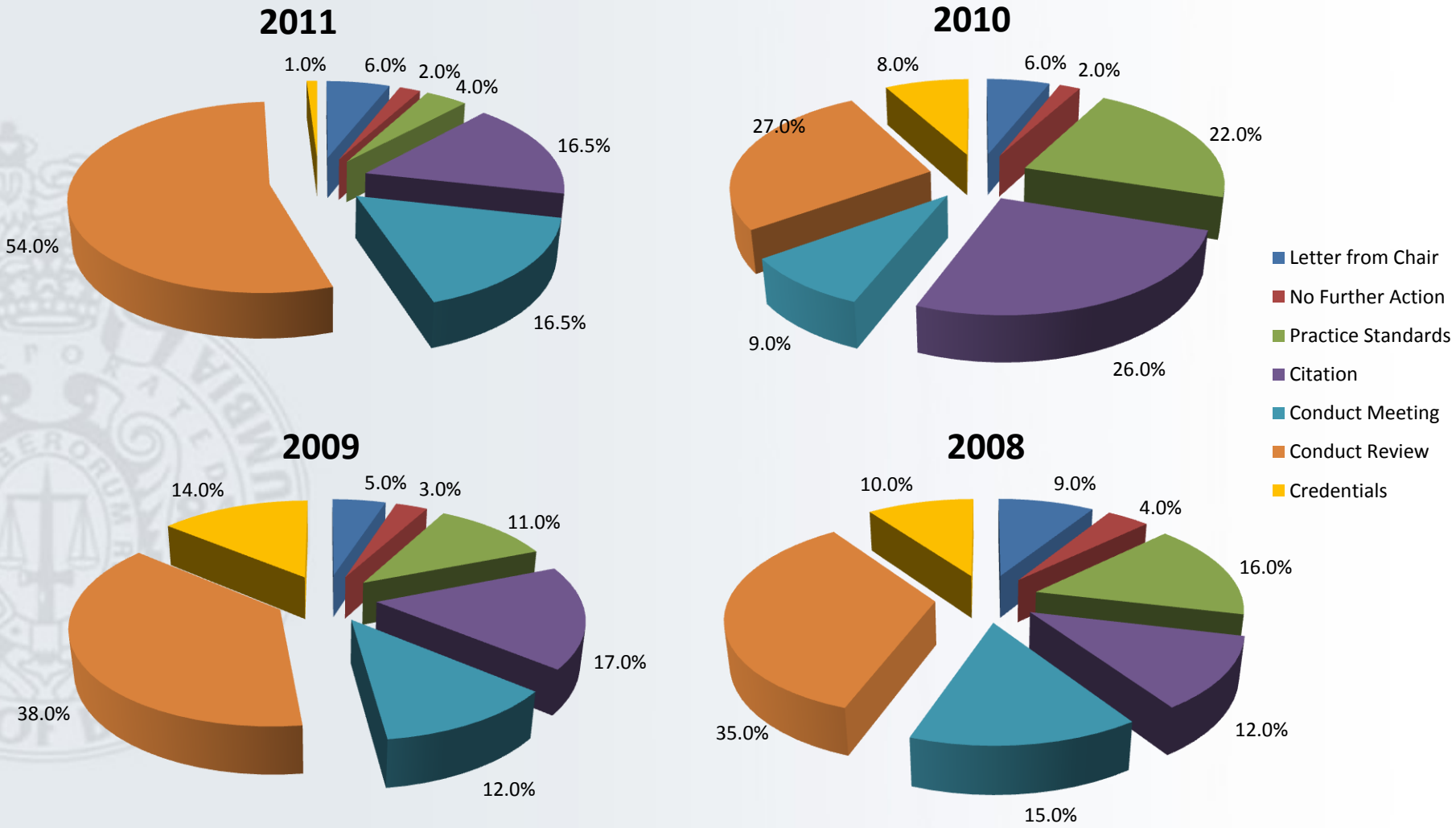
- The Department has been working hard to close complaints quickly. In 2011, 89% of all files were closed within 1 year.

- Both the CRC and the Ombudsperson continue to be satisfied with our complaints handling process and procedure.

2011 Complaints Results

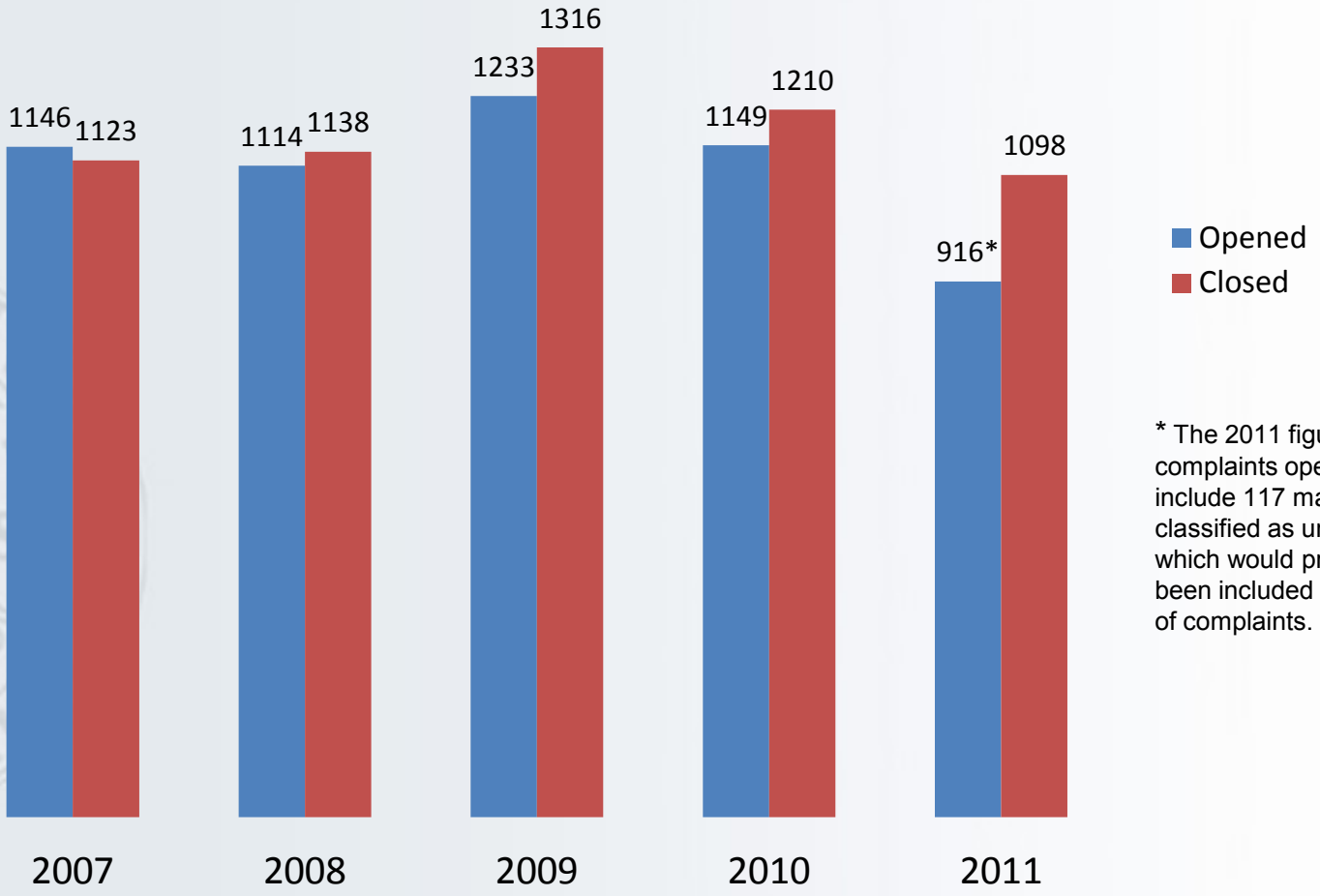


2011 Discipline Results



Key Activities

Number of Member Complaints Opened and Closed Each Year

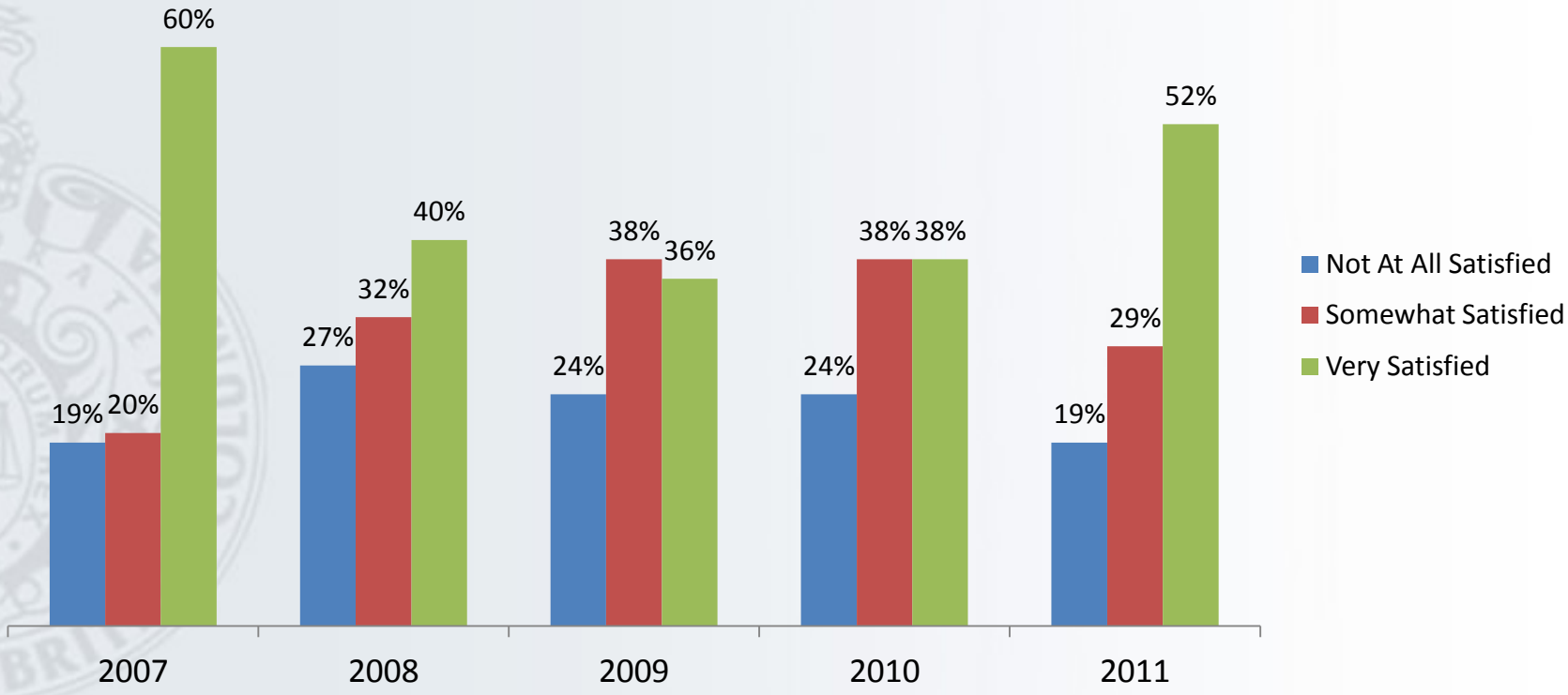


* The 2011 figure for complaints opened does not include 117 matters that were classified as unsubstantiated, which would previously have been included in the number of complaints.

Key Performance Measures

At least 75% of Complainants express satisfaction with timeliness

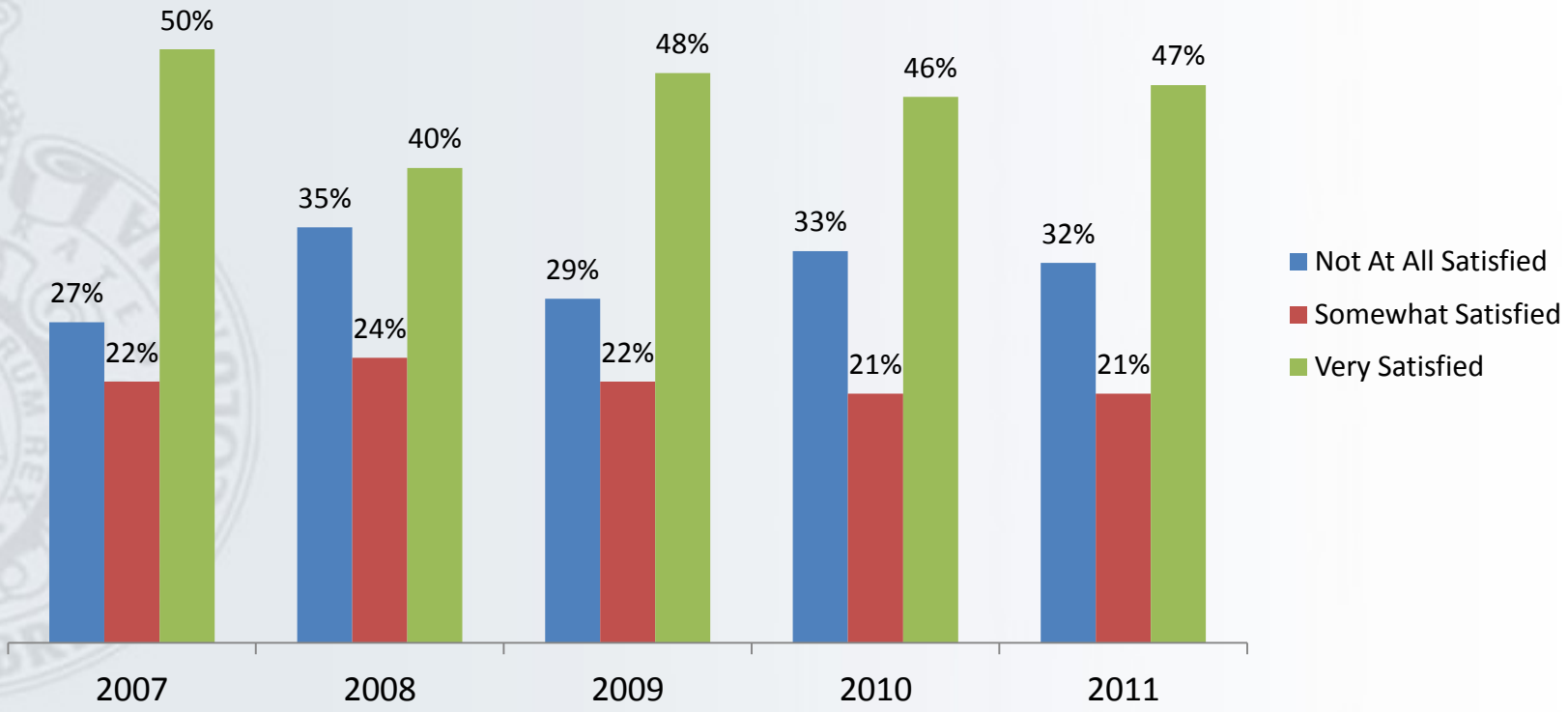
2011	81%
2010	76%



Key Performance Measures

At least 65% of Complainants express satisfaction with fairness

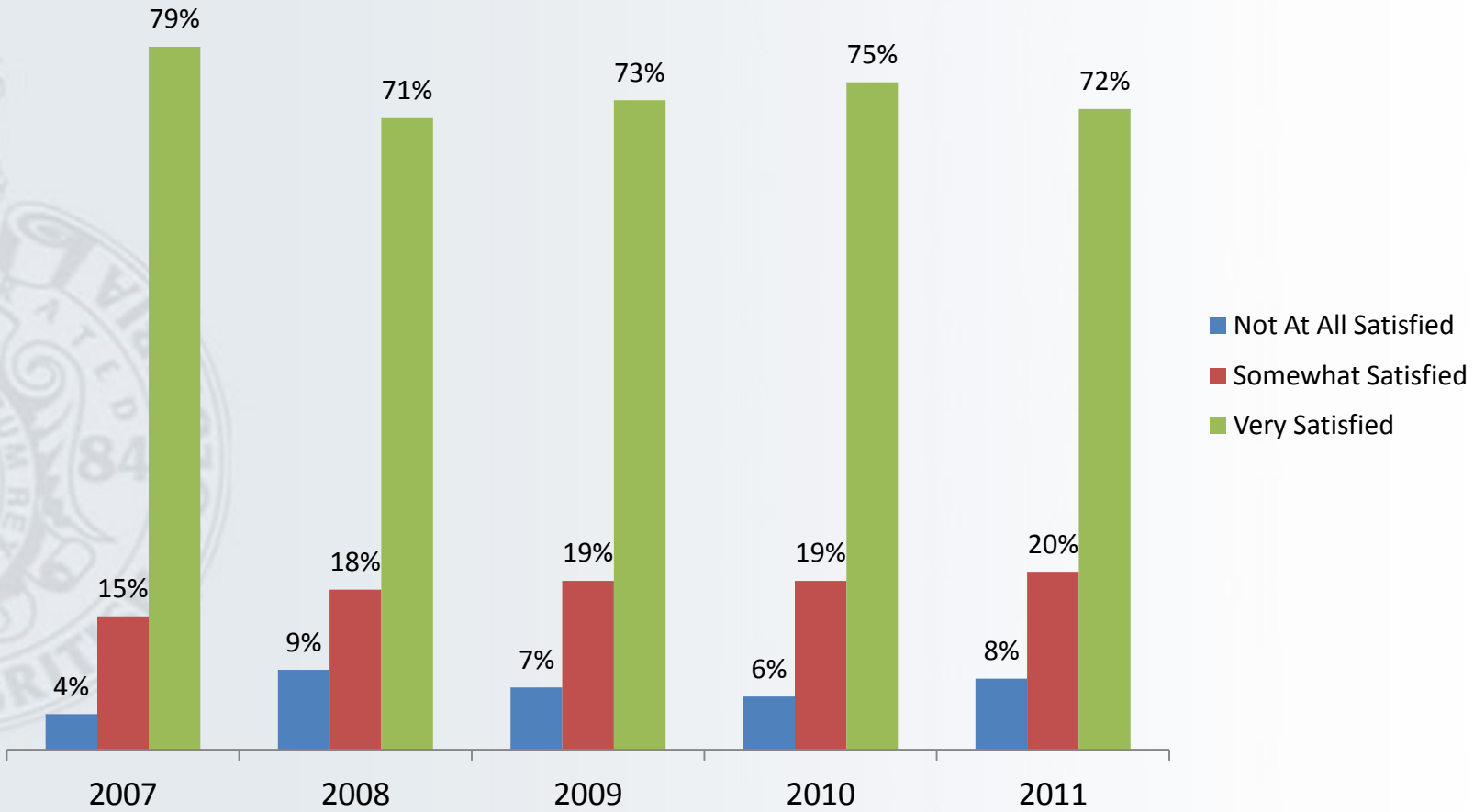
2011	68%
2010	67%



Key Performance Measures

At least 90% of Complainants express satisfaction with courtesy

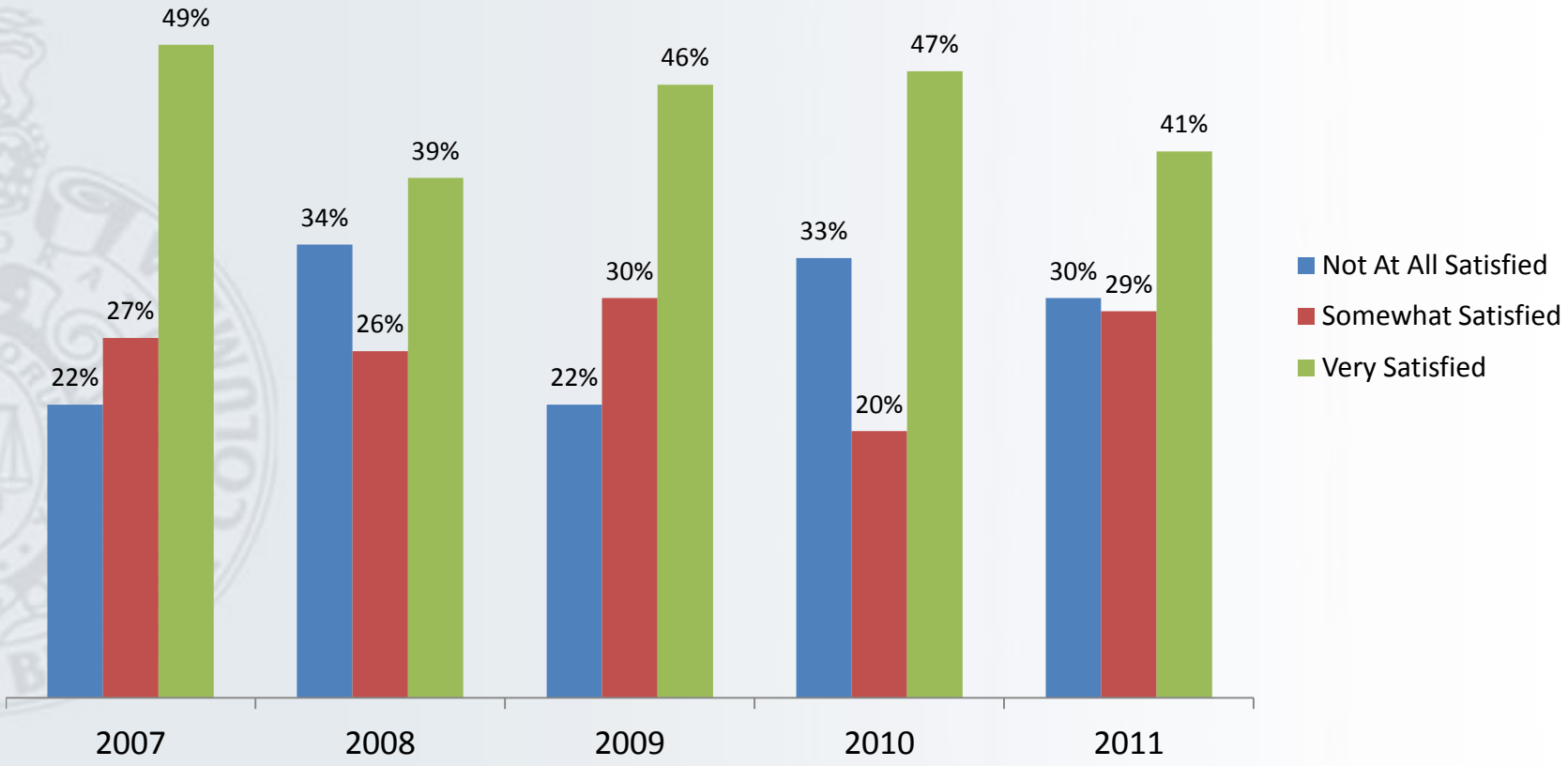
2011	92%
2010	94%



Key Performance Measures

At least 65% of Complainants express satisfaction with thoroughness

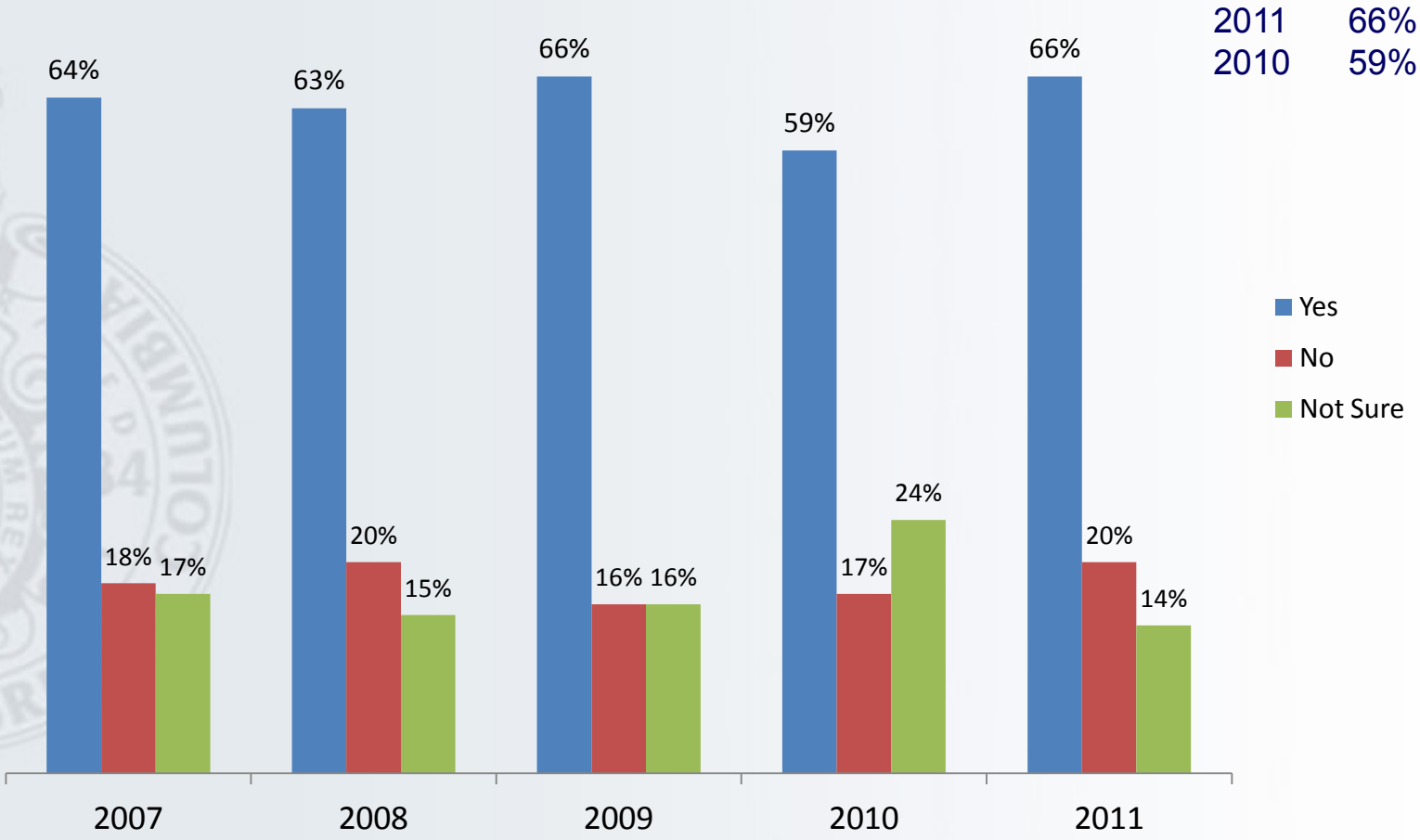
2011	70%
2010	67%



Key Performance Measures

At least 60% of Complainants would recommend someone make a complaint

If someone you knew had a concern about a lawyer, would you recommend that he or she make a complaint about that lawyer to the Law Society?



Key Performance Measures

The Ombudsperson, the Courts and the CRC do not find our process and procedures as lacking from the point of view of fairness and due process.

In 2011, 14 enquiries were received from the Office of the Ombudsperson concerning our complaint investigation process, compared with no enquiries received in 2010. Out of those 14 files, 7 were closed, and 7 remained open at the end of 2011.

In 2011, the Complainants' Review Committee considered 107 complaints as compared to 104 in 2010. The Committee resolved to take no further action on 98 of them on the basis the staff assessments made were appropriate in the circumstances. A total of five referrals were made to the Discipline Committee and four to the Practice Standards Committee. Included in those numbers are files in which the Committee sought further information.

The CRC closed the year with 6 files being carried over into 2012 as opposed to 49 files the previous year.

The Law Society of British Columbia

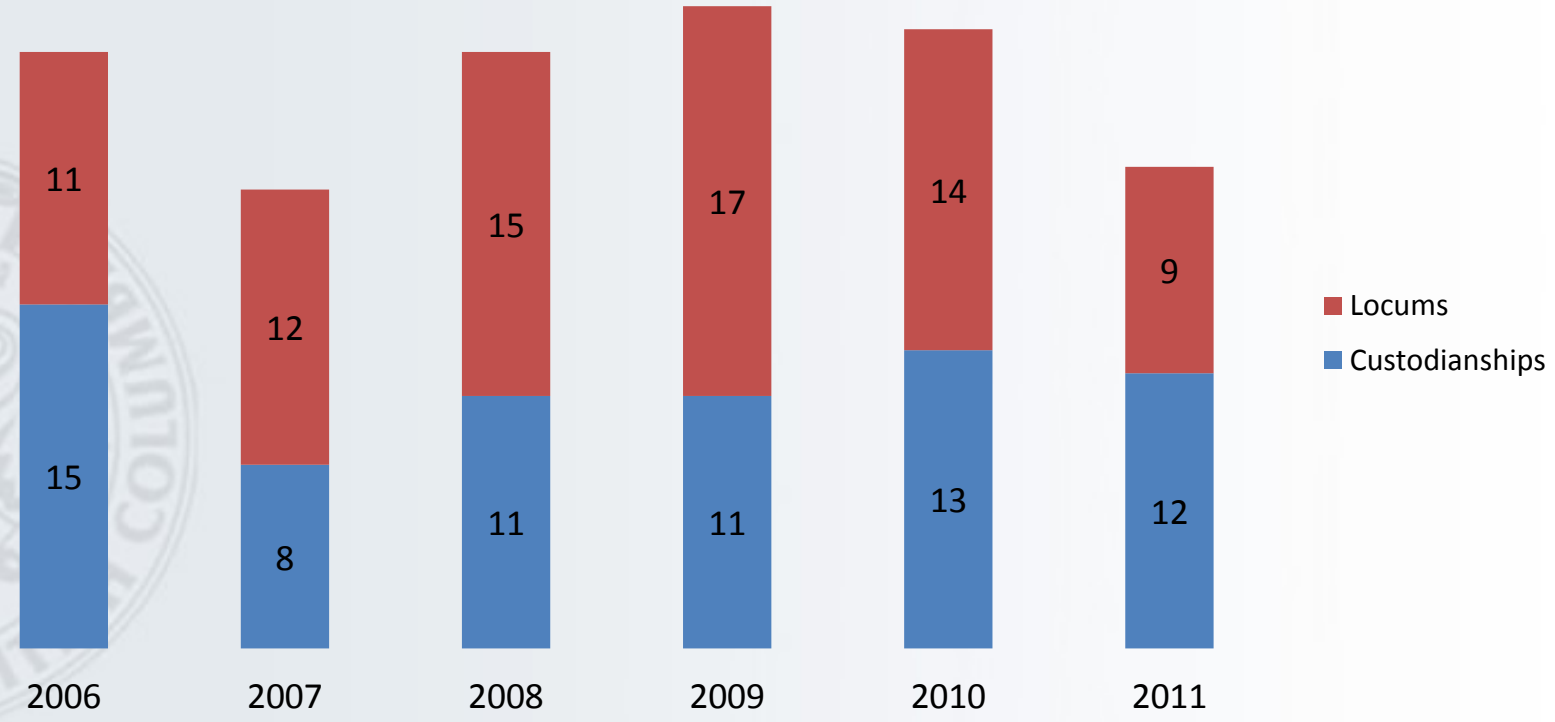
Custodianships

Department Highlights

- In 2011, the Law Society was appointed as a custodian for 12 practices and staff coordinated 9 formal locum placements, eliminating the need for the appointment of the Law Society as a custodian in those cases.
- There were 41 custodianships under administration at year end compared with 40 at the end of 2010.
- Overall, the total number of practices requiring the appointment of a custodian or placement of a locum has remained somewhat steady since 2008.
- The average time under the new program to complete a custodianship is lower compared with the historical average.
- 98% of clients surveyed are satisfied with the way in which we have dealt with their matter with 79% of them being extremely satisfied.

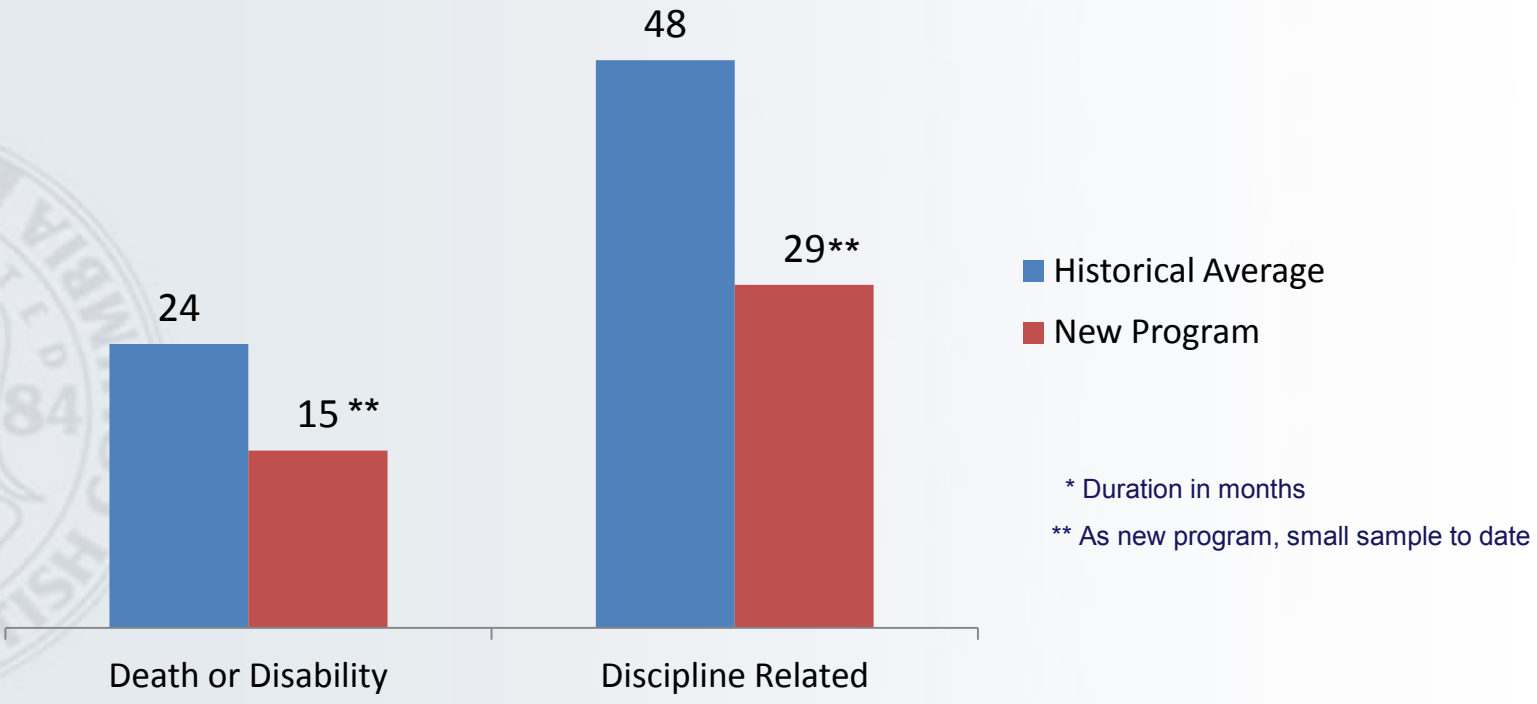
Key Activities

New Custodianships and Locums By Year



Key Performance Measures

The length of time required to complete a custodianship will decrease under the new program based on comparable historic averages*

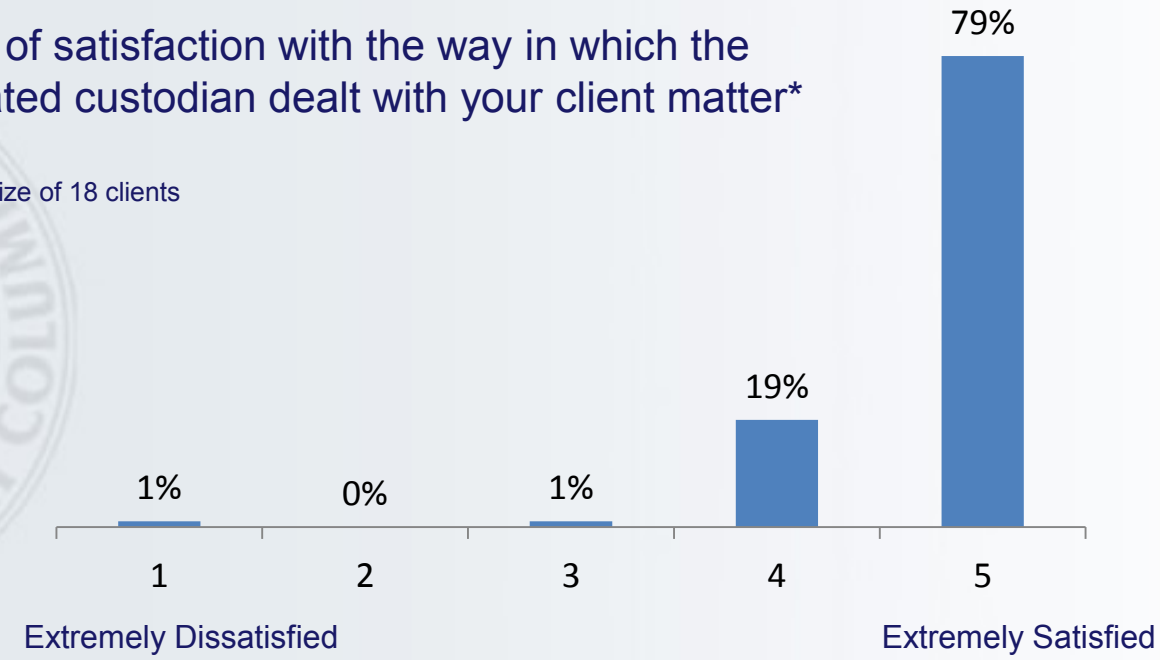


Key Performance Measures

98% of clients surveyed are satisfied with the way in which the designated custodian dealt with their client matter.

Degree of satisfaction with the way in which the designated custodian dealt with your client matter*

* Sample size of 18 clients



The Law Society of British Columbia

Trust Assurance

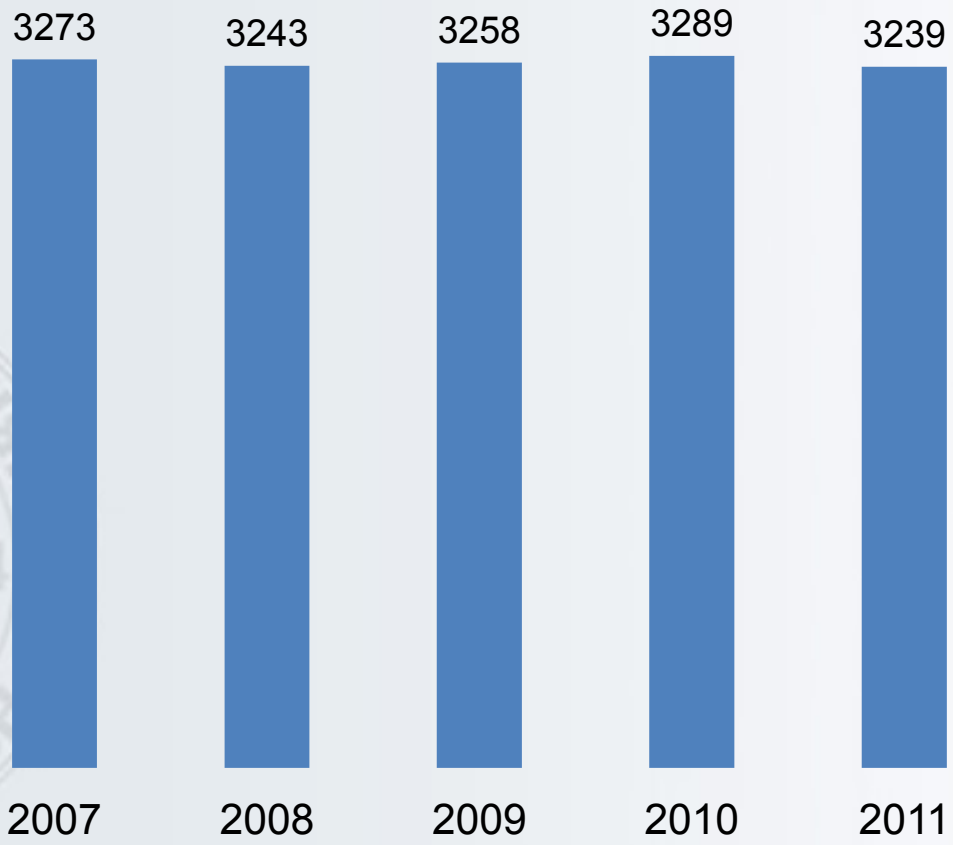
Department Highlights

- In addition to conducting trust compliance audits and reviewing annual law firm trust reports, the Trust Assurance Department also performs file monitors when necessary, to ensure deficiencies noted during the audits are corrected.
- The department also conducts new firm site visits upon request and continues to provide guidance on trust related matters through direct correspondence with the membership, formal presentations to various groups, and through the development of information resources such as the Trust Accounting Handbook and Checklists, which are available on the Law Society website.
- Reviewed approximately 3,200 trust reports in 2011, similar to past years.
- Performed 476 compliance audits in 2011, have completed over 2000 since the inception of the trust assurance program. On target to complete the first six year cycle of compliance audits by the end of 2012.

Department Highlights

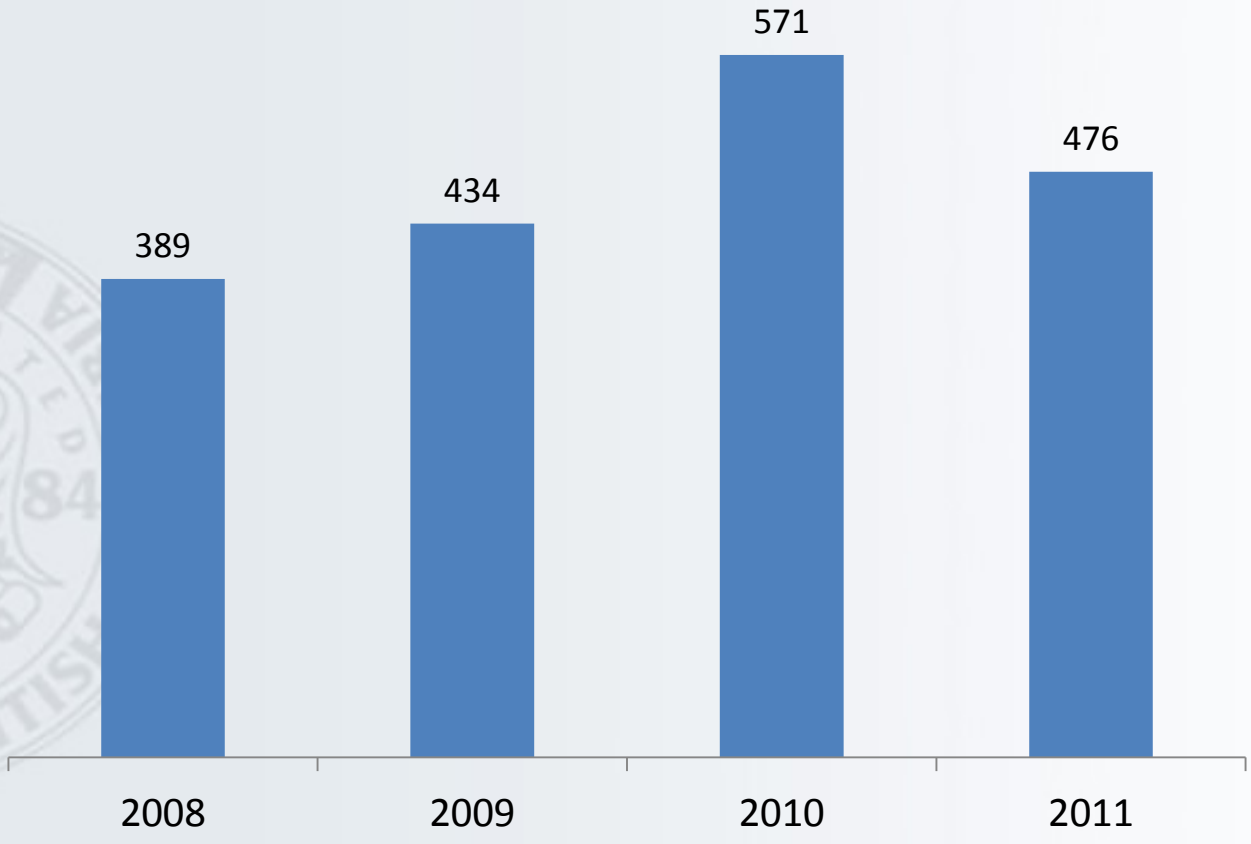
- Continued positive member survey results.
- The number of financial suspensions remains low and stable.
- Slight decrease in referrals in 2011 compared to 2010, but consistent results compared to recent years.
- Performance on key compliance questions stable in 2010 (the last complete year for trust reports) as measured by the percentage of self-reports allowed compared with those who were required to provide an accountant's report.

Number of Trust Reports



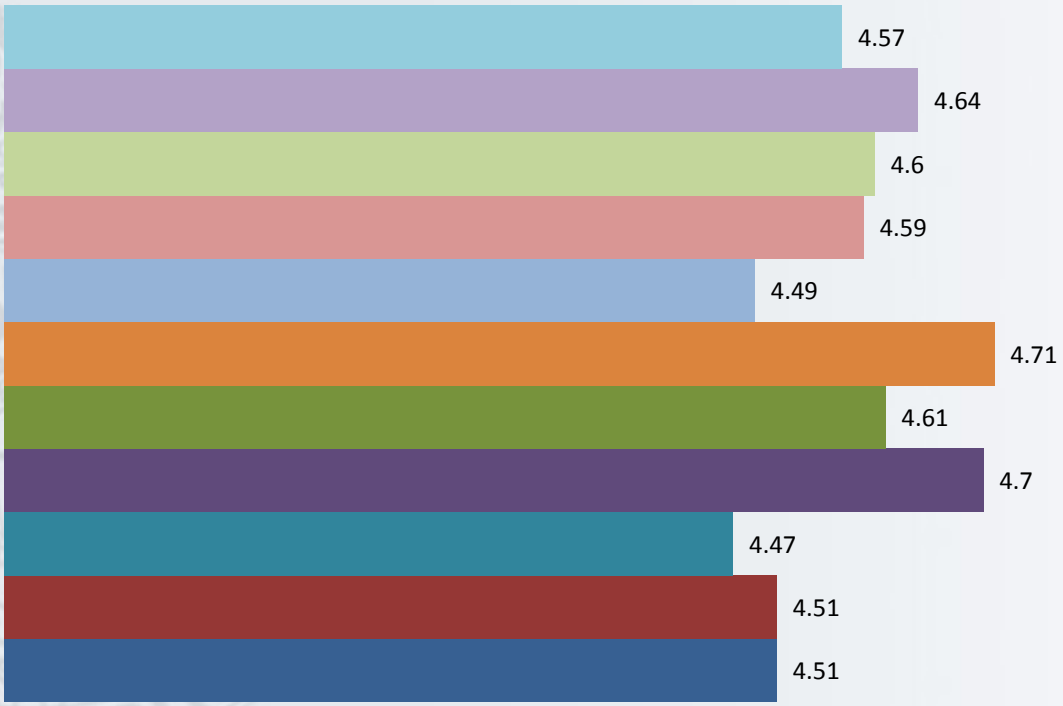
Compliance Audits

In 2011, we performed approximately 476 compliance audits



Key Activities

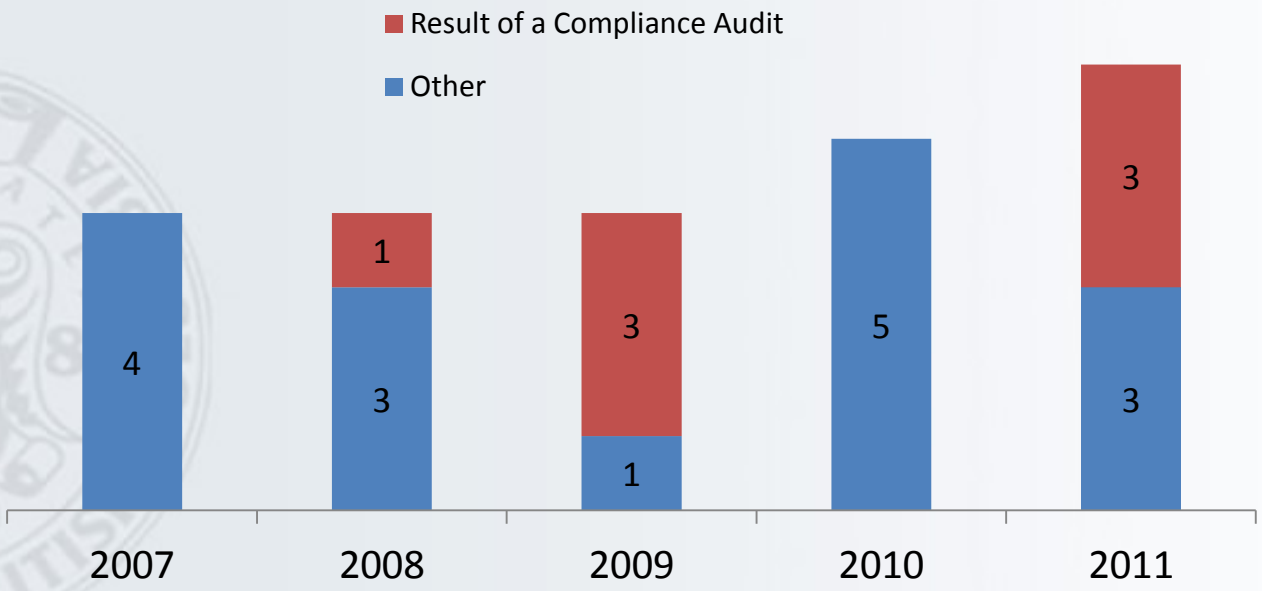
Compliance Audit Survey Results (Average rating based on 5 point scale)



- The compliance audit has benefited the practice by increasing awareness of the Law Society of Division 7 Rules
- The recommendations provided in the audit report and by the auditor were constructive and useful
- The time span of the audit appeared reasonable
- A draft audit report was delivered and discussed upon completion of the audit
- The auditor provided clear answers and rule references (if applicable) to any questions posed
- The auditor displayed a professional, constructive and positive approach during the audit
- There were minimal disruptions to the practice during the audit
- The practice had an opportunity to ask questions and provide explanations for the deficiencies noted
- The audit was clear, logical and well organized
- The auditor discussed key results/findings after completing the compliance audit
- The objectives of the compliance audit were clearly stated and discussed by the auditor

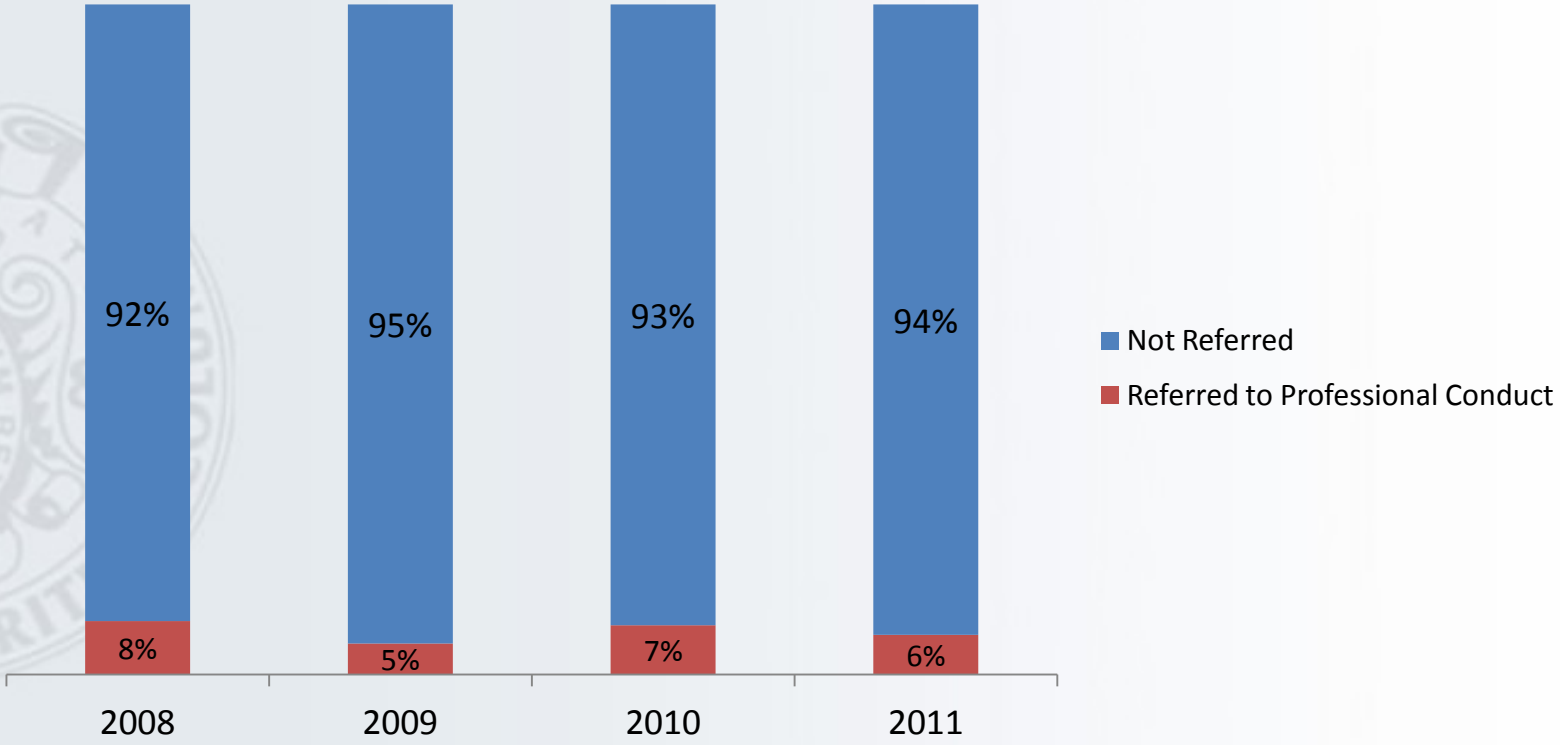
Key Performance Measure

Long term reduction in the number of financial suspensions issued by trust assurance program



Key Performance Measure

Long term reduction in the percentage of referrals to Professional Conduct department as a result of a compliance audit.



Key Performance Measure

Improved performance on key compliance questions from lawyer trust report filings

Stability in Self Reported Trust Report filings allowed

The Law Society of British Columbia

Credentials, Articling and PLTC

Department Highlights

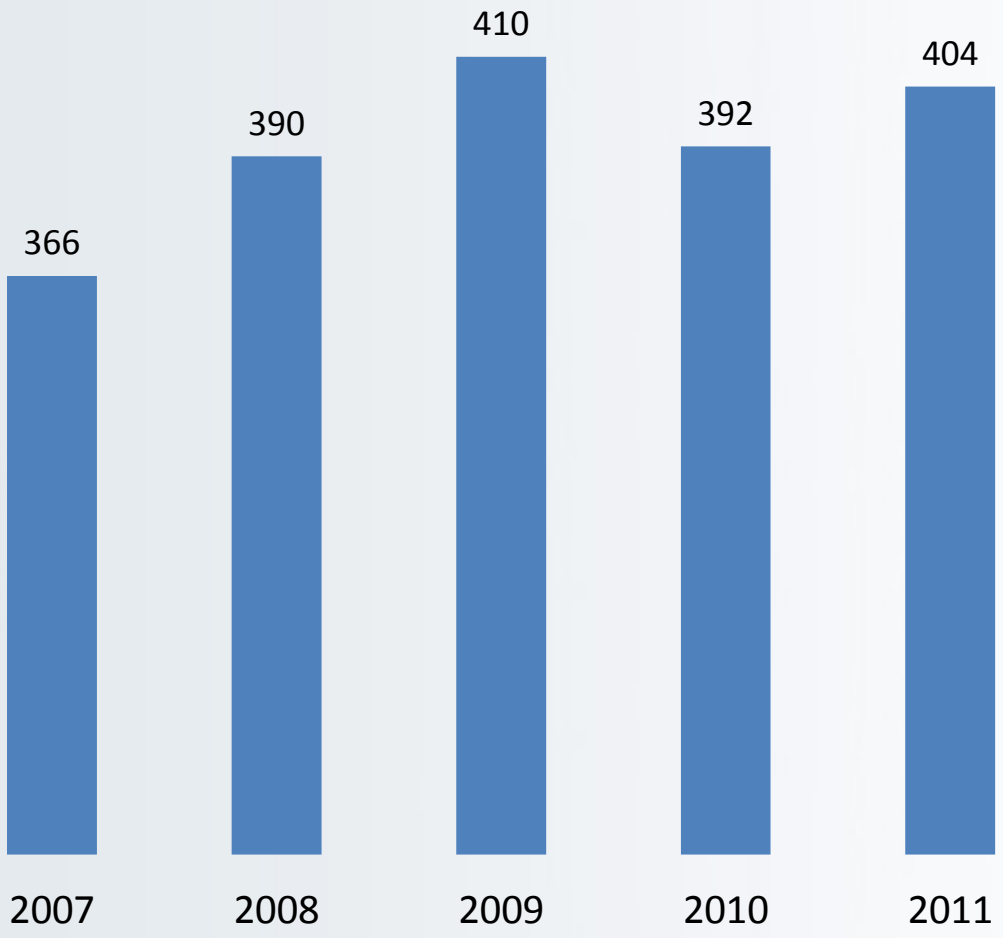
- PLTC Skills and Examination Tutoring - For many years, PLTC has had a tutoring program for students struggling with skills. This program is staffed part-time by the PLTC Academic Support Instructor. Since late 2010 PLTC has conducted a pilot project offering one-on-one tutoring for examinations on various examinable topics of law, practice and procedure. The project operates within existing budget by offering tutoring from regular staff faculty (not contractors) during the non-teaching periods of the course.
- In addition to articled students, the Credentials Department deals with:
  - former lawyers being re-instated (triggering the 'good character and fitness' test),
  - lawyers transferring from other provinces or territories (pursuant to the mobility agreement), and
  - non-practicing lawyers returning to practice (determining whether they have kept current).

Department Highlights

- The number of PLTC students achieving an initial pass on all six items (4 skills assessments, 2 examinations), exceeded the key performance measure of 85% in each of the last five years, with an initial pass rate of 90% in 2011.
- While students rated PLTC's value at an average of 3.5 or higher this year, principals rated PLTC's value slightly lower than 3.5 on one question out of four. It continues to be the case that students value PLTC somewhat more highly than articling, while articling principals value articling somewhat more highly than PLTC.
- Both students and principals rated the value of articles at an average of 3.5 or higher this year and last.

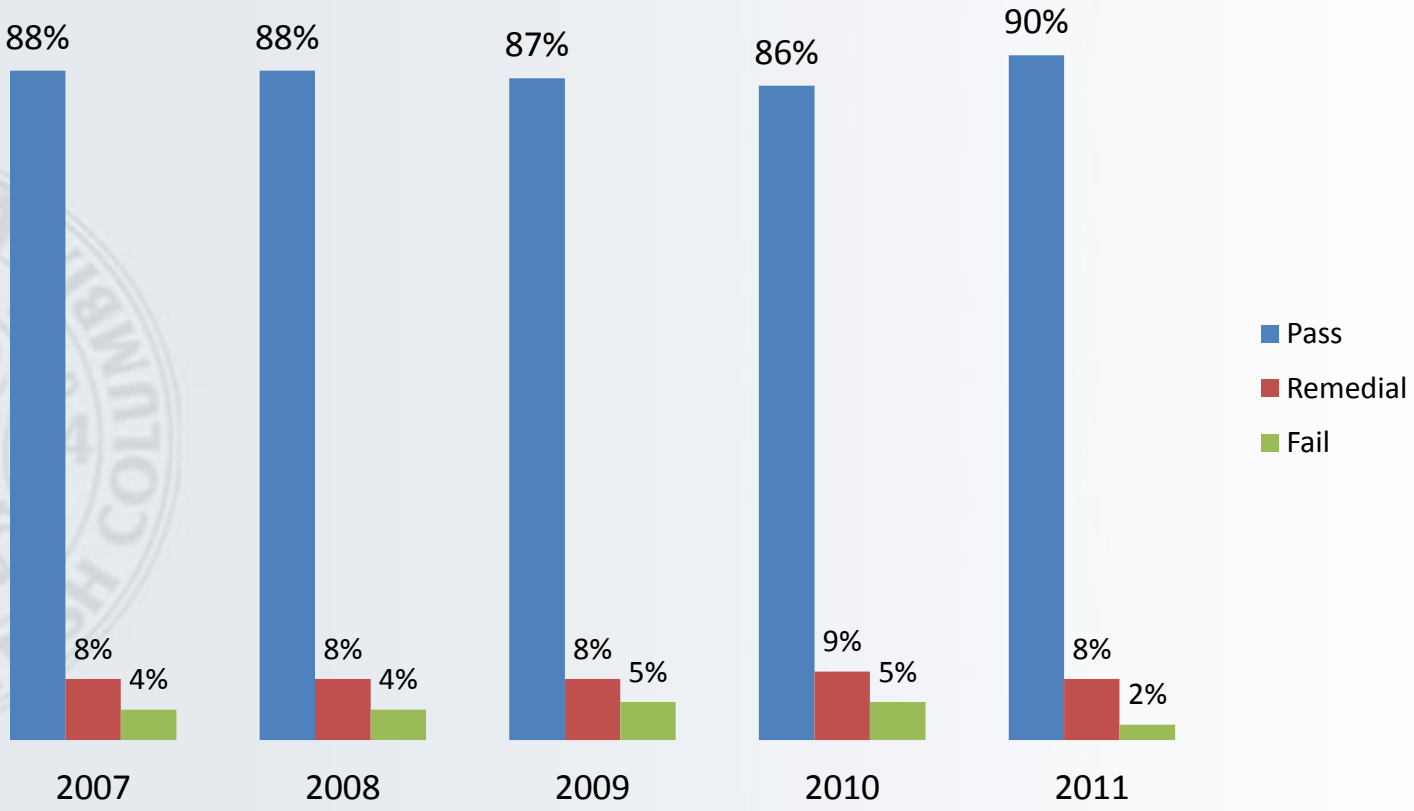
Key Activities

Number of Students



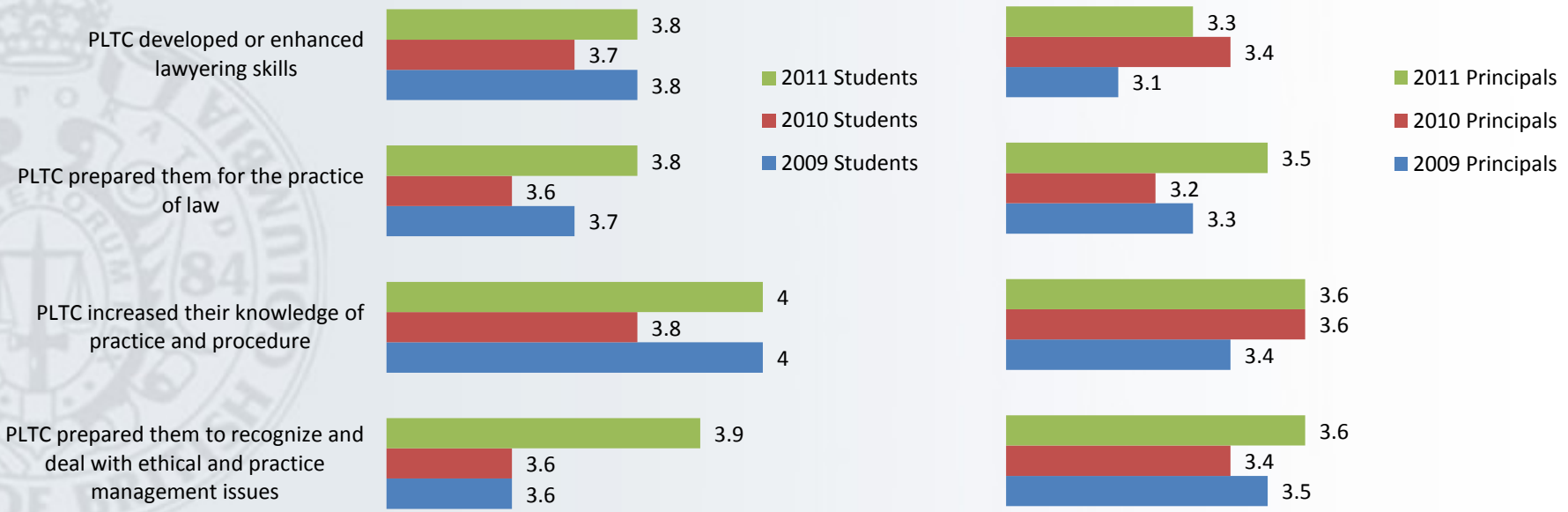
Key Performance Measures

At least 85% of the students attending PLTC achieve a pass on the PLTC results



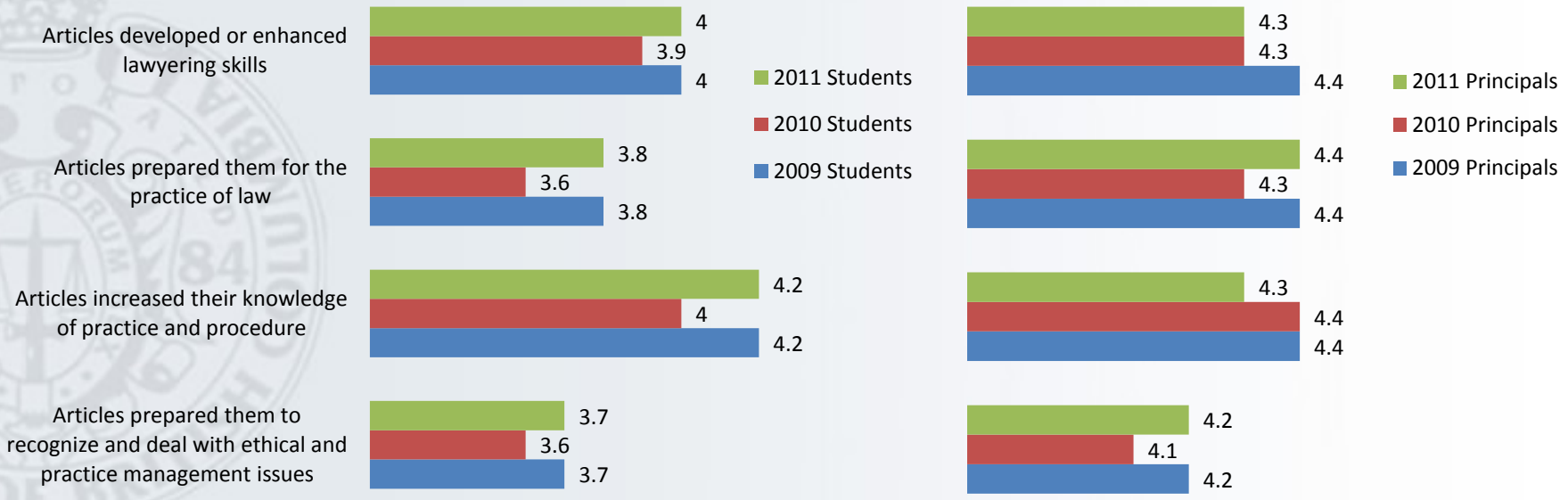
Key Performance Measures

Students and Principals rate PLTC's value at an average of 3.5 or higher on a 5 point scale (1 = lowest and 5 = highest)



Key Performance Measures

Students and Principals rate the value of articles at an average of 3.5 or higher on a 5 point scale
1 = lowest and 5 = highest



The Law Society of British Columbia

Practice Advice

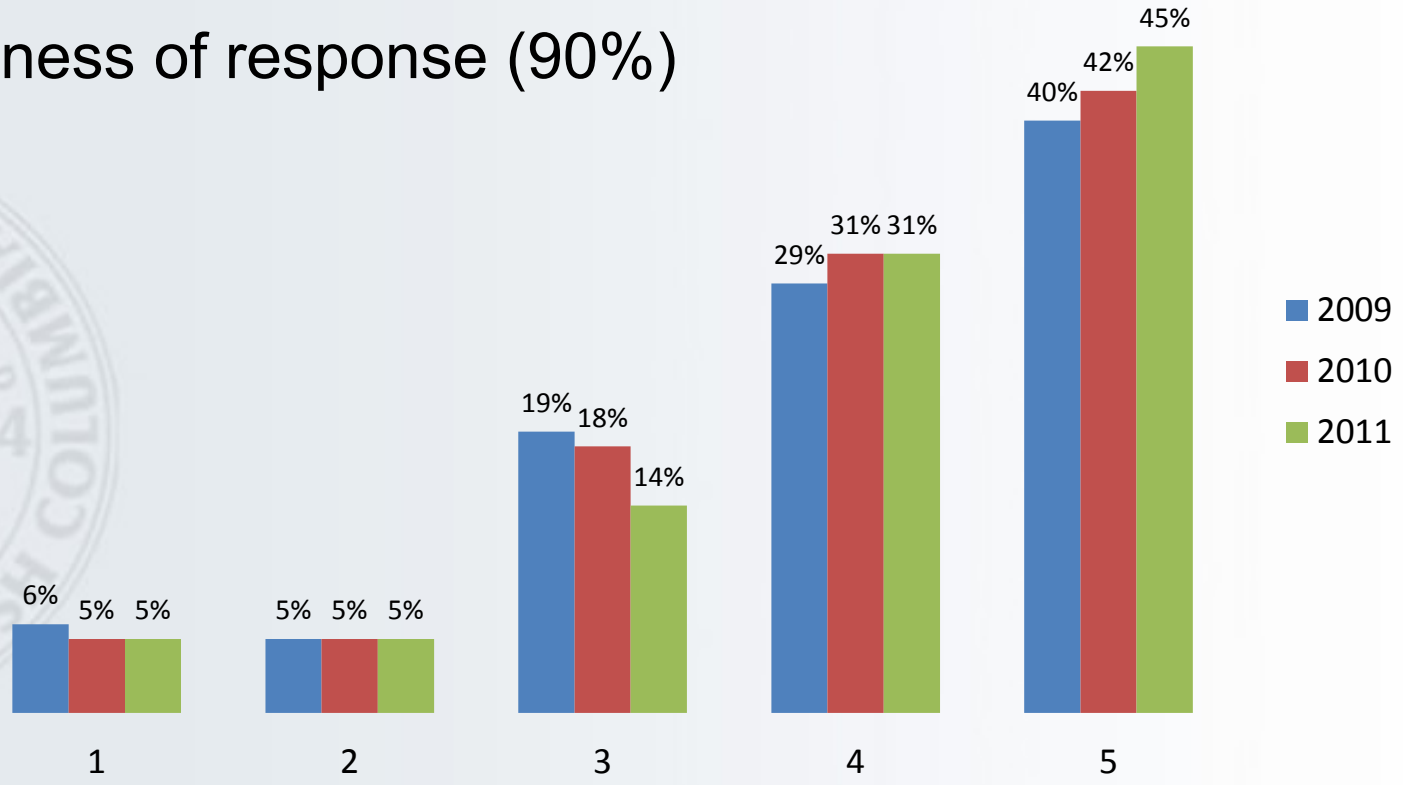
Department Highlights

- The four Practice Advisors (two are half-time) handled a total of 6,723 telephone and email inquiries in 2011, an increase over the 6,253 in 2010.
- 90% of the lawyers who responded to a survey rated timeliness of response at 3 or better.
- 93% of the lawyers who responded rated quality of advice at 3 or higher.
- In rating satisfaction with the resources to which they were referred, 91% of the lawyers provided ratings of 3 or higher.
- In rating their overall satisfaction, 92% of the lawyers provided ratings of 3 or higher.

Key Performance Measures

At least 90% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale

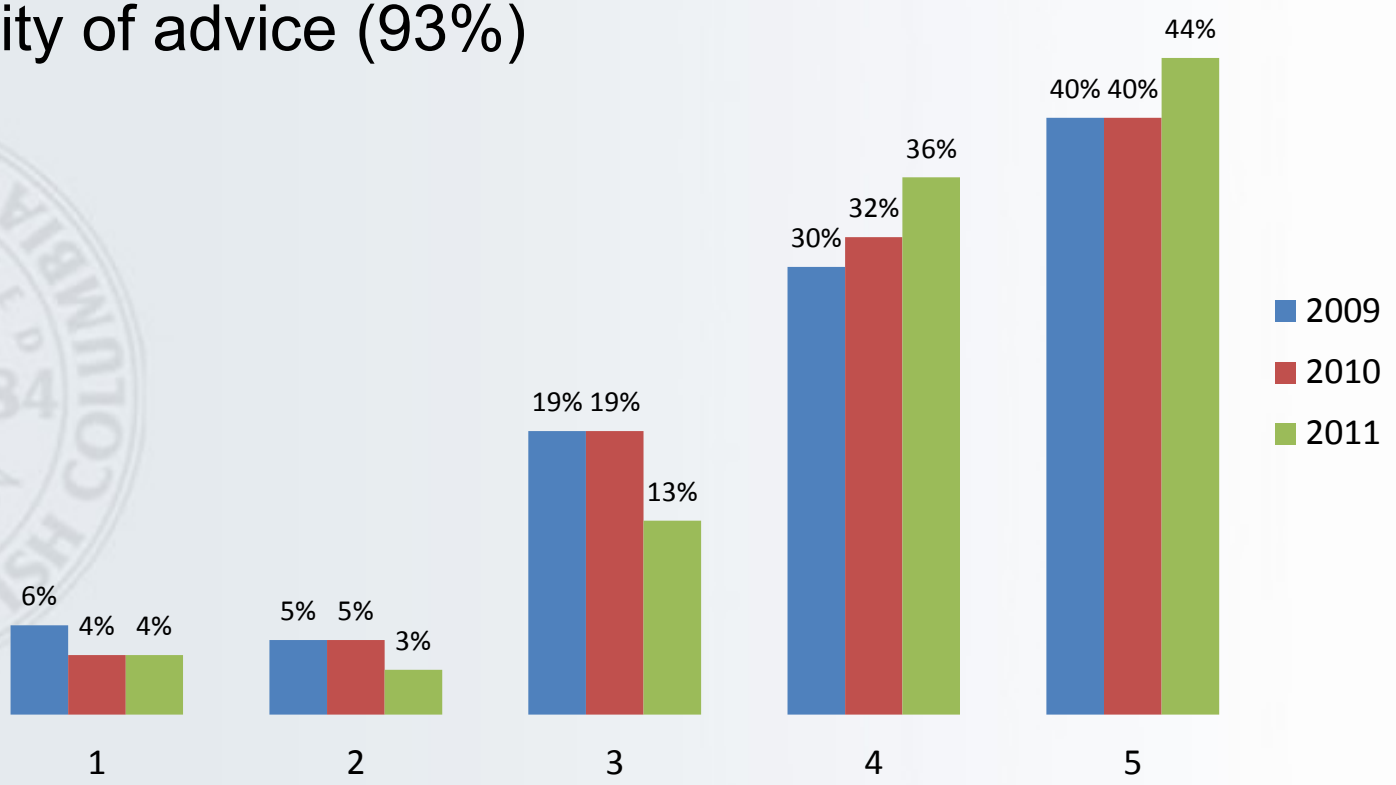
Timeliness of response (90%)



Key Performance Measures

At least 90% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale

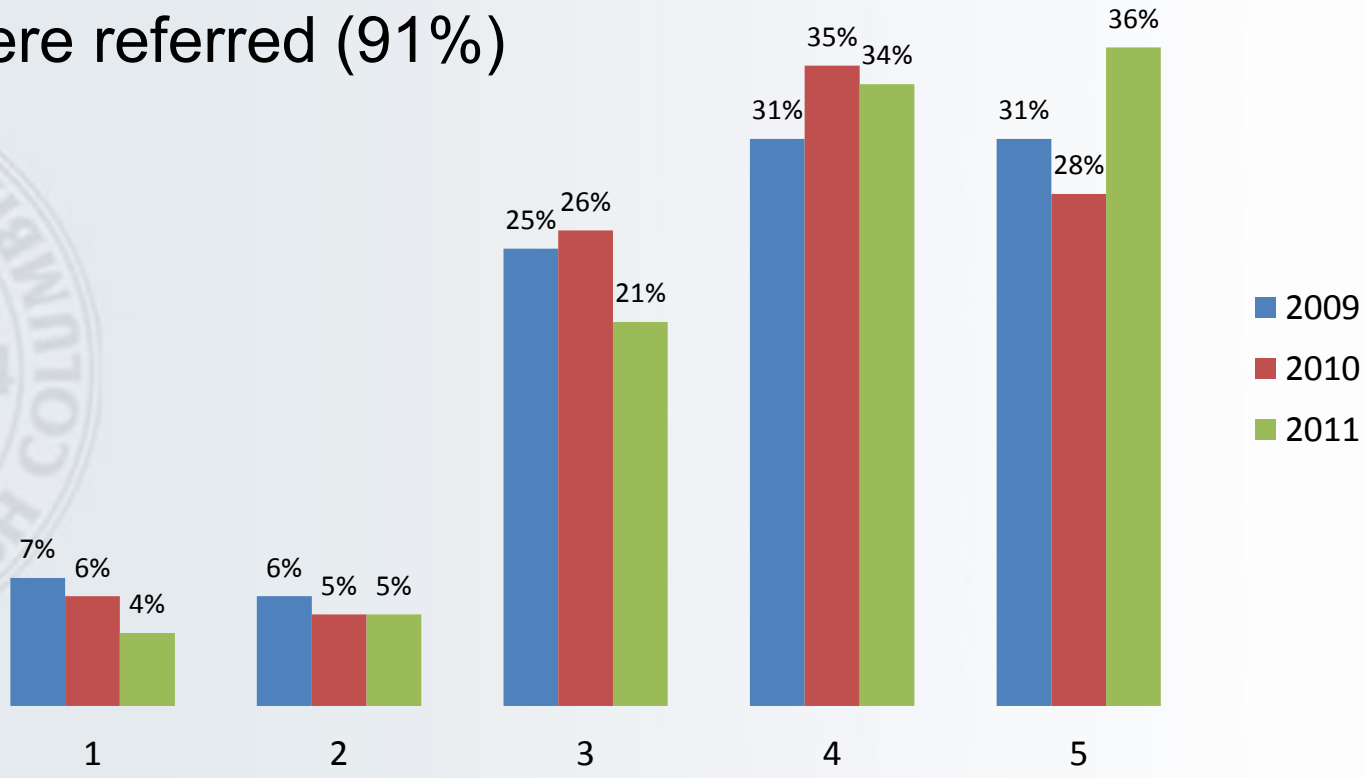
Quality of advice (93%)



Key Performance Measures

At least 90% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale

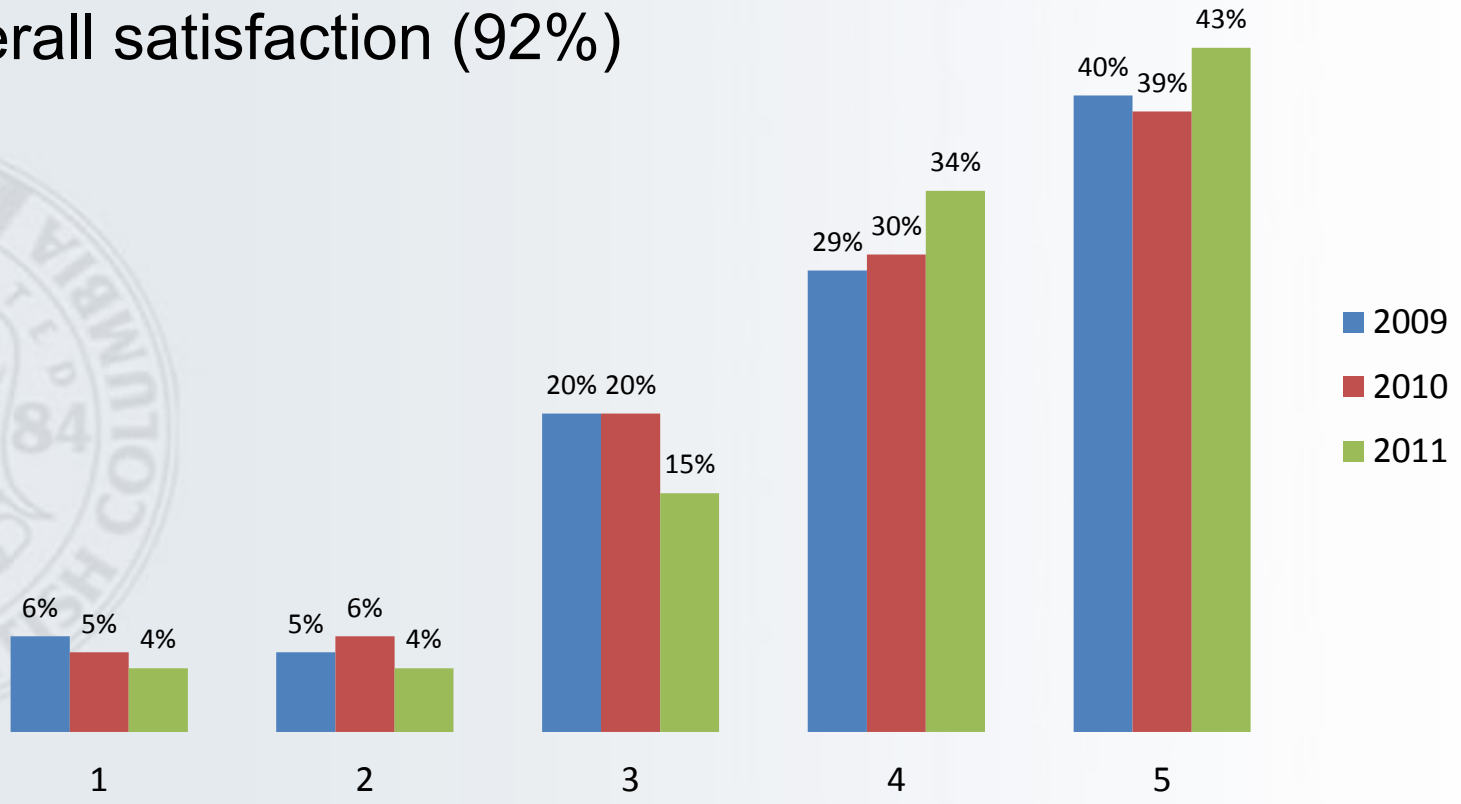
Quality of resources to which you were referred (91%)



Key Performance Measures

At least 90% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale

Overall satisfaction (92%)



The Law Society of British Columbia

Practice Standards

Department Highlights

The Practice Standards Department conducts practice reviews, and then advises the Practice Standards Committee on whether lawyers referred to the program meet accepted standards in their law practices. Where lawyers do not meet accepted standards, the Department monitors remedial measures directed by the Committee.

In 2011, 25 Practice Standards referral files were completed and closed. 35 files were opened. 23 of 25 lawyers for whom Practice Standards files were completed and closed improved by at least one point.

The Department also oversees the continuing operation and enhancement of several online support programs, including the Small Firm Practice Course and the Practice Refresher Course. The ratings for all the online support programs improved over 2010, with only the Practice Locums Program, up to 82% from 81%, falling below the 85% KPM target.

Key Performance Measures

At least two thirds of the lawyers who complete their referral demonstrate an improvement of at least 1 point on a 5 point scale in any one of the following categories:

1. Office management
2. Client relations and management
3. Knowledge of law and procedure
4. Personal/other

- In 2011, 25 Practice Standards referral files were completed and closed.
- 23 of 25 lawyers for whom Practice Standards files were completed and closed improved by at least one point.

Key Performance Measures

At least two thirds of the lawyers who complete their referral do so at an efficiency rating of 3 or higher on a 5 point scale in any one of the following categories:

1. Office management
2. Client relations and management
3. Knowledge of law and procedure
4. Personal/other

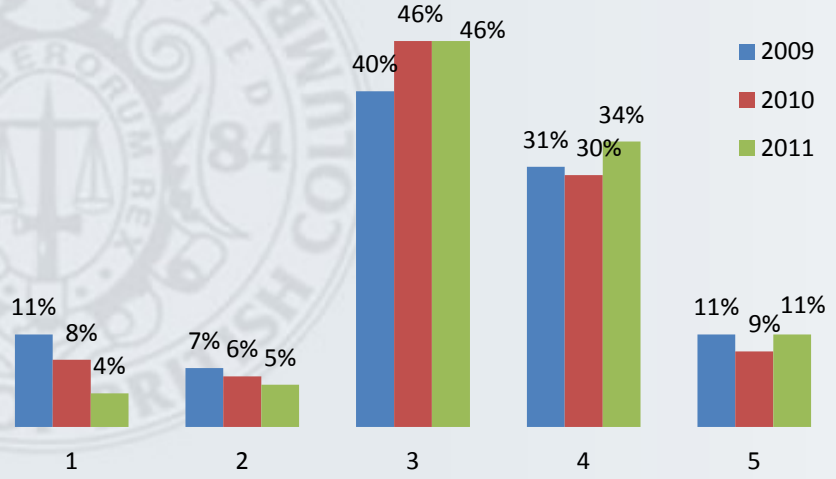
23 of the 25 lawyers finished at a rating of 3 or higher. The minimum threshold for a successful closure was a 3.

23 of the 25 referrals were completed at an efficiency rating of 3 or higher.

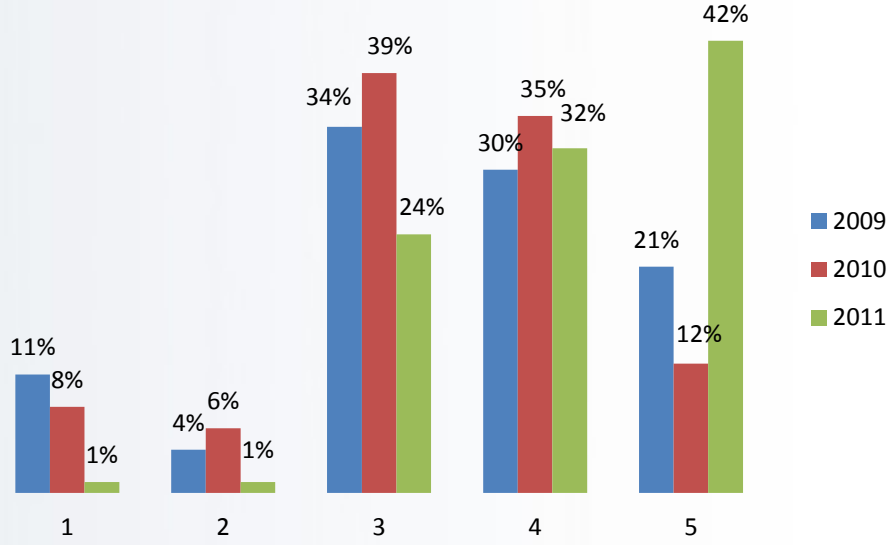
Key Performance Measures

At least 85% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale for these programs:

Succession and Emergency Planning Assistance (91%)



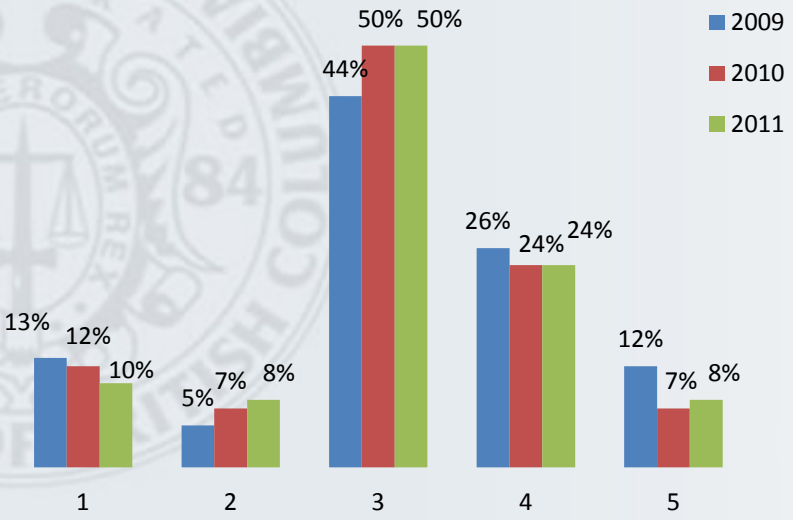
Practice Refresher Course (98%)



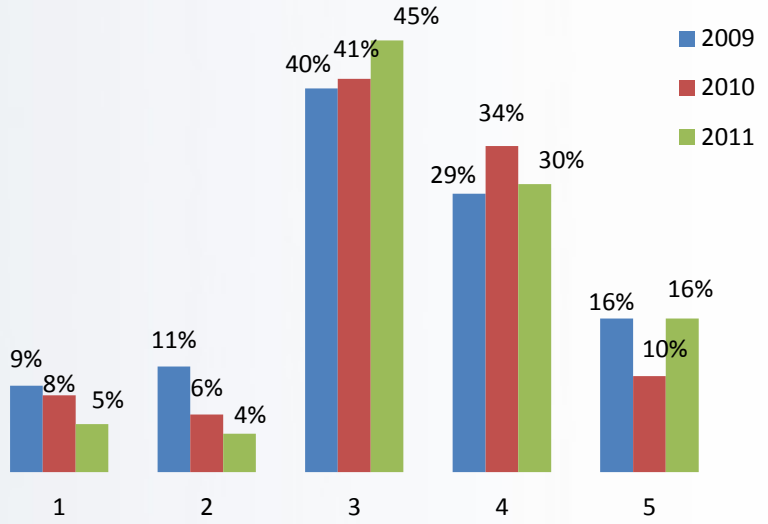
Key Performance Measures

At least 85% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale for these programs:

Practice Locums Program (82%)



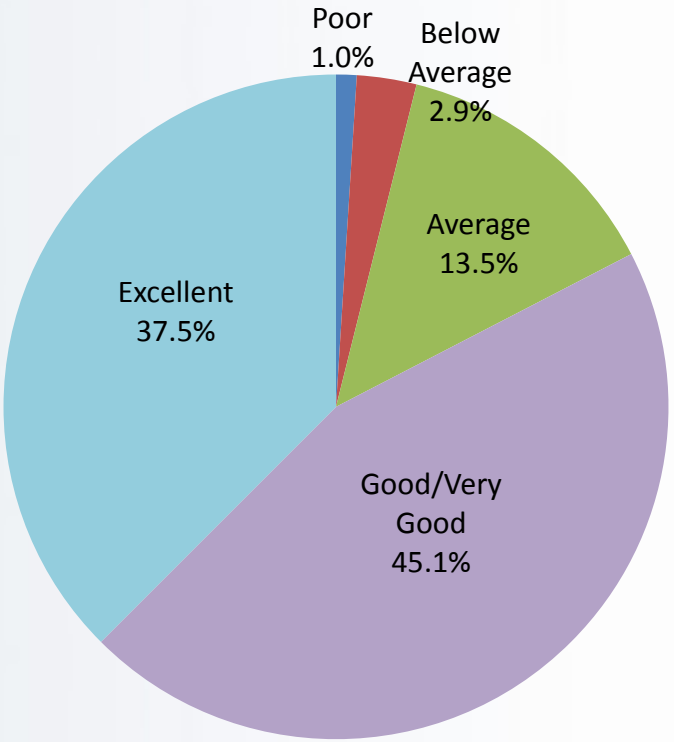
Bookkeeper Support Program (91%)



Key Performance Measures

At least 85% of the lawyers responding to a survey rate their satisfaction level at 3 or higher on a 5 point scale for these programs:

Small Firm Practice Course
(96.1% at 3 or higher)



2011

The Law Society of British Columbia

Lawyers Insurance Fund

Department Highlights

LIF's Goal

Our goal is to maintain a professional liability insurance program for BC lawyers that provides reasonable limits of coverage for the protection of both lawyers and their clients, and exceptional service, at a reasonable cost to lawyers. The Key Performance Measures indicate that we are achieving this goal.

Key Performance Measures

1. **Policy limits** for negligence and theft, the **member deductible**, and the **premium** are reasonably comparable with the 13 other Canadian jurisdictions.

   Our coverage limits for negligence and theft, at $1m and $300,000, respectively, are comparable. Our Part B coverage contractually assures payment on transparent terms, and thus may be superior to others that are based on the exercise of discretion.

   Our member deductible, at $5,000 per claim, is also comparable.

   At $1,750, our premium compares very favourably, especially considering that ours alone includes the risk of theft claims. All others charge a separate fee for this.

Department Highlights

Key Performance Measures cont.

2. Suits under the *Insurance Act* by claimants are fewer than 0.5% of files closed.

   Claimants have an unfettered right to proceed to court for a decision on the merits of their claim. However, if they obtain a judgment against a lawyer for which the policy should respond but does not due to a policy breach by the lawyer, we are failing to reasonably protect them. If that occurred, the claimant would sue the Captive directly under the Insurance Act, for compensation. There were no suits by claimants against the Captive in 2011. All meritorious claims were settled with the consent of the claimant or paid after judgment.

3. Every five years, third party auditors provide a written report on whether LIF is meeting its goals:

   Third party auditors declared "The goal of resolving claims in a cost effective manner balancing the interests of the insured lawyer, the claimant and the Law Society members is clearly being met – or exceeded – by this collegial and passionate group."

4. Insured lawyers demonstrate a high rate of satisfaction (90% choose 4 or 5 on a 5 point scale) in Service Evaluation Forms.

   In 2011, 98% of insureds selected 4 or 5.

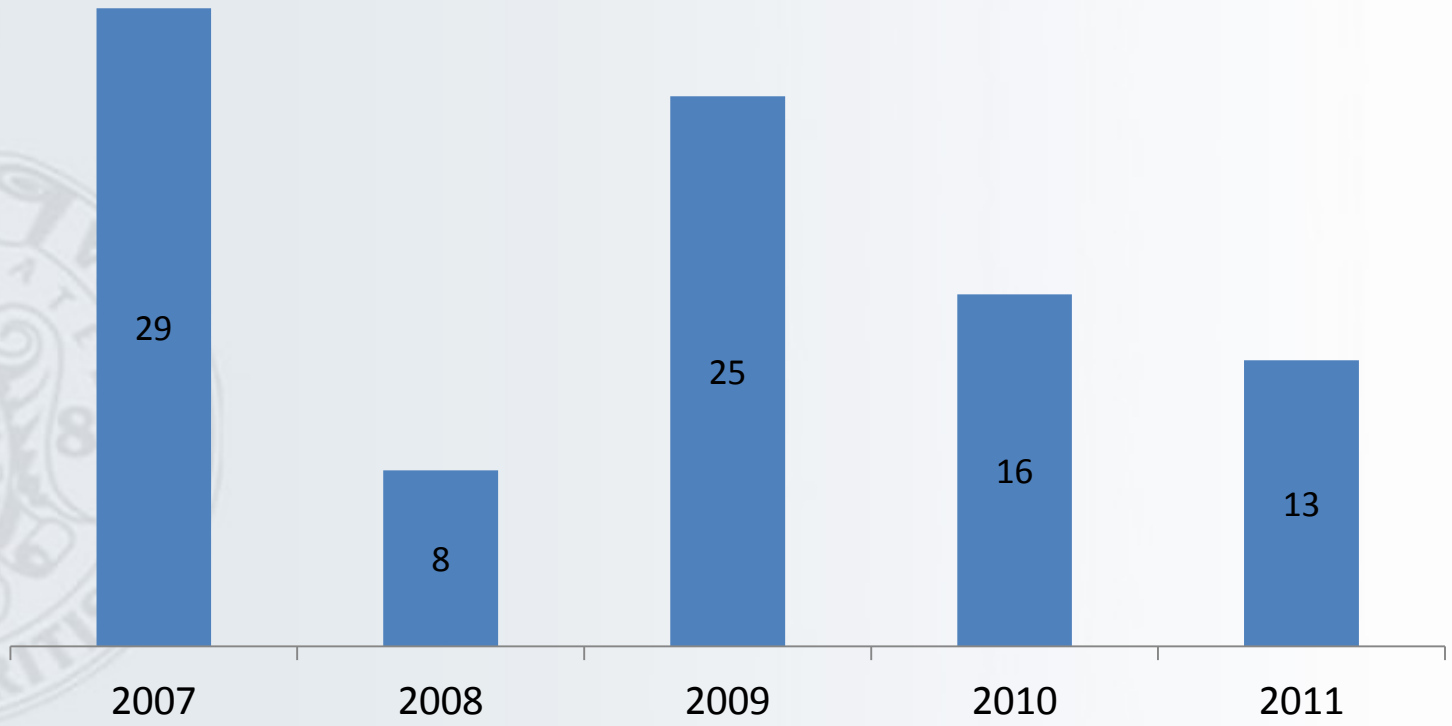
Frequency of Insurance Reports

Part A - Number and Frequency of Reports

The number of reports divided by the median number of insured lawyers

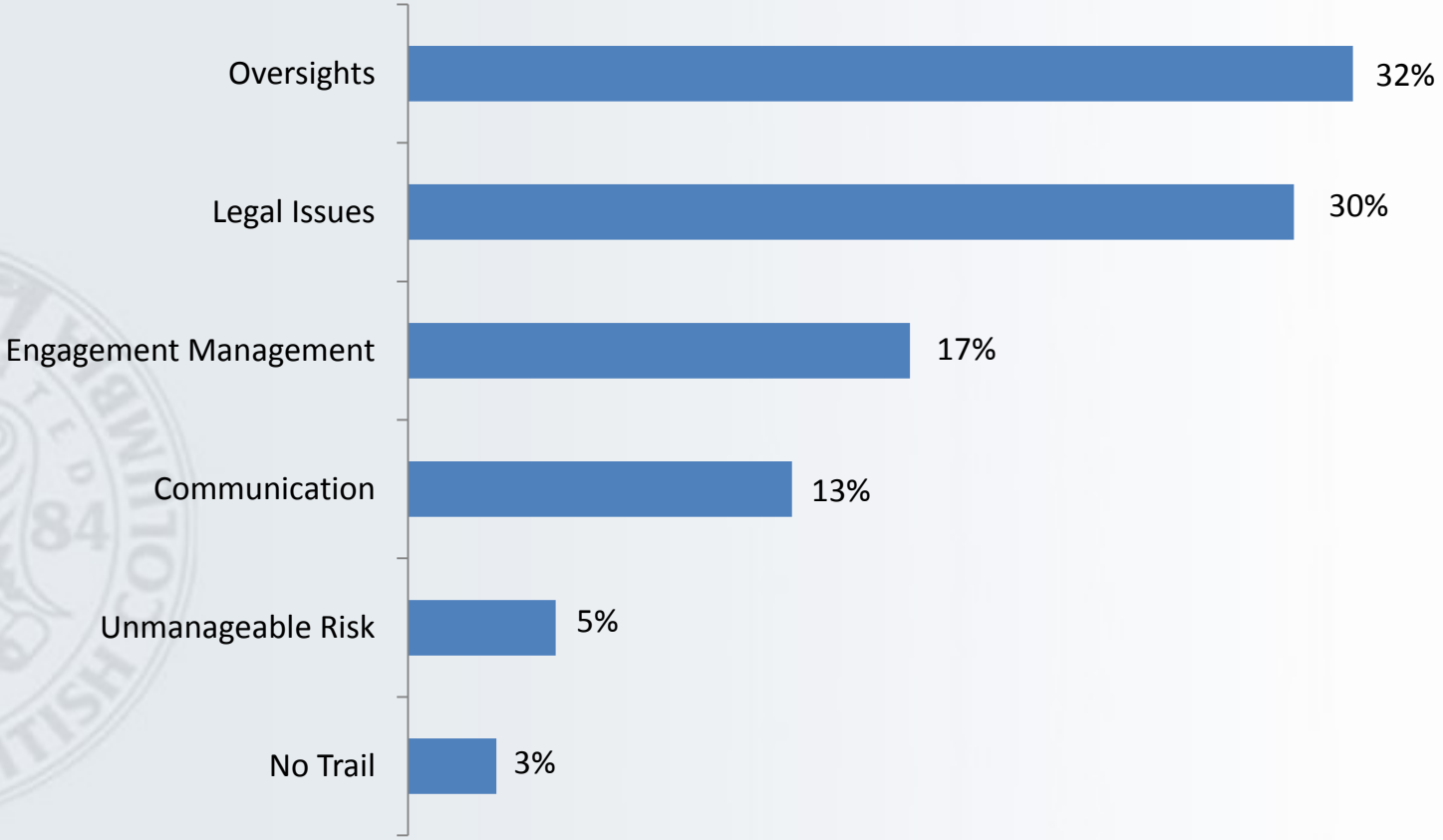
Key Activities

Part B - Number of Reports



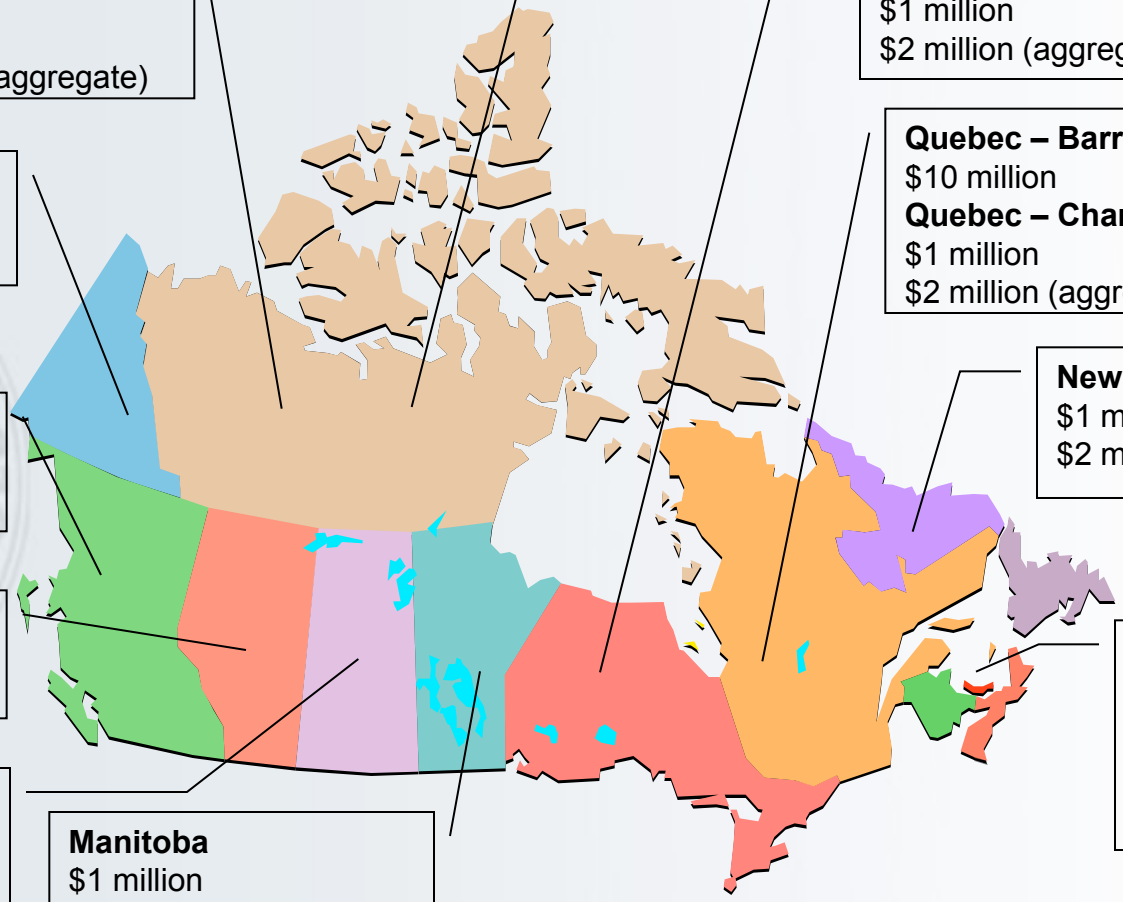
Key Activities

Causes of Reports



Key Performance Measures

Part A – Comparable Limits



Nunavut
$1 million
$2 million (aggregate)

NWT
$1 million
$2 million (aggregate)

Ontario
$1 million
$2 million (aggregate)

Yukon
$1 million
$2 million (aggregate)

Quebec – Barreau
$10 million
Quebec – Chambre
$1 million
$2 million (aggregate)

BC
$1 million
$2 million (aggregate)

Newfoundland
$1 million
$2 million (aggregate)

Alberta
$1 million
$2 million (aggregate)

New Brunswick
Nova Scotia
PEI
$1 million
$2 million (aggregate)

Saskatchewan
$1 million
$2 million (aggregate)

Manitoba
$1 million
$2 million (aggregate)

Key Performance Measures

Part B – Comparable Limits

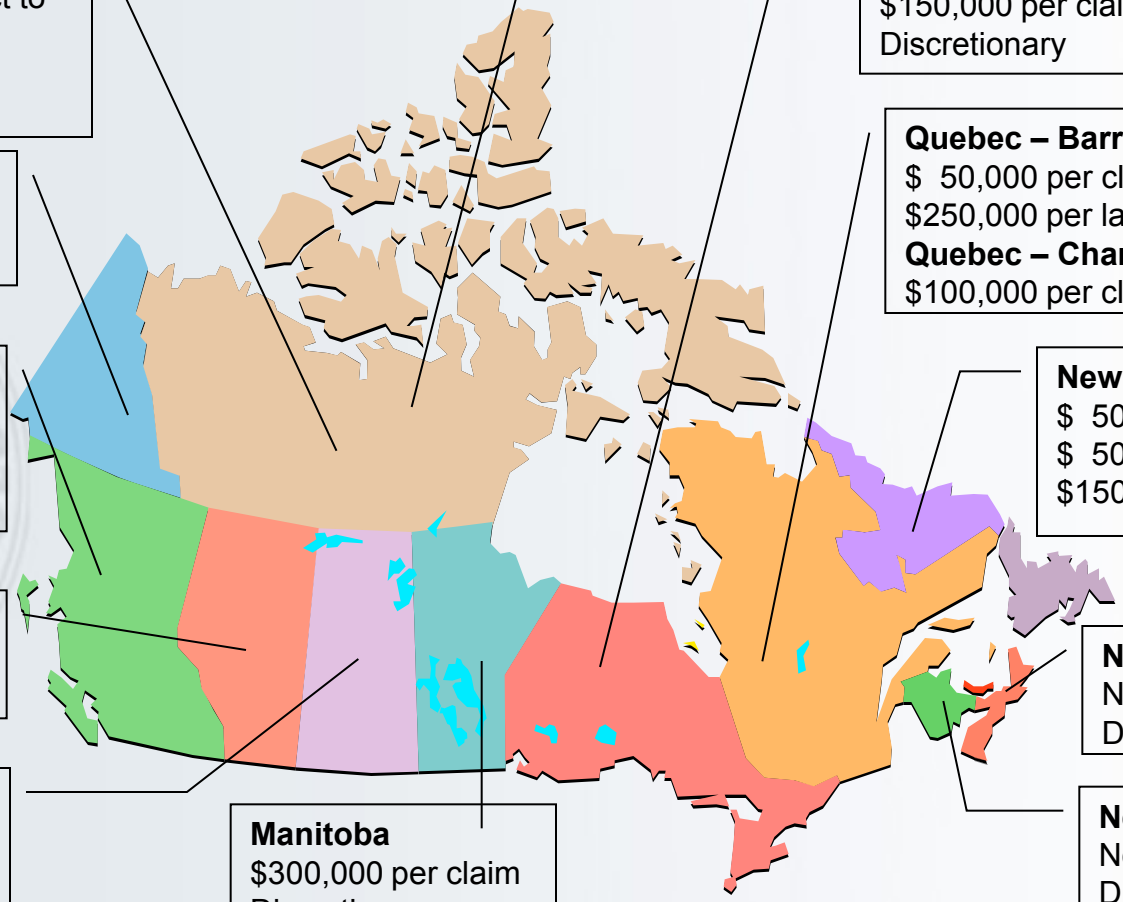
Nunavut
No limit
Discretionary

NWT
$50,000 per claim subject to an annual aggregate of $300,000 per claim
Discretionary

Ontario
$150,000 per claim
Discretionary

Yukon
No limit
Discretionary

Quebec – Barreau
$ 50,000 per claimant – discretionary
$250,000 per lawyer – discretionary
Quebec – Chambre
$100,000 per claim



BC
$300,000 per claim
$17.5 million total limit
Contractual right

Newfoundland
$ 50,000 per transaction
$ 50,000 per claim
$150,000 per lawyer

Alberta
No limit
Discretionary

Nova Scotia
No limit
Discretionary

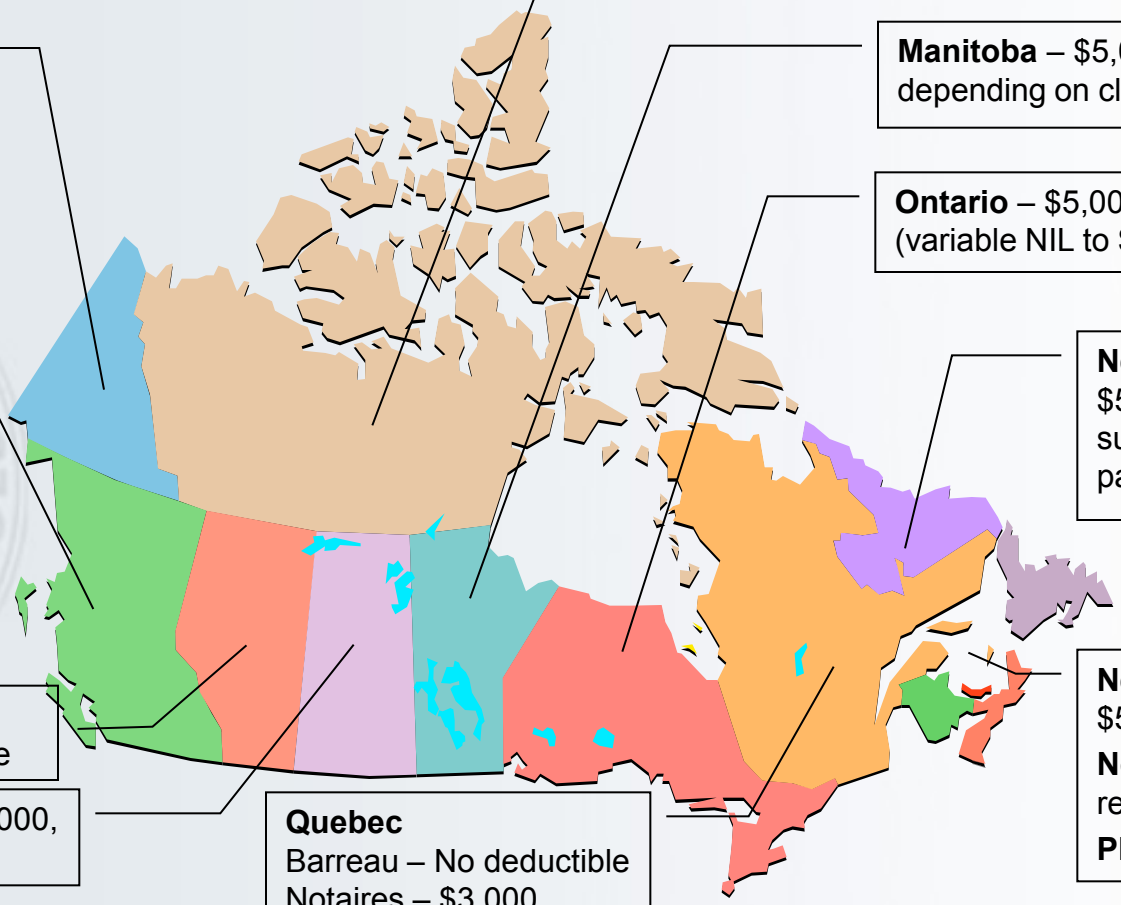
Saskatchewan
$250,000 per lawyer
Discretionary

Manitoba
$300,000 per claim
Discretionary

New Brunswick & PEI
No limit
Discretionary

Key Performance Measures

Comparable Member Deductible



NWT – $5,000
Nunavut – $5,000

Yukon – $5,000 with graduated deductible for successive paid claims in 5-year period.

Manitoba – $5,000 to $20,000 depending on claims history

Ontario – $5,000 standard (variable NIL to $25,000)

BC – $5,000 first paid claim and $10,000 each subsequent paid claim within 3 years

Newfoundland – $5,000 with graduated surcharge after second paid claim in 5 years

Alberta – Waived replaced by surcharge

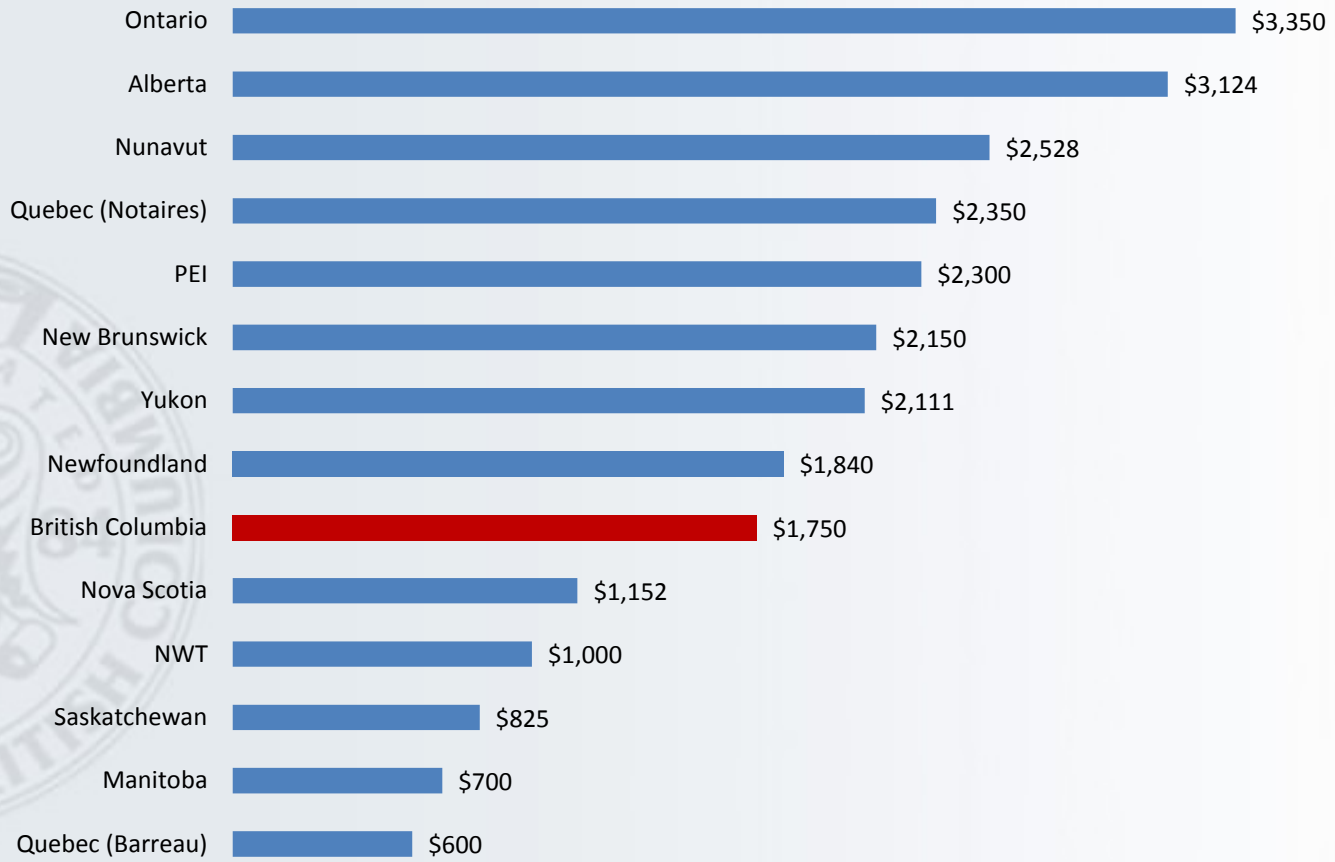
Saskatchewan – $5,000, $7,500 and $10,000

Quebec
Barreau – No deductible
Notaires – $3,000

New Brunswick – $5,000 to $10,000
Nova Scotia – Waived replaced by surcharge
PEI – $5,000

Key Performance Measures

Comparable Current Insurance Premium



Key Performance Measures

Outside claims audit every 5 years: obtain opinion

2011 C. Hampton and W. Bogaert Audit Findings

"…we can say with certainty that the claims handling goals are institutionalized in the claims documents, procedures and files, and are almost routinely met in the day to day handling of claims."

"...the materials we have reviewed strongly evidence the desire of Lawyers Insurance Fund management for continuous improvement and excellence, to provide even better service to its insureds and to be even more cost effective in its claims handling and resolution."

"In summary, we found a very experienced, skilled, creative and motivated staff and management performing tremendously and at a high level of effectiveness. The goal of resolving claims in a cost effective manner balancing the interests of the insured lawyer, the claimant and the Law Society members is clearly being met – or exceeded – by this collegial and passionate group."

Key Performance Measures

Outside claims audit every 5 years: obtain opinion

2008 CBELA Audit Findings

"Not unexpectedly the results of the audit were very positive…

There are numerous positive aspects to this program. Key underlying attributes of the program can be summed up as follows:

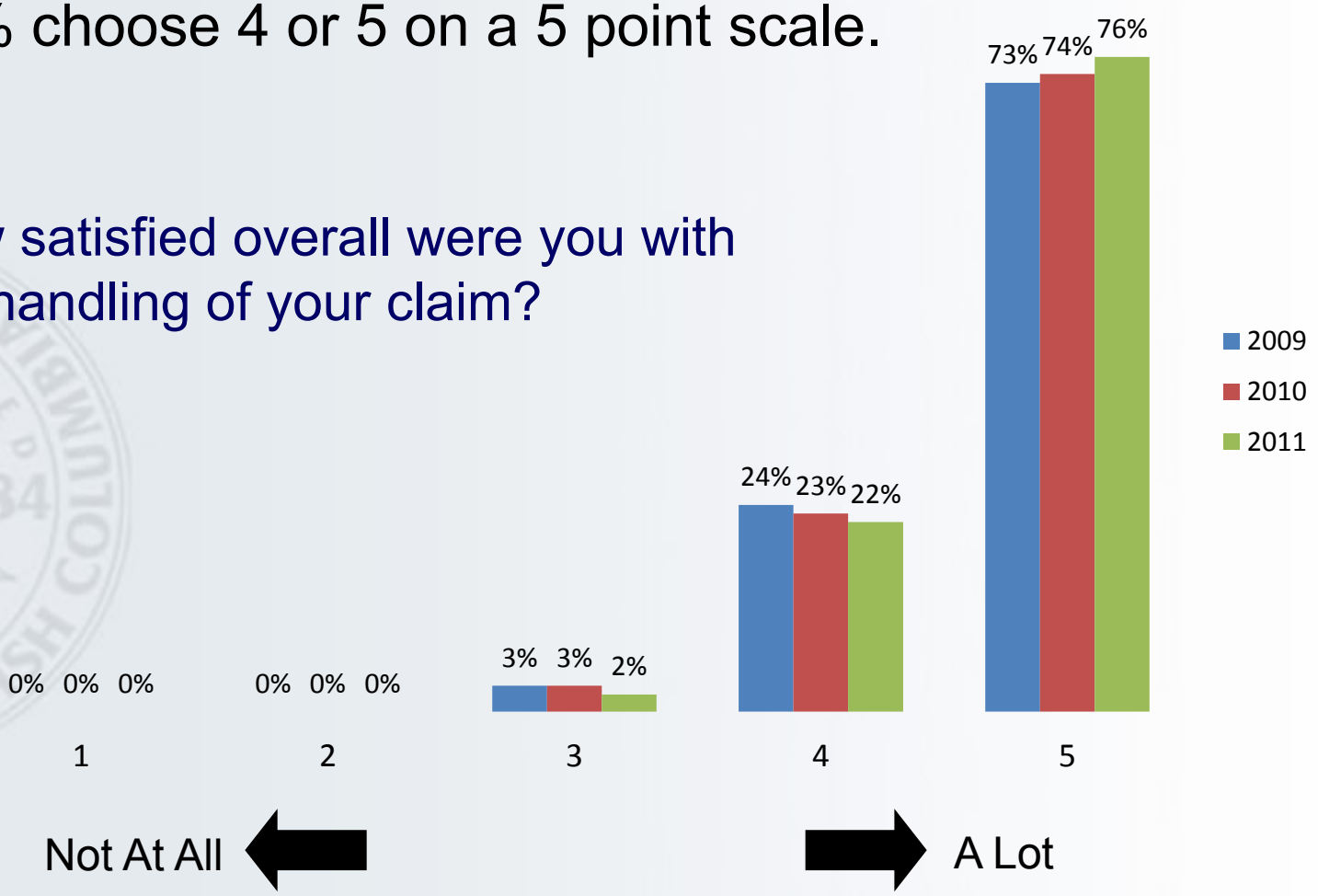
- Clarity of mandate and LSBC support of the program
- Highly trained, professional, committed individuals with a shared history
- Very high level of expertise in management of E&O claims
- Effective, sound management of a cohesive group whose size compliments the administrative style of the BC program"

Key Performance Measures

Results of Service Evaluation Forms:

90% choose 4 or 5 on a 5 point scale.

How satisfied overall were you with the handling of your claim?



The Law Society of British Columbia

New BC Code of Conduct (Conflicts Provisions): Based on Federation of Law Societies Model Code of Conduct

February 22, 2012

Purpose of Report:	**Recommendation to Benchers to Adopt Conflicts Portion of New BC Code of Professional Conduct**
Prepared by:	**Ethics Committee**

The Law Society of British Columbia

Memo

To: Benchers

From: Ethics Committee

Date: February 22, 2012

Subject: **New British Columbia Code of Conduct Based on Federation of Law Societies Model Code of Conduct**

I. Background

This paper recommends that you:

(a) adopt the conflicts portion of the Federation of Law Societies Model Code with the changes we have identified,

(b) modify the definition section of the non-conflicts portion of the BC Code to coincide with the definition portion of the conflicts section of the Code, and

(c) set a date for implementation of the entire BC Code (both the conflicts and non-conflicts portions) to replace the current *Professional Conduct Handbook*.

You will recall that the new Code of Professional Conduct that we are proposing for British Columbia is based on the Federation of Law Societies Model Code, and has much language in common with it, but amends it in ways we think will improve it for use in British Columbia. We are calling the BC version of the Model Code "the BC Code."

You adopted the non-conflicts portion of the BC Code at the April 13, 2011 Benchers meeting, but delayed setting a date for its implementation pending further review of the conflicts portion of the BC Code. The approved non-conflicts portion of the BC Code can be viewed at non-conflicts portion of the BC Code (PDF). The Chair of the Ethics Committee, Mr. Blom, gave a report on the conflicts portion of the BC Code at the May 13, 2011 Benchers meeting and you authorized the Ethics Committee to consult with the profession concerning it. The minute from Mr. Blom's May 13, 2011 presentation states:

6. Review Conflicts Portion of the Model Code of Professional Conduct

Professor Blom briefed the Benchers as Chair of the Ethics Committee. He provided background for the process followed by the Committee in developing the draft BC Code of Conduct (Conflicts Provisions) (the BC Code) as an adaptation of the Federation of Law Societies of Canada's Model Code of Professional Conduct (the Model Code). Professor Blom reminded the Benchers that last month they approved the Ethics Committee's proposed non-conflicts portion of the BC Code, with implementation to be delayed pending the Committee's further advice to the Benchers regarding the conflicts provisions.

Professor Blom expressed the Committee's view of the importance of a unified national framework for standards of professional conduct for lawyers, and noted the connection between that view and the Committee's decision to apply the structure and content of the Federation's Model Code wherever possible. The draft BC Code follows the Model Code as closely as possible, deviating from it only in instances where the Ethics Committee concluded that BC's current Profession Conduct Handbook is clearly superior, or where the BC context demands a different approach.

Professor Blom also noted that

- *the Federation has asked its Standing Committee on the Model Code (chaired by Mr. Hume) to review its conflicts provisions*
- *the Ethics Committee proposes to circulate the draft BC Code to the profession in early summer for comment and then report back to the Benchers in the fall*
    - *taking into account the profession's feedback and the status of the conflicts review being conducted by the Federation's Standing Committee.*

Professor Blom highlighted key provisions of the draft BC Code, referring the Benchers to the redlined draft (at page 6061 of the meeting materials, Appendix 3 to these minutes) for detailed depiction of its points of departure from the Model Code. He also circulated a re-drafted version of Section 2.04 (4), included as Appendix 3a to these minutes.
Professor Blom moved (seconded by Ms. Bond) that the draft BC Code be approved, and that the Ethics Committee be authorized to consult with BC's legal profession regarding its provisions.
The key points raised in the ensuing discussion were:

- *national consistency is important*
- *the principle of undivided loyalty is important*
- *large firms are pushing for moderation of the conflicts rules to permit multiple representation if the clients agree*
- *The term "Code" may be misleading because it suggests a set of general principles*
    - *whereas the Model Code includes both general principles and, on certain topics that frequently arise, detailed guidelines"*
- *Neither the general nor the specific provisions are binding rules; they are only the Law Society's best advice to the members as to their ethical obligations*

The motion was carried.

The Federation Standing Committee on the Model Code, referred to by Mr. Blom in his May 2011 presentation, was established in September 2010 with a mandate to monitor developments

in the law of professional responsibility, consider feedback from law societies as they implement the Model Code, and make recommendations for amendments to the Model Code as necessary. Past BC Law Society President and Ethics Committee member, Gavin Hume, Q.C., is the current Chair of the Standing Committee.

In June 2011 we invited comments from the profession on the conflicts portion of the BC Code by the end of August 2011, and we recommend in this paper a number of changes to the Code based on that consultation. However, in March 2011 the Federation Standing Committee on the Model Code was asked by the Federation Executive to review the conflicts section of the Model Code and recommend an appropriate rule for inclusion in the Code. The Standing Committee has now proposed to the Federation, and the Federation has adopted, a small number of revisions to the Model Code conflict rules that includes a revision to the definition of a conflict of interest and the crafting of a general conflicts rule that encompasses all situations, including those involving conflicts of interest between current clients. In December we invited the profession to comment on these latest changes in the Model Code and this memorandum takes account of those comments.

The changes recommended to the Federation by the Standing Committee, an analysis of those changes by Professor Brent Cotter of the Law Faculty of the University of Saskatchewan, and comments by the Canadian Bar Association on the conflicts issues are set out at the Federation of Law Societies website at http://www.flsc.ca/en/federation-news/. Paper copies of these materials are available by contacting Law Society staff Joanne Hudder (jhudder@lsbc.org) or Jack Olsen (jolsen@lsbc.org).

The changes to the BC Code we have made based on the Standing Committee report are set out in the description of Subrules 2.04(1) to 2.04(4) in Section IV below.

II. Relationship of the BC Code to the Current Professional Conduct Handbook

Most rules in the *Professional Conduct Handbook* have their counterparts in the BC Code. The attached table of concordance between the BC Code and the *Professional Conduct Handbook* permits a comparison between the conflicts portions of the two Codes. In some cases, we were of the view that the current language of the *Professional Conduct Handbook* was superior to that of the Model Code and in some of those circumstances we used the *Handbook* as a precedent, rather than the Model Code.

Where we think the language used in the BC Code is preferable to comparable language used in the Model Code, the LSBC will have the opportunity, through the Standing Committee on the Model Code, to persuade the Federation and other Law Societies to adopt it in place of the current Model Code language. In the interests of uniformity across Canada, however, where

such attempts are unsuccessful it will be important for the LSBC to review the parts of the BC Code that diverge from the Model Code to see whether we can accept the language of the Model Code in place of our own.

III. Issues relating to the Non-Conflicts Portion of the BC Code and the Model Code

Since you adopted the non-conflicts portion of the BC Code on April 13, 2012 some important changes have occurred in the definition section of the conflicts portion of the Code. Since these two portions of the Code must be reconciled, we ask that you approve the substitution of the definition section of the conflicts portion of the Code for the definition section that is currently part of the non-conflicts portion of the Code. A clean and redlined version of the proposed new definition section of the non-conflicts portion of the Code is attached. Adoption of these new definitions will permit the non-conflicts portion of the Code and the conflicts portion to be combined, with a single definition section.

IV. Issues relating to the Conflicts Portion of the BC Code and the Model Code

This section highlights some major issues raised in this portion of the BC Code, including the major changes we propose to make to the Model Code and the rationale for those changes, changes we made as a result of the recent recommendations made by the Standing Committee and other important aspects of the new BC Code.

The changes from the Model Code identified by this section are shown in the attached redlined version of the BC Code, and are similar to many of the proposed changes to the Model Code we identified for you in our presentation to you of in May 2011. Unlike the May 2011 version of the BC Code, however, you will note that the definition section and Subrules 2.04(1) to 2.04(4) of the BC Code are now very similar to the Model Code.

BC Code Definition of "conflict of interest"

Following the Model Code, "conflict of interest" is now defined in the definition section of the BC Code and the definition is repeated in the Commentary to Subrule 2.04(1). This definition now makes explicit reference to the duty of loyalty.

With respect to the reference to the duty of loyalty, the Standing Committee notes in its report to the Federation:

> The definition of conflict of interest included in the Definitions section that opens the Model Code, and referred to in the commentary to rule 2.04 (1), has been amended to make specific

> reference to the duty of loyalty. The revised definition reflects the opinion of the members of the Standing Committee that the duties that flow from the lawyer client relationship require that both conduct that would have an adverse impact on the representation of the client and conduct that might impair the relationship between a lawyer and the client be prohibited. The commentary to rule 2.04(1) (the general prohibition on acting in situations of conflict of interest) also highlights the importance of the duty of loyalty.

BC Code Subrule 2.04(1): Duty to Avoid Conflicts

Subrule 2.04(1) contains a general prohibition on acting where there is a conflict of interest. The Commentary following the general prohibition makes it clear the rule applies to all conflicts situations, including those involving conflicts of interest between current clients. No specific rule relating to lawyers acting against current clients is now required, although Subrule 2.04(1) and its Commentary deals extensively with that issue and includes specific references to the test set out in *R. v. Neil* 2002 SCC 70 and refined in *Strother v. 344920 Canada Inc.* 2007 SCC 24. The rule dealing with acting against a former client is preserved [Subrule 2.04(5)]. The Commentary makes specific reference to Appendix C which preserves Appendix 3 of the *Professional Conduct Handbook* and which permits a lawyer to act for more than one party in with different interests in a real property transaction.

It is noteworthy that Subrule 2.04(1) provides more scope for lawyers to act against current clients than the current *Professional Conduct Handbook.* Chapter 6, Rule 6.3 of the Handbook only permits a lawyer to act against a current client if the matters are unrelated, no confidential information is at risk and the affected clients consent. Subrule 2.04(1) in both the Model Code and BC Code versions permits a lawyer to act with client consent alone, provided the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

In opting to craft a rule that reflected the existing jurisprudence on conflicts the Standing Committee made the following comments (at paragraphs 7 & 8) in its Report to the Federation (see Section I above for website).

> 7. Ensuring that the rule on conflicts of interest protects the public interest and respects the duties that are fundamental to the lawyer-client relationship were the principles that guided the work of the Standing Committee. These principles are rooted in the mandates of the law societies to govern the legal profession in the public interest, and in the fiduciary duty, of which the duty of loyalty is a key component, which lawyers owe to their clients. In preparing the Recommended Rule, members of the Standing Committee started from the premise that the duties owed by lawyers to their clients require that a lawyer not act in a situation in which there is a conflict of interest unless the client consents. A consensus emerged early in the committee's work, that the rule should also reflect existing law on conflicts of interest, in particular the principle enunciated by the Supreme Court of Canada in its decisions in *Neil*, and *Strother v. 3464920 Canada Inc.* that a lawyer must not represent a

> client whose immediate legal interests are adverse to those of a current client, even if the matters are unrelated, unless the clients consent (known as the "bright-line rule"). As the members of the Standing Committee drafted the rule, we sought the guidance of Professor Cotter to ensure that the rule successfully captured these principles. His opinion is attached as Appendix "C".
>
> 8. It is the view of the members of the Standing Committee that the approach of the Advisory Committee to the current client conflicts of interest rule was correct as it respected relevant jurisprudence and focused on protecting the public interest. Committee members concluded, however, that there would be merit in taking a fresh approach to the drafting of the rule, in part to attempt to address some of the concerns expressed about the earlier version. As a result, the Recommended Rule differs in a number of ways from the rule recommended by the Advisory Committee. The most notable difference is the absence of a specific section in the rule referring to conflicts between current clients. The Standing Committee has opted instead to open the rule with a general prohibition on acting where there is a conflict of interest. The commentary that follows this general prohibition makes it clear that the rule applies to all situations, including those involving conflicts of interest between current clients.

We accepted a submission from the Canadian Bar Association that the Commentary under Subrule 2.04(1) in the Model Code under ``Èxamples of Conflicts of Interest,`` makes it insufficiently clear the examples given are actually categories of situations in which conflicts of interest may arise, depending on the circumstances, rather than instances where conflicts will always occur. We have stated this proposition differently in the BC Code to deal with this issue and will raise this matter with the Standing Committee.

We also accepted the view of the Canadian Bar Association and others with respect to positional conflicts and have eliminated Example 2 of the Model Code which describes the following situation as a conflict:

> A lawyer's position on behalf of one client leads to a precedent likely to seriously weaken the position being taken on behalf of another client, thereby creating a substantial risk that the lawyer's action on behalf of the one client will materially limit the lawyer's effectiveness in representing the other client.

Recognizing this kind of conflict may be a change in Canadian rules of professional conduct and we believe that more consideration needs to be given to it if it is to be an express part of our Code. We will be asking the Federation Standing Committee to give this issue further consideration and have added it to our own agenda for review, as well.

BC Code Subrule 2.04(2): Consent

Provisions dealing with consent in advance and implied consent to act against a current client have been revised from the draft we provided to you in May 2011. Subrule 2.04(2)(b) sets out

the criteria that govern when consent may be inferred and the Commentary expands on the nature of the inference that may be drawn and refers specifically to *Neil* and *Strother*. Advance consent is also dealt with in the Commentary.

The Standing Committee notes in its Report to the Federation:

> The general rule prohibiting a lawyer from acting where there is a conflict of interest is followed by an exception permitting a lawyer to act where there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without there being any material adverse effect upon either the representation of or the loyalty to the clients. The draft rule on consent and the commentary that follows it contain important clarifications on the use of implied consent and consent obtained in advance in order to provide reasonable, principled relief from the strict prohibition. The ability to obtain consent in advance and, in certain circumstances, to infer consent would permit a lawyer to act in situations otherwise proscribed by the general prohibition on acting when there is a conflict of interest.

Subrule 2.04(2)(b) and the Commentary dealing with implied consent is the BC Code counterpart to Chapter 6, Rule 6.4 of the *Professional Conduct Handbook*.

We are of the view that Subrule 2.04(2) precludes a lawyer acting for parties with different interests in a transaction, except where such representation is otherwise permitted by the Code (as in Appendix C) and our conclusion with respect to that issue is consistent with Ethics Committee opinions of 2002 and 2008. We have added the last portion of the Commentary entitled "Lawyer belief in reasonableness of representation" to make that conclusion more explicit.

BC Code Subrule 2.04(4): Concurrent Representation with Protection of Confidential Client Information

Subrule 2.04(4) preserves the Federation Model Code provision that permits a firm to act for more than one client with competing interests in some limited circumstances, including circumstances where there is no dispute between the clients, the clients consent and the matters are screened.

BC Code Subrule 2.04(5) Acting Against Former Clients

This Subrule is analogous to Chapter 6, Rule 7 of the *Professional Conduct Handbook* and, in our view, does not alter it in any substantive way.

BC Code Subrule 2.04(6)

Subrule 2.04(6) [analogous to Model Code Subrule 2.04(11)] recognizes that in unusual circumstances where a lawyer's firm has received confidential client information, a lawyer may act against a former client of the lawyer's firm, with appropriate screening in place. We have altered the circumstances contemplated in Subrule 2.04(6) from the Model Code provision to conform to the circumstances described in Subrules 2.04(17) to 2.04(25), the *Martin v. Gray* rules on conflicts arising out of a transfer between law firms.

BC Code Subrule 2.04(7 to 12) Joint Retainers

These subrules are the equivalent of Chapter 6, Rules 4 to 6.01 of the *Professional Conduct Handbook*. Sample letters currently in Appendix 6 of the *Professional Conduct Handbook* would be moved from the Code itself to the LSBC website.

BC Code Subrule 2.04(13 to 16) Limited Representation

These Subrules are imported unchanged from Chapter 6, Rules 7.01 to 7.04 of the *Professional Conduct Handbook* and are designed to permit lawyers to act pro bono for clients under the auspices of a not for profit organization without incurring the usual obligations under the traditional conflicts rules.

Model Code Subrule 2.04(12 to 16) Acting for Borrower and Lender

We are of the view it is undesirable for lawyers to act for both borrower and lender in any situations other than those contemplated for simple conveyances. We have not carried these Model Code Subrules through to the BC Code.

BC Code Subrules 2.04(17 to 25) Conflicts Arising as a Result of Transfer Between Law Firms (``the Martin v. Gray rules``)

These Subrules import the current rules in Chapter 6, Rules 7.1 to 7.9 and Appendix 5 of the *Professional Conduct Handbook* into the BC Code. The Benchers made some changes to the *Professional Conduct Handbook* in 2009 to take account of the experience with these rules since 1995 and, as a result, the BC Code provisions are slightly less onerous than those of the Model Code for a firm that is being joined by a new lawyer.

BC Code Subrule 2.04(26) Conflicts with Clients

Although it is clear from the Model Code rules respecting conflicts that a lawyer may not act when he or she is in a conflict with a client, we were concerned that the Model Code has no

standards to determine when such a conflict exists. Subrule 2.04(26) imports from Chapter 7 of the *Professional Conduct Handbook* the standards similar to those the LSBC has been using since 1993: a lawyer may not act if it would reasonably be expected the lawyer's professional judgment would be affected by the lawyer's or anyone else's relationship with the client, interest in the client or the subject matter of the legal services. We have given a variety of opinions on this standard since 1993 and, although the standard is not an exacting one, it nevertheless provides better guidance for lawyers than the Model Code.

BC Code Appendix C Real Property Transactions

Appendix C imports into the BC Code, without change, Appendix 3 of the *Professional Conduct Handbook.*

V. Implementation of the BC Code

We think it is wise to have a period of time for the profession to get used to the idea that lawyers will be living with a new Code. We are of the view that an implementation date of January 1, 2013 is appropriate. That will permit us to post the new Code on our website for review by the profession for a period of nine months before it becomes effective, ensure that appropriate training and information is available for the new Code and make any small, but necessary changes to it before it is implemented. We anticipate, for example, that our work on implementation of the work of the Delivery of Legal Services Task Force will be completed shortly and will require an amendment to the BC Code and perhaps the *Professional Conduct Handbook*, as well. We expect there will be other small issues arise between adoption of the Code and its implementation that may also require some amendments.

We do not think it is necessary or desirable to attempt to distribute a paper copy of the Code before January 1, 2013.

VI. Recommendation

We recommend that you:

(1) adopt for the BC Code the conflicts portion of the Federation of Law Societies Model Code with the changes we have identified, and

(2) modify the definition section of the non-conflicts portion of the BC Code to coincide with the definition portion of the conflicts section of the Code,

(3) set January 13, 2013 for implementation of the entire BC Code (both the conflicts and non-conflicts portions) to replace the current *Professional Conduct Handbook*.

VII. Attachments

So that you can identify the changes we propose to make to the conflicts portion of the Federation Model Code and to the definition section of the non-conflicts portion of the Code, we attach the following:

1) The conflicts portion of the Code that we propose for British Columbia ("the BC Code") which is based on the Model Code and has many rules in common with it, but amends it in ways we think will improve it for use in British Columbia.

2) The current version of the conflicts portion of the Federation of Law Societies Model Code ("the Model Code").

3) A redlined version of the conflicts portion of the BC Code that highlights the changes we propose to make to the Federation Model Code.

4) A redlined copy of the proposed new definition section of both the non-conflicts and conflicts portions of the BC Code (Adoption of these new definitions will permit the non-conflicts portion of the Code and the conflicts portion to be combined, with a single definition section).

5) A table of concordance between the draft conflicts provisions of the BC Code and the current *Professional Conduct Handbook*.

6) A table of concordance between the draft conflicts provisions of the BC Code and the conflict provisions of the Federation Model Code.

CONFLICTS (draft 22)

Draft Code of Professional Conduct for British Columbia ("the BC Code")

(conflicts provisions only)

Clean Version

February 21, 2012

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

Commentary
A lawyer-client relationship may be established without formality. When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing; For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

"**conflict of interest"** means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"interprovincial law firm" means a law firm that carries on the practice of law in more than one province or territory of Canada;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

"lawyer" means a member of the Society, and includes an articled student enrolled in the Law Society Admission Program;

"Society" means the Law Society of British Columbia;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.

As defined in these rules, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

The general prohibition and permitted activity prescribed by this rule apply to a lawyer's duties to current, former, concurrent and joint clients as well as to the lawyer's own interests.

Representation

Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The fiduciary relationship, the duty of loyalty and conflicting interests

The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest. This

obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil* 2002 SCC 70 and *Strother v, 3464920 Canada Inc.* 2007 SCC 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer client relationship.

Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of areas where conflicts of interest may occur

Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.

1. A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.
2. A lawyer provides legal advice to a small business on a series of commercial

transactions and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

3. A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

4. A lawyer has a sexual or close personal relationship with a client.

Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

5. A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

These two roles may result in a conflict of interest or other problems because they may

- affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
- obscure legal advice from business and practical advice,
- jeopardize the protection of lawyer and client privilege, and
- disqualify the lawyer or the law firm from acting for the organization.

6. Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See subrules (44) and (45) on space-sharing arrangements.

The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

Consent

2.04(2) A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

a) Express consent must be fully informed and voluntary after disclosure.

b) Consent may be inferred and need not be in writing where all of the following apply:

i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

ii. the matters are unrelated;

iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and consent

Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in Advance

A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent

In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *Neil* and in *Strother*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

Lawyer belief in reasonableness of representation

The requirement that the lawyer reasonably believe that he or she is able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client precludes a lawyer from acting for parties to a transaction who have different interests, except where joint representation is permitted under this Code.

Dispute

2.04 (3) Despite subrule (2) a lawyer must not represent opposing parties in a dispute.

Commentary

A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Concurrent Representation with protection of confidential client information

2.04 (4) Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

(d) each client is represented by a different lawyer in the firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see subrule (25)).

Acting Against Former Clients

2.04 (5) Unless the former client consents, a lawyer must not act against a former client in:

(a) the same matter,

(b) any related matter, or

(c) any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client.

Commentary

This Rule prohibits a lawyer from attacking legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

2.04 (6) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's firm may act against the former client in the new matter, if the firm establishes, in accordance with subrule (20), that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:

(a) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;

(b) the extent of prejudice to any party; and

(c) the good faith of the parties.

Commentary

The guidelines at the end of Appendix D regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or

associate to act against the former client.

Joint Retainers

2.04 (7) Before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other. The Law Society website contains two precedent letters that lawyers may use as the basis for compliance with subrule (7).

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (7). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain

their consent to act in accordance with subrule (9).

2.04 (8) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts a joint retainer from that client and another client, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (9) When a lawyer has advised the clients as provided under subrules (7) and (8) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate letter to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights or obligations will diverge as the matter progresses.

2.04 (10) Except as provided by subrule (12), if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise them on the contentious issue and must:

(a) refer the clients to other lawyers; or

(b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

(i) no legal advice is required; and

(ii) the clients are sophisticated.

2.04 (11) If the contentious issue referred to in subrule (10) is not resolved, the lawyer must withdraw from the joint representation.

Commentary

This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

2.04 (12) Subject to this rule, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary
This rule does not relieve the lawyer of the obligation, when the contentious issue arises, to obtain the consent of the clients if there is or is likely to be a conflicting interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients. When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Limited representation

2.04 (13) In subrules (13) to (16) **"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 lawyer and the client that the lawyer will not provide continuing representation in the matter.

2.04 (14) 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.

2.04 (15) 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.

2.04 (16) 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.

Conflicts Arising as a Result of Transfer Between Law Firms

Application of Rule

2.04 (17) In subrules (17) to (25):

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

"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.

Commentary

Subrules (17) to (25) apply to lawyers sharing space. Treating space-sharing lawyers as a law firm recognizes

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

Subrules (17) to (25) 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.

Subrules (17) to (25) 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.

See the definition of **"MDP"** in Rule 1 and Rules 2-23.1 to 2-23.14 of the Law Society Rules.

2.04 (18) Subrules (17) to (25) 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.

Commentary

Subrules (17) to (25) are intended to regulate lawyers and articled law 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.

2.04 (19) Subrules (20) to (23) do not apply to a lawyer employed by a federal, provincial or territorial government who continues to be employed by that government after transferring from one department, ministry or agency to another.

Firm Disqualification

2.04 (20) If the transferring lawyer actually possesses confidential information relevant to a matter referred to in subrule (18)(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 establish, in accordance with subrule (24), when called upon to do so by a party adverse in interest, that

(i) it is reasonable that its representation of its client in the matter continue, having regard to all relevant circumstances, including:

(A) the adequacy and timing of the measures taken under subparagraph (ii);

(B) the extent of prejudice to the affected clients; and

(C) the good faith of the former client and the client of the new law firm; 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.

Commentary

Appendix D may be helpful in determining what constitutes "reasonable measures" in this context.

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 may prejudice clients and may be considered sharp practice.

Continued Representation not to Involve Transferring Lawyer

2.04 (21) If the transferring lawyer actually possesses information relevant to a matter referred to in subrule (18)(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, the new law firm must notify its client of the relevant circumstances and its intended action under subrules (17) to (25).

2.04 (22) Unless the former client consents, a transferring lawyer to whom subrule (20) or (21) 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.

2.04 (23) Unless the former client consents, members 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 subrule (20) or (21) applies.

Determination of Compliance

2.04 (24) Notwithstanding remedies available at law, a lawyer who represents a party in a matter referred to in subrules (6) or (17) to (25) may seek the opinion of the Society on the application of those subrules.

Due Diligence

2.04 (25) 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 subrules (17) to (25), and

(b) does not disclose confidences of clients of

(i) the firm, and

(ii) another law firm in which the person has worked.

Conflicts with Clients

2.04 (26) A lawyer must not perform any legal services if it would reasonably be expected that the lawyer's professional judgment would be affected by the lawyer's or anyone else's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

Commentary
Any relationship or interest that affects a lawyer's professional judgment is to be avoided under this subrule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.

2.04 (27) The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client is not a disqualifying interest under subrule (26).

Commentary
Generally speaking, a lawyer may act as legal advisor or as business associate, but not both. These principles are not intended to preclude a lawyer from performing legal services on his or her own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to be uninsured as a result of Exclusion 6 in the B.C. Lawyers Compulsory Professional Liability Insurance Policy and similar provisions in other insurance policies. Whether or not insurance coverage under the Compulsory Policy is lost is determined separate and apart from the ethical obligations addressed in this chapter. Review the current policy for the exact wording of Exclusion 6 or contact the Lawyers Insurance Fund regarding the application of the Exclusion to a particular set of circumstances.

Doing Business with a Client

Independent legal advice

2.04 (28) In subrules (28) to (43), when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who has no conflicting interest in the matter.

2.04 (29) A lawyer giving independent legal advice under this Rule must:

(a) advise the client that the client has the right to independent legal representation;

(b) explain the legal aspects of the matter to the client, who appears to understand the advice given; and

(c) inform the client of the availability of qualified advisers in other fields who would be in a position to advise the client on the matter from a business point of view.

Commentary
A client is entitled to obtain independent legal representation by retaining a lawyer who has no conflicting interest in the matter to act for the client in relation to the matter. If a client elects to waive independent legal representation and to rely on independent legal

advice only, the lawyer retained has a responsibility that should not be lightly assumed or perfunctorily discharged.

Either independent legal representation or independent legal advice may be provided by a lawyer employed by the client as in-house counsel.

2.04 (30) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

Commentary

This provision applies to any transaction with a client, including:

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (31) Subject to subrule (32), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

If the lawyer does not choose to disclose the conflicting interest or cannot do so without

breaching confidence, the lawyer must decline the retainer.

A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (34).

2.04 (32) When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

2.04 (33) A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (34) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (35) Subject to subrule (33), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (36) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (37) Except as provided by subrule (38), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

2.04 (38) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this rule (Conflicts), in particular, subrules (28) to (43) (Doing Business with a Client); and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Testamentary Instruments and Gifts

2.04 (39) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

2.04 (40) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

2.04 (41) A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

2.04 (42) A lawyer must not act as a surety for, deposit money or other valuable security for, or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (43) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

Space-sharing arrangements

2.04 (44) Subrule (45) applies to lawyers sharing office space with one or more other lawyers, but not practising or being held out to be practising in partnership or association with the other lawyer or lawyers.

2.04 (45) Unless all lawyers sharing space together agree that they will not act for clients adverse in interest to the client of any of the others, each lawyer who is sharing space must disclose in writing to all of the lawyer's clients:

(a) that an arrangement for sharing space exists,

(b) the identity of the lawyers who make up the firm acting for the client, and

(c) that lawyers sharing space with the firm are free to act for other clients who are adverse in interest to the client.+

Commentary
Like other lawyers, those who share space must take all reasonable measures to ensure client confidentiality. Lawyers who do not wish to act for clients adverse in interest to clients of lawyers with whom they share space should establish an adequate conflicts check system. In order both to ensure confidentiality and to avoid conflicts, a lawyer must have the consent of each client before disclosing any information about the client for the purpose of conflicts checks. Consent may be implied in some cases but, if there is any doubt, the best course is to obtain express consent.

APPENDIX C — REAL PROPERTY TRANSACTIONS

Application

1. This Appendix does not apply to a real property transaction between corporations, societies, partnerships, trusts, or any of them, that are effectively controlled by the same person or persons or between any of them and such person or persons.

Acting for parties with different interests

2. A lawyer must not act for more than one party with different interests in a real property transaction unless:

   (a) because of the remoteness of the location of the lawyer's practice, it is impracticable for the parties to be separately represented,

   (b) the transaction is a simple conveyance, or

   (c) paragraph 8 applies.

3. When a lawyer acts jointly for more than one client in a real property transaction, the lawyer must comply with the obligations set out in rule 2.04 (7) to (12).

Simple conveyance

4. In determining whether or not a transaction is a simple conveyance, a lawyer should consider:

   (a) the value of the property or the amount of money involved,

   (b) the existence of non-financial charges, and

   (c) the existence of liens, holdbacks for uncompleted construction and vendor's obligations to complete construction.

Commentary
The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them: (a) the payment of all cash for clear title, (b) the discharge of one or more encumbrances and payment of the balance, if any,

in cash,

(c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,

(d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is

(i) a revolving mortgage that can be advanced and re-advanced,

(ii) to be advanced in stages, or

(iii) given to secure a line of credit.

(e) transfer of a leasehold interest if there are no changes to the terms of the lease,

(f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or

(g) any combination of the foregoing.

The following are examples of transactions that must not be treated as simple conveyances:

(h) a transaction in which there is any commercial element, such as

(i) a conveyance included in a sale and purchase of a business,

(ii) a transaction involving a building containing more than three residential units, or

(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(i) a lease or transfer of a lease, other than as set out in subparagraph (e),

(j) a transaction in which there is a mortgage back from the purchaser to the vendor,

(k) an agreement for sale,

(l) a transaction in which the lawyer's client is a vendor who:

(i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

(ii) is or was the developer of property being sold, unless subparagraph (f) applies, or

(m) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage.

A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

Advice and consent

5. If a lawyer acts for more than one party in the circumstances as set out in paragraph 2 of this Appendix, then the lawyer must, as soon as is practicable,

(a) advise each party in writing that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned and that, if a conflict of interest arises, the lawyer cannot continue to act for any of them in the transaction,

(b) obtain the consent in writing of all such parties, and

(c) raise and explain the legal effect of issues relevant to the transaction that may be of importance to each such party.

Commentary

If a written communication is not practicable at the beginning of the transaction, the advice may be given and the consent obtained orally, but the lawyer must confirm that advice to the parties in writing as soon as possible, and the lawyer must obtain consent in writing prior to completion.

The consent in writing may be set out in the documentation of the transaction or may be a blanket consent covering an indefinite number of transactions.

Foreclosure proceedings

6. In this paragraph, "mortgagor" includes "purchaser," and "mortgagee" includes "vendor" under an agreement for sale, and "foreclosure proceeding" includes a proceeding for cancellation of an agreement for sale.

If a lawyer acts for both a mortgagor and a mortgagee in the circumstances set out in paragraph 2, the lawyer must not act in any foreclosure proceeding relating to that transaction for either the mortgagor or the mortgagee.

This prohibition does not apply if

(a) the lawyer acted for a mortgagee and attended on the mortgagor only for the purposes of executing the mortgage documentation,

(b) the mortgagor for whom the lawyer acted is not made a party to the foreclosure proceeding, or

(c) the mortgagor has no beneficial interest in the mortgaged property and no claim is being made against the mortgagor personally.

Unrepresented parties in a real property transaction

7. If one party to a real property transaction does not want or refuses to obtain independent legal representation, the lawyer acting for the other party may allow the unrepresented party to execute the necessary documents in the lawyer's presence as a witness if the lawyer advises that party in writing that:

(a) the party is entitled to obtain independent legal representation but has chosen not to do so,

(b) the lawyer does not act for or represent the party with respect to the transaction, and

(c) the lawyer has not advised that party with respect to the transaction but has only attended to the execution and attestation of documents.

8. If the lawyer witnesses the execution of the necessary documents as set out in paragraph 7, it is not necessary for the lawyer to obtain the consent of the party or parties for whom the lawyer acts.

9. If one party to the real property transaction is otherwise unrepresented but wants the lawyer representing another party to the transaction to act for him or her to remove existing encumbrances, the lawyer may act for that party for those purposes only and may allow that party to execute the necessary documents in the lawyer's presence as witness if the lawyer advises the party in writing that:

(a) the lawyer's engagement is of a limited nature, and

(b) if a conflict arises between the parties, the lawyer will be unable to continue to act for that party.

APPENDIX D — 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 articled 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 this Code to preserve the confidentiality of information.

   In Rules 2.04 (17) to (25), "confidential" information refers to information not generally known to the public that is obtained from a client. It should be distinguished from 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 Rule 2.04 (20).

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 2.04 (24) 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 Rule 2.04 (20). Again, this process must be completed before the transferring lawyer is hired.

An application under Rule 2.04 (24) may be made to the Society or to a court of competent jurisdiction. The Society has a procedure for considering disputes under Rule 2.04 (24) that is intended to provide informal guidance to applicants.

The circumstances referred to in Rule 2.04(20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account.

(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, the new law firm must notify its client "of the relevant circumstances and its intended action under Rule 2.04(17) to (25).

Although Rule 2.04(21) 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.

A former client who alleges that the transferring lawyer has such confidential information may apply under Rule 2.04(24) 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 geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

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.

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 Rule 2.04(20)(b).

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 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.

5. 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.

6. Unless to do otherwise is unfair, insignificant or impracticable, the screened lawyer should not participate in the fees generated by the current client matter.

7. The screened lawyer's office or work station should be located away from the offices or work stations of those working on the matter.

8. The screened lawyer should use associates and support staff different from those working on the current client matter.

Federation of Law Societies Model Code of Professional Conduct

(conflicts provisions only)

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February 22, 2012

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

Commentary
A lawyer-client relationship may be established without formality. When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing; For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

A "**conflict of interest"** means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"interprovincial law firm" means a law firm that carries on the practice of law in more than one province or territory of Canada;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes a law student registered in the Society's pre-call training program;

"Society" means the Law Society of <province or territory>;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

As defined in these rules, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

The general prohibition and permitted activity prescribed by this rule apply to a lawyer's duties to current, former, concurrent and joint clients as well as to the lawyer's own interests.

Representation

Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The fiduciary relationship, the duty of loyalty and conflicting interests

The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act against the interests of the client. This obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil* 2002 SCC 70 and *Strother v, 3464920 Canada Inc.* 2007 SCC 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal

interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer client relationship.

Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of Conflicts of Interest

Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of conflicts of interest and are not exhaustive.

1. A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.
2. A lawyer's position on behalf of one client leads to a precedent likely to seriously weaken the position being taken on behalf of another client, thereby creating a substantial risk that the lawyer's action on behalf of the one client will materially limit the lawyer's effectiveness in representing the other client.
3. A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.
4. A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

5. A lawyer has a sexual or close personal relationship with a client.

Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

6. A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

These two roles may result in a conflict of interest or other problems because they may

- affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
- obscure legal advice from business and practical advice,
- jeopardize the protection of lawyer and client privilege, and
- disqualify the lawyer or the law firm from acting for the organization.

7. Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute.

The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

2.04(2) Consent

A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

a) Express consent must be fully informed and voluntary after disclosure.

b) Consent may be inferred and need not be in writing where all of the following apply:

i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

ii. the matters are unrelated;

iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and consent

Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in Advance

A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

While not a pre-requisite to advance consent, in some circumstances it may be advisable to

recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent

In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *Neil* and in *Strother*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

2.04 (3) Dispute

Despite 2.04(2) a lawyer must not represent opposing parties in a dispute.

Commentary

A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Concurrent Representation with protection of confidential client information

2.04 (4) Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

(d) each client is represented by a different lawyer in the firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 2.04 (26)).

Joint Retainers

2.04 (5) Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (5). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (9).

2.04 (6) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (7) When a lawyer has advised the clients as provided under subrules (5) and (6) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

2.04 (8) Except as provided by subrule (9), if a contentious issue arises between clients who have consented to a joint retainer,

(a) the lawyer must not advise them on the contentious issue and must:

i. refer the clients to other lawyers; or

ii. advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

A. no legal advice is required; and

B. the clients are sophisticated.

(b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

Commentary
This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

2.04 (9) Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary
This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients. When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Acting Against Former Clients

2.04 (10) Unless the former client consents, a lawyer must not act against a former client in :

(a) the same matter,

(b) any related matter, or

(c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary
This rule prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

2.04 (11) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy of assurances that no disclosure of the former client's confidential information to the other lawyer having carriage of the new matter has occurred;

(ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the other lawyer having carriage of the new matter will occur;

(iii) the extent of prejudice to any party;

(iv) the good faith of the parties;

(v) the availability of suitable alternative counsel; and

(vi) issues affecting the public interest.

Commentary
The guidelines at the end of the Commentary to subrule (26) regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Acting for Borrower and Lender

2.04 (12) Subject to subrule (13), a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

2.04 (13) In subrules (14) to (16) **"lending client"** means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

2.04 (14) Provided there is compliance with this rule, and in particular subrules (5) to (9), a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or

(d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

2.04 (15) When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the

advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary
What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

2.04 (16) If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

(a) provide the advice described in subrule (5) to the lending client before accepting the retainer**,**

(b) provide the advice described in subrule (6), or

(c) obtain the consent of the lending client as required by subrule (7), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary
Subrules (15) and (16) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act. Subrule (16) applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Conflicts from Transfer Between Law Firms

Application of Rule

2.04 (17) In subrules (17) – (26):

(a) **"client**", includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, and those defined as a client in the definitions part of this Code;

(b) **"confidential information"** means information that is not generally known to the public obtained from a client; and

(c) **"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.

Commentary
The duties imposed by this rule concerning confidential information should be distinguished from 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.

2.04 (18) Subrules (17)-(26) 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.

2.04 (19) Subrules (20) to (22) do not apply to a lawyer employed by the federal, a provincial or a territorial attorney general or department of justice who, after transferring from one department, ministry or agency to another, continues to be employed by that attorney general or department of justice.

Commentary
The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. **Lawyers and support staff —** This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked. **Government employees and in-house counsel —** The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same. **Law firms with multiple offices —** This rule treats 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 each 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.

Law Firm Disqualification

2.04 (20) If the transferring lawyer actually possesses confidential information relevant to a matter referred to in subrule (18) (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 establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including:

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur;

(ii) the extent of prejudice to any party;

(iii) the good faith of the parties;

(iv) the availability of suitable alternative counsel; and

(v) issues affecting the public interest.

Commentary

The circumstances enumerated in subrule (20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

2.04 (21) For greater certainty, subrule (20) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.

2.04 (22) If the transferring lawyer actually possesses information relevant to a matter referred to in subrule (18)(a) respecting the former client that is not confidential information but that may prejudice the former client if disclosed to a member of the new law firm:

(a) the lawyer must 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 the matter, the former client's lawyer, of the relevant circumstances and the firm's intended action under this rule, and

(ii) deliver to the persons notified under subparagraph (i) a copy of any affidavit or solemn declaration executed under clause (a).

Transferring Lawyer Disqualification

2.04 (23) Unless the former client consents, a transferring lawyer referred to in subrule (20) or (22) must not:

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

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

2.04 (24) Unless the former client consents, members 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 referred to in subrule (20) or (22) .

Determination of Compliance

2.04 (25) Anyone who has an interest in, or who represents a party in, a matter referred to in subrules (17) to (26) may apply to a tribunal of competent jurisdiction for a determination of any aspect of those subrules.

Due Diligence

2.04 (26) 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 subrules (17) to (26), and

b)

i. does not disclose confidential information of clients of the firm and

ii. any other law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

When a law firm ("new law firm") considers hiring a lawyer or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law 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. 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 the clients of the two law firms conflict; and

(c) the transferring lawyer actually possesses relevant information.

The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm ("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, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

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 exists

If the transferring lawyer actually possesses 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, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

(b) the new law firm complies with subrule (20)(b) and, in determining whether continued representation is in the interests of justice, both 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 no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under subrule (25) for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of subrule (20)(b). Ideally, this process should be completed before the transferring person is hired.

B. If no conflict exists

Although the notice required by subrule (22) need not necessarily be made in writing, it would

be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or 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 because, in the absence of such consent, the transferring lawyer may 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 no disclosure will occur to any member of the new law firm of the former client's confidential information. 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 may prejudice the former client if disclosed.

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 such confidential information may apply under subrule (25) for a determination of 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 actually 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

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former client's confidential information will occur to any member of the new law firm:

(a) when 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) when the new law firm is not sure whether the transferring lawyer actually 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. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information."

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 demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

The guidelines at the end of this Commentary, 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.

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 (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of subrule (20)(b), particularly clause (v). Only when the entire firm must be disqualified under subrule (20) will it be necessary to refer conduct of the matter to outside counsel.

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 previous representation with the screened lawyer.
4. The current 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.
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. Appropriate law firm members should provide undertakings 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. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
11. The screened lawyer should use associates and support staff different from those working on the current matter.
12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Doing Business with a Client

Definitions

2.04 (27) In subrules (27) to (41),

"**independent legal advice"** means a retainer in which:

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,

(b) the client's transaction involves doing business with

    (i) another lawyer, or

    (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,

(c) the retained lawyer has advised the client that the client has the right to independent legal representation,

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,

(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and

(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view;

"independent legal representation" means a retainer in which

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and

(b) the retained lawyer will act as the client's lawyer in relation to the matter;

Commentary
If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

"related persons" means related persons as defined in the *Income Tax Act* (Canada); and

2.04 (28) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

Commentary
This provision applies to any transaction with a client, including: (a) lending or borrowing money; (b) buying or selling property; (c) accepting a gift, including a testamentary gift; (d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity; (e) recommending an investment; and (f) entering into a common business venture. The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (29) Subject to subrule (30), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice and

(c) if the client requests the lawyer to act, obtain the client's ~~written~~ consent.

Commentary

If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (32).

2.04 (30) When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

2.04 (31) A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (32) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (33) Subject to subrule (31), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (34) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (35) Except as provided by subrule (36), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

2.04 (36) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this rule (Conflicts), in particular, subrules (27) to (36) (Doing Business with a Client); and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Testamentary Instruments and Gifts

2.04 (37) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

2.04 (38) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

2.04 (39) A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

2.04 (40) A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (41) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

CONFLICTS (draft 22)

Draft Code of Professional Conduct for British Columbia ("the BC Code")

(conflicts provisions only)

Redlined to Model Code

February 21, 2012

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

Commentary
A lawyer-client relationship may be established without formality. When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing; For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

~~A~~ "**conflict of interest"** means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable;

“disclosure” means full and fair disclosure of all information relevant to a person’s decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

“interprovincial law firm” means a law firm that carries on the practice of law in more than one province or territory of Canada;

“law firm” includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

“lawyer” means a member of the Society and includes a law student ~~registered~~ enrolled in the Law Society~~’s pre-call training p~~Admission Program;

“Society” means the Law Society of ~~<province or territory>~~British Columbia;

“tribunal” includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

2.04 CONFLICTS

Duty to Avoid Conflicts of Interest

2.04 (1) A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.

As defined in these rules, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

The general prohibition and permitted activity prescribed by this rule apply to a lawyer's duties to current, former, concurrent and joint clients as well as to the lawyer's own interests.

Representation

Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The fiduciary relationship, the duty of loyalty and conflicting interests

The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act ~~against the interests of the client.~~ in a

conflict of interest. This obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil* 2002 SCC 70 and *Strother v, 3464920 Canada Inc.* 2007 SCC 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer client relationship.

Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;
- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of ~~Conflicts of Interest~~**areas where conflicts of interest may occur**

Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest ~~and~~. The examples are not exhaustive.

1. A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

~~2. A lawyer's position on behalf of one client leads to a precedent likely to seriously weaken the position being taken on behalf of another client, thereby creating a~~

~~substantial risk that the lawyer's action on behalf of the one client will materially limit the lawyer's effectiveness in representing the other client.~~

~~3.~~2. A lawyer provides legal advice to a small business on a series of commercial transactions ~~to the owner of a small business~~ and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

~~4.~~3. A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

~~5.~~4. A lawyer has a sexual or close personal relationship with a client.

Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

~~6.~~5. A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

These two roles may result in a conflict of interest or other problems because they may

- affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
- obscure legal advice from business and practical advice,
- jeopardize the protection of lawyer and client privilege, and
- disqualify the lawyer or the law firm from acting for the organization.

~~7.~~6. Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See subrules (44) and (45) on space-sharing arrangements.

The fact or the appearance of such a conflict may depend on the extent to which the lawyers'

practices are integrated, physically and administratively, in the association.

Consent

2.04(2) ~~Consent~~

A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

a) Express consent must be fully informed and voluntary after disclosure.

b) Consent may be inferred and need not be in writing where all of the following apply:

i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

ii. the matters are unrelated;

iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and consent

Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage

that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in Advance

A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent

In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *Neil* and in *Strother*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

Lawyer belief in reasonableness of representation

The requirement that the lawyer reasonably believe that he or she is able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client precludes a lawyer from acting for parties to a transaction who have different interests, except where joint representation is permitted under this Code.

Dispute

2.04 (3) ~~Dispute~~

Despite ~~2.04~~subrule (2) a lawyer must not represent opposing parties in a dispute.

Commentary
A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Concurrent Representation with protection of confidential client information

2.04 (4) Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

(d) each client is represented by a different lawyer in the firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary
This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs. An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is

represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see ~~Rule 2.04 (26)).~~ subrule (25)).

Acting Against Former Clients

2.04 (5) Unless the former client consents, a lawyer must not act against a former client in:

(a) the same matter,

(b) any related matter, or

(c) any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client.

Commentary

This Rule prohibits a lawyer from attacking legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

2.04 (6) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's firm may act against the former client in the new matter, if the firm establishes, in accordance with subrule (20), that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:

(a) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;

(b) the extent of prejudice to any party; and

(c) the good faith of the parties.

Commentary

The guidelines at the end of Appendix D regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

Joint Retainers

2.04 (~~5~~7) Before a lawyer ~~acts~~is retained by more than one client in a matter or transaction ~~for more than one client~~, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other. The Law Society website contains two precedent letters that lawyers may use as the basis for compliance with subrule (7).

A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (~~5~~7). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (9).

2.04 (~~6~~8) If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts a joint ~~employment for~~retainer from that client and another client ~~in a matter or transaction~~, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

2.04 (~~7~~9) When a lawyer has advised the clients as provided under subrules (~~5~~7) and (~~6~~8) and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

Consent in writing, or a record of the consent in a separate ~~written communication~~letter to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that ~~a~~an issue contentious ~~issue will arise~~ between them will arise or their interests, rights or obligations will diverge as the matter progresses.

2.04 (~~8~~10) Except as provided by subrule (~~9~~12), if a contentious issue arises between clients who have consented to a joint retainer,

~~(a)~~ the lawyer must not advise them on the contentious issue and must:

~~i.~~(a) refer the clients to other lawyers; or

~~ii.~~(b) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

~~A.~~(i) no legal advice is required; and

~~B.~~(ii) the clients are sophisticated.

~~(b)~~ **2.04 (11)**~~if~~ If the contentious issue referred to in subrule (10) is not resolved, the lawyer must withdraw from the joint representation.

Commentary

This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

If, after the clients have consented to a joint retainer, an issue contentious between them or

some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

2.04 (~~9~~12) Subject to this rule, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

This rule does not relieve the lawyer of the obligation, when the contentious issue arises, to obtain the consent of the clients ~~when~~if there is or is likely to be a ~~conflict of~~conflicting interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.

When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Limited representation

2.04 (13) In subrules (13) to (16) **"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 lawyer and the client that the lawyer will not provide continuing representation in the matter.

2.04 (14) 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.

2.04 (15) 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.

2.04 (16) 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.

Acting Against Former Clients

2.04 (10) Unless the former client consents, a lawyer must not act against a former client in :

(a) the same matter,

(b) any related matter, or

(c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary
This rule prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

2.04 (11) When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy of assurances that no disclosure of the former client's confidential information to the other lawyer having carriage of the new matter has occurred;

(ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the other lawyer having carriage of the new matter will occur;

(iii) the extent of prejudice to any party;

(iv) the good faith of the parties;

(v) the availability of suitable alternative counsel; and

(vi) issues affecting the public interest.

Commentary
The guidelines at the end of the Commentary to subrule (26) regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Acting for Borrower and Lender

2.04 (12) Subject to subrule (13), a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

2.04 (13) In subrules (14) to (16) **"lending client"** means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

2.04 (14) Provided there is compliance with this rule, and in particular subrules (5) to (9), a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or

(d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

2.04 (15) When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary
What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

2.04 (16) If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

(a) provide the advice described in subrule (5) to the lending client before accepting the retainer,

(b) provide the advice described in subrule (6), or

(c) obtain the consent of the lending client as required by subrule (7), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

~~Commentary~~

~~Subrules (15) and (16) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.~~

~~Subrule (16) applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.~~

Conflicts ~~from~~Arising as a Result of Transfer Between Law Firms

Application of Rule

2.04 (17) In subrules (17) ~~– (26):~~

~~"**client**", includes anyone~~ to ~~whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, and those defined as a client in the definitions part of this Code;~~ (25):

~~(a)~~

~~(b)~~ **"confidential information"** means information that is not generally known to the public obtained from a client; and

~~(c)~~ **"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.

Commentary

~~The duties imposed by this rule concerning confidential information should be distinguished from 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.~~Subrules (17) to (25) apply to lawyers sharing space. Treating space-sharing lawyers as a law firm recognizes

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

Subrules (17) to (25) 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.

Subrules (17) to (25) 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.

See the definition of **"MDP"** in Rule 1 and Rules 2-23.1 to 2-23.14 of the Law Society Rules.

2.04 (18) Subrules (17~~) (26~~) to (25) 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.

2.04 (19) Subrules (20) to (~~22~~23) do not apply to a lawyer employed by ~~the~~a federal, ~~a~~ provincial or ~~a~~ territorial ~~attorney general or department of justice~~government who~~,~~ continues to be employed by that government after transferring from one department, ministry or agency to another~~, continues to be employed by that attorney general or department of justice~~.

~~**Commentary**~~

~~The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.~~

~~**Lawyers and support staff —** This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.~~

~~**Government employees and in-house counsel —** The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.~~

~~**Law firms with multiple offices —** This rule treats 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 each 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.~~

~~Law~~ Firm Disqualification

2.04 (20) If the transferring lawyer actually possesses confidential information relevant to a matter referred to in subrule (18~~) ()~~(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 ~~establishes~~can establish, in accordance with subrule (24), when called upon to do so by a party adverse in interest, that

~~(b)~~(i) it is ~~in the interests of justice~~reasonable that ~~it act~~its representation of its client in the matter continue, having regard to all relevant circumstances, including:

~~(i)~~(A) the adequacy and timing of the measures taken ~~to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur;~~under subparagraph (ii);

~~(ii)~~(B) the extent of prejudice to ~~any party;~~the affected clients; and

~~(iii)~~ the good faith of the ~~parties;~~

~~(iv) the availability of suitable alternative counsel; and~~

~~(v)~~(C) ~~issues affecting~~former client and the ~~public interest.~~client of the new law firm; and

~~**Commentary**~~

~~The circumstances enumerated in subrule (20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.~~

~~**2.04 (21)** For greater certainty, subrule (20) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.~~

(ii) **~~2.04 (22)~~**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.

Commentary

Appendix D may be helpful in determining what constitutes "reasonable measures" in this context.

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 may prejudice clients and may be considered sharp practice.

Continued Representation not to Involve Transferring Lawyer

2.04 (21) If the transferring lawyer actually possesses information relevant to a matter referred to in subrule (18)(a) respecting the former client, but that information is not confidential information ~~but~~ that may prejudice the former client if disclosed to a member of the new law firm~~:~~, the new law firm must notify its client of the relevant circumstances and its intended action under subrules (17) to (25).

~~(a) the lawyer must 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 the matter, the former client's lawyer, of the relevant circumstances and the firm's intended action under this rule, and~~

~~(ii) deliver to the persons notified under subparagraph (i) a copy of any affidavit or solemn declaration executed under clause (a).~~

~~**Transferring Lawyer Disqualification**~~

2.04 (~~23~~22) Unless the former client consents, a transferring lawyer ~~referred~~ to ~~in~~whom subrule (20) or (~~22)~~21) applies must not:

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

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

2.04 (~~24~~23) Unless the former client consents, members 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 ~~referred~~ to ~~in~~whom subrule (20) or (~~22)~~ 21) applies.

Determination of Compliance

2.04 (~~25) Anyone who has an interest in, or~~ 24) Notwithstanding remedies available at law, a lawyer who represents a party in~~,~~ a matter referred to in subrules (6) or (17) to (~~26~~25) may ~~apply to a tribunal~~seek the opinion of ~~competent jurisdiction for a determination of any aspect~~the Society on the application of those subrules.

Due Diligence

2.04 (~~26~~25) 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)~~(a) complies with subrules (17) to (~~26~~25), and

(b) does not disclose ~~confidential information~~confidences of clients of

~~i.~~(i) the firm~~,~~ and

~~ii.~~(ii) ~~any other~~another law firm in which the person has worked.

Conflicts with Clients

2.04 (26) A lawyer must not perform any legal services if it would reasonably be expected that the lawyer's professional judgment would be affected by the lawyer's or anyone else's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

Commentary
Any relationship or interest that affects a lawyer's professional judgment is to be avoided under this subrule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.

2.04 (27) The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client is not a disqualifying interest under subrule (26).

Commentary
Generally speaking, a lawyer may act as legal advisor or as business associate, but not both. These principles are not intended to preclude a lawyer from performing legal services on his or her own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to be uninsured as a result of Exclusion 6 in the B.C. Lawyers Compulsory Professional Liability Insurance Policy and similar provisions in other insurance policies. Whether or not insurance coverage under the Compulsory Policy is lost is determined separate

and apart from the ethical obligations addressed in this chapter. Review the current policy for the exact wording of Exclusion 6 or contact the Lawyers Insurance Fund regarding the application of the Exclusion to a particular set of circumstances.

Doing Business with a Client

~~**Definitions**~~

Independent legal advice

2.04 (~~27~~28) In subrules (~~27~~28) to (~~41),~~

~~"**independent legal advice"** means~~43), when a ~~retainer in which:~~

~~(~~client is required or advised to obtain independent legal advice concerning a~~) the retained lawyer, who~~ matter, that advice may only be obtained by retaining a lawyer ~~employed as in-house counsel for the client, who~~ has no conflicting interest ~~with respect to the client's transaction,~~in the matter.

~~(b) the client's transaction involves doing business with~~

~~(i) another lawyer, or~~

~~(ii)~~

2.04 (29) A lawyer giving independent legal advice under this Rule must:

~~(~~a ~~corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,~~

~~(c) the retained lawyer has advised~~)advise the client that the client has the right to independent legal representation~~,~~;

~~(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,~~

~~(e) the retained lawyer has explained~~(b) explain the legal aspects of the ~~transaction~~matter to the client, who ~~appeared~~appears to understand the advice given~~,~~; and

~~(f) the retained lawyer informed~~(c) inform the client of the availability of qualified advisers in other fields who would be in a position to ~~give an opinion to~~advise the client ~~as to~~on the ~~desirability or otherwise of a proposed investment~~matter from a business point of view~~,~~.

~~**"independent legal representation"** means a retainer in which~~

~~(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and~~

~~(b) the retained lawyer will act as the client's lawyer in relation to the matter;~~

Commentary

A client is entitled to obtain independent legal representation by retaining a lawyer who has no conflicting interest in the matter to act for the client in relation to the matter.

If a client elects to waive independent legal representation and to rely on independent legal advice only, the lawyer retained ~~lawyer~~ has a responsibility that should not be lightly assumed or perfunctorily discharged.

Either independent legal representation or independent legal advice may be provided by a lawyer employed by the client as in-house counsel.

~~**"related persons"** means related persons as defined in the *Income Tax Act* (Canada); and~~

2.04 (~~28~~30) Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

Commentary

This provision applies to any transaction with a client, including:

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

2.04 (~~29~~31) Subject to subrule (~~30~~32), if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's written consent.

Commentary

If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrule (3234).

2.04 (3032) When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

2.04 (3133) A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the

loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

2.04 (~~32)~~34) A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

2.04 (~~33~~35) Subject to subrule (~~31~~33), if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

2.04 (~~34~~36) If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a Lawyer

2.04 (~~35~~37) Except as provided by subrule (~~36~~38), a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

2.04 (~~36~~38) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this rule (Conflicts), in particular, subrules (~~27~~28) to (~~36~~43) (Doing Business with a Client); and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Testamentary Instruments and Gifts

2.04 (~~37~~39) A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

2.04 (~~38~~40) Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

2.04 (~~39~~41) A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

2.04 (~~40~~42) A lawyer must not act as a surety for, deposit money or other valuable security for, or act in a supervisory capacity to an accused person for whom the lawyer acts.

2.04 (~~41~~43) A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

Space-sharing arrangements

2.04 (44) Subrule (45) applies to lawyers sharing office space with one or more other lawyers, but not practising or being held out to be practising in partnership or association with the other lawyer or lawyers.

2.04 (45) Unless all lawyers sharing space together agree that they will not act for clients adverse in interest to the client of any of the others, each lawyer who is sharing space must disclose in writing to all of the lawyer's clients:

(a) that an arrangement for sharing space exists,

(b) the identity of the lawyers who make up the firm acting for the client, and

(c) that lawyers sharing space with the firm are free to act for other clients who are adverse in interest to the client.+

Commentary

Like other lawyers, those who share space must take all reasonable measures to ensure client confidentiality. Lawyers who do not wish to act for clients adverse in interest to clients of lawyers with whom they share space should establish an adequate conflicts check system.

In order both to ensure confidentiality and to avoid conflicts, a lawyer must have the consent of each client before disclosing any information about the client for the purpose of conflicts checks. Consent may be implied in some cases but, if there is any doubt, the best course is to obtain express consent.

APPENDIX C — REAL PROPERTY TRANSACTIONS

Application

1. This Appendix does not apply to a real property transaction between corporations, societies, partnerships, trusts, or any of them, that are effectively controlled by the same person or persons or between any of them and such person or persons.

Acting for parties with different interests

2. A lawyer must not act for more than one party with different interests in a real property transaction unless:

   (a) because of the remoteness of the location of the lawyer's practice, it is impracticable for the parties to be separately represented,

   (b) the transaction is a simple conveyance, or

   (c) paragraph 8 applies.

3. When a lawyer acts jointly for more than one client in a real property transaction, the lawyer must comply with the obligations set out in rule 2.04 (7) to (12).

Simple conveyance

4. In determining whether or not a transaction is a simple conveyance, a lawyer should consider:

   (a) the value of the property or the amount of money involved,

   (b) the existence of non-financial charges, and

   (c) the existence of liens, holdbacks for uncompleted construction and vendor's obligations to complete construction.

Commentary

The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them:

(a) the payment of all cash for clear title,

(b) the discharge of one or more encumbrances and payment of the balance, if any,

in cash,

(c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,

(d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is

(i) a revolving mortgage that can be advanced and re-advanced,

(ii) to be advanced in stages, or

(iii) given to secure a line of credit,

(e) transfer of a leasehold interest if there are no changes to the terms of the lease,

(f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or

(g) any combination of the foregoing.

The following are examples of transactions that must not be treated as simple conveyances:

(h) a transaction in which there is any commercial element, such as

(i) a conveyance included in a sale and purchase of a business,

(ii) a transaction involving a building containing more than three residential units, or

(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(i) a lease or transfer of a lease, other than as set out in subparagraph (e),

(j) a transaction in which there is a mortgage back from the purchaser to the vendor,

(k) an agreement for sale,

(l) a transaction in which the lawyer's client is a vendor who:

(i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

(ii) is or was the developer of property being sold, unless subparagraph (f) applies, or

(m) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage.

A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

Advice and consent

5. If a lawyer acts for more than one party in the circumstances as set out in paragraph 2 of this Appendix, then the lawyer must, as soon as is practicable,

(a) advise each party in writing that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned and that, if a conflict of interest arises, the lawyer cannot continue to act for any of them in the transaction,

(b) obtain the consent in writing of all such parties, and

(c) raise and explain the legal effect of issues relevant to the transaction that may be of importance to each such party.

Commentary

If a written communication is not practicable at the beginning of the transaction, the advice may be given and the consent obtained orally, but the lawyer must confirm that advice to the parties in writing as soon as possible, and the lawyer must obtain consent in writing prior to completion.

The consent in writing may be set out in the documentation of the transaction or may be a blanket consent covering an indefinite number of transactions.

Foreclosure proceedings

6. In this paragraph, "mortgagor" includes "purchaser," and "mortgagee" includes "vendor" under an agreement for sale, and "foreclosure proceeding" includes a proceeding for cancellation of an agreement for sale.

If a lawyer acts for both a mortgagor and a mortgagee in the circumstances set out in paragraph 2, the lawyer must not act in any foreclosure proceeding relating to that transaction for either the mortgagor or the mortgagee.

This prohibition does not apply if

(a) the lawyer acted for a mortgagee and attended on the mortgagor only for the purposes of executing the mortgage documentation,

(b) the mortgagor for whom the lawyer acted is not made a party to the foreclosure proceeding, or

(c) the mortgagor has no beneficial interest in the mortgaged property and no claim is being made against the mortgagor personally.

Unrepresented parties in a real property transaction

7. If one party to a real property transaction does not want or refuses to obtain independent legal representation, the lawyer acting for the other party may allow the unrepresented party to execute the necessary documents in the lawyer's presence as a witness if the lawyer advises that party in writing that:

(a) the party is entitled to obtain independent legal representation but has chosen not to do so,

(b) the lawyer does not act for or represent the party with respect to the transaction, and

(c) the lawyer has not advised that party with respect to the transaction but has only attended to the execution and attestation of documents.

8. If the lawyer witnesses the execution of the necessary documents as set out in paragraph 7, it is not necessary for the lawyer to obtain the consent of the party or parties for whom the lawyer acts.

9. If one party to the real property transaction is otherwise unrepresented but wants the lawyer representing another party to the transaction to act for him or her to remove existing encumbrances, the lawyer may act for that party for those purposes only and may allow that party to execute the necessary documents in the lawyer's presence as witness if the lawyer advises the party in writing that:

(a) the lawyer's engagement is of a limited nature, and

(b) if a conflict arises between the parties, the lawyer will be unable to continue to act for that party.

APPENDIX D — 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 articled 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 this Code to preserve the confidentiality of information.

   In Rules 2.04 (17) to (25), "confidential" information refers to information not generally known to the public that is obtained from a client. It should be distinguished from 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 Rule 2.04 (20).

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 2.04 (24) 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 Rule 2.04 (20). Again, this process must be completed before the transferring lawyer is hired.

An application under Rule 2.04 (24) may be made to the Society or to a court of competent jurisdiction. The Society has a procedure for considering disputes under Rule 2.04 (24) that is intended to provide informal guidance to applicants.

The circumstances referred to in Rule 2.04(20)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account.

(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, the new law firm must notify its client "of the relevant circumstances and its intended action under Rule 2.04(17) to (25).

Although Rule 2.04(21) 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.

A former client who alleges that the transferring lawyer has such confidential information may apply under Rule 2.04(24) 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 geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

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.

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 Rule 2.04(20)(b).

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 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.

5. 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.

6. Unless to do otherwise is unfair, insignificant or impracticable, the screened lawyer should not participate in the fees generated by the current client matter.

7. The screened lawyer's office or work station should be located away from the offices or work stations of those working on the matter.

8. The screened lawyer should use associates and support staff different from those working on the current client matter.

Code of Professional Conduct for British Columbia ("the BC Code")

(definitions only for both non-conflicts and conflicts portions)

Redlined Version

February 21, 2012

DEFINITIONS

In this Code, unless the context indicates otherwise,

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-discipline practice providing services that support or supplement the practice of law;

"client" ~~includes~~means a ~~client of~~person who:

(a) consults a ~~lawyer's firm, whether or not~~lawyer and on whose behalf the lawyer ~~handles~~renders or agrees to render legal services; or

(b) having consulted the ~~client's work, and may include a person who~~lawyer, reasonably ~~believes~~concludes that ~~a lawyer-client relationship exists, whether or not that is~~ the ~~case at law;~~lawyer has agreed to render legal services on his or her behalf.

Commentary

A lawyer-client relationship ~~is often~~may be established without formality. ~~For example,~~

When an ~~express retainer~~individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or ~~remuneration~~other legal entity that the individual is representing;

For greater clarity, a client does not ~~required for~~include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship ~~to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually~~would be established~~, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a lawyer-client relationship~~.

"**conflict of interest"** ~~or "conflicting interest"~~ means ~~an interest likely to affect adversely~~ the existence of a substantial risk that a lawyer's ~~judgment on behalf of, or~~ loyalty to~~,~~ or

representation of a client ~~or prospective~~would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client~~;~~, a former client, or a third person.

"consent" means fully informed and voluntary consent after disclosure

~~(a)~~ (a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

~~(b)~~ (b) orally, provided that each person consenting receives a separate ~~letter~~written communication recording the consent as soon as practicable;

"disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary in this Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed;

"interprovincial law firm" means a law firm that carries on the practice of law in more than one province or territory of Canada;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

~~(c) in an arrangement for sharing space;~~

~~(d) as a law corporation,~~

~~(e)~~ (c) as a clinic under the [provincial or territorial Act governing legal aid];

(d) in a government, a Crown corporation or any other public body; or

(~~f~~e) in a corporation or other ~~body~~organization;

~~(g) in a Multi-Disciplinary Practice (MDP).~~

"lawyer" means a member of the Society, and includes an articled student enrolled in the Law Society Admission Program;

"Society" means the Law Society of British Columbia;

"tribunal" includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures;

Table of Concordance Between BC Code and *Professional Conduct Handbook* for Conflicts Matters (February 2012)

BC Code Rule	***Professional Conduct Handbook* Rule**
Definitions	No similar definitions
2.04(1)	Chapter 6, Rules 1 to 3
2.04(2)	Chapter 6, Rules 1 to 3, 6.3 & 6.4
2.04(3)	Chapter 6, Rules 1 to 3
2.04(4)	No similar rule
2.04(5)	Chapter 6, Rule 7
2.04(6)	No similar rule
2.04(7) to 2.04(12)	Chapter 6, Rules 4, 5 & 6
2.04(13) to 2.04(16)	Chapter 6, Rules 7.01 to 7.04
2.04(17) to 2.04(25) & Appendix D	Chapter 6, Rules 7.1 to 7.9 and Appendix 5
2.04(26)	Chapter 7, Rules 1 & 2
2.04(27)	No similar rule
2.04(28)	No similar rule
2.04(29)	No similar rule
2.04(30)	Chapter 7, Rule 3
2.04(31)	Chapter 7, Rules 2 to 5
2.04(32)	Chapter 7, Rules 2 & 5
2.04(33)	Chapter 7, Rule 4
2.04(34)	No similar rule
2.04(35)	No similar rule
2.04(36)	No similar rule

2.04(37)	No similar rule
2.04(38)	No similar rule
2.04(39)	Chapter 7, Rule 2
2.04(40)	Chapter 7, Rule 2
2.04(41)	No similar rule
2.04(42)	Chapter 8, Rule 19
2.04(43)	Chapter 8, Footnote 3
2.04(44)	Chapter 6, Rule 6.1
2.04(45)	Chapter 6, Rule 6.2
Appendix C	Appendix 3
Appendix D	Appendix 5

Table of Concordance Between *Professional Conduct Handbook* and BC Code for Conflicts Matters (February 2012)

***Professional Conduct Handbook* Rule**	**BC Code Rule**
Chapter 6, Rule 1 to 3	2.04(1) to 2.04(3)
Chapter 6, Rules 4, 5 & 6	2.04(7) to 2.04(12)
Chapter 6, Rule 6.3	def. of conflict of interest, 2.04(2), 2.04(3)
Chapter 6, Rule 6.4	2.04(2)
Chapter 6, Rule 7	2.04(5)
Chapter 6, Rules 7.01 to 7.04	2.04(13) to 2.04(16)
Chapter 6, Rules 7.1 to 7.9 & Appendix 5	2.04(17) to 2.04(25) & Appendix D
Chapter 7, Rules 1 & 2	2.04(26), 2.04(27)

Chapter 7, Rules 2 to 5	2.04(31), 2.04(32)
Chapter 7, Rule 3	2.04(30)
Chapter 8, Rule 19	2.04(42)
Appendix 3	Appendix C
Appendix 5	Appendix D

Table of Concordance Between BC Code and Federation Model Code for Conflicts Matters (February 2012)

BC Code Rule	Model Code Rule
Definitions	Definitions
2.04(1)	2.04(1)
2.04(2)	2.042(2)
2.04(3)	2.04(3)
2.04(4)	2.04(4)
2.04(5)	2.04(10)
2.04(6)	2.04(11)
2.04(7) to 2.04(12)	2.04(5) to 2.04(9)
2.04(13) to 2.04(16)	no comparable rules
2.04(17) to 2.04(25) & Appendix D	2.04(17) to 2.04(26)
2.04(26)	no comparable rule
2.04(27)	Commentary to Subrule 28
2.04(28)	2.04(27)
2.04(29)	2.04(27)
2.04(30)	2.04(28)
2.04(31)	2.04(29)
2.04(32)	2.04(30)
2.04(33)	2.04(31)
2.04(34)	2.04(32)
2.04(35)	2.0433()
2.04(36)	2.04(34)

2.04(37)	2.04(35)
2.04(38)	2.04(36)
2.04(39)	2.04(37)
2.04(40)	2.04(38)
2.04(41)	2.04(39)
2.04(42)	2.04(40)
2.04(41)	2.04(39)
2.04(42)	2.04(40)
2.04(43)	2.04(41)
2.04(44)	no comparable rule
2.04(45)	no comparable rule

The Law Society of British Columbia

Memo

To: The Benchers

From: Alan Treleaven

Date: February 17, 2012

Subject: Rural Education and Access to Lawyers Initiative Summer Student Initiative (REAL Initiative)

Background

The purpose of the REAL Initiative is to address the current and projected shortage of lawyers practising in rural areas and small communities throughout BC. The purpose of the Summer Student Funding Program is to provide

- law school students an early opportunity to experience the benefits of practicing in a small community, and
- lawyers in small communities with the financial resources to hire a summer student.

On October 21, 2011 the Benchers approved a request from the CBABC to co-fund the REAL initiative for 2012 and 2013 with an annual contribution of $75,000 each year, subject to the following conditions:

1. the Law Society will only provide funding for 2012 and 2013 to the conclusion of the original five-year program;
2. the Law Society reaches agreement with the CBABC about the criteria for inclusion of the communities entitled to benefit from the initiative;
3. the Law Society's contribution is recognized in communications and public relations about the program during the two years;
4. conclusion of a satisfactory co-funding agreement with the CBABC consistent with the terms of the original proposal and grant from the Law Foundation.

The draft Terms of Reference for the REAL Initiative are attached.

The CBABC's Kerry Simmons chairs the REAL Advisory Committee. Tom Fellhauer represents the Law Society on the Committee, and Alan Treleaven participates at the staff level.

Request of the Benchers

1. To approve the following draft criteria for inclusion of the communities entitled to benefit from the initiative (section 9 of the draft).

> The selection of applications will be made in consideration of the following criteria:
>
> a. the ratio of lawyers to population in the community,
> b. the average age of lawyers in the community,
> c. the overall service area of the lawyer,
> d. information provided by lawyers in the community regarding unmet demand for legal services,
> e. support of the lawyer and community for a summer student,
> f. past experience with the REAL Initiative, and
> g. other criteria as relevant.

2. To provide any other input on the draft Terms of Reference.

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British Columbia Branch

DRAFT TERMS OF REFERENCE
RURAL EDUCATION AND ACCESS TO LAWYERS INITIATIVE
SUMMER STUDENT FUNDING PROGRAM

PURPOSE

1. The purpose of the Rural Education and Access to Lawyers Initiative (REAL Initiative) is to address the current and projected shortage of lawyers practicing in rural areas and small communities throughout British Columbia.

2. The purpose of the REAL Initiative Summer Student Funding Program is to:
    a. Provide students an early opportunity to experience the benefits of practicing in a small community; and
    b. Provide lawyers in small communities with the financial resources to hire a summer student.

3. For the purposes of the REAL Initiative a small community is defined as a community having a population less than 100,000.

ELIGIBILITY

1. All lawyers in British Columbia who are members in good standing of the Law Society of British Columbia are eligible to apply for funding for the summer student program.

2. Students who have completed their second year of studies but who have not commenced their third year of studies in a Canadian Law School are eligible to apply for the summer student program funded positions.

3. Students who do not fit the criteria above may apply to the Regional Legal Careers Officer for special consideration.

4. Notwithstanding the above eligibility terms, the Regional Legal Careers Officer, in consultation with the chairperson of the Advisory Committee may vary the eligibility of applicants for funding and summer positions through the Summer Student Program.

NOTICE

5. Notice of the application for funding through the Summer Student Program will be advertised generally through the publications of the Law Society of BC and the Canadian Bar Association BC.

6. Notice of the application for funding through the Summer Student Program may also be made directly to lawyers who have participated in the REAL Initiative in the past and to lawyers in communities identified as in high need by the Regional Legal Careers Officer.

SELECTION

7. Selection of lawyers for the Summer Student Program will be at the discretion of the Regional Legal Careers Officer in consultation with the chairperson of the Advisory Committee.

THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

8. The Regional Legal Careers Officer will receive and review applications for funding and will submit a recommendation to the chairperson of the Advisory Committee for approval.

9. The selection of applications will be made in consideration of the following criteria:

    a. the ratio of lawyers to population in the community,
    b. the average age of lawyers in the community,
    c. the overall service area of the lawyer,
    d. information provided by lawyers in the community regarding unmet demand for legal services,
    e. support of the lawyer and community for a summer student,
    f. past experience with the REAL Initiative, and
    g. other criteria as relevant.

The Law Society of British Columbia

Memo

To: The Benchers
From: Independence and Self Governance Advisory Committee
Date: January 26, 2012
Subject: Request for a Name Change

The Independence and Self Governance Advisory Committee is one of the four advisory committees that monitors developments on issues of importance to the Law Society. The Independence and Self Governance Advisory Committee has monitored developments and issues affecting the independence and self governance of the legal profession and the justice system in British Columbia, and has reported on those developments to the Benchers on a semi-annual basis.

The Committee asks the Benchers to consider changing the name of the Committee in order to make clearer the connection between the rule of law and the public right of lawyer independence. To be effective, the rule of law requires independent lawyers.

Background

The Advisory Committee itself is the successor to the Independence and Self Governance Committee which was originally created in 2002 as a subcommittee of the Futures Committee. Its creation arose due to concerns that had been raised in part by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and its application to lawyers, as well as by stories that had surfaced from Australia about the imminent loss of self regulatory status of the legal profession in states such as Queensland. The subcommittee was formed in order to address issues about the importance of independence and self regulation of both the legal profession and the judiciary.

The subcommittee was "elevated" into committee status in 2005. Both the Futures Committee and the Executive Committee recommended that the creation of a Committee would be advisable in order to examine issues concerning independence and governance of the legal profession that, it was evident, were going to continue into the foreseeable future. It was particularly important for the Law Society to be able to be seen to be giving high priority to those issues.

The Committee has, from that time, continued to review matters relating to self regulation and lawyer independence around the world, with particular focus on developments in Australia and New Zealand, as well as those arising out of the *Clementi* report and the subsequent *Legal Services Act* 2007 in England and Wales. The Committee has also considered matters in connection with

Supreme Court of Canada appointments, matters relating to the future of legal services, questions relating to the prosecutorial and adjudicative functions of Benchers, alternative business structures, multi-disciplinary practice, the Agreement on Internal Trade, and other numerous matters relating to or affecting lawyer independence and self-governance.

"Independent Lawyers" and the "Rule of Law"

The Committee continues to monitor issues relating to independence and self-governance. It appears that law societies in Canada have succeeded to some degree in bringing to the fore the importance of lawyer independence and self-regulation. For this, the Law Society of British Columbia can likely take some credit. The Committee would like to think that it has had some part of that success. However, more and more, the Committee has noticed the connection that has been made between the independent regulation of lawyers as a cornerstone of the Rule of Law.

Other jurisdictions have, in fact, created a separate "Rule of Law" Committee. In particular, the New Zealand Law Society established a Rule of Law Committee in 2007, which has the following specific terms of reference:

- promoting the continued separation of the legislative, executive, and judicial functions of government and, in particular, to promote and protect judicial independence;
- monitoring and responding to Rule of Law issues arising from proposals, decisions, or actions that the New Zealand government or government agencies;
- monitoring the mechanisms of government, including constitutional conventions;
- maintaining a neutral, apolitical position;
- responding as appropriate to requests for advice and assistance from international legal associations on Rule of Law issues; and
- assisting the Law Commission and like bodies in their goals to achieve laws that are just, principled, and accessible.

Most, if not all, of the terms of reference from the New Zealand Committee would resonate in British Columbia as well. In New Zealand, the *Lawyers and Conveyancers Act* (2006) places a statutory obligation on the New Zealand Law Society to uphold the Rule of Law. While the *Legal Profession Act* in British Columbia is not specific about a requirement that the Law Society protect the Rule of Law, the *Legal Profession Act* does require the Law Society to preserve and protect the rights and freedoms of all persons, and to ensure the independence, integrity, and honour of its members. These are undoubtedly aspects of preserving the Rule of Law. Moreover, the preamble of the Canadian *Charter of Rights and Freedoms* recognizes that Canada is founded upon principles that recognize the Rule of Law. While the New Zealand terms of reference for its Rule of Law Committee may be broader than what is required in British Columbia, it is not unreasonable to presume that the body regulating lawyers in British Columbia would work to ensure that the Rule of Law was upheld.

Connecting With the Public

Moreover, the connection of lawyer independence (a term that is often misunderstood by the public as a right of lawyers rather than a public right) to the protection of the Rule of Law (a principle that no one would argue against) might make it clear about what end purpose the independence of lawyers was serving. There are no shortages, worldwide, of abuses of the Rule of Law. While many of those incursions arise in the less democratic nations of the world, Professor Sir Jeffrey Jowell, QC (the Director of the Bingham Centre for the Rule of Law in London) has recently reminded us that "it is unrealistic to believe that violations of the Rule of Law are the preserve of "far away" countries."

Monitoring and advising on the effects of actions near to home and how they affect the Rule of Law might be more clearly serving a public interest than would, on its face, examining how lawyer independence may be affected by those matters. Each serve the same end. However, one is more easily connected to, and understood by, the public than the other.

Recommendation

With this in mind, the Committee debated whether it would be advisable to change the name of the Committee to include a reference the Rule of Law, and concluded that it should request the Benchers for a change of name.

The Committee debated several different names. It opted against recommending a change of name to simply the "Rule of Law Committee" because it believes that there needs to be a continued focus on the independence of lawyers and how that public right connects to the Rule of Law.

Ultimately the Committee settled on the "Rule of Law and Lawyer Independence Advisory Committee." That name permits the focus to be on both elements, and should assist the Law Society to more clearly establish the connection between the rule of law and the public right of lawyer independence. It drops the phrase "self-governance" from the current title, but the Committee believes that the focus on self-governance will persist, because self-governance is the most effective (some would say only) way to ensure that lawyers are independent of the State.

As a consequence of the change of name, the mandate of the Committee should be altered slightly. The mandate should reflect the imperative of the Committee monitor issues affecting the development and promotion of the rule of law and in particular those issues affecting the independence and self-governance of the legal profession and justice system in British Columbia. A proposed revised mandate is attached, which is informed by the original mandate of the Committee from 2005, but revised to focus on the advisory and monitoring functions of the Committee, having regard to both the rule of law and the independence of lawyers.

MDL/al
2012-01-26 Memo Request for a Name Change (Independence)

PROPOSED (REVISED) MANDATE

- to advise the Benchers on matters relating to the rule of law and lawyer independence so that the Law Society can ensure
    - its processes and activities preserve and promote the preservation of the rule of law and the independence and effective self-governance of lawyers;
    - the legal profession and the public are properly informed about the meaning and importance of the rule of law and how a self-governing profession of independent lawyers supports and is a necessary component of the rule of law
- to monitor issues (including current or proposed legislation) that affect or might affect the independence of lawyers and the rule of law, and to develop means by which the Law Society can effectively respond to those issues;

Memo

The Law Society of British Columbia

17000

To Benchers

From Alan Treleaven

Date March 2, 2012

Subject **For information: Université de Montréal Common Law J.D.**

The Federation of Law Societies' Council has approved, with the support of Gavin Hume, QC on behalf of the Law Society of British Columbia, the following resolution (edited excerpt).

> WHEREAS the Federation has received an application for approval of a common law J.D. program at the Université de Montréal:
>
> WHEREAS in fulfillment of its mandate, the Ad Hoc Committee on the Approval of Canadian Law Degree Programs has considered the application and makes the following recommendations to the Council of the Federation as set out in the Committee report:
>
> (a) That the Federation accept the application by Université de Montréal for approval of a new academic program leading to the conferral of a J.D. in North American Law, which would entitle its holders to apply for admission to Canadian law societies, such approval being granted on the following conditions:
>
> > (i) full implementation to the satisfaction of the Committee … of the undertakings and representations made by the applicant in its submissions to the Committee … ; and
> >
> > (ii) ongoing compliance with such measures as may be established by the Federation pursuant to the implementation of the Final Report of the Task Force on the Canadian Common Law Degree for the purpose of ensuring that the Université de Montréal Common Law Degree Program continues to meet the National Requirements.

BACKGROUND

The former Federation Task Force on the Canadian Common Law Degree, chaired by John Hunter, QC, made recommendations for the standards according to which Canadian common law degrees would be approved for purposes of entry into Canadian bar admission programs. Those standards were approved by all law societies.

The Federation then established the Common Law Degree Implementation Committee, which developed proposals to implement the Task Force's recommendations. Those proposals were approved by all law societies.

In 2010, the Université de Montréal established a one year program of study at the Faculty of Law leading to a J.D. specializing in North American law. The program accommodates approximately 50 students annually. The J.D. follows the existing Université de Montréal civil law LL.B. program. Applicants who

have not taken a Université de Montréal civil law LL.B. must demonstrate that they have competence in all required areas of a Université de Montréal civil law LL.B. before being accepted into the J.D. program. The Université de Montréal does not accept non-Canadian civil law graduates into this program.

The Federation received the proposal from the Université de Montréal requesting approval of its new common law degree program before the Federation's Canadian Common Law Program Approval Committee was established and populated, and therefore the proposal was assessed by the Ad Hoc Committee on the Approval of New Canadian Law Degree Programs, as was the case for the law degrees offered by Thompson Rivers University and Lakehead University.

The Ad Hoc Committee has once again applied the new national standards in formulating its recommendations. The Ad Hoc Committee's report recommends that law societies recognize the new Université de Montréal J.D. for purposes of entry into bar admission programs in the nine common law provinces and the three territories. (The Ad Hoc Committee's 119 page report is available to the Benchers on request.)

Law Society of BC rule 2-27 (4) (a) states that an applicant for admission must provide proof of

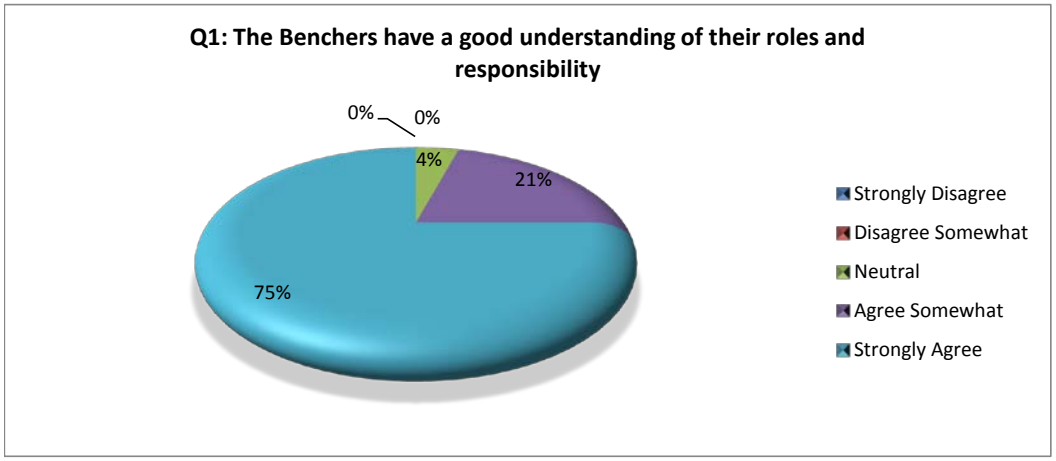
> … successful completion of the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian university … .

Pursuant to rule 2-27 (4) (a), holders of the new Université de Montréal J.D. will now be eligible to apply to the Law Society Admission Program, as are graduates of the University of British Columbia, the University of Victoria, Thompson Rivers University, and 14 other Canadian universities, together with holders of a Certificate of Qualification issued by the National Committee on Accreditation.

2011 Bencher Survey Results

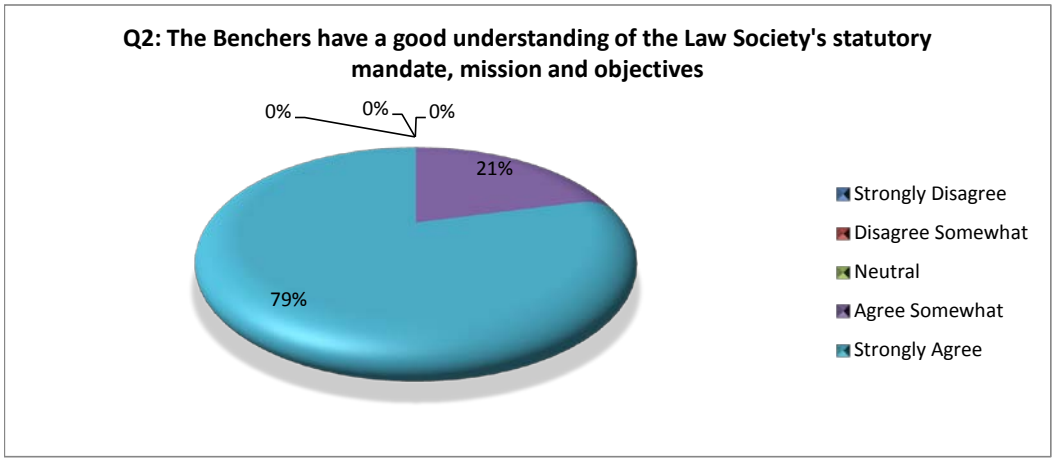
31 Benchers, 24 respondents

Q1: The Benchers have a good understanding of their roles and responsibility



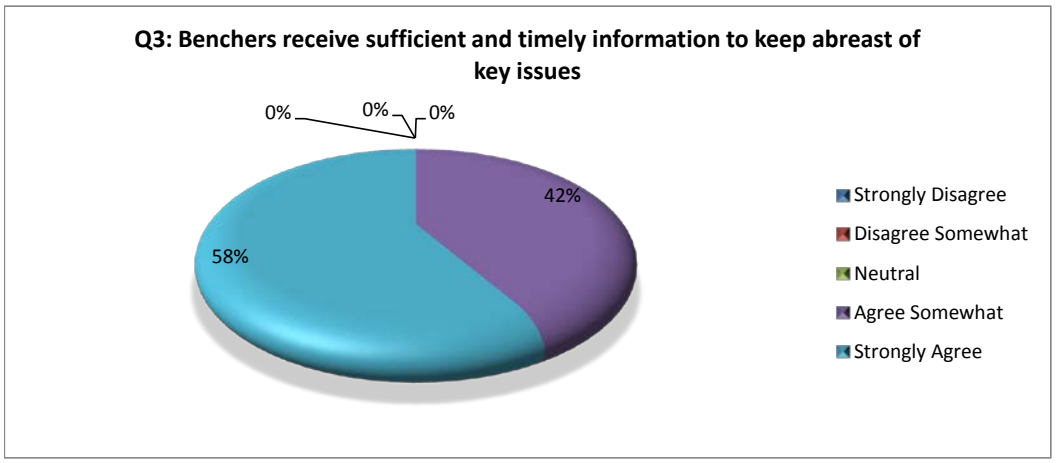
1	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	1
	Agree Somewhat	5
	Strongly Agree	18

Q2: The Benchers have a good understanding of the Law Society's statutory mandate, mission and objectives



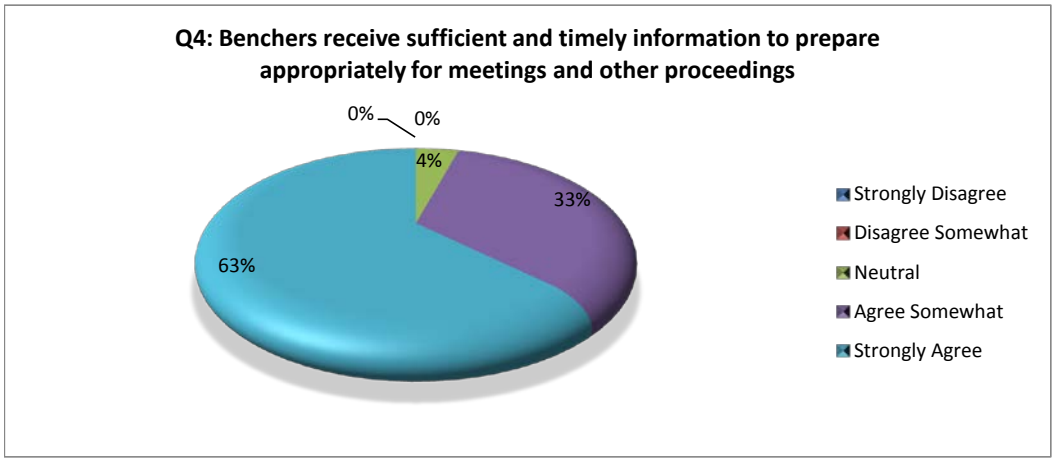
2	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	0
	Agree Somewhat	5
	Strongly Agree	19

Q3: Benchers receive sufficient and timely information to keep abreast of key issues



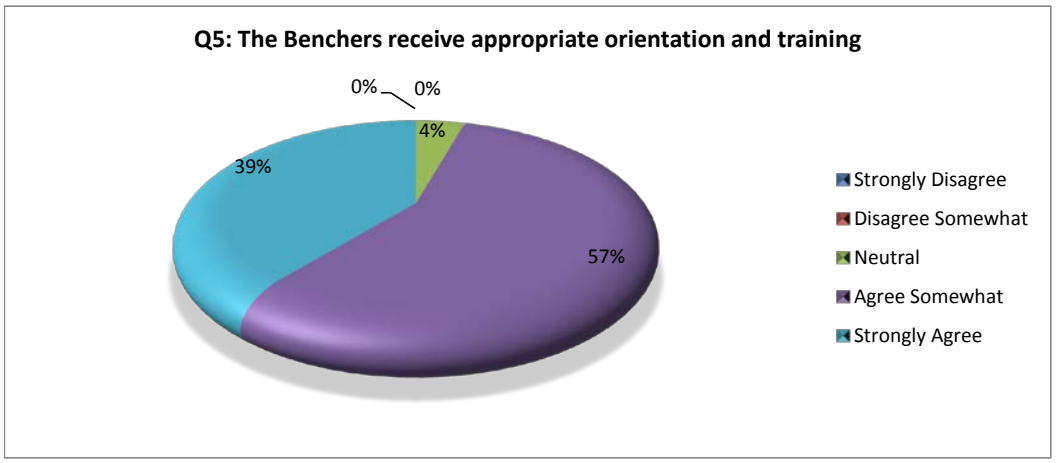
3	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	0
	Agree Somewhat	10
	Strongly Agree	14

Q4: Benchers receive sufficient and timely information to prepare appropriately for meetings and other proceedings



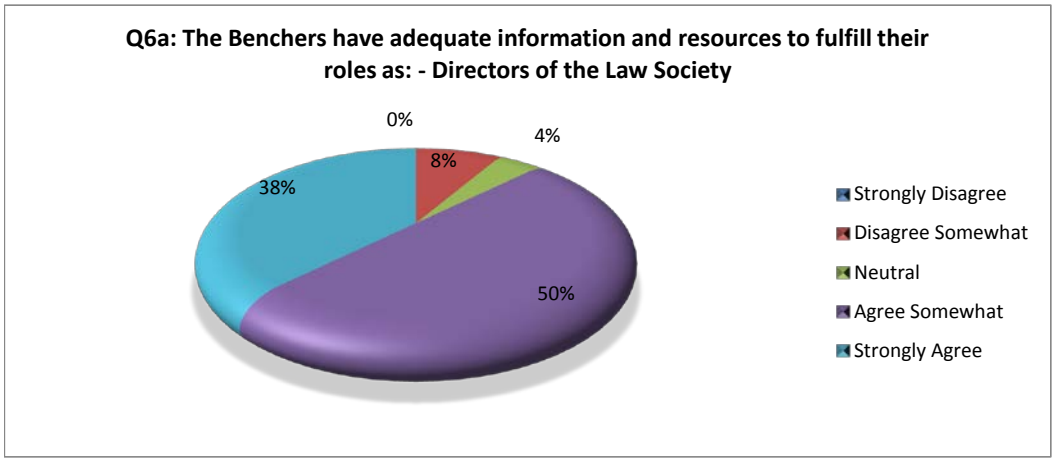
4	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	1
	Agree Somewhat	8
	Strongly Agree	15

Q5: The Benchers receive appropriate orientation and training



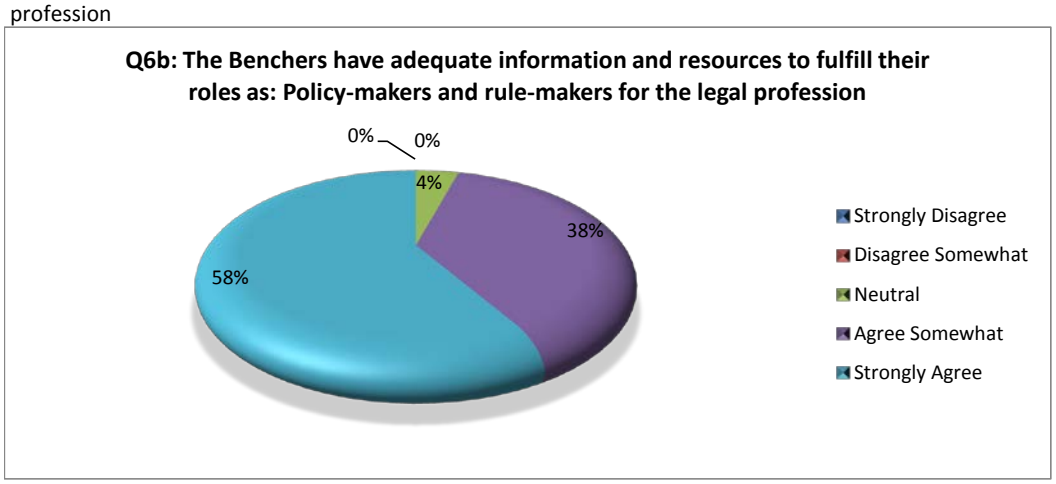
5	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	1
	Agree Somewhat	13
	Strongly Agree	9

Q6a: The Benchers have adequate information and resources to fulfill their roles as: - Directors of the Law Society



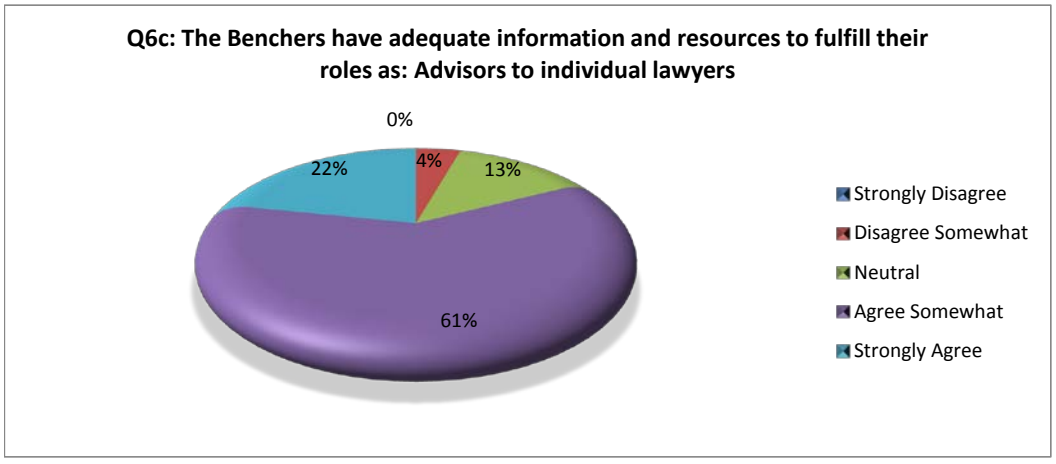
6a	Strongly Disagree	0
	Disagree Somewhat	2
	Neither Agree or Disagree	1
	Agree Somewhat	12
	Strongly Agree	9

Q6b: The Benchers have adequate information and resources to fulfill their roles as: Policy-makers and rule-makers for the legal profession



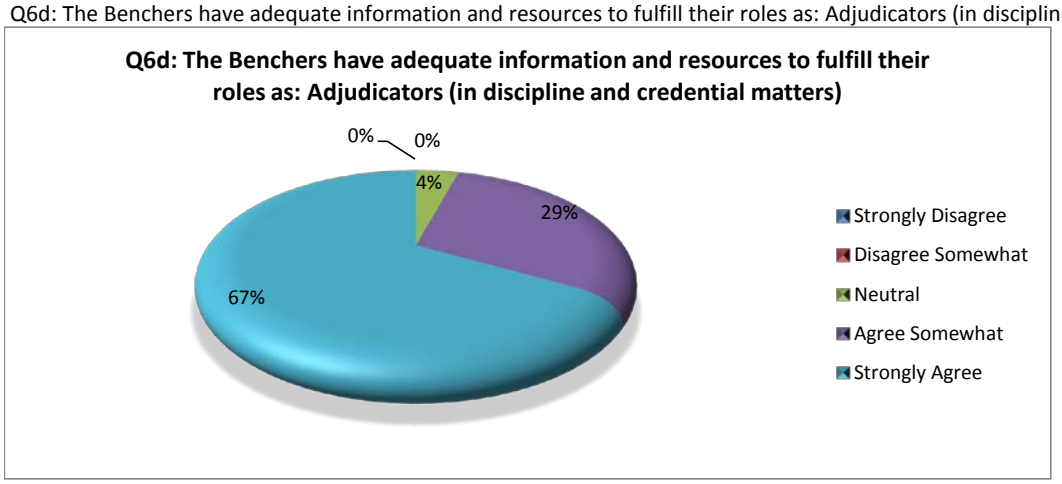
6b	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	1
	Agree Somewhat	9
	Strongly Agree	14

Q6c: The Benchers have adequate information and resources to fulfill their roles as: Advisors to individual lawyers



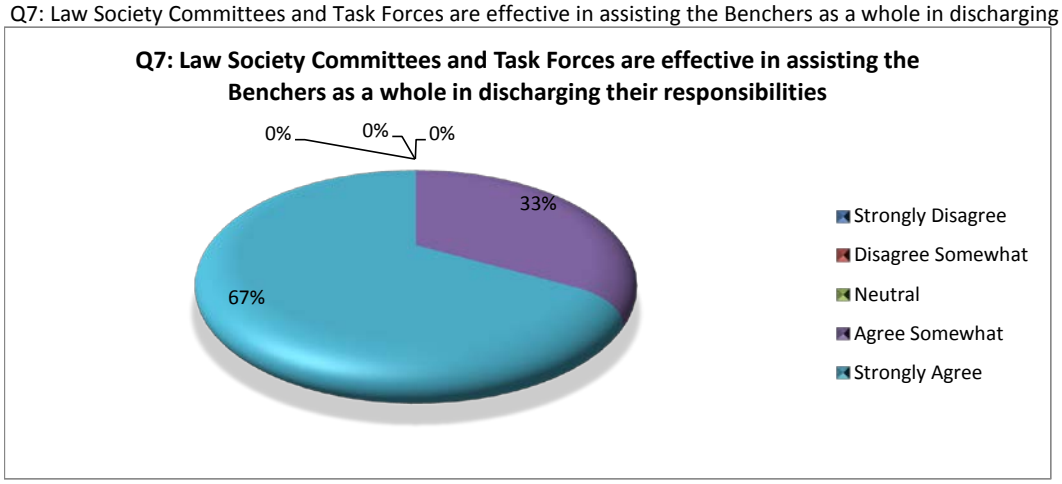
6c	Strongly Disagree	0
	Disagree Somewhat	1
	Neither Agree or Disagree	3
	Agree Somewhat	14
	Strongly Agree	5

Q6d: The Benchers have adequate information and resources to fulfill their roles as: Adjudicators (in discipline and credential matters)



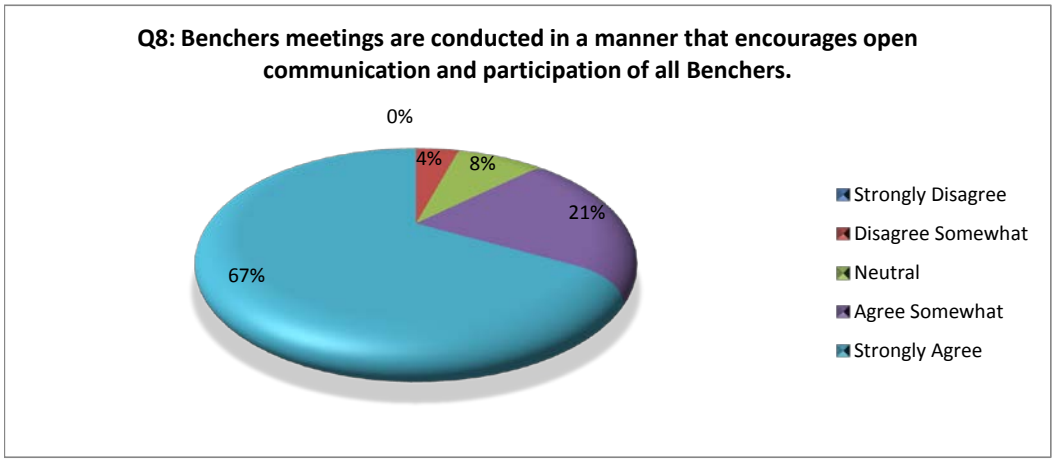
6d	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	1
	Agree Somewhat	7
	Strongly Agree	16

Q7: Law Society Committees and Task Forces are effective in assisting the Benchers as a whole in discharging their responsibilities



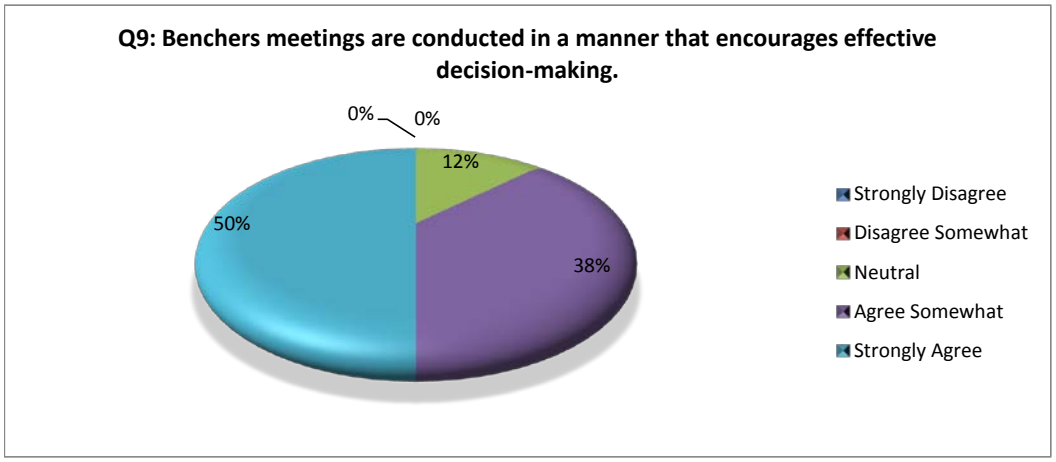
7	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	0
	Agree Somewhat	8
	Strongly Agree	16

Q8: Benchers meetings are conducted in a manner that encourages open communication and participation of all Benchers.



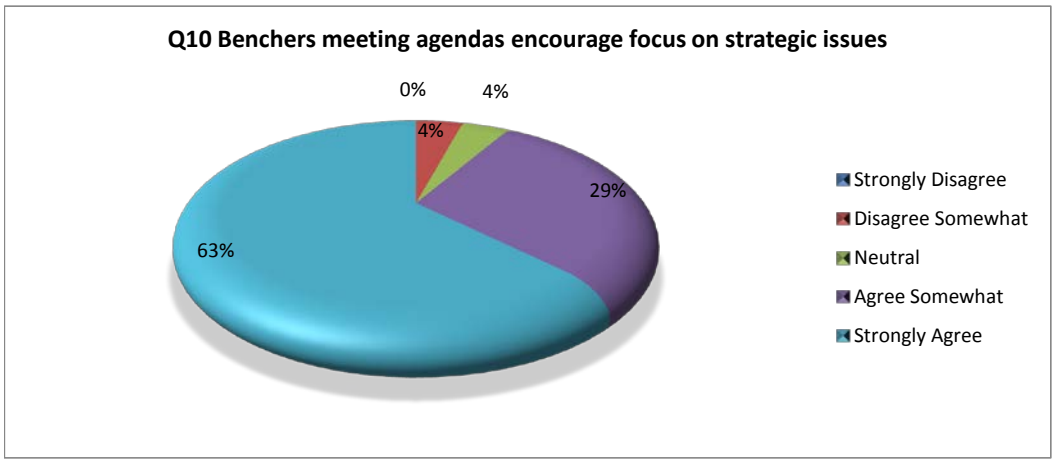
8	Strongly Disagree	0
	Disagree Somewhat	1
	Neither Agree or Disagree	2
	Agree Somewhat	5
	Strongly Agree	16

Q9: Benchers meetings are conducted in a manner that encourages effective decision-making.



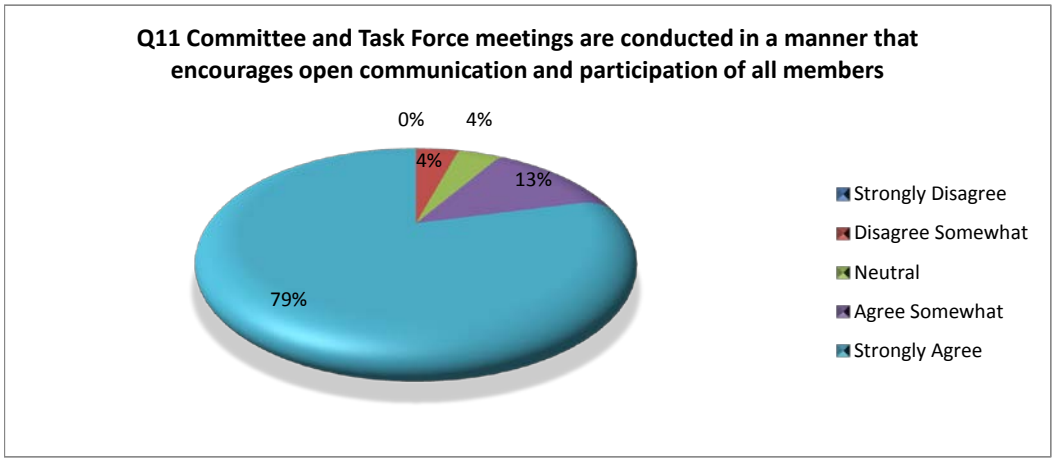
9	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	3
	Agree Somewhat	9
	Strongly Agree	12

Q10 Benchers meeting agendas encourage focus on strategic issues



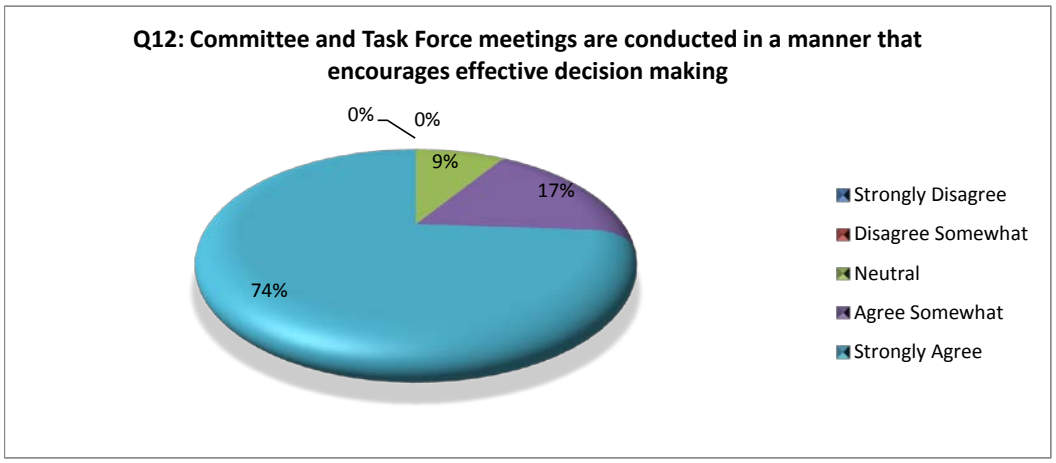
10	Strongly Disagree	0
	Disagree Somewhat	1
	Neither Agree or Disagree	1
	Agree Somewhat	7
	Strongly Agree	15

Q11 Committee and Task Force meetings are conducted in a manner that encourages open communication and participation of all members



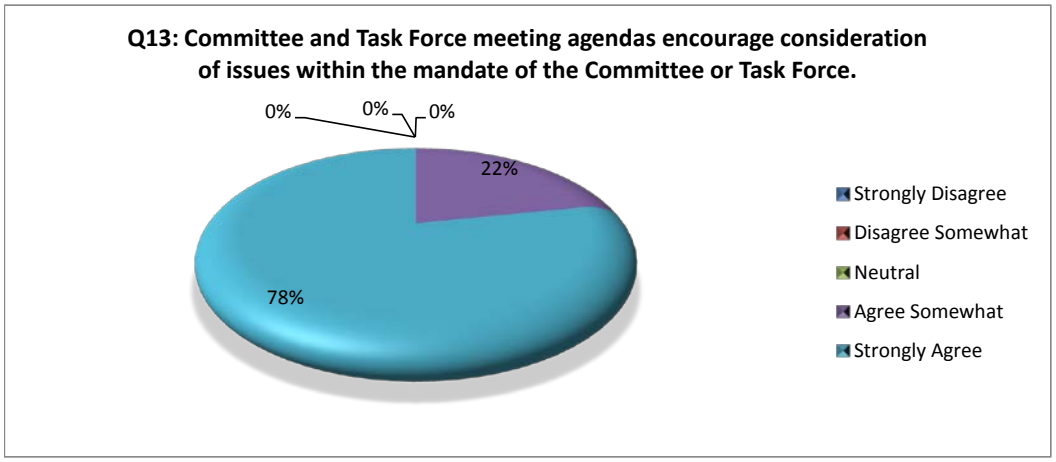
11	Strongly Disagree	0
	Disagree Somewhat	1
	Neither Agree or Disagree	1
	Agree Somewhat	3
	Strongly Agree	19

Q12: Committee and Task Force meetings are conducted in a manner that encourages effective decision making



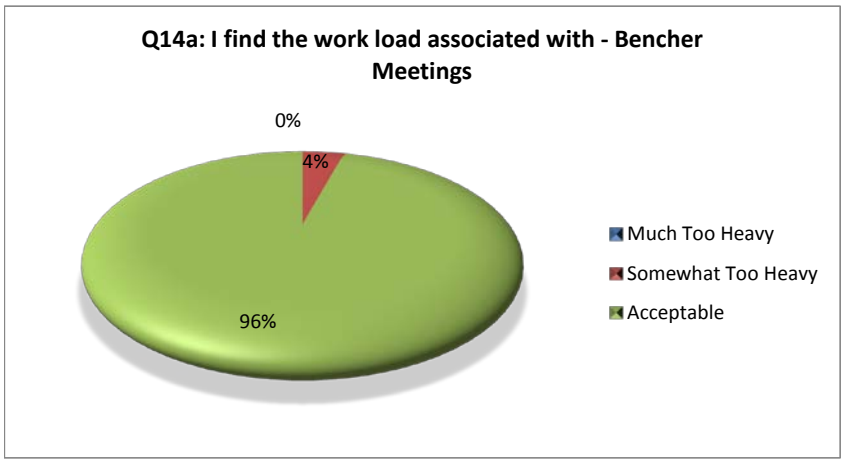
12	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	2
	Agree Somewhat	4
	Strongly Agree	17

Q13: Committee and Task Force meeting agendas encourage consideration of issues within the mandate of the Committee or Task Force.



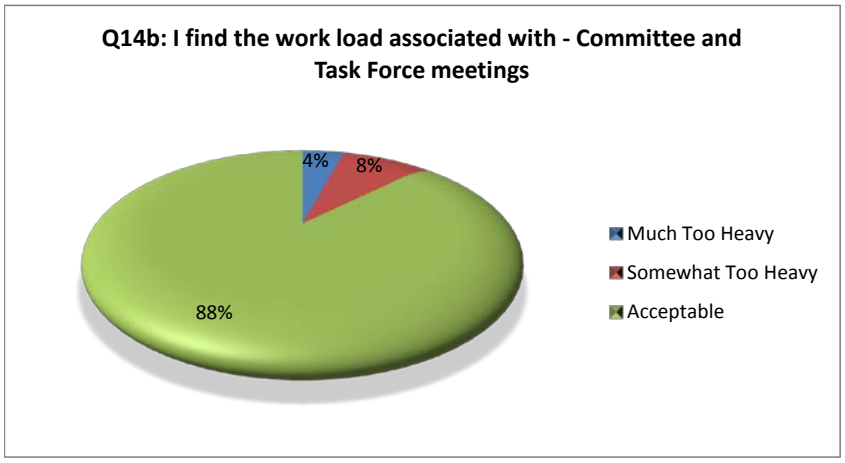
13	Strongly Disagree	0
	Disagree Somewhat	0
	Neither Agree or Disagree	0
	Agree Somewhat	5
	Strongly Agree	18

Q14a: I find the work load associated with - Bencher Meetings



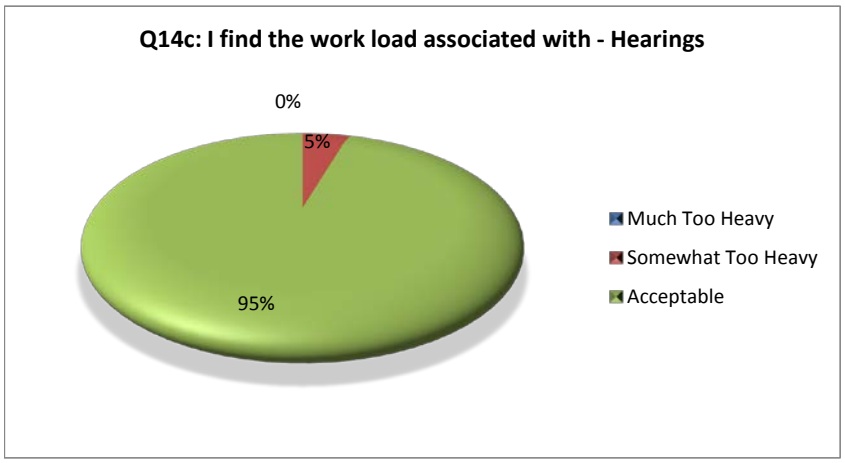
14a	Much Too Heavy	0
	Somewhat Too Heavy	1
	Acceptable	23

Q14b: I find the work load associated with - Committee and Task Force meetings



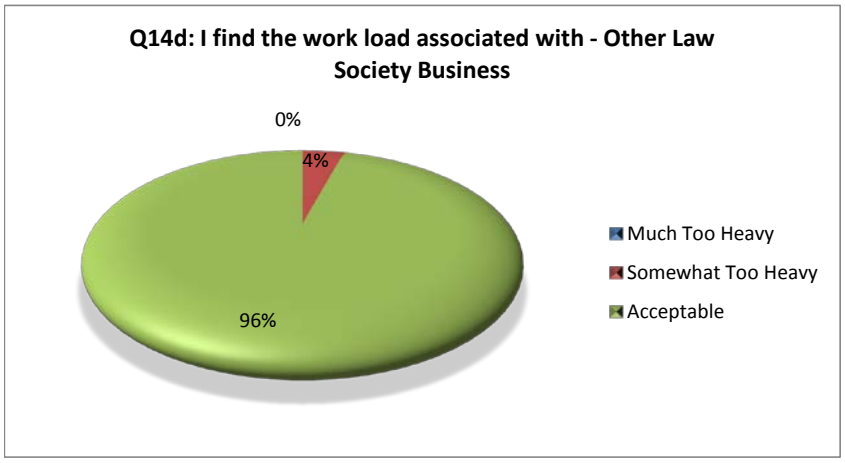
14b	Much Too Heavy	1
	Somewhat Too Heavy	2
	Acceptable	21

Q14c: I find the work load associated with - Hearings



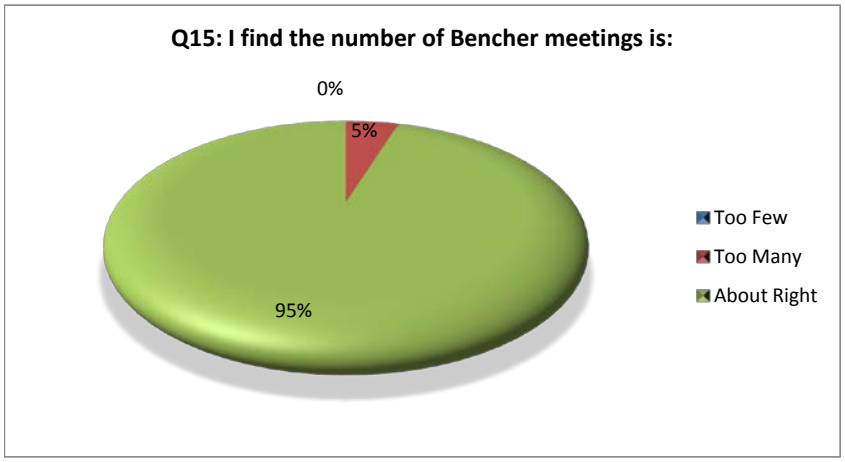
14c	Much Too Heavy	0
	Somewhat Too Heavy	1
	Acceptable	21

Q14d: I find the work load associated with - Other Law Society Business



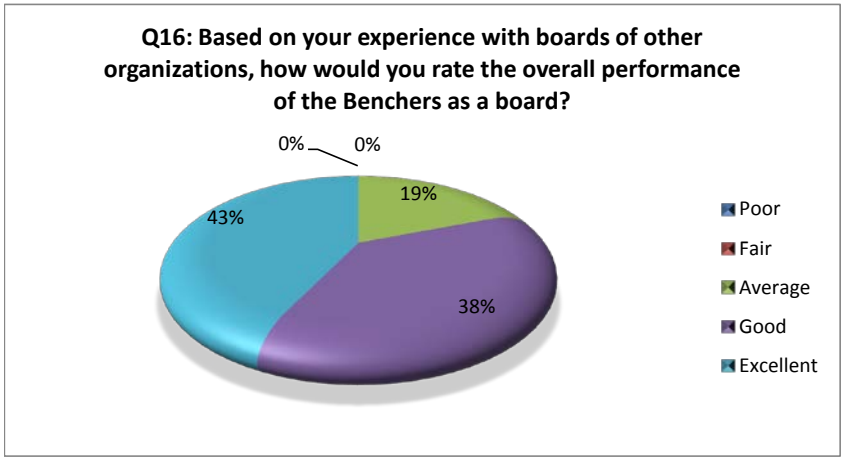
14d	Much Too Heavy	0
	Somewhat Too Heavy	1
	Acceptable	23

Q15: I find the number of Bencher meetings is:



15	Too Few	0
	Too Many	1
	About Right	20

Q16: Based on your experience with boards of other organizations, how would you rate the overall performance of the Benchers as a board?



16	Poor	0
	Fair	0
	Average	4
	Good	8
	Excellent	9

The Law Society of British Columbia

Memo

To: Benchers
From: Jackie Drozdowski, Information and Privacy Officer
Date: February 21, 2012
Subject: Bencher Advice and Records

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1. Background

Lawyers sometimes seek confidential advice on ethical or practice issues from Benchers. Benchers giving practical or ethical advice in their capacity as Benchers have the discretion to keep any information received, other than reports of the misappropriation of funds, confidential.

There have been some situations in the course of complaint investigations where the lawyer complained about informs the Law Society that they sought and followed the advice of a Bencher. With the consent of the lawyer, Law Society staff will request copies of the Bencher's notes. A problem may arise where the notes no longer exist, are incomplete or none were taken.

Some of the records created by Benchers while executing their official duties also fall within the scope of the *Freedom of Information and Protection of Privacy Act* (the "FIPPA"). The FIPPA imposes a duty on the Law Society, its Benchers and staff, to protect the privacy interests of individuals by protecting any personal information contained in these records.

2. Recommendation

It is recommended that Benchers providing advice in their capacity as Benchers take careful notes of the facts they are told by lawyers seeking ethical or practice advice and take careful notes of the advice given in case verification of the advice is later required by the Law Society. It is also suggested that Benchers confirm with the lawyer in writing the facts that they are given and the advice that they give. Please retain any records clearly marked as "Confidential."