The Law Society
of British Columbia

Report of the Conduct Review Task Force

Purpose of Report:	**Recommendations for Rule Changes to Implement Policy Proposals**
Prepared by:	**Conduct Review Task Force** **March, 2005**

Report of the Conduct Review Task Force

Introduction

The Conduct Review Task Force was created by the Benchers in October 2003 to review the conduct review process, including its procedural fairness, and to make any recommendations it considers necessary for improving the process.

Peter Keighley, Q.C. chaired the Task Force until his appointment as Master of the Supreme Court in March, 2004. Ian Donaldson assumed the role of Chair at that point. The other members appointed to the Task Force are William Everett, Q.C., Michael Falkins, Russell Tretiak, Q.C., Jane Shackell, Q.C., and Ian Sissett. Robert McDiarmid, Q.C. was added in January 2005. The former Executive Director of the Law Society, James Matkin, Q.C. also attended the meetings of the Task Force until November, 2004. The Task Force was assisted by staff members Tim Holmes, Michael Lucas and Kathy Copak.

The Task Force first met in January 2004, and has met several times over the subsequent months. The Task Force has examined the history of the conduct review process at the Law Society, and has considered past efforts to review the process. It has also considered somewhat similar processes at other law societies.

The Task Force also announced to the profession that it was undertaking the task of reviewing the conduct review process, and to that end invited any persons interested to submit any comments they may have to the Task Force. A number of responses were received, which the Task Force considered and found to be helpful.

Statutory Authority to Make Rules Concerning Conduct Reviews

The authority of the Benchers to make rules requiring a lawyer to attend before a Conduct Review Subcommittee is found in section 36(e) of the *Legal Profession Act* (the *"Act"*), which states:

> **36** The benchers may make rules to do any of the following:
>
> …..
>
> (e) require a lawyer or articled student to appear before the benchers, a committee or other body to discuss the conduct or competence of the lawyer or articled student.

Issues Addressed by the Task Force

1. What is a Conduct Review?

One core function of the Law Society is to regulate the conduct of its members. In order to do so, the Law Society investigates complaints made about the conduct of its members. The Law Society's Discipline Committee must consider any complaint about a member's conduct referred to it by another Committee or by staff charged with conducting an investigation. Rule 4-4 of the Law Society Rules provides that, after considering a complaint, the Discipline Committee must:

> (a) decide that no further action be taken on the complaint,
>
> (b) require the lawyer to appear before the Conduct Review Subcommittee, or
>
> (c) recommend that a citation be issued against the lawyer.

The Discipline Committee may also refer any matter or any lawyer to the Practice Standards Committee.

The Conduct Review was created in the 1970s as a means of compelling a lawyer to appear before a subcommittee of Benchers to discuss discipline or ethical matters in an informal manner with a view to giving the member advice or guidance. The intention of the Conduct Review was viewed as educational rather than punitive.

Charles Locke, Q.C., when he was Treasurer of the Law Society, described the problems that a conduct review was meant to address as:

> (1) how could the Law Society deal with what could be described as grave indiscretions not calling for citation but which bode ill for the future unless the member concerned is made to understand what he has done; and
>
> (2) how to help the lawyer with a past record of offences correct his ways so that it would not happen again.[1]

The functions of the Conduct Review Subcommittee were once described in the Benchers' Disciplinary Manual as follows:

> The main purpose of the Conduct Review Subcommittee is to provide a means whereby disciplinary or ethical matters may be discussed between a member and two or more Benchers in an informal manner with a view to giving advice and guidance to the member as to his future professional conduct. The emphasis is educational rather than punitive. While Rule 11 refers to a formal caution, when such caution is deemed necessary, it will be given for the purpose of impressing upon the member that repetition of the objectionable conduct will likely result in serious consequences, rather than rebuking him for past actions.

[1] Advocate, Volume 30, Part 1, December-January 1972

In the current Rules[2], Conduct Review subcommittees are appointed by the Chair of the Discipline Committee to consider the conduct of a lawyer which the Committee has resolved to refer to the subcommittee. The Subcommittee must include at least one lawyer, may include one more lay Benchers, and must be chaired by a Bencher or Life Bencher.

The member whose conduct is being reviewed must appear personally, and may be represented by counsel. The complainant, however, is only permitted to attend or speak at all or any part of the review in the discretion of the Subcommittee.

The conduct review itself is referred to in Rule 4-8(1) as an "informal proceeding."

However, the Subcommittee is required to prepare a written report of its findings of fact, conclusions and any recommendations. A process has been developed in Rule 4-9 permitting the lawyer subject to the review to dispute the contents of the report, which the Subcommittee must consider, and either amend its report as it considers appropriate, or forward its report to the Discipline Committee without amendment. After the report is considered by the Discipline Committee, the Committee must do one of three things:

(a) decide to take no further action on the complaint;

(b) refer the lawyer to the Practice Standards Committee; or

(c) recommend that a citation be issued against the lawyer.

2. <u>The Conduct Review and the Public Interest</u>

The Task Force considers the Conduct Review to be an important part of the Law Society's ability to protect the public interest. There are times where the conduct of a lawyer, while contrary to the Rules or the *Handbook*, will not be serious enough to warrant the full disciplinary machinery entailed by the citation process. If there were no other disciplinary procedure available, the public interest would be adversely affected because the error of the lawyer's conduct would never be adequately explained to the lawyer, nor would there necessarily be any "record" of the lawyer's conduct.

By instituting the Conduct Review, the Law Society has ensured that the public interest is served by:

- ensuring that the lawyer understands why what he or she has done has resulted in a meeting with two Benchers; and

- ensuring that corrective measures are discussed in order to avoid having a repeat of the impugned conduct.

[2] See generally Rules 4-7 to 4-12

The public interest is further served due to the fact that an entry is created on the lawyer's professional conduct record so that, if the lawyer has not learned from the Conduct Review and repeats the error, the report of the Conduct Review Subcommittee may become relevant at the penalty stage in a future hearing of a citation. The report may, of course, also have a bearing on what, if any, disciplinary process the lawyer should be subjected to should the lawyer's future conduct ever be the subject of a further referral to the Discipline Committee. If the lawyer were ever required to attend a future meeting with a Conduct Review Subcommittee, that Subcommittee could, of course, have reference to the report of an earlier Subcommittee.

There have been suggestions that the Conduct Review process should be a more open proceeding, and that, for example, the complainant should be permitted to attend the entire meeting between the lawyer and the Subcommittee. The Task Force, however, rejects that model for this particular form of discipline.

Conduct Reviews are generally held where the conduct in question is an indiscretion that may "bode ill" for the future unless the member concerned is made to understand what he has done or where, in the opinion of the Discipline Committee, a conclusion is reached that it is not in the public interest to authorize the issuance of a citation, but some disciplinary sanction is still warranted.

Professional misconduct that warrants a full hearing must, in the opinion of the Task Force, be the subject of a high level of natural justice, and the public interest requires an open process, permitting not only the complainant, but the public in general, to attend the proceedings (subject only to where evidence may disclose material subject to solicitor-client privilege). Conduct Reviews are a different model of discipline, however. In addition to serving a disciplinary function, the Conduct Review performs a corrective and educative function. The Task Force is convinced that the utility of the Conduct Review depends, in large part, on the ability of the Conduct Review Subcommittee to have a vigorous and frank discussion of matters with the lawyer. The Task Force also firmly believes that the lawyer who is the subject of the Review is more likely to be forthcoming to the Subcommittee about his or her conduct than would be the case if the complainant were present throughout the meeting or were the entire proceedings to be conducted on the record. Changes to the process to permit or require the complainant to be present for the entirety of the meeting would make the process less effective, and would, in the opinion of the Task Force, detract from rather than advance the public interest. The Task Force will make some recommendations, however, concerning how the process may be better explained and thereby made more transparent to complainants in particular and the public in general.

3. <u>There is no provision in the Rules Allowing a Conduct Review to be Rescinded</u>

The Task Force gave much consideration to the fact that, once a conduct review has been ordered, there is no process available to the Discipline Committee to rescind the order.

The Task Force considered past circumstances where Conduct Review Subcommittees have been provided with documents or other evidence which, for various reasons, were not given to the Law Society during its investigation of the underlying complaint. In some cases, the review of this evidence has made it clear that the lawyer's conduct was not improper. In other cases, the Subcommittee may determine that, in its view, and on the basis of the facts before it, the lawyer's conduct is not improper. Even if the Subcommittee, in its Report back to the Discipline Committee, identifies its concerns, there is no rule permitting the Subcommittee to recommend that the Discipline Committee rescind the order that the conduct review take place. Even if, in light of the new evidence, or in light of the Subcommittee's analysis of the facts, the Committee agrees that the lawyer has done nothing wrong, the Rules do not allow the Committee to rescind the order requiring that the conduct review take place.

The Task Force contrasted this lack of ability to rescind an order for a conduct review to the ability of the Discipline Committee to rescind an order that a citation be authorized. If subsequent facts come to the attention of the Discipline Committee after a citation has been authorized, the citation may be rescinded. If no further process were ordered, the lawyer in question would have no professional conduct record. In similar circumstances under an order for a conduct review, however, the best the lawyer could hope for is that the Report of the Subcommittee would report that the lawyer had done nothing wrong. The report would still, however, form part of the member's professional conduct record. While this may be of little consequence, the member may still feel aggrieved by the fact of a blemish on his or her record with the Law Society, in circumstances where the conduct of the member disclosed no real basis for the record.

4. A Conduct Review Subcommittee Report forms part of a member's "Professional Conduct Record"

The Task Force discussed the fact that the Report of the Subcommittee (and any written dispute of the Report) forms part of the member's "professional conduct record", which as a consequence may be used against the member in a hearing on penalty in the event that a subsequent citation is proven against the member. A member's professional conduct record may have other consequences as well. A considerable amount of discussion focused on the consequences to the member arising out of the existence of having a professional conduct record.

Some members of the Task Force considered that the simple existence of a professional conduct record constituted a blemish on the lawyer's reputation with the Law Society. If there was to be a formal recording of an event in a "record" that could be used for subsequent purposes adverse to the lawyer, then it was argued that there should be more procedural fairness in the process.

5. Fairness

The Task Force was created in part as a result of a potential concern about procedural fairness in the conduct review process.

The Task Force discussed, at some length, the varying degrees and level of procedural fairness in Law Society disciplinary processes. The hearing process that results from a decision to authorize the issuance of a citation is obviously a very formal process that results, if the citation is proven, in a penalty being imposed on the lawyer whose conduct is under review. The penalty can be a fine, a suspension from practice or, in the most serious cases, disbarment. A high level of procedural fairness is called for, including matters such as disclosure of evidence, and the right of cross-examination.

A conduct review is a less formal process than is the hearing of a citation. Indeed, the Rules describe it as an "informal proceeding", and the word "hearing" is conspicuously avoided. The Task Force discussed the level of procedural fairness required at a conduct review. There were differing views expressed on this topic.

On the one hand, it was noted that the hearing is described in the Rules as an "informal process", and that its purpose is as much educative as it is disciplinary. In many cases where a conduct review has been ordered by the Discipline Committee, the lawyer already recognizes that he or she has made an error. In such cases the conduct review allows the Law Society to discuss directly with the lawyer the circumstances under which the error is made and ensure (a) that the lawyer understands the nature of the error and (b) that the lawyer is clear about how to avoid making future errors of this nature. The level of procedural fairness required in this procedure was thought to be relatively low.

On the other hand, it was pointed out that there was a disciplinary function attached to the conduct review process as well. There is a consequence attached to the process, as the report of the Subcommittee forms part of the lawyer's professional conduct record. That record may be considered by the Law Society, if relevant, in future matters involving the lawyer. In some cases where a conduct review has been ordered, the lawyer does not agree that he or she has engaged in unprofessional conduct. Apart from disputing the eventual report of the Subcommittee, the lawyer has no real opportunity to test the evidence relied upon by the Law Society. Disputing the report of the Subcommittee has, on a few occasions, resulted in the Discipline Committee recommending that a citation be authorized. Some members of the Task Force believed that this left the lawyer in an unenviable predicament. Moreover, even if during the conduct review the lawyer was able to satisfy the Subcommittee that his or her conduct was not in error (either by bringing new evidence to the attention of the Subcommittee, or through successfully advocating that the basis of the Discipline Committee's analysis may be incorrect) there was no manner by which the lawyer could leave the process without his or her professional conduct record being affected.

The counterpoint to this is that a lawyer who does not acknowledge any wrongdoing may demand that a citation be authorized, which would then permit all of the procedural guarantees of a hearing. Some would consider this "Hobson's choice", and in the event of a stalemate between the member and the Discipline Committee, the Committee cannot be forced to authorize the issuance of a citation.

6. The Law Society's "Need to Know" about a Lawyer's Past Conduct

The Law Society is a self-regulatory body. Its statutory object and duty is to uphold and protect the public interest in the administration of justice by, amongst other things, establishing standards for professional responsibility and competence of lawyers.

The Task Force discussed the fact that, when determining what course is necessary to deal with a complaint of, for example, incompetence, the public interest may demand that the Law Society have regard to the previous history of the lawyer complained about. On some occasions, disciplinary or remedial action is determined to be necessary only after a review of a pattern of conduct exhibited by a particular lawyer over a period of time. The public interest may not be adequately protected if the Law Society did not have access to that information. The Task Force is mindful of the obligations placed on the Law Society by the *Legal Profession Act*, and has had regard to the recent judgment of the Supreme Court of Canada in *Finney v. Barreau du Québec* (2004 SCC 36) which held the Barreau liable to a complainant (member of the public) for having failed to take action against one of its members in a more diligent fashion (at para 44):

> The nature of the complaints and the lawyer's professional record in fact made it plain that this was an urgent case that had to be dealt with very diligently to ensure that the Barreau carried out its mission of protecting the public in general and a clearly identified victim in particular.

Some members of the Task Force were concerned that if the complaint(s) which had given rise to a conduct review or the result of the review itself were not available to the investigative arm of the Society in the investigation of future complaints against the same member – particularly if the subsequent complaints were similar to the complaint which had formed the basis of the conduct review – then the Law Society might be unable to fulfill its obligations as described in *Finney*.

7. The "Invitation to Attend" process at the Law Society of Upper Canada

The Task Force considered the "Invitation to Attend" ("ITA") process used by the Law Society of Upper Canada, which bears some similarity to the Law Society's conduct review. It is described as an informal process allowing the Benchers to discuss the conduct in issue with the member and to determine his or her position on the matter. It is, the Task Force understands, used in circumstances where the lawyer complained about has used "poor judgment", rather than in a deliberate contravention of the rules. The Benchers' role at an ITA is to educate the member about the nature of the conduct and the goal of an ITA is that the lawyer will gain more knowledge about his or her obligations and the consequences of his or her actions. However, the ITA does not form part of the lawyer's "record" (other than the fact it was held) and it is not disclosed to anyone beyond the Law Society of Upper Canada. No references to prior ITAs can be made on subsequent complaints against the lawyer referred to the Discipline Authorization Committee, nor can material prepared for the ITA be referenced. Some members of the Task Force thought this latter provision was a good approach, while others thought it might compromise the Law Society's ability properly to investigate

misconduct or incompetence. The Task Force understands that the Law Society of Upper Canada is currently reviewing whether it should continue the practice of not disclosing the fact of a previous ITA in subsequent referrals to the Discipline Authorization Committee.

Recommendations

The Task Force examined methods to address some of the concerns expressed with the conduct review process without destroying the benefits of that process. In particular, the Task Force wanted to ensure that there were processes available through the Discipline Committee to permit some matters of complaint to be dealt with in a less formal manner than through a hearing of a citation. Hearings should be aimed at serious transgressions of ethical or professional standards where, if proven, fines, suspensions or disbarment should be ordered.

The original purpose of a Conduct Review seems to have been to permit the Law Society to deal with "grave indiscretions" not calling for citation but which bode ill for the future conduct of the member if his or her conduct is not addressed. A grave indiscretion dealt with through a less formal process than a hearing may indeed have benefits for the lawyer by being educated about errors rather than going through a hearing from which he or she may – but also may not – come to realize the error committed. The public interest can also be served by ensuring that the lawyer has learned from the error and understands how to avoid it in future. If, indeed, the error is a "grave indiscretion", a formal record – a "professional conduct record" - is probably called for. There are, however, other ethical or professional transgressions that are much less than "grave indiscretions" and call for a less formal result. Sometimes it will be because the conduct complained of is, in the overall analysis, relatively minor. Other times it will be because, while possibly serious, the lawyer did not set out to act in such a manner. Sometimes the inadvertence of the conduct will not be relevant and more formal process will be necessary.

The Task Force also considered that any particular matter examined by a Conduct Review Subcommittee may not always be indicative of a lawyer's general professional conduct. The matter being reviewed may be but a single example of an ethical error committed by the lawyer over the course of many years at the Bar. A Conduct Review Subcommittee is really asked to review an "incident" or, perhaps, series of incidents, of a lawyer's conduct, not the lawyer's conduct as a whole.

The Task Force makes the following recommendations:

1. The Law Society Rules should be amended to permit the Discipline Committee to

    (a) authorize the Chair of the Committee to write a letter to a member whose conduct is the subject of a complaint before the Committee; and

(b) require a lawyer whose conduct is the subject of a complaint before the Committee to attend a meeting with one or more senior lawyers (who may or may not be a Bencher) to discuss the conduct of the lawyer.

In neither case would the letter or the meeting form part of the lawyer's "professional conduct record."

2. The Law Society Rules should be amended to permit the Discipline Committee, in appropriate circumstances, to rescind an requirement that a lawyer attend before a Conduct Review Subcommittee.

3. An effort should be made to improve the content of the minute of the Committee when resolving to require a lawyer to attend a conduct review. Disclosure to the lawyer of all the materials given to the Discipline Committee, including correspondence and documents should continue. The opinion given by staff to the Committee should not be disclosed to the lawyer, for reasons of privilege.

4. An effort should be made to ensure that complainants are properly and fully informed about the purpose of a conduct review, and how the public interest is served by the process. The Task Force recommends that

(a) a standard form of letter, explaining the purpose of and process involved in a conduct review, be created to send to complainants at the outset of the process;

(b) a list of suggestions be created that can be given to the members of the Conduct Review Subcommittee, in order to guide the Subcommittee when addressing the complainant at the meeting, and in particular to explain to the complainant why he or she is not invited to be present throughout the process;

(c) the Law Society website be updated to include a specific section on the process involved in the Conduct Review, including the purpose of such reviews, what they are intended to achieve, and how the public interest is served.

Discussion

1. <u>Amending the Rules to Permit Additional Options by which the Discipline Committee can Deal with a Complaint.</u>

Reasons for the Recommendation

Currently, when considering a complaint, the Discipline Committee has only three options[3]. It may:

[3] See Rule 4-4(1)

(a) decide that no further action be taken on the complaint;
(b) require the lawyer to appear before a conduct review subcommittee; or
(c) recommend that a citation be issued against the lawyer.

Taking no further action results, of course, in no professional conduct record being created. Recommending a citation or ordering a conduct review may result in a professional conduct record.

In addition to the outcomes provided for in the Rules, the Committee has developed a procedure (in minor cases of misconduct) of resolving that the Chair of the Committee write to the lawyer whose conduct is under consideration, advising the lawyer about where he or she erred, and how he or she may strive to improve their conduct in future. This "letter from the Chair" does not form part of a lawyer's professional conduct record.

The Task Force recommends that the "letter from the Chair" be included in the Rule 4-4 in order that the practice can be regularized.

Moreover, the Task Force recommends that Rule 4-4 be further amended to permit the Committee, in appropriate circumstances in the Committee's discretion, to order that the lawyer attend before a senior lawyer or lawyers to discuss his or her conduct. This process is envisaged by the Task Force as being slightly more "formal" than a letter from the Chair, but less formal than a Conduct Review. Like a letter from the Chair, it would *not* form part of the lawyer's professional conduct record. There would be no report, but the Task Force recommends that there be some closing document such as a letter from the Bencher conducting the process to ensure that the meeting has taken place and that the conduct which has given rise to the meeting has been discussed with the lawyer. The Task Force was divided as to whether this letter should be sent to each, or either, of the lawyer or the complainant.

The process would be focused on the education of the lawyer, rather than on his or her punishment. It would be the review, by a senior lawyer or lawyers, of an "incident" in which the lawyer, in the opinion of the Law Society, had not met the requisite standard of conduct required of a lawyer, but, in the opinion of the Committee, the conduct was not so egregious as to warrant a formal "record".

The Task Force believes that this recommendation meets the interests of both the public and the profession. Relatively minor misconduct could be addressed in a setting requiring the lawyer to attend to discuss his or her actions with a senior member of the Law Society, as is done with a Conduct Review, but there would be no creation of a "record", and therefore any arguments for a higher degree of procedural fairness than now exists in the conduct review process would be obviated.

This would leave more serious forms of misconduct to be dealt with through a Conduct Review where the Committee believes that a citation could be authorized, but that in the public interest a Conduct Review may suffice. In these circumstances, if the lawyer

disagreed with the recommendation, he or she could advocate against it either at the conduct review itself, or by disputing the report. If the Subcommittee accepted the lawyer's arguments, it could recommend that the order be rescinded (see recommendation 2, below). If either the subcommittee or the Committee rejected the lawyer's position, the Committee could then re-consider the matter to determine if a citation should now be authorized, which would give the lawyer the whole range of procedural fairness available through that process.

Implications

A rule change would be necessary to accomplish both of the above recommendations. The Task Force believes that there is authority to make such rules through a combination of ss. 36(e) and 11 of the *Act*.

Adding an option to the types of decisions that the Discipline Committee may make when considering a complaint should enhance the effectiveness of the disciplinary program by giving the Committee a wider array of choices. The Task Force believes that the three choices available now are unduly restrictive given the wide variety in type and seriousness of complaints considered by the Law Society. By adding an additional option, the Law Society will create a process by which the significance of the conduct can be discussed directly with the lawyer, but with no professional conduct record attaching. This, the Task Force believes, is appropriate for ethical transgressions or types of misconduct that need to be addressed, are not the sort of "grave indiscretion" that warrants a formal disciplinary consequence, and deserve personal discussion rather than a letter.

The conduct review process will remain open for "grave indiscretions" that do not warrant a formal hearing. Hearings will remain an available option for the serious complaints that require a serious sanction and penalty. Through this process, the Task Force believes that the public interest is enhanced. Member relations ought not to suffer, either, as an educative, but non-penal process will have been created. It is a process that ought to benefit those members who are currently ordered to attend a conduct review for matters that are misconduct or ethical transgressions, but perhaps not "grave indiscretions".

Determining the difference between a serious transgression warranting a conduct review and a less serious transgression warranting the proposed new procedure may prove to be somewhat difficult. The Task Force believes, however, that over time the distinctions will become easier to determine.

2. Amending the Rules to Permit the Discipline Committee to Rescind an Order for a Conduct Review

Reasons for the Recommendation

Rule 4-13 permits the Discipline Committee to rescind a citation at any time before a panel makes a determination on penalty. Theoretically, therefore, the Discipline Committee can rescind a citation even after a verdict has been given, provided that the penalty has not yet been determined. The Task Force recommends that there be a parallel process available for Conduct Reviews. The underlying rationale for the recommendation is that if a citation can be rescinded, why not also have a Rule permitting the rescission of a Conduct Review?

One matter for determination concerning this recommendation is whether the Discipline Committee could rescind the Conduct Review *after* the review itself had taken place. In other words, could the Committee order the undoing of an event that had already occurred? In light of the fact that the Committee can apparently rescind a citation after verdict, so long as the penalty has not been determined, perhaps there is no impediment to permitting the rescission of a Conduct Review prior to the Discipline Committee accepting the report of the Subcommittee.

The Task Force has considered the circumstances under which it would be appropriate to rescind a Conduct Review, and makes some recommendations to the Benchers in that regard. Circumstances could include the receipt by the Committee of new facts, a different take by the Committee on existing facts, or a re-examination by the Committee of the law or interpretation of the Rules or *Handbook* provisions giving rise to the original order for the Review. The Task Force notes that there are no limitations on the discretion given to the Discipline Committee with respect to the rescission of a citation.

The Task Force believes that the public interest is not adversely affected by permitting the Discipline Committee to rescind an order for a Conduct Review in appropriate circumstances. The public interest is not served by creating a professional conduct record concerning a lawyer where there is insufficient evidence that the impugned conduct supports an order for a Conduct Review. If further information comes to light after the Review has been ordered that changes the opinion of the Committee, the public interest does not require the lawyer to have a "record" simply because, on an analysis of incomplete information, the Committee originally ordered a Review to take place.

Implications

In order to implement this recommendation, the Task Force recognizes that a Rule change will be required. While there is authority to make rules requiring a lawyer to attend before the benchers (or a committee or other body) to discuss his or her competence, there is no specific authority to create a rule rescinding such an order. This is to be contrasted with rule making power concerning citations. Section 36(f) of the *Act*

authorizes the ordering of a hearing by way of citation, and section 36(g) permits the making of rules authorizing the rescission of a citation.

Despite the absence of a specific section in the *Act* permitting the rescission of a conduct review, the Task Force considers that a rule permitting the Committee to undo something it has resolved to do is consistent with sensible practice where there is a reason for the Committee to conclude that its original resolution was in error. Such a rule would therefore not be inconsistent with the *Act.* The *Act* permits the benchers to take any action they consider necessary for the promotion, protection, interest or welfare of the Society (s. 4) and to make rules for the carrying out of the *Act* (s. 11).

If the Rule is amended to permit the rescission of an order for a Conduct Review, one might expect that the Discipline Committee will begin receiving, and having to consider, applications from members to rescind Conduct Reviews which will add to the length of meetings. The number of such requests would be difficult to gauge in the abstract. For purposes of comparison, though, the Task Force understands that requests to rescind citations are not numerous.

This recommendation might be expected to have some positive effect on member relations, as it would permit a procedure whereby an order having a disciplinary consequence might be given a second look and, in some circumstances, rescinded. All that can happen in the present system is for the member to convince the Conduct Review Subcommittee itself that the underlying premise for the order is incorrect, which may result in a report from the Subcommittee to that effect. The existence of the order for the Review still persists, and the report, though favourable, still constitutes part of a professional conduct record, although in such cases there is little or no prejudicial consequence to the member by virtue of the record.

The Task Force recognizes that the recommendation might, however, have some negative effect on public relations. There is no mechanism by which a complainant can "appeal" a decision of the Discipline Committee with respect to a complaint referred to the Committee. If the Committee closes a complaint, the complaining member of the public has no avenue of review. The Task Force notes that the Ombudsman has raised these matters as criticisms of the current process.

By permitting the Committee to consider rescinding an order for a Conduct Review, however, lawyers would be given some limited ability to have the Committee reconsider an order having consequences against the member. The public may view this inequality of process as an example of lawyers looking out for themselves.

3. Disclosure Issues

Reasons for the Recommendation

The Task Force considers that in most situations, a lawyer who is required to attend before a Conduct Review Subcommittee will clearly understand the issue giving rise to

the Review. There are, however, circumstances where the issue will be less clear. There may be other circumstances where there may be several different possible reasons for ordering the Review, but the reasons have not been explained to the lawyer.

The Task Force understands that, currently, lawyers who are required to attend before a Conduct Review Subcommittee receive the correspondence and the documents that the Committee has considered when making its resolution. The lawyer does not receive the staff lawyer's opinion given to the Committee. While the lawyer does receive the minute from the Discipline Committee resolving that the review take place, there is no "charge" or "particulars" that are given to the lawyer. This is to be contrasted to the citation process. Attached to each citation is a schedule outlining the particular conduct and allegations which are to form the subject matter of the hearing.

The Task Force recognizes that a citation is a more formal and more serious process than a Conduct Review. The outcome of a hearing can result in a fine, suspension or disbarment. A Conduct Review, on the other hand, is an informal process. However, a Conduct Review is a process which can lead to the creation of a professional conduct record, and the Task Force believes that more precision should be taken in the disclosure process surrounding Conduct Reviews.

The Task Force recommends that

(a) the lawyer continue to receive all the materials that were before the Committee when the Committee considered the complaint and resolved to hold a Conduct Review;

(b) special care be taken when preparing minutes in which a resolution to hold a Conduct Review is made. The minute should, at a minimum, outline the facts considered by the Committee to be pertinent to its decision to resolve to require the lawyer to attend at a Conduct Review together with a brief narrative of the reasons that the Committee had for making the resolution. This will assist the lawyer in understanding the purpose behind the Conduct Review, and, in the view of the Task Force, will make the process more fair to the lawyer whose conduct is being reviewed. The educational and corrective aspects of the review will also be increased.

The opinion from the staff lawyer to the Committee in which the complaint is analyzed is not given to the lawyer, although it is given to the Conduct Review Subcommittee. The Task Force realizes that the opinion is the subject of solicitor-client privilege. The Task Force considers, however, that there may be circumstances where it is not contrary to the public interest or to the interest of the Society to waive that privilege. The implications of waiving privilege over the opinion are, however, complicated. For instance, if the privilege is waived, obligations under the *Freedom of Information and Protection of Privacy Act* may be triggered. The Task Force determined that it should not recommend that there be a blanket direction to waive privilege over staff opinions given to the Committee in cases where a Conduct Review was ordered.

Implications

The Task Force realizes that its recommendation may add some extra work, both for staff in preparing the minute, and for the Committee in giving direction as to its reasons for resolving to hold a Conduct Review. There are, however, benefits to be gained by more precisely identifying, in all cases, the reasons for ordering a Conduct Review and the facts upon which the Committee based its decision. The lawyer will be given a clear direction about the nature of the misconduct or incompetence forming the basis of the review and the review itself should, in all cases, be more informed. The Task Force notes that, as the member does not currently receive a copy of the staff lawyer's opinion, he or she may come into the review with a less clear understanding of the issues than does the review panel, who have had access to the opinion.

The Task Force expects that the complainant will also have the benefit of more clearly understanding the reasons of the Committee for ordering a Conduct Review. This may assist the complainant in a general sense by better understanding the Law Society's processes. It may also, in cases where the complainant is permitted to attend the review, assist the complainant by identifying specific, rather than general, concerns to the subcommittee.

4. Communication to the Public About the Conduct Review Process

Reasons for the Recommendation

The Task Force concluded that the Law Society should revisit its efforts to ensure that there is proper communication with the public about what a Conduct Review is intended to accomplish and how the Conduct Review serves the public interest by ensuring that a lawyer who has engaged in a level of misconduct that does not warrant a citation is still required to attend at a disciplinary process. Communicating to the public how the Conduct Review is also meant to ensure that the lawyer learns from the process so that the conduct is not repeated would, in the opinion of the Task Force, be beneficial.

This communication can, and should, be done in a number of manners. When the Discipline Committee has resolved to require a lawyer to attend before a Conduct Review Subcommittee, a standard form of letter should be sent to the complainant explaining the reasons that the Review was ordered, the process involved in the Review itself (including the complainant's ability to ask to attend at the meeting), and what the Conduct Review process intends to accomplish.

The Task Force also recommends that a list of suggestions be drafted to be given to Subcommittee members to assist them in dealing with questions or issues that may be raised during the meeting by either the complainant or the lawyer. These suggestions would be meant to address issues of process, such as why the complainant will be asked to leave at some point during the meeting in order that the Subcommittee may address the member directly.

Finally, the Task Force believes it would be advisable to include, on the Law Society's website, a section focused on the Conduct Review in order to explain to the public at large what is entailed in the process, the circumstances under which such Reviews are generally held, and what such Reviews are intended to accomplish.

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