The Law Society of British Columbia

Report to Benchers
April 12, 2013

Report of the Rule of Law and Lawyer Independence Advisory Committee on its Examination of the Relationship Between the Law Society as Regulator of Lawyers and as Insurer of Lawyers

Committee Members

Claude Richmond, Chair

Kathryn Berge, QC Vice Chair

Herman Van Ommen, QC,

Leon Getz, QC

David Crossin, QC

James Vilvang, QC

Craig Dennis

Jeevyn Dhaliwal

Purpose of Report: Decision

Prepared by Policy & Legal Services

Michael Lucas 604-443-5777
Lance Cooke 604-605-5325

Table of Contents

COMMITTEE PROCESS 3

ACKNOWLEDGEMENTS 3

EXECUTIVE SUMMMARY 4

BACKGROUND 6

INSURANCE OF LAWYERS WITHIN THE AUSPICES OF A PUBLIC INTEREST REGULATORY BODY 6

1. Statutory Mandate and Trust Protection Insurance Fund (Part B Insurance) Obligation 7
2. Statutory Mandate and Professional Liability Insurance Program 8
3. Public Interest Advantages to an In-House Liability Insurance Program 9
4. A Divergence of Duties and Consequences of Some Concern 11
5. Evaluating Claims, Defending Lawyers and Confidential Information Regarding Lawyers' Conduct 15

CONCLUSION 19

SUBSEQUENT STEPS: SOLUTION OPTIONS 21

RECOMMENDATIONS 24

COMMITTEE PROCESS

1. Approximately 5 years ago, a predecessor of the Committee encouraged the Benchers to consider the implications for the Law Society, as an organization responsible for acting in the public interest, arising from the operation of both a regulatory function that investigates and, where appropriate, sanctions lawyers, and an insurance program that may be required to defend lawyers in connection with their discharge of professional responsibilities – sometimes on the same facts that have given rise to regulatory involvement.

2. That predecessor Committee recommended that an examination of this issue be included on the Law Society's strategic plan. The recommendation was ultimately adopted by the Benchers for inclusion in the current strategic plan for 2012-2014, forming Initiative 1-1(b) under the first Goal of the Plan – that the Law Society will be a more innovative and effective professional regulatory body.

3. Consequently, the Committee began a further and more detailed examination of the matter and devoted most of its substantive work during 2012 to a consideration of the issues that arise. In the course of its examination, it has consulted with the Insurance Department, the Professional Regulation and Discipline Departments, as well as with the Chief Financial Officer and the Chief Executive Officer, all of which have attended one or more meetings of the Committee and all of which provided the Committee with a considerable amount of background and information that greatly aided the Committee's work.

ACKNOWLEDGEMENTS

4. A great deal of the discussion and analysis concerning this subject was done in 2012 by the Committee under the Chair of Kathryn Berge, QC, with Herman van Ommen QC as Vice Chair. Jan Lindsay QC, Richard Stewart QC, and Cam Mowatt were also members of the 2012 Committee.

EXECUTIVE SUMMMARY

5. The Law Society operates a professional liability insurance programme. Does this compromise or create an appearance that might reasonably be considered to compromise the performance of its statutory obligation to uphold and protect the public interest in the administration of justice? That is the question addressed in this Report. If the answer, either generally or in particular circumstances, is "yes" or "possibly", this could undermine or at least have the potential to undermine public confidence in the Society's ability to regulate the legal profession in the public interest.

6. In examining this question the Committee has taken account of the Law Society's responsibilities to set policy in relation to lawyers' professional liability insurance and to manage claims filed in respect of that insurance. The Committee has identified two risks associated with the current arrangement and operation of the Lawyers Insurance Fund within the Law Society. At a high, policy-setting level, both regulating and insuring lawyers are in the public interest. At the operational level, however, there is a risk of actual conflict in concurrently performing the obligations inherent in each role. The Committee has concluded that this first risk in the existing arrangement is best described in terms of a conflict of *duties*, rather than a conflict of *interests*. The second risk is the potential for a perception or apprehension of a conflict, in the minds of the public, and the effect that might have on the public confidence in the Law Society's ability to meet its statutory responsibilities. A public apprehension of conflicting duties would invite the question of which duty would take priority in the event of an actual conflict. Both the risk of an actual conflict of duties and the risk of related negative public perceptions remain to be addressed. The Committee's view is that the identified risks are sufficiently serious to warrant corrective action.

7. The Committee has considered a number of possible responses to the concerns it has identified and has come to the conclusion that a more extensive and readily apparent division between the Law Society's insurance department and the rest of the organization is desirable. The Committee's view is that this would go some distance towards enhancing transparency and minimizing the potential for loss of public confidence in the way in which the Society performs its functions. The details and extent of such a separation remain to be developed. The Committee has not been in a position to fully investigate the costs or all the operational consequences associated with the elements of any particular "solution option." Consequently, it is not recommending a particular solution for discussion in this Report. Further work is required to develop specific

"solution options" before the Benchers will be in a position to make a fully informed and final decision.

8. After considerable debate within the Committee, however, the range of potential responses has been narrowed to the following two options, which the Committee believes should now be developed as detailed proposals:

    A. Modify the Lawyers Insurance Fund's current integration as a Law Society department by creating more indicia of separation between the insurer and the rest of the organization, together with sufficient functional and operational separation to address the substance of the underlying tensions that are identified in the report;

    B. Operate the Lawyers' Insurance Fund as a separate legal entity, with sufficient independence from the Law Society that the insurer's duty to the insured would be removed from the responsibilities of the regulatory body.

9. As the development of the two proposals the Committee envisions remains a significant task, the Committee now makes the following ***recommendations***:

    1. That the Benchers first determine whether they agree with the Committee's conclusion that the tension and propensity for conflict between the Law Society's co-existing responsibilities as regulator and insurer of lawyers warrants corrective action; and

    2. If the Benchers share the Committee's concerns, that a working group, consisting of Benchers and Law Society staff, be created to undertake, in the light of this Report, a detailed examination and analysis of the two options to form the basis for future debate by the Benchers.

10. By following this recommended course, the Committee believes that the Law Society's ability to manage its co-existing responsibilities can be substantially improved, while preserving existing public interest benefits that result from the Law Society's fulfillment of both its regulatory and insurance functions.

BACKGROUND

11. Initiative 1-1(b) of the Strategic Plan – the issue that this Committee has been asked to address – is to "examine the relationship between the Law Society as the regulator of lawyers and the Law Society as the insurer of lawyers."

12. The Law Society has a statutory obligation to act in the public interest. It has a regulatory function that requires it to investigate and, where appropriate, sanction lawyers for misconduct in performing their professional responsibilities. It also operates a professional liability insurance program, which may require it to defend lawyers sued in connection with their performance of those responsibilities. Sometimes it may have to perform both functions in relation to the same facts.

13. Accordingly, the Committee has examined the relationship between the Law Society's regulatory and insurance functions, with an eye to effective self-regulation in the public interest. This Report is the Committee's report of its examination.

INSURANCE OF LAWYERS WITHIN THE AUSPICES OF A PUBLIC INTEREST REGULATORY BODY

14. One way to protect the public interest is to require that lawyers are insured for any errors or negligence that may occur during the representation of a client. The *Legal Profession Act* (the "LPA") specifically requires the Law Society to operate an insurance fund to compensate claimants for any dishonest appropriations from lawyers' trust accounts. More broadly, liability insurance allows a client who has suffered a proven loss caused by a lawyer to recover from an insurance fund, rather than having to risk recovery against the lawyer who may be unable to pay. The LPA permits (but does not require) the benchers to make rules to establish and operate a professional liability insurance program and, since 1992, this insurance function has been discharged through a department of the Law Society, which operates both the policy-setting function of the insurer and handles claims against insured lawyers.

15. Does the Law Society's function in operating as a professional liability insurer detract from its statutory obligation to act in the public interest? By operating an insurance program, including a claims-handling role, does the Law Society create a tension with its mandate to regulate the practice of law in the public interest? This question forms the essential underlying issue of consideration and analysis by the Committee in this report.

1. Statutory Mandate and Trust Protection Insurance Fund (Part B Insurance) Obligation

16. The Law Society takes its mandate from its originating statute, the LPA. Section 3 of the LPA sets out the organization's mandate as follows:

> **OBJECT AND DUTY OF SOCIETY**
>
> **3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

17. The LPA prescribes that the Law Society's object and duty is "to uphold and protect the public interest in the administration of justice" by engaging in a number of different kinds of activities. For any activity the Law Society may undertake, the measuring stick is set: Is the activity consistent with the Law Society's duty to uphold and protect the public interest in the administration of justice?

18. The LPA also sets out a number of insurance-related obligations and powers in section 30. The provisions in section 30 require the benchers to establish an insurance fund and to maintain and operate a trust protection insurance program. "Trust protection insurance" is a defined term in the section, meaning insurance to compensate persons who suffer a loss by a dishonest appropriation from a lawyer's trust funds. Trust protection insurance may be contrasted with professional liability insurance, which is to compensate for losses suffered as a result of a lawyer's negligence in the course of legal practice. Additionally, section 30 provides that the benchers may maintain and operate a professional liability insurance program, although the provision is clearly enabling, not mandatory. Thus the LPA's treatment of professional liability insurance is different than its treatment of trust protection insurance. Maintaining a program to cover trust protection insurance is a statutory obligation of the Law Society. Operating a professional liability insurance program is an option for the Law Society, presuming of course that the activities involved

in the course of such a program are not themselves inconsistent with the Law Society's statutory mandate.

19. The purpose of reviewing the Law Society's co-existing regulatory and insurance responsibilities is to identify and assess any potentially problematic issues that arise from the relationship between them. When such concerns are raised there is a reasonable question as to how those concerns are most accurately characterized. Do they involve a conflict of interests or duties? Or is the issue something less, perhaps merely a perceivable tension between the co-existing responsibilities? Tensions among competing priorities and duties may be common in complex organizations, such as governments and regulatory authorities, making an appreciation of their overall effect on the public interest a matter of some importance. In any event, the Committee is satisfied that at the highest conceptual level, that is, at the level of the Law Society's statutory *obligations,* no concerns arise regarding the Law Society's statutory mandate and the obligation to maintain a trust protection insurance fund and program.

2. Statutory Mandate and Professional Liability Insurance Program

20. Although the Law Society does not have a statutory *obligation* to operate a professional liability insurance program, section 30(2) provides that "[t]he benchers may establish, administer, maintain and operate a professional liability insurance program" and that they may set fees and use the fees collected for that purpose. The LPA also requires the benchers to make rules that require lawyers to have professional liability insurance. In fact, as enabled by section 30(2), the Law Society does operate a professional liability insurance program. The Law Society's practicing member lawyers are required to obtain their professional liability insurance from the Law Society and to pay the Law Society an insurance fee.

21. The Law Society's professional liability insurance program is operated by the Lawyers Insurance Fund (LIF), a department within the Law Society. In this program LIF staff lawyers function as claims examiners and, in many cases, as legal counsel to the lawyers who are or may be subject to negligence claims. Also in many cases, insurance litigation lawyers from outside the Law Society are retained to act as legal counsel to the lawyers subject to claims. In such cases, an LIF staff lawyer continues to act in the capacity of a claims examiner and is responsible for instructing the outside counsel retained to defend against the claim.

22. Described in broad outline only, the maintenance of a professional liability insurance program is not apparently inconsistent with the Law Society's statutory mandate. By enabling the creation and maintenance of such a program, the LPA does not speak to operational details, such as whether Law Society employees will perform the claims handling function or will provide insured lawyers with legal advice relating to claims against them.

3. Public Interest Advantages to an In-House Liability Insurance Program

23. When considered at the level of description set out in the LPA, a Law Society-administered professional liability insurance program has potential public interest advantages over a "for-profit" alternative provider. One obvious advantage is that an efficiently operated Law Society program does not need to incorporate a profit-margin into premiums. The immediate effect should be less onerous insurance costs and no need for lawyers to pass along an additional profit expense to their clients through higher billing rates. At the margin, relatively lower insurance costs may make some law practices more viable and attractive to lawyers who provide services in areas where there are no comparable alternatives. Thus, relatively modest liability insurance costs have an immediate access to legal services benefit that is very much in the public interest.

24. A second public interest benefit is represented by the fact that the Law Society is in a position to ensure that insurance is available and at relatively stable rates. If the provision of the required insurance were left in private or for-profit hands, there is always the possibility that short-term market forces or company-specific financial issues might make insurance costs extremely volatile, or even make the required insurance unavailable for limited periods of time. Such possibilities could have a disastrous impact on the provision of legal services and the proper functioning of the administration of justice. However, as a regulatory agency created by statute, the Law Society's existence and involvement with the legal profession is part of the foundation of the administration of justice in British Columbia. When setting professional liability insurance premiums, it can be guided by the public interest in affordable legal services and in the long-term stability of the insurance program itself. There is no risk of the Law Society's being enticed away to more profitable markets because, on one hand, it is not seeking financial profit and, on the other, it has no capacity to leave the province or to separate itself from its public interest mandate. In these ways, the Law Society is well positioned to be able to ensure that the required insurance coverage continues to be available to qualified lawyers.

25. A further public interest benefit may be found in the ability of the Law Society to bring some amount of public interest concern to bear on the policy decisions that set the guidelines for claims management within LIF. The full extent of this point can be difficult to illustrate effectively. On one hand, the claims handling process involves making decisions about when liability ought to be contested, what litigation tactics ought to be employed, when the quantification of compensable loss should be questioned, and how strenuously. A public interest focused regulatory body such as the Law Society can ensure that litigation procedures are not used to take unfair advantage of claimants and that claimants are treated with courtesy and respect. As a result, the Law Society may approach some of these decisions in a different manner than a profit-motivated private insurance company would.

26. On the other hand, any insurance provider, including the Law Society, owes a duty of utmost good faith to act in the best interests of the insured, in accordance with the terms of the insurance policy and on the available facts. In other words, strictly speaking, the Law Society's orientation to achieving broader public interest benefits can never be allowed to compromise its duty of utmost good faith to the insured in any given case.

27. The Law Society's co-existing responsibilities (acting in accordance with a public interest mandate versus meeting the insurer's duty of utmost good faith to the insured) have quite different characteristics. The mandate to uphold and protect the public interest in the administration of justice is imposed by statute. It is sufficiently broad that deciding how it applies in a given situation may require significant interpretation. If it is viewed as a duty, it is not a duty to act in the best interests of any particular individual, though it may call for action that happens to be in some individuals' best interests. On the other hand, the duty to the insured is a duty to a specific person in each case. That duty is accepted by the Law Society in choosing to operate its insurance program, rather than having it imposed by statute. The duty is assumed and discharged by LIF staff, as part and parcel of the Law Society's assumption of the role of insurer and manager of professional liability claims.

28. Any duty to act in the best interests of a given individual cannot be identical to a duty to uphold and protect the public interest in the administration of justice, even if in some cases actions taken in fulfillment of those duties may be consistent or overlapping. Consequently, in establishing and operating a professional liability insurance program, the Law Society has taken on a responsibility that has a potential to be in tension with its statutory mandate. In view of the evident public interest benefits of a Law Society-operated professional liability insurance program, it may be quite legitimate to posit that

those benefits could simply outweigh any potential tensions arising between the Law Society's co-existing responsibilities.

4. A Divergence of Duties and Consequences of Some Concern

29. The Committee has observed that there is a divergence of duties between the Law Society as a regulator of lawyers on one hand, and the Law Society as an insurer of lawyers on the other. In addition to its public interest duties, as an insurer handling insurance claims against lawyers, the Law Society has a duty to those who are insured – lawyers. Because the Law Society may be handling a regulatory investigation or hearing regarding a lawyer's conduct, while providing or supervising the lawyer's defence on an insurance claim arising from the same facts, the Committee is concerned that the Law Society's duties may come into conflict and that the perception of this tension could raise public concern about whether the Law Society might be preferring one duty over the other.

30. In the course of its examination, the Committee considered a number of operational scenarios and observations that it views as manifestations or consequences of the underlying divergence of duties. Some of these scenarios were based on historical examples and some were identified merely as potential risks inherent in the Law Society's present structure and co-existing responsibilities. While some of these scenarios and observations did not concern every member of the Committee, each was identified as a matter of concern to one or more members of the Committee or as a potential basis for a negative public perception, that is, a perception that the Law Society's attention to its duties to insured lawyers might be detracting from its regulation of the profession in the public interest. These examples, reproduced in brief description, are intended to illustrate the basis for the Committee's concern, the scope of that concern, and the significance of the underlying issue for the Law Society. This set of examples should also be regarded as a suggestion of appropriate targets, to guide corrective action, should the Benchers conclude that such action is warranted after a full consideration of this Report.

a. Maintaining contrary positions in parallel proceedings

31. In contemporaneous disciplinary proceedings and insurance litigation, discipline counsel and counsel retained by the Law Society to defend the insured lawyer may need to take contradictory positions on the facts from which both proceedings arise. For example: there may be a dispute as to whether the lawyer received clear instructions from a client. In accordance with the citation directed by the Discipline Committee, discipline counsel may be required to argue, and a panel may find, that clear instructions were provided but

not heeded by the lawyer. At the same time, in the parallel negligence action, insurance defence counsel may be duty-bound to argue that no clear instructions were received by the defendant lawyer.

b. Discouraging admissions or apologies

32. In the course of a complaint investigation Law Society regulatory staff may seek to obtain relevant admissions regarding the conduct of the subject lawyer or even an apology from the lawyer in order to further the investigation, confirm appropriate remediation, or assist in the resolution of the complaint. It is foreseeable that the lawyer's defence counsel in a related insurance matter may be concerned that such communications could be detrimental to the lawyer's legal defence and may advise the lawyer to refrain from making admissions or apologies where a defence risk is perceived. While such advice may be good counsel from an insurance defence perspective, it may be perceived as unseemly that it should come from an agent of the same regulatory authority that is conducting the complaint investigation, regardless of whether that agent is an LIF staff lawyer or outside counsel retained by the Law Society for the purpose of defending in the insurance claim.

c. Influencing complaint investigation responses

33. Closely related to the theme addressed above is any extent of influence by insurance defence counsel upon the answers or explanations provided by the lawyer in response to a complaint investigation. In the course of a complaint investigation, the lawyer's response to the complaint is communicated, in summary or verbatim, to the complainant. In many cases the lawyer's response is a very important communication, as it often delineates facts in dispute and contentious issues and interpretations. The lawyer's response often shapes the course of subsequent investigation and in some cases it may be taken to fully answer and effectively resolve the complaint. Many lawyers subject to complaints would do well to obtain the advice of experienced counsel in preparing their responses in the investigation. However, there may be an unseemly appearance where the lawyer's response has been edited, vetted, or otherwise influenced by an agent of the Law Society, retained to defend the lawyer in a legal action arising from the same circumstances as the complaint, and who must give priority to the duty of utmost good faith to the lawyer in that regard. Particularly to a member of the public who may be dissatisfied with the outcome of the investigation and who has no means of confirming that nothing inappropriate occurred in communications beyond his view, the inference that the regulator stacked the deck in favour of its registrant may be too compelling to resist.

d. Insurance defence processes that may affect timely regulatory investigations

34. The Committee is concerned that, occasionally, good insurance defence counsel may employ completely valid litigation strategies, such seeking abeyances of regulatory investigations for litigation purposes, determining not to produce documents where relevance is in issue, or taking other steps that result in delays in the Law Society's parallel complaint investigation. Once again, while exactly the same steps might be taken by insurance defence counsel if the Law Society had no role in evaluating and defending the insurance claim, when such steps are taken by an agent of the Law Society on behalf of the subject lawyer, there is a potentially unseemly appearance that may be difficult to effectively dispel.

e. Lack of transparency to the separation of the functions

35. While measures taken toward effective separation of the regulatory and insurance functions at the operational level may be apparent to Law Society staff, they may be invisible to members of the public, the media, government, and even to lawyers who have dealings with various Law Society departments. It may be impossible to completely eliminate the potential for an individual complainant, insurance claimant, or even a lawyer, to be confused as to the effective separation of the Law Society's co-existing responsibilities and functions. However, reports of confidential materials being received by the wrong department and reports of individuals assuming that confidential communications with one department are immediately available to all Law Society departments are troubling. Similarly, the committee is troubled by reports of complainants remaining confused at the point of a disciplinary hearing, as to whether the loyalties of the Law Society's discipline counsel may be divided as a result of the Society's relationship with the insured lawyer and its acting against the same complainant in a parallel insurance action. Public perception is important in regard to the Law Society's ability to meet each of its coexisting responsibilities without sacrificing others. Consequently, the Committee is concerned that outside observers who want to take the time to understand the separation of functions within the Law Society should be able to do so. The Committee is also concerned that the Law Society's public appearance should make manifest its relevant operational separations rather than enable confusion as to their existence.

f. Appropriate use of statutory authority

36. The Law Society's Chief Legal Officer drew the Committee's attention to the issue of whether the use of the Law Society's regulatory powers should be more carefully

restricted to the protection the public interest. It was noted that a lawyer's required compliance with terms of the insurance contract has been incorporated into the Code of Professional Conduct (and previously was addressed in the Professional Conduct Handbook). More particularly then, the question was raised as to whether the taking of disciplinary action in response to failures to report insurance claims would be an appropriate use of the Law Society's regulatory authority.

g. Apparent consequences of the use of statutory authority

37. What appearances may follow on the use of the Law Society's regulatory authority, particularly from the perspective of a complainant who is also a plaintiff in a negligence action against the lawyer? To such a complainant it may appear unfair or unseemly if information first provided by the complainant to the Law Society in the conduct investigation is subsequently marshaled in the lawyer's defence in the negligence action. There may in fact be nothing inappropriate occurring in such a situation. However, to the complainant the Law Society may appear to be "on the lawyer's side" in such circumstances. Stated most generally, it may create an unseemly appearance if the regulatory and disciplinary authority and processes of the Law Society are used for the benefit of an individual lawyer in the context of a legal action to which the Law Society is not a party.

h. Apparent access fuels a potential perception issue

38. Even where insurance department staff may not avail themselves of regulatory department information about specific individuals, either routinely or ever, the fact that they have access to the location of the information (either the physical location or the electronic location) may encourage the perception that they can and do, in certain cases, use the information. The Committee's view is that in responding to such concerns when raised, it is more effective to answer that the staff in question have no access than to explain that while they do have access they do not generally make use of it.

i. The withholding of any information from the regulatory departments should be minimal and necessary

39. As the insurance function is fulfilled by a department of the Law Society, attention should be given to the question of how much of the information gathered by LIF must be kept confidential from the regulatory departments in order to meet the insurer's duties to the insured, so as to ensure that the regulatory departments have access to as much of the Law Society's information as possible, even where the potential utility of the information to the

regulatory departments may not be immediately apparent. The availability of specific information for regulatory purposes could be addressed in the terms of the liability insurance policy. While some insurance file information may need to be kept confidential from the regulatory departments in order to fulfill the insurer's duties to the insured, it is important that any resulting impairment of access by the regulatory departments is kept to a minimum, in order for the Law Society to best meet its regulatory responsibilities. It is also important for the Law Society to be able to respond most effectively in the event that issues of public perception arise.

j. Regulatory staff's silence about potential insurance claims

40. Complainants or other members of the public whom regulatory staff may encounter in the course of a complaint investigation may need guidance or prompting to mitigate or forestall any loss suffered as a result of interactions with the lawyer subject to investigation. Investigating staff are usually lawyers and may have insight into whether the recommendation of legal advice would be appropriate. If the investigating staff person is of the opinion that it would be reasonable and potentially important for the member of the public to seek legal advice, then remaining silent on the point may amount to a failure to best fulfill the Law Society's public interest mandate. Further, to the extent that the silence may be motivated, or perceived to be motivated, by the Law Society's role as insurer or by a duty to the insured lawyer, then it may appear that the Law Society's insurance function is being preferred to its public interest mandate in the context of a regulatory investigation. The Committee's view is that investigating regulatory staff ought to be enabled and guided by a clearly stated policy that in applicable circumstances it may be appropriate to raise the possibility of a negligence claim with a member of the public and to recommend obtaining timely legal advice in the same regard.

5. Evaluating Claims, Defending Lawyers and Confidential Information Regarding Lawyers' Conduct

41. In cases where the same set of circumstances gives rise to both a negligence action and a professional conduct complaint against the same lawyer, the plaintiff in the legal action and the complainant who has brought the professional conduct complaint may be the same person. With respect to the negligence action, Law Society staff lawyers involved in the claims examining and insurance defense processes receive confidential and privileged information directly from the lawyer and from any outside legal counsel who may be retained to act in the lawyer's defence. In order to meet the duty of utmost good faith and the entailed duty of confidentiality to the defendant lawyer, any information received by

the Law Society in the reporting, evaluating and defending of the insurance claim must be kept confidential and must not be used for any other purpose. Consequently, the Law Society has a longstanding operational policy that restricts access to LIF claims files to LIF staff. With limited exceptions, such as cases where there is evidence of misappropriation or other criminal activity, information residing in LIF claims files is not made available to other Law Society staff who may be investigating the professional conduct complaint against the same lawyer, notwithstanding the potential relevance of the claims file information to the complaint investigation.

42. Such dual activity situations illustrate the tension that sometimes arises between the Law Society's co-existing responsibilities. In terms of the roles it must assume, the Law Society is simultaneously defending the lawyer against the negligence claim and investigating the lawyer's conduct, potentially even pursuing a citation against the lawyer in a regulatory hearing. These roles may not be directly inconsistent. In a regulatory proceeding, the Law Society is not acting in the personal interest of a complainant. The Law Society's submissions may have an adversarial appearance in relation to those of the respondent lawyer. However, the Law Society's objective is a just and fair regulatory result in the public interest, which does not necessarily equate to the harshest penalty it could recommend to the hearing panel. That said, in discharging its regulatory responsibilities, the Law Society may well be seeking a fine, a suspension, or even disbarment of a lawyer, as the appropriate result in the public interest.

43. However, consider the confidentiality of the information received by Law Society staff in the process of handling the insurance claim. In a situation where that information would be relevant to a disciplinary proceeding, were it to be available for that purpose, the Law Society is in a position of having relevant information but refusing to consider it with respect to the discharge of the statutory duties to ensure the integrity and honour of lawyers and to regulate the practice of law in the public interest. A similar circumstance can occur where LIF staff receives information in respect of a number of claims against a lawyer, information that would raise sufficient concern to cause a professional conduct investigation, if it were known by the Law Society's regulatory staff. If no professional conduct complaints have been received to alert the regulatory staff to the issue, and if LIF staff are bound by a duty of confidentiality not to share the information with the regulatory departments, then the Law Society may be in the position of having information that ought to trigger an investigation, while its investigations staff have no way of knowing that they ought to be investigating. In this situation is the Law Society's duty to the individual lawyer effectively trumping its statutory regulatory responsibilities?

44. Does the Law Society have a duty to make use of all relevant information in its possession in the discharge of its statutory obligations? Rule 3-4 appears to be consistent with the contention that it does, at least in the case of information relating to possible misconduct, as follows:

> ***Consideration of complaints and other information***
>
> **3-4** (1) The Executive Director must consider every complaint received under Rule 3-2.
>
> (2) Information received from any source that indicates that a lawyer's conduct may constitute a discipline violation must be treated as a complaint under these Rules.
> [heading and (2) amended 09/1999]

45. If the Law Society has such a duty to make use of all relevant information in its possession in the execution of its regulatory functions, then the segregation and exclusion of information provided to LIF does not merely illustrate a tension in the Law Society's coexisting responsibilities; it marks both a conflict between the Law Society's duties and an apparent preference of the assumed duty of utmost good faith to the insured lawyer over the statutory duty to regulate the profession in the public interest. On the other hand, not all may agree that the Law Society has a duty to use all of the relevant information in its control in fulfilling its responsibility to regulate the profession, in which case even the confidential information issue may be viewed as a mere tension, rather than a conflict.[1] The Committee is concerned, in either case, that the conflict or tension inherent in this restricted use of information within the Law Society has the potential to undermine the public confidence in the Society's ability to regulate the legal profession in the public interest.

46. An aspect of concern to the Committee is the matter of public perception. Would members of the public, and members of the media that informs the public, find it unacceptable that the only authority capable of disciplining lawyers should receive information regarding a lawyer's conduct and then refuse to consider its potential regulatory significance? Arguments to the contrary aside, would the Law Society *be perceived as* placing its duty to preserve the confidentiality of the lawyer's information ahead of its responsibility to regulate the conduct of the lawyer? Is the potential for such a

[1] Information provided to Law Society Practice Advisors in communications from lawyers seeking ethical and professional advice is also kept confidential and is not available to other personnel within the Law Society. In view of the fact that neither confidential insurance information nor confidential practice advice communications are routinely treated as potential "complaints," one might argue that an amendment to Rule 3-4(2) should be considered.

perception effectively countered by an accounting of the public interest benefits to be gained from the Law Society's maintenance and operation of a professional liability insurance program? The complexity of the explanation may compromise its effectiveness in a battle for public perception and acceptance. At the same time, there would likely be a need to explain *why* it is necessary for the Law Society to handle the claims information, in order to create each of the public interest benefits that may weigh in favour of having a Law Society-based professional liability insurance program. Would it not be possible for the same public interest benefits to be obtained without the necessity of dividing the Law Society's loyalties? Could a re-structuring or re-assignment of the claims management and insurance defence functions resolve or diminish the tension that may be perceived as calling into question the motives of the regulatory authority?

47. It is open to observe in response that moving the claims handling and insurance defence functions outside of the Law Society would not increase the information available in the context of a professional conduct investigation. Exactly the same information would likely be conveyed to those charged with the claims and defence responsibilities. The same information that would previously have been withheld from the Law Society's regulatory departments would now be withheld from the Law Society as a whole. Thus there would be no investigative improvement or gain in the shift. The gain would merely be in the ability of the Law Society to maintain a more cohesive focus in the pursuit of its regulatory function and the execution of its statutory responsibilities. There would be no potential issue about the propriety of a regulatory body withholding from itself potentially relevant information. The gain would be that when insurance defence counsel cautions a client lawyer about the dangers of being too forthcoming with information in a professional conduct investigation, and cautions of the propensity for claimants to use such investigations as an alternative avenue of discovery, it would not be a Law Society staff lawyer (nor counsel retained and instructed by the Law Society) who might be taken as suggesting that his client be less than fully and immediately candid with a Law Society investigator. It is almost certain that the same cautions would be provided by any reasonably knowledgeable outside claims adjuster or outside counsel in assuming the roles currently handled by LIF staff lawyers. However, there would be no question of whether *the Law Society* might be effectively frustrating its own investigative and disciplinary responsibilities in order to meet its insurance defence duties to individual lawyers. To the extent that the Law Society would not assume those duties to individual lawyers at the outset, there could be no question as to whether the Law Society may have gone too far in the satisfaction of those duties, at the expense of its statutory obligation to regulate the profession in the public interest.

CONCLUSION

48. In accordance with its mandate, the Committee has addressed itself to the task identified under Initiative 1-1(b) of the Strategic Plan: to examine the relationship between the Law Society as the regulator of lawyers and the Law Society as the insurer of lawyers. Through its investigation to date, the Committee has concluded that the Law Society's dual roles as regulator and insurer give rise to a significant tension between its co-existing responsibilities. In the Committee's view the manifestations of this tension are problematic, in part because they may support a perception that the Law Society may be compromising its statutory mandate in order to meet its assumed duties to insured lawyers.

49. Quite apart from express statutory obligations that are imposed upon the Law Society, the Law Society may assume additional responsibilities in furtherance of its efforts to fulfill its statutory mandate. Ideally such duties will be consistent with the Law Society's statutory obligations and not in tension or in conflict with them. Where the fulfillment of an assumed duty might prevent or diminish the fulfillment of a statutory obligation, the assumption of the duty may have created a conflict of duties. If one is of the view that the Law Society, when regulating the practice of law, has a duty to use all of the relevant information it possesses, then one would likely view the Law Society's assumption of the insurer's duty of utmost good faith to the insured, and the duty of confidentiality that flows from it, as creating such a conflict. Even if one views the segregating of information for a particular purpose as not implying a conflict, one may yet be concerned about the potential for a negative perception developing in the mind of the public as a result of the Society's divergent duties.

50. In short, the conclusions of the Committee are that the Law Society's co-existing responsibilities as both regulator and insurer of lawyers are in tension, that the tension is problematic, and that appropriate corrective measures should be developed. The Committee has also concluded that there remains much work to be done before the Benchers would be sufficiently well informed on the specifics of any proposed corrective measures to enable an adequate evaluation and determination.

51. The Committee has considered a range of potential courses the Law Society might follow in response to the identified concerns, though of necessity these options have been conceived of in broad strokes only. At one end of this range would be the maintenance of the *status quo*: no change to the current set of functions and operations. At the other extreme would be the Law Society's complete withdrawal from the professional liability insurance function: a return of the role of insurer to commercial interests. The Committee

rejects both of these extremes. The Committee's view that the identified concerns warrant the development of appropriate corrective measures is a rejection of the idea that the *status quo* is completely satisfactory. At the same time, the Committee is concerned that the Law Society's complete withdrawal from the professional liability insurance arena would come at the cost of the significant public interest benefits that may be derived from its continued participation.

52. Between the rejected extremes there remains a broad range of potential responses, depending on which measures and how many measures may be included in a proposal. For illustration's sake, one may consider measures such as:

- increasing the indicia of apparent separation for LIF, such as a separate brand, logo, email address format, telephone network and reception desk;

- the physical separation of LIF from the rest of the Law Society by a move to a different location;

- a more significant restriction on LIF staff's access to information gathered in the Law Society's regulatory capacity, such that there would be no appearance of potential advantage for the insured lawyer from the insurance claimant's cooperation with the Law Society's regulatory investigation;

- an additional rule or rules to clarify that a lawyer's obligation to respond in a conduct investigation is not diminished or compromised by the lawyer's position as an insured; and

- the corporate separation of LIF from the rest of the Law Society, to address any concern of conflicting duties by placing them in the hands of separate legal persons, in addition to any other methods of separation that may be brought to bear.

53. Neither these measures nor any like them are specifically recommended at this time because the operational impact of such steps needs to be considered in the preparation of any proposal. Any propensity for individual measures to do more harm than good must be evaluated. There may be significant expenses associated with specific measures. The Committee has not been in a position to investigate, for example, such costs such as may attend the relocation of personnel or any amount of organizational restructuring. In addition, the Committee has observed that some of the more significant changes that could be considered may call for a preliminary evaluation from a corporate management consultant or for legal opinions regarding corporate law, tax or employment obligations.

While this kind of evaluation may be essential to further steps in the direction of addressing the issues of concern to the Committee, thus far it has been beyond the scope of the Committee's examination of those issues. It is reasonable to expect some cost related to obtaining such expert advice as may be necessary for the evaluation of specific solution options. However, it may be possible to assess the merits of some potential solutions in advance of any decision to incur the cost of expert advice.

54. Having concluded that it has identified a problem that warrants correction, the Committee has concluded that a Working Group including Benchers and Law Society staff should be directed to develop two alternative proposal sets to be brought to the Benchers for debate in the future. The Working Group may be guided in the process of crafting the proposals by the concerns identified in this report and, if useful, by future consultation with the Committee. The Benchers' future debate may be similarly informed by this report. Thus, the Committee envisions the proposals being brought to the Benchers for debate focusing significantly on the extent to which the proposals provide solutions to the identified concerns, as well as on their practicability and anticipated cost.

55. The "Subsequent Steps" section below provides further guidance on the development of solution options for future debate.

SUBSEQUENT STEPS: SOLUTION OPTIONS

56. The Committee has considered a range of potential solution options for further development to address the issues raised in analysis of the problem being addressed.

57. Some of the potential options were rejected reasonably quickly.

58. For example, one available option would be to make no changes, to simply carry on the operation of the insurance program as a department of the Law Society as it is currently operated. For the reasons identified earlier in this Report, the Committee has concluded that this is not a recommended option. Having identified a number of concerns or risks with the current structure, the Committee is of the view the *some* action needs to be taken to address the issue.

59. The Committee also considered, but dismissed, an effort limited to enhancing the *appearance* of separation of the insurance and regulatory operations, focusing on the points of interface with the public and with lawyers (such as letterhead, website, email addresses, receptionists, etc.). The Committee agreed that changes to these items would not address the underlying issues with substantive solutions. The result could be worse

than the current standard – it could create the appearance of separation that would be deceptive of the actual relationship. One Committee member summed up the matter as "simply masking a relationship that the public ought to otherwise know exists." The Committee does not believe that the Law Society should engage in any revisions that may be perceived as deceptive.

60. At the other end of the spectrum, the option of leaving the role of insurance provider to the commercial market was deemed unlikely to serve the public interest. In particular, profit-motivated insurance companies would not have the same motivation to continue public interest-informed claims-handling policies. In addition, there would be a substantial risk of increased premiums adding to lawyers' overhead costs and, ultimately, contributing to increased legal expense for members of the public. In effect, a move to private insurance providers would carry a risk of decreasing public access to legal services.

61. In the end the Committee supports the further consideration and development of two options. The two options should be measured by the extent to which they would be a reasonably practical solution in the public interest and by the extent to which they would provide substantive solutions to the various concerns identified by the Committee. As models of the two options are developed, they may display many similarities but they are distinguishable by a difference in corporate structure, as follows:

(a) Solution Option 1: Modify LIF's integration as a Law Society department –

62. This option maintains the Lawyers Insurance Fund "in-house" and involves no significant changes to the corporate structure of the Law Society.

63. The development of Option 1 incorporates the challenge of maintaining the existing corporate structure of the Society while envisioning a list of operational policies, protocols, and other changes that will address the concerns of the Committee for matters of both appearance and underlying substance. Thus, while changes may include more indicia of separation between LIF and the rest of the Law Society (e.g. separate letterhead, web presence, telephone numbers, and potentially even location and address, etc.), the relatively cosmetic changes must be "backed up" with sufficient functional and operational separation to address the substance of the motivating concerns.

64. For example, it is foreseeable that, with very limited and well defined exceptions, there would be no sharing of file information between the regulatory departments and the insurance department. Other than the stipulation that LIF will remain a department of the

Law Society and will not have a separate and independent legal existence, the potential for functional and operational change is not limited in advance and such change may be taken as far as it needs to be taken to address such issues as may be addressed in the context of this approach.

65. The development of Option 1 should ultimately provide the benchers with a proposal of steps the Law Society could take to address the concerns identified by the Committee, an explanation of exactly how those steps would address the associated concerns, and a clear description of the limits of the proposal, in terms of any issues that are not substantively addressed in the context of Option 1.

(b) Solution Option 2: Operate LIF as a separate legal entity, in the form of a relatively independent subsidiary of the Law Society –

66. Rather than operating claims management and insurance services through a private, for-profit corporate model, this option envisages instead the creation of a separate, not-for-profit Law Society subsidiary corporation that would handle claims management with a separate board and reporting structure.

67. This option would more clearly separate the Law Society's regulatory function from its responsibilities regarding insurance. In theory it would more effectively remove actual or perceived conflicts because the insurance program would be operated by a separate subsidiary organization. Decisions would, however, need to be made about the board structure of the subsidiary, as the more common the board is to that of the Law Society itself, the less separate the subsidiary would be perceived to be.

68. This option might allow the maintenance of a sufficient connection in the corporate structures of the insurance program and the Law Society to ensure the Law Society's continued ability to substantially impact and address claims-handling policies at the highest, policy, level in order to ensure continued guidance by the public interest in the execution of LIF's corporate responsibilities. On the other hand, the Committee envisions this option as promising a sufficient, legal, separation between the insurance program and the Law society itself, such that there would be no basis for imputing any knowledge of LIF's file information to the Law Society and such that the Law Society may focus on regulatory matters without concern for a duty of utmost good faith to an insured party.

RECOMMENDATIONS

69. As the development of the two proposals the Committee envisions remains a significant task, the Committee now makes the following ***recommendations***:

    1. That the Benchers first determine whether they agree with the Committee's conclusion that the tension and propensity for conflict between the Law Society's co-existing responsibilities as regulator and insurer of lawyers warrants corrective action; and

    2. If the Benchers share the Committee's concerns, that a working group, consisting of Benchers and Law Society staff, be created to undertake, in the light of this Report, a detailed examination and analysis of the two options to form the basis for future debate by the Benchers.

70. By following this recommended course, the Committee believes that the Law Society's ability to manage its co-existing responsibilities can be substantially improved, while preserving existing public interest benefits that result from the Law Society's fulfillment of both its regulatory and insurance functions.