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PRO BONO DUTY COUNSEL AT DISCIPLINE HEARINGS

A. BACKGROUND

3. In January 1997, the previous Committee was instructed by Convocation to study the feasibility of a *pro bono* duty counsel program at discipline hearings. Currently, the Law Society provides duty counsel only at Discipline Convocation.
4. The previous Committee reviewed a staff discussion paper on the issues and canvassed other legal organizations¹ for input on the need for such a program, design issues and how or by whom the program should be run.
5. The Advocates' Society, in meeting with the previous Committee's representatives in June 1997, indicated that it was prepared to administer a duty counsel program.

B. THE ADVOCATES' SOCIETY'S PROPOSAL

6. Discussions within the Advocates' Society, including consultations at the Board level, took place in the fall of 1997, and included consideration of proposed features for the program.
7. Ms. Sachs, president of the Advocates Society, reported to the current Committee on the status of the Board's discussions, and her report appears at Appendix 1.
8. While the report should be read for details of the proposal, in brief, the Advocates' Society is prepared to administer the program.
9. The first phase of the program, to be implemented as soon as possible, would consist of provision of *pro bono* duty counsel on Law Society discipline hearing days to assist lawyers appearing before discipline panels who are unrepresented. No means test would be required before this assistance is available. This is essentially what occurs at Discipline Convocation with *pro bono* duty counsel.
10. The Advocates' Society would compile a roster of lawyers from its membership, with certain minimum qualifications required.
11. Training for the program, it is proposed, would be provided by senior members of the bar and facilitated through the Law Society. The proposal would see the training program held in February 1998 which would allow the first stage of the program to begin in March 1998.

¹The Canadian Bar Association, The Advocates' Society, County and District Law Presidents Association, Metropolitan Toronto Law Association and Criminal Lawyers Association.

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12. A second phase would consist of the provision of pro bono services, beyond those performed by duty counsel, for example in contested hearings where lawyers are unrepresented. A means test would be required, and the question in this respect is whether the Law Society would be prepared to fund the means test.²

C. POLICY DISCUSSION

13. The following provisions of the Role Statement are relevant to a discussion on this issue:
- 1.3 ...We can ask in respect of every program and activity of the Law Society (actual or proposed): "Does it qualify as governance of the profession?" or "Is it an essential function of governing the profession?"
- 3.1 It is sometimes assumed that the public interest must necessarily be opposed to the interest of the profession and that, in fulfilment of its duty to govern in the public interest, the Law Society can give no consideration to the interest of the profession. This is not so. Ideally, what is in the public interest will also be in the interest of the profession. It is only when the two interests conflict that the Law Society must subordinate the interest of the profession to that of the public.
- 8.3 Every activity and program of the Law Society must...contribute to the advancement of justice and the rule of law. If it fails to serve that purpose it cannot be a legitimate activity of the Law Society.
- 8.4 The fact that a particular activity can be said to advance the cause of justice and the rule of law, however, is not sufficient to qualify it as an appropriate activity of the Law Society. Many other organizations and individuals share responsibility of advancing the cause of justice and the rule of law in Canada. For example, every individual lawyer has that duty. Other bodies with responsibility for justice and the rule of law include the judiciary, the courts and government at all its levels.
14. The broad policy objectives in considering a duty counsel program at the hearing level are:
- to provide a measure of consistency with Convocation in providing assistance to members involved in the discipline process, and
 - to increase the efficiency and timeliness of the hearing process.
15. It is against these objectives that the practical questions about a program design and delivery and the Law Society's role therein, should be considered by Convocation.

²The financial impact on the Society's annual budget would be a factor to be considered in this respect.

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16. A key question is whether it would be seen as a conflict or be an actual conflict for the Law Society's regulatory arm to administer a duty counsel program for lawyers appearing before its disciplinary tribunals. The broad issue is whether the necessary objectivity and independence of the regulatory scheme, from the lawyer's and the public's perspective, would exist if the regulator were involved in providing the means through which duty counsel could be obtained for a hearing.
17. The Committee considered this issue and determined that to maintain the requisite independence in all enforcement processes, the program should be delivered by another group or organization.
18. The Committee's view is that the proposal for the first phase of the program is a workable scheme to assist lawyers and the hearing process, while ensuring that no conflict or appearance of conflict exists on the part of the Law Society.
19. The Committee also agreed that the effectiveness of the first phase of the program should be assessed before expansion to include other *pro bono* services could be considered.
20. In reviewing the proposal set out in Ms. Sachs' report, Convocation may wish to consider the purpose of and the goal to be achieved through a duty counsel program. To that end, the primary question may be whether such a program will assist the regulatory process and to whom, primarily, that assistance is provided: lawyers, the Society, the public, or a combination thereof.

Options and Alternatives for Decision by Convocation

21. Convocation should decide whether, with respect to the first phase of the program:
 - a. As a feature to be introduced into the Law Society's hearing process, the first phase of the proposed program to be administered by the Advocates' Society should be implemented;
 - b. Whether the design from the Law Society's perspective is workable;
 - c. Whether other features should be added to the design or its implementation.

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It was moved by Mr. Topp, seconded by Ms. Sealy that the words "language of their choice" be added to subparagraph 4. under the heading Generally, of the Proposed Draft Protocol so that it would then read:

"The Society should make every effort to communicate with a Complainant, if the Complainant so requests, in French or the language of their choice."

Carried

It was moved by Mr. Wilson, seconded by Mr. Crowe that the Society must respond in French if requested.

Carried

The Draft Protocol proposal as amended was adopted unanimously.

Item: Pro Bono Duty Counsel

Ms. Sachs presented the item in the Report dealing with pro bono Duty Counsel.

It was moved by Ms. Sachs, seconded by Ms. Cronk that the Advocates' Society's proposal to administer a program in providing pro bono duty counsel on Law Society discipline hearing days to assist unrepresented solicitors be adopted.

Carried

The items regarding the prescription of a new form, the Private Practitioner's Report and the Proposed Policy on Provision of Complaints Review Throughout Ontario were deferred.

Convocation took a brief recess at 10:15 a.m. and resumed at 10:30 a.m.

Report of the Finance and Audit Committee (1998 Budget)

Mr. Krishna presented for Convocation's approval the 1998 Budget for the Law Society of Upper Canada.

Finance and Audit Committee
November 13, 1997

Report to Convocation

Purpose of Report: Decision Making

Appendix to Professional Regulation Committee rep
Convocation files, 28 Nov. 1997.

APPENDIX 1

**ADVOCATES' SOCIETY REPORT ON
PRO BONO COUNSEL FOR DISCIPLINE HEARINGS**

PRO BONO DISCIPLINE COUNSEL

In 1992, the Law Society decided to implement a duty counsel program for lawyers appearing at Discipline Convocation. Since then, well-qualified and reputable lawyers have donated their time and expertise. Their presence has proved to be of significant assistance to Convocation's discipline counsel and individual unrepresented lawyers.

In 1996, of the 382 discipline complaints and applications disposed of, 185 were at the Committee (as opposed to Convocation) level.

Senior discipline counsel at the Law Society estimate that about one-third of the lawyers appearing before discipline panels are unrepresented. For them there is no duty counsel service available.

Last year informal discussions began between representatives of the Advocates' Society and representatives of the Law Society about whether or not the Advocates' Society could administer any kind of pro bono discipline counsel program for the Law Society. For the Law Society as the regulatory\prosecutorial arm to administer such a program might raise real conflict of interest\independence questions.

The Advocates' Society is prepared to propose to the Law Society that it administer a program to provide duty counsel services on Committee hearing days. No means test would be administered to obtain access to duty counsel services. These services would

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include speaking to adjournments; helping to finalize Agreed Statements of Fact; acting on consent findings of professional misconduct (or conduct unbecoming) and speaking to penalty. Duty Counsel would be precluded from accepting a long term retainer from any solicitor whom they acted for as Duty Counsel.

If approved by Convocation, the Advocates' Society would put together a roster of counsel with a satisfactory number of years of experience who would be prepared to volunteer their time to perform such services. As part of the commitment, all counsel on the roster would agree to take a training program. Training for the program is to be provided by the Law Society. The hope would be (barring a postal strike) to solicit names for the roster in December and January with a view to having all approved applicants participate in a training program some time in February so that services could be made available as of March 1998.

The Advocates' Society is also prepared to collect and maintain a roster of qualified and trained counsel who would be prepared to perform pro bono services beyond those performed by Duty Counsel. However, the Advocates' Society also decided that before access could be obtained to such a roster, an appropriate means test would have to be administered by somebody other than the counsel being approached to render these services. Inquiries from Legal Aid revealed that their means testing usually takes up to 6 hours per applicant, over several days. The means test is administered by assessment officers who, on average, earn a salary of \$35,000.00, which translates to an hourly rate

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of approximately \$20 to \$25. At these rates, a typical assessment would cost a minimum of \$150.00 to administer, not taking into account a supervisor's time, or the cost of a training program for assessment officers. The Advocates' Society does not have the financial resources necessary to develop and administer such a means test. If the Law Society were prepared to provide the funding for this aspect of the program, the Advocates' Society would be prepared to do the rest.

It was the consensus of the Professional Regulation Committee that we should start with the Pro Bono Duty Counsel Program for Committee hearing days only, assess its effectiveness and then look at expanding it to include other pro bono services.