The Law Society of British Columbia

Benchers' Bulletin

A publication of the Law Society of British Columbia
2005: No. 2 April-May

Inside

President's View

Lawyer independence in the balance

by Ralston S. Alexander, QC

There has been much talk in recent months among lawyers about the independence of the Bar — a topic that should be of interest to all lawyers in BC. A number of events have combined to raise the profile of this important issue both at home and abroad:

- **In Canada** … Four years ago, the federal government decided, without consultation, to conscript the legal profession in Canada into espionage under new anti-money laundering and terrorist financing legislation. This was to fulfil its quest for information on the financial transactions of all our clients. As lawyers, we were expected to undertake this task without our clients' consent and, perhaps worse, without their knowledge. Across the country, law societies said "no." Starting in BC, we obtained interim injunctions from the courts to exempt lawyers from this legislation on the basis it amounted to an unconstitutional violation of solicitor-client privilege. Although the first battle was won, it is too early to declare victory, as I note further on.

- **In the UK** … In December, 2004, Sir David Clementi (a CA and MBA - Harvard, career banker and later Deputy Governor of the Bank of England) reported out on the results of his two-year consultation and study into the regulation of law-related service providers in Great Britain. His report paints a troubled landscape in the UK. He flagged numerous bodies regulating the legal profession, conflicting responsibilities, lack of coordination and cooperation and a demonstrated reluctance to respond to clearly articulated demands from legislators for reform. He has recommended splitting the representative (lawyer advocacy) functions from the regulatory functions in the profession and creating a new Legal Services Board, which would become responsible for overseeing regulation and would be accountable to government.

- **In other Commonwealth jurisdictions** … Following public controversies over law society complaints handling, the governments of two other Commonwealth jurisdictions (Queensland and New South Wales) decided that the self-governing privileges of the profession had been abused and should be revoked. They have effectively removed the complaints and discipline responsibilities from the law societies and transferred them to other bodies.

The question needs to be asked. How far can government intrude into the profession before independence is lost?

All these circumstances have alerted the Benchers to the dangers of complacency in the discharge of our regulatory obligations. Never before has the legal profession been under such intense public and government scrutiny. Although we may not be facing the same criticisms as in other countries, we need to maintain a high standard of regulation and be vigilant about protecting an independent bar in this country. The consequences of failing to do so are serious.

Canadians today have privacy and security over their legal matters and they trust that lawyers will keep their

Benchers' Bulletin

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers and articled students on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities.

The views of the profession on improvements to the *Bulletin* are always welcome – please contact the editor.

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confidences. They also trust their lawyers to represent them fully, without improper influences or pressures coming to bear, even if they may be up against a branch of government. But without lawyers who are independent of the state, such confidence would no longer be justified. And without an independent law society, there are no independent lawyers. So the question needs to be asked. How far can government intrude into the profession before that independence is lost?

Our Benchers recently promoted a subcommittee on independence of the bar, under the able leadership of Bencher Gordon Turriff, QC, to full committee status. Mr. Turriff has gathered a group of intelligent and articulate members from our legal community to study the changing world of lawyer independence. I know they will bring new insights and leadership to the table on this issue.

I am proud that it was our law society that spearheaded the 2001 constitutional challenge to the money laundering legislation. This battle has been carried on by BC on behalf of all Canadian lawyers in consultation with the Federation of Law Societies of Canada. Our court action was an appropriate response to the federal government's suggestion that we become spies against our own clients.

The public interest, the primary motivation of everything that we do as a law society, must suggest that the reporting provisions of the money laundering and terrorist financing legislation is unacceptably intrusive when it comes to solicitor-client privilege and confidentiality. Yet the government has not abandoned its approach to the legislation, insisting that the evils of illegal international currency movement justify the intrusion.

There are, in fact, other ways to tackle the threat of money laundering. In 2004, the Benchers passed a rule that has become a model for most of the law societies in Canada. Known as the "no-cash rule," it prohibits members of the law society from receiving for any purpose, other than retainers or bail, cash in excess of $10,000. This restriction can be monitored by the Law Society directly through its regulatory control of lawyers. In this way, we are demonstrating to the federal government and the public that the legal profession in Canada will not be an inadvertent participant in the money laundering game. [For more on this rule, see page 5.]

The federal government is now asking that we reduce the "cap" on cash receipts from $10,000 to $7,500 (a matter for consideration by the Benchers sometime soon). So far, the government has not yet acknowledged that our no-cash rule will alleviate the need for the very intrusive reporting requirements of the money laundering legislation.

It will be up to the legal profession to remain vigilant about independence issues and to find responsible solutions to problems without discarding solicitor-client privilege or other fundamental underpinnings of our justice system.

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The Federation of Law Societies is continuing discussions with the federal government to resolve these issues and come to a long-term solution. We recently agreed that the trial on money laundering, which had been scheduled to begin this fall, will be adjourned to a later date so that the law societies and the federal government can explore settlement options.

To ensure that Canadian lawyers do not become the next target for a Clementi-like report, I think all law societies must carefully avoid any deficiencies in their regulatory processes that could draw criticism or interference. Thankfully, there are important differences between the profession in Canada and abroad. In BC, for example, we recognized years ago that the mandate of the Law Society in regulating the profession was very different from that of the CBA in representing and advocating for lawyers — and we support that separation of roles.

A major concern addressed by Sir David is that the profession in Great Britain was responsible for long delays and private processes in responding to misconduct complaints. By contrast, we in Canada, and BC in particular, have become much more transparent and aggressive in our response to complaints of misconduct. Response times overall are appropriate, discipline hearings are open and full hearing reports are published promptly on our website.

This need for vigilance is not an obligation that is limited to the elected leaders of the profession. In the work that lawyers do, we must continue to provide competent, timely and cost-effective service to our clients. We must do our work in a manner that in all things is consistent with the fundamental public need for independent lawyers.

By maintaining our vigilance and perspective on the overarching importance of the independence of lawyers, we will protect that independence into the future. This is a task of immense significance, and we must, as members of this profession, do everything we can to ensure that it is accomplished.✧

Tim McGee appointed CEO of Law Society

Tim McGee has been appointed Chief Executive Officer and Executive Director of the Society effective June 1, 2005.

Mr. McGee was called to the Ontario Bar in 1987 and began his legal career with the Toronto law firm now known as Torys LLP. Most recently, he was President of Bell ExpressVu, Canada's largest provider of digital television. Prior to joining Bell ExpressVu, he was Chief Legal Officer of Bell Canada and was Vice-President, General Counsel and Corporate Secretary of AT&T Canada Inc.

Born and raised in Victoria, Mr. McGee was educated at Harvard University and the University of Ottawa Law School. He served two years as Executive Assistant to BC's Attorney General and has competed internationally for Harvard University in rowing. Mr. McGee is a member of the Canadian Bar Association and the Bishop's College School Foundation Board.

"Mr. McGee's experience as a lawyer, as a business executive in a regulated industry and with corporate governance make him ideally suited to managing the Law Society's regulatory and public interest roles," Society President Ralston Alexander, QC said. "I would like to thank the selection committee, chaired by Law Society Past-President William Everett QC, for recommending Mr. McGee for this important position."

"I want to bring strong leadership, solid regulation and a strategic vision to the Law Society and the legal profession," Mr. McGee stated. "I look forward to discharging this important mandate and to ensuring that the public is well served by a legal profession that is honourable, competent and independent."✧

Rules require lawyers to guard against fraud

The Benchers have amended Chapter 4, Rule 6 of the *Professional Conduct Handbook* to reinforce a lawyer's duty to be on guard against becoming the tool or dupe of an unscrupulous client.

In recent years, the Law Society has learned of dishonest investment promoters who have asked to deposit funds in lawyers' trust accounts. The funds typically come from investors who have been promised spectacular profits. Perpetrators of these scams use a lawyer's trust account and insurance coverage to add credibility to a fraudulent enterprise.

Although lawyers have always been under an ethical obligation to refrain from dishonest or fraudulent activities, the amendments to Chapter 4 of the *Handbook* expressly highlight a lawyer's duty to refrain from any activity the lawyer "knows or ought to know" assists a fraudulent enterprise. In addition, a new footnote to Rule 6 explicitly warns a lawyer to be wary of clients who promise third parties unrealistic returns on investments placed in trust with the lawyer. The Law Society also urges lawyers to be wary of unfamiliar clients or investors who ask them to make representations about protection for potential claimants under the lawyer's insurance coverage.

Amended provisions of Professional Conduct Handbook:

Dishonesty, crime or fraud

6. A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.[3]

Footnote:

3. A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should be wary of a client who:

(a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matters, or

(b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.✧

Learn more about fraud targeting Canadian lawyers in real estate practice in this issue's Practice Tips on page 15. For an overall survey of common schemes and scams, see "When scamsters target lawyers" in the May-June, 2003 *Benchers' Bulletin*.

Reminder of anti-money-laundering rules

Lawyers restricted from accepting $10,000 or more in cash

Under Law Society Rule 3-51.1, which took effect May 7, 2004, BC lawyers are prohibited from accepting $10,000 or more in cash, other than:

- from a law enforcement agency;
- pursuant to a court order;
- in the lawyer's capacity as executor of a will or administrator of an estate; or
- as professional fees, disbursements, expenses or bail.

Lawyers are reminded that the rule defines a cash transaction as the receipt of $10,000 or more in cash in a single transaction or the receipt of two or more cash amounts in a 24-hour period that total $10,000 or more. Clients who wish to deposit $10,000 or more with a lawyer must convert the cash into negotiable instruments through a financial institution before depositing the money with a lawyer.

This limitation on cash transactions is the first of its kind in Canada. Following the lead of BC, however, law societies in Alberta, Saskatchewan, Ontario, Newfoundland and Labrador and the Northwest Territories have since passed similar rules, helping to ensure that Canadian lawyers are at the forefront of the fight against money laundering. The remaining law societies, along with Quebec's Chambre des Notaires, are expected to pass their own anti-money-laundering rules soon.

While the rules (and proposed rules) differ from province to province in certain details, they all prohibit lawyers from accepting cash over a prescribed amount from clients, except in certain permitted circumstances.

Rule 3-51.1 is part of the legal profession's response to the fight against money laundering in Canada.

While the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* require professionals who accept $10,000 or more in cash to report the transaction to the Financial Transactions and Reports Analysis Centre (FINTRAC), lawyers are currently exempt from *PC(ML)TFA* reporting requirements.

In 2001 BC and the Federation of Law Societies argued that *PC(ML)TFA* violated the constitution because it required lawyers to report privileged client matters to the government, contrary to the concept of an independent legal profession, and the BC Supreme Court ordered that lawyers be exempt from the reporting requirements of this legislation until the constitutional issue could be heard. The BC Court of Appeal upheld the decision, and the superior courts in several other provinces granted similar injunctions.

The federal government later agreed to be bound by the exemption in all Canadian jurisdictions until the court case is concluded.

The Law Society of BC, along with the other Canadian law societies, take the commitment to combat money laundering seriously. For that reason, the Society urges lawyers to familiarize themselves with Rule 3–51.1 and ensure they are in compliance. While very few lawyers would knowingly launder money on behalf of criminal or terrorist organizations, all lawyers should guard against money laundering or against serving as a dupe to facilitate fraudulent schemes.✧

Rule amendment

Discipline panels can hold penalty hearing after oral verdict

Law Society Rule 4-35 has been amended to allow a discipline hearing panel, if it has given oral reasons on its findings of fact and verdict, to proceed to the penalty stage of the hearing without first having to prepare written reasons.

Rule 4-35 previously required a panel to make a written report on facts and verdict under Rule 4-34(2) before it could consider penalty, even if it had already given an oral decision. This provision caused unnecessary delays in some hearings.

The text of Rule 4-35, as revised, is included in the *Member's Manual* amendment package in this mailing and available in the Publications & Forms section of the Law Society website at www.lawsociety.bc.ca.✧

Supreme Court offers help for unrepresented litigants

April 18 saw the debut of the Supreme Court's new self-help centre at the Vancouver Law Courts. The first of its kind in BC, the centre offers resources to the growing number of litigants now going it alone in civil cases.

Tucked into the Provincial Court side of the law courts complex, the centre is easily accessible from the Smithe Street entrance on the north side. Visitors can expect a welcome from one of the centre coordinators, Richard Rondeau and Laurel Holonko, and will find a comfortable spot to sit and read brochures, booklets and manuals, fill out court documents, research online or watch a video to learn more about the court system and procedures.

The centre is set to offer services over the next year as a pilot project supported by the BC Court of Appeal, BC Supreme Court, the provincial and federal governments and a broad range of organizations in the legal community — the BC Courthouse Library Society, the Canadian Forum on Civil Justice, Community Legal Assistance Society, Legal Services Society, Law Courts Education Society, People's Law School and Pro Bono Law of BC.

The Law Society, through the Access to Justice Committee, is following the project closely.

The problems of self-representation

As more people choose to handle their own cases, or feel financially compelled to do so, the centre may be an idea whose time has come.

Colin Richardson, Area Manager for the Vancouver Law Courts, and John Simpson, Manager of Community Services for the Legal Services Society are keen supporters, as well as co-chairs of the Centre Services Committee that has facilitated collaboration across the justice system.

Not surprisingly, they see the biggest problem faced by lay litigants who are on their own in court is that they are simply not trained for the task.

"A number of concerns exist about the unrepresented litigant's ability to access justice in an environment that assumes an organized process among professional lawyers," Colin Richardson says. "The key is whether the unrepresented litigant will be able to access justice. Reading, understanding and arguing the law, and knowing how to behave in court and follow Supreme Court procedures, can be enormously difficult for those who are

Laurel Holonko, Colin Richardson (front) and John Simpson celebrate the launch of the new self-help centre at the Vancouver Law Courts, which opened its doors April 18.

unrepresented."

Richardson and Simpson point to a common perception that unrepresented litigants may use more court time and resources because they may not be adequately prepared or know which documents are required, or they may not fill out the documents correctly. They may also fail to understand the roles of the various people in the courtroom or how to conduct themselves.

These problems can affect judges, counsel on the other side and counsel and parties in other cases. Thorny questions arise: *Will the court's neutrality be called into question if the judge prompts the unrepresented litigant to ask a question that he or she has failed to ask? To what extent is it appropriate for counsel on the other side to assist the unrepresented litigant?*

What the self-help centre can offer

The self-help centre is one step in helping unrepresented litigants in civil actions, by offering them basic legal information, education and referral services.

The overarching goal is to increase access to justice for unrepresented people and efficiencies for the justice system — fewer delays, lower costs and fewer challenges for the court and for other litigants who are represented by lawyers.

As centre coordinators, Richard Rondeau and Laurel Holonko are available to provide information and assistance, though not legal advice, on civil and family matters. They can help direct people to appropriate resources, at the centre or via other referral agencies. Within the centre itself, visitors will find print, video and online resources that help them:

- learn about the court system and court procedures,
- access legal information (print materials, videos, legal information websites),
- locate and fill out the relevant court forms for family or civil cases,
- explore free legal advice services, and
- consider alternatives to court.

Among the many public legal education materials are a series of guidebooks on *Representing Yourself in Court*, recently published by the Law Courts Education Society. (For online copies, see www.lawcourtsed.ca.)

Litigants who need to do research on substantive law will be referred to the courthouse library for assistance.

Hours of service

The centre is open for drop-in, Monday to Friday, from 9:00 am to 12:00 pm and from 1:30 to 4:00 pm. For litigants outside the Lower Mainland who cannot visit in person, the centre's website is a starting point for online research: see www.supremecourtselfhelp.bc.ca. The centre is not able to accept telephone or email enquiries.

What the future holds

The self-help centre is a pilot project that will be evaluated at the end of its first year of operation, Colin Richardson says, and decisions will be made at that time on future steps — such as whether to continue the service or whether centres might open in other locations. "Civil (non-family) duty counsel is not being considered at this time," he adds.

Funding for the self-help centre is from the Law Foundation, Vancouver Foundation, Ministry of Attorney General and the Department of Justice.✧

Practice experience requirements eased for principals

The Benchers have agreed with a Credentials Committee recommendation to allow for greater flexibility in the practice experience requirements of lawyers who wish to serve as principals to articled students. As amended, Law Society Rule 2-30 now requires a principal:

- to have been in active (either full-time or part-time) practice for seven of the 10 years preceding the articling start date; *and*
- to have been in *full-time* active practice for three of the five years immediately preceding the articling start date.

Close to a year ago, a change in Law Society Rule 2-30 increased the practice experience requirements of principals. Instead of five years full-time practice immediately preceding the articling start date, a principal needed to have seven years' practice experience. This higher threshold came at the recommendation of the Admissions Program Task Force.

Since then, the Credentials Committee has seen an increase in the number of applications brought forward by prospective principals to be exempted from Rule 2-30 — in most cases because these lawyers cannot meet the requirement of seven years of continuous full-time practice. The Committee advocated changing the rule, thereby accommodating some of the applicants and limiting exemptions to exceptional circumstances.

For the text of Rule 2-30, as amended, see the enclosed *Member's Manual* amendment package or visit the Law Society website at www.lawsociety.bc.ca .✧

Task Force recommends expanded role for law firm paralegals

BC lawyers should be allowed to delegate more work to their paralegals, including some solicitor's services, limited advocacy in Provincial Court and advocacy before some administrative tribunals, according to an interim report of the Paralegal Task Force presented to the Benchers in April.

The Task Force recommends reworking Chapter 12 of the *Professional Conduct Handbook* to lift some of the prohibitions on delegation to paralegals and to articulate new principles to guide lawyers (see *Draft principles of delegation to paralegals*). In developing these principles, the Task Force sought to balance the risks of delegation against the benefit to the public of more affordable legal services in some circumstances.

"The key to making sure that the public is protected is to require the lawyer to oversee any work delegated and to only delegate work to employees whose training, education and experience is appropriate to the work being delegated," the Task Force told the Benchers.

It would be for each supervising lawyer to oversee the services provided by a paralegal and to identify and address any issues requiring the lawyer's professional judgement. "Because lawyers are responsible for all work entrusted to them, the services (of the paralegal) are regulated and insured," the Task Force advised the Benchers. "The clients have recourse in the event that services are not properly delivered."

The Benchers have not yet debated the Task Force's recommendations, other than to take a straw vote against allowing paralegals to give or receive undertakings. A final report is expected back before the Benchers for consideration later this year or early next year, after the Task Force has consulted further with the Provincial Court on the possibility of permitting law firm paralegals in Small Claims Court.

The Task Force last reported to the Benchers in December, 2003. At that time, the Benchers considered but rejected the option of a paralegal certification program. The Task Force subsequently focused on two issues — whether the Law Society should expand the range of services that lawyers can delegate to their non-lawyer staff and whether the Society should define the qualifications of such staff.

Life Bencher Brian J. Wallace, QC, chair of the Task Force, together with Paralegal Task Force members President Ralston S. Alexander, QC, Life Bencher William J. Sullivan, QC and former Lay Bencher Jaynie W. Clark, have spent the past year on those questions.

As a starting point in its work, the Task Force defined a paralegal as "a non-lawyer employee who is competent to carry out legal work that, in the absence of a paralegal, would need to be done by the lawyer."

After canvassing the current work of today's paralegals, the Task Force came out in favour of broadening the scope of delegation — to provide the public greater access to legal services.

What new services would be suitable for paralegals? The Task Force proposes to allow paralegals to meet directly with clients to take instructions on some solicitor's services such as uncontested divorces and services provided by notaries public, including simple conveyances and simple wills. In the Task Force's view, "it is appropriate for lawyers' paralegals to provide services in relation to these matters where the issues are not complex and the amounts in question are not large, provided the matters are appropriately supervised by the lawyer."

The Task Force also proposes that law firm paralegals should be permitted to represent clients before administrative tribunals if such representation is permitted by those tribunals and not prohibited by law. "The client is in a better position than if he or she retains a 'consultant'," the Task Force told the Benchers. "[T]he paralegal employed

by a lawyer is supervised and the lawyer employer is regulated and insured and responsible for all work done by his or her employees."

Following consultations with the Chief Judge and Associate Chief Judge, the Task Force has also identified some advocacy functions for paralegals in Provincial Court — (in criminal or quasi-criminal matters) uncontested interlocutory applications or "ticket offences" where there is no risk of imprisonment or significant fines or other serious consequences or (in family matters) on uncontested applications.

Another prospect is for law firm paralegals to represent clients in Small Claims Court. The Task Force notes that businesses are permitted to appear in Small Claims Court through an officer, director or employee. For many Small Claims Court litigants who might otherwise have to

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Draft principles of delegation to paralegals

These draft principles have been extracted from the Interim Report to the Benchers on Delegation and Qualifications of Paralegals of the Paralegal Task Force. The Benchers have not yet debated the report or its recommendations, other than by taking a straw vote respecting Principle 4(c), as noted below.

It is in the interests of the profession and the public in the efficient delivery of legal services that lawyers be permitted and encouraged to delegate legal tasks to their paralegals.

By delegating work to paralegals, lawyers can ensure the legal services they provide are delivered cost-effectively to clients. A "paralegal" in this context is a non-lawyer employee who is competent to carry out legal work that, in the absence of a paralegal, would need to be done by a lawyer. A lawyer must be satisfied that the paralegal is competent by determining that one or more of the paralegal's training, work experience or education is sufficient for the paralegal to carry out the work delegated.

A lawyer who delegates work to paralegals should do so in accordance with the following principles:

1. A lawyer is responsible for all work delegated.
2. A lawyer must be satisfied that a paralegal is qualified to competently carry out the work delegated to the paralegal by one or more of education, training and work experience.
3. A lawyer must appropriately supervise and review the work of a paralegal taking into consideration that person's qualifications and skills and the tasks that the lawyer delegates.
4. The lawyer may, with the consent of the client, allow a paralegal to perform certain advocacy work on behalf of that client. Because a lawyer cannot directly supervise a paralegal's advocacy work, the delegation of such work is permitted only as follows:

   (a) A paralegal may represent a client in Provincial Court:

   (i) in the Small Claims Division;

   (ii) in criminal or quasi-criminal matters:

   a. on uncontested interlocutory applications;

   b. on those hearings that the Chief Judge of the Provincial Court assigns to Judicial Justices of the Peace[1];

   (iii) in the Family Division, only on uncontested matters;

   (b) A paralegal may represent a client on matters before administrative tribunals if permitted by the tribunal and not prohibited by legislation;

   (c) A paralegal may give or receive an undertaking in a hearing described in (a) or (b) if the circumstances require it and only then. When a paralegal gives an undertaking, it is given or received on behalf of the lawyer.*

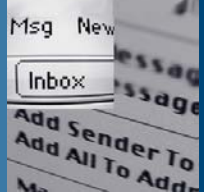
   [Note:** A straw vote conducted at the April 8, 2005 Benchers meeting indicated that the Benchers were not in favour of allowing non-lawyers to give undertakings. The Task Force has agreed to take that feedback into account when making its final report.]*
5. A paralegal must be identified as such in correspondence and documents that he or she signs, and in any appearance before a Court or tribunal on behalf of a client.

[1] Pursuant to Chief Judge Baird Ellan's Assignment of Duties September 1, 2004 the following types of hearings are assigned to Judicial Justices of the Peace:

"(a) Hearings in respect of all provincial offences in which proceedings are commenced by ticket information;

(b) Hearings in respect of all traffic-related municipal bylaw offences;

(c) Hearings in respect of any traffic-related offence under the *Government Property Traffic Regulations* and *Airport Traffic Regulations* made pursuant to the *Government Property Traffic Act of Canada* (adult only)."



Paralegals *… from page 9*

represent themselves, paralegals could offer another alternative — legal representation or assistance that is affordable and backed by training and regulation. The Provincial Court judiciary is reviewing this option in its own study, and the Task Force plans further consultations with the Court later in the year. Any change to allow law firm paralegals in Small Claims Court would require a legislative amendment.

Future changes to the scope of work open to law firm paralegals would also require Bencher approval of *Professional Conduct Handbook* changes. Since direct supervision of a paralegal by a lawyer would be inconsistent with some broader paralegal functions, the Task Force recommends that lawyers instead have responsibility for "appropriate supervision and review." The *Handbook* would likewise need to accommodate a paralegal having a direct relationship with a client, acting finally without reference to the lawyer in some situations and giving clients legal advice.

In completing its work for the Benchers, the Task Force also considered whether to recommend specific qualifications for paralegals who engage in expanded practice. In the end, a lawyer must be satisfied that a paralegal is competent by determining that one or more of the paralegal's training, work experience or education is sufficient for the paralegal to carry out delegated work. The Task Force recommends allowing each supervising lawyer to evaluate a paralegal's abilities to perform the tasks delegated and that the Law Society not specify qualifications for such paralegals or approve particular paralegal programs.

The Benchers will be asked to consider the scope of practice for lawyers' paralegals as recommended by the Task Force when this issue comes back to their table later this year or early 2006.

The *Interim Report to the Benchers on Delegation and Qualifications of Paralegals* is available in the Reports section of the Law Society website at www.lawsociety.bc.ca.✧

Compensation claims will be decided first under trust protection coverage

Since May 1, 2004, the Law Society's compulsory liability insurance policy has provided coverage, not only for lawyer negligence (Part A), but for claims arising from the theft of money or property by a BC lawyer relating to his or her practice of law (Part B or "trust protection" coverage). Claims made on or after May 1, 2004 fall under Part B of the policy and are handled by the Lawyers Insurance Fund.

The Special Compensation Fund has remained responsible for determination of all claims prior to May 1, 2004 (including those relating to former lawyer Martin Wirick). Moreover, the Fund will continue to exist under the *Legal Profession Act*. With the co-existence of trust protection coverage and Special Compensation Fund coverage, there is potential for confusion in the eyes of the public on how to apply for compensation.

To provide greater certainty, the Benchers have confirmed that claims for compensation arising from lawyer defalcation must be decided first under Part B trust protection coverage, and that the Special Compensation Fund should be a fund of last resort. Most, if not all, claims for compensation arising from lawyer misappropriation are expected to be resolved entirely under Part B.

A new Rule 3-33 implements this policy as follows:

> **Limit on payments from the Fund**
>
> **3-33** Despite Rules 3-31 and 3-32, the Special Compensation Fund Committee, or the subcommittee with the consent of the Committee, must not authorize a payment from the Special Compensation Fund in respect of a claim made on or after May 1, 2004 unless the claimant has made a claim under Part B of the policy of professional liability insurance and the claim has been denied in whole or in part.

The Special Compensation Fund Committee, which had raised these process issues for Bencher consideration, also looked at whether a cap or limit on Fund payments was advisable. In raising this issue with the Benchers in April, the Committee recommended against placing an annual global cap or "per-claim" cap on Special Compensation Fund payments, on the basis that a judicious use of discretion was the best way to manage Fund payouts. At the Benchers' suggestion, the Committee will study the question of a cap further, as well as guidelines on payments from the Fund.

Rule 3-33 and housekeeping amendments to Rules 3-40 and 3-41 relating to the Special Compensation Fund are reflected in the enclosed *Member's Manual* amendment package.✧

Green paper on civil justice reform

The Benchers are considering making a submission to the Civil Justice Reform Working Group of the BC Justice Review Task Force.

The Civil Justice Reform Working Group — co-chaired by BC Supreme Court Chief Justice Donald Brenner and Deputy Attorney General Allan Seckel, QC — has so far backed an increase in the monetary jurisdiction of the Small Claims Court that takes effect on September 1 and the introduction of an economical litigation process for claims of $100,000 or less in Supreme Court.

Last fall the Working Group also issued a green paper, *The Foundations of Civil Justice Reform*, which identifies cost and delay as problems in BC's civil justice system.

At that time Attorney General Geoff Plant, QC said he was concerned that Supreme Court trials had become so expensive, time-consuming and complex that only large corporations, insurance companies and governments can afford to have their disputes resolved there.

The Working Group now points to court statistics from the past five years showing the number of cases in Supreme Court have dropped by half, but cases proceeding are taking twice as long to resolve.

The Working Group is now calling for fundamental reforms — more than what it calls "innovative off-ramps from the litigation highway."

"Our planning for the future must take into account that, while adversarial values and litigation models dominate our theories about the civil justice system, it is in fact a system where the practicalities are all about dispute resolution," the Working Group states in its green paper.

For background information and a copy of the green paper, see www.bcjusticereview.org. For a closer look at possible reforms, consider attending "Restructuring Justice," a CLE course that includes consultations by the Civil Justice Reform Working Group. It takes place June 9-10 in Vancouver: see details on page 20.✧

Lay Benchers offered per diem

The Benchers have approved a policy, in effect April 1, to offer a per diem payment to lay Benchers for their service to the Law Society, following the recommendation of a special committee charged with studying the issue.

That committee — chaired by G. Leigh Harrison, QC and composed of Life Benchers Warren Wilson, QC, Trudi Brown, QC and William Everett, QC as well as lawyer Martin Taylor, QC — canvassed the practices in other professions and other provinces. The committee canvassed whether BC's lay Benchers should receive some form of remuneration and, if so, how much and who should pay it.

The committee observed that remuneration could help recognize the hard work and valuable contribution of lay Benchers, although this advantage had to be weighed against the possibility that such payment might imply an inequality between lawyer and non-lawyer Benchers. On balance, a majority of the committee favoured remunerating lay Benchers.

A point the committee found persuasive is that lay Benchers in all of the larger jurisdictions outside of BC receive compensation. Moreover, there are some fair reasons to distinguish the position of elected Benchers and lay Benchers with respect to remuneration — since the elected Benchers are lawyers and have a direct interest in good governance of the profession while lay Benchers are representatives of the public and have a more general interest.

In some jurisdictions (notably, Alberta and Ontario), it is the government that pays lay Benchers. In BC, the provincial government's policy is to remunerate appointees to outside bodies only if government appoints a majority of board members. In the view of the Law Society's special committee, there were both principled and practical reasons why the Society should pay the lay Benchers and not call on government to do so.

"Considering the paramount public interest in an independently governed legal profession, and in view of the encroachments on that independence in other jurisdictions, […] the Law Society should not invite anything that could result in real or perceived government influence over Benchers," the committee recommended. "The practical point is that the government does not pay any of its lay appointees to professional governing bodies, and is most unlikely to agree to do so."

The amount of the per diem approved by the lawyer Benchers is $125 per day and $75 per half day (four hours or less) for Benchers meetings and hearings. As noted by the special committee, the amount of the remuneration is not intended to reflect the value of the lay Benchers' time or contributions or to serve as income replacement, but rather "to soften the financial impact of their service and make it possible for a wide range of people to accept appointment."

None of the Law Society's six lay Benchers participated in the decision on remuneration.✧

Women in the Legal Profession Task Force

Equality initiatives elsewhere may hold promise for BC women lawyers

After examining leading equity studies from across Canada and in the United States, the Women in the Legal Profession Task Force is preparing to recommend to the Benchers new policies and programs for advancing the equality of women lawyers in BC.

The Law Society's own studies — of the Women in the Legal Profession (WILP) Subcommittee (1989-1991) and Gender Bias Committee (1990-1992) — were landmarks. The WILP study showed that BC women lawyers were leaving the profession in disproportionate numbers to men and that many women faced discrimination in the practice of law, difficulties accommodating work and career responsibilities and barriers to career advancement.

To address some of the concerns, the Law Society introduced a number of changes:

- A 1992 *Professional Conduct Handbook* rule that identified discrimination, including sex discrimination and sexual harassment, as a form of professional misconduct;
- a 50% reduction in liability insurance for members in part-time practice, beginning in 1993;
- a non-practising membership category with a lower fee, beginning in 1994;
- active encouragement of women lawyers to stand for election as Benchers;
- reimbursement of reasonable child-care expenses incurred by Benchers and lawyers while on unpaid Law Society business;
- encouragement of law firms to adopt workplace policies on maternity and parental leave, alternative work arrangements, gender-neutral language, employment equity and workplace harassment; and
- retaining an independent Discrimination Ombudsperson (now Equity Ombudsperson) to mediate allegations of discrimination in law firms, with the agreement of all parties.

The Law Society initially monitored these initiatives, including the uptake of workplace policies. But now, 15 years later, the question remains whether women have achieved equality and, if not, what more should be done.

According to a recent study out of Alberta the most common type of discrimination against women and other diversity groups was perceived to be discrimination in career advancement.

Last December, the Benchers struck a new Women in the Legal Profession Task Force — composed of Vancouver Benchers Gavin Hume, QC, chair, and Margaret Ostrowski, QC, Life Bencher Warren Wilson, QC, Lay Bencher June Preston and lawyer Wynn Lewis. The Task Force has considered whether to undertake further survey work in BC or instead to review existing studies and to recommend policy and programs that will help BC's women lawyers.

In its interim report to the Benchers in March, the Task Force said that a gender equality problem still exists in the profession.

Although women have for many years made up 50% of law school graduates, they still make up only a third of all lawyers in the profession. On a brighter note, this is a marked increase from 15 years earlier when women represented just one-quarter of the profession.

What still is evident from the statistics is that a proportionally higher percentage of women are in part-time practice or hold non-practising membership (32% of women as compared to 17% of men). 2004 President Bill Everett, QC reflected on these points in his President's View column when he asked, *"Are women lawyers where they want to be in their careers, or are they settling for less?"*

The negative experiences of BC women lawyers on issues of discrimination, harassment, career satisfaction, advancement or remuneration identified some years ago appear to be mirrored in other jurisdictions. For that reason, the Task Force took a closer look at the recent studies out of Alberta, Ontario and some American states and concluded that the experiences in those jurisdictions remained relevant and helpful in formulating possible initiatives in BC.

A 2003 Law Society of Alberta study flagged that 92% of the women and 69% of the men surveyed thought that there was some form of bias or discrimination against women in the profession (33% of the men and 14% of the women thought there was discrimination against men). For details, see *Final Report on Equity and Diversity in Alberta's Legal Profession* at www.lawsocietyalberta.com/files/reports/Equity_and_Diversity.pdf.

According to that study, sexual harassment is an ongoing problem, and the most common type of discrimination against women and

other diversity groups was perceived to be discrimination in career advancement.

"Discrimination was most commonly manifested in the forms of racist and sexist comments, denial of opportunities to work on files, exclusion from opportunities to be involved in workplace activities related to career advancement, exclusion from work-related social or business development activities related to career advancement, and negative career consequences as a result of having children or being a parent," the BC Task Force told Benchers in describing the Alberta study.

The Alberta report concludes that, while incidences and perceptions of discrimination have slightly decreased since 1991, there remain serious hindrances to the advancement of women lawyers. Little progress has been made in the private sector to accommodate parenting by both men and women. The study also found overall dissatisfaction in the culture of the legal profession among active and inactive members.

Turning to Ontario, BC's Task Force reviewed the 2004 report of the Law Society of Upper Canada: *Turning Points and Transitions: Women's Careers in the Legal Profession*. This report is the culmination of a study of the same panel of lawyers over a 12-year period. It is available at www.lsuc.on.ca/equity/pdf/oct2604_turning_points.pdf.

While the study noted some impressive advances in the status and mobility of women lawyers in Ontario since 1990, there were also "sizeable gaps that persist between men and women in remuneration, promotional opportunities and levels of job satisfaction." Moreover, both men and women faced common challenges in law practice, including balance between career and family, lack of workplace flexibility and benefits.

According to that study, women lawyers in Ontario were less likely to be partners or sole practitioners, less likely to own businesses, less likely to attain management or supervise others and more likely to leave the profession than men.

The Task Force in BC has recommended against conducting another full-scale, detailed follow-up study of BC lawyers on equality issues, but plans to draw on the best research from other Canadian jurisdictions and from Washington State, California and New York. At this juncture, the Task Force is evaluating equality initiatives that have already seen success and might serve as a model in BC.

* * *

The Task Force plans a further report and recommendations to the Benchers in the coming months. If you would like more information, or have a view you would like the Task Force to consider, please contact any member of the Task Force or sent your comments care of Kuan Foo, Staff Lawyer, Policy and Legal Services, by email to kfoo@lsbc.org or by mail to the Law Society office.✧

2006 practice fee will go to referendum

The Benchers will hold a referendum this year to set the Law Society's 2006 annual practice fee; and the fee resolution they propose to the profession will not include a CBA fee component.

Although there were different views around the table, many Benchers favour a referendum as allowing a greater number of lawyers to set the fee resolution, compared to the number who attend the Annual General Meeting.

In 2004 BC lawyers rejected mandatory payment of a CBA fee component, and the Benchers will not include this as part of the proposed Law Society practice fee when setting the referendum question. The Benchers are expected to approve a fee resolution on May 6, which will be posted on the Law Society website.

The referendum ballot package will be mailed in early June. The deadline for receipt of ballots is expected to be set for June 21, with the referendum count scheduled for June 22.✧

Fee splitting rule

LLPs can include law corporations and non-lawyer partners from other provinces

Recent Law Society Rule changes now expressly allow limited liability law partnerships in BC to include a law corporation or, in the case of an inter-jurisdictional LLP, a non-lawyer who is permitted to participate in a law partnership in another Canadian jurisdiction.

Law corporations as partners of LLPs

Rule 9-13, which permits a BC lawyer to practise law through an LLP, also now expressly permits law corporations to do so. Since the duties and responsibilities of an individual lawyer are not changed by virtue of being an employee, shareholder, officer, director or contractor to a law corporation, there is no reason to prevent a law corporation from joining an LLP.

The Law Society requires only that the partner making the application on behalf of the LLP confirm that the voting shareholders of a BC law corporation are practising members of the Society.

Non-lawyer partners in national LLPs

A national law firm may become an LLP under the BC *Partnership Act* and then register extraprovincially in any other province (or provinces) in which it carries on business. The firm may alternatively set up the LLP under the legislation of another province and register extraprovincially under the BC *Partnership Act*.

The Law Society Rules contemplate a system for approval of LLPs, including those that do business in more than one province. As first introduced, Rule 9-15(2) provided that the Executive Director may issue a statement of approval for an LLP in which all partners *are members of the Society or are members of a recognized legal profession in another jurisdiction.* In April, the Benchers approved an expansion of the Rule to allow partners of an LLP to include "a non-lawyer participating in another Canadian jurisdiction as permitted in that jurisdiction."

This change reflects the national landscape. Law firms in some provinces now include entities that are not "members" of a recognized legal profession, but are nonetheless entitled to join in partnership with lawyers in those provinces. In Quebec, for example, certain trusts are permitted to form partnerships with lawyers, and in Ontario some non-lawyers whose work complements legal practice (such as patent and trademark agents and engineers working under lawyer supervision) can also be partners in an Ontario law firm.

While the new Rules may result in multi-disciplinary partnerships between lawyers from BC and both lawyers and non-lawyers from another province, Part 9, Rule 6 of the *Professional Conduct Handbook* continues to prohibit fees from being shared by BC lawyers and non-lawyers in the partnership.✧

Would you like to be considered for Law Society appointments?

The Law Society makes appointments to a variety of boards, commissions and agencies and is seeking volunteers interested in serving as appointees.

While a few of these outside bodies require that the Law Society appointee be a Bencher, most do not, which means the Society looks to the profession to find volunteers and build a pool of prospective candidates.

Periodically, the Law Society seeks expressions of interest from the profession so as to expand the pool and to confirm that those who have previously expressed interest remain available for appointment.

Within the next 12 months, the Law Society will consider appointments to the following bodies:

- Vancouver Building Permit Board of Appeal
- Continuing Legal Education Society (board of directors)
- Law Foundation (board of governors)
- BC Medical Services Foundation (board of directors)
- Vancouver International Airport Authority (board of directors).

These appointments offer a lawyer the opportunity to participate more fully in the work of the profession and the community and to demonstrate the commitment of the profession to public service. If you would like to be considered, please send your curriculum vitae and a note about which appointments interest you, by mail or email to:

David Newell
Corporate Secretary
8th Floor, 845 Cambie Street
Vancouver BC V6B 4Z9
Email: dnewell@lsbc.org.✧

Practice Tips, by David J. Bilinsky, Practice Management Advisor

Fighting back against fraud — the risks in real estate

♪ *For the love of money*
People will lie, Lord, they will cheat
For the love of money
People don't care who they hurt or beat … ♪
— Words and music by The O'Jays

Fraud against lawyers and involving lawyers is on the rise across Canada and the United States — and BC lawyers have unfortunately seen their share of the problem.

Fraudsters have exploited the weaknesses in our systems and shown why we must all put into place practice safeguards to limit our exposure. There are many factors that give rise to fraud. This article does not focus on those weaknesses, but on helping a lawyer avoid becoming the next victim or pawn of a fraudster.

As reported in this *Bulletin*, the Benchers have recently amended the *Professional Conduct Handbook* to strengthen Chapter 4, Rule 6:

Dishonesty, crime or fraud

6. A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.[3]

Footnote

3. A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should be wary of a client who:

(a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matters, or

(b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

Without limiting the endless ingenuity of fraudsters, here are examples of the main types of fraud that Canadian lawyers have encountered in real estate.

Use of false identity

In this circumstance, the fraudster impersonates the true owner of the property. The fraudster chooses the property, does a title search to confirm the identity details of the owner and then makes up false identity papers that match the identity of the true owner.

If the property is already mortgaged, the fraudster may forge a discharge to clear title. Then he or she applies to a new financial institution for mortgage financing equal to one-half the property value. The fraudster is counting on the financial institution doing only a basic background check since the mortgage is only 50% of the property value.

On receipt of the new mortgage funds, the fraudster may keep up the payments for a time before disappearing with the balance of the funds. The true owner is then left with the headache of trying to discharge the fraudulent mortgage. The lawyer who prepared and registered the mortgage later finds out that he or she witnessed the signature of a fraudster.

In a variation on the identity fraud, the fraudster presents to a lawyer a false agreement of purchase and sale to obtain title to a property. The fraudster then mortgages the property. Again, after a time, both the fraudster and the

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balance of the mortgage funds disappear. The true owner of the property finds that the property is in foreclosure and that he or she no longer holds title. The lawyer later discovers that he or she unwittingly helped a fraudster in obtaining title to the property.

A similar scenario involves the fraudster targeting property owned by a corporation. False minute books are prepared and the fraudster may impersonate one of the corporate principals. The fraudster applies to a financial institution for financing, and presents the false corporate documents in support of the mortgage application. Soon after receiving the funds, the fraudster disappears.

Another possibility is for the fraudster to impersonate both the purchaser of property and a legitimate lawyer. The fraudster enters into a real purchase and sale contract with a legitimate vendor. Using the false lawyer credentials, the fraudster opens a trust account and mocks up letterhead as if acting for the purchaser. The fraudster-as-lawyer draws up the purchase documents and applies for mortgage financing. When the mortgage funds are received, they are deposited to the false trust account. Then the fraudster and the mortgage funds disappear.

Value fraud

In this situation, back-to-back purchases of the same property are arranged from a legitimate vendor. The first purchase is for the arranged sale price — say $300,000. Then a subsequent (fraudulent) deal (from one fraudster to another) is arranged (i.e., a "flip") for $400,000. Both purchases are set to close on the same day. The fraudster arranges for a high-ratio mortgage on the basis of the second deal. The high-ratio mortgage funds are used to close the real estate deals, since the amount of the mortgage (95% of $400,000 = $380,000) is enough to cover the deals.

The fraudsters are counting on the financial institutions not doing their full due diligence or having an on-site appraisal done of the property to verify the stated property value. Sooner or later, the balance of the mortgage funds and the fraudster disappear, leaving the bank holding a mortgage for far more than the property is worth.

A second value fraud occurs when a legitimate agreement of purchase and sale is entered into between a vendor and the fraudster, say for $350,000. The vendor and the fraudster then sign a one-page amendment that provides a credit of $50,000 against the purchase price (stated to be for repairs). The fraudster does not disclose this credit in obtaining high-ratio financing. The deal closes and the mortgage payments stop shortly thereafter. The fraudster disappears with the balance of the financing leaving the bank with a mortgage greater than the value of the property.

What to look for

There are usually indications that a fraud is in the works. Here are some of the signs to watch for:

Recent property purchase situations

- The client has recently purchased the property on an all-cash basis and is now seeking to place a mortgage against the property.
- The client has a transfer of the property but no other documents relating to the purchase of the property.
- The client does not return to the lawyer who did the purchase to do the mortgage transaction and expresses a desire for the new lawyer not to contact the former one.
- A historical title search reveals recent transfers at increasingly higher amounts, perhaps with the same lawyer on all the transactions.

Agreement of purchase and sale

- The agreement contains no handwritten amendments.
- The client is reluctant to produce identification or is uncomfortable with you making (front and back) photocopies of the identification produced by the client.
- An amendment to the agreement provides for either a reduction in the purchase price or a payment to the vendor following closing.
- The vendor acknowledges payment of a deposit that is not required by the agreement of purchase and sale.
- The deposit is payable directly to the vendor, not to a real estate agent or a lawyer.
- There is no real estate agent involved in the transaction.
- There is an agent listed in the agreement, but the lawyer does not receive any communications from the agent or the agency (such as for payment of a commission).

The transaction(s)

- The client does not have fire insurance on the home.
- The utility companies are unaware of the vendor owning the home.
- The client needs to close the transaction very quickly.
- The client is a new client and promises to refer more transactions to the lawyer.
- The client arranges the mortgage through a broker, and the brokerage fee is unusually high.
- The client is prepared to pay higher legal fees than normal for the lawyer's services.
- The purchase price is much higher than the purchase price of recent transfers of the same property.

- There are large and unusual adjustments in the Statement of Adjustments (e.g. a large credit for renovations or work to be done).
- The statement of adjustments does not reflect the terms of the agreement of purchase and sale and any amendments thereto.
- The title indicates a pattern of mortgages being registered and discharged shortly afterwards.
- All of the funds required to close the transaction come from an institutional lender.
- The name of the client in the identification produced by the client does not match the name of the client in other documents in the transaction.

Mortgage proceeds

- There is a surplus of mortgage proceeds after the closing of the transaction to be paid to the borrower or to a third party.
- The client directs part of the mortgage proceeds to third parties (e.g. off-shore recipients, currency exchange).
- The client instructs the lawyer that it is unnecessary to prepare written directions authorizing the payment of funds to third parties.
- The mortgage is a cash-back mortgage and the cash-back is the full amount of the equity in the property.
- The client directs the lawyer to rebate a portion of the mortgage surplus to the vendor.

Client is a facilitator

- A new client (facilitator) refers a number of real estate files to the lawyer, and the client, although not a party to the transaction, controls the transaction (e.g. gives instructions to the lawyer or arranges for the parties to the transaction to sign documents) and directs the parties in the transaction.
- The client does not have a personal cheque for his or her pre-authorized debit plan but provides a blank "counter cheque."
- The lawyer is instructed to pay the excess mortgage proceeds to the facilitator even though the facilitator does not appear to have an interest in the transaction.

Flip transaction

- The vendor acquires the property the same day that it is being sold for a higher purchase price (flip transaction).
- The lawyer is asked to act for both the purchaser and the vendor in the flip transaction (see *Professional Conduct Handbook*, Appendix 3).
- A bank loans money on the strength of the consideration contained in the flip agreement.
- The client instructs the lawyer not to disclose to the lender that the transaction is a flip or that the lender is lending money on the higher consideration.
- The transfer signed by the original vendor contains a lower consideration and is manually altered prior to closing to match the consideration set out in the agreement of purchase and sale.

Multiple transactions

- A new client begins referring a number of real estate files to the lawyer, and the same parties (purchasers and vendors) are involved over and over in transactions.
- The client indicates that he or she is in the business of renovating homes.
- The same real estate agency appears regularly on the agreements of purchase and sale.
- The mortgages arranged in these transactions are high-ratio mortgages with mortgage insurance.
- The lawyer is instructed to use the excess mortgage proceeds for the purchase of another property.

Corporations

- The original minute book for the company is not available or is incomplete.

Conclusion

Real estate fraud is but one type of fraud that can target lawyers. Upcoming Practice Tips columns will address fraud in other practice areas and fraud being perpetrated via the Internet. One thing is clear: every type of fraud involves someone motivated by the love of money who will seek to cheat by exploiting any weaknesses in our day-to-day systems.

Resources

www.lsuc.on.ca/news/pdf/convmar05_mortgage_fraud.pdf – Law Society of Upper Canada's report to Convocation on mortgage fraud.

www.lsuc.on.ca/services/pdf/july2304_fraud_indicators.pdf – Law Society of Upper Canada's practice tips on real estate transactions.

www.lsuc.on.ca/services/pdf/july2304_fraud_scenarios.pdf – Law Society of Upper Canada's real estate fraud scenarios.

www.lsuc.on.ca/services/real_estate_fraud.jsp – Law Society of Upper Canada's website on fighting real estate fraud.

* * *

I gratefully acknowledge materials prepared by LAWPRO and by the Law Society of Upper Canada that were adapted and summarized in this column, with permission, for the benefit of BC lawyers.✧

2005 Pacific Legal Tech Conference coming this fall

Mark your calendars now for the 2005 Pacific Legal Technology Conference. The day-long event takes place on **Friday, October 14, 2005** at the Vancouver Convention & Exhibition Centre.

Pacific Legal Tech is your opportunity to explore many of the practical advantages that the latest technology offers your own law practice, as demonstrated in presentations by leading lawyers, legal administrators, librarians and technologists.

This year's conference is not to be missed. Watch **www.pacificlegaltech.com** for updates.✧

Services to members

Practice and ethics advice

Contact **David J. (Dave) Bilinsky**, Practice Management Advisor, to discuss practice management issues, with an emphasis on technology, strategic planning, finance, productivity and career satisfaction. **Email**: daveb@lsbc.org **Tel**: 604 605-5331 or 1-800-903-5300.

Contact **Felicia S. Folk**, Practice Advisor, to discuss professional conduct issues in practice, including questions on undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships and lawyer-lawyer relationships. All communications are strictly confidential, except in cases of trust fund shortages. **Tel**: 604 669-2533 or 1-800-903-5300 **Email**: advisor@lsbc.org.

Contact **Jack Olsen**, staff lawyer for the Ethics Committee, on ethical issues, interpretation of the *Professional Conduct Handbook* or matters for referral to the Committee. **Tel**: 604 443-5711 or 1-800-903-5300 **Email**: jolsen@lsbc.org.

Interlock Member Assistance Program – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society, and provided at no cost to individual BC lawyers and articled students and their immediate families: **Tel**: 604 431-8200 or 1-800-663-9099.

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no cost to individual lawyers: **Tel**: 604 685-2171 or 1-888-685-2171.

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra**: **Tel**: 604 687-2344 **Email**: achopra@novus-tele.net.

Remember your professional development in 2005

BC lawyers are reminded of the requirement to report to the Law Society in 2005 on their professional development (continuing legal education) activities for the preceding 12 months.

Each practising lawyer reports this information as part of an Annual Practice Declaration at the same time his or her law firm files its annual Trust Report. Filing deadlines in 2005 vary from firm to firm, and the Law Society's trust review staff provides more information to all firms in advance of their respective dates. Practising lawyers who are exempt from insurance, such as in-house counsel and Crown Counsel, will file their Annual Practice Declaration in September.

The Benchers encourage each practising lawyer in BC to complete a minimum of 12 hours of coursework (the equivalent of two full course days) and 50 hours of self-study each year. The targets are set as minimum expectations for the profession and are not mandatory.

For BC lawyers, staying current on the law has always been a matter of professional responsibility. Rule 1, Chapter 3 of the *Handbook* provides that, with respect to each area of law in which a lawyer practises, he or she must acquire and maintain adequate knowledge of the substantive law, knowledge of the practice and procedures by which that substantive law can be effectively applied and skills to represent the client's interests effectively.

By setting recommended minimum expectations for professional development coursework and self-study and by requiring BC lawyers to report on their professional development, the Benchers have affirmed their commitment and that of the profession to continuing legal education and to collecting comprehensive data for tracking continuing education in the profession and determining the future needs of BC lawyers.

A lawyer who does not meet the recommended minimum expectations for professional development, or takes no professional development over the course of a year, faces no consequences on reporting that fact to the Law Society — with one exception. If complaints or concerns have arisen over a lawyer's competency, and if the Practice Standards Committee orders a review of that lawyer's practice, the lawyer's record of professional development activities may be considered in the course of the practice review and be noted in the resulting practice review report. As a result, the issue could be considered by the Practice Standards Committee or by a hearing panel should the lawyer's conduct or competence ultimately warrant a formal hearing.

Lawyers will be asked to report the continuing legal education courses and programs they have attended in the preceding 12 months, and also to specify how much of that time was devoted to professional ethics or practice management material. They will also be asked to report on the hours they devoted to self-study during that period, excluding any research or review of material undertaken in connection with specific files in their practice.

The Lawyer Education Task Force is developing guidelines to assist lawyers in determining what constitutes coursework and what constitutes self-study. In general terms, it is anticipated that reported hours of coursework will include time a lawyer has committed to:

- live programs, workshops and conferences, such as those offered by the CLE Society of BC, Trial Lawyers Association of BC, Canadian Bar Association, Federation

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From the Courts

BC Supreme Court

A two-year pilot project will begin in the Vancouver, Victoria, Prince George and Nelson Supreme Court registries beginning September 1 to streamline cases under $100,000.

Supreme Court Rule 68 sets out the new procedures and is available on the Supreme Court website at www.courts.gov.bc.ca/sc. Chief Justice Brenner has issued a notice to the profession, "Rule 68: Expedited Litigation Project Rule," which is available at www.lawsociety.bc.ca/N-SCC-Rule 68.pdf.

BC Court of Appeal

The BC Court of Appeal has advised the profession that, under Rule 40(9), there are lists of authorities that the parties need not reproduce in their book of authorities. Instead, when one of these authorities is being relied upon, the Court of Appeal requires that the party reproduce only the headnote and the passage relied upon. The authorities are set out as "frequently cited authorities" under "What's new" on the BC Court of Appeal webpage: www.courts.gov.bc.ca/ca.✧

PLTC material now online

The Professional Legal Training Course *Practice Material* is now available online for articled students, BC lawyers and lawyers from other provinces who are seeking to transfer to BC or practise here temporarily.

The material provides an overview of law and practice in British Columbia, in the following areas:

- civil litigation
- commercial
- company
- creditors' remedies
- criminal procedure
- estates
- family
- professional responsibility
- practice management
- real estate

The material is in PDF format in the Licensing & Membership section of the website at **www.lawsociety.bc.ca**.

It can be viewed on screen or downloaded and printed for private research and study and for supporting the lawful practice of law by BC lawyers and by lawyers from other provinces who are practising in BC.

Please note that the material may not be copied, modified or distributed in any way without the permission of the Law Society.✧

Restructuring Justice

The CLE Society of BC is holding a new two-day course, ***Restructuring Justice***, on June 9 and 10 in Vancouver to help lawyers prepare for changes ahead in the resolution of civil disputes. Under the theme of "getting on with business," this course focuses on finding solutions to the cost, delay and complexity of civil disputes.

Co-chairs of the BC Justice Review Task Force, Allan Seckel, QC (Deputy Attorney General) and Chief Justice Donald I. Brenner of the BC Supreme Court, will provide opening comments and invite feedback on the direction of civil justice reforms in BC.

Panels of experienced counsel, judges and international guests will lead presentations on civil justice today, including the tools that lawyers need to meet the needs of different clients. Sessions include *Shifting Family Law Away from the Adversarial Framework*, *New Reforms in the Supreme and Provincial Courts* (a closer look at expedited litigation and Small Claims changes) and *What Do Clients Really Want from the System and from their Lawyers?*

A choice of presentations and breakout discussions will explore both practice and business implications — such as how reforms will affect your bottom line and how you can provide services proportional to a particular dispute. Course participants can also delve into the details of specific litigation reforms of interest to them, such as settling complex cases, environmental ADR, the Court of Appeal settlement initiative and child protection mediation.

For details on all sessions and to register, see "courses" on the CLE website at www.cle.bc.ca.✧

Check it out — the 2005 practice checklists are a click away

New on the Law Society's website this spring are the 2005 practice checklists, ready for BC lawyers to download, print or adapt as required.

Highlights of the 2005 update include procedural notes relating to the *Business Corporations Act*, LLP legislation, preliminary inquiries, the National Sex Offender Registry, collections, Land Title Office e-filing and changes in probate practice.

Ready to update your copy? Just click on Practice Support at **www.lawsociety.bc.ca**.✧

Unauthorized practice actions

Undertakings

[redacted]

Injunction

On application of the Law Society, the BC Supreme Court has ordered that **Mark Edward Grimwood**, a former lawyer of Vancouver, be permanently enjoined from appearing as counsel or advocate; from drawing documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute, documents relating to real or personal estate for a fee or wills, trust deeds, powers of attorney or estate documents; from negotiating in any way for the settlement of a claim or demand for damages; from giving legal advice or from offering or holding himself out as qualified or entitled to provide any of these services for a fee: February 24, 2005.

The Court further ordered that the Law Society be awarded costs.✧

Special Compensation Fund claims

The Special Compensation Fund, funded by all practising lawyers in BC, compensates persons who suffer loss through the misappropriation or wrongful conversion of money or property by a BC lawyer acting in that capacity.

The Special Compensation Fund Committee makes decisions on claims for payment from the Fund in accordance with section 31 of the *Legal Profession Act* and Law Society Rules 3-28 to 3-42. Rule 3-39 (1)(b) allows for publication to the profession of summaries of the written reasons of the Committee. These summaries are published with respect to paid claims, and without identifying the claimants.

Martin Wirick

Vancouver, BC
Called to the Bar: May 14, 1979
Resigned from membership: May 23, 2002
Custodian appointed: May 24, 2002
Disbarred: December 16, 2002 (see Discipline Case Digest 03/05)

Special Compensation Fund Committee decision involving claims 20020107, 20020233, 20020260, 20020402, 20020444, 20020517

Decision date: March 31, 2004
Report issued: March 31, 2005

Claimant: A Bank
Payment approved: **$145,527.99**
($132,412.57 and $13,115.42 interest)

Claimant: B Credit Union
Payment approved: **$347,660.56**
($318,479.85 and $29,180.71 interest)

The V Drive properties

B was the owner of property in Vancouver. He obtained a $136,000 loan from A Bank, secured by a mortgage registered against the property. B later subdivided the property into two lots.

In February, 2001 B entered into a contract to sell one of the lots to W and L. He contracted to sell the other lot to Mr. and Mrs. W.

B obtained an *inter alia* mortgage for $200,000 and assignment of rents (in favour of N) against the two lots. He arranged a further *inter alia* mortgage for $323,610, registered in favour of B Credit Union.

On June 7, 2001 Mr. Wirick provided written undertakings to the lawyers representing the purchasers in the sale transactions to pay out and discharge the A Bank, B Credit Union and N mortgages from both properties.

In both transactions, the purchasers obtained new mortgage financing: Mr. and Mrs. W obtained financing from D Bank, while W and L obtained financing from E Bank.

With respect to the lot purchased by W and L, Mr. Wirick received in trust $214,989.08 from their lawyer. With respect to the lot purchased by Mr. and Mrs. W, Mr. Wirick received in trust from their lawyer $205,262.48. In neither transaction did Mr. Wirick use the funds to pay out the mortgage, but instead used the funds for other purposes, contrary to the undertakings he had given.

As a result of Mr. Wirick breaching his undertakings, the mortgages remained on title, other than the N mortgage, which was discharged in 2003.

The Special Compensation Fund Committee found that, while not every breach of undertaking is fraudulent, the circumstances of this case did not suggest negligence or error, but an intention to deceive. Mr. Wirick knowingly paid out money in breach of his undertakings and the Committee was satisfied that he had misappropriated or wrongfully converted the funds.

The Committee decided that it would not require the claimants to exhaust

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Special Fund claims … from page 21

their civil remedies in this case by obtaining a judgment against Mr. Wirick, given that there was little hope of recovery from him.

The Committee allowed the claim of A Bank and B Credit Union, subject to certain releases, assignments and conditions, including the requirement that they discharge their mortgages. The Committee also exercised its discretion to pay on these claims interest at the contract rate to May 24, 2002 and thereafter to the date of the decision at the applicable rate to a maximum of 6% per annum.

Following this payment and discharge of the prior mortgages, the purchasers Mr. and Mrs. W, the purchasers W and L and their mortgagees (D Bank and E Bank) would suffer no loss. Accordingly, these separate claims for compensation were denied.

Arthur Skagen

Surrey, BC
Called to the bar: May 18, 1989
Gave an undertaking not to practice: September 1, 2003
Ceased membership for non-payment of fees: January 1, 2004
For a summary of Mr. Skagen's discipline admission, see the May Discipline Digest.

Special Compensation Fund Committee decision involving claims 20035004, 20035005, 20035006

Decision date: June 9, 2004
Report issued: September 1, 2004

Claimant: M
Payment approved: **$256,729.85**
($239,390.63 plus mortgage interest and costs)

In May, 2003 Mr. Skagen acted for M who had agreed to sell his property in Abbotsford to N and W. The property had two mortgages on title, one for $240,000 in favour of a trust company and one for $32,000 in favour of H Corporation.

Mr. Skagen gave an undertaking to the notary representing the purchasers (N and W) that, upon receipt of funds in the transaction, he would pay out and discharge the two mortgages from title. He used some of the funds to pay out the H Corporation mortgage and discharge it but, contrary to his undertaking, he failed to use the funds to pay out the trust company mortgage.

In October, 2003, the trust company's solicitors demanded payment from the vendor M, and also from the purchasers, N and W. The trust company subsequently began a foreclosure action. An order nisi of foreclosure was granted on December 15, 2003, with a nine-month redemption period.

The Special Compensation Fund Committee found that, while not every breach of undertaking is fraudulent, the circumstances of this case did not suggest negligence or error, but an intention by to deceive by Mr. Skagen who breached his undertaking to use the trust funds forwarded to him in the real estate transaction in the manner he had promised.

The Committee decided that it would not require the claimants to exhaust their civil remedies in this case by obtaining a judgment against Mr. Skagen. In these circumstances, Mr. Skagen was no longer in practice. Moreover, both the innocent vendor and the innocent purchasers were being pursued by the trust company on the foreclosure action for funds that Mr. Skagen had undertaken to pay.

The Committee allowed the claim of M in the amount owing to the trust company to pay out its mortgage, plus applicable interest and costs on the order nisi of foreclosure. The payment was subject to conditions, assignments and releases. As a result of the payment, and discharge of the trust company mortgage, the vendor M, the purchasers N and W and the purchaser's mortgagee (which should hold a first charge on the property) would all be placed in the positions that they had bargained for. The Committee accordingly denied their separate claims for compensation.

Mark Edward MacDonald

Vancouver, BC
Called to the bar: September 2, 1994
Ceased membership for non-payment of fees: January 1, 2001

Special Compensation Fund Committee decision involving claim 20000015

Decision date: September 29, 2004
Report issued: November 16, 2004

Claimant: W
Payment approved: **$15,000**

In August, 1998 Mr. MacDonald began acting for W, a German citizen and the sole beneficiary of her sister's estate in BC, in applying for an Order for Administration of the Estate, dealing with assets and liabilities and distributing the estate.

W contracted with Mr. MacDonald to pay him 3.5% of the gross aggregate value of the estate for his legal services and to provide a $1,000 retainer for disbursements on the proviso that Mr. MacDonald provide W with an invoice before using money from the trust account. Mr. MacDonald in fact never invoiced W for court disbursements prior to using money from the trust account.

On December 18, 1998 Mr. MacDonald withdrew $5,000 from trust by cheque for deposit to his general account. The trust ledger for W indicated that the funds were "to [the M estate] for payment on account (advance on fees)."

On November 3, 1999 Mr. MacDonald withdrew a further $10,000 from trust by cheque for deposit to his general account. The cheque included a note

stating "advance on fees – W."

On January 18, 2000, in a state of emotional crisis, Mr. MacDonald wrote a note indicating that he would steal funds from the M estate, leave the country and commit suicide. That same day he withdrew $50,000 from his trust account, a cheque payable to himself that stated "W – A/C#1."

Mr. MacDonald's note was discovered by a friend on January 21, 2000. That same day, the Law Society was advised that Mr. MacDonald was in a state of emotional crisis and had indicated he intended to steal funds. The Society commenced an investigation, which led to the discovery of the $50,000 misappropriation. Mr. MacDonald was cited and suspended on January 25, 2000, pending his hearing, and the BC Supreme Court appointed a custodian of his practice on application by the Society on January 26, 2000.

Mr. MacDonald, who had left Vancouver, returned on January 27, 2000. Mr. MacDonald admitted to misappropriating the sum of $50,000 from the M estate. He deposited the $50,000 to the estate trust account, thereby making restitution of the sum he had misappropriated.

W retained new lawyers to complete the estate administration and they alleged that Mr. MacDonald had misappropriated the $15,000 from trust.

The Committee considered it relevant that Mr. MacDonald admitted to misappropriating $50,000 from the M estate. They found that he withdrew the $15,000 in contravention of his contract with W and without rendering accounts or providing any time records to support these accounts.

The Committee considered whether Mr. MacDonald's actions in withdrawing the $15,000.00 amounted to negligence, as distinct from fraud, and further whether the claim was more properly characterized as a fee dispute. The Committee concluded that it could not credibly be claimed that the $15,000 was paid by Mr. MacDonald to himself in connection with the provision of legal services.

The Committee concluded that W's claim should be allowed, without interest and subject to W executing a release and an assignment of her claim against Mr. MacDonald.✧

Ceased members

A list of BC lawyers who ceased membership during 2004 and have not since been reinstated (as of April 18, 2005) is posted in the Publications & Forms /Notices section of the Law Society website at www.lawsociety.bc.ca.

The notice lists those BC lawyers who have ceased Law Society membership by voluntarily electing not to renew for 2005, those who have been appointed to the Bench and those who have passed away.

Lawyers can reinstate or cease membership throughout the year. Up-to-date information on the membership status of any BC lawyer can be confirmed through the BC Lawyer Lookup on the Society's website.✧

Professional development *… from page 19*

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of Law Societies and other continuing legal education providers,

- in-house legal education programs offered to employees by law firms and in-house legal departments,
- telephone programs, such as teleseminars,
- interactive online programs, such as those of the CLE Society of BC,
- video replay programs in an organized group setting,
- organized education discussion groups, such as at CBA section meetings,
- participation in a post-LL.B. degree program, and
- preparation for and teaching in PLTC, continuing professional education programs and law school programs.

Reported hours of self-study are expected to include hours a lawyer has spent in the study of legal material in the following media:

- print material (such as publications of continuing legal education providers, legal texts, case law and articles in the *Advocate*, Law Society publications, *Canadian Bar Review*, *BarTalk* and other legal journals),
- internet material, including online versions of the publications noted above,
- CD-ROM,
- videotape (other than in an organized group setting), and
- audiotape.

As noted, lawyers will receive more information on the filing of their Annual Practice Declaration in advance of their next filing deadline.

If you have any questions about reporting on professional development activities, please contact Alan Treleaven, Director of Education and Practice, at atreleaven@lsbc.org or 604 605-5354 (toll-free within BC 1-800-903-5300).✧

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