The Law Society of British Columbia

2014: No. 1 • SPRING

BENCHERS' BULLETIN

Keeping BC lawyers informed

Change, challenges and opportunities

by Jan Lindsay, QC

2013 ENDED ON a high note for the Law Society. The recommendations of the Legal Service Providers Task Force were unanimously accepted by the Benchers. The report of the task force is available on our website, and I encourage everyone to read it. The recommendations are (1) to engage in discussions with the Society of Notaries Public with a view to creating a single regulator of lawyers and notaries. The recommendations continue with (2) a suggestion that credentialing for paralegals be considered. The recommendations go further and suggest (3) "a regulatory framework by which other providers of legal services could provide credentialed and regulated legal services in the public interest." If implemented, these recommendations would result in significant changes to the legal landscape and the provision of legal services in British Columbia, not to mention for the Law Society and the regulation of legal services.

When we look at the regulation of other legal service providers, we will consider changes to how legal services are provided in this province, and by whom. We want to recognize that legal services are much more than attendance in courts. Of course, we will want the results to include increased access to legal services for the public.

Not everyone will embrace these changes. The practice of law is an ancient and learned profession, steeped in tradition and often slow to change. Change is often good, but change for the sake of change may not produce the desired result. Many lawyers (and citizens) remind us to consider very carefully any change and to anticipate all the consequences, especially unintended ones. However, we should also remember that lawyers have often led social and political change. Nelson Mandela and Mahatma Gandhi were both educated and trained as lawyers, and both were instrumental in changing their societies to better reflect the public interest. Closer to home, lawyers have long been advocates for change in the public interest. BC lawyers were instrumental in establishing the Law Foundation in 1969, in re-inventing the bar admission program in 1984 to create the Professional Legal Training Course, and in approving a continuing professional development requirement in 2007. Lawyers have also been instrumental in changing the law, such as when we successfully argued that non-employed spouses were contributors to the family assets and fortune, and that their contributions should be recognized. I am not suggesting the changes we are currently considering are as substantial, nor am I advocating revolution or civil disobedience, but I am reminding you that lawyers have often been leaders and engines of social and political change.

I believe 2014 will be a year of opportunity for the Law Society. We are engaged with the changes and challenges before us and energized by the work to be done and the potential to increase access to legal services for the public.

And as we head into 2014, I want to speak briefly about another change the Benchers are currently considering. In April, the Benchers will be asked to consider approval of a new law school at Trinity Western University. We have established a process for considering the issues that is transparent, open and fair. We had received close to 300 submissions from lawyers and the public when submissions closed on March 3. And on April 11, the Benchers will review and consider these submissions, submissions from TWU, the reports of the Federation of Law Societies and other material. We will webcast the April discussion and debate to provide interested parties with the opportunity to understand and

BENCHERS' BULLETIN

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers, articled students and the public on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities. BC lawyers are responsible for reading these publications to ensure they are aware of current standards, policies and guidelines.

Suggestions on improvements to the *Bulletin* are always welcome — contact the editor at communications@lsbc.org.

Electronic subscriptions to the *Benchers' Bulletin*, *Insurance Issues* and *Member's Manual* amendments are provided at no cost. Print subscriptions may be ordered for $70 per year ($30 for the newsletters only; $40 for the *Member's Manual* amendments only) by contacting the subscriptions assistant at communications@lsbc.org.

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view the proceedings.

I believe 2014 will be a year of opportunity for the Law Society. We are engaged with the changes and challenges before us and energized by the work to be done and the potential to increase access to legal services for the public.

I am so proud to be a lawyer and am grateful for this opportunity to serve as President of the Law Society for 2014. I look forward to working with the elected and appointed Benchers, many of whom are serving in their first terms. And I want to recognize the dedicated staff at the Law Society who support our initiatives and our ongoing work, always in the public interest.❖

Benchers set to consider Trinity Western University law school at upcoming meeting

ON APRIL 11, the Benchers will consider whether to approve or disapprove the proposed faculty of law at Trinity Western University. The Law Society's rules provide that the Benchers have the final say in whether any faculty of law is approved for the purpose of meeting the academic qualification requirement of the Law Society's admission process.

In December 2013, the Federation of Law Societies of Canada announced the Canadian Common Law Program Approval Committee had completed its work and gave preliminary approval of the proposed law school program at TWU. Shortly thereafter, the BC Ministry of Advanced Education authorized TWU to grant law degrees.

The Benchers received notice of a motion to be made at the April 11 meeting. President Jan Lindsay, QC made it clear that, in giving notice of the motion, there was no intention to express any opinion as to its merits and that the notice was being given in order that the question might be properly considered by the Benchers.

"The sole intention in giving notice of the motion to be tabled at our April 11 meeting is to provide the Benchers with the opportunity to consider thoroughly, carefully and in a manner that is fair, whether to exercise their discretion in the public interest." Lindsay said.

She said that the notice of motion also provides interested parties, particularly Trinity Western University, with a clear indication that the Benchers will be considering the exercise of their discretion at the April 11 meeting.

In January, the Law Society invited the public and lawyers to make written submissions regarding the proposed law school until March 3. Close to 300 submissions were received and will be considered by the Benchers. The submissions will be made available to TWU and may also be made available on the Law Society website.

The April 11 meeting will be webcast to enable those who wish to see and hear the meeting to do so without having to be physically present. The webcast will also permit a much larger number of people to watch and listen than could be reasonably accommodated at the Law Society's premises.

The proposal for a law school at TWU has generated considerable comment, discussion and debate among the legal profession and the public. The Benchers are committed to ensuring that their exercise of discretion is transparent, open and fair.

"We will be thoughtful. We will be thorough. We will be fair," Lindsay said.❖

New appointed Bencher

The Law Society is pleased to welcome **David Corey** to its board of governors, following his appointment by the provincial government. Haydn Acheson, Satwinder Bains, Peter B. Lloyd, Benjimen Meisner and Claude Richmond were reappointed. The six appointed Benchers are non-lawyers who work with the elected lawyer Benchers to ensure the public is well served by a competent and honourable legal profession.

Corey is currently the Executive Officer of the Victoria Real Estate Board and previously served as Manager of Operations & Member Service and Manager, Information Technology. He is a Director of the Greater Victoria Development Agency and serves on an advisory board tasked with organizing a joint US/Canada Association Executive Institute real estate conference in 2015. He spent two years as a director of the MLS® and Technology Council of the Canadian Real Estate Association.

The Law Society extends its appreciation to outgoing appointed Bencher Stacy Kuiack for his years of service and valued contributions since his appointment in 2008.❖

Significant work ahead as Law Society identifies top priorities for 2014

by Timothy E. McGee, QC

AT THE BEGINNING of each year, I advise the Benchers of the operational priorities we will be pursuing over the course of the year, in addition to our day-to-day regulatory work. These initiatives are sometimes to implement policy directives from the Benchers. Others are focused on operational improvements.

The first of those priorities for 2014 is the implementation of the recommendations of the Legal Service Providers Task Force. We will be developing a framework for certification of paralegals to be considered by the Benchers, and discussing merger with the Society of Notaries Public. In addition, we will be supporting the efforts of a new task force to develop the proposed regulatory framework by which other existing providers of legal services, or new stand-alone groups who are neither lawyers nor notaries, could provide credentialed and regulated legal services.

Our second priority is to undertake a detailed examination and analysis of the two solution options in the Report of the Rule of Law and Lawyer Independence Advisory Committee. This effort is intended to address the question that arises from the Law Society operating a professional liability insurance program and whether that may compromise, or appear to compromise, the performance of the Society's statutory obligation to uphold and protect the public interest. The group embarking on this work comprises Benchers, a non-Bencher and senior staff due to the breadth and significance of the policy and operational issues that will be considered.

In 2013, a cross-departmental working group looked extensively at our current delivery of lawyer support services and concluded that our model needs to be broadened to provide more self-help assistance to meet lawyers' evolving expectations, both in what is available and how it is accessed. In 2014, we will implement the recommendations of the working group, which includes budget for lawyer support resource development.

We have established a staff working group to compile information from other jurisdictions and develop possible models for law firm regulation in BC. Our ability to regulate law firms was granted with the passage of the *Legal Profession Amendment Act, 2012*, and we are now developing the mechanics of how that regulation will be done. Regulating firms, in addition to individual lawyers, is critical to the Law Society's ability to oversee the full breadth of activities performed by the profession. The staff working group will report its findings and ideas to a Bencher task force.

Finally, another staff working group will review our employee performance management process, considering best practices and consulting with employees. The goal of the effort is to ensure we continue to support our staff in developing the talents and skills required in their work.

As always, if you have any comments, I can be reached at ceo@lsbc.org.❖

Unauthorized practice of law

UNDER THE LEGAL Profession Act, only trained, qualified lawyers (or articled students or paralegals under a lawyer's supervision) may provide legal services and advice to the public, as others are not regulated, nor are they required to carry insurance to compensate clients for errors and omission in the legal work or claims of theft by unscrupulous individuals marketing legal services.

When the Law Society receives complaints about an unqualified or untrained person purporting to provide legal services, the Society will investigate and take appropriate action if there is a potential for harm to the public.

From November 13, 2013 to February 13, 2014, the Law Society obtained undertakings from nine individuals and businesses not to engage in the practice of law.

The Law Society has obtained orders prohibiting the following individuals and businesses from engaging in the unauthorized practice of law:

- **Wu, Lisa Lihua** – Mr. Justice Pearlman ordered an injunction against Lisa Lihua Wu, of Richmond, prohibiting her from engaging in the practice of law. Wu offered to draft legal documents, refer a matter to a lawyer and give legal advice in expectation of a fee. In granting the order, the court also awarded the Law Society's costs. (January 16, 2014).
- **Vancouver Credit Collection Inc.**, **Nitya Nand** a.k.a. **Nick Nand**, **Joysika Nand**, and **Nirmala Nand** a.k.a. **Nancy Smith**, all of Surrey, provided various legal services for a fee, including giving legal advice and preparing and filing of court documents, builders' liens and corporate documents. The respondents consented to an injunction permanently prohibiting them from engaging in the practice of law for or in the expectation of a fee, gain or reward and paid the Law Society's costs. (February 6, 2014)❖

Your Fees at Work: Online Learning Centre

THE LAW SOCIETY regularly highlights how annual practice fees are spent so that lawyers are aware of services to which they are entitled as well as programs that benefit from Law Society funding.

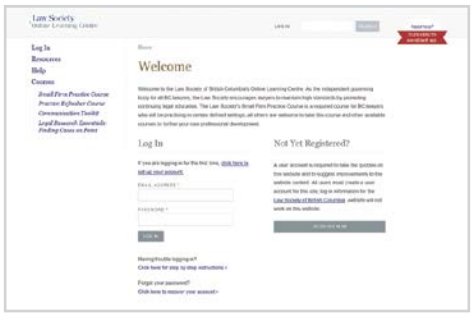
In this issue, we feature the Law Society's Online Learning Centre.

Each year, all practising BC lawyers must report completion of at least 12 hours of continuing professional development in accredited educational activities. At least two of the 12 hours must pertain to any combination of professional responsibility and ethics, client care and relations, or practice management.

A portion of membership fees are allocated towards courses provided by the Online Learning Centre for CPD credits. These courses allow lawyers the flexibility to earn their education credits anytime, anywhere and at their own pace.

The Online Learning Centre currently offers four courses:

- The Small Firm Practice Course is mandatory for all lawyers commencing practice in a firm of four or fewer lawyers. It takes about six to eight hours to complete and qualifies for six education credits.
- The Practice Refresher Course primarily assists lawyers who wish to resume practice after a leave of absence or who are venturing into a new area of practice. The course comprises seven modules covering various areas of practice, including small claims, Supreme Court, wills and estate planning, probate and estate administration, real estate, corporate commercial law and family law. It qualifies for six CPD credits.



- The Communication Toolkit provides tips on how communication can be improved. It counts for two hours of CPD and meets the annual requirements for two hours of course work covering professional responsibility and ethics.
- Legal Research Essentials: Finding Cases on Point is an introduction or refresher on using popular research tools to find relevant case law. It takes one hour to complete and is approved for one CPD credit.

The Online Learning Centre also offers interactive participation between lawyers in updating the substantive content and test questions. It features a discussion page, so that editors can debate and discuss the changes that should be made to each page. This online editing functionality allows lawyers to submit additional credit for discussions and edits made after they have taken the course.

In addition, the Law Society provides an online database, which is a public listing of courses for lawyers. By logging into the member-only section of the Law Society website, lawyers can learn about hundreds of course options, many of them online.

For more information about the courses offered by the Online Learning Centre, visit the Law Society's website at Quick Links > Law Society Online Courses > Online Learning Centre, or to find out more about the Law Society's online directory of courses that qualify for CPD credits, go to Quick Links > Other Legal Courses.❖

In Brief

JUDICIAL APPOINTMENTS

Jennifer M.I. Duncan, QC, Crown counsel with the Ministry of Justice, Criminal Justice Branch in Vancouver, was appointed a judge of the Supreme Court of BC, replacing Justice Janice R. Dillon, who elected to become a supernumerary judge.

Richard Hewson was appointed a judge of the BC Provincial Court (Nelson).

Nigel P. Kent, a lawyer with Clark Wilson LLP in Vancouver, was appointed a judge of the Supreme Court of BC, replacing Justice R.B.T. Goepel, who was appointed to the Court of Appeal of BC.

George K. Macintosh, QC, a lawyer with Farris, Vaughan, Wills & Murphy LLP in Vancouver, was appointed a judge of the Supreme Court of BC, replacing Justice William B. Smart, who resigned.

Neena Sharma, a lawyer with the Ministry of Justice in Vancouver, was appointed a judge of the Supreme Court of BC, replacing Justice Wendy G. Baker, who elected to become a supernumerary judge.

Lyndsay Smith was appointed a judge of the BC Provincial Court (Richmond).

Lisa Wyatt, a partner with Pushor Mitchell LLP, was appointed a judge of the BC Provincial Court (Vernon).❖

Thanks to our 2013 volunteers

THE BENCHERS THANK and congratulate all those in the profession and the legal community who volunteered their time and energy to the Law Society in 2013. Whether serving as members of committees, task forces or working groups, as Professional Legal Training Course guest instructors or authors, as fee mediators, event panellists or advisors on special projects, volunteers are critical to the success of the Law Society and its work.

Over the past year, the Society has enjoyed the support and contributions of over 300 volunteers, all of whom deserve acknowledgement.

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Scott Wright ❖

In memoriam

WITH REGRET, THE Law Society reports the passing of the following members during 2013:

Thomas D. Agnew
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Gillian A.L. Chee
Douglas H. Christie
David A. Coulson
Owen C. Dolan, QC
Firoz R. Dossa
Garde B. Gardom, QC
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Christopher G. Walker
Richard H. Watts
Caroline A. Wells
David R. Wilson
David L. Worthington ❖

LAW SOCIETY FEE MEDIATION PROGRAM

Distance fee mediation serves lawyers and clients

WHEN SURREY RESIDENT Thomas Kreutz needed to settle a fee dispute with his lawyer two years ago, he reluctantly applied for fee mediation with the Law Society.

"I thought that the [mediator] the Law Society provided wasn't going to be neutral," Kreutz said. He soon realized his assumption was mistaken, after learning that the mediator was independent of the Law Society.

"It really was an honest attempt by your organization to find a solution. It was excellent."

The mediator helped Kreutz and his lawyer solve their dispute, with both sides agreeing on a compromised fee.

Kreutz was also impressed by how quickly the mediator met with him. From the time he sent in his application to their meeting, he had only waited "a few weeks."

Kreutz's experience with the Law Society's Fee Mediation Program is not unlike many others. The program is a free, informal process for dealing with fee disputes quickly and efficiently, without having to go to court.

"Usually at the root of fee disputes there are some misunderstandings about the lawyer's billing practices, or some unmet expectations of the client relating to the legal outcome," Neil Hain said. Hain is a lawyer with the Law Society's intake and early resolution department. "In the context of fee disputes, mediation offers the opportunity to foster better client relations and address the lawyer's legitimate business interest in being paid."

This year, important changes were made to the Fee Mediation Program, with the introduction of limits on the amounts it will review of between $1,000 and $25,000.

The program has also integrated modern-day technology, so that those who wish to participate in fee mediation can do so without having to leave their offices – or living rooms.

"We have now added an option for distance mediation through video and telephone conferencing," Hain said. "It's going to be significantly more convenient and cost effective for the lawyer and the client."

Whereas before, the lawyer, client and mediator met in person to settle fee disputes, distance mediation allows all parties to resolve the matter remotely. To participate, one only needs a computer with a web camera and microphone and access to high-speed internet. The Law Society provides the software.

The distance mediation option is aimed at improving access for those in remote areas of British Columbia. For lawyers, they will be able to participate from behind their computer desks, without having to travel to resolve the dispute, which will save time and money.

"There is an obvious economic incentive to both parties. Clients faced with a legal bill they disagree with have a free and convenient forum to air their concerns. Lawyers can save time, money and effort collecting on their accounts," Hain said.

The changes to the program are positioned to strengthen public confidence in legal regulation and to continue fostering good lawyer-client relations in this province for years to come.❖

Thomas Kreutz has authorized the Law Society to use his name for the purpose of this publication.

FROM THE LAW FOUNDATION

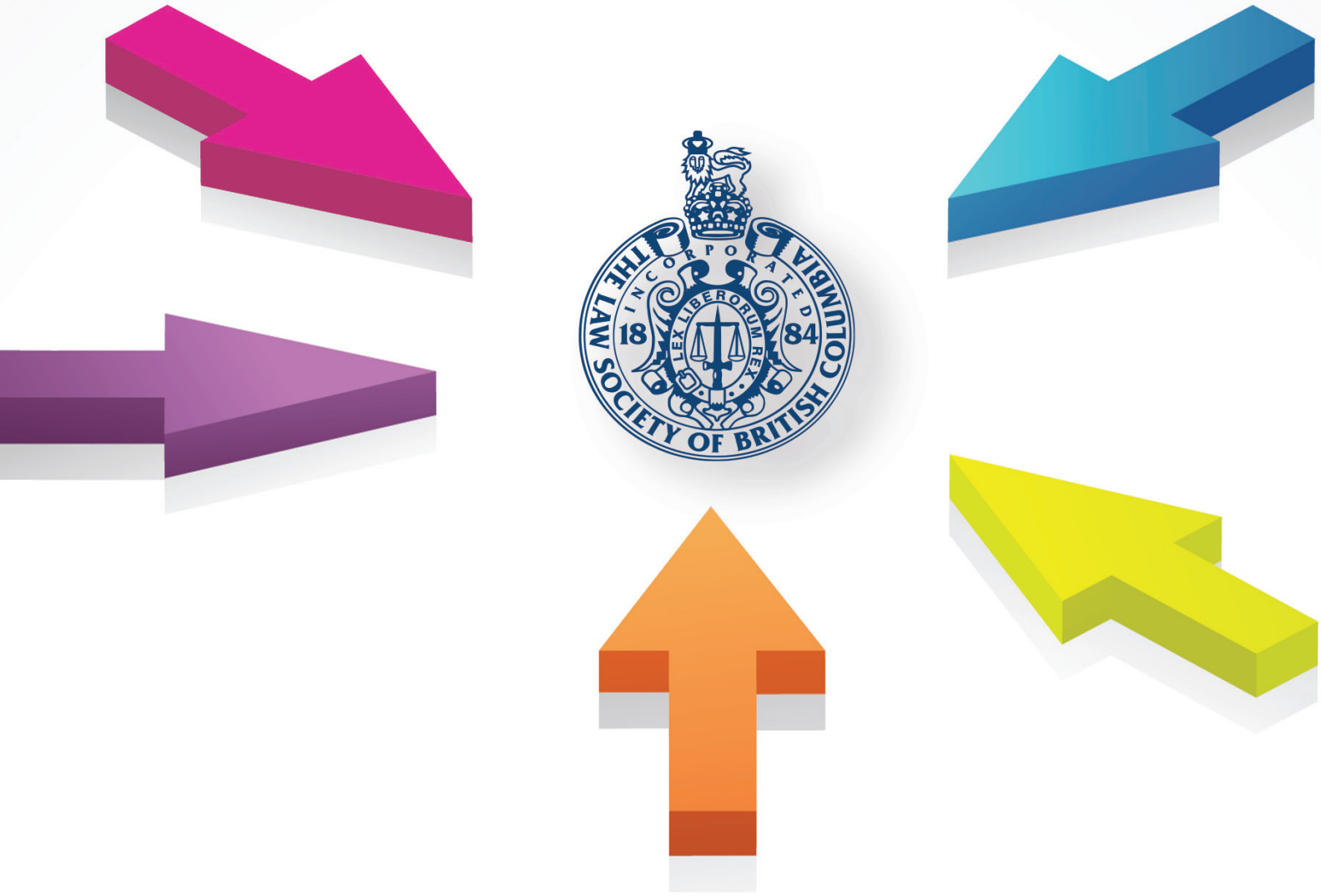
New Law Foundation board members

THE LAW FOUNDATION has two new governors as of January 2014. Under the *Legal Profession Act*, the Law Society appoints 12 lawyers or judges to the foundation's board, one from each county.

Danielle Daroux, of the County of Kootenay, graduated from Queen's law school in 1992. Called to the Bar in 1994, Daroux practises plaintiff's personal injury law in Trail, Rossland and Cranbrook. She has a strong record of service to her community and the profession, including as a member of the Mental Health Review Board, as a board member and chair of the Continuing Legal Education Society of BC (CLE), as President of the Kootenay Bar Association, and as an instructor for the Trial Lawyers Association of BC and CLE.

Eileen Vanderburgh, of the County of Vancouver, was called to the bar in 1991. She is a partner with Alexander Holburn Beaudin + Lang LLP, where she leads the Information and Privacy Practice group and is involved with general litigation and administrative law. Vanderburgh has been on the Executive of the CBA Administrative Law Section and has a rich variety of experience in a number of sectors, including not-for-profit.

A full list of the Law Foundation board members can be seen on the Law Foundation website at www.lawfoundationbc.org/about-us/board-of-governors.❖



Moving forward: the evolution of legal regulation

IT IS A topic that has been discussed, debated and deliberated for decades: Should the Law Society regulate other legal service providers?

In December, this question was one substantial step closer to being answered, after the Benchers unanimously approved the recommendations made by the Legal Service Providers Task Force.

The approval of the task force recommendations marks a seismic shift in the future of legal regulation in this province. The goal is to have lawyers, notaries public and paralegals providing legal services under consistent regulatory and ethical standards. In the end, the hope is the public will have greater confidence in the legal system and improved access to justice.

However, the idea of the Law Society regulating legal service providers other than lawyers is not a completely new concept in this province.

The possibility of expanding the Law Society's scope of regulation began percolating as far back as 1989. At that time, a recommendation was made that the Law Society approach the Society of Notaries Public with a view to negotiating an agreement for the integration of existing notaries into the legal profession as lawyers with limited licences. There was also a recommendation that certification of paralegals was in the best interests of the public, legal assistants and the profession in general. The Benchers adopted that recommendation and asked that a certification program be developed.

However, none of the recommendations were ultimately implemented.

So what has changed?

"Issues about access to legal services have really risen to the top of the debate about problems facing the legal profession in the last five or six years," Michael Lucas said. Lucas is the Law Society's manager

of policy and legal services. "The cost of legal services is perceived to be high, and there are some areas where there is a need for legal services that may not be currently be well served by lawyers. Poverty law, workers compensation and employment standards issues, are frequently cited examples."

The evolving discussion is outlined in the *Final Report of the Legal Service Providers Task Force*, prepared on behalf of the task force by Lucas and staff lawyer Doug Munro.

The real push for expanded legal regulation in British Columbia began to pick up steam around 2006, soon after the Law Society's Paralegal Task Force made several recommendations for change. The recommendations included adopting a system for paralegal certification, exploring the introduction of a regulatory regime, and expanding the services that properly trained paralegals working under the supervision of a lawyer could perform.

In 2007, changes in the regulation of legal professionals in Ontario altered the conversation drastically. The Law Society of Upper Canada began regulating Ontario's paralegals as well as lawyers. The development in Ontario also occurred at a time when there were increasing concerns about access to legal services. Some legal services in Ontario were being provided by unsupervised, untrained and unregulated paralegals. The Ontario government asked the Law Society of Upper Canada to develop a regulatory regime by which that law society could credential and regulate these non-lawyer service providers.

The cost of legal services is perceived to be high, and there are some areas where there is a need for legal services that may not be currently be well served by lawyers. Poverty law, workers compensation and employment standards issues, are frequently cited examples."

– Michael Lucas, Manager of Policy and Legal Services

"So now, we had examples from another jurisdiction," Lucas said. "Once Ontario started to regulate paralegals, people here and in other parts of Canada took notice."

It seemed the time was right to further consider expansion of regulation in BC, especially if lawyers were not providing, or were not being sought out to provide, legal services in some areas of law that could potentially be performed by other groups for lower cost.

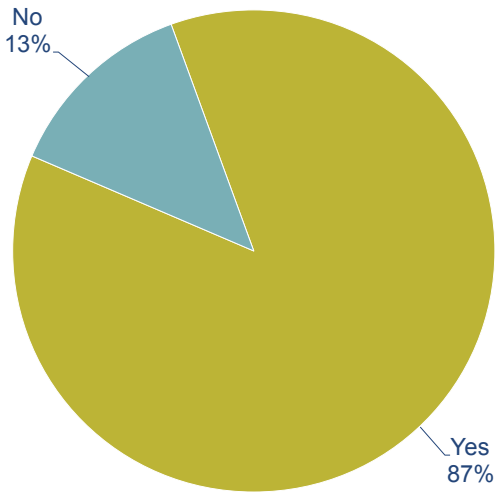
"We asked, 'should these other non-lawyer providers be regulated, and should some standards be created?'" Lucas said. "We needed to open up an examination as to who else could provide legal services, who should provide legal services, should they be regulated, and, if so, how."

In 2008, the Futures Committee released its report, *Towards a New Regulatory Model*, which gave rise to the discussion among the Benchers that year about potential initiatives.

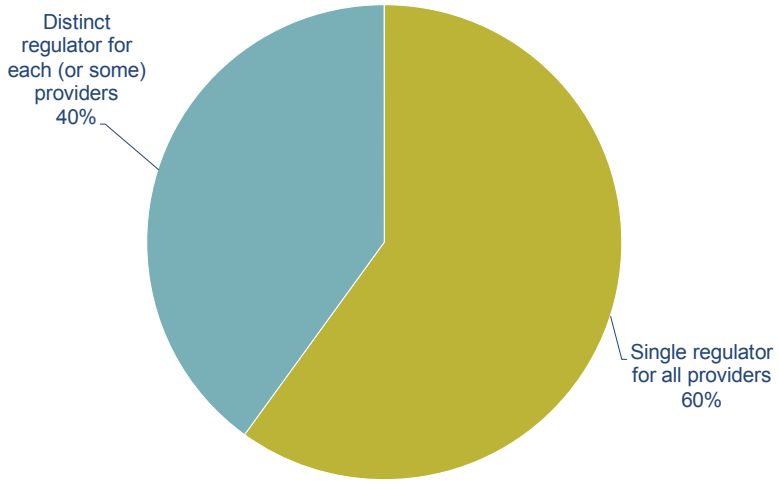
The report stated, "The strategic policy question is whether the current regulatory arrangements … facilitate or present a barrier to access to legal services and access to justice, or would the public have greater access to justice if some non-lawyers are permitted to provide some legal services? An ancillary question is who would regulate non-lawyers who provide legal services? If those questions are examined in a systematic and principled way, then the Law Society can either defend the status quo or advocate for progressive

Law Society online survey results

Should legal service providers other than lawyers be regulated?



Should legal service providers be regulated by a single regulator or should each profession be regulated by a distinct regulator?



change on public interest grounds."

In the fall of 2012, the Legal Service Providers Task Force was created to examine whether the Law Society of BC should regulate just lawyers, or whether it should regulate all legal service providers. It set out to answer several questions:

- Since, in some cases under particular legislative schemes, individuals other than lawyers can practise law in BC, should there be joint or separate regulation of these individuals?

In 2007, changes in the regulation of legal professionals in Ontario altered the conversation drastically. The Law Society of Upper Canada began regulating Ontario's paralegals as well as lawyers. The development in Ontario also occurred at a time when there were increasing concerns about access to legal services. Some legal services in Ontario were being provided by unsupervised, untrained and unregulated paralegals. The Ontario government asked the Law Society of Upper Canada to develop a regulatory regime by which that law society could credential and regulate these non-lawyer service providers.

- Should the Law Society remain as the regulator of lawyers or should it become the regulator of a larger group of legal service providers?
- What would be the implications of an expanded regulatory regime?

The task force considered previous work undertaken by the Law Society and also examined processes beyond British Columbia's borders. It began compiling statistics, surveys, reports and articles from Canada and other jurisdictions. Furthermore, it reviewed materials related to approaches to legal profession regulation in Alberta, Ontario, Quebec, Washington state, England and Wales, and Denmark.

During its research, the task force learned that the regulation of paralegals in Ontario has been working well. A five-year review of the program showed that paralegals and the public were generally satisfied.

The task force also examined regulation in England and Wales, where there are several regulatory bodies for various branches of the legal profession.

"We observed reports that said clients in England and Wales were confused," Lucas said. "They might assume that, if they retained someone for legal advice, that person was a solicitor. If they later tried to file a complaint with the Law Society, they might discover that the person they retained was actually a legal executive and they would have to deal with a regulatory body they'd never heard of. Moreover, different regulatory bodies could create different standards."

The task force agreed that the English model was not the preferred model.

Feedback from the public was also sought throughout the process. Consultations took place in the fall of 2013. An online questionnaire was also made available.

Feedback from the online survey, written submissions and the public consultations indicated where the public stood: that providers of legal services should be regulated. Eighty-seven per cent of survey respondents said that legal service providers other than lawyers and notaries should be regulated. Those legal service providers included paralegals, mediators and arbitrators. Sixty per cent felt that there should be a single regulator for all providers, and 82 per cent felt that the single regulator should be the Law Society of British Columbia.

Feedback from the online survey, written submissions and the public consultations indicated where the public stood: that providers of legal services should be regulated.

Overall, the predominant reason for favouring regulation was a need to protect the public from unqualified individuals providing legal services and to give the public some recourse to a system for resolving complaints about the quality of the services received.

Based on the research, analysis and public input, the task force concluded that legal service providers other than lawyers and notaries should be regulated unless operating under the supervision of a lawyer or notary public, and that a single regulator is the preferred model. It also concluded that, if there is to be one regulator of legal services, then on balance, the Law Society is the logical regulator body.

Overall, the predominant reason for favouring regulation was a need to protect the public from unqualified individuals providing legal services and to give the public some recourse to a system for resolving complaints about the quality of the services received.

"The task recommended that notaries and lawyers, who both provide legal services, should be governed by one regulatory body," Lucas said. This is to avoid having two different legal professionals provide the same service, but with different standards of professional responsibility and regulatory oversight.

The task force also concluded that paralegals who could meet certain prescribed education and training requirements, should be certified, saying it would assist greatly in defining that function when working under the supervision of a lawyer, and allowing the public to know that the people handling their legal affairs have achieved a standard of education and experience.

"Even if you are getting legal advice from a paralegal at a law firm, you might now be better assured that that person has had some legal training if they've been certified by the Law Society," Lucas said.

The hope, in the end, is to protect the public by having all legal service providers subject to consistent ethical standards, regulation, insurance and complaint processes, and that they will have met a standard of education and competence appropriate for the service provided. The hope is that areas of legal need that are currently not served by lawyers might then be served by other legal service providers, giving the public better access to justice at a much lower cost.❖

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Can-spam Canadian style

♫ S-P-A-M
Again and again and again and again
… ♫

Lyrics and music by Brian Mashburn, recorded by Save Ferris

THE CANADIAN ANTI-SPAM and anti-malware legislation (CASL) will come into force on July 1, 2014. CASL is considered to be the toughest legislation in the world aimed at spam emails and malware. The penalties are anything but trivial; fines can range up to $1 million for individuals and $10 million for organizations. A private remedy will come into force on July 1, 2017 that provides for fines of up to $1 million per day for violating the Act. There is also a provision for personal liability for "an officer, director, agent or mandatary of a corporation"

How does this legislation affect lawyers? The Act requires senders of electronic messages to obtain express consent before transmitting any messages, unless they fit within one of the statutorily defined categories in which consent is implied. Electronic messages include emails, SMS (short messaging service or texting, as it is commonly known), instant messaging and the like.

Exemptions to the legislation include messages sent within a law firm (to any of a class of people who include: an employee, representative, consultant or franchisee to another person in this class) concerning the activities of the law firm. A further exemption covers messages sent by the same class of people (now expanded to include contractors as well) to a similar class of people in another organization "that have a relationship" at the time the message was sent if the message concerns the activities of the receiving organization.

Another exemption covers messages sent in response to requests, inquiries or complaints (unsolicited messages) that are sent to a law firm where you would not have the prior consent of the person who is sending the original message.

Of particular interest to law firms and lawyers are exemptions for messages sent to enforce a legal right or a judicial obligation. These include electronic statements of account, debt collection, licensing information and communications concerning the enforcement of contractual obligations or court orders and foreign legal rights.

There is a general exemption for messages that conform to the form, content and unsubscribe requirements of the Act. The messages must be conspicuously published and readily available on the interface upon which they are accessed. Further, the recipient must consent to receive the messages expressly or "by implication."

Any false or misleading descriptions of the sender's identity, subject matter, message or URL (or other means of referencing a webpage) are prohibited. It is doubtful that many lawyers would fall into this prohibition, given the requirements for marketing activities prescribed by rule 4.2-5 of the *Code of Professional Conduct for British Columbia*:

Content and format of marketing activities

4.2-5 Any marketing activity undertaken or authorized by a lawyer must not be:

(a) false,

(b) inaccurate,

(c) unverifiable,

(d) reasonably capable of misleading the recipient or intended recipient, or

(e) contrary to the best interests of the public.

Commentary

[1] For example, a marketing activity violates this rule if it:

(a) is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient,

(b) is likely to create in the mind of the recipient or intended recipient an unjustified expectation about the results that the lawyer can achieve, or

(c) otherwise brings the administration of justice into disrepute.

It is prohibited to use email lists that have been "harvested" from the internet (as is harvesting these addresses directly).

On January 15, 2015, further provisions will come into force that will prohibit the installation of computer programs without the consent of the user or owner, subject to narrow exemptions set out by CASL and Industry Canada. It is hard to see how this would affect lawyers and law firms, but it is mentioned for completeness.

Law firms that have set up secure portals, such as those available via Microsoft Sharepoint, will be pleased to learn that there is an exemption for messages sent "to a limited-access secure and confidential account to which messages can only be sent by the person who provides the

account."

There is a further exemption for messages that you believe will be accessed in a foreign state, so long as those messages conform to the laws of that state that prohibit conduct similar to CASL.

Of interest to law firms is the exemption for referrals. A single message sent as a result of a referral from a person with a family, personal, business or non-business relationship both with the sender and the recipient can be exempted, provided the sender states the ordinary or full name of the person being referred. The intent is clearly that this one message will lead to receiving consent to further communications.

A "personal or family relationship" is defined in the final regulations. A personal relationship includes an in-person as well as a virtual relationship in which the two individuals have had a direct, voluntary two-way communication and it would be reasonable to conclude that the relationship is personal, taking into account all the relevant factors. These factors include the sharing of interests, experiences, opinions and information in the communications; the frequency of their communications; the length of time that the parties have been communicating; and the parties having met in person. Consistent with the intent of CASL, the recipient can always withdraw consent to receiving any messages.

July 1, 2014 is not far away. The onus is on lawyers and law firms to bring their communication systems, marketing, messaging practices and processes into compliance with CASL ...

A "family relationship" consists of relationships between people who are married or in common-law relationships or those who have a legal parent-child relationship.

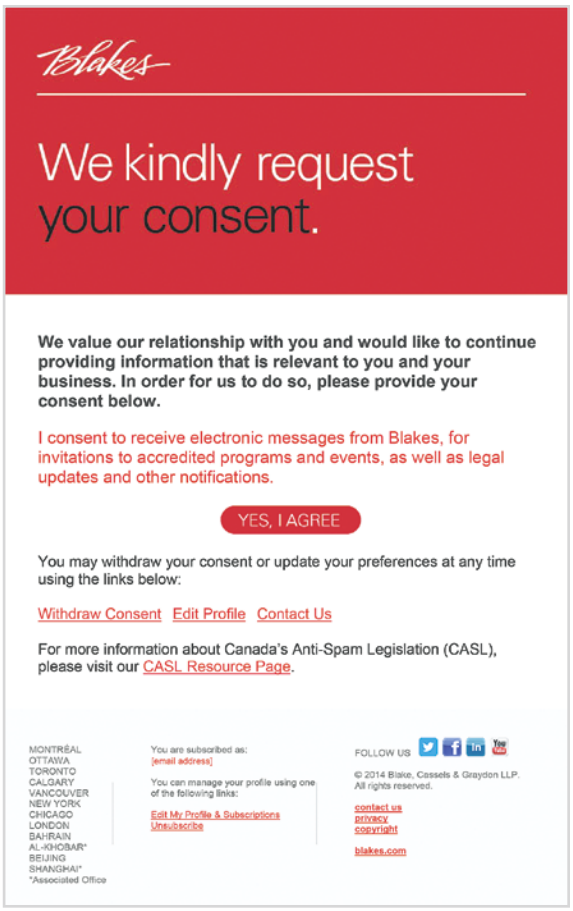
For legal organizations, CASL establishes an "existing non-business relationship" that includes membership in a club, association or voluntary organization, as defined in the regulations. "Membership" is achieving the status of being accepted as a member in accordance with the membership requirements of the club or association.

A "club, association or voluntary organization" is a non-profit organization that operates exclusively for social welfare, civic improvement, pleasure or recreation, or for any other purpose than profit, so long as no part of the income of such organization was payable to, or otherwise available for, the personal benefit of any proprietor, member or shareholder (except for an organization whose primary purpose is the promotion of amateur athletics in Canada). Local and voluntary bar associations and other non-profit legal associations presumably could take advantage of this exemption.

There are a few potential concerns to be aware of regarding CASL. The first is that consents obtained by an organization under the *Personal Information Protection and Electronic Documents Act* will not be valid once CASL comes into force. The second is that the apparent focus of CASL is on email. The application of CASL to SMS and other social media communications is impractical. Perhaps later changes to the regulations will tweak the provisions to better accommodate communication methods other than email.

July 1, 2014 is not far away. The onus is on lawyers and law firms to bring their communication systems, marketing, messaging practices and processes into compliance with CASL, specifically:

- IT systems and law firm policies and procedures should be examined;
- retainer agreements should incorporate a form of consent;
- marketing newsletters, social media communications and holiday greetings emails may need to be adapted;
- existing and prior clients should be asked to provide consent to receiving communications;
- unsubscribe provisions should be incorporated into communications;
- individuals who have not provided consent should be removed from any lists.


Blakes

We kindly request your consent.

We value our relationship with you and would like to continue providing information that is relevant to you and your business. In order for us to do so, please provide your consent below.

I consent to receive electronic messages from Blakes, for invitations to accredited programs and events, as well as legal updates and other notifications.

YES, I AGREE

You may withdraw your consent or update your preferences at any time using the links below:

Withdraw Consent Edit Profile Contact Us

For more information about Canada's Anti-Spam Legislation (CASL), please visit our CASL Resource Page.

MONTRÉAL
OTTAWA
TORONTO
CALGARY
VANCOUVER
NEW YORK
CHICAGO
LONDON
BAHRAIN
AL-KHOBAR*
BEIJING
SHANGHAI*
*Associated Office

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Undertake an audit of your firm's communications – when they are sent, to whom and why – and check whether or not they fall within an exemption. You will need to properly document that you have received consents from those individuals with whom you send electronic messages.

Most importantly, your systems and procedures should ensure that you are not sending out spam again and again and again. ❖

The writer gratefully acknowledges the excellent review of CASL in the publication "Internet and E-Commerce Law in Canada," by Charles Morgan and Puneet Soni of McCarthy Tétrault LLP, that served as a reference for this article.

Practice Watch

by Barbara Buchanan, Practice Advisor

MUSIC TO YOUR EARS … OR "CAT SLIDING DOWN A BLACKBOARD"?

The single biggest problem in communication is the illusion that it has taken place. – George Bernard Shaw

Do you sometimes quit listening when someone's voice pitch is too annoying? Do people often ask you to speak up or repeat what you've said? Do you lose your voice when you speak for many hours? Would you like to sound more professional or pleasant? Lawyers can get technical training from a vocal coach for various voice issues.

We've all experienced playing voicemail messages back repeatedly to try to discern a mumbling caller's name and telephone number. Also, it's often hard to understand what some people are saying on the telephone. (If a lawyer says that he or she is having communication problems with another lawyer, a bubble above your head might read, "It's not surprising …") For some, the root of the problem may be speaking too quickly, too softly, or not articulating clearly. Others may be easy to understand but use "uptalk" (when a declarative sentence is spoken as if it's a question), which doesn't sound professional or portray confidence. It may be okay to uptalk with your friends (e.g. when you are looking to add a certain softness to your tone when telling them with as much tact as possible that the outfit they're wearing doesn't work for them), but in your lawyer role, you may come across as unsophisticated, unprofessional or lacking confidence.

In the movie *In a World*, one of the characters, Carol, imitates a Valley-speaking, uptalking corporate lawyer with an annoying voice. Carol realizes that the lawyer could benefit from some voice training to come across more professionally and sound easier on the ears. After seeing the movie, I was motivated to consult with Kathryn Gretsinger, audio trainer at CBC and an instructor in UBC's Graduate School of Journalism, about tips she might have for lawyers. Here are some key points that I took away from our conversation:

- Relax and breathe. When people feel anxious, their vocal chords get tight. Be aware of stress in the body (neck, jaw, tongue, shoulders, back).
- Focus on what you are saying as opposed to how you are saying it. Be clear about what you know. Lack of certainty can lead to uptalking.
- Slow down and focus on pronunciation. This can help uptalkers interrupt

their speech patterns. It also helps people who have a tendency to speak too fast or have accents that may affect a listener's understanding. If people focus on the movement of your voice, they won't focus on the meaning.

- Pause between sentences. Practise saying the punctuation out loud before starting the next sentence. For example: This is an application for an adjournment. Period. I was retained yesterday. Period. Your voice should generally go down at the end of a declarative sentence.
- Keep hydrated to avoid losing your voice. Throat lozenges can help. Stay away from carbonated water, citrus drinks, and caffeine.. Coffee is hard on the mouth, especially if it has milk in it.

If people focus on the movement of your voice, they won't focus on the meaning of your words.

If you have oral communication concerns, consider a professional voice coach. Hey, even Margaret Thatcher, whose voice had at once time been described as "a cat sliding down a blackboard," had voice coaching.

HEALTH CARE COSTS RECOVERY ACT – ETHICAL ISSUES

The *Health Care Costs Recovery Act* and the Health Care Costs Recovery Regulation apply to various personal injury and wrongful death actions. The Act creates obligations on a plaintiff to claim past and future "health care services" (as defined in section 1). The Act may also apply to settlements where litigation has not been commenced. A lawyer with the BC Ministry of Justice, Legal Services Branch has asked the Law Society to assist in giving guidance to lawyers. In addition to some lawyers not appearing to be aware of the legislation at all, the ministry has identified three specific problem scenarios when dealing with lawyers making claims on behalf of plaintiffs:

1. The lawyer agrees to represent the ministry in a claim the ministry has under the Act, but proceeds to settle the ministry's claim without obtaining instructions from the ministry.
2. The lawyer does not agree to represent the ministry in a claim the ministry has under the Act, but settles the ministry's claim anyway.
3. The lawyer agrees to represent the ministry in a claim the ministry has under the Act, but withdraws as part of the settlement at mediation, leaving the ministry to fend for itself.

In the Ethics Committee's opinion (September 2013), scenarios 1 and 2 are contrary to the *BC Code*, and scenario 3 may be improper if the lawyer does not withdraw in compliance with the Code's withdrawal rules (rule 3.6-2, commentary [2], specific to withdrawing from a contingent fee agreement, and section 3.7).

Note that the joint retainer rules apply if a lawyer acts for more than one client in a matter (Code rules 3.4-5 to 3.4-9). If the clients consent and there is no conflict, a lawyer may act for a claimant for damages for personal injury and also act for the Ministry of Justice for its claim for the matter under the *Health Care Costs Recovery Act*. A sample joint retainer letter is on our website (see Practice Support and Resources > Retainer agreements and joint retainer letters). This letter will be reviewed in light of amendments to the joint retainer rules when they occur.

Keep in mind that a contingent fee agreement must be in writing and comply with the *Legal Profession Act* (Part 8 – Lawyers' Fees), the Law Society Rules (Part 8 – Lawyers' Fees) and the *BC Code* (section 3.6 – Fees and disbursements).

DEFAULT JUDGMENTS – PROVIDING REASONABLE NOTICE TO OPPOSING COUNSEL

Lawyers have been disciplined for obtaining a default judgment without prior reasonable notice to opposing counsel (see hearing decision 2012 LSBC 31 and Chapter 11, Rule 12 of the former *Professional Conduct Handbook*). In an earlier Practice Watch (Spring 2013), lawyers were advised that the Ethics Committee would recommend that express language be added to the *BC Code* to make it clear that a lawyer must give notice to opposing counsel before proceeding by default. Rule 7.2-1,

Services for lawyers

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky** 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.

Practice and ethics advice – Contact **Barbara Buchanan**, **Lenore Rowntree** or **Warren Wilson**, QC to discuss ethical issues, interpretation of the *Code of Professional Conduct for British Columbia* or matters for referral to the Ethics Committee.
Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships.
Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org.
Contact Lenore at: tel: 604.697.5811 or 1.800.903.5300 email: lrowntree@lsbc.org.
Contact Warren at: tel. 604.697.5857 or 1.800.903.5300 email: wwilson@lsbc.org.

All communications with Law Society practice and ethics advisors are strictly confidential, except in cases of trust fund shortages.

◆

PPC Canada EAP Services – 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 additional cost to 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 other legal workplaces.
Contact Equity Ombudsperson, **Anne Bhanu Chopra**: tel: 604.687.2344 email: achopra1@novuscom.net.

commentary [5] has since been added:

> [5] A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

Note that commentary [5] is a mandatory statement. The *BC Code* has three parts: rules, commentary and appendices, any of which may include mandatory language, advisory language or elements of both.

GIFTS TO CHARITIES

A charity has raised a concern that some wills prepared by lawyers do not correctly name charities, causing additional expense in administration of the estate. This may occur because the client for whom the will is being drafted is unwilling to pay the additional costs involved in conducting name searches and obtaining detailed information about the charity, including the correct address and branch or division. If a client wishes to name a charity as a beneficiary, explain to the client the importance of using the correct legal name. Then either verify the correct name of the charity or confirm that the client will perform the verification. If the gift is intended for a specific purpose, the client should determine that the charity can actually fulfill that purpose. It may be appropriate to discuss the provision of an alternate beneficiary, in the event the charity no longer exists on the date of the client's death.

A search of Canada Revenue Agency's "Charities Listings" will provide information about a charity, including:

- whether it is registered under the *Income Tax Act*;
- the registered name and if it is known by a name other than its registered name;
- contact information, programs and general information;
- financial information.

The Canadian Donor's Guide to fundraising organizations in Canada, an annual directory, is another resource containing information on charities. Refer to the Wills and Estates section of the Practice Checklist Manual on our website under Practice Support and Resources for more information regarding will procedure and drafting.

SOLICITORS' LIENS

The solicitors' lien articles that were previously on our website have been combined into one article and updated and revised. See Solicitors' Liens and Charging Orders – Your Fees and Your Clients under Practice Support and Resources to learn what types of solicitors' liens may be available. The article includes a checklist with steps that may be taken by lawyers wanting to assert a lien as security for payment of their accounts.

PHONY REFERRALS AND OTHER SCAMS

Fraudsters continually seek new ways to try to get access to a lawyer's trust account. In January, a BC lawyer was targeted by Stephan Mike Proennecke, Project Manager & Director of Production, Debiotech S.A., who claimed to be referred to the lawyer's firm by the American Bar Association. In another attempt, a scamster pretended to be lawyer Gorge Qin of Jon Pin Kazutaka Law Office in Tokyo. The purported lawyer asked the BC lawyer to represent his client, Renesas Electronic Corporation, against an entity "in your jurisdiction." In these scenarios, the pretend client tries to trick the lawyer into the bad cheque scam (instructing the lawyer to wire funds from trust to the "client" on the strength of a bad cheque or phony bank draft provided to the lawyer for deposit).

To see a list of new bad cheque scam attempts on BC lawyers so far in 2014, see the bad cheque scam names and documents list on our website. The names are listed by type of ruse (e.g. collecting on phony commercial sales agreements and invoices, phony personal loans, phony intellectual property rights, and matrimonial scams such as collecting on a phony collaborative divorce agreement) often with emails and other documents linked to the names. On the right side of the web page, you will find the complete list of names in alphabetical order.

What can you do to protect yourself?

- See Take steps to manage the risk and review the bad cheque scam names and documents list on our website as part of your firm's intake process. Check back often, as the list is updated regularly.
- Encourage your support staff to subscribe to the Law Society's free e-publications to help keep you current with news from the Law Society. To subscribe to fraud alerts, click on "Fraud: Alerts and Risk Management" on our home page and then click on "Subscribe to Fraud Alerts: RSS Feeds." Staff can also sign up for free electronic subscriptions to the *Benchers' Bulletin* (which also gets them *Insurance Issues*, E-Brief and Notices to the Profession) and *Member's Manual* updates. Just click on Subscribe to Publications under "for the Public" on the home page.
- Conduct an online search of your name and your firm's name regularly to see if your names may be used without your knowledge.

Author's note: This fraud alert includes names used by fraudsters in BC. Real people with the same names may be the victims of a fraudster or of coincidence, but are not suspected of wrongdoing.

FURTHER INFORMATION

Contact Practice Advisor Barbara Buchanan at 604.697.5816 or bbuchanan@lsbc.org for confidential advice or more information regarding any items in Practice Watch.❖

Court of Appeal consultation on mandatory e-filing

THE COURT OF Appeal is seeking input from the profession, the public and filing agents on a proposal to require mandatory e-filing of civil and criminal factums and criminal statements by January, 2016. E-filing of factums will not be required for self-represented litigants.

The changes to the filing procedure and the requirements are outlined in the consultation paper on the court's website. Comments may be submitted to FactumConsultation@courts.gov.bc.ca by April 30, 2014. Any comments received may be used anonymously in a public report.❖

Credentials hearing

Law Society Rule 2-69.1 provides for the publication of summaries of credentials hearing panel decisions on applications for enrolment in articles, call and admission and reinstatement.

For the full text of hearing panel decisions, visit the Hearing reports section of the Law Society website.

CHRISTOPHER EDWARD KAY

Vancouver, BC
Called to the bar: January 9, 1986
Ceased membership: December 31, 1998
Hearing (application for reinstatement): July 8 to 10, 2013
Panel: Maria Morellato, QC, Chair, Lois Serwa and Donald Silversides, QC
Decision issued: December 11, 2013 (2013 LSBC 34)
Counsel: Jean Whittow, QC for the Law Society; Christopher Edward Kay on his own behalf

FACTS

In 1999, former lawyer Christopher Edward Kay emigrated from Canada to Europe in an attempt to conceal his whereabouts from his creditors and avoid his financial obligations to a bank and a client.

Kay returned to Canada in October 2010. He worked as a realtor in BC until he ceased to be licensed in March 2012. In July 2012, Kay became employed as a taxi driver.

In January 2012, Kay applied to be reinstated as a lawyer. The Credentials Committee ordered that a hearing be held to determine whether Kay meets the criteria for admission. A hearing panel considered three key issues in assessing his application.

Departure from practice and from Canada

The panel considered the circumstances around Kay's departure from practice and from Canada.

Kay did not disclose to his clients or the Law Society that he intended to leave Canada permanently. He failed to comply with Law Society requirements with respect to his withdrawal from practice.

Kay felt that he dealt with his clients and their records in a proper and responsible manner when he ceased practising. He ensured that all of his continuing clients were represented by new counsel and that their files and records were transferred to new counsel before he left Canada.

History with the Law Society

The panel considered Kay's history with the Law Society, including past complaints and reports/claims to the Lawyers Insurance Fund.

During his 13 years of practice, there were two situations that Kay failed to deal with properly. He had very large bills to two clients for whom he obtained large settlements, both on a contingent fee basis. After paying a refund to one client in 1997, it became clear in early 1998 that Kay would likely be required to pay a substantial refund to a second client. This would have been a financial disaster for Kay.

Kay stated that, if he were in the same circumstances today, he would attempt to negotiate a mutually acceptable amount for his fee with the client and refund the amount that exceeded the agreed amount.

Before he left practice, there were eight complaints about Kay that either did not contain serious allegations or did not involve any improper conduct. After Kay left Canada, two complaints were received that related to the unacceptable manner in which he wound up his practice, and a third complaint showed no evidence that Kay acted improperly.

One claim to the Lawyers Insurance Fund was related to the cost of appointing a substitute trustee in the place of Kay when he left Canada. Other potential or actual claims to the Lawyers Insurance Fund concerning Kay did not raise issues regarding his character or reputation or his fitness to be a practising lawyer.

Financial difficulties

The panel considered Kay's financial difficulties, including his handling of his indebtedness to the bank at the time of his departure and later.

Instead of taking steps to deal with his obligations to the bank and his client, Kay decided to quit practising law, abandon his condominium and leave the country with $300,000. His actions revealed flaws in his character.

However, the panel determined that these were a series of related but isolated actions and were not consistent with the rest of Kay's practice history or his conduct after settling in Europe and returning to Canada.

Except for the manner in which he dealt with his two major creditors, there was no evidence that Kay acted for his clients or dealt with counsel in any manner other than a competent, honest and trustworthy manner.

CONCLUSION

Kay repeatedly stated that leaving Canada as he did in 1999 was a terrible mistake, and he was genuinely remorseful. The panel was satisfied that Kay would act differently today if faced with the same circumstances and that he was currently of good character.

Since Kay left the practice of law, he worked as a real estate agent and as a taxi driver. The consequences of his actions ultimately wreaked havoc on his personal life and finances. Kay nonetheless moved forward and did what he needed to do to support himself.

Strong letters of reference were received from his employers in the real estate industry, attesting to his professional ethics and honesty, and his taxi business employers attesting to his respectfulness and reliability. As well, his landlord and his banks, from before and after

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Discipline Digest

BELOW ARE SUMMARIES with respect to:

- Philip Richard Derksen
- Brian John Kirkhope
- Jeffrey Robert Arndt
- William Jacob Mastop
- Laurel Elizabeth Hudson (Tanner)
- Douglas Edward Dent

For the full text of discipline decisions, visit the Hearings reports section of the Law Society website.

PHILIP RICHARD DERKSEN

Abbotsford, BC
Called to the bar: May 20, 1988
Discipline hearing: June 20, 2013
Panel: Greg Petrisor, Chair, John Ferguson and Shona Moore, QC
Oral decision (facts and determination): June 20, 2013
Decision issued: November 27, 2013 (2013 LSBC 33)
Counsel: Carolyn Gulabsingh for the Law Society; Philip Richard Derksen on his own behalf

FACTS

Between September 2012 and March 2013, the Law Society wrote several letters and left a voicemail message for Philip Richard Derksen, while investigating allegations of an unreported judgment against Derksen. Further, between December 2012 and March 2013, the Law Society wrote several letters and left a voicemail message for Derksen, while investigating concerns arising from a compliance audit of his practice. Derksen failed to provide a prompt or substantive response to these communications.

Derksen did provide a letter to the Law Society dated May 15, 2013, but his response to requests for information and documents was incomplete. He provided further material to the Law Society on the date of his hearing, but without time to review that material, it could not be determined if the material answered all of the requests for information.

ADMISSION AND DISCIPLINARY ACTION

Derksen acknowledged that he had not, prior to the hearing, provided a full response to the Law Society's requests for information and admitted that his conduct constituted professional misconduct.

Derksen took issue with the allegation that he failed to respond substantively to three specific Law Society letters. However, he admitted that, in a global sense, he failed to provide prompt or adequate responses to Law Society communications regarding both investigations. He characterized his efforts as imperfect and ongoing rather than a refusal to respond.

Derksen argued that the current Code requirement that a lawyer reply promptly *and completely* to any communication from the Law Society only came into effect on January 1, 2013, after the date of the initial correspondence . The panel rejected his argument. The former Handbook, in addition to requiring a prompt response to any communication from the Law Society, also required Derksen to provide documents, not improperly obstruct or delay an investigation, cooperate with an investigation, and otherwise comply with the Law Society's regulation of his practice. Derksen did not meet those obligations. Further, his failure to respond continued after January 1, 2013, when the current Code came into force.

The panel considered a number of aggravating factors including that Derksen was a senior lawyer, had an extensive professional conduct record, and his misconduct was persistent over an extended time period.

Derksen's effort to comply with the requests for information made of him, albeit late, was viewed as a mitigating factor.

Failure by a lawyer to respond to communication from the Law Society is serious. Complete and timely cooperation from lawyers is necessary for the Law Society to regulate the profession effectively.

The panel accepted Derksen's admission and ordered that he:

1. provide a complete and substantive response to the inquiries made in the Law Society's letters;
2. be suspended from practising law for one month; and
3. pay $2,000 in costs.

The panel also ordered that three affidavits be sealed to protect confidential information contained in those documents.

BRIAN JOHN KIRKHOPE

Nanaimo, BC
Called to the bar: August 31, 1990
Discipline hearings: December 3, 2012 and October 29, 2013
Panel: Thomas Fellhauer, Chair, Ralston Alexander, QC and Patrick Kelly
Decisions issued: July 4 (2013 LSBC 18) and December 13, 2013 (2013 LSBC 35)
Counsel: Jaia Rai (facts and determination) and Alison Kirby (disciplinary action) for the Law Society; Henry Wood, QC for Brian John Kirkhope

FACTS

Brian John Kirkhope represented a client in a family law proceeding involving spousal support and division of assets. The parties had previously reached an agreement whereby Kirkhope's client would pay $1,800 per month for interim spousal support.

On January 12, 2010, Kirkhope advised counsel for the former spouse that his client was unable to make the support payments.

On July 12, 2010, an application for interim spousal support was

heard in BC Supreme Court. An order was made that required Kirkhope's client to pay monthly interim spousal support payments of $2,028 commencing on July 15, 2009. Arrears of support were to be dealt with when the assets were divided.

Kirkhope's client made the payments in July and August 2010, in accordance with the terms of the order.

On July 22, 2010, Kirkhope drafted the order and delivered it to opposing counsel. On August 25, Kirkhope was advised that counsel found several omissions in the draft order and was awaiting a copy of the transcript of the reasons for judgment order.

On September 15, Kirkhope accepted instructions from his client to deposit and hold the September payment in his trust account pending final settlement. Kirkhope wrote opposing counsel stating that he was holding funds in trust as his client felt that his former spouse was purposely delaying final settlement to cause him ongoing monthly expense, rather than concluding all issues between them in a timely manner.

When the former spouse did not receive the September payment, she made a complaint to the Law Society. After the Law Society advised Kirkhope of the complaint, he returned the funds to his client who then made the spousal support payment.

DETERMINATION

The panel found that Kirkhope's disregard of a court order and his participation in his client's strategy to withhold a spousal support payment in an attempt to motivate a quicker settlement of the division of property issues constituted professional misconduct.

DISCIPLINARY ACTION

The panel considered a number of aggravating factors. Kirkhope's participation in a strategy that resulted in the breach of a court order is a serious matter and undermines the public's confidence in the integrity of the legal profession.

Kirkhope admitted that he participated in this strategy with the hope that it would motivate the complainant and her legal counsel to speed up the process of a division of property and resolution of the other issues in dispute. While this conduct was to the benefit of Kirkhope and his client, it had a negative impact on the complainant.

Kirkhope had 23 years of experience in family law matters and civil litigation. He had two prior findings of professional misconduct, the most recent of which involved breach of a court order. That complaint was in progress at the time that he participated in this breach of a court order. Kirkhope provided statements that he would change his practice; however, the panel recognized that he had an opportunity to change prior to September 2010 and chose not to.

It appeared to the panel that Kirkhope's two previous penalties for professional misconduct in the nature of fines had not been effective.

After Kirkhope was contacted by the Law Society, he took quick action to redress the wrong and acknowledge his misconduct. The panel considered this as a mitigating factor as well as the negative impact that a suspension would have on his clients and the two employees in his small law office.

On the overall consideration of the aggravating and mitigating factors, the panel found that a significant suspension of 45 days was appropriate in this case.

The panel ordered that Kirkhope:

1. be suspended for 45 days effective February 1, 2014 (varied to February 14, 2014); and
2. pay $7,725.20 in costs.

The panel further ordered that financial information with respect to Kirkhope's income and law practice not be disclosed or published.

JEFFREY ROBERT ARNDT

Duncan, BC
Called to the bar: May 14, 1979
Discipline hearing: May 28, 2013
Panel: Gregory Petrisor, Chair, Carol Hickman, QC and Graeme Roberts
Oral reasons: May 28, 2013
Decision issued: December 20, 2013 (2013 LSBC 38)
Counsel: Alison Kirby for the Law Society; Richard Margetts, QC for Jeffrey Robert Arndt

FACTS

Jeffrey Robert Arndt failed to file income tax returns for the years 1996 through 2002. The Canada Customs and Revenue Agency (CCRA) estimated that Arndt owed $360,000 to $500,000 in unpaid taxes. Arndt was charged in October 2001 with eight counts of failing to comply with the *Income Tax Act*, and his personal and law corporation's general bank accounts were garnished between 2001 and 2004.

In March 2002, Arndt was retained by a client in criminal proceedings. Arndt agreed to provide legal services and receive payment in cash as an "off the books" transaction. This would avoid any PST and GST owed for the services, including the amount in income on Arndt's personal or law corporation's income tax filings, and collection proceedings brought by the CCRA.

In early November 2002, Arndt accepted $2,500 in cash from the client. He acknowledged receipt of the funds on the back of a business card. He did not deposit the funds into a pooled trust account, but placed the cash in a desk drawer. He did not record the transaction in his trust account records, on a separate client trust ledger, or in his general account records.

On November 8, 2002, Arndt attended a preliminary inquiry on behalf of the client and billed the client $2,500. The statement of account acknowledged the $2,500 as paid. Arndt maintained it was only after he rendered his bill that he used the funds to pay personal and business expenses. He did not bill, collect or remit GST or PST and did not report the $2,500 as income for tax purposes.

On January 16, 2003, Arndt pleaded guilty to two of the CCRA charges against him. In May 2003, he was served with a writ of seizure and sale for assets of his law corporation and was also served with attachment orders for bank accounts of his law corporation. That same

month, Arndt informed the Law Society of his financial difficulties.

In May 2003, Arndt and his client negotiated a flat fee of $10,000 for services in connection with a criminal trial and sentencing.

On May 31, Arndt filed for bankruptcy. In August, he filed estimated income tax returns for the years 1996 to 2002.

On October 23, Arndt accepted $10,000 cash from the client in the same manner as the $2,500 cash payment.

On October 27, Arndt negotiated a plea bargain on behalf of the client. On October 28, Arndt billed the client a flat fee of $10,000 for services rendered. The statement of account acknowledged the $10,000 as having been paid and, again, he did not bill, collect or remit GST or PST and did not report the $10,000 as income for tax purposes.

In December 2003, Arndt made a proposal of insolvency to CCRA, which was approved by the court. In April 2004, Arndt pleaded guilty to the remaining six charges brought against him under the *Income Tax Act*.

From May 2004 to May 2009, Arndt provided various legal services to his client in six separate matters without rendering a bill to the client to avoid a review of the "off the books" transactions from 2002 and 2003.

In October 2011, Arndt's client made a complaint to the Law Society. In the course of the investigation, Arndt raised the "off the books" transactions, which would not have otherwise come to the attention of the Law Society.

ADMISSION AND DISCIPLINARY ACTION

Arndt failed to follow the rules regarding the handling of funds and the recording of transactions. By participating in "off the books" transactions to avoid tax consequences and collection efforts, he also engaged in dishonourable conduct that cast doubt on his integrity. Arndt admitted that his conduct amounted to professional misconduct.

The panel considered some aggravating factors. Arndt is a senior lawyer. His misconduct occurred in two separate transactions and involved multiple breaches of tax laws and Law Society rules. He engaged in the misconduct for personal gain, to avoid tax reporting and payment as well as to avoid collection efforts.

Arndt's misconduct did not harm his client. He brought his misconduct to the attention of the Law Society. The misconduct happened more than 10 years ago, and there was no suggestion that Arndt had any professional conduct history arising from his actions since. These were all considered as mitigating factors.

The panel accepted Arndt's admission of professional misconduct and ordered that he pay:

1. a $7,500 fine; and
2. $2,000 in costs.

The panel also made an order to prevent disclosure of certain information contained in the agreed statement of facts and the hearing transcript.

WILLIAM JACOB MASTOP

Vernon, BC
Called to the bar: May 19, 1995
Non-practising member: January 26, 2010
Summary proceeding under Rule 4-40 (Conviction): November 13, 2013
Decision issued: December 20, 2013 (2013 LSBC 37)
Benchers: Leon Getz, QC, Chair, Lynal Doerksen, Jan Lindsay, QC, Benjimen Meisner, Thelma O'Grady, Lee Ongman, David Renwick, QC and Kenneth Walker, QC
Counsel: Jaia Rai for the Law Society; Richard Fernyhough for William Jacob Mastop

FACTS

A client of William Jacob Mastop was the acknowledged leader of a criminal organization known as "the Greeks." This client, along with four other members of the Greeks, was charged with the murder of three individuals. During the murder investigations, the police intercepted over 300 conversations between Mastop and members of the Greeks.

Through these intercepted conversations it was learned that Mastop, while representing another client, received an Information to Obtain (ITO) document from the Crown. As an affidavit for the police to obtain a search warrant, the ITO may include sensitive information from an informer about the criminal activity of a suspect. In the criminal drug world, the revelation of an informant's identity can have serious consequences to the informant, including bodily harm or death.

Mastop gave the ITO to his client who, as leader of the Greeks, was interested in the informant's identity. There was no evidence to suggest that, by providing the ITO to his client, any harm was suffered by anyone. Mastop knew, however, that if the identity of an informer was revealed, the informer could face serious violent consequences.

Numerous other incidents showed Mastop's willingness to aid the members of this criminal organization.

On December 20, 2012, Mastop pleaded guilty in the Supreme Court of BC to one count on an indictment alleging that he knowingly participated in or contributed to the activity of a criminal organization for the purpose of enhancing the ability of the criminal organization to facilitate or commit an indictable offence, contrary to the *Criminal Code*. Mastop was sentenced on April 4, 2013 to one year incarceration.

As Mastop was found guilty on an indictable offence, the Discipline Committee referred the matter to the Benchers pursuant to Rule 4-40.

After being charged with the offence, Mastop was released on a Recognizance of Bail on January 26, 2010 with one of the conditions being that he not engage in the practice of law. Mastop has not practised law since that date.

On November 18, 2013 the BC Court of Appeal allowed a Crown appeal and increased Mastop's sentence to two-and-one-half years of incarceration.

DETERMINATION

The issue before the Benchers was whether to summarily suspend or disbar Mastop.

Mastop pointed out that the offence to which he pleaded guilty was a relatively new provision in the *Criminal Code* and, but for its enactment, he would not have been charged. Further, that offence was the least serious of the "trilogy" of new offences relating to aiding a criminal organization.

The Benchers did not consider that a lawyer could not be disbarred or suspended for an offence because other offences may be more serious. They found Mastop's proposition that the *Criminal Code* sections were novel offences and therefore mitigated his blameworthiness had no support in law. It was difficult to imagine someone in a better position to know what the law is in this area than Mastop, a seasoned criminal lawyer.

Although it was not proven that Mastop providing the ITO to his client caused any harm to anyone, the Benchers did not see that as a mitigating factor. It was difficult to characterize Mastop's conduct as anything but a deliberate attempt to assist a criminal organization in committing an indictable offence.

Mastop claimed that the *Criminal Code* section was not classified as an "Offence Against the Administration of Law and Justice" and, therefore, the Benchers should not conclude that this was an offence that strikes at the heart of the administration of justice.

The Benchers failed to see how the placement of a section in the *Criminal Code* mattered in this case. The trial judge characterized Mastop's offence as "undermining the system of justice."

Mastop asserted that he was simply assisting the Greeks, without any intent to assist the criminal organization to commit an indictable offence. He explained his guilty plea on the basis that "it was foreseeable that his conduct could have the effect of assisting the criminal organization."

Mastop knew that the Greeks were a criminal organization and he well knew what criminal activity they were involved in. These facts alone should have given him pause about his relationship with its members. There was nothing on the record to suggest that he ever questioned or sought advice on how he should provide services to the Greeks.

The Benchers agreed that, if Mastop were permitted to practise law, it was highly unlikely that he would commit such an offence again. The Benchers were also aware of his lack of a prior record, criminal or disciplinary, and his numerous letters of support from family, friends, former clients and colleagues.

Criminal defence lawyers have a difficult task when representing persons charged with criminal offences and especially so when defending persons who are members of a criminal organization. Lawyers are bound to be diligent and vigorously defend their clients' rights and interests, but they must do so within the law.

The Benchers were not persuaded that even a lengthy suspension was appropriate. Mastop used his particular privileged position in the justice system to provide assistance to a criminal organization contrary to the criminal law. In order to maintain public confidence in the legal profession, there should be no possibility of doubt that the Law Society takes such conduct with the utmost seriousness, and the profession needs to know that as well.

DISCIPLINARY ACTION

The Benchers ordered that Mastop be disbarred.

LAUREL ELIZABETH HUDSON (TANNER)

Cranbrook, BC
Called to the bar: May 19, 2000
Discipline hearing: November 20 to 22, 2013
Panel: Thelma O'Grady, Chair, Don Amos and Brian J. Wallace, QC
Decision issued: January 20, 2014 (2014 LSBC 02)
Counsel: Carolyn Gulabsingh for the Law Society; Richard Gibbs, QC for Laurel Elizabeth Hudson (Tanner)

FACTS

Laurel Elizabeth Hudson (Tanner) agreed that she deliberately falsified accounts submitted to the Legal Services Society (LSS) on her behalf and on behalf of other lawyers employed by her firm, even after being cautioned about doing so by LSS, as follows:

- Between April and October 2007, Hudson submitted to LSS for payment at least six accounts that falsely stated the time spent by lawyers in order to recover time spent by legal assistants. She knew the accounts were false and that LSS did not permit billing for time spent by legal assistants.
- Between October 2007 and April 2008, Hudson caused the time records of lawyers who worked at her firm to be altered on at least 12 accounts to include time spent by legal assistants. These false accounts were submitted to LSS for payment based on the altered time records.
- Between April and September 2008, Hudson caused the time records of lawyers who worked at her firm to be altered to include approximately 20 per cent more hours than had actually been worked by the lawyers and caused at least nine false accounts to be submitted to LSS based on the altered time records.
- Between June and November 2008, Hudson caused at least five false accounts to be submitted to LSS for payment in which she claimed preparation time related to court applications when no application was filed on that date, or multiple applications were filed on the stated date and preparation time was claimed for each application, contrary to the LSS tariff.
- Between April 2007 and November 2008, Hudson caused accounts to be submitted electronically to LSS on behalf of other lawyers in her firm. She used the other lawyers' e-billing access codes when she knew it was not permitted to submit accounts for payment on behalf of other lawyers without prior authorization from LSS.

ADMISSIONS AND DISCIPLINARY ACTION

Hudson admitted that her actions constituted professional misconduct.

At the hearing, Hudson's counsel cast doubt on her admission to one of the allegations, but did not withdraw Hudson's agreement to it. The panel considered whether this allegation had been proven. The allegation arose immediately following a 2007 LSS audit of Hudson's firm's billings, which uncovered that legal assistant billings were identified in the firm's records, but not on the bills to LSS. After the audit, Hudson's firm continued these billings but without identifying them in its billing records. In letters and the agreed statement of facts, Hudson admitted to the allegation twice, and denied it twice. The panel found that the facts supported her admission and there was no evidence to support her denial.

The panel considered a number of aggravating factors. Hudson's misconduct was not an isolated incident. Rather, it consistently occurred over an extended period of time. Despite the caution from LSS that billing for legal assistants' time was not permitted under the tariff, she found another way to do it.

Hudson deliberately misreported time and submitted false invoices to LSS because she thought that she was justified in doing so, and because she believed that the exclusion of legal assistants' time from the LSS tariff was improper.

The direct victim of Hudson's misconduct was LSS, as Hudson received thousands of dollars from LSS on the basis of falsified billings. The resources expended by LSS to satisfy the false accounts, and in uncovering the false accounts submitted by Hudson, also took resources away from LSS clients or potential clients who would have benefitted from those resources. Further, BC taxpayers were indirect victims of Hudson's misconduct as LSS is funded, in part, through revenue generated by the provincial government.

Letters of reference attested that Hudson was a dedicated and skilful lawyer. It was clear to the panel that she had great concern for poor and marginalized people and their lack of access to justice. When LSS took away her vendor number, she continued to assist poverty clients by doing pro bono work.

The panel found no evidence that Hudson's misconduct was the result of duress or undue influence at the time of the wrongdoing. Hudson admitted that she had temporarily lost her "moral compass." In the panel's view, her intentional dishonesty fell far below the standard that the Law Society expects of lawyers.

The panel ordered that Hudson:

1. be disbarred; and
2. pay $13,860 in costs.

DOUGLAS EDWARD DENT

100 Mile House, BC
Called to the bar: September 14, 1976
Discipline hearing: October 11, 2013
Panel: Vincent Orchard, QC, Chair, Jennifer Chow and June Preston
Oral reasons (facts and determination): October 11, 2013
Decision issued: January 27, 2014 (2014 LSBC 04)
Counsel: Carolyn Gulabsingh for the Law Society; Ravi Hira, QC and Michael Drouillard for Douglas Edward Dent

FACTS

In May 2011, Douglas Edward Dent's client and the client's wife entered into a separation agreement. The client agreed to pay his spouse $5,000 by way of five instalments of $1,000. On June 18, the client provided Dent with post-dated cheques, each in the amount of $1,000. These equalization payments were to be deposited in Dent's trust account and then paid to the client's spouse.

On June 18, the client also provided a $4,000 cheque to Dent for legal fees. Dent deposited this cheque and the first cheque of $1,000 into his trust account.

On July 4, Dent deposited the second equalization payment into his trust account. The same day, Dent transferred $3,480.20 from his trust account as payment of his client's December 2010 invoice.

On July 14, Dent emailed the client to advise that he intended to provide the first equalization payment to the client's spouse. He also referred to discussions with the client at their last meeting about his expectation that the client would forward cheques for $1,000 in mid-July and mid-August to cover legal work performed since his last account.

On July 16, the client requested a final statement of account that he would pay with a single cheque. Dent replied that his firm would prepare a final statement and expected to receive immediate payment as the client's accounts had remained outstanding for months at a time.

Dent did not forward the first equalization payment to his client's spouse.

On July 19, Dent issued two accounts to the client that totalled $2,968.40. Instead of waiting for a cheque from the client, Dent transferred funds from trust towards payment of his account, including the $2,000 representing the equalization payments. Dent included a note to his client that a balance of $448.60 was owing to the law firm as well as an additional $2,000 to be forwarded to the client's spouse.

ADMISSION AND DISCIPLINARY ACTION

Dent admitted that his conduct in improperly withdrawing trust funds to pay fees and disbursements amounted to professional misconduct.

Dent stated that he acted on the mistaken but honest belief that he had obtained the express consent of the client orally on June 18, 2011. There was no record confirming the express oral consent of Dent's client to divert the equalization payments to pay his account.

It was apparent to the panel that Dent acted in haste to pay off his account and, in doing so, preferred his interests to those of his client. He benefited from his misconduct.

In 2001 Dent received a one-month suspension for conduct in connection with the financing of a family home that put him in a conflict of interest with his client due to a personal interest in the transaction. While there had been significant passage of time since this matter of professional misconduct, the panel found it troubling that, in both matters, Dent preferred his own interests to that of his client.

The panel accepted as mitigating factors that Dent had practised law

for over 37 years and had made a significant contribution professionally and through volunteer activities in his community.

Counsel for Dent strenuously argued that a suspension would have a detrimental effect on Dent's reputation and that of his firm in a small community.

The panel found that Dent's conduct in withdrawing funds from his trust account to pay fees and disbursements, without express authority to do so, fell markedly below the standard expected of a lawyer. It was necessary for the panel to have due regard for the public interest and the need to ensure the public's confidence in the integrity of the profession generally.

The panel ordered that Dent:

1. be suspended for 45 days; and
2. pay $4,720 in costs.

Dent has applied for a review of the decision, and a stay of disciplinary action has been ordered. ❖

Conduct reviews

THE PUBLICATION OF conduct review summaries is intended to assist lawyers by providing information about ethical and conduct standards.

A conduct review is a confidential meeting between a lawyer against whom a complaint has been made and a conduct review subcommittee, which may also be attended by the complainant at the discretion of the subcommittee. The Discipline Committee may order a conduct review pursuant to Rule 4-4, rather than issue a citation to hold a hearing regarding the lawyer's conduct, if it considers that a conduct review is a more effective disposition and is in the public interest. The committee takes into account a number of factors, including:

- the lawyer's professional conduct record;
- the need for specific or general deterrence;
- the lawyer's acknowledgement of misconduct and any steps taken to remedy any loss or damage caused by his or her conduct; and
- the likelihood that a conduct review will provide an effective rehabilitation or remedial result.

DISHONOURABLE OR QUESTIONABLE CONDUCT

A lawyer assisted his client to breach a court order not to distribute or otherwise make use of video footage when he knew or ought to have known that the order prohibited his client from doing so except for the purposes of preparing the client's defence. The lawyer advised the court of his breach by letter and in person. (CR 2013-46)

A lawyer made support payments to his client from funds held in trust for another purpose, contrary to a court order and Law Society Rule 3-56(1). The lawyer self-reported his conduct to the Law Society and the court. (CR 2013-47)

QUALITY OF SERVICE

A lawyer failed to serve her clients for an extended period of time due, in part, to significant personal issues. Lawyers must manage their personal lives such that they are able to fulfill their responsibility to clients and, if they cannot, they must resign from the file. This lawyer was encouraged to seek counselling for possible underlying conditions that may have contributed to her pattern of delay and failure to meet obligations. (CR 2014-01 and 2014-02) ❖

Credentials hearing ... from page 17

his bankruptcy, submitted letters relating to the time period after his return to Canada. They stated that he was "extremely reliable" fiscally. Further, Kay recognized and admitted he made serious mistakes that he would not repeat again. He understood the gravity of his wrongdoings. Kay worked hard to overcome his failings, and has demonstrated a marked change from the time just before he left his practice and Canada.

At the time of the hearing, Kay was 62 years old and still employed as a taxi driver. The panel was mindful of the fact that Kay had not practised law for 15 years and that, before he is reinstated, the Credentials Committee will undoubtedly require him to take steps to ensure that he is still qualified to practise law in BC. In view of his previous contingent fee billing difficulties, the panel also recommended that the committee consider imposing conditions or limitations on Kay's practice.

The panel found that Kay was a person of good character and repute and was fit to become a barrister and a solicitor of the Supreme Court, subject to the following conditions that he:

1. comply with, and fulfill, all requirements of the Law Society with respect to his qualification to practise law; and
2. practise only in a supervised setting as directed and approved by the Law Society, for the period of time to be set by the Law Society.

The Credentials Committee has applied to the Benchers for a review of the hearing panel decision. ❖

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