

Benchers' Bulletin

The Law Society
of British Columbia



Your information bulletin on Law Society of British Columbia activities

2001: No.5 September-October



The first ever Day of Law videoconference — featuring professional development sessions — was held on September 21 in conjunction with the Law Society and CBA annual meetings. The event, sponsored by the Law Society, the CLE Society and the B.C. Branch of the CBA, drew together 350 lawyers at nine B.C. locations. Highlights of several educational sessions are posted on the CLE website at www.cle.bc.ca.

Sweeping proceeds of crime legislation is imminent

The federal government's new *Proceeds of Crime (Money Laundering) Act* and accompanying regulations will impose onerous new reporting requirements on lawyers beginning November 8, 2001.

To assist B.C. lawyers in understanding these obligations, the Law Society has published:

- *A Guide to Managing a Lawyer's Obligations under the Proceeds of Crime Legislation*
- *Model Compliance Manual: Proceeds of Crime (Money Laundering) Act [New]*

Both publications are available on the Law Society website at www.lawsociety.bc.ca/services-

[/frame_pcmla.html](#) and will be updated as necessary. The *Compliance Manual* contains useful reference material for lawyers, including a precedent letter for law firms to consider when informing clients about the new legislation.

The Law Society is gravely concerned about this legislation. Lawyers will breach solicitor-client confidentiality by complying with some provisions, in conflict with their ethical obligations. At the same time, the consequences of non-compliance under the legislation are serious. The Law Society and the Federation of Law Societies sought to delay implementation and are now launching a constitutional challenge. □

The Law Society of British Columbia



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Benchers' Bulletin

The *Benchers' Bulletin* and related bulletins are published by the Law Society of British Columbia and are distributed to B.C. lawyers and articulated students to apprise them of the activities of the Benchers and Law Society committees. Additional subscriptions to Law Society bulletins may be ordered at a cost of \$50.00 (plus GST) per year, prorated at \$12.50 per quarter. If you have ideas on how to improve the *Bulletin*, please contact the editor.

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Knowledge — it's what proves our value in times of change



Richard S. Margetts, Q.C.

I have said on many occasions, and once or twice in this column, that our profession faces daunting change. I propose to address the subject once again — but this time not to explore limited liability partnerships, multi-disciplinary practice or other current issues — but to focus on our greatest asset: knowledge.

What distinguishes lawyers from the clients we serve is our knowledge of the law. The practice of law is in many respects simply the application of legal principles, in conjunction with the exercise of common sense, with a view to the resolution of a particular problem.

I believe it fair to say most members of our profession are well imbued with common sense and, until recently, have been the primary conveyors of legal knowledge and advice. A variety of factors have emerged over the past few years that have had the effect of significantly eroding the traditional domain of the lawyer. These factors include the development of administrative processes, the increased complexity and cost of the traditional judicial approach to dispute resolution, the increased cost of legal services and the increased availability of legal information for the prospective litigant through social agencies and, more recently, web-based resources. This list of factors contributing to the change is far from exhaustive, and continues to expand as the marketplace develops.

How are we to respond? The answer, in my mind, is for us to identify what value it is that a lawyer brings to a transaction and to develop and promote our attributes ahead of the marketplace. Foremost among the skills that a lawyer has acquired through his or her studies is a sound knowledge of the law. Knowledge is, for want of a better way of putting it, the basic tool of the lawyer's trade. It is time to take a close look at knowledge — both in how we obtain it and how we market it.

This involves at least two aspects. We must publicly display our expertise. This means a variety of things, ranging from members of the profession being active at a community level to the liberalization of marketing rules. Another way for us to do this as a profession is to embrace specialization. Recently, members of the tax bar approached the Law Society, encouraging the Benchers to consider a program for the certification of

tax specialists. It seems the Chartered Accountants are developing such a program to keep ahead of the other accounting disciplines, and the tax lawyers need accreditation to keep one step ahead of the accountants.

But why just the accountants? Paralegals and business advisors, seeking to engage in the practice of law, have crept well over the horizon. The solution must be to make the lawyer a better and more marketable service provider. Specialization, with the attendant expertise, is one such step we must take. In other words, we must emphasize and focus on the knowledge we have relative to others who may seek to involve themselves in competition with us.

I am pleased the Benchers will soon be taking a fresh look at specialization.

The second aspect to this is that we must ensure lawyers can maintain and enhance their knowledge through both traditional and emerging resources. We are lucky to welcome Sylvia Teasdale as the new head librarian of the British Columbia Courthouse Library Society. She assumes her new position at a time when much is happening in the evolution of information service providers.

The Law Society is committed to the harmonization of the delivery of legal knowledge in a cost effective fashion — critical to a knowledge-based profession. We fund a variety of organizations and programs intended to provide lawyers with the tools of the trade; these include the Continuing Legal Education Society, CanLII (the virtual law library) and the courthouse libraries. This harmonization process may not be easy, but I have confidence it will work because of the expertise and commitment to the profession of all involved. You will appreciate that each of these organizations provides essential material to the members of our profession, though not without some overlap. As the delivery of information evolves, so must each of the service providers, with a view to ensuring cost-efficiency, the ready availability of as much information as possible and the provision of professional assistance for the member who wants to keep on top of the burgeoning mountain of available information. All this must be done at a time when budgetary demands are expanding and there are diminishing financial resources.

The underlying challenge for us is to plan for a future in which the lawyer remains a valued, trusted and respected advisor, and recognized as such by all those

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who need legal services.

* * *

On a different note, I would like to extend the sincere congratulations and warmest wishes of all the Benchers to Mr. Justice Robert Crawford, formerly a Bencher for Westminster County, who was appointed to the B.C. Supreme Court on September 28, replacing Mr. Justice J.F. Rowan. □

Reply to *BarTalk* column on insurance policy "business exclusion"

The decision of the Court of Appeal in *Douglas Symes & Brissenden v. LSBC Captive Insurance Company et al.* brought into sharp focus the business exclusion that has formed part of the compulsory insurance coverage for more than 10 years.

In November last year, the Benchers initiated a review of the current business exclusion. At their October meeting this year, the Benchers decided to give law firm partners an option to purchase from the Lawyers Insurance Fund "innocent insured" coverage that would generally protect them from the consequences of any particular partner being off-side the business exclusion. This coverage is described more fully on page 5.

Recently, Carman Overholt, President of the B.C. Branch of CBA, has written in *BarTalk* about what he perceives as the inadequacy of the insurance coverage provided by the Lawyers Insurance Fund. I believe that the Benchers' decision to offer optional "innocent insured" coverage addresses the main point of Mr. Overholt's column. However, I must take this opportunity to address some of his specific comments that reflect unfairly on the Lawyers Insurance Fund and the Law Society's insurance program.

The Law Society operates the compulsory

insurance program for the benefit of the public and all the insured members. In considering the coverage offered, the Benchers are mindful that any covered claim must be paid for by the members as a whole. There is, of necessity, a balance struck between the scope of the coverage provided and the cost of that coverage to the insured membership. Some may argue, after the fact, that the right balance is not struck in the case of the business exclusion. However, providing "innocent insured" coverage for all law firm partners burdens the 2,200 sole practitioners who will never receive any benefit from such coverage and certainly provides no incentive for partners to police themselves.

The compulsory insurance program managed by the Lawyers Insurance Fund since 1986 has consistently offered reasonable coverage, consistently received third-party praise for its claims management and consistently offered B.C. lawyers stable, reasonable insurance fees. To suggest, as Mr. Overholt does, that existing coverage is inadequate, or that the "business exclusion clause" is unfair because of one firm's experience, and that the Benchers and staff of the Lawyers Insurance Fund have been dilatory in addressing the issues, is unfair and unreasonable. □

Certificates of Authentication: *new requirements from Victoria*

Some foreign jurisdictions recognize notarized documents from B.C. only if the notary's seal and signature have been authenticated by the Lieutenant Governor. (*For more information on this process, please contact the Orders-in-Council Office at (250) 387-4376 or the Law Society at (604) 669-2533/1-800 903-5300 (Ask for the Member Information Group).*)

The Orders-in-Council Office now requires a lawyer who notarizes a document to include on the same page as the notarization:

- the lawyer's address, telephone and fax number; and
- the wording "A Notary in and for the Province of British Columbia."

This information is important should the Orders-in-Council Office need to follow up with the lawyer on any aspect of the authentication process. It is sometimes the client, rather than the lawyer, who sends a notarized document to Victoria for authentication, and it is not always clear from the notarized document how the lawyer can be reached. □

Lawyers Insurance Fund to offer optional “innocent insured” coverage

In October the Benchers decided that the Lawyers Insurance Fund should provide, for an additional fee and on an optional basis, \$1 million of insurance coverage to protect innocent partners in law firms who may face claims that are otherwise uninsured because the business interests of another lawyer in the firm trigger the “business exclusion” clause in the mandatory liability insurance policy.

The business exclusion clause excludes from coverage a claim by, against, arising out of or in connection with any organization in which the lawyer, his or her family or law firm partners or associates had effective management or control or a greater than 10% ownership interest at the time of the error: *see section 6.2 of the policy*.

This exclusion was incorporated into the insurance policy 10 years ago to avoid exposing the program to significant losses and claims expense that could result from lawyers acting for clients in which they have an interest. The Benchers have now reviewed the business exclusion, and considered whether to modify the wording or whether to offer new coverage to innocent partners.

After canvassing the options, the Benchers decided to maintain the business exclusion clause in the insurance policy. This decision appears in keeping with the views of most lawyers in private practice, almost three-quarters of whom support the exclusion according to a Law Society survey. Dropping the exclusion would increase risk for the insurance program and also be at odds with a lawyer’s ethical obligations under Chapter 7 of the *Professional Conduct Handbook* that “a lawyer may act as legal advisor or as business partner, but not both.”

The Benchers have decided, however, it would benefit both the profession and the public for the Lawyers Insurance Fund to offer a new category of coverage to protect innocent partners in these situations.

The new “innocent insured” coverage will be available for purchase by B.C. law firms for 2002, and will provide \$1 million of protection, both against claim defence costs and indemnity payments, subject to the usual deductibles. If a firm opts for the coverage, the firm must purchase it for *all* partners in the firm. The coverage will apply when partners are unaware, despite reasonable and regular enquiries, that another lawyer in the firm was providing legal services when the business exclusion would apply.

Details on the “innocent insured” coverage have yet to be finalized. The annual fee will be determined after consideration of the risk factors involved, including the number of lawyers in the firm, and is expected to be in the range of \$400 per lawyer.

The Lawyers Insurance Fund will set out, as part of this coverage, the steps for law firms to take in monitoring that no lawyers hold a greater than 10% interest in a client. This may include requiring new lawyers to sign statements declaring their interests and requiring all lawyers to confirm their interests annually.

This optional coverage will offer greater protection to partners in firms that choose to purchase it, as well as to the public. The Benchers, however, decided against making the additional coverage mandatory, as such coverage would of be no value to some lawyers, in particular sole practitioners, and would increase insurance fees for all lawyers in the program.

Law firms can expect more information on the new coverage by year-end; in the meantime lawyers should feel free to contact Margrett George, Program Administrator [(604) 443-5761 or mgeorge@lsbc.org] or Su Forbes, Director of Insurance [(604) 443-5760 or sforbes@lsbc.org] at the Lawyers Insurance Fund. □

From the B.C. Supreme Court

Submissions requested on “forms of address”

Chief Justice Brenner: October 15, 2001

Following the recent decision of the Supreme Court of Canada to change the traditional mode of address from “My Lord/my Lady” to “Justice,” the B.C. Supreme Court is currently considering whether any change to the mode of address should be adopted by that court.

The Court is interested in hearing the views of the Bar on this issue and invites lawyers to send any submissions or proposals to:

The Office of the Chief Justice
Supreme Court of British Columbia
The Law Courts
800 Smithe Street
Vancouver, B.C.
V6Z 2E1
Fax: (604) 660-0752

Proceedings under the *Class Proceedings Act*

(Practice direction – Chief Justice Brenner: October 15, 2001)

Chief Justice Brenner has issued a new practice direction on proceedings under the *Class Proceedings Act* that replaces the direction issued on October 11, 1995. The new direction is posted on the Superior Courts website at www.courts.gov.bc.ca/Sc/sc-pdir.htm.

Distribution of reserved written reasons by email

(Notice – Chief Justice Brenner: September 5, 2001)

The Supreme Court Registry in Vancouver provides an option to receive written reasons of reserved decisions by email. The notice describing this service can be found at www.courts.gov.bc.ca/Sc/sc-pdir.htm. □



Lawyers elect Second Vice-President for 2002

William (Bill) Everett, Q.C. (right) accepts congratulations from President Richard Margetts, Q.C. on his election as Second-Vice President for 2002 by members of the Law Society at the September 21 AGM. Mr. Everett, a partner with Lawson Lundell, has been a Bencher for Vancouver County since 1998.

Law Society calls on federal government to take steps to protect public

Supreme Court of Canada dismisses appeal on immigration consultants

The Supreme Court of Canada has held that sections of the *Immigration Act* allowing non-lawyer immigration consultants to appear before the Adjudicative and Refugee Divisions of the Immigration and Refugee Board, and to provide related services for a fee, are paramount to the unauthorized practice provisions of the *Legal Profession Act*: *The Law Society of British Columbia v. Jaswant Singh Mangat, Westcoast Immigration Consultants Ltd., and Jill Sparling* 2001 SCC 67 File No.: 27108 (www.lexum.umontreal.ca/csc-scc/en/rec/html/mangat.en.html).

In dismissing the Law Society's appeal of a judgment of the B.C. Court of Appeal, the Supreme Court of Canada found that the pith and substance of ss. 30 and 69(1) of the *Immigration Act* is the granting of certain rights to aliens in the immigration administrative process. The provisions provide rights to aliens to be represented in proceedings before the Adjudication and the Refugee Divisions of the Immigration and Refugee Board, by either barristers or solicitors or "other counsel" (which extends to non-lawyers) for a fee. The provisions further allow clients to obtain services from those "counsel," including documents those "counsel" prepare for use in the proceedings and advice on matters relevant to their case prior to the

proceedings.

These provisions of the *Act* fall within the federal jurisdiction over aliens and naturalization. As they relate to the legal profession, these provisions also fall within provincial jurisdiction over civil rights in the province and may also fall within provincial jurisdiction over the administration of justice.

The Court found a conflict between the federal *Immigration Act* and B.C.'s *Legal Profession Act* since sections 30 and 69(1) of the *Immigration Act* authorize non-lawyers to appear for a fee, whereas the *Legal Profession Act* prohibits them from doing so. Dual compliance with both statutes was impossible without frustrating Parliament's purpose, and the *Immigration Act* provisions accordingly prevail under the doctrine of federal paramountcy. As such, the unauthorized practice provisions of the *Legal Profession Act* are constitutionally inoperative to non-lawyers acting within the scope provided by the *Immigration Act*.

The Court noted, however, that other services related to

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immigration were not at issue in this case. The Society will review the judgment in relation to other services of immigration consultants.

The Law Society is urging the federal government to take steps to protect the public interest against the risks of unregulated immigration consultants in wake of the decision.

The federal government has been aware of these risks for years. As a 1995 Parliamentary Committee noted:

In contrast to lawyers, immigration consultants have no

tests for competency for practice; they have no code of conduct; they have no negligence insurance; there is no compensation fund for defrauded victims; there are no trust accounts; there are no formal complaint mechanisms; and there are no disciplinary procedures to deal with unethical or incompetent individuals. On every score, members of the public are unprotected.

“Immigrants and refugees are an extremely vulnerable portion of Canadian society and they need to be represented by people who are licensed, regulated and ethical,” said Second Vice-President Howard Berge, Q.C. in a public statement issued October 18. “We don’t think the federal government ever intended to create an environment in which immigration consultants are not regulated at all.” □

* * *

The CLE course voucher program, piloted in 2000 and 2001, did not prove to be an incentive sufficient to boost CLE attendance as hoped, and will not be offered again in 2002. The Benchers, however, remain committed to assisting lawyers with their continuing legal education — and are seeking a more effective means to increase access to CLE, especially outside the Lower Mainland, and to better assist those lawyers who are unable to afford CLE.

CLE voucher program discontinued in 2002

For the past two years, the Law Society has offered each insured lawyer in B.C. two \$150 vouchers as discounts against courses offered by the Continuing Legal Education Society — an immediate financial incentive designed to encourage lawyers to attend more courses.

The voucher program was a pilot project that, on analysis, has failed to meet its objectives, and the Benchers agreed with a staff recommendation in October that it be discontinued in 2002.

The increase in overall CLE course registrations during the pilot did not meet program objectives. Notably, there was also no significant increase in the number of first-time CLE registrants, nor any change in the registration pattern of lawyers who had previously attended CLE. From the pilot project, it would appear that the cost of courses is not the most significant factor for most lawyers in deciding on their CLE commitments.

There may be other factors at play that need exploration — such as lawyers’ concern over time away from the office to attend courses, or the cost of travel and

accommodation for those lawyers who must travel to courses.

The Benchers are committed to encouraging continuing legal education in the profession and providing financial support for new initiatives that may prove more effective than either the course voucher program or the system of loss prevention credits that preceded it.

As the course voucher program has been funded by the Lawyers Insurance Fund, the importance of loss prevention in CLE courses and other resources remains an objective. The needs of lawyers outside the Vancouver Lower Mainland are also an important consideration, as are the needs of those lawyers who truly require financial assistance to attend courses and who may require a subsidy.

As staff canvass alternative approaches for supporting continuing legal education in the coming months, B.C. lawyers are invited to relay any suggestions or questions to Chief Financial Officer, Neil Stajkowski, or Chief Knowledge Officer, Adam Whitcombe, at the Law Society office. □

Appointments

Continuing Legal Education Society — The President has reappointed Anna Fung, Q.C. and William Sullivan, Q.C. to the CLE Board of Directors for two-year terms, or until they are no longer Benchers, whichever comes first.

Federation of Law Societies — Trudi Brown, Q.C. was nominated by the Benchers and re-elected to a further one-year term as a Director of the Federation of Law Societies, representing British Columbia and Yukon.

Hamber Foundation — The Benchers have appointed John Leathley to the Board of Governors for a three-year

term.

Legal Services Society — The Benchers have appointed Terrence Robertson, Q.C., Geoffrey Cowper, Q.C., Kenneth Learn and Barbara Yates, Q.C. to the Board of Directors for two-year terms.

UBC Law Faculty Council — The President has appointed D. Peter Ramsay, Q.C. as the Law Society’s representative on the UBC Law Faculty Council for a two-year term. □

Lawyers as lobbyists

The *Lobbyists Registration Act* passed Third Reading on August 21, 2001 in the B.C. Legislature, and will come into force by regulation. The *Act* provides that persons in certain designated categories who deal with the Government of B.C. must register with government and disclose information about themselves and their clients or employers.

Anyone who is paid to attempt to influence government policy, or the awarding of contracts, will generally be considered a lobbyist and will be required to register for lobbying activity.

Under the *Act*, a “consultant lobbyist” is an individual who, for payment, undertakes to lobby on behalf of a client. An “in-house lobbyist” is an individual who is employed by a person or organization and a significant part of whose duties is to lobby on behalf of the employer. Both these definitions may include lawyers.

Lawyers in private practice and in-house counsel carrying out certain tasks may be defined as lobbyists under the Act. Every lawyer should review the provisions of the Act to determine whether it is necessary to register as a lobbyist before undertaking any communication with the Gov-

A “consultant lobbyist” and an “in-house lobbyist” must register under the provincial legislation if they are paid to communicate with a public office holder in an attempt to influence any legislative proposal, bill, resolution, regulation, order-in-council, program or policy of the government, or the awarding of any contract or financial benefit by or on behalf of the government. Consultant lobbyists must also register if they are paid to arrange a meeting between a public office holder and any other person.

Under the *Act*, “public office holder” includes, not only a Member of the Legislative Assembly and any person on that Member’s staff, but also any officer or employee of the government, any appointee by order-in-council or minister and any officer, director or employee of a government corporation. Judges and justices of the peace are excluded.

“Organization” is very broadly defined and includes a professional organization and a society.

The publicly accessible lobbyists registry will be run through the Office of the Information and Privacy Commissioner.

It is not yet known when the *Act* will come into force.

Out-of-province no-fault insurance benefits

The Alberta Court of Appeal ruled in April, 2001 that, if a motor vehicle accident occurs in B.C., the Alberta insurer must pay no-fault benefits to the higher B.C. limits,

Your Practice Advisor



Felicia S. Folk, the Law Society’s Practice Advisor, is available to discuss your practice concerns. All communications between Ms. Folk and lawyers are strictly confidential, except in cases of trust fund shortages.

You are invited to call her at (604) 669-2533 or toll-free in B.C. 1-800-903-5300 at any time, or write to her at:

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8th Floor – 845 Cambie Street
Vancouver, B.C. V6B 4Z9
Fax: (604) 646-5902. □

regardless of where any lawsuit is brought. In *Lindblom v. Wawanesa Insurance* [2001] A.J. No. 548, the Court departed from earlier case law and interpreted Alberta’s *Insurance Act* to mean that the applicable insurance limit is the greater of two limits: the limit where the policy was issued or the limit where the accident occurred.

Associate leaving a firm

When an associate leaves a firm, there are frequently discussions within the firm about the difficulties ahead — clients choosing to leave with the associate, disruption to the firm and financial arrangements that will have to be made with the associate and with the clients. There are often discussions about the form of letter that the associate and the firm will write to the clients. Sometimes the firm and the associate will agree to send, virtually unchanged, the sample letter set out in Appendix 4 of *Professional Conduct Handbook*.

But it would be prudent for the firm to carry out a review of the files handled by the associate *before* sending letters to clients. Otherwise the firm may discover, after a client chooses to remain with the firm, that the file is not one the firm wishes to handle or is not able to handle well. The firm may then find itself constrained by the Chapter 10 requirements on withdrawing from files. In that circumstance, there may well be three unhappy parties — the firm, the associate and the client, who may complain about both.

If an associate is planning to leave your firm, take the opportunity to review the files for which the associate was the responsible lawyer and determine as early as possible whether or not those files are a good fit for the firm, or whether the firm’s practice has evolved in such a way that the client would be better served by the associate or possibly by referral to another firm. □

More Questions and Answers

Are “handling fees” for disbursements allowed?

Question: We would like to add a “handling fee” to our client billings when we incur disbursements for our clients. What do you think about this?

Answer: There are a couple of cases you should be aware of:

- *Pierce van Loon v. Russell* (1994) 32 CPC (3d) 277 at pp 280-81: A handling fee or surcharge on disbursements is not recoverable, especially when it is sought to be justified as a way of avoiding the limit on contingent fee agreements fixed by the Law Society Rules.
- *Knock v. Owen* (1904) 35 SCR 168 at p 174: Lawyers must not charge their clients more for disbursements than the amounts they actually incur on their clients’ behalf. See also *Girardet v. Crease & Co.* (1987) 11 BCLR (2d) 361 (SC) at p. 362.

These cases should be carefully considered before adding any disbursement surcharges on a bill.

* * *

Can I certify a trust cheque from a virtual bank?

Question: I have received a lawyer’s trust cheque drawn on the Citizens Bank of Canada to complete a real estate transaction. It is my practice to have all such cheques certified prior to depositing them to my trust account and paying out on the conveyance. However, as Citizens Bank is a “virtual” bank, there is no “branch” that I can send the cheque to for certification. What do I do?”

Answer: Citizens Bank of Canada has been established by VanCity Savings Credit Union. It bills itself as a “different kind of bank.” It is one of a new class of “virtual” banks. It does not have the branch network of the traditional banks and accordingly, does not have the facilities to certify cheques. However, lawyers using the services of a any bank and, in particular, a virtual one, must comply with Chapter 11, Rule 8 of the *Professional Conduct Handbook*, which states:

8. Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque

(a) will be paid, and

(b) is capable of being certified if presented for that purpose.

On my contacting Citizens Bank, their representative, John Nation, stated that, if a certified cheque is required

The Practice Management Advisor



David J. (Dave) Bilinsky is the Society’s Practice Management Advisor. His focus is to develop educational programs and materials to increase lawyers’ efficiency, effectiveness and personal satisfaction in the practice of law with a special emphasis on technology.

His preferred way to be reached is by email to: daveb@lsbc.org (no telephone tag). Alternatively, you can call him at the Law Society office at (604) 605-5331 or toll-free in B.C. 1-800-903-5300, or address mail to:

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8th Floor – 845 Cambie Street
Vancouver, B.C. V6B 4Z9

from a lawyer banking with Citizens Bank, the lawyer delivering the cheque must instead request a bank draft from their Service Centre which is located on the 5th floor- 815 West Hastings Street, Vancouver. They do not have facilities to certify a trust cheque.

Accordingly, all lawyers must make appropriate arrangements to deliver a bank draft or other negotiable instrument that is the equivalent of certified funds if facilities do not exist at their bank to certify their trust cheques. Otherwise, delivering a trust cheque drawn on a virtual bank such as the Citizens Bank is in contravention of the *Handbook*, since it is not capable of being certified.

* * *

Can a contract legal secretary work on both sides of a file?

Question: I maintain my own practice and have a secretary who is looking for additional work. A lawyer who maintains a (separate) office down the hall has just hired her to work part-time. Now I have been advised that this other lawyer is on the other side of a family file on which I act for one of the spouses. In the ordinary course of events, the shared secretary will now be working on both sides of the file. Should I be concerned?

Answer: Secretaries are not bound by the rules of professional conduct — but the lawyers who hire them are. I have drafted a Confidentiality Agreement that can be signed by staff to bring home the important confidential nature of the lawyer’s work (www.lawsociety.bc.ca — click on *Services for Lawyers* – then *Practice and Ethics*).

The Ethics Committee has stated that, over and above the ordinary obligations of confidentiality, lawyers who share the services of an employee with another firm must

continued on page 10

exercise due diligence to ensure the employee does not divulge the other firm's confidential information to them. The Ethics Committee has not suggested that it is proper for such an employee to work on matters at different law firms for clients adverse in interest. Accordingly, I would take steps to ensure that any staff member that is in your office on a shared, casual or part-time basis (such as temporary staff) not be exposed to work that could place them in a position of working on both sides of a file.

* * *

Does liability insurance extend to a firm's corporate services company?

Question: We have a non-law corporation that is acting as a records and registered office for a number of our corporate clients. We are only billing for non-legal services rendered by this corporate services company. We are concerned about liability insurance — does the standard policy extend to services rendered by a corporate services company? If not, can we add them as an additional-named insured?

Answer: There are two problems with trying to claim under the standard lawyer's liability policy for any work done in the corporate services company. First there is a business exclusion in the policy that prevents coverage of such a loss (any claim arising out of an organization in which the individual insured, the insured's family or the individual insured law firm, the law firm's partners or associates individually or collectively, indirectly or directly, had effective management or control of the organization in a amount greater than 10% — see Exclusion 6.2 for full details). Furthermore, a non-law company is not entitled to be named as an additional insured under the professional liability insurance policy.

So while using a non-law corporation to bill for registered and records office work to save a client taxes may seem at first blush to be a good idea, it carries with it the associated risk of not being covered by any professional liability

insurance.

Can I take retainers or payments from clients on credit or debit?

Question: We have had enquiries from clients wanting to pay by VISA or by debit card. Does the Law Society allow lawyers to take these forms of payment? What about taking retainers in this way?"

Answer: There are two parts to your question. There is no problem in accepting payment of rendered accounts by VISA, MasterCard or other credit card, or by debit card. You must make appropriate arrangements with your financial institution to establish the credit card or debit card service, and set up a separate account to which these payments will be credited. There will be a service fee deducted from the payment, which is normally treated by the firm as a cost of doing business. However, if you are proposing to take retainers by credit card or debit card, you must take some precautions.

First, this separate account must be designated as a trust account, since Law Society Rule 3-51 (2) states: *Except as permitted under section 62(5) of the Act, a lawyer must deposit all trust funds to a pooled trust account.* Having this special account designated as a general account and withdrawing the funds in order to deposit them into a trust account is not sufficient compliance with the Rules.

Second, any credit card or debit card service fees or deductions from the deposit must either be taken from the lawyer's own funds (up to \$300 permitted in any trust account under Rule 3-52(4)) or the lawyer must immediately deposit to the trust account sufficient funds to the credit of the client to offset these credit card or debit card service fees or deductions.

Last, you should be attentive to any policies of your financial institution that may allow the institution to withdraw any credit card or debit card payments in the event that the card was used fraudulently or if the amount exceeds the card's limit. It would be prudent to institute a policy that no such deposits would be transferred out of the trust account unless and until the time limit for the bank to institute such action has passed.

Practice precedent bank on the web: Can you contribute?

If you have recently looked at the Law Society's website at www.lawsociety.bc.ca, you will have noticed a new area under "Services for Lawyers" entitled "Practice & Ethics." It is my intent to populate this area with as many law office management precedents as possible. The need for such precedents was identified in the survey of the profession that I did a little while ago — and this is where you come in.

Over the next while, I am asking for lawyers to forward their precedents to me for posting on the website to assist others in the profession who may find them useful.

On this first round I am looking for two types of agreements:

- **Agreements for lawyers in office-sharing arrangements;** and
- **Associate employment agreements**

Kindly forward any precedents you are able to share in electronic form (Word or WordPerfect formats are fine) to daveb@lsbc.org, together with any suggestions you have for other useful management precedents to be included in this initiative. Thank you.□

A look at 2002 Law Society fees

Practice fee

Lawyers at the September 21 Annual Meeting approved \$1,045 as the Law Society component of the 2002 practice fee, up \$45 from 2001. The increase was recommended by the Benchers, based on a balanced budget without the need to draw on General Fund reserves.

There are two other components of the practice fee: the *Advocate* subscription fee, which remains at \$25, the CBA membership fee of \$409.10 for members in practice at least five full years, up \$32.44 from 2001 (\$255.10 for members in practice less than five full years, up \$16.94 from 2001.)

Here is the break-down of the 2002 practice fee:

A. For members who have been in practice five full years or more:

Law Society fee	\$1045.00
Advocate subscription	25.00
CBA fee	<u>409.10</u>
Total practice fee	<u>\$1,479.10</u>

B. For members who have been in practice less than five full years:

Law Society fee	\$1045.00
Advocate subscription	25.00
CBA fee	<u>255.10</u>
Total practice fee	<u>\$1,325.10</u>

Liability insurance assessment

In 2002, for the third year in a row, the Benchers have set the base professional liability insurance assessment for B.C. lawyers in private practice at \$1,500. The profession has enjoyed a stable assessment because of strong reserves

Reinstatements

The following people have been reinstated to membership in the Law Society. These reinstatements do not relate to discipline proceedings.

As of March, 2001: Kathleen M. Mildred Baldwin, of Richmond. **As of April, 2001:** Jack Lesgor Thomson Edwards, Q.C., of Vancouver; Joseph Ping Choi Lee, of Hong Kong; Pavla Polcarova, of Vancouver. **As of May, 2001:** Michael John Molson, of Vancouver; Corrie Lynn Stepan, of Ottawa. **As of June, 2001:** Elizabeth Ann Gilmour, of El Cerrito, California; Shirley E.K. Giroday, of Powell River; Norine Agnes MacDonald, Q.C., of Vancouver. **As of**

in the Lawyers Insurance Fund, effective management of the Fund and relative stability in claims and losses.

A new category of "innocent insured" coverage will be offered to law firms that wish to purchase it: *see page 5.*

Special Compensation Fund assessment

The Special Compensation Fund assessment, paid by all practising lawyers, will increase \$50 to \$250 in 2002.

The increase is necessary because of a substantial increase in the number and size of claims against the Fund over the past four years, and a substantial increase in payments or potential payments from the Fund this year and last. The increase in claims has also resulted in significantly higher audit and investigation costs as well as custodianship costs. It remains the experience of the Fund that the bulk of claims and claim payments relate to misappropriations by a small number of lawyers.

The Special Compensation Fund is responsible for the first \$2.5 million in claims paid in a year, and the next \$15 million is insured. The Fund reserve is now projected to stand at \$6.77 million at the end of 2002.

* * *

Other fees

There will be no increase in 2002 to non-practising or retired member fees or to the PLTC fee paid by articulated students. Most administrative fees will also stay the same, other than the application for enrolment fee, which doubles from \$125 to \$250 to offset the higher cost of credentials investigations, the certificate of standing fee (\$50 in 2002) and notarial authentication fee (\$18.70 in 2002). □

July, 2001: Lindsay Margaret Lyster, of Vancouver; Diba Bayan Majzub, of Vancouver; Allan Davis McEachern, of Vancouver; Paul Joseph Gomes Soares Mendes, of Vancouver; Marla Diane Mennie, of Vancouver; Edward Thomas Sebastian Morgan, of Ottawa; Patricia Ruth Strangway, of Kelowna. **As of August, 2001:** Jacqueline Ann Gaudet, of Campbell River; Dougall James Molson, of Paris, France; Shannon Joan Rogers, of Vancouver. **As of September, 2001:** John Nicholas Brampton, of Vancouver; David Anthony Fewer, of Ottawa; Theodore Mark Hargrave, of Chilliwack. □

Land Title Office staff marks December 12 as "Paperless Office Day"

In honour of Malcolm McAvity, Director of Land Titles who passed away earlier this year, staff at the Lower Mainland Land Title Office will be "weighing in" their *no-longer-needed-because-it's-now-available-online* paper for donations to the Victoria Hospice and Palliative Care

Foundation and the B.C. Cancer Agency's "Daring to Believe Campaign." The LTO staff invites pledges from lawyers (and the wearing of bow ties) on December 12.

For further information, contact the staff at lmto@ag.gov.bc.ca or (604) 660-2595. □

Law Society Rules changes

The Benchers have adopted Law Society Rule 4-17 (1.1) to clarify that, when the Chair of the Discipline Committee authorizes a citation against a lawyer, any three *other* Benchers may order an interim suspension pending the hearing of the citation.

Rules 2-41 (8) and (9) have been amended to provide the Executive Director with the discretion to extend a leave of absence for an articulated student, provided the student will be eligible for call within two years of his or her enrolment, and subject to the student's right to apply for a

From the Ethics Committee

Whether an employee is a witness or a party

Chapter 4, Rule 1, Professional Conduct Handbook

Lawyer A represented a plaintiff who was suing an organization (a legal entity). Lawyer A asked whether he was prohibited by Chapter 4, Rule 1.1 from contacting an employee of the organization concerning matters at issue in the litigation. The organization was represented by Lawyer B.

Rule 1.1 states: "A lawyer who has an interest in a matter, or represents a client who has an interest in a matter, must not communicate with any person regarding the matter if, to the lawyer's knowledge, the person is represented by another lawyer, except through or with the consent of the person's lawyer."

The Committee noted and approved the following reasoning of Wolfram in *Modern Legal Ethics*, 1986, at p. 613 on whether an employee of a corporate litigant is a party to litigation and approachable only through the lawyer for the entity, or is merely a witness:

Application of the anti-contact rule to corporate clients should be guided by the policy objective of the rule. The objective of the anti-contact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounseled, but represented, party and to enable the corporation's lawyer to maintain an effective lawyer-client relationship with members of management. Thus, in the case of

review of the decision to the Credentials Committee or apply to the Committee for a longer leave than that which the Executive Director has discretion to grant. Rule 2-42 (2) allows the Executive Director to grant temporary articles, not only to B.C. law school students, but also to those at any common law faculty of law in Canada.

These rules, as amended, are posted on the Law Society website; amendment pages will be issued in the next mailing. □

corporate and similar entities, the anti-contact rule should prohibit contact with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in the representation. And generally the anti-contact rules should apply if an employee or other non-official person affiliated with an organization, no matter how powerless within the organization, is independently represented in the matter.

Applying this reasoning to this case, the Committee was of the view that the employee's authority in the matter fell short of the authority that he would be required to have in order to find that he was a party to the litigation. The materials did not disclose that he had the power to bind the organization in the matter, or that direct contact with him by Lawyer A would undermine the lawyer-client relationship between Lawyer B and the organization, nor were the employee's own interests at stake in the litigation.

For these reasons, the Committee concluded that, subject to any rulings by the court, it was proper for Lawyer A to contact the employee in accordance with the provisions regarding contacting witnesses set out in Chapter 8 of the *Professional Conduct Handbook*. □

From the Ethics Committee

Lawyers' participation in the First Canadian Title "Home Closing Services Program" is improper

The Ethics Committee has determined that it is not proper for a lawyer to act for all of the purchaser, mortgagee and the title insurer under the First Canadian Title "Home Closing Services Program." Provided multiple representation is permitted by Appendix 3 of the *Professional Conduct Handbook*, a lawyer may act jointly for a purchaser and a mortgagee who have contracted to purchase title insurance from First Canadian. However, the lawyer must not

at the same time represent First Canadian in the transaction or permit First Canadian to determine the procedures that will be followed or fees that will be charged in relation to the matter.

More details on the Ethics Committee opinion are expected in November and will be published in the November-December *Bulletin*. □