The Law Society of British Columbia

Benchers' Bulletin

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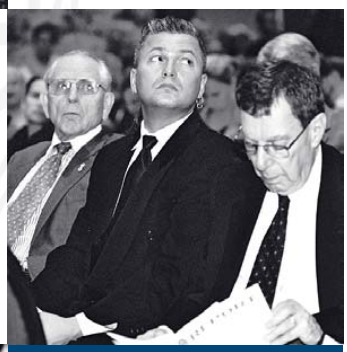

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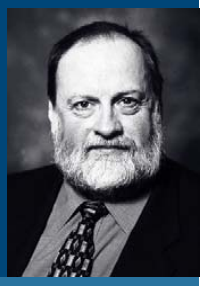

President's View

Once more unto the breach, dear friends, once more

As I've met and talked with lawyers this past month, Martin Wirick is top of the mind for many. BC lawyers are upset. They are concerned about their reputations and about their financial health in light of the Wirick revelations.

It is vital that the profession stays informed on the Law Society's audit and investigation of Mr. Wirick's practice, the impact of claims on our Special Compensation Fund and options the Benchers will consider to manage future risks. We can't expect your support if you don't know what is afoot.

The background

Martin Wirick resigned as a member of the Law Society by letter of May 20, 2002 and received by the Law Society May 22, flagging "serious errors" in his practice and breaches of undertakings to pay out funds on about 80 properties.

The Law Society had a custodian of Mr. Wirick's practice judicially appointed on May 24. Over the next two months, the Law Society copied all of Mr. Wirick's files and accounting records — the photocopy paper cost alone exceeded $11,000. We had to create duplicates of all files and accounting records as the originals could be seized by search warrant or under orders for the production of documents and records in civil actions.

Mr. Wirick declared bankruptcy in June, listing contingent liabilities of about $50 million. Mr. Wirick's client, for whom all Mr. Wirick's actions were apparently carried out, is a Mr. Tarsem Gill. Mr. Gill was petitioned into bankruptcy.

At this stage, the Law Society has a team of five forensic accountants, an investigator, a staff lawyer and a legal assistant working on the audit and investigation of Mr. Wirick's practice. The audit will take about five more months to complete.

Tracing the flow of funds is necessary to quantify the loss. Our investigators are conducting witness interviews, obtaining documents and other evidence and searching some 250 land titles. We have requested the cooperation of the major mortgage lenders and private lenders and have met with them several times. Some have indicated they will cooperate completely; others are playing things a bit closer to the vest.

Vancouver City Police have opened a file on this case. Head of the commercial crime unit, Inspector Ken Hutchinson, has publicly stated that two detectives and a senior sergeant have been assigned to the matter, a forensic accounting firm has been retained and further assistance may be sought from the RCMP commercial crime section.

How did it all happen?

Mr. Wirick began practice in May, 1979. He seems to have been an ordinary lawyer who operated properly for 20 years. His misdirection of funds began in 1999 while he was acting for Tarsem Gill. In Gill-related real estate transactions, Mr. Wirick received money as solicitor for the vendor (Mr. Gill or nominees) from solicitors and notaries acting for purchasers and subsequent mortgagees. Instead of paying off the prior encumbrances, as he undertook to do, Mr. Wirick misdirected the down payment and mortgage funds to Mr. Gill or one of his companies. Mr. Gill then used some of that money to service mortgage debts that should have been discharged, thereby preventing those mortgages from going into default.

As those prior mortgages had not been paid out, no discharges were forthcoming. But, because the prior mortgages were being serviced, those lenders did not become concerned. Mr. Wirick exploited the lag time for the issuance of discharges (of up to six months, and even longer for some

Benchers' Bulletin

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

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

Additional subscriptions to Law Society newsletters may be ordered at a cost of $50.00 (plus GST) per year, prorated at $12.50 per quarter, by contacting the subscriptions assistant. To review current and archived issues of the *Bulletin* online, please check out the "Resource Library" at www.lawsociety.bc.ca.

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institutions) to create a plausible story as to why he was not supplying the discharges of the prior encumbrances in a timely way.

As a result, Mr. Wirick was able to string things out. Eventually, he came up with discharges either by paying out the prior encumbrance with other misdirected funds, or possibly by forging discharges in some cases.

Mr. Wirick's actions on behalf of his client Gill remained undetected for three years. In September, the Discipline Committee cited Mr. Wirick respecting two transactions. A hearing date has been set for December 3. Further citations may be issued depending on the evidence and the judgement of the Discipline Committee.

What is the impact on our Compensation Fund?

Claims expected against the Special Compensation Fund relating to Mr. Wirick could range from $34.6 to $46.8 million, but these are ballpark guesses only, not estimates. We have to determine the value of some claims, identify overlapping claims and repayments, and ascertain the potential for recoveries. As a result, the *net* losses are likely to be less than the claims received.

We are encouraging claimants to the Fund to come forward promptly. The Law Society is doing triage on the claims, trying to ensure that hardship cases receive immediate attention. The Special Compensation Fund Committee will deal with some urgent cases at a meeting on October 28. We are proceeding as quickly as possible to relieve the plight of innocent victims, but at the same time we cannot act precipitously — we must make decisions based on the verified facts of the individual cases.

All claims arising from the practice of Martin Wirick will be attributed to the Special Compensation Fund 2002 claims year. At present, the Special Compensation Fund's reserves and the Fund's insurance are in excess of $20 million.

Some lawyers steal. We have to deal with lawyer theft every year. Looking at the last 15 years of the Fund, the best year we've had was 1999 when we paid out $22,031. The most we've paid in one year was $1,370,265.45. The average has been $348,161.27 — it would have been much lower but for two "big" years. The grand total paid over the past 15 years is $5,222,419.06. If the Wirick "ballpark guesses" are close to correct, they represent about a century's worth of claims.

Is Wirick a "one-off" or do his misappropriations tell us that we were gulled into thinking the base level of misappropriation was different from what it really is? Are there other defalcations out there as yet undetected? The last 15 years' experience tells us the answer is almost certainly "yes." We don't know what we will experience, but we do know there is a risk — and it is a bigger and different risk than we thought it was earlier this year.

In September the Benchers resolved to remove the annual aggregate cap on payments from the Special Compensation Fund, thereby authorizing the Special Compensation Fund Committee to approve payment of all legitimate claims should these total a higher amount. I am very proud of the Benchers for showing decisive leadership in a very difficult situation. Our Lay Benchers were extremely proud of how we behaved that day, and have said so.

We have options for funding the claims, which include increasing the Special Compensation Fund fee paid by lawyers. The Benchers have increased the fee from $250 in 2002 to $600 in 2003, which will cover the Wirick investigation and audit costs and increase Fund reserves in 2003. As we learn what the Wirick claims will cost, further decisions will be needed. Options include a special assessment on members or an increased Special Compensation Fund fee for one or more years.

The Law Society has options to finance the claims over time by way of inter-fund borrowing or borrowing against our building. The financial strength of the Law Society gives the Benchers great flexibility in that regard. The Benchers will be mindful of the impact of a large special assessment on our members — I think it unlikely that we will go that route.

Reviewing real estate practices

Our Conveyancing Practices Task Force, chaired by Victoria Bencher Ralston Alexander, QC, continues its study and consultation on conveyancing reforms to minimize the opportunity for abuse of funds, in absorbing the lessons of Wirick. For more on the Task Force's interim report, see the Law Society website. The Task Force will come forward with guidelines. The Benchers might ultimately prescribe conveyancing standards.

One option is to severely limit the time in which the vendor's solicitor must prove payment of the funds to the proper parties, such as by a receipt from a financial institution. Cheque particulars could be provided. Purchasers' lawyers and subsequent mortgagees' lawyers could follow up to ensure that the financial institution was paid.

A two-cheque system is also possible: one cheque payable to the mortgagee for the funds to clear the encumbrance; one cheque to the vendor's solicitor to pay the vendor's equity (in the simplest of situations).

Any system can be abused. The real lesson of Wirick is that it went on so long and involved so much money. Lawyer theft at historical levels we can absorb. The Wirick misappropriations challenge our ability and our willingness to save the public harm-

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Lawyers weigh in on CBA fee debate at AGM

After a long, thought-provoking debate on the pros and cons of universal or mandatory membership in the Canadian Bar Association, a majority of lawyers attending the Law Society Annual Meeting on September 20 approved a Law Society 2003 practice fee that will include an amount equivalent to the CBA membership fee. Lawyers defeated (332:178) a motion put forward by Gail Davidson and Anthony Vecchio of Vancouver to amend the practice fee resolution by removing the CBA fee equivalent.

The meeting accordingly approved the Benchers' recommendation of a 2003 practice fee of $1,538.94 (for lawyers in practice five years or more) and $1,369.94 (for lawyers called less than five years).

Lawyers also gave the nod to a motion submitted by Eric Rice, QC of Richmond and John Waddell, QC of Victoria directing the Law Society to remit to the Canadian Bar Association the amount equivalent to the CBA fee, which is collected as part of the practice fee *(the Benchers had themselves earlier resolved at their September meeting to remit the fee to the CBA).* The motion also calls on the Law Society to work cooperatively with the CBA to develop a protocol to address the issue of those members of the Society who do not wish to be CBA members.

In speaking to her proposed amendment to drop the CBA fee, Gail Davidson emphasized that she was not against the CBA. "What I'm *for* is the integrity of the Law Society of British Columbia," she said. "I am for the Law Society continuing to be able to regulate the profession of law in BC. Therefore I am concerned that the Law Society conduct itself in governing the profession and in upholding its statutory duty to uphold the public interest in BC in a way that is not only above reproach, but is seen to be above reproach."

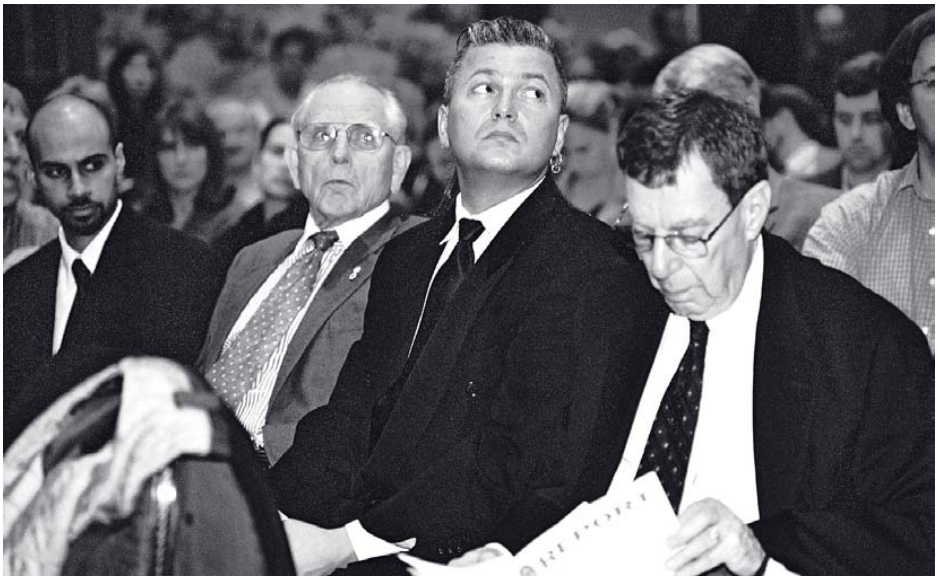
In her view, 54 years of compulsory membership had been bad for the CBA. As an example, she cited the CBA BC Branch's decision in the Spring to sign a joint statement with the Attorney General in a way that was "alarmingly dismissive" of the publicized interests of the profession. She noted that, after the members voted overwhelmingly against that agreement, "the CBA didn't apologize, they didn't rescind the agreement — they didn't have to. We have to belong to the CBA. They didn't have to respond to members' concerns."

Ms. Davidson said that, more importantly, compulsory membership was a problem for the Law Society. She noted that in June the Benchers decided to recommend a "CBA equivalent fee" as part of the practice fee. At that time they had in hand the results of a poll of members that reflected that 54% of respondents wished membership in the CBA to be voluntary, she noted. In September the Benchers resolved that the equivalent fee be remitted to the CBA.

Ms. Davidson said that, when the Benchers made these decisions, they were aware of two critical money issues affecting the public interest — severe cuts in legal aid, resulting in a total loss of legal aid for poverty law — as well as uninsured claims against the Special Compensation Fund. In her view, any amount added to the practice fee would be better applied to these needs.

She said she was not suggesting the Benchers were unable to keep the public interest ahead of allegiances to the CBA when passing these resolutions. "I am suggesting that there is a public perception that that might be the case," Ms. Davidson said. "And I'm saying that, as a member of the profession in BC, I think that's a dangerous thing. It's time that there is a clear delineation between the Law Society and the CBA, and the only way that can occur is for the Law Society to stop exercising its agency to collect fees."

Ms. Davidson said she was disappointed the CBA was vigorously



The September 20 AGM was not without controversy, as lawyers took up a debate over mandatory payment of the CBA fee equivalent as a condition of Law Society membership. Lawyers at the meeting voted down a motion that would have removed the CBA fee equivalent component from the 2003 practice fee.

lobbying for what she saw as an anachronistic practice. "If the CBA were acting in the interests of the lawyers of BC, people from the CBA would be standing where I'm standing and saying 'Let's give lawyers in BC the same right to make a choice about the professional association that they belong to that lawyers in the rest of Canada have.'"

Jim Murphy, of Nanaimo, past president of the Trial Lawyers Association, spoke against the amendment, citing as a reason for supporting the CBA the successful campaign that TLA and others waged against no-fault auto insurance. "There were many keys to winning that battle. One of the keys was that the legal fraternity was strong and spoke with one voice," he said, reminding lawyers that they faced a similar situation with the government's civil liability review. "The CBA has historically spoken for all lawyers in BC.… As a lawyer who wants to share the benefits that the CBA provides me, I think it only fair that I pay for that."

David Paul, President of the BC Branch of the CBA, spoke against the proposed amendment to drop the CBA equivalent fee. "The amendment that has been proposed would effectively paralyze advocacy for BC lawyers at a time when we need the support of the CBA more than ever," he said.

Mr. Paul noted that 54 years earlier the lawyers at the Law Society AGM voted freely and democratically to establish universal membership on the premise that lawyers are best served by one unified voice, speaking out to promote the interests of BC lawyers first and foremost above any other mandate. "Universal membership was not forced on the membership from on high," he said. "Every year since 1948 the lawyers of this province have voted to continue this practice. The debates of the day in the late '40s show that the members of the profession recognized the virtues and necessity of having a common, unified and strong voice for our profession. That principle, the need for a strong and unified voice, is as pertinent today as it was then."

In the Fall of 2002 the issues had evolved. "Our profession and the justice system itself are in a great struggle on many fronts," Mr. Paul observed. "A struggle with politicians who choose to trample individual rights by denying adequate legal aid funding or access to our courts. A struggle in the Supreme Court of Canada in our *Fink* intervention to ensure that one of the tenets of the legal profession, solicitor-client privilege, remains in force."

Gail Davidson of Vancouver speaks to her motion to drop the CBA fee equivalent from the practice fee for 2003. In her view, the mandatory nature of that fee had proved bad for both the CBA and the Law Society.

"We of the legal profession must meet these challenges head on and counter them, one by one, on the field of public opinion," Mr. Paul noted. "Each and every member of the profession in BC benefits from this advocacy. The CBA is the credible voice of the profession, and when it speaks, it is heard."

He noted that public scrutiny of the professions had never been greater and it was not surprising that the Law Society emphasized its statutory responsibility to govern the legal profession in the public interest. The CBA's mandate was to represent the interests of all members of the profession. He noted that the CBA's Special General Meeting in June proved that the will of the members takes precedence and that, if they disagree with a position

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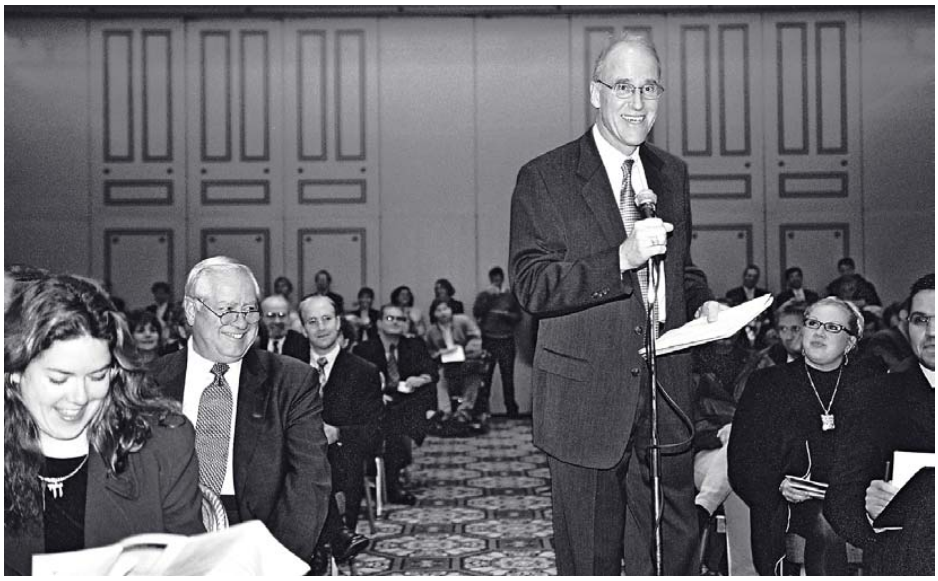
David Paul of Kamloops, President of the BC Branch of the CBA, urges lawyers to demonstrate support for the CBA to ensure a common, unified and strong voice for the profession.



Westminster Bencher Peter J. Keighley, QC adds a light note to serious discussion at the Vancouver site of the AGM. On recommendation by the Benchers, Mr. Keighley was elected Second Vice-President for 2003 by lawyers at the meeting.

***AGM** … from page 5*

the CBA has taken, they can object and set policy through a democratic process.

Mr. Paul said the profession needed a strong, properly funded organization to represent lawyers' interests on big issues and that it would be unfair for some lawyers to pay while all benefit. In his view, dropping universal membership was in the exact opposite direction to where the profession should be going. "Numbers make a difference," he said. "The stronger our representation, the better our chances of success."

Among the speakers who spoke in support of the CBA, Warren Wilson, QC, a Past President of the Law Society, said "We need a strong lawyers' organization to provide the framework for lawyers to keep up with the changes to the law and practice through section and other activities, to provide quality input on legislative reform, to stand up for lawyers and to be constantly available to speak for the profession."

Cameron Ward of Vancouver spoke in favour of the amendment, noting he was in favour of the CBA, but against compulsory membership. "It baffles me that BC lawyers are still forced to join the CBA while our colleagues in Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, the Yukon, the Northwest Territories and Nunavut are all free to choose whether or not to become members," he said. "It seems to me that the CBA branches in those provinces and territories are effective and strong on behalf of their members there."

Mr. Ward said he stuck his neck out on this issue because he believed forced membership was unlawful or unconstitutional — the subject of a court case he was bringing forward in December — and because he believed the CBA would be stronger, more credible and more accountable through voluntary membership. He said the BC Branch now lacked accountability when lawyers "can't vote with our feet." He referred to the decision of the CBA executive on the eve of a no-confidence vote in the Attorney General to issue a joint statement with the Attorney General. Another issue was the $450,000 expenditure on the CBA website. He found both issues of great concern and would have resigned over them.

Following other expressions of support for the amendment by Dugald Christie and Anders Ourum, Anthony Vecchio addressed the meeting as seconder of the motion. "We are a profession that values freedom of association," he said. "We are an association that stands for the rights of an individual. We are a profession that embraces and stands for democracy. As lawyers we must be mindful that we are at the forefront of the democratic society in which we exist. We set the example for the community at large. Isn't it ironic that we are here today to vote on a resolution to force members of the Law Society to be mandatory members of the CBA in order to practise law?"

He noted that, as a result of compulsory membership, BC lawyers provide over 25% of CBA National revenues, which was a disproportionate share, and he questioned the impact on lawyers who can't afford that expense.

He acknowledged the tremendous respect he had for the leadership of the CBA and their work. "We know the CBA is a good organization. They do good work; they're deserving of praise. Let's be clear: this vote is essentially about protecting the right of freedom of association, the individual right of choice. It's about democracy."

Vancouver lawyer Sandra Jakab-Hancock told the meeting she is deeply involved in CBA work, yet did not find the issue easy. Hailing from Alberta, she said she has had many of the same thoughts as Mr. Vecchio. She said she was persuaded to vote against the amendment, and for the practice fee resolution recommended by the Benchers, for the simple and practical reason that it would be imprudent to make such a change, effectively devastating the CBA, without any provision for transition. Her second reason was

more substantial. She said she asked herself why the Benchers for 54 years had recommended the CBA fee as part of the practice fee.

"I don't think that it's simply out of courtesy or out of an obeisance to tradition," Ms. Jakab-Hancock said. "What I think is that the Law Society is better able to deliver its mandate to protect the public interest by ensuring that we are competent and ethical lawyers through the work of the CBA, through the section memberships … through the advocacy work that we can do for the greater good and through the opportunity to develop fully as professionals by participating in the volunteer work of the organization."

After lawyers at the meeting passed a practice fee that included the CBA equivalent fee, Cameron Ward and Lloyd Duhaime introduced a motion to call on the Law Society to conduct a referendum of all members on whether payment of the CBA fee should be voluntary. The second part of their proposed motion read "***If a majority of members*** *answer the said question in the affirmative, that the Law Society cease its practice of making payment of the Canadian Bar Association fee a condition of practising law in the Province of British Columbia.*" (emphasis added) Mr. Duhaime asked that this second part of the motion be amended by changing the word "*members*" to "*respondents*." When this amendment was ruled out of order, Mr. Duhaime and Mr. Ward opted to withdraw their motion.✧

Correction to report on CBA Special General Meeting

The July-August *Benchers' Bulletin* noted that *"Over 60% of lawyers at a CBA special general meeting on June 12 called on the BC Branch to withdraw its support for a joint statement signed by the BC Branch President and the Attorney General on April 12. Paul Pearson of Victoria and Phil Rankin of Vancouver introduced the motion, which passed 168:62."*

As correctly pointed out by a reader, the vote count in fact reflects that over 73% (not 60% as stated) voted in favour of the resolution.✧

Peter Keighley elected to presidential ladder

Peter J. Keighley, QC of Rosborough & Co. in Abbotsford, a Bencher for Westminster District, was elected Second Vice-President of the Law Society by lawyers at the AGM and will accordingly become President in 2005.

Victoria Bencher Ralston Alexander, QC spoke to Mr. Keighley's nomination. "Mr. Keighley, in my experience, has been the quintessential full-service Bencher," he said. "In each of the years that I have been a Bencher, Mr. Keighley has topped the poll for the number of hearing days conducted by individual Benchers. He is fully and totally engaged in the work of the Law Society and it gives me great pleasure to commend his appointment as Second Vice-President."

On a question from Sandra Harper in Victoria, Mr. Keighley affirmed to the meeting his own support for the CBA and for universal membership.✧

Ken Meredith to receive Law Society Award

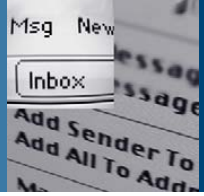
Kenneth E. Meredith will be presented with the Law Society Award for 2002, in recognition by the Benchers of his remarkable service as a member of the Bar and as a Justice of the Supreme Court. The Law Society Award is given every two years to honour the lifetime contributions of the truly exceptional within the profession and the legal community, based on integrity, professional achievements, service and reform.

Mr. Meredith's career has embraced 23 years of practice as a commercial law lawyer in Vancouver, 10 years as editor of the *Advocate*, eight years as a Bencher and over 20 years as a Justice of the Supreme Court of BC.

His vision and commitment led to the establishment of a legal aid plan that has served British Columbians for the past 30 years and to founding of the Law Foundation of British Columbia in 1969, which has played a critical role in funding legal aid, law libraries, legal education, legal research and law reform in the province.

Presentation of the Law Society Award to Mr. Meredith will take place at the Bench and Bar Dinner, co-sponsored by the Law Society and the BC Branch of the CBA, on November 21 in Vancouver.

If you would like to attend the Bench & Bar Dinner, ticket orders may be faxed to the CBA, BC Branch office. A copy of the event flyer and order form are available in the "Events Calendar" section of the Law Society website at **www.lawsociety.bc.ca**.✧



A look at 2003 Law Society fees

Practice fee

Lawyers at the September 20 Annual Meeting approved a 2003 practice fee of $1,538.94 (for lawyers in practice five years or more) and $1,369.94 (for lawyers called less than five years).

As set out in materials circulated for the AGM, the Law Society component of that fee, which funds the Society's General Fund operations, is $903, up $21 (2.4%) from 2002. Other components of the 2003 practice fee are: an *Advocate* subscription fee of $27.50, up $2.50, an amount equivalent to the CBA membership fee of $441.44 for members in practice at least five full years, up $32.34 (7.9%) (or $272.44 for members in practice less than five full years, up $17.34 (6.8%)), a Lawyers Assistance Program fee of $37, up $4 (12.1%) and a BC Courthouse Library fee of $130, which did not increase.

Here is the breakdown of the 2003 practice fee:

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

Law Society fee	$903.00
BC Courthouse Library Society	130.00
Lawyers Assistance Program	37.00
Advocate subscription	27.50
Amount equivalent to the CBA fee	441.44
Total practice fee	$1,538.94

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

Law Society fee	$903.00
BC Courthouse Library Society	130.00
Lawyers Assistance Program	37.00
Advocate subscription	27.50
Amount equivalent to the CBA fee	272.44
Total practice fee	$1,369.94

Liability insurance assessment

In 2003, for the fourth year in a row, the Benchers have set the base professional liability insurance assessment for BC lawyers in private practice at $1,500.

The part-time insurance fee for 2003 remains at $750 and the insurance surcharge (which applies for five years to lawyers with paid indemnity claims, in accordance with Rule 3-26(2)) remains at $1,000.

The profession has enjoyed a stable insurance assessment because of strong reserves in the Lawyers Insurance Fund, effective management of the Fund and relative stability in claims and losses.

Special Compensation Fund assessment

The Special Compensation Fund assessment will increase by $350, from $250 to $600 in 2003. Contrary to a story in the October 4 issue of the *Lawyers Weekly* newspaper, the Benchers are not considering imposing a $4,600 assessment on lawyers. *(The Lawyers Weekly apologizes to the profession for any confusion this article may have caused.)*

The increase in the Special Compensation Fund fee is needed to cover audit and investigation costs, to pay claims and to increase the Special Compensation Fund reserves.

All claims arising from the practice of former lawyer Martin Wirick will be attributed to the Special Compensation Fund 2002 claims year. At present, the Special Compensation Fund's reserves and the Fund's insurance are in excess of $20 million.

The Law Society's analysis of total net claims against the Fund respecting Mr. Wirick will take some time to complete because of overlapping claims and repayments, the complexity of the claims and the availability of recoveries. As these matters become clearer through the Law Society's audit and investigation, the Benchers will consider if and when further financing for the Special Compensation Fund is required and what options are preferable.

The Law Society will keep lawyers updated on the issue, both in the *Benchers' Bulletin* and on the Law Society's website at www.lawsociety.bc.ca.✧

Meet the new Lay Benchers

The Law Society of BC is pleased to welcome five new Lay Benchers, appointed by the provincial cabinet in July and August.

Reappointed as a Lay Bencher is **June Preston**, a social worker and Director of Family Education Services for the Vancouver Island Health Authority in Victoria. In 2002, she received an international award for her work with adoptive families. She has also been recognized by her profession as Social Worker of the Year. Ms. Preston was first appointed a Bencher in April 2001.

The current terms of all Lay Benchers, along with those of elected Benchers, expire on December 31, 2003.

Michael J. Falkins is a retired insurance broker who lives in Victoria. Prior to his retirement, Mr. Falkins ran his own insurance brokerage firm in Cranbrook, Fort Nelson and Victoria and served as Senior Vice-President of Aon Reed Stenhouse.

Patrick Kelly is a member of the Lakahahmen First Nation and Director of Strategic Planning and Communications with the BC Regional Office of Indian and Northern Affairs Canada. Prior to joining INAC, Mr. Kelly ran his own consulting business. He resides in Vancouver.

Valerie MacLean isVice-President of Consumer Affairs for the Better Business Bureau of Mainland BC. Currently a mayoralty candidate in Vancouver, Ms. MacLean is on leave from the Bureau, and so has not yet taken up work as a Lay Bencher. Prior to joining the BBB, Ms. MacLean worked for the provincial government and was an RCMP officer in Burnaby and Maple Ridge.

Patrick Nagle is a former City Editor of the *Vancouver Sun* and was presented with the Bruce Hutchison Lifetime Achievement Award by the Jack Webster Foundation in 2001. As a journalist, Mr. Nagle has covered major political events around the world and in 2001 assisted reporters in Cambodia to prepare for democratic elections in that country. Mr. Nagle is retired and lives in Sooke.

Dr. **Maelor Vallance** is a psychiatrist currently on staff at St. Paul's Hospital in Vancouver. He is also Clinical Professor Emeritus in the UBC Faculty of Medicine and frequently appears as an expert witness in court cases.✧

President's view *… from page 3*

less. Another Wirick, or a "worse than Wirick" situation, must be prevented, not absorbed.

Future management of the risk

The Benchers are already considering alternatives to manage future risks. One option is insurance. Lenders may now see real estate transactions as requiring insurance to provide more certain protection against risks, in particular since payment from the Fund is discretionary under our statute. Without our own product in place, lenders may require title insurance, with all the unnecessary costs that would impose on consumers in BC.

Our Conveyancing Practices Task Force originally conceived a new form of insurance as being paid for through a real estate transaction fee levy. An alternative approach is to set a fee for each *trust* transaction above some threshold amount, regardless of the nature of the transaction. This recognizes that areas other than real estate, such as estate probate, are also areas of risk. The prospect of a transaction levy being paid directly by clients received some unfavourable media coverage over the past month, in particular as the levy might be used to fund past claims.

The Benchers have asked staff to work up an insurance option. I personally support this approach — there is a risk and a premium must be collected in respect of it. The door is not closed to other possibilities, however, and, as I write, I have only 77 days left in office.

I look forward, between now and the end of the year, to meeting with groups of lawyers at local bar associations and CBA sections — to keep all of you updated and to hear your views. Please feel free to write or to email me. I will answer each letter personally in as much detail as I feel I can reveal. This is no time to just grouse. Bang the table and the fork will answer.✧

Benchers approve 28 recommendations for admission reform

Changes ahead for articling and PLTC

This Fall the Law Society begins work on an implementation plan to introduce reforms to articling, PLTC, examinations and skills assessments, governance of the admission program and post-call competence.

The Benchers approved 28 recommendations for reform to the admission program this summer, as set out in the Task Force's comprehensive 2002 report, *Admission Program Reform*, available in the Resource Library/Reports section of the Law Society website at www.lawsociety.bc.ca.

Many of these reforms were first raised in an interim report, presented by the Task Force to the Benchers in December, 2001 and published to the profession for comment. The Benchers directed the Task Force on the options that merited further review, and the Task Force accordingly undertook a more extensive study, which included surveying and consultations with law school faculty and students, PLTC faculty and staff, CLE staff, the BC Branch of the CBA, current and former principals in large and small firms, local and county bar associations and others in the profession. The Task Force also considered the potential for on-line learning, and reviewed on-line learning initiatives underway in BC, other jurisdictions and other professions.

As noted by the Task Force in its interim report, the Law Society admission program is intended to ensure that those seeking call to the BC bar are competent and fit to begin the practice of law. The profession must be satisfied that newly called lawyers possess legal knowledge, lawyering and law practice skills, professional attitude, experience in the practice of law and good character.

The Task Force concluded that the admission program should retain both teaching and articling components, but that PLTC and articling should be better integrated and harmonized.

In the Task Force study, it became clear that articling was a weak link in the professional legal education process. Because articling functions in isolation, and the quality of the experience varies greatly, for some students it is now less significant than PLTC as preparation for the competent practice of law. Indeed, 1997 and 2001 surveys of articling principals and students, supplemented by interviews, confirm the perception that the most significant shortcomings of the articling term include inconsistencies in the quality of articling experiences, in supervision and feedback and in instruction about professional values and attitudes, as well as the powerlessness of students to ensure they receive satisfactory articles.

This became a focus of reform. "The Law Society ought not to continue with its hands-off approach to articles," the Task Force reported to the Benchers. "The Law Society should take steps to ensure that principals and articling students understand their obligations during articles and that a process exists to ensure that there is a reasonable level of consistency in the articling experience."

To overcome current shortcomings, students will be required to obtain experience during articles in a range of lawyering skills — to be set out in an admission program checklist — and in at least three areas of practice. Articled students and principals will also be required to file with the Law Society at the start of articles an articling education contract that incorporates references to the checklist, a joint mid-term report and a joint final compliance report.

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Articling survey

The Admission Program Task Force undertook extensive consultations within the legal profession and the legal community, including a 2001 survey of BC principals and their articled students (those called between January, 2000 and September, 2001).

The most striking result was that principals and students often gave very different responses on such issues on the frequency and quality of supervision and evaluation during articles — with 56% of principals, for example, saying they "often" supervised and provided feedback to their students, while only 34% of the students were of the same view. When students and principals were asked whether articling needed improvement, 67% of principals and 91% of students said somewhat or very much.

The survey suggests that there is a perceived need for improvement in the articling program and that the Law Society could do more to define what is expected of both principals and students. The 2001 articling survey is available in the Resource Library/Surveys section of the Law Society website.✧

Admission program reforms – *highlights*

Here are highlights of the 28 recommendations of the Admission Program Task Force that have been approved by the Benchers. For a full list of recommendations and analysis, see Admission Program Reform – final report, on the Law Society website.

Admission program expectations

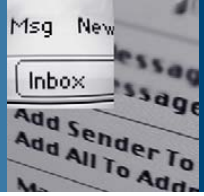
- In partnership with the BC law schools, the Law Society should offer to help law schools teach more about professional ethics and professionalism, increase its profile in the law schools and begin to explain the Law Society roles of protecting the public and serving the profession.
- The Law Society should inform law school students that it is fundamental to their success in the admission program that they be knowledgeable in the core areas of substantive law, practice and procedure on which they will be examined, but on which they may receive little or no instruction during the admission program.

Articling

- Articling students should be required to obtain experience during articles in all lawyering skills, pursuant to an admission program checklist, and also in at least three areas of practice.
- Articling students and principals should be required to file with the Law Society a) an articling education contract (incorporating references to the checklist), at the commencement of articles, b) a joint mid-term report and c) a joint final compliance report.
- A failure to complete the required items in the checklist should have the following consequences: a) *For the student*, an extension of the articling requirement until there is compliance with the required items, subject to a successful application to the Credentials Committee for an exception and b) *For the principal*, a caution and possible referral to the Credentials Committee before future articles will be approved.
- The required years of practice experience for eligibility to serve as a principal should increase from four to seven years, with each principal limited to two students at one time.
- Support should be provided for articling principals and students, including:
  a) a comprehensive Articling Manual for students and principals, containing practical information and guidance on the student/principal relationship, including Law Society requirements and expectations, resources and contact information;
  b) the designation of a Law Society staff member as the Articling Officer to answer questions relating to articling, including the new articling initiatives, to receive suggestions and complaints concerning the articling process and to refer students or principals to appropriate resources;
  c) coaching/mentoring by PLTC faculty who will provide support, on request, to students seeking advice on skills, ethics, resources and the performance of articling tasks.
- The Law Society should coordinate with and promote the work of law school career service offices as a means of assisting students to find articles suited to their career goals, and to encourage the elimination of barriers that may be encountered in the articling recruitment process by Aboriginal and visible minority students and students with disabilities.

PLTC

- PLTC and articling should be combined into a single admission program, governed and administered by the Law Society.
- The PLTC curriculum should be revised and adjusted as required to correspond to an approved "competency profile" through a) an increase in the instructional emphasis on skills, professional responsibility and practice management, b) a decrease in the substantive law teaching component and c) the incorporation of diversity issues.
- Lawyers applying for admission from foreign common law jurisdictions who hold a National Committee on Accreditation Certificate of Qualification (or a Canadian common law LL.B.) and have five years in practice should be entitled to apply to the Credentials Committee for exemption from parts of PLTC.
- Students should be advised prior to articles that they have the option to write the Qualification Examinations at any of the scheduled examination sittings during articles, whether before, during or after PLTC.
- There should be a change from the points system for examinations and skills assessments to showing a pass/fail grade on each.✧



Law societies consider signing enhanced mobility agreement

When law society representatives from across Canada came together at the annual meeting of the Federation of Law Societies in August, they took new steps towards enhanced mobility for Canadian lawyers. Delegates approved the final report of the Federation's National Mobility Task Force, which proposes a more liberal mobility regime for lawyers practising temporarily in another province or territory and those who wish to be admitted as members in another province or territory: *for a copy of the Task Force report, see* www.flsc.ca/en/committees/mobilityReports.asp.

At the recommendation of the Credentials Committee, the Benchers will consider approving the new national mobility agreement at their meeting on November 8, 2002. It is anticipated that most Canadian law societies will be ready to formally sign the agreement as early as year-end. Questions or comments can be relayed to Alan Treleaven, Director, Education and Practice, at atreleaven@lsbc.org.

Under the proposed new temporary mobility regime, a lawyer in a common law jurisdiction in Canada would be entitled to practise temporarily in another Canadian common law jurisdiction for a cumulative period of up to 100 days in a calendar year. *(The current Federation protocol entitles lawyers to practise in another province for up to 10 matters over 20 days in any 12-month period).* Under proposals for admission on transfer from another province or territory, transfer examinations would be replaced with a prescribed reading requirement.

There are separate provisions for lawyers practising between Quebec (the Barreau du Québec) and the common law jurisdictions in Canada, in recognition of differences in legal systems.

Federation delegates agreed to distribute a new National Mobility Agreement to all Canadian law societies for each to determine whether they wish to participate in the regime. While BC lawyers now enjoy enhanced practice mobility in the western provinces under a protocol of the western law societies, the new National Mobility Agreement would supersede the western protocol in any province in which it is adopted.

Participation in the new national regime is now being considered by all Canadian law societies, except the Chambre des Notaires du Québec (in light of the unique role that notaries play under Quebec's civil law system). The law societies of the Yukon, Northwest Territories and Nunavut have expressed concerns about preserving the strength of their local bars. The Mobility Task Force will consider options for these jurisdictions further.✧

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Changes ahead for articling *… from page 10*

The Professional Legal Training Course will retain its current structure, duration and classroom delivery model, but will be directly administered by the Law Society. The program will maintain full-time faculty, supplemented by guest practitioners and a primarily workshop format. PLTC, however, will place greater emphasis on skills, professional responsibility and practice management, and less on substantive law.

There will be no mandatory entrance examination as a prerequisite to PLTC or articling. Such an exam was proposed in 1999 as a way to reduce or eliminate substantive law components from the PLTC curriculum, to phase out the qualification exams and to allow students to focus more fully on skills training.

The Task Force took account of concerns subsequently raised over an entrance exam, including the narrowing effect it might have on the law school curriculum, the delay it might pose in students starting the admission program and the concern that students might go to other provinces.

As part of a greater outreach effort in the law schools, the Law Society will, however, advise law students that success in the admission program requires they be knowledgeable in core areas of substantive law, practice and procedure, as they will be examined on these but may receive little or no additional instruction in PLTC.

Lawyers from other common law countries with five years of practice experience will be able to apply for an exemption from parts of PLTC, as they may now do for the articling term.

As interprovincial lawyer mobility in Canada is becoming increasingly liberal, the Task Force expects that the Law Society may eventually wish to harmonize admission standards on a more national scale, warranting further reforms.

The Admission Program Task Force will bring its implementation plan, and any proposed rule changes, before the Benchers for approval in 2003. The Task Force was chaired by President Richard Gibbs, QC and was composed of Vice-President Howard Berge, QC, Bencher Robert Diebolt, QC, Mary Childs, Anne Chopra, William Ehrcke, QC, Susan Sangha, Life Bencher Jane Shackell, QC and Peter Warner, QC. Staff support to the Task Force is by Jim Matkin, QC, Lynn Burns (PLTC), Michael Lucas, Lesley Small and Alan Treleaven.✧

Law Society moving toward certification scheme for paralegals

The Benchers have decided in principle to allow a broader scope of work for law firm paralegals who become certified under a proposed Law Society certification and regulatory program.

A special Paralegals Task Force recommended such a program, after canvassing three different approaches to paralegals, as requested by the Benchers. The options explored were: 1) to expand legal assistant functions, but without a certification scheme; 2) to certify legal assistants, with regulation through their supervising lawyers; and 3) to certify legal assistants, with those assistants to be regulated directly by the Law Society: *For a copy of the Task Force report, see the Resource Library/Reports section of the Law Society website at www.lawsociety.bc.ca.*

While the Task Force did not recommend permitting independent paralegals in BC, the Benchers decided it prudent to have the Task Force also investigate this issue further in light of pressures in other jurisdictions.

The Task Force study was spurred by developments in Ontario and other jurisdictions in which there are a significant number of unregulated independent paralegals in the marketplace. In May, 2000, the Honourable Peter deC. Cory issued a report to the Ontario Ministry of Attorney General, entitled *A Framework for Regulating Paralegal Practice in Ontario* (the Cory Report). Although that report recommended the regulation of independent paralegals by an independent agency, the Law Society of Upper Canada itself is considering whether to seek the authority for paralegal regulation.

Legislative restrictions on non-lawyer practice are stronger in BC than in Ontario, and the experience with independent paralegals differs in the two provinces. Still, the Task Force flagged the possibility of change ahead in BC.

In *LSBC* v. *Mangat* 2001 SCC 67, the Supreme Court of Canada found that the unauthorized practice provisions of the *Legal Profession Act* could not limit the meaning of the *Immigration Act* provisions that allow representation by "barrister or solicitor *or other counsel*."

"The *Mangat* decision makes it clear that non-lawyers are entitled to practise law in British Columbia for a fee provided they do so pursuant to federal legislation that allows for representation by non-lawyers," the Paralegals Task Force reported to the Benchers, noting that more non-lawyers would likely start practising law in the federal fields as a result. "The Task Force notes with some irony that, given this decision, only paralegals employed by lawyers can't practise in these fields as they are prohibited from doing so by the *Professional Conduct Handbook*."

The Paralegals Task Force recommendations focus on ensuring that members of the public in BC derive the full benefit of paralegals in the delivery of legal services, but without the risks posed by independent paralegals.

The primary recommendation is to expand the functions of paralegals (beyond what is now permitted by Chapter 12, Rule 4 of the *Professional Conduct Handbook*) if those paralegals work under the supervision of lawyers and if they are certified and regulated by the Law Society. *(Following consulations with legal assistant groups, the Task Force has now adopted the term "paralegal" to mean trained legal assistants.)*

Bencher Robert Gourlay, QC, a member of the Paralegals Task Force, told the Benchers in June that this approach provides assurance to the public that certified paralegals have attained an appropriate level of education — such as graduation from a recognized paralegal education program — to perform certain work. It further allows the Law Society to remain in control of

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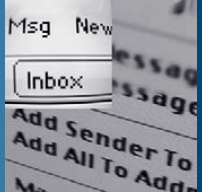

Supreme Court of Canada upholds protection of privilege in law office searches

On September 12 the Supreme Court of Canada struck down section 488.1 of the *Criminal Code* as unconstitutional since the section inadequately protects solicitor-client privilege in police searches of law offices, resulting in unreasonable search and seizure that infringes section 8 of the *Charter of Rights* and cannot be justified under section 1 of the *Charter*: *Lavallee, Rackel & Heintz* v. *Canada (Attorney* General); *White, Ottenheimer & Baker* v. *Canada (Attorney General); R.* v. *Fink* 2002 SCC 61. The Federation of Law Societies of Canada was an intervenor before the Supreme Court of Canada on behalf of Canadian law societies.

The Supreme Court of Canada considered the constitutionality of section 488.1 by way of three separate appeals. The Court upheld appeal court decisions from Alberta (*Lavalle*) and Ontario (*Fink*), which had found section 488.1 unconstitutional, and overturned an appeal court decision from Newfoundland and Labrador (*White*) in which the court had used the remedial techniques of severance and reading-in to save the impugned section.

[Last year a majority of the BC Court of Appeal declared section 488.1 unconstitutional and read down section 487, which authorizes search warrants, to exclude its application to law offices: Festing v. Canada (Attorney General) 2001 BCCA 612. The Court of Appeal stayed its orders until two weeks after the outcome of the Supreme Court of Canada decision in Lavallee. On the Crown's application for leave to appeal to the Supreme Court of Canada, the Court took the unusual step of remanding the case to the BC Court of Appeal for further consideration in light of the Lavallee decision. The stay of the Court of Appeal decision remains in effect.]

The issue before the Supreme Court of Canada in *Lavallee* was whether section 488.1 of the *Criminal Code*, which sets out a procedure determining a claim of solicitor-client privilege in relation to documents seized from a law office under a warrant, infringed section 8 of the *Charter of Rights and Freedoms* against unreasonable search and seizure. The section 488.1 procedure requires that the material be sealed at the time of the search, that the lawyer make application within strict timelines for a determination that the material is intended to be protected by privilege and that, with the permission of the court, the Crown may be permitted to examine the material in order to assist in a determination of the existence of privilege.

The Court *(L'Heureux-Dubé, Gonthier and LeBel JJ dissenting in part*) found that section 488.1 more than minimally impairs solicitor-client privilege and amounts to an unreasonable search and seizure contrary to section 8 of the *Charter*. Its constitutional failings can result from: (1) the absence or inaction of the solicitor to claim the privilege; (2) the naming of clients; (3) the fact that notice is not given to the client; (4) the fact that privilege must be claimed within strict time limits; (5) an absence of discretion on the part of the judge determining the existence of solicitor-client privilege; and (6) the possibility of the Attorney General's access prior to that judicial determination.

The Court found that the principal fatal feature of the statutory scheme is the potential breach of solicitor-client privilege without the client's knowledge, let alone consent. The Court noted that privilege does not come into being by an assertion of a privilege claim; it exists independently. Section 488.1 gives the opportunity to protect privileged information to the lawyer, but not to the client.

Where the interest at stake is solicitor-client privilege, which is a principle of fundamental justice and a civil right of supreme importance in Canadian law, the usual exercise of balancing privacy interests and the exigencies of law enforcement is not particularly helpful because the privilege is a positive feature of law enforcement, not an impediment to it. Given that solicitor-client privilege must remain as close to absolute as possible to retain its relevance, the Court must adopt stringent norms to ensure its protection. The procedure set out in s. 488.1 must minimally impair solicitor-bclient privilege to pass *Charter* scrutiny.

The Court found that another fatal flaw was an absence of judicial discretion in the determination of the validity of an asserted claim of privilege.

The provision in s. 488.1(4)(*b*), which permits the Attorney General to inspect the seized documents if the judge is of the opinion that it would materially assist him or her in deciding whether the document is privileged, is also an unjustifiable impairment of the privilege.

The Court articulated the general principles that govern the searches of law offices as a matter of common law until Parliament, if it sees fit, re-enacts legislation on the issue:

1. No search warrant can be issued with regard to documents that are known to be protected by solicitor-client privilege.
2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so as to afford maximum protection of

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Law Society submissions

Securities Commission should not interfere with lawyer independence

In September the Law Society made further submissions to the British Columbia Securities Commission, opposing the Commission having the power to restrict or prohibit the practice of lawyers before it — matters of lawyer discipline that properly fall to the Law Society: see *Submissions to the Securities Commission Re: New Proposals for Securities Regulation (September 25, 2002)* on the Law Society website (www.lawsociety.bc.ca).

The BC Securities Commission put forward various proposals for reform earlier this year, including a proposal giving the Commission scope to exclude professionals, including lawyers, from practice before it. The Commission's current proposal is:

> *The Commission can prohibit a professional from practising before the Commission if the professional has intentionally contravened the securities legislation, or has intentionally assisted others to do so.*

As noted in the last *Benchers' Bulletin*, the scope of the provision proposed by the Commission was originally even broader — purporting to authorize the Commission to assess the competence of lawyers appearing before it.

The Law Society is pleased to acknowledge that, in response to submissions, the Commission has narrowed the proposed provision. Nevertheless, the Commission still wants the power to prohibit a lawyer from practising law in some circumstances.

The Securities Commission proposals suggest that professionals, including lawyers, sometimes engage in behaviour that negatively affects the integrity and efficiency of the capital markets. The Commission wants authority to order that a professional, including a lawyer, not appear before it or prepare documents that are filed with it — powers similar to those held by the US Securities and Exchange Commission.

A lawyer, of course, is not immune from the Commission's existing enforcement and penalty powers, in the same way that a lawyer is not, simply owing to his or her professional designation, immune to prosecution under the *Criminal Code* for any acts that may violate the criminal law.

In the Law Society's view, however, the proposal goes well beyond the scope of the powers afforded to the Commission by the *Securities Act*, and falls within the powers given to the Law Society by the *Legal Profession Act* to regulate professional conduct. The language of the proposed legislation is overly broad and could result in the imposition of professional sanctions on a lawyer based on personal conduct that falls outside the practice of law, such as in the lawyer's capacity as a director of a public company.

As lawyers are required to protect information that is subject to solicitor-client privilege, they would be prohibited from disclosing such information to the Commission even if it were necessary to defend themselves against a charge they have "aided or abbetted the contravention of the *Securities Act* or Regulations." (By contrast, such privilege is maintained in proceedings under the *Legal Profession Act*.)

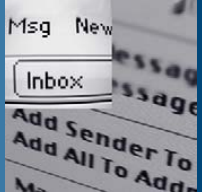
One of the most compelling reasons against the proposal is that it would be detrimental to the public interest — by compromising the independence of the legal profession in BC. Making a lawyer subject to potential discipline by a tribunal before which the lawyer appears on behalf of a client would wrongly interfere with the vigorous pursuit of the client's interests. Clients must be entitled to have their cases placed before a tribunal in the best way possible, by counsel of their choice, provided that counsel is a Law Society member in good standing.

In essence, the issue is that an agent of the state ought not to determine whether a lawyer can practise in a given area of law. In order to protect the independence of lawyers from the state, that determination must be made by a body independent of the state.

The Law Society has the statutory responsibility to govern the conduct of lawyers. It maintains a complaints and discipline process to which all BC lawyers are subject, and there are a range of penalties that may be imposed on a lawyer for misconduct, conduct unbecoming or breach of the Act or Rules, including, in appropriate cases, the power to suspend or disbar a lawyer from practice.

The Society investigates all complaints received concerning the conduct of lawyers practising in the securities law area, including those complaints that come from the Commission or from media reports.

These incidents are few, and there appears to be no pervasive problem with respect to the conduct of lawyers dealing with the Commission. The Law Society has asserted it is unnecessary to impose any other authority over the conduct of lawyers to ensure the proper regulation of securities practice.✧



Access to justice at stake in government's civil liability reforms

On September 23 President Richard Gibbs, QC wrote to Attorney General Geoff Plant, QC on behalf of the Benchers, urging that the provincial government hold off adopting civil liability reforms that might significantly affect the public's access to justice — such as those that would diminish the likelihood of plaintiffs receiving recompense for damages. The Benchers are asking the Attorney General to first conduct a broad consultation and to support the BC Law Institute undertaking a full review of the issues. The government's deadline for submissions on its review was October 1.

The Society has flagged a number of critical access to justice issues that have not been addressed by the Attorney General's Civil Liability Review and that merit full consideration.

While the Benchers were of the view that it is not within the Law Society's mandate to deal directly with the substantive issues raised by the Review, the Society should address matters affecting access to justice as well as matters generally affecting the public interest in the administration of justice as set out in s. 3 of the *Legal Profession Act*.

In his letter, Mr. Gibbs stressed that a careful, detailed examination of proposed reforms is required, a process requiring significantly more consultation and discussion.

"By way of comparison, the Law Society points to the process undertaken by your Ministry in its Administrative Justice Review Project," he wrote. "There, government released discussion papers on specific topics for consideration, and invited comment from interested parties. The government, we believe, benefited from the comment generated on the specific topics, and was able to create a White Paper that appears to have met with a general degree of approval."

On behalf of the Benchers, he identified some of Law Society's public interest concerns on the proposed reforms:

Limitations laws — The Civil Liability Review consultation paper appears to support changing the ultimate limitation period (ULP) from 30 years to 10 years, but does not address the question of whether some causes of action should continue to fall outside a ULP, nor the date from which the 10 years would run and whether a special limitation should apply to protect the most vulnerable members of society, including minors and persons with disabilities.

Joint and several liability — The consultation paper offers no evidence of a crisis in BC arising out of "at-fault" defendants being held jointly and severally liable to an innocent plaintiff. If a plaintiff is innocent of any wrongdoing, and the defendant is found negligent, resulting in a loss to the plaintiff, the present law reasonably places the burden on an "at-fault" defendant to seek indemnity against the other co-defendants, rather than on the blameless plaintiff.

It is not clear that it is in the public interest to change the system to make innocent plaintiffs bear the risk of a defendant's insolvency. In the absence of evidence that the current law is not operating well, it is difficult to postulate on possible alternatives for reform. If government's concern is with a particular industry (for example, insolvent defendants in the construction industry) consideration could instead be given to legislative changes in the industry concerned, rather than re-writing the law of negligence as a whole. For example, it may make more sense for government to consider requirements for performance bonds or mandatory minimum insurance, rather than embarking on a general revision to the law of joint and several liability.

Costs in class action suits — Class action proceedings vary the normal rules in costs by prohibiting the courts from awarding costs against either party unless there is improper conduct. Any change in the rules to allow costs against a plaintiff may, however, impede access to justice by deterring potential class proceedings. Lawyers may also not be willing to take on class proceedings on behalf of representative plaintiffs if they have to assume a burden of costs as well as the risk that the action may not succeed.

The consultation paper states that defendants must incur enormous and unrecoverable costs in the discovery process that are typically not incurred to the same extent by plaintiffs. While there are pros and cons of a no-costs regime, no empirical evidence was offered to show that defendants in BC are suffering severe prejudice. Without evidence of a pressing problem, and without the benefit of broader consultation and discussion, the Law Society does not see a need to amend the *Class Proceedings Act*.

Vicarious liability of employers — Without the vicarious liability doctrine, a plaintiff who has suffered damages is less likely to find a defendant able to pay on a judgment. The doctrine also serves to make it more likely that employers will exercise a higher degree of scrutiny or caution when hiring employees. The availability of insurance, based on risk, enables an employer to compensate the plaintiff, thereby removing the burden from the taxpayer. From a plaintiff's perspective, it is difficult to imagine why one would be opposed to the doctrine. From a public interest perspective, vicarious liability functions both as a fair and practical remedy for harm, and as a deterrent against possible future harm.

There is certainly principled legal analysis that can be raised against vicarious liability, and there has been

some judicial invitation for the Legislature to consider reform of this area of law. The Law Society believes that there needs to be a clearer expression by the government of what it proposes as a legislative amendment before any useful comment could be made about alternatives. For example, if reform were needed, should vicarious liability be statutorily abolished? Or should it be kept, but have classes of defendants statutorily exempted? If this course were followed, what criteria would be required for a class of defendants to be exempted? Choosing one option over another without consultation or discussion by all interested parties is, in the view of the Law Society, a dangerous exercise.

Alternatives to traditional "lump sum" damage awards — The consultation paper provides no evidence that the current approach to damage awards is flawed or unjust. Disadvantages of structured settlements are that the plaintiff is denied the flexibility to make his or her own investment and consumption choices and the structure cannot usually be modified. Any mandatory scheme would prevent the courts from determining what arrangement is in the best interests of a particular plaintiff. Such a scheme gives rise to the risk of default if a defendant does not have adequate means to fund periodic payments over time.

The consultation paper suggests that there is a basis for legislation in support of judicial structured awards because of advances made in actuarial science and the experience gained from negotiated structured settlements — although no explanation of this is offered. Nor is there information on whether, or to what extent, a problem currently exists.

Non-delegable duty doctrine — The doctrine of non-delegable duty offers protection to an injured plaintiff by making a principal liable for the acts of independent contractors in some circumstances. There are good policy reasons for the doctrine in circumstances in which the nature of the relationship between the plaintiff and defendant contains a special element that may justify a higher obligation on the defendant to ensure that care is taken in the fulfilment of a duty. On the other hand, arguments have been made that there is an apparent absence of any coherent theory to explain why or when a particular duty should be classified as non-delegable. Questions have been raised as to whether the uncertainty and complexity of the law as it has developed is matched by corresponding advantages.

The consultation paper argues that one of the difficulties with the non-delegable duty doctrine is the "uncertainty of its conceptual foundations," but does not elaborate on this point. There is no discussion of problems raised by the doctrine, other than an underlying premise that the increased scope of liability is not warranted, and there has not been enough analysis or consultation on this issue.✧

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Law office searches *… from page 14*

solicitor-client confidentiality.

4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.
6. The investigative officer executing the warrant should report to the justice of the peace the efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.
7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.
8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.
9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.
10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

If you have questions, please contact any of the following lawyers at the Law Society office:

Kensi Gounden, Staff Lawyer, Professional Conduct (kgounden@lsbc.org)

Michael Lucas, Staff Lawyer, Policy & Planning (mlucas@lsbc.org)

Tim Holmes, Manager of Professional Conduct (tholmes@lsbc.org)

Jean Whittow, QC, Deputy Executive Director (jwhittow@lsbc.org).✧

Practice Tips, by Dave Bilinsky, Practice Management Advisor

♪ I won't beg you to stay with me
through the tears of the day,
of the years, baby baby baby.
Just call me angel of the morning, Angel ♪

Words and music by Chip Taylor,
recorded by Merrilee Rush

Management moment

What factors cause lawyer burn-out, disillusion and dissatisfaction with the practice of law? In a tongue-in-cheek aside, lawyers will say: "The practice of law would be great were it not for the clients." Implicit in this statement is the assumption that clients, or at least some of them, are demanding, droning time-wasters — that if only the clients would leave you alone, you would have a great practice.

Let us take a moment and turn this statement and its assumptions inside out. Lawyers continually state that they have no time to market — yet seeking to meet the communication and information needs of your clients *is* marketing on a very personal, one-on-one level. Examine each of your files and ask yourself: do you care about this particular client and his or her problems? Or do you wish the client would just go away?

This is an important moment: if the client and the problems do not resonate with you, if the problems are not touching a chord within you for justice and if the matter falls outside your practice or would prove uneconomical for either of you, do not wait for the client to become disillusioned with the justice system in general and you in particular. The result of client disillusionment, dissatisfaction and unmet needs is clear — complaints, unpaid fees and possibly a negligence claim. That client will certainly not do you any favours in terms of positive referrals — exactly the opposite is likely. Those clients will consume an inordinate amount of your time and your resources and are likely to be dissatisfied in the end result.

How can you make the best of a difficult situation? If you have a client who causes such a heartfelt, negative gut reaction, ask the client to kindly find another lawyer, provided it is legal and ethical for you to do so. This is not being inconsiderate. That client deserves a lawyer who identifies with his or her problem and who can ethically, competently and economically solve it. You, in turn, deserve clients with whom you can build a relationship of mutual trust and good will.

Asking a client to find another lawyer can be done any number of ways — for example, you can arrange a meeting and in a factual manner state that, in your opinion, they would be better served by another lawyer. If they ask why, you can state that your current caseload does not allow you the opportunity to devote the kind of time and attention to their file that it deserves. In most situations, I believe the client is coming to or has already arrived at the same conclusion, hence the persistent telephone calls. Hearing it straight out from you allows both of you to acknowledge the situation and move.

There is a further corollary: seek to understand the profile and personality of these clients and try to prevent further situations by increasing your initial client screening. One way to do this is to permit yourself to think about whether or not to take on a new client. Start the habit of saying to potential clients: Let me think about your case for a day or two. I will send you a letter indicating whether I think I can help you on this (and ensure that you send a letter that clearly sets forth whether you accept or reject the file!) If the client is persistent, irritable or desires you to take action immediately, then this in itself should send up warning flags that are ignored at your peril.

Make file review an annual event — say in December — and acknowledge it as part of a "new year" renewal — to regenerate your interest in and satisfaction from your practice. By carefully pruning your client base, you gain a little control over your practice and your life and start to be your own guardian angel.

Practice Q & As

Taking affidavits in the US

Question: Can a BC lawyer go to the US and take a client's affidavit on a matter pending in a court proceeding in BC?

Answer: Section 69 of the BC *Evidence Act* allows a lawyer acting as a Commissioner for Taking Affidavits for British Columbia to take the oath/affirmation of a witness outside of BC on an affidavit for use in proceedings in BC.

Billing WIP after incorporating

Question: I am considering incorporating a law corporation. However, I have a great deal of unbilled WIP accumulated to date. What is the proper way to bill out this WIP after I have formed my law corporation?

Answer: To simply start billing out that accumulated WIP under the law corporation would amount to a transfer of an asset into the law corporation for no consideration. Accordingly, one way to proceed would be to transfer the WIP into the law corporation under s. 85 of the *Income Tax Act*, in turn taking back a combination of debt and shares.

Valuation of the WIP is also important, as it should be transferred at fair market value. Fair market value can be determined one of two ways: one is based on the percentage of completion of the file applied against the expected value of the file. A second method takes the time value of the WIP (accumulated hours x hourly rate), assuming you keep time records. However you value the WIP, you must be able to

demonstrate that the valuation method was "reasonable."

Billing anticipated disbursements

Question: We are running into a situation where we are issuing bills for corporate annual reports that include anticipatory filing fees as disbursements. Is this proper?

Answer: It would not be improper to issue an invoice that includes disbursements that must be incurred as part of the services to be rendered, such as filing annual reports.

Cashing out trust cheques

Question: From time to time, we act for clients who do not have bank accounts. Rather than issuing a cheque to the client, we have been asked to issue the trust cheque payable to a lawyer or a staff member in our firm. It is then cashed and the cash handed over to the client. Is this proper?

Answer: This is not proper, as the funds do not belong to the lawyer or to the staff member. It is also not acceptable to make the cheque payable to "cash" or "bearer": Rule 3-56. In these circumstances, send the client to the issuing bank with the trust cheque payable to the client. It may be necessary to have the cheque certified first. Make arrangements with your bank in advance, to cash the cheque for the client.

Billing quoted disbursements

Question: We have been approached by a client who wishes to enter into a "standard pricing" arrangement — in other words, we agree to charge a fixed amount, fees and disbursements, for doing a "chunk of work." The client has the certainty of billing and the firm has an incentive to do the work efficiently.

The problem is, when we come to billing, our actual disbursements may be higher or lower than the estimated amounts. We propose to just charge our estimated disbursement amounts and not worry about the actual disbursements. Are there any problems under s. 69 of the Legal Profession Act and the Knock v. Owen case? Is this otherwise proper?

Answer: So long as the client was fully and frankly informed, and as long as the agreement was otherwise fairly obtained and the terms were reasonable, this would fall within s. 68 of the *Legal Profession Act* and should not be a problem. *Knock* v. *Owen* would only apply if there were no valid agreement between the lawyer and the client. *(Thanks to Gordon Turriff for his assistance in answering this question.)*

Billing personal services to a client's company

Question: I have been asked by a client to bill his company for his personal legal services. Should I?

Answer: The client is asking you to "coat" the invoice with a patina that it

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Practice Advice

Dave Bilinsky

Felicia S. Folk

Jack Olsen

Practice management advice

David J. (Dave) Bilinsky is the Law Society's Practice Management Advisor. His focus is to develop educational programs and materials on practice management issues, with a special emphasis on technology, to increase lawyers' efficiency, effectiveness and personal satisfaction in the practice of law. His preferred way to be reached is by email to daveb@lsbc.org (no telephone tag). Alternatively, you can call him at (604) 605-5331 (toll-free in B.C. 1-800-903- 5300).

Practice advice

Felicia S. Folk, the Law Society's Practice Advisor, is available to give advice in confidence about professional conduct, including questions about undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships, lawyer-lawyer relationships and other ethical and practice questions. 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 (toll-free in B.C. 1-800-903- 5300) or email her at advisor@lsbc.org.

Ethical advice

Jack Olsen is the staff lawyer for the Ethics Committee. In addition to fielding practice advice questions, Mr. Olsen is available for questions or concerns about ethical issues or interpretation of the *Professional Conduct Handbook*. He can be reached at (604) 443-5711 (toll-free in B.C. 1-800- 903-5300) or by email at jolsen@lsbc.org. When additional guidance appears necessary, Mr. Olsen can also help direct enquiries to the Ethics Committee.

You can also reach Mr. Bilinsky, Ms. Folk or Mr. Olsen by writing to them at:

The Law Society of BC
8th Floor – 845 Cambie Street
Vancouver, BC V6B 4Z9
Fax: (604) 646-5902.

Do you have a disaster recovery plan for your firm?

by Felicia S. Folk, Practice Advisor

If your office was completely disrupted by fire or theft, how long would it take you to contact all of your clients, recreate all your computer data, contact your insurance company, process invoices, contact opposing counsel and generally get your practice operational again? Does your practice have a plan in place to cover such a crisis?

Lawyers will find answers to these questions in a new booklet, *Managing Practice Interruptions*, published by LawPro® (previously the Lawyers Professional Indemnity Company), which is the liability insurance arm of the Law Society of Upper Canada.

The booklet helps lawyers determine how prepared they are to cope with practice interruptions, and it details the steps involved in disaster planning.

Some of the topics include:

- scope of a disaster recovery plan;
- processes and procedures that need to be in place to prepare, respond and recover from a disaster, such as contact lists, evacuation procedures and emergency response teams;
- property and premises issues, such as the need for an inventory of all contents, adequate insurance coverage, space planning and computer backups;
- proper storage of client files and other key documents; and
- steps in the recovery process.

The booklet is available on LawPro's practice website at www.practicepro.ca/disasterrecovery.✧

Federation issues guidelines on ethics and new technologies

The Federation of Law Societies of Canada has published *Guidelines on Ethics and the New Technology*. The Guidelines are available on the Law Society website in the Practice & Services/Practice Resources section.

The Law Society of BC Ethics Committee notes that the concerns addressed by these Guidelines are covered in a general way by existing rules in the Law Society *Professional Conduct Handbook*. Ethics Committee opinions relating to the transmission of confidential information over the Internet and the security of electronic communications were also published in the June-July, 1998 and January-February, 2001 issues of the *Benchers' Bulletin*.

The Federation Guidelines, however, expand on issues covered by the *Handbook* and are published for the information of the profession. They are guidelines only and are not part of the *Professional Conduct Handbook*.✧

Enduring powers of attorney to stay

The Attorney General has announced that the enduring power of attorney will not be phased out but will remain as an advance planning tool in financial and property matters. For more information see **www.gov.bc.ca/ag**.✧

Law Foundation gains new rate with HSBC Bank Canada

Law Foundation Chair Don Silversides, QC commends HSBC Bank Canada for its commitment to paying a new rate of return on lawyers' pooled trust accounts, ensuring the HSBC a spot on the Law Foundation's list of preferred financial institutions.

As of July 1, 2002, interest paid to the Law Foundation on lawyers' pooled trust accounts by the bank is at a net rate of prime less 2.9%, after service charges.

Thanks are extended to Larry Doerksen, Assistant Vice President, and Peter Paget, Manager, Commercial Cash Management, for supporting this initiative.

The Law Society, the Law Foundation, and the Canadian Bar Association (BC Branch) encourage lawyers to consider which financial institutions provide the best support to the Law Foundation when deciding where to place their trust accounts.✧

From the Courts

Practice directions and notices

Check the superior courts website at www.courts.gov.bc.ca/SC/sc-pdir.htm for the most recent BC Supreme Court notices and practice directions. Highlights include:

- **Exchange of witness lists** (Practice direction: July 10, 2002; in effect, September 1, 2002)
- **Release of written reserved judgments** (Practice direction: June 7, 2002)
- **Judicial case conferences in family law proceedings under Rule** 60E (Practice Direction: June 26, 2002)
- **Publication of family law judgments on the Supreme Court website** (Notice: July 11, 2002; in effect September 1, 2002)*

**Note on family law judgments*: As of September 1, 2002, the BC Supreme Court is no longer publishing judgments in family law cases on the court's website, with one important exception. If a judge or master considers that his or her judgment is one that should be posted for any reason, including the fact that it is considered to have precedential value, the judgment will be posted. For judgments that are to be posted, the judge or master will remove names and other sensitive personal information before the judgment is released.

The Court will continue to make family law judgments available at registries and will continue to distribute them to legal publishers.

The BC Courthouse Library Society has announced that it will receive and store all family law judgments, available to users at the Library's copy rate of 60 cents per page. The Library is also planning to create a web-based full-text searchable database, to be available to members of the Law Society. The database should be available by the end of 2002. Please contact the Vancouver Courthouse Library Reference Section at (604) 660-2821, toll-free at 1-800 665-2570 or by e-mail at bccls@bccls.bc.ca.✧

Rules Revision Committee seeks comments on Calderbank letters

Due to recent appellate decisions placing the continuing use of *Calderbank* letters in doubt, the Supreme Court Rules Revision Committee is seeking input from the bar about possible changes to Rule 37, which governs offers to settle to allow for the continued use of *Calderbank* letters where appropriate.

The deadline for comments to the Committee is **January 15, 2003**. For details, see www.courts.gov.bc.ca/Sc/sc-main.htm.✧

Deadline for comments: December 1

Task Force seeks profession's views on unified family court

On October 7 the BC Justice Review Task Force issued a discussion paper to collect information and comments from the profession in order to help weigh the merits of a Unified Family Court in BC. The report, which gives background to the issue, is available on the Task Force's website at: www.bcjusticereview.org.

Task Force members will attend CBA Family Section meetings in November to discuss the paper. ***Interested parties are invited to forward comments to the Task Force through its website by December 1.***

The Justice Review Task Force was initiated by the Law Society in March, 2002 to identify a wide range of reform ideas and initiatives that may help to make the justice system more responsive, accessible and cost-effective.

The decision to explore Unified Family Courts does not mean that the idea is necessarily endorsed by one or all members of the Task Force.

The Task Force is chaired by a Past President of the Law Society, Richard Margetts, QC. Other Task Force members are Chief Justice Donald Brenner of the Supreme Court of BC, Chief Judge Carol Baird Ellan of the Provincial Court of BC, Deputy Attorney General Gillian Wallace, QC and Assistant Deputy Minister Jerry McHale, QC on behalf of the Attorney General and Peter Leask, QC on behalf of the CBA, BC Branch.✧

New website feature

The BC Lawyer Lookup ... how to find a lawyer

The Law Society website now offers lawyers and members of the public a new service — the *BC Lawyer Look-up*. The look-up allows lawyers and members of the public to search for a current BC lawyer by name. Search results provide a lawyer's basic membership status information and, in the case of a practising lawyer, his or her business address and telephone number. This is the same information that the Law Society routinely provides in response to telephone enquiries and the look-up is an extension of that service.

The Law Society updates the website data daily. The look-up service is intended to be easy for the public and lawyers to use without assistance. However, it is still necessary to contact the Law Society office for information about a former member or to enquire about a lawyer's professional conduct record.

Practising lawyers are categorized as either "in private practice" or "not in private practice." These categories are based on insured/exempt codes on our Member Information System and are intended to help members of the public distinguish lawyers who are eligible to provide legal services from those who are not, although there will be exceptions depending on a lawyer's exact practice situation.

The contact information for non-practising and retired members is excluded from the service, as are email and fax numbers for all lawyers. While email and fax are common and useful means of contacting lawyers, they are also more amenable to misuse for commercial or marketing purposes. The Law Society Disclosure and Privacy Task Force and staff will consider this feature further, possibly posting email and fax numbers on a consent basis.✧

Do we have your contact information?

Now is the ideal time for BC lawyers to ensure that the Law Society has their correct addresses and other contact information.

An address/contact information change form is available in the Resource Library/Forms section of the Law Society website at www.lawsociety.bc.ca. The form must be completed, signed and either mailed or faxed back to the Member Information Group at the Law Society office.

Please note that, if you already updated your contact information on the Practice Declaration form (Form 30) in September, that information will soon be reflected on the Law Society database and you need not submit an address change form.✧

Reinstatements

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

As of July, 2002: Michele Dawn Stannard, of West Vancouver. **As of August, 2002**: Michael Karton, of Vancouver; Edward Peghin, of Vancouver. **As of September, 2002**: Katherine Lynn Fraser, of Coquitlam. **As of October, 2002**: Aleem Shiraz Bharmal, of Vancouver; Martina Hwa-Young Lee, of Richmond; Darragh Kennedy McManamon, of Vancouver; Cathryn Diane McVeigh, of Victoria.✧

Practice Tips *… from page 19*

was for legitimate corporate purposes. If the client is otherwise entitled to be reimbursed by the company for these services, that is something that the client should take up directly with the company. By asking you to bill the company for personal legal services, the client is asking you to participate in a possible fraud on income tax authorities.

New Books

The ABA has just published a number of new books that may be of interest: *The Legal Career Guide from Law Student to Lawyer* by Gary A. Munneke; *Keeping Good Lawyers – Best Practices to Create Career Satisfaction* by M. Diane Vogt and Lori-Ann Rickard; *Winning Alternatives to the Billable Hour* by James A. Calloway and Mark A. Robertson, editors; and *Flying Solo – A Survival Guide for the Solo Lawyer*, 3rd edition, Jeffrey R. Simmons, editor. All four are filled with good tips, advice and commentary. Further details can be found at: www.abanet.org/lpm/catalog/home.html.

LawPro® has also just published a tool to be used by mentors and mentees to make more out of a mentoring relationship. Details can be found at www.lawpro.ca/news/pdf/LawPROmagazine.pdf.✧

Recent unauthorized practice undertakings and orders

On petition of the Law Society, the BC Supreme Court has ordered that **Brian Carlisle** and his business **All Business (AB) Paralegals**, of Hope, be prohibited from appearing as counsel or advocate, drawing documents for judicial or extra-judicial proceedings or relating to proceedings under a statute, negotiating for or settling a claim or demand for damages, giving legal advice or offering or holding out as qualified or entitled to provide these services for fee: *July 16, 2002.*

The court ordered that Mr. Carlisle be at liberty to apply to vary the order within 30 days of it being served on him. The Law Society was awarded costs.

The BC Supreme Court has also ordered that **Chris Goodsell** of Chilliwack be prohibited from appearing as counsel or advocate; drawing documents for judicial or extra-judicial proceedings or relating to proceedings under a statute, drawing corporate documents, giving legal advice or offering or holding out as qualified or entitled to provide these services for fee: *April 16, 2002.*

The Law Society was awarded costs.

[redacted]

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[redacted]

[redacted]

[redacted]

[redacted]

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***Paralegals** … from page 13*

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the certification process and regulation.

Under such a program, certified paralegals could be encouraged to take on new functions. This could include some advocacy roles, such as appearing before specialized boards and tribunals where lay representation is well established; undertaking debt collection matters in Small Claims Court or appearing at Small Claims settlement conferences (both would require an amendment to the *Small Claims Act)* or handling first appearances and interim appearances on uncontested adjournments in criminal matters. The Task Force has asked the CBA sections to determine in what areas the role of paralegals could be expanded, and any other lawyers with views are most welcome to contact the Task Force through the Law Society office.

The Benchers have endorsed the Task Force's overall approach on paralegal certification, and specifically the Task Force's recommendations to:

- consult with the Attorney General on whether the *Legal Profession Act* allows the Law Society to certify/regulate paralegals and/or whether the Act should be amended;
- consult with administrative tribunals, the court system, CBA groups and the government regarding the possible expansion of duties of certified paralegals;
- explore and cost out a system of regulating certified paralegals;
- develop and establish standards and examinations for the certification of paralegals; and
- establish a committee on paralegals consisting of Benchers, Lay Benchers, paralegals and a representative from a recognized educational institution.✧

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