



The Law Society
of British Columbia



Benchers' Bulletin

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President's View

Lawyers coming through in tight times

by William M. Everett, QC

I became Law Society President in mid-October, more than two months earlier than expected and in less than happy circumstances. As you know from the intensive media coverage of the past month, Howard Berge, QC recently resigned as President. We all understood why it was appropriate for him to step down. Still, I cannot make this early transition into the role of President without first acknowledging Howard's decade of valuable service as a Bencher and countless hours of volunteer service to the public and the profession. I wish to thank him for all that work.

As we wind down the year, I look forward to welcoming Federation of Law Societies representatives who are meeting in Victoria in November and hosting special year-end events, such as our 50-year certificate luncheon in honour of longstanding members of the profession. I also look forward to our annual Bench & Bar dinner in Vancouver where I hope to see many of you.

There is hard work ahead for the Benchers and staff in 2004, but I am pleased to say that the Law Society will head into the new year in a sound fiscal position. I see it as critical that we demonstrate financial restraint and accountability, especially at a time when many in the profession and the public face similar pressures. Our approach will be reflected in a tighter budget for 2004 and the Law Society component of the 2004 practice fee dropping 8.6% from 2003.

Despite the pressures many law firms face, I'd hope that we as lawyers have it in our hearts to reach out to those who keenly need our help yet cannot afford to pay us. By all indications, BC lawyers believe strongly in pro bono.

Of those lawyers surveyed last year, over three-quarters do some pro bono work, citing as their motivation a

sense of professional responsibility and volunteerism. Without doubt, lawyers bring unique services to the community — we are often the only ones who can help level the playing field for people in trouble or assist charities and community groups carry out their work. For lawyers to offer that talent at no cost reinforces our role as true professionals and strengthens our call for better government funding of essential services through legal aid.

Not all lawyers can offer to work for free, or do so on an ongoing basis. Meeting existing workload, family responsibilities and community commitments understandably takes great time and energy. But even among the lawyers in the survey who were not doing any pro bono at the time, over 70% wished to in the future.

The Law Society has been instrumental in the launch of Pro Bono Law of BC, a society to facilitate pro bono services in the province. The operation is lean, staffed only on a part-time basis by an Executive Director and a Coordinator. It is not intended to become a service provider or to create a new bureaucracy. Rather, it is to put the right people in touch with each other so that more pro bono work is done and given a public profile. To widen the pool of volunteers, the Law Society has also extended its professional liability insurance to cover retired and non-practising lawyers, specifically so they can offer certain services through approved pro bono programs.

Law firms need to meet billing targets to stay afloat. But they also have an obligation to foster professionalism. For those of us whose eyes fix instinctively on the bottom line, we should consider strategic advantages to pro bono that may previously have been overlooked. American lawyers have done just that. They see pro bono policies as offering positive PR for their firms and

Benchers' Bulletin

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers and articulated 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 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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a tool for recruiting the best lawyers. There are a range of pro bono policies in law firms, from those that are inspirational (simply encouraging lawyers to do pro bono) to those with a bit more bite (giving credit for pro bono work toward billing targets).

Without knowing the face of the profession five or 10 years from now, I am confident pro bono will thrive. I admire those lawyers within my own firm who have taken the opportunity to help people in tragic accident cases and in test litigation cases on a pro bono basis. And I know the

commitment is reflected in many firms, both large and small, and in many communities.

Helping individuals in difficult circumstances with a case, from beginning to end, is a classic concept of pro bono. But it is not the only option. Some law firms are now choosing to “partner” with a charity to do all of its legal work, which may mean involving more than one lawyer in the firm with that client. For lawyers who would like to do pro bono legal work, but do not wish to strain administrative and staff resources within their

firms, volunteering for a summary legal advice clinic may be ideal. This allows the lawyer to set regular but limited hours at a clinic, without taking responsibility for the subsequent legal work or court appearances.

Pro bono is demanding, but need not be overwhelming. Consider the possibilities.

* * *

For more on pro bono opportunities and the work of Pro Bono Law of BC, see page 4. ✧

New Conduct Review Task Force invites comment

If you have comments or concerns about conduct reviews as a component of the Law Society discipline process, a new task force would like to hear from you. The Conduct Review Task Force, chaired by Westminster Benchers Peter J. Keighley, QC, is addressing three primary questions in its study:

- What works in the conduct review process?
- What does not work?
- What changes or improvements are needed?

Law Society Rules 4-7 through 4-12 govern conduct reviews. A conduct review is not a hearing, but an informal review carried out by a Conduct Review Subcommittee composed of a Benchers and a non-Benchers practitioner or by two Benchers. When Law Society staff assess and refer a complaint about a lawyer to the Discipline Committee for consideration, the Committee may choose to order a conduct review as a means of further investigating or disposing of the complaint. In many instances, the Discipline

Committee may determine there is a conduct issue to address but one that may not warrant a citation.

A lawyer appears at a conduct review personally and may be accompanied by counsel; the complainant may attend all or part of the review with permission of the Subcommittee. The proceeding is otherwise not open to the public. If a complaint giving rise to a conduct review is already known to the public, however, the fact of the review and its disposition may be disclosed under recent rule changes.

A Conduct Review Subcommittee considers any conduct issues and prepares a report and recommendations. It may recommend that the Discipline Committee take no further action on the complaint against the lawyer (although the Subcommittee may recommend that the lawyer take certain steps to rectify a matter or prevent future problems in practice). If the matter is more serious, the Subcommittee may instead recommend that the Discipline Committee issue a citation or refer the lawyer to the Practice Standards Committee. In 2002, the Discipline Committee ordered 33 conduct

reviews (40% of all actions taken by the Committee).

Lawyer Ian Sisett of Vancouver raised concerns over the complaints and conduct review process through a proposed motion to the AGM in September, but later agreed to withdraw his motion after the Benchers determined to strike the task force to look specifically at conduct reviews. Mr. Keighley will be joined on the Task Force by Mr. Sisett and by Benchers Ian Donaldson, QC, Michael Falkins and Russell Tretiak, QC and Life Benchers Howard Berge, QC and Jane Shackell, QC.

Lawyers who have served on conduct review panels, counsel who have represented lawyers in the process or lawyers who have undergone conduct reviews themselves, as well as any others in the profession with an interest in the issue, are welcome to relay their comments to the Conduct Review Task Force **by November 30** c/o Kathy Copak by email to kcopak@lsbc.org or by mail to 8th Floor, 845 Cambie Street, Vancouver, BC V6B 4Z9. ✧



Pro Bono Law of BC ... building partnerships

If you can donate any of your time and expertise to the people who need it most, Pro Bono Law of BC is ready to show you how. Whether you foresee making an ongoing commitment to pro bono work or would like to offer services on occasion, here are some ways to take up the challenge.

Watch the probononet.bc.ca website

The probononet.bc.ca website, maintained by Pro Bono Law of BC, provides full details and contact information for ongoing pro bono legal programs and new requests from community organizations for pro bono assistance.

Consider these pro bono programs

With the need for pro bono legal services on the rise, structured pro bono programs have emerged. BC lawyers in private practice who deliver pro bono legal services to individuals or community organizations already enjoy coverage for their pro bono activities under the BC Lawyers' Compulsory Professional Liability Insurance Policy, just as they do when representing paying clients.

Crown Counsel and lawyers who practise as in-house counsel, as well as non-practising and retired members, will be pleased to know that the Law Society has extended coverage under the policy to them, free of charge, for certain pro bono services they provide through "approved" programs. Approval is reserved for those programs that meet and maintain certain best practice protocols. The Law Society extended insurance coverage in this way to encourage pro bono across the profession.

The first programs to receive such approval are:

Salvation Army BC Pro Bono Program

This program offers free summary advice to clients in criminal, family, immigration, labour and civil law, including residential tenancy disputes and small claims and bankruptcy proceedings. Contact John Pavey, Central Coordinator at 604 299-3908 or john_pavey@can.salvationarmy.org.

For experienced appellate counsel who are interested in offering pro bono on criminal, civil and family appeals to the BC Court of Appeal, the Salvation Army Pro Bono Program also administers a **Court of Appeal Pro Bono Program** that serves unrepresented litigants who have brought appeals. A roster of senior counsel is maintained by Richard Peck, QC (criminal), Geoff Cowper, QC (civil) and Georgiale Lang (family). For more information, please contact any of these lawyers or John Pavey.

Multiple Sclerosis Society of Canada, BC Division, Volunteer Legal Advocacy Program

This program meets the advocacy needs of its members in the areas of human rights, employment equity, insurance, income security, estate planning and family law through the pro bono work of lawyers. Contact Adrienne Boothroyd, Coordinator, Volunteer Legal Advocacy Program at 604 689-3144 or adrienne.boothroyd@mssociety.ca.

South Fraser Women's Services Society, Legal Information and Advocacy Program

This program provides free legal information and representation to women on family law issues, such as divorce, separation, child custody and access, child support, spousal maintenance, peace bonds

and restraining orders. Contact Ram Sidhu, Legal Advocate at 604 536-9611 or advocate@sfwomenservices.com.

Western Canada Society to Access to Justice (WCSAJ)

This society provides a professional setting in which volunteer lawyers devote two to four hours of time each month to help those who cannot obtain legal help elsewhere. The Society works with various social and charitable agencies to arrange and administer half-hour legal appointments in criminal, family and other areas of law.

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Pro Bono Law of BC update

Pro Bono Law of BC is a non-profit society that strives to encourage a pro bono commitment by lawyers and firms in the province.

A joint initiative of the Law Society of BC and the BC Branch of the Canadian Bar Association, the Society is primarily funded by the Law Foundation of BC and the Law Society.

Pro Bono Law of BC directors recently adopted a strategic plan, welcomed the Society's first Executive Director, Pat Pitsula, and Coordinator Carol Jones, both working part-time through offices in the Law Society building. Ms. Pitsula works on Tuesday and Wednesday and Ms. Jones on Tuesday through Thursday. They welcome your calls at 604 893-8932.



The Salvation Army pro bono clinic



John Pavey (left), Central Coordinator for the Salvation Army pro bono program, meets with Langley lawyer Don MacDougall, who serves both as a clinic volunteer and as a member of the program's Executive Committee. Through regular clinics in communities across BC, lawyers offer summary legal advice to people who cannot afford to pay for a lawyer but who are ineligible for legal aid.

For Don MacDougall, a lawyer with Fleming, Olson and Taneda in Langley, pro bono is one way of fostering public confidence in lawyers. "For lawyers concerned about the appearance of the profession to the public, pro bono is an opportunity to bridge the gap and show that lawyers are people, they are accessible and they are not reserved solely for the very rich," he says.

MacDougall is a volunteer and Executive Committee member for the Salvation Army Pro Bono Program, which holds legal advice clinics in 21 offices across the province at least once a month, with a few clinics operating weekly and one clinic (on Robson Street in Vancouver) held daily.

Currently, clinics run in Courtenay, Duncan, Nanaimo, Victoria, Parksville, Qualicum Beach, Gibson's, Vancouver (three locations),

Burnaby, Richmond, Surrey, New Westminister, Port Coquitlam, Chilliwack, Vernon, Kamloops, Kelowna, Cranbrook and Fernie. New clinics are coming to North Vancouver, Langley and Maple Ridge.

Relying entirely on Salvation Army fund-raising, including some donations from law firms, the pro bono program offers summary advice on criminal, family, immigration, labour and welfare law and on such civil matters as residential tenancy disputes, small claims and bankruptcy proceedings. Volunteer lawyers give advice, prepare documents or assist clients who intend to appear in court unrepresented, but they do not serve as counsel in court matters.

To qualify for the program, clients must be ineligible for legal aid and must meet financial criteria — having a monthly household income not

exceeding \$1,500 for a single person (or \$2,500 for a person with one or more dependants) and holding no more than \$30,000 in equity.

"We expect to assist at least 3,000 clients in BC by the end of 2003," says John Pavey, Central Coordinator for the program. "We have approximately 300 lawyers involved actively with our program — each lawyer, on average, commits to two hours of volunteer service per month."

"I think most lawyers see the Salvation Army as an organization that does a lot of good; we are also good at what we do," Pavey adds. "The lawyers believe that we provide an environment in which their boundaries are recognized and respected. This ensures that clients are not adding burdensome legal issues to the lawyer's caseload, unless the lawyer chooses to respond by providing more than what is expected."

MacDougall agrees. "What impressed me about the program is that it allows lawyers to provide advice to clients in a summary fashion for specified and scheduled blocks of time," he said. "The program itself takes care of weeding out people who can afford to pay for legal advice and takes care of all arrangements for the appointments. The lawyer's job is only to meet with the clients and provide advice at the meeting, without any ongoing obligation after the meeting is over unless the lawyer wants to take on that responsibility."

For lawyers who have little face-to-face interaction with clients in their own practices, the pro bono program offers that opportunity, MacDougall notes — and clients are very grateful for the assistance. ♦



Law Society Rule changes

Disclosure and privacy in complaints

The Benchers have passed new rules to address privacy and disclosure issues in the Law Society complaints and discipline process, as flagged by the ongoing work of the Privacy and Disclosure Task Force.

Rules 2-15(1)-(2) and 4-36.1(4) and (6) now provide that, when another law society is investigating the conduct of a BC lawyer or is initiating discipline proceedings, the Law Society may inform clients if relevant information concerning them is sent to that other law society.

Rule 3-3 has been amended for clarification. Under 3-3(2), when a complaint is known to the public, the existence, subject matter and status of the complaint may be disclosed. A recent amendment to 3-3(2) also now allows disclosure of additional information that is necessary to correct inaccurate information.

Finally, Rule 3-3(2) and (3), as amended, clarify that the “status” of a complaint means its stage of progress through the complaint handling process, including but not limited to the fact that a complaint file has been opened, is under investigation, has been referred to a committee or has been closed (including the reason it has been closed). A new subsection (4) provides that these disclosure provisions are subject to solicitor-client privilege and confidentiality.

When a complaint giving rise to a conduct review is known to the public, the fact of the conduct review and its disposition by the Discipline Committee may be disclosed, subject to solicitor-client privilege (Rule 4-11(3)-(5)).

All or part of minutes of meetings of the Complainants’ Review Committee respecting a complaint may be released to the complainant or lawyer concerned (Rule 3-9(7)).

Annual practice declaration

An annual practice declaration must be completed, signed and delivered by a practising lawyer by the date set by the Executive Director (Rule 2-6(2)-(3)). *Note: The due date for insured practising lawyers to file the declaration has changed from September 30 to the date on which firms become required to file a new form of accountant’s report. That new form of accountant’s report is expected to be introduced late in 2003. For insurance-exempt practising lawyers, the due date for filing the practice declaration remained September 30 this year.*

Business address

Rule 2-8(1) provides that a lawyer must inform the Executive Director of his or her place of business. A new subsection now stipulates that a lawyer’s place of business includes the place of business and registered and records office of a law corporation of which the lawyer is a voting shareholder (Rule 2-8(2)).

Benchers set guidelines for meeting in camera

Bencher meetings — held each month other than January and August — are open to Benchers, Law Society staff, BC lawyers and BC articulated students, unless the President (or other Bencher presiding) declares the meeting closed under Law Society Rule 1-15(4). For information on meeting dates, please see the calendar section of the Law Society website at www.lawsociety.bc.ca.

In September the Benchers passed guidelines for holding portions of their meetings in camera. These guidelines are available in “About the Law Society / Strategic Plan and Governance” on the Society’s website.

The Benchers must meet in camera to deliberate on a review of a panel decision or other matter that constitutes a

hearing under the *Legal Profession Act* and Law Society Rules.

They may also meet in camera, with only appropriate Law Society staff, counsel and contractors present, to discuss:

- matters relating to Law Society personnel of a financial or personal nature or other matters in respect of which, in the opinion of the Benchers, the need for privacy outweighs the public interest in disclosure.
- litigation involving the Law Society and to seek or receive legal advice in any matter;
- negotiations between the Law Society and another body or an

individual, if the Benchers consider that disclosure might reasonably be expected to harm the interests of the Law Society;

- any matter if, in the opinion of the Benchers, an open discussion would compromise the security of the Law Society or its property or of an identifiable individual; or
- any matter if the Benchers consider that disclosure may reasonably be expected to harm the conduct of an investigation or enforcement of the *Act*, *Rules* or *Professional Conduct Handbook*.

The Benchers will not make a decision during an in camera session unless it is necessary to do so to protect privacy, security, confidentiality or privilege.



Cherished moments

Call ceremonies are a family affair, with spouses, partners, children, family, friends and colleagues joining newly called lawyers to celebrate years of hard work, academic achievement and a promising future in the profession. Over 100 lawyers were formally called to the BC bar and admitted as solicitors at a ceremony held September 26 in the Great Hall of the Vancouver Law Courts.

AGM votes for mandatory CBA equivalent fee

A majority of lawyers attending the Law Society Annual Meeting on October 27 voted (295:139) to amend the Benchers' recommended 2004 practice fee resolution so as to include — as a component of the practice fee paid by all practising members in 2004 — an amount equivalent to the Canadian Bar Association membership fee. The amendment also calls on the Law Society to remit to the Canadian Bar Association, upon receipt, the amount equivalent to the CBA fee that the Society collects as a component of the practice fee.

Robert Brun and J.J. Camp, QC, both of Vancouver, put forward this amendment to the practice fee resolution. The Benchers' recommended resolution would not have included an amount equivalent to the Canadian Bar Association fee as a mandatory component

of the practice fee. Rather, the Benchers had resolved to authorize the Law Society to serve as agent for the CBA for the purpose of collecting CBA membership fees only from lawyers who choose to be CBA members.

Following adoption of the Brun/Camp amendment, the meeting approved (303:67) an amended 2004 practice fee of \$1,492.91 (for lawyers in practice five years or more), of which \$465.41 represents the CBA equivalent fee, and \$1,303.91 (for lawyers called less than five years), of which \$276.41 represents the CBA equivalent fee.

The Annual General Meeting began on September 19, but was adjourned to October 27 because of technical problems on the audioconference. Prior to adjournment of the meeting on September 19, Victoria Bencher Ralston Alexander, QC was elected Second

Vice-President for 2004* and PriceWaterhouseCoopers were appointed as auditors for the Society. The business of the meeting was completed on October 27.

A petition to challenge the statutory authority of the Law Society to include as part of the annual practice fee an amount equivalent to the CBA fee was heard in BC Supreme Court in July, with judgment reserved. That petition was brought by former Law Society President, Richard Gibbs, QC.

** Note: as a result of the recent resignation of Howard Berge, QC as President of the Law Society, Mr. Alexander assumed the position of Second Vice-President effective October 10, 2003 and Peter J. Keighley, a Bencher for Westminster District, assumed the position of First Vice-President on the same date. Mr. Alexander and Mr. Keighley will continue in these roles in 2004. ♦*



BC paralegals support certification



Over 90% of BC paralegals responding to a recent Law Society survey say they would apply to become certified paralegals if the Society introduces a certification program as proposed by the Paralegal Task Force.

The survey results are available in the Task Force's *Report on Paralegal Survey Results*, available on the Law Society website at www.lawsociety.bc.ca.

The Law Society is considering paralegal certification as a way of raising the profile of paralegals in law firms and law-related workplaces and ensuring that members of the public in BC fully recognize and derive the benefit of paralegals working with lawyers in the delivery of legal services. The Task Force is also of the view that it is to the advantage of BC

lawyers to use paralegals in the delivery of legal services as effectively as possible to ensure the profession meets current and future marketplace competition.

The survey was intended to gauge overall interest in certification, determine whether or not the proposed standards for certification are appropriate and ensure input on the proposal from paralegals.

For more information, lawyers are invited to read the Task Force's paper, *Proposal for a Law Society Paralegal Certification Scheme*, in the Resource Library/Reports section of the website. ↵

Equity and Diversity Committee calls for new volunteers

The Law Society Equity and Diversity Committee, which provides the Benchers with policy options, training and information on equity and diversity issues, is seeking expressions of interest from BC lawyers to serve on the Committee or one of its working groups in 2004.

The Committee — composed of Benchers, non-Bencher lawyers and representatives of different community groups having knowledge and experience of diversity issues — was formed in 1998 from merger of the Gender Equality, Multiculturalism and Disability Advisory Committees. Since then, it has moved forward initiatives to promote and sustain diversity in the legal profession, including studies examining the experiences of

lawyers of Aboriginal descent and lawyers with disabilities.

Most recently the Committee has:

- organized presentations at both UVic and UBC on issues facing women lawyers;
- hosted a policy forum on strategies to address barriers faced by lawyers with disabilities; and
- organized a training session for the Benchers on the history of First Nations in British Columbia as a context for the current issues.

Much of the Committee's mandate is carried out by smaller working groups, made up of Committee members and other volunteers who complement existing expertise. The

current working groups are:

- Women in the Legal Profession
- Disability Research
- Aboriginal Students and Lawyers; and
- Court Interpreters.

All appointments to the Committee are made by the Law Society President at the beginning of each calendar year, and a limited number of positions are expected to open in 2004.

If you are interested in participating on the Equity and Diversity Committee or one of its working groups, please contact Kuan Foo at the Law Society offices at 604 443-5727 or kfoo@lsbc.org. ↵



Lawyers owe duties to clients in face of Securities Commission summons

Investigators appointed by the BC Securities Commission occasionally deliver to a lawyer a summons under s. 144 of the BC *Securities Act*. The summons may seek to compel the lawyer to give evidence on oath as a witness or to produce records pursuant to a Commission investigation of one of the lawyer's clients.

Section 148(1) of the *Securities Act* prohibits communication related to such summons as follows:

Without the consent of the commission, a person must not disclose, except to the person's counsel, any information or evidence obtained or sought to be obtained or the name of any witness examined or sought to be examined under section 143, 144, or 145.

Chapter 5, Rule 14 of the *Professional Conduct Handbook* sets out a lawyer's

responsibilities when such demands are made:

A lawyer who is required, under the *Criminal Code*, the *Income Tax Act* or any other federal or provincial legislation, to produce or surrender a document or provide information which is or may be privileged shall, unless the client waives the privilege, claim a solicitor-client privilege in respect of the document.

On its face and unless the Commission consents to the contrary, s. 148 of the *Securities Act* prohibits a lawyer served with a summons under s. 144 from seeking instructions from his or her client on whether to claim privilege or whether the client wishes to waive privilege over any information the Commission seeks from the lawyer.

The Law Society has met with Commission representatives to discuss

concerns about the application of section 148, in light of a lawyer's professional obligations under Chapter 5, Rule 14.

As a result of those discussions, the Commission has agreed to publish the following consent to disclose under s. 148 of the *Securities Act*:

Under s. 148(1) of the Act, the commission consents to a person's counsel disclosing to the person any information or evidence obtained or sought to be obtained or the name of any witness examined or sought to be examined under section 143, 144, or 145.

This *Consent to Disclose [Section 148]* took effect on October 7, 2003 and has been posted on the Commission's website under "Decisions & Orders / Exemption Orders" at www.bcsc.bc.ca. ✧

Public complaints about CanLaw lawyer referral service

The Law Society has received complaints from the public and lawyers regarding an online lawyer referral service called CanLaw (www.canlaw.com). The complaints come primarily from women who report receiving abusive and obscene emails from CanLaw when they request a referral for a lawyer (especially if the referral is for a family relations matter).

One woman who requested a referral received a reply which said: "Are you stupid? You want us to provide you with thousands of lawyers' names for free? Piss off you pathetic lunatic."

A woman who requested a referral in a

custody dispute, but had her credit card rejected when she tried to pay CanLaw's \$5.00 service charge, received this reply: "You are a deadbeat. You are also a lunatic. I hope you and your family die. Now go to hell."

The woman who received this email was particularly concerned because she had provided CanLaw with a great deal of personal information, including her home address and phone number, the type of legal dispute she was involved in and her credit card number.

Women lawyers who have registered with CanLaw also report receiving

abusive emails. One lawyer who was not registered with CanLaw, but asked CanLaw to stop sending her unsolicited emails, received a response calling her "another stupid little girl who got through law school on her back" and a "despicable, ignorant, round-heeled, feminist bigot."

Some members of the public mistakenly assume CanLaw, which is based in Toronto, is in some way affiliated with or approved by provincial law societies or the Canadian Bar Association. CanLaw is not associated with any law society or with any bar association and its principal is not a lawyer. ✧



10 Sure Ways to Fail: common financial mistakes and how to avoid them

by David J. Bilinsky and Reid F. Trautz

Finding your receivables high? Having trouble setting costs? Monthly invoices going out late? It's easy to do, but neglecting the financial side of the business of law can be the first step down a slippery slope to financial ruin. Few small firms have the luxury of professional managers to keep the firm's finances on the straight, true course. But help is here! If you've been frustrated by money management, pore over this list of the 10 most common mistakes small firms make — and how to get safely past them.



1. Don't develop a cash flow and financial plan.

Initially, lawyers do contemplate the financial side of their law practices. But in some cases, they don't give it all the attention it deserves — especially as things start to slide downhill. Don't assume that things will “just work out.” The road to success isn't merely paved with hard work; you have to keep your eye on the business fundamentals.

Timing is everything. Rent, salaries, other bills — all have to be paid on time or you do more than risk losing credit. You risk losing your business. When you combine overdue bills with clients who refuse to pay, or you delay making payments on your accounts, you can be caught in a financial squeeze.

Sit down and do the math. For an annual (12-month) period, prepare a

month-by-month detailed budget. Build in all expenses that you know will occur, or that you can anticipate, and when they must be paid. Calculate in unexpected expenses, because it is a Murphy's Law that costs will always be greater than you anticipate, particularly as the volume of work increases. Build in marketing time and expenses. Most of all, build in your draw, because if you don't look after yourself, no one else will.

Compare the total expenses to your anticipated revenue. If you don't have a historical basis to forecast income, make an educated estimate based on your marketing plan. Yes, it takes planning. Financial security is rarely an accident.

2. Rely on total billable hours rather than realization rates to track progress.

The realization rate is the percentage

of actual income paid to the firm from the billable hours of each timekeeper. For example, Partner X bills 200 hours per month at \$200 per hour for a total amount billed of \$40,000. Of that amount, 10 hours are written down (taken off the books) for various reasons, and clients pay a total of \$30,000. Partner X's realization rate is 75 percent. In contrast, Partner Z bills 165 hours at \$200 per month, but she has no write-downs, and her clients pay 95 percent of that for a total of \$31,350. Although Partner X bills more hours, because of the low realization rate, Partner Z — with fewer hours billed — is generating more income for the firm.

Your computer-based time and billing program should be able to create this report for you. Examine the results and use it to help guide any discussion of compensation for partners and associates.

3. Use accounting software that doesn't have financial modelling and reporting.

It's a given that you need good data to make good decisions. There are many good general and legal accounting packages out there. But recognize that accounting packages exist for accountants. As lawyers and business owners, we need software that will give us insight into how we are doing as business owners. So look for packages that build in as many management and modelling reports as possible.

Look closely at the software you now use. Unfortunately, most of the legal accounting packages out there put the powerful financial analysis tools into the “Pro” versions, which are suitable



for larger firms. Solos and smaller firms face a Hobson's choice: acquire the basic level of the software and forego the higher-end financial tools, or pay thousands of dollars for a Pro version that you will never use fully.

Although moving to a different accounting package may be a troublesome undertaking, remaining with one that doesn't help you run your business will be more expensive and problematic in the longer run.

4. Fail to regularly reconcile trust accounts.

A client trust account often poses a lawyer's greatest risk for ethics trouble. Yet it seems that one of the tasks lawyers quickly delegate is that of properly maintaining client trust accounts. It is certainly acceptable to have a bookkeeper administer this function, but the lawyer must remain active in the oversight of the account. The lawyer must reconcile the account each month or thoroughly review the reconciliation completed by the bookkeeper (Rule 3-65). Here are quick tips to help keep your account in good shape:

- Keep separate ledgers. In addition to the account journal (or general ledger) that has the running balance of how much money is in the trust account, you must create a ledger for each client on whose behalf you hold money. Also, ensure that all bank administrative charges are taken from your general account rather than from the trust account. (Your computer bookkeeping program may automatically do this, but if you don't know for sure, confirm it immediately.)
- Never pay out trust funds in cash; always do so by cheque (Rule 3-56(1.2)). Do not use an ATM card to withdraw trust money, and never use a deposit ticket to get "cash back." Wire transfers can be used in very limited circumstances, for amounts over \$25 million (Rule

3-56(3.1)).

- Don't disburse a cheque from trust until the deposited funds have cleared. Be diligent, but don't let a client rush you. (It is not permissible to issue postdated trust cheques — a trust cheque must be able to be cashed at the time it is written (Rules 3-56(1.2)(b) and 3-55). The problem with postdated trust cheques is that they may be written in anticipation of sufficient funds being deposited at some time in the future — which means that, at the time the cheque was written, the lawyer did not have sufficient funds in the trust account to the credit of that client, contrary to Rule 3-56(1.2)(b). When you write trust cheques, always take a moment to add them up and compare them against the client's balance in the trust account. Make sure there are funds available in that client's ledger to cover the cheques.
- Have a good audit trail. In addition to the account statement and any cancelled cheques, keep a monthly folder with the following:
 - A trust cash book that shows all trust transactions that month. This should record the date and amount of all funds received and disbursed, the source of funds, the identity of the client for whom the funds were deposited (since there are circumstances when the funds may be paid by a third party on behalf of a client), the cheque number or wire transfer record of each trust withdrawal and the name of the recipient of each trust cheque;
 - A trust ledger breaking down the pooled trust account into separate clients;
 - Records showing all transfers between client trust ledgers and containing an explanation of why each transfer occurred and

a lawyer's signed written approval for each trust transfer;

- Copies of all bank-validated duplicate deposit slips; and
 - All supporting vouchers and documents, including all bank statements, passbooks, cancelled cheques (do not bank with a financial institution that refuses to provide you with your cancelled trust cheques), bank vouchers and all other relevant documents. In particular, retain any memos that you have made concerning bank errors and steps taken to have them corrected, regardless of amount.
- Reconcile your trust account monthly, regardless of how boring the task seems. Compare your monthly bank statement to the cancelled cheques; the cancelled cheques to the copies you made before they left your office; the cheques to the account journal; and the account journal to the client ledgers. Everything should match. Some accounting systems will help automate this task by downloading account information directly from the bank and entering this information into the accounting system. However, this is only part of the task — you must still oversee this process and ensure that everything is reconciled monthly and all exceptions are investigated and resolved.

The Law Society requires you to maintain all the above-mentioned books, records and accounts for 10 years (Rule 3-68), in case questions arise later. Organizing your recordkeeping now will save headaches later. Also, if you keep your trust records on computer, be sure to save the information before you decide to upgrade and discard your computer!

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10 Sure Ways to Fail ... from page 11

5. Don't track your time.

The first step in determining whether you were profitable on a sale of a service is being able to determine the costs of the services rendered. To do that, you need accurate costing mechanisms that can track both direct and allocated (or fixed) costs.

Direct costs are your time plus any direct disbursements incurred for the file — court reporter fees, filing fees and the like. Allocated costs are the file's share of the office overhead — staff salaries, rent, insurance fees, electricity rates and so forth.

Because the biggest direct cost is the time that you put into the file, you cannot determine what it cost you to render the service unless you can track the time you put into it — billable, non-billable, written off and so forth. When it comes time to distribute funds among partners, not knowing the true cost of the files worked on can lead to inequities. Most firms simply look at the gross revenue generated at the conclusion of a file, but this can be misleading.

Let us look at two files that were billed on a contingency basis. Each file generated \$100,000 in revenue after disbursements. File A took three years and involved 400 hours of lawyer time (at \$250/hr = \$100,000) plus hundreds of hours of staff time. File B took six months and 100 hours of lawyer time (at \$250/hr = \$25,000) and the same amount of staff time as on File A. Which file was more profitable? Not only was B more profitable, you could argue that File A resulted in a net loss to the firm, since the total of lawyer and staff costs exceeded revenues.

Don't make the mistake of treating these files equally at the point of distributing draws and bonuses among lawyers! Failing to know the true costs of services rendered (and not just gross billings) rewards inefficient

lawyers, and punishes efficient ones.

6. Think you don't need a fee agreement with every client.

Don't you believe it! It's important to communicate in writing with every client during, or immediately after, the initial consultation to define your professional relationship. This will help avoid any misunderstandings about the timing, scope and cost of your legal representation. Misunderstandings about the lawyer-client relationship often lead to the souring of the relationship — and to costly collection and malpractice suits.

A well-written fee agreement encompasses more than your hourly, flat or contingent fee. It should define the parameters of the work to be completed and address your obligations to the client and the client's obligations to you. It should also address your rights (for example, to seek withdrawal) and your client's rights (for example, to terminate representation). Be clear in the language you choose. Avoid legalese. Remember, because you are the person drafting this document, it is possible that any error or ambiguity may be resolved against you if a fee dispute arises later.

7. Put off dealing with underperforming lawyers.

Generally, lawyers practise together because they perceive a positive economic relationship and, usually, genuinely like the other people in the firm. But in a smaller firm, failing to face up to the fact that "ol' Joe" isn't having a very good year (or years) can have dire consequences.

Schedule monthly meetings to examine everyone's performance against stated financial goals: billable hour targets (WIP), WIP billed (bills rendered), bills collected, accounts receivable balances (net increase or decrease), accounts written off or deemed uncollectible, disbursements incurred, disbursements billed, disbursements written off and status of outstanding accounts.

If done regularly and honestly, this won't be a confrontational meeting. When everyone in the firm is required to report monthly to all other partners, you instil a culture in the firm that is self-correcting. If someone fails to regularly meet their financial goals, you have a decision to make and a forum within which it can be made.

8. Always assume more risk than needed when agreeing to represent clients.

Many lawyers balk at the thought of turning down new clients. But ask yourself the following questions:

- Looking at my present workload, do I have adequate time to devote to this matter? Or am I taking this client solely because it has been a while since the last client called?
- Do I have the legal abilities and experience to handle this matter with the required level of competence?
- Do I have the financial resources to handle this matter?

If you answer no to any of these questions, consider associating with more lawyers, or refer the client to several other lawyers you believe can handle the matter.

You should also assess whether you can accept the financial risks associated with taking the matter, just as clients will assess whether they can (and will) pay your fee. Spend time at the beginning of the relationship to learn if a client is able and willing to pay a reasonable fee for the legal work the client wants done. It's up to you to take the initiative to discuss fees and costs openly, candidly and comprehensively, preferably at the first interview. Look for danger signs in the client's story and demeanour to gauge whether the client will honour the impending commitment to pay your fees.

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Practice Watch, by Felicia S. Folk, Practice Advisor

Don't be pressured into unacceptable practices

This is a reminder that lawyers must not allow themselves to be pressured into following unacceptable practices, whether such practices are advocated or followed by other lawyers or anyone else.

These examples arise from calls to the Law Society from lawyers seeking practice advice:

- A sole practitioner who had witnessed the signing of a lease was asked by the other party's solicitors, a large firm, to authorize the large firm to attach the signature page to a short form of lease, which would then be registered. The lawyer properly refused to allow his signature to be attached to a document that he had not witnessed, despite being urged by a lawyer from the large firm to do so because this was allegedly a common practice.
- Lawyers from some areas of the province say that they lose business to other local lawyers who ignore the real estate conflicts rules, especially the rule that defines a "simple conveyance." Some banks urge lawyers to disregard the rule and to accept mortgage files in breach of the rules. The fact that certain other lawyers are breaching the rules of professional conduct should not influence your own conduct.
- Regardless of how pressing the situation may be for your client, do not alter a client's affidavit without having it resworn, even if your client has since left the country and is not available to sign a document. This advice applies even if the alteration appears to be minor.

A lawyer's duty to approve draft orders

A lawyer's obligation to approve a court order is owed to the court and to opposing counsel, as well as to the lawyer's own client. *The duty to approve a draft order that accurately reflects the court's decision continues even when the lawyer has been dismissed by the client and despite the client's instructions that the lawyer must not approve the order.* Instructions not to approve a draft order would conflict with the higher duty a lawyer owes to the court to enter orders promptly.

Furthermore, when a client has given instructions to a solicitor not to approve a draft order and there are no proper grounds on which to withhold such approval, the neglect or refusal of the solicitor to approve the order may attract an award of costs against that solicitor: *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd* (1991) 5 OR (3d)65 (Ont Gen Div), cited in *Fraser & Horn, The Conduct of Civil Litigation in BC*, c.26, p.1002.

Communicating with a judge

If you need to communicate with a judge about any matter, there are guidelines to follow. You should never address your letter to the judge. Instead, address your letter or other communication to the court registry. You may ask the registry to refer your communication to the judge for reasons that you set out. For example, you may wish to correct an error you have made or a false impression you may have left, or to provide the name and citation of an authority. Any such communication must be copied to opposing counsel.

If a letter has some more complex purpose than merely correcting your own error, however, counsel should not write to the court registry about a matter in litigation without first

conferring with opposing counsel.

Before making any decision about communicating with the court, please read the June 27, 1988 practice direction of then CJSC McEachern, "Memorandum re: Communications to the Court," which sets out certain procedures to be followed.

The memorandum says, "the Profession should understand that most judges will not usually read or respond to letters which are, or appear to be, written *ex parte*. Counsel are not precluded in a proper case from writing to the Court just because one or more opposing counsel says such a letter should not be written, but such view should always be disclosed. An exception to the above is where counsel believes it is necessary to write to the Court and he cannot reach his learned friend. In such case counsel must, of course, disclose that there has been no discussion between counsel and the reasons for that situation."

Cheque imaging at credit unions

If you maintain a trust account at a credit union, you may have received a notice that the credit union will no longer return cancelled cheques, but instead will provide account holders only with images of cheques. Cheque images are not acceptable under Law Society Rules 3-60 and 3-68, which require that cancelled trust cheques be retained by a lawyer for 10 years.

The Law Society has discussed this issue with Credit Union Central of British Columbia, which has now implemented a system to enable credit union branches to return cheques and statements on lawyers' trust accounts. Please call your branch manager to ensure that your accounts are designated "trust" and that cancelled cheques will

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Legislative Assembly now offers live and video webcasts

Debates of the BC Legislative Assembly are now carried live on the internet, as well as on television: see www.leg.bc.ca.

These video webcasts are scheduled for archiving within 15 minutes of the end of each sitting, so it is also possible to view previous sittings online. As an added benefit, a user can search Hansard online for statements of interest, using the Legislature's search engine, and then click from the Hansard

text directly to the appropriate point in the archived webcast.

The webcasting is a pilot project for the Fall sitting of the Legislature, which began October 6, 2003, and is scheduled to end November 27. The archives will be available at least until the end of the year.

The Assembly will assess feedback from users to determine if the project will be continued in the new year. If it is, future enhancements may include

audio webcasts of the Estimates Debates in the Spring. The Federal House of Commons in Ottawa has already adopted webcasting (see www.cpac.ca), as have several other provinces and most US jurisdictions.

Comments and suggestions on the BC Legislative Assembly service are invited at webcast@leg.bc.ca. Computer system requirements are outlined under "Webcasting Pilot Project/System Requirements" at www.leg.bc.ca. ♦

10 Sure Ways to Fail ... from page 12

9. Avoid having a written office-sharing or partnership agreement.

The purpose of having a written agreement between all parties in the firm is that everyone then knows the terms of the arrangement between them — the expectations, the consequences and the means to implement those consequences. Failing to have such an agreement between lawyers is the equivalent of a shoemaker's children running around barefoot.

Office-sharing agreements cover issues between solos sharing the same office suite. Common issues include management of the suite, lease payments, confidentiality, signage and sharing of the costs and services of common employees.

Every partnership agreement should cover management issues, capital contributions, income-sharing and compensation issues, disability, adding new partners, voluntary partner withdrawal, partner expulsion and dissolution. Further, every partnership agreement should incorporate the

requirement for adequate life and disability insurance to ensure that, should someone die or become disabled, there is proper compensation for the partnership share, and that the firm can pick up the pieces and carry on the business. Inadequate insurance can leave a deceased partner's family and the remaining partners financially stuck or, worse, in litigation.

It can be very difficult to negotiate a partnership agreement. Be prepared for some tense moments. However, negotiating an agreement in advance is far less tense than litigating the issues later. For reference, see the sample partnership agreement in the CLE publication *Managing Your Law Firm*. A sample associate agreement is available in the Practice and Services/Practice Resources section of the Law Society website.

10. Rely on the lottery for your partnership retirement plan.

Lastly, another major issue facing smaller firms is how to deal with the introduction of new partners while funding the buyout of existing, but aging, partners. Without a succession plan that compensates aging partners over time by establishing a retirement fund, the firm might be unable to

attract new partners. The reason is that prospective partners who are on the upswing may very likely be unwilling to contribute their billings to fund the exit of a diminishing partner. Make this planning part of your partnership agreement to ensure the future of your firm.

Acknowledgements

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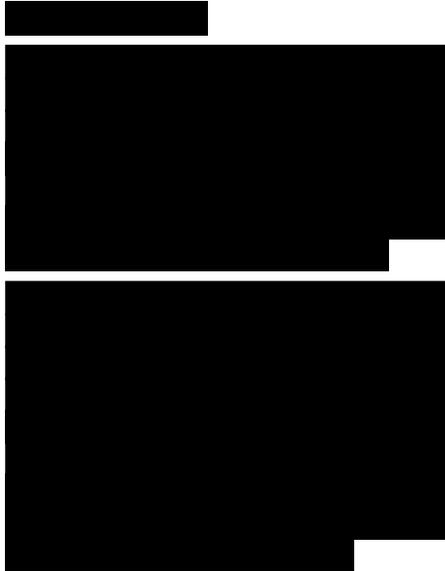
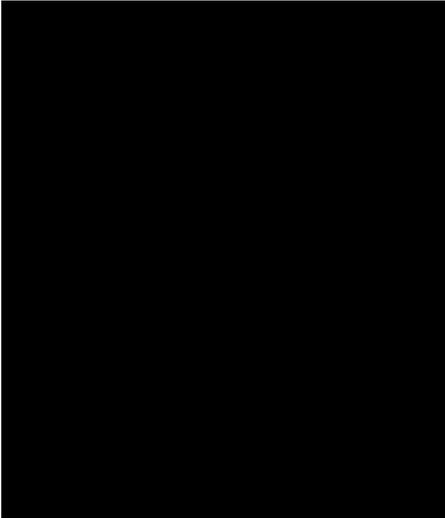
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Unauthorized practice actions

Undertakings



Pro bono ... from page 4

Volunteer lawyers provide summary advice and help clients prepare to represent themselves in court. Contact the Society by e-mail at accessjustice@telus.net.

* * *

Sign on for upcoming programs

Poverty Law Training Project

Through a grant from the Law Foundation of BC, Pro Bono Law of BC plans to develop training resources to support the private bar in providing pro bono poverty law services. Two pilot projects — inside and outside the Lower Mainland — are slated for early

2004. If you are interested in volunteering to take training through these pilots, please contact consultant Anne Beveridge at 604 521-8403 or abev@shaw.ca.

Supreme Court Pro Bono Civil Duty Counsel Program

Pro Bono Law of BC, in consultation with Chief Justice Brenner, is helping to coordinate a new approach to assist unrepresented litigants in BC Supreme Court by early 2004. The first organizational meeting has been held with representatives of the Supreme Court of BC, Court Services Branch, Legal Services Society, Pro Bono Students of Canada, Salvation Army Pro Bono Delivery Program and Western Canada Society to Access Justice. If

you are interested in pro bono civil work at the BC Supreme Court, contact Executive Director of Pro Bono Law of BC, Pat Pitsula, at 604 893-8932 or ppitsula@probononet.bc.ca.

Just ahead

Pro Bono Law of BC is also working with the Ministry of Attorney General to explore the development of a pro bono policy for in-house counsel and, with the Legal Services Society, to create a pro bono disbursement fund. While the Law Foundation of BC and the Law Society have been pivotal in funding the launch of Pro Bono Law of BC, the board intends to diversify its sources of funding through new fund-raising projects and charitable donations. ✧

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be returned to you.

If necessary, your branch manager

may wish to contact Credit Union Central of BC at 604 734-2511.

Cheque imaging is expected to be implemented by banks within the next several years. The Law Society is

reviewing its trust accounting rules to ensure they are in keeping with this and other technological changes implemented by financial institutions. ✧

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