The Law Society of British Columbia

Benchers' Bulletin

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Inside

President's View

Lawyers and learning

by William M. Everett, QC

Early in our careers we recognize that each client, each file presents an opportunity to learn something new about the law, as well as human nature. But taking the time for more formalized learning isn't easy, especially as our practices and our lives grow busier. We feel pressure to do more — so how do we fit it all in?

I do not intend this question as rhetorical. Nor can I claim to answer it. After many years of the Law Society making assumptions about how lawyers learn (or should learn), we are starting to look more deeply.

That means examining afresh the whole spectrum of continuing legal education, both as a matter of lawyer competence and professional responsibility. In 2002 we struck a task force to develop proposals for a "*comprehensive, strategic approach to promoting the excellence and competence of lawyers through post-call learning and information support.*" In part, we wanted to clarify the Law Society's own role in continuing legal education. We also realized that we needed to assess the educational needs and interests of BC lawyers, to evaluate the effectiveness of continuing legal education in BC offered by various educational providers (as to quality, availability and pricing) and to consider a range of options for reforms.

The Lawyer Education Task Force, chaired by Bencher Patricia Schmit, QC, is laying everything on the table for consideration — from different ways of enhancing educational resources in BC, to publishing educational guidelines for the profession, to requiring lawyers to report on the courses they have taken voluntarily. And yes, as controversial as it has been, mandatory continuing legal education is an option for consideration. The Task Force, however, is also looking at lawyer competence more generally. That means reviewing current Law Society practice support programs and the effect of programs run by other law societies and professional bodies.

We expect the results of the Task Force study and the options for consideration to come to the Benchers table later in 2004. For now, identifying the options and consulting with the profession is key. Last year the Task Force members themselves contacted a small sample of lawyers to ask what continuing legal education they want and need. A more formal consultation on continuing legal education needs was underway in October — through an Ipsos-Reid telephone survey of 400 lawyers province-wide, the results of which are expected to be published on the Law Society website in February.

I am very pleased we are engaged in this work. I'm especially happy that we are listening to the views of BC lawyers. While I don't know what conclusions the Task Force will draw, I thought I'd flag a few interesting things that lawyers are telling us so far. First, although courses remain a common way for BC lawyers to stay current, the most popular resource in the profession is publications. Some 94% of lawyers in the Ipsos-Reid survey say they use legal publications as an educational resource (43% do so frequently), with those respondents assessing the publications now available as both useful and of good quality. Course materials followed in popularity, used by 89% of respondents.

As for courses, seminars and workshops, 69% say they attend courses and 38% say they attend in-house workshops and seminars. According to the Ipsos-Reid survey, lawyers identified several barriers to attending courses: in particular, the time, cost and travel involved.

If lawyers are fond of publications as a means of staying current, they also

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 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.

Editor: Denise Palmer
dpalmer@lsbc.org; Tel. 604 443-5706

Editorial Assistant: Denise Findlay
dfindlay@lsbc.org; Tel. 604 443-5788

Subscriptions: Donna Kokot
dkokot@lsbc.org; Tel. 604 443-5768

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have a growing affection for online information. And some of the best online information is close to home. In the Task Force's own consultations, for example, many lawyers praised the website of the Continuing Legal Education Society of BC (CLE) as "an outstanding resource." And in the Ipsos-Reid survey, many respondents spontaneously mentioned the CLE website and its award-winning case digest service as resources they use.

This is a promising sign for CLE and other educational publishers who are moving online. I pause here to commend CLE for embracing technology as a way of reaching lawyers in all areas of law, in all parts of the province. CLE, which already successfully publishes over 40 books and 200 course manuals, piloted an online version of its *Probate Practice Manual* last year. In 2004 CLE plans to launch a formal online version of that manual, plus up to 10 other practice manuals, 1,500 forms and precedents and all of its course materials. This collection will make it easier for lawyers to gain access to the publications whenever they need them and wherever they are.

Also in 2004, CLE plans to offer online archived videos of its courses, supported by course materials and links to resources.

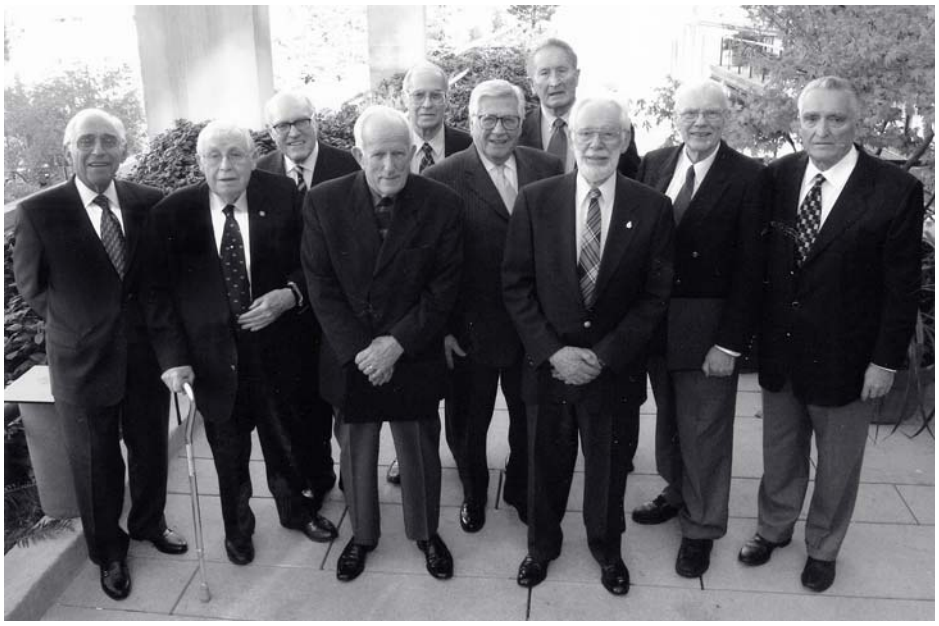
Finally, BC lawyers will soon have the opportunity to sign up for real-time webcasting of CLE courses. If you haven't participated in webcasting, this technology provides audio via telephone and online visuals (such as Power Point slides) via the web. Apart from convenience, an advantage of webcasting is interactivity since participants can relay their questions or comments and participate in polls. If time or distance to a course are problems, this is a chance to try a new way of learning — and to give CLE the feedback it needs to move forward with new technologies. Webcasts are planned for CLE's courses on Manufactured Home Registry and LTO e-filing (see details on pages 21 and 24).

The profession doesn't yet have a base of experience with online learning, so even webcasting of courses may seem unfamiliar. Yet I believe technology can offer many solutions, provided educators recognize the need for creativity and lawyers are prepared to try new things. As the tools become more sophisticated (and they will), as different media of communication merge and new technologies emerge, the future looks promising.

This is just a taste of what's ahead. In the coming months, you will hear more on the work of the Lawyer Education Task Force, what BC lawyers are saying they want from continuing legal education and what the future might look like for career-long learning, in all its dimensions.✧

The honour rolls

President William Everett, QC and the Benchers were pleased to honour the contributions of longstanding members of the profession at a special luncheon at the Law Courts Inn in Vancouver on November 13. Receiving certificates in honour of their years of service to the profession and the public were (left to right) ***Morley Koffman***, ***Darrell Braidwood***, *QC,* ***Raymond Cocking***, *QC,* ***William Beckingham***, *QC,* ***Mervin Chertkow***, ***Owen Dolan***, *QC,* ***Glenn Gates***, *QC,* ***Dallas Gordon, Milton Wylie*** *and* ***Harvey Bowering****. All received 50-year certificates, except Mr. Braidwood, who was presented with a 60-year certificate.*



Also receiving 50-year certificates in 2003, but unable to attend the luncheon, were ***Arnold Armstrong***, ***Thomas Campbell***, *QC,* ***David Cowper-Smith***, ***Dudley Edwards***, *QC,* ***John Goodwin***, ***Gordon Lyall***, ***James Miller***, ***John Montgomery***, *QC,* ***Donald Ward*** *and* ***Stan Winfield****.*

New trust accounting rules are now in effect, and a new Trust Report will be phased in to replace the Form 47 Accountant's Report in 2004

Benchers take steps toward more effective trust reporting regime

In December the Benchers adopted reforms to modernize and streamline the trust account reporting requirements of BC lawyers — through new trust accounting rules and a new form of Trust Report. The new Trust Report, which is designed to collect more relevant information, will be phased in as a replacement for the current Accountant's Report (Form 47) and Statutory Declaration (Form 48), beginning in 2004.

These reforms were recommended by the Society's Trust Assurance Reform Task Force as necessary first steps to improving trust assurance standards, while also streamlining administrative requirements and minimizing the cost of compliance for law firms.

From a regulatory perspective, the current Form 47 Accountant's Report, filed annually by law firms, presents several problems. First, the form is not designed to detect theft or fraud. It is primarily a report by a public accountant to help confirm that a law firm has properly maintained its books and records and has performed monthly reconciliations. Second, these reports seldom provide the Law Society with sufficient information to pursue an audit of a firm. Third, accountants are not necessarily trained or sufficiently instructed to detect activities that may be harmful to clients or the general public.

The new form of Trust Report will contain sections that a law firm will complete and a section that an accountant retained by the firm will complete. The Trust Report is designed to provide better information to the Law Society, as detailed in ***A look at the new Trust Report*** on page 5.

In the view of the Trust Assurance Task Force, the Law Society should be able to use this information to better assess what other steps, if any, need to be pursued with a particular firm.

In addition, the Trust Report should yield data on the profession as a whole to help the Society determine whether certain lawyers or firms are likely to present a greater risk of trust account irregularities. Such risk analysis could show whether greater risk attaches to such factors as the number of trust transactions a firm conducts, the size of those transactions, the size of a firm, the nature or volume of practice or the experience of lawyers.

If supported by risk analysis, the Society could consider other reforms in the future, such as instituting different trust reporting requirements for different firms based on various risk factors. If firms represent a low risk of trust irregularities, for example, it may well be justifiable to consider allowing those firms to self-report on trust activity and retain an accountant to prepare a trust report less frequently than once a year. Firms that are very high risk, on the other hand, may require more frequent reports or periodic audits by independent Law Society auditors.

While striving to ensure that the Society's trust reporting scheme is as effective as possible, the Task Force has also been sensitive to the cost to the profession.

Any increase in Law Society costs to administer the new form of Trust Report is expected to be covered by the new trust administration fee (see page 8). As for a law firm's cost of retaining

an accountant to conduct the trust review, recent estimates show the Trust Report should cost about the same as the current Accountant's Report (Form 47).

Although the Task Force has reviewed many trust review systems, its recommendations for reform are fairly modest. In its report to the Benchers, the Task Force recommended leaving open the possibility that more Law Society audits may be needed in the future.

The Law Society will advise law firms individually as to when they should begin completing and filing the new Trust Report instead of the Form 47 or 48. The Report will be phased in gradually over 2004 to allow the Society to make system changes and to prepare lawyer and accountant education. The Report should be in use for all law firms by the end of 2005.

The Trust Report is available for reference in the "Resource Library/Forms" section of the Law Society website at www.lawsociety.bc.ca.✧

The principles behind trust reform

Four objectives have guided the recent reforms to financial and trust assurance standards for the legal profession:

- **Compliance** – ensuring that lawyers and their firms comply with standards and rules set by the Law Society concerning the handling of client property;
- **Detection** – ensuring that the Law Society has the ability to investigate, detect and objectively determine any losses occasioned to client property by lawyers in order to meet the regulatory mandate of the Law Society;
- **Deterrence** – ensuring through the enforcement of the standards and rules set by the Law Society that the few lawyers who need it are deterred from mishandling client property;
- **Credibility** – ensuring that the methods used by the Law Society to ensure compliance with rules and standards are appropriate to the mandate of the Law Society, and that they meet the needs of lawyers, clients and the community at large.

The Trust Assurance Task Force identified two governing considerations when meeting these objectives:

- Keeping the regulatory mandate of the Law Society front and centre in considering the alternatives — to ensure that the Society has the ability to detect and prevent fraud or misappropriations of client property by members; and
- Ensuring that the alternatives considered address the cost to members of trust assurance compliance and doing what can be done to reduce that overall cost or at least ensuring that the overall cost is kept as low as possible.

A look at the new Trust Report

The new Trust Report, which must be filed annually, will be phased in gradually in 2004 to replace the Form 47 Accountant's Report and Form 48 Statutory Declaration. The Law Society will advise law firms individually as to when they will be expected to use the new Trust Report instead of the Form 47 or Form 48. All firms are expected to be using the Trust Report by the end of 2005.

Lawyers and their accountants who wish to review the new Trust Report now may access it in the "Resource Library/Forms" section of the Law Society website at www.lawsociety.bc.ca. The Trust Report is divided into four sections. Three sections will be completed by the law firm and one section by a public accountant retained by the firm. Here are the key improvements to be noted for each section:

Section A *(completed and signed by law firm)*[1]

- Information will be collected on whether the law firm had trust activity during the year, or whether it only held trust funds. The firm must also disclose whether it used the trust account of another firm, or whether it allowed another lawyer to use its trust account. This provision will be especially relevant to the temporary inter-jurisdictional mobility of lawyers. A lawyer who practises temporarily in BC may only conduct trust transactions through a trust account in his or her home jurisdiction or through the account of another lawyer in BC.
- The firm must report on whether any of its lawyers acted as trustee or sole executor of an estate, had authority to act under a power of attorney or a representation agreement. This will allow the Law Society to identify a lawyer with access to funds outside the practice of law, but in situations that may be related to the lawyer's professional capacity.

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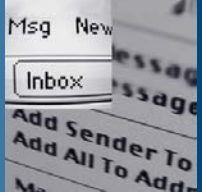


The new Trust Report … from page 5

- All authorized signatories to the firm's trust account will be named, to identify which lawyers have access to trust monies through signing authority.
- All bank accounts maintained by the firm (including general accounts) must be listed on a schedule. This will prevent firms from depositing trust money to accounts that need not be disclosed on the present form of Accountant's Report.
- All trust accounts maintained by the firm under a different business name must be disclosed. The present form of report does not specifically require such disclosure.
- Any financial difficulties (bankruptcies or insolvencies) of any of the lawyers in the firm must be disclosed. This will ensure compliance by all lawyers in the firm with Rule 3-45 and will allow the Law Society to compare the information disclosed with that already in the Society's database.
- The firm must report on its method of maintaining books and records (not part of the present form of Accountant's Report) in order to ensure compliance with Rule 3-59, as well as reporting whether the firm has taken steps to establish a back-up system.
- The firm must disclose whether it has off-site storage and, if so, its location.
- The firm must disclose whether it has received any funds as a loan from a client, to better ensure compliance with Part 7 of the *Professional Conduct Handbook*.
- There must be confirmation of monies in trust accounts to ensure that all non-trust money has been properly removed and that the firm has taken steps to remit trust money to the client or, if the money is unclaimed, to the Law Society.
- The firm must disclose any cheques (trust or general) returned for insufficient funds. NSF cheques in the trust account are a serious matter, being a breach of undertaking: see Chapter 11, Rule 8 of the *Professional Conduct Handbook*. NSF cheques in the general account can be an indication that the firm is having difficulties meeting its operation costs.
- The firm needs to disclose whether it has been audited by any other regulatory body, such as the Canada Customs and Revenue Agency for GST or income tax purposes, or by provincial tax authorities for PST compliance.
- The firm must confirm whether it has taken steps to ensure its proper winding up in the event of disability or death of the partners. Such steps are needed to reduce the costs of future custodianships.

Section B *(completed and signed by the law firm if there is any trust activity during the reporting period)*

- The firm must disclose the type of trust transactions it has handled. Each type of trust transaction may have an associated risk factor.
- The firm must also state its actual number of trust transactions, together with the largest transaction and the average number of transactions over the reporting period. The level of risk may increase as the number of transactions increases.
- The firm must report on whether any trust shortages were handled appropriately and in accordance with Rule 3-66.
- The firm must also report on whether client trust funds were properly insured by CDIC in accordance with Rule 3-70.
- The firm must address whether it has complied with the requirements of other regulatory bodies (particularly with respect to GST and PST).

Section C *(completed and signed by accountant)*

- The accountant must verify that he or she has read all the information provided in Sections A and B. The accountant, having access to the records and books of the firm, should identify any obvious errors contained in those sections.
- The accountant must confirm that the specific tests required have been performed.
- The accountant must report on the balance of trust assets and liabilities of the firm at the end of the reporting period. This allows the Law Society to confirm that there are sufficient funds on deposit in the trust accounts to meet the firm's obligations concerning funds held in trust for clients. Any discrepancies will be reviewed.

Section D *(completed and signed by the law firm)*

- A statutory declaration of a lawyer or lawyers of the firm must confirm that all books and records of the firm have been provided to the accountant.

* * *

Law firms can expect to receive more details on the new Trust Report over the course of 2004. For more information, contact Neil Stajkowski, Chief Financial Officer, at nstajkowski@lsbc.org or 604 443-5712.✧

[1] At present, if the firm is a sole practitioner, the lawyer must sign. If the firm is three partners or fewer, all partners must sign. If the firm has more than three partners, any three partners may sign.

What's new in the trust accounting rules?

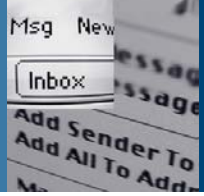
The Law Society Rules have been revised to support trust assurance reforms. The Rules are now more effective and more compatible with current and future business practice in law firms — such as modern trust accounting practices and computerized accounting systems.

Because the accounting rules have been streamlined and updated, it is useful for lawyers and their accounting staff to review all the rules in Part 3, Divisions 7 and 8.

The text of the trust accounting rule changes and a summary of those changes are set out in the January, 2004 *Member's Manual* amendment package, included in this mailing. The rules are also published in the Resource Library section of the Law Society website.

Here are the highlights:

- *Rule 2-23:* The amendment to this rule clarifies that *all* accounting records of the lawyer, *wherever they are located*, must be made available to the Law Society on demand.
- *Rule 2-77*: An amendment to this rule clarifies that any money received by the Law Society from a lawyer is first attributed to outstanding fines, costs, penalties *and deductibles*. The amendment ensures that insurance deductibles payable by a lawyer are included in the "priority" list.
- *Rule 3-45*: The principal amendment adds to subrule (3) the proposition that a lawyer conducts himself or herself in a manner unbecoming a lawyer if he or she fails to take reasonable steps to obtain a discharge from bankruptcy within a reasonable time.
- *Rules 3-47 and 3-48:* Rule 3-47 now sets out a definition of "valuables." Rules 3-47 and 3-48 give recognition to the fact that lawyers receive in trust assets other than funds and require that lawyers account in writing to anyone having a beneficial interest in such funds or valuables.
- *Rule 3-49*: This rule, as amended, is intended to ensure that any institution that is a "designated savings institution" has a sound, physical presence in British Columbia.
- *Rule 3-52*: A lawyer need no longer receive cancelled cheques and bank statements *monthly*, so long as they are received *periodically*. A lawyer is permitted to receive and store cancelled cheques and statements in an electronic form acceptable to the Executive Director.
- *Rules 3-60 and 3-61:* These rules set out the nature of the information that a lawyer must maintain, rather than the method by which the information is recorded and stored, such as by computerized accounting records.
- *Rule 3-66:* A new subrule (3) clarifies that a "trust shortage" includes a shortage caused by service charges, credit card discounts and bank errors.
- *Rule 3-68:* Under this rule, the period of mandatory on-site retention of records decreases from five years to three years, which is viewed as reasonable. There is a requirement under subrule (3) for lawyers to make adequate and necessary provision for the security of records and the information contained in them. A lawyer is also required to make a written report to the Executive Director if he or she for any reason loses custody or control of the records.
- *Rule 3-71:* This rule, as amended, provides that a lawyer retains a right or recourse to a lien, claim or set-off to valuables held in trust, as well as to funds.
- *Rule 3-80:* On termination of a lawyer's practice, the lawyer must report on the disposition of all files, trust money, documents and valuables for the practice within 30 days of ceasing practice, rather than within three months, which was previously the case. This is an important safeguard in the Law Society being able to detect any problems in a timely way.✧



Four Corners Community Savings no longer eligible for trust fund deposits

The BC Community Financial Services Corporation, doing business as Four Corners Community Savings in Vancouver, is no longer eligible for the deposit of lawyers' trust funds under the Law Society Rules.

Rule 3-51(4), as previously drafted, described the types of institutions into which lawyers could deposit trust funds, and these included an institution "guaranteed under the *Community Financial Services Act* RSBC 1996, c. 61, s. 19."

This reference was removed from the trust accounting rules on December 12, 2003. The Benchers adopted this rule change on recommendation of the Trust Assurance Reform Task Force.

Accordingly Four Corners Community Savings, which is structured and guaranteed under the *Community Financial Services Act*, is no longer eligible for the deposit of lawyers' trust funds. The provincial government has also recently announced that Four Corners Community Savings will cease operations as of February 27, 2004 on the basis that the institution has incurred unsustainable operating losses.

Any lawyer who holds trust funds with Four Corners Community Savings must immediately transfer the funds into a designated savings institution unless his or her client has instructed otherwise in writing: see Rules 3-49 and 3-50 as revised.✧

Fee scheduled to take effect July 1, 2004

Trust administration fee (TAF) will fund array of trust initiatives

Beginning July 1, 2004, BC lawyers who maintain one or more trust accounts will be required to remit to the Law Society a $10 trust administration fee for each trust transaction (or series of trust transactions relating to one client matter) over $5,000.

The proceeds of this trust administration fee (TAF) will fund various Law Society trust administration programs, including the audit and investigations program, the custodianship program and a new program of trust reports that will replace the Form 47 accountant's report over the next year: see "Benchers take steps toward more effective trust reporting regime" on page 4. The funding of these trust initiatives through the TAF will be on a go-forward basis.

In the future it is possible that a portion of the fee may also be allocated toward new innocent insured coverage that the Lawyers Insurance Fund will offer beginning May 1, 2004: see page 9. If a portion of the trust administration fee is allocated as a contribution toward the innocent insured coverage, this would be on a go-forward basis only (not to pay any claims made against the Special Compensation Fund). Any such allocation would result in lawyers who carry out trust transactions in effect contributing a greater portion of the overall risks associated with those transactions.

The Law Society's trust administration programs are important in monitoring the proper handling of trust funds within the profession. To date, all practising lawyers have funded these programs. However, since the programs relate to lawyers who hold trust funds and carry out trust transactions, it is appropriate for those lawyers to bear a larger portion of the overall expense. The Benchers recognize, however, that lawyers will need to adopt administrative procedures to calculate and remit the fee.

It is important to note that only one transaction fee will apply per client file or matter; accordingly, multiple trust deposits and disbursements in relation to one client matter will not incur multiple trust administration fees. The deposit or payment of money for legal fees and disbursements will not attract the fee.

Lawyers will be asked to report the fees they owe for the quarters ending March 31, June 30, September 30 and December 31, and to remit those fees by the end of the following month. A penalty of 5% plus interest at a prescribed rate will apply to late payments. As the TAF is not scheduled to take effect until July 1, 2004, the first reporting period would end September 30, with the first remittance due October 31.

The Benchers will consider rules to implement the new trust administration fee in early 2004.✧

New insurance will cover losses arising from lawyer defalcation

In December the Benchers approved a plan for the Lawyers Insurance Fund (through the LSBC Captive Insurance Company Ltd.) to provide insurance coverage to the legal profession to cover claims arising from the misappropriation of money or property by any BC lawyer.

The "innocent insured coverage" (IIC) is expected to come into effect for claims made on or after May 1, 2004. Although the Special Compensation Fund will continue to exist for the resolution of existing claims, all new claims will be covered by the IIC, not by the Special Compensation Fund.

The coverage is intended to maintain public confidence in the profession by ensuring that innocent members of the public do not suffer a pecuniary loss through misappropriation by a BC lawyer.

The Law Society of BC has historically shown leadership in providing financial protections that benefit the public, becoming the first law society in North America (in 1949) to create a Special Compensation Fund. Most Commonwealth jurisdictions have since followed BC's example, although the extent of coverage varies greatly from fund to fund. Some law societies, for example, cap payments from their funds or reimburse some types of claimants and not others.

In 2002 the Special Compensation Fund faced an unprecedented number of claims arising from the practice of former Vancouver lawyer Martin Wirick, and the Law Society appointed a Conveyancing Practices Task Force to consider reforms to the compensation regime. Following its review, the Task Force concluded that claims should be resolved more expeditiously and that the payment of meritorious claims should be mandatory, not discretionary, as is the case under the Special Compensation Fund scheme. After further study and consultation with BC lawyers, the Task Force outlined a form of insurance coverage that could offer these protections more effectively than the Special Compensation Fund.

In June, 2003 the Benchers considered various regulatory, actuarial and insurance issues related to innocent insured coverage and asked Law Society staff to develop a specific proposal. The Benchers approved that proposal in December.

What will the IIC cover?

The innocent insured coverage, as approved by the Benchers, will cover claims arising from the misappropriation of money or property by any BC lawyer related to his or her practice of law. If that lawyer practises in partnership, the coverage will protect any of the lawyer's innocent partners from liability arising from the misappropriation. The Lawyers Insurance Fund will be entitled to seek reimbursement from the responsible lawyer and to subrogate against third parties who also may be liable.

What are some of the benefits and risks of the IIC?

The Conveyancing Practices Task Force recommended insurance coverage as an alternative to the Special Compensation Fund to offer the public greater certainty as to payment and a more expeditious determination of claims.

Under the IIC, claims will be handled by the Lawyers Insurance Fund, rather than the Special Compensation Fund Committee. Although there will be some increased costs within the Lawyers Insurance Fund to administer the new coverage, the program should benefit from the claims handling expertise and efficiencies that exist in the Lawyers Insurance Fund.

Payment of meritorious claims will be a contractual obligation under the IIC, not a discretion exercised by a committee as is now the case. The payment of claims will be based on terms of coverage incorporated into the compulsory professional liability policy. Claimants will ultimately have access to the courts in the event of a dispute over a claim for recovery of a loss.

The new scheme should benefit from greater overall stability since all payments will be subject to a global annual aggregate limit. The Benchers have set that limit at $17.5 million for 2004, inclusive of all defence costs and settlements. This is the same limit that previously applied to what the Special Compensation Fund Committee could award in a calendar year. Although the Benchers decided to exceed that limit in 2002, so as not to restrict compensation on the Wirick claims, the limit will be reinstituted for the IIC program.

The $17.5 million annual aggregate will clarify for the public the extent of the coverage available and will help ensure the stability and longevity of

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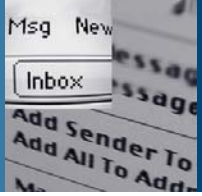

New insurance … from page 9

the program by limiting catastrophic losses.

It is important to flag that, while the IIC brings greater certainty respecting the coverage of claims, there are clear limits on this coverage. As a result, when relying on the services of BC lawyers, clients such as financial institutions that are involved in large real estate or commercial transactions will wish to take note of the coverage and consider the degree of financial risk involved in the transaction. While misappropriation is very rare in the profession, such clients should consider whether they wish to seek coverage in addition to the general insurance coverage carried by BC lawyers.

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Who will pay for the IIC?

All practising members of the Law Society of BC will pay an annual assessment as the primary funding for the innocent insured coverage, just as they now pay an assessment for the Special Compensation Fund. These assessments may in fact be charged together in future years.

When will coverage take effect?

The innocent insured coverage is expected to take effect on May 1, 2004. Prior to that date, all claims for compensation arising from a lawyer's misappropriation must be made against the Special Compensation Fund.

What is the cost of the coverage?

For 2004 all practising lawyers in BC are required to pay the $600 Special Compensation Fund assessment toward the funding of claims made up to May 1, 2004. (Note: This is not a new fee and has already been billed to all practising lawyers as part of the fee billing for 2004.)

A portion of that assessment may be allocated to the Lawyers Insurance Fund to fund the innocent insured coverage, for claims made on or after May 1, 2004. The exact amount of the allocation will be based on the extent of the claims, and it is possible, given the strength of the Lawyers Insurance Fund reserves, that no allocation may be required in 2004.

In 2005 and 2006 all practising lawyers will be expected to pay an annual assessment of $100-200 as primary funding for the IIC. They will also pay a Special Compensation Fund assessment of sufficient amount to pay those claims made against the Fund prior to May 1, 2004, which include all the claims made in respect of former lawyer Martin Wirick.

The funding model for innocent insured coverage has been mapped out over the next three years (2004-2006). Over this period, the Lawyers Insurance Fund should be able to better evaluate revenues and costs. There should also be a more complete picture of the Special Compensation Fund claims already under consideration.

What will be the future role of the Special Compensation Fund?

The Special Compensation Fund will continue to exist under the *Legal Profession Act* after introduction of the innocent insured coverage on May 1, 2004. As noted, the Fund will be responsible for the determination and payment of all claims made prior to May 1. Claims made after that date will be resolved through the IIC.

The Special Compensation Fund, however, will continue as a discretionary fund of last resort. In the rare event that losses in a future year should exceed the IIC global limit, or should a particular claim fall outside IIC coverage in some unusual circumstance, it is possible that a claimant might elect to bring a claim against the Special Compensation Fund. In that event, it would be for the Benchers to determine how they would exercise their discretion on such claims.

When can I expect more information?

The Law Society and the Lawyers Insurance Fund will update the profession on the innocent insured coverage in the near future. Terms of the coverage will be set out in a new policy of the LSBC Captive Insurance Company Ltd. and posted in the Practice & Services/Lawyers Insurance Fund section of the Law Society website once available. The coverage is scheduled to take effect on May 1, 2004.

For more information, please contact Margrett George, Program Administrator at mgeorge@lsbc.org (Tel: 604 443-5761) or Susan Forbes, QC, Director of Insurance at sforbes@lsbc.org (Tel. 604 443-5760).✧

BC Supreme Court dismisses petition challenging CBA fee equivalent

The BC Supreme Court has dismissed the petition of Prince George lawyer and former Law Society President Richard C. Gibbs, QC, which challenged on judicial review the Law Society's authority to require BC lawyers to pay an amount equivalent to the CBA fee as a condition of obtaining a practising certificate: *Gibbs* v. *Law Society of BC* 2003 BCSC 1814.

Mr. Gibbs resigned his membership in the CBA in May, 2002. He launched his petition after a majority of members at the 2002 Law Society Annual General Meeting voted to include "an amount equivalent to the Canadian Bar Association fee" as part of the Law Society's 2003 annual practice fee.

Mr. Gibbs argued that the *Legal Profession Act* did not empower the Law Society to require a mandatory contribution by its members to the CBA as a requirement of obtaining a practising certificate. He sought an order, among other things, that *"the proper construction of the enactment, namely sections 23 and 24 of the Legal Profession Act, is that the Benchers are limited to authorizing the Law Society of British Columbia to act as the agent of the Canadian Bar Association for the purpose of collecting Canadian Bar Association fees from members of the Law Society who are members of the Canadian Bar Association, pursuant to section 24(1)(c), but that the enactment does not permit the Law Society of British Columbia to impose 'an amount equivalent to the Canadian Bar Association fee' as a compulsory aspect of the practice fee required to be paid to the Law Society of British Columbia, pursuant to section 23(1), to engage in the paid practice of law in British Columbia for the calendar year 2003."*

In dismissing the petition, Mr. Justice Taylor found there was nothing inconsistent between the obligations imposed on the Law Society by the *Legal Profession Act* and the functions of the CBA. Law Society members were entitled to vote at the AGM for a practice fee that included a CBA equivalent fee. He noted:

> Here the members reasonably concluded through the use of a democratic process that support of the *[Canadian Bar]* Association's objects was compatible with those of the Society and should be supported on the principles of universality.
>
> Having concluded as I do that the inter-relationship between the objects of the Association are substantially consistent with the objects and duties set out in s. 3 [of the *Legal Profession Act*], it cannot, therefore, be said that such a determination of universality was patently unreasonable or even unreasonable.

The judge rejected Mr. Gibbs' submission that s. 24(1)(c) of the *Act* — which authorizes the Law Society to act as agent for the CBA in the collection of CBA fees — prohibited the Benchers from remitting fees to the CBA on behalf of lawyers who are not CBA members.

Justice Taylor said s. 4 of the *Act* gave the Benchers a general power to govern the Law Society and that s. 24 did not limit that power.

The decision preserves the status quo and has no impact on the 2004 fee billing.✧

Media law workshop 2003

The Law Society of BC and the Jack Webster Foundation teamed up on November 5 for their annual media law workshop, held at the Law Courts Inn in Vancouver.

The workshop briefed reporters, editors and news directors on techniques in covering legal stories and the state of the law on the difficult issues that directly affect the media. Leading lawyers and journalists offered insights on researching court files, the law on confidential media sources and an update on defamation law.

Presenters and panellists were: Rick Ouston, Convergence Editor, *Vancouver Sun*; lawyer David Sutherland, of Sutherland and Associates in Vancouver, counsel for the BC and Yukon Community Newspapers Association; Patrick Nagle, former City Editor of the *Vancouver Sun*, Bruce Hutchison Lifetime Achievement Award winner and Law Society Lay Bencher; Nick Russell, former head of the VCC journalism program and retired professor of journalism at the University of Regina and lawyer Robert Breivik, of Breivik and Co., counsel for *Stockwatch* magazine in Vancouver.

Also late last year, *Vancouver Sun* reporter Kim Bolan received the 2003 Jack Webster Award for Excellence in Legal Journalism for her coverage of the Air India investigation and trial. The award is sponsored by the Law Society. Tom Woods of Lawson Lundell and Marvin Storrow, QC of Blake, Cassels & Graydon were Award judges in 2003.✧

Benchers will look at expanding paralegal functions in law firms, but will not pursue certification

After considering a report from the Paralegal Task Force on November 7, 2003, the Benchers have decided against pursuing a Law Society certification program for paralegals at this time. The Benchers will instead ask the Task Force to review Chapter 12 of the *Professional Conduct Handbook* to consider whether paralegals working under lawyer supervision should be permitted to perform expanded functions and, if so, to consider defining those paralegals who would be entitled to perform such functions.

The Task Force's *Report to the Benchers on Paralegals* summarizes the consultations about paralegals undertaken with the courts, various administrative bodies and the legal community, including a survey of over 600 paralegals working under the supervision of BC lawyers. Those survey results reflect a very high level support for a Law Society certification program, with over 90% of respondents indicating they would apply for certification under a program proposed by the Task Force.

Reporting to the Benchers in November, Vancouver Bencher Robert Gourlay, QC said that Task Force members were divided on whether a certification proposal should proceed. Pivotal issues were whether there was a public interest reason for such a scheme, the cost and the most appropriate certifying body. The position of the Ministry of Attorney General was that the Law Society lacked the jurisdiction to certify paralegals, and the Task Force believed it would prove difficult to obtain the necessary authority.

Of the options outlined by the Task Force, the Benchers declined to pursue the option of paralegal certification. They instead asked the Task Force to review Chapter 12 of the *Professional Conduct Handbook* to consider whether paralegals should be permitted to perform new functions under the supervision of lawyers. In that context, the Task Force will also consider whether to define the paralegals who would be entitled to perform such expanded functions.

In endorsing a review of Chapter 12, several Benchers acknowledged the importance of helping lawyers remain competitive by taking advantage of appropriate delegation to paralegals.

On the issue of independent paralegals, the Task Force pointed out that the unauthorized practice provisions of the *Legal Profession Act* already prohibit independent paralegal practice in BC. Exceptions exist for notaries public, immigration consultants and — once Bill 37 (*Skills Development and Labour Statutes Amendment Act*) comes into effect — workers compensation consultants.

In the view of the Task Force, independent paralegal practice could not be in the public interest without paralegals being required to attain a high standard of competency through a combination of formal education, testing and experience or without appropriate regulation, insurance and defalcation coverage. Even then, allowing independent paralegals could lead to a two-tiered justice system and be misleading and unfair to the public.

The Benchers resolved to reiterate to the provincial government their concern about Bill 37. That Bill, which has passed third reading, introduces legislative amendments that will allow unregulated lay advocates to represent parties in workers compensation hearings, including non-unionized injured workers. While opposing this approach, the Society will offer its expertise to assist government in developing an appropriate regulatory scheme to help protect the public.✧


Joost Blom, QC, Vancouver


Carol Hickman, Westminster


Gavin Hume, QC, Vancouver


Terry La Liberté, QC, Vancouver


Bruce LeRose, Kootenay


Darrell O'Byrne, Prince Rupert


Art Vertlieb, QC, Vancouver

Election and referendum results

Bencher elections for 2004-2005 term

Seven new Benchers have been elected and 14 Benchers re-elected for the 2004-2005 term, following elections held November 17. As a result of a tie vote in the election of a Bencher to represent District 6 (Okanagan), the Executive Committee has authorized a by-election in that district, in accordance with the Law Society Rules. That new Bencher will be elected on January 21.

New to the Benchers table to represent District 1 (Vancouver) in 2004 are: Joost Blom, QC, of the UBC Faculty of Law, Gavin H.G. Hume, QC, of Fasken Martineau DuMoulin, returning Bencher Terence E. La Liberté, QC, of La Liberté and Company and Arthur E. Vertlieb, QC, of Vertlieb Anderson MacKay. Re-elected are Ian Donaldson, QC, Anna K. Fung, QC, John J.L. Hunter, QC, Margaret Ostrowski, QC, Ross D. Tunnicliffe, Gordon Turriff, QC, James D. Vilvang, QC and David A. Zacks, QC. President William M. Everett, QC also continues to serve as a Bencher for Vancouver to the end of 2004.

Completing their terms of service for Vancouver and attaining the position of Life Bencher at the end of 2003 are Robert D. Diebolt, QC, David W. Gibbons, QC and Robert W. Gourlay, QC (all of whom have served as Benchers since 1996) and William J. Sullivan, QC (who has served since 1997).

Anne K. Wallace, QC was re-elected a Bencher for District 2 (Victoria) by acclamation. Ralston S. Alexander, QC, Second Vice-President in 2004, also continues as a Bencher for the district.

In District 3 (Nanaimo) G. Glen Ridgway, QC was re-elected by acclamation.

Carol W. Hickman was elected and Grant C. Taylor was re-elected as Benchers for District 4 (Westminster). Also continuing as a Bencher for the district is First Vice-President Peter J. Keighley, QC. After 12 years of service, Russell S. Tretiak, QC completed his last term as a Bencher at the end of 2003 and has become a Life Bencher.

Bruce A. LeRose, of Thompson LeRose & Brown in Trail, is newly elected in District No 5 (Kootenay), replacing Gerald J. Kambeitz, QC who has completed eight years of service and is now a Life Bencher.

Re-elected in District 7 (Cariboo) are Patricia L. Schmit, QC and William Jackson.

Darrell J. O'Byrne, of Peters & O'Byrne in Prince Rupert, was elected by acclamation in District No. 8 (Prince Rupert), replacing G. Ronald Toews, QC who became a Life Bencher at the end of 2003 after serving as Bencher for the district for eight years.

Robert W. McDiarmid, QC was re-elected by acclamation in District No. 9 (Kamloops).

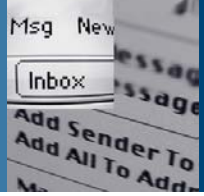
Referendum

More than two-thirds of the members voting in a referendum on November 17 approved referendum Questions 1 and 2. As a result, the Benchers are authorized to amend the Law Society Rules to allow for webcasting of Law Society general meetings and to change the minimum number of members required to requisition a special general meeting from 150 members to 5% of members in good standing. (At their December meeting, the Benchers amended Rule 1-9 to implement this latter reform.)

Less than the requisite two-thirds majority of members approved Questions 3 and 4 in the referendum and the Benchers are accordingly not authorized to change the Law Society Rules to increase the maximum number of Bencher terms as proposed.

* * *

For full election results by district and referendum results, see "What's new" on the Law Society website at www.lawsociety.bc.ca. These results will be archived with the online version of the *Benchers' Bulletin* in the Resource Library.✧



Lay Benchers

The Lieutenant Governor in Council announced on December 11, 2003 that all six Lay Benchers of the Law Society — **Michael Falkins, Patrick Kelly, Patrick Nagle, June Preston, Lilian To** and **Dr. Maelor Vallance** — have been reappointed for the 2004-2005 Bencher term.

Like elected lawyer Benchers, Lay Benchers are Law Society volunteers. They bring a public viewpoint to all work of the Society, in policy discussions before committees and task forces and at the Benchers table.

They also participate on hearing panels. One of the Law Society's first Lay Benchers was the late journalist and broadcaster Jack Webster who was appointed in 1988 and served for eight years. Since then, Lay Benchers have included social workers, union leaders, community workers and members of other professions.

When the Benchers met with the BC government caucus on November 5, Lay Bencher June Preston shared her observations on the importance of both Lay Benchers and lawyer Benchers in governance of the legal profession. This is a summary of her remarks.

* * *

Summary of remarks by June Preston to the Benchers and members of the BC government caucus on November 5, 2003:

I would like to comment on two aspects of the Law Society. First, the role of a Lay Bencher. Second, the governance of the Law Society of BC as a self-regulatory body.

I discovered at my table that *Lay Bencher* was the new "word of the day" — and one that many of you did not yet know!

It is worth noting that Lay Benchers were first appointed in 1988 to diminish any public perception of the Law Society as a "closed, self-serving guild."

There are six Lay Benchers. We are a diverse group of individuals who recognize the responsibility and importance of our appointment. I think I can speak on the behalf of the others in saying we feel valued for our contribution to the Law Society.

Lay Benchers truly are an established part of the governance of the legal profession. We are full members of Law Society committees and task forces and members of both credentials and discipline hearing panels. I sit on five committees and one task force. I chair the Complainants' Review Committee, which relates very closely to the public who have complaints about lawyers. I am also a member of the Executive Committee, having been elected to that role by my peer Lay Benchers.

We are treated as equal members of these committees, and the view seems to be that we improve the quality of the regulatory decisions by bringing a broader and sometimes alternative perspective to the important deliberations. Our votes do count and our contributions in committee discussions can make a difference!

The reading and preparation for meetings is very time-consuming; however, it is a stimulating learning experience! As a member of the general public, I previously had no understanding of how lawyers were governed, regulated or disciplined. This opportunity has changed that and highlights the importance of relaying more information about the Law Society to the public.

One might ask (as I did as a new Lay Bencher): *Who should be regulating lawyers?*

In the BC Law Society, this falls to the Benchers. There are 25 lawyer Benchers from all parts of BC who are elected by their peers. They represent all locations in the province so are able to keep a close eye on the legal needs of the citizens across BC. It seems they often have been active in their local CBA Branch. The Benchers like and respect other lawyers. They are very knowledgeable and current about the law and they represent a diversity of law practices. They value their profession enough to give time from their private lives and busy practices.

The 25 lawyer Benchers serve as "frontline" lawyers who face the public every day with the responsibility for upholding the image and reputation of lawyers. This is clearly of great importance to them. The Lay Benchers have also seen the importance that the lawyer Benchers place on addressing issues in the "best interest of the public."

– June Preston, Lay Bencher

From my observations, this Society has clear rules, regulations and policies and is generally effectively governed. Even with unexpected events, such as the resignation of its President in 2003, the Society managed to carry on effectively, without skipping a beat.

The 25 lawyer Benchers serve as "frontline" lawyers who face the public every day with the responsibility for upholding the image and reputation of lawyers. This is clearly of great importance to them. The

Lay Benchers have also seen the importance that the lawyer Benchers place on addressing issues in the "best interest of the public."

The Benchers are proud of their profession and feel great concern when another lawyer is in conflict with the Law Society rules or is found to be doing harm to the public. They take seriously issues affecting access to justice and equity and diversity in the profession. Most of them also volunteer time to their own home communities through a variety of organizations.

Now I would like to share some observations about the governance of the Law Society of BC:

- issues seems to be handled by the Society in a timely fashion;
- the Society strives to be technically up to date and to have regular communication with over 9,000 members;
- there is excellent, professional assistance from dedicated, long-serving staff;
- Benchers play an active, vital role in teaching, guiding and monitoring the credentials of those entering the profession of law as well as regulating the standard of practice and competence of members;
- there is enthusiasm and dedication from the non-Bencher lawyers who volunteer on a variety of committees;
- the Society is well connected across Canada, both with other law societies and with the Canadian Bar Association, and even internationally on issues in common with other countries.

Tonight has been an opportunity to learn more about the Law Society through the conversations around the tables.

I once heard a conference speaker suggest that, to develop more meaningful relationships, we need to have "*more conversations*"... but he said the conversations aren't *about* the relationship. The conversations *are* the relationship! So hopefully, from tonight's gathering, you will remember who you met at your table and the conversations and this will continue as an important, ongoing relationship with the Law Society of BC.✧

June Preston is a social worker and the Coordinator of Family Education Services at Queen Alexandra Centre for Children's Health in Victoria. She was first appointed a Lay Bencher in 2001.

2004 committees and task forces

The chairs of the 2004 committees and task forces are set out below. For a complete listing of committee and task force members, see "About the Law Society" at www.lawsociety.bc.ca.

Committees

Executive Committee: William M. Everett, QC

Access to Justice Committee: Margaret Ostrowski, QC

Audit Committee: Robert W. McDiarmid, QC

Complainants' Review Committee: Dr. Maelor Vallance

Credentials Committee: Ralston S. Alexander, QC

Discipline Committee: Peter J. Keighley, QC

Equity and Diversity Committee: Anne K. Wallace, QC

Ethics Committee: David A. Zacks, QC

Futures Committee: Ralston S. Alexander, QC

Practice Standards Committee: Ross D. Tunnicliffe

Public Affairs Committee: William M. Everett, QC

Special Compensation Fund Committee: Robert W. McDiarmid, QC

Technology Committee: Ralston S. Alexander, QC

Unauthorized Practice Committee: James D. Vilvang, QC

Task forces

Alternative Dispute Resolution Task Force: Deborah Zutter, non-Bencher

Conduct Review Task Force: Peter J. Keighley, QC

Conveyancing Practices Task Force: Ralston S. Alexander, QC

Disclosure and Privacy Task Force: Peter J. Keighley, QC

Lawyer Education Task Force: Patricia L. Schmit, QC

Libraries Task Force: Ross D. Tunnicliffe

Paralegals Task Force: Brian J. Wallace, QC, Life Bencher

***Real Estate Act* Exemption Task Force**: Ralston S. Alexander, QC

Western Law Societies Task Force: William M. Everett, QC.✧

Practice Tips, by Dave Bilinsky, Practice Management Advisor

Towards calm seas – the top 10 financial reports you need to stay on course

♪ Huh, please don't you rock my boat
'Cause I don't want my boat to be rockin' anyhow
Please don't you rock my boat, no
'Cause I don't want my boat to be rockin' ♪

Words and Music by Bob Marley, recorded by B. Marley and the Wailers

It has often been said that failing to plan is planning to fail. Yet many of us do not put time into planning our financial success before we set sail in our careers.

Financial planning is a matter of setting up our systems, getting a compass bearing on our goals, creating reports that measure our progress and modifying our performance as needed to stay on course. How do we assess how we are really doing? What reports should we be reviewing from our financial management systems? And what do they mean?

The key to starting out right is cash flow management — we must understand what money is coming into our practices, where money is flowing out and when all of this is happening. With our cash flow under control, we can then start planning other aspects of our financial future.

For the purpose of this analysis, I assume that you have already charted out an annual income and expense budget, broken down by month and reflecting all anticipated costs, including your monthly draw. Such a budget will show which months present the most dangerous financial reefs or shoals, so you can plan to steer clear. (A sample law firm budget is on the Law Society website in Excel format: see "Practice and Services/Practice Resources" at www.lawsociety.bc.ca.)

Here then are 10 monthly managerial reports you should be getting from your accounting system (and what they mean).

1. **What are your overall and projected monthly billings?** How are your overall monthly billings measuring up against the projected billings in your budget? This tells you if your gross income is meeting your projected cash flow billing needs. In setting your budget, consider what percentage of collected monthly billings you expect to take as a draw. According to one analyst, it should be 55-60%.[1]

2. **What are your projected billings versus cash flow?** Review your collected billings as measured against your budgeted cash flow needs for the month. This tells you if you are in a projected positive or negative cash balance for the month. Studies have indicated that you will have approximately a 105-day "lag" between the date you incur an expense and the day you collect that expense from your client.[2] Accordingly, it is important to keep a handle on your potential cash deficit — for while you can cover a small short-term deficit, over the longer haul, your cash flow must be positive.

3. **What are your actual versus budgeted costs?** What are your actual costs as compared to your budget? This will tell you if you are managing to run your office within the financial constraints that you have anticipated. If your costs are higher than your budgeted amounts, you will be required to cut other costs or increase your collected billings to remain in balance.

   To be on the safe side, look at cutting costs before trying to

increase your income, as cost cuts take effect immediately, but income is subject to the collection "lag." However, over the long haul, cutting costs may degrade your ability to produce work and, thereby, to earn income.

4. **What is your WIP?** Do you record your time? If not, how can you ever determine if you have made a profit on any file — or if anyone else in the office has as well? Does your compensation system pay out draws and bonuses based on *revenues* (i.e. collections) or *profits* (i.e. the actual net amount to the firm after all costs including lawyer time)? *If you are paying out on revenues, you are potentially paying bonuses to lawyers who have lost money to the firm on their files* — thereby adding to your financial troubles.

   The only way to determine this is to track all time (billed, unbilled and written-off) put into the files and include all this time as a cost of the file. You need to reconcile total revenues against costs (including allocated overhead and staff costs) to determine your net overall file profitability. Only then can you justify paying bonuses on truly profitable files.

   Once you see the value of recording all lawyers' billable time, you have a further financial health question: "Is your work in progress increasing or decreasing?" If it is increasing, why? Is it due to time being put into contingency files that have the potential of paying off at some point in the future? Or is it building because you have not been billing as regularly as you should?

   On files that can be billed monthly, you are doing yourself a disservice (and potentially digging yourself into a financial hole) if you fail to regularly bill for the work done. Here is a benchmark: WIP over 180 days/Total WIP = 20 to 40%.[3]

5. **What are your unbilled disbursements?** These represent credit that you have extended to your clients and therefore capital that is unavailable for you to operate your practice. If at all possible, bill these out to recapture the necessary operating cash for your office. Disbursements can be one of the biggest components of total firm debt, and can be a huge albatross around everyone's neck — particularly firms that have contingency files. A reminder: Total debt/net fixed assets = 50-80%.[4]

6. **What are your receivables?** Are they increasing or decreasing? What percentage are they of your annual billings? 15% is high, 5% is within the range of acceptability. Uncollectible accounts represent holes in the bottom of the financial boat — and will sink you if not plugged. If you do have an unpaid account, do something about it and quickly. You'll do well to remember that aging is beneficial only to cheese and wine.

   Make early attempts at collection and determine whether or not further time and energy is warranted. Attempting to collect an unpaid account against an unhappy client often leads to professional conduct complaints and/or malpractice claims. These can be emotionally and financially draining as well as PR nightmares — even if they are resolved in your favour. By acting quickly and decisively and staying within your written client credit policy, you can minimize your exposure to bad debts.

7. **What is your realization rate?** 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, 50 hours are written off or down (taken off the books) for various reasons, and clients pay a total of $30,000. Partner X's realization rate is 75%.

   Partner Z bills 150 hours at $200 per month, but only 5% is written down or taken off the books, and her clients pay 95% of that for a total of $28,500. Partner X bills more hours but has a lower realization rate than Partner Z. Even with far fewer hours billed, Partner Z is generating almost as much 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.

   A low realization rate indicates that a lawyer is using resources of the firm inefficiently, which is usually a sign of poor client or file selection. Realization rates should be no lower than approximately 90-95%.[5]

8. **What are your unbilled fees and disbursements by lawyer, client and area of law?** Although some lawyers may not like it, firms should look at unbilled fees and disbursements aggregated separately by lawyer, client and area of law. Computerized accounting systems should be able to generate these aggregations for you. Look for trouble spots in these categories, and take steps to correct them as soon as possible.

9. **What are your daily lawyer time summaries?** Daily time summaries for lawyers are also

continued on page 27

Practice Watch, *by Felicia S. Folk, Practice Advisor*

Reading the Handbook

I strongly recommend that you take an hour one day soon to re-read the *Professional Conduct Handbook*, found in your *Member's Manual* and on the Law Society website. Written in plain language, and not very long, the *Handbook* will answer many of the questions that may nag at you from time to time. There have also been a number of changes to the rules in the *Handbook* over the last several years and you will wish to stay on top of these.

I have answered questions recently for lawyers who were unaware that we had changed some rules, for example, the rules about dealing with incapable clients, the rules about acting for and against the same client and the rules about referral fees. If you have been too busy to insert the amendment pages into your *Manual*, or if your packages from the Law Society are destined to stay at the bottom of your in-basket, I recommend you go to our website and read the up-to-date *Handbook*.

Using your notarial seal

What is the meaning of a notarial seal on a document? What obligation do you have to use your notarial seal judiciously? Do you have an obligation to examine a document before you affix your seal? To what kind of document are you lending the credibility of your name and professional reputation? What does it mean to "notarize" a document?

The Law Society recently received a spate of odd documents purporting to be surety bonds, together with bizarre and confusing claims, some with religious symbols and pictures, some with judges and lawyers and US cabinet ministers named throughout and using phrases that are clearly non-legal or meaningless. A few lawyers in BC had affixed their notarial seals to these documents.

A notarial seal may be used when a lawyer certifies, and states that he or she is certifying, a copy of a document as a true copy. Even then, it is not necessary for a lawyer to use the seal — it is enough for a lawyer to state that he or she is a commissioner.

A lawyer, acting as a commissioner or as a notary, has the authority to take an oath, so that a person may swear to the truth of something contained in an affidavit or a statutory declaration. That creates a "sworn document," which may then be offered as evidence of the facts contained in it. A lawyer asked to take such an oath need not read the contents of the document. A lawyer may take an oath that the contents of a document are true, even if the document is in a language the lawyer does not understand.

Why use a notarial seal at all? The seal is generally used so that persons in other jurisdictions may accept the authority of the notary public. Other than for that purpose, what is the point of placing a notarial seal on a piece of paper without taking an oath? Does affixing a notarial seal give a paper additional force or effect? If you are asked to affix your notarial seal without being asked to take an oath or certify that a document is a true copy of another document, it would be prudent to consider whether there is any good reason to do so.

In the case described above, the documents were brought to the attention of the Law Society by the Supreme Court of BC, and the lawyers' use of their seals became the subject of a professional conduct investigation.

Succession planning

If you have not yet made plans for the disposition of your practice in the event of your sudden death or disability, now is the time to do so. It is not fair to leave the headache of having to deal with files to an unsuspecting spouse. If that happens, your estate may have to pay the costs of a custodian to wind down your practice if the Law Society must step in to obtain an order for a custodian.

The most important aspect of planning for your death or disability is designating a lawyer to take over your practice should the need arise, and providing him or her with a power of attorney to

deal with bank accounts. This person should be someone who is competent and experienced and will be able to make the time to come into the practice. The designated lawyer's task is not to come in and take over the practice, but rather to wind it down.

Make certain that appropriate employees are aware of who the designated lawyer is and how to contact this person in an emergency.

Always thoroughly document your files. The designated lawyer will need to review all client files and make a determination as to whether any immediate protective action is necessary. Write a letter that details duties for all employees; includes passwords for the computer system; sets out financial details, such as location and account numbers for all bank accounts, particularly client trust accounts; and notes contact information for all staff and principal vendors, such as banks, insurance companies, utility companies and the landlord.

Associate Counsel

The Law Society does not have specific rules referring to names and titles, other than those in Chapter 14 of the *Professional Conduct Handbook*. Lawyers in British Columbia can, for example, call themselves "Counsel," or "Associate Counsel" to a firm.

You must not call yourself anything that would mislead the public, but there is wide discretion in the use of terminology.

You must also keep in mind that any marketing activity must not be contrary to the best interests of the public or to the maintenance of a high standard of professionalism and must be dignified. Before making any decision about names, titles and marketing generally, please take a few minutes to read Chapter 14.

Protection of privacy legislation

On January 1, 2004, law firms in British Columbia became subject to new privacy legislation. At the time this is written, it is not yet known whether private sector organizations in BC that do not operate federally or across provincial borders will be subject to the federal *Personal Information Protection and Electronic Documents Act*, known as PIPEDA, or BC's *Personal Information Protection Act*, known as PIPA. That will depend on a decision by the federal government as to whether PIPA is "substantially similar" to PIPEDA. This decision is expected soon and will be noted on the Law Society website.

Whether PIPEDA or PIPA applies, law firms, like all private sector organizations, will be subject to the legislation. A sole practitioner is considered a private sector organization. All private sector organizations will be required to have a privacy policy.

Firms will not find relationships with clients much affected by this legislation, since lawyers' confidentiality obligations mean that lawyers are generally in compliance with privacy requirements. The legislation, however, places on organizations certain obligations with respect to the collection, use and disclosure of personal information. This includes the personal information of clients, other parties (such as witnesses or even parties adverse in interest to a client) and employees. For an outline of how those obligations may be expected to impact on lawyers, see the June-July, 2003 *Benchers' Bulletin*.

To assist BC lawyers, we have drafted two model privacy policies for use in firms, one dealing with the personal information of clients and other parties and one dealing with the personal information of employees. You can find these model privacy policies on the Society's website under "Practice and Services/Practice Resources."

For more information about the *Personal Information Protection Act*, and how it will affect your practice, please go to the Ministry of Management Services website at **www.mser.gov.bc.ca/FOI_POP**. We recommend reading the "Implementation Tools" section of that website at **www.mser.gov.bc.ca/foi_pop/Privacy/Tools/Tools_toc.htm**.

If you have questions about the Law Society's model privacy policies, please contact Michael Lucas, Staff Lawyer, Policy & Legal Services, at mlucas@lsbc.org or 604 443-5777 or Felicia S. Folk at ffolk@lsbc.org or 604 669-2533.✧

From the BC Court of Appeal

Notice to the profession (November 17, 2003) from Chief Justice Finch

Family law judgments on the Court of Appeal website

At a recent meeting, the judges of the Court of Appeal reconsidered their decision to replace names with initials in the publication of family law judgments on the Court of Appeal website. The original decision was implemented to protect privacy interests. The judges agreed that the use of initials for the names of the parties and their children has led to a difficulty in the development of the family case law from the Court of Appeal.

Members of the Court have agreed to develop and apply guidelines for the protection of the privacy interests of the parties and their children, other than by removing their names from judgments. The new practice attempts to strike a better balance between the need for access to family law judgments for the profession and the public and the need to protect parties from the unnecessary dissemination of personal, private information.✧

From BC Assessment

Farm land: A warning to potential purchasers

BC Assessment wishes to remind lawyers, notaries and realtors whose clients are purchasing land classified as farm for property tax purposes that specific requirements must be met for that property to continue to qualify for farm classification. Those requirements are set out in the *Assessment Act* RSBC 1996, c.20 and BC Reg. 411/95 (Standards for the Classification of Land as a Farm Regulation). In particular, the regulation requires a specified amount of "primary agricultural products" to be produced and sold by October 31 to qualify the land for farm class in the following year.

The regulation also requires the completion of an application form by October 31 for any new farm to enable farm class to be granted the next tax year. The assessor may require new owners of existing farms to file an application for farm class. Also, at any time during the year, the assessor may require the provision of farm income details or other information to support the continuation of farm class.

If requirements are not met, the assessor is required to deny or remove farm classification for the following year. Typically this means the land will change to Class 1 (residential) or Class 6 (business and other). These classes typically have higher tax rates and higher land values than farm land. Land classified as farm is valued by rates set by the assessment commissioner, reflecting only the value of the land in farm use, not necessarily highest and best use.

Further information on farm assessment can be obtained from the BC Assessment website at www.bcassessment.bc.ca, through a local assessor or by contacting the farm appraiser in Cost and Legislated Assessment Services, BC Assessment Head Office, 1537 Hillside Avenue, Victoria, BC V8T 4Y2 (Tel. 250 595-6211).✧

Over 600 journals available online at Vancouver courthouse library

The BC Courthouse Library has recently purchased a subscription to an electronic journal collection, HeinOnline, now accessible for free on the public computers in the Vancouver Courthouse Library. HeinOnline provides the full text of over 600 legal journals from the US, Canada and elsewhere.

The service includes an extensive archive — holdings begin with the first issue of each journal. Hein has an ongoing program of updating holdings as well, so most of the journals still in existence are current to the last year or so, and will be updated again in the future.

Articles are available as PDF files, which allows users to view the pages of the articles as they originally appeared in print, complete with charts, graphs, pictures and footnotes. The articles are searchable by author or title or in the full text of the journals. The entire database may also be browsed by article title, journal title or author.

Canadian journals in the collection include the *UBC Law Review*, *UBC Legal Notes*, *McGill Law Journal*, *Osgoode Hall Law Journal*, *University of Toronto Faculty of Law Review* and *Canadian Journal of Family Law*.✧

Call for comments from the BC Court of Appeal

Use of videoconferencing in the BC Court of Appeal

The BC Court of Appeal is considering the use of videoconferencing for hearing of appeals where one or more of the parties are located outside the city of Vancouver.

The Court has already conducted a few chambers hearings using videoconferencing and is favourably impressed with the technology. The Court of Appeal is interested in obtaining the views of counsel and litigants, particularly those who live outside the city of Vancouver, on whether or not videoconferencing offers a viable alternative to travelling to Vancouver for a hearing.

Please send your comments to the registrar as follows:

Registrar J.L. Jordan
Court of Appeal
800 Smithe Street
Vancouver BC V6Z 2E1

Fax: 604 660-1951
Email: Jennifer.Jordan@courts.gov.bc.ca.✧

From the Manufactured Home Registry

Manufactured home registry filings now online

BC lawyers and notaries will soon be required to file the most common registration documents related to manufactured homes (also known as mobile or modular homes) electronically. The Manufactured Home Registry's new web-based system, MH Online, allows users to control the date and time of document registration, extends hours of access to the Registry, decreases paper handling and makes records more accessible. The system will become mandatory in the spring of 2004, possibly as early as February 23.

MH Online replaces several of the most frequently used paper forms (initial registration, bill of sale transfers, residential exemptions and transport permits) with electronic versions. Once the e-filing system becomes mandatory, the Registry will no longer accept paper forms for these filings, but only for more specialized, low-volume transactions.

Lawyers, notaries, home manufacturers and parties approved by the Registrar of Manufactured Homes can enrol as "qualified suppliers." Qualified suppliers must:

- have a BC OnLine account;
- have knowledge of the *Manufactured Home Act* and regulations and procedures pertaining to the filing of documents online;
- carry liability insurance and
- agree to store for seven years the documents that they file online.

Over the past year, the Registry has seen the biggest changes in its 25-year history:

- A new *Manufactured Home Act* received Royal Assent on November 17, 2003 and came into force by regulation on December 8, 2003: see www.legis.gov.bc.ca/37th4th/3rd_read/gov72-3.htm;
- A new manufactured home regulation was approved on November 27, 2003 and came into effect on December 8, 2003. Copies of the regulations can be obtained from Crown Publications at 250 386-4636;
- The MH Online system debuted on December 8, 2003. By extending hours of availability, the new system has increased access to the Registry significantly.

Information in the Manufactured Home Registry regarding ownership and location of manufactured homes is directed at protecting owners and purchasers, improving the security of the lenders and streamlining government tax collection.

For more information on qualified suppliers and on the Registry, visit www.fin.gov.bc.ca/registries/mhrpg and www.fin.gov.bc.ca/registries/mhrproject/index.htm.✧

CLE offers Manufactured Home Registry course online and in real time

The Continuing Legal Education Society of BC is offering a 1.5 hour course about MH Online, the Manufactured Home Registry online filing system, on two dates (March 3 and April 7), from 12:00 noon to 1:30 pm.

The course is offered as real-time telephone conference, supported by PowerPoint slides delivered to each registrant's computer desktop via the internet. This format allows lawyers to join the course live from home or office, anywhere in the province or beyond.

The course will review changes to the *Manufactured Home Act* and Regulations, offer a system demonstration, walk through the online forms and explain how lawyers can enrol as "qualified suppliers" to carry out the registration of transfers and residential exemptions.

For details, see "Courses" at www.cle.bc.ca.

Interlock Member Assistance Program

Dealing with difficult people: clients, counsel & colleagues

by Nancy Payeur, Regional Director, Interlock

Client — He's the most challenging client I've ever worked with … fired his last three lawyers, his last payment was three months late … he calls and leaves sarcastic messages on my voicemail. He's rude with our support staff … expects me to be immediately available at all times … it goes on and on. Somehow I keep getting demanding people in my life, and it sure makes my days miserable. But what can you do when you need the billable hours?

Counsel — This counsel is known to be difficult. She does a lot of showboating in court to impress her clients. Makes all kinds of ridiculous appeals and objections, which just delays things. It becomes very draining trying to deal with someone like that. And yet she's very successful, so you know she's going to be around and you'll eventually need to work with her. Certainly takes the joy out of life!

Colleague — My partner used to be a friend, but after two years of working together, I can no longer say that. Choosing to set up shop together was a really bad call on my part. He's very controlling, questions my decisions on files regularly, always giving unwanted and what I see as unnecessary advice. Plus he's so unpredictable — his moods are up and down. One day he's Mr. Nice Guy, the next he's tearing a strip off our legal assistant. We've gone through three in the last year, and it's miserable to be at the office these days. I try to keep a low profile…

* * *

What do these situations have in common? Simple. All involve difficult people. And the narrators imply these must be endured.

In fact, often the most difficult part of dealing with obnoxious people is moving away from a victim mentality to seeing yourself as having choices. There are few perfect choices, but most are preferable to tolerating the intolerable.

Difficult clients

When life is so short, why are lawyers seduced into working with difficult, unreasonable and obnoxious people? A multitude of reasons, some irrational: fantasies (I'll do it differently, better than other lawyers, and will turn it all around), a passion for the legal issue on the file, immediate pressures to generate billable hours and lack of confidence in being able to generate new business if difficult clients are turned away. Or it may be that a lawyer simply hasn't stopped to make a conscious decision about whether or not to accept a client.

Often limits can be placed on client behaviour through your own responses. Calm and deliberate words and actions can make it clear you won't tolerate verbal slurs. It's always a good idea to remove yourself from situations when you are being verbally attacked or threatened. Advise the client that you will reschedule when he or she is ready to hear what you have to say.

Most lawyers do have latitude in determining whom they will serve and how they will work with people. It all starts with the initial retainer — which is key to providing any type of professional service.

You need to communicate with potential clients about the service you can realistically provide and set parameters around how you will work together. This includes a discussion of fee structures and billing requirements. Most of the time, clients are reasonable people and you don't need to state the obvious. When you know you are dealing with a difficult person, however, you need to make the implicit explicit and not take anything — like sensible behaviour — for granted. When you are aware of someone's negative patterns, remember the maxim: the best predictor of future behaviours is the past. Keep expectations grounded in reality.

Develop a personal "Plan B" for the 20% minority who have the potential to be unreasonable. This framework should be in place and kick in as needed, and includes signed fee agreements, prompt billing and follow-up on overdues, work suspended on the file until fees have been paid and regular consultation with a colleague skilled at setting limits.

If you're worried about your ability to bring in new clients, address that issue directly. There are many resources available to assist you with business development skills. Consider, for instance, university and community college courses in marketing and business development, Toastmasters groups, service clubs, professional organizations and more experienced colleagues who have grown their practices successfully.

Keep in mind that serving difficult clients has associated costs. They can end up being a drain on you and your

co-workers, in time and emotional energy, as well as psychic angst and general wear and tear! Assess up front which types of difficult people are within your "workable" range and which need to be "fired" and referred elsewhere.

A warning: some clients will be so shocked at your denying their request for service, they may readily agree to follow your terms and conditions. Setting clear parameters at the outset can make all the difference; when it doesn't, you need to follow through with your original decision.

When opposing counsel are difficult

A whole different set of issues are at stake here.

First question: How bad is the behaviour? How much can you ignore, deflect or diffuse? If counsel's behaviour doesn't amount to a matter of professional conduct, but is nevertheless interfering with your ability to be effective, are you able to discuss your concerns directly? If you decide to go this route, make sure the feedback you provide is specific and behaviourally descriptive, and that you remain polite and factual. Avoid any kind of pejorative language or labels. Clearly outline the changes you are requesting, and thank the person for hearing you out. Avoid engaging in argument or debate. Ask opposing counsel to think over your feedback and keep the meeting short. Keep and date your notes on the conversation.

If this is too risky, and you don't trust that someone is at all receptive or you think he or she might use the conversation against you somehow, what are some other options?

One option is to consult with a trusted associate who is aware of the person's behaviour and reputation, and whose advice you trust. In talking through such situations with a colleague — or another neutral third party — the solution can become clearer. Avoid consulting with someone who just agrees with you. This type of listener is sympathetic, reinforces your impressions and adds personal experiences and complaints to the mix. Such "ain't it awful" conversations are supportive, and that may be what you need initially. If that is the only kind of help you get, though, you could end up doing nothing and remain stuck in the problem.

Another option is to correspond in writing only where possible, to protect yourself and your client's interests. Most importantly, you need to avoid investing too much energy in the situation. Disengaging emotionally is a

useful skill for dealing with all kinds of obnoxious behaviours. You may refocus your energy most constructively by thoroughly preparing your case and ensuring you do the best job possible for your client.

When colleagues are difficult

Dealing with a difficult colleague, especially a partner, can be tough, and probably involves both short and long-term solutions. In the short term, you need to have the "fireside chat" with your partner, giving feedback on the disruptive behaviours and asking him or her to stop.

Over the long term, some soul-searching and a thorough assessment of the situation is in order. Is the situation salvageable? If not, should you force yourself to live forever with one bad decision? This has financial and professional implications and requires an investment of money, time, energy, and planning — i.e., searching for another position, dissolving a partnership, looking for an alternate partnership, setting up solo or whatever you decide is the next logical step. Take your time, and make sure you apply what you've learned from the experience to your planning process.

The sad reality is that, no matter where you go, there will be difficult people. Some responses inadvertently encourage, reinforce and allow such behaviour to flourish. Others make it clear you will not be part of the dance.

Last, but not least ...

You always have the option of talking things over with one of the counsellors at Interlock, which provides the Member Assistance Program. Interlock's counselling services are professional, neutral, confidential and available at no cost to Law Society members and their immediate families.

To access services, call:

1-800-663-9099 (Toll-free)
604-431-8200 (Lower Mainland)

Further reading

Tongue Fu! How to Deflect, Disarm, and Defuse Any Verbal Conflict. Sam Horn, St. Martin's Griffin, 1996.

201 Ways to Deal With Difficult People: A Quick-Tip Survival Guide. Alan Axelrod & Jim Holtje, McGraw-Hill, 1997.✧

Land Title Office e-filing – upcoming CLE courses

The CLE Society of BC is offering new courses to help lawyers and their staff prepare for the new e-filing system of the Land Title Office, scheduled for introduction in April. For details on any of the following, visit www.cle.bc.ca.

Getting your computer ready for e-filing: *issues for technology staff*
February 24
This half-day course focuses on technology staff issues and will be offered as either a face-to-face live event in Vancouver or as a real-time online conference.

LTO e-filing: *lawyer issues*
Live: March 4 (Victoria), March 9 (Vancouver) and March 23 (Kelowna)
Video repeats: March 25 (Duncan, Kamloops and Vernon), April 2 (Dawson Creek, Trail and Surrey), April 6 (Nanaimo and Penticton) and April 16 (Courtenay, Cranbrook and Prince George).

LTO e-filing: *legal support staff issues*
Live: March 5 (Victoria), March 10 (Vancouver) and March 24 (Kelowna)
Video repeats: March 24 (Duncan), April 2 (Courtenay, Cranbrook and Prince George), April 8 (Kamloops and Vernon), April 13 (Nanaimo and Penticton) and April 16 (Dawson Creek, Trail and Surrey).✧

Federal government extends amnesty order on handguns

The Canada Firearms Centre has issued a notice to the legal profession that an amnesty order for businesses and individuals as to their compliance with new requirements on handguns under the *Firearms Act* or section 22 of the Firearms Licences regulations has been extended from December 31, 2003 to December 31, 2005.

The intent of the amnesty is to protect affected businesses or individuals from penalties for possessing certain prohibited handguns without a valid licence or registration certificate while they dispose of those handguns or become eligible to keep them as a result of legislative and regulatory amendments. The notice also states that a number of regulations under the *Firearms Act*, scheduled to come into force on January 1, 2004, will be deferred to January 1, 2005.

For details, see "What's new" on the Canada Firearms Centre website at www.cfc-ccaf.gc.ca .✧

Services to members

Practice and ethics advice

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

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

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

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

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

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

Special Compensation Fund claims

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

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

Martin Wirick

Vancouver, BC

Called to the Bar: May 14, 1979

Resigned from membership: May 23, 2002

Custodian appointed: May 24, 2002

Disbarred: December 16, 2002 (see Discipline Case Digest 03/05)

Special Compensation Fund Committee decision involving claims 20020216, 20020152 and 20020424

Decision date: June 18, 2003
Report issued: August 29, 2003 / referred for publication November 14, 2003

Claimant: A Bank
Payment approved: ***$210,178.92***
($200,379.54 and $9,799.38 interest)

The L Street property

In February, 2002 Mr. Wirick represented S as vendor in the sale of a residential property on L Street in Vancouver to RL and LL for $280,000. The vendor, S, was a nominee of Mr. G, who was also a client of Mr. Wirick. At the time that S sold the L Street property to RL and LL, the property was subject to a mortgage of $201,500 and an assignment of rents. S had originally arranged this mortgage financing with A Bank when he purchased the property earlier that year.

RL and LL arranged a new mortgage of $300,000 with B Bank to fund their property purchase. On March 8, the solicitor for the purchasers forwarded $270,771.88 to Mr. Wirick in trust, on this latter's undertaking to pay out the A Bank mortgage and assignment of rents. In breach of his undertaking, Mr. Wirick did not use these funds to pay out the prior mortgage, but instead transferred the funds to another property, paid an account of his law firm and forwarded the remaining funds to V Ltd., a construction company owned by his client Mr. G.

As a result of Mr. Wirick's breach of undertaking, the A Bank mortgage and assignment of rents remained on title of the L Street property and in priority to the B Bank mortgage

The Special Compensation Fund Committee found that, while not every breach of undertaking is fraudulent, in this case Mr. Wirick's pattern of behaviour did not suggest an error, but rather conduct similar to that reflected in his earlier discipline proceedings. He misled and deceived the purchasers' lawyer and he breached his undertaking in order to facilitate the misappropriation and wrongful conversion of the purchase money that he received in trust.

The Committee decided that it would not require the claimant, A Bank, to exhaust its civil remedies in this case by obtaining a judgment against Mr. Wirick, given that there was little hope of recovery from him.

The Committee allowed the claim of A Bank, subject to certain releases, assignments and conditions, including the requirement that A Bank discharge its mortgage and assignment of rents. Noting that A Bank was in a position to commence foreclosure proceedings against the innocent purchasers, RL and LL, the Committee also exercised its discretion to pay to A Bank interest at the contract rate to May 24, 2002 and thereafter at the applicable rate to a maximum of 6% per annum.

As a result of the payment, and discharge of the prior charges from title, B Bank and RL and LL would suffer no loss. Accordingly, their separate claims for compensation were denied.

Special Compensation Fund Committee decision involving claims 20020211, 20020593, 20020212, 20020594, 20020098, 20020213, 20020241, 20020102, 20020214 and 20020242

Decision date: July 9, 2003
Report issued: October 29, 2003

Claimant: A Credit Union
Payment approved: ***$919,674.74***
($864,000 and $55,674.74 interest)

The P Avenue property

In September, 2001 Mr. Wirick represented V Ltd. in the refinancing of adjacent properties on P Avenue in Burnaby. V Ltd. was a construction company that belonged to Mr. G, another client of Mr. Wirick.

V Ltd. had originally bought the properties as two lots in December, 1999 through mortgage financing from T Mortgage Corporation and several individuals: AN, BN and SN. Each property was subsequently subdivided into two strata lots, for a total of four strata lots.

V Ltd. arranged with A Credit Union

continued on page 26

Special Fund claims *… from page 25*

to refinance the strata properties through two *inter alia* mortgages: one mortgage of $440,000 over the first two strata lots and the second mortgage of $440,000 over the second two strata lots. On September 28, 2001 the solicitors for A Credit Union forwarded $862,510 to Mr. Wirick as solicitor for V Ltd. on Mr. Wirick's undertaking to discharge the mortgages and assignments of rent that were already on title.

In breach of his undertaking, Mr. Wirick did not use any of the funds he received to discharge the prior mortgages. He did subsequently pay out these mortgages, but from funds received on a later date. He also discharged the mortgages, other than the BN mortgage, which was paid out but not discharged.

On October 17, 2001 K purchased one of the four strata lots on P Avenue from V Ltd. for $322,071.21. K obtained a new mortgage to help finance the purchase. His notary public forwarded the net sale proceeds to Mr. Wirick on this latter's undertaking to pay out and discharge all prior mortgages and charges and the *inter alia* mortgage of A Credit Union. In breach of his undertaking, Mr. Wirick did not use the funds to pay out or discharge the mortgages. The A Credit Union *inter alia* mortgage accordingly remained on title.

Also on October 17, 2001, L purchased the second strata lot from V Ltd. for $322,071.21. The notary public representing L forwarded the net sale proceeds to Mr. Wirick on his undertaking to pay out and discharge all of the prior mortgages and the A Credit Union *inter alia* mortgage. In breach of his undertaking, Mr. Wirick again failed to pay out and discharge the mortgages. The A Credit Union mortgage remained on title.

H and S purchased the third strata lot from V Ltd. on October 15, 2001 for $330,206.74. They obtained mortgage financing of $220,800 from B Bank. The solicitor for H and S forwarded $333,293.15 to Mr. Wirick on his undertaking to pay out all the prior charges and the A Credit Union *inter alia* mortgage. Mr. Wirick did not use any of the funds to pay out or discharge the mortgages. The T Mortgage Corporation, AN, BN and SN mortgages were subsequently paid out from other funds that Mr. Wirick received and all these mortgages, except the BN mortgage, were discharged from title.

On October 19, 2001 CH and FC purchased the fourth strata lot from V Ltd. They arranged mortgage financing. Their solicitor forwarded $311,275.90 to Mr. Wirick on his undertaking to pay out and discharge all of the prior charges on title and the A Credit Union *inter alia* mortgage. Mr. Wirick did not use these funds to pay out and discharge the mortgages and other charges as he had undertaken to do.

The Special Compensation Fund Committee found that Mr. Wirick's breaches of undertaking in these circumstances were egregious and wilful. In each case, he diverted funds that he had received on specific undertakings. His actions were dishonest and resulted in misappropriation and fraudulent conversion of the funds. This conduct was discreditable in the extreme and completely at variance with the straightforward and honourable dealings expected of a lawyer.

The Committee decided that it would not require A Credit Union to exhaust its civil remedies in this case by obtaining a judgment against Mr. Wirick, given that there was little hope of recovery from him and given that, for A Credit Union to exercise its remedies, would result in foreclosure proceedings against innocent claimants.

The Committee allowed the claim of A Credit Union, subject to certain releases, assignments and conditions, including the requirement that A Credit Union discharge its *inter alia* mortgage. As a result, all other claimants (both purchasers and the financial institutions from which they obtained new financing) would be made whole and restored to the position they ought to have been in.

The Committee also exercised its discretion to pay to A Credit Union interest on its claim at the contract rate to May 24, 2002 and thereafter at the applicable rate to a maximum of 6% per annum.✧

Unauthorized practice undertakings

[redacted]

[redacted]

[redacted]✧

Suspensions

James Douglas Hall, of Victoria, has been suspended for one month, effective January 24, 2004, after a hearing panel found him guilty of professional misconduct.

A summary of this matter will be published in an upcoming *Discipline Case Digest* and the hearing report will be posted on the Law Society website.

Brian M. Legge, of Vancouver, was suspended on an interim basis by three Benchers of the Law Society on November 10, 2003, pursuant to section 39 of the *Legal Profession Act*, pending final disposition of a citation against him.

Alan Marsden, of Royston, has been suspended for one month, effective December 15, 2003, after a discipline hearing panel accepted his admission of professional misconduct and his proposed penalty under Law Society Rule 4-22.

A summary of this matter will be published in an upcoming *Discipline Case Digest* once the panel has rendered its hearing report. The report will also be posted on the Law Society website.

H.A. (Sandy) McCandless, of Langley, has been suspended for one month, effective January 4, 2004, after a hearing panel accepted his admission of professional misconduct and conduct unbecoming and his proposed penalty, under Law Society Rule 4-22.

A summary of this matter will be published in an upcoming *Discipline Case Digest*, and the hearing report will be posted on the Law Society website.

M. Joy O'Dwyer, of Port Coquitlam, was suspended on an interim basis by three Benchers of the Law Society on December 15, 2003, pursuant to section 39 of the *Legal Profession Act*, pending final disposition of a citation against her.✧

Top 10 financial reports *… from page 17*

important. To make this analysis accurate, *all* lawyers should be accounting for *all* their time — billable, firm administration or management, education, pro bono, vacation etc. Look for aberrations or time summaries that don't make sense or indicate poor time management or failure to meet minimum billable time requirements.

A quick way to determine how many hours you should be billing is as follows: Take your desired annual income (say $150,000). Collected billings should be approximately twice that — $300,000. Factor in bad debt at 10%. That indicates that you should be billing approximately $330,000/year. There are approximately 231 working days/year (365 minus: 21 days vacation, 104 weekend days, 9 statutory holidays). This indicates that you must bill just over $1,400/day ($330,000/231). If you bill at $250/hour, you must log 5.7 billable hours/day — every day.

By doing this analysis, you can determine if your desired annual income (or anyone else in your firm) has any reasonable resemblance to their daily work history.

10. **What are your client trust account balances?** Personally review the trust account balances for all clients monthly. Are there funds in trust that can be applied against unbilled time or disbursements? Can your accounting or practice management system produce a listing of the clients/files that are approaching the exhaustion of their retainers or funds in trust? Do you need to write to these clients and warn them that they need to bring in further funds and, if so, by what date? Is your written retainer agreement clear on the consequences of failing to replenish retainers?

These are just a sample of the financial reports that can be generated by most computerized accounting systems. It is important to understand the role that each one can play in running your practice and keeping your financial ship on course. Perhaps most importantly these reports will help draw your attention to small problems before they start rocking the boat.✧

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[1] Cotterman, James D., "Capitalization, Debt and Taxes," *Report to Legal Management*, June 2000.

[2] Ibid. Of course, for contingency files this can be two years or longer.

[3] Ibid.

[4] Ibid.

[5] Ibid.

ELECTED BENCHERS

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The Law Society of British Columbia

845 Cambie Street
Vancouver, BC
Canada V6B 4Z9

Telephone: 604 669-2533
Toll-free within BC: 1-800-903-5300
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