The Law Society of British Columbia

2011: No. 4 • WINTER

BENCHERS' BULLETIN

Keeping BC lawyers informed

FEATURE

Access, regulation take centre stage in 2011

by Gavin Hume, QC

WITH MERE WEEKS until the end of my term as president, my attendance at the International Bar Association's 2011 Annual Conference in Dubai in early November provided a most appropriate backdrop for the work of the Law Society this year.

The conference was eye-opening, as was the emirate of Dubai itself, but for reasons that may surprise you.

Without exception, the key topics of the conference and the issues causing the most concern among my counterparts were subjects well known to the Benchers and staff of the Law Society. Topics such as alternative business structures and cloud computing are very much at the fore of these meetings, and I am very pleased to report that the Law Society is keeping abreast or, in many cases, is ahead of other legal regulators around the world. In fact, the Law Society was mentioned more than once for specific work that is considered leading edge at this time.

To recap some of the specifics that have led to our international recognition, we have accomplished much in 2011. This is the final year of our first, three-year strategic plan of which all initiatives will either be completed or initiated by year end.

Of particular ongoing focus this year was access to justice. The Benchers and staff continue to work very hard to do what we can in this arena.

In 2011, we implemented new rules that allow articled students to provide certain legal services to the public under the supervision of a lawyer, and we are now working to expand the roles for paralegals.

The Law Society, together with the Canadian Bar Association and others, supported the work of the Public Commission on Legal Aid, which earlier this year released a report that has been an important part of the access dialogue.

The new model code of conduct was developed by a series of committees coordinated by the Federation of Law Societies and well represented by BC lawyers, including myself. With the majority of the code now approved and the remainder to be finalized next year, the code will increase the ease with which lawyers can move and practise in other provinces.

The Law Society partnered with the Canadian Bar Association to sustain the REAL (Rural Education and Access to Lawyers) program for two years. This initiative is designed to attract new lawyers to rural BC communities, many of which either already have a shortage of lawyers or are projected to in the coming years.

We also launched a campaign to encourage sole practitioners to take the critical step of arranging for a winding up caretaker and fulfill their obligation to their clients to ensure continuity of service.

Topics such as alternative business structures and cloud computing are very much at the fore of these meetings, and I am very pleased to report that the Law Society is keeping abreast or, in many cases, is ahead of other legal regulators around the world.

Also in 2011, we made some significant improvements to our regulatory effectiveness.

Lawyers and the public were invited to participate in our discipline and credentials hearing panels to make our regulatory processes more transparent and reflective of the public interest. We received applications from over 130 lawyers and almost 600 members of the public and have now added 26 lawyers and 21 members of the public to our hearing panel pools. Training began in October, and panels now comprise a Bencher, a non-Bencher lawyer and

BENCHERS' BULLETIN

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

Suggestions on improvements to the *Bulletin* are always welcome — please contact the editor at communications@lsbc.org. Additional subscriptions to Law Society newsletters may be ordered at a cost of $50 (plus HST) per year by contacting the subscriptions assistant at communications@lsbc.org. To review current and archived issues of the *Bulletin* online, see "Publications and Resources" at lawsociety.bc.ca.

PHOTOGRAPHY

Brian Dennehy Photography: pages 4, 7, 9, 14 and 17

Publications Mail Agreement No. 40064480

a public representative.

Additionally, new guidelines have been adopted to assist the Discipline Committee in making appropriate and consistent decisions on professional conduct matters that come before them.

In early 2011, Law Society staff completed a months-long evaluation of all core regulatory processes to find ways to work more effectively. As a result of that review, several hundred suggestions, both simple and complex, were made to improve operations. Many changes have now been made and others, including implementation of an information management system, are underway.

Also as a result of the review, the Law Society reorganized its professional conduct group to speed processes and improve overall effectiveness. Now, a specialized intake unit assesses initial complaints and gathers key documents and a complex files unit handles more complicated matters from start to finish.

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By the time my term ends, the Benchers will have approved a new strategic plan covering the years 2012-2014. The new plan will continue to focus on improving access to justice and enhancing public confidence in lawyers. It will also call for regulatory innovation as the legal profession continues to evolve in a rapidly changing world characterized by technology and growing expectations.

This has been a rewarding, fulfilling and incredibly busy year. I want to thank my fellow Benchers and our other volunteers for their admirable commitment to this organization. And I want to commend the staff of the Law Society, under the leadership of Timothy McGee. The public and lawyers are well served by the staff of this organization, who are dedicated to the highest standard of professional regulation and support of the profession.❖

President Hume's cooking skills support United Way campaign

The yearly United Way campaign is always a big event for Law Society staff, and 2011 was no exception.

The kick-off pancake breakfast and other fundraising efforts, combined with donations, saw staff exceed their goal and raise more than $35,000.

President Gavin Hume flipped pancakes at the always popular United Way campaign kick-off pancake breakfast, under the supervision of the campaign co-chair, Chief Legal Officer Deb Armour.

Staying informed amid global developments

by Timothy E. McGee

I RECENTLY ATTENDED the annual conference of the International Institute of Law Association Chief Executives. This conference brings together the CEOs of legal regulatory and representative organizations from over 20 countries around the world, including all the major common law countries and more recently civil law jurisdictions such as Germany. A rough tally revealed that collectively the participants were connected in some way with more than one million lawyers around the world.

The emergence of "alternative business structures" as a law firm business model in England and Australia was the topic on the conference agenda that drew the most interest and discussion. Alternative business structures are business models through which legal services are delivered that differ from the standard sole proprietorship or partnership model.

In England there are more than 400 law firms owned at least 25% by non-lawyers. Starting in 2012, 100% of an English law firm can be owned by non-lawyers. The Australian firm Slater & Gordon went public in 2007, raising capital in the public markets and assuming the disclosure and other myriad responsibilities of a reporting issuer. Today Slater & Gordon has contributed share equity exceeding $100 million.

What is behind these developments?

The emergence of significant non-lawyer ownership in law firms in England was attributed to a general lack of capital for small to mid-sized firms. Of 10,000 law firms in England, well over half derive 45% of their earnings from real estate transactions. Private investment by non-lawyers is a source of capital for these firms, which improves balance sheets and provides greater financial capacity for investment in resources and infrastructure, among other things.

Slater & Gordon's significant equity play is now funding a broadly based acquisition and expansion strategy for that firm. Business results year on year are impressive, including total income up 46% to $182 million, profits up 41% and an increase in the dividend to shareholders of 10%. For all its business merits, however, this model raises many issues and challenges for legal regulation, including the possibility of conflicting ongoing duties to clients, the courts and shareholders, and conflicts arising upon the acquisition of a firm such as interlocking litigation. Should regulators care that Mr. Gordon left the firm to join a rival but still maintains a significant share holding in his old firm?

These real life examples of how alternative business structures are manifesting themselves in foreign settings may seem far away from the reality of the legal profession in British Columbia and indeed Canada. But they bear watching and inspection to assess both their merits and weaknesses, including how they may affect professional values.

The Law Society's Independence and Self-Governance Advisory Committee has recently published a report entitled "Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations" (which can be found at www.lawsociety.bc.ca/docs/publications/reports/AlternativeBusinessStructures.pdf). I recommend it to you. We are at the forefront in terms of improving our understanding of developments in this area, which are gaining momentum around the world.❖

2011 Bench & Bar Dinner

Almost 350 turned out for the Bench & Bar Dinner, including *(left to right)* CEO Tim McGee and Justice Robert D. Punnett.

Those present saw Jeffrey Rose, QC honoured with the CLEBC Leader in Learning award, and James Vilvang, QC receive the CBA Georges A. Goyer, QC Memorial Award for Distinguished Service.

Mentoring project to help retain more Indigenous lawyers

THE LAW SOCIETY has hired lawyer **Rosalie Wilson** to develop a collaborative mentoring program to support Indigenous lawyers. This is one initiative intended to advance the Law Society's strategy to enhance the retention of Aboriginal lawyers.

The program is aimed at increasing diversity within the legal profession as the public is best served by a more representative and inclusive profession. Further, the program aims to improve access to legal services for Aboriginal peoples. Currently, Aboriginal people are significantly underrepresented in the legal profession, which has important implications regarding access to culturally appropriate legal services.

"I believe it's in the interests of both the public and the profession to have stronger Aboriginal representation among lawyers," said Wilson. A member of the Syilx (Okanagan) and Secwepemc (Shuswap) Nations, Wilson was selected after an open search for candidates.

Wilson began working on the project at the end of November by launching phase one, which involves consulting with Indigenous lawyers to develop effective mentoring options, models and best practices. This phase is fully funded by a Law Foundation of BC grant, for which the Law Society is greatly appreciative. The position may be extended to phase two of the project, which will involve implementation and evaluation; that is expected to occur in summer 2012.

In addition to being a lawyer, Rosalie brings a wealth of experience in consultation and policy and program development with Aboriginal organizations and communities.

Wilson highlights her extensive knowledge in developing strategies and initiatives in a culturally appropriate manner through her previous position as a senior policy analyst with a prominent First Nations organization. There, she was responsible for developing province-wide initiatives to advance First Nations interests in matters relating to children and family wellness, health and education.

In addition, Wilson is a member of the Indigenous Bar Association and the Canadian Bar Association, BC Branch's Aboriginal Lawyers Forum.

"As a First Nations person, as a lawyer, and as a member of the public in BC, I have a direct interest in the initiatives undertaken by the Law Society to increase retention rates of Aboriginal lawyers," said Wilson. "It is such a positive undertaking, and I am happy to be a part of it."

Lawyers wanting more information about the project, or who are interested in participating, should contact Rosalie Wilson at rwilson@lsbc.org.❖

Important notice for all lawyers

Fee for paper subscriptions goes into effect on March 1, 2012

Lawyers who wish to be mailed **print versions** of Law Society publications will be charged a fee as follows:

Benchers' Bulletin (including *Insurance Issues*): $20 / year

Member's Manual amendments: $30 / year

BOTH *Benchers' Bulletin* and *Member's Manual*: $50 / year

Electronic subscriptions to publications will continue to be free for members.

In mid-January 2012, all print subscribers will receive an invoice based on your publication preferences at that time.

To continue your paper subscription to *Benchers' Bulletin* and/or *Member's Manual* updates with no disruption in service, the Law Society must receive payment no later than March 1, 2012. Print subscriptions will not commence until payment has been received.

To switch to an electronic subscription, log in to the Law Society website and change your publication preferences. Changes must be made before March 1, 2012 to avoid charges.

If you have any questions, please contact Member Services at 604.605.5311 or memberinfo@lsbc.org.❖

ANTI-MONEY LAUNDERING AND TERRORIST FINANCING LAWS

BC Supreme Court rules that provisions do not apply to lawyers

THE REGULATION OF the legal profession by Canada's law societies provides an effective and constitutional anti-money laundering and terrorist financing regime, the BC Supreme Court has ruled.

In a judgment handed down September 27, 2011, the court also said the application of the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the related regulations to the legal profession violate section 7 of the *Canadian Charter of Rights and Freedoms*, and is therefore unconstitutional.

The case was brought by the Federation of Law Societies of Canada with support from the Law Society of BC, the Barreau du Québec, the Chambre des notaires du Québec, and the Canadian Bar Association as intervening parties.

The Federation argued the federal legislation is unnecessary because Canada's law societies have already implemented rules requiring legal professionals to identify their clients, and to not accept large amounts of cash from clients except in certain circumstances. The court accepted these arguments, and held that all legal professionals are exempt from the legislation.

The Federation also argued before the court that the federal legislation is unconstitutional because it interferes with the rights of clients to obtain legal advice in confidence.

"When they consult their legal advisor, Canadians expect their communications will be held in strict confidence," former Federation President, Ronald J. MacDonald, QC, said at the time. "But law societies also recognize that the legal profession must not be used to facilitate money laundering activities. Canada's law societies promote these two objectives by adopting rules that protect the public and put clients first, while respecting basic constitutional values."

Section 7 of the *Charter of Rights and Freedoms* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The BC Supreme Court decision says federal money laundering legislation jeopardizes the liberty of clients, because lawyers would be required to collect information from their clients to establish a paper trail for law enforcement agencies to access, and this is contrary to the expectations of confidentiality Canadians have when they communicate with legal professionals.

The court ruled that lawyers, Quebec notaries, and legal firms in Canada be excluded from the list of persons and entities subject to the federal legislation. The parties had previously consented to a court order agreeing that the legislation would not be applied to the legal profession pending the resolution of the constitutional challenge, so the court's decision preserves that status. The parties also agreed in advance that the decision from the BC Supreme Court would be binding across Canada.

The Federation was represented in the proceedings by John Hunter, QC, of Hunter Litigation Chambers, and Roy Millen of Blake, Cassels & Graydon LLP.❖

This article has been adapted, with permission, from the Federation of Law Societies September 28, 2011 news release.

IN MEMORIAM

Hon. Charles C. Locke, QC

The Honourable Charles Conrad Locke, QC passed away on October 1, 2011 at the age of 94. Locke was a former treasurer (now called president) of the Law Society and a Life Bencher, having served six two-year terms. He also served as President of the Federation of Law Societies of Canada.

Locke, the son of a Justice of the Supreme Court of Canada, was a senior litigator before being appointed to the Supreme Court of BC in 1978 and then the Court of Appeal in 1988, where he served until his retirement in 1992.

Locke also served as a member of the Canadian Bar Association Council and as vice-president for British Columbia. He was appointed Queen's Counsel in 1961 and made a Fellow of the American College of Trial Lawyers in 1972.

In recognition of his enormous contributions to the affairs of the Bench and Bar in this Province as well as nationally, Locke was presented with the Law Society Award in 2006.❖

Bencher election results

THE 2012-2013 BENCHER election results are in: six Benchers were elected for the first time and 16 were re-elected (two by acclamation).

Members had previously elected the following Benchers as President, First Vice-President and Second Vice-President, respectively, for 2012:

- Bruce A. LeRose, QC (President and Bencher for Kootenay)
- Art Vertlieb, QC (First Vice-President and Bencher for Vancouver)
- Jan Lindsay, QC (Second Vice-President and Bencher for Westminster)

LeRose, Vertlieb and Lindsay continue as Benchers for their respective districts by virtue of their executive office.

President Gavin Hume, QC congratulates the elected and re-elected Benchers, and thanks all those who stood for election. Hume also acknowledges the dedication of the Benchers who will be stepping down at the end of this year, in particular Joost Blom, QC, Robert C. Brun, QC, Carol W. Hickman and Alan M. Ross for their many years of dedicated and effective Bencher service.

Blom and Hickman join outgoing president Gavin Hume, QC as Life Benchers on January 1, 2012.❖

New Benchers in 2012

Bill Maclagan

Maria Morellato, QC

Vincent Orchard, QC

Phil Riddell

Tony Wilson

Barry Zacharias

Here are the Benchers who were elected on November 15, 2011 for the 2012-2013 term:

County of Vancouver
Rita C. Andreone
Patricia Bond
E. David Crossin, QC
Leon Getz, QC
Bill Maclagan
Maria Morellato, QC
David Mossop, QC
Thelma O'Grady
Vincent Orchard, QC
Catherine A. Sas, QC
Herman Van Ommen
Tony Wilson

County of Victoria
Kathryn A. Berge, QC
Richard N. Stewart, QC

County of Nanaimo
Nancy G. Merrill

County of Westminster
David M. Renwick, QC
Phil Riddell

Okanagan
Tom Fellhauer

County of Cariboo
Lee Ongman
Gregory Petrisor

County of Prince Rupert
Barry Zacharias

Kamloops
Kenneth M. Walker

Long history of UBC representation ends on January 1
January 1, 2012 ends a long history of representation by UBC law professors at the Bencher table, dating back to 1973. Professor Joost Blom, QC, shown here at the 2011 Bench & Bar dinner, becomes a Life Bencher in 2012.

Committee on Relations with the Judiciary welcomes new members

Important resource provides assistance during proceedings

THREE WELL-KNOWN SENIOR lawyers have agreed to serve on the Committee on Relations with the Judiciary, replacing Karen Nordlinger, QC, who is stepping down after providing 15 years of service since the program's inception.

The committee is an informal and optional resource for lawyers and judges. Its mandate is to:

- assist lawyers who need emergency assistance in the course of a trial or other proceeding in circumstances where such assistance is requested by the judiciary; and

Karen Nordlinger, QC steps down after 15 years on the Committee on Relations with the Judiciary

- provide advice and assistance to lawyers who wish to make complaints about judges, or who wish to argue that a judge's conduct has manifested a bias against the lawyer's client, and in suitable cases would raise the complaints directly with the judiciary.

The committee was originally formed in the late 1990s, drawing its mandate and terms of reference from the 1997 Protocol between the Law Society and the BC Courts Respecting Concerns that Arise in Ongoing Proceedings (the 1997 Protocol).

L-R: Ian Donaldson, QC, Dinyar Marzban, QC and J. Kenneth McEwan, QC, are the newest members of the Committee on Relations with the Judiciary

"The committee provides a service to the Bench and Bar," said Nordlinger. "If I could not myself assist I would, with the help of the Law Society, find a lawyer to approach counsel to offer assistance."

Three senior practitioners, drawn from civil, criminal and family litigation bars, will now form the committee. They are J. Kenneth McEwan, QC (civil), Ian Donaldson, QC (criminal) and Dinyar Marzban, QC (family).

HOW TO ACCESS THE COMMITTEE

The committee acts independently of the Law Society, responding directly to requests for assistance from the Bench and Bar in carrying out its mandate.

Appointments to the committee are made by the president of the Law Society, following consultation with senior members of the judiciary and the profession. Appointments are for an indefinite term and subject to annual review.

Communication with the committee by judges and lawyers is voluntary and the committee does not communicate with or report to the Law Society on particular cases.

For more information and contact details for committee members, please visit the Law Society website and go to Lawyers > Practice Support > Committee on Relations with the Judiciary.❖

In Brief

Update from the Law Foundation of BC

NEW LAW FOUNDATION WEBSITE

The Law Foundation has updated and redesigned its website. The goal of the redesign was to further meet the needs of grantees and the public. This new site makes information about the Foundation accessible, provides current information about grant cycles, and highlights Law Foundation-funded groups. It is a key tool in the Law Foundation's work, which is based on its mission statement: *To advance and promote a just society governed by the rule of law, through leadership, innovation and collaboration*.

Visit the Law Foundation at www.lawfoundationbc.org.

JUDICIAL APPOINTMENTS

Patrice Abrioux, a lawyer with Quinlan Abrioux in Vancouver, was appointed a Judge of the Supreme Court of BC in Vancouver. He replaced Mr. Justice J.S. Sigurdson who elected to become a supernumerary judge.

Gregory Fitch, QC, a lawyer with the Ministry of the Attorney General in Vancouver, was appointed a Judge of the Supreme Court of BC in Vancouver. He replaced Mr. Justice E.J. Rice who resigned.

The Honourable **Ronald Tindale**, a judge of the Provincial Court of BC in Prince George, was appointed a Judge of the Supreme Court of BC in Prince George. He replaced Mr. Justice E.G. Chamberlist who resigned.❖

Bruce LeRose, QC: First president from County of Kootenay

IN JANUARY, BRUCE LeRose, QC will become the first president to come from the County of Kootenay in the Law Society's 127 year history.

The 54-year-old was born and raised in the small interior city of Trail in the south central part of the province. He, his twin brother and their two older brothers learned perseverance and hard work at the family-owned businesses, the Terra Nova hotel and the Colander restaurant.

Rather than following in his parent's footsteps in the hospitality business, LeRose decided to become a lawyer because he liked the idea of helping people solve their problems. LeRose eventually attended UBC, where he first earned his BA and then, in 1982, his law degree. He was called to the Bar and joined Thompson, LeRose and Brown (formerly Geronazzo and Thompson), a full-service general practice firm with three offices in the West Kootenays. LeRose was elected a Bencher in 2004 and was appointed Queen's Counsel in 2006. He lives with his partner, Melanie, and has two grown sons, Nicholas and Alex.

"I'm extremely proud to be the first president from the Kootenay region," LeRose said in an interview with the *Benchers' Bulletin*. "Lawyers in the Kootenays have a long history of volunteerism and making contributions to both the Law Society and to the Canadian Bar Association, and now, with technology, we're capable of stepping up to the highest positions in the legal profession."

A year as president will certainly mean more time away from home and his offices, but LeRose is very proud of the fact that he has a wonderful group of co-workers in his offices that are committed to picking up the slack and supporting his presidency. "I am very grateful for all of the support I have received over the years as Bencher from Melanie and all the great people at Thompson, LeRose & Brown. I could not have achieved this goal without them."

PRIORITIES FOR 2012

Since becoming a Bencher in 2004, LeRose has been active in programs and initiatives to support the work of small law firms. More than half of all lawyers in BC operate in a small practice setting, with no more than four lawyers in the firm.

When he became second vice-president in 2009 he said at the time that supporting lawyers in small firms would be a priority when he ascended to the role of president. LeRose explains that, while that is still a priority, the Society's focus has broadened to enhancing the public's access to legal services, including those provided in rural areas. One of the solutions in which the Law Society is now involved is helping to fund an initiative to attract more lawyers to rural areas. "Overall, the primary focus this year was to develop programs designed to promote access to legal services and, under the leadership of President Gavin Hume, QC, we've made huge strides in that area. I want to help build on that success," he explained. "Public access is an issue that's going to continue to be in the forefront for many years.

There are two elements of the Law Society's strategic plan that LeRose plans to see through as president. The first is a comprehensive review of Law Society governance, and he will chair the task force responsible for it. The Benchers have identified a governance review as being important to the Law Society's evolution in its commitment to transparency and protecting the public interest. "This review will reflect the Law Society of British Columbia's continued desire to improve our self-governance model and preserve the independence of the Bar," said LeRose. "We really haven't had a comprehensive governance review since 1991, and a lot has changed in the past 20 years."

LeRose's other priority is to build relationships with stakeholders by making himself available for speaking engagements to explain the work of the Law Society. "There's a vast array of activities that the Law Society is involved in to protect the public interest beyond the disciplining of lawyers, and I want to talk about that."

LeRose's one-year term as president begins January 1, 2012.❖

Bringing Justicia to BC

Law Society approves development of program to support women lawyers

THE LAW SOCIETY has approved a plan for 2012 to bring a program to BC aimed at retaining and advancing women lawyers. The program is called Justicia, which means justice in Latin.

The Justicia Project was launched by the Law Society of Upper Canada at the end of 2008 and was the first of its kind in the country. The Ontario project has brought together more than 50 firms committed to sharing best practices, developing resources and adopting programs to support women lawyers.

BC has completed a feasibility assessment investigating whether the program would be possible here. The assessment flowed from a recommendation in the Law Society's 2009 *Report of the Retention of Women in Law Task Force*.

"What we discovered during the feasibility study is that there is an appetite on the part of firms to do their part at keeping and advancing women lawyers," said Susanna Tam, a Law Society policy lawyer who works with the Equity and Diversity Advisory Committee. "The law firms we spoke with see that it's good for women lawyers, good for the profession and good for business. And they were open to working with us to make a difference."

"What we can't and shouldn't do," said Law Society President Gavin Hume, QC, "is control whether, how and when firms implement Justicia policies and initiatives. Our role as the regulator is to bring firms together to share strategies and best practices. Essentially, we will be facilitating a strategic process."

The Law Society will implement a consultation and engagement plan in 2012. The first phase of the plan will focus on BC offices of national firms that are participating in Justicia in Ontario. The second phase will aim at engaging regional firms in BC.

"What we can't and shouldn't do," said Law Society President Gavin Hume, QC, "is control whether, how and when firms implement Justicia policies and initiatives. Our role as the regulator is to bring firms together to share strategies and best practices. Essentially, we will be facilitating a strategic process."

"I'm extremely pleased that our feasibility assessment showed support for taking these important steps and, while there is no quick fix, I'm hopeful that it will ultimately advance the Law Society's strategic goal of supporting the retention of women lawyers," said Hume.

The expected outcome for 2012 is to have a number of firms collectively consider initiatives aimed at retaining and advancing women in private practice. Lawyers or law firms with questions about Justicia or how to participate should contact Susanna Tam at stam@lsbc.org.❖

Unauthorized practice of law

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

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

From August 10 to November 10, 2011, the Law Society obtained undertakings from nine individuals and businesses not to engage in the practice of law.

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

Marlane Lauren, of Vancouver, BC, provided legal services, including providing legal advice, preparing pleadings and negotiating settlements for a fee. She also falsely represented herself as a lawyer, law student or otherwise capable or entitled to practise law. The Law Society obtained an order permanently prohibiting Lauren from engaging in the practice of law as defined in section 1 of the *Legal Profession Act*, from falsely representing herself as a lawyer, and from commencing, prosecuting or defending a proceeding in any court on behalf of another party. The court awarded the Law Society its costs.

Glen P. Robbins, of Coquitlam, BC, falsely represented himself as a lawyer and commenced and prosecuted proceedings on behalf of others. The Law Society obtained an order permanently prohibiting Robbins from falsely representing himself as a lawyer and from commencing, prosecuting or defending proceedings in any court on behalf of others. The court awarded the Law Society its costs.

John P. Gorman, formerly of Surrey, BC, was disbarred by the Law Society of Upper Canada in the late 1980s. In 2001, the Law Society obtained an injunction prohibiting Gorman from engaging in the practice of law in BC as defined in section 1 of the *Legal Profession Act*. In 2007 and 2010, Gorman disobeyed the injunction order by writing demand letters and drafting pleadings. The court found Gorman in contempt of the 2001 order and sentenced him to two weeks' incarceration and a $5,000 fine. The court also expanded the injunction to permanently prohibit Gorman from representing himself as a lawyer, counsel or an advocate. The court awarded the Law Society special costs.❖

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Watch for: anti-spam law, confidentiality in marketing, settlement agreements, undertakings, scams and more

"MARKETING" TO POTENTIAL CLIENTS? GET READY FOR CANADA'S NEW ANTI-SPAM LAW

Bill C-28, Canada's new anti-spam law (frequently referred to as "CASL"), received Royal Assent and is expected to come into effect sometime in mid-2012. The legislation will deal with threats to electronic commerce, including spam, against individuals, businesses and organizations. Industry Canada has received comments from the public regarding draft regulations related to the legislation and is preparing to move to the next stage.

How will CASL affect law firm marketing? Lawyers and law firms will generally be prohibited from sending emails or electronic newsletters to prospective clients without the intended recipient's consent. You are encouraged to become familiar with CASL and to establish policies and procedures regarding electronic marketing. The penalties for violating the Act are up to $1 million per violation for an individual and up to $10 million per violation for any other "person" (a defined term in section 1). The Canadian Radio-television and Telecommunications Commission, the Competition Bureau and the Office of the Privacy Commissioner of Canada will be responsible for enforcing the law. Individuals and organizations will also have a right to bring a separate private action.

See the federal government website (www.fightspam.gc.ca) for more information about the new law as well as tips to protect yourself and your firm from spam and other threats to electronic commerce. A spam reporting centre is being established to identify and analyze trends and accept reports of spam and electronic threats, such as phony debt collection scams.

BRAGGING RIGHTS? NOT SO FAST

You've seen magazines, newspapers, books and law firm websites where lawyers publicize large transactional or other work that they've done on behalf of named clients. Though it can be interesting reading, remember that you need your client's authority to disclose confidential information. And, while you may disclose information with your client's implied authority, getting express authority in writing minimizes the chances of misunderstanding and upset.

Some clients, including large entities, do not want their names in the media, so consider whether publishing such information is in the best interest of the client and not just for self-promotion. Chapter 8, Rule 24 of the *Professional Conduct Handbook* requires that, before making a public statement, you must be satisfied that any communication is in the client's best interest. Also, keep in mind the confidentiality provisions of Chapter 5 of the Handbook, in particular Rules 1 to 14. Generally speaking, you are required to hold in strict confidence all information concerning the business and affairs of a client acquired in the course of a professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge.

Elevator talk with colleagues? Carefully consider with whom you may speak at your firm about your client's affairs and where you do that. Unless a client directs otherwise, you may disclose a client's affairs to partners, associates and articled students and, to the extent necessary, to legal assistants and non-lawyer staff who you use to provide services to that client (Chapter 5, Rule 11(b)). However, avoid elevator talk, talk in the reception area or any public place. Stress upon associates, employees, students and other lawyers under contract with you or your firm the importance of confidentiality, both during their employment and afterwards.

Most Handbook rules have counterparts in the new *Code of Professional Conduct* for British Columbia (the "BC Code"). BC Code Rule 6.05 deals with public appearances and public statements while Rule 2.03 deals with confidentiality obligations. These two BC Code Rules are approved with an effective date yet to be established.

BC CODE RULE 2.02(4) – ENCOURAGING COMPROMISE OR SETTLEMENT A MUST

Chapter 8, Rule 1(a) of the Handbook prohibits lawyers from instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the client's part and are brought solely for the purpose of injuring another party. Rule 4.01(2)(a) is the counterpart to Rule 1(a) in the new BC Code. In addition, BC Code Rule 2.02(4) requires lawyers to encourage clients to compromise or settle a dispute on a reasonable basis.

> **Encouraging Compromise or Settlement**
>
> 2.02(4) A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

continued on page 12

Practice Watch ... from page 11

Commentary

A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

UNDERTAKINGS IN YOUR CONTROL?

It has come to my attention that some lawyers are giving or accepting undertakings that are not within their ability to control. This is an example of a bad undertaking: "I undertake to have my client execute the document by December 31, 2011." This undertaking is not within the lawyer's control because it's up to the client whether or not the client executes the document. If the client does not execute the document, the lawyer has breached the undertaking and is subject to being reported to the Law Society. Never give or accept an undertaking that is not within your control. If a client is supposed to do something, be clear that you aren't assuming the client's obligations.

FAKE LAW FIRM WEBSITE USING BC LAWYER'S WEBSITE CONTENT

A BC lawyer was recently surprised to see that a scamster copied content from the lawyer's website, including testimonials, to set up a fake law firm website with a fake lawyer's name and contact information outside of BC. However the scamster failed to completely delete the real lawyer's name in every spot and the scam came to light. This website was taken down quickly after the police and the web host were alerted. This isn't the first phony law firm that we've seen (see the May 2, 2011 Notice to the Profession about how a fake law firm website was used in a new variation of the bad cheque scam). Consider monitoring the use of your name on the Internet, if you are not already doing so. It can be as simple as using Google Alerts, or you can use a more sophisticated approach. Discuss your options with a professional.

MORE BAD CHEQUE SCAMS

Fraudsters posing as clients continue to ask lawyers to pay money out of trust based on a bad cheque, often under the guise of collecting on a phony debt. Some of the different fraud scenarios and names that fraudsters have used in BC are set out below:

- ***Commercial loan agreement*** – David Lawson, James Gillard, Mark Rudic, Yu Shengli, Dr. Richard Abramovic, Izzabin Bin Aris, Aris Izaddin, Ma Li Ni, Larry Mason, Edward Williams, Fred Williams, George Graham, Christine Gilbert, Daniel Smith, John Fischer,* Noriko Kudou,* Peter Jackson, William Brock, Prateep Ponimdang,* Lisa Lambert*
- ***Personal loan*** – Prateep Ponimdang* loan to friend, Ms. Lisa Jin
- ***Personal injury settlement between employer and employee*** – Terry Sullivan,* Patrick Cluster, Graham Jackie Lynn, Tammy Savage
- ***Commercial invoices*** – Mark Branson, Alice Wood, Bessant James, Shi Quen, Qui Xiandong, Chongan Lee,* Pete Basu*
- ***Matrimonial, including collaborative divorce agreement*** – Donna Chipman, Kathy Scotia, Mima Oshiro, Masako Kazue, Rika Takahashi, Tanako Masato, Julie Burany, Brenda Blumenkrantz, Alice Goldbery, Zaria Hoshiko, Hikari Yamato, Akemi Kobayashi, Crystal Masaru,* Diana Hamasaki,* Jacklyn Kaidence,* Umeko Mizuki*
- ***Real estate*** – Jyoung Chung Tu, Young Chung Tu, Shiukmoda Joji

** An asterisk marks the names commonly used recently; however the old names still pop up and new names and email addresses appear regularly, usually with a Gmail, Hotmail or Yahoo address.*

"Mr. Prateep Ponimdang from Thailand" – personal loan agreement scam

A scamster calling himself "Mr. Prateep Ponimdang" has recently been emailing BC lawyers for help to collect on a fake loan. He's been using the email address prateep42@yahoo.co.th or prateep_23@yahoo.co.th. The scamster provides a scan of his Thai passport and a loan agreement by email. (Remember that, if the client is outside of Canada, a lawyer must enter into an agreement with an agent to verify the client's identity — a new client sending you a scan of his passport isn't sufficient (Law Society Rule 3-97(5).)

Like all phony collection scams, the "client" needs a trusting lawyer who will pay out on a certified cheque or bank draft deposited to the lawyer's trust account before discovering the instrument is bad. Waiting for a cheque to clear may help but not eliminate the risk. For example, a cheque that's drawn on an actual bank account may clear initially, but when the financial institution later finds that the instrument was bad, the lawyer will have a trust shortage. Below is an example of some actual content of the scamster's emails, including spelling, grammar and punctuation errors.

> ***From**: Mr. Prateep Ponimdang prateep_23@yahoo.co.th*
> ***Date**: Sun, 23 Oct 2011*
> ***To**: lawyer name*
> ***Subject**: Ref: Legal inquiry*
>
> *I am Mr Prateep Ponimdang from Thailand.I need the service of a lawyer to collect the money i loan to a friend who now reside in Canada.*
>
> *Please let me know if this matter is within the areas of your practice.*
>
> *Sincerely*
> *Mr Prateep Ponimdang*

A lawyer who responded received the further email:

> ***From**: Mr. Prateep Ponimdang prateep_23@yahoo.co.th*
> ***Date**: Tues, 25 Oct 2011*
> ***To**: lawyer name*

Figure 1: Scan of Prateep Ponimdang's passport.

***Subject**: Ref: Legal inquiry*

Thanks for your response. It was a personal loan which I granted to her as she needed it for her business then in Thailand, but she now reside presently in Kelowna, BC Canada.

The agreement was that the loan be paid back after 27 Months and the agreed period is past and she yet to pay back the money.

So i shall need your service in collecting this money from her, since she now reside within your legal boundaries .

I have just inform her of my intention to retain your firm to collect the money from her and from her responds she seem very much afraid of litigation and she don;t want this to result to a court case. So she is assuring me that she is ready to make the payment, so i advice that all funds should be directed to your office as that is the only way i can make her pay without any further delay.

Meanwhile, she has requested that i forward her the following information below from your firm to enable her issue a part payment to show her readiness to meet her obligation while the balance will be paid soonest.

1 Name to issue the cheque :
2. Your Address:
3. Your Telephone number :

Upon receipt of the payment you shall deduct you hourly charges and any other legal fee applicable for this kind of service. Hope to hear from you ASAP with the information above so that I can forward to her and i could also send her information to you for record purpose.

Attached is copies of the loan agreement and my ID for your file. [See Figures 1 and 2 below.]

Sincerely,
Mr. Prateep Ponimdang

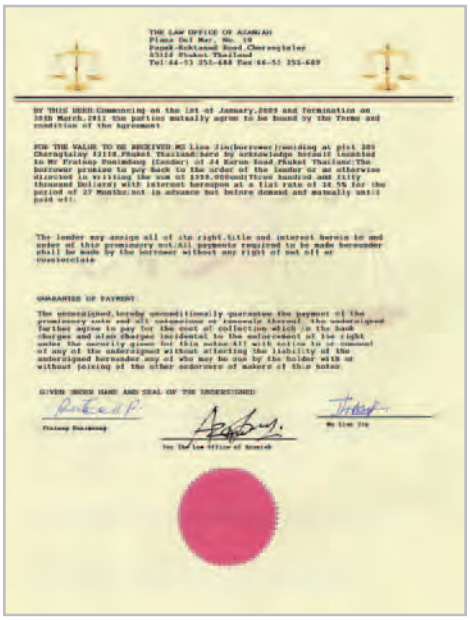

Figure 2: Scan of loan agreement.

The lawyer provided information about how to make out the cheque to the law firm and where to send it and then received the following two emails:

***From**: Mr. Prateep Ponimdang prateep_23 @yahoo.co.th*
***Date**: Sat, 29 Oct 2011*
***To**: lawyer name*
***Subject**: Ref: Legal inquiry*

Dear <lawyer's name>

Your information was forwarded to Ms. Lisa Jin and this morning i got an email from her followed by a call that she has traveled down to Paris for an important business engagement, but not to worry to avoid any delay of the payment, she has handle everything regarding to the payment to her Investment Manager (Mr. Ryan Baileys) .

Also she inform me that Mr. Ryan Baileys will call you to inform you on when you shall be receiving the payment and also on the exact amount but she assured me that there will be no delay in making the payment .

Regards and let me know when you hear from Ryan Baileys.

Regards
Mr. Prateep Ponimdang

***From**: Ryan Baileys ryanbaileys@standard trustmanagement.com*
***Date**: Mon, 31, Oct 2011*
***To**: <lawyer's name>*
***Subject**: ""NOTIFICATION LETTER""*

Oct.31,2011

<lawyer's name and address>

Dear Sir,

This is to officially inform you that we (Standard Trust Management); have been directed to forward funds to you on behalf of one of our customers-Ms. Lisa Jin, in conjunction with settlement money owed to your client,Mr. Prateep Ponimdang (Thailand)

We are an investment management firm and Ms.Jin has directed that we liquidate some of her stocks / shares (financial Investments / Assets), managed by our Institution, to enable him utilize the proceeds derived from the sale, to cater for all the liability owed to your client.

You are advised to get in touch with one of our Investment officer (Mr.Ryan Baileys), via his email address ryanbaileys@standardtrustmanagement.com or by telephone at his direct telephone #: 1 (613) 255-2239, to enable him to facilitate the payment.

Be aware that we do not release funds to third party, until some pertinent information has been satisfactorily provided to us. Our days of operation are Monday to Friday, between the hours of 9:30am to 7:30pm (EST).

Sincerely,
Ryan Baileys
INVESTMENT OFFICER

Keep informed and learn to recognize scams

Visit the Law Society's website to find out more about how to identify and avoid being caught by scams (see Lawyers>Fraud Alerts>Bad Cheque and Other Negotiable Instrument Scams) or contact Practice Advisor Barbara Buchanan for confidential advice. If you are not sure if you are dealing with a scamster, protecting yourself could be as simple as not acting, or requiring the "debtor" to pay the "client" directly so that the funds do not go through your trust account.

Get advice from your financial institution about protecting yourself. Also visit the Canadian Anti-Fraud Centre's (CAFC) website which used to be commonly known as Phonebusters (www.antifraudcentre.ca). CAFC, jointly managed by the RCMP, the Ontario Provincial Police and the Competition Bureau of Canada, is currently Canada's central fraud data repository and its Call Centre Unit has 11 full-time call takers who are trained anti-fraud specialists. You can report a fraud to CAFC or get information. Eventually you will be able to report these scamsters to the spam reporting centre being established under Canada's upcoming anti-spam law discussed earlier in this article.

HOLIDAYS COMING – SCAMSTERS LOOKING TO LINE THEIR POCKETS WITH YOUR HARD-EARNED CASH

The winter holiday season is upon us. Scamsters like to prey on businesses when they think they may be short-staffed or rushed for time and not as careful as usual. Be extra vigilant at these times.

FURTHER INFORMATION

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

Members of the public hearing panel pool at the welcome dinner held October 20 at the Hotel Vancouver –

Front row (l-r): Graeme Roberts, Dr. Gail Bellward, Adam Eneas, Paula Cayley, Clayton Shultz, Lois Serwa and J.S. (Woody) Hayes

Back row (l-r): John Lane, David Chiang, Dan Goodleaf, Dennis Day, Thelma Siglos, Donald Amos, Linda Michaluk, Lance Ollenberger and Carol Gibson.

Not pictured: Glenys Blackadder, Jory Faibish, John Ferguson, Laura Nashman, Robert Smith

Breaking down walls and building public confidence

Greater regulatory transparency: members of the public now sit on hearing panels

WHEN JEFF HOSKINS, QC, started at the Law Society nearly 23 years ago, it wasn't just the colour of his hair that was different. The doors were just a little harder to open for the average person.

"There's a big difference now. The attitude of Law Society staff and Benchers is much more open to the need for public transparency than it was at that time. Not that people were secretive then — it simply wasn't a big part of what we did," said Hoskins, Tribunal and Legislative Counsel.

Hoskins began working at the Law Society less than a year after Lay Benchers, now called Appointed Benchers, started sitting at the governance table. Hoskins saw how they worked to bring the public view to what used to be more like a private meeting.

"The Appointed Benchers identified things that the lawyer Benchers didn't necessarily see. Things, such as, it's all very well to say discipline hearings are open to the public, but they asked, 'how does the public even know there's a hearing?' That simple question took us down a path to where we are now. Anybody in the world who's interested can find out, because the entire schedule of hearings is posted on our website."

Hoskins is now overseeing another change of historic proportion. Members of the public now form part of the pool of adjudicators who sit on discipline and credentials hearings, as of this winter.

"This is as big as the addition of Appointed Benchers. When we did that, it was a big step and not everybody agreed with it. I haven't heard any negative comments in years and years from anyone about Appointed Benchers. I think it's been a resounding success, and I expect this will be too."

The hope is that adding people without legal training to the hearing panel pool will bring the public perspective to each and every hearing. While Hoskins thinks it's an important step, he anticipates that — as with Appointed Benchers in the beginning — not everybody in the legal profession will think it's a good idea.

Dan Goodleaf is prepared for that kind of skepticism. He is one of the 21 members of the public chosen to be part of the pool.

"A skeptical lawyer is the most powerful agent in seeking out truth," said Goodleaf. "I would say, remain skeptical, but not defensive. Demand of us no less than you would of your peers, and hold us equally accountable for decisions made. And know that, in the end, there are no requisite credentials needed in one's ability to protect the public interest."

Nevertheless, Goodleaf and the others chosen from nearly 600 applications have many impressive credentials. This past spring, the Society ran a province-wide ad campaign to attract applicants from throughout BC. The screening and selection process was assisted by a third-party recruitment team.

"I'm confident that the expertise this group will bring will enhance the process and help us meet the high expectations that the public, quite rightly, has of us as a self-regulating profession."

– President Gavin Hume, QC

Of the final selections, Law Society President Gavin Hume, QC said, "they are an accomplished group of people, many of whom have sat in similar positions for other regulatory groups, and several have experience on public bodies. For example, we have three former mayors in the pool. I'm confident that the expertise this group will bring will enhance the process and help us meet the high expectations that the public, quite rightly, has of us as a self-regulating profession."

As for Goodleaf, there is much he hopes to bring from a public point of view. He recently retired from the Government of Canada, where he held many senior posts, such as Deputy Minister of Indian and Northern Affairs Canada and Chief Federal Negotiator and Executive Director of the Federal Treaty Negotiations Office. A member of the Mohawk First Nation, he also served as a Canadian Ambassador in Central America. Throughout his career, he worked with lawyers.

"I've had lawyers who have served as chiefs of staff, confidantes, policy advisors, technical experts, and members of management teams. I have been impressed by their crispness of thought, thoroughness in analysis, objectivity and professional comportment. But my admiration of the profession has not blinded me to the fact that, as with all walks of life, there are the good, the bad, and yes, the ugly. I have had the fortune of dealing with the good."

"I have no interest in regulating lawyers. But," clarified Goodleaf, "I do have an interest in being thrown into the mix of something that has as its reason the wrestling out of detractors that corrode the standing of a profession, the institution to which it is part, and the public confidences it shares. And if that can be achieved, I have served the public interest."

Sandra Weafer's goals are not dissimilar to Goodleaf's. Weafer is Senior Counsel and Deputy Director at the Public Safety Defence and Immigration Law Section of the Department of Justice's BC regional office. She is also one of 26 lawyers chosen to be part of the non-Bencher pool to sit on hearings. This pool was created at the same time as the public one.

Jeffrey Hoskins, QC

"I think that my role will be to add another voice to the process — someone who is a member of the profession, but who does not sit at the Bencher table," said Weafer.

Weafer, like everyone in the two new hearing pools, has to attend training sessions organized by the Law Society on everything from hearing skills to Law Society practice and procedure. The courses are mixed, with both lawyers and those without legal training attending together. Benchers who have not taken the course before or choose to take it again are also included.

"At the end of November I was in the decision-writing course with a few of the lay members. I was impressed at their ability to articulate their decisions very clearly, as well as their common-sense approach to issues. As a lawyer, I welcome public input into the hearing process. Many complaints are initiated by non-lawyers. Having non-lawyers on the panel will ensure that the public perspective has a voice."

"... I was in the decision-writing course with a few of the lay members. I was impressed at their ability to articulate their decisions very clearly, as well as their common-sense approach to issues.

– lawyer Sandra Weafer

When Weafer saw the ad for the position, she knew she wanted to be a part of it.

"I guess, fundamentally, I believe in the importance of integrity of the profession and the importance of the profession being seen to have integrity. I don't know that

The Law Society held training sessions for members of both lawyer and public hearing panel pools. The sessions covered everything from hearing skills to practice and procedure.

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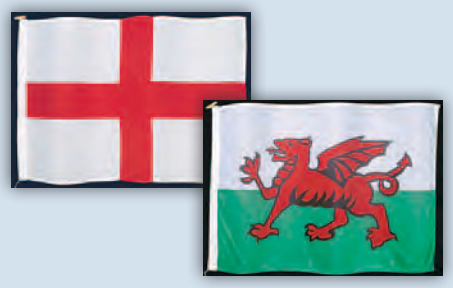
Transparency timeline

Timeline of changes that brought more transparency and public confidence to the self-regulation of BC lawyers

1858	Creation of a publicly accessible "Roll" listing practising lawyers
1874	The Law Society creates a law library to make it easier to access legal information
1921	The incorporation of the Canadian Bar Association effectively separates advocacy for and regulation of lawyers
1975	The library becomes independent of the Law Society with the formation of the then BC Law Library Foundation
1983	Discipline hearings are opened to the public
1983	Discipline summaries, or digests, are published
1988	First Appointed Benchers (formerly Lay Benchers) join the board of governance: Jack Webster, Mayor Anne Clarke and Dr. Anne Autor
1988	Appointed Benchers sit on some hearing panels and reviews, marking the first time a member of the public – that is, not a lawyer – does so
1992	All lawyers became eligible to sit on hearing panels, but in practice only Benchers and former Benchers were appointed before 2011
1993	Full discipline decisions are published electronically on Quicklaw
1993	Legislation is proclaimed to permit the provincial Ombudsperson to review Law Society processes for fairness
1995	The Law Society becomes subject to the *Freedom of Information and Protection of Privacy Act*
1999	Credentials hearings are made open to the public
2002	Lawyer Lookup is added to the Law Society website for members of the public to easily check who is and is not a practising lawyer
2003	Discipline and credentials decisions, as well as hearing schedules, are posted on the Law Society website
2004	Minutes of Bencher meetings are posted on the Law Society website
2010	Agenda materials for regular Bencher meetings are posted on the Law Society website
2011	Members of the public and non-Bencher lawyers are added to the hearing panel pool for discipline and credentials hearings

What's happened elsewhere when public confidence erodes



In England, lawyers lost the right to self-regulate following a series of poor, highly public decisions made by self-regulating bodies of the legal profession. Those decisions prompted criticism from the Office of Fair Trading, followed by a government-commissioned report that ultimately led to the creation of the *Legal Services Act 2007*. Now lawyers in England and Wales are regulated through the government-appointed Legal Services Commission that was created under the Act.

This October the Legal Services Regulation Bill was published by the Minister for Justice in Ireland. It proposes the establishment of a legal services regulatory authority, appointed by the government. This authority will have wide powers, including the drawing up and approval of rules of professional conduct. The new regulatory authority would report to the Minister for Justice, effectively ending self-regulation and removing the buffer that exists between the executive branch of government and the legal profession.

In Australia, several states have legal services commissions appointed by government to regulate lawyers. In Queensland, in particular, the loss of self-regulation happened quickly after intense media criticism of how the self-regulating body handled complaints against a prominent law firm. The federal government is now working on the creation of a government-appointed National Legal Service Board, which will take over responsibility for regulating the profession.

Dan Goodleaf met fellow members of the public hearing panel pool, Linda Michaluk (l) and Carol Gibson, at the welcome dinner.

Breaking down walls ... from page 15

this new process will help that because the profession — and the people who I have had the pleasure of working with in my career — already place a very high value on integrity. However, I think it will help the public's perception of lawyers, generally, and of the Law Society's ability to self-regulate."

Other self-regulating professions in BC have been in the spotlight. In October the province introduced legislation to create a more accountable and transparent teacher regulation system. And regarding the police, the Attorney General announced that in 2012 the new Independent Investigations Office led by civilians will conduct investigations where there has been serious harm involving police in BC.

"There is a shift in public perceptions of what were once considered the most noble of professions, be that of the medical or legal fields, the clergy, law enforcement or politicians," said Goodleaf.

"Unfortunately, that shift is moving to the negative. With the ever-increasing exposure to a readily available and varied media, high-profile cases of abuse and misconduct are now too often seen as a barometer of a profession gone astray. And with it, people demand that something be done to restore a sense of order and, indeed, confidence. The obligation rests with those very institutions to be vigilant in demonstrating that the collective interests will outweigh that of the institution itself."

Sandra Weafer

Hoskins also believes the public's opinions have changed.

"I think the day when professional governance was just left to the professionals without any input or influence from the outside is gone. There are higher expectations of the professions. You can't just say 'trust us, we'll do it right.' We now have to show that we're listening and be transparent and accountable to the public whose interests we're supposed to be advancing."

And, added President Hume, as the need arises, more changes may come.

"Our mandate is to regulate in the public interest. As the law is constantly evolving, so is the public interest. And if we are to meet our mandate, we must continue to change, which isn't to say that what we had before was broken. But as a self-regulating profession, we must always be looking for ways to make things better, and we will continue to take steps to do that."❖

MEMBERS OF THE PUBLIC HEARING PANEL POOL

Donald Amos, of Sidney
Dr. Gail Bellward, of Vancouver
Glenys Blackadder, of Victoria
Paula Cayley, of Lions Bay
David Chiang, of Vancouver
Dennis Day, of Langley
Adam Eneas, of Penticton
Jory Faibish, of Vancouver
John Ferguson, of Burnaby
Carol Gibson, of Vancouver
Dan Goodleaf, of Vancouver
J. S. (Woody) Hayes, of Duncan
John Lane, of Cobble Hill
Linda Michaluk, of North Sannich
Laura Nashman, of Victoria
Lance Ollenberger, of Fort St. John
Graeme Roberts, of Brentwood Bay
Lois Serwa, of Kelowna
Clayton Shultz, of Surrey
Thelma Siglos, of New Westminster
Robert Smith, of Surrey

MEMBERS OF THE NON-BENCHER LAWYER HEARING PANEL POOL

Jasmin Ahmad, of Vancouver
Ralston Alexander, QC, of Victoria
Jo Ann Carmichael, QC, of Vancouver
Jennifer Chow, of Vancouver
Ian Donaldson, QC, of Vancouver
James Dorsey, QC, of North Vancouver
William Everett, QC, of Vancouver
Anna Fung, QC, of Vancouver
John Hogg, QC, of Kamloops
William Jackson, QC, of Dawson Creek
David Layton, of Vancouver
Richard Lindsay, QC, of Vancouver
Shona Moore, QC, of Vancouver
Karen Nordlinger, QC, of Vancouver
Jennifer Reid, of Prince Rupert
Dale Sanderson, QC, of Vancouver
Donald Silversides, QC, of Prince Rupert
Marvin Storrow, QC, of Vancouver
William Sundhu, of Kamloops
Gordon Turriff, QC, of Vancouver
John Waddell, QC, of Victoria
Brian J. Wallace, QC, of Victoria
Peter Warner, QC, of Prince George
Sandra Weafer, of Vancouver
Gary Weatherill, QC, of Vernon

For a short bio of each hearing panel member, go to the Law Society website (Complaints and Discipline > Citations, Hearings and Sanctions).

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Confidential emails, mandatory e-filing of land title documents

♫ A moving stream of information
That is floating on the wind
The secrets never end
And now they call,
They sing, they play, they dance
For you, from out of the blue,
What can you do? ♫

Lyrics and music by Jeff Lynne, recorded by Electric Light Orchestra ("Secret Messages")

CONFIDENTIAL EMAILS

YOU ARE A family law lawyer. One day, a client walks into your office and drops off an envelope of papers for you to review.

You open the envelope and start to read. Your eyes grow wide as you see printouts of emails between your client's spouse and the spouse's solicitor.

Now a host of questions come into your mind. How did your client obtain these emails? Did his wife print and leave them lying around? Were they in a locked filing cabinet? Did your client legitimately have access to his spouse's email or did he guess or find her user name and password, perhaps with stealthy key-logging software on a shared family computer? Did he install such key-logging software on his spouse's computer? Does it matter?

Notwithstanding how your client obtained these emails, placing them in an envelope and delivering them to you clearly places you in the middle of an ethical quandary, both legal and technological.

Chapter 5, Rule 15 of the *Professional Conduct Handbook* deals with these questions. It reads:

> **Use of opponent's documents**
>
> **15.** A lawyer who has access to or comes into possession of a document which the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, shall:
>
> (a) return the document, unread and uncopied, to the party to whom it belongs, or
>
> (b) if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it, uncopied, to the party to whom it belongs, advising that party:
>
> (i) of the extent to which the lawyer is aware of the contents, and
>
> (ii) what use the lawyer intends to make of the contents of the document.

So what should you do? Well, as they say, that all depends on the circumstances. Following are extracts from Ethics Committee or hearing panel decisions in prior cases:

Your client obtained the emails innocently:

The parties negotiating a separation agreement were living in separate residences. Their child innocently obtained a copy of the husband's notes to his lawyer about the agreement and brought them to the wife's home. The wife's lawyer was required to return the notes in accordance with this Rule. The husband would have had a reasonable expectation of privacy about the notes and they were released in error. *(Ethics Committee, October 2004)*

No steps were taken to secure the emails:

A party's expectation of privacy regarding a document will depend on the steps taken to secure it. When that issue is in dispute, the lawyer who has received the document must return it. That does not prevent the lawyer from later seeking its disclosure on the basis of relevancy. *(Ethics Committee, October 2004)*

(It would be a very rare case indeed that a party to litigation would not have an expectation of privacy regarding emails with their counsel. After all, solicitor-client communications are privileged and there would be no right of disclosure by the other side. If there were emails in that envelope that were not solicitor-client communications, then the issue of the security taken to keep those emails private becomes relevant.)

What should you do with the emails?

A lawyer acted for a client who purchased a strata lot. A portion of the building was in dispute between the client and the strata

corporation, with the client claiming that a storage area constituted part of his strata lot. After raising the issue on behalf of the client with the strata corporation, the client found a binder of documents in a closet in the living area of his unit. The binder included letters from the strata corporation's lawyer regarding the dispute. Some of the documents were likely privileged and were not intended for the lawyer or his client to see. Rule 15 required the lawyer to return the material to the strata corporation or its lawyer. After returning the documents, the lawyer was free to apply to the court to have the documents produced to him on the ground that privilege was lost as a result of their disclosure and they should be available to the lawyer's client for use in proceedings to resolve the dispute. If the client's instructions prevented the lawyer from carrying out his obligations under Rule 15, the lawyer must withdraw. *(Ethics Committee, October 2006)*

What use can you make of these emails:

A lawyer was guilty of professional misconduct when, prior to his retainer, he accepted a recording of a telephone conversation between his client's wife and her lawyer (without consent of either party), prepared a transcript of the recording, and used the transcript to prepare for an examination for discovery. (*Law Society* v. *Kirkhope*, 2005 LSBC 23)

What if the client issues instructions contrary to Rule 15?

If client instructions prevent a lawyer from carrying out the lawyer's duty under Rule 15, the lawyer must follow the client's instructions but may not act for the client any further in the matter. *(Ethics Committee, September 1999)*

What if there were more than just solicitor-client emails in that envelope?

A lawyer's client, the wife in divorce proceedings, had access to her husband's email which contained evidence of undisclosed assets and income. Her husband had given her the password to two email accounts, but had subsequently changed only one. The client provided the emails to the lawyer from the account where the husband had given the wife the password. The lawyer did not have an obligation to turn over the emails in question to the husband or his lawyer because the husband had provided his wife with the password. Any information obtained from an account where the husband had changed the password and not provided it to the wife would trigger an obligation under Rule 15. *(Ethics Committee, December 2006)*

Conclusion

In summary, solicitor-client emails are (and possibly further correspondence could be) privileged and there is an obligation under Rule 15 to inform opposing counsel that you have the emails and are returning them. You must also inform counsel how much you know about the content of the emails and what use you plan to make of that knowledge.

If the envelope contained emails that were not solicitor-client communications, then you should embark on a line of inquiry as to how your client obtained these emails, such as whether they were left in hard copy form in a folder in an unlocked filing cabinet or whether the client was previously provided with a password to the spouse's email account. How you ethically deal with these emails depends on the answers that you get to your inquiries.

If your client has "hacked" into the spouse's email account, then you have an obligation to comply with Rule 15 and seek instructions to return the emails to opposing counsel. If your client refuses to provide you with those instructions, your duty is to withdraw and no longer act for that client.

Hopefully this column has provided a bit of helpful advice if some secret messages come into your office one day.

LAND TITLE E-FILING DEVELOPMENTS

As we know, phase 2 of the mandatory electronic filing (as opposed to hard copy paper filing) of certain land title documents will start May 7, 2012 pursuant to s. 168.111 of the *Land Title Act*.

The schedule for the required electronic filing of forms and associated applications is as follows:

July 1, 2011
Posting plan and associated application and certificate

continued on page 20

Services for lawyers

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky** to discuss practice management issues, with an emphasis on technology, strategic planning, finance, productivity and career satisfaction.
email: daveb@lsbc.org tel: 604.605.5331 or 1.800.903.5300.

Practice and ethics advice – Contact **Barbara Buchanan**, **Jack Olsen** or **Warren Wilson**, QC to discuss ethical issues, interpretation of the *Professional Conduct Handbook* or matters for referral to the Ethics Committee. Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships.
Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org.
Contact Jack at: tel: 604.443.5711 or 1.800.903.5300 email: jolsen@lsbc.org.
Contact Warren at: tel. 604.697.5837 or 1.800.903.5300 email: wwilson@lsbc.org.

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

◆

PPC Canada EAP Services – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families.
tel: 604.431.8200 or 1.800.663.9099.

◆

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers. tel: 604.685.2171 or 1.888.685.2171.

◆

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra**: tel: 604.687.2344 email: achopra1@novuscom.net.

Practice Tips ... from page 19

January 16, 2012
Form A – Freehold Transfer of Fee Simple
Form B – Mortgage
Form C – Charge
Form C – Release

May 7, 2012
Claim of Builders Lien
Form A – Freehold Transfer of Life Estate, Determinable Fee Simple and Fee Simple on Condition
Form 17 (including supporting documents)
Strata Plan not requiring local government or provincial approving officer's approval
Forms and applications under the *Strata Property Act*, S.B.C. 1998, c.143
Reference, Explanatory or Statutory Right of Way Plan filed in support of a Form C – Charge or Form C – Release
Statutory Right of Way Plans not accompanying a Form C – Charge
Reference Plan pursuant to s. 100 of the Act
Public Official Plan

There are only a few exemptions from this requirement to e-file that are applicable to lawyers:

Phase 1 (July 1, 2011 to May 6, 2012)

- Any land title form that is submitted as part of a package where the package includes one or more other documents, such as a survey plan requiring local government or provincial approving officer approval by the Land Title Office, are not required to be filed electronically.

Phase 2 (effective May 7, 2012)

- Applications requiring preliminary inspection, specifically:
  - Caveat (*Land Title Act*, s. 282)
  - Certificate of Pending Litigation (*Land Title Act*, ss. 215-217, 252-258)
  - Provincial Expropriations (*Expropriations Act*, ss. 6(1), 16(2), 18(5), 19(2) and 23(1))
  - Injunction (*Land Title Act*, s. 284)
  - Provisional Indefeasible Title (*Land Title Act*, s. 193)
  - Securities Act Charge (*Land Title Act*, s. 151)
- A hard copy Land Title Form, Posting Plan or Claim of Builders Lien that has been executed prior to the effective date of a requirement to electronically file under s. 168.111(1)(b).

What can you do to get ready for e-filing?

The Land Title Survey Authority and BC Online offer training online or at your office as well as ongoing telephone support. This can be arranged by calling 1.800.663.6102 or 250.953.8200.

What do you need?

Go to the Land Title Survey Authority website at **https://help.ltsa.ca/cms/getting-started** for what you need to get started with electronic filing, including:

- setting up a BC OnLine account, with access to land title applications;
- computer system requirements;
- scanner requirements;
- setting up folders for your electronic filing system (EFS) files;
- downloading electronic form templates and accessing EFS;
- obtaining a digital certificate registered with Juricert (juricert.com);
- Adobe Acrobat 9 or 10 (standard or professional edition);

  (Note that LTSA recommends that users of Adobe Acrobat 8 purchase an upgraded version within the next few months, as Adobe Systems has discontinued support for version 8. Current LTSA electronic forms will support Acrobat 8 until newer versions of these forms are introduced by the LTSA, tentatively in Spring 2012.
- setting up electronic payment (separate from your BC OnLine electronic funds transfer agreement).

There are a number of online video tutorials on how to get started with EFS on the Land Title Survey Authority website (https://help.ltsa.ca/cms), such as:

- Get a Digital Certificate from Juricert
- Set up the Digital Certificate in Adobe Acrobat
- Submit a Package
- Create or Contribute to an Electronic Meet
- Authorized Electronic Payment

What do you do with the signed documents?

Many people wonder what to do with the signed land title documents.

Section 168.51 of the *Land Title Act* states:

> **Production of evidence**
>
> **168.51** The registrar may, before the registration or cancellation of an estate, interest or claim evidenced by an electronic instrument, require that an applicant do one or more of the following:
>
> (a) produce for inspection
>
> (i) the executed true copy of the electronic instrument referred to in section 168.3 (3) (a),
>
> (ii) a supporting document referred to in section 168.41 or a true copy of a supporting document, and
>
> (iii) the executed true copy of the electronic instrument referred to in section 168.3 (3.1);
>
> (b) produce evidence, satisfactory to the registrar, to verify that a transferor
>
> (i) if Part 5 applies in relation to an instrument, executed a true copy of the electronic instrument in the presence of an officer and made the applicable acknowledgement under that Part, and
>
> (ii) if Part 5 does not apply in relation to an instrument, executed a true copy of the electronic instrument in compliance with the applicable enactment;
>
> (c) produce evidence, satisfactory to the registrar, to verify that the requirements established under section 168.3 (3.2) are met.

Once the time period has passed by under s. 168.51 (i.e. the estate, interest or claim has become fully registered or cancelled), there is no need to retain the "executed true copy" (the originally signed document). It is recommended that you scan or copy this executed true copy and send the originally signed document to your client for their records.❖

Credentials hearing

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

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

WUQIANG (ANTHONY) ZHOU

Vancouver, BC
Called to the bar: May 20, 1994
Ceased membership: December 31, 2008
Hearing (application for reinstatement): October 28, 2011
Panel: David Mossop, QC, Chair, Rita Andreone and Leon Getz, QC
Reports issued: November 3 (2011 LSBC 32) and November 4, 2011 (2011 LSBC 33)
Counsel: Henry C. Wood, QC for the Law Society and Maureen Baird for Wuqiang (Anthony) Zhou

In 2000, when Wuqiang (Anthony) Zhou set out as a sole practitioner, he had to learn basic law firm accounting and relied primarily on his wife for bookkeeping services. She had had little bookkeeper training, and performed these unpaid services in addition to having primary responsibility for managing the household and raising their two daughters.

Up until 2006, when the Law Society rules removed the annual trust account audit requirement, Zhou's trust accounts were audited annually, and the auditors noted no exceptions after his first year of sole practice.

In June 2008, the Law Society conducted a compliance audit of Zhou's practice and found an unacceptable level of compliance with the trust accounting rules.

Zhou admitted to several breaches of the accounting rules. He cooperated fully and immediately made changes, such as retaining a bookkeeper experienced in law firm accounting.

In December 2008, Zhou ceased to practise and the matter of his breaches of accounting rules were placed on his member file. He applied for reinstatement in April 2011.

In the panel's view, no material issues concerning Zhou's good character and repute and his fitness to be reinstated as a lawyer are raised by the trust accounting issues. While the compliance audit disclosed an overall unacceptable level of accounting rule compliance, Zhou took immediate steps to address the deficiencies in processes and systems. The panel was satisfied that Zhou now understands the importance of meticulous compliance with the accounting rules. In addition, the panel was impressed that he acknowledged that it was best that he practise at a firm that can handle all the administrative duties, rather than attempting to do so on his own as a sole practitioner.

Upon consideration of all of the evidence, the panel ordered that Zhou be reinstated on the condition that he:

1. practise only in the capacity of an employee at a firm and under the supervision of another lawyer;
2. not handle any trust transactions, trust money, or be responsible for documenting trust transactions;
3. not assume responsibility for any bookkeeping or the creation or maintaining of financial records normally handled by a law firm bookkeeper; and
4. report to the Law Society any change in his employment situation that goes to the nature of these conditions.

Zhou received considerable support from a former colleague who attested to his good character, moral integrity and keen awareness of and scrupulous adherence to the standards of professional conduct. This former colleague invited Zhou to join his firm as an associate to work under his supervision.❖

Conduct reviews

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

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

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

CR #2011 – 20

This conduct review addressed the lawyer's failure to fully and effectively communicate with his clients about his legal bill, in which he charged a premium, as well as his offensive language in a letter to the clients after they disputed this bill. The lawyer issued a bill for a $25,000 premium, when he had no written retainer agreement and had not previ-

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Conduct reviews ... from page 21

ously discussed premium billing with the clients. He sent the bill to the clients with a letter asking them to let him know their "thoughts" about it. He then transferred the funds from trust a few days later, without adhering to the 30-day billing cycle he had previously followed. A fee review occurred. The subcommittee pointed out that the lawyer's letter to the clients was unprofessional due to his use of profanity and the disrespectful comments he made about opposing counsel to justify the premium. The lawyer explained that he intended to be informal and down to earth. The subcommittee reminded him that lawyers must maintain a degree of objectivity and formality in client relations to ensure a professional tone.

CR #2011-21

The conduct review was ordered to discuss the lawyer's breach of undertaking, which occurred when he was acting for both the property owner and the third mortgagee in a complicated foreclosure. A vesting order was granted, which was not consistent with the terms of the undertaking to which the lawyer was bound, and the lawyer simply assumed that, because of that inconsistency, the undertakings were mutually varied. He did not discuss or confirm variation of the undertaking with the lawyer to whom it was given. The situation was aggravated by neither lawyer taking reasonable steps to conclude the matter. The subcommittee reminded the lawyer that it is important to scrupulously comply with undertakings and to ensure that any variation is confirmed in writing.

CR #2011-22

The subcommittee addressed the failure of a lawyer to promptly report an apparent breach of undertaking by another lawyer in accordance with Chapter 13 of the *Professional Conduct Handbook*, his failure to provide complete information when he did report, and his failure to respond to the Law Society. There were a number of relevant facts that he did not include in his report to the Law Society about the other lawyer's breach of undertaking, which was compounded by the fact that the lawyer had failed to print off and file all of the email correspondence between them. The lawyer stated this matter had caused him to change his file management practice to retain all emails.

CR #2011-23

The conduct review arose from a complaint by a former client. The lawyer was retained in a debt action and he believed his retainer was concluded when he filed the defence. However, he did not confirm the scope of the retainer with his client nor did he remove himself as counsel of record. He received a summary trial application, but did not take adequate steps to protect the client's interests, either by forwarding the summary trial application materials to the client or otherwise speaking directly to the client. He also did not respond to opposing counsel. The lawyer accepted that he had failed to provide a reasonable quality of service as required under Chapter 3 of the *Professional Conduct Handbook*. The subcommittee encouraged the lawyer to use written retainer agreements, particularly when engaged for a limited purpose. It also reminded him that, while counsel of record, he had an obligation to respond to opposing counsel, and that he should have taken timely steps to remove himself as counsel of record.

CR #2011-24

The conduct review addressed a lawyer's breach of Chapter 5, Rule 15 of the *Professional Conduct Handbook,* when she received a privileged email between the estranged wife of her client and the wife's counsel. This rule obliged the lawyer to return the privileged email unread and uncopied to the party to whom it belonged, and to notify that party of her knowledge of the contents and of any intended use by her. Instead, she read the email and attempted to use it at a judicial case conference. The lawyer admitted she was unaware of her obligation under the *Handbook* at the time. She apologized to the wife of her client at the conduct review, but acknowledged she should have apologized earlier.

CR #2011-25

Two issues were addressed in this conduct review. The first related to a lawyer improperly affixing his electronic signature to a land title document, when he did not have a true copy in his possession, contrary to the requirements of s. 168.3 of the *Land Title Act*. The electronic document stated that the signatures of the mortgagor and the guarantor were certified by the same person, when the "paper version" showed that the signatures were certified by different persons. The second issue related to the same transaction, in which the lawyer acted for the purchaser and the first mortgagee. On closing, the purchasers had to increase the amount of the first mortgage. The lawyer had previously sent a copy of the executed first mortgage to counsel for the second mortgagee, but did not advise him that the amount of the first mortgage had increased. The lawyer agreed that, in the circumstances, counsel for the second mortgagee reasonably expected to be told of any material change to the first mortgage and that common courtesy dictated that he should have told counsel of this change.

CR #2011-26

This conduct review arose from a lawyer's rude comment and unprofessional comments to the unrepresented opposing party in matrimonial litigation. The lawyer made comments to the opposing party that this party was "silly," an "ass," and a "wife-beater," and also added some words commonly recognized as expletives. The opposing party made a complaint to the Law Society, and in the course of the investigation, the lawyer responded by setting out the wording he should have used, which contained the same rude inferences but expressed in a more "erudite" manner. The subcommittee stated that it did not view that response as clever and emphasized that his conduct was unprofessional and the lawyer must learn to "fly above the action" between the parties and not become part of it.

CR #2011-27

The conduct review addressed a lawyer's conduct in entering into a contingency fee agreement that did not contain all the material terms, and his conduct in acting contrary to its terms. The lawyer agreed to act on a personal injury case, in circumstances in which the client had previously retained other lawyers. The lawyer asserted that he agreed to the retainer only on the express terms that the client would accept a reasonable offer from ICBC and that he would withdraw his services if the client was abusive to him or to staff. Further, after the client refused a reasonable offer to settle, the lawyer demanded the client pay all outstanding disbursements as a condition of proceeding to trial, although this term was not included in the contingency fee agreement. The subcommittee reminded the lawyer that the terms of a contingency fee agreement must be in writing and be clear. The agreement is a contract, but the lawyer has fiduciary obligations to his client and must ensure the client fully understands its terms. The lawyer also made unprofessional and disrespectful comments to his client, including about his associate, which in hindsight

he agreed were "improper and outrageous" and the result of him acting rashly.

CR #2011-28

The conduct review arose from a breach of the "no cash" rule. A lawyer received cash of $20,000 in two instalments as a retainer for a trial. The trial did not occur and the lawyer refunded $13,000 the money by trust cheque, contrary to Rule 3-51.1(3.2). The lawyer misinterpreted the rule. The subcommittee reviewed the rule with him, as well as the importance of this rule to avoid any involvement in money laundering and to preserve the independence of the profession.

CR #2011-29

The conduct review arose from a lawyer's conduct in his handling of his client's retainer funds and the steps he took to recover payment of his bill. The lawyer acted for his client, who was a long-standing friend, to prepare a mortgage to secure a loan made by the client to a third-party mortgagor. When the third party defaulted, the client retained the lawyer to collect the outstanding balance and provided a retainer. The lawyer deposited these funds directly into his general account, rather than his trust account. This conduct was contrary to Rules 3-51(1) and 3-63(3) because, although he had performed most of the work to earn those funds, he had not issued a bill. The debt matter was settled, and the lawyer deducted his fees and disbursements from the settlement funds and sent the balance to the client, without issuing a bill or otherwise providing an accounting, which was contrary to Rule 3-57 and s. 69 of the *Legal Profession Act*. The matter escalated when counsel for the mortgagor erroneously suggested the lawyer had breached an undertaking by disbursing the settlement funds without having an executed discharge. The lawyer was unable to contact the client to return the settlement funds so, in a "panicked" attempt to "fix" the matter, he commenced an action against the client for the return of the funds and registered a certificate of pending litigation against the client's property. The lawyer acknowledged his handling of funds was contrary to the accounting rules. The subcommittee recommended that he create a support network of other lawyers with whom to discuss practice issues. The lawyer was also referred to Practice Standards.

CR #2011-30

The conduct review addressed a lawyer's conflict of interest, which resulted from a loan of funds to a corporate client under a secured loan agreement, without meeting the requirements of Chapter 7, Rule 5 of the *Professional Conduct Handbook*. The *Handbook* prohibits a lawyer from acquiring a financial interest in a client of the firm, unless the acquisition is effected on or through the facilities of a stock exchange and the client acknowledges in writing that the lawyer is not representing the client and will not rely on any advice from the lawyer in the matter and, further, the client is independently represented in the transaction. None of these requirements were met. The lawyer acknowledged that he acted in a position of conflict between his own interests and those of his client and that he had not met the standards of ethical conduct.

CR #2011-31

The conduct review arose from the lawyer's conduct in charging fees on a contingency basis, when his client had not signed a written contingent fee agreement as required by Part 8 of the Law Society Rules. The lawyer sent a contingent fee agreement to the client, but he did not sign it. When the lawyer settled the matter, he met with the client to discuss the fee and believed the client had agreed to his proposed fee; however, the lawyer did not take any notes and the client disputed that he had agreed. The situation was further complicated by the client's vulnerability arising from a brain injury. Although the client was competent, the lawyer should have taken more care both to ensure the client understood the proposed fee and to properly document such discussions through notes and confirming letters to the client.

CR #2011-32

The conduct review addressed a lawyer's apparent failure to provide a reasonable quality of service and her failure to respond to the Law Society after the client complained. The lawyer did not provide all relevant information during the investigation, but she did bring a volume of materials to the conduct review itself. Those materials showed some of the complainant's concerns were not justified, but the subcommittee pointed out that the matter might not have proceeded as far as it did if she had properly responded during the investigation, as she was required to do. The subcommittee recommended that the lawyer proactively manage client expectations by clearly communicating to clients what she can reasonably achieve, both at the outset in a written retainer letter and then throughout the course of the matter. It also recommended that she document that advice properly, through letters to the client or detailed file notes.

CR #2011-33

This lawyer breached Rule 3-51.1 (the no-cash rule), by accepting an aggregate of $23,000 in cash intended as a retainer, then disbursing some of those funds by trust cheque in settlement of the client's matter. The subcommittee reminded the lawyer that, although there is an exception in the no-cash rule to receive cash of $7,500 or more for professional fees, disbursements and expenses, it is not permissible to then use those funds received in cash for a different purpose. It is of fundamental importance that lawyers adhere to this rule so the profession continues to have the confidence of governments, both inside and outside Canada, to allow lawyers to continue to be exempted from the onerous reporting requirements for cash transactions.

CR #2011-34

The conduct review arose from a lawyer's improper handling of retainers received from clients, which was identified during a compliance audit. The lawyer primarily practised in criminal defence. He billed clients on a fixed fee basis and occasionally provided the flat fee bill prior to completing all of the work, then deposited the retainer to his general account. This practice is contrary to Rule 3-56, regardless of whether the fee is a "flat fee," as the funds must be held in trust until the services are completed. After this breach was identified in the audit, the lawyer took the Small Firm Practice Course and arranged for his support staff to complete the Law Office Management 101 course offered by the Law Courts Centre for Legal Education. He also arranged for his accountant to review his office accounting procedures to ensure compliance with the Law Society Rules.

CR #2011-35

The conduct review addressed a lawyer's responsibilities to his clients in a joint retainer situation, and to their respective counsel. He was jointly retained by an estranged husband and wife on the sale of their matrimonial property. Each of them was represented by counsel on the matrimonial

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Discipline digest

PLEASE FIND SUMMARIES with respect to:

- Christopher John Van Twest
- Donald Douglas McLellan
- Douglas Warren Welder
- Gerhard Ernst Schauble
- Allan Edward Lester
- Lawyer 13

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

CHRISTOPHER JOHN VAN TWEST

Vancouver, BC
Called to the bar: September 14, 1976
Discipline hearing: December 21, 2010
Panel: *Majority decision:* **Glen Ridgway, QC, Chair and Alan M. Ross;** *Minority decision*: **Kenneth Walker**
Reports issued: March 10, 2011 (2011 LSBC 09) and July 26, 2011 (2011 LSBC 20)
Counsel: Maureen Boyd for the Law Society and Ian Aikenhead, QC for Christopher John Van Twest

FACTS

In March 2008, Christopher John Van Twest represented two clients in the purchase of property. He had acted for these clients in other legal matters since the late 1970s.

The clients gave Van Twest a $102,000 cheque plus $9,000 in cash for the purchase of the property. The funds were deposited to a trust account; however, Van Twest did not provide a receipt to the clients for the cash received. The funds were subsequently used to complete the purchase.

Following a compliance audit of Van Twest's practice in October 2008, the Law Society sent a letter to Van Twest on February 9, 2009 regarding the receipt of cash and the failure to maintain a cash receipt book. Van Twest replied on March 20 indicating that he had been under the impression that the limit for cash transactions was $10,000. He also advised that he would maintain a cash receipt book in future.

On March 27, one week after his letter, Van Twest completed his trust report for 2008 and represented to the Law Society that his practice had not received cash in excess of $7,500, and that his practice maintained a cash receipt book. He also referred to his March 20 letter, which contained the correct information, in the trust report.

The Law Society issued a citation asserting that Van Twest:

- breached the "no cash" rule (allegation 1);
- provided an incorrect answer on his trust report regarding receipt of cash of $7,500 or more (allegation 2(a)); and
- provided an incorrect answer on his trust report about maintaining a cash receipt book (allegation 2(b)).

DETERMINATION

The panel accepted Van Twest's admission that his acceptance of cash in excess of $7,500 constituted a breach of the rules. The panel considered the fact that the clients had been known to him for a long time and there was no suggestion of criminal activity on the part of the clients.

Van Twest also admitted the underlying facts in allegation 2(a) and (b); however he submitted that his conduct constituted a simple negligent, non-culpable mistake and was, at worst, a breach of the rules.

The panel found that, although the importance of the trust report made the error significant, the gravity was outweighed by the other factors and did not constitute professional misconduct. However, there was disagreement among the panel about whether this error constituted a breach of the rules.

Majority (Ridgway, Ross)

The majority found that Van Twest's incorrect answers to questions on the Trust Report were not culpable mistakes; however, his error was not insignificant, and it followed that his conduct constituted a breach of the rules.

Minority (Walker)

The minority disagreed that the incorrect answers on the trust report constituted a breach of the rules. Although Van Twest had answered the questions and momentarily erred, he had included the letter that contained the accurate information with the trust report. The minority stated that there was no harm caused to the Law Society or the public by the inconsistency of information in the trust report.

The minority viewed the improperly answered questions as minor mistakes and not a breach of the rules and, therefore, would dismiss allegations 2(a) and (b).

DISCIPLINARY ACTION

Van Twest admitted, and the panel agreed, that he had accepted a cash deposit of $7,500 or more, which constituted a breach of the rules. The panel further found that Van Twest answered two questions incorrectly on his trust report, and the majority concluded that this conduct constituted a breach of the rules.

The panel ordered that Van Twest pay:

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

DONALD DOUGLAS MCLELLAN

New Westminster, BC
Called to the bar: May 17, 1971
Discipline hearing: June 9, 2011
Panel: Kenneth Walker, Chair, Benjimen Meisner and Gordon Turriff, QC
Report issued: August 23, 2011 (2011 LSBC 23)
Counsel: Carolyn Gulabsingh and Maureen Boyd for the Law Society and Richard Fernyhough for Donald Douglas McLellan

FACTS

Donald Douglas McLellan was retained to probate an estate in 2000. The estate was efficiently probated and distributed by 2002. During this time, the executrix came to believe that the son (and financial advisor) of the

deceased had dissipated the assets of the estate. In particular, she was concerned that the son had sold and purchased stocks without authorization for the purpose of generating commission income. She believed the loss was substantial and instructed McLellan to recover these funds.

McLellan investigated and determined the amount of the loss to be about $20,000. He filed a claim against the son and his employer investment house in 2002 and renewed the claim in 2003. There were problems locating the defendant son for purposes of service of the claim. When he was eventually found, he notionally responded by filing an Appearance in October 2003.

The client inquired several times about the progress of the case. McLellan failed to respond to his client and failed to advise her that he believed there was no practical reason to pursue the claim or incur further costs.

In 2009, the client complained to the Law Society.

ADMISSION AND DISCIPLINARY ACTION

McLellan admitted that between 2005 and 2009 he failed to respond to his client's numerous inquiries and that he failed to serve his client in a conscientious, diligent and efficient manner as expected of a competent lawyer. He admitted that his conduct constituted professional misconduct.

The panel noted that, while the client showed loyalty to McLellan as her lawyer, McLellan failed to reciprocate with the loyalty and service that he owed her.

The panel considered a number of factors in determining disciplinary action. McLellan had been a lawyer for 40 years. He had been disciplined before for two breaches of undertaking (one conduct review and one proven citation) and for acting in a conflict of interest (conduct review).

During the period of time he failed to contact his client, McLellan was suffering from difficult personal circumstances and dealing with staffing problems in his office.

There was no personal gain from McLellan's conduct and, in fact, it appeared to the panel that he was trying to save his client from paying more fees.

McLellan was apologetic and remorseful. Since this complaint, he reviewed his files to ensure all were current and no similar non-responsive correspondence existed in his files. He also took counselling sessions to address personal issues and restricted his practice to areas within his experience.

The panel accepted his admission and ordered that he pay:

1. a $5,000 fine; and
2. $3,000 in costs.

DOUGLAS WARREN WELDER

Disciplinary action hearing: By written submission
Panel: Leon Getz, QC, Chair, Robert Brun, QC and Alan Ross
Report issued: August 30, 2011 (2011 LSBC 25)
Counsel: Maureen Boyd for the Law Society and Douglas Warren Welder on his own behalf

BACKGROUND

In the decision of the hearing panel and the Benchers on review (facts and verdict: 2010 LSBC 05; Bencher review: 2011 LSBC 06; discipline digest: Spring 2011 *Benchers' Bulletin*), Douglas Warren Welder was found to have committed professional misconduct for: 1) failing to respond to questions from the Law Society, and 2) not responding to a Law Society request for details of trust and general accounts.

The Benchers referred the second matter back to the hearing panel to consider submissions on proposed disciplinary action from the Law Society and Welder. Welder provided his written submissions well after the date directed by the panel.

DISCIPLINARY ACTION

Welder contended that his conduct was serious and that, because he saw this incident as a "one-off" event, there was no need for any "remediation." The panel concluded that Welder did not acknowledge his own misconduct and noted that earlier attempts at remediation had been unsuccessful and there were no mitigating circumstances. This was but the latest in a continuing pattern of misconduct.

Welder submitted that the Law Society's proposed disciplinary action of a suspension would be very severe given the fact that he was a sole practitioner. The panel noted that Welder had been suspended twice in the past and that it was completely within his power to have cooperated with the Law Society's audit and investigation.

The panel found that Welder's grave conduct, both during the audit and the later investigation, demonstrated a deliberate and prolonged failure or refusal to cooperate with the Law Society's investigators. The Law Society was forced to expend significant resources pursuing an investigation instead of completing an audit that should have been straightforward.

The panel ordered that Welder:

1. be suspended for 45 days; and
2. pay $3,000 in costs.

GERHARD ERNST SCHAUBLE

Kelowna, BC
Called to the bar: July 21, 1989 (BC); June 19, 1981 (Alberta)
Retired membership: April 2011
Discipline hearing: June 27, 2011
Panel: David Renwick, QC, Chair, Nancy Merrill and David Mossop, QC
Report issued: September 7, 2011 (2011 LSBC 27)
Counsel: Gerald Cuttler for the Law Society and Gerhard Ernst Schauble appearing on his own behalf

FACTS

In 2005, Gerhard Ernst Schauble jointly represented two clients (Client E and Client K) in the sale of their jointly owned real property. Schauble did not advise each client that no information received from one of them as part of the joint representation could be treated as confidential as between them. Also, he purported to assist them as a mediator to resolve a conflict that had arisen between them without obtaining the informed consent of Client K.

In agreeing to act as a mediator for the clients in their dispute over the division of sale proceeds, Schauble made it difficult to determine whether he was acting as a lawyer or a mediator. He failed to make adequate

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inquiry to determine whether the dispute was a family law mediation. He knew that he had previously acted for both clients and that they were cohabiting at the time of the sale. He initially received instructions that there would be an equal division of the proceeds of sale, but division of the proceeds became an issue from his first meeting with the clients.

Schauble preferred the interests of Client E over Client K by entering into an agreement with him to reduce the fees payable by him pursuant to a Retainer Agreement for Negotiation of Property Dispute. He agreed to keep the terms of his fee agreement with Client E confidential, contrary to his obligation to disclose all material information to Client K.

When the sale completed on September 30, 2005, Schauble received the sale proceeds of $451,390.31 in trust. He failed to provide an accurate account in writing to Client K of the disbursement of those funds to her.

Client K made a complaint about Schauble to the Law Society in July 2006. In October 2006, an appointment to review Schauble's account was filed on her behalf.

In November 2009 Schauble sent a without prejudice letter to Client K advising her that a clerical error was made in calculating her account and refund to her the sum of $15,380.67. In June 2010, he further reduced his fees to $2,500 plus HST. The assessment of his account was discontinued and he reimbursed the client a further sum of $8,866.49.

ADMISSION AND DISCIPLINARY ACTION

Schauble conditionally admitted, and the panel accepted, that his conduct constituted professional misconducted.

The panel determined that the mitigating factor in this case was that Schauble repaid money to his client.

The panel also noted that Schauble was previously cited for knowingly or intentionally misappropriating funds. In October 2009, a panel ordered that he be suspended for three months and pay costs in the amount of $32,000.

In keeping with the principles of progressive discipline, the panel ordered that Schauble:

1. be suspended for four months, to be served at such time as he becomes a practising lawyer; and
2. pay $10,000 in costs.

ALLAN EDWARD LESTER

Burnaby, BC
Called to the bar: July 12, 1983
Discipline hearing: July 28, 2011
Panel: Joost Blom, QC, Chair, Patricia Bond and Peter Lloyd
Report issued: September 14, 2011 (2011 LSBC 28)
Counsel: Carolyn Gulabsingh for the Law Society and no one appearing on behalf of Allan Edward Lester

FACTS

Operating a trust account while insolvent

Allan Edward Lester made an assignment in bankruptcy in December 2008 and advised the Law Society by letter in April 2009. Law Society Rule 3-45 sets out the financial responsibilities of an insolvent lawyer. In this case, there was evidence of more than 200 transactions in Lester's pooled trust accounts between May 2009 and September 2010. All of the transactions were effected during his insolvency without the approval of the Law Society and without a second signatory, in contravention of the rule.

The Law Society communicated extensively with Lester concerning his obligations, including a direct discussion upon completion of an October 2010 compliance audit summary report. Lester acknowledged in correspondence with the Law Society that he operated a trust account while insolvent and he continued to do so after being specifically informed that it was in contravention of Law Society rules.

Operating a trust account while suspended

Lester was administratively suspended from practice for failure to file a trust report for the period ending December 31, 2009. He was served with notice of the suspension on June 1, 2010.

On June 8, 2010, Lester was advised by the Law Society that he could not practise law while suspended and was precluded from dealing with any trust funds. He was reinstated to membership on September 13, 2010.

While suspended from practice, Lester personally signed trust cheques on five occasions. He admitted to the Law Society that he signed trust cheques while he was not a practising lawyer, and the evidence showed that he was at all relevant times aware of the Law Society rules.

DETERMINATION

At the time of the hearing, Lester was suspended from practice for failing to file a trust report. On the morning of the hearing, he left a message that he was ill and would not be in attendance and requested a copy of the panel's decision.

The panel determined that a finding of professional misconduct was warranted because Lester's breaches of the rules continued over an extended period of time during which he was repeatedly reminded of the rules.

DISCIPLINARY ACTION

The panel ordered that Lester:

1. be reprimanded;
2. comply with Law Society Rules 3-45(4) and 3-56(2)(c);
3. provide monthly to the Law Society certain accounting records; and
4. pay $1,500 in costs.

LAWYER 13

Discipline hearing: July 21, 2011
Panel: Leon Getz, QC, Chair, Peter Lloyd and Lee Ongman
Report issued: September 21, 2011 (2011 LSBC 30)
Counsel: Maureen Boyd for the Law Society and Henry Wood, QC for Lawyer 13

FACTS

In January 2010, Lawyer 13 was retained by a client in a family law proceeding against her husband. In a letter to the husband's lawyer, dated February 8, Lawyer 13 used the words "odalisque" and "courtesan" to refer to a woman who was alleged to be living in an adulterous relationship with his client's husband. "Odalisque" and "courtesan" are archaic

terms that suggest scandalous or morally reprehensible conduct. Both the husband and his lawyer were offended by this characterization. They viewed this as unnecessarily inflammatory and demanded an immediate apology.

When no apology was received, the husband and his lawyer complained to the Law Society on February 16.

On February 23, Lawyer 13 wrote to the husband's lawyer. He did not apologize; rather, he sought to justify his choice of words and repeated the "insult." On May 12 Lawyer 13 emailed an apology to the Law Society and stated that his words were not intended to be rude or harsh.

DETERMINATION

The panel had to determine whether Lawyer 13's choice of words constituted gross culpable neglect of his duties as a lawyer and a marked departure from conduct the Law Society expects of its members.

The panel considered two possibilities. One was that Lawyer 13 used "odalisque" and "courtesan" with the intention of abusing, insulting and degrading the husband and his lawyer. If that was how the evidence must be understood, it would have been a proper and defensible basis to find that he was guilty of professional misconduct.

The other possibility was that he had no such intention. Lawyer 13 told the panel that he had a long-standing interest in words and language. When composing his February 8 letter to the husband's lawyer, he used an online thesaurus to search for words that were more original and interesting than "mistress." He assumed that, since "odalisque" and "courtesan" were identified as synonyms for "mistress," the three words were perfectly exchangeable.

The panel commented that a lawyer, more than anyone, should be aware of the importance of using words carefully, alive to their nuances. Whether Lawyer 13's failure to do so was the product of naïveté, stupidity or lack of care, it was at least unintelligent and certainly inexcusable. In one sense it might be considered incompetent even if not, perhaps, a form of incompetence that warrants discipline. However, a finding of professional misconduct would be an exercise in prissy censoriousness, and the panel did not believe that the disciplinary powers of the Law Society were conferred upon it for that purpose.

The panel decided that Lawyer 13's conduct did not constitute professional misconduct.

The citation was dismissed. Under Law Society Rule 4-38.1(2), if all counts of a citation are dismissed, the hearing report summary must not identify the respondent without the respondent's consent,

DEEPAK AZAD CHODHA

Vancouver, BC
Called to the bar: February 20, 1998
Discipline hearing: May 12, 2011
Panel: Carol Hickman, QC, Chair, David Mossop, QC and Gregory Petrisor
Report issued: September 23, 2011 (2011 LSBC 31)
Counsel: Jean Whittow, QC for the Law Society and Henry Wood, QC for Deepak Azad Chodha

FACTS

Deepak Azad Chodha represented the sellers in a residential real estate transaction in which the purchasers were taking title to the property subject to a builders lien.

On July 14, the purchaser's lawyer delivered the closing proceeds on Chodha's undertaking to pay sufficient funds to obtain a discharge of the lien, to file the discharge at the land title office and to provide her with a filed copy within 60 days of the completion date.

On September 16, the purchaser's lawyer phoned and told Chodha that the lien had not been resolved; Chodha abruptly ended that call. Between September 18 and 29, the lawyer phoned and faxed Chodha numerous times to explain that he was in breach of his undertaking.

On October 1, the purchaser's lawyer reported Chodha's breach of undertaking to the Law Society.

On October 19, the purchaser's lawyer wrote again to Chodha regarding the undertaking. The next day, another lawyer with Chodha's firm responded and said that the discharge would be filed in the "next day or two." There were several more communications between the two parties before, on November 10, the purchaser's lawyer finally received confirmation that the pending discharge had been finalized.

ADMISSION AND DISCIPLINARY ACTION

Although the panel recognized that Chodha and another lawyer in his firm did, eventually, discharge the builders lien, there was a period of approximately two months during which the breach was outstanding.

Chodha had been the subject of a conduct review arising from the failure to comply with an undertaking in 2008. The panel noted the relatively close proximity in time between that conduct review and this case as an important aggravating factor and determined that any penalty imposed must be meaningful. It must be obvious to the public that undertakings are properly regarded and breaches of undertakings are appropriately dealt with.

While it seemed apparent to the panel that Chodha felt the undertaking imposed upon him was unreasonable and unnecessary in some respects, he accepted the undertaking and failed to comply with it. The panel saw no suggestion of Chodha being unable to fulfill the undertaking by reason of any incapacity and, accordingly, his conduct was culpable in the circumstances.

Chodha admitted that his conduct constituted professional misconduct. The panel accepted his admission and ordered that he pay:

1. a $5,000 fine; and
2. $2,500 in costs.❖

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action. The wife's lawyer had filed a certificate of pending litigation on the property and provided a discharge, on an undertaking that the lawyer hold the balance of the sale proceeds pending an agreement between the parties or a court order. The wife contacted him after the sale and told him that she could not reach her lawyer and he could release the funds to the parties' joint account. The lawyer confirmed those instructions with the husband and took these conversations as sufficient instruction to pay out the sale proceeds. The subcommittee observed that he should not have dealt directly with the clients, when he knew they were each represented by counsel concerning the disposition of the sale proceeds. Further, the lawyer should have used the joint retainer letter from Appendix 6 of the *Professional Conduct Handbook*.❖

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