The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

FEATURE

The Law Society's unauthorized practice program: protecting the public / 12

Conference highlights global nature of issues facing legal profession

by Art Vertlieb, QC

IN APRIL I was honoured to represent the Benchers of the Law Society at the bi-annual conference of the Commonwealth Lawyers' Association, held in Cape Town, South Africa.

The Commonwealth Lawyers Association is an international organization representing 54 countries that exists to promote and maintain the rule of law throughout the Commonwealth by ensuring an independent and efficient legal profession, with the highest standards of ethics and integrity.

Given the common ground of our legal systems, education and practice, Commonwealth lawyers have much to learn from one another. In this case, the theme of the conference was "Common Challenges – Common Solutions," and it could not have been more fitting.

I attended several exceptional presentations on the changing face of the legal profession and the challenges of maintaining access to justice, coming away with a renewed appreciation that lawyers and regulators across the globe are wrestling with the same dilemmas we face in BC.

Among the challenges that were discussed were legal aid funding cutbacks, the need to expand the use of paralegals and other legal service delivery options, and judicial appointment processes that recognize "merit with bias" to ensure diversity of the bench.

The practice of law, though it may be managed at the provincial or state level, is a global profession, driven by international trade and the mobility of people. This creates common experiences and also provides for solutions that can be shared among jurisdictions.

Here in BC, we are learning a great deal from what is happening elsewhere, particularly in the United Kingdom. What's more, others are learning from us, as I am frequently reminded when I attend such conferences.

PARALEGALS ENTHUSIASTIC ABOUT PROVIDING OPTIONS FOR LEGAL SERVICES

Closer to home, I have been speaking to lawyers and paralegals about the new rules that allow supervised designated paralegals to provide legal advice and make limited appearances in family court.

The energy, interest and passion for this opportunity among paralegals are clearly evident, and I am hearing of a number of variations on how the new rules can work in practice.

We plan to profile in future editions of the *Benchers' Bulletin* some of the success stories that are developing as a result of this opportunity. For those who read my letter to the *Vancouver Sun* in April of this year, you will know that the Benchers are urging lawyers to find ways to offer their clients greater price flexibility through the use of paralegals and articled students.

The profession has a long-standing tradition of improving society. We cannot now be slow to respond to the forces that are driving change.

The need is obvious. Just recently, University of Windsor law professor Julie Macfarlane released her report on the experiences of self-represented litigants. Her interviews with over 250 such individuals were disheartening and should cause great concern for the entire profession.

Whether or not the reasons for access to justice barriers are world-wide or local, each of us has a part to play in making much-needed changes. The profession has a long-standing tradition of improving society. We cannot now be slow to respond to the forces that are driving change. Given our proud history and experience, we must be willing to reform our business models and step out of our comfort zone.❖

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 — contact the editor at communications@lsbc.org.

Electronic subscriptions to the *Benchers' Bulletin*, *Insurance Issues* and *Member's Manual* amendments are provided at no cost. Print subscriptions may be ordered for $50 per year ($20 for the newsletters only; $30 for the *Member's Manual* amendments only) by contacting the subscriptions assistant at communications@lsbc.org.

Current and archived issues of the *Bulletin* are published online at lawsociety.bc.ca (see Publications and Resources).

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Aboriginal Lawyers Mentorship Program launched

THE LAW SOCIETY, in collaboration with the Canadian Bar Association, BC Branch's Aboriginal Lawyers' Forum and the Indigenous Bar Association, is set to begin the recruitment phase of the new Aboriginal Lawyers Mentorship Program.

The program is the first of its kind in North American and is geared toward enhancing the retention and advancement of Aboriginal lawyers, who are currently underrepresented in the legal profession in British Columbia. This mentorship program will pair experienced lawyers with junior Aboriginal lawyers who have up to three years of call.

The program will be launched during National Aboriginal Day (June 21) at a reception hosted by the Aboriginal Lawyers' Forum at the River Rock Casino in Richmond, BC.

MENTORS NEEDED – PLEASE VOLUNTEER FOR THIS IMPORTANT INITIATIVE

The Law Society is currently seeking mentors for the program, which aims to provide a broad pool of mentors to meet a wide range of mentorship needs. It is not necessary that mentors have Aboriginal ancestry.

Once a number of mentors are established, junior Aboriginal lawyers who are interested in being mentored will be recruited.

Mentors must possess the following attributes:

- membership in good standing in the Law Society, with no current or previous citations;
- more than three years of call in any jurisdiction in Canada;
- established professional experience;
- effective communication skills;
- sufficient time to commit to supporting a mentee (mentors should aim to meet, in person, by phone or at networking events, at least once per month for one full year);
- an advanced understanding of issues related to the retention of Aboriginal lawyers in British Columbia.

To apply, please download the form from the Law Society website (go to Lawyers > Forms).

For more information, contact Andrea Hilland, Law Society staff lawyer, at ahilland@lsbc.org or 604.443.5727.❖

Law Society Fee Mediation Program offers free mediation to manage fee disputes

Lawyers with mediation experience needed to fill roster of qualified mediators

FOR OVER 30 years, the Law Society's Fee Mediation Program has been an alternative to the assessment of a lawyer's account by a registrar of the Supreme Court.

The program relies on a roster of qualified mediators and the Law Society is currently seeking lawyers who are interested in being a part of this important program.

Complaints about fees are one of the more common inquiries received by the Law Society. While the Society does not have jurisdiction to order a lawyer to reduce or refund legal fees, the Fee Mediation Program is a way to meet the needs of complainants who would otherwise be turned away.

The program is voluntary and non-binding. Either a lawyer or a client can request mediation by submitting an application to the Law Society. If both the lawyer and the client agree to the process, the Society appoints an independent, neutral mediator from its roster.

The range of amounts that can be mediated is a minimum of $1,000 and a maximum of $25,000.

The program is free for participants and up to three hours of mediation time is provided, in person or by telephone. Mediators are currently compensated at $300 plus reasonable expenses, which is funded by the Law Society.

In 2012 and 2013, almost 80% of the fee mediations that were completed resulted in successful resolution.

To ensure the program remains available to anyone who requests it, the Law Society is currently recruiting mediators throughout BC.

Law Society intake officer Lynne Knights has been responsible for the operation and administration of the program almost since its inception. "The lawyers on our roster tell me that mediating is time well spent," she said, "as more often than not they are able to achieve a satisfactory resolution for both the client and lawyer involved in the fee dispute."

Gerald Lecovin, QC has been acting as a Law Society fee mediator for many years. He sees benefit to both the lawyer and client through the Fee Mediation Program. "For clients, there is no cost to participate, and they don't have to incur further legal fees by hiring a new lawyer to represent them," he reasoned. "For both sides, they are able to have the benefit of an experienced, dispassionate lawyer who is currently in practice and so has up-to-date knowledge as to whether the fees are appropriate."

To be a mediator in the program, lawyers must meet the following qualifications:

- member of Mediate BC/Civil Roster;
- minimum of five years related experience.

"Many lawyer-mediators have told me how fulfilling it is to have an opportunity to both serve the public and give back to the profession," said Knights.

If you have questions or would like to be considered for the roster of mediators, please contact Lynne Knights at lknights@lsbc.org. Applicants should send an expression of interest including a summary of their experience with mediation.❖

Momentum for change to improve access to justice continues to build

by Timothy E. McGee

PUTTING PERSONAL POLITICS aside, a positive outcome of the May provincial election is that there will hopefully be continued momentum for initiatives aimed at improving access to justice.

Given several recent announcements and events, it is clear the many stakeholders in our justice system, including government, are moving beyond simply talking about the issues.

In April, a memorandum of understanding was signed by then Minister of Justice and Attorney General Shirley Bond and the three levels of judiciary in BC. The purpose is to describe the roles and responsibilities of the Attorney and the Chief Justices in the administration of the courts. I believe the memorandum demonstrates that a constructive and informed approach to reform is preferred by those who play essential and vital roles in the justice system.

Other government initiatives already underway and identified in the White Paper on Justice Reform are also expected to continue to be developed, presumably with the consultative process that has largely been used by the ministry in recent years.

... it is clear the many stakeholders in our justice system, including government, are moving beyond simply talking about the issues.

Beyond government, the April Canadian Bar Association's Envisioning Equal Justice Summit in Vancouver was very well attended, by lawyers, judges and other parties involved in the justice system throughout Canada and internationally as well. The focus on the drive to realize material and positive progress in improving access to justice was encouraging.

On the ground level, the Law Society continues to develop programs and make changes that are intended to be part of a much larger solution to the access to justice issue.

In addition to continuing to communicate the rule amendments that allow articled students and designated paralegals to provide legal advice, this month we are launching the Aboriginal Lawyers Mentorship Program. Based on work done to date, we expect this to be well received.

As always, any comments or suggestions can be directed to me at ceo@lsbc.org.❖

2012 Report on Performance now available

The Law Society's annual report provides a progress update on the first year of our 2012-2014 Strategic Plan and a review of our regulatory performance. Key performance and bellwether measures evaluate the effectiveness of our programs and are a critical part of our regulatory transparency, intended to inform the public as well as lawyers, the media and government.

The 2012 Report on Performance also includes a summary of reports on the Law Society's regulatory process from the Office of the BC Ombudsperson and the Complainants Review Committee.

Read the 2012 Law Society Report on Performance on our website in Publications > Reports and surveys.❖

Discover your insurance policy

EARLIER THIS YEAR, the Lawyers Insurance Fund announced a new chapter to its book of information about the insurance program and policies. That chapter is now published and available online.

"My Insurance Policy: Questions and answers" uses straightforward language to answer questions such as *What exactly is my basic coverage?*; *What if someone else makes a mistake, not me?*; and *What other claims and activities does my policy cover or exclude?* The material gives lawyers important information ranging from how much the policy pays to how retired lawyers are protected. It explains clearly what's covered and what's not, and details your responsibilities as an insured lawyer.

The actual policy wording, including information relating to specific coverage questions, is still available, and "My Insurance Policy" references both. In addition, it offers a comprehensive, plain language overview of the full policy. It clearly explains the claims and activities the policy covers, as well as those it does not, so that lawyers can take steps either to avoid or manage uncovered risks by, for instance, obtaining other insurance. If you've always wondered exactly what your policy does for you, this is your chance to find out in a user-friendly format.❖

The Law Society and Law Week 2013

ONCE AGAIN, THE Law Society of BC co-sponsored Law Week, an annual Canadian Bar Association event celebrating the signing of the *Canadian Charter of Rights and Freedoms*.

Law Week is an opportunity for the public to learn about the law and the institutions that form the cornerstones of the legal system. The theme of 2013 Law Week was, "Access to justice: the role of public opinion."

This year, the Law Society sponsored the Law Day open houses in Cranbrook, Fort St. John, Kamloops, Nanaimo, North Vancouver and Vancouver. The open houses were held between April 11 and April 27 and included tours of the courthouses, mock trials and a citizenship ceremony.

In addition to sponsoring the open houses, the Law Society also made its senior staff and first vice-president available for media interviews about access to justice and the Law Society's mandate to protect the public interest in the administration of justice.

A number of interviews were conducted with, among others, journalists from *The Province*, CBC, CFAX and *Kamloops Daily News*.❖

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, as others 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 purporting to provide legal services, the Society will investigate and take appropriate action if there is a potential for harm to the public.

From November 14, 2012 to May 31, 2013, the Law Society obtained undertakings and covenants from 11 individuals and businesses not to engage in the practice of law.

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

- Steven Serenas consented to an injunction order that prohibits him from engaging in the practice of law, regardless of whether he does so for or in the expectation of a fee, gain or reward. Serenas is also prohibited from commencing, prosecuting or defending a proceeding in any court. Serenas consented to pay restitution in the amount of $1,000 to the Law Society's witnesses, a fine in the amount of $2,000 and the Law Society's costs. (April 13, 2013)
- Mr. Justice Greyell granted an injunction against Ralph Charles Goodwin, also known as Yuxweletun, and his company Gaia-Watts Enterprises Ltd. d.b.a. Touchstone Committee and Touchstone Committee Law Institute. Goodwin was found to have falsely represented himself as counsel to the court and to other parties. The court also found that Goodwin and his company offered and provided various legal services for a fee, including appearing on behalf of the accused in criminal matters, giving legal advice, drafting legal documents and delivering demand letters. Goodwin and his company are prohibited from referring to themselves as lawyers, counsel, attorney, a law firm, law institute or a law corporation, and any other title that connotes that they are entitled or qualified to engage in the practice law. Goodwin is also prohibited from commencing, prosecuting or defendant a proceeding in any court and must advise the Law Society of any proceeding or legal matter in which he is involved, in any manner whatsoever, other than representing himself as an individual party to a proceeding acting without counsel solely on his own behalf . The Law Society was awarded its costs. (March 28, 2013)❖

Demographics of the profession set to influence the delivery of legal services in the years ahead

IT HAS BEEN suggested that demographics are destiny, and while some take issue with the general proposition, there is little question that age, gender and geography will influence the delivery of legal services by lawyers in British Columbia in the coming decades.

What follows are some observations by the Law Society about the historical demographics of BC's lawyers and where the three factors of age, gender and geography will lead the profession in the future.

AGE

Over 1,100 (or 10.4%) of the 10,700 practising BC lawyers today are 65 years old of age or older, compared to only 380 practising lawyers 65 or older in 2003 (4.2% of total). That's an annual growth rate of 11.2%. There has also been a significant increase in the number of practising lawyers between the ages of 60 and 64, with 486 in 2003 compared with 1,245 in 2013, a 9.9% annual increase.

While 65 years of age has long been seen as a societal norm for retirement, there is evidence the norm has been changing in Canadian society generally. Statistics Canada has reported that there has been "a significant increase in delayed retirement starting in the mid-1990s, which is consistent with the increase in the employment rate of older Canadians starting in the same period.

At the same time, Statistics Canada noted in 2009 that "Canada's population aged 65 and older has more than doubled in the past 35 years to 4.3 million — or 13% of the population — in 2006. Medium-growth scenarios suggest the senior population will grow to 23% in 2031."

The implications of an unprecedented growth in the number of older lawyers continuing to practise remain a matter of speculation. As long ago as 1999, author Marc Galanter, in his article, "Old and in the Way: The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services," predicted that "... many of the much larger number of over-fifty lawyers that will soon populate the profession will be involuntary retirees, under-employed, or otherwise inclined to forsake their practices."

Based on Law Society data, generally lawyers aged 65 and older who continue on in their practices work fewer hours on average than younger members of the profession.

A significantly higher proportion (48.5%) of private practice lawyers 65 years of age or older are sole practitioners compared with the overall proportion in private practice. And in keeping with the greater number of sole practitioners, practising lawyers 65 years of age or older in private practice are much more likely to be practising outside Vancouver and most likely to be found in Victoria, northern Vancouver Island and in the Fraser Valley.

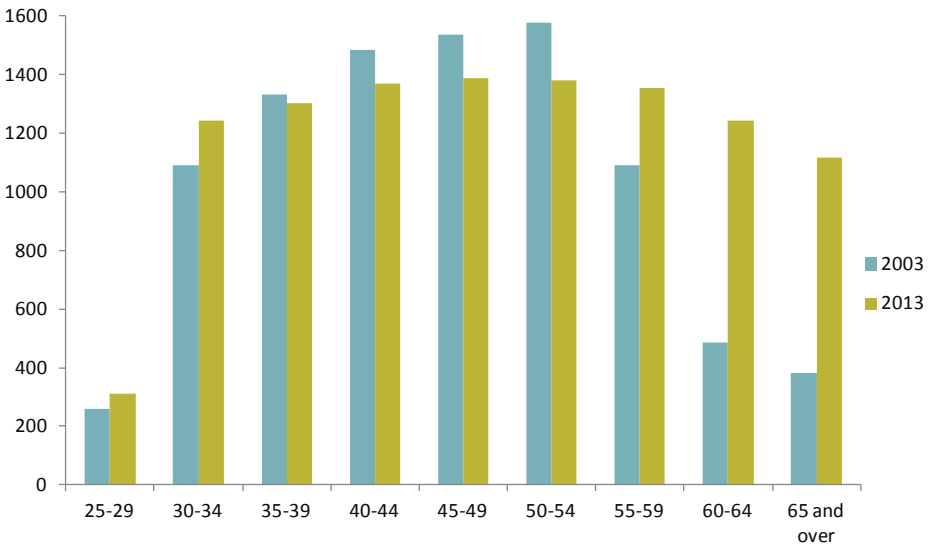
At the same time, there has been very little change in the proportion of practising lawyers under the age of 40. In 2003, about 2,660 or 29% of practising lawyers were under 40 years of age while, at the beginning of this year, 2,850 or about 27% of practising lawyers were under age 40.

As a result, the distribution of practising lawyers across the entire age range is more even today than it has been since the early 1980s.

In addition to lawyers practising longer, the other reason for the more even distribution of practising lawyers across the age range is the number of younger lawyers leaving practice early in their careers. For example, of the lawyers called to the bar in 2008, only 78% are practising lawyers in BC today. And while a slightly higher number of female lawyers from 2008 are now non-practising or have left practice in BC, an almost equal number of male lawyers have also left or are now non-practising.

The overall impact of these two trends is that the net growth rate for practising lawyers in BC over the past several years has been about 2%. This rate is slightly lower than for a number of other provinces and territories. Based on the national statistics compiled by the Federation of Law Societies of Canada, at year end 2005 there were 74,447 practising lawyers in Canada. By the end of 2010, the most recent year for Federation statistics, this number had grown to 83,675 practising lawyers. Over the period, this amounts to a 2.4% annual

Age of practising lawyers in BC – 2003 and 2013



growth rate. Alberta, Ontario and Quebec had annual growth rates at 2.4%, 2.4% and 2.2% respectively. Both Saskatchewan and Manitoba had much higher annual growth rates, at 5.2% and 5.3% respectively, and the Maritime provinces had lower rates, ranging from 0.5% in Prince Edward Island to 1.9% in New Brunswick.

In looking at the overall population of lawyers in BC over the coming decade, the most significant unknown is whether the proportion of the profession over the age of 65 and those approaching that age will continue to grow or whether the upcoming cohort of lawyers approaching 65 years of age will choose not to continue to practise for as long as their older colleagues.

GENDER

In September 1991, the Women in the Legal Profession Subcommittee published its report, *Women in the Legal Profession*. The report noted that, in 1990, 21% of practising lawyers were women and in 1988 (the last year for data at the time) 38.4% of those called to the bar were women.

Today, 36.8% of practising lawyers are women and, of those called to the bar in 2012, 47.5% were women. This latter percentage is a reversal of the trend we have seen in recent years of slightly more women than men being called to the bar.

The report also noted that, as of January 1990, the attrition rate for women called between 1984 and 1988 was 19% while the attrition rate for men was 11%. Today, for those called in the last five years (2008 – 2012), the attrition rate calculated in the same manner is about 19% for women and 14% for men.

Over the long term, the attrition rate for women means that only 31% of lawyers with 10 or more years of practice experience are women, compared with 49.6% of lawyers with less than 10 years experience. For lawyers in private practice, the difference in proportions is even greater. Only 24.7% of lawyers in private practice with 10 or more years of experience are women compared with 48% in private practice with less than 10 years experience.

In 1992, the Gender Bias Committee endorsed the *Women in the Legal Profession* recommendation that the Law Society encourage part-time work and job sharing by providing lower fees and lower insurance premiums for part-time members. The result was the part-time insurance discount that was introduced in 1994.

Since its initial introduction, the number of lawyers claiming the discount has grown to roughly 1,100 each year. Of these, 56% are men and 44% are women.

The Gender Bias Committee also endorsed the recommendation that the Law Society introduce an inactive category of membership with substantially lower fees to permit lawyers to take leaves of absence from the profession and maintain contact with the legal profession. At any given time, women are more likely to choose non-practising status than men, with 57% of the current non-practising lawyers being women.

Despite the measures put in place in the early '90s, women continue to leave practice in greater numbers than men. And, while the increase in the proportion of women lawyers in practice from 21% in 1990 to 37% today is an improvement, the retention of women in the profession remains an unmet challenge.

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GEOGRAPHY

As is generally known, the majority of BC lawyers are located in Metro Vancouver, with over 7,700 practising lawyers located within this region. The city of Vancouver proper has over 5,700 practising lawyers, while the city of Victoria has 960 practising lawyers. Outside these two major urban areas of the province, other cities such as Kelowna, Kamloops, Nanaimo and Prince George account for another 850 lawyers. And, while approximately three million citizens reside in these cities and urban areas, there remain about 1.4 million citizens residing throughout the rest of the province who might not find a lawyer close by.

The overall ratio of lawyers to population for the province is about one lawyer for every 450 residents. Based on the Federation of Law Societies statistics, this compares with about one lawyer for every 460 residents in Alberta and 437 residents in Ontario. The Maritime provinces, Saskatchewan and Manitoba have a lower ratio of lawyers to population with an average of one lawyer for every 600 residents, while Quebec has a higher ratio of about one legal advisor for every 290 residents when we combine the Barreau du Quebec and the Chambre des Notaires.

However, although the ratio of lawyers to population for BC is about one in 450, in Kitimat the ratio is one lawyer for every 4,500 residents and in Merritt it is one lawyer for every 2,400 residents. Similar examples of low ratios of lawyers to population exist throughout the province. Some of the distribution of lawyers is clearly driven by economic activity, and particularly corporate and commercial work, rather than population. Nevertheless, for personal legal services, there are some parts of the province where there are relatively few lawyers in relation to the population.

In addition to there being relatively few lawyers in some areas, there are parts of the province where the lawyer population is considerably older than average. For the province as a whole, the average age of the population of practising lawyers is 48. However, in some BC towns, the average age of the lawyer population is as much as a decade higher than the provincial average.

While the Rural Education and Access to Lawyers (REAL) program, supported by the Canadian Bar Association, BC Branch and the Law Society, is attempting to address a current and projected shortage of lawyers practising in the small communities of British Columbia, relatively few junior lawyers are taking up practice in those communities. Of the nearly 1,400 currently practising lawyers with one to three years of experience, only 53 are in Cariboo, Kamloops and Kootenay counties.

As a result of the aging lawyer demographic in the small and rural communities and the relatively few junior lawyers taking up practice in those communities, it remains likely that, over the next decade, even more small and rural communities will no longer have easy access to a lawyer. The situation is potentially a significant barrier to access to justice and legal services and clearly not one that can be easily resolved. ❖

Recommended terms for law office search warrants

Warrants must include processes that will preserve privilege

FORTUNATELY, THE AUTHORIZATION of a warrant to search a law office occurs only infrequently.

However, it is possible that a criminal investigation of a lawyer's client or client matter or, in rare and unfortunate cases, a matter in which a lawyer has direct involvement, will result in a law office search warrant.

When a lawyer is faced with the presence of the police or investigators at the office, it is not always easy to remember that professional duties must be observed.

In particular, a lawyer's obligation to protect the privilege and confidence of clients persists, even if the lawyer is the target of the search. The lawyer must ensure that the warrant authorizing the search of the law office includes processes that will preserve that privilege.

Some years ago, the Supreme Court of Canada struck down the provisions in the *Criminal Code* that purportedly dealt with the protection of privilege during the search of a law office.

Since then, it has become evident that providing some direction for recommended terms of a warrant to search law offices would assist the profession and the investigating authorities, particularly when the lawyer is the target of the search or closely

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2013 Law and the Media Workshop

FIFTY JOURNALISTS FROM newsrooms across Metro Vancouver attended the 2013 Law and the Media Workshop at the Law Society Building in Vancouver on May 29.

The workshop is an annual Law Society event for news reporters, editors, producers and other newsroom staff. It examines the relationship between journalism, the legal system and the law, in addition to exploring the latest trends and developments in defamation and media law.

The Law Society produces the event with the help of the Jack Webster Foundation and Daniel Burnett of Owen Bird Law Corporation.

The 2013 event was titled, "Major crimes and mega trials: covering police, criminals and the courts in the 21st century." It examined a fictional scenario involving an organized crime boss and underling who were charged with murder.

The 90-minute panel discussion opened with a mock news release from the police department announcing the arrests of the two gangsters, and ended with guilty pleas from both accused. Along the way, it explored the legal pitfalls of news-gathering and reporting, including how best to deal with confidential information, anonymous sources, publication bans, bail hearings and tweeting from the courtroom.

Sitting on the panel were media lawyers Burnett and Michael Skene of Borden Ladner Gervais LLP, Global National news director Doriana Temolo and *The Province* newspaper deputy editor Ros Guggi.

The event was recorded and will be posted to the Law Society's website and YouTube channel.❖

FROM THE LAW FOUNDATION OF BC

Law Foundation thanks Law Society Trust Assurance department

THE LAW FOUNDATION started working with the Law Society's Trust Assurance team in 2008, around the time of the first cycle of compliance audits. Since then, the Foundation has met with Felicia Ciolfitto, the Society's manager of trust regulation, and her team of auditors, at least once a year.

As the profession knows, lawyers and law firms are no longer generally required to submit an accountant's report to the Law Society but, instead, file an annual trust report electronically. This change created an opportunity for the Foundation to work together with the Law Society to ensure that lawyers' pooled trust accounts were set up properly and that interest on those accounts was being remitted to the Law Foundation.

This collaboration, and the diligence of the Trust Assurance auditors in checking to ensure that interest is being paid as it should, has resulted in significant benefits to the public of British Columbia. Since the Society and Foundation started working together in 2008, the Law Foundation has received over $1.1 million in additional trust revenues on accounts that had not been set up properly by the financial institutions.

The Law Foundation, pursuant to the *Legal Profession Act*, receives the interest on lawyers pooled trust accounts and uses it to fund legal aid, legal education, legal research, law reform and law libraries. This additional money has funded a variety of programs and projects that enhance access to justice in British Columbia.

Over the past couple of years, the Law Foundation has been successful in accomplishing another positive change – getting all of the major financial institutions to report their pooled trust account information electronically.

The Law Foundation of BC thanks the Law Society and the Trust Assurance auditors in particular, for their assistance in ensuring that financial institutions are remitting the correct amount of interest to the Law Foundation. This contribution is especially appreciated during these challenging economic times.❖

Law Society to administer accreditation of family law alternative dispute resolution professionals

Online system created to simplify registration

THE GOVERNMENT OF BC is emphasizing the use of family law alternate dispute resolution professionals to diffuse the adversarial nature of family law disputes and to see more family law disputes resolved out of court. Under the *Family Law Act*, the Law Society has been given the authority to regulate and accredit BC lawyers who wish to act as family law mediators, family law arbitrators and/or parenting coordinators.

In anticipation of the new *Family Law Act*, the Family Law Task Force issued a report on September 7, 2012 recommending qualification requirements for lawyers acting as family law mediators, family law arbitrators and/or parenting coordinators.

Lawyers who, as of March 18, 2013 were previously accredited as family law mediators by the Law Society or were acting as family law arbitrators and/or parenting coordinators, will have until January 1, 2014 to meet the new requirements. Lawyers wishing to qualify in the first instance to act as family law mediators, family law arbitrators and/or parenting coordinators must meet the new requirements and receive accreditation.

The Law Society has developed a new online system for lawyers to apply for accreditation to act as family law mediators, family law arbitrators and/or parenting coordinators. Lawyers can record already approved alternate dispute resolution courses or request approval of an unlisted course by logging in through Lawyer Login > Family Law ADR Accreditation – Initial Request.

The task force recommended that, before lawyers are permitted to act as family law mediators, family law arbitrators and/or parenting coordinators, they must satisfy certain training criteria. The criteria include specific alternative dispute resolution skills training, training in recognizing and dealing with family violence, and targeted continuing professional development. In addition, the task force recommended experience requirements for family law arbitrators and parenting coordinators, while eliminating the previous three-year practice experience requirement for family law mediators.

Oversight of family law alternative dispute resolution qualifications now falls under the jurisdiction of the Law Society's Credentials Committee, and the assessment of courses is guided by the substantive minimum requirements set out by the task force in its report.

SCREENING FOR FAMILY VIOLENCE

In addition to the substantive minimum requirements set out for family law mediators, family law arbitrators and parenting coordinators, lawyers wishing to be accredited must have a minimum of 14 hours of training in screening for family violence in order to comply with section 8 of the *Family Law Act*.

Lawyers who do not act as family law mediators, family law arbitrators and/or parenting coordinators, but will be advising a party in relation to a family law dispute, are strongly encouraged to ensure they possess the required skills, knowledge and training to properly discharge their obligation under the *Family Law Act*.

For more information on the minimum substantive requirements, how to submit a request to be accredited and/or the mandatory continuing professional development credits please see the Law Society website at Lawyers > Family law alternate dispute resolution accreditation.❖

Downtown Vancouver articling offers to stay open to August 16

LAW FIRMS WITH an office in the downtown core of Vancouver (west of Carrall Street and north of False Creek) must keep open all offers of articling positions they make this year until 8 am, Friday, August 16. This timeline, set by the Credential Committee under Rule 2-31, applies to offers firms make to second-year law students or first-year law students, but not offers to third-year law students or offers of summer positions (temporary articles).

A law firm may set a deadline of 8 am on August 16 for acceptance of an offer. If the offer is not accepted, the firm can then make a new offer to another student the same day. Law firms may not ask students whether they would accept an offer if an offer were made, as this places students in the very position Rule 2-31 is intended to prevent.

If a lawyer in a downtown Vancouver firm makes an articling offer and later discovers circumstances that mean it must withdraw the offer prior to August 16, the lawyer must receive prior approval from the Credentials Committee. The committee may consider conflicts of interest or other factors that reflect on a student's suitability as an articled student in deciding whether to allow the lawyer to withdraw the offer.

If a law student advises a law firm that he or she has accepted another offer before August 16, the firm can consider its own offer rejected. However, if a lawyer learns from a third party that a student has accepted another offer, the lawyer should first confirm with the student that the offer is no longer open for this reason.

Contact Member Services at 604.605.5311 for further information.❖

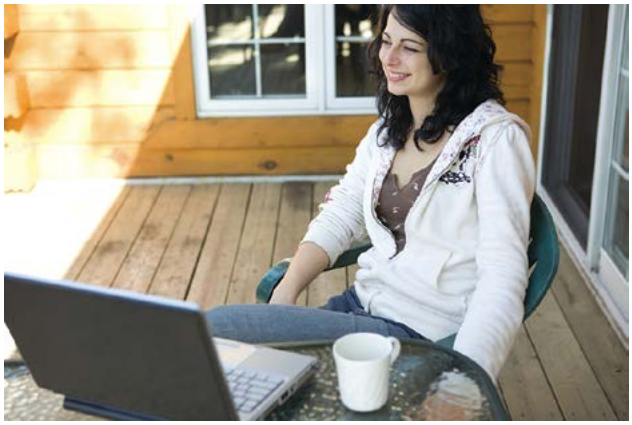
PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Temporary practice in other jurisdictions; unrepresented parties; loans to clients; solicitors' legal opinions; bad cheque scam

ENJOYING YOUR VISIT TO ALBERTA? GREAT – JUST DON'T ADVERTISE IT

YOU'VE RENTED A cabin in Alberta's Kananaskis region and are considering making it a working holiday. You consult with the Law Society of Alberta and are satisfied that you meet all of its requirements to provide legal services on Alberta law as a visiting BC lawyer. You plan to provide some of the services while still in BC (by telephone and email) and some later on while at the cabin. You figure that, while you're there, you may as well advertise your services in the local newspaper.

Wrong! You must not advertise yourself as willing or qualified to accept new clients in Alberta. Similar restrictions apply in other jurisdictions as well. For example, a visiting lawyer from any Canadian province is not permitted to advertise or hold her or himself out as willing to accept new clients in BC. By doing so, the lawyer would establish an economic nexus in BC, would no longer be eligible to practise law on an occasional basis in BC, and would be required to cease doing so immediately.



BC lawyers desiring to temporarily practise in another province should obtain information from that province's law society. The three territories require a special permit. For more information, see the Law Society website (Public > Legal Information and Resources > Law Societies).

BC CODE OBLIGATIONS FOR DEALING WITH UNREPRESENTED PARTIES

Unrepresented parties may choose to self-represent for a number of reasons, including the costs of legal representation or a belief in their own advocacy skills. In difficult family law cases, a party may be angry, aggressive and unreasonable. The party may want to punish your client, and you may become a target as well. What do you do?

The main *BC Code* rule governing a lawyer's relationship with unrepresented parties is rule 7.2-9. Paragraphs 7 to 9 of Appendix C provide additional guidelines for dealing with unrepresented parties in real property transactions. Rule 7.2-9 states:

> **7.2-9** When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:
>
> (a) urge the unrepresented person to obtain independent legal representation;
>
> (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
>
> (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.
>
> Commentary
>
> [1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.

Rule 7.2-9 contains strong wording. Notice that it requires a lawyer to urge (rather than to "suggest") the person to obtain independent legal representation (the Code makes a distinction between independent legal advice and independent legal representation). Take care to ensure that the unrepresented party understands your role. While the rule doesn't require it, I recommend that you confirm the elements of rule 7.2-9 in writing so that there is no misunderstanding. You may also wish to provide information about how you will communicate with the unrepresented party. This is particularly advisable if a party contacts you excessively or in an abusive manner. If you are upset by an offensive comment, keep your cool. Be calm and objective and maintain a professional and courteous tone (rules 7.2-1 and 7.2-4). Answer professional letters and communications with the reasonable promptness that you would accord to a lawyer (rule 7.2-5).

It may increase a client's legal bill to have an unrepresented party on the other side. Explain this to your client. You may even want to include language about this in your retainer letter. While you won't give legal advice to the opposing party, you may have to provide more information than usual to move your client's case along.

THINKING OF MAKING A LOAN TO A CLIENT? READ THE BC CODE

Though lawyers are not prohibited from lending money to clients in all circumstances, in some cases it would not be permitted because of a "conflict of interest." A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted by *BC Code* rule 3.4-1. The Code defines a "conflict of interest" as follows:

> **1.1-1** "conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected *by the lawyer's own interest* or the lawyer's duties to another client, a former client, or a third person. [emphasis added]

A lawyer must consider whether and how the lawyer's professional judgment would be affected by the lawyer's or anyone else's relationship with the client, or interest in

the client or the subject matter of the legal services. Any relationship or interest that affects a lawyer's professional judgment is to be avoided (rule 3.4-26.1).

Rule 3.4-28 requires that a lawyer must not lend money to a client unless:

- the transaction is fair and reasonable;
- the client consents; and
- the client has independent legal representation with respect to the transaction.

Rule 3.4-34 states:

> **3.4-34** If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must
>
> (a) disclose and explain the nature of the conflicting interest to the client;
>
> (b) require that the client receive independent legal representation; and
>
> (c) obtain the client's consent.

Remember that "consent" is a defined term and has a written component (rule 1.1) and that the Code distinguishes between independent legal advice and independent legal representation (rules 3.4-27 and 3-4-27.1).

NEW! SOLICITORS' LEGAL OPINIONS – MATERIALS, GUIDELINES AND SAMPLE LETTERS POSTED TO WEBSITE

Since 1987, a group of lawyers referred to as the Solicitors' Legal Opinion Committee has been reviewing opinion materials and preparing guides for British Columbia. The committee comments on major issues that disrupt legal opinion practice by advising lawyers of such issues and of what the committee considers to be the related general practice in BC. The committee is not a Law Society committee but has made its materials available on our website. Go to Lawyers > Practice Support and Resources > Education and other resources. A contact list of committee members is also provided, if you require further information.

NEW VARIATIONS ON THE BAD CHEQUE SCAM – MERGERS, SURETY BOND SERVICES

The bad cheque scam continues to spin as phony new clients approach lawyers for legal services. Scamsters try to dupe a lawyer into depositing what appears to be a genuine certified cheque, regular cheque, bank draft or money order, into trust. Relying on the strength of the deposit, a lawyer then pays funds out of trust to the "client." After the funds are paid out, the lawyer discovers that the instrument deposited was a well-made fake, leaving the lawyer's trust account short and often overdrawn.

Two variations on the scam that have recently appeared in BC are phony mergers and surety bond service claims. Hiroshi Fujinoo, posing as the president of Denkyosha Co., Ltd., claimed to want legal representation for a merger with another company. John Joseph, purporting to work for Trammel, Harper and Williams Inc., claimed to need representation in relation to surety bond services. The ordinary ruses continue as well, e.g. Akio Wu Ryo (collection on a phony commercial loan), Gary Seiders (collection on a phony personal loan) and Li Wei (collection on a phony overdue business account).

Note that there may be real people with the same names as those in the scams. It may be a coincidence or they may themselves be the victims of a fraudster, but they are not suspected of wrongdoing.

Remember to read the Fraud: Alerts and Risk Management section of the website to learn how to protect yourself from these and other scams. See the bad cheque scams names and documents page for more information on the above scamsters and others, and a wide range of phony documents including loan agreements, promissory notes, bank drafts, identity documents and claims.

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.❖

Your fees at work: Equity Ombudsperson

THE LAW SOCIETY regularly highlights how annual practice fees are spent so that lawyers are aware of services to which they are entitled as well as programs that benefit from Law Society funding.

In this issue, we feature the Law Society's Equity Ombudsperson

Law firms have a duty to foster a professional work environment that promotes equal opportunities and prohibits discriminatory practices. Lawyers or employees who discriminate against or harass others in the firm may face a human rights complaint or a civil action, and these can result in serious damage awards. As well, lawyers may face a complaint to the Law Society.

For law firms, a commitment to equity contributes to a healthy bottom line. Discrimination in the workplace can lead to employee absenteeism, lack of productivity and resignations. If you lose your people, you lose your most valuable resource, including your investment in their recruitment and training. All of this can hurt your firm's overall productivity, reputation and ability to attract new people in the future.

The Law Society provides BC law firms with the services of Equity Ombudsperson Anne Bhanu Chopra to encourage equitable workplace practices and help stop workplace discrimination.

Chopra operates independently of the Law Society and reports only anonymous, statistical data. She is available on a confidential basis to assist law firm employees in resolving concerns over possible discrimination, and help law firms in preventing discrimination and promoting a healthy work environment.

Law firm staff, students, lawyers, managing partners and human resource administrators are welcome to contact the Equity Ombudsperson, as are law students.

Services include confidential discussion, resource information, advice and strategies to meet obligations under the *Human Rights Act* and the *Code of Professional Conduct for British Columbia*, educational seminars and more.

You can reach Anne Bhanu Chopra on her confidential, dedicated telephone line at 604.687.2344 or by email to achopra1@novuscom.net.❖

The Law Society's unauthorized practice program: protecting the public

BRAD FLEWELLING WAS getting desperate in early 2011 when he turned to the internet looking for legal advice.

Flewelling had been on the losing end of a lengthy legal battle with a Vancouver financial institution over a loan he and his business partners had used to support a business venture. Flewelling had hired lawyers in the past to help work on his case but eventually ran out of money, then represented himself at trial and lost.

"I felt I hadn't properly represented the case," said Flewelling. "I had to find some way to get back in front of a judge."

On the website Craigslist, Flewelling came across an advertisement for a woman named Marlane Lauren. Lauren had obtained an LLB from the University of Saskatchewan and had done legal work in California.

They met, and Flewelling was impressed. He signed a retainer agreement with Lauren and began transferring money to her account. He expected to be back in court by the spring of 2012.

"I was excited," said Flewelling. "I had lost my business, my home, my wife, everything. This was going to be my opportunity to get into court and salvage some of that."

Unfortunately for Flewelling, he would not be back in court. In November, he tried to contact Lauren to ask a question about his case, but the telephone line had been disconnected.

He contacted the Law Society and was told Lauren was neither a lawyer nor an articled student in BC and was not authorized to practise law. What's more, the Law Society's Unauthorized Practice (UAP) program had been investigating complaints about Lauren since October 2010 and had obtained a court order prohibiting her from, among other things, giving legal advice and representing herself as a lawyer.

After spending years fighting his financial institution, Flewelling said this latest bit of information was the final straw, and he gave up. "I was not able to move forward from that period on," said Flewelling. "It just completely sucked the life out of me."

The Law Society ended up taking Lauren back to court and in May 2012, she was found to be in contempt of the earlier court order. She was fined and ordered to reimburse Flewelling for approximately $3,000 he had paid pursuant to the retainer agreement.

ENFORCEMENT

Flewelling's complaint is one of approximately 140 received by the Law Society's UAP program each year.

Under the *Legal Profession Act*, the Law Society is responsible for licensing lawyers and regulating the practice of law. The Law Society also protects the public by taking action against people who illegally offer legal services, or misrepresent themselves as lawyers.

The UAP program is a complaint-driven process. The Law Society will investigate every complaint received and determine whether it is in the public interest to pursue.

Law Society unauthorized practice counsel, Michael Kleisinger says, in many cases, a simple letter from the Law Society to the unauthorized practitioner is enough to make them stop.

"We have a graduated system of enforcement," said Kleisinger. "We'll write a letter and inform the party of what the law says and ask them to stop. It's only after that request is ignored, or if there is a serious danger to the public, that the Law Society will take further steps such as getting an injunction."

Kleisinger says in some instances, even an injunction is not enough to stop an unauthorized practitioner from providing legal services.

"In those cases, we have to take a further step and get a contempt order, which can result in fines and even jail sentences," said Kleisinger.

In 2012, the Law Society obtained 10 injunctions, two contempt orders and

three Court of Appeal orders, in addition to 33 undertakings from unauthorized practitioners promising to stop offering legal services.

RISKS OF UNAUTHORIZED PRACTICE OF LAW

The overriding purpose of the UAP program is to protect the public from those who are unqualified, unregulated and uninsured to practise law. From the Law Society's perspective, unauthorized practitioners present a range of risks.

"For starters, some people simply get ripped off," said Kleisinger. "They hire an unauthorized practitioner to perform a legal service, who then takes the money and disappears."

Kleisinger points to a number of other risks, including:

- a person could receive harmfully poor legal advice from an unauthorized practitioner that could negatively impact a case or claim;
- unauthorized practitioners don't carry insurance or trust protection coverage;

The overriding purpose of the UAP program is to protect the public from those who are unqualified, unregulated and uninsured to practise law.

- unauthorized practitioners aren't subject to ethical and practice standards and other regulatory requirements;
- unauthorized practitioners can slow down the legal process and clog the courts.

Impeding the functioning of the courts is a problem the UAP program is observing in connection with the anti-establishment Freeman on the Land movement. Freeman practitioners have appeared in court on their own behalf, and sometimes on behalf of others.

Problems with the Freeman movement are not limited to BC. In *Meads* v. *Meads* 2012, from the Court of Queen's Bench of Alberta, Associate Chief Justice J.D. Rooke wrote at length about what he termed the Organized Pseudolegal Commercial Argument (OPCA) litigants, which include Freeman on the Land.

"OPCA strategies as brought before this Court have proven disruptive, inflict unnecessary expenses on other parties, and are ultimately harmful to the persons who … attempt to invoke these vexatious strategies," wrote Associate Chief Justice Rooke. "Beyond that, these are little more than scams that abuse legal processes."

In BC in 2012, the UAP program initiated injunction proceedings against three Freeman practitioners, in addition to working with the RCMP and Society of Notaries Public to address the concern.

GETTING THE MESSAGE OUT

In 2012, the Law Society's Unauthorized Practice Committee, which oversees the UAP program, determined that protecting the public from unauthorized practitioners required more publicity on the topic.

"The public needs to know about UAP and the risks that are being addressed," said Bencher and committee chair Lee Ongman, QC.

To that end, the Law Society now issues news releases when the UAP program obtains an injunction or another court order against an unauthorized practitioner. It has also created a searchable, online database of unauthorized practitioners with links to court orders and reasons for judgement.

"Knowledge is power and we really want people to know whether the legal advice they're receiving is coming from a trained, insured professional," said Ongman.

MAKING SURE

For members of the public who want to confirm whether the person they're working with is a qualified and insured lawyer, Michael Kleisinger recommends they start by visiting the Law Society website.

"It has a search tool called Lawyer Lookup," said Kleisinger. "You can punch in the lawyer's last name and confirm their status, call date and contact details. If nothing shows up there, that's a red flag and you should contact us."

"Absolutely, check with the Law Society," said Brad Flewelling. "Make sure the lawyer is registered, and if they're not, don't even go there."❖

Access to legal services enhanced by other service providers

The *Legal Profession Act* prohibits people who are not lawyers from providing many legal services and representing themselves as lawyers. However, there are certain legal services that can be offered by people other than lawyers. These professionals play an important role in providing access to justice for the public.

- Notaries: The BC *Notaries Act* allows notaries public to provide certain legal services, primarily with respect to wills and real estate. Notaries are regulated by the Society of Notaries Public of BC.
- Immigration consultants: The federal *Immigration and Refugee Protection Act* and regulations allow registered immigration consultants to provide limited legal services as specified under that legislation (such as representing persons before immigration tribunals). Immigration consultants are regulated by the Immigration Consultants of Canada Regulatory Council.
- Designated paralegals: Under regulatory changes recently enacted by the Law Society, designated paralegals who work under the supervision of a lawyer are permitted to provide certain legal services. Specifically, they can provide legal advice directly to clients, and they can make certain applications in some court registries in both BC Provincial and Supreme Court as part of a two-year pilot project.
- Articled students: Under Law Society Rule 2-32.01, articled students working under the supervision of a lawyer may provide most of the services of a lawyer, so long as the student is competent and properly prepared.

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Using Microsoft Outlook to manage limitation (and other important) dates

OF ALL THE tasks that must be done in a law office, few of them have such far-reaching professional implications as managing limitation dates. Missing a limitation date involves significant personal and professional embarrassment, loss of trust with the client, possible negligence liability, having to report to the Lawyers Insurance Fund and, not the least of all, loss of face.

Despite all the consequences of missing a limitation date, it is still a regular occurrence in law firms.

Managing limitation dates, along with reminders of other important dates, is a task that can be systematized. While organizing paper calendars and/ or index cards by month, date and year was traditionally the way of keeping up with limitation dates, these days computer calendars offer a distinct advantage over paper-based systems. One of the biggest advantages is that electronic calendars can "push" reminders out to lawyers and staff, while paper calendars must be examined. Since many electronic calendars are synchronized with smart phones, lawyers can obtain reminders of limitation and other important dates whether or not they are in the office.

There are two main ways you can use Outlook for limitation and other reminder dates. One is to make appointments in your Outlook calendar that act as reminders; the other is to use the To-Do Bar and Tasks (combined with Flags and Categories). In this column, we will explore the appointments method. On our website, you will find a complementary paper that details both methods of using Outlook to manage limitation dates (go to Lawyers > Practice Support and Resources > Technology).

WORKING WITH OUTLOOK CATEGORIES

Outlook allows you to create categories, which is a way to group similar tasks (such as limitation reminders, for example).

Among many other functions, categories can draw extra attention to limitation date reminders that are tasks or to-dos within the To-Do Bar.

You can rename an existing category to "Limitation Date" as I have done in image 1 (coloured red). Now you can "tag" a to-do as a limitation date – and it would appear with this red box next to it – bringing it prominently to your attention.

You can also use categories for appointments in the calendar and mark them as limitation dates (see image 2).

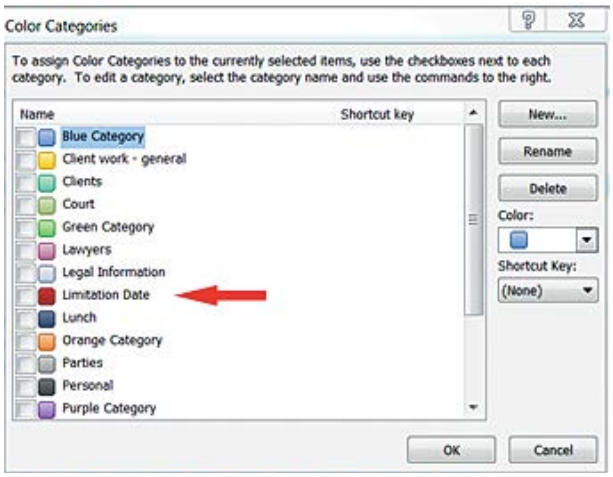


Image 1: Rename an existing category

As you can see, once you have created "Limitation Date" as a category, you can click on "Categorize" and specify an appointment in your calendar as a limitation date. The extra visual "kick" that this adds to the appointment makes it stand out.

Image 3 shows how the appointment looks in your calendar:

BACKUP SYSTEMS

While there are many advantages to moving to an electronic calendar, firms should also have a paper-based central calendar back at the office that serves as a backup system, just in case. After all, every firm is well-advised to have an electronic data backup and disaster recovery system in place, and a paper calendar is yet another form of data-backup!

You may also consider synching Outlook with other online calendars, but be aware that other calendars may not have the feature richness of Outlook. Microsoft Office 365, the online version of the venerable Microsoft Office suite, is also an excellent (and inexpensive) way to back up all your calendar data. (office.microsoft.com/en-ca).

SHARED CALENDARS

The real benefit of moving to an electronic calendar system is the ability to share calendars and see another person's deadlines, appointments and tasks, whether they are in the office or not. Another best practice is to delegate one person in the firm to be responsible for all upcoming deadlines. That person will draw deadlines to the appropriate person's attention, and ensure that they are dealt with. For deadlines that are "drop dead" substantive limitations, adapt Outlook as your firm's centralized diary system. Be sure to adopt formal, written procedures in your office policy and procedures manual to ensure limitation dates and reminders are entered in a clear and consistent manner, are properly delegated and are followed up.

Outlook has at least two ways to

Image 2: Use categories in your calendar

Image 3: The appointment in your calendar

share calendars in an office setting.

One way is to use Microsoft Exchange. Exchange is an application that allows everyone in an office to connect their Outlook calendars, among other services. The other way is to publish your calendars on the Microsoft Office website and determine who can see what information (using Microsoft Office 365).

I consider the ability to share calendars a best practice; just make sure shared viewing of tasks and appointments on calendars is enabled. You can mark personal or client appointments as private, to ensure the protection of confidentiality and privacy.

This requires installation of Exchange on your network servers or use of a hosted Exchange service. In Canada there are a number of vendors who will provide hosted services, including:

- Telus (about.telus.com/serviceprovider/products/collaboration/hosted_unified_communications/hosted_exchange),
- Bell (www.bell.ca/shop/Sme.Sol.Applications.Bhme.page) ,
- BMC Networks (bmcnetworks.ca)
- i-worx Enterprises (i-worx.ca)

Costs for hosted Exchange services range from approximately $2.50 to $30 per user per month, depending on the level of services you choose.

For more information on Office 365, I suggest that you contact BMC or i-worx and inquire about their Office business solutions for lawyers. The added advantage of an Office 365 installation with a trusted provider is your data is also backed up by the provider – giving you one more level of protection.

CONCLUSIONS

When it comes to limitation dates, no firm can be too careful. Fortunately technology can assist in many ways and help draw important dates, events and to-dos to your attention, minimizing the risk of missing a limitation date. The important fact is to adopt a system that incorporates best practices, is documented in the office policy and procedures manual and is followed by everyone in the firm.

Note also that the new *Limitation Act* came into effect on June 1, 2013; for more information on legislative changes, see "Ten tips to beat the reset clock" in the Summer 2013 *Insurance Issues, Risk Management*.

If you have any questions, please email me at daveb@lsbc.org or call 604.605.5331.

The writer gratefully acknowledges the information posted by Microsoft.com to its various websites on using Outlook, portions of which have been incorporated here, as well as the invaluable input of Ben Schorr, author of The Lawyer's Guide to Microsoft Outlook 2010.❖

Search warrants ... from page 8

associated with the target, or where the lawyer's whereabouts are unknown at the time the search is to be executed.

To this end, the Associate Chief Justice asked the Law Society, in consultation with other interested parties, to develop guidelines for the terms contained in and procedures associated with the execution of warrants to search a law office in order to protect solicitor client privilege. The resulting guidelines represent the combined efforts of the Law Society, the Public Prosecution Service of Canada, the Ministry of Justice – Criminal Justice Branch, the Vancouver Police Department and the BC Association of Chiefs of Police. The guidelines were forwarded to the Associate Chief Justice and no reservations were registered.

The intent of the guidelines is to clearly set out the steps that need to be in place in advance of the search to ensure the privilege of clients is protected during the search. The guidelines contemplate the appointment of a "referee" (a lawyer who will have the same or similar qualifications as those necessary to be appointed as a special prosecutor) whose responsibilities are to:

- under the direction of the officer in charge of the search, search for and seize documents, including electronic documents and images of data stored on computer equipment, and computer equipment itself, that are authorized to be seized by the warrant, in the manner authorized by the warrant;
- maintain the continuity and the confidentiality of the documents in accordance with the warrant; and
- examine and handle the documents in accordance with the procedures established in the warrant.

Documents identified and seized by the referee are to be delivered to the custody of the Supreme Court. The guidelines contain procedures for the notification of clients whose privilege may be affected, including information about how privilege claims can be addressed before the Court. There are also provisions in the guidelines for when the search involves the seizure of computers and electronic records.

The guidelines can be downloaded from the Law Society website at Lawyers > Law office search warrants.❖

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, including:

- 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.

CONDUCT REVIEW SUMMARY – GLEN ORRIS QC

The subject of this conduct review summary has consented to publication of his name as this matter is known to the public.

Mr. Orris was counsel for one of the accused charged with three murders committed between 2004 and 2005 in the North Okanagan. The trial, which was expected to last many months, started in Vancouver in May 2011 before a judge and jury.

At the start of the trial, the judge gave instructions to the jury that during the trial the jurors were not to talk about the case or anything else with anyone involved in it, including the accused, witnesses, investigating officers and the lawyers. Two weeks later, Crown Counsel asked the judge to clarify for the jury that no rudeness was implied when counsel ignored them when they ran into each other the vicinity of the courthouse. Several counsel, including Mr. Orris, took the position that this clarification was unnecessary.

Mr. Orris regularly exercised during lunch at a gym close to the courthouse. One of the jurors also started to exercise there. On a number of occasions, Mr. Orris was observed by members of B.C. Sheriff Services talking to a juror for periods of between five to 15 minutes while they worked out in close proximity. The sheriffs advised the judge.

The judge raised the issue with counsel, in the absence of the jury. Mr. Orris volunteered that it was likely he, as he worked out at the same gym as one of the jurors and they had occasionally discussed weightlifting and exchanged pleasantries. He offered to adjust his workout schedule, but the judge indicated it was not necessary. The judge again warned the jury not to communicate with people involved in the trial. That same day, Mr. Orris again spoke with the juror at the gym, where he apologized to her for what had happened and accepted full responsibility.

The judge again raised the issue in court, after receiving further information from the sheriffs. He conducted an inquiry which included interviewing the juror, who said the conversations did not relate to the trial and her impartiality was not affected. In his decision, while the judge decided it was not necessary to remove the juror from the jury, he characterized Mr. Orris' conduct as "incomprehensible" and "profoundly wrong". The inquiry caused a delay in the proceedings. The contact between Mr. Orris and the juror could have caused grave consequences by interfering with the juror's duty to be objective in her decision-making.

Mr. Orris acknowledged during his conduct review that there was no excuse for his behaviour and that it was wrong. He was embarrassed that his actions caused the concerns that they did as well as delaying the proceedings while the court undertook its inquiry. Mr. Orris acknowledged that his engaging the juror in conversation, even though they did not talk about the trial or anything to do with it, was inappropriate. It was acknowledged by Mr. Orris that in the future any casual contact between counsel and a juror should be dealt with by nothing more than a brief, informal greeting.

BREACH OF TRUST ACCOUNTING RULES

A lawyer withdrew his fees from trust without first preparing and delivering a bill to 38 of his clients, contrary to Rule 3-57(2). The withdrawals occurred at a time when the lawyer was suffering from significant mental health issues. The lawyer attends the Lawyer Assistance Program and now has no responsibility for trust accounts. (CR #2013-18)

BREACH OF TRUST ACCOUNTING RULES AND BREACH OF UNDERTAKING

A lawyer inadvertently disbursed holdback funds prior to complying with all conditions of an undertaking. He failed to report the breach of undertaking or the resulting trust shortage to the Executive Director, contrary to Rule 3-66, and he permitted a non-lawyer notary, who was supervising his practice while he was away, to sign seven trust cheques, contrary to Rule 3-56(2)(c). The lawyer was encouraged to use Law Society resources, such as the Practice Advisors and local Benchers, when questions arise. (CR #2013-19).

BREACH OF UNDERTAKING

A lawyer released funds to his client, contrary to terms of an undertaking. The undertaking was not in compliance with what the lawyer believed to be the terms of the settlement. He wrote opposing counsel indicating his disagreement with the terms imposed and saying that, unless he heard from him within two days, he would release the funds. Opposing counsel did not respond for one month, by which time the funds had been released. A conduct review subcommittee discussed with the lawyer the importance of complying with Chapter 11, Rule 11 of the *Professional Conduct Handbook* (now rules 5.1-6 and 7.2-11 of the *BC Code*). The lawyer has taken steps to flag all undertakings and now knows that, regardless of his personal or professional assessment of their appropriateness, he must comply with the strict wording of the undertaking or advise counsel that he cannot accept the undertaking and promptly return the documents or property sent with it. The subcommittee encouraged the lawyer to consult with Benchers, Law Society Practice Advisors or other senior members of the bar when he faces similar challenges in the future. (CR #2013-22)

BREACH OF NO-CASH RULE

A lawyer accepted an aggregate amount of $8,000 cash in relation to one client matter, contrary to Rule 3-51.1. The lawyer received funds from or on behalf of his client that were to be forwarded to the Family Maintenance Enforcement Program. The lawyer mistakenly believed that the $7,500 restriction applied to each transaction or payment, not each client matter. (CR #2013-13)

CONDUCT UNBECOMING

A lawyer was involved in an altercation with another person at a restaurant that resulted in a criminal charge, contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* (now section 2.2 of the *BC Code*). The lawyer subsequently completed anger management counselling and a Canadian Bar course on ethics. He is now aware that the private actions of lawyers can affect the public confidence in both the Law Society and the justice system. (CR #2013-21)

DUTY TO COURT

A lawyer failed to disclose material information in an *ex parte* application in a family law matter about her communications with an unrepresented opposing party. A conduct review subcommittee encouraged the lawyer to clearly advise the court of all material facts, both adverse and in support of her client's position, on any *ex parte* applications. The subcommittee recommended using written communication when dealing with self-represented litigants, wherever possible, and reminding them that the lawyer was neither acting in their interest nor providing legal advice to them. (CR #2013-12)

A lawyer failed to attend previously scheduled appearances in Provincial Court. The lawyer has improved his office systems to ensure that his diary contains a history of all appearances and that there is written record of requests for adjournments. (CR #2013-14)

DUTY TO OTHER LAWYERS AND QUALITY OF SERVICE

A lawyer failed to respond to communications from another lawyer on a real estate transaction and, by doing so, also failed to provide the level of service his client should have been able to expect from a competent lawyer. The lawyer reviewed his office practices and now has procedures in place to ensure that matters requiring attention are not missed or delayed. (CR #2013-20)

FAILURE TO REPORT CRIMINAL CHARGE

A lawyer failed to report an impaired driving and refusal to provide a breath sample charge to the Law Society, contrary to Rule 3-90(1). The lawyer has a history of alcohol dependency for which she has been previously monitored by Practice Standards and for which she is now seeking treatment. She is currently a non-practising lawyer. Lawyers are reminded of their obligation to report criminal charges to the Law Society. (CR #2013-10)

A lawyer failed to report charges of assault and uttering a threat to the Law Society. He was later charged with a breach of a no-contact order, which he did report to the Society. The lawyer acknowledged that his conduct in breaching an undertaking given to the court was conduct unbecoming and admitted that he should have reported the criminal charges. The lawyer has met with the Lawyers Assistance Program and a family counsellor. (CR #2013-16)

QUALITY OF SERVICE

A lawyer contacted clients of his employer and entered into retainer agreements with them in an inappropriate manner. His conduct included directing those clients' settlement funds to his own personal trust account while still in the employ of his employer. Such conduct was in breach of Chapter 3, Rules 6 and 8 of the *Professional Conduct Handbook* (now commentary to rule 3.7-1 of the *BC Code*), which require that a letter be sent to the client explaining that the client has the choice of counsel going forward. The rules are intended to prevent clients from being in a legal tug of war between two firms. The lawyer's conduct was also dishonourable in that it showed a lack of professionalism, integrity and collegiality that one should expect from a lawyer, contrary to Chapter 2, Rule 1 (now section 2.2 of the *BC Code*). The lawyer has taken steps to educate himself about his professional obligations and the importance of separating his emotions from his judgment. (CR #2013-23)

A lawyer delayed for 18 months in handling his client's claim and failed to properly communicate with the client his decision to withdraw in the face of an impending deadline for service of a Writ of Summons and Statement of Claim. The lawyer has since taken the Law Society's Communications Toolkit course. (CR #2013-24)

DISHONOURABLE OR QUESTIONABLE CONDUCT

A lawyer violated the *Securities Act* by engaging in insider trading. The lawyer had failed to ensure that a press release had been issued prior to purchasing the shares. His conduct is contrary to Chapter 2, Rule 1 and Chapter 7, Rules 1 and 2 of the *Professional Conduct Handbook* (now section 2.2 and rule 3.4-26.1 of the *BC Code*). (CR #2013-25)

A lawyer failed to advise an unrepresented party that she was not protecting their interests, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook* (now rule 7.2-9 of the *BC Code*). The lawyer also failed to properly supervise her paralegal by allowing her to give legal advice, contrary to Chapter 12, Rule 1 of the *Professional Conduct Handbook* (now rule 6.1-1 of the *BC Code*). The lawyer now practises with two senior practitioners who are available to provide her with assistance. (CR #2013-26)

RUDENESS AND INCIVILITY

A lawyer was confrontational and aggressive when dealing with an unrepresented opposing party in a family law matter. He showed no appreciation of the boundaries between being an advocate and litigant and showed a lack of judgment in bringing children to court in a highly charged, emotional matter. He failed to appreciate his role in facilitating a resolution between emotionally volatile parties. A conduct review subcommittee reviewed the professional obligations of a lawyer to uphold the standards of the profession, which include courtesy, civility, good judgment and acting in a professional manner at all time. The subcommittee recommended that he continue to seek professional advice and therapy to rectify his behaviour. (CR #2013-09)

A lawyer was involved in altercations with several Crown Counsel and court staff and treated a client in a rude and verbally abusive manner. The lawyer has a history of anger management problems. The lawyer has been referred to Practice Standards for help with practice management issues. He has also taken courses in anger management and has contacted the Lawyers Assistance Program for guidance. (CR #2013-17) ❖

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.

ARUN MOHAN (formerly APPLICANT 5)

Bencher review: November 23, 2012 and May 24, 2013 (review of costs and time for re-application)
Benchers: Art Vertlieb, QC, Chair, Kathryn Berge, QC, Tom Fellhauer, Miriam Kresivo, QC, Jan Lindsay, QC, Bill Maclagan and Claude Richmond
Reports issued: February 7 (2013 LSBC 05) and May 24, 2013 (2013 LSBC 12)
Counsel: Jason Twa for the Law Society; Henry Wood, QC for Arun Mohan

BACKGROUND

In March 2012, a credentials hearing was held regarding the application of Arun Mohan for enrolment in the Law Society admission program. The hearing was ordered as a result of a history of cheating and plagiarism during undergraduate studies and law school. The decision of the majority of the hearing panel was to allow Mohan's enrolment. However, the chair of the hearing panel would have rejected the application (credentials hearing report: 2012 LSBC 24; *Benchers' Bulletin* summary: 2012 No. 3 Fall).

The Credentials Committee sought a review of the hearing panel decision to determine whether the majority erred in the proper application of the burden of proof as to Mohan's good character, repute and fitness to be enrolled as an articled student, specifically in reference to the evidence relating to his 2000 sociology honours thesis.

Mohan claimed that he prepared two versions of this thesis, a plagiarized version and a non-plagiarized one. He claimed that he submitted the non-plagiarized thesis for grading, but accidentally submitted the plagiarized one for archival purposes.

Mohan was unable to find a copy of his thesis in 2005, apparently due to documents being thrown out during a family move; however, six years later he found what he alleged to be a copy after searching boxes and garbage bags left over from the move.

DECISION

The issue on review was whether Mohan was sufficiently rehabilitated from his "admitted history of academic fraud and deception" to now be of good character and repute and fit for admission to the bar.

Written evidence showed that Mohan had engaged in significant efforts that spoke to his rehabilitation. The review panel considered a strong recommendation from Mohan's law professor who had employed Mohan as compelling evidence of his current good character.

However, any recent dishonesty or deception would speak against Mohan's rehabilitation. Therefore, it was imperative that the review panel determine whether Mohan had been honest about the events surrounding his thesis in his sworn evidence at the hearing.

Regrettably, the hearing panel did not make a finding on Mohan's credibility and did not state whether they believed his evidence. In fact, the hearing panel majority referred to serious concerns about Mohan's evidence.

It was found that the hearing panel also erred in stating that there was no evidence before them inconsistent with Mohan's evidence. There was important circumstantial evidence before them that needed to be analyzed and considered regarding Mohan's version of events.

Even if it could be said that the hearing panel implicitly made a finding of credibility, they did not state their reasons for such a conclusion in accordance with the preponderance of probabilities. In the review panel's view, failure to make such a central finding was an error in law.

Although the conduct in question took place in 1999 and 2000, the applicant's explanations were given in 2012 under oath. His sworn statements to the hearing panel directly speak to the issue of good character, repute and fitness.

The hearing panel majority failed to examine the consistency of Mohan's evidence with the circumstantial evidence. The panel was obliged to weigh all of the relevant evidence and make a finding of fact. It was not entitled to deference where it had failed to do so.

Mohan's elaborate explanation about the thesis demonstrated that he did not discharge the onus of proof that he is now of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court. It bears noting that, in the opinion of the minority on the hearing panel, Mohan's "evidence on this serious issue defies credulity."

The review panel ordered that the decision of the hearing panel be set aside and the application was rejected.

Time for re-application

The Benchers reviewed submissions on an abridgement of the time for re-application, and agreed to Mohan's request that the two-year disqualification period be reduced by seven months.

Costs

The Benchers reviewed submissions on costs and noted that the onus is on an applicant in a credentials hearing, whereas that onus is on the Law Society in a disciplinary hearing. The Benchers were of the view that that onus would also apply when asking the Benchers on a review to reduce costs.

While noting the significant differences between credentials and discipline hearings, the Benchers applied the factors set out in *Law Society of BC* v. *Racette.* The Benchers rejected the submission that the matters in question were not serious because they were "historical" in nature. The evidence of Mohan under oath at the hearing was clearly not historical,

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Discipline digest

BELOW ARE SUMMARIES with respect to:

- David Stephen Rulton Burgess
- Vivian Chiang
- Crystal Irene Buchan
- Roger Dwight Batchelor
- Milan Matt Uzelac
- William Ralph Southward

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

DAVID STEPHEN RULTON BURGESS

Kelowna, BC
Called to the bar: June 13, 1986
Discipline hearing: December 2, 2010;
Panel: David Renwick, QC, Chair, Patricia Bond and Benjimen Meisner
Oral reasons: December 2, 2010
Application for stay of penalty: January 28, 2011
Chamber Bencher (stay of penalty): Alan M. Ross
Reports issued: February 3 (2011 LSBC 03) and February 22, 2011 (2011 LSBC 07)
Counsel: Jaia Rai for the Law Society; Henry Wood, QC for David Stephen Rulton Burgess (discipline hearing) and Burgess on his own behalf (application for stay of penalty)

FACTS

David Stephen Rulton Burgess acted for a client who had entered into a separation agreement with her husband. The agreement, dated June 27, 2007, provided that the husband would buy out the wife's interest in a rental property by way of payments that were to take place over time.

The agreed purchase price was $180,000. Burgess was to hold the funds in trust until the final payment was made, at which time the property would be transferred into the husband's name. Burgess was familiar with both the husband and the wife and knew their families.

During a meeting with his client and her husband in April 2008, the husband unexpectedly produced $50,000 cash. Although Burgess initially indicated he could not accept the cash, he deposited the funds into his trust account, pending registration of the transfer of the property and ultimate payout to his client.

Two days after Burgess deposited the cash into his trust account, he asked his assistant to contact the Law Society. She spoke with a practice advisor who advised that the circumstances did not fall within any exception to the Law Society's no-cash rule. Burgess did not speak to the practice advisor, as requested, and did not report his acceptance of the cash until he filed his trust report in 2009.

DETERMINATION

Burgess argued that no breach occurred because there was virtually no risk that the husband was using laundered funds. As the husband had received the funds from a financial institution, an exception to the no-cash rule should be invoked.

The panel stated that Burgess would have to receive cash directly from a financial institution in order to fall within the rule. If the rule were to be interpreted as suggested by Burgess, the onus would be on a lawyer to determine where funds originate and whether they were legitimately gained. While there will be instances where that is readily done, the panel believed that there are many more instances in which it will be impossible for a lawyer to determine the source and legitimacy of funds.

The panel found that it was not acceptable to read into the rule further exceptions where a lawyer believes that no money laundering or fraud has occurred. The Law Society created this rule to secure an exception from federal legislation that would breach solicitor-client privilege and compromise the independence of the bar. While the rule may be inconvenient at times, it was invoked for good reason and should be enforced.

Accordingly, the panel determined that Burgess breached the Law Society's no-cash rule.

While Burgess' actions were deliberate, he was well-intentioned. He did not personally benefit from the receipt of the cash, and no one was harmed, nor were anyone's interests compromised as a result of his actions. On the contrary, Burgess' client was very appreciative of his legal services.

Burgess realized he was in breach of the no-cash rule, but he was not diligent in discussing the matter with the Law Society. However, he did report the breach in his trust report at the end of the year.

The panel also took into consideration that Burgess had no relevant conduct history and that the breach of the rule did not amount to professional misconduct.

DISCIPLINARY ACTION

The panel ordered that Burgess pay:

1. a $750 fine; and
2. $1,500 in costs.

APPLICATIONS FOR REVIEW

In December 2010, Burgess filed a Notice of Review seeking to set aside the adverse determination made by the hearing panel as well as the costs.

In January 2011, Burgess applied for a stay of the fine until the Bencher review was complete. He submitted that he had suffered serious and significant financial hardship and a tremendous loss of time from his law practice addressing the no-cash rule issues with the Law Society.

The Chamber Bencher found no suggestion that harm would come to Burgess or to others if the fine was paid as ordered by the hearing panel, pending the outcome of the review. Burgess' application for a stay of the imposition of the penalty was denied.

Burgess subsequently decided to abandon the Bencher review.

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VIVIAN CHIANG

Vancouver, BC
Called to the bar: May 17, 1996
Bencher review: September 30, 2010
Benchers: Glen Ridgway, QC, Chair, Joost Blom, QC, Leon Getz, QC, Benjimen Meisner, Lee Ongman, Gregory Petrisor and Catherine Sas, QC
Report issued: December 20, 2010 (2010 LSBC 29)
Counsel: Henry Wood, QC for the Law Society; Vivian Chiang appearing on her own behalf
BC Court of Appeal decision: January 15, 2013 (2013 BCCA 8)

BACKGROUND

The Law Society issued a citation to Vivian Chiang alleging four counts of professional misconduct. One allegation was withdrawn, and the October 2008 hearing proceeded on three allegations of acting contrary to the duty of an officer of the court or misleading the court.

The hearing panel issued its decision, dismissing the remaining three allegations on June 17, 2009 (facts and verdict: 2009 LSBC 19; discipline digest: 2009 No. 3 Fall).

The Discipline Committee sought a review of the decision to determine if the panel was correct in dismissing the allegations and not finding that Chiang's conduct constituted professional misconduct.

DECISION OF THE BENCHERS ON REVIEW

Allegation 1

Allegation 1 asserted that Chiang failed to advise the court on March 11, 2005 that she was appearing as counsel or was a member of the Law Society.

The Benchers agreed with the conclusion of the panel that Chiang was under no obligation as an officer of the court to disclose her status as a member of the Law Society. There was no evidence that Chiang, by reason of her omission to disclose her status, could or did obtain any material advantage or that, if the judge was under a misapprehension about her status, that misapprehension was material to anything that transpired in court.

However, it seemed to the Benchers that the panel grounded its conclusion, at least in part, on the absence of any authority. When the question to be decided requires a fact-specific inquiry as to whether a given pattern of conduct constituted a "marked departure from the conduct the Law Society expects of its members," the absence of prior authority on the point cannot be determinative of anything.

Allegation 2

Allegation 2 asserted that, while appearing in court on March 15, 2005, Chiang proceeded to seek relief in respect of a portion of the Notice of Motion for which short leave had not been granted and while there was a specific order to the contrary.

A majority of the panel concluded that the evidence did not justify a finding of professional misconduct.

In the minority's view, however, Chiang allowed her personal financial interest in her client's business to overcome her professional judgment. As a result of that lapse, she attempted to obtain an order which she knew she did not have approval to seek. Misleading the court in this manner represented a marked departure from behaviour that the Law Society expects of its members, and, therefore, the minority would have found that Chiang had committed professional misconduct.

The Benchers agreed with the minority's analysis and conclusions. The Benchers determined that Chiang had committed professional misconduct and referred the matter back to the panel to consider appropriate sanctions.

Allegation 4

Allegation 4 asserted that, when Chiang appeared in court on June 16, 2005 on behalf of her client, she advised the court that counsel for one of the defendants had consented to an adjournment when he had not, which may or did have the effect of misleading the court.

The Benchers agreed with the unanimous view of the panel that Chiang's conduct in allegation 4 did not amount to professional misconduct.

COURT OF APPEAL

On her appeal to the Court of Appeal, Chiang alleged that the review panel misapprehended the facts. In the court's view, the review panel had accepted the facts as found by the hearing panel, but determined, as they were entitled to do, that stress and inexperience did not excuse Chiang's deliberate and misleading conduct.

Chiang did not persuade the Court of Appeal that the decision of the review panel was unreasonable and her appeal was dismissed.

Vivian Chiang has applied to the Supreme Court of Canada for leave to appeal the decision of the Court of Appeal.

CRYSTAL IRENE BUCHAN

Victoria, BC
Called to the bar: May 15, 1992
Discipline hearing: February 13, 2013
Panel: Leon Getz, QC, Chair, Paula Cayley and William Sundhu
Oral reasons: February 13, 2013
Report issued: March 6, 2013 (2013 LSBC 08)
Counsel: Carolyn Gulabsingh for the Law Society; Mary Clare Baillie for Crystal Irene Buchan

FACTS

In July 2012, the Law Society received a complaint about several aspects of Crystal Irene Buchan's quality of service on a client file, specifically failure to reply to communications from the client or to do so on a timely basis. The Law Society advised Buchan of the complaint and sent her a letter soliciting a written response.

On September 19, 2012, Buchan wrote a letter to the Law Society apologizing for any distress that she may have caused her client. However, she did not address six particular matters in the Law Society's letter.

On October 17, the Law Society sent another letter to Buchan requesting a reply, and reminded her that a failure to respond may be referred to the

Discipline Committee.

On December 10, the Law Society issued a citation to Buchan. On February 1, 2013, two months after the issuance of the citation and about two weeks before the hearing, Buchan provided a response to the Law Society's letters.

ADMISSION AND DISCIPLINARY ACTION

The Law Society submitted that Buchan had committed professional misconduct, which Buchan did not dispute. The panel agreed.

Failure to respond to the Law Society has consistently been regarded by hearing panels as a serious breach of a lawyer's professional obligations. The panel took into account a number of considerations in determining disciplinary action.

In recent years, Buchan experienced significant personal pressures as a result of serious disabilities or illnesses of family members. Further, around the time she received the first letter from the Law Society, she learned that her elderly mother was terminally ill.

Buchan claimed these circumstances rendered her almost incapable of responding appropriately to the Law Society's request. She also misunderstood the importance of responding to the Law Society's letters and the possibility of a citation if she did not.

The panel accepted that Buchan's personal circumstances were a source of great stress. On the other hand, the pressures did not prevent her from dealing with correspondence and other matters in her practice during the period in question. In the panel's opinion, Buchan did not provide any specific, meaningful explanation for why she failed to respond to the Law Society.

Buchan eventually sought counselling and legal advice but, as the panel noted, not until after the citation was issued.

The panel also considered Buchan's professional conduct history, which includes a conduct review in 2011 arising from another complaint about delay and quality of service issues and failure to respond to the Law Society.

The panel accepted Buchan's admission that she committed professional misconduct and ordered that she pay:

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

ROGER DWIGHT BATCHELOR

Victoria, BC
Called to the bar: September 21, 2005
Discipline hearing: February 15, 2013
Panel: David Mossop, QC, Chair, Satwinder Bains and James E. Dorsey, QC
Oral reasons: February 15, 2013
Report issued: March 18, 2013 (2013 LSBC 09)
Counsel: Alison Kirby for the Law Society; Roger Dwight Batchelor appearing on his own behalf

FACTS

In May 2009, Roger Dwight Batchelor was retained by a client in regards to a family law matter. In March 2011, the Law Society received a complaint from the client about the fees charged by Batchelor and the quality of service provided. The Law Society exchanged correspondence with Batchelor regarding the complaint.

In December 2011, Batchelor and his client entered into a written agreement. Under the terms, he would provide approximately $11,000 to his client and, in exchange, she would withdraw the complaint against him with the Law Society and provide a release of all claims.

Batchelor issued the first cheque to his client in the amount of $2,000. He then informed the Law Society that he had reached a settlement with his client and that she was going to withdraw her complaint.

On January 18, 2012, the Law Society wrote to Batchelor's client to ask whether she wished to withdraw or pursue her complaint. In the absence of receiving any further information from the client to support her allegations, the Law Society did not have sufficient evidence to support disciplinary action against Batchelor.

The client, however, informed the Law Society about the conditions in the agreement with Batchelor, which raised a new professional misconduct concern. It is improper for a lawyer to make it a requirement of a civil settlement that a person refrain from making or proceeding with a complaint to the Law Society. The Law Society asked the client for a copy of the agreement.

After being notified by his client that the Law Society requested a copy of the agreement, Batchelor forwarded a revised agreement to his client for execution and removed the reference to the complaint. He subsequently provided his client with cheques for the balance owing.

ADMISSION AND DISCIPLINARY ACTION

Batchelor admitted that he attempted to resolve the complaint made by his client to the Law Society by preparing and entering into a written agreement with her. The terms of this agreement included that he would pay her $11,000 and she would withdraw the complaint. He admitted that his conduct constituted professional misconduct.

The investigation and proper treatment of complaints are at the core of the Law Society's work in the fulfillment of its regulatory function. The panel recognized the need for a clear message to be sent to the legal profession that there will be no tolerance of lawyers attempting to undermine the Law Society's investigation of complaints by negotiating a withdrawal of the complaint.

Batchelor's prior disciplinary record was an aggravating factor. His professional conduct history consists of a conduct review for failure to comply with accounting rules and provide accurate responses in two trust reports, as well as practice standards referrals for failure to clarify service expectations to clients, failure in duties to clients and opposing counsel, excessive delegation to staff and poor file documentation.

Batchelor considered two points to be mitigating factors: he was cleared of the original complaint, and he does a great deal of pro bono work. In the panel's opinion, Batchelor knew of these factors before he entered into the proposed disciplinary action and, even if they accepted the points he raised, the proposed disciplinary action was still fair and reasonable.

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Discipline digest ... from page 21

The panel noted, however, that Batchelor acknowledged his misconduct and took immediate steps to amend the agreement to remove the requirement that his client withdraw the complaint. These actions demonstrated Batchelor's new understanding of his regulatory compliance obligations to the Law Society and a willingness to rehabilitate.

The panel accepted Batchelor's admission of professional misconduct and ordered that he pay:

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

MILAN MATT UZELAC

Vancouver, BC
Called to the bar: June 26, 1975
Discipline hearing: January 30, 2013
Panel: Barry Zacharias, Chair, Woody Hayes and John Waddell, QC
Oral reasons: January 30, 2013
Report issued: March 26, 2013 (2013 LSBC 11)
Counsel: Alison Kirby for the Law Society; Milan Matt Uzelac appearing on his own behalf

FACTS

In January 2008, Milan Matt Uzelac was retained by a client in connection with an asset purchase of a business. Part of the broader transaction involved refinancing a residential property owned by the client.

Uzelac received mortgage instructions from the bank to register a new mortgage in the amount of $700,000 in favour of the bank. The new mortgage was to form a first charge on the residential property. At the time of the refinancing, there were two pre-existing mortgages on the residential property, a first mortgage to the same bank and a second mortgage to a different bank.

On February 1, 2008, Uzelac registered the new mortgage and released funds to the client. The new mortgage was registered behind the first and second mortgages. The bank held back funds to pay out its own mortgage, but Uzelac did not pay out or deal with the second mortgage. His actions were contrary to his undertaking involving the bank's instructions.

Uzelac failed to report to the bank on the status of the registration of the mortgage within 90 days, contrary to his undertakings. He also failed to advise the bank that he had released the funds advanced by the bank on February 1, 2008, without first obtaining and registering the new mortgage as a first charge against the property.

The bank wrote to Uzelac on several occasions between January 2009 and January 2011. Uzelac failed to provide a substantive response to any of these letters. In-house counsel for the bank made a complaint to the Law Society in June 2011.

In subsequent correspondence to the Law Society, Uzelac noted that the pay out of funds contrary to the bank's instructions was inadvertent. In particular, there may have been confusion in the priority of mortgages because there was already a first mortgage on title in favour of the same bank.

ADMISSION AND DISCIPLINARY ACTION

The Discipline Committee authorized a citation against Uzelac for breach of undertaking by releasing mortgage funds without registering the mortgage as a first charge as instructed and failing to report to the bank on the status of the registration of the mortgage, failing to report to the bank that he had released the mortgage funds without securing its position as instructed and failing to answer communications from the bank.

Uzelac admitted that his conduct amounted to professional misconduct.

While the offending conduct related to only one transaction, it continued over time as the details of the initial error became known to Uzelac. The bank suffered no economic loss, but was left without a first priority for the full funds secured, and the discharge of the first mortgage cannot be registered without seriously undermining its priority position.

The panel acknowledged that Uzelac gained no personal advantage from the transaction.

The panel also considered Uzelac's discipline history. In 2003, he was subject to three citations related to failures of accounting and record-keeping obligations; breach of three practice conditions regarding trust accounting; and a rules breach for failure to report unsatisfied judgments. Uzelac voluntarily withdrew from practice for nine months as a result of these citations.

While there was no pattern of related misconduct, the panel agreed that Uzelac's prior conduct history meant a strong sanction must be applied to provide deterrence as well as ensure the public's confidence in the integrity of the legal profession.

The panel accepted Uzelac's admission that he had committed professional misconduct and ordered that he:

1. be suspended from practice for six weeks; and
2. pay $2,000 in costs.

WILLIAM RALPH SOUTHWARD

Victoria, BC
Called to the bar: September 13, 1973
Retired membership: December 31, 2011
Ceased membership: January 1, 2013
Admission accepted by Discipline Committee: May 9, 2013
Counsel: Carolyn Gulabsingh for the Law Society; Henry Wood, QC for William Ralph Southward

FACTS

On December 17, 2010, William Ralph Southward was retained by a client to obtain a committeeship of the person of his mother. The mother and sister of Southward's client owned a condominium together in joint tenancy.

On March 11, 2011, Southward filed a petition seeking an order appointing his client as the committee of the person and the estate of his mother.

On April 4, Southward's assistant received a call from the client stating that he was not particularly interested in obtaining a committeeship of the person of his mother, but he understood he needed to obtain this to sell the condo. Southward later spoke to his client who agreed to pursue

the application for committeeship of the person.

On May 24, Southward received a letter from the lawyer representing his client's sister setting out the terms under which the sister would consent to the committeeship application. Southward's client did not accept these terms.

On June 1, Southward wrote to the sister's lawyer and the Public Guardian and Trustee and advised that, because the mother had been admitted to hospital and her health was deteriorating, he would proceed with an application to have his client appointed as the committee of the person only.

The client's sister was opposed to her brother being appointed as committee of the estate of their mother, but was not opposed to him being appointed as committee of the person of their mother. On June 1, 2011, Southward stated in a letter to the sister's lawyer that he was applying for an order for committee of the person only. As a result, the sister instructed her lawyer not to attend the hearing.

On June 9, the court made an order for Southward's client to be appointed as committee of the person of his mother.

Southward drafted the order and submitted it for entry. The entered order contained ambiguous terms as one clause contained wording granting committeeship of the estate and person and a second clause adjourned generally the application for committeeship of the estate.

On June 28, Southward instructed his legal assistant to make an application to sever the joint tenancy of the condo and to submit a copy of the order with the application. The assistant expressed her concern in using the order to sever the joint tenancy because the order was for committee "of the person" and not for committee "of the estate." Southward instructed his assistant to proceed with the application, despite her concern.

On June 30, Southward wrote to the sister's lawyer in response to her settlement proposal but did not mention that the joint tenancy of the condo was being severed.

On July 4, the joint tenancy of the condo was severed.

On September 8, the client's mother passed away. On September 13, the sister applied to the Land Title Office to have the condo transferred to herself as sole owner and discovered that the joint tenancy had been severed. The sister then made a complaint to the Law Society.

In November, Southward attempted to rectify the situation; however, the Land Title Office refused to reverse the severance of the joint tenancy.

On December 30, Southward filed an application to the court to have the condo transferred into the sister's name. In support of the application, he swore an affidavit stating that he had applied to sever the joint tenancy in error.

On January 5, 2012, the court granted an order transferring the mother's interest in the condo to the sister by consent.

ADMISSION AND DISCIPLINARY ACTION

Southward admitted that, in the course of representing his client regarding the committeeship of his mother, he engaged in questionable conduct that cast doubt on his professional integrity and was in breach of the *Professional Conduct Handbook* rules.

Under Rule 4-21, the Discipline Committee accepted Southward's admission on his undertakings:

1. not to apply for reinstatement to the Law Society until released of this condition by the Discipline Committee;
2. not to apply for membership in any other law society without first advising the Law Society of BC; and
3. not to permit his name to appear on the letterhead of any lawyer or law firm or otherwise work in any capacity whatsoever for any lawyer or law firm in BC, without the prior written consent of the Law Society. ❖

Credentials hearing ... from page 18

and he had also not disclosed his complete financial circumstances. Further, while the outcome of the hearing was calamitous for the applicant, there is no range of outcomes in a credentials hearing. The Benchers found no reason to vary from the normal tariff application.

Mohan had not disputed the amounts of $3,672 with respect to the hearing and $7,099.12 with respect to the review. Mohan was entitled to credit for the $2,500 that he posted as security for costs. The difference is $8,271.12.

The Benchers ordered that:

1. the time for re-application be abridged by seven months; and
2. Mohan pay $8,271.12 in costs.

Pursuant to Rule 2-69.2(2), as the application was rejected, the publication does not identify the applicant.

Mohan has appealed the decision of the Benchers on review to the BC Court of Appeal. ❖

Editor's note: A subsequent decision has resulted in Applicant 5 being identified; see the Winter 2013 *Benchers' Bulletin*.

ELECTED BENCHERS

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