

legal services in an area of need. At any given time, there are approximately 60 clients benefiting from the program.

- The BC Ministry of Justice has opened three justice access centres for people dealing with family and civil law issues, including separation or divorce, income security, employment, housing and debt matters. The centres also link people with other services, such as pro bono legal services or assistance from supervised paralegals (at least in Vancouver).

The increasing prevalence of self-represented litigants is a significant fact in any discussion about access to justice, as noted in the report of the National Self-Represented Litigants Project authored by Dr. Julie Macfarlane of the University of Windsor. Madam Justice Gray, of the Supreme Court of British Columbia, has also reported on the issue of self-represented family and civil litigants in the Supreme Court.

It was noted that many – perhaps most – self-represented litigants *do* want some legal assistance, indicating that a market exists for “limited retainer” or “unbundled” legal services. Fewer and fewer people can afford to have a lawyer do everything, but many can find the funds for a lawyer to assist with advice on various steps along the way, or for certain advocacy tasks. Lawyers could make more use of unbundling, and the Law Society could help by providing more information on the rules that permit unbundled legal services.

Rural access to justice remains a concern. That being said, there are opportunities for successful legal practices outside the larger urban centres, and lawyers need to learn how to grasp these opportunities.

How can access be improved? Much depends on what lawyers are prepared to do and, further, if the Law Society can assist by developing models or regulatory requirements that permit or encourage new methods of service provision. The Benchers considered a number of issues:

- While the provision of unbundled legal services is not going to *solve* access to justice, it will help. Why are lawyers not engaging more in this mode of delivery? How can the Law Society better promote it to lawyers? Or are lawyers providing unbundled services, but the message is not getting out

to the public? If so, how can lawyers better advertise their services? Are the Law Society rules constraining advertising?

- Can non-lawyer legal services be engaged or expanded? Could lawyers make better use of paralegals? Can a range of non-lawyer legal technicians be credentialed and regulated to work with lawyers in providing customized services at lower cost?
- What can lawyers do to improve or expand upon the services offered through the justice access centres? Can they volunteer their time or provide incentives for their staff to provide volunteer assistance? Can lawyers work with other organizations in their community to open – even on a part-time basis – a justice access centre in communities where one does not exist? Can lawyers assist in modelling a justice access centre as an intake – or “triage” – centre where people can go to determine whether a problem they face is a legal problem and, if so, obtain some preliminary advice and, perhaps, a referral?

- Can rural practice be promoted better by the Law Society or, indeed, by law schools when educating prospective lawyers?
- How can lawyers and justice system organizations – including the Law Society – better educate the public about basic legal knowledge and how to arrange their affairs to reduce the risk of a legal problem arising?
- Are there new ways of delivering legal services, either through new technology options or through business models other than a traditional firm partnership or sole practice, that will lower the cost of legal service delivery and thereby improve access?

There is no one solution to the problems relating to access to justice and to legal services, but the Benchers left the retreat invigorated and confident that there are things that lawyers and the Law Society can do make improvements. As the Benchers move forward in developing the Law Society's next three-year strategic plan, there is no doubt that improving access to justice and legal services will be a key outcome. ❖



Speakers at the Benchers retreat included Allan Fineblit, QC, Chief Executive Officer of the Law Society of Manitoba, Jay Chalke, QC, Assistant Deputy Attorney General, and Michael Litchfield, Managing Director of Thinklab Consulting and Regional Legal Careers Officer for the CBA's Rural Education and Access to Lawyers Initiative. Dr. Julie Macfarlane of the University of Windsor weighed in through a prepared video presentation.

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Ethical considerations when a lawyer moves on



What happens to the clients and their files when a lawyer leaves or the firm breaks up?

WHEN A LAWYER leaves a firm, what happens to the clients and their files? What if the firm breaks up altogether?

Sometimes lawyers hold the view that the law firm or an individual lawyer owns a client. They may believe that a client must either stay with the firm or that the lawyer can simply take the client's electronic and paper files to the new firm. They are mistaken. A client is the property of neither the departing lawyer nor the law firm.

When a lawyer leaves a firm, whether to practise alone or to join another firm, the lawyer and the law firm have a duty to honourably discharge their ethical responsibilities to clients and each other. Following are some duties and guidelines to keep in mind, primarily based on rule 3.7-1, commentary [4] to [11] and rules 3.7-8 and 3.7-9 of the *BC Code*. The same duties may arise when a firm winds up or divides into smaller units.

1. **Duty to inform clients.** The departing lawyer and the law firm have an ethical duty to inform all clients for whom

the lawyer is the responsible lawyer in a legal matter that the clients have a right to choose who will continue to represent them. The client may choose to continue to be represented by the departing lawyer or to stay with the firm (and of course a client may always decide to move the file somewhere else altogether).

2. **Duty not curtailed by a contractual arrangement between lawyer and law firm.** The law firm should not prevent the departing lawyer from carrying out his or her duty to inform clients of their right to choose. A client's right to be informed of changes to a law firm and to choose his or her lawyer cannot be curtailed by any contractual or other arrangement. For example, despite a law firm's insistence that the firm keeps a client's business because of a contractual arrangement between the lawyer and the firm, the client has a right to be informed and to exercise his or her choice of lawyer.

3. **Duty does not arise in some circumstances.** The duty to inform clients about their options does not arise if the lawyers affected by the changes, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of a particular lawyer or law firm. For example, if the departing lawyer has been appointed a judge, it is obvious that he or she will not be in a position to continue to represent clients. Another example is if the departing lawyer is the only lawyer at the firm who is competent to represent the client (e.g. the only family law lawyer or the only tax lawyer at the firm), it would be inappropriate for the law firm to try to hang on to the client.

4. **Responsible lawyer.** To assist in determining whether the departing lawyer is the "responsible lawyer" in a legal matter, consider objectively, from the client's perspective who that would be. The responsible lawyer is not merely a name on a file. It is preferable for the law firm and the departing lawyer to review the client files, mutually agree on who is the responsible lawyer, make a list of the files, and inform clients of the change. If the lawyer and the law firm cannot agree on who is the responsible lawyer, they may opt to ask for assistance from an impartial lawyer. Another option is to err on the client's side; in other words, inform the client of the change.

5. **Timing.** Clients must be notified of their right to choose their lawyers as soon as practicable after the effective date of the changes is determined. In my view, this effective date would normally be the date that the lawyer gave notice to the firm that the lawyer is leaving the firm as of a specific date or within a specific time frame. It is best to send the letters prior to the lawyer's departure, to make any transition as seamless as possible for the clients.

6. **Joint letter preferable.** The departing

lawyer and the law firm should agree on a neutrally worded joint letter informing clients of the changes and their choices as to representation. A joint letter has advantages over separate letters from the firm and the departing lawyer. For the clients, a joint letter may decrease confusion and anxiety, lessen concerns about continuity of representation and not expose them to any unseemly wrangling. For the firm and the lawyer, an advantage is that they will know exactly what is written and to whom during what can be an awkward and tumultuous period.

7. **Precedent letters in the absence of a joint announcement.** In the absence of a joint announcement, the law firm and any lawyers affected by the changes, including the departing lawyer, may use the precedent letters on the Law Society website, one for the departing lawyer and one for the firm. Both precedent letters provide for the inclusion of the departing lawyer's new law firm name or sole practice and for the client's written instructions regarding representation. The client may check a box indicating the client's choice, and return it to the sender. Whether the client provides direction in this way or through other correspondence, if the file is to be transferred, there should be written direction from the client regarding the transfer of the file and any trust funds.
8. **Not a marketing letter.** The Ethics Committee has considered whether it is proper for either the firm or the departing lawyer to include marketing materials in a letter informing clients of their right to choose representation. The committee's view (July 2011) was that, unless the lawyer and the law firm agree otherwise, such a communication must not include a marketing component.
9. **Telephone calls.** The departing lawyer and the law firm should agree that, prior to a client exercising his or her choice, the lawyer may continue to communicate with clients by telephone or other means if reasonably necessary to discuss the client's matter (e.g., a settlement offer with a

deadline for acceptance).

10. **No undue influence once client's choice is made.** Once a client has received either a joint or precedent letter and has made a choice, neither the departing lawyer nor the law firm should try to change the client's mind. If a client does not respond to the letter, it may be necessary to send a second letter or follow up in another way. If there is still no response, in most situations it will be preferable for the file to stay with the firm.
11. **Common law restrictions.** Lawyers should be mindful of the common law restrictions on proprietary information and interference with contractual and professional relations between the law firm and its clients.
12. **Restrictive covenants.** The *BC Code* makes it clear that a client's right to choose his or her lawyer cannot be curtailed by any contractual or other arrangement (rule 3.7-1, commentary 9). Restrictive covenants that may affect a lawyer's ability to act for prospective clients (as distinct from existing clients) are not prohibited, although in some cases they may be unenforceable at law (Ethics Committee, May 1999).
13. **Transitioning the file.** Lawyers have an obligation to protect a client's information and property and must

minimize any adverse effect on the client's interest when a lawyer leaves a firm. This generally includes an obligation to ensure that the files are properly transitioned. The lawyers involved should cooperate so as to minimize expense and avoid prejudice to the client.

14. **Obligation to provide client documents (including electronic file) within a reasonable time.** A lawyer has an ethical duty, at a client's request, to provide the client with documents that, at law, the client is entitled to have. A lawyer is also obliged to provide electronic documents in the same form in which the lawyer holds them at the time of the client's request. The lawyer must make reasonable efforts to meet a client's request. For more information, see the Ethics Committee's November 2009 and December 2008 opinions. To assist in determining whether it is the client or the lawyer who owns various file documents, see "Whose file is it anyway?" a practice resource on the Law Society website.
15. **Billing for production of electronic documents or photocopies.** Since it is for the lawyer's benefit to retain copies of a client's file documents to defend

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Scam attempts against BC lawyers continue

SCAMSTERS CONTINUE TO pretend to be BC lawyers' legitimate new clients, either using the phony debt collection scam or other ruses. Whatever their stratagem, the scamster's ultimate goal is usually to coerce a lawyer to deposit fraudulent financial instrument (often a bank draft or certified cheque) into a trust account, and then to trick the lawyer into electronically transferring funds to the scamster before the lawyer finds out the instrument is no good. So far in 2014, scam attempts against BC lawyers include the following phony schemes: collecting on a franchise agreement, copyright infringement claim, bogus real estate purchaser, CRA tax claim, personal loan agreement claim, collaborative divorce agreement claim, and a fake lawyer.

Protect yourself. Review risk management tips on the Law Society website. Review the bad cheque scam names and documents web page as part of your firm's intake process. Report potential new scams to bbuchanan@lsbc.org. Reporting allows us to notify the profession, as appropriate, and update the list of names and documents on our website.

Articling offers by downtown Vancouver firms to stay open to August 15, 2014

ALL OFFERS OF articling positions made this year by law firms with offices in downtown Vancouver must remain open until 8 am on Friday, August 15, 2014. Downtown Vancouver is defined as the area in the city of Vancouver west of Carrall Street and north of False Creek.

Set by the Credentials Committee under Rule 2-31, the deadline applies to offers made to both first and second-year law students. The deadline does not affect offers made to third-year law students or offers of summer positions (temporary articles).

Law firms are encouraged to set an acceptance deadline for 8 am on August 15; if the offer is not accepted, the firm can make a new offer to another student within the same day. Law firms cannot ask students whether they would accept an offer if an offer was made, as this places students in the very position Rule 2-31 is intended to prevent.

If a law student advises that he or she has accepted another offer before August 15, the firm can consider its offer rejected. If a third party advises a lawyer that a student has accepted another offer, the

lawyer must confirm this information with the student.

Should circumstances arise that require the withdrawal of an articling offer prior to August 15, 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 articulated student in deciding whether to allow the lawyer to withdraw the offer.

For further information, contact Member Services at 604.605.5311. ❖

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against negligence claims or respond to complaints, the lawyer should generally make any copies of the client's documents for the lawyer's retention at the lawyer's own expense. If a client requests photocopies of documents that the lawyer has previously provided to the client at no charge, a client is entitled to receive copies again. However, a lawyer is entitled to bill a fair and reasonable amount for additional photocopies and, in the case of electronic documents, for the cost of a memory stick or disk.

The Law Society's [August 10, 2012 Discipline Advisory](#) provides that disbursements must be billed at their actual, rather than estimated, cost. There is also an Ethics Committee opinion (October 1997) that a lawyer may add surcharges to disbursements if they reasonably reflect actual costs incurred and are fully disclosed in the statement of account. See [section 3.6](#) of the *BC Code* for more on fees and disbursements.

16. **File status.** When preparing to transition a file, consider the file's status (e.g. whether there are unfulfilled undertakings, outstanding commitments, unpaid or unbilled fees and disbursements, and limitation deadlines).

If the file is to remain at the firm, it may be necessary for the departing lawyer to detail the status of the file in a memorandum.

17. **Solicitors' liens.** If the client has chosen to go with the departing lawyer, arrangements must be made to pay any outstanding accounts. The law firm may refuse to transfer the file and claim a retaining lien if the accounts are not paid. See the practice resource "[Solicitors' Liens and Charging Orders – Your Fees and Your Clients](#)" on the website.

Once a client has received either a joint or precedent letter and has made a choice, neither the departing lawyer nor the law firm should try to change the client's mind.

18. **Undertakings.** A person to whom a lawyer has given an undertaking is entitled to assume that the lawyer will personally fulfill the undertaking (*BC Code*, rule 7.2-11, commentary [1]). When a client file is being transitioned to another lawyer, consider how any outstanding undertakings may be satisfied or whether they may be retracted. If an undertaking cannot be fulfilled by the original lawyer before

the transfer, it may be possible to arrange for that lawyer to be released from the undertaking and for the successor lawyer to accept the undertaking in place of the original lawyer. The transfer of the obligation should be acceptable to the original lawyer, the successor lawyer and the person to whom the undertaking was given.

19. **File retention requirements and guidelines.** If a lawyer is discharged by the client, see "[Closed Files – Retention and Disposition](#)," a practice resource on our website.
20. **Conflicts from transfer between law firms.** The departing lawyer should review *BC Code* rules 3.4-17 to 3.4-26, the rules that apply to conflicts that may result when a departing lawyer transfers from one law firm to a new law firm.

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. ❖

Note: Look for an expanded version of this article, to be published as a practice resource on the Law Society website later this year.