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Keeping BC lawyers informed

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My remarkable year

by Jan Lindsay, QC

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.

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PHOTOGRAPHY

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Photos submitted: pages 4, 5 and 8 (left)

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AS I PEN my last column for the *Bulletin*, I reflect on my year as your president. I am humbled by all I have learned. I expected a year of service to the Law Society, a year that would allow me to make a difference to the profession. Instead, the profession gave me an experience of a lifetime, and I walk away realizing that this year has had a profound effect on me.

Many I have spoken with have been apologetic, expressing how sorry they are that my term as president was rife with so many issues and challenges. I am always quick to respond and say that, on the contrary, it has been an amazing year, full of change and possibility.

I have had the chance to see, firsthand, all the good work the Society is doing. I have marvelled at the great things BC lawyers do in the public interest, demonstrating their leadership in pro bono representation and providing valuable service

as volunteers. I have witnessed the passion and commitment of the many lawyers who have spoken out strongly and fervently on our various issues throughout the year.

Although our attention was frequently caught up in the issues around Trinity Western University's proposed law school, the work of the Law Society continued. We called new lawyers to the bar, trained students to be great lawyers, and continued to manage complaints and practice issues.

And while this business went on solidly day-by-day, we reviewed a comprehensive application for the proposed law school that set off an unprecedented series of events. In due course, we webcast two Bencher meetings, held a special general meeting and an AGM that drew large numbers of highly engaged members, and

held a referendum — all while pundits publicly deconstructed our every move, often daily.

This increased scrutiny positioned us, perhaps more than ever before, as leaders of the profession. It also put us squarely on centre stage where, in plain view to all, we learned an important leadership lesson, one that I will never forget: leadership is sometimes about leading from the front and other times about stepping back and listening. This became clear to me during my term.

As I pass the gavel to the next president, I want to express my immense and enduring gratitude to the profession that has given me so much, especially during my time as president. This year, at various times, has been stressful, exciting, daunting and frustrating. It brought me face-to-face with important issues, and gave me a perspective that I have not had before.

But above all, it has been an honour to serve in this capacity, and I am deeply grateful for the opportunity. I must admit that I will miss it.

I have many to thank for their support throughout this eventful year. First of all, Tim McGee, QC and the staff at the Law Society have provided invaluable guidance and encouragement — I could not have done this without them. Secondly, I want to acknowledge the Benchers, who helped me work through the many issues we had to address. And last, but by no means least, my home team, who reminded me that, in a short time, life will return to normal.

I extend my very best wishes to Ken Walker, QC and his team for next year. There is much important work yet to do, and I know he will lead the Law Society of BC with distinction. ❖

... leadership is sometimes about leading from the front and other times about stepping back and listening. This became clear to me during my term.



TWU's proposed law school not approved for Law Society's admission program

IN A MEETING on October 31, the Benchers decided that the proposed law school at Trinity Western University is not approved for the purpose of the Law Society's admission program.

This decision came after careful consideration of the outcome of a referendum of BC lawyers conducted in October, together with the many other factors related to this issue.

The Benchers decided to hold a referendum after a resolution was passed at a special general meeting in June directing

the Benchers to disapprove of the proposed law school. The *Legal Profession Act* provides that a member resolution can be made binding by referendum after 12 months following the general meeting at which it was adopted. The Benchers decided to accelerate the process to provide certainty now rather than leave the issue open until next June.

In the referendum vote, 5,951 BC lawyers said that the Benchers should not approve a proposed law school at Trinity Western University for the purpose of

the Law Society's admission program. The referendum was conducted by mail-in ballot, and required one-third of BC's lawyers to participate and two-thirds to vote in favour in order to pass. The vote was 5,951 (74%) in favour and 2,088 (26%) against, out of 8,039 valid ballots. Thirteen thousand, five hundred thirty practising, non-practising and retired lawyers were entitled to vote.

More information regarding the accreditation of TWU can be found on the Law Society's [website](#). ❖

Westminster county election results



EDMUND P. CAISSIE was elected a Bencher for Westminster county in the November 17, 2014 election. Caissie's one-year term begins on January 1, 2015.

Called in 1984, Caissie practises civil litigation with Caissie & Company in Surrey. He is currently a member of the Law Society Discipline Committee. He has been an elected

governor of the Trial Lawyers Association since 2007 and was one of the founding members and past President of the Surrey Bar Association. He is an elected representative of the Canadian Bar Association, BC Branch.

Caissie has been active in the community, serving a three-year term as trustee and Chair of the Surrey School Board. He also served a three-year term as Councillor on the Surrey City Council, where he was appointed Chair of the Public Safety Committee supervising police, fire and bylaw

personnel, as well as Vice-chair of the Finance Committee.

In his election statement, Caissie noted, in part: "I applaud the efforts of our currently elected Benchers in Westminster County to reach out to the members with regular, informative email broadcasts explaining their work and inviting input into their difficult decisions."

For the voting results, see the Law Society's website (About Us > Governance > Benchers > [Bencher elections](#)). ❖



2014 Law Society Award

Three hundred twenty lawyers and judges attended the 30th annual Bench & Bar Dinner in Vancouver on November 6, 2014, to see John Hunter, QC receive the Law Society Award from President Jan Lindsay, QC. The CBA Georges A. Goyer, QC Memorial Award for Distinguished Service was presented to Professor Isabel Grant of UBC law school.

The Law Society Award is given every two years to honour the lifetime contributions of the truly exceptional within the profession and the legal community, based on integrity, professional achievements, service and reform.



Clearing up the cloud

by Timothy E. McGee, QC

THIS MONTH WE focus on a technology becoming familiar to a growing number of lawyers in this province: cloud computing.

Whether you know it or not, chances are you're using the cloud – inside and/or outside your practice. For example, if you have a web-based email account, such as Gmail, Hotmail or Yahoo, effectively you're on the cloud.

However, the use of cloud computing technology goes beyond storing emails. Many lawyers are using cloud servers specifically designed to store client files and trust accounting records.

There are clear benefits to using this technology – for lawyers and clients. In fact, it can be argued that cloud computing technology can help with the access to

justice issue; for lawyers, it can save money on overhead.

However, there are also concerns over the risks of using the cloud, which lawyers should be alive to – particularly concerns

Whether you know it or not, chances are you're using the cloud – inside and/or outside your practice.

about the security of the information being stored. It's an important discussion, especially for those in the legal profession.

The feature story in this issue of the *Benchers' Bulletin* briefly talks about how

lawyers can benefit from using this technology, but it also highlights the risks. The feature, along with the Practice Tips column, provides valuable insight and sets out what the Law Society is doing to address these risks – making rule changes, guidelines for use of cloud technology and helpful tools like a checklist.

However, what the Law Society cannot do is regulate new technology, nor can we recommend one product over another.

On our end, we continue to work on keeping lawyers accountable in order to protect the public. Lawyers must protect the confidentiality and security of client files – this is an enduring principle of the profession that will never change, even though technology surely will. ❖



Law Society congratulates legal journalism award winner

THE LAW SOCIETY congratulates Duncan McCue, winner of the Jack Webster Award for Excellence in Legal Journalism. McCue was honoured for his work on CBC *The National's* series "Last Right," which followed Canadians, many of them terminally ill, who have decided to end their lives and want to control the way they die.

The award is sponsored by the Law Society, and the winner is chosen by an independent panel composed of current and former journalists, and members of the community.

The Law Society is proud to partner each year with the Jack Webster Foundation to support excellence in legal journalism. Jack Webster was appointed by the provincial government to serve as an Appointed Bencher in 1988, making him one of the original members of the public to serve on the Law Society's board of governors. ❖

Photo: Law Society First Vice-President Ken Walker, QC (left) and Duncan McCue.



In Brief

TRU INAUGURAL GOLD MEDALLIST

Taylor-Marie Young (left) is the first recipient of the Law Society gold medal for Thompson Rivers University. Young achieved the highest cumulative grade point average over the three-year program.

LAW SOCIETY CEO ELECTED PRESIDENT OF INTERNATIONAL INSTITUTE OF LAW ASSOCIATION CHIEF EXECUTIVES

At its 2014 conference and annual general meeting in Cape Town last month, the International Institute of Law Association Chief Executives (IILACE) elected the CEO of the Law Society, Timothy McGee, QC, as its new president.

IILACE is an association of chief executive officers of law societies and bar

associations from around the world. The annual meeting provides a forum for exchange of views and information of common interest to local, national and international executive officers of law societies and bar associations. McGee will serve a two-year term.

JUDICIAL APPOINTMENTS

Richard Browning, of Browning, Dunne, Soga, Ray & Mirsky in New Westminster, was appointed a judge of the BC Provincial Court.

Barbara Flewelling, a lawyer with Barbara Flewelling Law Corporation in Victoria, was appointed a judge of the BC Provincial Court. ❖

Unauthorized practice of law

UNDER THE LEGAL Profession Act, only trained, qualified lawyers (or articled students or paralegals 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 September 4 to November 24, 2014, the Law Society obtained undertakings from two individuals 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:

- **Christophere Nat Kit Ho, Thelma**

Wai Yee Leung and Ho & Associates Consulting Group Inc., all of Richmond, provided immigration law services out of Richmond while not being practising lawyers or registered immigration consultants. On November 10, 2014, Ho, Leung and Ho & Associates Consulting Group Inc. consented to an injunction prohibiting them from engaging in the practice of law for or in the expectation of a fee, gain or reward, direct or indirect from the parties for whom the acts are performed, unless and until they are authorized to do so. The Law Society was also awarded costs.

- **Mel Farrell**, doing business as **Reliable Tax Services**, of Victoria, consented to an order prohibiting him from engaging in the practice of law. The Law Society had received evidence that Farrell's business was offering to incorporate companies and shareholders' agreements, and giving legal

advice for or in the expectation of a fee. Farrell consented to paying the Law Society's costs.

- On November 7, 2014, Madam Justice Fisher found **Brian Carlisle**, of Abbotsford, in contempt of a court order pronounced June 5, 2002. The court found that Carlisle had advertised legal services on the internet and offered to prepare *Charter* applications for or in the expectation of a fee, contrary to the previous order. The court fined Carlisle \$500 and awarded the Law Society its special costs.
- **Fazlolah Ghaemmaghmi**, doing business as **Ghaemmaghmi Immigration Services**, of North Vancouver, consented to an order permanently prohibiting him from falsely representing himself as a lawyer or in any other way that connotes that he is qualified or entitled to engage in the practice of law. ❖



Ken Walker, QC, 2015 president

THE SON OF a self-made business man and veteran of the Second World War, and the grandson of a farmer, Ken Walker, QC, had never met a lawyer or a judge while growing up in Saskatchewan – and had scarce reason to consider law as a profession.

It was when he was in university he began thinking about becoming a lawyer.

Armed with little more than a cursory knowledge of the profession and a healthy curiosity, Ken went on to study law at the University of Saskatchewan.

Immediately, he was drawn in by what he saw. He loved the collegiality and the aspirations of his fellow students, all bent on creating a better world. He was completely captivated by the prospect of belonging to a profession that performed an important service to others.

As a newly married graduate, he spent three months working in a street clinic

where he was deeply affected by the experience of helping people who could not afford legal services. For the aspiring young lawyer, this put in sharp relief how many were left out of the legal equation.

After returning from a long-awaited trip in Europe, Ken crossed the Rockies with his wife, Shirley, in search of articles. He had heard of an opportunity in Kamloops, and shortly after his arrival, began working at Wozniak, Meikle and Shupe, though it was a short-lived arrangement. When the firm dissolved, Ken continued working with senior partner Wally Wozniak, starting a partnership and friendship that lasted 33 years before Wally passed away.

The firm Wozniak and Walker is still a partnership. Ken now works alongside his son, Kevin, and they continue the tradition of helping people tackle their legal problems in an efficient and affordable way.

Ken has never forgotten that first experience working in the street clinic in Saskatchewan. Today, he travels regularly to small interior communities like Williams Lake and is still troubled by the number of access to justice issues he comes across in the course of his work. It comes as no surprise he is committed to using his time as president to address this challenge. In considering the issue, he has embraced the concepts set out in the Canadian Bar Association's 2013 report *Reaching Equal Justice* and believes working collaboratively, thinking systemically, and acting locally, as suggested in the report, will go a long way to increasing access. In 2015, he plans to call on everyone in the profession to find small personal ways to meet the needs of clients and justice system users every day, while continuing to contribute to systemic reforms.

What has become clear to Ken over the years is that access to justice issues are different in all of BC's varied

geographical regions, and he believes the solution will need to be flexible in its application. The insight gleaned from years working in rural BC will serve the profession well as discussions progress throughout the year.

PLTC is another trending topic for Ken in his year as president. With issues of mobility driving discussions of program change, the Law Society will focus on determining what its admission program should look like moving forward, and how to pick the best attributes from the current range of training programs used across the country.

While Ken is passionate about the profession, he is equally committed to his family. He and Shirley have five grandchildren under the age of six to keep them young at heart. ❖

Towards a framework for the expansion of legal service providers

A YEAR AGO, the Benchers unanimously approved the recommendations of the Legal Service Providers Task Force. That report built on past work of the Law Society and a range of legal needs studies and recognized that the time had come to explore a framework for the liberalization of regulatory requirements to permit the Law Society to better respond to future initiatives and needs for the provision of legal services.

One of the recommendations was that the Law Society develop a regulatory framework by which other existing

providers of legal services, or new stand-alone groups who are neither lawyers nor notaries, could provide credentialed and regulated legal services in the public interest.

The Legal Services Regulatory Framework Task Force was created to consider and report back to the Benchers on that recommendation.

On December 5, 2014, the Benchers adopted the recommendations of the task force set out in the *Report of the Legal Services Regulatory Framework Task Force*. The task force recommended that the Law

Society seek an amendment to the *Legal Profession Act* to permit the Law Society to establish new classes of legal service providers to engage in the practice of law, set the credentialing requirement for such individuals, and regulate their legal practice. The task force also identified several areas of practice in which new classes of legal service providers could be permitted to practise.

The Law Society will approach the government early in 2015 to request the necessary amendments. ❖



FROM THE LAW FOUNDATION

New Law Foundation governors

THE LAW FOUNDATION of BC welcomes four new members, appointed by the Law Society, to its Board of Governors. The appointments are for three-year terms effective January 1, 2015.

The Honourable Judge Marion Buller (Westminster County) is a member of the Mistawasis First Nation in Saskatchewan. She was called to the bar in 1988, practised with Connell Lightbody for over five years, and was appointed as a judge of the Provincial Court of BC in 1994. She developed and presides in the BC First Nations Courts, and was a judge for the BC Northern Circuit Court for seven years. She has presided in criminal, youth, family, small claims, and various circuit courts in the past.

Judge Buller has written and presented extensively on Aboriginal legal issues. She is past-president of the Indigenous Bar Association of Canada and received the Queen's Golden and Diamond Jubilee Medals.

Jan Lindsay, QC (Vancouver County) was called to the BC bar in 1981 and has practised civil litigation since that time. She was appointed Queen's Counsel in 2009.

Lindsay is president of the Law Society in 2014 and has been involved with Society activities since 2000. She has served on numerous committees, including serving as chair of the Discipline and the Independence and Self-Governance Advisory Committees, as well as the Task Force on Retention of Women in the Legal Profession.

As a member of the Canadian Defence Lawyers, Lindsay is the tenth recipient of the prestigious Lee Samis Award of Excellence. In 2013 she was awarded the BC Women Lawyers Forum Award of Excellence.

Mary MacGregor (Kamloops district) practises law in Kamloops. She was called to the bar in 1977, worked with firms in the Merritt and Kamloops areas for several years, and started her own practice in 1995. She works mainly in corporate-commercial law, including clients in the resource and service sectors in the interior of BC.

MacGregor served on the Thompson Rivers University Law School Advisory Committee. She was also a member of the CBA, BC Branch Judicial Advisory

Committee and has worked as a government appointee on the BC Farm Debt Review Board, the Fraser Basin Management Board, the BC Fiscal Review Panel and the BC Lottery Corporation Board. MacGregor also has volunteered with the Vancouver Foundation's Environmental Advisory Committee and various committees on the BC Cattlemen's Association and the Canadian Cattlemen's Association.

Geoffrey White (Okanagan district) first practised in Ontario, but moved to BC in 1997. His practice in Kelowna is focused on estate and charity law.

White is currently chair of the Okanagan Chapter of the Society of Estate and Trust Practitioners and past-president of the Kelowna Estate Planning Society. He is a frequent presenter on estate law and is co-editor of the CLE *Probate and Estate Administration Practice Manual*. White also volunteers with the People in Motion Society and the Salvation Army. He is a past board member of the BC Centre for Elder Advocacy Society, and a presenter for the Planned Lifetime Advocacy Network. ❖

Cloud computing

WHEN SERVING HER clients, Nicole Garton aims for the sky – and she credits the cloud for helping her to get there.

A lawyer and mediator of family law, wills and estate matters with Heritage Law, Garton has been practising for 14 years. She relies on cloud computing technology to serve her clients more effectively.

“All of our staff are able to connect to their hosted desktop from anywhere,” Garton said. “This has enabled us to work seamlessly from the office or home or when we’re away, and to access remote talent, primarily remote paralegals. Overall, we feel the cloud infrastructure enhances firm productivity and efficiency.”

Garton is part of a growing number of lawyers in BC, and around the world, who are integrating the use of cloud computing technology into their practice. Many are unfamiliar with the term “cloud computing,” even though they may use cloud-based services. Web-based email providers, for example, such as Gmail and Hotmail, are cloud-based services that store information on the Internet.

So, what is cloud computing? A simple Google search of the term provides a succinct definition: “A network of remote servers hosted on the Internet to store,

manage, and process data, rather than a local server or a personal computer.”

Outside of web-based email providers, several companies offer cloud-based storing services specifically to allow businesses – like law firms – to store electronic files off site. It allows lawyers to access data – such as client files and accounting and trust records – from virtually anywhere, which can translate into cost savings, time savings and convenience.

Lawyers at Heritage Law use what is called a “private cloud” in their day-to-day operations, which provides more control over what is stored, and avoids “multi-tenancy” – where several tenants are isolated on a server, but physically integrated .

“We use hosted desktops that reside in secure data centers in BC,” Garton said. “We run our entire law firm on these desktops, meaning we connect securely via the Internet to all our legal applications, email, client files and data on the hosted desktops.”

Staff can use any device to connect, including tablets and laptops. None of the firm’s data or legal applications resides on the device they connect from.

While it is clear the technology provides benefits to lawyers, there are risks

associated with the security and privacy of that information on a remote server. The profession has been particularly alive to the risks, especially since former NSA contractor Edward Snowden came forward with allegations that governments are tapping into established networks.

“I think Snowden had a huge impact in terms of opening people’s eyes to the amount of surveillance that could be done on communications,” David Bilinsky, practice management advisor with the Law Society of BC, said. “It was the end of the age of innocence with Snowden.”

This past summer, Snowden told *The Guardian* newspaper, “I would say lawyers, doctors, investigators, possibly even accountants. Anyone who has an obligation to protect the privacy interests of their clients is facing a new and challenging world and we need new professional training and new professional standards to make sure that we have mechanisms to ensure that the average member of our society can have a reasonable measure of faith in the skills of all the members of these professions.”

The Law Society has been working to address security and privacy concerns around cloud computing well before Snowden’s revelations. In 2010 a working group was struck to look into what rules and policies the Law Society will need for BC lawyers who are using cloud computing and/or remote processing and storing of client and business records. The working group also considered BC lawyers’ use of electronic storage, both in and outside of the province. The *Report of the Cloud Computing Working Group*, which included key recommendations, was subsequently released and was adopted by the Benchers in January 2012.

“The report is premised on the concept of, we don’t regulate technology or the business model they use, but we regulate lawyers,” Doug Munro said. Munro is a policy lawyer with the Law Society who prepared the report. The report identifies



Nicole Garton



Doug Munro



Dave Bilinsky



the risks associated with lawyers using cloud computing technology and suggests how they can use those technologies and services while still meeting their professional obligations.

"Lawyers have professional responsibilities that arise out of their roles as lawyers and fiduciary obligations to their clients. Some of the records are the client records, and so the lawyers have obligations to protect those records, to ensure that they remain confidential and privileged," Munro said.

The report recommended the Law Society publish guidelines to assist lawyers in performing due diligence when deciding whether or not to use a third-party service provider for electronic data storage and processing, including cloud computing. After the guidelines were published, Munro and Bilinsky developed the comprehensive Cloud Computing Checklist released in January 2013, which raises some of the issues that should be considered prior to a lawyer or law firm moving data into the cloud. Since its release, the checklist has

garnered national and international attention, including from the secretary general of the Council of Bars and Law Societies of Europe.

"It involved a lot of research because it wasn't just the report that we'd have to look at. We'd have to look at what other knowledgeable people in the whole legal computing cloud sphere were saying about the things you should be thinking

continued on page 11

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

BC lawyers and cloud computing

♪ *It's coming down, it's coming down, it's coming down*
These clouds could never hope to save us ... ♪

Lyrics, music and recorded by Thrice

THE BENCHERS HAVE recently adopted rule changes based on the [report and recommendations of the Cloud Computing Working Group](#).

The amendments address three areas:

- the requirements for electronic data storage and processing;
- producing records in a complaint investigation or forensic audit; and
- third-party storage providers and security.

I would like address a number of questions that have been raised concerning the use of cloud computing resources by BC lawyers.

Q: Why is the cloud computing report important?

A: The rule changes recently adopted by the Benchers give effect to the recommendations in the [Cloud Computing Working Group Report \(January 2012\)](#). To my understanding, this report is one of the leading examinations of the use of cloud computing resources by lawyers by any regulator. BC lawyers considering using cloud computing resources should refer to the [Cloud Computing Checklist](#) for guidance. The report, recommendations and checklist highlight that the Law Society has provided and continues to provide thoughtful leadership to the profession on the adoption of new technologies.

Q: What guidance is there for BC lawyers looking to use cloud computing?

A: The Cloud Computing Working Group Report supports the idea that the Law Society regulates lawyers, not technology. It is up to the lawyer to determine whether it is appropriate to use a particular technology, recognizing that the professional responsibilities of a lawyer will continue. This places cloud computing on an equal

basis with a lawyer's use of services such as bookkeeping, accounting software, IT consultants or any other provider of services. As a result, the Law Society expects lawyers to exercise due diligence when using any service provider that handles, stores or processes client records, whether those records are in paper form or electronic. The Cloud Computing Checklist provides a list of considerations for a lawyer contemplating moving data to the cloud. Lastly, the Law Society's Practice Advice department is available to discuss cloud computing.

Q: Are BC lawyers prohibited from using US-based cloud computing providers?

A: There is no prohibition against using services in which servers are located outside Canada. However, lawyers must ensure the service complies with any legal limitations on where the records can be stored. Consider, for example, s. 30.1 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, chapter 165. If the lawyer acts for clients that are prevented from storing data outside of Canada, this will be a very important consideration. The checklist and the report highlight that lawyers' obligations to preserve and protect privilege and confidentiality do not disappear; accordingly, the checklist includes questions to consider when choosing a service so the lawyer can be satisfied client information is protected. Lawyers should disclose to their clients that they use cloud computing resources and that a client's data may be stored outside of Canada. This advice should be incorporated into the law firm's retainer agreement, since informed client consent is an integral part of responsibly using cloud computing resources.

Q: Does the Law Society prohibit the use of non-BC based cloud computing providers, such as Google or Dropbox, by lawyers?

A: The Law Society neither endorses nor rejects the use of specific products.

While new Rule 4-10 permits the Executive Committee, by resolution, to declare that a specific entity is not a "permitted storage provider" for the purposes of compliance with that rule, no such entity has been so declared.

However, if the Law Society discovers during the course of exercising its regulatory function that lawyers who use certain services are unable to comply with the rules for disclosing records, either because the service provider refuses to assist with the regulatory disclosure or is incapable of providing the records, the Law Society can



disapprove the use of that service for lawyers. But at this time, no cloud provider is prohibited by the Law Society.

Q: What has changed in BC regarding cloud-based computing?

A: In my view, the recent rule changes address how storing data in the cloud may impact the regulatory work that the Law Society is mandated to perform in the public interest.

The Law Society must have access to the files, documents and other records of a lawyer under investigation. If those files, documents and other records are stored, either in paper form or electronically, in a way that prevents the Society from gaining access to them, then the rules envision a process by which lawyers who are unable to provide such records can be suspended until they are able to do so.

For example, a lawyer who is required under Rule 3-5 (Investigation of complaints) or 4-43 (Investigation of books and accounts) to produce and permit the copying of files, documents and other records, provide information or attend an interview and answer questions, fails or refuses to do so, may be suspended until he or she has complied with the requirement to the satisfaction of the Executive Director (Rule 3-5-01).

In particular, Rule 10-4(4) contains provisions that a lawyer needs to consider when using any cloud provider:

- (4) A lawyer must not maintain records, including electronic records, with a storage provider unless the lawyer
- (a) retains custody and control of the records,
 - (b) ensures that ownership of the records does not pass to another party,
 - (c) is capable of complying with a demand under the Act or these Rules to produce the records and provide access to them,
 - (d) ensures that the storage provider maintains the records securely without
 - (i) accessing or copying them except as is necessary to provide the service obtained by the lawyer,

(ii) allowing unauthorized access to or copying or acquisition of the records, or

(iii) failing to destroy the records completely and permanently on instructions from the lawyer, and

(e) enters into a written agreement with the storage provider that is consistent with the lawyer's obligations under the Act and these Rules.

These are new provisions, but the concepts are not new. No lawyer would store records – paper or electronic – with a provider that accessed them or copied them, except as necessary to provide the service to the lawyer. No provider would be permitted to gain unauthorized access to the lawyer's records. Further, when a lawyer destroys records, he or she needs to ensure that the records have been completely and permanently destroyed – regardless of whether the records are in paper or electronic form. What the Benchers have done is made it clear that these responsibilities apply to records that are stored with a cloud provider.

* * *

To recap, the Law Society has simply updated the Rules to incorporate the potential use of cloud computing and the requirement for the Law Society to have

access to a lawyer's records should the need arise, no matter where those records may be stored. Further, the lawyer's responsibilities apply equally, whether the records are in paper or electronic form.

The Cloud Computing Checklist is designed to ensure lawyers turn their minds to compliance with Law Society audits and investigations, regardless of the technology they may be using.

Any questions on the use of cloud computing resources by BC lawyers can be directed to Practice Management Advisor Dave Bilinsky at daveb@lsbc.org.

With respect, I submit that BC lawyers' use of cloud computing resources has not come down and that, in fact, these clouds can save us a great deal of time, energy and resources. ❖

I gratefully acknowledge the assistance of Law Society staff lawyer Doug Munro who co-authored the Cloud Computing Checklist with me, based on the ground-breaking work of the Cloud Computing Working Group.

A version of this article originally appeared on slaw.ca on November 18, 2014.

Feature – Cloud computing... from page 9

of." Bilinsky said. "Take the policy positions that were set out in the report and try to put them into a form that is a bit more workable for lawyers to use."

Some examples of the questions on the checklist are: Has the cloud provider had any security breaches? What happens if the cloud provider ceases business or has their servers seized or destroyed? Who has access to your data?

"You're relying on the security of the trust of the cloud provider to put into place adequate safeguards around that data," Bilinsky said. "You have to ensure it doesn't get sold to third parties, that only authorized people have access to both the physical location of the data, and access

to the data electronically, which can prove problematic."

While the Law Society does not recommend particular cloud computing services over others, Bilinsky suggests that lawyers use technology that provides zero knowledge encryption along with a password keeper program.

Not only does the checklist guide lawyers when they engage, with due diligence, in protecting the confidentiality and security of client files, but it also provides help to lawyers when thinking about their obligations to the Law Society.

"Lawyers have obligations with respect to the Law Society when we're doing audits and investigations. Lawyers need to make their records available to us," Munro said. "Cloud computing doesn't change

those obligations."

On October 31, the Benchers adopted several changes to the Law Society Rules to address the obligations of a lawyer to the Law Society, giving the regulator more powers to ensure that lawyers comply.

"We clarified the capacity to suspend. That won't give you the records, but what it will do is suspend the lawyer and provide public protection on that level," Munro said.

More changes to the Law Society Rules will inevitably happen, as technology and the discussion around its use evolve over time.

Lawyers who have any questions about the use of cloud computing are encouraged to contact the Law Society's practice management advisor. ❖

Practice watch

by Barbara Buchanan, Practice Advisor

CASH TRANSACTIONS AND RECORDS

AS PART OF its efforts to combat money laundering and terrorist financing, the Law Society limits the amount of cash that a lawyer can accept and requires lawyers to abide by the Law Society's client identification and verification rules. Lawyers who accept cash face additional recordkeeping requirements. Some changes to the recordkeeping requirements were made on October 31, 2014. No changes were made to the amount of cash that may be accepted. Lawyers should ensure that all staff who handle money understand the rules regarding cash transactions.

What additional record-keeping is required when a lawyer accepts cash?

Rule 3-61.1 sets out very detailed requirements. A lawyer who receives any amount of cash for a client that is not the lawyer's employer, must maintain a cash receipt book of duplicate receipts (the "receipt

book") and make a receipt in the receipt book for any amount of cash received. The receipt book must be kept current. The lawyer must record the following for each receipt:

- the date on which the cash is received;
- the name of the person from whom the cash is received;
- the amount of cash received;
- the client for whom cash is received;
- the number of the file in respect of which the cash is received;
- all dates on which the record was created or modified (new);
- the signature of the person from whom the cash was received;
- the lawyer's signature (or an individual authorized by the lawyer to sign the receipt on the lawyer's behalf).

Is any special record-keeping required when a lawyer withdraws cash from a trust account?

Unless it is required under Rule 3-51.1(3.2) or (3.3), a lawyer must not make or authorize a cash withdrawal from a pooled or separate trust account (Rule 3-56(1.3)(d)). Rule 3-61.1(3) requires that, for each cash withdrawal, a lawyer

must make a record of transaction signed by the person to whom the cash was paid and identifying:

- the date on which the cash was withdrawn;
- the amount of cash withdrawn;
- the name of the client in respect of whom the cash was withdrawn;
- the name of the person to whom the cash was paid;
- all dates on which the record was created or modified (new).

It is recommended that lawyers use the

cash receipt book of duplicate receipts to record the information, including the signature of the person to whom the cash was paid.

How long must a lawyer keep cash transaction records?

Rule 3-68 provides that a lawyer must keep the cash receipt book of duplicate receipts and required cash withdrawal records ("cash transaction records") for as long as these records apply to money held in trust and for at least 10 years from the final accounting transaction (new). Cash transaction records must be kept at the lawyer's chief place of practice in BC for as long as the records apply to money held in trust and, in any case, for at least three years.

The record retention requirement in Rule 3-68 applies to cash transaction records as well as to all the other records referred to in Rules 3-59 to 3-62 (e.g. accounting records, including supporting documents, trust account records, general account records, and billing records). However, as of October 31, 2014, records maintained in electronic form do not have to be kept at a lawyer's chief place of practice in BC as long as they are kept for the requisite period and in accordance with the Law Society Rules (see Rule 3-68(2) and new Rules 10-4 and 10-5).

How much cash may a lawyer accept?

Lawyers are generally prohibited from accepting an aggregate amount of \$7,500 or more in cash with respect to any one client matter or transaction, except within the limited exceptions set out in Law Society Rule 3-51.1. A lawyer who accepts cash incrementally must make sure that, in total, it adds up to less than \$7,500, unless acceptance of a greater amount is permitted by the rule (e.g. a retainer or payment of an account for professional fees and disbursements).

When does the prohibition against accepting an aggregate amount of \$7,500 or more apply?

Rule 3-51.1 applies to a lawyer engaged in



any of the following activities on behalf of a client, including giving instructions on the client's behalf in respect of the activities:

- receiving or paying funds;
- purchasing or selling securities, real property or business assets or entities;
- transferring funds or securities by any means.

Can a lawyer refuse to accept cash?

Yes, a lawyer can make it a policy not to accept any amount of cash. To avoid issues, the policy could be included in the retainer agreement. Further, a lawyer should not accept cash if the lawyer knows or ought to know that it would assist in or encourage any dishonesty, crime or fraud (*Code of Professional Conduct for British Columbia*, rules 3.2-7 to 3.2-8). Lawyers should ensure that all staff who may handle cash understand the Law Society Rules and the firm's policy.

If there is money left over from a cash retainer when the lawyer's services end, should a lawyer issue a refund in cash or by trust cheque?

Whether a refund is issued by trust cheque or in cash would depend on the amount of the cash retainer and the amount of the refund:

- cash retainer of \$7,500 or more with refund of greater than \$1,000 = refund in cash;
- cash retainer of \$7,500 or more with refund of \$1,000 or less = refund by trust cheque;
- cash retainer under \$7,500 = refund by trust cheque.

If the refund is in cash, do not write a trust cheque payable to "cash" or "bearer"; rather, make a cash withdrawal. The lawyer must make a record of the transaction, including the identifiers set out in Rule 3-61.1(3), signed by the person to whom the cash was paid.

Are there any other Law Society resources pertaining to cash transactions?

Yes, see the *Trust Accounting Handbook* and *Know your obligations before accepting cash* (Discipline Advisory, November 8, 2013). For accounting questions, contact the [Trust Assurance department](#).

For questions about ethics and conduct, contact a [Practice Advisor](#) in the Practice Advice department.

GUIDE TO DETECTING MONEY LAUNDERING

The International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe have collaborated to publish *A Lawyer's Guide to Detecting and Preventing Money Laundering*, available for download at no charge. This guide could be a resource for lawyers who want to further their understanding about how money laundering works. It discusses how lawyers may be vulnerable to criminals, alerts them to red flags, and provides case studies (e.g. trust structures, property purchases).

A lawyer must retain a record of the information and any documents obtained for the purposes of client identification and verification for the longer of (a) the duration of the lawyer and client relationship and for as long as is necessary for providing services to the client, and (b) a period of at least six years following completion of the work for which the lawyer was retained (Rule 3-100).

CLOSED FILE RECORDS – RETENTION, STORAGE AND DESTRUCTION

The practice resource article, [Closed Files – Retention and Disposition](#), is being updated to take into account Law Society rule changes that were adopted on October 31, 2014:

- electronic data storage and processing (definitions of "metadata" and "record" and Rules 3-43.1, 3-59, 3.61.1, 3-62, 3-65 and 3-68);
- producing records in a complaint investigation (Rule 3-5.01);
- producing records in a forensic audit (Rule 4-43);
- storage providers and security (Rules 10-4 and 10-5).

Lawyers should particularly note the required retention periods for various accounting records, as well as the new

requirements with respect to storage providers and security.

How long is a lawyer required to keep records?

Rule 3-68 requires a lawyer to keep the following records for as long as the records apply to money held in trust and for at least 10 years from the final accounting transaction:

- accounting records, including supporting documents (Rule 3-59);
- trust account records (Rule 3-60);
- general account records (Rule 3-61);
- records of cash transactions (Rule 3-61.1);
- billing records (Rule 3-62).

Unless they are electronic records, the above records must be kept at a lawyer's chief place of practice in BC for as long as the records apply to money held in trust and, in any case, for at least three years.

A lawyer must retain monthly trust reconciliations and the detailed listing supporting the reconciliations for at least 10 years (Rule 3-65).

A lawyer must retain a record of the information and any documents obtained for the purposes of client identification and verification for the longer of (a) the duration of the lawyer and client relationship and for as long as is necessary for providing services to the client, and (b) a period of at least six years following completion of the work for which the lawyer was retained (Rule 3-100).

Appendix B of the article [Closed Files – Retention and Disposition](#) includes a schedule of suggested minimum retention periods (not rules) for other records. These guidelines take into account statutory considerations, defending a negligence claim and responding to a complaint.

What are "records"?

A lawyer should consider what is meant by "records" in the context of the rules. For example, Rule 3-68 only applies to the records referred to in Rules 3-59 to 3-62. In contrast, the records referred to in Rules 10-4 and 10-5 are a broader category of records.

Section 29 of the *Interpretation Act* provides that, in an enactment, "record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and

any other thing on which information is recorded or stored by any means whether graphic, electronic, mechanical or otherwise. (Section 1 of that Act, states that “enactment” means an Act or a regulation or a portion of an Act or regulation. The word “regulation” is also a defined term in section 1; the Law Society Rules are regulations.) Rules 10-4 and 10-5 generally apply to all of the documents in a lawyer’s client files (e.g. client identification and verification documents, correspondence, etc.).

Are there rules about storing records outside of the law office?

Yes. Regardless of whether the records are in paper or electronic form, if a lawyer stores or processes records with an entity outside of the office, whether or not for payment, all records must be maintained in a way that will allow compliance with Rule 10-4. When required by the *Legal Profession Act* or the Law Society Rules, a lawyer must, on demand, promptly produce records in any or all of the following forms:

- printed in a comprehensible format;
- accessed on a read-only basis;
- exported to an electronic format that allows access to the records in a comprehensible format.

Note that a lawyer must not maintain or process records with a “storage provider” (a defined term) outside of the office unless the lawyer:

- retains custody and control of the records;
- ensures that ownership of the records doesn’t pass to another party;
- is capable of complying with a demand under the *Legal Profession Act* or the Law Society Rules to produce the records and provide access to them;
- ensures that the storage provider maintains the records securely without
 - accessing or copying them except as is necessary to provide the service obtained by the lawyer,
 - allowing unauthorized access to or copying or acquisition of the records, or
 - failing to destroy the records completely and permanently on instructions from the lawyer; and

- enters into a written agreement with the storage provider that is consistent with the lawyer’s obligations under the Act and the Rules.

Regardless of whether the records are stored at the office or outside, and regardless of the form in which the records are maintained, Rule 10-5(1) requires that a lawyer protect all records and the information contained in them by making reasonable security arrangements against all risks of loss, destruction and authorized access, use or disclosure.

What should a lawyer do if the security of records may have been compromised?

The lawyer should read Rule 10-5(2) and consult with a Practice Advisor. Depending on the facts, the lawyer may be required to report to the Lawyers Insurance Fund.

New Rule 10-5(2) outlines the circum-

stances in which lawyers must notify the Executive Director if security of records may have been breached:

(2) A lawyer must immediately notify the Executive Director in writing of all the relevant circumstances if the lawyer has reason to believe that

- (a) he or she has lost custody or control of any of the lawyer’s records for any reason,
- (b) anyone has improperly accessed or copied any of the lawyer’s records, or
- (c) a third party has failed to destroy records completely and permanently despite instructions lawyer to do so.

PRACTICE CHECKLIST MANUAL – 2014 UPDATES COMPLETED

Check out the 2014 updates to the Law

SCAM ATTEMPTS AGAINST BC LAWYERS A CONSTANT FEATURE

Scam attempts against BC lawyers superabound (yes, that’s a word). Appoint someone in your firm to ensure that lawyers and relevant staff are kept up to date with new information from the Law Society. Since scamsters may impersonate you, regularly perform internet searches of your own name and firm, to see what turns up. For example, scamsters have posed as lawyers in real estate transactions, in employment and immigration matters, in a securities prospectus and to obtain retainers (see Practice Watch, Winter 2013 *Benchers’ Bulletin*). Though performing searches won’t necessarily prevent fraudsters from using your name, you may be able to take some mitigating actions.

Scamsters continue to pretend to be BC lawyers’ legitimate new clients, either using the phony debt collection scam or other ruses. Whatever the stratagem, the scamster’s end goal is usually to coerce a lawyer to deposit a 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. The scams range from the obvious to the very sophisticated and everywhere in between.

Protect yourself. Get familiar with the [common characteristics](#) of these scams and the risk management tips on our website (go to [Fraud: Alerts and Risk Management](#)). Review the [bad cheque scam names and documents web page](#) as part of your firm’s intake process. Use a [checklist](#) to assist you in complying with the client identification and verification rules.

Margrett George and Surindar Nijjar from the Lawyers Insurance Fund, Practice Advisor Barbara Buchanan and the Continuing Legal Education Society of BC presented a free webinar for lawyers regarding these scams: *The bad cheque scam – don’t get caught*. Videos from the webinar are available on [CLE’s website](#).

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.

Society's *Practice Checklists Manual* (in the Practice Support and Resources section of the website). The manual consists of 41 checklists to assist lawyers in managing files and in carrying out professional obligations. They are available in PDF and in Word format, so that you can revise them to suit your personal needs and circumstances. You can view the [Highlights](#) page to get a sense of some of the changes made in the checklists, reflecting statutory changes, new case law and changes in practice.

The 13 corporate and commercial checklists were completed in November. They are:

- Asset Purchase Procedure,
- Asset Purchase Agreement Drafting,
- Share Purchase Procedure,
- Share Purchase Agreement Drafting,
- Incorporation – Business Corporations Act Procedure,
- Shareholders' Agreement Procedure,
- Shareholders' Agreement Drafting,
- Partnership Agreement Procedure,
- Partnership Agreement Drafting,
- Commercial Lease Procedure,
- Commercial Lease Procedure Drafting,
- Security Agreement Procedure, and
- Security Agreement Drafting.

If you have suggestions for improving the manual's content in 2015, please send them to Barbara Buchanan at bbuchanan@lsbc.org. The manual has been developed by the Law Society with the assistance of the Continuing Legal Education Society of BC.

INCORPORATING A COMPANY FOR A NEW CLIENT OUTSIDE OF BC? BEWARE OF NEW SCAM

A new corporation scam has popped up in BC. At this point, it is not clear whether it's simply a case of a client not paying the lawyer's bill or if it's a scamster tricking a lawyer into incorporating a BC company for nefarious purposes (the latter seems more likely). Although the details may differ somewhat from lawyer to lawyer, it generally works as follows:

- A new client asks a lawyer to incorporate a company quickly because he wants to use the company for a

business contract.

- The client claims to reside in the UK and provides an address and telephone number.
- The client provides identity documents over the internet and a retainer by credit card.
- The client says that he will come to BC soon and that he can meet the lawyer in person at that time.
- The lawyer agrees that the law firm will be the company's registered and records office.
- After the lawyer has incorporated the company and notified the client, the client disappears, the credit card payment is eventually disallowed, and mail is returned.
- The lawyer learns that the client has subsequently extra-provincially registered the new company in another province.
- The law firm is concerned that it is the registered and records office for a new company that may be used to perpetrate a future scam.

How might a lawyer avoid this situation? Although a lawyer is not required to verify a new client's identity, if there isn't a "financial transaction" (as defined in Law Society Rule 3-91), when approached by a new client to incorporate a company on facts similar to those above, it is suggested that the lawyer verify the client's identity. In the case of a client outside of Canada, the lawyer must use an agent (see Appendix II of the [Client Identification and Verification Checklist](#)). In one case where the lawyer attempted to verify the client's identity, the client was never heard from again. If a lawyer has incorporated a company for a director and officer scamster outside of BC who cannot be located, in appropriate circumstances, section 40 of the BC *Business Corporations Act* might be used by the lawyer to apply to court to eliminate the lawyer's address as the registered office of the company.

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.❖

Services for lawyers

Practice and ethics advisors

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

Practice and ethics advice – Contact Barbara Buchanan, Lenore Rowntree or Warren Wilson, QC to discuss ethical issues, interpretation of the *Code of Professional Conduct for British Columbia* or matters for referral to the Ethics Committee.

Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships.

Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org.
Contact Lenore at: tel: 604.697.5811 or 1.800.903.5300 email: lrowntree@lsbc.org.
Contact Warren at: tel: 604.697.5857 or 1.800.903.5300 email: wwilson@lsbc.org.

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



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



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



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

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.

TRUST AND GENERAL ACCOUNTING

A lawyer failed to comply with various accounting rules set out in Part 3, Division 7 of the Law Society Rules. The lawyer failed to maintain trust and general account records adequately, failed to prepare monthly trust reconciliations, incurred trust shortages and did not immediately eliminate them, and failed to report to the Law Society those trust shortages that were in excess of \$2,500. The rule breaches were discovered during a compliance audit of the lawyer's practice. The lawyer was a sole practitioner practising in a new area of law. He had little accounting experience and relied on an accountant who was said to have ten years experience dealing with trust accounting matters. A conduct review subcommittee stated that maintaining trust accounts and proper accounting records in accordance with Law Society Rules is not only an important regulatory requirement, but an essential part in maintaining the public's trust in lawyers. Relying on others does not relieve a lawyer of his or her duties in this respect. The lawyer accepted full responsibility for the rule breaches and has taken steps to rectify his conduct. He also ceased operating as a sole practitioner and is now in partnership with another lawyer. He has hired adequate staff to assist him in his busy practice, and he maintains active oversight of his accounting obligations. (CR 2014-13)

INCIVILITY AND DISHONOURABLE CONDUCT

While employed as in-house counsel, a lawyer made inappropriate and offensive comments about his supervisor and a judge, and made further inappropriate and offensive comments about the supervisor after his termination. The comments were contrary to one or more of rules 2.1-2(b), 2.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*. The lawyer acknowledged making the comments and made two written apologies. The comments were made in communications with a colleague. There were a number of mitigating circumstances that affected his judgment at the time. The lawyer has taken steps to improve the manner in which he addresses co-workers and judges. (CR 2014-14)

In another case, a lawyer made unwarranted, discourteous and offensive remarks to opposing counsel during three separate incidents. The first incident involved comments made in court criticizing opposing counsel and asserting opposing counsel was misleading the court. Six days later, the lawyer uttered a profanity and raised his voice against the same opposing counsel at the courthouse in the presence of a police constable. A few months later, the lawyer yelled at the same opposing counsel, calling him a liar and a cheat in the presence of Crown counsel staff. The remarks in the first two incidents were contrary to one or more of Chapter 1, Rules 4(1) and 3(4), Chapter 2, Rule 1 and Chapter 11, Rule 13 of the *Professional Conduct Handbook* then in force. The remarks in the third incident were contrary to rules 2.1-3(d), 2.1-4(a), 2.2-1, 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*. The lawyer acknowledged his misconduct and wrote a letter of apology to opposing counsel. A conduct review subcommittee accepted that the lawyer acknowledged and was genuinely remorseful for his conduct. The subcommittee emphasized that such unprofessional behaviour not only reflected poorly on the lawyer, but on the integrity of the profession as a whole. (CR 2014-16)

DUTY OF CONFIDENTIALITY

A lawyer breached his duty of confidentiality owed to an individual seeking legal advice from him, by disclosing to another party (about whom the first party was seeking legal advice) that the individual had contacted him. The lawyer violated the duty of confidentiality imposed on lawyers by rule 3.3-1 of the *Code of Professional Conduct for British Columbia*. He apologized for his conduct and recognized the need to take greater care in complying with this duty. The lawyer had two prior conduct reviews related to other duties owed to clients and third parties. (CR 2014-15)

REPORTING CHARGES UNDER RULE 3-90

A lawyer breached Law Society Rule 3-90 by failing to report to the Law Society charges and convictions relating to his failure to file personal and corporate tax returns and a driving offence. The lawyer was not aware of the reporting obligation, and the problem with his tax filings occurred when he was suffering from health issues. At the time of the conduct review, there were no outstanding filing obligations or tax arrears owing. The lawyer had two prior conduct reviews for unrelated conduct. (CR 2014-17)

AFFIDAVITS

A lawyer swore an affidavit that contained a misleading statement. In particular, he failed to ensure the accuracy of the statement and to swear that the statement was based on information and belief. The affidavit, which was in support of an application to adjourn a summary trial, was drafted in a rushed manner by the lawyer's paralegal when the lawyer was ill. The misleading statement related to the paralegal's communications with court registry staff. The lawyer did not make the court aware of the inaccuracy in the affidavit, until questioned by the court during the adjournment application. The lawyer had a prior conduct review and a citation concerning the provision of a false affidavit. A conduct review

subcommittee noted that it is fundamental to the practice of law that lawyers appearing in court are truthful and that they not mislead the court with their statements or evidence. The subcommittee explained to the lawyer that it was only the passage of time and the unintentional nature of his conduct under current review that explains why he is undergoing a conduct review for substantially the same conduct that was the subject of the prior citation. (CR 2014-18)

LAND TITLE ACT ELECTRONIC FILINGS

A lawyer failed to strictly comply with the *Land Title Act*, Law Society Rule 3-56(3.2)(b) and rule 6.1-5 of the *Code of Professional Conduct for British Columbia* regarding electronic filings and the use of the lawyer's personal

continued on page 23

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 decisions](#) section of the Law Society website.

APPLICANT 6

Benchers review: June 5, 2014

Benchers: Herman Van Ommen, QC, Chair, Lynal Doerksen, Thomas Fellhauer, Craig Ferris, Benjimen Meisner, Phil Riddell and Elizabeth Rowbotham

Decision issued: August 27, 2014 (2014 LSBC 37)

Counsel: Jean Whittow, QC for the Law Society; Applicant 6 on his own behalf

BACKGROUND

In 1999, Applicant 6 left his law practice and his life in Canada to pursue a new life in France. Unfortunately, he left before all his affairs were in order, and this resulted in financial loss and inconvenience for former clients, the Law Society and his bank.

After experiencing financial difficulties in France, Applicant 6 returned to Canada in 2010 and worked as a realtor and as a taxi driver. In January 2012, he applied to be reinstated as a member of the Law Society.

A three-day credentials hearing was held in July 2013 to determine if Applicant 6 was of good character and repute and was fit to become a barrister and a solicitor of the Supreme Court. The panel granted the application for reinstatement with conditions (2013 LSBC 34).

The Law Society applied for a review of the panel's decision.

DECISION

The hearing panel found that Applicant 6 left Canada in 1999 for the purpose of avoiding his financial difficulties. The hearing panel described this as an isolated incident. However, the misconduct did not end in 1999. The evidence before the hearing panel showed that Applicant 6 did nothing to make his creditors, former clients or the Law Society aware of

his whereabouts. He provided no evidence to the hearing panel that he did anything to address the wrong he committed in 1999. He made no attempts at restitution to any party to whom he owed money when he left.

The Benchers found it troubling that Applicant 6 left France after experiencing financial difficulties there and, curiously, destroying all his financial records before leaving, as he did when he left Canada.

The passage of 15 years would normally be a sufficient lapse of time in a case such as this. However, the mere passage of time itself does not restore one's character or repair the harm one causes. The lapse of time must be accompanied with other positive conduct.

As the hearing panel found, Applicant 6 "preferred his own financial interest to that of his client." There was no evidence on the record to show that Applicant 6 had addressed this character flaw other than his expression of remorse at the time of the hearing.

The reference letters put forward by Applicant 6 were very brief and general in nature; they did not express knowledge of his departure from Canada in 1999. Most, if not all, of these letters were from people to whom Applicant 6 would be in some degree of dependency. Letters of reference from people who were dependent on him, such as his clients, would have been a stronger determiner of character.

A former client who testified about Applicant 6's character had suffered no harm from Applicant 6's conduct. This witness only provided proof that Applicant 6 did a competent job; however, competency does not equate to good character.

If Applicant 6 had provided evidence from those he had harmed and who had perhaps forgiven him, or if he had shown that he had made some effort to repair the relationship, this may have been sufficient to satisfy the test of his rehabilitation.

Applicant 6 had the burden of proving on a balance of probabilities that he was a person of good character. The review panel concluded that the hearing panel erred in finding that Applicant 6 had met the onus to provide evidence that he was a person of good character and repute and was fit to become a barrister and a solicitor of the Supreme Court.

The review panel ordered that the hearing panel's decision be set aside and Applicant 6's application for reinstatement be rejected. ❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Gary Russell Vlug
- John Edward Roberts
- Raffaele Crescenzo
- Thomas Paul Harding
- Martin Drew Johnson
- Vivian Chiang

For the full text of discipline decisions, visit the [Hearings reports](#) section of the Law Society website.

GARY RUSSELL VLUG

Vancouver, BC

Called to the bar: August 28, 1992

Discipline hearings: June 3 – 5, 2013 and April 28, 2014

Panel: Tony Wilson, Chair, Clayton Shultz and Gary Weatherill, QC

Decisions issued: February 26 ([2014 LSBC 09](#)) and September 5, 2014 ([2014 LSBC 40](#))

Counsel: Carolyn Gulabsingh for the Law Society; Gary Russell Vlug on his own behalf

FACTS

The Law Society issued a citation against Gary Russell Vlug that contained 11 allegations that relate to three family law matters.

Six of the allegations are related to Vlug's conduct in 2009 while representing a client in a child custody matter. A Supreme Court judge ordered that a Views of the Child Report be prepared by a doctor. The judge's ruling provided that the doctor should see all of the materials that were before the court to enable him to write his report. The judge did not order who was to provide those materials to the doctor.

Opposing counsel subsequently wrote the doctor, and copied Vlug, advising that he would deliver copies of his client's materials and suggesting Vlug do the same on behalf of his client.

It was later revealed in court that the doctor had only been provided information from opposing counsel and had not been provided with any documentation by Vlug. Vlug represented to the court that he was led to believe, in a telephone conversation, that opposing counsel had provided Vlug's client documents to the doctor. There was no such telephone conversation between the Vlug and opposing counsel.

Vlug prepared and commissioned two affidavits sworn by his client that represented to the BC Supreme Court and to the Court of Appeal that there was an active attempt by opposing counsel to deprive the doctor of Vlug's materials. Vlug knew or ought to have known that the representation was untrue or that the affidavit was not competently drafted.

Vlug represented to the Court of Appeal that he had not received a letter sent by opposing counsel advising that he was to provide his client's documents to the doctor when he knew or ought to have known that the statement was untrue.

He made discourteous and unfounded statements about opposing counsel to the Court of Appeal when he said that opposing counsel had "duped" him.

Vlug made a misrepresentation to the Law Society by claiming that the Court of Appeal had an "off record" discussion with opposing counsel respecting opposing counsel's apparent failure to deliver his client's affidavits and other materials to the doctor.

Three of the allegations in the citation related to Vlug's conduct concerning the representation of a client in a divorce proceeding.

On October 30, 2008, Vlug filed a Writ and Claim in the New Westminster Registry of the BC Supreme Court. The plaintiff in both was identified by his Canadian name and a copy of his marriage certificate was included in this filing. The only relief sought was "divorce."

On February 5, 2010, Vlug filed another Writ and Claim, but this time with the Vancouver Registry. The plaintiff was identified by his Chinese name. The relief sought in this filing was expanded to "divorce," "division of the family assets" and "other relief." The marriage certificate was not included in this filing. Vlug asserted to the court, on behalf of his clients, that it was impossible to obtain a certificate of the marriage.

There is no plausible excuse for Vlug filing in Vancouver without the marriage certificate and under a wrong name. He misrepresented the existence of the then-active New Westminster proceeding and also made an untrue statement to the court about the marriage certificate.

The remaining two allegations in the citation related to Vlug's conduct while representing another client in a family law matter in 2009. Vlug added documents to a previously prepared and sworn financial statement and prepared and commissioned an affidavit on behalf of his client that contained a statement that he knew was false.

DETERMINATION

The panel found that Vlug had committed professional misconduct in respect of all 11 allegations arising from three separate complaints, all by lawyers. He knowingly misrepresented facts while appearing before judges of the BC Supreme Court and the Court of Appeal, misled the Law Society, attached documents to an affidavit after it had been sworn, and acted with incivility in dealing with fellow lawyers.

The panel found Vlug's conduct was egregious and beneath the standards expected of members of the profession. It was of significant concern to the panel that Vlug failed to acknowledge his misconduct.

Vlug's professional conduct record includes one prior citation, four conduct reviews and a practice review.

DISCIPLINARY ACTION

The panel determined it was critically important that Vlug, the legal profession in general and the public understand that Vlug's behaviour – particularly his lying to the court, the Law Society and the panel – was not acceptable and should result in significant sanctions.

The panel found Vlug's conduct amounted to professional misconduct and ordered that he:

1. be suspended from the practice of law for six months; and
2. pay \$20,000 in costs.

During final submissions, Vlug argued that the Law Society had delayed its investigation and prosecution of six of the allegations against him, a matter on which the panel decided the parties could provide written submissions after the conclusion of the oral hearing.

The panel found that the delay was not inordinate or unacceptable, did not prejudice Vlug and was, in large part, caused by Vlug himself. The application to dismiss the citation as a result of an abuse of process involving delay in proceeding on six of the allegations was dismissed.

Vlug has applied for a review of the decision, and a stay of suspension has been granted until April 30, 2015.

JOHN EDWARD ROBERTS

Langley, BC

Called to the bar: November 10, 1995

Discipline hearing: July 16, 2014

Panel: Martin Finch, QC, Chair, William Everett, QC and Clayton Shultz

Oral reasons: July 16, 2014

Decision issued: September 8, 2014 ([2014 LSBC 42](#))

Counsel: Kieron Grady for the Law Society; John Edward Roberts on his own behalf

FACTS

In October 2013, the Law Society received a complaint from a former client and business partner of John Edward Roberts. The complaint alleged various forms of conflict of interest and failures to advise, misrepresentations regarding the structure of business, unauthorized withdrawal of funds from the business, attempted backdating of loan documents and failure to report a claim promptly to the Lawyers Insurance Fund.

On December 11, the Law Society wrote to Roberts advising him of the complaint and requesting written confirmation as to whether he had notified the Lawyers Insurance Fund of a court action that had been commenced against him by the complainant. Roberts responded by email confirming that he had notified the Lawyers Insurance Fund of the court action.

On December 18, the Law Society emailed Roberts to ask what date he had notified the Lawyers Insurance Fund of the court action. He did not reply to this email; however, he replied to a subsequent email advising that his letter to the Lawyers Insurance Fund was sent on December 12.

On February 19, 2014, the Law Society emailed Roberts to request

information related to:

- the establishment of the business with his partner;
- the operation, sale and winding down of the business
- allegations of a backdated signature on a general security agreement; and
- transfer of funds in relation to the business.

When Roberts did not respond by the deadline, the Law Society re-sent the letter. Roberts replied on March 21 indicating that he did not receive the original letter of February 19. He also advised that he was taking steps to close his law practice as a sole practitioner, was seeking part-time status for insurance, and may or may not apply for non-practising status in the future. He intended, in the short-term, to take time off from the practice of law due to personal matters and to evaluate his future.

On April 4, Roberts left a voice message to indicate he would not be able to deal with the letter's substantive matters by the deadline. At the date of hearing, July 16, 2014, Roberts had not responded to the requests contained in the Law Society's letter of February 19.

ADMISSION AND DISCIPLINARY ACTION

Following a protracted period of time with continued requests, Roberts failed to properly or completely respond to inquiries from the Law Society, even in the face of a citation hearing.

Roberts' failure to comply with the Law Society's requests appeared to the panel to be, in part, the result of his ongoing process of closing his practice and changing his status to either non-practising or part-time. It was not the product of financial incapacity, but rather lack of time and attention. While his heavy commitments to his family and his work in the construction industry may constitute an explanation, it did not constitute an excuse. A lawyer must respond to the requests of the Law Society in a prompt and complete fashion when an investigation is in progress.

The panel considered Roberts' professional conduct record as an aggravating factor. A citation issued in 2011 related to Roberts' taking default judgment against a represented party and failing to respond to communications from opposing counsel.

The panel accepted Roberts' admission of professional misconduct and ordered that he:

1. pay a \$2,000 fine;
2. pay \$1,417.38 in costs; and
3. provide a complete and substantive response to the inquiries made by the Law Society in its letter dated February 19, 2014.

RAFFAELE CRESCENZO

Vancouver, BC

Called to the bar: September 25, 1987

Ceased membership: January 1, 2011

Counsel: Mark Andrews, QC and Gavin Cameron for the Law Society; Raffaele Crescenzo on his own behalf

FACTS

On August 6, 2009, the Law Society gave notice to Raffaele Crescenzo that a routine compliance audit of the books and records of his practice was scheduled for September 22, 2009.

Crescenzo requested a meeting with the Law Society so that he could self-report trust account issues. He attended this meeting with his counsel and he admitted that during the preceding 18-month period, he took approximately \$150,000 from his pooled trust account when he was not entitled to these funds. He provided information about his circumstances at the relevant time period. Crescenzo, his wife and son have all had serious health issues. He reported that these issues impaired his judgment during that time. He was also on prescription medication and developed an addiction to the drugs. He sought assistance from the Lawyers Assistance Program for his addiction. Two years ago, Crescenzo was indebted to the Canada Revenue Agency for \$88,000. Approximately 18 months ago, he started using funds from his trust account with the intention of repaying the money, but had not replaced the funds.

When Crescenzo received notice of the upcoming compliance audit, he realized the misappropriation would come to light and he consulted a bankruptcy trustee. He filed for bankruptcy on September 16. The Law Society was listed as an unsecured creditor for \$150,000. He and his wife were in the process of selling their house and he proposed to pay \$100,000 to the Law Society from the proceeds of the sale, after other secured creditors, including the CRA, were paid.

On September 17, Crescenzo signed a voluntary undertaking to cease practice and consented to the appointment of a custodian. By order of the BC Supreme Court, the Law Society was appointed as custodian over Crescenzo's law practice.

The Law Society conducted an audit under Rule 4-43 of Crescenzo's books, records and accounts and an external accountant was retained to reconcile his trust accounts and reconstruct the client trust ledger balances. Based on a reconciliation of all client ledgers sitting in a negative position, it was determined that Crescenzo's client trust liabilities totalled \$693,799.52. The pooled trust account had a balance of only \$549,759.18, resulting in a global trust shortage of \$144,040.34.

The Law Society identified funds withdrawn by Crescenzo over and above the global trust shortage when individual client files were reviewed, including matters where the client trust ledger had a positive balance.

The evidence obtained during the investigation established that, between December 2006 and September 2009, Crescenzo took funds in the amount of \$156,309.85 held in trust on behalf of his clients when he was not entitled to the funds.

ADMISSION

Crescenzo admitted that he misappropriated \$156,309.85 held in trust on behalf of his clients, by withdrawing the funds from his pooled trust account by cheques made payable to himself when he was not entitled to the funds. He admitted that his conduct constituted professional misconduct. His admission was made to the Discipline Committee under Rule 4-21. This rule provides for a process whereby a respondent can admit misconduct without a hearing. At the time of the admission,

Crescenzo's membership in the Law Society had ceased and he had been prohibited from practising law since September 17, 2009.

The Discipline Committee accepted Crescenzo's admission and his undertaking not to apply for reinstatement to the Law Society, amongst other things, for a period of four years commencing on September 25, 2014.

Crescenzo will not be eligible to apply for reinstatement with the Law Society until September 25, 2018. If he chooses to apply at that time, he will have to convince a credentials hearing panel that he is fit to practise and is of good repute. The Discipline Committee believes the misconduct in this case is very serious but the Committee also believes the minimum nine years Crescenzo will not have practised, together with the future oversight of the Credentials Committee, properly protects the public. The Committee considered expert medical reports and acknowledged the severe medical conditions suffered by Crescenzo, his wife and adolescent son. The Committee does not accept that medical conditions, whether suffered by him or his family members, in any way excuses his actions, but the serious medical issues are mitigating circumstances that contributed to the Committee's decision to accept the admission of misconduct under Rule 4-21.

TRUST PROTECTION COVERAGE

In every profession, there are occasionally members who are dishonest. Although not all professions or industries protect victims of their dishonest members, the legal profession in BC has, since 1949, provided financial protection to members of the public whose money has been stolen by their lawyer. If a claim is made against a lawyer relating to the theft of money or other property, Trust Protection Coverage (TPC) is available under Part B of the lawyer's insurance policy to reimburse the claimant, on the lawyer's behalf, for the amount of the loss. Based on the circumstances described in allegations 1.1, 1.2, 1.4 paragraph 33, 1.4 paragraph 44, 1.10, 1.27, 1.30, 1.37 and 1.38 of an admission made under Rule 4-21 of the Law Society Rules, nine TPC claims were made against Crescenzo and the amounts of \$7,206, \$958, \$1,346, \$1,994, \$3,792, \$195, \$9,803, \$510 and \$701 paid respectively. A tenth TPC claim was made in relation to the circumstances described in allegation 1.39 and the allegations relating to funds taken from the pooled trust account, and the amount of \$159,070 was paid. Crescenzo is obliged to reimburse the Law Society in full for the amount paid under TPC. For more information on TPC, including what losses are eligible for payment, please go to [Trust Protection Coverage](#).

THOMAS PAUL HARDING

Surrey, BC

Called to the bar: August 3, 1990

Discipline hearing: May 15, 2014

Panel: Elizabeth Rowbotham, Chair, Karen Nordlinger, QC and Thelma Siglos

Decision issued: September 29, 2014 ([2014 LSBC 45](#))

Counsel: Kieron Grady for the Law Society; Gerald A. Cuttler for Thomas Paul Harding

FACTS

Thomas Paul Harding was retained by a plaintiff in a personal injury action arising out of a motor vehicle accident.

On June 25, 2013, the paralegal to counsel for the defendant sent a letter to Harding advising that defence counsel had scheduled an independent medical examination (IME) of his client with an orthopaedic surgeon. The letter further advised that the surgeon's cancellation policy was five working days or \$800.

On June 27 Harding wrote to defence counsel advising that the orthopaedic surgeon had already examined his client and that the defence was not entitled to a second medical examination by the same medical specialist, except in very limited circumstances. He also asked to be informed of the facts that would entitle the defence to a re-examination of his client.

On July 2, the paralegal to defence counsel sent a letter to Harding advising that defence counsel had scheduled an additional IME of Harding's client with a psychiatrist. The letter also advised that the psychiatrist's cancellation policy was 10 working days or \$950.

Also on July 2, the paralegal sent a letter to Harding in response to his June 27 letter to defence counsel. The paralegal set out the position of the defence on the IME by the orthopaedic surgeon and referenced case law in support of that position.

On July 3, Harding wrote two letters to counsel for the defence, one in response to the proposed IME by the orthopaedic surgeon and the second in response to the proposed IME by the psychiatrist. Both letters contained 15 pre-conditions that Harding required be addressed before he would consider any defence medical examination of his client.

In the letters, Harding also set out his views on the propriety of paralegals debating issues of law with opposing counsel. He referred to the paralegal as "an uneducated person" and indicated that only a lawyer should correspond with him in the future. He also used the word "hireling" with respect to the orthopaedic surgeon and the psychiatrist.

In July, 2013, defence counsel filed a complaint with the Law Society in respect of the two letters. On April 17, 2014, Harding wrote a letter of apology to defence counsel and the paralegal.

DETERMINATION

The question for determination was whether Harding's statements were a marked departure from the conduct expected of a lawyer and, therefore, professional misconduct. The panel noted the right of freedom of expression under the *Charter of Rights and Freedoms*.

Harding has strong views on the propriety of paralegals debating issues of law with opposing counsel. He testified that he was "vexed" when he wrote the letters and that he intended the final paragraphs to be a witty admonishment to defence counsel that paralegals should not be debating legal issues with counsel and that those types of discussions should be between counsel. The panel found that Harding's remarks fell short of the mark of "witty" and were open to misinterpretation. However, his words and the manner in which they were expressed were not a marked departure from the conduct expected of lawyers. If the panel had found otherwise, the fact that Harding was "vexed" and irritated would not

justify misconduct.

Harding also had strong views on the impartiality and independence of the orthopaedic surgeon and the psychiatrist. He testified that his use of the term "hireling" was intended to be derogatory and that he has disdain for these practitioners. Harding's opinion was based, in part, on the billing information that he obtained from ICBC through freedom of information requests. The amount received by each doctor for the period 2009 to 2012 formed a significant part of their professional revenue.

Given Harding's views that the orthopaedic surgeon and the psychiatrist are neither independent nor impartial, and that the percentage of their medical billings paid by the defence is evidence of this lack of independence, the panel did not find that his use of the term "hireling" was necessarily inapt or offensive.

The panel found that Harding could have expressed his views more elegantly, less abrasively, and more persuasively. However, the panel did not find that the words he used or the manner in which he expressed his views on the two practitioners constituted professional misconduct.

DECISION

The panel dismissed the citation and the allegations against Harding.

MARTIN DREW JOHNSON

Kelowna, BC

Called to the bar: May 10, 1977

Discipline hearings: October 17, 2013 and June 16, 2014

Panel: majority decision (facts and determination): Tony Wilson, Chair and Dan Goodleaf; concurring decision: Dale G. Sanderson, QC

Decisions issued: February 24 ([2014 LSBC 08](#)) and November 3, 2014 ([2014 LSBC 50](#))

Counsel: Larry R. Jackie, QC for the Law Society; Gregory P. Delbigio, QC for Martin Drew Johnson

FACTS

On March 9, 2011, in the course of representing his client at the courthouse, Martin Drew Johnson was involved in an altercation outside the courtroom with a police officer who was a potential witness.

The police officer had previously arrested Johnson's client for breach of recognizance when he went to his former matrimonial home at the request of his wife. Outside the courtroom, Johnson asked the police officer a question that was related to the breach of recognizance charge. The exchange between Johnson and the officer became heated and volatile, and they were reportedly "nose to nose." Johnson responded to some remarks made by the officer by saying "f*** you" to him.

The officer then told Johnson that he was under arrest and very quickly grabbed his left arm and tried to spin him. Johnson had artificial hip replacement surgery done the previous year and, as a result, was unable to spin around. The officer was substantially larger and younger than Johnson and, after a struggle, Johnson ended up being pinned against a glass wall. A court sheriff's officer immediately intervened to assist in the

arrest. Johnson was placed in handcuffs and taken down the hallway in front of a number of people.

The officer sought to have charges laid against Johnson for assault; however, charges were ultimately not laid against Johnson for assault or any other offence.

DETERMINATION

Majority decision

In the majority's view, provocation is irrelevant to a finding of professional misconduct. The only issue to determine was whether or not Johnson's use of profanity as an insulting interjection, spoken in anger to a witness in a courthouse hallway, constituted professional misconduct.

The majority did not see the facts of this case as an over-aggressive police officer provoking a lawyer into uttering a verbal insult. Although the police officer might have taken more proactive steps to diffuse the situation, Johnson had a higher duty to avoid putting himself into the position where the police officer and Johnson were "nose to nose," leading to the expletive being angrily uttered by him.

The majority did not accept that there are any circumstances in which a lawyer in a courthouse could say "f*** you" in anger to a witness, to another lawyer or to any member of the public in a courthouse in an angry, insulting, hostile or belligerent manner. This type of behaviour was totally indefensible and was a marked departure from the standard of conduct that the Law Society expects of lawyers and, therefore, constituted professional misconduct.

Concurring decision

The concurring panel member took into consideration that Johnson's remark was overheard by Crown counsel, but no one else. The remark was made at the end of a quiet corridor. At issue was whether uttering an expletive to a witness in a proceeding within a courthouse corridor (whether that witness was a police officer or not) was excusable in the particular circumstances of provocation by the police officer.

In the view of the concurring panel member, the police officer's conduct was not so aggravating or severe to excuse Johnson's conduct. While Johnson's remarks were understandable, they were not excusable and were a marked departure from what the Law Society expects of lawyers. The concurring panel member found that Johnson's words constituted professional misconduct.

DISCIPLINARY ACTION

The panel found that Johnson's prior disciplinary record was a concern. This was the second time that Johnson had committed this type of breach. However, his previous misconduct and other infractions were, in part, fueled by substance abuse problems that had apparently been resolved.

The panel did not place significant weight on Johnson's letters of reference because some of the authors may not have been aware of all the factors of this case and may not represent a broad view of the profession.

Johnson testified that he immediately regretted his remark and recognized it was a mistake. He fully acknowledged and took responsibility for his inappropriate and unprofessional conduct.

The panel believed that the likelihood of Johnson repeating similar conduct was unlikely and that he had learned from this experience. Given the circumstances of his arrest by the officer, he had already paid a high price for his outburst.

The panel concluded that the breach was moderately serious because Johnson ought to have kept his temper despite the provocation. And it was serious because the incident occurred in a public area of the courthouse.

The panel ordered that Johnson:

1. be suspended for 30 days; and
2. pay \$10,503.05 in costs.

VIVIAN CHIANG

Vancouver, BC

Called to the bar: May 17, 1996

Bencher review: September 12, 2014

Benchers: David Mossop, QC, Chair, Haydn Acheson, Thomas Fellhauer, Dean Lawton, Sharon Matthews, QC, Herman Van Ommen, QC and Tony Wilson

Decision issued: November 10, 2014 ([2014 LSBC 55](#))

Counsel: Henry Wood, QC for the Law Society; Vivian Chiang on her own behalf

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 dismissed the remaining three allegations (2009 LSBC 19; discipline digest: 2009 No. 3 Fall). One member of the panel dissented with respect of one of the allegations and would have found that Chiang had committed professional misconduct.

A Bencher review panel agreed with the minority decision, found that one of the three allegations amounted to professional misconduct and referred the matter back to the hearing panel to consider appropriate sanctions ([2010 LSBC 29](#); discipline digest: 2013 No. 2 Summer).

Chiang appealed to the Court of Appeal; the appeal was dismissed on January 15, 2013 ([2013 BCCA 8](#)).

Chiang applied to the Supreme Court of Canada for leave to appeal the decision of the Court of Appeal; the application was dismissed on June 13, 2013 (No. 35279).

A hearing panel issued a decision on disciplinary action on September 25, 2013 ([2013 LSBC 28](#); discipline digest: 2013 No. 4 Winter). Chiang was ordered suspended for one month and assessed costs in the amount of \$10,000.

Chiang sought a review of the decision on disciplinary action. A stay of proceedings was issued on November 4, 2013 ([2013 LSBC 30](#); discipline digest: 2013 No. 4 Winter).

On April 25, 2014, Chiang submitted an application that the record before the review panel must include the transcripts and submissions of every proceeding in prior hearings. Her application was denied (2014 LSBC 26). The facts that caused the finding of professional misconduct were no longer available for review as a higher court had already determined that issue. The transcript and submissions of the first review hearing were not relevant to the matter before the current review panel.

The review hearing on disciplinary action was set three times on March 31, July 21, and September 12, 2014. Prior to each review hearing, Chiang made an application for adjournment that was denied (2014 LSBC 10, 2014 LSBC 28 and 2014 LSBC 43).

Subsequent to each decision and on the eve of each review hearing, Chiang renewed her application for an adjournment on the basis that she was seeking the assistance of counsel, she had recently retained counsel who needed more time to prepare for the hearing and, lastly, she had parted ways with her counsel and was without counsel to represent her at the review hearing.

Chiang was granted the adjournment on the first two occasions. The Benchers decided that the September 12 review hearing would proceed with or without Chiang having counsel. The lengthy history of adjournments and missed deadlines emphasized the need for this matter to be heard. Chiang was capable of representing herself as she had previously done so in all of the Law Society proceedings as well as in the Court of Appeal and in the Application for Leave to the Supreme Court of Canada.

DECISION OF THE BENCHERS ON REVIEW

The Benchers rejected Chiang's request to review all decisions relating to the citation. This review was limited to the decision of the hearing panel issued September 25, 2013.

The panel had ordered a suspension of one month plus costs of \$10,000. Chiang submitted that the disciplinary action was too harsh.

Chiang asserted that no one had been harmed by her actions. In the Benchers' view, the panel correctly found that the parties in the litigation were negatively affected. They faced additional unjustified costs due, in part, to Chiang's misleading behaviour.

Chiang took the position that she had suffered enough. She stated she was ordered to pay costs in the court proceeding, her company went into bankruptcy, and she was humiliated by publication of the reasons concerning this matter. The Benchers found nothing in the record verifying that Chiang was held personally liable for costs. Although publication by the Law Society that a lawyer has committed professional misconduct is painful and humiliating, it is a normal incident of the disciplinary process and not a basis for determining that the disciplinary action imposed was inappropriate.

Chiang claimed that other lawyers found to have committed similar acts had received less severe sanctions. She was found to have intentionally misled the Court while motivated by her financial interest. In the Benchers' view, when one considers the proper characterization of her misconduct, it was clear that she was not treated differently from other lawyers who have committed similar misconduct.

Chiang suggested that a less punitive approach ought to have been taken by the Law Society. She said that a conduct review would have been more helpful and more appropriate. The panel did not have the jurisdiction to consider such an approach nor do the Benchers on review.

In considering the appropriateness of the disciplinary action imposed in this case, the Benchers considered these primary factors:

- (a) the misleading conduct was intentional;
- (b) the conduct was motivated by financial interests;
- (c) Chiang still failed to recognize the extent of her misconduct.

The Benchers agreed that the disciplinary action imposed was appropriate and dismissed this application for review with costs.

Chiang has filed a Notice of Appeal in the BC Court of Appeal. ❖

Conduct reviews ... from page 17

digital signature. During a compliance audit of the lawyer's practice, it was discovered that he had shared the password to his digital signature with his conveyancing assistants and that his digital signature had been applied to documents submitted to the Land Title & Survey Authority. The lawyer permitted his staff to apply his digital signature in his absence from the office for one or two years. He amended his practice immediately when his misconduct was brought to his attention. A conduct review subcommittee accepted the lawyer's explanation that he had not remembered the requirements for electronic filing and had not read the Law Society communications that would have refreshed his memory. The subcommittee emphasized the role that lawyers play in preserving the

integrity of the electronic filing of land title documents. (CR 2014-19)

ACTIVITY THAT ASSISTS DISHONEST, FRAUDULENT OR CRIMINAL CONDUCT BY CLIENT

A lawyer prepared documents that allowed his client to acquire shares from the client's son when the son was restrained from disposing of those shares pursuant to a court order in a family law proceeding. The lawyer failed to conduct sufficient due diligence to satisfy himself that his conduct was not contrary to Chapter 4, Rule 6 of the *Professional Conduct Handbook* then in force. The lawyer acknowledged his failures, including the failure to recognize a possible fraudulent conveyance. He now maintains office procedures to avoid similar incidents in the future. (CR 2014-20) ❖

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