Practice watch

by Barbara Buchanan, Practice Advisor

LAWYER ACTING AS SURETY

IN THE *BC Code*, a "conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person (rule 1.1-1). The rules under section 3.4, provide detailed guidance about conflicts and include specific rules with respect to a lawyer acting as a surety:

> **Judicial interim release**
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> 3.4-40 A lawyer must not act as a surety for, deposit money or other valuable security for, or act in a supervisory capacity to an accused person for whom the lawyer acts.
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> 3.4-41 A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

Accordingly, if a lawyer acts as a surety for an accused person, the lawyer should not concurrently act as the accused person's lawyer. A lawyer's judgment and freedom of action on a client's behalf should be as free as possible from conflicts; otherwise the client's interests may be seriously prejudiced. Any relationship or interest that affects a lawyer's professional judgment is to be avoided, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer (rule 3.4-26.1, commentary [1]).

Unlike BC, the Law Society of Alberta's *Code of Conduct* does not include specific rules regarding a lawyer acting as a surety for an accused. As has been reported in the case of Omar Khadr, one of the terms of the Alberta court order releasing him pending the appeal of his conviction in the US is that he must live with his lawyer in Edmonton. Our Ethics Committee has not considered whether a person in Khadr's position as an appellant would be considered an "accused person" under rule 3.4-40 and, consequently, whether it would be open to a BC lawyer to act as a surety during an appeal rather than in the first instance. Lawyers who wish to act as a surety are encouraged to contact a practice advisor for ethics advice.

HELP THWART SCAMS – FOLLOW THE CLIENT ID RULES AND BEWARE OF CHANGES TO PAYMENT INSTRUCTIONS

Scammers continue to pose as prospective clients and approach BC lawyers, using the phony debt collection scam or other ruses. Their 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 scammer before the lawyer finds out the instrument is no good. A recent scam of a different nature targeted a BC lawyer disbursing trust funds. The scammer sent an email, purportedly from the client, with a change in payment instructions, directing that the funds be wired to a different account (see the May 7, 2015 Notice to the Profession).

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Scams range from the obvious to the very sophisticated and everywhere in between. What can you do to protect yourself?

Verify the client's identity as required by Law Society Rules 3-98 to 3-109 (Rules 3-91 to 3-102 before July 1, 2015). Appreciate that compliance with the rules is a prerequisite for coverage under the compulsory insurance policy if a lawyer suffers a trust shortfall as a result of the bad cheque scam.

Use a checklist. See the updated checklist and frequently asked questions available in the Practice Resources section of our website. Appendix 1 of the checklist is a sample attestation for the verification of identity of a client who is in Canada, but not physically present before the lawyer. Appendix II is a sample agreement between the lawyer and the lawyer's agent to verify the identity of a client who is outside of Canada. Appended to the agreement is a sample attestation form for the agent's use. Select the commissioner, guarantor or agent yourself, rather than allowing a potential scammer to provide you with a phony attestation.

Get familiar with the common characteristics of these scams and the risk management tips on our website. Read the fraud notices from the Law Society (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.

Watch the free webinar for lawyers: *The bad cheque scam – don't get caught*. Videos from the webinar presented by the Law Society (Lawyers Insurance Fund lawyers Margrett George and Surindar Nijjar and practice advisor Barbara Buchanan) and the Continuing Legal Education Society of BC are available on CLE's website. Check out the archive of the client identification and verification rules online course (Roy Millen and Barbara Buchanan), originally webcast by CLE, and available in the practice resource section of our website.

Appoint someone in your firm to keep lawyers and relevant staff up to date with new information from the Law Society. Since scammers may impersonate you, regularly perform internet searches of your own name and firm to see what turns up.

As insurance is available on the commercial market for these kinds of risks, talk to your broker. For a list of brokers, see the Lawyers Insurance Fund information regarding excess and other commercial liability insurance products on our website.

Report potential new scams to a practice advisor at 604.669.2533. Reporting allows us to notify the profession, as appropriate, and update the list of names and documents on our website.

CHANGES TO HEALTH CARE COSTS RECOVERY REGULATION

Effective February 13, 2015, section 7 of the Health Care Costs Recovery Regulation was amended with respect to the notices to the government prescribed for the purposes of sections 4, 10, 12 and 13 of the *Health Care Costs Recovery Act*. The Ministry of Justice, Legal Services Branch, Health & Social Services Group has advised that the notices were amended to clarify the information required by the Ministry of Health to effectively manage its obligations as defined in the Act. Note that the form required pursuant to section 13 of the Act, the Notice of Proposed Terms of Settlement, requires payors to include the proposed total amount of the settlement, the amount for health care costs, the consent dismissal order and releases, in addition to other information.

Lawyers who act for clients in relation to personal injury and wrongful death claims should familiarize themselves with the changes. Section 24 of the Act sets out exclusions to the legislation (such as personal injury or death arising out of a wrongdoer's use and operation of a motor vehicle where ICBC insures the defendants, and personal injury or death claims covered by the *Workers Compensation Act*).

ISSUES CONCERNING OFF-SITE WORD PROCESSING

Are you contemplating an arrangement with a non-lawyer to do word processing at a location outside of your firm (e.g., at a home office)? Is it possible that the word processor may also work for another law firm? In such cases, review *BC Code* sections 3.3 (confidentiality) and 3.4 (conflicts) and Law Society Rules 10-3 (requirements for storing or processing records outside of a lawyer's office; Rule 10-4 before July 1, 2015) and 10-4 (security of records; Rule 10-5 before July 1, 2015). Enter into a written agreement with the word processor consistent with your professional obligations.

The Ethics Committee has provided guidance on the issue of off-site workers in opinions dated March 1, 2001 and April 9, 2015 (see the annotated *BC Code* in the Publications section of our website). In the event a lawyer does employ an off-site contractor who also works for another law firm, the firm must exercise due diligence to ensure that both the firm and the contractor preserve client confidentiality, not only of that firm's clients, but of the clients of the other firm. Such due diligence would include:

- requiring the contractor to advise the firm of the names of any other firms for whom the contractor is working, and
- obtaining the express consent of clients to make use of the contractor's services on the client's behalf or to disclose the client's name to the contractor for the purpose of permitting the contractor to conduct a conflicts check.

In 2001, the Ethics Committee approved of American Bar Association Opinion 95-398, which specifically recognizes that law firms may use a computer maintenance company that would have access to the firm's client files. The ABA opinion recognizes that law firms use outside agencies for numerous functions such as accounting, data processing and storage, printing, photocopying, computer servicing and paper disposal and that it is proper practice to do so. It was the committee's view that, although lawyers who use the services of such outside contractors do not breach their obligations of confidentiality by doing so, they must use due diligence to ensure that the information remains confidential. The committee also pointed out that the due diligence required must take account of all the circumstances, but would usually include, at a minimum, giving the contractor written notice of the requirement to preserve confidentiality. Law Society Rules 10-3 and 10-4 (Rules 10-4 and 10-5 before July 1, 2015) came into effect in October 2014, with further requirements that must be taken into account, including a mandatory written agreement with any entity storing or processing records outside of a lawyer's office.

LAWYERS WITH A JD DEGREE MAY NOT USE "DR." IN MARKETING MATERIALS

From time to time, lawyers who have obtained a juris doctor degree (JD) or a JSD (a degree that may be awarded following graduate study in law), have asked if they may use the title "Dr." in front of their names. The Ethics Committee considered this question on April 9, 2015, and was of the view that the title "Dr." may inadvertently mislead the public into thinking that such lawyers hold an MD, an SJD or a PhD. It was the committee's opinion that using the title "Dr." for JD or JSD degrees is contrary to Code rule 4.2-5(d) and (e).❖

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.

CONFLICT OF INTEREST BETWEEN LAWYER AND CLIENT

A lawyer prepared for her clients wills that included a bequest to the lawyer's son, without recommending that the testator obtain independent legal advice. Chapter 7, Rule 1(b) of the *Professional Conduct Handbook* then in force states that a lawyer must not perform any legal services for a client if "anyone, including a relative …, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgment." A conduct review subcommittee advised the lawyer that her conduct was inappropriate because she failed to adequately pursue her own misgivings about the bequest to her son.

Further, the clients were spouses who passed away a year and a half apart. The subcommittee noted that the lawyer could have arranged for independent legal advice, either at the time the wills were prepared or after the first spouse died. The lawyer accepted responsibility for her lapse in judgment. The subcommittee accepted that her failure to recognize the seriousness of the ethical dilemma was not prompted by any expectation of financial gain for herself or her son. (CR 2015-06)

FAILURE TO SUPERVISE EMPLOYEE AND MISLEADING ADVERTISING

A lawyer hired a Korean-speaking law school graduate from the United States to attract Korean-speaking clients through advertising. The lawyer did not speak or read Korean. The lawyer approved several advertisements, but did not have the ads translated and did not know that the ads described the law school graduate as a "lawyer" and that his web page stated in English, "our lawyers speak Korean." The lawyer failed to directly supervise his employee and permitted his employee to be held out as a lawyer, contrary to rules 6.1-1 and 6.1-3 of the *Code of Professional Conduct for British Columbia*, and authorized a marketing activity that was inaccurate and reasonably capable of misleading the public, contrary to rule 4.2-5. The lawyer made an error in judgment in relying upon the employee to advertise and market the law practice without supervision, and not taking steps to have the advertising translated so he could review what had been written. He made a further error in judgment in assuming that being qualified to practise law in the US meant that the employee could advertise himself as a lawyer in British Columbia. The conduct was careless but not deliberate. In future, the lawyer will engage a professional third-party language translator for all law practice communications in languages other than English, Mandarin and Cantonese. (CR 2015-07)

SUPERVISION OF STAFF PREPARING COURT DOCUMENTS

A lawyer caused three inaccurate affidavits to be filed in court, contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force, and failed to properly supervise his legal assistant who prepared the affidavits, contrary to Chapter 12, Rule 1. In response to an application to set aside a default judgment, the lawyer's legal assistant, who was also his wife, swore three affidavits. The court found that the affidavits were inaccurate in some respects and that the lawyer's failure to verify the affidavits amounted to serious misconduct, though the conduct fell short of deliberately trying to mislead the court.

A conduct review subcommittee said the lawyer's conduct was inappropriate as it led to a situation where his integrity was called into question in court. The lawyer acknowledged his duty to fully supervise staff at all times and to ensure the accuracy of material he puts before the court. The subcommittee was satisfied that he had analyzed the circumstances and learned from his mistakes. The lawyer explained that, at the time the conduct occurred, he was under an unusual amount of stress and he had relied too heavily on his staff. He has taken steps to reduce his workload and stress. (CR 2015-08)

DUTY OF CANDOUR TO THE COURT / DISHONORABLE OR QUESTIONABLE CONDUCT

A lawyer prepared an affidavit on instructions from senior counsel and relied on that affidavit, sworn by senior counsel, in an *ex parté* application, even though she had substantial doubts about the accuracy of the affidavit. In a subsequent related application, she swore and relied on her own affidavit, which lacked candour, contrary to the duty owed to the court and contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force. The lawyer admitted that she erred in relying on the senior lawyer's less than candid affidavit and that she ought to have disclosed to the court that she had some doubts about some of the content. She also admitted that her affidavit lacked candour and ought to have set out all the facts forthrightly.

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Credentials hearings

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.

IMRAJ SINGH GILL

Hearing (application for enrolment): March 4 and 5, 2015

Panel: Gregory Petrisor, Chair, Peter Warner, QC and Benjimen Meisner (approved the decision in draft, but passed away before it was finalized)

Decision issued: March 5, 2015 (2015 LSBC 16)

Counsel: Gerald Cuttler for the Law Society; Michael Shirreff for Imraj Singh Gill

BACKGROUND

When Imraj Singh Gill applied for enrolment, he disclosed that he had faced a charge of narcotics possession in 2006. In response to further inquiries from the Law Society, he further disclosed a history of driving prohibitions, including a charge of having open liquor in a motor vehicle.

In 2004 and 2005, when he was 17 and 18, Gill received three 24-hour driving prohibitions for having consumed alcohol prior to driving with a novice driver's licence.

Gill was 19 in 2006 when he was charged with possession of narcotics for the purpose of trafficking. The car he was driving had been pulled over by the police for failing to stop at a red light. A search of the car found the drugs in the glove compartment and, according to the police report to Crown counsel, Gill admitted that the drugs were his and that he sold drugs for his own profit. However, Gill testified at his hearing that he never sold drugs and that the drugs belonged to his friend, who was a passenger in the car at the time. Gill testified that he had asked his friend to take responsibility for owning the drugs and to speak to Gill's lawyer. Although there was no evidence that the friend did talk to Gill's lawyer, the charges against Gill were stayed.

In 2008 Gill was again issued a 24-hour driving prohibition for having consumed alcohol prior to driving with a novice driver's licence.

In 2009 he was charged with having open liquor in a vehicle, and Gill testified at his hearing that his friend had been driving at the time of the charge, and that the beverage belonged to his friend. Gill disputed the charge, and the officer who issued the charge did not show up for the hearing.

Gill attended a responsible drivers course in approximately 2009, which he says had such an impact on him that he now has a "zero tolerance policy" toward drinking and driving. The Credentials Committee found that there is no evidence that he has had any driving suspensions since then, nor that he has any alcohol-related difficulties today.

Gill obtained a degree in criminology from Simon Fraser University and a law degree from Bond University. He proposes to article with Avtar Dhinsa, who practises in Burnaby.

In his application for enrolment, Gill did not disclose his 24-hour driving prohibitions. He explained at his credentials hearing that, after consulting with Dhinsa, he did not consider those prohibitions to be "charges," and so thought that they did not need to be disclosed.

Gill also did not disclose his charges for having open liquor in a vehicle. He testified that he did not remember the open liquor and traffic violation when he was preparing his application.

DECISION

Gill conceded that, at the time he was charged with possession of narcotics for the purpose of trafficking, he would not have been able to prove that he was of good character and repute. The panel found that the evidence established that he had rehabilitated himself, that he took responsibility and made the effort to improve his situation. The panel concluded that Gill was able to change his life's trajectory and has earned the respect of people who have written letters of reference and who gave evidence in the hearing.

The panel found that Gill has shown diligence, discipline, honesty, an appreciation of right from wrong, a willingness to do right in the face of adverse consequences and a desire to assist others in the community. He appears to have learned from past mistakes and has matured, and has shown he is fit to become a barrister and a solicitor.

The panel granted Gill's application for enrolment in the Admission Program, and ordered that he pay $4,000 in costs.

NELSON SELAMAJ

Hearing (application for enrolment): February 24, 25 and 27, 2015

Panel: Jamie Maclaren, Chair, Gavin Hume, QC and John Lane

Oral reasons: February 27, 2015

Decision issued: April 1, 2015 (2015 LSBC 12)

Counsel: Gerald Cuttler for the Law Society; Craig Jones, QC for Nelson Selamaj

BACKGROUND

Nelson Selamaj secured employment with a law firm in the summer of 2013 between his second and third years of law school. His prospective principal encouraged him to apply to the Law Society for temporary articles so that he may occasionally appear in court.

Selamaj discovered that an application for temporary articles is due 30