The Law Society of British Columbia

Benchers' Bulletin

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Highlights

President's View

Is now the time for Compulsory Continuing Education?

by Robert W. McDiarmid, QC

Data collected from insurance claims and complaints tells us that when lawyers have problems, those problems rarely result from lack of knowledge of substantive law. That suggests that lawyers are generally knowledgeable about the law, and practise competently. A recent survey carried out by staff at the Law Society of Upper Canada (LSUC), however, has concluded that our profession is the worst among the senior professions when it comes to "quality assurance" and "quality improvement," the in-vogue terms for demonstrably being up-to-date in the latest professional knowledge. Has the time come for Canadian law societies to require continuing education as a condition of being permitted to practise? There are strong arguments suggesting the answer is "yes."

When a lawyer makes a mistake, as will inevitably happen, questions arise about that lawyer's knowledge. The fact that the mistake probably had nothing to do with lack of recent upgrading is to some extent irrelevant; res ipsa loquitur may be dead in the courts, but not in the court of public opinion. And when the spotlight shifts from the lawyer who made the mistake to the law society that licensed the lawyer to practise, we need an effective response.

If we are compared to other professions (accounting, medicine and dentistry are obvious ones), we fail miserably. Those professions all require a certain number of continuing education hours per year to retain a professional licence. So do the vast majority of US state bar associations. Our inability to provide an effective response jeopardizes our self-governance, all the more so because this is, in many ways, an objective criterion, easy for complainants to point to.

While being able to demonstrate performance may on its own be a sufficient reason, it certainly is not the only one. Lawyers in BC are now able to practise in other common law provinces under the national mobility agreement. Clients are also coming to BC from these other provinces, in large numbers. They are seeking advice respecting legal issues both here and in their former home province. Are we equipped to serve them competently?

Do most BC lawyers know, for instance, that Alberta has a general limitation period of two years, even in contract? Do most BC lawyers understand the conveyancing system in Ontario? Are all Saskatchewan wills valid in BC? These are pretty basic matters, but are examples of the kind of knowledge we need to practise competently throughout the country, which is what our client base, even in small firms and small towns, will require in the near future.

Somewhat paradoxically, as large firms create specialist lawyers within their downtown office towers, small firm lawyers need to broaden their knowledge base to properly serve their clients, at least to the point of being able to recognize new types of legal problems and make the proper referrals.

The excuse that attaining the requisite number of hours is too onerous a burden on some firms is no longer valid. Modern methods of delivering courses online will permit lawyers in Smithers access to courses just as easily and cheaply as in downtown Vancouver.

Both the public and our profession are likely to benefit. If we follow the American Bar Association model, in which the ABA certifies course providers, it is likely that Canadian Bar association section meetings will qualify

Benchers' Bulletin

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers and articled students on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities.

The views of the profession on improvements to the *Bulletin* are always welcome – please contact the editor.

Additional subscriptions to Law Society newsletters may be ordered at a cost of $50.00 (plus GST) per year by contacting the subscriptions assistant. To review current and archived issues of the *Bulletin* online, please see "Publications & Forms / Newsletters" at www.lawsociety.bc.ca.

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for providing requisite credits. The same goes for Trial Lawyers Association of BC sessions. Both those groups provide valuable resources to their members for the purpose of assisting them to better serve their clients, but neither group has the ability to mandate membership. Strengthening and increasing their membership aids both lawyers and their clients.

The Lawyer Education Task Force at the Law Society is currently discussing this topic. When the Federation of Law Societies of Canada holds its annual meeting in Vancouver this November, quality assurance/quality improvement is one of the key topics. The 14 law societies within the Federation will undoubtedly be debating whether the time has come for mandatory continuing education for Canadian lawyers. I suspect the answer will be in the affirmative.✧

Benchers to honour Charles C. Locke, QC with Law Society Award

The Benchers have chosen Charles C. Locke, QC to receive the Law Society Award in 2006, in recognition of his outstanding career — as counsel and a judge — and a lawyer who has committed many hours to his profession and community. Praised by colleagues as "a professional of unimpeachable good character," he has earned a reputation for integrity and honesty.

His early years

Born in Winnipeg, Charlie Locke joined a family in law. He embraced his family's legal tradition to follow in the footsteps of his father and grandfather. After a degree at UBC, he was called to the BC bar in 1942. His early adult years were in active service with the Canadian Army and, having completed training on the Coast, he was posted overseas and trained with the 5th Medium Battery. In July 1944 Mr. Locke landed in Normandy with his regiment and participated in the Battle of Normandy, Channel Ports and Scheldt Estuary and the Rhine Crossing into Germany.

A career in law

After his return home to Canada from overseas after the war, Mr. Locke articled and later practised with his father's firm of Locke Land Guild and Sheppard until 1955 when he became a partner at Ladner Downs. He was appointed Queen's Counsel in 1960.

His long and distinguished career as counsel includes many interesting roles, including as Counsel for the Workmen's Compensation Board, Royal Commission of Inquiry (1950 and 1960), Counsel to Chief Justice Sloan on the Royal Commission on Forestry in BC (1954-1955), Commission Counsel to Chief Justice, Royal Commission on Voter Fraud (1975) and Counsel to the Government of BC on aboriginal affairs (1975-1978).

He was appointed to the Supreme Court of British Columbia in 1978 and was elevated to the Court of Appeal in 1988 where he served until his retirement from the Bench in 1992.

After retirement as a judge, he rejoined the profession and served as a member of the Pensions Appeal Board and in commercial and insurance law, in particular appellate work and in arbitrations and alternative dispute resolution.

Professional service

In 2007, as he turns 90, Charles C. Locke will celebrate 65 years in the profession. Over that time he has built a full career and a full life. He and his wife Elinor, who passed away in 1975, raised three sons and three daughters.

His professional service reveals his commitment. Mr. Locke was a Bencher from 1960 to 1972, Law Society Treasurer from 1971 to 1972 and President of the Federation of Law Societies of Canada from 1974 to 1975. He is now a Life Bencher.

The Canadian Bar Association also has benefitted from his talents. He was a member of Council and served as President of the BC Branch from 1968-1969.

Former Law Society Secretary Alfred Watts, QC observed in his *History of the*

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Bench & Bar Dinner: November 23

Plan to join your colleagues for presentation of the Law Society Award to Charles C. Locke, QC and also presentation of the Georges A. Goyer, QC Memorial Award (recipient to be announced). It's all happening at the annual Bench & Bar Dinner in Vancouver on November 23. Watch for details.

Meet our newest Lay Bencher – Barbara Levesque

Barbara L. Levesque, Executive Director of the North Okanagan/ Kootenay John Howard Society, has been appointed a Lay Bencher by the provincial cabinet.

Since 1994 Ms. Levesque has worked with communities, non-profit agencies and all levels of government (municipal, provincial, federal and First Nations) in BC as a facilitator, process development consultant and evaluator. In her work with The Premier's Congress on Aging and Seniors' Issues, the Social Economy and Social Enterprise BC Regional Forums and the Office of the Public Guardian and Trustee, she has focused on building community capacity for civic engagement. Ms. Levesque is currently working with the John Howard Society of the North Okanagan / Kootenay to lead the rebuilding of that organization's programs and operations.

Barbara Levesque joins Ken Dobell, Michael Falkins, Patrick Kelly, June Preston and Dr. Maelor Vallance as Lay Benchers. The appointment brings the Law Society to its full complement of Lay Benchers.✧

Benchers refer report and recommendations to committees

Let lawyers delegate some court appearances to their paralegals, Task Force recommends

Lawyers should be allowed to have their employed paralegals make some appearances in Provincial Court, provided the court grants audience and provided that lawyers satisfy themselves their paralegals are qualified to do the work, a Law Society Task Force has recommended.

Life Bencher Brian J. Wallace, QC, Chair of the Paralegal Task Force, presented the report to the Benchers in May. He said the Task Force had initiated discussions with the Provincial Court on the types of court appearances that might be appropriate for paralegals. There was some consensus that it might be appropriate for law firm paralegals to appear on the same classes of cases that the Chief Judge assigns to Judicial Justices of the Peace and also on uncontested or consent applications in family matters.

On the civil side, the Chief Judge supported law firm paralegals becoming more involved in preparing files and witnesses, but expressed concern about them appearing in court. This is because Small Claims cases can be as complex as in Supreme Court — the only difference is the amount at issue — and judges already deal with unrepresented litigants well.

In the view of the Task Force, however, there are members of the public who do not wish to appear in court on their own. "[A]llowing paralegals employed by lawyers to represent clients in Small Claims Court would enhance the public's right to affordable, trained and regulated legal assistance," the Task Force told the Benchers. The Task Force was quick to emphasize that audience would be a privilege, not a right, for a paralegal.

The Task Force recommends pulling back on the delegation prohibitions in Chapter 12 of the *Professional Conduct Handbook.* If lawyers could delegate some appearances in court or before administrative tribunals to their paralegals, legal services could be made more accessible and affordable for clients, without sacrificing quality or putting clients at risk.

A future step, in Mr. Wallace's view, would be for the Law Society to negotiate a protocol with the Court on how a lawyer might apply for advance permission to have a paralegal appear on a matter.

Practically speaking, lawyers could not directly supervise the advocacy work of paralegals, but they would have overall professional responsibility for the client's case and for the work performed by their paralegals, including court work. Mr. Wallace noted that the Task Force had earlier raised the possibility of the Law Society accrediting paralegals employed in law firms, but the option did not find support at the Benchers table.

The Benchers have now referred the Task Force recommendations to various Law Society committees, including the Ethics Committee, for input. They plan to consult further with the Provincial Court and also the Supreme Court on what expanded role supervised paralegals might play.✧

Top students take the gold

Simply shining, **Vivian Kung** (right centre) accepts a 2006 Law Society gold medal from Second Vice-President John Hunter, QC after achieving the highest cumulative grade point average over the three years of her LL.B. program at the UBC Faculty of Law. Law Dean Mary Anne Bobinski (right) hosted the presentation following the UBC Convocation in May. Ms. Kung's friends and family joined in the celebration.

The gold medal completes a set for Ms. Kung — as top graduating student at Templeton Secondary in 1999 she was awarded the Governor General's Bronze Medal and as a UBC undergraduate she put in an equally stellar performance, this time earning the Governor General's Silver Medal in Arts. With her law degree behind her, she begins work as a law clerk this year at the BC Court of Appeal and then as an articled student at Blake Cassels.

At the University of Victoria, this year's Gold Medallist was **Jennifer Marles**, who was honoured by Victoria Bencher Richard Stewart, QC at a reception in June. Ms. Marles entered law school with a solid academic record — an honours degree in biochemistry from UBC and a Master of Science from the University of Toronto. In her legal studies, she demonstrated the same passion for excellence, while still making time for community service. Ms. Marles will clerk with the BC Supreme Court before beginning articles with Oyen, Wiggs, Green and Mutala.

The Benchers and Law Society staff commend Ms. Kung and Ms. Marles for their accomplishments and wish them all the best in the future.✧

Territories sign on for greater lawyer mobility

The law societies of the Northwest Territories, the Yukon and Nunavut are ready to sign a new agreement that will make it easier for lawyers who now practise law in the territories to transfer to one of the common law provinces, and for lawyers in the common law provinces to transfer to the territories. The agreement essentially extends the National Mobility Agreement of the Federation of Law Societies to the territories as it relates the permanent transfer of lawyers. The change is expected to be in place this fall.

BC lawyers who wish to move to one of the territories and practise there will be able to take advantage of these relaxed transfer requirements. If they wish to practise there on a temporary basis, however, they must still apply to the responsible territorial law society for a "single appearance permit."

The longer-term objective of the Federation of Law Societies is to have all the territories and Quebec, like the common law provinces, become full signatories to the National Mobility Agreement and to have a uniform set of rules cover permanent transfers and temporary mobility of lawyers in Canada. PEI is the most recent province to agree to come under the National Mobility Agreement. To date, the territories have been reluctant to accept the temporary mobility provisions (which would accord other lawyers the right to practise in the territories up to 100 days in a calendar year). A primary concern has been a drop in permit fees to those law societies. The Law Society of Nunavut is also concerned that relaxed mobility rules could negatively impact on the development of a local indigenous bar.

Over the next five years, the territorial and provincial law societies will make best efforts to resolve issues arising from implementation of the temporary mobility provisions — and to bring all lawyers under the same interjurisdictional scheme.✧

Articling offers stay open to August 21 in downtown Vancouver firms

Law firms with an office in the downtown core of Vancouver (west of Carrall Street and north of False Creek) must keep open all offers of articling positions they make this year until 12:00 noon on Monday, August 21. This timeline is set by the Credential Committee under Law Society Rule 2-31. It applies to offers firms make to second-year law students or first-year law students, but not offers to third-year law students or offers of summer positions (temporary articles).

Rule 2-31 gives law students greater choice in selecting law firms for articles by relieving them of the pressure to accept short-term offers before they have had an opportunity to interview with other firms.

A law firm may set a deadline of 12:00 noon on August 21 for acceptance of an offer. If the offer is rejected, the firm can then make a new offer to another student the same day. Law firms may *not* ask students whether they would accept an offer if an offer were made. The Credentials Committee has found this practice improper because it places students in the very position Rule 2-31 is intended to prevent.

If a lawyer in a downtown Vancouver firm makes an articling offer and later discovers circumstances that mean it must withdraw the offer prior to August 21, the lawyer must receive prior approval from the Credentials Committee. The Committee may, for instance, consider conflicts of interest or other factors that reflect on a student's suitability as an articled student in deciding whether to allow the lawyer to withdraw the offer.

If a law student advises a law firm that he or she has accepted another offer before August 21, the firm can consider its own offer rejected. However, if a lawyer learns third-hand that a student has accepted another offer, the lawyer should first confirm with the student that the offer is no longer open for this reason.

Any firm with a question respecting articling offers may contact Lesley Small, Manager, Member Services and Credentials, at 604 443-5778 or by email at lsmall@lsbc.org.✧

Shared articles registry – help for small firms seeking students

A shared articles registry — hosted on the CBA website at www.cba.org/BC/initiatives/articles — will help law firms attract articled students who are interested in splitting their articles among more than one firm. The registry lends support to law firms that may want to employ articled students, but may not have quite enough work or variety of work to offer complete articles. This is a common dilemma for small firms, those in small communities and boutique practices.

One way small firms and students can accommodate each other is through "shared" articles. While articled students usually complete articles under one principal, the Law Society may permit a student to complete sequential periods of articles in more than one firm and under separate principals under Rule 2-39. Known as an "assignment of articles," this option is explained on the Law Society website: see Licensing & Membership/Articling at www.lawsociety. bc.ca.

Not surprisingly, it's time-consuming for students to identify, pursue and secure articling opportunities while carrying a full course load at law school. This becomes even more of a burden for a student who is trying to round out a full term of articles through arrangements with more than one small or boutique firm. The shared articles registry is expected make the process of offering and finding shared articles easier.

The registry is a joint project of the Canadian Bar Association, BC Branch, the Career Services Offices of the University of British Columbia and the University of Victoria law faculties, and the Law Society.

Firms can use the service to advertise their need for an articled student, specifying length of articles available and practice areas covered. Students can search for available articles and take steps to work out a shared articles program that meets the requirements of the Law Society Admission Program.

The Law Society's Credentials Committee, in considering a student's application for shared articles, will expect confirmation that:

- each principal of a student will provide adequate and appropriate supervision;
- systems are in place to prevent conflicts of interest between or among firms in the representation of clients;
- systems are in place to maintain confidentiality in each firm;
- there is some continuity in a student's work on tasks or files and the student is able to complete work before leaving one firm for the next. (This is particularly important if a student proposes a shared arrangement that would involve splitting time between two firms for the whole of the articling period. The more usual arrangement is for a student to spend several months of articles in one firm followed by the balance of articles in the second firm.)
- all requirements of the Articling Skills and Practice Checklist will be fulfilled.

In every case, it is at the Credentials Committee's discretion whether to approve a particular arrangement for shared articles.

If your firm is interested in shared articles, be sure to bookmark the registry and come back to post your position. Take the time now to familiarize yourself with current articling requirements and the qualifications of each principal. All the details are available in the Licensing & Membership section of the Law Society website.✧

Law students headed for practice need law in core areas

The Law Society is advising law students who plan to practise in BC that they need to learn the law in core practice areas either during law school or through self-study in order to prepare for PLTC.

The notice, to be posted on the Law Society website and communicated through the BC law faculties states:

> To successfully complete the Law Society Admission Program, you will need to acquire knowledge of the law in the eight core practice areas upon which you will be examined, and which are the foundation for the practice, procedure and skills instruction and assessment in the Professional Legal Training Course (PLTC).
>
> Law school is the first step for prospective lawyers in British Columbia. The second step is successful completion of the Law Society Admission Program, comprising 10 weeks of PLTC, including the examinations and skills assessments, and nine months of articles.

During PLTC, students will be examined on professional responsibility, practice management, lawyering skills, and the law, practice and procedure in eight core areas of practice.

Lawyering skills: Writing; Drafting; Interviewing; Advocacy; Legal Research; Dispute Resolution.

Practice areas: Civil Litigation; Commercial; Company; Creditors' Remedies; Criminal Procedure; Family; Real Estate; Wills and Estates.

Teaching during PLTC focuses on lawyering skills, professional responsibility, law office management, and practice and procedure in the eight core practice areas. There is little basic instruction in the law during the 10 weeks of PLTC. It is therefore the responsibility of each student who wishes to be licensed to practise law in British Columbia to learn the law in these areas either during law school or through self-study.

The PLTC *Practice Material* is a valuable resource for students in the Admission Program. It contains summaries of practice and procedure in the eight core practice areas, and forms the knowledge basis for the examinations. Students should decide whether to take courses in these subject areas during their law school studies or expect to educate themselves after law school graduation in these subject areas.

This information is provided to law school students to communicate, at an early stage in the legal education process, the Law Society of British Columbia's requirements for the successful completion of the Admission Program and entry into the practice of law in British Columbia.

For further information please contact Lynn Burns, Deputy Director, Professional Legal Training Course, at lburns@lsbc.org.✧

Lawyers to consider privilege when Canada Revenue Agency seeks client documents

BC lawyers should be aware that section 231.2 of the *Income Tax Act* authorizes the Minister of National Revenue (MNR) to require a person to provide information or documents for any purpose related to the administration or enforcement of the *Income Tax Act*. These are usually referred to as requirements for information (RFIs). In practical terms, RFIs are usually issued through a Canada Revenue Agency (CRA) auditor or collections officer.

Lawyers may receive an RFI for documents in their possession relating to a former client. Often, the RFI asks a lawyer to produce a trust cheque relating to the payout from the lawyer's trust account of the proceeds of a sale of an item or piece of property.

A lawyer's obligation to protect privilege

Lawyers owe a duty of loyalty to a client and a duty to protect a client's confidences and privilege — even when a transaction is complete and the file is closed. Chapter 5, Rule 14 of the *Professional Conduct Handbook* states:

> "A lawyer who is required, under the *Criminal Code*, the *Income Tax Act*, or any other federal or provincial legislation, to produce or surrender a document or provide information which is or may be privileged shall, unless the client waives the privilege, claim a solicitor-client privilege in respect to the document."

Steps to take on receiving a requirement for information

The Law Society generally advises a lawyer who receives an RFI to do the following:

1. Contact the client and seek instructions with respect to privilege. The Law Society suggests that the client may want to obtain independent legal advice on the question of whether any privilege exists;
2. If the client waives privilege and instructs the lawyer to produce the document(s) in question, the lawyer may do so;
3. If the client claims privilege, or if the lawyer no longer knows the whereabouts of the client and cannot obtain instructions, the lawyer should make a claim of privilege if the document is or may be privileged.

If MNR seeks a compliance order

If a lawyer does not produce documents under an RFI because the client has either claimed privilege or cannot be located, the MNR may apply to the Federal Court pursuant to s. 231.7 of the *Income Tax Act* for a compliance order. The lawyer is named as the respondent in that case. If that occurs, the Law Society generally advises the lawyer to consider the following:

1. If the client has instructed the lawyer to claim privilege over the documents sought under an RFI, the lawyer should file an affidavit in the proceeding advising of these instructions; or
2. If the lawyer has been unable to contact the client, he or she should file an affidavit stating that:
   (a) the lawyer has been unable to contact the client (it may be prudent to describe what efforts have been made to do so) and therefore has no instructions with respect to a waiver of any privilege that may attach to the document(s);
   (b) the lawyer does not know if the client is aware of the demand or of the application for a compliance order to produce the document(s) in the possession of the lawyer; and
   (c) to the best of the lawyer's knowledge, the client has not had an opportunity to consider whether or not to make a claim of privilege.
3. In each case, the document(s) should be attached to the affidavit in a sealed envelope to present to the court on the application. The sealed envelope must be given to the Court, not the CRA.

A lawyer's obligations when in receipt of an RFI

The Law Society considers that a BC lawyer has a duty of loyalty to clients first and foremost, which includes protecting a client's right to claim privilege. This duty survives the conclusion of the retainer. It extends to ensuring that a client has a practical ability to make a decision about whether he or she wishes to make a claim of privilege, and to argue that issue before a court if the claim is contested.

The client may disagree with the CRA's assertion of privilege and wish to present arguments to the court about why, in the particular circumstances of the case, privilege attaches. Alternatively, the client may wish to challenge the constitutional validity of any statutory provision that defines solicitor-client privilege. The privilege is the right of the client, not the lawyer. Without instructions, the lawyer must not waive the client's right, nor should the lawyer compromise the client's ability to argue whether that right applies if the claim is contested.

A lawyer who receives an RFI to produce a document may also be placed in a conflict between his or her own interests (to avoid penalty for

non-production) and the interests of any client who wishes to argue privilege or may wish to do so. It is not in the public interest for a lawyer to be in such a position.

By acting on a client's instructions to claim privilege, or by asserting a claim of privilege in the absence of instructions, a lawyer is discharging his or her professional obligations as set out in Chapter 5, Rule 14 of the *Handbook.*

When an application is made for a compliance order, the Law Society is of the view that the court also needs to be satisfied the client has received sufficient notice of the application from the Minister of National Revenue. If the whereabouts of the client are known, this ought to be a relatively easy task. Indeed, the client will likely wish to appear at the hearing once advised. If the client's whereabouts are not known, the task may be more difficult. The Law Society considers that it is the obligation of the MNR to notify the client, and that the lawyer has no responsibility to assist since the Minister is potentially adverse in interest to the client, although the law may be unclear on this point. If you are facing a compliance order and have any questions on this point, contact the Law Society.

Please review the article in the March-April 2003 *Benchers' Bulletin*, "Demands that lawyer produce documents under the *Income Tax Act*," for further information on a lawyer's professional obligations when in receipt of an RFI.

Proceedings in Quebec

The Chambre des Notaires in Quebec has commenced a proceeding in the Quebec Superior Court seeking a declaration that sections 231.2, 231.7 and 232 of the *Income Tax Act* are unconstitutional on the grounds that they are in contravention of sections 7 and 8 of the *Charter of Rights and Freedoms*. No hearing date for this proceeding has yet been set.

If you face an RFI or compliance order, contact the Law Society

Lawyers who have questions about their professional obligations when in receipt of an RFI should contact the Law Society.

The Society would also like to hear from any BC lawyer who is faced with an application for a compliance order after having made a claim of privilege, especially if costs are being sought against the lawyer in the application.

Please contact Michael Lucas, Staff Lawyer, Policy and Legal Services (Tel.: 604 443-5777) or Kensi Gounden, Practice Standards Counsel (Tel.: 604 605-5321) at the Law Society office.✧

Updated GST information online

The GST drops 1%, from 7% to 6%, beginning July 1. The federal component of the Harmonized Sales Tax (which applies in Nova Scotia, New Brunswick and Newfoundland and Labrador) also drops 1% on that date, meaning the HST is reduced from 15% to 14%.

The reduced GST rate applies to invoices billed on July 1 or later, even if the work was performed prior to July 1. Accordingly, lawyers are not required to prorate their unbilled work in progress.

The Canada Revenue Agency website now features updated information that lawyers will find helpful for their own billing of GST and also for the application of GST in various transactions: see "Reduction in the Rate of GST/HST" at www.cra-arc.gc.ca/agency/budget/2006/gstrateqa-e.html#infob.

On the webpage you'll find a Q & A section as well as several information sheets on tax transition issues. Lawyers involved in real estate transactions will wish to consult "GI-015 GST/HST Rate Reduction and Purchasers of New Housing" which addresses the application of GST in taxable sales of real property, transitional rules for residential complexes and rebates.

The GST changes were introduced in Bill C-13 (*Budget Implementation Act*, 2006) as amendments to sections 256.3 to 256 of the *Excise Tax Act*.✧

Court issues directions on sealing orders, e-evidence and fax filing

The Chief Justice of the BC Supreme Court has issued several recent directives: 1) on a new form to be completed following issuance of a sealing order, 2) on the critieria for the preparation, exchange and presentation of electronic evidence and 3) on extending the fax filing pilot project that is underway in Supreme Court registries.

The directives are available in the Supreme Court section of the Courts of BC website at www.courts.gov.bc.ca.✧

From the Ethics Committee

Lawyer obligations under ICBC defence retainers

The Ethics Committee recently considered several questions arising out of an agreement that the Insurance Corporation of British Columbia has with law firms that represent ICBC in the defence of motor vehicle claims. ICBC calls this agreement its Strategic Alliance Agreement (SAA).

As part of the SAA, law firms whose lawyers are retained to act as part of a legal team for ICBC must not permit those lawyers to bring actions against the Corporation that include allegations of bad faith or claims for punitive, aggravated or exemplary damages. ICBC also requires that firms acting for ICBC in the prosecution of actions alleging fraud must not act against the Corporation in defending any such actions.

Some relevant provisions of a standard SAA state the following:

> **Article 6.2(a)(vi)**: wherein ICBC at its sole discretion may impose penalties or restrictions, including termination of the SAA, where "the Firm or any member of the Legal Team, in the performance of the Legal Services, fails to act in the best interests of ICBC or ICBC's insureds…";
>
> **Article 6.2(b)(i)**: wherein the same penalties or restrictions can be imposed where "the Firm or any member of the legal team was or is engaged in any activity that was, is or may be contrary to ICBC's strategic business or financial direction or initiatives, or the interest of ICBC's insureds;"
>
> **Article 9.4**: Members of the Firm's Legal Team will not directly or indirectly:
>
> - commence or participate in claims or actions, or
> - counsel or assist others in bringing claims or actions
>
> against ICBC which include allegations of bad faith, or claims for punitive, aggravated or exemplary damages.
>
> **Article 9.5**: The Firm will not directly or indirectly:
>
> - resist claims or conduct the defence of actions, or
> - counsel or assist others in resisting claims or defending actions
>
> brought by ICBC against alleged fraudulent claimants or defendants, if the Firm has agreed to act for ICBC in the prosecution of fraudulent claims or actions.

In the Committee's opinion, a lawyer who accepts the restrictions required by ICBC must decline to act against ICBC if it appears there is a reasonable basis for believing the evidence supports a claim that the lawyer or the lawyer's firm has agreed not to prosecute. A lawyer already acting for a client when such evidence emerges must withdraw. When a lawyer declines to act or must withdraw, it is proper for that lawyer to advise the client or prospective client to seek the advice of other counsel with respect to the claim.

In the Committee's opinion, a lawyer may properly act against ICBC for clients whose cases fall outside the restrictions. However, a lawyer acting in these circumstances must advise these clients of the lawyer's relationship with ICBC and the implications of the restrictions the lawyer is under.✧

Ethics Committee issues draft policy for discussion

Joint retainers in the defence of third-party liability claims – what should be a lawyer's obligations?

For the past several years, the Ethics Committee has examined the ethical obligations of counsel who jointly represent insurers and insureds in the defence of third-party liability claims. Although the Committee has benefitted from the views of a number of lawyers who practise in the insurance field, there is no clear agreement among them on several key issues. In particular, *what advice should a lawyer give clients about a joint retainer? What circumstances require a lawyer to withdraw from a joint retainer? What information can the lawyer give to the parties when the lawyer is required to withdraw?*

It seems likely that not all lawyers who practise in this area are complying with their obligations in Chapter 6, Rules 4 and 5 of the *Professional Conduct Handbook* which state:

Acting for two or more clients

4. A lawyer may jointly represent two or more clients if, at the commencement of the retainer, the lawyer:
   (a) explains to each client the principle of undivided loyalty,
   (b) advises each client that no information received from one of them as a part of the joint

representation can be treated as confidential as between them,

(c) receives from all clients the fully informed consent to one of the following courses of action to be followed in the event the lawyer receives from one client, in the lawyer's separate representation of that client, information relevant to the joint representation:

(i) the information must not be disclosed to the other jointly represented clients, and the lawyer must withdraw from the joint representation;

(ii) the information must be disclosed to all other jointly represented clients, and the lawyer may continue to act for the clients jointly, and

(d) secures the informed consent of each client (with independent legal advice, if necessary) as to the course of action that will be followed if a conflict arises between them.

5. If a lawyer jointly represents two or more clients, and a conflict arises between any of them, the lawyer must cease representing all the clients, unless all of the clients:

(a) consented, under paragraph 4(d), to the lawyer continuing to represent one of them or a group of clients that have an identity of interests, or

(b) give informed consent to the lawyer assisting all of them to resolve the conflict.

The Ethics Committee proposes, for discussion purposes only, a formulation of a lawyer's obligations when acting for an insured and insurer in the defence of a third-party claim (see right). The Committee invites comment from the profession.✧

From the Ethics Committee – draft for discussion

Defending third party liability claims under a policy of insurance[1]

(1) Lawyer may defend a third party liability claim under joint retainer

A lawyer engaged by an insurer to represent an insured to defend a third-party liability claim may represent the insured alone or, with appropriate disclosure in accordance with Chapter 6 of the *Professional Conduct Handbook*, may represent both the insurer and the insured jointly with respect to all or some aspects of the matter. Where the representation is structured as a joint retainer, the lawyer has duties to both the insured and the insurer, and must take care to identify and avoid conflicts of interest between the two clients. So long as the insured is a client, the rules of professional conduct — and not the insurance contract — govern the lawyer's obligations to the insured.

(2) Duty of lawyer when a conflict emerges

If, after commencing to act on a joint retainer, the lawyer receives information that evidences a conflict between the insured and the insurer, the lawyer must withdraw from the joint representation without disclosing the information giving rise to the conflict.

(3) Duty of lawyer when policy authorizes insurer to conduct defence

Where the policy of insurance authorizes the insurer to control the defence and to settle within policy limits in its sole discretion, the lawyer must inform the clients of these limitations on the representation. After the lawyer has communicated the necessary information to the insured, the lawyer may settle at the direction of the insurer. If a lawyer for an insured knows that the insured objects to a settlement, the lawyer may not settle the claim against the insured at the direction of the insurer, without giving the insured an opportunity to reject the defence offered by the insurer and to assume responsibility for the defence at the insured's own expense.

* * *

Lawyers are invited to comment on the Ethics Committee's proposed opinion by contacting Jack Olsen, Staff Lawyer – Ethics, at:

Law Society of British Columbia
8th Floor, 845 Cambie Street
Vancouver, BC V6B 4Z9
Tel. 604 443-5711
Fax 604 646-5902
Email: jolsen@lsbc.org

[1] For a discussion of bad faith and negligence in the context of the defence of third party liability claims see the October 2003 *Alert bulletin* "Avoiding allegations of 'bad faith' and professional negligence in defending third party liability claims."

Child support recalculation – pilot project launched in Kelowna

On June 1, 2006, the Ministry of Attorney General brought in a Child Support Recalculation Service Pilot Project (CSRS) in the Kelowna Provincial (Family) Court, under the authority of the *Family Relations Act* (s. 93.3 and regulation 129/2006).

The pilot introduces a service to recalculate child support amounts on an annual basis. It does so by applying the child support guidelines tables to updated income information of parents.

CSRS is intended to assist in keeping child support amounts current in relation to the payor's income, without the need for the parties to return to court. The recalculation pilot project is mandatory for all *Family Relations Act* orders for child support made on or after June 1, 2006 in the Kelowna Provincial (Family) Court. However, there are some limited circumstances in which the CSRS will not recalculate support, and parents with written support agreements may opt into the project.

CSRS accepts only income tax information as the source of up-to-date income information. When payors do not submit their income tax information as required, the service will apply a 10% increase to the income that was used to determine the current child support amount. Only recalculations that result in changes of $5 or more will result in a change in the child support amount to be paid. Special or extraordinary expenses will not be recalculated.✧

Parenting After Separation offered in new communities

Parenting After Separation is a free, three-hour information session for BC parents and other family members who are involved in a dispute over child custody, access, guardianship or support. The program is available in 13 BC communities, most recently in Chilliwack, North Vancouver and Richmond. Parties who intend to schedule a court appearance to resolve family law issues are first required to attend a session.

The program is voluntary in seven other BC communities, and in some locations is also offered in Hindi, Punjabi, Cantonese and Mandarin.

Facilitators lead the sessions, with a view to helping parents make careful and informed decisions about their separation and any conflicts that may result, taking into account the best interests of their children. The sessions cover:

- the impact of separation on parents and children;
- how families can adjust to change;
- effective ways for parents to communicate;
- how to keep the children out of the middle of conflict;
- options for resolving family disputes, including mediation; and
- counselling and the court process.

The sessions also touch on how the child support guidelines are applied and what resources are available in local communities, including LAWlink and other programs of the Legal Services Society.

For details, contact a local Family Justice Centre. Call Enquiry BC at 604 660-2421 in Vancouver, 250 387-6121 in Victoria or toll-free 1-800 663-7867 in other locations.✧

Equity Ombudsperson

Creating a culture of choice

The welcoming workplace

This is the third in a series of articles on Creating the Culture of Choice at your law firm — that is, creating a workplace culture that allows lawyers and employees to be the best they can be and that helps draw potential employees to your firm over others. Just what would set your firm apart? It all starts with respect. Respect for all people, in all of our diversity. A workplace that embraces inclusiveness and diversity usually has a happier workforce, which leads to greater job satisfaction and lower employee turnover.

by Anne Bhanu Chopra

Workplaces that are free from discrimination, inclusive of everyone and open to diversity reap the benefits of loyalty and productivity from their employees.

Many people think of diversity in the workplace as tolerating differences. Others see it as closely tied with one or two obvious issues, such as gender or race. However, true organizational diversity is much broader in scope. An organization that embraces diversity has moved beyond mere tolerance and lip service and toward an understanding of how diversity can benefit the workplace.

At the heart of organizational diversity is the notion that all employees are entitled to be treated fairly and equitably. When employees feel that their concerns are not being addressed or are marginalized within the firm, they either do not contribute their best or they leave.

Walk the talk (and put the talk in writing)

As a starting point, your firm should adopt and follow formal policies that reinforce your commitment to diversity. These include anti-harassment and anti-discrimination policies, as well as policies on workplace equity, flexible work arrangements, pregnancy and parental leave, and respectful language. (I will deal with some of these topics in more detail.)

There are many precedents available. A comprehensive and fully updated set of workplace policies will be coming on the Law Society website this fall, thanks to the work of the Women in the Legal Profession Task Force and a team of dedicated volunteer lawyers. When adapting policies for your own firm, it is important to solicit and include input from lawyers and staff.

Policies set the framework, but on their own are not enough. To make a deeper impact, it is important to encourage a workplace environment that embraces and responds to diversity as part its everyday business. In other words, firms need to encourage people to shift the culture toward greater respect of others. That means being more accommodating of individual differences.

Plan inclusive events for staff and clients

Law firm events and social gatherings help foster collegiality and networking. Events that involve clients or potential clients can also have a direct impact on a lawyer's career advancement. Therefore, it is important to plan your events so everyone can participate fairly and nobody feels excluded. Here are some things to think about:

- Be conscious of what religious or cultural observances might prevent people from participating in events on particular dates by using a "multi-faith" calendar as a planning tool. Such calendars are available online or from some multicultural service agencies.
- Consider holding events during work hours to accommodate people who may have family responsibilities or commuting issues. Also consider holding different events — not everybody plays golf!
- Do not plan events around religious holidays that may exclude people of other faiths or beliefs. For example, consider holding a "Winter" or "Seasonal" party rather than a "Christmas" party.
- Ensure that all venues for events are accessible to people with disabilities. It is always best to check a venue beforehand and in person. A colleague once told me that a venue he was considering for an event promised a wheelchair-accessible washroom. The washroom itself was indeed accessible. Unfortunately, it was also located at the end of long narrow corridor half-filled with stacked chairs!
- If you are serving food and beverages, make sure that you can accommodate all dietary requirements, whether based on health, cultural or religious observance, or even personal choice. Also be sensitive to the fact that some religions require their adherents to fast at certain times of the year.
- As a rule, it is best to invite participants to tell you beforehand what they require by way of dietary or disability accommodation, rather than to assume you have it covered.

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Welcoming workplace … from page 13

- Consider using retreats, internal committees and firm projects as opportunities for people who would not normally interact to do so. These are safe events for the firm to encourage interaction and exposure to all firm members.

Remember the advantages of flexible work arrangements

Many lawyers may, for reasons including work-life balance, family responsibilities, religious observances or disability, prefer flexible work arrangements that restructure or reduce the time devoted to work, or allow for flexibility on taking days off. With advances in communications technology, it is also increasingly viable to work from locations other than the office. Here are pointers on staying flexible:

- Not all religious observances fall on national holidays, so consider allowing one or two "personal days" off a year (in addition to sick days and holidays) that may be used for any purpose, including religious and cultural observances.
- Develop a flexible work arrangements policy that balances the needs of your workforce and your firm. Such a policy should set out what the types of flexible work arrangements are available (e.g., flexible time, flexible location), eligibility for those arrangements, and the standards and expectations over work hours, productivity and compensation. For example, a firm may decide to allow its lawyers to work at home as long as they meet specific conditions (e.g., clients receive timely communications without background noise or distractions on the lawyer's side, and the lawyer checks in with the firm on a regular basis to ensure continuity).

Insist on respectful language

Communication, including the use of respectful language, is an important part of your firm's image to the outside world. Consider a respectful language policy to ensure that all of your organization's communications are inclusive. While most people have a clear understanding of what constitutes overtly sexist, racist or homophobic language, sometimes terminology that was once acceptable can betray hidden biases.

Some examples of outdated language that might be considered offensive are:

- terms or phrases that have an inherent gender bias such as "chairman," "businessman" or "manpower." Use gender-neutral terms such as "chair," "businessperson" or "workforce;"
- dehumanizing terms that refer to persons with disabilities such as "crippled" or "handicapped." The best formulation always puts the person before the condition (e.g., a "lawyer with a disability" rather than a "disabled lawyer").

Monitor your mentoring

It is to your firm's benefit that all articled students and young lawyers receive quality mentorship to support their professional development. Therefore, it is vital that the quality of mentorship not be compromised because of discrimination or inability to deal with issues of diversity. Consider these ideas:

- Add structure to your mentoring program. This includes setting out the minimum of what is expected from the relationship (e.g., monthly face-to-face meetings) and putting in place systems for monitoring the mentorship relationship to ensure it is working.
- Train your mentors both in mentorship skills and diversity awareness.
- Ensure there is adequate opportunity for mentees to provide feedback and also to raise any concerns of discrimination with a confidential source, either inside or outside the firm (e.g., the Equity Ombudsperson).✧

As you head for retirement, think Pro Bono

It's official — you're ready for retirement. As you pull together your plan, wind up your files and begin your farewells, let your last days be full of memories and free of regrets. Retirement need not mean an end to your life in law, after all. For lawyers who are keen on staying young in spirit, setting aside a few hours of retirement time for pro bono work is a perfect way to stay connected to the profession and the community.

The Law Society's Access to Justice Committee encourages retiring lawyers to take up retired membership in the Law Society with pro bono in mind. Retired lawyers have an important contribution to make — by offering pro bono legal services directly and by mentoring younger lawyers.

What does it mean to become a retired member?

Retired members of the Law Society have the same rights as practising members, except the right to practise law (offer legal services) for fees, act as notaries public or take affidavits. They can, however, offer pro bono legal services, and will be granted free liability insurance protection if offering approved services through an approved pro bono program.

If you are a practising or non-practising member of the Law Society in good standing, you can become a retired member if you:

- have reached the age of 55; or
- have been a member in good standing for 20 of the previous 25 years; or
- have been engaged in the full-time active practice of law for 20 of the previous 25 years.

To apply, submit an application form (available on the Law Society website at www.lawsociety.bc.ca), a non-refundable application fee of $26.50, and the annual retired membership fee of $79.50.

If you are a former member who wants to take up retired membership, you must first apply for reinstatement. If your reinstatement application is satisfactory, you will not be required to meet any conditions of reinstatement other than providing an undertaking not to engage in the practice of law. (Your undertaking will not preclude you from doing pro bono legal work. Pro bono is not the "practice of law" under the *Legal Profession Act* because it is not performed in the expectation of a fee, gain or reward.)

The Credentials Committee has discretion to waive all or part of the reinstatement fee for an applicant for retired membership, on any conditions the Committee considers appropriate.

What about insurance coverage for pro bono?

The Law Society offers professional liability insurance ($1 million per claim, $2 million annual aggregate) to retired, non-practising or insurance-exempt lawyers (such as Crown Counsel) who perform pro bono legal services. The coverage is available at no cost and without payment of a deductible or surcharge on claims.

There are provisos: First, a lawyer must perform pro bono services through a pro bono service provider approved by the Law Society. Second, the services cannot be for the benefit of a person previously known to the lawyer, including a family member, friend or acquaintance. Practising insured lawyers providing pro bono services who meet these two key provisos will also receive relief from payment of any deductible in the event of a claim.

The Law Society believes it is important to expand the pool of lawyers willing to offer pro bono services, and extended insurance coverage is one way to do just that. Although retired lawyers are also at liberty to provide pro bono legal work outside of approved programs, they will not have insurance coverage for that work.

The Pro Bono Law of BC website lists approved programs for the purposes of the Law Society's liability insurance coverage: see "Resources/Approved Programs" at www.probononet. bc.ca. For a specific look at approved services within these programs and other conditions, see also "Insurance for Lawyers Providing Pro Bono Services" available via the same webpage.

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Pro bono … *from page 15*

Are there restrictions on what I can do pro bono?

There are things a retired member is *not* permitted to do, even on a pro bono basis. For example, only a practising lawyer can take affidavits or act as an officer for witnessing Land Title Office documents. Also note that there are other terms and conditions in the policy that may limit coverage, so it is a good idea to familiarize yourself with the policy from the start (see Regulation & Insurance on the Law Society website).

How can I find the right pro bono opportunity?

The following programs are currently approved, so feel free to call or visit them online:

Pro Bono Law of BC
(Roster programs relating to family law, judicial review and Federal Court of Appeal)
www.probononet.bc.ca
Contact: Jamie Maclaren, Executive Director; Tel: 604 893-8932

Salvation Army BC Pro Bono Program
www.probono.ca
Contact: John Pavey, Central Coordinator; Tel: 604 681-3405

Western Canada Society to Access Justice
www.accessjustice.ca
Contact: Dugald Christie, Central Coordinator; Tel: 604 482-3195. ✧

Volunteers wanted for fee mediation roster

No lawyer wants to end up in a dispute with a client over fees. Thankfully there are some time-tested practices to build a common understanding about fees — discussing fees at the beginning of a retainer, asking clients to enter into fee agreements and billing for legal services promptly.

But what if a legal bill becomes a point of controversy regardless, and both lawyer and client find themselves at an impasse? That is where the Law Society's fee mediation program comes in.

Fee mediation is an accessible and informal alternative to fee review before a registrar. Mediation can be requested by either a lawyer or client, but it will go forward only if both agree to participate. The success of each mediation depends on the engagement of the participants and the help of volunteer lawyers. That is were you come in.

If you are a BC lawyer who has experience in mediation, and you would like to make a contribution to the profession, consider volunteering for the fee mediation roster. The Law Society receives a modest number of requests for mediation each year, but it strives to fulfil those requests quickly, so having an active roster is important. The Society selects a small number of lawyer-mediators for the roster, as well as some non-lawyers who are members of the BC Mediator Roster Society or equivalent body. If you would like to be considered, please let us know.

In brief, here is how the program works.

Fee mediation – how is one requested?

Either a lawyer or client who is in a fee dispute can request a mediation by completing and submitting an application to the Law Society. After checking to see if both are agreeable to mediation, the Society appoints an independent, neutral mediator from its roster. Mediators are volunteers and receive a very small honorarium from the Society, along with reimbursement of reasonable expenses. The views of the lawyer and client who participate in the mediation are taken into consideration on selection of the mediator.

What does the mediator do?

Once appointed, a mediator independently contacts the lawyer and client to arrange a mediation of up to three hours. The form of mediation — such as a face-to-face discussion or a telephone meeting — is up to the mediator and participants. The mediator encourages a lawyer and client to explore their interests, develop and consider potential options for resolution based on those interests and try to reach a mutually agreeable resolution.

The mediation is on a "without prejudice" basis. Any negotiations during the fee mediation process cannot be used in evidence in any subsequent proceedings, including a court proceeding or fee review by a registrar of the Supreme Court of BC.

Participation in the fee mediation program is entirely voluntary. Neither the client nor the lawyer is in any way obliged to opt in and either can withdraw from the mediation at any time.

Because the results of a fee mediation are not binding on the parties, fee review remains an option after fee mediation if either party wishes to pursue it, provided the matter has not been settled and the time limit for applying for the review has not expired. The fee mediation service is only available if the fees have *not* already been subject to a fee review.

How do mediators offer to join the roster?

If you would like to be considered for the fee mediation roster, please send an expression of interest and a summary of your background experience to Lynne Knights, Complaints Officer, at the Law Society office (see page 2) or by email to lknights@lsbc.org.✧

Interlock

Depression – Do you know the signs?

Feeling low from time to time is normal. But clinical depression is more than just a blue day. Symptoms may include one or more of the following:

- Loss of interest and enjoyment in usual activities and hobbies
- Feeling hopeless, down, or in despair
- Severe mood swings within short periods of time
- Sleep disturbances — insomnia, sleep disruption, restlessness, early morning awakening
- Low energy most of the time
- Changes in eating patterns — loss of appetite or bingeing
- Feeling bad about yourself or believing that you are a failure
- Trouble concentrating on tasks, feeling distracted
- Thoughts of self-harm
- Destructive or "out of control" behaviours — heavy drinking, reckless driving, unsafe or compulsive sexual behaviours.

Help is available. For professional and confidential assistance at no cost, call Interlock at **604 431-8200 (Lower Mainland)** or **1-800-663-9099**.✧

Services for members

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky**, Practice Management Advisor, 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**, Practice Advisor, to discuss professional conduct issues in practice, including questions on undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships and lawyer- lawyer relationships. **Tel**: 604 697-5816 or 1-800-903-5300 **Email**: advisor@lsbc.org.

Ethics advice – Contact **Jack Olsen**, staff lawyer for the Ethics Committee to discuss ethical issues, interpretation of the *Professional Conduct Handbook* or matters for referral to the Committee. **Tel**: 604 443-5711 or 1-800-903-5300 **Email**: jolsen@lsbc.org.

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

Interlock Member Assistance Program – 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 cost to individual lawyers: **Tel**: 604 685-2171 or 1-888-685-2171.

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra**: **Tel**: 604 687-2344 **Email**: achopra1@novuscom.net.

Practice Tips, by David J. Bilinsky, Practice Management Advisor

Black or red? How to tell what's really profitable in your practice

An objective of every law practice is to provide legal services while returning a reasonable profit to the lawyers for their efforts on behalf of clients. After all, if we aren't making a profit, the doors won't remain open for long.

In this column I thought I would return to basics and discuss the typical financial reports that you could be generating from your accounting system and why they are important. In particular, I will highlight some of the differences between the cash basis of accounting and the accrual basis of accounting. The idea is to provide you with greater insight into the operation of your practice. By concentrating on the indicators of financial health, you really can put more green in your jeans, without working harder.

Balance sheet

This document, typically prepared annually, shows a snapshot of the assets, liabilities and equity in your practice at a certain point in time. For our purposes in looking at the finances of a law firm, its principal use would be to determine the relationship between assets and liabilities. Simply put, assets should be greater than liabilities. Bankers will also see if the owners of the practice have placed enough of their own capital at risk in the practice by looking at the relationship between liabilities (principally debt) and owner's equity. However, as an indicator of financial health, that is of limited purposes to us.

Income statement

This is a measure of the revenues (or *topline metric*) generated by your practice over a certain time period (typically monthly or annually), offset by expenses incurred over the same period. While the income statement can show the profitability of a practice over a time period, it also may produce distorted results if there is a difference in timing between the incurring of expenses relative to the receipt of revenues. For example, the monthly income statement of a firm handling contingency fee work may show completely different results depending on whether the income statement is dated the month before a big contingency fee award (where you have incurred high expenses but little revenue) or the month after the award (when you have received high revenues but few expenses).

Related to this measure is calculating the right percentage of a lawyer's income relative to collected monthly or annual billings. The typical benchmark is 55-60%.

Statement of cash flows (or source and application of funds)

This statement takes your beginning cash balance for the period (typically a month), adds in all revenues received, deducts all expenses paid and arrives at the closing cash balance for the month. If you are using an accrual accounting system (and virtually all Canadian law firms do so), the Source and Application of Funds Statement is a necessity to bring everything back to cash.

The reason is the accrual system recognizes revenues when the invoice is rendered (not paid) and it spreads out certain expenses (called depreciation) over the lifetime of an asset, notwithstanding that the expenses must be paid in one accounting period. The accrual system can be very useful for looking at your practice over a long period, but the Statement of Cash Flows (and other financial reports) are needed to keep a handle on that all-important financial asset, namely *cash*!

Budget

There are two principal reasons for preparing a budget. The first is to forecast your expected revenues and expenses for a certain period (typically one year). The second is to compare your forecast numbers against your actuals (typically monthly and year-to-date), in order to determine if you are managing your practice within your expectations. Your income statement and budget comparisons will often be your first indications of future trouble and should be looked at monthly, if not more often. Your labour costs (including your draws), rent and technology expenses should account for approximately 85% of your budget. There is little that you can cut if times turn downwards without seriously impairing your ability to get work done — meaning that monitoring your budget is especially important as funds grow scarce.

Your budget should contain a calculation of your HEAR — the highest expected annual revenue, based on total expected billable hours for each lawyer per year. There are approximately 231 working days/year: 365 minus 21 days vacation, 104 weekend days and nine statutory holidays. The expected annual billable hours can range from 1,386 billable hours/year (231 work days/year x 6 billable hours/day) to 2,310 billable hours/year (231 days x 10 billable hours/day).

Every lawyer should have a standard hourly rate. That is so, even if you are a contingency fee biller. A standard hourly rate provides a baseline measure that is used in other financial calculations, principally to determine profitability. Now if you multiply your standard hourly rate by your billable hourly expectation, you arrive at your HEAR. This should be part of a firm's budget for each lawyer.

If your standard hourly rate is $250 an hour and you expect to bill 1,700 hours a year, your HEAR is $1,700 x $250 = $425,000.

Daily time summaries

Daily time summaries by lawyer are also important. To make this analysis accurate, all lawyers should be accounting for all their time — billable, firm administration, education, pro bono and vacation. Look for aberrations or time summaries that don't make sense or indicate poor time management or failure to meet minimum billable time requirements.

A quick way to determine how many hours you should be billing is as follows: Take your desired annual income (say $150,000). Collected billings should be approximately twice that ($300,000). Factor in bad debt at 10% (this is a little higher than normal but we are building in a bit of wriggle room for safety). That indicates that you should be billing approximately $330,000/year. There are approx 231 working days/year (365 minus: 21 days vacation, 104 weekend days, 9 statutory holidays). This indicates that you must bill approximately $1,400/day ($330,000/231). If you bill at $250/hour, this indicates that you must log 5.6 billable/hours/day — every workday.

Realization rate

What is your realization rate? The realization rate is the percentage of actual income paid to the firm from the billable hours of each timekeeper. For example, Partner X bills 200 hours per month at $200 per hour for a total amount of $40,000. Of that amount, 10 hours are written down (taken off the books) for various reasons, and clients pay a total of $30,000. Partner X's realization rate is 75%. Partner Z bills 150 hours at $200 per month, but has no "write downs," and clients pay 95% of that for a total of $28,500. Although Partner X bills more hours, because of Partner X's low realization rate, Partner Z with far fewer hours billed is generating almost as much income for the firm.

Your computer-based time and billing program should be able to create this report for you. Examine the results and use it to help guide any discussion of compensation for partners and associates. A low realization rate indicates that a lawyer is using resources of the firm inefficiently — which is usually a sign of poor client or file selection. Realization rates should be no lower than 90%, and 95% is your target rate.

Write-up, write-down report

The purpose of this report is to show the variance between your actual fees billed on each file over a certain time period measured against a standard measure, being your standard hourly rate times your billable hours logged on each file. This comparison provides an indication of which files, clients or lawyers produce high write-ups (for example on contingency fee work) or high write-downs. The typical benchmark is that an hourly rate biller should have, on average, a 5% write-down rate (in other words, a 95% collection rate) and a contingency fee biller should have, on average, a 150% write-up rate. If you are under either of these, then the write-up, write-down report will draw this to your attention and allow you to take corrective action, typically by tighter client/file acceptance policies and retainer requirements.

Client activity reports

There are any number of reports that can be run for each client. The typical reports are:

- fees billed
- effective hourly rate (EHR)
- accounts receivable
- fees collected
- trust balances
- work-in-progress (WIP)
- outstanding disbursements.

Fees billed are simply a volume

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Profitable practice *… from page 19*

indicator that allow you to rank clients on their ability to generate high-fees to low (a top-line metric). Unfortunately many firms do not look much beyond fees collected (i.e., revenues) and the amount of cash in the bank account as their principal financial indicators. There is much more that they can and should be looking at if they wish to increase the profitability of their practice.

EHR (Effective Hourly Rate): This results from dividing fees collected by client by the hours logged in the file (total hours, not just hours billed). If you then sort your clients by high EHR to low, you can start to dig a bit deeper and rank the *relative* profitability of your clients from high to low.

For example, assume you have two clients, each of which you billed $10,000. Their top-line metric (revenue) is the same. Now assume for client A you logged 100 billable hours and for client B you logged 500 hours. Client A's EHR is $10,000/100 = $100/hour while Client B's EHR is $10,000/500 = $20/hour. You don't know the absolute profitability of either client A or B, but in relative terms, you can clearly see that client A is much more profitable than client B. If you don't log billable time, then you have no basis on which to start to determine even the relative profitability of any client, much less the absolute profitability.

Accounts receivable: There will always be clients who pay their invoices shortly after the date of receipt and others that will drag out payments for 90 days or longer. By date-aging your receivables (over 90, over 60, over 30, current) and ordering them highest-to-lowest in each date range, you can again see who is costing you money (since you are in effect carrying the financing costs of unpaid fees and disbursements). Accounts receivable should turn over every 60-80 days — anything older than this should be dealt with pronto — as aging enhances only cheese and wine.

Recall that while your accounts receivable extend out over 90 days, your accounts payable demand payment in 30, leaving you with a time lag or delay. In fact, there is typically a 105-day delay on average between rendering an invoice and receiving payment. Accordingly, since that is about three "paying" periods from an A/R standpoint, monitoring you're a/P becomes an exercise in cash management. This also indicates how a growing firm can actually dig itself into financial trouble since increased expenses are incurred now (and must be paid within 30 days), but increased revenues will not be recognized for 105 days or longer. This indicates that the firm will be subject to a cash-flow squeeze as a result of their growth, and this must be covered for the firm to survive.

If your collected annual receivables are increasing each year, you'll want to know how much of the increase is coming from an increase in your hourly rates and how much of it is the result of an actual increase in the amount of business you are handling.

To make these calculations, you will need to gather your collected revenue, your average billing rate and your number of hours billed for the two periods you want to compare. Let's assume that in 2004 you collected $350,000 in gross revenue, your average hourly rate was $150, and you billed 1,500 hours. In 2005 you collected $400,000 in gross revenue, your average hourly rate was $175 and you increased your billed hours to 1,600. To determine how much of the revenue increase resulted from additional business (and not the increase in average hourly rates) you'll have to do the following:

> 100 [increase in billable hours] x $150 [last year's average rate] = $15,000 ÷ $50,000 [total revenue increase] = 30%.

In this example, 30% of the revenue increase was the result of additional business while 70% resulted from the increase in the lawyer's average billing rate. Obviously, you want these numbers to be the other way around. A firm can only increase revenue by raising rates for so long; after that, you'll have to increase the amount of new business you handle if you want to keep increasing revenues.

Fees collected: If you aggregate the legal fees by client, ranked from largest to smallest, you can determine which clients contribute large amounts towards your total fee billings. If you aggregate these numbers over a year and divide your client billings by your total annual billings, you can determine the percentage that each client contributes towards your annual fee billings. That is, assume you billed a client $25,000 last year. Your total billings were $300,000. That client contributed 8.3% of your annual fees ($25,000 / $350,000 X 100%).

Trust balances: This isn't so much a profitability measure as a determination of which clients use large amounts of your accounting resources. An interesting correlation is to see how many of these clients are also high fee generators, or not, as the case may be.

WIP: This is your banked inventory. The problem is, it doesn't produce any results sitting in inventory. A useful metric is the number of days that WIP sits in inventory before it is billed. Do a printout from your accounting system that lists the amount of WIP per file along with the days that it has been in inventory. WIP should turn over every 60-70 days. If you have large amounts that are sitting there approaching 60 days (or longer), then it may be time to consider billing them and converting them to accounts receivable.

To see where you stand, divide your WIP older than 180 days by your total WIP and multiply by 100 to obtain a percentage. If the result is 30% or less, you're in relatively good shape. If the

result is 40% or more, consider foregoing new matters until you can make time to bill for the work that you have already done. No WIP over 90 days? Then you're in great shape!

Outstanding disbursements: Clients who generate large disbursements use a disproportionate amount of the firm's capital, particularly if the disbursements are carried by the firm for any period of time. By ranking outstanding disbursements by client from largest to smallest, you can see the relative ranking of clients in this regard. An interesting question is to ask yourself if clients with high outstanding disbursements can be carried.

Projected billings versus cash flow report

Recall that billings, on average, are outstanding 105 days prior to payment. If you have large upcoming cash requirements (practice insurance payments, bonuses, income tax) then to avoid having to call on your line-of-credit to meet these needs, you need to bill an adequate amount well in advance of the cash requirement date to ensure that the funds are in hand. Accordingly, your projected billings versus cash flow report allow you to anticipate if you are going to be in a cash plus or negative situation and take remedial action if necessary.

Unbilled fees and disbursements

All of us have to bank fees until such time as they can be billed. The average time of carrying unbilled fees is between 60-70 days. Disbursements are usually carried for 60-80 days. If you list your unbilled fees by date, oldest to most recent, as well as unbilled disbursements, you can determine which clients or files are being carried for an inordinate time prior to billing and which are not. Large unbilled fees or disbursements can be a warning sign of procrastination, it can be a warning sign of a problem client, and it most definitely is a warning sign of future difficulty in collection. By monitoring these two classes and preventing them from exceeding a certain amount over a certain date range, you can minimize your exposure to large (negative) impacts on your cash flow.

Leakage reports

These reports determine the "leakage" or lost income resulting from time leakage — from failure to record billable time, to writing off time at the moment of billing, writing off time at the time of collection or writing off the account in its entirety. Last, there is the leakage resulting from carrying unpaid disbursements from time of billing to payment. By comparing your HEAR (your standard hourly rate x your annual billable hour target) to your actual annual fee receipts, you can see the total amount of your billable time leakage. By determining the time written off, your uncollected time and estimating the unrecorded time, you can arrive at the totals for each type of leak — and then take steps to stop up these leaks. It's essential to keeping your financial boat afloat.

Exception reports

You can immerse yourself in detailed reports, or you can instruct your bookkeeper to produce reports that only provide the exceptions (i.e., unpaid fees or disbursements over a certain dollar threshold and past a certain date). This way, you keep your eye on the forest, not only the trees, and focus on the matters most important to you.

Profitability reports

It can be a very detailed process to determine actual overhead rates to apply to fee billers and can be quite time-consuming. However, you can do a quick and dirty overhead calculation to determine overhead rates.

If you are a solo lawyer, simply divide your annual expenses by your actual annual billable hour expectation. This will provide you with an approximate cost-per-hour or standard cost to render professional services. If, on any file, you are not collecting at least your billable hour total x your standard cost, you are losing money on that file.

An example will help.

Assume you expect $100,000 in draws from your practice. You pay your secretary $45,000 (including salary and all benefits). All other overhead expenses total $25,000 for the year. Your total expenses are $100,000 + $45,000 + $25,000 = $170,000. Assume that you bill 1,700 hours/year. Your standard cost of rendering services would be $170,000 / 1,700 = $100/hour. If you are not collecting at least $100 for each hour you put into a file, then that file is simply costing you money.

If your firm is composed of multiple timekeepers, you will need to factor out each person's overhead rates or decide to treat all equally, at least in terms of overhead rates. However you decide to do this, having some idea of standard cost amounts will allow you to start to determine absolute profitability of clients, files, lawyers and practice groups.

In the end result

As you can see, law firms can quickly progress beyond looking at revenues, to looking at relative profitability factors, to doing a profitability analysis. Profitability reports mean no more muddled guesswork. Finally, the black can be distinguished from the red, and everyone affected by the bottom line know what it is. At that point, financial decisions — and yes, this includes fee-biller compensation, draws and bonuses — can be made with much greater confidence.✧

Special Compensation Fund claims

Re: A Lawyer*

**The lawyer is not identified as this claim was denied.*

Special Compensation Fund Committee decision involving claim 199903
Decision date: February 4, 2004
Report issued: April 23, 2004

Claimant A
Claim of $50,000 USD denied

The lawyer in this case acted for a company that offered an investment scheme. The company entered into an agreement with one investor (A) under which A would invest $50,000 USD. The lawyer received from A $30,000 USD and deposited these funds to trust. Per the terms of the agreement, A agreed that, upon execution of the agreement, the lawyer would release A's funds to the company. There was no evidence that A provided the additional $20,000 USD to the lawyer; rather, it appears that A may have paid this money in cash directly to the company.

The lawyer paid the $30,000 USD to two people, one of whom was the wife of the company's principal. The Special Compensation Fund determined that the company had directed the lawyer to pay the funds in the manner he did.

The Committee found that the lawyer acted in his capacity as a barrister and solicitor for the company. In these circumstances, however, he was not a signing party to the investment agreement with A, and he did not act for A or undertake to perform any legal services on A's behalf.

The investor (A) knew that his funds would be paid to the company on execution of the agreement. The company indeed acknowledged receipt of the funds and an obligation to repay them to A. The company chose to direct money to two other people. While possibly not in strict compliance with A's understanding of the intent of the agreement with the company, this did not mean that the lawyer had misappropriated funds. The Committee concluded that, in this situation, the lawyer had not misappropriated or wrongly converted the investor's funds.

◆

Martin Wirick

Vancouver, BC
Called to the Bar: May 14, 1979
Resigned from membership: May 23, 2002
Custodian appointed: May 24, 2002
Disbarred: December 16, 2002 (see *Discipline Case Digest* 03/05)

Special Compensation Fund Committee decision involving claims 20020278, 20020157 and 20020545

Decision date: June 1, 2005
Report issued: September 1, 2005
Corrigenda date: November 9, 2005

Claimants: Credit Union A, Mr. and Ms. F, and Bank B
Payment for Credit Union A approved: ***$250,444.59*** *($217,226.71 and $33,217.88 interest)*

In 2001 V Construction Ltd. (a company belonging to Mr. Wirick's client, Mr. G) sold a lot on Nelson Street to Mr. and Ms. F for $332,000. The lot was then encumbered by three mortgages. In late October 2001, in closing the transaction, Mr. Wirick reported to the solicitor for Mr. and Ms. F that he had discharged the first, second and third mortgages. In fact, contrary to his undertaking, Mr. Wirick did not use the sale proceeds to pay out and discharge, among other charges, the third mortgage of Credit Union A.

Mr. and Mrs. F meanwhile obtained $215,800 to finance their purchase through a mortgage loan from Bank B. The mortgage, which they expected to be a first mortgage, was registered on title.

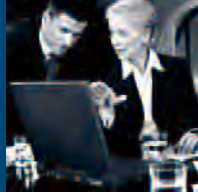
In April 2002, Mr. Wirick filed a Form C discharge of the Credit Union A mortgage, which Credit Union A alleged was fraudulent. In October 2002, Credit Union A filed a Certificate of Pending Litigation and Writ of Summons in BCSC Action No. L023071 seeking a declaration from the court that the discharge of the mortgage was "fraudulent and as a result void and of no effect."

On May 12, 2005, in a similar case to this one (Action No. BCSC 712), Mr. Justice Sigurdson allowed the rectification of title and reinstatement of the Credit Union A mortgages on two properties, subject to consideration of further evidence and argument on two issues.

The Special Compensation Fund Committee considered claims made by Credit Union A , Mr. and Ms. F and Bank B. The Committee determined that Mr. Wirick had not used the sale proceeds in accordance with his undertaking, and that his breach of undertaking amounted to wrongful misappropriation of funds in his capacity as a lawyer. Mr. and Ms. F had sustained a loss since their purchase monies were supposed to be used to pay out the charges on title, but in fact the Credit Union A mortgage was fraudulently discharged from title without being paid out.

Therefore, the Committee decided that, if it paid out the Credit Union A mortgage, its claim would be satisfied and Credit Union A would remove its Certificate of Pending Litigation and acknowledge satisfaction of any claim on its mortgage and lawsuit.

The Committee approved payment of $250,444.59 to Credit Union A, subject to various conditions and assignments, for the purpose of discharging its mortgage from title. By so doing, Mr. and Ms. F would be restored to the position they ought to have been in had Wirick fulfilled his undertakings.✧



Unauthorized practice undertakings and orders

The Law Society has obtained the following court orders and undertakings to prevent non-lawyers from engaging in the unauthorized practice of law.

Court orders

On application of the Law Society, the BC Supreme Court has ordered that former lawyer **James D. Hall**, of Victoria, be prohibited from representing that he is a lawyer and also from appearing as counsel or advocate; preparing corporate documents, wills or estate documents, documents relating to real or personal estate or documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute; negotiating for the settlement of a claim or demand for damages; giving legal advice; placing at another's disposal the services of a lawyer; or representing that he is qualified or entitled to provide any of these services for a fee: March 20, 2006.

The BC Supreme has also ordered that **Larry Bellman**, doing business personally and as **Stonecypher Enterprises**, of Penticton, be prohibited from appearing as counsel or advocate; preparing documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute; negotiating for the settlement of a claim or demand for damages; giving legal advice or offering or representing that he is qualified or entitled to provide any of these services for a fee: April 11, 2006.

The BC Supreme has further ordered that **John P. Micka** and his company **Machiavelli & Associates Emprize Inc.**, of New Westminster, be prohibited from appearing as counsel or advocate; preparing documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute; negotiating for the settlement of a claim or demand for damages; giving legal advice or offering or representing that they are qualified or entitled to provide any of these services for a fee: May 10, 2006.

Undertakings

[redacted]

Law Society Award *… from page 3*

Legal Profession in BC that Charlie Locke is to be thanked for his contributions to pre-call education in the mid-1960s by transforming the Law Society's system of student lectures to a new system of tutorials. He also helped clarify and delineate the statutory responsibilities of the Law Society from other activities in the late 1960s. This was an opportunity for the BC Branch of the CBA to step up and engage many younger lawyers in law reform and other activities of the bar.

Charlie Locke's nominators summarize his contributions this way:

> "Mr. Locke, a soldier who served his country with distinction, a loving husband and father, leader in his church, a most highly respected lawyer and judge, has certainly made the kind of contribution to his country, community and profession which we believe makes him eminently well qualified as a candidate for the Law Society Award. He is the kind of truly exceptional member of the profession and the community whose receipt of the Award would strengthen the importance of the Award and, at the same time, link the generations of lawyers and judges in this province who have strived to preserve the rule of law and system of justice that makes possible the independence of the bench and bar in the interest of the public."

In recommending him for the 2006 Award, the Selection Committee added this: "Despite his many years of service already, Charles C. Locke, QC demonstrates as active an interest as he ever did in the history of the Law Society, in the current work of the Benchers and in the future of our profession. It is a testament to his devotion and an inspiration for the rest of us."

Nowhere is this devotion more evident than in a three-part series he penned, called *Reflections on the Governance of the Legal Profession in British Columbia*. The series was published between 2002 and 2003 in the *Advocate*. Charlie Locke imparted these words to future generations of lawyers:

> "One looks at the problems that have faced the profession in this province now for 125 years and endeavours to find a guiding thread. And there is: It is ethics, or morality if you will. In the dizzily moving world of the 21st century, it is impossible to predict the new problems that will arise. But one can look at the past to make one major deduction: the Law Society's affairs must be conducted publicly within a framework of honour, accompanied by appropriate action. The moment the profession forgets itself and lets its strict standards slide or fails to appreciate the public trust reposed on the Law Society, and in each lawyer, the future is at hazard."✧

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