The Law Society of British Columbia

Agenda

Benchers

Date: Saturday, June 16, 2012

Time: **7:00 am** Breakfast Buffet *(PeakFine Restaurant, Sparkling Hill Resort)*
8:30 am Meeting begins *(Austria Ballroom, Sparkling Hill Resort)*

Location: Sparkling Hill Resort, Vernon

Recording: ***Benchers, staff and guests should be aware that a digital audio recording is made at each Benchers meeting to ensure an accurate record of the proceedings.***

CONSENT AGENDA:
The following matters are proposed to be dealt with by unanimous consent and without debate. Benchers may seek clarification or ask questions without removing a matter from the consent agenda. If any Bencher wishes to debate or have a separate vote on an item on the consent agenda, he or she may request that the item be moved to the regular agenda by notifying the President or the Manager, Executive Support (Bill McIntosh) prior to the meeting.

1	**Minutes of May 11, 2012 meeting** • Draft minutes of the regular session • Draft minutes of the in camera session (Benchers only)	pg. 1000
2	**Act & Rules Subcommittee: Various Amendments to the Rules Consequential to the *Legal Profession Amendment Act, 2012*** • Memorandum from Mr. Hoskins on behalf of the Act & Rules Subcommittee	pg. 2000
3	**Act & Rules Subcommittee: Amendment to Rule 3-90 (reporting criminal charges)** • Memorandum from Mr. Hoskins on behalf of the Act & Rules Subcommittee	pg. 3000
4	**Act & Rules Subcommittee: Amendment to Rule 5-6 (public hearings)** • Memorandum from Mr. Hoskins on behalf of the Act & Rules Subcommittee	pg. 4000

REGULAR AGENDA		
5	**President's Report** • Oral report to be presented at the meeting	
6	**CEO's Report** • Written report	pg. 6000
7	**Federation of Law Societies of Canada: Council Report by the Law Society's Council Representative** Mr. Hume to report	
8	**Report on Outstanding Hearing & Review Reports** • Report to be distributed at the meeting	
GUEST PRESENTATIONS		
9	**Federation of Law Societies of Canada: Executive Update** President John Hunter, QC and CEO Jonathan Herman to report	
2012 – 2014 STRATEGIC PLAN IMPLEMENTATION		
10	**Strategic Plan Implementation Update** Mr. LeRose and Mr. McGee to report	
OTHER MATTERS For discussion and/or decision		
11	**Paralegals Providing Enhanced Levels of Legal Services: Follow-up to May 11 Benchers Meeting** Mr. LeRose to report • Memorandum from the Executive Committee	pg. 11000
12	**Selection of Benchers' Nominee for 2013 Second Vice-President** Mr. McIntosh to report on candidates declared to date and Mr. Le Rose to issue last call to Benchers to declare their candidacy	

FOR INFORMATION ONLY		
13	**Law Foundation report on use of Law Society pro bono funds in 2011** • Letter dated May 16, 2012 from Wayne Robertson, QC, Executive Director of the Law Foundation of BC, to Mr. McGee	pg. 13000
IN CAMERA SESSION		
14	**Bencher Concerns**	

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, May 11, 2012

Present:

Bruce LeRose, QC, President
Art Vertlieb, QC, 1st Vice-President
Jan Lindsay, QC 2nd Vice-President
Rita Andreone, QC
Kathryn Berge, QC
Patricia Bond
David Crossin, QC
Thomas Fellhauer
Leon Getz, QC
Miriam Kresivo, QC
Bill Maclagan
Nancy Merrill
Maria Morellato, QC
David Mossop, QC
Thelma O'Grady
Lee Ongman
Vincent Orchard, QC
Greg Petrisor
David Renwick, QC
Phil Riddell
Catherine Sas, QC
Richard Stewart, QC
Herman Van Ommen
Ken Walker
Tony Wilson
Barry Zacharias
Haydn Acheson
Stacy Kuiack
Peter Lloyd, FCA
Ben Meisner
Claude Richmond

David Loukidelis, QC, Deputy Attorney General of BC, Ministry of Justice, representing the Attorney General

Absent: Satwinder Bains

Staff Present:

Tim McGee
Deborah Armour
Robyn Crisanti
Jeffrey Hoskins, QC
Su Forbes, QC
Michael Lucas
Bill McIntosh
Jeanette McPhee
Doug Munro
Susanna Tam
Alan Treleaven
Adam Whitcombe

Guests:

Katie Armitage, Associate, Watson Advisors Inc.
Dom Bautista, Executive Director, Law Courts Center

Mark Benton, QC, Executive Director, Legal Services Society
Johanne Blenkin, Executive Director, Courthouse Libraries BC
Kari Boyle, Executive Director, Mediate BC Society
Anne Chopra, Equity Ombudsperson
Donna Greschner, Dean, Faculty of Law, University of Victoria
Jeremy Hainsworth, Reporter, Lawyers Weekly
Gavin Hume, QC, the Law Society's Representative on the Council of the Federation of Law Societies of Canada
Marc Kazimirski, President, Trial Lawyers Association of BC
Jamie Maclaren, Executive Director, Access Pro Bono
Caroline Nevin, Executive Director, Canadian Bar Association, BC Branch
Wayne Robertson, QC, Executive Director, Law Foundation of BC
Rob Seto, Director of Programs, Continuing Legal Education Society of BC
Kerry Simmons, Vice-President, Canadian Bar Association, BC Branch
Elizabeth Watson, President, Watson Advisors Inc.

OATH OF OFFICE

Bruce LeRose, QC, President of the Law Society of BC, administered the swearing of the Bencher's Oath of Office by Vancouver Bencher Miriam Kresivo, QC. Ms. Kresivo was elected in the May 8, 2012 Bencher by-election for the balance of the 2012-2013 term.

PRESENTATION OF 2012 Law Society Scholarship to Jennifer Wai Yin Chan

Mr. LeRose presented the 2012 Law Society Scholarship to Jennifer Wai Yin Chan. Ms. Chan is a 2008 graduate of the University of Victoria Faculty of Law, and plans to pursue a Master of Laws at Harvard Law School. She intends to research and then propose a legal test for determining what situations will support a right to legal representation.

CONSENT AGENDA

1. Minutes

The minutes of the meeting held on April 13, 2012 were approved as circulated.

REGULAR AGENDA – for Discussion and Decision

2. President's Report

Mr. LeRose briefed the Benchers on various Law Society matters to which he has attended since the last meeting, including nine outside meetings and events. Mr. LeRose highlighted the following matters:

a) Bill 40 (*Legal Profession Amendment Act, 2012)*

Bill 40 has passed third reading in the provincial Legislature and is expected to be enacted by the end of May. Mr. LeRose noted with thanks the hard work by many Benchers and staff on this major initiative, led by Jeff Hoskins, QC, the Law Society's Legislative & Tribunal Counsel. Mr. LeRose thanked the Ministry of Attorney General staff for their cooperation and support in helping to guide the package of amendments to the *Legal Profession Act*, S.B.C. 1998, c. 9, through the legislative process

b) Proposed Expansion of BC Notaries' Scope of Practice

Mr. LeRose briefed the Benchers on the Law Society's submissions to the Minister of Justice and Attorney General. He noted that the focus of those submissions is the importance on ensuring effective regulation of the provision of legal services to British Columbians.

c) Governance Review Task Force

Mr. LeRose updated the Benchers on the progress of the current review of Law Society governance review. He reported that the review is being led by Elizabeth Watson of WATSON Advisors, that the stakeholder interview and document review phases of the project are substantially complete, and that Ms. Watson will provide an interim report at the Benchers' Retreat in June. Mr. LeRose noted that the governance review project is proceeding well, on-time and on-budget.

d) Cowper Review of BC's Judicial System

The Law Society's draft response to the BC Government's Green Paper (*Modernizing British Columbia's Justice System*) has been completed, and will be circulated to the Executive Committee and then the Benchers for comment prior to submission to Mr. Cowper.

3. CEO's Report

Mr. McGee provided highlights of his monthly written report to the Benchers (Appendix 1 to these minutes), including the following matters:

a) First Quarter Financial Results

b) Bill 40, *Legal Profession Amendment Act, 2012*

c) 2012 Operational Priorities – Progress Report

a. Review of Performance Management Process and How it Ties into Recognition

b. Lawyer Advice and Support Assessment Project

d) Law Society Privacy Review – Update

e) Law Week – "Day-in-the-Life" Twitter Campaign and Law Society Speakers Bureau

f) Re-design of the Employee Recognition Program

g) Executive Committee Review of Key Performance Measures (KPM) Targets

h) Indigenous Lawyers Mentoring Project Update

i) Law Society Equity Ombudsperson's Annual Report for 2011

4. Bill 40 *(Legal Profession Amendment Act, 2012)*: Next Steps Planning

Mr. Hoskins provided the Benchers with a briefing on Bill 40's background, substance and implementation timeline. He reported that the bill is expected to be enacted as the *Legal Profession Amendment Act, 2012* by the end of May. Mr. Hoskins noted that while most of the provisions of the new Act will come into force on Royal Assent, many will require the Benchers to amend the Law Society Rules to take effect. Most of those will require the provincial Cabinet to proclaim sections of the amending Act.

Mr. Hoskins also noted the importance of ensuring comprehensive and effective communications with BC lawyers and the public regarding the purpose, effect and timeline for implementation of

the legislative changes. Ms. Crisanti confirmed that a range of communication initiatives are being planned, including an article in the upcoming *Benchers' Bulletin*.

David Loukidelis, QC, Deputy Attorney General of BC, expressed appreciation on behalf of Minister Bond and the staff of the Ministry of Justice and Attorney General for the cooperative approach shown by the Law Society throughout this amendment initiative and process.

5. Federation of Law Societies of Canada: Council Report by the Law Society's Council Representative

Gavin Hume, QC reported as the Law Society's FLSC Council representative on various Federation matters, including:

a. National Admission Standards

The National Admission Standards Steering Committee met in Calgary on May 2. Federation President John Hunter, QC, Law Society CEO Tim McGee, and Law Society Director of Education Alan Treleaven are Steering Committee members.

The Steering Committee is developing proposed strategies for implementing the national competency standards and good character standards. Work on both is well under way. The draft national competency standards are now being validated nationally by a survey of about 5,000 Canadian lawyers with five or fewer years of practice experience.

In the fall of this year, the Credentials Committee and the Benchers will be asked to approve the national competency standards and good character standards, and to consider national strategies for implementing those standards.

b. Federation Council Meeting and Fall Conference (September 20 – 22, 2012, Vancouver)

Planning is underway for the Federation's Annual Conference to be held September 20-22 in Vancouver. All law societies will attend, and conference topics will include next steps and strategies for National Admission Standards, including the role and future of articling.

c. Common Law Degree Approval Committee

This Federation committee has been struck to oversee implementation and administration of the Canadian Common Law degree standards that are now in place. Law school students who

graduate in 2015 (the 2012 entry class) will be the first to be subject to the Federation's law degree standards, developed by the Canadian Common Law Degree Task Force.

All Canadian common law degree programs require approval; so all law schools have been submitting detailed applications to the Federation. The Federation Common Law Degree Approval Committee meets in Toronto on June 7 and 8 to review the law schools' applications. UBC Law Dean Mary Anne Bobinski and the Law Society Director of Education Alan Treleaven serve on that committee.

d. Model Code Implementation Update

Mr. Hume updated the Benchers on Model Code implementation progress by the Federation's various member societies to date.

e. National Discipline Standards Pilot Project

This two-year initiative is underway, and the representatives of the Federation's member law societies, including members of the Law Society's Professional Regulation department, are working toward meeting the standards set for the pilot project.

f. June Meeting of the Federation Council

The Council's June meeting will be held in Ottawa. Review of the Federation's current Strategic Plan will be on the agenda.

6. Report on Outstanding Hearing & Review Reports

The Benchers received and reviewed a report on outstanding hearing decisions.

STRATEGIC PLANNING AND PRIORITIES MATTERS – For Discussion and/or Decision

7. Strategic Plan Implementation Update

Mr. LeRose briefed the Benchers on a number of strategic plan implementation matters. He reported that the 2012Advisory Committees will provide their mid-year reports to the Benchers at the July meeting.

Mr. LeRose also provided an update on the BC Courts Family Law Paralegals Pilot Projects (BC Supreme Court and BC Provincial Court). A Benchers' working group will be created to oversee

the two pilot projects, freeing the Access to Legal Services Advisory Committee to pursue its other responsibilities. The Family Law Paralegals Pilot Projects Working Group will comprise Mr. LeRose and Vertlieb as co-chairs, and Mr. Mossop, Mr. Stewart and Life Bencher Carol Hickman QC as members.

Mr. LeRose reported on planning for creation of a task force to carry out the work underlying Initiative 1-1(c) in the current Strategic Plan:

Initiative 1–1(c)

> Examine whether the Law Society should regulate just lawyers or whether it should regulate all legal service providers.

This work was initially tasked to the Access to Legal Services and the Independence and Rule of Law Advisory Committees. Both advisory committees have noted that the scope of work will exceed the current year and would be more efficiently undertaken by a dedicated task force. The Executive Committee has been briefed and has approved the preparation of draft terms of reference and a mandate for presentation to the Benchers in July, with a request to strike such a task force.

Mr. LeRose also reported on:

Initiative 1–2(a)

> Examine issues of governance of the Law Society generally including:
>
> - …
> - developing a model for independent evaluation of Law Society processes;
> - …

A working group comprising Past-President Gavin Hume, QC, Mr. LeRose and Mr. McGee has been working on this matter since the fall of 2009. Stakeholder interviews have been concluded; Mr. McGee will prepare a paper with recommendations for the Benchers' review at the September meeting.

OTHER MATTERS – For Discussion and/or Decision

8. Ethics Committee: Review and Approval of BC Code Rule 5.01 and *Professional Conduct Handbook* (Paralegals)

Mr. Getz briefed the Benchers, referring them to the Ethics Committee's memorandum at page 8000 of the meeting materials, and to the Committee's recommendations (at page 8007 of the meeting materials) that the Benchers:

- adopt amended Rule 5.01 and Appendix E of the BC Code, to be effective when the new Code is proclaimed on January 1, 2013, pursuant to the attached suggested resolutions [at page 8032-8037]

- adopt amended Chapter 12 of the *Professional Conduct Handbook* and Appendix 7 until the BC Code is in effect, pursuant to the attached suggested resolutions [at page 8038-8045].

Mr. Getz confirmed that the Ethics Committee's recommendations differ in two respects from those of the Delivery of Legal Services Task Force, which were approved in principle by the Benchers in October 2010. The Ethics Committee has recommended that there be no "cap" on the number of such paralegals that a lawyer would be allowed to supervise (the Task Force had recommended a cap of two), and that such paralegals be permitted to give and receive undertakings (the Task Force had recommended that paralegals not be permitted to do so).

Mr. Getz outlined the Ethics Committee's rationale for its recommendations. He referred to page 8006 of the meeting materials for explanation of the proposed replacement of a hard "cap" with a regime that would focus on the qualitative and practical aspects of paralegals' supervision by lawyers, and the regulation of such supervision. Mr. Getz referred to page 8004 for explanation of the proposed amendment to the current subrule 5.01(3)(c) of the BC Code, to clarify that the undertaking given or accepted by a paralegal is not the paralegal's own undertaking, but rather is that of the lawyer responsible for the matter.

Mr. Getz alerted the Benchers to a clerical error in the Executive Committee's memorandum, such that in a number of instances the word "non-lawyer" was inadvertently used when "paralegal' was intended. He referred particularly to the following passage (at pages 8004-8005):

> 5.01(3) **A lawyer must not permit a non-lawyer to:**
>
> (c) give or accept undertakings or trust conditions, but a ~~non-lawyer~~ [paralegal] may give or accept undertakings on behalf of the lawyer responsible for a legal matter, at the direction of and under the supervision of that lawyer, provided that, in any communications, the fact that the person giving or accepting the undertaking or

> accepting the trust condition is a ~~non-lawyer~~ [paralegal] is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

Mr. Getz moved (seconded by Mr. Crossin) that the Benchers adopt the Ethics Committee's recommendations (as set out above).

Mr. Vertlieb outlined the basis for the Delivery of Legal Services Task Force's recommendations.

Mr. Mossop advised the Benchers that if the motion were passed, he would present a motion to amend the *Professional Conduct Handbook*, Chapter 12, subrule 4(c) to add the words "or the Benchers" to the exceptions to subrule 3's limitations on the work that may be done by a non-lawyer under the supervision of a lawyer, as follows:

> 4. The limitations imposed by subrule (3) do not apply when a non-lawyer is
>
> (a) a community advocate funded and designated by the Law Foundation;
>
> (b) a student engaged in a legal advice program or clinical law program run by, associated with or housed by a law school in British Columbia; and
>
> (c) with the approval of the Executive Committee [or the Benchers], a person employed by or volunteering with a non-profit organization providing free legal services.

In the ensuing discussion a number of issues were raised by the Benchers regarding both recommendations.

The motion was withdrawn, and the matter was referred to staff and the Executive Committee for consideration, to be returned to the Benchers for decision at their June meeting.

IN CAMERA SESSION

The Benchers discussed other matters in camera.

WKM
2012-05-31

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

May 11, 2012

Introduction

My report this month attaches the financial results for the first quarter ending March 31, 2012, as well as a progress report on two of our 2012 operational priorities and updates on several other items.

1. First Quarter Financial Results

Highlights of the financial results for the first quarter ending March 31, 2012 are summarized in Appendix 1. These results have been reviewed with the Chair of the Finance Committee, Art Vertlieb, QC. Jeanette McPhee, our Chief Financial Officer, and I will be available to answer any questions you may have on the results at the meeting.

2. Bill 40, *Legal Profession Amendments Act, 2012*

At the time of writing, Bill 40, our package of proposed amendments to the *Legal Profession Act*, had received second reading in the Legislature. The comments from both sides of the House were supportive. Jeff Hoskins, QC will be at the meeting to provide an updated report on the progress of this important new legislation.

3. 2012 Operational Priorities – Progress Report

The 2012 Operational Priorities Plan sets out five priorities for 2012. Here is a progress report on two of those priorities.

(a) Review of Performance Management Process and How it Ties Into Recognition

At the April 2012 Town Hall meeting, I invited all staff to participate in small-group discussions to provide feedback on three questions related to performance recognition:

1. If you could design the recognition program, what would it look like?

2. What kinds of behaviours, achievements and activities do you think should be recognized at the Law Society?

3. What do you see as some of the potential pitfalls of a recognition program and how could they be averted?

Over 100 staff members participated in the group sessions, which were not attended by managers, and were facilitated by staff volunteers.

They provided invaluable feedback on how we can make the Law Society's recognition program more relevant to Law Society employees and more effective in engaging the behaviours we value and the performance we seek. Management is now reviewing the feedback and a follow-up targeted survey is being conducted to drill down further into certain key issues. Our plan is to have a redesigned employee recognition program in place for 2013.

(b) Lawyer Advice and Support Assessment Project

One of the three major strategic recommendations in the Core Process Review Report was the establishment of a cross-departmental staff working group to make a full assessment of the strengths and opportunities of our current model for delivering lawyer advice and practice support services.

The project objectives are to identify:

- what lawyer advice and practice support the Law Society should provide;
- who within the Law Society should provide the particular types of advice and support;
- what are the best means to provide the advice and support; and
- what are the resource implications and needs of providing these services?

Currently the Law Society provides a wide range of assistance and support to BC lawyers, including telephone practice advice about questions of ethics, professional responsibility and practice management, related web resources, email alerts to the entire profession about current frauds and scams, online courses for the small firm practitioner, and in-house trust compliance seminars, to name but a few.

While the Law Society is a regulator, it is very much in the Law Society's interests to assist and support BC lawyers to be aware of, understand, and comply with our regulatory standards. It is also very much in the interests of BC lawyers that there be an effective, integrated and coordinated program of lawyer support and assistance.

In the fall of 2011, Alan Treleaven, our Director of Education and Practice, delivered a preliminary report of the Lawyer Advice and Practice Support Working Group. The Working Group's preliminary findings will be shared with the Executive Committee in June. Our plan is to present the Benchers in the Fall with new options for consolidating and expanding the work the Law Society does today to support and assist BC lawyers with all aspects of regulatory compliance and professional competence.

4. Privacy Review – Update

As part of the risk management initiative, we have commenced a comprehensive privacy review to assess all aspects of our current privacy practices, policies and procedures, identify potential risks and identify controls that should be in place.

Following an RFP process, we retained Sara Levine, a lawyer specializing in this area, and Drew McArthur, a privacy and compliance consultant, to conduct the review. The consultants have met with Management Board and are now conducting interviews with managers and staff in all departments. Jeff Hoskins, QC and Jackie Drozdowski, the Information and Privacy Officer, are working with the consultants to complete this process.

The consultants will deliver a final report by mid-year, which will include recommendations for improvements to ensure compliance with all privacy laws and standards, and for ongoing monitoring, enforcement and compliance. We will be bringing that report forward to the Executive Committee and to the Benchers before the Fall.

5. Law Week – "Day-in-the-Life" Twitter Campaign and Law Society Speakers Bureau

The Law Society recognized Law Week in two ways. The first was our "Day-in-the-Life" Twitter Campaign which involved many staff and resulted in a fascinating Twitter narrative that touched on a broad range of different activities that go on at the Law Society. The campaign attracted four media reports, over 100 new Twitter followers, drove 129 people to the Law Society website and exposed more than 60,000 people via Twitter to Law Society information throughout the day. We also launched our Speakers Bureau during Law Week, which is available to the public through our website and features at least 15 speakers from the Law Society who are available to speak to the public, including organizations, on a variety of topics.

Robyn Crisanti, Manager, Communications and Public Affairs, will be at the meeting to answer any questions or to provide further details on these innovative communications initiatives.

Timothy E. McGee
Chief Executive Officer

Appendix 1

CFO Quarterly Financial Report – First Quarter 2012

Attached are the financial results and highlights for the first quarter of 2012.

General Fund

General Fund (excluding capital and TAF)

The General Fund operations resulted in a positive variance of $217,000 to March 31, 2012.

Revenue

Revenue is $4,679,000, $113,000 (2.5%) ahead of budget due primarily to:

- $28,000 in practice fee late payment charges
- $60,000 in Members Manual and Benchers Bulletin revenue which is offset by the cost of producing the publications

Operating Expenses

Operating expenses for the first quarter were $4.4 million, $111,000 (2.5%) below budget due the timing of costs in various areas.

2012 Forecast - General Fund (excluding capital and TAF)

Operating Revenue

Practicing membership is expected to be on budget this year, with 10,787 members. With a projection of 420 PLTC students for the year, PLTC revenue will have a positive variance of $60,000. We are also projecting $50,000 in additional miscellaneous revenue.

Operating Expenses

There are a number of Bencher approved items after the 2012 budget was set, resulting in a negative variance of $250,000. The negative variance includes the Governance Review $100,000, the CBA REAL program $75,000, the Federation levy $40,000, the CBA conference sponsorship $25,000 and the Aboriginal Scholarship $12,000.

Offsetting this, we are projecting $50,000 savings related to hearing panelist training costs.

845/835 Building – net results

845/835 Cambie lease revenue is projected to be below budget.

The Benchers approved the forgiveness of CLE rent for two months, resulting in a reduction in lease revenue of $60,000.

In addition, for the first time since 1992, we have vacant space in the 835 Cambie building. Our leasing agent, CB Richard Ellis continues to actively market the space, but with no confirmed tenants yet in place, we have assumed that this space will not be leased by year end, which results in a revenue reduction of $325,000.

Building expense savings of $45,000 are projected, mainly due to a reduction in property taxes. Management initiated the reclassification of the 9th floor space as a non-profit meeting area, resulting in a lower property tax rate and savings of $20,000 per year on a go-forward basis.

TAF-related Revenue and Expenses

The first quarter TAF revenue is not received until the April/May time period.

TAF operating expenses had a positive variance in the first quarter, with savings in travel costs.

Special Compensation Fund

There was little activity in the Fund during the first quarter.

Lawyers Insurance Fund

LIF operating revenues were $3.6 million in the first quarter, very close to budget.

LIF operating expenses were $1.4 million, $223,000 below budget. This positive variance was due to staff vacancies and lower investment management fees.

The market value of the LIF long term investments was $98 million, an increase of $4.5 million in the first quarter. The year to date investment return was 4.8%, compared to a benchmark of 3.6%.

The Law Society of British Columbia

Summary of Financial Highlights - March 2012
($000's)

2012 General Fund Results - YTD March 2012 (Excluding Capital Allocation & Depreciation)

	Actual	Budget	$ Var	% Var
Revenue (excluding Capital)				
Membership fees	3,620	3,594	26	0.7%
PLTC and enrolment fees	254	256	(2)	-0.8%
Electronic filing revenue	215	215	-	0.0%
Interest income	126	120	6	5.0%
Other revenue	464	381	83	21.8%
	4,679	4,566	113	2.5%
Expenses before 845 Cambie (excl. dep'n)	4,349	4,460	111	2.5%
	330	106	224	
845 Cambie St. - net results (excl. dep'n)	211	218	(7)	-3.2%
	541	324	217	

2012 General Fund Year End Forecast (Excluding Capital Allocation & Depreciation)

Practice Fee Revenue	**Avg # of Members**
2008 Actual	10,035
2009 Actual	10,213
2010 Actual	10,368
2011 Actual	10,564
2012 Budget	10,787
2012 Actual YTD	**10,538**

	Actual Variance
Revenue	
PLTC	60
Misc Revenues	50
	110
Expenses	
FLS Contribution - rate increase *	(40)
Exec Comm - CBA Canadian legal conference sponsorship contribution *	(20)
CBA REAL Initiative *	(75)
Governance Review *	(100)
Aboriginal Scholarship*	(12)
Hearing Training Costs - some incurred in 2011	50
	(197)
845 Cambie Building	
CLE Lease Forgiveness*	(60)
835 Vacancy - assume not leased during 2012	(325)
Other Savings	45
	(340)
2012 General Fund Forecast Variance	(427)
2012 General Fund Budget	-
2012 General Fund Actual	(427)

* Bencher approved items

Trust Assurance Program Forecast

	2012 Forecast	2012 Budget	Variance	% Var
TAF Revenue	2,364	2,500	(136)	-5.4%
Trust Assurance Department	2,388	2,468	80	3.2%
Net Trust Assurance Program	(24)	32	(56)	

2012 Lawyers Insurance Fund Long Term Investments - YTD March 2012 *Before investment management fees*

Performance	4.8%
Benchmark Performance	3.6%

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date: May 23, 2012
Subject: **Bill 40 – Rule amendments to implement, Part 1**

As you know, Bill 40 is now the *Legal Profession Amendment Act, 2012*, SBC 2012, c. 16, amending many of the sections of the *Legal Profession Act*. Many of the provisions came into effect on Royal Assent and are now law. Several others, however, will require the Benchers to amend the Law Society Rules before they take effect. Some amendments give the Benchers powers to make Rules where they did not previously have that express power; others cannot take effect until the Benchers adopt Rules and then will require the provincial Cabinet to proclaim the statutory provision in effect by regulation.

This memo recommends to the Benchers rule amendments that are required to implement Bill 40 in the short run. In some cases, the proposed amendments include provisions that take effect retroactively to avoid a gap in regulation between the effective date of the Bill 40 amendments and the date of the rule amendments.

1. Pro bono by non-practising and retired members

Section 1(d) of Bill 40 amends paragraph (h) of the definition of "practice of law" in section 1(1) of the *Legal Profession Act* so that, when a lawyer does any of the acts in the definition paragraphs (a) to (g), it is the practice of law whether it is paid work or not, and the Law Society can regulate it as such.

This causes a difficulty because the previous definition basically made any unpaid legal work not the "practice of law". That meant that members of the Law Society who do not hold a practising certificate (i.e., non-practising and retired members) could do pro bono legal work for deserving clients without offending section 15, which prohibits persons who are not practising lawyers from doing anything that is the practice of law. In addition, retired and non-practising members are required to give the Law Society an undertaking not to practise law.

To solve that problem, there is another provision in Bill 40 (section 8(a)) that adds paragraph (g) to section 15 *[Authority to practise law]*:

Authority to practise law

15(1) No person, other than a practising lawyer, is permitted to engage in the practice of law, except

(g) a lawyer who is not a practising lawyer to the extent permitted under the rules.

This provision allows the Benchers to adopt a rule that would allow non-practising and retired members to do pro bono legal work without being in breach of the *Legal Profession Act*. It would also be appropriate to relieve current non-practising and retired lawyers from their undertakings to the extent that it applies to pro bono legal work.

To that end, the Subcommittee recommends adopting a definition of "pro bono legal services", which will also be useful for amendments in relation to the insurance rules:

"pro bono legal services" means the practice of law not performed for or in the expectation of a fee, gain or reward;

This definition does not include the full phrase that appears in section 1(1) of the Act, "not for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed," so that any compensation from any source would take the legal work outside of the definition of pro bono.

The Subcommittee recommends the following new Rule:

Pro bono legal services by non-practising and retired members

2-4.2 Despite an undertaking given under Rule 2-3(1)(a) or 2-4(2)(a), a non-practising or retired member may provide pro bono legal services.

Since the amended definition of "practice of law" and the new section 15(1)(g) are now in effect, technically, retired and non-practising members doing pro bono work are currently offending section 15(1). Fortunately, there is a provision in section 51 *[Transition – power to make rules]* of Bill 40 for the Benchers to adopt rules retroactive to the date that that section comes into force for the purpose of avoiding unintended transitional problems such as this.

The Subcommittee recommends that the Benchers enact the following new Rule to authorize pro bono work by retired and non-practising members during the period between Royal Assent to Bill 40 and the adoption of new Rule 2-4.2:

Transition

2-4.3 A retired or non-practising member who has provided pro bono legal services between May 14, 2012 and June 16, 2012 is deemed not to be in breach of section 15 nor the undertaking given under Rule 2-3(1)(a) or 2-4(2)(a) for that reason alone.

2. Rules related to the setting of the annual fees

Bill 40 repeals sections of the *Legal Profession Act* that require the membership of the Law Society as a whole to set the annual practice fee. In particular, section 23 is amended as follows:

Annual fees and practising certificate

23(1) A practising lawyer must pay to the society an annual fee consisting of

(a) a practice fee in an amount set by the benchers ~~a majority of the members voting on the resolution at a general meeting or in a referendum,~~

~~(b) a sum, set by the benchers, to be placed in the special compensation fund continued under section 31 (2)~~, and

Accordingly, rules governing the conduct of the Annual General Meeting need to be amended to remove references to the setting of the annual practice fee at that meeting.

Annual general meeting

1-6(5) At least 60 days before an annual general meeting, the Executive Director must distribute to members of the Society by mail a notice ~~containing the following information: (a)~~ of the date and time of the meeting.~~;~~

~~(b) the text of the resolution recommended by the Benchers to set the practice fee under section 23 *[Annual fees and practising certificate]* of the Act.~~

~~(7) Subrule (6) applies to amendments to be moved at the annual general meeting that would have the effect of changing the practice fee recommended by the Benchers.~~

(8) At least 21 days before an annual general meeting, the Executive Director must make available to members of the Society,

(a) by mail, a notice containing the following information:

(ii) each resolution and amendment received in accordance with subrule~~s~~ (6) ~~and (7)~~, and

In addition Schedule 1 to the Rules contains a reference to the "fees set by the members". I suggest that that phrase be removed:

SCHEDULE 1 – 2012 LAW SOCIETY FEES AND ASSESSMENTS

A. Annual fee		$
1.	Practice fee ~~set by members~~ (Rule 2-70)	1,840.41

The Subcommittee recommends these changes be adopted by the Benchers.

3. Special Compensation Fund fee

The amendments will eliminate the need for each member of the Law Society to pay an amount into the Special Compensation Fund. See the amended section 23(1) above. This is in anticipation of the repeal of section 31 *[Special compensation fund]* and the amendment, now in effect, of section 30 *[Insurance]* to account for trust protection insurance. As a result, references in the Rules to the Special Compensation Fund fee should be removed:

The Subcommittee recommends a number of amendments called for under this heading:

First call and admission

2-48 (1) An articled student who applies for call and admission must deliver the following to the Executive Director:

(d) the following fees:

~~(iv) the prorated Special Compensation Fund assessment specified in Schedule 2;~~

Transfer from another Canadian jurisdiction

2-49 (1) An applicant for call and admission on transfer from another jurisdiction in Canada must deliver the following to the Executive Director:

(f) the following fees:

~~(iv) the prorated Special Compensation Fund assessment specified in Schedule 2;~~

Transfer as Canadian legal advisor

2-49.3 (1) Subject to subrule (3), a member of the Barreau du Québec or of the Chambre des notaires du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(e) the following fees:

~~(iv) a prorated Special Compensation Fund assessment;~~

Reinstatement of a former lawyer

2-52 (3) On reinstatement, an applicant under subrule (2)(a) may be issued a practising certificate on payment of the following:

~~(c) the prorated Special Compensation Fund assessment specified in Schedule 2;~~

Annual practising fees

2-70 (1) The annual practising fee~~, special compensation fund assessment~~ and insurance fee are payable in respect of each calendar year.

(2) The date for payment of the annual practising fee~~, special compensation fund assessment~~ and first insurance fee instalment is November 30 of the year preceding the year for which they are payable.

Refund when lawyer does not practise law

2-74 (1) A lawyer who has paid the annual fee for a practice year but who satisfies the Executive Director that the lawyer has totally abstained from practice in British Columbia during that year through disability other than a suspension is entitled to a refund of

(a) the difference between the practice fee set by the members of the Society under section 23(1)(a) of the Act and the non-practising member fee specified in Schedule 1, and

~~(b) the Special Compensation Fund assessment set by the Benchers under section 23(1)(b) of the Act, and~~

Recovery of investigation or audit costs, trust report penalty and Special Compensation Fund payments

5-11 (1) A lawyer or former lawyer who is liable to pay money under the following provisions must pay to the Society the full amount owing by the date set by the Discipline Committee:

~~(c) recovery under Rule 3-42 of part or all of the amount paid out by the Society on that lawyer's behalf under section 31 of the Act.~~

SCHEDULE 1 – 2012 LAW SOCIETY FEES AND ASSESSMENTS

A. Annual fee	$
1. Practice fee set by members (Rule 2-70)	1,840.41
~~2. Special Compensation Fund assessment (Rule 2-70) .....~~	~~1.00~~

SCHEDULE 2 – 2012 PRORATED FEES AND ASSESSMENTS FOR PRACTISING MEMBERS

Delete column of prorated Special Compensation Fund fees.

4. Insurance exemption

The current Rule 3-25 *[Exemption from liability insurance]* is affected by the amendment of the definition of the "practice of law" in section 1(1) of the *Legal Profession Act*. It exempts from the insurance program lawyers who do not engage in the practice of law outside of employment as in-house counsel.

Many lawyers who otherwise qualify do some pro bono work, which is now the practice of law as defined. After consulting the Lawyers Insurance Fund, the Subcommittee recommends amending the Rule to extend the status quo position of exemption for those who only engage in the practice of law, as now defined, pro bono.

This is another provision that can be given retroactive effect to avoid there being a gap in which some lawyers are offside section 15 of the *Legal Profession Act* by doing pro bono work.

Exemption from liability insurance

3-25 (1) A lawyer is exempt from the requirement to maintain professional liability insurance and pay the insurance fee if the lawyer is

(a) not engaged in the practice of law, other than pro bono legal services, anywhere in his or her capacity as a member of the Society, or

(b) employed by one of the following and is not engaged in the practice of law, other than pro bono legal services, except in the course of that employment:

(i) a government department;

(ii) a corporation other than a law corporation;

(iii) a society, trade union or a similar organization.

(2) A lawyer is not exempt under subrule (1)(b) if the lawyer engages in the practice of law, other than pro bono legal services, in any way other than as described in those provisions.

Transition

3-25.1 A lawyer who has provided pro bono legal services between May 14, 2012 and June 16, 2012 does not lose the exemption under Rule 3-25(1) for that reason alone.

5. Appointment of investigators

Bill 40 will add the following subsections to section 26 *[Complaints from the public]*:

(3) For the purposes of subsection (4), the benchers may designate an employee of the society or appoint a practising lawyer or a person whose qualifications are satisfactory to the benchers.

(4) For the purposes of an investigation authorized by rules made under subsection (2), an employee designated or person appointed under subsection (3) may make an order requiring a person to do either or both of the following:

(a) attend, in person or by electronic means, before the designated employee or appointed person to answer questions on oath or affirmation, or in any other manner;

(b) produce for the designated employee or appointed person a record or thing in the person's possession or control.

(5) The society may apply to the Supreme Court for an order

(a) directing a person to comply with an order made under subsection (4), or

(b) directing an officer or governing member of a person to cause the person to comply with an order made under subsection (4).

(6) The failure or refusal of a person subject to an order under subsection (4) to

(a) attend before the designated employee or appointed person,

(b) take an oath or make an affirmation,

(c) answer questions, or

(d) produce records or things in the person's possession or control

makes the person, on application to the Supreme Court by the society, liable to be committeed for contempt as if in breach of an order or judgment of the Supreme Court.

In order to give these provisions effect, there needs to be some mechanism for the appointment of a person to conduct the investigation. While subsection (3) says that the Benchers may designate the investigator, section 8(a) allows that responsibility to be delegated:

Officers and employees

8 The benchers may make rules to do either or both of the following:

(a) delegate to the executive director, or the executive director's delegate, any power or authority of the benchers under this Act except rule-making authority;

Obviously, it would be more efficient to delegate to the Executive Director and staff the authority to designate investigators than for the Benchers to attempt to do that on a case by case basis. The Subcommittee recommends adding a subrule to Rule 3-5 to achieve that end:

(1.1) For the purpose of conducting an investigation under this Division and section 26 of the Act, the Executive Director may designate an employee of the Society or appoint a practising lawyer or a person whose qualifications are satisfactory to the Executive Director.

6. Maximum fine

Bill 40 increases the maximum fine that can be imposed on a lawyer from $20,000 to $50,000. Rule 4-35 sets the maximum fine that can be imposed on a visiting lawyer at $20,000. That is possibly not necessary, since section 16 of the *Legal Profession Act* makes the disciplinary provisions apply to visiting lawyers. However, until that is considered and resolved, it would be advisable to retain the provision and amend it to be consistent with section 38(5). Otherwise, there would be differential penalties available, with the difference favouable to out-of-province lawyers temporarily in BC over the resident Bar.

This is the amendment that the Subcommittee recommends to the Benchers:

Disciplinary action

4-35(2)Despite subrule (1)(b), if the respondent is a member of another governing body and not a member of the Society, the panel may do one or more of the following:

(b) fine the respondent an amount not exceeding $~~20~~50,000;

7. Resignation of membership when facing disciplinary proceedings

Bill 40 adds the following section:

Prohibition on resignation from membership

21.1(1) A lawyer may not resign from membership in the society without the consent of the benchers if the lawyer is the subject of

(a) a citation or other discipline process under Part 4,

(b) an investigation under this Act, or

(c) a practice review under the rules.

(2) In granting consent under subsection (1), the benchers may impose conditions.

The intention of the added provision is that lawyers should not be able to escape some of the consequences of their misconduct by simply resigning from membership in the Law Society. It is not intended that the consent of all the Benchers is required. Rather, this is another provision where it is appropriate for the Benchers to delegate the authority to the Executive Director under section 8(a).

Where a citation has been authorized and the Respondent is under the authority of the Discipline Committee in that respect, the Subcommittee considered that the right to consent to a resignation from membership ought to reside in the Committee. Similarly, where there is a practice review ordered by the Practice Standards Committee, the Subcommittee felt that the Committee should be charged with consenting to a resignation. In those cases, the authority of the Benchers would be delegated under section 9(2):

Law Society committees

9 (2) The benchers may authorize a committee to do any act or to exercise any jurisdiction that, by this Act, the benchers are authorized to do or to exercise, except the exercise of rule-making authority.

The weakness in the new provision is that a member of the Law Society can escape membership simply by failing to pay the annual fees when due. One way to plug that gap would be to use the current section 25(1) to continue the membership of a lawyer under discipline proceedings, without the benefit of a practice certificate. This is that provision:

Failure to pay fee or penalty

25 (1) If a lawyer fails to pay the annual fee or a special assessment as required under this Act by the time that it is required to be paid, the lawyer ceases to be a member, unless the benchers otherwise direct, subject to rules made under section 23 (7) *[Annual fees and practising certificate]*.

These are the new provisions and amendments that the Act and Rules Subcommittee recommends to delegate the authority to consent to resignations and prevent ceasing of membership to the Discipline Committee in the case of discipline and investigations, and to the Practice Standards Committee in the case of practice reviews:

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Members

Member in good standing

2-2 Subject to Rules 3-13(7) *[Practice review]* and 4-4.2(2) *[Continuation of membership under investigation or disciplinary proceedings]*, ~~A~~ a member of the Society is a member in good standing unless suspended under section 38(5)(d) of the Act or under these Rules.

Division 2 – Admission and Reinstatement

Resignation

Resignation

2-60.1 Subject to Rule 3-13(6) *[Practice review]* or 4-4.2(1) *[Continuation of membership under investigation or disciplinary proceedings]*, a member of the Society may resign from membership in the Society on written notice to the Executive Director.

Division 3 – Fees and Assessments

Annual practising fees

2-70 (1) The annual practising fee, special compensation fund assessment and insurance fee are payable in respect of each calendar year.

(2) The date for payment of the annual practising fee, special compensation fund assessment and first insurance fee instalment is November 30 of the year preceding the year for which they are payable.

(3) A lawyer who has not paid all fees due on or before December 31 ceases to be a member of the Society, subject to Rule 3-13(7) *[Practice review]* or 4-4.2(2) *[Continuation of membership under investigation or disciplinary proceedings]*.

PART 3 – PROTECTION OF THE PUBLIC

Division 2 – Practice Standards

Practice review

3-13 (6) A lawyer who is the subject of a practice review may not resign from membership in the Society without the consent of the Practice Standards Committee.

(7) The Practice Standards Committee may, by resolution, direct that a lawyer who is subject to a practice review and would otherwise cease to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to practise law.

(8) A direction under subrule (7) may be made to continue in effect until stated conditions are fulfilled.

(9) When a direction under subrule (7) expires on the fulfillment of all stated conditions or if the Practice Standards Committee rescinds the direction

(a) the lawyer concerned ceases to be a member of the Society,

(b) if the rescission is in response to a request of the lawyer concerned, the Committee may impose conditions on the rescission.

PART 4 – DISCIPLINE

Continuation of membership under investigation or disciplinary proceedings

4-4.2 (1) In this Rule, **"investigated lawyer"** means a lawyer who is the subject of

(a) an investigation under Part 3, Division 1, or

(b) a decision of the Discipline Committee under Rule 4-4(1)(a.2) or (b).

(2) An investigated lawyer may not resign from membership in the Society without the consent of the Executive Director.

(3) A respondent may not resign from membership in the Society without the consent of the Discipline Committee.

(4) The Executive Director may direct that an investigated lawyer who would otherwise have ceased to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to engage in the practice of law.

(5) The Discipline Committee may, by resolution, direct that a respondent who would otherwise have ceased to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to engage in the practice of law.

(6) A direction under subrule (4) or (5) may be made to continue in effect until stated conditions are fulfilled.

(7) When a direction under subrule (4) or (5) expires on the fulfillment of all stated conditions or is rescinded by the Executive Director or Discipline Committee

(a) the lawyer concerned ceases to be a member of the Society,

(b) if the rescission is in response to a request of the lawyer concerned, the Committee may impose conditions on the rescission.

8. Summary disbarment or suspension on conviction of a serious offence

Section 24(e) of Bill 40 amends section 36(h) of the *Legal Profession Act* to read as follows:

Discipline rules

36 The benchers may make rules to do any of the following:

(h) permit the benchers to summarily suspend or disbar a lawyer convicted of an offence that was proceeded with by way of indictment or convicted in another jurisdiction of an offence that, in the opinion of the benchers, is equivalent to an offence that may be proceeded with by way of indictment;

This changes the previous provision in two ways:

- the Benchers may act on a conviction for an offence that is prosecuted by way of indictment, even if it is a hybrid offence, i.e., one that could also be prosecuted on summary conviction;

- the Benchers may also act on a conviction for an equivalent offence in another country.

The current rule is drafted using the language of the former provision. The Subcommittee recommends amending the Rule so that it imports the language of the amended provisions fairly closely. This is the recommended provision:

Conviction

4-40 ~~(1) On proof that a lawyer or former lawyer has been convicted of an offence that can only be prosecuted by way of indictment, the Benchers may, without following the procedure provided for in the Act or these Rules, summarily suspend or disbar the lawyer or former lawyer.~~

(1.1) In this Rule, **"offence"** means

(a) an offence that was proceeded with by way of indictment, or

(b) an offence in another jurisdiction that, in the opinion of the Benchers, is equivalent to an offence that may be proceeded with by way of indictment.

(2) If the Discipline Committee is satisfied that a lawyer or former lawyer has been convicted of an offence ~~that can only be prosecuted by way of indictment~~, the Committee may refer the matter to the Benchers under subrule (~~1~~3).

(3) Without following the procedure provided for in the Act or these Rules, the Benchers may summarily suspend or disbar a lawyer or former lawyer on proof that the lawyer or former lawyer has been convicted of an offence.

I attach redlined and clean versions of all the draft amendments together, as well as a suggested resolution, which the Act and Rules Subcommittee recommends be adopted by the Benchers.

JGH

E:\POLICY\JEFF\memo to ARS on rule amendments under Bill 40.docx

LAW SOCIETY RULES

Definitions

1 In these Rules, unless the context indicates otherwise:

"pro bono legal services" means the practice of law not performed for or in the expectation of a fee, gain or reward;

PART 1 – ORGANIZATION

Division 1 – Law Society

Annual general meeting

1-6 (5) At least 60 days before an annual general meeting, the Executive Director must distribute to members of the Society by mail a notice ~~containing the following information: (a)~~ of the date and time of the meeting.~~;~~

~~(b) the text of the resolution recommended by the Benchers to set the practice fee under section 23 *[Annual fees and practising certificate]* of the Act.~~

~~(7) Subrule (6) applies to amendments to be moved at the annual general meeting that would have the effect of changing the practice fee recommended by the Benchers.~~

(8) At least 21 days before an annual general meeting, the Executive Director must make available to members of the Society,

(a) by mail, a notice containing the following information:

(ii) each resolution and amendment received in accordance with subrule~~s~~ (6) ~~and (7)~~, and

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Members

Member in good standing

2-2 Subject to Rules 3-13(7) *[Practice review]* and 4-4.2(2) *[Continuation of membership under investigation or disciplinary proceedings]*, a ~~A~~ member of the Society is a member in good standing unless suspended under section 38(5)(d) of the Act or under these Rules.

LAW SOCIETY RULES

Pro bono legal services by non-practising and retired members

2-4.2 Despite an undertaking given under Rule 2-3(1)(a) or 2-4(2)(a), a non-practising or retired member may provide pro bono legal services.

Transition

2-4.3 A retired or non-practising member who has provided pro bono legal services between May 14, 2012 and June 16, 2012 is deemed not to be in breach of section 15 nor the undertaking given under Rule 2-3(1)(a) or 2-4(2)(a) for that reason alone.

Division 2 – Admission and Reinstatement

Call and admission

First call and admission

2-48 (1) An articled student who applies for call and admission must deliver the following to the Executive Director:

(d) the following fees:

~~(iv) the prorated Special Compensation Fund assessment specified in Schedule 2;~~

Transfer as Canadian legal advisor

2-49.3 (1) Subject to subrule (3), a member of the Barreau du Québec or of the Chambre des notaires du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(e) the following fees:

~~(iv) a prorated Special Compensation Fund assessment;~~

Reinstatement

Reinstatement of a former lawyer

2-52 (3) On reinstatement, an applicant under subrule (2)(a) may be issued a practising certificate on payment of the following:

~~(c) the prorated Special Compensation Fund assessment specified in Schedule 2;~~

LAW SOCIETY RULES

Division 3 – Fees and Assessments

Annual practising fees

2-70 (1) The annual practising fee~~, special compensation fund assessment~~ and insurance fee are payable in respect of each calendar year.

(2) The date for payment of the annual practising fee~~, special compensation fund assessment~~ and first insurance fee instalment is November 30 of the year preceding the year for which they are payable.

Refund when lawyer does not practise law

2-74 (1) A lawyer who has paid the annual fee for a practice year but who satisfies the Executive Director that the lawyer has totally abstained from practice in British Columbia during that year through disability other than a suspension is entitled to a refund of

(a) the difference between the practice fee set by the members of the Society under section 23(1)(a) of the Act and the non-practising member fee specified in Schedule 1,

~~(b) the Special Compensation Fund assessment set by the Benchers under section 23(1)(b) of the Act,~~ and

PART 3 – PROTECTION OF THE PUBLIC

Division 1 – Complaints

Investigation of complaints

3-5(1.1) For the purpose of conducting an investigation under this Division and section 26 of the Act, the Executive Director may designate an employee of the Society or appoint a practising lawyer or a person whose qualifications are satisfactory to the Executive Director.

LAW SOCIETY RULES

Division 2 – Practice Standards

Practice review

3-13 (6) A lawyer who is the subject of a practice review may not resign from membership in the Society without the consent of the Practice Standards Committee.

(7) The Practice Standards Committee may, by resolution, direct that a lawyer who is subject to a practice review and would otherwise cease to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to practise law.

(8) A direction under subrule (7) may be made to continue in effect until stated conditions are fulfilled.

(9) When a direction under subrule (7) expires on the fulfillment of all stated conditions or if the Practice Standards Committee rescinds the direction

(a) the lawyer concerned ceases to be a member of the Society,

(b) if the rescission is in response to a request of the lawyer concerned, the Committee may impose conditions on the rescission.

Division 4 – Professional Liability Insurance

Exemption from liability insurance

3-25 (1) A lawyer is exempt from the requirement to maintain professional liability insurance and pay the insurance fee if the lawyer is

(a) not engaged in the practice of law, other than pro bono legal services, anywhere in his or her capacity as a member of the Society, or

(b) employed by one of the following and is not engaged in the practice of law, other than pro bono legal services, except in the course of that employment:

(i) a government department;

(ii) a corporation other than a law corporation;

(iii) a society, trade union or a similar organization.

(2) A lawyer is not exempt under subrule (1)(b) if the lawyer engages in the practice of law, other than pro bono legal services, in any way other than as described in those provisions.

Transition

3-25.1 A lawyer who has provided pro bono legal services between May 14, 2012 and June 16, 2012 does not lose the exemption under Rule 3-25(1) for that reason alone.

LAW SOCIETY RULES

PART 4 – DISCIPLINE

Continuation of membership under investigation or disciplinary proceedings

4-4.2 (1) In this Rule, **"investigated lawyer"** means a lawyer who is the subject of

(a) an investigation under Part 3, Division 1, or

(b) a decision of the Discipline Committee under Rule 4-4(1)(a.2) or (b).

(2) An investigated lawyer may not resign from membership in the Society without the consent of the Executive Director.

(3) A respondent may not resign from membership in the Society without the consent of the Discipline Committee.

(4) The Executive Director may direct that an investigated lawyer who would otherwise have ceased to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to engage in the practice of law.

(5) The Discipline Committee may, by resolution, direct that a respondent who would otherwise have ceased to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to engage in the practice of law.

(6) A direction under subrule (4) or (5) may be made to continue in effect until stated conditions are fulfilled.

(7) When a direction under subrule (4) or (5) expires on the fulfillment of all stated conditions or is rescinded by the Executive Director or Discipline Committee

(a) the lawyer concerned ceases to be a member of the Society,

(b) if the rescission is in response to a request of the lawyer concerned, the Committee may impose conditions on the rescission.

Disciplinary action

4-35 (2) Despite subrule (1)(b), if the respondent is a member of another governing body and not a member of the Society, the panel may do one or more of the following:

(b) fine the respondent an amount not exceeding $~~20~~50,000;

Conviction

4-40 (1) ~~On proof that a lawyer or former lawyer has been convicted of an offence that can only be prosecuted by way of indictment, the Benchers may, without following the procedure provided for in the Act or these Rules, summarily suspend or disbar the lawyer or former lawyer.~~

(1.1) In this Rule, **"offence"** means

(a) an offence that was proceeded with by way of indictment, or

(b) an offence in another jurisdiction that, in the opinion of the Benchers, is equivalent to an offence that may be proceeded with by way of indictment.

(2) If the Discipline Committee is satisfied that a lawyer or former lawyer has been convicted of an offence ~~that can only be prosecuted by way of indictment~~, the Committee may refer the matter to the Benchers under subrule (~~1~~3).

(3) Without following the procedure provided for in the Act or these Rules, the Benchers may summarily suspend or disbar a lawyer or former lawyer on proof that the lawyer or former lawyer has been convicted of an offence.

PART 5 – HEARINGS AND APPEALS

Recovery of investigation or audit costs, trust report penalty and Special Compensation Fund payments

5-11 (1) A lawyer or former lawyer who is liable to pay money under the following provisions must pay to the Society the full amount owing by the date set by the Discipline Committee:

~~(c) recovery under Rule 3-42 of part or all of the amount paid out by the Society on that lawyer's behalf under section 31 of the Act.~~

SCHEDULE 1 – 2012 LAW SOCIETY FEES AND ASSESSMENTS

A. Annual fee	$
1. Practice fee ~~set by members~~ (Rule 2-70)	1,840.41
~~2. Special Compensation Fund assessment (Rule 2-70) .....~~	~~1.00~~

SCHEDULE 2 – 2012 PRORATED FEES AND ASSESSMENTS FOR PRACTISING MEMBERS

Delete column of prorated Special Compensation Fund fees.

LAW SOCIETY RULES

Definitions

1 In these Rules, unless the context indicates otherwise:

"pro bono legal services" means the practice of law not performed for or in the expectation of a fee, gain or reward;

PART 1 – ORGANIZATION

Division 1 – Law Society

Annual general meeting

1-6 (5) At least 60 days before an annual general meeting, the Executive Director must distribute to members of the Society by mail a notice of the date and time of the meeting.

(8) At least 21 days before an annual general meeting, the Executive Director must make available to members of the Society,

(a) by mail, a notice containing the following information:

(ii) each resolution and amendment received in accordance with subrule (6), and

PART 2 – MEMBERSHIP AND AUTHORITY TO PRACTISE LAW

Division 1 – Practice of Law

Members

Member in good standing

2-2 Subject to Rules 3-13(7) *[Practice review]* and 4-4.2(2) *[Continuation of membership under investigation or disciplinary proceedings]*, a member of the Society is a member in good standing unless suspended under section 38(5)(d) of the Act or under these Rules.

Pro bono legal services by non-practising and retired members

2-4.2 Despite an undertaking given under Rule 2-3(1)(a) or 2-4(2)(a), a non-practising or retired member may provide pro bono legal services.

LAW SOCIETY RULES

Transition

2-4.3 A retired or non-practising member who has provided pro bono legal services between May 14, 2012 and June 16, 2012 is deemed not to be in breach of section 15 nor the undertaking given under Rule 2-3(1)(a) or 2-4(2)(a) for that reason alone.

Division 2 – Admission and Reinstatement

Call and admission

First call and admission

2-48 (1) An articled student who applies for call and admission must deliver the following to the Executive Director:

(d) the following fees:

Transfer as Canadian legal advisor

2-49.3 (1) Subject to subrule (3), a member of the Barreau du Québec or of the Chambre des notaires du Québec may apply for call and admission on transfer as a Canadian legal advisor by delivering to the Executive Director the following:

(e) the following fees:

Reinstatement

Reinstatement of a former lawyer

2-52 (3) On reinstatement, an applicant under subrule (2)(a) may be issued a practising certificate on payment of the following:

Division 3 – Fees and Assessments

Annual practising fees

2-70 (1) The annual practising fee and insurance fee are payable in respect of each calendar year.

(2) The date for payment of the annual practising fee and first insurance fee instalment is November 30 of the year preceding the year for which they are payable.

LAW SOCIETY RULES

Refund when lawyer does not practise law

2-74 (1) A lawyer who has paid the annual fee for a practice year but who satisfies the Executive Director that the lawyer has totally abstained from practice in British Columbia during that year through disability other than a suspension is entitled to a refund of

(a) the difference between the practice fee set by the members of the Society under section 23(1)(a) of the Act and the non-practising member fee specified in Schedule 1, and

PART 3 – PROTECTION OF THE PUBLIC

Division 1 – Complaints

Investigation of complaints

3-5(1.1) For the purpose of conducting an investigation under this Division and section 26 of the Act, the Executive Director may designate an employee of the Society or appoint a practising lawyer or a person whose qualifications are satisfactory to the Executive Director.

Division 2 – Practice Standards

Practice review

3-13 (6) A lawyer who is the subject of a practice review may not resign from membership in the Society without the consent of the Practice Standards Committee.

(7) The Practice Standards Committee may, by resolution, direct that a lawyer who is subject to a practice review and would otherwise cease to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to practise law.

(8) A direction under subrule (7) may be made to continue in effect until stated conditions are fulfilled.

(9) When a direction under subrule (7) expires on the fulfillment of all stated conditions or if the Practice Standards Committee rescinds the direction

(a) the lawyer concerned ceases to be a member of the Society,

(b) if the rescission is in response to a request of the lawyer concerned, the Committee may impose conditions on the rescission.

LAW SOCIETY RULES

Division 4 – Professional Liability Insurance

Exemption from liability insurance

3-25 (1) A lawyer is exempt from the requirement to maintain professional liability insurance and pay the insurance fee if the lawyer is

(a) not engaged in the practice of law, other than pro bono legal services, anywhere in his or her capacity as a member of the Society, or

(b) employed by one of the following and is not engaged in the practice of law, other than pro bono legal services, except in the course of that employment:

(i) a government department;

(ii) a corporation other than a law corporation;

(iii) a society, trade union or a similar organization.

(2) A lawyer is not exempt under subrule (1)(b) if the lawyer engages in the practice of law, other than pro bono legal services, in any way other than as described in those provisions.

Transition

3-25.1 A lawyer who has provided pro bono legal services between May 14, 2012 and June 16, 2012 does not lose the exemption under Rule 3-25(1) for that reason alone.

PART 4 – DISCIPLINE

Continuation of membership under investigation or disciplinary proceedings

4-4.2 (1) In this Rule, **"investigated lawyer"** means a lawyer who is the subject of

(a) an investigation under Part 3, Division 1, or

(b) a decision of the Discipline Committee under Rule 4-4(1)(a.2) or (b).

(2) An investigated lawyer may not resign from membership in the Society without the consent of the Executive Director.

(3) A respondent may not resign from membership in the Society without the consent of the Discipline Committee.

(4) The Executive Director may direct that an investigated lawyer who would otherwise have ceased to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to engage in the practice of law.

(5) The Discipline Committee may, by resolution, direct that a respondent who would otherwise have ceased to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to engage in the practice of law.

(6) A direction under subrule (4) or (5) may be made to continue in effect until stated conditions are fulfilled.

(7) When a direction under subrule (4) or (5) expires on the fulfillment of all stated conditions or is rescinded by the Executive Director or Discipline Committee

(a) the lawyer concerned ceases to be a member of the Society,

(b) if the rescission is in response to a request of the lawyer concerned, the Committee may impose conditions on the rescission.

Disciplinary action

4-35 (2) Despite subrule (1)(b), if the respondent is a member of another governing body and not a member of the Society, the panel may do one or more of the following:

(b) fine the respondent an amount not exceeding $50,000;

Conviction

4-40 (1)

(1.1) In this Rule, **"offence"** means

(a) an offence that was proceeded with by way of indictment, or

(b) an offence in another jurisdiction that, in the opinion of the Benchers, is equivalent to an offence that may be proceeded with by way of indictment.

(2) If the Discipline Committee is satisfied that a lawyer or former lawyer has been convicted of an offence, the Committee may refer the matter to the Benchers under subrule (3).

(3) Without following the procedure provided for in the Act or these Rules, the Benchers may summarily suspend or disbar a lawyer or former lawyer on proof that the lawyer or former lawyer has been convicted of an offence.

LAW SOCIETY RULES

PART 5 – HEARINGS AND APPEALS

Recovery of investigation or audit costs, trust report penalty and Special Compensation Fund payments

5-11 (1) A lawyer or former lawyer who is liable to pay money under the following provisions must pay to the Society the full amount owing by the date set by the Discipline Committee:

SCHEDULE 1 – 2012 LAW SOCIETY FEES AND ASSESSMENTS

A. Annual fee	**$**
1. Practice fee (Rule 2-70)	1,840.41

SCHEDULE 2 – 2012 PRORATED FEES AND ASSESSMENTS FOR PRACTISING MEMBERS

Delete column of prorated Special Compensation Fund fees.

BILL 40 IMPLEMENTATION – JUNE 2012

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. In Rule 1 by adding the following definition:

"pro bono legal services" means the practice of law not performed for or in the expectation of a fee, gain or reward;***;***

2. In Rule 1-6:

(a) by rescinding subrule (5) and (7) and substituting the following:

(5) At least 60 days before an annual general meeting, the Executive Director must distribute to members of the Society by mail a notice of the date and time of the meeting.***;***

(b) by repealing subrule (8)(a)(ii) and substituting the following:

(ii) each resolution and amendment received in accordance with subrule (6), and***;***

3. By rescinding Rule 2-2 and substituting the following:

Member in good standing

2-2 Subject to Rules 3-13(7) *[Practice review]* and 4-4.2(2) *[Continuation of membership under investigation or disciplinary proceedings]*, a member of the Society is a member in good standing unless suspended under section 38(5)(d) of the Act or under these Rules.***;***

4. By adding the following Rules:

Pro bono legal services by non-practising and retired members

2-4.2 Despite an undertaking given under Rule 2-3(1)(a) or 2-4(2)(a), a non-practising or retired member may provide pro bono legal services.

Transition

2-4.3 A retired or non-practising member who has provided pro bono legal services between May 14, 2012 and June 16, 2012 is deemed not to be in breach of section 15 nor the undertaking given under Rule 2-3(1)(a) or 2-4(2)(a) for that reason alone.***;***

5. By rescinding Rule 2-48(1)(d)(iv);

6. ***By rescinding Rule 2-49.3(1)(e)(iv);***

7. ***By rescinding Rule 2-52(3)(c);***

8. ***By rescinding Rule 2-70 and substituting the following:***

Annual practising fees

2-70(1) The annual practising fee and insurance fee are payable in respect of each calendar year.

(2) The date for payment of the annual practising fee and first insurance fee instalment is November 30 of the year preceding the year for which they are payable.***;***

9. ***By rescinding Rule 2-74(1)(b);***

10. ***In Rule 3-5, by adding the following subrule:***

(1.1) For the purpose of conducting an investigation under this Division and section 26 of the Act, the Executive Director may designate an employee of the Society or appoint a practising lawyer or a person whose qualifications are satisfactory to the Executive Director.***;***

11. ***In Rule 3-13, by adding the following subrules:***

(6) A lawyer who is the subject of a practice review may not resign from membership in the Society without the consent of the Practice Standards Committee.

(7) The Practice Standards Committee may, by resolution, direct that a lawyer who is subject to a practice review and would otherwise cease to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to practise law.

(8) A direction under subrule (7) may be made to continue in effect until stated conditions are fulfilled.

(9) When a direction under subrule (7) expires on the fulfillment of all stated conditions or if the Practice Standards Committee rescinds the direction

(a) the lawyer concerned ceases to be a member of the Society,

(b) if the rescission is in response to a request of the lawyer concerned, the Committee may impose conditions on the rescission.***;***

12. ***In Rule 3-25, by striking "***the practice of law***" wherever it appears, and substituting "***the practice of law, other than pro bono legal services,***";***

13. By adding the following Rule:

Transition

3-25.1 A lawyer who has provided pro bono legal services between May 14, 2012 and June 16, 2012 does not lose the exemption under Rule 3-25(1) for that reason alone.***;***

14. By adding the following Rule:

Continuation of membership under investigation or disciplinary proceedings

4-4.2(1) In this Rule, "investigated lawyer" means a lawyer who is the subject of

(a) an investigation under Part 3, Division 1, or

(b) a decision of the Discipline Committee under Rule 4-4(1)(a.2) or (b).

(2) An investigated lawyer may not resign from membership in the Society without the consent of the Executive Director.

(3) A respondent may not resign from membership in the Society without the consent of the Discipline Committee.

(4) The Executive Director may direct that an investigated lawyer who would otherwise have ceased to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to engage in the practice of law.

(5) The Discipline Committee may, by resolution, direct that a respondent who would otherwise have ceased to be a member of the Society under Rule 2-70 continue as a member not in good standing and not permitted to engage in the practice of law.

(6) A direction under subrule (4) or (5) may be made to continue in effect until stated conditions are fulfilled.

(7) When a direction under subrule (4) or (5) expires on the fulfillment of all stated conditions or is rescinded by the Executive Director or Discipline Committee

(a) the lawyer concerned ceases to be a member of the Society,

(b) if the rescission is in response to a request of the lawyer concerned, the Committee may impose conditions on the rescission.***;***

15. By rescinding Rule 4-35(2)(b) and substituting the following:

(b) fine the respondent an amount not exceeding $50,000;***;***

16. By rescinding Rule 4-40 and substituting the following:

Conviction

4-40(1.1) In this Rule, **"offence"** means

(a) an offence that was proceeded with by way of indictment, or

(b) an offence in another jurisdiction that, in the opinion of the Benchers, is equivalent to an offence that may be proceeded with by way of indictment.

(2) If the Discipline Committee is satisfied that a lawyer or former lawyer has been convicted of an offence, the Committee may refer the matter to the Benchers under subrule (3).

(3) Without following the procedure provided for in the Act or these Rules, the Benchers may summarily suspend or disbar a lawyer or former lawyer on proof that the lawyer or former lawyer has been convicted of an offence.***;***

17. By rescinding Rule 5-11(1)(c);

18. In Schedule 1, by rescinding paragraphs A1 and 2 and substituting the following:

1. Practice fee (Rule 2-70) 1,840.41***;***

and

19. In Schedule 2, by deleting the column of prorated Special Compensation Fund fees.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date: May 23, 2012
Subject: **Rule 3-90 – Reporting criminal charges**

Attached is a memorandum from Mr. Lucas indicating that changes are required to Rule 3-90. Also attached are redlined and clean versions of the proposed amendments and a suggested resolution to give effect to them, which the Act and Rules Subcommittee recommends that the Benchers adopt.

JGH
E:\POLICY\JEFF\RULES\memo to benchers on rule 3-90 June 2012.docx

Attachments: draft rule amendments
suggested resolution

The Law Society of British Columbia

Memo

To: Act and Rules Subcommittee
From: Michael Lucas
Date: May 1, 2012
Subject: Proposed Amendments to Rule 3-90

Introduction

Rule 3-90 was created in 2003, and was amended in 2007. The rule introduced a requirement that lawyers, articled students and applicants, when charged with an offence under a federal or provincial statute, give written notice to the Law Society of the particulars of the charge and of the disposition of the charge. The rule now requires lawyers, students, practitioners of foreign law and applicants when charged with an offence to provide the Law Society with written notice containing all relevant information concerning the charge after various events have taken place. Rule 3-90(1.1) also requires the person charged to provide the Law Society "with a copy of any statement of particulars of the charge immediately upon receipt."

The rule was created to ensure that the Law Society was aware charges against lawyers and students, recognizing that the canons of legal ethics require a lawyer to demonstrate personal integrity, and provide that the lawyer owes a duty to the state to maintain its integrity and its law. An allegation of a violation of a federal or provincial statute might be thought to give cause for an inquiry into the lawyer's conduct to determine whether such violation amounted to professional misconduct or conduct unbecoming a lawyer. Addressing such allegations or convictions may be viewed as part of the duty of the Society in upholding and protecting the public interest in the administration of justice by ensuring the integrity of lawyers.

Problem Arising – Implied Undertaking of Confidentiality

The current rule requires that all people to whom the rule applies give the Law Society written notice, when charged with an offence, of *all relevant information* as soon as practicable after each of the events listed in the rule and *with a copy of any statement of particulars of the charge immediately upon receipt*.

Developments in the law that have taken place subsequent to the creation of the rule, however, seem have raised concerns with lawyers or others who are caught by the rule. In a number of cases[1], the Courts have now held that there is an implied undertaking of confidentiality over information provided by the Crown to an accused relating to a charge laid against that accused. The undertaking "recognizes that disclosure documents may contain matters over which the Crown could claim public interest immunity, privilege, or that the documents would not be in the public interest to produce."[2] The undertaking exists to protect individuals who are not involved other than as witnesses and to protect the integrity of the Crown's investigative process and prosecution.

As a result of these decisions, the Crown considers that it is not open to the recipient of Crown disclosure materials to simply provide them to third parties as they see fit. Consequently, the rule as currently worded may leave a lawyer charged with an offence in an invidious catch-22 situation. He or she can either comply with the rule and thereby risk breaching the implied undertaking, or abide by the undertaking and thereby risk non-compliance with the rule.[3]

Discussion and Recommendation

While Rule 3-90 does not specifically require a lawyer charged with an offence to provide the Crown disclosure materials to the Law Society, the requirement to provide all relevant information and a copy of any statement of particulars of the charge immediately upon receipt can certainly lead one to the conclusion that the Law Society is seeking information from the Crown disclosure materials given to the accused. And, in fact, the Law Society would like to obtain that material in order to make the most informed decision about what course of action needs to be taken to protect the public interest.

Law Society staff and staff at the Criminal Justice Branch of the former Ministry of Attorney General have met to try to reach a consensus on dealing with the implied undertaking in a way that would ensure that the Law Society could continue to receive the Crown disclosure information provided to the accused lawyer, as contemplated by the rule. We have attempted to appeal to the Crown that as a professional regulatory body charged with protecting the public interest in the administration of justice, we have need to review information relating to charges against a lawyer in order to determine whether the Law Society (for example) needs to take any interim steps to protect the public interest pending the conclusion of an investigation. We have impressed on the Crown that the Law Society is able to handle information in confidence,

---

[1] In British Columbia, the principal cases of note are *R. v. Basi*, 2008 BCSC 1242 and *Wong v. Antunes*, 2009 BCCA 278, both of which follow an earlier Ontario case of *P. (D.) v. Wagg* (2004), 239 DLR (4th) 501 (CA).

[2] *R. v. Basi* at paragraph 13.

[3] Sometimes the crown delivers the materials to the accused with an *express* undertaking not to disseminate them to third parties.

pointing out the obligations in sections 87 and 88 of the *Legal Profession Act* on dealing with information that comes into our possession during the course of an investigation.

While those discussions have been very amicable, it is relatively clear that a obtaining a blanket consensus on the part of the Crown that would, in effect, "waive" the implied undertaking on the lawyer in order to permit him or her to provide the disclosure material to the Law Society is not going to be possible.

This leaves two options. The first option would be to alter the Rule to ensure that the lawyer charged must notify the Law Society of the fact of the charge together with a written explanation and description of the circumstances that gave rise to the charge,but limit the rule so that it is clear that the lawyer is not required to provide us information over which the implied undertaking would apply. The other would be to litigate the issue by either challenging the existence of the undertaking or seeking a common law exemption to it.

Amending the rule is the recommended option. Once notified of the charge, the Law Society will remain able to contact the Crown and seek its consent to the provision of the "disclosure materials" as the undertaking is in favour of the Crown and can be waived by it. Recent past history suggests that more often than not, the Law Society is able to obtain a considerable amount of material, including at least a copy of the information or a description of the recommended charge, and a synopsis of the circumstances. While the full Report to Crown Counsel and (for example) witness lists are not usually provided, history has shown that are occasions where such information is given to the Law Society when asked for. Leaving the decision about what can be provided to the Law Society in the hands of the Crown is less than ideal, but is a consequence of the existence of the implied undertaking. Generally speaking, we expect the Crown will be helpful, but recognize that it must ensure the integrity of its own investigative process as well.

Suggested Amendments

It is suggested that rule 3-90 be amended by removing subrule (1.1) and amending subrule (1) by removing "containing all relevant information" and replacing it with "describing the circumstances giving rise to the charge and, where applicable, the outcome."

MDL/al

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 10 – Criminal charges

Reporting criminal charges

3-90(0.1) This Rule applies to lawyers, articled students, practitioners of foreign law and applicants.

(1) Subject to subrule (2), a person who is charged with an offence under a federal or provincial statute must provide to the Executive Director written notice describing the circumstances giving rise to the charge and, where applicable, the outcome ~~containing all relevant information~~ as soon as practicable after each of the following events:

(a) laying of the charge;

(b) disposition of the charge;

(c) sentencing in respect of the charge;

(d) commencement of an appeal of the verdict or sentence;

(e) disposition of the appeal.

~~(1.1) A person charged with an offence must provide the Executive Director with a copy of any statement of the particulars of the charge immediately on receipt.~~

(2) No notification is required under subrule (1) if a person is issued or served with a ticket as defined in the *Contraventions Act* (Canada) or a violation ticket as defined in the *Offence Act*.

LAW SOCIETY RULES

PART 3 – PROTECTION OF THE PUBLIC

Division 10 – Criminal charges

Reporting criminal charges

3-90(0.1) This Rule applies to lawyers, articled students, practitioners of foreign law and applicants.

(1) Subject to subrule (2), a person who is charged with an offence under a federal or provincial statute must provide to the Executive Director written notice describing the circumstances giving rise to the charge and, where applicable, the outcome as soon as practicable after each of the following events:

(a) laying of the charge;

(b) disposition of the charge;

(c) sentencing in respect of the charge;

(d) commencement of an appeal of the verdict or sentence;

(e) disposition of the appeal.

(2) No notification is required under subrule (1) if a person is issued or served with a ticket as defined in the *Contraventions Act* (Canada) or a violation ticket as defined in the *Offence Act*.

REPORTING CRIMINAL CHARGES

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend Rule 3-90 of the Law Society Rules as follows:

1. ***In subrule (1) by striking the phrase "***written notice containing all relevant information***" and substituting "***written notice describing the circumstances giving rise to the charge and, where applicable, the outcome***"; and***

2. ***By rescinding subrule (1.1).***

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Memo

To: Benchers
From: Jeffrey G. Hoskins, QC for Act and Rules Subcommittee
Date: May 23, 2012
Subject: **Rule 5-6—Public hearings**

The Benchers recently approved the Law Society's participation in the National Discipline Standards Project. This is a two-year pilot project with the objective of improving the quality, transparency and effectiveness of the disciplinary process in each of the 14 Canadian law societies.

One of the standards to be applied to the process during the pilot project will require a change in the rules governing discipline (and incidentally other) hearings in British Columbia. This is standard #13:

> 13. Reasons are provided for any decision to close hearings.

The practice is, when an application is made to close a hearing or part of a hearing, the panel gives reasons orally for its decision. However, there is no requirement in the rules for them to do so. The Subcommittee's view is that the better practice for transparency and also to create a jurisprudence for the guidance of parties and to improve consistency, there should be a requirement for written reasons, at least by the time that the hearing is concluded.

This is the suggested amendment:

Public hearing

5-6(1) Every hearing is open to the public, but the panel may exclude some or all members of the public in any circumstances it considers appropriate.

(2) On application by anyone, or on its own motion, the panel may make the following orders to protect the interests of any person:

(a) an order that specific information not be disclosed;

(b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).

(3) Despite the exclusion of the public under subrule (1) in a hearing on a citation, the complainant and one other person chosen by the complainant may remain in attendance during the hearing, unless the panel orders otherwise.

(4) Except as required under Rule 5-7, when a hearing is proceeding, no one is permitted to possess or operate any device for photographing, recording or broadcasting in the hearing room without the permission of the panel, which the panel in its discretion may refuse or grant, with or without conditions or restrictions.

(5) When a panel makes an order under this Rule or declines to make an order on an application, the panel must give written reasons for its decision.

The Act and Rules Subcommittee recommends the attached suggested resolution be adopted by the Benchers.

JGH
E:\POLICY\JEFF\Memo template 2011.docx

Attachments: suggested resolution

PUBLIC HEARINGS

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend Rule 5-6 of the Law Society Rules by adding the following subrule:

(5) When a panel makes an order under this Rule or declines to make an order on an application, the panel must give written reasons for its decision.

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Chief Executive Officer's Monthly Report

A Report to the Benchers by

Timothy E. McGee

June 16, 2012

Introduction

My report to the Benchers this month is somewhat abridged because I will be delivering a comprehensive mid-year report to the Benchers in July. That report will provide updates on progress made under the 2012 – 2014 Strategic Plan and our 2012 Operational Priorities, interim results under our KPM's, as well the formal presentation of the 2013 Budget and Fees recommendation.

For this meeting, I am pleased to provide the following updates for your information.

1. 2013 Budget and Fees – Planning Process

The Finance Committee, chaired by Art Vertlieb, QC, met in May to review the proposed 2013 Law Society budgets and member fees. The meeting included a detailed review of the main expense items by category as well as an analysis of management's revenue assumptions and projections for 2013. The recommendations of the Finance Committee, which were reviewed by the Executive Committee at their May 29 meeting, will be brought to the Benchers for consideration at the July meeting.

2. 2012 – 2014 Strategic Plan

We are now halfway into the first year of the Law Society's 2012 – 2014 Strategic Plan.

Implementation of the Strategic Plan is progressing well and on schedule. There are a total of 19 implementation initiatives divided among the 3 overarching strategic goals in the plan. Work has begun on 11 of the 19 initiatives.

Of most immediate interest will be the advances made on the initiatives raised by recommendations from the Delivery of Legal Services Task Force report, and in particular the development of a pilot project to allow paralegals to appear as counsel on some family law matters in Supreme Court. Work continues in creating a similar pilot project with the Provincial Court.

Work has been proceeding as well on Phase 1 of the Indigenous Lawyers Mentoring Project. A draft report has been prepared, and it is expected that it will be before the Benchers in July. The Rule of Law and Lawyer Independence Committee has made a good start examining the relationship between the insurance and regulatory functions of the Law Society and, through the Lawyer Education Advisory Committee, work has been done with the Continuing Legal Education Society toward creating courses for lawyers, to be offered free of charge, on the BC Code of Conduct. A Task Force is being created to examine the issue of whether the Law Society should regulate lawyers or expand regulation to all legal service providers.

Other initiatives are underway or are in the stages of starting up. A more detailed progress report and commentary on the Strategic Plan will be prepared and presented to the Benchers for the July meeting that will inform as to the status of the various initiatives that are underway.

In the fall, the Benchers will undertake their annual review of the Strategic Plan. The annual review has two objectives: to confirm that the priorities set out in the current Strategic Plan continue to have the support of the Benchers, and secondly, to review the annual reports of the four Advisory Committees to identify and assess any emerging priorities for the current or subsequent plan.

3. Government Relations Update

a) Law Society of BC/Justice Services Branch Staff Meeting

On May 22, the Justice Services Branch, Ministry of Justice hosted a meeting among staff of the Law Society and the Justice Services Branch. At the half-day meeting we were briefed on recent changes to the Ministry of Justice, and on its justice reform and review initiatives. We also shared information on our respective organizational structures and staff roles and responsibilities.

The view of all participants was that the meeting was a success, opening lines of communication on common issues of interest and facilitating cooperation and collaboration where that would be in the public interest.

We agreed to make the plenary session a biannual event and to follow up on a one-on-one basis as topics or issues arise. Both our respective organizations can now put names to roles and faces to names, and this should auger well for the future.

Attending with me from the Law Society were:

- Adam Whitcombe, Chief Information and Planning Officer
- Jeff Hoskins, QC, Tribunal and Legislative Counsel
- Michael Lucas, Manager, Policy and Legal Services
- Doug Munro, Staff Lawyer, Policy and Legal Services
- Robyn Crisanti, Manager, Communications and Public Affairs

Representing the Justice Services Branch were:

- Jay Chalke, QC, Assistant Deputy Minister, Justice Services Branch
- Chris Beresford, Executive Director, Maintenance Enforcement and Locate Services
- Nancy Carter, Executive Director, Civil Policy and Legislation Office

- James Deitch, Executive Director, Criminal Justice and Legal Access Policy Division
- Cris Forrest, Director, Planning and Operational Support
- David Merner, Executive Director, Dispute Resolution Office
- Nancy Pearson, Manager, Stakeholder Relations
- Irene Robertson, Executive Provincial Director, Family Justice Services Division

b) Bill 44 - Civil Resolution Tribunal Act

On May 24, Bruce LeRose, Adam Whitcombe and I attended a briefing on Bill 44, *Civil Resolution Tribunal Act*. The briefing, organized by the Justice Services Branch and held at the Ministry of Justice offices in Victoria, was also attended by Sharon Matthews, President, CBABC and Caroline Nevin, Executive Director, CBABC.

At the briefing Jay Chalke, QC, Assistant Deputy Minister, David Merner, Executive Director, and Richard Rogers, Director, Strategic Projects, both of the Dispute Resolution Office, outlined the intent and scope of Bill 44 and provided us with the opportunity to seek clarification and to determine our role in future implementation.

Bill 44 passed third reading without amendment on May 30 and we have been invited to participate in an implementation working group to be established by the Ministry in the weeks ahead. We look forward to working with the Ministry and others in the legal community to ensure that the promise of an effective voluntary dispute resolution process is fulfilled.

4. Professional Responsibility – Thank You to Our Teachers

I would like to thank the following Benchers and Life Benchers who taught Professional Responsibility to PLTC students in May.

Vancouver class	**Victoria class**
Art E. Vertlieb, QC	Ralston S. Alexander, QC
David W. Mossop, QC	G. Glen Ridgway, QC
Anna K. Fung, QC	Richard S. Margetts, QC
Gordon Turriff, QC	
Karl F. Warner, QC	

We very much appreciate the time and effort that all Benchers and Life-Benchers contribute from time to time to this important topic of instruction.

Timothy E. McGee
Chief Executive Officer

The Law Society of British Columbia

Memo

To: The Benchers

From: The Executive Committee

Date: May 30, 2012

Subject: Paralegals Providing Enhanced Levels of Legal Services: Policy Issues Concerning Whether to "Cap" how many Paralegals can be Supervised by a Lawyer and Whether such Paralegals should be Permitted to give and Accept Undertakings

---

I. Background

The Delivery of Legal Services Task Force reported to the Benchers in October 2010 (attached as Appendix 1). The object of the Task Force was to find ways to increase access to lower cost, competent legal services. The approach the Benchers endorsed was expanding the permitted functions of articled students and paralegals. In so doing the Task Force recommended, and the Benchers accepted in principle, that the number of paralegals performing the enhanced services contemplated in the Task Force report that a lawyer could supervise be limited to two, and that paralegals should not be permitted to give or receive undertakings.

In order to implement some of the Task Force's recommendations, changes to the Rules and *Professional Conduct Handbook* would be necessary. The Ethics Committee was asked to consider the necessary changes to the rules of professional conduct and reported at the May 11 Benchers meeting. The Ethics Committee's recommendations (attached as Appendix 2), made after consideration of the issues that arose from the decision of the Benchers made in principle in October 2010, differed from those of the Task Force in connection with the "cap" on the number of paralegals (the Ethics Committee recommended no cap) and on the issue of undertakings (the Ethics Committee recommended that paralegals be permitted to give and receive undertakings).

The Ethics Committee's recommendations were considered by the Benchers on May 11, 2012, and a wide range of views were expressed. Ultimately, the proposed resolutions were withdrawn. The President directed that the matter be referred back to staff and considered by the Executive Committee at its next meeting. The matter is to be returned to the Benchers for a final decision at their meeting on June 16, 2012.

II. Purpose of this Memorandum

This memorandum outlines the two policy issues under consideration. It explains the decisions that the Benchers have made in principle on each issue, as well as describing and analyzing the arguments in favour and against. Further, the memorandum addresses some of the debate given to each issue. Possible options to address the policy issues are raised, and a recommendation is given as to which option would be preferable.

III. The Policy Issues

There are two policy issues for consideration. First is whether the Law Society should restrict the number of paralegals performing enhanced functions that a lawyer may supervise. Second is whether paralegals who perform enhanced legal functions should be able to give and receive undertakings.

(a) Should the Law Society restrict the number of paralegals performing enhanced functions that a lawyer may supervise?

Much of the discussion at the May Benchers meeting involved the question of whether or not to restrict the number of paralegals a lawyer may supervise to two for purposes of performing enhanced functions.

In order to answer the question of whether or not to cap the number of paralegals performing enhanced functions a lawyer may supervise the Benchers should:

(i) consider the question of how to define "paralegal" and why this is important.

(ii) consider whether to restrict the number of paralegals performing enhanced functions a lawyer may supervise.

(i) The definition of "paralegal" and why this is important.

At present "paralegal" is not a defined term in the *Professional Conduct Handbook.* The term currently in use is "legal assistant" but that term is not defined, either. The *Handbook* states that a lawyer may not permit a legal assistant to give legal advice, appear in court, or give or receive an undertaking (Chapter 12, Rule 6(a)). The Delivery of Legal Services Task Force recommended, and the Benchers agreed, that paralegals should be permitted to give legal advice and appear in court (as permitted by the courts) in order to improve access to lower cost and competent legal services. What this required was providing lawyers with a means to determine which of their staff are "paralegals" and therefore competent to provide these enhanced services, and which staff are "non-paralegals" and therefore limited to the existing permissible functions of legal assistants. At the May Benchers meeting the Ethics Committee recommended that

paralegals also be permitted to give and receive undertakings on behalf of the supervising lawyer.

The Delivery of Legal Services Task Force recommended an approach to defining "paralegal" that was followed with minor changes by the Ethics Committee and presented to the Benchers in May. The approach included a proposed Appendix E to the *Handbook* which is intended to assist lawyers in determining which members of their staff are capable of performing enhanced functions and also provide the lawyers with some best practice tips for supervising these paralegals.

The term "paralegal" is in common use in law firms but there are no required criteria for what that term means. As a result there are "paralegals" who have graduated legal assistant programs from Capilano University, paralegals from private colleges, and paralegals with no legal education who were formerly called "legal secretaries" but whose employers have rebranded as paralegals. The reasons for designating certain staff as paralegals are numerous and vary from firm to firm. They need not be addressed here, but the result is that a "name" has been created that has no real meaning and can therefore be the subject of much confusion within the profession, let alone to the public.

The Task Force recognized that there was a problem with how the term "paralegal" is currently being used and suggested that it might be desirable for some form of adjectival descriptor to delineate between paralegals that are permitted to perform enhanced functions and paralegals that are not permitted to do so (those who are the "legal assistants" to which the *Handbook* currently refers). The Task Force was unable to come up with a suggested name, however, and when the Ethics Committee considered the same issue they were also unable to do so. Ultimately the Ethics Committee decided that paralegals should be called "paralegals" and other staff should be called "non-lawyers" (presumably in keeping with the Model Code). The definition of paralegal, along with proposed Appendix E to the *Handbook*, will allow lawyers to determine which staff are "paralegals" for purposes of what is permitted under the *Handbook* and eventually the BC Code. "Paralegal" will therefore mean a category of staff who can do all the activities permitted of non-lawyer staff but who may also engage in activities that other non-lawyer staff are excluded from performing: namely, giving legal advice and appearing in court, and (subject to resolving the issue raised by the Ethics Committee), being permitted to give or receive undertakings.

The consequence of this outcome would mean that, in some uncomfortable circumstances, firms may be required to inform certain staff who are now being held out as paralegals that they may no longer be so held out, unless some other name can be devised. This will be discussed further below, and a recommendation will be made.

(ii) Restricting the number of "paralegals" performing enhanced functions that a lawyer may supervise.

It must be kept firmly in mind that the Benchers have already determined as a matter of policy that "paralegals" should be permitted to perform an enhanced level of legal services under the supervision of a lawyer, beyond those services that a legal assistant is currently allowed to provide. This decision should not create a contraction on existing business models because lawyers should not currently be permitting legal assistants to give legal advice, appear in court or give or receive undertakings. The question that has to be answered is whether a cap on the number of "paralegals" that a lawyer can supervise makes sense as a matter of policy.

At the May Benchers meeting a number of questions were raised with respect to the concept of capping at two the number of paralegals performing enhanced functions a lawyer may supervise. Most of the questions raised were discussed by the Task Force during its initial analysis and the October 2010 report represented a distillation of both the Task Force's process and the discussion of various topics by the Benchers at the June 2010 Retreat.

When the Benchers discussed the concept of a cap at the June 2010 Benchers' retreat, 60% of the Benchers favoured a cap. In light of its own analysis and after considering the discussion at the retreat the Task Force recommended:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;

2. There should be no limit to the number of legal assistants performing *traditional* functions that a lawyer may supervise.

3. Law Society communications should make it clear that these changes are not intended to alter existing legal services delivery models in law firms; rather, they are intended to allow for lower cost, competent legal services to be delivered to the public in areas of unmet need.

The reason the Task Force recommended capping the number of paralegals performing enhanced functions a lawyer may supervise was based on an effort to strike a balance between improving access to legal services and protecting the public. The pros and cons of the issue were debated at length.

It is worth noting that as a result of the approval in principle by the Benchers of the recommendations made by the Delivery of Legal Services Task Force, the Law Society has engaged in discussions with the Supreme Court and the Provincial Court about the granting of rights of audience to paralegals in accordance with the proposals approved. Those discussions have proceeded on the basis of lawyer supervision being limited to no more than two paralegals able to appear in court. The Supreme Court has approved a pilot project with respect to paralegal representation on certain matters in family law proceedings based upon the discussions it has had with the Law Society.

Arguments in favour of a cap

- Permitting paralegals to give legal advice, appear in court and give or receive undertakings introduces new levels of risk to the traditional practice of law; a cap provides a mechanism to guard against risk;

- Capping the number of paralegals who can perform enhanced functions can reduce the risk exposure of the Insurance Fund;

- A cap might reduce unintended risks to sole practitioners and small firms in the event a competitor sets up a mill, particularly with remotely supervised paralegals;

- The Law Society restricts the number of articled students a lawyer is permitted to supervise.

Discussion

The basic theory of the cap started from the premise that at present legal assistants cannot give legal advice or appear in court. Allowing non-lawyers to appear in court and to give legal advice without final reference to the supervising lawyer were viewed as ways to enhance access to legal services, but were also seen to be something of a brave new world in which the risk of unintended consequences might develop. Once the Task Force was satisfied it had suggested a method to assist lawyers in determining how to identify which non-lawyer staff might be competent to provide these enhanced services on a case-by-case basis, it then asked whether additional safeguards were required.

The operating premise is that regardless of how many legal assistants a lawyer supervises at present, none of these staff are currently permitted to give direct legal advice to a client, appear in court, or give or receive undertakings. Having recommended that "paralegals" (as defined) would be permitted to give legal advice and appear in court, some members of the Task Force were concerned that several potential risks might arise.

The first of these risks was that legal services "mills" might be set up in which a lawyer engaged in nominal supervision of paralegals. The Task Force envisioned that some lawyers might "seed" rural communities with paralegals able to provide enhanced legal services and in so doing compromise the day-to-day work of local lawyers whose practices were operating at the margins, which may make it more difficult for lawyers to open practices in rural communities. The Task Force was concerned that, at the extreme, such a risk could mean that there would end up being fewer lawyers providing services in some communities, meaning *less* access to those legal services that could not be provided by a paralegal. The argument was that it is better to guard against this risk rather than attempt to react to the consequences should it arise.

The second risk was a concern arising from an opinion received by the Lawyers Insurance Fund that more paralegals providing legal advice increased the risk from an insurance perspective

because the Law Society does not collect additional premiums based on the number of paralegals. A cap was seen to be a mitigating factor. Ms. George commented on this as follows:

> In theory, the more paralegals a lawyer supervises, the more the risk of claims increases.
>
> As outlined for the Task Force, there are two reasons for this potential increase in claims. First, the volume of legal work per lawyer increases, leading to more opportunities for mistakes. Second, a lawyer's ability to effectively supervise diminishes, leaving paralegals at greater risk of making mistakes that proper supervision would have avoided. If claims do increase, we would expect an increase in related costs, although the pool of insurance-fee paying lawyers would remain unchanged.
>
> In reality, that increased risk may not be significant for several reasons. For instance, if the type of work done by paralegals is low risk in nature, doing more of it may not have much impact on the program. To the extent the risk does exist, however, a cap is beneficial. It recognizes that lawyers can only effectively supervise a finite number of paralegals and limits the volume of additional work insured. The proposed recommendation will still operate to 'cap' the number of paralegals. Whether or not it achieves the same benefits as the Task Force's recommendation really depends on how much the allowable number of paralegals increases.

The third reason advanced in favour of a cap was that the Law Society restricts the number of articled students a lawyer may supervise to two and that it makes sense to take a similar approach with paralegals. There is, it must be acknowledged, a difference in the relationship between a lawyer and a paralegal and a principal and a student. The latter has an educative and mentoring role that may not exist in the former, which might be viewed more as a business relationship. That said, there is clearly a supervisory responsibility in each role.

After much debate, the Task Force settled on the cap as the starting place from which to launch the proposal of enhanced provision of legal services by paralegals, recognizing that a cautious approach would perhaps be advisable. The Task Force was of the view that the concept of a cap could (and likely should) be revisited at a later time if it proves unnecessary or unworkable.

Arguments against a cap

- The risks associated with capacity to supervise are determined by a range of factors best assessed on a case-by-case basis and a cap of two paralegals is arbitrary;
- Capping the number of paralegals a lawyer may supervise greatly limits the potential scope of increasing access to lower cost competent legal services;
- Some lawyers will be able to competently supervise far more than two paralegals, thereby optimizing the reach of the lawyer's practice to the benefit of the public;

- It is not the Law Society's role to limit the number of paralegals a lawyer may supervise in order to protect other lawyers from competition – the issue is whether paralegals may provide enhanced services competently and whether lawyer can competently supervise such paralegals;

- There are practical challenges in circumstances where a lawyer is currently supervising more than two paralegals who are competent to perform enhanced functions;

- The more rules the Law Society imposes on the paralegal project, the less likely lawyers will be to embrace the changes or engage in it at all.

Discussion

Arguments against a cap debated by the Task Force started with the proposition that if the object is to enhance access to legal services a cap can frustrate that objective. It was argued that numerous subjective factors go into determining whether or not a lawyer is competent to supervise a paralegal. While some lawyers will struggle supervising one paralegal, others will be able to supervise many without difficulty. Moreover, the infrastructure of and support available within a law firm can further affect capacity to supervise. A numeric cap would therefore be seen to be arbitrary and would consequently be subject to criticism.

Those in favour of not having a restriction also argued that lawyers are unlikely to "seed" remote communities with paralegals as the business costs would make that model less profitable than using the paralegals under local supervision.

It was also argued that a lawyer may have many qualified paralegals who the lawyer may wish to use to perform enhanced functions on a part-time basis rather than as full time tasks. This was addressed as well by the Ethics Committee, who thought it unlikely that paralegals will only be engaged in the enhanced functions permitted by the new rules. More likely, they will instead move from their traditional and usual work into the enhanced work and back again. In other words they will continue to do what they have always done but will add some enhanced functions to their traditional work. Because they will not be performing the enhanced functions exclusively, their new duties will not be a full time job. Restricting the number of paralegals a lawyer can supervise in these circumstances may therefore be unrealistic, and has the potential to constrain lawyers from assigning enhanced work to existing staff in circumstances where the public would benefit from such a reassignment.

Options to address the Policy Issue

It is evident that a number of questions exist with respect to how a cap limiting the number of paralegals a lawyer could supervise would work, and whether in light of those questions it might be better to change direction and remove the cap. In order to move the overarching policy decision (increasing access to legal services by allowing paralegals to provide enhanced levels of legal services) along, a decision must be settled on the question of how many paralegals who are

providing these enhanced legal services a lawyer is allowed to supervise. Four options present themselves:

Option 1

Lawyers may supervise no more than two paralegals able to perform enhanced legal services (defined as giving legal advice, appearing in court, and subject to the resolution of the undertaking issue, potentially giving or receiving undertakings).

This option retains the decision already approved in principle by the Benchers and does not address any of the questions concerning implementation that have been raised. It is also consistent with the proposals that have been given to the Court concerning the development of a pilot project to permit paralegals a limited right of audience.

Option 2

Lawyers may supervise no more than two paralegals able to perform enhanced legal services (defined as giving legal advice, appearing in court, and subject to the resolution of the undertaking issue, potentially giving or receiving undertakings). Lawyers must provide the Law Society with the names of the paralegals being supervised, together with any other information that the Law Society considers necessary.

This option retains the cap and aims to address some of the implementation issues that have been raised. It is consistent with an "optional recommendation" (Recommendation 6(b)) made by the Delivery of Legal Services Task Force in its report:

b) The supervising lawyer should be required to submit a form to the Law Society electronically that includes:

i. The names of the paralegals the lawyer is supervising;
ii. The areas of law in which the lawyer is using the paralegals;
iii. The types of enhanced services the paralegal will perform;
iv. The education and experience of the paralegal;
v. A copy of the oath/affirmation of conduct;
vi. The location of the office the lawyer & paralegals work in;
vii. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals;
viii. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs.

This option was not adopted in October 2010. It would add administrative requirements for both the Law Society and lawyers that are not currently contemplated. As noted above, one of the dangers of creating a cap is that the more rules the Law Society creates in connection with the paralegal project, the less likely lawyers will be to embrace the changes or engage in it at all.

Option 3

Lawyers may supervise no more than two paralegals able to perform enhanced legal services (defined as giving legal advice, appearing in court, and subject to the resolution of the undertaking issue, potentially giving or receiving undertakings). The limitation will be reviewed after a period of time to determine if it is necessary.

This option retains the cap, recognizing that a cautious approach in embarking into this new program may be warranted. It also recognizes, however, that the cap may have limiting effects on the overarching policy goal and may not be necessary if lawyers can demonstrate that the supervision requirements can be met and there is greater capacity to supervise. A review of how the program operates after a given period of time will allow the Benchers to consider the issue armed with a period of experience and make decisions that may be better informed. As with Option 1, the option is also consistent with the proposals that have been given to the Court concerning the development of a pilot project to permit paralegals a limited right of audience.

Option 4

Lawyers may supervise as many paralegals able to perform enhanced legal services as the lawyer is capable of supervising while still meeting the professional standards expected of a reasonably prudent and competent lawyer.

This option departs from the decision approved by the Benchers in principle in October 2010.

Recommendation of Executive Committee

The Executive Committee recommends Option 3. After debate at its meeting on May29, the Committee reached a consensus that the novelty of the proposal put forward by the Delivery of Legal Services Task Force to expand the range of legal services that could be offered by a supervised paralegal warranted a cautious approach at the outset to ensure, as much as possible, that the public interest was properly protected. Setting an initial limit around the number of paralegals providing these services that a lawyer can supervise will, the Committee believes, allow the Law Society to better assess the efficacy of the proposal in a controlled manner, while being able to ensure other stakeholders in the justice system (including the Courts) that proper supervision by lawyers will be both expected and possible. The cap will need to be included in the Law Society Rules, rather than contained in the BC *Code.*

The recommendation, though, should be reviewed after a given period of because the Committee understands that, while constituting a prudent limitation at the outset of the program, a cap of two may be unnecessary in the long term. The Committee recommends reviewing the cap at the same time as the assessment is being done of the pilot project for paralegals appearing as counsel on certain family law matters that has recently been approved by the Court. Conducting a survey at that time concerning the efficacy of the proposal and seeking feedback from the profession and, perhaps, clients about whether the cap is necessary, would be advised.

The Committee also recognized that it is necessary to have a specific designation for the paralegals performing the enhanced services, especially if a cap on the number that a lawyer can supervise remains. The purpose of the proposal has never been to affect current business models of the use of "legal assistants" as defined by the *Handbook.* Rather, the proposal has been created to permit lawyers to identify paralegals who will be capable of performing the enhanced services and training and supervising them accordingly. It is expected that these paralegals will do more than just perform the enhanced services. They will in all likelihood also continue to spend much of their time performing the work that "legal assistants" currently undertake. Many of those people are called "paralegals" now, and it would be very difficult, if not impossible, to require them to stop using that designation.

If a cap is imposed at the outset, however, it will be necessary to find some way of identifying which of the "legal assistants"/paralegals under the supervision of a lawyer are allowed to provide the enhanced services. The Executive Committee recommends the use of the term **"**Designated Paralegal.**"** The use of this term would permit persons who are currently using the term "paralegal" to continue doing so while performing currently permissible functions. Lawyers will, however, each be able to "designate" up to two paralegals who, under their supervision, will be able to perform the "enhanced services" including giving legal advice and appearing in Court and (subject to the debate in the section below) perhaps giving and receiving undertakings.

(b) Should Paralegals be Permitted to Give or Receive Undertakings

Chapter 12, Rule 6(a)(ii) of the *Professional Conduct Handbook* currently prohibits a lawyer from permitting a non-lawyer to give or receive undertakings. The Delivery of Legal Services Task Force recommended maintaining this rule. The Task Force did not believe that permitting paralegals to give or receive undertakings would enhance access to legal services in a meaningful way. The Task Force also viewed undertakings as too important to permit non-lawyers to perform. The potential risk was seen as disproportionate to the potential benefit.

The Ethics Committee, on the other hand, recommended that paralegals be permitted to give and receive undertakings in order to improve access to legal services. It made this recommendation having regard to the new *Code of Professional Conduct for British Columbia*, based on the Federation of Law Societies Model Code, which the Benchers agreed to adopt in April 2011 and which is to come into force on January 1, 2013. The new *Code*, in section 5.01(3)(c) states that:

> A lawyer must not permit a non-lawyer to:
>
> > (c) give or accept undertakings or accept trust conditions, *except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is*

> *indicated and the lawyer who is responsible for the legal matter is identified* (emphasis added);

The Federation's Model Code and the new BC *Code*'s provisions on this issue depart from the current provisions in the *Professional Conduct Handbook.* The *Code* provisions would permit any non-lawyer working under the supervision of a lawyer to give or accept an undertaking where the requirements of the section are met. The Ethics Committee's recommendation is therefore a narrowing of the *Code* provision (as it would permit only paralegals allowed to perform enhanced functions to give and accept undertakings), but it is broader than the current *Handbook* provision.

It should also be noted that sections 5.01(3)(b) and (d) of the new *Code* prohibit a lawyer from permitting a non-lawyer to give legal advice and from acting finally without reference to the lawyer in matters involving professional judgment. Both of those provisions will need to be amended to permit "paralegals" to provide the enhanced level of legal services that have been approved by the Benchers. Although the BC Code says non-lawyers may not give legal advice, by creating a category of "paralegals" who can give legal advice the Law Society would not be creating an inconsistency with the *Code* provisions because non-lawyers who are not paralegals will still be excluded. Such a distinction cannot be made with respect to undertakings, however, because the broader category of "non-lawyers" (which includes people without the requisite skills of a "paralegal") in the *Code* are permitted to give and receive undertakings. If the exception in Rule 5.01(3)(c) of the *Code* is appropriate it would not make sense to prohibit the more experienced paralegals from also being able to give or receive undertakings.

In order to make a policy decision on whether paralegals should give undertakings, it will be useful to consider some of the law underlying undertakings, together with some of the practicalities relating to the issue.

(i) Undertakings as a matter of law

As a matter of law, can a non-lawyer bind a lawyer to an undertaking? If there is a valid concern on this point, the Benchers may wish to raise it with their Federation colleagues for an assessment of whether the Model Code needs to be amended.

In a fortunate bit of timing, Allan McDonell, Q.C. recently wrote an article entitled "Undertakings in B.C.: Don't get Buried" in The Advocate.[1] Mr. McDonnell indicates that in *Kutilin v. Auerbach* (1988) 34 BCLR (2d) 23 (CA) Esson J.A. for the Court stated that an undertaking may be given by a lawyer "either personally or by a member of his staff." Mr. McDonnell goes on to observe that the reference to undertakings by staff was *obiter* and the matter has not been litigated in Canada. After pointing out that the Law Society of British Columbia limits undertakings by articled students in Rule 2.32.01(2) and of non-lawyers in Rule

[1] Vol. 70 Part 3 May 2012, 375-382.

6(a)(ii) of Chapter 12 of the *Professional Conduct Handbook*, Mr. McDonnell cautions that "it is not hard to imagine these restrictions colliding in a busy law office with the doctrine of ostensible authority from the law of agency" (at 376).

After reviewing the approach the courts and the Law Society have taken with respect to enforcing the solemnity of undertakings, Mr. McDonnell suggests some "rough rules" for lawyers that include "Instruct all members of your staff, other lawyers in your office, and articled students never to give or receive an undertaking on your behalf or to agree to any trust condition without your concurrence" (at 381). If the Benchers are to endorse the concept of non-lawyers giving undertakings that are personally binding on the lawyer, then a cautionary practice such as Mr. McDonnell suggests is a good practice. It is a practice, however, that undercuts the cost saving envisioned by having the non-lawyer give the undertaking because in such circumstances the lawyer will have reviewed the undertaking and made the risk assessment and merely indicated whether the non-lawyer may proceed to bind the lawyer. From an access to legal services cost-savings perspective, the benefit is nominal. From a risk management perspective, the approach is wise.

We have not performed an exhaustive search of approaches to undertakings by other regulators, but observe that Rule 22.2A of the Law Institute of Victoria *Professional Conduct and Practice Rules 2005* has language that both supports the concept of an employee giving an undertaking, while more clearly articulating the nature of the undertaking:

> For the purposes of rule 22.1 an undertaking given by an employee of a practitioner, whether or not the employee is a practitioner, shall be deemed to be a personal undertaking given by the employer practitioner unless the employee, being a practitioner, makes expressly clear that the undertaking is the employee's personal undertaking and that of the employer.

This supports the concept of non-lawyers giving undertakings that personally bind the employer lawyer. Perhaps interestingly, it also suggests an approach where the non-practitioner cannot be personally bound by the undertaking.

It is not certain that, when asked to enforce an undertaking given by a non-lawyer purporting to bind the supervising lawyer, the courts would agree with Esson J.A.'s *obiter*, although it seems that undertakings given by notaries public on their own can be enforced so it might be surprising if an undertaking given by a paralegal acting under the supervision of a lawyer could not be enforced.

The true import of undertakings is their solemnity. Enforcement of the underlying promise contained in an undertaking may be done by the Court, but the seriousness of a breach of an undertaking by a lawyer is reflected in the professional sanctions that may be imposed by the Law Society. It is the certainty of professional sanctions should a breach occur that make undertakings a solemn, professional obligation and ensures to the greatest extent that they will be

performed *without* having to have them enforced by the Court. As Madam Justice Prowse observed in *Hammond v. Law Society of British Columbia*, 2004 BCCA 560:

> These undertakings are regarded as solemn, if not sacred, promises made by lawyers, not only to one another, but also to members of the public with whom they communicate. These undertakings are integral to the practice of law and play a particularly important role in the area of real estate transactions as a means of expediting and simplifying those transactions.
>
> When a lawyer's undertaking is breached, it reflects not only on the integrity of that member, but also on the integrity of the profession as a whole. [paras. 55 and 56]

While the Law Society can certainly make allowances in the BC *Code* for paralegals to give undertakings, it is unclear how a breach of an undertaking given by a paralegal would be treated. As the Delivery of Legal Service Task Force said in its October 2010 report, past allegations of failure by a lawyer to supervise staff do not appear to have led to a disciplinary consequence more severe than a Conduct Review.

> If the supervised paralegal engages in activity that would lead to a suspension or disbarment if performed by a lawyer, but the result is never more severe than a conduct review for the supervising lawyer [where the conduct is committed by the paralegal], we have arguably created a weaker regulatory function with respect to those services.

Ideally, to preserve the solemnity of undertakings and the integrity of the profession (and, of course, to best protect the public interest) the regulatory process would treat such an undertaking as if it was given by the lawyer and the consequences on a lawyer for a breach of an undertaking given by a paralegal would be similar to those for a breach of an undertaking given by a lawyer.

(ii) As a matter of principle and practicality, should paralegals be permitted to give or receive undertakings?

If the Benchers are confident that permitting non-lawyers to bind lawyers to an undertaking is not problematic as a matter of law, the question that remains to be answered is whether it is principled and practical to permit it.

Arguments in favour of allowing Paralegals to give or receive undertakings

- The Benchers have adopted the BC Code which permits non-lawyers to give or receive undertakings (Rule 5.01(3)(c));
- It is desirable to strive for unanimity amongst the various provincial Codes;
- In some circumstances there might be a cost saving associated with non-lawyers being able to give or receive undertakings;

- Notaries are able to give and receive undertakings with respect to matters within their jurisdiction;

- In *obiter* the Court in *Kutilin v. Auerbach* states that non-lawyers may give undertakings;

- In other jurisdictions such as Australia (Victoria) employees of lawyers may give undertakings that personally bind the lawyer.

Arguments against Paralegals being able to give or receive undertakings

- The Benchers rejected the idea of allowing non-lawyers to give or receive undertakings when they considered the matter in June and October of 2010;

- A general permission that non-lawyers or paralegals may give or receive undertakings creates a variable risk;

- It is doubtful that a prudent lawyer would allow staff to bind him or herself to an undertaking without first assessing the issues and requirements of the undertaking and making it clear to the staff what was transpiring. The very due diligence one would expect might mitigate the cost savings that would otherwise be generated by allowing staff to bind the lawyer to an undertaking.

Discussion

As noted above, the Delivery of Legal Services Task Force did not think paralegals should be permitted to give or receive undertakings. This view was unanimously adopted by the Benchers at the 2010 Benchers' retreat and summarized in the Task Force report for the following reasons:

> The consensus view of the Benchers was that paralegals should not be allowed to provide undertakings. A concern relating to undertakings is that they are a personal obligation of the lawyer, and therefore might not easily transfer to the paralegal. Perhaps more significantly, undertakings are often related to monies in trust and that calls for a heightened degree of protection. Lastly, requiring lawyers to provide undertakings creates a mechanism to involve the lawyer in the file, thereby dovetailing with the object of properly supervising the paralegal.

The Ethics Committee recommended that paralegals be permitted to give and receive undertakings and that it would be consistent with the objective of increasing access to legal services. As noted, the BC *Code* would permit non-lawyers to give and receive undertakings.

At the May 11th Benchers meeting Mr. Walker expressed the need for caution regarding undertakings and referred to the process for articled students. Revisions to the articled student rules, while originating from a question of how to increase access to legal services, were ultimately considered through the lens of training students to become lawyers. Once an articled

student is called to the Bar he or she may give or receive undertakings, so training the student how to do give or receive and undertaking makes sense. During this discussion, Mr. Hume observed that notaries can give and receive undertakings. It is perhaps important to distinguish that notaries are restricted in the areas of law and types of services they can provide and paralegals would face no such limitation. It is also relevant that Notaries are regulated directly by the Society of Notaries Public, and that consequently a finding of a breach of an undertaking by that body can have direct professional consequences on the Notary him or herself

Rule 5.01(3)(c) of the BC *Code* refers to non-lawyers under the direct supervision of a lawyer, but it does not clearly set out a process such as has been established for articled students. Requiring the lawyer to also sign the undertaking would serve the training function, but would eliminate the cost saving object. A possible middle ground would be to require the lawyer to co-sign a certain number of undertakings or co-sign for a certain period of time until the lawyer was confident in the paralegal (or non-lawyer as the case may be) ability to deal properly with undertakings. Another possibility would be to require the lawyer to document the file the paralegal was working on with an authority for the paralegal to give or receive undertakings on that file. This concept would create an administrative obstacle, but would also turn the lawyer's mind on a case-by-case basis to the discretion. An unscrupulous lawyer, however, might not paper the file and then would point to the absence of the consent as evidence the paralegal was acting outside his or her ostensible authority.

A question that might further complicate matters is how to interpret Rule 5.01(3)(d), which states that a lawyer must not permit a non-lawyer to "act finally without reference to the lawyer in matters involving professional legal judgment." A strong argument exists that the decision to give or receive an undertaking is a final act without reference to the lawyer in a matter involving professional legal judgment. The same may be said about a paralegal giving legal advice, however, so at the very least the BC *Code* might need some commentary that clarifies these ambiguities.

While nothing prevents the Benchers from changing the approach to undertakings adopted at the October 2010 meeting, another consideration is that in all of the Law Society's representations on the subject since then we have indicated that undertakings are not on the table. This is likely more of an issue with respect to our dialogue with the courts where the concept of expanding roles for paralegals has been met with caution. The British Columbia Supreme Court has made it clear they will not treat paralegals as officers of the court and as such would likely not accept an undertaking from a paralegal as a proxy for the lawyer having given the undertaking. At the same time, the Law Society has adopted the BC *Code* that would allow non-lawyers to give and receive undertakings. It is important to arrive at a definitive conclusion to this topic.

As a practical matter, the Benchers might consider how much permitting paralegals to give and receive undertakings will improve access to lower cost, competent legal services. It is difficult to assess this in a vacuum as the amount of time that goes into constructing the undertaking will vary depending on the circumstances.

Another practical question is to ask who would allow their paralegal to bind them to an undertaking? If the premise is that when a paralegal gives an undertaking it is treated as if the undertaking is given by the supervising lawyer, what are the consequences when the undertaking is not fulfilled? The premise of the Delivery of Legal Services Task Force is that the failure to supervise has to be open to the full range of discipline sanctions when a paralegal performing enhanced functions engages in what would constitute professional misconduct if performed by the lawyer. Breach of undertaking is one of the more serious forms of professional misconduct and it may be that only very reckless lawyers would permit a non-lawyer to bind them to an undertaking. Another practical matter, as was identified by Ms. Merrill, is the question of what obligations do other lawyers have with respect to undertakings given or received by a non-lawyer? As a matter of business efficacy, there may be unintended consequences to permitting non-lawyers to give or receive undertakings.

Options to address the Policy Issue

It is evident that a decision must be made concerning paralegals and undertakings. The current approval in principle of the recommendation of the Delivery of Legal Services Task Force (that paralegals not be permitted to give or receive undertakings) contradicts the provision in the *Code* that will come into effect in January that allows non-lawyers to give and receive undertakings in to the extent allowed in the *Code.*

Option 1

Prevent paralegals (and all non-lawyers) from giving or receiving undertakings

This option adopts the recommendation of the Delivery of Legal Services Task Force. It is premised on the recognition that undertakings are a personal obligation of the lawyer, and therefore might not easily transfer to a paralegal, that undertakings are often related to monies in trust and may therefore call for a heightened degree of protection and that requiring lawyers to provide undertakings creates a mechanism to involve the lawyer in the file, thereby dovetailing with the object of properly supervising the paralegal.

If this option were adopted it will require an amendment to the *Code*, which will result in British Columbia having more stringent professional conduct requirements concerning undertakings than the rest of the country.

Option 2

Permit paralegals who are able to provide enhanced legal services (but not other non-lawyers) to give and receive undertakings

This option adopts the recommendation made by the Ethics Committee in May 2012. In the words of the Ethics Committee, it would recognize that the ability to act as the supervising lawyer's agent in giving or accepting undertakings is an important part of

increasing the responsibilities that paralegals are able to fulfill. Increased potential of paralegals to assume responsibility for undertakings will increase the flexibility of the services a lawyer is able to offer and will ultimately benefit the public.

Adopting this option would also require an amendment to Subrule 5.01(3)(c) of the *Code*. It would have to limit the ability to give the undertaking to that of a paralegal offering enhanced legal services, not to all non-lawyers, and this may again draw out the need for a definition of "paralegal." As per the Ethics Committee's recommendation in May 2012, it would also have to limit the current language of that subrule to clarify that the undertaking given or received by a paralegal is not the paralegal's own undertaking, but that of the lawyer responsible for the matter.

Section 5.01(3)(d) would also need to be amended. It currently prohibits non-lawyers from "acting finally" without reference to a lawyer in matters involving legal judgment. A paralegal giving or accepting an undertaking would be contrary to that provision.

The result would be that the rule in BC's *Code* would be narrower than that of the Model Code, but may still be more in keeping with the direction taken in the Model Code.

Option 3

Adopt either Option 1 or Option 2, but review after a given period of time

This option would either allow or prevent a paralegal from giving or receiving an undertaking, but would subject the decision to a review after a given period of time.

Option 4

Make no changes to the Rule 5.01(3)(c) of the BC *Code*

This option would support the decision made by the Benchers in April 2011 when they adopted the BC *Code*. It would mean that *all* non-lawyers supervised by a lawyer could give or accept an undertaking at the direction of and under the supervision of a lawyer responsible for the legal matter provided that the fact that the person in question is a non-lawyer is disclosed, the capacity of that person is indicated, and the lawyer responsible for the legal matter is identified.

There is no indication in the minutes that shows that the Benchers considered this provision of the BC *Code* specifically, so it is unclear on what basis it was adopted other than that it was consistent with the Model Code. Leaving it 'as is" would result in the rules concerning the ability of a non-lawyer to give undertakings to be consistent across the country.

It will be recalled that the Ethics Committee *did* make recommendations to amend other provisions of Rule 5.01(3) BC *Code* and recommended adding to Rule 5.01 subrules

- (3.1), which provides that the limitations in subrule (3) do not apply to enumerated groups

- (3.2), which permits a lawyer to employ as a paralegal a person who meets the requirements set out in that section and

- (3.3), which provides that subrule (3) does not limit a paralegal with the necessary skills and experience to give legal advice, and represent clients before a tribunal.

These recommended amendments will still be needed in order to implement the proposals of the Delivery of Legal Services Task Force.

Recommendation of Executive Committee

The Executive Committee recommends Option 4, that no changes be made to Rule 5.01(3)(c) of the BC *Code.*

After a considerable amount of discussion, the Committee was satisfied that the language of Rule 5.01(3)(c) of the BC *Code* would provide adequate protection to ensure that the important professional obligations that are created by undertakings remain in place.

The Rule is a general prohibition on non-lawyers giving or accepting undertakings except where given or accepted under the direction of and supervision of a lawyer responsible for the particular matter. Moreover, the non-lawyer must disclose that he or she is not a lawyer, describe his or her capacity, and identify the lawyer who is responsible for the legal matter. The Committee was satisfied that with these conditions in place, a properly supervised non-lawyer could give or accept an undertaking because it would not be expected that the undertaking would be given or accepted without consultation with the responsible lawyer.

The Committee accepted that it mattered not whether the non-lawyer was a paralegal providing enhanced legal services or any other non-lawyer. A non-lawyer who was not authorized by a lawyer to give or accept undertakings would be effectively precluded from doing so by virtue of the conditions in Rule 5.01(3)(c) unless he or she were acting as a "rogue," and even the current rules do not preclude the possibility of a rogue non-lawyer giving or accepting undertakings undertakings under the name of the responsible lawyer.

The remaining changes recommended by the Ethics Committee to Rule 5.01 of the BC *Code* will need to be made. Following this Committee's recommendation in the Part above concerning the need to name the paralegals who are able to provide enhanced services, the name chosen will have to be incorporated into Rule 5.01(3.3) accordingly, or be added to the definition section in Rule 5.01(2).

MDL/al

Attachments

2012-05-30 Memo Executive to Benchers Paralegal Cap and Undertaking (FINAL)

The Law Society of British Columbia

Delivery of Legal Services Task Force Final Report
For: The Benchers

Date: October 1, 2010

Art Vertlieb, QC (Chair)
Haydn Acheson
Carol Hickman
Gavin Hume, QC
William Jackson, QC
Bruce LeRose, QC
David Mossop, QC
Gregory Petrisor
Stanley Lanyon, QC
James Vilvang, QC

Purpose of Report: **Discussion and Decision**

Prepared on behalf of: **Delivery of Legal Services Task Force**

Policy and Legal Services Department
Michael Lucas 604-443-5777
Doug Munro 604-605-5313

PREAMBLE

The purpose of this Report is to recommend changes to the model through which legal services are delivered in British Columbia in order to enhance the public's access to competent and affordable legal services. The approach focuses on incremental change, by increasing the roles that paralegals and articled students can perform under the supervision of a lawyer. The delivery of legal services and the history of the profession has never been static. The profession has through its history, attempted, as necessary, to evolve with the needs of the public it serves. This Report represents a further stage in that evolutionary history.

The Task Force makes a series of recommendations in this Report. The rationale for the recommendations is explained in the body of the Report under the various relevant headings, and a Summary of the recommendations is included at the end of the Report for ease of reference.

In working through its mandate and in making its recommendations, the Task Force has tried to find the balance through which the public's access to competent and affordable legal services will be enhanced without introducing an unacceptable level of harm to those who need such services. The Task Force believes, however, that these suggested reforms must be tested in the market place in order to determine whether it has found the right balance.

1. BACKGROUND

The Delivery of Legal Services Task Force was created to advance Strategy 1-1 of the 2009-2011 Strategic Plan:

> *Increase the public's access to legal services by developing a new regulatory paradigm that may broaden the range of persons permitted to provide certain legal services.*

The Task Force issued a preliminary report to the Benchers in December 2009, and an interim report at the Benchers' Retreat in June 2010. The detailed analysis contained in those reports is not duplicated here, but a brief synopsis follows.

The concept for strategy 1-1 had its genesis in the work of the Law Society of British Columbia Futures Committee. After a lengthy analysis, that Committee recognized the time had come to explore broadening the range of people able to provide legal services. The Committee recommended that additional research be performed to assess the best way forward. On the strength of that recommendation the Benchers created the Delivery of Legal Services Task Force. The Task Force's initial mandate involved collecting missing information to assess the need for change. In addition to reviewing numerous reports and surveys, the Law Society commissioned an Ipsos Reid survey to get a better sense of how British Columbians of low, middle, and high income resolved their serious

legal problems. Following its report to the Benchers in December 2010 the Task Force was given a mandate to analyze the substantive issues involved in expanding the range of persons permitted to provide legal services. This stage involved select consultations and additional research and analysis, leading to the report to the Benchers in June 2010.

As a result of its research, the Task Force confirmed that access to justice and to lawyers is a challenge being tackled around the world. There exists a growing body of research and discussion of this topic. In light of this reality the Task Force decided to take an incremental approach to reform, rather than attempt to find a universal solution. This decision led the Task Force to focus on three topics:

1. Expanded roles for paralegals;
2. Expanded roles for articled students;
3. Issues relating to Community Advocates.

The Benchers' discussion in June 2010 focused on paralegals and articled students. The majority of the Benchers concluded that both paralegals and articled students should be able to perform additional duties, but that further details, particularly with respect to paralegals, had to be worked out.

2. PURPOSE OF THIS REPORT

This report contains recommendations of the Task Force for moving forward with the goal of enhancing access to affordable, competent legal services, in light of the Benchers' discussion of the topic on June 11, 2010.

3. ARTICLED STUDENTS

The vast majority of the Benchers were of the view that articled students should be allowed to perform enhanced functions, including acting as Commissioners for Oaths.

The Task Force recommends that the Credentials Committee be directed to explore expanded duties for Articled Students. The referral of matters to the Credentials Committee should include the background material on Articled Students that the Task Force considered.

The Law Society, as part of its request for amendments to the *Legal Profession Act*, has also asked that s. 60 of the *Evidence Act* be amended to allow articled students to act as commissioners for oaths.

4. PARALEGALS

As a result of the discussion and directions given by the Benchers at the June 2010 Retreat the Task Force takes it that a consensus has been reached, and therefore recommends, that it is time to enhance the permitted duties of paralegals acting under the supervision of a lawyer.

Issues relating to the definition of paralegal, as well as the scope of enhanced duties and nature of supervision need to be worked out. This section of the report attempts to synthesize the views of the Benchers and suggest a way forward.

A. *Definition of Paralegal*

The Benchers have recognized that it is important to define "paralegal". Doing so will reduce the risk of public confusion concerning the roles of non-lawyers working at a law office. It will also allow lawyers to identify which employees lawyers can hold out as paralegals. This approach is consistent with earlier reports such as the *Proposal for a Law Society Paralegal Certification Scheme* (May 2003) (**Attachment 1**), although that report ultimately focused on credentialing.

"Legal Assistant" is the term the Law Society uses at present for the services that are permitted under the *Professional Conduct Handbook*. The Law Society does not define the term or set criteria for the application of that term however, so there is a wide range of people providing legal assistant services. In essence, lawyers have been left on their own to determine who is a legal assistant. The Task Force recommends keeping the term "legal assistant" for the category of existing functions in the *Handbook*, and creating a new category of "paralegal" that could perform the expanded functions proposed by the Task Force, as well as the current functions allowed for legal assistants. In order to distinguish between paralegals and legal assistants, at a minimum the term "paralegal" should be defined.

A relatively straightforward approach would be to modify the proposed credentialing criteria detailed in Attachment 1, turning the criteria into guidelines that a lawyer must consider in deciding whether to hold someone out as a paralegal.

The Paralegal Task Force also recognized in 2003 that a paralegal requires knowledge of not only substantive and procedural law but also practical and analytical skills. A definition based on these four pillars might look something like this:

> A paralegal is a trained professional who:
> - works under the supervision of a lawyer;
> - possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
> - possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and

- carries out his or her work in a competent and ethical manner.

This definition might be supplemented by a rule and guidelines that state:

> A lawyer must not delegate work to a paralegal, nor may a lawyer hold someone out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training, experience, and good character to perform the tasks delegated by the lawyer in a competent and ethical manner. In arriving at this determination lawyers should be guided by [**refer to guidelines**]. Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

An alternative approach is to set (objective) criteria in the definition and then provide guidelines for the lawyer to make the subjective determination as to whether a staff member can be held out as a paralegal. Such an approach might look like this:

> A paralegal is a person who is qualified by virtue of education,[1] training and experience to provide services normally performed by a lawyer, provided those services are delivered under the supervision of a lawyer.[2]

The guidelines could then set out factors for a lawyer to take into account, such as the bulleted points above and the list of acceptable schools/education contained in the Paralegal Task Force report.

The Task Force discussed the "training" requirements for paralegals. The Task Force recognized that not all legal assistants have completed a paralegal training course. Many legal assistants will have developed their experience over a number of years working in a firm setting. The Task Force believes that education is an important part of training, but an allowance has to be made for people who have achieved adequate substantive and analytical skills through work experience. One possibility is to set education as a requirement moving forward, and to grandfather in experienced legal assistants as of a certain date. The Task Force considered whether a certain number of years experience should be required, but did not arrive at a conclusion. Ultimately, the Task Force believes the onus will lie on the supervising lawyer to ascertain whether the staff member possesses the requisite skills to function as a paralegal.

---

[1] Education could be described in greater detail (e.g. with a degree or diploma in legal studies from a recognized university or college, etc.).

[2] Should "character" also be included?

I. Recommendations regarding definition of "paralegal"

The Task Force recommends that:

a) the term "paralegal", or a new coined term, be defined in the *Professional Conduct Handbook* to make it clear which staff can perform enhanced paralegal functions. Two options for definitions are set out above. Consideration should be given whether to set out criteria for the training of paralegals as well as whether to refer to them as "professionals";

b) a rule or guidelines similar to that set out above accompany the definition in order to assist lawyers in identifying which staff can be held out as paralegals, and to put lawyers on heightened notice of their professional obligations regarding supervising these paralegals.

The Task Force believes that option (b) is the better choice and should be coupled with the bulleted definition on page 4.

B. *What expanded duties should paralegals be allowed to perform?*

At present, the three main prohibitions contained in the *Professional Conduct Handbook* relate to giving undertakings, acting as an advocate, and providing legal advice.

I. *Undertakings*

The consensus view of the Benchers was that paralegals should not be allowed to provide undertakings. A concern relating to undertakings is that they are a personal obligation of the lawyer, and therefore might not easily transfer to the paralegal. Perhaps more significantly, undertakings are often related to monies in trust and that calls for a heightened degree of protection. Lastly, requiring lawyers to provide undertakings creates a mechanism to involve the lawyer in the file, thereby dovetailing with the object of properly supervising the paralegal.

II. *Advocacy*

With respect to advocacy, the Task Force is of the opinion that the extent to which a non-lawyer can appear in court depends on what the courts are prepared to allow. It does not make sense for the Law Society to create a list of permissible advocacy functions at this time only to risk having them rejected by the courts. As the Benchers are aware, the Task Force laid the ground work for future consultations with the British Columbia Supreme Court and the Provincial Court of British Columbia on this subject. The Task Force believes the Law Society should work with the courts to ascertain what advocacy

functions should be permitted, and that the Law Society should adopt the findings from that work.

It is important to realize that working with the courts will require an allocation of resources, and will require both Bencher and staff time, and that this needs to be reflected in the Law Society's Strategic Plan. The Task Force therefore recommends that the Strategic Plan be amended to include the following initiative in furtherance of Strategy 1-1:

> A working group or task force of Benchers and staff will work with the British Columbia Supreme Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.

III. *Giving legal advice*

When the Task Force discussed this topic it decided that the best approach is to allow the supervising lawyer to determine the circumstances under which it is appropriate for the paralegal to give legal advice. The reason for this conclusion is largely pragmatic. To attempt to chart out every conceivable circumstance for providing legal advice (taking into account such matters as the areas of law involved in the retainer, the seriousness of the matter, the complexity of the matter, the implications to the justice system, and the implications to the parties involved), would be to embark on an epic enterprise around which consensus would never be achieved. The more rigid the codification, the less ability there is for a lawyer to recognize the varied skill between individual paralegals. At present there are some lawyers who rely tremendously on the work of a paralegal in certain areas because the paralegal is the "go-to" source at the firm. A rigid codification would almost certainly stifle the level of existing functions being performed in those settings, and apparently being performed without great harm to the public.

Every additional administrative layer will act as a deterrent to the profession in using paralegals to perform enhanced functions. The rules will either be ignored (if they constrict existing practices), or not embraced (if they are perceived to be too cumbersome to learn and apply in practice). The Task Force remains of the opinion that protection of the public is better achieved through properly defining who can perform enhanced functions, providing rules and guidelines for supervision, and ensuring our regulatory process is robust enough to deal with complaints against lawyers about substandard paralegal work.

IV. *Recommendations regarding expanded duties for paralegals*

The Task Force recommends:

a) Paralegals should not be allowed to give or receive undertakings;
b) The Law Society should work with the courts to determine what forms of advocacy paralegals should be permitted to perform;
c) The Strategic Plan should be amended to include as follows: A working group or task force of Benchers and staff will work with the British Columbia Supreme Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.
d) Paralegals should be allowed to give legal advice in matters the supervising lawyer has deemed the paralegal competent to provide advice.

C. *Supervision of Paralegals*

Supervision is the critical part of expanding roles for paralegals. The key is to find a balance between rules for supervision, which create safeguards, and flexibility which increases the likelihood lawyers will use paralegals for enhanced roles, thereby enhancing access to justice. If the balance is cast too far in either direction we will either create reforms that will not be embraced and therefore accomplish nothing, or that are too unstructured and therefore introduce a level of risk to the public that is unacceptable. The Benchers considered a number of concepts that are central to the issue of supervision.

When the Task Force discussed supervision it considered a number of concepts that might fit within a general framework of supervision, including:

- A supervising lawyer should be aware of what functions staff are performing, what files are assigned to staff, etc;
- The supervising lawyer must establish effective communication with staff;
- The supervising lawyer should engage in file triage and to determine proper delegation to staff;
- The supervising lawyer should ensure staff are trained and competent to undertake assigned functions;
- The supervising lawyer should engage in periodic file review and debriefing sessions (scaled to the experience and qualifications of the staff being supervised and the nature of the files assigned to staff);
- The supervising lawyer should provide ongoing skills training for staff;
- The supervising lawyer would benefit by asking the clients to give feedback regarding the quality of services received;

- The supervising lawyer would benefit from creating written supervision policy & procedure document.

The Benchers may wish for any, or all, of these concepts to be expressed in guidelines for lawyers' supervision of paralegals.

In addition to these concepts, the Task Force explored whether there should be a limit on the number of paralegals a lawyer can supervise, and whether remote supervision should be permitted. These topics led to a variety of views expressed by the Benchers, and are analyzed in more detail in the following sections.

(i). *Should there be a limit on the number of paralegals a lawyer can supervise?*

When the Benchers discussed the idea of capping the number of paralegals a lawyer can supervise, approximately 60% were in favour of a cap for paralegals performing enhanced roles.

At both the Task Force level, and the Bencher level, the concept of capping the number of paralegals has presented challenges for achieving unanimity. A cap has merit because logic tells us that at some point supervision becomes fraught with risk as the ratio of staff to supervising lawyer grows. The challenge is that a hard cap is inflexible, and fails to recognize that effective supervision is about more than ratios. Some lawyers will be able to competently supervise many paralegals while others will struggle supervising one. Competency to supervise is not dictated by a cap. Recognizing this tension, the challenge becomes identifying the number, or whether to identify a number at all.

Although competency is not dictated by a cap, capacity to supervise is influenced by the number of staff a lawyer is responsible for. As a result there are insurance implications if the number is not capped. This is because for each additional staff providing legal services the risk profile of the lawyer increases without a commensurate increase in insurance fees. The opinion the Task Force received from the Lawyers Insurance Fund recognized that a cap would have a mitigating effect.

One perspective raised by the Benchers was that it is preferable not to institute a cap, and that the decision should be left to lawyers. It was noted that the key would be to make it clear to lawyers that they carried the responsibility for the work performed by the paralegal, and liability for the work performed. The argument is that properly instructed, lawyers will not take on the risk associated with supervising too many paralegals. This approach allows for a case-by-case flexibility.

One suggestion considered by the Task Force was to limit the number of supervised paralegals performing enhanced functions to two, similar to the number of articled students that a principal may supervise. When the Task Force discussed this concept it considered the similarities and differences between the principal/articled student relationship and the lawyer/paralegal relationship. If the theory behind a cap is that the public is at risk if a lawyer supervises too many paralegals, how do we deal with

situations where the lawyer also acts as a principal? If the paralegal cap was set at two, one could envision a situation where the lawyer is acting as principal for one student while supervising two paralegals. This would effectively mean the lawyer was supervising three people who are allowed to provide lawyer-like services. Is the public more at risk in this situation as compared to a lawyer supervising two paralegals? If not, then might we allow a lawyer to supervise three paralegals?

A possible way around this discrepancy would be to say that a lawyer can supervise up to four paralegals and articled students, provided no more than two are articled students. Another possibility is to allow a lawyer who has supervised the maximum number of paralegals for a set period of time without a founded complaint to be able to apply for an expansion of the cap. This would allow lawyers on a case-by-case basis to expand the delivery model, but with a safeguard based on past performance.

While the Task Force was alive to arguments both in favour of and opposed to capping, it ultimately concluded the insurance issues arising from not having a cap, together with the resulting adverse effect on the protection of the public interest, spoke in favour of a cap. The Benchers may wish to consider whether a process for applying for an exemption should be created.

I. Recommendation regarding capping the number of paralegals a lawyer can supervise

There are essentially three options the Task Force considered regarding a cap:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of paralegals performing enhanced functions a lawyer can supervise;
3. Absent obtaining permission from the Law Society, a lawyer can supervise a maximum of four paralegals performing enhanced functions and articled students, with no more than 2 being articled students.

The Task Force recommends:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of legal assistants or paralegals performing *traditional* functions that a lawyer may supervise.
3. Law Society communications should make it clear that these changes are not intended to alter existing legal services delivery models in law firms; rather, they are intended to allow for lower cost, competent legal services to be delivered to the public in areas of unmet need.

(ii). *Should remote supervision be permitted*?

Similar to the issue of capping, neither the Benchers nor the Task Force had unanimity regarding remote supervision. Approximately 56% of the Benchers favoured allowing remote supervisions.

In determining the best approach, it is worth considering the extent to which remote supervision occurs at present. If one considers the amount of communications where instructions are provided by way of phone and/or email to staff, it is clear that a measure of delegation and supervision is already occurring via telecommunication devices.

It is also important to be mindful that people are increasingly communicating through digital technologies. It is becoming the norm, and people are developing greater fluency with the technology.

When the Task Force discussed Community Advocates with Wayne Robertson, QC, Executive Director of the Law Foundation of British Columbia, he explained that there are some communities, such as Haida Gwaii, where the advocate is currently being supervised remotely by lawyers in Vancouver. This is because there are no lawyers in Haida Gwaii. This is similar to the observation, made by Pamela Shields at the Benchers' Retreat, that there are paralegals working in some aboriginal communities where there are no lawyers. An absolute restriction on the ability to remotely supervise paralegals would have a detrimental effect on these important services.

One concern raised by some Benchers is that if remote supervision was allowed, then large firms would set up paralegals in smaller communities, providing lower cost legal services that harm the viability of local lawyers. In determining the weight to be given to this concern, the Benchers need to be guided by the mandate to protect the public interest in the administration of justice. If the conclusion is that the remotely supervised paralegal cannot provide services competently, then the services should not be permitted. If the services can be provided competently, then the services should be allowed. If the Society is seen to be protecting the economic interest of lawyers over the access to justice needs of British Columbians it will create negative optics for the profession and the future of self-regulation.

Predicting the likelihood of harm to practices outside major urban centres is not a scientific enterprise. One may reasonably take the position that remote supervision of paralegals will harm legal practices in smaller communities, but one may equally take a contrary view. The decision to implement a cap would have a mitigating effect on the potential materialization of that risk, however. It is highly unlikely that a lawyer in Vancouver would use his or her limited cap space to seed remote communities with paralegals. The cost of operating the law practice from one office with four paralegals is less than operating five offices (one with the lawyer, and four remote offices). Profit margins would be seriously impacted, and it would not in most cases be a good business decision. Another consideration is that the retainer will continue to be between the lawyer and the client, and if the client lives in a remote community and wants to speak to

the lawyer, odds are they would prefer having the lawyer's office located within (or proximate) to the community where the client lives. The local firm's presence in, and connection to, the community gives it an advantage that the remotely supervised satellite office cannot likely match.

Recognizing, however, that a decision either way is speculative, one possibility is to place an additional cap on the number of remotely supervised offices a lawyer (or law firm) can have.

II. Recommendation regarding remote supervision of a paralegal

The Task Force Recommends that remote supervision of paralegals be permitted, but that the Benchers also consider capping the number of paralegals a lawyer or law firm can supervise through remote supervision.

D. *General issues*

If the Benchers adopt the approach recommended by the Task Force there are several factors to bear in mind:

1. It would be important to make it clear that lawyers remain responsible for the actions of non-paralegal staff. While the wording of Chapter 12, Rule 1 of the *Professional Conduct Handbook* covers this, it is a point worth emphasizing in communications about the changes.
2. The requirements for supervision should be set out in rules (the *Handbook*?), guidelines, or both.
3. The more a paralegal is a proxy for the lawyer, particularly in giving legal advice or appearing in court, the more important good character becomes. Without regulating paralegals directly, how can the good character of a paralegal be assured? One possibility is to require lawyers who use paralegals to require the paralegal to sign an oath or affirmation to subscribe to certain standards of conduct.
4. Because "paralegal" is already in common usage, the Benchers might want to consider whether a new term should be coined. The risk in using an existing term is that some firms will have multiple people using the term already, many of whom might not qualify as paralegals under the new scheme. Using adjectival descriptors might similarly cause problems. For example "Advanced Paralegal" or "Enhanced Paralegal" might have pejorative connotations for ordinary paralegals. Because we don't certify paralegals, "Certified Paralegal" is not an option. "Registered Paralegals" might also require a scheme. One possibility would be to call them "Professional Paralegals" to connote a higher standard.
5. An idea the Task Force approved of, but which was not debated by the Benchers, is the idea of requiring the supervising lawyer to submit a form to the Law Society that sets out important information about the supervision arrangement. If the form were automated through the member login portion of the website, it

would be easier to analyze information than if the form is a paper form. This will likely add administrative functions to the Law Society's operations, and at some point the cost and resource implications for Member Services needs to be considered. The form might include:

a. The names of the paralegals the lawyer is supervising;

b. The areas of law in which the lawyer is using the paralegals;

c. The types of enhanced services the paralegal will perform;

d. The education and experience of the paralegal;

e. A copy of the oath/affirmation of conduct;

f. The location of the office the lawyer & paralegals work in;

g. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals;

h. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs.

6. It is important to ensure that any changes to the roles of paralegals do not harm existing programs provided by the Legal Services Society or funded agencies, or the community advocate work funded by the Law Foundation. Poverty law services fill an important gap in the access to justice landscape, and it is important to avoid unintended consequences arising from the proposed changes.

I. Recommendations regarding general issues

a) The requirements and restrictions for lawyer supervision should be set out in either the Rules, the *Handbook*, or an appendix to the *Handbook*.

b) [Optional] The supervising lawyer should be required to submit a form to the Law Society electronically that includes:

i. The names of the paralegals the lawyer is supervising;

ii. The areas of law in which the lawyer is using the paralegals;

iii. The types of enhanced services the paralegal will perform;

iv. The education and experience of the paralegal;

v. A copy of the oath/affirmation of conduct;

vi. The location of the office the lawyer & paralegals work in;

vii. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals;

viii. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs.

The Task Force did not determine that the form was required. It is provided as an optional recommendation because the Benchers have not made a determination as to whether it is desirable.

E. *Regulatory Process*

In the past, an allegation of failure by a lawyer to supervise staff has never led to a disciplinary process more severe than a Conduct Review. As the Task Force observed in its June 11, 2010 report:

> If the supervised paralegal engages in activity that would lead to a suspension or disbarment if performed by a lawyer, but the result is never more severe than a conduct review for the supervising lawyer, we have arguably created a weaker regulatory function with respect to those services. (p. 17)

Either the rules (the *Handbook*?) or the guidelines should make it clear that if a paralegal performs a task incompetently the lawyer may be treated, for regulatory purposes, as if the lawyer performed the task incompetently. In other words, our regulatory process must not allow for a two-tiered model of regulation based on whether the services were provided by a lawyer or a paralegal. Such a result cannot be permitted because we have no means to directly sanction the paralegal. Serious errors by a paralegal must have the potential to carry serious consequences for the supervising lawyer. Public confidence in the regulatory system requires this safeguard and lawyers must be made to understand this necessity and the risk associated with it. The disciplinary process must be commensurate with the gravity of the complaint, and the process must be as transparent as possible in order to ensure the public has confidence in the regulatory model.

I. Recommendations regarding the regulatory process

The Task Force recommends that the Discipline Guidelines be amended to make it clear that failure to supervise a paralegal performing enhanced functions is by its nature more serious than a standard finding of failure to supervise, and the full range of discipline actions should be available. A sanction that should be added to the list is a prohibition against a lawyer being able to supervise paralegals performing enhanced functions in the future.

5. EXEMPTIONS

As noted, the intention of the proposed reforms is to enhance access to competent and affordable legal services. The object is not to harm the existing practices of lawyers and law firms, nor to harm important public interest work that is being performed. Because of this the Task Force considered whether exemptions should be permitted.

As the Task Force observed in its June 11, 2010 report, community advocates perform an important function in the access to justice landscape. In particular, they provide legal assistance to the poor and marginalized members of society who will rarely have access to a lawyer. While expanding the permissible duties of paralegals and articled students might allow for a marginal increase of legal services to the poor, the Task Force does not anticipate the recommendations contained in this report will have a meaningful impact on access to justice for the poor. In light of this, it is essential that any reforms do not hinder the important work that is being done by lawyer supervised community advocates.

The Law Foundation has been funding and developing programs for the training of community advocates. To date, the feedback on that work has been very positive. The reality of this niche legal service, however, is that it might not be possible to deliver existing community advocacy services under a model of heightened paralegal services unless the Benchers create exemptions for the community advocate services. The example of direct supervision by a lawyer and the situation in Haida Gwaii is one such example. Care has to be taken to ensure that in our efforts to improve access to legal services for people of moderate and middle-class means, we do not create a supervisory model that extinguishes much needed services for the poor.

In addition, there are clinical programs such as the Law Students' Legal Advice Program and the Aboriginal Law Clinic, that provide valuable legal services to the public. These programs should be exempted, and clinics should be able to apply to a committee as designated by the Benchers for consideration of an exemption. The key components will be that the non-lawyers providing services at the clinic are supervised by a lawyer and properly trained, and that the lawyer is satisfied the staff are able to provide services in a competent and ethical manner. These services must also comply with the restrictions on the practice of law as contained in the *Legal Profession Act.*

I. Recommendation regarding community advocates

The Task Force recommends that the following be exempted from the application of this report:

1. Community advocates funded and designated by the Law Foundation of British Columbia;
2. Student legal advice programs or clinical law programs run by, associated with, or housed by a law school in British Columbia; and
3. Non-profit organizations providing free legal services, provided the organization is approved by the Executive Committee of the Law Society of British Columbia.

6. CONCLUSION

Access to justice and legal services challenges are occupying governments, policy-makers, legal professionals and the public in jurisdictions around the world. For a variety of reasons, many people with serious legal problems are unable to secure the services of a

lawyer. For many people the cost of legal services present a barrier. Yet these people are dealing with legal issues that can impact adversely on their private lives as well as their ability to function in society. While the Benchers realize that in a perfect world these people would have recourse to the services of a lawyer, we know as a practical matter this is not always the case. It is therefore incumbent on the profession to examine its delivery model and ask how it can respond to the needs of the public in the 21st Century, while still ensuring that the safeguards of competency and proper regulation are met.

The recommendations in this report are incremental rather than revolutionary, and the Task Force does not purport to hold them out as a cure for all the challenges associated with access to justice. The Task Force does believe, however, that it is an important step in the right direction. The Law Society's mandate requires it to protect the public interest in the administration of justice. This mandate was the focal lens through which the Task Force examined its work. Once the profession embarks down this road the Law Society needs to monitor the changes to ensure the public is being well-served and that the regulatory mechanism is properly protecting the public from harm. This examination may involve an initial survey of the profession, and a follow-up survey of both the profession and the public down the road. It is important to receive feedback as to what is working and what is not with respect to these changes, in order that the Law Society can ensure the public is well served.

The object of these reforms is to enhance the public's access to competent and affordable legal services. The object is not to constrain existing practices. Similar to the Benchers' decision to provide guidelines for lawyers to provide limited scope legal services, the intention is to enable lawyers to modify their practices to meet the legal service needs of the public, while ensuring that safeguards exist to protect the public from harm. The Task Force believes the recommendations contained in this report are small but important steps the profession should take to better meet the legal needs of the public it serves.

SUMMARY OF RECOMMENDATIONS

Expanded Roles for Articled Students:

Recommendation 1:
The Task Force recommends that the Credentials Committee be directed to explore expanded duties for Articled Students. The referral of matters to the Credentials Committee should include the background material on Articled Students that the Task Force considered.

Expanded Roles for Paralegals:

Recommendation 2:
The Task Force recommends the following definition of paralegal:

> A paralegal is a trained professional who:
> - works under the supervision of a lawyer;
> - possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
> - possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and
> - carries out his or her work in a competent and ethical manner.

The Task Force further recommends that the following instructions supplement the definition, potentially by way of an annotation or footnote:

> A lawyer must not delegate work to a paralegal, nor may a lawyer hold someone out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training, experience, and good character to perform the tasks delegated by the lawyer in a competent and ethical manner. In arriving at this determination lawyers should be guided by [**refer to guidelines**]. Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

Recommendation 3:
The Task Force recommends:

a) Paralegals should not be allowed to give or receive undertakings;
b) The Law Society should work with the courts to determine what forms of advocacy paralegals should be permitted to perform;
c) The Strategic Plan should be amended to include as follows: A working group or task force of Benchers and staff will work with the British Columbia Supreme

Court and the Provincial Court of British Columbia to explore what advocacy roles supervised paralegals should be allowed to perform in accordance with the recommendations contained in the Report of the Delivery of Legal Services Task Force. The working group or task force will make recommendations to the Benchers with regard to any potential changes to the Law Society Rules and *Professional Conduct Handbook* that might be required as a result of the consultations with the courts.

d) Paralegals should be allowed to give legal advice in matters the supervising lawyer has deemed the paralegal competent to provide advice.

Recommendation 4:
The Task Force recommends:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of legal assistants or paralegals performing *traditional* functions that a lawyer may supervise.
3. Law Society communications should make it clear that these changes are not intended to alter existing legal services delivery models in law firms; rather, they are intended to allow for lower cost, competent legal services to be delivered to the public in areas of unmet need.

"Enhanced functions" consist of giving legal advice and/or engaging in advocacy functions permitted by courts or tribunals.

Recommendation 5:
The Task Force Recommends that remote supervision of paralegals be permitted, but that the Benchers also consider capping the number of paralegals a lawyer or law firm can supervise through remote supervision.

Recommendation 6:

a) The requirements and restrictions for lawyer supervision should be set out in either the Rules, the *Handbook*, or an appendix to the *Handbook.*
b) **[Optional]** The supervising lawyer should be required to submit a form to the Law Society electronically that includes:
    i. The names of the paralegals the lawyer is supervising;
    ii. The areas of law in which the lawyer is using the paralegals;
    iii. The types of enhanced services the paralegal will perform;
    iv. The education and experience of the paralegal;
    v. A copy of the oath/affirmation of conduct;

vi. The location of the office the lawyer & paralegals work in;

vii. A description of the supervision model/plan the lawyer has in place to train and supervise the paralegals.

viii. Whether any supervision occurs remotely, and if so a description of the steps the lawyer is taking to ensure adequate supervision occurs

Recommendation 7:

The Task Force recommends that the Discipline Guidelines be amended to make it clear that failure to supervise a paralegal performing enhanced functions is by its nature more serious than a standard finding of failure to supervise, and the full range of discipline actions should be available. A sanction that should be added to the list is a prohibition against a lawyer being able to supervise paralegals performing enhanced functions in the future.

Recommendation 8:

The Task Force recommends that the following be exempted from the application of this report:

1. Community advocates funded and designated by the Law Foundation of British Columbia;
2. Student legal advice programs or clinical law programs run by, associated with, or housed by a law school in British Columbia; and
3. Non-profit organizations providing free legal services, provided the organization is approved by the Executive Committee of the Law Society of British Columbia.

ATTACHMENT 1

Proposal for a general certification scheme

The Paralegal Task Force has determined that the curricula of the Capilano College legal assistant diploma and certificate programs should serve as the benchmark for paralegal education in British Columbia. The Task Force anticipates that other colleges in the province will develop curricula to meet specific criteria the Paralegal Task Force expects to develop based on this benchmark.

Categories of applicants for general certification

Subject to the grandparenting certification scheme, the Task Force proposes that the following categories of applicants be eligible to apply for general certification:

- Graduates of Canadian law schools

Graduates of Canadian law schools may apply for certification, provided they have completed one year of legal or paralegal work experience in British Columbia in the preceding five years.

- Graduates of approved Canadian paralegal programs

Graduates of recognized Canadian paralegal programs that meet specified criteria may apply for certification, provided those graduates have completed one year of paralegal work experience in British Columbia in the preceding five years.

At present, the Task Force views the Capilano College Legal Assistant diploma and certicate programs as the benchmark for paralegal education in BC, and graduates of either of those programs who have completed one year of paralegal work experience in BC accordingly may apply for certification.

- Applicants who graduate from Canadian paralegal programs of recognized Canadian institutions but which programs do not meet specified criteria

Graduates of paralegal programs that do not meet specific criteria set by the Law Society may apply for certification provided they successfully pass a challenge exam and have completed one year of paralegal work experience in British Columbia in the preceding five years.

- Graduates of paralegal programs from other common law jurisdictions

Graduates of paralegal programs offered by recognized institutions in other common law countries may apply for certification provided they successfully pass a challenge exam and have completed one year of paralegal work experience in British Columbia in the preceding five years.

- Applicants holding an LL.B or equivalent degree from common law jurisdictions outside Canada

Applicants who hold an LL.B. or equivalent degree from a law school in a common law jurisdiction may apply for certification provided they:

- have completed one year of legal or paralegal work experience in British Columbia in the preceding five years; or
- have completed one year of legal or paralegal work experience outside British Columbia in the preceding five years and have successfully passed a challenge exam.

Proposal for a grandparenting certification scheme

The Paralegal Task Force recognizes that BC paralegals have diverse backgrounds, including those who have graduated from the Capilano College, Selkirk College, Vancouver Community College or other college legal assistant programs, those who have an LL.B from a common law jurisdiction and those who have legal work experience and no formal legal training.

The Paralegal Task Force identified four factors that must be considered when evaluating the different work and educational experience of paralegals for the purpose of certification. The Task Force considers of key importance an applicant's:

- knowledge of procedural law;
- knowledge of substantive law;
- practical skills; and
- analytical skills.

In recognition of the diversity of paralegal backgrounds, the Paralegal Task Force is proposing two categories of applicants who may apply for paralegal certification through special grandparenting provisions, provided they do so within five years of the commencement of a general paralegal certification program. After the five-year period, the grandparenting provisions would expire and applicants would have to meet general certification requirements.

Categories of applicants for certification through grandparenting

- Graduates of the Vancouver Community College or Selkirk College legal assistant programs

Graduates of the legal assistant programs of either Vancouver Community College or Selkirk College who have three years of paralegal work experience in British Columbia in the preceding five years may apply for certification.

- Paralegals with work experience only

Persons who have completed 10 years of legal work experience in British Columbia, including at least five years of paralegal work experience, in the preceding 15 years may apply for certification.

Memo

The Law Society of British Columbia

To Benchers

From Ethics Committee

Date April 23, 2012

Subject **Delivery of Legal Services Task Force: Implementation of Recommendations Regarding Professional Conduct**

I. Background

In October 2010 the Law Society's Delivery of Legal Services Task Force Report recommended increasing the roles that paralegals and articled students can perform under the supervision of a lawyer to enhance the public's access to competent and affordable legal services. The Benchers endorsed those recommendations at the October 1, 2010 Bencher meeting.

In order to implement some of the Task Force's recommendations it is necessary to change the rules of professional conduct. This memo identifies the recommendations of the Task Force that, in our view, fall within the jurisdiction of the Ethics Committee and proposes rule changes to the BC Code to either give effect to the recommendation or to implement an alternative policy we believe is more appropriate.

II. Recommendations Within the Ethics Committee's Jurisdiction

In our view, Recommendation 2, Recommendation 3, items (a) and (d), and Recommendation 8 fall within our jurisdiction. We also make our own recommendation in Section III below with respect to Recommendation 4, which proposes that the number of paralegals a lawyer may supervise should be limited to two. We set out those recommendations below and describe the steps we have taken to deal with them in the attached changes we propose to Subrule 5.01 of the BC Code.

Recommendation 2:

> The Task Force recommends the following definition of paralegal:
>
> A paralegal is a trained professional who:
> - works under the supervision of a lawyer;

- possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
- possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and
- carries out his or her work in a competent and ethical manner.

The Task Force further recommends that the following instructions supplement the definition, potentially by way of an annotation or footnote:

> A lawyer must not delegate work to a paralegal, nor may a lawyer hold someone out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training, experience, and good character to perform the tasks delegated by the lawyer in a competent and ethical manner. In arriving at this determination lawyers should be guided by [refer to guidelines]. Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

The definition of "paralegal," together with Subrule 5.01(3.2) and the following Commentary in the draft incorporate the criteria recommended by the Task Force. These provisions state:

> **"paralegal"** means a non-lawyer who is a trained professional working under the supervision of a lawyer.

(3.2) A lawyer may employ as a paralegal a person who

(a) possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;

(b) possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and

(c) carries out his or her work in a competent and ethical manner.

Commentary
A lawyer must not delegate work to a paralegal, nor may a lawyer hold a person out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training and experience and is of sufficiently good character to perform the tasks delegated by the lawyer

in a competent and ethical manner.

In arriving at this determination, lawyers should be guided by Appendix E.

Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

Recommendation 3:

The Task Force recommends:

a) Paralegals should not be allowed to give or receive undertakings;
b) Paralegals should be allowed to give legal advice in matters the supervising lawyer has deemed the paralegal competent to provide advice.

Subrule 5.01(3)(c) of the BC Code which you have passed already permits non-lawyers to give or accept undertakings on behalf of a lawyer under strict conditions, including at the direction and under the supervision of a lawyer. It currently states:

5.01(3) A lawyer must not permit a non-lawyer to:

(c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

We think the ability to act as the supervising lawyer's agent in giving or accepting undertakings is an important part of increasing the responsibilities that paralegals are able to fulfill. Increased potential of paralegals to assume responsibility for undertakings will increase the flexibility of the services a lawyer is able to offer and will ultimately benefit the public. However, we think the current language of Subrule 5.01(3)(c) is too wide and we propose to alter it to clarify that the undertaking given or accepted by a paralegal is not the paralegal's own undertaking, but that of the lawyer responsible for the matter. In our view, although this proposal is narrower than the current rule, it is a more reasonable limitation than that sought by the Task Force and more in keeping with the general purpose of expanding the range of functions non-lawyers can provide, while still ensuring the public is adequately protected.

The version of Rule 5.01(3)(c) that we propose now states:

5.01(3) A lawyer must not permit a non-lawyer to:

(c) give or accept undertakings or trust conditions, but a non-lawyer may give or accept undertakings on behalf of the lawyer responsible for a legal matter, at the direction of and under the supervision of that lawyer, provided that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

Subrule 3.2 permits paralegals to give legal advice and represent clients before a tribunal, where such representation is permitted by the tribunal.

Recommendation 8:

The Task Force recommends that the following be exempted from the application of this report:

1. Community advocates funded and designated by the Law Foundation of British Columbia;
2. Student legal advice programs or clinical law programs run by, associated with, or housed by a law school in British Columbia; and
3. Non-profit organizations providing free legal services, provided the organization is approved by the Executive Committee of the Law Society of British Columbia.

Subrule 3.1 incorporates Recommendation 8.

III. Limitation on number of paralegals a lawyer may supervise

Recommendation 4 states:

The Task Force recommends:

1. A lawyer can supervise a maximum of 2 paralegals performing enhanced functions;
2. There should be no limit to the number of legal assistants or paralegals performing *traditional* functions that a lawyer may supervise.
3. Law Society communications should make it clear that these changes are not intended to alter existing legal services delivery models in law firms; rather, they are intended to allow for lower cost, competent legal services to be delivered to the public in areas of unmet need.

"Enhanced functions" consist of giving legal advice and/or engaging in advocacy functions permitted by courts or tribunals.

We are of the view it is a mistake to limit the number of paralegals a lawyer may supervise. We understand the Task Force was divided on this issue, although it ultimately recommended a lawyer should not supervise more than two paralegals.

The number of paralegals it is realistic for a lawyer to supervise, in our view, will depend on the areas of law in which the lawyer and paralegal work, the paralegal's training and experience, the lawyer's experience and other factors unique to the working situation between the lawyer and the paralegal. Where a lawyer lacks sufficient time to oversee the work of a paralegal in the way required by the rules, or is too inexperienced in the work the paralegal is entrusted with to properly supervise that work, it may be unreasonable for a lawyer to attempt to supervise any paralegals at all. In other circumstances, where the lawyer has structured his or her practice to accommodate supervision responsibilities and is familiar with paralegals' areas of practice it may be reasonable for the lawyer to supervise more than two paralegals.

We think it is unlikely that paralegals will only be engaged in the enhanced functions—giving legal advice and appearing before tribunals—permitted by these new rules. More likely, they will instead will move from their traditional and usual work into the enhanced work and back again. In other words they will continue to do what they have always done but will add some enhanced functions to their traditional work. Because they will not be performing the enhanced functions exclusively, their new duties will not be a full time job. Restricting the number of paralegals a lawyer can supervise in these circumstances is unrealistic in our view, and has the potential to constrain lawyers from assigning enhanced work to existing staff in circumstances where the public would benefit from such a reassignment.

The attached draft attempts in the Commentary to Subrule 5.01(1) to recognize individual circumstances and impose a duty on lawyers not to attempt to supervise an unreasonable number of paralegals. You need to consider whether you agree with this recommendation. Should you not agree and wish to limit the number of paralegals one lawyer may supervise to two, we are of the view it would be more appropriate to have such a limitation in the *Law Society Rules*, rather than in the Code of Conduct.

IV. Best Practice Guidelines

Appendix E to BC Code Rule 5.01 consists of best practice guidelines based on a report prepared by former Benchers Ralston Alexander and Glen Ridgway and 2011 Ethics Committee member Christine Elliot. A memorandum from Messrs. Alexander and Ridgway and Ms. Elliot along with the guidelines is attached for your information.

V. Transition Provisions to BC Code

Because the revisions to the BC Code we propose cannot be operative until the Code comes into effect on January 1, 2013, we also attach a revised Chapter 12 of the *Professional Conduct Handbook* that amends Chapter 12 of the *Professional Conduct Handbook* to make the language of Chapter 12 as close as possible to the revised language we propose here to Rule 5.01 of the BC Code. The Chapter 12 language, of course, will come into effect immediately if you pass it and will be effective until it is replaced by the BC Code language on January 1, 2013.

Note that Chapter 12 continues in effect Rules 10, 11 and 12 of the current *Professional Conduct Handbook* dealing with real estate assistants (rules 10, 11 and 12 are not shown in the attached draft). These rules are not carried forward at this time into Rule 5.01 pending discussions with the Real Estate Association about whether a 2004 understanding between the Association and the Law Society concerning them may permit their transfer to the Law Society website from the Code of Conduct.

VI. Recommendations

We recommend you:

- Adopt amended Rule 5.01 and Appendix E of the BC Code, to be effective when the new Code is proclaimed on January 1, 2013, pursuant to the attached suggested resolutions.

- Adopt amended Chapter 12 of the *Professional Conduct Handbook* and Appendix 7 until the BC Code is in effect, pursuant to the attached suggested resolutions.

Attachments:

- Draft of revised Rule 5.01 of the BC Code with Appendix E.
- Draft of revised Chapter 12 of *Professional Conduct Handbook* with Appendix 7.
- Suggested resolutions in relation to the BC Code.
- Suggested resolutions in relation to the *Professional Conduct Handbook.*
- Delivery of Legal Services Report
- Memorandum from Messrs. Alexander and Ridgway and Ms. Elliot and Draft Best Practice Guidelines for Lawyers Supervising Paralegals.

THE LAW FOUNDATION OF BRITISH COLUMBIA

1340–605 Robson Street, Vancouver,
British Columbia, V6B 5J3 Canada
FAX 604/688-4586 • Phone 604/688-2337

Bencher
FYI

May 16, 2012

Mr. Tim McGee
CEO and Executive Director
Law Society of BC
845 Cambie Street
Vancouver, BC V6B 4Z9

Dear Mr. McGee:

Re: Pro Bono Law in British Columbia

I am writing to report to you on the use of the Law Society's pro bono funds in 2011. This report details funds advanced during the year, as opposed to grants made during the year. This, I believe, provides a more accurate picture of funding activities as some grants are made covering multiple years (for example, a grant might be made in 2009 which provides funding to an organization for the period 2009 to 2011).

As you know, the Law Foundation has, since 2001, been funding pro bono activities of the legal profession in the province. It has supported, together with the Law Society and the Canadian Bar Association, the development of Pro Bono Law BC, which in 2010 merged with the Western Canada Society to Access Justice to become the Access Pro Bono Society of British Columbia. I am pleased to let you know that at our Board's March 2012 meeting, Access Pro Bono was made a continuing program of the Law Foundation.

At the Benchers meeting of November 10, 2006, the Benchers of the Law Society passed a motion authorizing an annual payment to the Law Foundation of 1% of the general fund portion of the annual practice fee to be distributed to organizations offering pro bono services to the public. In 2011, the amount received by the Law Foundation was $152,650.22.

Prior to 2006, the Law Foundation had funded a total of approximately $200,000 per year towards pro bono activities and committed to continuing to fund at least this amount out of its own, non-Law Society funds, in the future.

I am pleased to report to you that in 2011, with this support from the Law Society, the Law Foundation was able to provide funding totalling $600,727 to pro bono organizations (if you include the Law Students Legal Assistance Program at UBC (LSLAP) and the Law Centre at the University of Victoria (UVic) the figure grows to $1,127,447, with those two programs receiving $166,920 and $359,800 respectively). Breakdowns of funding to, and statistics from, pro bono organizations in 2011 are attached.

As you will see from the attached statistics, there are a significant number of lawyers and law students involved in pro bono activities in the province. There are a significant number of clients served. The profession can be proud of the pro bono contribution its members make.

On behalf of the Law Foundation, I want to thank you and the Benchers of the Law Society for your support of this important initiative.

I trust you will find the above in order. If you have any questions or comments, I can be reached at wrobertson@lawfoundationbc.org 604-688-7360.

Yours truly,

Wayne Robertson, QC
Executive Director

cc: Bill McIntosh, Manager, Executive Support

W:\PROJECTS\Pro Bono Report to Law Society\Letter Tim McGee Pro Bono April 2012.doc

Pro Bono Projects and Programs **funded in 2011**:

Access Pro Bono Society of BC
- $390,000 Operating Grant
- $32,000 Rural and Disabled Access to Pro Bono Legal Services Project
- $10,700 Civil Chambers Pro Bono Duty Counsel Project Extension; and
- $25,000 Pro Bono Disbursement Fund

Salvation Army (SA): $50,000 Pro Bono and Justice Services Program

Multiple Sclerosis Society (MS): $50,000 Volunteer Legal Advocacy Program

Pro Bono Students Canada – UBC (PBS-UBC): $24,360 Community Placement Project

Pro Bono Students Canada – UVic (PBS-UVic): $18,667 Student Placement Program

Statistics
Pro Bono Activities by Lawyers and Law Students in British Columbia
2011

Total number of lawyers participating in formal Pro Bono programs:

SA	APB	MS	LSLAP	Total
203	508	37	95	843

Number of lawyers volunteering in clinics:

SA	APB	LSLAP	Total
187	308	95	590

Number of lawyers volunteering on roster programs:

APB	MS	Total
97	37	134

Number of law students volunteering:

LSLAP	UVic	PBS-UBC	PBS-UVic	Total
269	42	48	44	403

Number of clinic locations:

SA	APB	LSLAP	Total
22	94	22	138

Total number of clients served by clinics:

SA	APB	LSLAP	UVic	Total
1,795	5,439	3,122	1,602	11,958

Number of clients served by roster programs:

APB	MS	Total
105	18	123

Number of community organizations served:

PBS-UBC	PBS-UVic	Total
20	11	31

Number of lawyers volunteering on the Civil Chambers Pro Bono Duty Counsel project (APB) : 99

Number of clients served by the Civil Chambers Pro Bono Duty Counsel project: 213