THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING:	Benchers	
DATE:	Friday March 5, 2004	
PRESENT:	William Everett, QC, President	Darrell O'Byrne
	Ralston Alexander, QC, 1st Vice-president	Margaret Ostrowski, QC
	Joost Blom, QC	June Preston
	Ian Donaldson, QC	Glen Ridgway, QC
	Anna Fung, QC	Patricia Schmit, QC
	Carol Hickman	Alan Seckel, QC, Deputy AG
	Gavin Hume, QC	Dirk Sigalet, QC
	John Hunter, QC	Gordon Turriff, QC
	William Jackson	Art Vertlieb, QC
	Patrick Kelly	James Vilvang, QC
	Terry La Liberté, QC	Anne Wallace, QC
	Bruce LeRose	David Zacks, QC
	Robert McDiarmid, QC	
	Patrick Nagle	
NOT PRESENT:	Michael Falkins	Ross Tunnicliffe
	Grant Taylor	Dr. Maelor Vallance
	Lilian To	
STAFF PRESENT:	James Matkin, QC, Executive Director	Michael Lucas
	Mary Ann Cummings	David Newell
	Charlotte Ensminger	Jack Olsen
	Su Forbes, QC	Neil Stajkowski
	Tim Holmes	Alan Treleaven
	Jeffrey Hoskins	Ron Usher

GUESTS:
Dean Mary Ann Bobinksi, University of British Columbia
Robert Brun, President, CBABC
Bill McNaughton, Chair CLE Society
Jack Huberman, QC, Executive Director, CLE Society
Ron Friesen, CLE Society
Ian Aikenhead, QC, Chair, LAP
Derek LaCroix, Executive Director, LAP
Mike Wilhelmson, Lawyers Weekly

1. MINUTES

The minutes of the meeting held on February 6, 2004 were approved as corrected.

2. PRESIDENT'S REPORT

Mr. Everett noted that as a result of being appointed a master of the Supreme Court, Peter Keighley would no longer be a Bencher. He said Mr. Keighley's departure was bittersweet because noone deserved the appointment more than Mr. Keighley, and noone would be more missed from the Benchers table. He said Mr. Keighley was a true "full-service" Bencher, who never said no to a task he was asked to take on.

Mr. Everett reported that he and others had been working with the CBABC on the question for the referendum on the annual practice fee, which would be discussed later in the meeting. He thanked Mr. Hoskins for the work he had done.

Mr. Everett reported that a task force had been appointed to develop rules with respect to lawyers practicing through limited liability partnerships (LLPs), if legislation permitting LLPs passes later in the year.

Mr. Everett reported that the Law Society had hosted a ceremony and reception for newly appointed Queen's Counsel, which was appreciated by the Attorney General and the guests.

Mr. Everett reported that the Law Society of Upper Canada had won its litigation in the Supreme Court of Canada over copyright issues; consequently, law libraries and lawyers would continue to be able to make copies of reported decisions for the purpose of conducting research or representing their clients, without infringing the copyright of the publishers. He said the result was an important win for the public and access to justice.

Mr. Everett thanked Ms. Wallace for representing the Law Society at the swearing in and welcoming of new Judges Donna Senniw and Joseph Galati.

Mr. Everett reported that unless the Benchers objected, he intended to take Mr. Keighley's place as the Law Society's representative on the Federation of Law Societies Council for the balance of the year, with Mr. Alexander as the alternate representative.

3. EXECUTIVE DIRECTOR'S REPORT

Mr. Matkin reiterated Mr. Everett's thanks to Mr. Hoskins for the extraordinary effort he had made with respect to various matters, including several complex drafting projects for the Federation of Law Societies. With further regard to Law Society staff, Mr. Matkin reported that there were a number of internal candidates for the position of Director of Regulation. Mr. Matkin said senior staff members had begun work on a revision of the strategic plan, based on the theme of building trust.

Mr. Matkin reported that the provincial government had introduced the *Business Practices and Consumer Protection Act* that included the requirement for lenders to provide discharges within thirty days of payment.

Mr. Matkin reported that the Law Society had reached a tentative deal with the Society of Notaries Public to provide certification for notaries for electronic filing at the LTO.

Mr. Matkin introduced his report on the Law Society organizational performance review. He explained that the report was in four parts. The monitoring indicators for 2003, a public survey, a member survey, and a performance analysis of key programs using the "stoplight" indicator. With respect to the voluntary member survey, Mr. Matkin said the members were happier with the Law Society and its performance in almost all respects. He also noted that reported incomes were somewhat higher than what was reported in the previous survey. With respect to the public survey, Mr. Matkin said the trend was downward in most respects, which was quite serious,

although the only area where lawyers were rated lower than five on a scale of ten was "value for money". He said it was difficult to attribute the decline in public perception to any one program area but following discussion with the Audit Committee and Financial Planning Subcommittee the Communications department "stoplight" had been changed from green to yellow. Mr. Matkin reviewed the program areas covered by the report.

Mr. Turriff commented that the theme of the strategic plan would be better described as "maintaining trust" rather than "building trust". Mr. Turriff noted the higher than average number of disability claims among Law Society staff and asked if any particular cause had been determined.

Mr. Stajkowski said there was no clear cause for the larger number of claims because there were multiple claim types. He said discussions with the Law Society's insurer were continuing.

Mr. McDiarmid said the public survey results with respect to "effectiveness" were troubling. He said advertisements by other professional organizations tended to say why someone should go to that profession, but the Law Society published how to complain about your lawyer. He said this was an irritant to members and sent a negative message. He did not think the Law Society had ever undertaken a promotion of the profession's strengths.

Mr. Kelly commented that the idea of a strategic plan and the communications challenge were related. He said if the Benchers focused effort on what they wanted to achieve, which is what a strategic plan can do, the kind of communications work that needed to be done would be closely related.

Ms. Wallace noted that the provincial council of the CBA had undertaken a campaign to improve the image of lawyers. She said the posters they put out were excellent and thought they did work to improve the public view of lawyers. Ms. Wallace said that if the Law Society decided to conduct a promotional campaign, it could learn from what the CBA had done.

Mr. Nagle said the public perception of lawyers was not a public relations problem but a professional problem that must be addressed by the profession. He said Mr. Zacks was correct when he said people don't like lawyers until they need them. He suggested the survey results pointed directly to the collapse of the legal aid system and the access of truly needy people to the law. He said the profession must address those issues rather than embark on a public relations campaign.

Mr. Brun said the CBA had launched a new program that included both print and television advertisements. He agreed with Mr. Nagle that professional issues were involved but he said it was still necessary to get the message out about the things that lawyers do.

Ms. Preston noted that people deal with individual lawyers, not the legal profession as a body. She said that from her experience on the Complaints Review Committee, many complaints came down to a question of courtesy. Ms Preston agreed with Mr. Brun that the legal profession needed to promote itself.

Mr. Turriff said it was important to get into the community with the message by working to get a curriculum for law into high schools and then working with teachers to help students gain an understanding of the significance of the legal profession. With respect to value for money, he noted that he was better placed than many to say that people do not like to pay large lawyer's bills, but the reason the bills are big is because the standards of work are very high. He said the profession could lower its standards and lower the cost to clients, which is effectively what happens when lay advocates take over. He said the message that must be delivered is that you have to pay for high standards.

It was moved (Sigalet/Zacks) to accept the Executive Director's report on organizational performance.

The motion was carried.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. ANNUAL PRACTICE FEE REFERENDUM

Mr. Hoskins reviewed his memorandum setting out three options for the form of question to be used in the referendum to set the annual practice fee for 2005.

Mr. Everett, in response to a question from Mr. Ridgway, confirmed that the referendum would set the fee only for 2005.

Mr. Brun said he had not been able to discuss the most recent draft questions with the CBA National. He noted that it was not necessary for the Benchers to decide on the questions at this meeting, and he suggested that the decision might be postponed until the April Benchers meeting. He noted that Option 2 was more in line with what he and Frank Kraemer had suggested, while Option 3 was perhaps the more accurate reflection of what could happen at an AGM. He said his concern was that the questions should be as neutral as possible, and that should be the guiding principle in formulating the question.

It was moved (Alexander/Hume) to postpone the discussion of this matter to the next meeting.

The motion was carried.

6. PRESENTATION FROM THE LAWYERS ASSISTANCE PROGRAM (LAP)

Mr. Aikenhead thanked the Benchers for the opportunity to speak on behalf of LAP. He said the presentation was not about money or budgets, but was an opportunity for the volunteers of LAP to speak to the volunteers of the Law Society. He said the program had tremendous value to members of the Law Society, and was based on the belief that the profession can be changed one person at a time. He said confidentiality was crucial to the success of the program, and people must believe that LAP is independent of the Law Society. Mr. Aikenhead then introduced the first of three lawyers who had been assisted by LAP and subsequently become volunteers.

Each of the three volunteers related their personal experience with LAP. Mr. C said he volunteered because he wanted to help the organization that kept him in the profession. He noted the earlier references to a strategic plan, and suggested that LAP could be a component of the strategy to improve the public view of lawyers. Mr. S. said LAP was instrumental in saving his life, and he would go to any length to help another member of the profession. He said it made a huge impact when one lawyer speaks to another and demonstrates that it is possible to recover from addiction. He said there was no doubt in his mind that every lawyer who has recovered from addiction with the assistance of LAP makes a better impression on the public. Mr. R observed that for every lawyer's life that is turned around by LAP, the benefit to the public and the profession is manifold. He said LAP did a wonderful and very cost-effective job.

Mr. LaCroix presented a report that included long term plans for LAP, and a list of services provided. He drew the Benchers' attention to a survey from Oregon, which has a program second only to LAP, funded by the lawyers' insurance program and which suggests that substantial savings in insurance claims results from the program.

Mr. McDiarmid noted that the Executive Director's report showed practice standards as a problematic area for the Law Society. He said in his experience, many of the people who come to the attention of the Practice Standards Committee ought to be referred to LAP, and he asked if there was something the Benchers could do to help get those people the assistance they need.

Mr. LaCroix said an earlier initiative to allow Law Society staff to initiate contact with LAP was voted down by the Benchers, but could be revisited.

Mr. Turriff asked if LAP had enough money.

Mr. LaCroix said there was enough money for the current year, but he drew attention to the long-term plan, which included adding another staff person in the next year.

7. LAWYER EDUCATION TASK FORCE INTERIM REPORT

Ms. Schmit introduced the first interim report of the Lawyer Education Task Force. She said the task force was examining a broad range of issues but was bringing forward an immediate recommendation with respect to continuing legal education because it was necessary, in the task force's view, to move ahead in that area in order to fulfill the Law Society's statutory mandate. Ms. Schmit said the task force recommended that the Benchers make a rule requiring lawyers to report to the Law Society how much continuing legal education they undertake each year, and establish a minimum expectation of 12 hours of course-work and 50 hours of self-study. Ms. Schmit said if the Benchers accepted the recommendations in principle, the task force would return with a detailed proposal for implementation, including a cost estimate.

It was moved (Schmit/Jackson) to adopt in principle the following recommendations:

1. Lawyers be required to report:

    a. Continuing legal education through course study (and instructing), including courses offered by the Continuing Legal Education Society, the Canadian Bar Association, the Trial Lawyers Association, local bar associations. The Federation of Law Societies, and commercial continuing legal education providers.

    b. Continuing legal education through self-study, including a broad range of self-study activities such as studies of legal texts, legal journals, case law and statutes, and case-specific reading or research.

2. Minimum expectations will be 12 hours annually for course study, and 50 hours annually for self-study.

Mr. Vilvang asked if there was any plan for a bureaucracy or some other mechanism to accredit courses, and whether any consideration had been given to establishing different expectations for lawyers of differing experience.

Ms. Schmit said the task force considered a number of models but at present suggested that the recommended expectations would be the minimum for all lawyers. With respect to accreditation, she said the task force was striving for simplicity. She noted that the Law Society of Upper Canada used a self-reporting system that involves tick boxes that allow lawyers to identify the kinds of work they have done. Ms. Schmit said the task force would consider implementation in more detail if the Benchers accepted the recommendations.

Mr. Vertlieb asked if the task force voted on mandatory CLE.

Ms. Schmit said the task force did vote on mandatory CLE and the outcome was split on whether mandatory CLE was appropriate at that time. She said the majority view was that self-reporting would be a necessary step should mandatory CLE be implemented in the future.

Mr. O'Byrne noted that criminal lawyers sometimes became involved in long trials that made it difficult to undertake any study for a lengthy period. He asked if consideration would be given to a longer reporting period.

Ms. Schmit said the task force had considered longer reporting periods. She noted that the Oregon State Bar used a three-year reporting period for mandatory CLE. However, she said, the task force concluded that since the recommendation was only for mandatory reporting and a statement of minimum expectations, a one-year reporting period was reasonable.

Mr. LaLiberté asked what had happened to the insurance rebate on CLE courses.

Ms. Schmit recalled that the insurance rebate scheme was ended because it was concluded that the discount could not be correlated to a benefit.

Mr. Sigalet favoured the recommendation, but said he was not in favour of mandatory CLE. He said reporting was an important step and would provide information for future consideration.

Mr. Hunter agreed with Mr. Sigalet's comments. He said there were some task force members who favoured immediate implementation of mandatory CLE and some who opposed it at any time. However, he said, all task force members agreed that the Law Society needs more information and that it would be worthwhile emphasizing the importance of continuing education to members.

Ms. Hickman asked if any Canadian jurisdictions had mandatory CLE requirements.

Ms. Schmit said there were no mandatory CLE jurisdictions in Canada. She said Ontario had had mandatory reporting for two years.

Ms. Fung favoured the recommendations. She said there was a clear emphasis in the interim report on increasing competence and continuing legal education. She asked if consideration had been given to emphasizing professionalism and ethics as a component of CLE.

Ms. Schmit said the task force did consider those components and near the beginning of its considerations had had discussions with Law Society staff members Jean Whittow, Su Forbes, and Jackie Morris, who said a small number of members account for a large proportion of problems and most problems are not competence. She said the task force did not know how to deal with the situation yet but would be continuing to consider it and would likely return with more detailed suggestions.

Mr. Turriff said the proposal was too little and too fuzzy, but there were good reasons for taking a baby-step. He said he accepted but was not necessarily persuaded that the Law Society need to take this route, and for his part would push for more and faster CLE requirements.

Ms. Preston asked if credit for self-study would be given to lawyers who contribute to the Law Society through committee work, which often required considerable self-study, and would Benchers get some credit for the work they do for the Law Society.

Ms. Schmit said that was the kind of detail the task force would return to the Benchers if the recommendations were accepted.

Ms. Wallace was not certain that a lack of direct correlation between CLE vouchers or insurance rebates and insurance claims was a reason not to offer the program, if the objective was to encourage people to undertake CLE. She suggested that it should be made clear to members that if they ever find themselves in front of a hearing panel at the Law Society, whether or not they have taken courses would have an affect on the outcome.

Mr. LaLiberté suggested that self-study should also include things such as teaching at universities, the Trial Lawyers Association, and other institutions.

The motion was carried.

8. CLE ONLINE DEMONSTRATION

Mr. McNaughton reported that over 1,100 people had registered for upcoming CLE offerings on electronic registration. He noted that the first time a CLE course was offered online, there were 98 people who attended from their offices via the internet. He said future plans included one-hour annual review courses over the noon-hour that people could attend from their desk while eating lunch. Mr. McNaughton said the CLE was developing three approaches to online delivery: online publications, online video presentations, and online conferences.

Mr. McNaughton demonstrated the CLE online publications service. He said CLE would have four practice manuals online in April 2004 and more would be added later in the year. Access to online publications will be by subscription. The online manuals provide an abstract of the manual, followed by chapters that can be access individually. As well there is a list of cases, legislation and precedents that can be pulled up by pointing and clicking. The manual allows the user to have the chapter content, a case, and a precedent open at the same time. Precedents can be downloaded in MS Word or Wordperfect format. Case links show where cases can be found in CanLII or the CLE website, and clicking the link will bring up the case from the chosen source.

Mr. McNaughton demonstrated the CLE online video service, which allows a user to purchase a video presentation that combines power-point slides and a streaming video screen. The user is able to skip from one part of the presentation to another in order to focus on the parts of greatest interest to them without losing the coordinated slides and video.

Mr. McNaughton and Mr. Freisen demonstrated the CLE online conference system that allows participants to attend and participate in a conference via internet and telephone conference link.

9. RESIGNATION OF THE FIRST VICE-PRESIDENT

Mr. Hoskins reviewed the consequences of Mr. Keighley's resignation following his appointment as a master of the Supreme Court. The first consequence was that Mr. Alexander automatically became the First Vice-president, leaving the office of Second Vice-president vacant. Mr. Hoskins said the Benchers could elect an interim Second Vice-president, but were required to hold an election for the office at the first opportunity. The first opportunity was the fee referendum scheduled in June 2004. Mr. Hoskins then reviewed the normal process for selecting the Benchers' nominee for Second Vice-president and suggested that the process for selecting an interim Second Vice-president follow that process as closely as possible. Mr. Hoskins reviewed a proposed timeline for that process.

It was agreed to elect an interim Second Vice-president using the proposed process and timeline, and that the Bencher elected as interim Second Vice-president would also be the Benchers' nominee for Second Vice-president for the remainder of 2004.

10. NOMINATION OF BENCHER TO FINANCIAL PLANNING SUBCOMMITTEE

Mr. Alexander nominated Mr. Zacks as the Benchers' nominee to the Financial Planning Subcommittee. There being no other nominations, Mr. Zacks was acclaimed as the Benchers' nominee to the Financial Planning Subcommittee.

11. RETURNING TO PRACTICE, PROPOSED RULE REVISIONS

Mr. Alexander introduced a proposal from the Credentials Committee to revise the Rules to prohibit a lawyer who has refrained from practicing law for three years or more unless the lawyer has either passed a qualification examination or obtained the permission of the Credentials Committee. He explained that the proposed rule change was intended to address the different treatment under the current Rules for nonpracticing lawyers and lawyers who hold a current practicing certificate but who have not been in practice for more than three years, by making it clear that the prohibition on practice applies to all lawyers, whether or not they hold a practicing certificate.

It was moved (Alexander/Zacks) to amend the Law Society Rules as set out in Appendix 1.

Mr. Jackson asked how would not being in practice be defined.

Mr. Alexander said the practice of law was defined in the *Legal Profession Act.*

Mr. Vilvang was concerned that the proposed rules would create a group of people who would engage in a minimal amount of practice to ensure their continued practicing status unless there was a define threshold for how much practice was required.

Mr. Alexander acknowledged that such a situation could arise, but he noted that as matters stood, a lawyer could blatantly tell the Law Society that he or she would be paying their fees for ten years but not practicing and then returning to practice.

Mr. LaLiberté asked if people who had been paying their fees in order to ensure their ability to return to practice under the existing rules would be grandfathered under the new rules.

Mr. Alexander said the proposed changes would only take effect from the time of enactment, and would not have retroactive effect.

Mr. LaLiberté was concerned that this would be unfair to people who had been paying their fees in the expectation that they would be able to return to practice.

Mr. Alexander said protecting the public was the primary issue addressed by the proposed rules and the Benchers ought not be too concerned about some inconvenience to members.

Mr. Vertlieb suggested dealing with Mr. LaLiberté's concern by starting the clock running on the three year period from the time the rules come into force, making the rules prospective only so that someone has three years from the time to the rules take effect to start practicing.

Mr. Alexander said that solution did not address the possible incompetence of people who have not been practicing for a long time. He said the public interest seemed to require the Law Society to close what might be considered a gap in regulation.

Mr. Nagle expressed some sympathy for the argument advanced by Mr. LaLiberté and Mr. Vertlieb. He said members should be put on notice that the rules would take effect at some time in the future.

Mr. McDiarmid was concerned that the proposed rules would really be retrospective legislation. He noted that there was no information about whether there was a large problem to be addressed,

and under the circumstances, it might be best to do something to ameliorate the problem identified by Mr. LaLiberté.

Ms. Schmit said the Law Society's primary obligation was to protect the public interest and the Benchers could only consider the members' interests if they are satisfied that doing so would not derogate from the public interest.

Mr. Zacks agreed with Ms. Schmit. He was sympathetic to the retroactive implications of the proposed rules but said the public interest was what the Benchers should consider. If a person has not practiced for a long time, they should have to demonstrate that they are competent to practice law again and the Law Society would not be cheating them by having received their fees in the past and changing the rules. He questioned how the Law Society could justify allowing somebody to return to practice if they could not demonstrate their competence just because they had paid money.

Mr. Hoskins noted that other Law Societies had expressed some concern about the current state of the Rules in the context of lawyer mobility.

Mr. Turriff agreed with Ms. Schmit and Mr. Zacks, noting that the proposed rules would leave the Credentials Committee with the discretion to allow a lawyer to return to practice, and it could be assumed that the discretion would be exercised fairly.

Mr. Vilvang noted that there had been no evidence presented that returning members represented a disproportionate number of claims or complaints. He said the proposed rules would be unfair to members and would encourage some members to engage in nominal practice in order to keep within the rules.

Mr. Donaldson agreed with Mr. Nagle's remarks about a future start date for new rules. He noted that the Benchers were concerned about losing women from the profession and why that happens. He suggested the proposed rules would impact women more than men because women were more likely to spend some time away from practice. He was concerned that the proposed rules might further reduce the number of women who return to practice and he did not think the Benchers should do anything that makes it more difficult for women to return.

The motion was defeated.

It was moved (Zacks/Hume) to amend the Law Society Rules as set out in Appendix 1, to take effect on January 1, 2005.

The motion was defeated.

12. PROPOSED AMENDMENTS TO RULES 2-28, 2-44 AND 2-45, PLTC EXAMINATION REWRITES.

Mr. Alexander said the current rules permitted unsuccessful PLTC candidates to rewrite the PLTC examinations an unlimited number of times. He said the practice at the Credentials Committee had evolved to effectively limit the number of rewrites to two, except in rare special circumstances when one further rewrite is permitted. He said the rule changes proposed by the Credentials Committee would reflect the practice that had developed by permitting two rewrites and a one-year hiatus before reapplication. Under the proposed rules a person who fails the examination three times, would automatically cease articles. The Executive Director would have the discretion to allow a student to rewrite the examination if the student fails part but not all of the examination.

It was moved (Alexander/McDiarmid) to amend the Law Society Rules as set out in Appendix 2.

The motion was carried by greater than a two-thirds majority of the Benchers present.

13. AMENDMENT TO RULE 3-5 – MEMBERS RESPONDING TO COMPLAINTS.

Ms. Fung reviewed a proposal from the Discipline Committee to amend the Law Society Rules to require a member to provide access to or produce all information relevant to a complaint. Ms. Fung noted that the proposed rule would not compel a lawyer to give access to privileged or confidential client information in the absence of a waiver by the client.

It was moved (Fung/Jackson) to amend the Law Society Rules by rescinding Rule 3-5(6) and substituting the following:

> (5.1) A lawyer must cooperate fully in an investigation under this Division by all available means, including but not limited to, the production of all records and disclosure of all information that may be relevant to the investigation.

Mr. Zacks was concerned that the proposed rule might require the lawyer to violate confidentiality.

Ms. Fung said the rule was not intended to abrogate the common law with respect to privilege.

Mr. LaLiberté was concerned that as drafted the rule was very subjected and appeared to encompass everything that might be relevant. He was attracted to the requirement in the rules of the Law Society of Saskatchewan that a lawyer must respond to the substance of a complaint.

Mr. Donaldson said there had been debate over a number of years with respect to the extent to which lawyers can be compelled to disclose privileged information, and if the Benchers take the Discipline Committee's view that disclosure pursuant to a requirement in the Law Society Rules would not result in the loss of privilege, then Mr. Zacks concerns did not arise.

Ms. Hickman was concerned about the possibility that confidential information might be passed on to third parties.

Mr. Holmes explained how complaints were handled by the Law Society to ensure that confidential information was not disclosed.

Mr. Ridgway asked who would determine what constituted a full response. For example, he said, if a complainant wrote a fifty page diatribe, as some complainants are wont to do, would the lawyer be required to respond point by point, or would the lawyer be able to respond by saying the whole complaint was without merit?

Ms. Fung said that in her experience, Law Society staff looked carefully at the complaint and exercised professional judgment as to the nature of the issues that require response. The problem occurred when a lawyer asserts that he or she has responded to the substance of a complaint by saying it is without merit and no more. Under the current rules, there is nothing the Law Society can do about that. Ms. Fung noted that the proposed change did not go as far as many other jurisdictions.

Mr. Everett suggested that the Discipline Committee might wish to consider the comments made and revisit the proposed rule revision.

The motion was withdrawn.

14. *PROFESSIONAL CONDUCT HANDBOOK*, CHAPTER 8, RULE 18 AND CHAPTER 1, RULE 1(2): PROSECUTORIAL DISCRETION

Mr. Zacks reviewed a memorandum from the Ethics Committee proposing changes to Chapter 8, Rule 18 and Chapter 1, Rule 1(2) of the *Professional Conduct Handbook*, regarding the duties of a lawyer engaged as a Crown prosecutor, intended to address the Supreme Court of Canada decision in *Krieger v. The Law Society of Alberta*. The proposed changes would remove the reference to the duty of disclosure of a prosecutor from Chapter 1 (Canons of Legal Ethics), in order to eliminate duplication of the same duty in Chapter 8, Rule 18, and add a footnote to Chapter 8, Rule 18 to the effect that the rule was not intended to interfere with the proper exercise of prosecutorial discretion.

It was moved (Zacks/Ridgway) to amend Chapter 1, Rule 1(2) of the *Professional Conduct Handbook* by deleting the words "…to that end the lawyer should make timely disclosure to the defence of all facts and known witnesses whether tending to show guilt or innocence, or that would affect the punishment of the accused." And to add the following footnote to Chapter 8, Rule 18 of the Professional Conduct Handbook:

"In view of the policy, legal and constitutional considerations that favour permitting prosecutors to function independently, this rule is not intended to interfere with the proper exercise of prosecutorial discretion. See *Krieger v. Law Society of Alberta*, 2002, S.C.C. 65 and other cases."

Mr. McDiarmid opposed removing rule 1(2) from Chapter 1 of the handbook. He noted that the court in *Krieger* concluded that decisions that do not go to the nature or extent of the prosecution do not fall within the scope of prosecutorial discretion.

Mr. Zacks said rule 1(2) was unnecessary because an equivalent provision was included in Chapter 8. He said the Ethics Committee wanted to keep the Canons simple.

Mr. Donaldson said there was a significant difference between the provisions in Chapter 1 and Chapter 8. In Chapter 8 the duty to make timely disclosure is limited to the "extent required by law and accepted practice". Accepted practice may be significantly different in different courts. The broad statement in Chapter 1 is an accurate statement of the law and is vital as a clear statement to prosecutors of their obligations. Mr. Donaldson suggested that the proposed footnote to Chapter 8 was the proper response to the *Krieger* decision because it would clarify that the Law Society does not intrude on the core prosecutorial function of deciding whether to prosecute. Disclosure is a different obligation, and there is no reason to take that obligation out of the Canons of Legal Ethics.

By agreement, the motion was split into a motion to amend Chapter 1, rule 1(2) of the *Professional Conduct Handbook* in the manner set out in the original motion, and a second motion to amend Chapter 8 of the Professional Conduct Handbook in the manner set out in the original motion.

The first motion (to amend Chapter 1, rule 1(2) was defeated.

The second motion (to amend Chapter 8) was carried.

15. *PROFESSIONAL CONDUCT HANDBOOK,* CHAPTER 9, RULES 2 AND 6: INTERJURISDICTIONAL PRACTICE

Mr. Zacks reviewed a proposal from the Ethics Committee to amend Chapter 9, rules 2 and 6 of the *Professional Conduct Handbook* to permit a lawyer to share fees with lawyers in other jurisdictions. Mr. Zacks said the proposed change would reflect the increasing number of interjurisdictional law firms and affiliations.

It was moved (Zacks/Turriff) to amend Chapter 9 of the *Professional Conduct Handbook* to read as set out in Appendix 3.

The motion was carried.

16. ELECTRONIC PAYMENT OF PROPERTY TRANSFER TAX FROM TRUST

Mr. Alexander reviewed a proposal to amend the Law Society Rules to permit lawyers to pay Property Transfer Tax from trust accounts using the Land Title Branch's Electronic Filing System. He explained that the amendment was necessary to make electronic registration of land transfer documents practical, noting that if Property Purchase Tax had to be paid by trust cheque, electronic document filing would be substantially useless. The proposed rule change would permit lawyers to transfer money from trust electronically to pay for Property Purchase Tax when the payment is made concurrently with an electronic filing transaction at the Land Title Office.

It was moved (Alexander/Zacks) to amend the Law Society Rules as set out in Appendix 4.

The motion was carried by a majority of more than two-thirds of the Benchers present.

17. FINANCIAL RESULTS FOR 2003

Mr. Stajkowski gave a presentation on the Law Society financial results for 2003. A copy of the presentation is attached as Appendix 5.

Mr. McDiarmid asked for clarification of how Juricert was expected to generate revenue to offset its costs.

Mr. Alexander said Juricert Services was an authority that verified the status of lawyers and notaries who electronically file documents for registration at the Land Title Office. Each transaction requires payment of a fee of $2.50. The fee was based on a conservative estimate that 60,000 documents would be filed electronically each year.

Mr. Stajkowski said Juricert would receive the payments but it was hoped that they would be collected on Juricert's behalf by BC Online.

Mr. McDiarmid asked why there was a debt owing from Juricert to the Law Society.

Mr. Stajkowski explained that Juricert Services Inc. is a wholly owned subsidiary of the Law Society so it is consolidated out in the financial statements. He said the value of the debt would decrease over time as money flows to the Law Society from e-filing transactions.

18. FEDERATION OF LAW SOCIETIES, MONEY LAUNDERING LEGISLATION

This matter was considered *in camera.*

19. LAW SOCIETY INVESTMENT POLICY

This matter was considered *in camera*.

20. REPORT ON THE CUSTODIANSHIP OF WIRICK'S LAW PRACTICE AND APPLICATIONS TO THE SPECIAL COMPENSATION FUND IN RESPECT OF WIRICK

This matter was discussed *in camera*.

21. LAND TITLE OFFICE AUTHORITY

This matter was discussed *in camera*.

22. BENCHER CONCERNS

This matter was discussed *in camera.*

DMGN
04-03-20

Appendix 1

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

1. ***In Rule 1, by rescinding the definition of* "requalification".**

2. ***In Part 2, Division 1 by adding the following Rule:***

Release from undertaking

2-4.1 (1) A retired or non-practising member may apply for release from an undertaking given under Rule 2-3 or 2-4 by delivering to the Executive Director an application in a form approved by the Credentials Committee, including written consent for the release of relevant information to the Society.

(2) The Executive Director must not grant the release from undertaking applied for under this Rule unless satisfied that the lawyer is not prohibited from engaging in the practice of law under Rule 2-57.

3. ***In Rule 2-49***

(a) ***by rescinding subrules (2) and (3) and substituting the following:***

(2) An applicant under this Rule must not be called and admitted unless the Executive Director is satisfied that the lawyer is not prohibited from engaging in the practice of law under Rule 2-57.

(3) Unless Rule 2-49.2 applies, an applicant under this Rule must pass an examination on jurisdiction-specific substantive law, practice and procedure set by the Executive Director.

(b) ***by inserting after*** "under this Rule" ***in both subrules (5) and (6),*** "or Rule 2-57".

4. ***In Rule 2-52(2), by rescinding paragraph (a) and substituting the following:***

(a) a practising lawyer on reinstatement, only if the applicant has met the conditions for engaging in the practice of law under Rule 2-57;

5. ***By rescinding Rules 2-55 to 2-60 and substituting the following:***

Returning to Practice

Definitions

2-55 (1) **[rescinded]**

(2) In Rules 2-55 to 2-60, unless the context indicates otherwise,

"equivalent practice" includes activities that, in the opinion of the Credentials Committee, have kept a lawyer or former lawyer current with substantive law and practice skills;

"lawyer" includes a former lawyer or applicant;

"relevant period" is the shortest of the following periods of time in the immediate past:

(a) 5 years;

(b) the time since the lawyer's first call and admission in any jurisdiction;

(c) the time since the lawyer last passed the qualification examination.

(3) For the purpose of paragraph (b) of the definition of **"relevant period"** in subrule (2), a lawyer is deemed to have been called and admitted as of the date that a practising certificate was issued under Rule 2-51(4).

2-56 [rescinded]

Returning to the practice of law after an absence

2-57 (1) Despite any other Rule, a lawyer who has refrained from practising law for a period of 3 years or more in the relevant period must not engage in the practice of law without first doing one of the following:

(a) passing the qualification examination;

(b) obtaining the permission of the Committee under subrule (3).

(2) Subrule (1) applies whether or not the lawyer holds or is entitled to hold a practising certificate.

(3) A lawyer may apply in writing to the Committee for permission to engage in the practice of law without passing the qualification examination.

Qualification examination

2-58 (1) **[rescinded]**

(2) A lawyer who is required to write the qualification examination under Rule 2-57(1) must pay, at least 30 days before writing the first examination, the fee specified in Schedule 1.

Conditions on returning to the practice of law

2-59 (1) If a lawyer has spent a period of 7 years or more not engaged in the practice of law, the Committee may require as a condition of granting permission under Rule 2-57(3) one or more of the following in addition to passing the qualification examination:

(a) successful completion of
  (i) the admission program,
  (ii) the training course, or
  (iii) a part of the training course;

(b) a written undertaking to do any or all of the following:
  (i) practise law in British Columbia immediately on being granted permission;
  (ii) not practise law as a sole practitioner;
  (iii) practise law only in a situation approved by the Committee for a period set by the Committee, not exceeding 2 years;
  (iv) successfully complete the training course or a part of the training course within a period set by the Committee, not exceeding one year from the granting of permission;
  (v) practise only in specified areas of law;
  (vi) not practise in specified areas of law.

(2) **[rescinded]**

(3) Despite Rule 2-26(3), the Credentials Committee may vary a condition under subrule (1)(a) without the consent of the lawyer concerned.

(4) On the written application of the lawyer, the Credentials Committee may allow a variation of an undertaking given under subrule (1)(b).

2-60 [rescinded]

6. ***By rescinding Rule 3-27(3) and substituting the following:***

(3) The Executive Director must not grant the insurance coverage applied for under subrule (1) or (2) unless satisfied that the lawyer is not prohibited from engaging in the practice of law under Rule 2-57.

7. ***In Schedule 1, part G***

(a) ***by rescinding the heading and substituting the following:***

G. Application fees

(b) ***by striking out*** "(Rule 2-56(b))" ***in paragraph 3 and substituting*** "(Rule 2-4.1)".

Appendix 2

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

1. By rescinding Rule 2-28 and substituting the following:

Re-enrolment

2-28 (1) This Rule applies to a person

(a) whose application for enrolment has been rejected because he or she has not satisfied a panel that he or she is of good character and repute and fit to become a barrister and solicitor of the Supreme Court,

(b) whose enrolment has been set aside by a panel under section 38(6)(d) of the Act, or

(c) who has failed to complete the training course satisfactorily.

(2) A person referred to in subrule (1)(a) or (b) may not apply for enrolment until the earlier of

(a) the date set by a panel acting under subrule (1)(a) or (b), or

(b) 2 years after the date of the event referred to in subrule (1)(a) or (b).

(3) A person referred to in subrule (1)(c) may not apply for enrolment for 1 year after the later of

(a) the date on which the Executive Director issued the transcript of failed standing, or

(b) the failed standing is confirmed under Rule 2-45(6)(a).

2. In Rule 2-44 by inserting the following subrule:

(5.1) If a student fails part of the training course, the Executive Director may allow the student one further attempt to pass the examinations, assignments or assessments concerned.

3. In Rule 2-45 by rescinding subrule (1) and substituting the following:

(1) Subject to subrule (1.1), an articled student who has failed the training course may apply in writing to the Credentials Committee not more than 21 days after the date on which the Executive Director issued the transcript, for a review of his or her failed standing.

(1.1) An articled student may not apply to the Credentials Committee under subrule (1) if the student has failed in 3 attempts to pass the training course, including any of the following:

(a) the original attempt;

(b) a further attempt to pass examinations, assignments or assessments under Rule 2-44(5.1);

(c) any attempt to meet a requirement under subrule (6).

Appendix 3

CHAPTER 9

FEES

Definition

1. In this chapter, **"another lawyer"** includes a lawyer who is:

   (a) a member of a recognized legal profession in any other jurisdiction, and

   (b) acting in compliance with the law and any rules of the legal profession of the other jurisdiction.

Excessive fees

1. A lawyer must not charge an excessive fee.

Referral fees

2. A lawyer must not:

   (a) pay any remuneration to a person, other than another lawyer, in exchange for that person referring a client to the lawyer, or

   (b) act for a client if, to the lawyer's knowledge, a person other than another lawyer was paid any remuneration by the client in exchange for being referred to the lawyer.

3. A lawyer acting for a client who was referred to the lawyer by another lawyer may pay that other lawyer remuneration for the referral only if, at the commencement of the retainer, the lawyer fully discloses the remuneration to the client and the client consents in writing to its payment.

Prepaid legal services plan

4. A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

   (a) the scope of work to be undertaken by the lawyer under the plan, and

   (b) the extent to which a fee or disbursement will be payable by the client to the lawyer.

Apportionment of fees

5. A lawyer who acts for two or more clients in the same matter must apportion the fees and disbursements equitably among them, in the absence of an agreement to the contrary.

Sharing fees

6. A lawyer must not split, share or divide a client's fee with any person other than another lawyer.[1]

Hidden fees

7. A lawyer must fully disclose, to the client or to any other person who is paying part or all of the lawyer's fee, any fee that is being charged or accepted.

8. A lawyer must take no fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation whatsoever related to the lawyer's professional employment

from anyone other than the client or the person who is paying part or all of the lawyer's fee on behalf of the client, without full disclosure to and consent of the client or that other person.

9. A lawyer who is financially interested in the person to whom disbursements are made or by whom services are performed, such as an investigating, brokerage or copying company, must expressly disclose this fact to the client.

FOOTNOTE:

1. This provision does not prohibit a lawyer from paying an employee for services other than referring clients based on the revenue of the lawyer's firm or practice.

Appendix 4

BE IT RESOLVED to amend Rule 2-56 of the Law Society Rules

(a) by rescinding subrule (2) and substituting the following:

(1.3) A lawyer must not make or authorize the withdrawal of funds from a pooled or separate trust account, except by

(a) cheque as permitted by subrule (2) or (3),

(b) electronic transfer as permitted by subrule (3.1) or (3.2), or

(c) instruction to a savings institution as permitted by subrule (4).

(2) A lawyer who makes or authorizes the withdrawal of funds from a pooled or separate trust account by cheque must

(a) withdraw the funds with a cheque marked "Trust,"

(b) not make the cheque payable to "Cash" or "Bearer," and

(c) ensure that the cheque is signed by a practising lawyer***, and***

(b) by rescinding subrule (4) and substituting the following:

(3.2) A lawyer may make or authorize the withdrawal of funds from a pooled or separate trust account by electronic transfer using the Electronic Filing System of the Land Title Branch for the purpose of the payment of Property Transfer Tax on behalf of a client, provided that the lawyer

(a) retains in the lawyer's records a printed copy of

(i) all Electronic Payment Authorization forms submitted to the Electronic Filing System,

(ii) the Property Transfer Tax return, and

(iii) the transaction receipt provided by the Electronic Filing System,

(b) digitally signs the Property Transfer Tax return in accordance with the requirements of the Electronic Filing System, and

(c) verifies that the money was drawn from the trust account as specified in the Property Transfer Tax return.

(4) A lawyer may instruct a savings institution to pay to the Foundation under Rule 3-52 the net interest earned on a pooled trust account.