THE LAW SOCIETY OF BRITISH COLUMBIA

MINUTES

MEETING:	Benchers	
DATE:	Friday May 6, 2005	
PRESENT:	Ralston Alexander, QC, President	Margaret Ostrowski, QC
	Robert McDiarmid, QC, 1st Vice-president	June Preston
	Joost Blom, QC	Greg Rideout
	Robert Brun, QC	Glen Ridgway, QC
	Ian Donaldson, QC	Patricia Schmit, QC
	Michael Falkins	Alan Seckel, QC, Deputy AG
	Carol Hickman	Dirk Sigalet, QC
	Gavin Hume, QC	Grant Taylor, QC
	John Hunter, QC	Russell Tretiak, QC Life Bencher
	William Jackson	Gordon Turriff, QC
	Patrick Kelly	Dr. Maelor Vallance
	Terry La Liberté, QC	Art Vertlieb, QC
	Bruce LeRose	James Vilvang, QC
	Patrick Nagle	Anne Wallace, QC
	Darrell O'Byrne, QC	Warren Wilson, QC Life Bencher
		David Zacks, QC
NOT PRESENT:	Anna Fung, QC	Ross Tunnicliffe
	Lilian To	
STAFF PRESENT:	Sholto Hebenton, QC	Michael Lucas
	Stuart Cameron	David Newell
	Mary Ann Cummings	Jack Olsen
	Charlotte Ensminger	Denise Palmer
	Felicia Folk	Neil Stajkowski
	Su Forbes, QC	Alan Treleaven
	Tim Holmes	Ron Usher
	Jeffrey Hoskins	Adam Whitcombe

GUESTS: Fritz Verhoeven, Treasurer, CBABC
Frank Kraemer, Executive Director, CBABC
Johanne Blenkin, Chief Librarian, BCCLS
Derek LaCroix, Executive Director, LAP
Wayne Robertson, Executive Director, Law Foundation
Anne Chopra, Equity Ombudsperson
Janice Mucalov, Lawyers Weekly

1. MINUTES

The minutes of the meeting held on April 8, 2005 were approved as circulated.

2. PRESIDENT'S REPORT

Mr. Alexander circulated a written report outlining his activities on behalf of the Law Society over the previous month.

3. EXECUTIVE DIRECTOR'S REPORT

Mr. Hebenton circulated a written report summarizing the activities of Law Society staff over the previous month.

4. REPORT ON OUTSTANDING HEARING DECISIONS

The Benchers received a report on outstanding hearing decisions.

5. BC COURTHOUSE LIBRARY SOCIETY FUNDING

Ms. Schmit spoke on behalf of the Legal Information Committee, which recommended an increase of $10 per member in the Law Society funding for the BC Courthouse Library Society for 2006, plus a one time grant of $200,000 in transitional funding. Ms. Schmit said there were two reasons for the recommendation. First, the BCCLS is facing a financial crisis brought about by the astronomical increase in the cost of secondary research materials. If the Library Society does not get more money, they will be forced to close branches, and once libraries close, they generally don't reopen. Second, the Legal Information Committee believes there is a need to develop a national library policy to create a united, national front in negotiations with publishers. Ms. Schmit noted that the Financial Planning Subcommittee took the view that consistent, long-term funding is more important that crisis funding.

Ms. Blenkin gave a presentation, a copy of which is attached as Appendix A.

Mr. Wilson noted that in 1995 the Law Society and Law Foundation provided a special grant of $1 million to the Library Society to allow it to develop the infrastructure to use and deliver materials electronically as an alternative to expensive print materials. He said the grant had proven to be very useful and was used as intended, with the result that electronic services are now much more widely available. However, he noted that the cost of electronic information and services has also increased in price and requires periodic upgrading.

Mr. Nagle asked if the courthouse libraries were staffed twenty-four hours per day. Ms. Blenkin said the libraries are staffed only during normal working hours, and during that time the public has access. Lawyers have access twenty-four hours a day.

Mr. Hunter asked if it would be possible to wean lawyers off printed law reports. Ms. Blenkin said that had been done to a significant extent, which had allowed the libraries to reduce holdings in that area. She said printed law reports series formed only a small part of the budget.

Mr. Alexander said the Financial Planning Subcommittee had concluded that the Library Society had possibly tried to make their funding request more acceptable to the Benchers by dividing it into a one-time grant and a smaller amount of ongoing funding. However, the subcommittee believed that the whole amount, equal to $30 per member, would be needed on an ongoing basis. Accordingly, the Financial Planning Subcommittee recommended an increase of $30 per member in the annual funding to the Library Society rather than the special grant.

Mr. Zacks added to Mr. Alexander's comments, saying that the budget presented to the Financial Planning Subcommittee was a barebones operating budget for operating the libraries at their current service levels. In effect, he said, the grant was required to cover operating costs.

Ms. Schmit said developing a national plan to deal with publishers was the Legal Information Committee's idea, and describing part of the funding was a grant was intended to keep the underlying cause of the financial problems on the Benchers' "radar screen", so that they don't think that the situation can be dealt with simply by increasing the annual funding by $30 per member. Ms. Schmit put the proposed funding in perspective by suggesting that most lawyers would think the library services and their access to them was worth the proposed $160 per year, and would think it was good value for money.

Ms. Ostrowski said it was important to bear in mind that the public interest is served not only by ensuring lawyers have access to the library services, but directly through public access to the library.

Ms. Blenkin estimated that about one third of library use is by members of the public.

Mr. McDiarmid thought the Law Society should increase funding by $30 per year. He said the BCCLS have committed to operating within a budget based on $130 per member in order to demonstrate fiscal responsibility, and had done so, and he would not want their success to now come back to bite them.

Mr. Sigalet suggested that having a national library concept could reduce the consumption of materials, which might push up costs and negate the benefit.

Ms. Blenkin said a national library system was distinct from the idea of a national negotiating presence. She said having a national library would at least guarantee that accurate sources existed somewhere.

Mr. Rideout said his only concern was that the same pressures would result in a request for another increase next year.

Ms. Blenkin said she understood Mr. Rideout's concerns, and said she planned to return to the Benchers next year with a more sustainable plan.

Mr. Alexander thanked Ms. Blenkin and Mr. Wilson, and said the Benchers would consider the funding request when they determined the amount of the annual practice fee to be put to the members later in the meeting.

Ms. Schmit noted that the Legal Information Committee also sought the Benchers' approval for a number of initiatives set out in the material circulated to the Benchers.

It was moved (Nagle/Schmit) to approve the following initiatives:

a) the Legal Information Committee would work with the BCCLS to develop a proposal for Bencher approval and presentation to the Federation of Law Societies. The proposal would include:

   i) creation of a Federation of Law Societies Task Force, comprising law societies' representatives, courthouse / law society library representatives, and representatives of academic law libraries,

   ii) Task Force terms of reference, as follows:

      - examine the feasibility of a national approach to the negotiation of licenses for electronic products and for reduced prices for print materials,
      - investigate the development of a national law library, and

- examine the viability of creating national guidelines for core collections based on practitioners' needs.

b) the Legal Information Committee and the BCCLS would collaborate to develop a more immediate local plan, which would include investigation of areas of mutual interest with respect to library collections amongst the University of BC law library, the University of Victoria law library and the BCCLS. The process would also include liaising with the Lawyer Education Task Force to identify lawyer information needs within the context of skills necessary to remain competent.

c) the Law Society would host a workshop / round table meeting of representatives of the main stakeholders of the BCCLS, including sole practitioners, rural lawyers, the Law Foundation and others to provide information that is necessary for the BCCLS to assess whether the library system meets user needs. The maximum estimated Law Society cost of hosting the workshop would be $5000.

The motion was carried.

6. CONDUCT REVIEW TASK FORCE

Mr. Donaldson briefly reviewed the circumstances leading to the formation of the Conduct Review Task Force and its mandate. He said some members thought conduct reviews should not form part of the professional conduct record because the process lacks adequate procedural fairness. He said an additional concern was that the member does not have the ability to dispute facts in a conduct review. However, he said, it was important when addressing those concerns to remember that conduct reviews are intended to have an educational component. The task force concluded that the Ontario model of an "invitation to attend" provides a middle option between a letter from the chair of the Discipline Committee, and a two-Bencher conduct review. It would allow a more direct discussion of concerns without forming part of the lawyer's professional conduct record.

Mr. Tretiak said the recommendations represented a mediated consensus among very diverse views, but was something that everyone on the task force felt comfortable with. The task force sought a balance between the legitimate needs of the Law Society and the members' right to fairness, and the recommendations offered a reasonable compromise. Mr. Tretiak said success would depend to a large degree on how much Law Society staff could do to provide information to the lawyer concerned.

Mr. Nagle asked how the Law Society would maintain an institutional memory of a member's past problems if the invitation to attend does not form part of the member's professional conduct record?

Mr. McDiarmid pointed out the complaint itself and the fact that an invitation to attend was the outcome will remain recorded on the member's file, but it will not form part of the formal professional conduct record.

Mr. Taylor was concerned about the recommendation for guidelines to be used by conduct review subcommittees when addressing complainants attending the review because of the possibility that inviting a complainant to the review and then asking them to leave at a certain point in the process would invite suspicion that the subcommittee is trying to hide something. Mr. Taylor asked if the invitation to attend would be similar to the "fileside chat" used by the Practice Standards Committee.

Mr. Donaldson said the "fileside chat" was a similar process to what was envisioned. He noted that Professional Conduct staff sometimes use that sort of process on an informal basis when they perceive that something more than a letter from the Discipline Chair is required but a conduct

review would be too much. Mr. Donaldson said the task force discussed at length whether complainants should attend conduct reviews. Some task force members took the view that complainants should attend and members should be able to question them, while others did not think that would be helpful in a process that is intended to focus on the lawyer's conduct. Under the current rules, attendance of the complainant is left to the discretion of the subcommittee, and the process remains under their control. The task force's view was that it would be helpful to offer some guidance to subcommittees dealing with the question.

Ms. Wallace agreed that the Discipline Committee should be able to rescind a conduct review. She was concerned about what would happen if an invitation to attend reveals a more serious problem.

Mr. Donaldson noted that a conduct review subcommittee can write a report recommending a citation, and by analogy a Bencher conducting an invitation to attend could send the matter back to the Discipline Committee for further consideration or investigation. However, an invitation to attend should not be used as an investigative tool.

Ms. Wallace was concerned about how the Discipline Committee would decide whether an invitation to attend or a conduct review is appropriate.

Mr. Donaldson said the committee would likely decide based on whether they think the matter is serious enough to appear on the member's professional conduct record.

Mr. McDiarmid did not think the committee would have any difficulty deciding which response is appropriate.

Mr. Falkins noted that at all times during the development of the recommendations, the protection of the public interest was the task force's paramount consideration.

Mr. Cameron advised that current practice was for the Professional Conduct lawyers to send a letter to complainants advising them about what participation they may be entitled to in a conduct review, and the limits that might be imposed by the subcommittee. He said he would revise the letter to provide more information in accordance with the task force's recommendations.

Ms. Ostrowski suggested it would be useful if a copy of the letter was sent to the Chair of the conduct review subcommittee.

Ms. Preston suggested that it might be helpful for the letter to include the fact that Lay Benchers participate in the process at the Discipline Committee.

It was moved (Donadson/McDiarmid) to approve in principle the recommendations of the Conduct Review Task Force as follows:

1. The Law Society Rules should be amended to permit the Discipline Committee to

   (a) authorize the Chair of the Committee to write a letter to a member whose conduct is the subject of a complaint before the Committee; and

   (b) require a lawyer whose conduct is the subject of a complaint before the Committee to attend a meeting with one or more senior lawyers (who may or may not be a Bencher) to discuss the conduct of the lawyer.

   In neither case would the letter or the meeting form part of the lawyer's "professional conduct record."

2. To amend the Law Society Rules to permit the Discipline Committee, in appropriate circumstances, to rescind an requirement that a lawyer attend before a Conduct Review Subcommittee.

3. An effort should be made to improve the content of the minutes of the Committee when resolving to require a lawyer to attend a conduct review. Disclosure to the lawyer of all the materials given to the Discipline Committee, including correspondence and documents should continue. The opinion given by staff to the Committee should not be disclosed to the lawyer, for reasons of privilege.

4. An effort should be made to ensure that complainants are properly and fully informed about the purpose of a conduct review, and how the public interest is served by the process. The Task Force recommends that:

   (a) a standard form of letter, explaining the purpose of and process involved in a conduct review, be created to send to complainants at the outset of the process;

   (b) a list of suggestions be created that can be given to the members of the Conduct Review Subcommittee, in order to guide the Subcommittee when addressing the complainant at the meeting, and in particular to explain to the complainant why he or she is not invited to be present throughout the process;

   (c) the Law Society website be updated to include a specific section on the process involved in the Conduct Review, including the purpose of such reviews, what they are intended to achieve, and how the public interest is served.

Mr. Vilvang was generally in favour of the recommendations but he questioned why a matter would have to be returned to the Discipline Committee to rescind a conduct review. He suggested the subcommittee could rescind the conduct review because they are the people who heard the information.

Mr. McDiarmid noted that a conduct review subcommittee always reports back to the Discipline Committee.

Mr. Donaldson said the Discipline Committee takes the view that it can rescind a conduct review before it has been heard, but there is no Rule on that point, and their ability to rescind a conduct review after it has been heard is even more uncertain. He said the proposed rules would allow for rescission on a principled basis either before or after the conduct review is heard.

Mr. LaLiberté agreed that conduct review matters should be returned to the Discipline Committee for final decision, but he thought that whatever was discussed during an invitation to attend should remain between the participants and not be used against the member later on.

The motion was carried.

7. ANNUAL PRACTICE FEE

Mr. McDiarmid reviewed the recommendation of the Financial Planning Subcommittee that the Law Society Annual Practice Fee for 2006 be $1065.50. He noted that funding requests from LAP had gone up astronomically in the last few years, but the Financial Planning Subcommittee concluded that this was not the year to require them to hold the line because their request made sense. However, he said, the subcommittee thought that LAP needed to have a rigorous budgeting process and should not expect more than cost of living increases in Law Society funding in the future.

It was moved (McDiarmid/Zacks) to set the amount of the Annual Practice Fee for 2006 to be put to the members in a referendum at $1065.50.

The motion was carried.

8. POLICY ON FUNDING EXTERNAL PROGRAMS

The Benchers considered a memorandum setting out options with respect to a policy regarding Law Society funding of external programs. The first question considered was whether the Law Society would fund external programs related to the Law Society's mandate or Ends and, if so, what criteria would be applied.

Mr. Rideout said the Law Society is regulatory in nature and must be very cautious and philosophically conservative with the members' money. He preferred the third option of funding externally operated programs only when the Law Society specifically sponsored or participated in the creation of the project or program.

Ms. Schmit agreed with Mr. Rideout. She said the members' money should be spent on Law Society programs only. Ms. Schmit wanted to see more strict criteria developed for deciding what is a Law Society sponsored program.

It was moved (McDiarmid/Hume) to adopt the policy that the Law Society will consider funding externally operated projects or programs only when the Law Society specifically sponsored or participated in the creation of the project or program.

The motion was carried.

The Benchers then considered whether the Law Society would fund external programs not related to the Law Society's mandate or Ends as a charitable giving policy.

Ms. Hickman said it was important to support some charities even if only in a small amount.

Mr. Stajkowski said the Law Society had contributed to charity in small amounts for several years in a number of different ways. In some cases, the Law Society funds charities by attending fundraising functions, but those charities do not resonate with the non-lawyer staff members. The Law Society also sponsors teams in events such as the 24-hour relay and the Sun Run. These are staff morale and team building events as well as charitable causes, and the Law Society's contribution often took the form of matching staff donations or supporting charitable giving by staff through payroll deductions or advances. He suggested that if the Benchers wanted to take control of this area, the amount set aside for charitable giving of this kind should be around $20,000 per year, and placed under the control of the Executive Committee so that the Benchers did not have to spend their time dealing with small matters.

Mr. Turriff said that modest charitable giving along the lines Mr. Stajkowski described was appropriate so long as sensible guidelines were in place.

Ms. Hickman said the 24-hour relay was a good example of the Law Society being seen positively in the public eye.

Mr. LeRose said his main concern was that the Benchers not be inundated with requests, so he preferred guidelines that would allow the Executive Director or Executive Committee to deal with these matters.

Ms. Wallace agreed that an informal process for making relatively small charitable contributions, as outlined by Mr. Stajkowski was the right way to go about things. She said things like the 24-hour relay were consistent with the Law Society mandate.

Mr. Sigalet said the CBA was the body to seek to change the image of lawyers and he didn't think members would appreciate significant expenditures in this area.

Mr. Hume favoured a parsimonious approach and agreed that the Law Society should carry on with the low key charitable support Mr. Stajkowski described.

Ms. Ostrowski asked how much had been spent in this way in the past.

Mr. Stajkowski said the amount was approximately $10,000 to $15,000.

Mr. McDiarmid suggested that an annual maximum amount of about $15,000 with decision-making delegated to the Executive Director would be a sensible approach.

Mr. Kelly said there was another dimension to the issue that bore consideration. He said it would not surprise him to find that the amount of personal charitable giving by lawyers in BC far exceeded the amounts being discussed, and it was important that charitable giving by the Law Society as an organization not give rise to the perception that this was the contribution made by the legal profession as a whole. He said it was important to tell the story in the broad sense.

Ms. Preston said it was valuable to let people know what the Law Society does to serve the public in every way and the Benchers should think about being more proactive in seeking the best places to connect with the public and get the message out.

It was agreed to bring back a draft policy along the lines suggested by Mr. Stajkowski to the next meeting.

The Benchers considered how and to what degree external organizations receiving Law Society funding should be accountable to the Law Society.

It was agreed that the accountability requirements should be crafted to match the amount of funding and the nature of the external body, and to refer the matter to the Audit Committee to develop a more detailed set of accountability criteria.

9. GREEN PAPER ON CIVIL JUSTICE REFORM

Ms. Ostrowski said the deadline for responses to the Green Paper on Civil Justice Reform had been extended so there was still time for the Benchers to contribute their ideas.

Ms. Ensminger reviewed the draft paper circulate to the Benchers.

Mr. Turriff commented that everyone knows the questions, but no-one knows the answers. He said, with respect, that the ideas offered in the draft response were no more than tinkering with the system and if real reform is to be made, the participants in the justice system must consider more radical changes such as introducing an inquisitorial judicial model, or limiting rights of audience to certain groups of people, or changing the laws of evidence, perhaps giving less discretion to judges.

Mr. Zacks asked if the Access to Justice Committee would be responding substantively to the Green Paper.

Ms. Ostrowski said the committee would like to provide a response from the Benchers. She said the paper was helpful in raising issues but did not offer substantial answers.

Mr. Vilvang said the paper was a welcome approach but a lot of things restated or reshaped the groundwork. He agreed with Mr. Turriff that big ideas were needed, but the hard part is thinking of what big changes can be made.

Ms. Ensminger commented that when the government undertook the administrative justice review project, they provided detailed and well researched papers on specific topics, which assisted the Law Society and others to provide more substantive and detailed input. She said a similar process would be helpful in the civil justice area.

Mr. Seckel said Mr. Turriff's comments were "spot on". He said the working group had tried to focus on important changes rather than just tinkering, and had split into three groups to deal with how people enter the justice system, the culture of the justice system, and how the superior courts should work once people are in the system. He said later papers would provide greater focus.

Mr. Hunter did not think mediation was an appropriate "theme" for the Law Society to promote ahead of all other possibilities. He said the Law Society must consider the continued availability of rights-based adjudication of disputes. He suggested a better theme would be reducing the cost associated with resolving civil disputes. One area to consider in terms of reducing costs is the cost imposed by government on the process. He said there were huge costs involved in the discovery process, for example, and it would be necessary to examine more radical reforms to document discovery.

Ms. Hickman commented that from the family law perspective, judicial conferences had proven to be quite useful, and the specialization of judges tends to determine whether judicial case conferences are successful. She said a unified family court was the direction to take.

10. DISCLOSURE AND PRIVACY TASK FORCE – CUSTODIANSHIPS AND DISPOSALS

Mr. Hunter reviewed the task force's recommendations with respect to custodianships and disposals. With respect to disposals, the task force concluded that the existing rule dealing with disclosure and privacy was adequate, therefore recommended no change. With respect to custodianships, the task force noted that if the custodianship results from a court order, the fact of the custodianship is public knowledge, although the lawyers' files remain subject to solicitor/client confidentiality. The main question is how proactive the Law Society should be in publishing information about custodianships. The task force recommended a permissive rule that would allow the Law Society (Executive Director) to publish certain information when a custodian has been put in place.

It was moved (Hunter/Jackson) to amend the Law Society Rules by adding the following Rule:

"Notice of custodianship order

6-5 When a custodianship order is made, the Executive Director may publish to the profession and the public generally, in a form that appears appropriate to the Executive Director, the following information:

(a) the name of the lawyer who is the subject of a custodianship order;

(b) the name and contact information of the custodian;

(c) *the reasons for the custodianship order."*

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

11. OMBUDSPERSON PROGRAM REVIEW TASK FORCE

Ms. Wallace reviewed the report from the Ombudsperson Program Review Task Force. She noted that the review was not the result of criticism of the current ombudsperson, Ms. Chopra, but arose because the program had not been reviewed for some time.

On a motion duly moved and seconded it was moved to accept the recommendation of the task force to:

1. review the performance of the incumbent ombudsperson using a survey of users of the program conducted by an independent third party survey company using the appendix to the 1997 Western Management Consultants report as a basis for the survey questions; and

2. to conduct an overall systems review to address whether the program has the most effective structure for fulfilling its goals.

Ms. Chopra thanked the Benchers for undertaking a review of the program. Ms. Chopra said she had not been involved in the task force but would like to be involved in the systems review, and would like to report at least annually to the Benchers.

Mr. Falkins agreed with Ms. Wallace that this was a good program that should be supported. He had some concern that the program may not be well known.

Mr. Vertlieb noted that this would be on the agenda of the Access to Justice Committee to discuss concerns about how to support the ombudsperson through policy setting.

Mr. Kelly agreed that the ombudsperson's work is important, but he noted that the Benchers did not know who the ombudsperson reported to, and he thought some history of the program might be useful. He asked if a subgroup of Benchers would undertake a periodic review of what amounts to an operational matter rather than leaving it with the Executive Director.

Ms. Preston said she had attended a conference at which she had an opportunity to meet with ombudspersons from other Law Society's and although the Law Society of BC may have been the first to create such a program, it appeared to be lagging behind in ongoing development.

The motion was carried.

12. PROFESSIONAL CONDUCT HANDBOOK CHAPTER 4, RULE 6

Ms. Wallace reviewed two small "housekeeping" changes to Chapter 4, Rule 6 of the Professional Conduct Handbook, and the association footnote intended to clarify the language. The first would change the heading of rule 6 to read "Dishonesty, crime or fraud of client", and the second would change the words "be wary" in footnote 3 to "make inquiries".

It was moved (Wallace/Zacks) to

1. amend Chapter 4, Rule 6 of the Professional Conduct Handbook by adding the words "*of client*" to the heading; and

2. amend Chapter 4, footnote 3 of the Professional Conduct Handbook by deleting the words "*be wary*" and substituting the words "*make inquiries*".

The motion was carried.

13. PROFESSIONAL CONDUCT HANDBOOK, APPENDIX 3

Ms. Wallace reviewed changes to Appendix 3 of the Professional Conduct Handbook recommended by the Ethics Committee. The first recommendation was to eliminate the requirement for separate representation in construction mortgages that are drawn down in stages. The second recommendation was to clarify that the mere fact that a party to a transaction is a corporation does not create a "commercial element" that disqualifies the transaction as a simple conveyance. The third recommended change would draw lawyers' attention to their obligations under Chapter 6 of the handbook.

It was moved (Wallace/Rideout) to amend Appendix 3 of the Professional Conduct Handbook by:

1. adding Rule 2.1 as follows:

   "*2.1 When a lawyer acts jointly for more than one client in a real property transaction, the lawyer must comply with the obligations set out in Chapter 6, Rules 4, 5, and 6."*

2. deleting subrule 5(g); and

3. adding a footnote to subrule 5(a) as follows:

   "*A transaction is not considered to have a commercial element merely because one of the parties is a corporation."*

Mr. Zacks was concerned with the first proposed change. He said that while many construction mortgages proceed without problems, an appreciable number do not, and there is always a tension between the borrower and the lender in construction mortgages. He did not think lawyers should be allowed to engage in what might well become a conflict of interest.

Mr. Turriff agreed with Mr. Zacks. He said if the rule was not being followed then the proper response was to enforce it, not change the rule.

Mr. Ridgway agreed. He said the banks are aiding and abetting lawyers in not abiding by the rule.

Mr. Sigalet said members in the interior would like to see the change made. In practical terms, the current rule causes problems.

Mr. LeRose did not think the proposed change would cause a problem because if a conflict arises, the lawyer must cease acting for both parties.

Mr. Zacks did not think that was perfectly clear to many solicitors. He said many lawyers continue to act and some actually try to mediate disputes between lender and borrower, and that was not in the public interest.

Mr. Hume said the Ethics Committee proposed the change because of requests from members, particularly in small towns where they are faced with increased competition from notaries and other lawyers who are not following the existing rule.

Mr. Turriff said the premise of the rule is sound, and it does not follow that it should be eliminated because it is not being followed.

Mr. LeRose said that from a public perspective, the borrower would wind up paying for two lawyers because the lender would push all the costs onto the borrower.

Ms. Wallace agreed with Mr. Hume. She said there are two kinds of lawyers dealing with these situations: big firm lawyers whose clients can afford two lawyers, and small practitioners whose clients cannot. She said inconsistent enforcement brings the rules into disrepute, and citing everyone not in compliance is not practical and would not be effective.

Mr. Zacks said the potential conflicts were more than whether or not a builder's lien has been filed. There may be disputes over how much money should be advanced, or how much the whole project costs. This is an exception to the simple conveyance, which is itself an exception to the more general conflicts rules. If the remoteness of the members' practice makes it impracticable to have separate representation, the rule would not apply. Mr. Zacks said if lawyers cannot economically afford to do a proper job, then perhaps it is not a proper job for a lawyer to do.

Mr. Brun was concerned that the Law Society might be perceived as requiring two lawyers to what in most cases one could do. He said he would be more comfortable if he know how often conflicts actually arise, and how easy it is for lawyers to remove themselves from the file when that occurs.

Mr. Olsen said he had been advised by an experienced conveyancing lawyer that it is rare for a conflict to arise in this situation, and when it does, the lawyer can usually get off the file.

Mr. Zacks said it was not unusual for conflicts to arise on the closing day or under some other tight timeline that makes it difficult for the client to obtain a new lawyer quickly enough to solve the problem.

Mr. Nagle said that from the public perspective this was a creation of the banks, not the Law Society, and he was unhappy that the Law Society might be lumbered with responsibility in the public eye. He said he was coming to the conclusion that there was no such thing as a simple conveyance, and in these circumstances, he agreed with Mr. Turriff and Mr. Zacks.

Mr. Donaldson said if the simple conveyance is the exception to the basic rule against conflicts, and there are some circumstances in which it may be in the public interest to proceed with a single lawyer, there should be some way to resolve the tension in a way that would expand the simple conveyance exception enough to allow for the person buying a house to get an extra draw on their mortgage to renovate without broadening the rule in the way that the Ethics Committee was recommending.

Mr. Zacks said the Ethics Committee was suggesting that a mortgage still in the advance stage is a simple conveyance. The Ethics Committee did not suggest that a mortgage securing a line of credit should be considered a simple conveyance, and a construction mortgage is like a line of credit.

Mr. Alexander said a secured line of credit may be a simple conveyance.

Mr. Taylor shared Mr. Brun's concerns and suggested that the matter be put over to another time.

Mr. Hunter said a lawyer acting for a borrower and lender is in a conflict of interest from the start, but the Law Society has made an exception to allow that conflict in certain circumstances. He was not sure whether the situation under consideration should be considered a simple conveyance falling within the exception, and the Benchers should be careful in dealing with conflicts. Mr. Hunter's preference, on balance, was not to make the change because there is a conflict and a significant prospect that it could cause difficulties.

Mr. O'Byrne agreed with Mr. Taylor. He said the Benchers should not loosen conveyancing rules in the post-Wirick world.

Mr. LeRose acknowledged that inconsistent enforcement could impugn the integrity of the rules, but so too could a rule that simply does not work in the real world.

It was agreed to amend the motion by deleting paragraph 2 of the motion.

The motion as amended was carried.

14. PROPOSED AMENDMENTS TO RULES 3-44 AND 3-46

Mr. McDiarmid reviewed recommendations from the Discipline Committee to amend Rules 3-44 and 3-46 of the Law Society Rules to impose on solvent and insolvent lawyers the same obligations to report an unpaid judgment to the Law Society together with a proposal to satisfy the judgment that is adequate in the opinion of the Executive Director.

It was moved (Donaldson/McDiarmid) to amend the Law Society Rules as follows:

1. In Rule 3-44, by adding the following subrule:

(4) If a lawyer fails to deliver a proposal under subrule (1)(b) that is adequate in the discretion of the Executive Director, the Executive Director may refer the matter to the Discipline Committee.

2. By rescinding Rule 3-46 and substituting the following:

Consideration by Discipline Committee

3-46 (1) After receiving the information and material required under Rule 3-45(2), the Executive Director may refer an insolvent lawyer to the Discipline Committee.

(2) The Executive Director may refer any matter for decision under this Division to the Discipline Committee.

(3) When a matter is referred to the Discipline Committee under this Division, the Committee may make or authorize any investigations it considers desirable.

(4) The Discipline Committee may suspend or impose conditions and limitations on the practice of a lawyer that it considers does not meet the standards of financial responsibility established under section 32 of the Act.

(5) The Discipline Committee may remove the suspension or vary or remove conditions and limitations imposed under subrule (4).

(6) The Discipline Committee must not suspend a lawyer or impose conditions and limitations on the practice of a lawyer under subrule (4) until it has notified the lawyer of the reasons for the proposed action and given the lawyer a reasonable opportunity to make representations about those reasons.

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

15. FEDERATION AND WESTERN/NORTHER LAW SOCIETIES TASK FORCES

It was moved to disband the Federation and Western Law Societies Task Force.

The motion was carried.

16. WOMEN IN THE LEGAL PROFESSION TASK FORCE

Mr. Hume explained that the mandate of the Women in the Legal Profession Task Force expired at the end of May, but the Task Force sought an extension to complete the review of policies and practices in other jurisdictions.

It was moved (Hume/Ostrowski) to extend the mandate of the Women in the Legal Profession Task Force to the end of 2005, and to approve further investigation of the following initiatives:

1. Review and revise where necessary the following Model Workplace and Equity Policies currently available on the Law Society website:

    - Privacy Policy;
    - Privacy Policy for Employees of a Law Firm;
    - Workplace Harassment;
    - Maternity and Parental Leave;
    - Alternate Work Arrangements;
    - Workplace Equity; and
    - Gender-Neutral Language Policy;

    and seek volunteers to update these policies.

2. Encourage the staff development and implementation of an Exit Survey.

3. Implement a "contract compliance" policy, through which all law firms contracting with the law society be asked and encouraged to adopt workplace equity policies and to provide copies of such policies to the Law Society.

4. Investigate implementing a comprehensive mentoring program.

5. Make the Equity Ombudsperson program more visible through publicity and advertising, including the following:

    - Contact the Vancouver Association of Legal Administrators;
    - Contact the Victoria Legal Secretaries Association;
    - Contact Legal Assistant programs at community colleges, CLE etc.;
    - Prepare bulletins to be posted in Law Office staff rooms;
    - Prepare a hand-out for PLTC;
    - Advertise in CBA directory;
    - Promote at Young Lawyer CBA subsections.

6. Require the President and Benchers, when making all appointments, to seek to fill at least one third of the positions with women and also consider involving younger members of the profession.

7. Investigate, in consultation with the Equity and Diversity Committee, the possibility of more staff to deal with equity and diversity and the education therewith.

8. Investigate the possibility of a parental/maternity leave insurance program for single practitioners and, in particular, review the Quebec program.

9. Investigate and report back on the No Glass Ceiling Commitments program instituted by the Bar Association of San Francisco.

Mr. McDiarmid was concerned by the recommendation that the President and Benchers be "required" to seek to fill at least one third of appointments with women.

Ms. Schmit agreed with Mr. McDiarmid and said appointments should be merit-based.

It was agreed to amend the motion to change the word "*require*" in paragraph 6 to "*request*", and to change paragraph five by adding the words "*investigate ways to*" at the beginning of the paragraph.

Mr. Hunter thought the Benchers should await a further report and have a full discussion of the various initiatives, but would extend the mandate of the task force for as long as required to bring back a comprehensive package of proposals.

Mr. Nagle said he would like to approve the extension of time but send the rest of the recommendations back to the task force for further work.

Mr. Alexander said that was essentially what the motion would do.

Mr. Zacks noted that some of the recommendations were in fact conclusions. He did not think the Benchers should make any final decisions, particularly with respect to paragraphs 3 and 6.

Mr. Hume said some of the items were things the task force thought should be done immediately and other were recommendations for future action.

Mr. Turriff agreed with Ms. Schmit that appointments should be based on merit not quotas.

It was agreed to amend the motion to remove paragraphs 3 and 6.

The motion as amended was carried.

17. POLICY CONSIDERATIONS FOR THE SPECIAL COMPENSATION FUND COMMITTEE

Mr. Alexander reminded the Benchers of the sensitivity of this discussion and the need to avoid any discussion of specific cases or outcomes. He asked the Benchers to confine themselves to discussion of policy matters.

Mr. Zacks asked if it was the policy of the Special Compensation Fund to consider the nature of claimants in terms of whether they are corporations or individuals.

Ms. Schmit said the Legal Profession Act requires that the Law Society have a Special Compensation Fund and the Benchers have delegated authority to the Special Compensation Fund Committee to decide claims. The Committee has an unfettered discretion to pay some, all, or none of a claim. The Committee has developed jurisprudence regarding the factors that may be considered in exercising its discretion and the factors include the claimant's sophistication and wealth. There is no specific consideration of the corporate or other nature of the claimant. Ms. Schmit said the Special Compensation Fund Committee sought to consult the Benchers on the public relations implications of their decisions and the fact that the Special Compensation Fund is exhausted. She said the Committee would be assisted by knowing what weight the Benchers might place on some of the factors it considers.

Mr. Nagle confirmed that the fact that the fund is exhausted is a matter of public record and that the Law Society in the face of that continues to pay claims is a public relations matter in itself.

Mr. Donaldson recalled that the Benchers had said some time ago that they felt an obligation to make good on the defalcation of others as the committee thought was right. The present ability of the Law Society to do so is limited, but it can finance payment if the committee thinks payments should be made. The wealth and sophistication of the claimant is a proper consideration for the committee in determining the timing of consideration and payment of claims, and the committee may also want to consider the conduct of the claimant. Public relations considerations that arise are matters that the Law Society needs to deal with. The Law Society should say what has been done and what will continue to be done notwithstanding that the Society must borrow to do it. The Benchers need not depart from their prior commitment to fund payments authorized by the committee. The public relations question is for the Law Society to consider, leaving the committee to make its decisions based on the sensible factors that have been established.

Mr. Nagle supported everything Mr. Donaldson said. He said he took great comfort from the phrase "innocent homeowners" and as long as the Law Society kept those people as their focus and priority, it could withstand any test of public relations.

Mr. Zacks agreed with Mr. Donaldson. He said the factors the committee takes into account are largely adequate, but in terms of what the committee sought consultation on, there are considerations, including self-governance considerations. Mr. Zacks said there is a limit on the ability of lawyers to stand behind every defalcation if the resources are not present. The defalcations to date are taxing members but they are solidly behind payment, but it is not inconceivable that a greater problem could arise in the future. Some significance should be placed on the fact that ultimately the resources are limited.

Mr. McDiarmid assumed the Chair from Mr. Alexander.

Mr. Alexander said the Benchers needed to be aware from a public relations point of view that it would be disingenuous to make a distinction between the words used about funding all payments authorized by the committee, and the intended meaning of those words. He said the reasonable understanding of the public is that the lawyers of the province have stepped up and will continue to do so to pay valid claims. There appears to be nearly universal approbation of that action. Lawyers have been supportive because they see themselves as the beneficiaries of the honourable position taken by the Law Society on their behalf. Mr. Alexander supported penalizing claimants who have acted negligently or otherwise contributed to their own loss, but it would be odious if there was not payment in the absence of such contribution to the loss.

Mr. Turriff did not think the Benchers should be influenced by how wealthy, sophisticated claimants might deal with lawyers as a result of how their claims are treated by the Law Society, but otherwise he agreed with Mr. Alexander.

Mr. Brun said it seemed that an honourable decision was made three years ago and it would be nonsensical to diminish the public relations value of that decision by now taking contrary action.

Mr. Kelly recalled the earlier discussion concerning the priority of dealing with innocent victims. In that case the Law Society is trying in essence to restore the "Bambis" of the word from being preyed upon, but the story is different in relation to other claimants where from a public relations perspective the script is more like "Alien vs. Predator", and there are different considerations.

Mr. Zacks said the conduct of claimants has always been a legitimate factor to consider. He said the committee might also consider the timing of payments. For example, a claimant entitled to a large sum might be paid out over an extended period, possibly without interest.

Mr. Vilvang said he would be shocked if it was suggested that the Benchers did not say the Law Society would pay all legitimate claims, and he thought the members and the public would be shocked too.

Mr. Hunter said the factors already considered were legitimate, but the resources of the fund was not a consideration in relation to existing claims because the Law Society was already committed to exceeding the limit as necessary to pay proper claims. However, going forward, it would be a proper consideration.

Mr. Taylor said public relations should not be taken into consideration by the committee. It is a factor to be considered by the Benchers but not by the committee when they are deciding claims.

Ms. Wallace said she had a particular sensitivity to people who make a commitment and then back away because they don't have the money. She said the Benchers made a commitment and must follow through.

Ms. Schmit thanked the Benchers for their views. She reminded the Benchers that in 2002 when faced with the Wirick matter, the Benchers decided to remove the cap on payments and the effect of that was to assure claimants that they would not be getting pennies on the dollar, but it did not guarantee that they would get 100 cents on the dollar. The Benchers only guaranteed that the Law Society would pay all amounts the committee determined should be paid. She said there is no doubt that BC is seen as one of the most generous jurisdictions in compensating for loss, and there will still be hard questions to be decided in the future.

Mr. Alexander returned to the Chair.

18. WIRICK UPDATE

This matter was considered *in camera.*

19. OPEN DISCUSSION OF BENCHER CONCERNS

This matter was discussed *in camera*.

DMGN
05-05-20