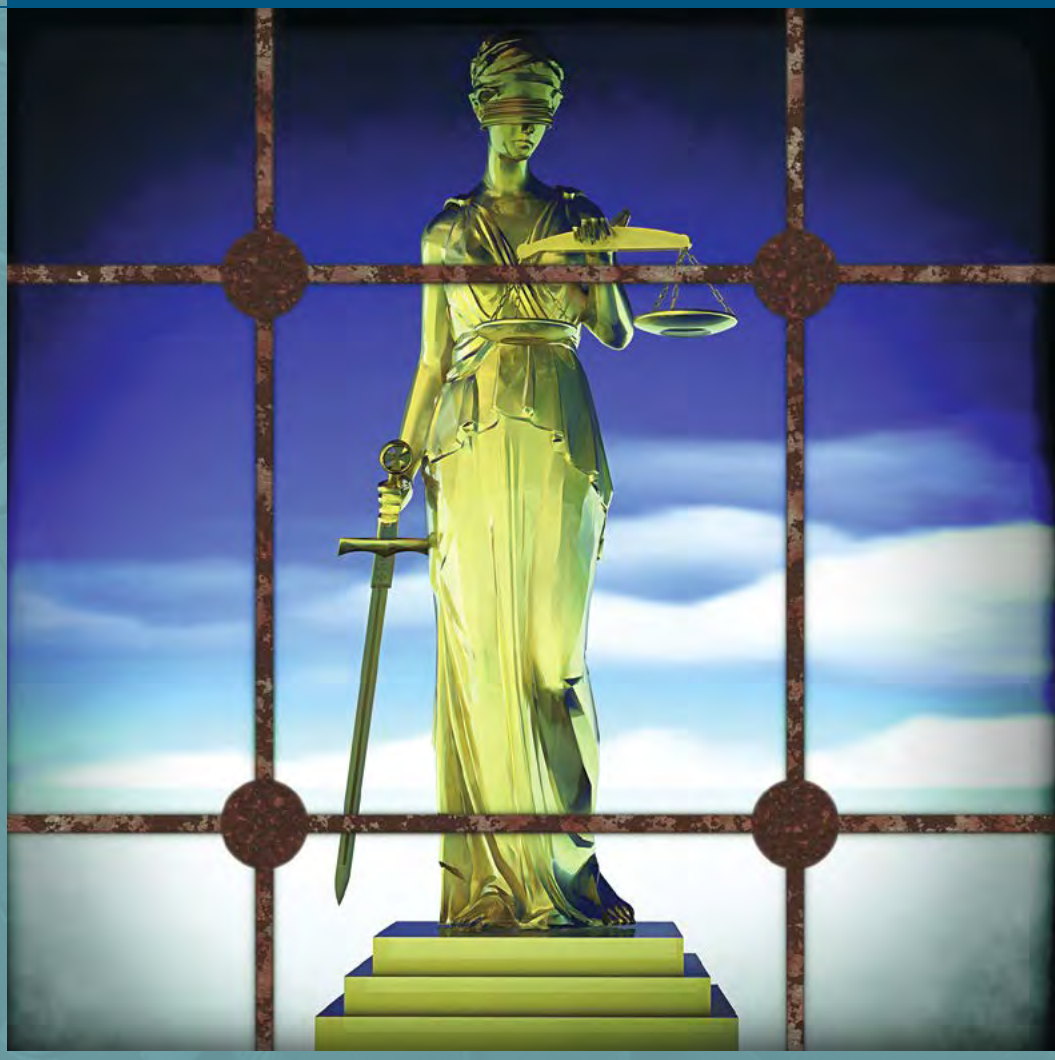
The Law Society of British Columbia

2014: No. 2 • SUMMER

BENCHERS' BULLETIN

Keeping BC lawyers informed



FEATURE

While TWU grabs the spotlight, the work goes on

by Jan Lindsay, QC

WHEN I SAT down to write my previous column for this publication, we were just starting out on the Trinity Western journey. Shortly after the April 11 Bencher meeting and the Bencher decision not to disqualify TWU law grads from entering our admission program, many members demanded a special general meeting to pass a resolution to direct the Benchers to change their decision.

Now, having concluded our July 11 Bencher meeting, notices of two motions have been put forward for the September 26 Bencher meeting. It is clear the Benchers are divided on this difficult and complex issue. But until these motions are debated and voted on at the next meeting, the position of the Law Society still stands as it was on April 11 – that the graduates from the proposed law school at Trinity Western University will be eligible to enter our PLTC program.

The story has legs, as they say. Within the period of a few weeks we saw more coverage than we've had in years, with articles or opinion pieces that reflect the passion and engagement, both from the broader public as well as from our members, on this topic. We read it all, consider it all and move forward, giving careful consideration to how best to apply the principles of good governance in fulfilling our mandate on this complex issue.

There is more information on this matter, including the two motions, later in this publication. I also encourage you to visit the Law Society website to review a full package of materials on the accreditation of TWU's law school

The staff at the Law Society has been amazing throughout this process. Our commitment to transparency has driven an epic collection of materials, and by the time this reaches print, there will be over 370 documents on the Law Society website. This grows daily, as we capture every aspect of the process as well as opinions and arguments that have been sent to us. We certainly live in interesting times.

In the meantime, there are students graduating from law school who want to enroll in our admission program; we are working to review those applications, and line up the PLTC sessions and instructors. We are scheduling and organizing call and admission ceremonies. The Credentials Committee continues to meet and consider applications for transfer, or admission, or return to practice.

In another area, complaints continue to be made about lawyers and their practices, consistently more than 1,000 a year.

The story has legs, as they say. Within the period of a few weeks we saw more coverage than we've had in years, with articles or opinion pieces that reflect the passion and engagement, both from the broader public as well as from our members, on this topic.

Those complaints are being investigated, and will either be resolved or prosecuted. The Discipline Committee meets and considers appropriate steps, while the Practice Standards Committee meets to consider interventions and practice support. The Ethics Committee continues to meet and consider ethical issues, on request from members or as identified through our other work. The *BC Code* is continuing to be reviewed. All Benchers sit on one of these committees that meet regularly. There is always material to be reviewed and troubling issues to be considered.

Practice advisors continue to manage and respond to calls and email requests. We hold hearings when a citation is issued against a lawyer, when the Credentials

BENCHERS' BULLETIN

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers, articled students and the public on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities. BC lawyers are responsible for reading these publications to ensure they are aware of current standards, policies and guidelines.

Suggestions on improvements to the *Bulletin* are always welcome — contact the editor at communications@lsbc.org.

Electronic subscriptions to the *Benchers' Bulletin*, *Insurance Issues* and *Member's Manual* amendments are provided at no cost. Print subscriptions may be ordered for $70 per year ($30 for the newsletters only; $40 for the *Member's Manual* amendments only) by contacting the subscriptions assistant at communications@lsbc.org.

Current and archived issues of the *Bulletin* are published online at lawsociety.bc.ca (see Publications and Resources).

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Committee orders a hearing, and if sanctions or conditions need to be considered and imposed. Lawyers continue to be sued, and the Lawyers Insurance Fund continues to defend and settle claims.

We manage our insurance reserves and other assets carefully and well. We continue to review the relationships between our various departments and groups to protect individual privacy and client confidences. Our Policy group continues to support the Justicia Project, Aboriginal lawyers and students, and other equity seeking groups, and we are continuing to explore options and policies that will enhance the public's access to legal services. In that area, the Legal Services Regulatory Framework Task Force is considering other possibilities for the provision of legal services.

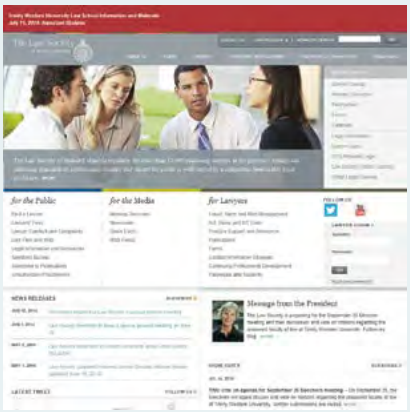
We are involved in litigation to resist the federal government's initiatives that would enlist lawyers as investigators of their clients, or compel lawyers to disclose privileged information about their clients' affairs. The Law Society also participates and contributes to the work of the Federation of Law Societies on many initiatives aimed at harmonizing standards for admission and discipline across the country, supporting a national profession and mobility. In all of this, we are guided by the public interest, which is our legislated mandate.

Throughout my time as a Bencher, and now as President, I continue to be amazed at the extent of the work being done at the Law Society. The Benchers are integral to that work, and contribute many hours every month to ensure that the work is done as carefully and in as timely a way as possible.

In addition to Law Society work, the Benchers are asked to serve with other organizations connected to but distinct from the Law Society. We regularly sit on committees, and consult with government agencies. As President, I am asked to appoint Benchers to boards, to participate in university activities, especially at the law schools, and to work with other professionals on common interest initiatives.

I continue to be so proud to be a lawyer, especially when I see the good work done by so many, and I am proud to be part of our Law Society, and the good work being done by it, every day.❖

COMING SOON: "THE PRESIDENT'S BLOG"



The Law Society is pleased to announce the launch of President Jan Lindsay's blog, available on the Law Society website starting mid-August. President Lindsay will blog on topics of interest to lawyers and the broader public. To start with, she will focus on matters relating to the proposed faculty of law at Trinity Western University.

The blog will be available at www.lawsociety.bc.ca – please visit frequently!

Westwood elected in Prince Rupert county by-election

Sarah Westwood was elected as a Bencher for Prince Rupert county in the June 6, 2014 by-election. Westwood's term began immediately on election and ends on December 31, 2015.

Called in 2002, Westwood articled and practised as a corporate-commercial solicitor in Vancouver until moving to Smithers in 2004. She started her own firm in 2005, and has since practised largely as a barrister, including ad hoc Crown, criminal defence, family, employment and child protection cases.

In 2013, she was elected as a representative to the Provincial Council of the CBA, BC Branch, and served on the Rural Lawyers Task Force in 2014. She also presented and spoke at the 2013 CBABC conference on issues facing rural practitioners.

In her election statement, Westwood noted, in part: "I am acutely aware of the challenges of practice and access to justice in rural and remote communities, and how issues of poverty, distance and culture affect our clients and the communities in which we live and work. I am also aware of, and have written on, how these issues complicate and affect how we practise and serve those seeking legal assistance while maintaining our professional standards."

See the Law Society website for voting results.

Access to justice an ongoing priority

by Timothy E. McGee, QC

THUS FAR, 2014 has been an eventful year at the Law Society and for the legal profession as a whole. The Benchers have thoughtfully and thoroughly considered Trinity Western University's (TWU) law school, and whether it should be an approved faculty of law for the purposes of the Law Society's admissions program. This question garnered passionate discussion at the April 11 Bencher meeting, the June 10 special general meeting and the July 11 Bencher meeting, and at this point there are two motions that will likely be debated and voted on at the Bencher meeting in September. Throughout this process, the Law Society continues to embrace principles of good governance by providing a process that is supportive and transparent for members and the public.

While the Benchers have, in large part, focused their attention on TWU's law school, they continue to tackle other important matters that impact many British Columbians. On April 11, there was another decision made, albeit one that attracted less attention. The Benchers approved the formation of the new Legal Services Regulatory Framework Task Force to look at how the Law Society can provide opportunities for non-lawyer service providers to give legal services under a single regulatory framework. This is an important step toward expanding the scope of legal service providers, thereby improving access to justice.

Access to legal advice and services continues to be a challenge for many members of the public, specifically low and middle income earners. Many are reluctant to seek legal assistance because of the costs and complexity involved. Clearly, the Law Society has a role to play in tackling these challenges, and over the past few years, we have made significant strides in this area.

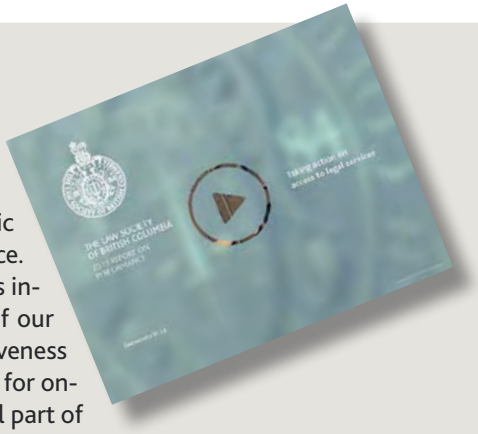
In 2011, the Law Society began allowing articled students to provide certain legal services to the public under the supervision of a lawyer, which gives clients a lower cost option. In 2012, the role of paralegals was enhanced to help reduce the cost of some legal services and make justice more attainable. Just last year, a pilot project was launched that allows paralegals to make certain appearances in family court. Further, we continue to encourage lawyers to use limited scope legal services in order to benefit the client. The Law Society also supports and participates in the BC Justice Summits hosted by the Attorney General and Ministry of Justice.

At their retreat last month, the Benchers drilled further into the complex issue of access to justice, this time taking a very broad view of the topic. The retreat and discussion are featured in this edition of the *Benchers' Bulletin*. In the appropriately titled "Focus on access to justice," the Law Society's manager of policy and legal services, Michael Lucas, highlights the concerns raised in this area, and possible solutions that were considered at the retreat.

Guest speakers at the retreat challenged the Benchers by identifying access needs – such as the prevalence of self-represented litigants and access to legal services and advice in rural areas – and addressed what lawyers in BC might do to help bridge those gaps. They considered: *How can the Law Society better promote unbundled legal services to lawyers? Can non-lawyer legal services be engaged or expanded? Can rural practice be better promoted by the Law Society? Can new technology options, or alternative business models, be used to deliver legal services at a lower cost?*

These questions are just a few among many that were discussed by the Benchers, and the sheer volume of potential solutions illustrates there is no silver bullet for resolving issues dealing with access. Undoubtedly, there is an opportunity for the Law Society to demonstrate leadership on this issue, as we continue our work of ensuring a just and equitable legal system for all in British Columbia.❖

2013 Report on Performance now available



The Law Society's annual report provides a progress update on the second year of our 2012-2014 Strategic Plan as well as a review of our regulatory performance.

In this year's report, key performance measures indicate that we were successful in meeting most of our goals. These measures evaluate the overall effectiveness of Law Society programs, giving us the opportunity for ongoing improvement. In addition, they form a critical part of our regulatory transparency, informing the public, government, the media and the legal community about how we are meeting our regulatory obligations.

Read the *2013 Law Society Report on Performance* on our website in Publications > Reports and surveys.

The Law Society's 2013 audited financial statements are also available online.❖

TWU on agenda for September Benchers meeting

ON JUNE 10, the members of the Law Society voted on a resolution at a special general meeting directing the Benchers to declare that the proposed law school at Trinity Western University is not an approved faculty of law for the purposes of the Law Society's admission program. The meeting was convened at the request of more than five per cent of the entire membership.

After oral submissions from members around the province, the resolution was passed in a 3,210 to 968 vote.

On July 11, the Benchers received two notices of motion regarding the TWU matter. It is expected that two motions will be considered by the Benchers on September 26.

The motions are as follows:

Motion 1:

BE IT RESOLVED that the Benchers implement the resolution of the members passed at the June 10, 2014 special general meeting, and declare that the proposed law school at Trinity Western University is not an approved faculty of law for the purposes of the Law Society's admissions program.

Motion 2:

BE IT RESOLVED THAT:

1. A referendum (the "Referendum") be conducted of all members of the Law Society of British Columbia (the "Law Society") to vote on the following resolution:

"Resolved that the Benchers implement the resolution of the members passed at the special general meeting of the Law Society held on June 10, 2014, and declare that the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the Law Society's admissions program."

Yes _____ No _____ (the "Resolution")

2. The Resolution will be binding and will be implemented by the Benchers if at least:

(a) 1/3 of all members in good standing of the Law Society vote in the Referendum; and

(b) 2/3 of those voting vote in favour of the Resolution.

3. The Benchers hereby determine that implementation of the Resolution does not constitute a breach of their statutory duties, regardless of the results of the Referendum.

4. The Referendum be conducted as soon as possible and that the results of the Referendum be provided to the members by no later than October 30, 2014.

If the Benchers pass a motion calling for a referendum, ballots will be mailed to all members in early October with the vote to be counted on October 30. The ballots would be returnable on or before October 29. Those wishing to take part in a referendum must be a member in good standing when the Law Society finalizes the voting list on September 24.

In the interests of maintaining an open and transparent decision-making process, the September meeting will be available online via webcast, which will allow the public and the profession to conveniently see and hear the proceedings online.

The Benchers are also accepting written submissions from anyone wanting to provide input or information to assist them with their decisions. The deadline for submissions is September 3. Submissions may be sent by email to submissions@lsbc.org or by mail to The Law Society of BC – Attention: Executive Director, 845 Cambie Street, Vancouver, BC, V6B 4Z9. All submissions will be identified by the name and date of submission and made public on the Law Society website as they are received. Anonymous submissions or those containing inappropriate language will not be considered or posted.❖

2014 Aboriginal Scholarship

Kinwa Bluesky *(pictured with President Jan Lindsay, QC at the July 11 Benchers meeting)* is the recipient of the 2014 Law Society Aboriginal Scholarship. She is a member of the Sandy Lake First Nation, an independent Oji-Cree First Nation in the Kenora district of northern Ontario.

Bluesky completed her J.D. and LL.M. at the University of Victoria in 2004 and 2006. She is currently in the final year of her Ph.D. in the UBC Faculty of Law. Her dissertation focuses on "The Art of Indigenous Law – The Law of Indigenous Art."

Her research today continues and builds on the hypothesis that Indigenous artists are active agents in their own respective legal traditions. Her research falls in line with legal scholarship that is exploring Indigenous legal traditions from a normative perspective. Grounded within Indigenous legal theory, her dissertation compares some of the ideas about Indigenous legal theory set out in the works of Indigenous legal scholars. These ideas are set against the background of Western legal theory.

Bluesky's career objective is to be a leader in serving Indigenous legal education by redefining Aboriginal legal issues within BC and Canada through the enhancement of Aboriginal involvement in all areas of the legal profession.❖

CRA requirements for information – an update

THE LAW SOCIETY has alerted lawyers in the past about requirements for information that Canada Revenue Agency (CRA) issues to lawyers pursuant to s. 231.2 of the *Income Tax Act*, seeking information about client transaction matters. CRA usually takes the position that the information sought is not privileged. If the lawyer does not produce the documents, either because a client has claimed privilege or the client cannot be found, CRA often applies for a "compliance order" against the lawyer pursuant to s. 231.7 of the *Act*, to compel the lawyer to deliver the information.

On March 21, 2014, the Quebec Court of Appeal issued reasons for judgment in *Chambre des Notaires du Québec* v. *Procureur Général du Canada* 2014 QCCA 552. The Court of Appeal upheld the decision of the Superior Court that struck down ss. 231.2(1) and 231.7 as unconstitutional.

The Law Society has been advised that, despite the decision of the Quebec Court of Appeal, the CRA will continue to issue requirements for information to lawyers in British Columbia pursuant to s. 231.2, when it considers it appropriate to do so. Further, if lawyers do not comply with the requirements, the CRA may seek a compliance order under s. 231.7.

The Law Society is considering seeking leave to intervene in an application against a lawyer pursuant to s. 231.7 to argue, in the Federal Court, that ss. 231.2 and 231.7 are unconstitutional.

Lawyers who receive notices of requirement should refer to "Canada Revenue Agency: requirements for information" in the Summer 2010 *Benchers' Bulletin* and "CRA requirements for information – new developments" in the Winter 2010 *Benchers' Bulletin*. For more information, contact Barbara Buchanan, Practice Advisor (604.697.5816) or Michael Lucas, Manager, Policy & Legal Services (604.443.5777).❖

NEWS FROM THE LAW FOUNDATION

Law Foundation 45th anniversary celebration

ON APRIL 4, the Law Foundation of BC celebrated its 45th anniversary with the help of approximately 150 grantees, current and former board members, judges, MLAs, and other supporters. Some of the groups represented at the reception had received funding from the Foundation for over 30 years.

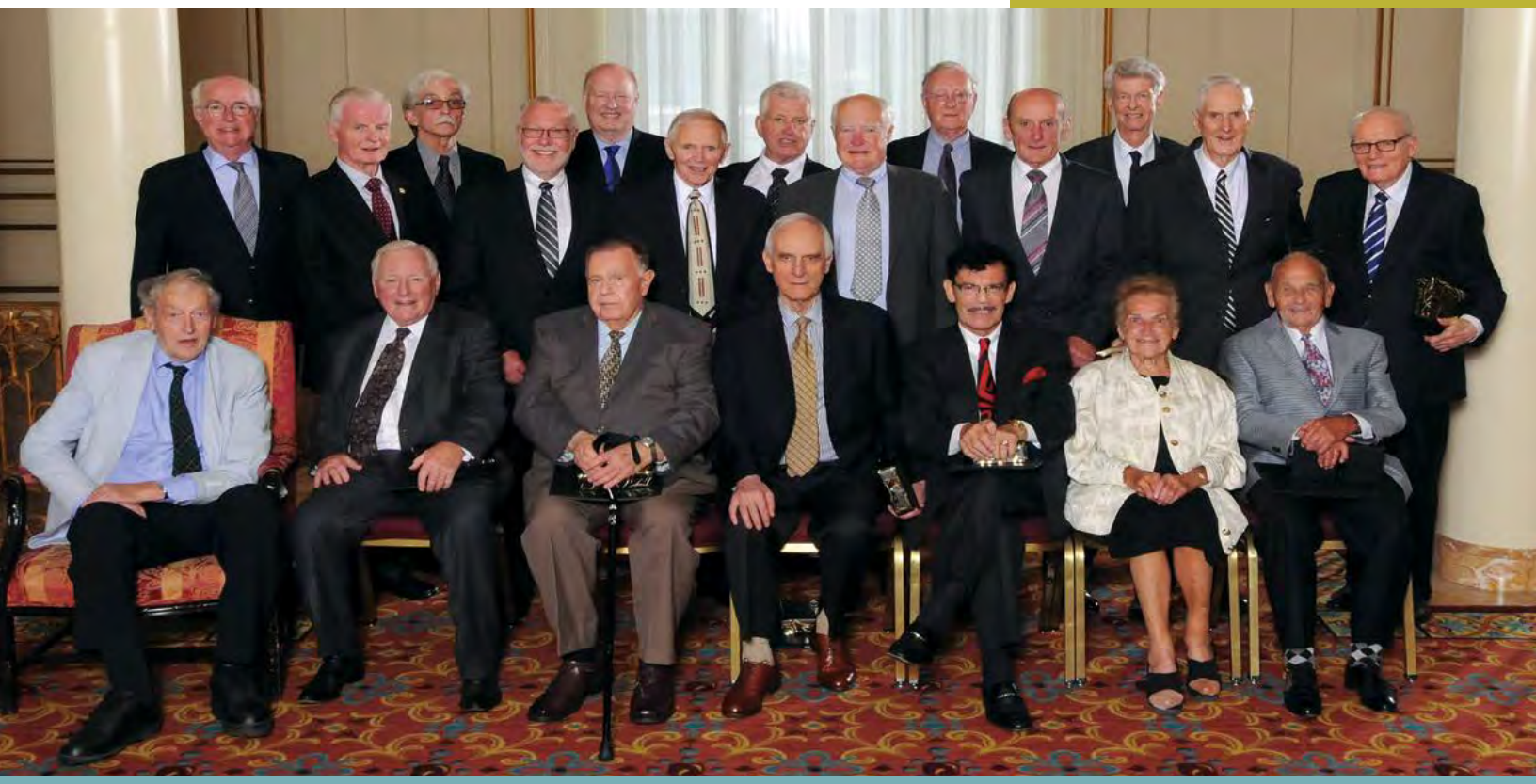
Tamara Hunter, Chair of the Law Foundation Board, welcomed the crowd, reviewed the history of the Law Foundation, noted the extent of the work funded by the Foundation, and reflected on the accomplishments of the many groups funded by the Foundation over the years. She talked about the contribution of founding members, the Honourable Ken Meredith and Arthur Harper, QC, both of whom passed away in the past 18 months. She also noted the contributions of two people with long-term connections to the Foundation – auditor Cal Tompkins, who has worked with the Foundation since it started, and designer Linda Coe, who has worked on the Foundation's Annual Report for 26 years.

At the celebration (L-R): Ed Macaulay, President, Community Legal Assistance Society, Margaret Sasges, former chair, Law Foundation, Sandra Dick, Law Foundation board member, and Tony Wilson, Law Society Bencher.

Hunter noted that, since its inception, the Foundation has issued grants totalling $496 million, and much has been accomplished with those funds. She talked of the law reform and systemic advocacy work done as a result of funding from the Foundation – in particular, noting that one of these initiatives led to the development of the Registered Disability Savings Plan.

Other speakers represented important sectors of the legal community that have partnered with the Law Foundation through the years. The Honourable Suzanne Anton, QC spoke on behalf of government. The Honourable Chief Justice Christopher Hinkson of the BC Supreme Court, Dean Crawford, President of the Canadian Bar Association, BC Branch, and Law Society Bencher Tony Wilson also reflected on the valuable work of the Foundation.

The 45th anniversary celebration provided an opportunity for the many groups and individuals who are working on improving access to justice in the province to gather, appreciate the work that has been done, and acknowledge those involved over the years.❖



50 and 60-year certificates

The Law Society hosted a luncheon in Vancouver on June 26, 2014 to honour lawyers celebrating milestone anniversaries in the profession in 2014. Receiving 50-year certificates, unless otherwise noted, were:

Front Row (left to right): John D. McAlpine, QC (60 years), Terrence L. Robertson, QC, Thomas B. Marsh, QC, Philip G. Ferber, Jacob B. Kowarsky, Stella F. Samuels (60 years) and Leonard C. Dudley (60 years).

Back Row (left to right): John A. Gemmill, Darrell W. Roberts, QC, Roderic K. McDonald, J. Lorne Ginther, Brian N. McGavin, Donald N. Patten, Gary W. Griffiths, Robert W. Brewer, Alan N. Patterson, Donald W. Maskall, Bruce F. Fraser, QC, Robert J. Falconer, QC (60 years) and J. Lyle Woodley, QC.

Not pictured: Gerald Donegan, QC, Robert E. Eades, David K. Fraser, Frederick H. Herbert, QC (60 years), E. George MacMinn, QC (60 years), John S. McKercher, QC, Geoffrey H. Mott, Colin A. Pritchard, Richard L. Raibmon, David P.R. Roberts, QC (60 years), John M. Tennant (60 years), Gordon W. Young (60 years) and Elmer A. Yusep.

In Brief

JUDICIAL APPOINTMENTS

Emily Burke, a lawyer with Emily Burke Arbitration & Dispute Resolution Services in Vancouver, was appointed a judge of the Supreme Court of BC (Vancouver).

Shannon Keyes, Crown counsel with the Criminal Justice Branch, was appointed a judge of the BC Provincial Court (Prince George).

Timothy Outerbridge was appointed a registrar of the BC Court of Appeal.

Judge Steven Point, a retired judge and former Lieutenant Governor of BC, was appointed a judge of the BC Provincial Court (Abbotsford).

Carmen Rogers, Crown counsel with the Ministry of Justice, was appointed a judge of the BC Provincial Court (location to be determined).❖

Focus on access to justice

THE BENCHERS CHOSE the complex issue of access to justice as the focus of their annual retreat. In particular, the Benchers considered the difficult question of what lawyers could do to improve access to legal services, and what the Law Society might do to assist. The Benchers heard from speakers who not only identified the access needs of British Columbians, but also addressed what lawyers might do to meet those needs.

Access to justice has been widely discussed. The Chief Justice of Canada has mentioned its importance, as has the Governor General. Many reports on the subject have been published, including the National Action Committee on Access to Justice's "Roadmap for Change" and the Report of the Canadian Bar Association's Access to Justice Committee, both of which were provided as background material for the retreat.

A number of successful programs addressing access were considered, including:

- A Manitoba program called the Family Law Access Centre that assists people in need of family law advice. Through this program, the Law Society refers people needing family law-related advice or services to lawyers who have agreed to reduce their billing rate by approximately one-third. In exchange, the Law Society guarantees payment of the lawyer's account and enters into a payment arrangement with the client in which the client makes monthly payments to the Law Society until the account is paid off. The program has been quite successful in facilitating access to reduced-cost

legal services in an area of need. At any given time, there are approximately 60 clients benefiting from the program.

- The BC Ministry of Justice has opened three justice access centres for people dealing with family and civil law issues, including separation or divorce, income security, employment, housing and debt matters. The centres also link people with other services, such as pro bono legal services or assistance from supervised paralegals (at least in Vancouver).

The increasing prevalence of self-represented litigants is a significant fact in any discussion about access to justice, as noted in the report of the National Self-Represented Litigants Project authored by Dr. Julie Macfarlane of the University of Windsor. Madam Justice Gray, of the Supreme Court of British Columbia, has also reported on the issue of self-represented family and civil litigants in the Supreme Court.

It was noted that many – perhaps most – self-represented litigants *do* want some legal assistance, indicating that a market exists for "limited retainer" or "unbundled" legal services. Fewer and fewer people can afford to have a lawyer do everything, but many can find the funds for a lawyer to assist with advice on various steps along the way, or for certain advocacy tasks. Lawyers could make more use of unbundling, and the Law Society could help by providing more information on the rules that permit unbundled legal services.

Rural access to justice remains a concern. That being said, there are opportunities for successful legal practices outside the larger urban centres, and lawyers need to learn how to grasp these opportunities.

How can access be improved? Much depends on what lawyers are prepared to do and, further, if the Law Society can assist by developing models or regulatory requirements that permit or encourage new methods of service provision. The Benchers considered a number of issues:

- While the provision of unbundled legal services is not going to *solve* access to justice, it will help. Why are lawyers not engaging more in this mode of delivery? How can the Law Society better promote it to lawyers? Or are lawyers providing unbundled services, but the message is not getting out to the public? If so, how can lawyers better advertise their services? Are the Law Society rules constraining advertising?
- Can non-lawyer legal services be engaged or expanded? Could lawyers make better use of paralegals? Can a range of non-lawyer legal technicians be credentialed and regulated to work with lawyers in providing customized services at lower cost?
- What can lawyers do to improve or expand upon the services offered through the justice access centres? Can they volunteer their time or provide incentives for their staff to provide volunteer assistance? Can lawyers work with other organizations in their community to open – even on a part-time basis – a justice access centre in communities where one does not exist? Can lawyers assist in modelling a justice access centre as an intake – or "triage" – centre where people can go to determine whether a problem they face is a legal problem and, if so, obtain some preliminary advice and, perhaps, a referral?
- Can rural practice be promoted better by the Law Society or, indeed, by law schools when educating prospective lawyers?
- How can lawyers and justice system organizations – including the Law Society – better educate the public about basic legal knowledge and how to arrange their affairs to reduce the risk of a legal problem arising?
- Are there new ways of delivering legal services, either through new technology options or through business models other than a traditional firm partnership or sole practice, that will lower the cost of legal service delivery and thereby improve access?

There is no one solution to the problems relating to access to justice and to legal services, but the Benchers left the retreat invigorated and confident that there are things that lawyers and the Law Society can do make improvements. As the Benchers move forward in developing the Law Society's next three-year strategic plan, there is no doubt that improving access to justice and legal services will be a key outcome.❖

Speakers at the Benchers retreat included Allan Fineblit, QC, Chief Executive Officer of the Law Society of Manitoba, Jay Chalke, QC, Assistant Deputy Attorney General, and Michael Litchfield, Managing Director of Thinklab Consulting and Regional Legal Careers Officer for the CBA's Rural Education and Access to Lawyers Initiative . Dr. Julie Macfarlane of the University of Windsor weighed in through a prepared video presentation.

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Ethical considerations when a lawyer moves on

What happens to the clients and their files when a lawyer leaves or the firm breaks up?

WHEN A LAWYER leaves a firm, what happens to the clients and their files? What if the firm breaks up altogether?

Sometimes lawyers hold the view that the law firm or an individual lawyer owns a client. They may believe that a client must either stay with the firm or that the lawyer can simply take the client's electronic and paper files to the new firm. They are mistaken. A client is the property of neither the departing lawyer nor the law firm.

When a lawyer leaves a firm, whether to practise alone or to join another firm, the lawyer and the law firm have a duty to honourably discharge their ethical responsibilities to clients and each other. Following are some duties and guidelines to keep in mind, primarily based on rule 3.7-1, commentary [4] to [11] and rules 3.7-8 and 3.7-9 of the *BC Code*. The same duties may arise when a firm winds up or divides into smaller units.

1. **Duty to inform clients.** The departing lawyer and the law firm have an ethical duty to inform all clients for whom the lawyer is the responsible lawyer in a legal matter that the clients have a right to choose who will continue to represent them. The client may choose to continue to be represented by the departing lawyer or to stay with the firm (and of course a client may always decide to move the file somewhere else altogether).
2. **Duty not curtailed by a contractual arrangement between lawyer and law firm.** The law firm should not prevent the departing lawyer from carrying out his or her duty to inform clients of their right to choose. A client's right to be informed of changes to a law firm and to choose his or her lawyer cannot be curtailed by any contractual or other arrangement. For example, despite a law firm's insistence that the firm keeps a client's business because of a contractual arrangement between the lawyer and the firm, the client has a right to be informed and to exercise his or her choice of lawyer.
3. **Duty does not arise in some circumstances.** The duty to inform clients about their options does not arise if the lawyers affected by the changes, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of a particular lawyer or law firm. For example, if the departing lawyer has been appointed a judge, it is obvious that he or she will not be in a position to continue to represent clients. Another example is if the departing lawyer is the only lawyer at the firm who is competent to represent the client (e.g. the only family law lawyer or the only tax lawyer at the firm), it would be inappropriate for the law firm to try to hang on to the client.
4. **Responsible lawyer.** To assist in determining whether the departing lawyer is the "responsible lawyer" in a legal matter, consider objectively, from the client's perspective who that would be. The responsible lawyer is not merely a name on a file. It is preferable for the law firm and the departing lawyer to review the client files, mutually agree on who is the responsible lawyer, make a list of the files, and inform clients of the change. If the lawyer and the law firm cannot agree on who is the responsible lawyer, they may opt to ask for assistance from an impartial lawyer. Another option is to err on the client's side; in other words, inform the client of the change.
5. **Timing.** Clients must be notified of their right to choose their lawyers as soon as practicable after the effective date of the changes is determined. In my view, this effective date would normally be the date that the lawyer gave notice to the firm that the lawyer is leaving the firm as of a specific date or within a specific time frame. It is best to send the letters prior to the lawyer's departure, to make any transition as seamless as possible for the clients.
6. **Joint letter preferable.** The departing

lawyer and the law firm should agree on a neutrally worded joint letter informing clients of the changes and their choices as to representation. A joint letter has advantages over separate letters from the firm and the departing lawyer. For the clients, a joint letter may decrease confusion and anxiety, lessen concerns about continuity of representation and not expose them to any unseemly wrangling. For the firm and the lawyer, an advantage is that they will know exactly what is written and to whom during what can be an awkward and tumultuous period.

7. **Precedent letters in the absence of a joint announcement.** In the absence of a joint announcement, the law firm and any lawyers affected by the changes, including the departing lawyer, may use the precedent letters on the Law Society website, one for the departing lawyer and one for the firm. Both precedent letters provide for the inclusion of the departing lawyer's new law firm name or sole practice and for the client's written instructions regarding representation. The client may check a box indicating the client's choice, and return it to the sender. Whether the client provides direction in this way or through other correspondence, if the file is to be transferred, there should be written direction from the client regarding the transfer of the file and any trust funds.
8. **Not a marketing letter.** The Ethics Committee has considered whether it is proper for either the firm or the departing lawyer to include marketing materials in a letter informing clients of their right to choose representation. The committee's view (July 2011) was that, unless the lawyer and the law firm agree otherwise, such a communication must not include a marketing component.
9. **Telephone calls.** The departing lawyer and the law firm should agree that, prior to a client exercising his or her choice, the lawyer may continue to communicate with clients by telephone or other means if reasonably necessary to discuss the client's matter (e.g., a settlement offer with a deadline for acceptance).
10. **No undue influence once client's choice is made.** Once a client has received either a joint or precedent letter and has made a choice, neither the departing lawyer nor the law firm should try to change the client's mind. If a client does not respond to the letter, it may be necessary to send a second letter or follow up in another way. If there is still no response, in most situations it will be preferable for the file to stay with the firm.
11. **Common law restrictions.** Lawyers should be mindful of the common law restrictions on proprietary information and interference with contractual and professional relations between the law firm and its clients.
12. **Restrictive covenants.** The *BC Code* makes it clear that a client's right to choose his or her lawyer cannot be curtailed by any contractual or other arrangement (rule 3.7-1, commentary 9). Restrictive covenants that may affect a lawyer's ability to act for prospective clients (as distinct from existing clients) are not prohibited, although in some cases they may be unenforceable at law (Ethics Committee, May 1999).
13. **Transitioning the file.** Lawyers have an obligation to protect a client's information and property and must minimize any adverse effect on the client's interest when a lawyer leaves a firm. This generally includes an obligation to ensure that the files are properly transitioned. The lawyers involved should cooperate so as to minimize expense and avoid prejudice to the client.
14. **Obligation to provide client documents (including electronic file) within a reasonable time.** A lawyer has an ethical duty, at a client's request, to provide the client with documents that, at law, the client is entitled to have. A lawyer is also obliged to provide electronic documents in the same form in which the lawyer holds them at the time of the client's request. The lawyer must make reasonable efforts to meet a client's request. For more information, see the Ethics Committee's November 2009 and December 2008 opinions. To assist in determining whether it is the client or the lawyer who owns various file documents, see "Whose file is it anyway?" a practice resource on the Law Society website.
15. **Billing for production of electronic documents or photocopies.** Since it is for the lawyer's benefit to retain copies of a client's file documents to defend

continued on page 12

Scam attempts against BC lawyers continue

SCAMSTERS CONTINUE TO pretend to be BC lawyers' legitimate new clients, either using the phony debt collection scam or other ruses. Whatever their stratagem, the scamster's ultimate goal is usually to coerce a lawyer to deposit fraudulent financial instrument (often a bank draft or certified cheque) into a trust account, and then to trick the lawyer into electronically transferring funds to the scamster before the lawyer finds out the instrument is no good. So far in 2014, scam attempts against BC lawyers include the following phony schemes: collecting on a franchise agreement, copyright infringement claim, bogus real estate purchaser, CRA tax claim, personal loan agreement claim, collaborative divorce agreement claim, and a fake lawyer.

Protect yourself. Review risk management tips on the Law Society website. Review the bad cheque scam names and documents web page as part of your firm's intake process. Report potential new scams to bbuchanan@lsbc.org. Reporting allows us to notify the profession, as appropriate, and update the list of names and documents on our website.

Articling offers by downtown Vancouver firms to stay open to August 15, 2014

ALL OFFERS OF articling positions made this year by law firms with offices in downtown Vancouver must remain open until 8 am on Friday, August 15, 2014. Downtown Vancouver is defined as the area in the city of Vancouver west of Carrall Street and north of False Creek.

Set by the Credentials Committee under Rule 2-31, the deadline applies to offers made to both first and second-year law students. The deadline does not affect offers made to third-year law students or offers of summer positions (temporary articles).

Law firms are encouraged to set an acceptance deadline for 8 am on August 15; if the offer is not accepted, the firm can make a new offer to another student within the same day. Law firms cannot ask students whether they would accept an offer if an offer was made, as this places students in the very position Rule 2-31 is intended to prevent.

If a law student advises that he or she has accepted another offer before August 15, the firm can consider its offer rejected. If a third party advises a lawyer that a student has accepted another offer, the lawyer must confirm this information with the student.

Should circumstances arise that require the withdrawal of an articling offer prior to August 15, the lawyer must receive prior approval from the Credentials Committee. The committee may consider conflicts of interest or other factors that reflect on a student's suitability as an articled student in deciding whether to allow the lawyer to withdraw the offer.

For further information, contact Member Services at 604.605.5311.❖

Practice Watch ... from page 11

against negligence claims or respond to complaints, the lawyer should generally make any copies of the client's documents for the lawyer's retention at the lawyer's own expense. If a client requests photocopies of documents that the lawyer has previously provided to the client at no charge, a client is entitled to receive copies again. However, a lawyer is entitled to bill a fair and reasonable amount for additional photocopies and, in the case of electronic documents, for the cost of a memory stick or disk.

The Law Society's August 10, 2012 Discipline Advisory provides that disbursements must be billed at their actual, rather than estimated, cost. There is also an Ethics Committee opinion (October 1997) that a lawyer may add surcharges to disbursements if they reasonably reflect actual costs incurred and are fully disclosed in the statement of account. See section 3.6 of the *BC Code* for more on fees and disbursements.

16. **File status.** When preparing to transition a file, consider the file's status (e.g. whether there are unfulfilled undertakings, outstanding commitments, unpaid or unbilled fees and disbursements, and limitation deadlines). If the file is to remain at the firm, it may be necessary for the departing lawyer to detail the status of the file in a memorandum.
17. **Solicitors' liens.** If the client has chosen to go with the departing lawyer, arrangements must be made to pay any outstanding accounts. The law firm may refuse to transfer the file and claim a retaining lien if the accounts are not paid. See the practice resource "Solicitors' Liens and Charging Orders – Your Fees and Your Clients" on the website.

Once a client has received either a joint or precedent letter and has made a choice, neither the departing lawyer nor the law firm should try to change the client's mind.

18. **Undertakings.** A person to whom a lawyer has given an undertaking is entitled to assume that the lawyer will personally fulfill the undertaking (*BC Code*, rule 7.2-11, commentary [1]). When a client file is being transitioned to another lawyer, consider how any outstanding undertakings may be satisfied or whether they may be retracted. If an undertaking cannot be fulfilled by the original lawyer before the transfer, it may be possible to arrange for that lawyer to be released from the undertaking and for the successor lawyer to accept the undertaking in place of the original lawyer. The transfer of the obligation should be acceptable to the original lawyer, the successor lawyer and the person to whom the undertaking was given.
19. **File retention requirements and guidelines.** If a lawyer is discharged by the client, see "Closed Files – Retention and Disposition," a practice resource on our website.
20. **Conflicts from transfer between law firms.** The departing lawyer should review *BC Code* rules 3.4-17 to 3.4-26, the rules that apply to conflicts that may result when a departing lawyer transfers from one law firm to a new law firm.

FURTHER INFORMATION

Contact Practice Advisor Barbara Buchanan at 604.697.5816 or bbuchanan@lsbc.org for confidential advice or more information regarding any items in Practice Watch.❖

Note: Look for an expanded version of this article, to be published as a practice resource on the Law Society website later this year.

ETHICS COMMITTEE OPINION

Lawyers' contact with expert witnesses

LAWYERS' CONTACTS WITH witnesses or potential witnesses are governed by section 5.3 of the *BC Code*, which provides:

> **5.3** Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

In the opinion of the Ethics Committee, a lawyer must notify an opposing party's counsel when the lawyer is proposing to contact an opposing party's expert. Such notification promotes discussion between counsel about the permissible scope of such a contact at law, including the applicability of solicitor-client privilege. Failing agreement between counsel, either counsel may determine to take formal steps to resolve any issues.

Formal examination of an opposing party's expert witness is governed by the Supreme Court Civil Rules: see especially Rules 7-5(2) and 11-7.❖

NEWS FROM THE EQUITY OMBUDSPERSON

Respectful workplaces now expected

Anne B. Chopra

I HAVE OBSERVED a growing trend in the legal community: the expectation of a respectful workplace.

Treating each other with respect has become a prerequisite for building a successful and productive organization that will attract and retain lawyers and staff.

Firms can no longer afford to look the other way. There is a cost to doing nothing. When lawyers and staff are searching for new employment, one of their top concerns is, *how are people treated? What is the firm's reputation?* A poor reputation, lack of policies and structure, and lack of implementation of those policies will result in an inability to attract and retain top people. On the other hand, investing in healthy workplace behaviours will reduce staff turnover and training costs, foster staff commitment and innovation and contribute to staff well-being. This, in turn, results in greater job satisfaction and improved work performance.

We have heard it all before, so what has changed? Judging by the calls I have received over the last 14 years, there has been a definite shift in attitude. The lawyers I talk to seem to be more confident and are willing to take steps to secure a position in a firm that accepts the importance of work-life balance. They would rather risk losing the partnership track than stay at a firm that does not embrace their values. I believe lawyers today want, and expect, to feel respected and will not accept a work environment that is not supportive and does not respect the law.

If you are interested in learning more about respectful workplace behaviours and policies, the Equity Ombudsperson can assist you. A one-hour session is approved for one CPD credit towards the two-hour requirement (in professional responsibility and ethics, client care or practice management).

You can contact Equity Ombudsperson Anne Chopra by phone at 604.687.2344 or by email at achopra1@novuscom.net.❖

Services for lawyers

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky** to discuss practice management issues, with an emphasis on technology, strategic planning, finance, productivity and career satisfaction.
email: daveb@lsbc.org tel: 604.605.5331 or 1.800.903.5300.

Practice and ethics advice – Contact **Barbara Buchanan**, **Lenore Rowntree** or **Warren Wilson**, QC to discuss ethical issues, interpretation of the *Code of Professional Conduct for British Columbia* or matters for referral to the Ethics Committee.
Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships.
Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org.
Contact Lenore at: tel: 604.697.5811 or 1.800.903.5300 email: lrowntree@lsbc.org.
Contact Warren at: tel. 604.697.5857 or 1.800.903.5300 email: wwilson@lsbc.org.

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

◆

PPC Canada EAP Services – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families.
tel: 604.431.8200 or 1.800.663.9099.

◆

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers. tel: 604.685.2171 or 1.888.685.2171.

◆

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces.
Contact Equity Ombudsperson, **Anne Bhanu Chopra**: tel: 604.687.2344 email: achopra1@novuscom.net.

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Security practice tips

♫ Who can you trust these days
Cause people don't be about it like they say
Gotta be watching your back night and day
Who can you trust? ♫

Lyrics and music by Mint Condition

THE PARTICULAR VULNERABILITY of lawyers and law firms to hackers has been in the news as of late, so I decided to pull together some of the best tips I could find to improve the security of law firm IT systems:

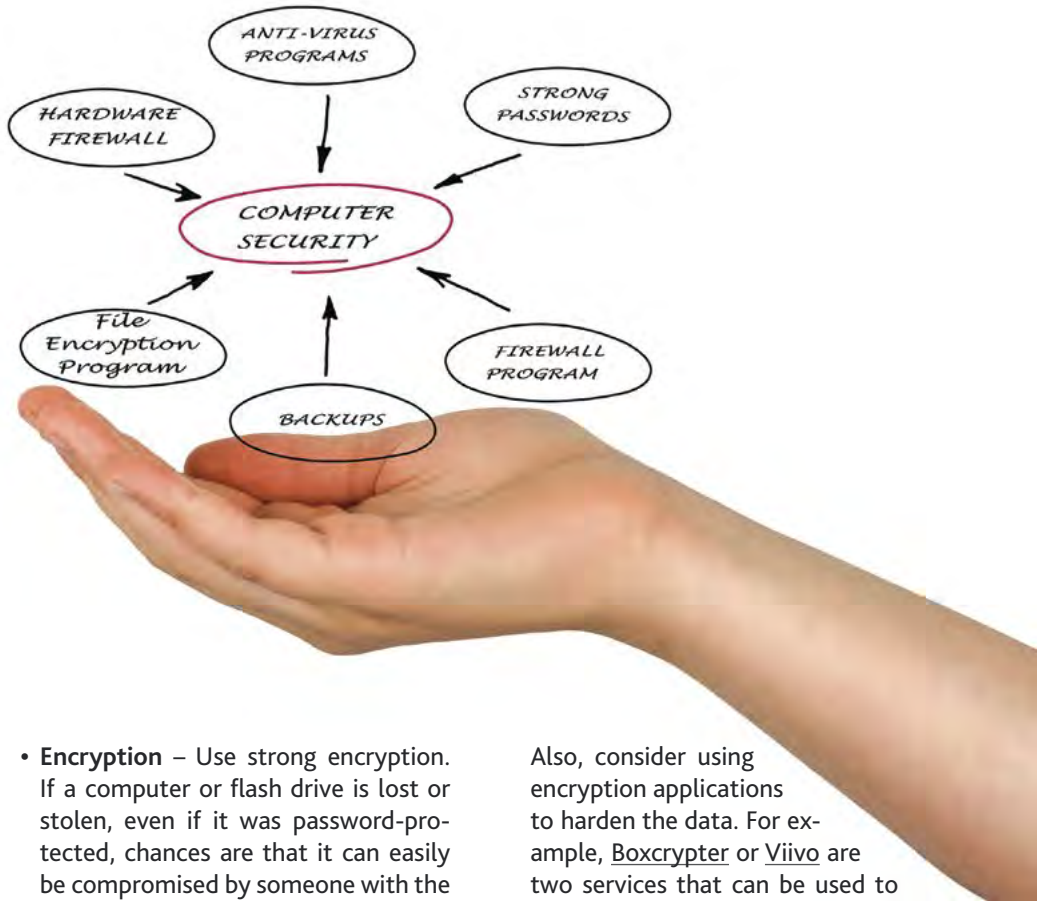
- **Acceptable use policy** – The first step is to put in place an acceptable use policy. There is a precedent on the Law Society website (see Practice Support and Resources > Model policy: Internet and Email Use Policy). The policy outlines the appropriate use of the firm's internet resources and establishes a clear expectation for staff use of these resources. Reducing a firm's vulnerability by implementing good practices and establishing appropriate standards for use of resources is a first step in increasing the security of the IT systems and data.

  The policy should be reviewed with staff annually and be consistently and strictly enforced. Needless to say, your acceptable use policy should state that you have the right to monitor all usage of the firm's IT resources to ensure that they are being used appropriately and that no vulnerabilities are being introduced into the system.

  Your policy should also state that the firm's resources may only be used for legitimate firm purposes. Sketchy websites are renowned for being infected with malware – and a business-only internet policy is a critical component of staying protected. If you do need to do research on the web that involves wide-ranging web searches, then you are advised to do so using a stand-alone computer that is not connected to the office network. You may wish to use a Mac, as they are, at least at this time, less vulnerable to some of the malware aimed to exploit Windows vulnerabilities.
- **Email attachments** – Do not click on email attachments without first determining that the email and sender are authentic. The cryptolocker malware (that locks up your system by encrypting files en masse and demanding a ransom be paid in order to de-encrypt them) is typically introduced by clicking on a ZIP file that is disguised as a PDF file. If you don't recognize the sender, it would be wise not to open any attachments. Even if you recognize the sender, if the email appears to be out of the ordinary, call the sender and verify that they in fact sent the email to you. They may have had their email address hacked or spoofed for the purposes of forwarding malware under the guise of being a legitimate email.

Reducing a firm's vulnerability by implementing good practices and establishing appropriate standards for use of resources is a first step in increasing the security of the IT systems and data.

- **System backups** – Maintain a backup of your data that is not connected to your network. This way, if your network is infected with cryptolocker or other malware, you should be able to retrieve a clean copy of your data.
- **Security software** – Periodically check that your security software is up-to-date and has not been compromised. For example, on the day of writing this column, TrueCrypt – hard drive encryption software – warned users that it was no longer secure and advised people to move to BitLocker (PC) or FileVault (Mac) instead.
- **Internet browsers** – Use a secure browser (in its Internet Browser Software Review, Purch ranked Mozilla Firefox, Google Chrome and Internet Explorer as the top three secure browsers in 2014). Take steps to increase the security of all browsers on your network as much as possible. For example, the computer security company Sophos advises that you:
  - Block third-party cookies (they can be exploited by cybercriminals).
  - Be wary of autocomplete (using autocomplete for log-ins poses a risk if your computer is stolen).
  - Restrict add-ons, as they can harbour malware and other security risks. At a minimum, configure your system so that you are prompted before these are installed.
  - Enable content filters. (All browsers maintain a database of phishing and malware sites. Turning on content filters ensures that this protection is in place.)
  - Turn on pop-up blockers (pop-ups can host malware or lure you into clicking on something that will install malware on your system).
- **Anti-virus software** – Install top-rated anti-virus software and ensure that it is kept up to date. For example, BitDefender Plus is consistently given a high rating, earning a 10/10 score for malware removal from Purch (see Best Antivirus Software Review).
- **Firewalls –** A strong firewall prevents unauthorized people from entering your system. A firewall can be implemented in hardware (wi-fi routers typically come with a firewall) or software. Next generation firewalls filter network and internet traffic and help detect unauthorized users. Gibson Research Corporation has a number of tests that you can run on your system to determine if your firewall and your system processor offer the best security possible (see Freeware and Security). They also offer other free tests to determine and shut down other vulnerabilities.
- **Passwords** – Use secure passwords.



Password insecurity is rife – everyone finds it difficult to remember several secure passwords, all containing a long string of random numbers, both uppercase and lowercase letters and symbols. To generate secure passwords, Gibson Research Corporation has created the Perfect Passwords feature that generates three 63-character, high-quality and cryptographic-strength passwords that are unique each time you visit the page.

Use a good password cache application. LastPass is consistently rated as an excellent password manager application, earning an outstanding rating by *PC Magazine* in 2014. LastPass stores all your secure passwords – all you need to remember is the one password to open LastPass.

- **Software updates** – Keep your operating system up-to-date and patched. Microsoft discontinued support for Windows XP on April 8, 2014, yet I still get calls from lawyers who are using XP machines! At the very least, upgrade to Windows 7 – if the computer can be upgraded – or, better yet, transfer your data off these old machines, perform a security wipe and then recycle them. For Mac users, Snow Leopard 10.6.8 has also discontinued support and users should upgrade to a newer version or, similarly, wipe the computer and recycle it. It is important to note that older machines may not be able to run newer versions of OSX. Using an unsupported operating system opens you up to attack as the vulnerabilities in the old system are no longer being patched.

  Install all application updates. Vulnerabilities are discovered all the time, so to be as secure as possible, you should configure your system to regularly check for updates on all applications.
- **Default settings** – Change key default settings that come with hardware and software programs. Hackers know these default settings, which may allow them to gain access. For example, there may be default administrator account names on servers and routers, and open ports on firewalls. Leaving these on the default settings increases your vulnerability.
- **Encryption** – Use strong encryption. If a computer or flash drive is lost or stolen, even if it was password-protected, chances are that it can easily be compromised by someone with the right software and skills. Encrypting your data is prudent. There are a number of encryption tools that you can use. Some experts advise using open source encryption, on the basis that proprietary encryption applications may have had "back doors" installed at the behest of the NSA.

Keep your operating system up-to-date and patched. Microsoft discontinued support for Windows XP on April 8, 2014, yet I still get calls from lawyers who are using XP machines!

- **The cloud** – If you store your data in the cloud, take extra measures to ensure that it is protected. Wikipedia lists a number of cloud services that use two-step verification, such as Dropbox, Evernote, LastPass, Google (including Gmail) and Yahoo mail. Turn on two-step verification and ensure that it is as difficult for someone to break into your data as possible.

  Also, consider using encryption applications to harden the data. For example, Boxcrypter or Viivo are two services that can be used to encrypt cloud storage providers, such as Dropbox.
- **Public wi-fi** – Use public wi-fi with care. There are tools available that allow people to sit in public wi-fi areas and capture log-in credentials and much, much more.
- **Mobile devices** – Ensure that your mobile devices can be remotely "wiped" if they are lost or stolen. All the major smart phone and tablets have some kind of remote erase capability. Ensure that it is enabled and you know how to initiate it.
- **Bring Your Own Device (BYOD)** – Be cautious about BYOD situations in which an outsider connects to your network. Each device increases your vulnerability. For more information, read Six Tips for BYOD Security from IBM, published by NetworkWorld.
- **The inside job** – Just one final thought … the most dangerous people may be those inside the moat, as they already have the credentials to get inside.

When it comes to IT security, you gotta be watching your back night and day!❖

Discipline Digest

BELOW ARE SUMMARIES with respect to:

- Rudi Gellert
- Thomas Paul Harding
- Roger Dwight Batchelor
- Alan Gordon Shursen Hultman
- David Donald Hart
- Douglas Warren Welder
- Stanley Chang Woon Foo

For the full text of discipline decisions, visit the Hearings reports section of the Law Society website.

RUDI GELLERT

Surrey, BC
Called to the bar: May 19, 1995
Ceased membership: December 16, 2003 (reinstated May 11, 2006) and January 1, 2011
Discipline hearings: July 18 and November 27, 2013
Panel: David Renwick, QC, Chair, Dennis Day and David Layton
Decisions issued: August 26, 2013 (2013 LSBC 22) and February 13, 2014 (2014 LSBC 05)
Counsel: Carolyn Gulabsingh for the Law Society; no one appearing on behalf of Rudi Gellert

FACTS

Between March 2008 and September 2010, Rudi Gellert misappropriated $14,486.69 of client funds by means of 31 transactions involving 31 different clients. Most of the transactions involved cancelling a stale-dated trust cheque made out to the client, after which the same amount was paid either to Gellert's law firm or a company run by his wife. The bulk of the money went to his wife's company.

Gellert's misappropriations were discovered during a routine compliance audit at his law office in October 2010. After the two Law Society auditors arrived, Gellert expressed displeasure and told one auditor that if he had a gun he would shoot someone. He also said that he would not allow the first auditor to look at any files and would not have her in his office.

Later on during the audit, Gellert refused to answer an auditor's question about a number of trust cheques he had caused to be made out payable to cash. He subsequently failed to respond to Law Society letters asking for information regarding these cheques as well as numerous other matters.

Gellert failed to appear at the hearing on facts and determination as well as the hearing on disciplinary action. The panel exercised its discretion to proceed with each hearing in his absence.

DETERMINATION

The panel concluded that Gellert had committed professional misconduct by misappropriating over $14,000 in client trust funds, making discourteous and threatening comments to a Law Society auditor and failing to respond to communications from the Law Society. It was also determined that he had breached three rules by issuing trust cheques payable to "cash" and failing to maintain proper trust accounting records.

The panel considered a number of factors, including that Gellert had deliberately misappropriated a substantial amount of client money. Further, the misappropriations occurred over a period of almost three years and involved 31 different clients. This was not a one-time misadventure on Gellert's part.

There was no evidence that any of the 31 clients complained. Since the money was taken from clients whose matters had concluded, it was likely that they did not realize that any funds were left owing to them. However, the failure of a client to know or complain about deliberate misappropriation does not mitigate the seriousness of the infraction.

Gellert received an indirect benefit from the misappropriations insofar as most of the funds were transferred to a company in which his wife was the sole director and officer.

A particularly aggravating factor was that there are 12 prior findings of professional misconduct against Gellert, arising from four different citations covering conduct occurring from 1999 to 2003, including a prior finding of misappropriation of client funds.

The penalty decision in Gellert's prior instances of misconduct shows that he came close to being disbarred. It was only the presence of significant mitigating circumstances that resulted in an 18-month suspension and the imposition of conditions on any return to practice.

Gellert returned to practice after his suspension and was prohibited from having signing authority over any trust accounts. This restriction would have underlined for him the paramount importance of properly managing trust accounts and avoiding any conduct that might put a client's trust money at risk.

However, six days after the Law Society removed the restriction regarding his handling of trust money, Gellert commenced misappropriating client funds. His actions demonstrated that even a lengthy suspension combined with practice restrictions and supervision were insufficient means of protecting the public from his continued misconduct.

DISCIPLINARY ACTION

The panel ordered that Gellert:

1. be disbarred; and
2. pay $8,630 in costs.

The panel also ordered that a number of materials filed during the hearing be sealed to protect confidential client information.

THOMAS PAUL HARDING

Surrey, BC
Called to the bar: August 31, 1990
Discipline hearings: December 11-12, 2012 and April 29, 2013 (facts and determination) and December 19, 2013 (disciplinary action)
Panel: Bruce LeRose, QC, Chair, William Everett, QC and June Preston, MSW
Decisions issued: August 30, 2013 (2013 LSBC 25) and February 17, 2014 (2014 LSBC 06)
Counsel: Kieron Grady for the Law Society; Gerald Cuttler for Thomas Paul Harding

FACTS

In November 2009, Thomas Paul Harding was retained by a client in a family law action. Harding requested a copy of the client's file from the client's previous lawyer. In response, he received a letter, enclosing accounts totalling $3,072.56 and advising that the file would be provided once the client paid the accounts.

There was an exchange of correspondence between Harding and the other lawyer on the appropriateness of the accounts. On February 17, 2010, the other lawyer wrote to Harding and enclosed the client's file on the undertaking that the outstanding accounts would be paid out, as solicitor of first charge, upon receipt of any future settlement paid to the client in this matter. Further, if Harding was unwilling or unable to accept the undertaking, he would return the file uncopied.

On March 15, 2010, Harding contacted a Law Society practice advisor about the undertaking imposed by the other lawyer. Harding was advised that all undertakings must be complied with, regardless of merit.

That same day, Harding wrote a letter to his client's former lawyer and three other lawyers at the law firm. The letter included rude and discourteous remarks, such as "any stupid, dishonest lawyer can purport to impose a stupid undertaking, and the receiving lawyer is stuck with it."

The other lawyer objected to the tone of Harding's letter on the basis that it was damaging to his reputation and brought the practice of law into disrepute. He demanded an immediate retraction and apology. Harding followed up with a second letter that continued to demean the lawyer and to belittle his English skills. Its context and tone were not consistent with that of an apology.

In a second family law matter, Harding wrote an email, dated September 9, 2010, to counsel for the opposing party that contained rude and discourteous remarks directed to opposing counsel. The impugned remarks implied that opposing counsel was not meeting his ethical duty to the children and appeared to tie that alleged failure to his grooming habits.

Harding's remarks were made because of his concern for the best interests of the children and where they would be located during his client's access to them. His letter achieved its purpose and advanced his client's case, as opposing counsel provided a substantive response by letter the next morning.

DETERMINATION

The panel found that Harding's conduct in writing two letters to his client's former lawyer that contained rude and discourteous remarks constituted professional misconduct.

The *BC Code* and recent decisions of the Supreme Court of Canada make it clear that incivility in a lawyer's conduct toward another lawyer impedes the proper functioning of the administration of justice and undermines public confidence.

Harding did not acknowledge his misconduct, nor did he retract his remarks or apologize to the complainant.

The panel was particularly concerned that Harding's professional conduct record includes a prior citation and two conduct reviews that involve an uncivil manner in his dealings with other counsel. Therefore, the two letters could not be viewed as an isolated incident.

Notwithstanding that Harding recently began undergoing psychological counselling and treatment, he had opportunities to change his behaviour in the past and chose not to. However, the panel did see Harding's current attempt to change his behaviour as a positive step and considered this as a mitigating factor.

In the second matter, Harding acknowledged that his remarks in the email to opposing counsel were sharp and sarcastic. The panel was of the view that the remarks constituted discordant communication to a degree that did not go beyond mere rudeness and discourtesy. The panel found the impugned remarks were not a marked departure from the conduct expected of lawyers and did not constitute professional misconduct.

DISCIPLINARY ACTION

The panel ordered that Harding:

1. pay a $2,500 fine; and
2. continue counselling and treatment with a psychologist.

ROGER DWIGHT BATCHELOR

Victoria, BC
Called to the bar: September 21, 2005 (BC); October 4, 2002 (Ontario)
Discipline hearing: January 28, 2014
Panel: Lee Ongman, Chair, Dr. Gail Bellward and Carol Hickman, QC
Decision issued: March 4, 2014 (2014 LSBC 11)
Counsel: Patrick McGowan for the Law Society; Roger Dwight Batchelor on his own behalf

FACTS

Roger Dwight Batchelor represented the defendant in an estate action in the Supreme Court of BC. In January 2012, he provided an

affidavit to his client, to be commissioned before a notary in Hawaii, having already signed the exhibits to that affidavit. He did not possess the original affidavit, as required by Supreme Court rules, when he caused a copy to be filed electronically. Further, he did not compare the signature on the copy of the affidavit to the original prior to electronic filing, as he indicated on the electronic filing statement.

Batchelor did not respond to or address concerns raised by opposing counsel in a letter regarding the commissioning of the affidavit.

In August 2012, when Batchelor provided an affidavit to his client to be commissioned before a lawyer in Winnipeg, he did not provide copies of the exhibits with the affidavit, nor did he instruct her that the affidavit must be commissioned together with the exhibits to the affidavit.

When he received the sworn affidavit back from his client without exhibits, he attached and signed the exhibits to the affidavit in the absence of his client, who had previously sworn the affidavit before the Winnipeg lawyer. Again, Batchelor filed an affidavit electronically without complying with Supreme Court rules.

In August 2013, Batchelor made representations to the court to the effect that the exhibits to the affidavit of his client, filed in August 2012, were commissioned by the lawyer before whom his client swore the affidavit. These representations were false. Batchelor had signed the exhibits himself five days earlier in the absence of his client.

ADMISSION AND DISCIPLINARY ACTION

Batchelor admitted that his actions constituted professional misconduct. In the course of representing his client, he relied on two affidavits that he knew were improperly commissioned and that he knew were filed electronically without compliance with the court's electronic filing rules.

He further made a representation to the court that the exhibits to the affidavit of his client were commissioned by the lawyer before whom the client swore the affidavit, when he knew or ought to have known that this was false because he had signed the exhibit pages in the client's absence.

The panel noted that Batchelor is an experienced practitioner and has a significant disciplinary history in only eight years of practice in BC.

Batchelor's conduct was a marked departure from the standards that the Law Society expects of lawyers. Confidence in the court's ability to fairly and judiciously view and receive evidence is eroded when sworn affidavits are falsified.

In the panel's view, the seriousness of Batchelor's misconduct cannot be overstated. He prepared affidavits for his client to sign, he received the signed affidavits, and he knew the exhibits were not properly signed by the lawyer who commissioned the affidavit because he was the lawyer whose signature was on the exhibits. He represented to the court, upon questioning by the judge, that the exhibits were sworn in front of the lawyer who commissioned the affidavit. In addition, he proceeded to file the documents electronically for court use, and in the filing is an inherent undertaking to the court and court registry that the lawyer has complied with the rules in the documents being filed in the proper format.

Batchelor's behaviour in wilfully filing improperly sworn affidavits and representing to the court otherwise is one of the most serious transgressions that can be committed by a lawyer. It goes to the heart of the legal process before our courts.

The panel accepted Batchelor's admission of professional misconduct and ordered that he:

1. be suspended from the practice of law for one month; and
2. pay $2,000 in costs.

ALAN GORDON SHURSEN HULTMAN

Vancouver, BC
Called to the bar: June 13, 1986
Discipline hearing: December 12, 2013
Panel: Barry Zacharias, Chair, James E. Dorsey, QC and Patrick Kelly
Oral reasons: December 12, 2013
Decision issued: March 7, 2014 (2014 LSBC 13)
Counsel: Carolyn Gulabsingh for the Law Society; Gerald Cuttler for Alan Gordon Shursen Hultman

FACTS

Alan Gordon Shursen Hultman represented a long-time client on several matters, including two foreclosure actions against her property, as well as an action for money owed by the client to a creditor on a promissory note. A default judgment was obtained on the promissory note and registered against the client's property.

In November 2009, Hultman was served with the sale approval order for the client's property, which enumerated some charges and encumbrances that were to be discharged and also had a clause noting all charges subsequent to the certificate of pending litigation were cancelled. The balance of the proceeds were to be paid into court under the terms of the order.

On December 20, 2009, Hultman spoke with his client who was recovering from surgery. She stated she needed the balance of the sale proceeds to look after her immediate needs, including the move necessitated by the sale of the property. She said she intended to satisfy the promissory note judgment from funds from her mother's estate, which she expected shortly. She wanted the funds paid out of trust and told Hultman not to disclose the existence of the promissory note judgment.

Hultman told his client he could not apply for a payout of those funds without disclosing the judgment. He then spoke with a senior litigator and concluded he could not act on the application for the payout of the funds due to his client's instructions not to disclose the judgment. At his client's request, he then took steps to obtain another lawyer for her for the payout application.

On January 6, 2010, Hultman wrote the client asking if a portion of his account could be paid from her proceeds if the application was

successful. Subsequently, through Hultman, the client directed her other lawyer to pay his own account from those funds and send the balance to Hultman. Hultman was directed to pay $5,000 from the funds toward his outstanding account and forward the rest to the client.

ADMISSION AND DISCIPLINARY ACTION

Hultman admitted that he assisted his client to retain another lawyer in order to obtain a variation of the sale order, knowing the judgment was unsatisfied. He also admitted that he received the funds from the varied sale order, paid himself $5,000 on an account owed to him by his client, and paid her the balance, when he knew the judgment was unsatisfied.

It was clear to the panel that Hultman's actions in assisting his client in the way he did were contrary to and a marked departure from his obligations as a lawyer. Additionally, his actions in dealing with the sale proceeds when he knew of the unsatisfied judgment are a marked departure from those obligations. The panel found his conduct amounted to professional misconduct.

Hultman is experienced counsel and was not duped by his client, but knew exactly the nature of his actions. The creditor on a promissory note who was owed money by the client was victimized by losing the protection of her registered judgment and had to pursue further legal remedies. Hultman personally benefitted from his actions by having monies paid on his account.

The panel took into consideration that Hultman was cooperative and had no prior discipline record. Hultman's compassion for his client does not diminish his responsibility for his actions but, perhaps, makes them more understandable.

The panel ordered that Hultman:

1. was suspended from practice for a period of one month; and
2. pay $3,000 in costs.

DAVID DONALD HART

Langley, BC
Called to the bar: May 15, 1961
Discipline hearing: February 25, 2014
Oral reasons: February 25, 2014
Decision issued: April 9, 2014 (2014 LSBC 17)
Panel: Lynal Doerksen, Chair, Glenys Blackadder and John Hogg, QC
Counsel: Carolyn Gulabsingh for the Law Society; Dennis Quinlan, QC for David Donald Hart

FACTS

On September 9, 2009, David Donald Hart was retained by a client respecting issues arising from her separation from her husband. Hart filed documents on his client's behalf, seeking a divorce and corollary relief.

On November 18, the client's family residence was sold, and the net sale proceeds of $45,073.64 were placed in Hart's trust account.

On January 8, 2010, Hart and his client attended a judicial case conference with the husband and his lawyer. Between January and August 2010, there was an exchange of communication at various times between Hart's paralegal, secretary and legal assistant and either his client or the husband's lawyer.

In August, Hart's client expressed her disappointment in the lack of services and professionalism that had been demonstrated by several members of Hart's team. Until August 25, her repeated requests for the court order from the January judicial case conference were ignored. She planned to contest Hart's bill, because she was not much further ahead than a year before.

In December, the client informed Hart's legal assistant that she would respond to her husband's lawyer on her own behalf, as she could no longer afford legal bills. Hart's legal assistant advised her that the opposing lawyer would not be able to deal with her directly until Hart was removed as solicitor of record. Additionally, the client would need to satisfy Hart's final account before acting on her own.

On January 12, 2011, Hart received a letter advising that the lawyer representing the client's husband had been replaced. Hart did not provide a copy of this letter to his client or advise her that a new lawyer had been retained.

On January 19, Hart stopped working on the client's file until the outstanding account in the amount of $2,500 had been paid.

The client continued to have telephone conversations and exchange emails with Hart's staff regarding her case and her outstanding account. In April, the client requested a meeting with Hart and inquired if the trust funds were being held in an interest-bearing trust account.

Hart met with the client in May and assured her that he would give her a letter outlining her options and provide an update after reviewing his file materials. He did not follow through with this promise.

In August, the client emailed the lawyer representing her husband to express her dissatisfaction with Hart's services. This email prompted Hart to send a letter to the client confirming that he would write off her existing accounts receivable in the amount of $3,000.97 and provide a refund of an additional $500.

Hart also enclosed a Notice of Intention to Act in Person for her signature and advised that, once it was filed in the court registry, he would provide the refund cheque and her file materials. The client refused to sign it until her name and address were corrected on the document and the refund was increased to $1,000 to cover the interest lost from not having her funds in an interest-bearing account.

In March 2012, the client reluctantly signed the Notice of Intention to Act in Person form and filed it in the court registry on Hart's terms.

In May, the funds that Hart held in trust on the client's behalf were placed in an interest-bearing trust account and the client was advised that her file material and refund cheque were ready for pick up.

In July, the client and her husband entered into a separation agreement, resolving all outstanding issues.

ADMISSION AND DISCIPLINARY ACTION

Hart admitted that his conduct amounted to professional misconduct.

Failing to provide a sufficient level of service to one's client is a serious matter. Hart's misconduct impacted his client emotionally and financially.

From the time the client retained Hart until her matter was finally concluded (without the assistance of Hart), almost three years had passed. It appeared to the panel that this matter could have been concluded well within a year.

Hart further failed to put his client's funds in an interest-bearing account, failed to provide an opinion letter when he promised to do so, failed to correct an address on a Notice of Intention to Act in Person, failed to notify his client that her husband's lawyer had been replaced, and failed to inform his client that he would cease work until his account was paid.

Hart is an experienced family law litigator and has been practising law for almost 53 years. He has a lengthy history with the Law Society consisting of three prior citations, three conduct reviews and a referral to the Practice Standards Committee.

The panel considered the fact that Hart wrote off his client's account, reimbursed her $500, and compensated a partner in his firm for time spent on the file as mitigating circumstances.

The panel accepted Hart's admission and ordered that he pay:

1. a $7,500 fine; and
2. $1,000 in costs.

DOUGLAS WARREN WELDER

Kelowna, BC
Called to the bar: May 12, 1981
Discipline hearing: December 18, 2013
Panel: Lee Ongman, Chair, Jasmin Ahmad and Jory Faibish
Reports issued: August 30, 2013 (2013 LSBC 24) and April 30, 2014 (2014 LSBC 20)
Counsel: Geoffrey Gomery, QC for the Law Society; Douglas Warren Welder on his own behalf

FACTS

Between May and December 2011, Douglas Warren Welder was retained to represent a business owner and her company in defence of several claims against them including, but not limited to, bank foreclosure proceedings that had commenced in July 2011.

In February 2012, Welder's former clients renegotiated the terms of a loan with a lender, and the business owner granted a mortgage over her personal residence to the lender. Welder did not represent either of the former clients in respect of that mortgage.

In April 2012, Welder accepted a retainer from the lender to foreclose on the mortgage granted over his former client's personal residence and for judgment against each of the former clients. Welder did not seek consent from his former clients before agreeing to represent the lender in proceedings against them.

DETERMINATION

The panel concluded that, on the basis of the bank foreclosure alone, Welder's representation of the lender was not "substantially unrelated" to the representation of the former clients so as to relieve Welder from the overriding prohibition from acting in conflict with his former clients without consent.

As a result of his representation of the former clients, Welder came into possession of confidential information that could reasonably affect his representation of the other client's foreclosure. Welder admitted he was in possession of the former client's draft financial statements for 2010 and 2011 and had intimate knowledge of the company's financial affairs.

The panel found that Welder committed professional misconduct when he acted in a conflict of interest by representing a client in a foreclosure proceeding against former clients, contrary to the rules.

Professional conduct record and ungovernability

The Law Society's primary position was that Welder should be found ungovernable, not solely on the basis of the professional misconduct in this matter, but on the totality of his professional conduct record. If Welder was found ungovernable, the Law Society submitted that he must be disbarred.

The panel found the length and the content of Welder's record were serious aggravating factors. His record disclosed six conduct reviews, six citations and a practice standards referral. Previous disciplinary sanctions include a reprimand, conditions, fines, costs and four separate suspensions of 60 days, three months, 45 days and, most recently, three months.

Each of the six citations involved allegations of professional misconduct in a series of different circumstances. Welder admitted professional misconduct in respect of four of the six citations and entered into agreed statements of fact in respect of three.

The panel found a few mitigating factors that could indicate that Welder is not consistently unwilling to be governed by the Law Society:

- although Welder was not exonerated on each conduct review, no further action was taken in any of the six conduct reviews and the one practice standards review;
- Welder acknowledged and admitted improper conduct in respect of several of the matters set out in the record;
- Welder cooperated with the Law Society in numerous of the matters set out in the record; and
- there was an indication of "underlying psychological issues impinging on Welder's ability to practise in a reasonable and professional manner" and, more significantly, he voluntarily attended at counselling to address those issues.

At the time of the hearing on facts and determination, Welder did not recognize the conflict of interest issue, insisting that, having reviewed the rules and considering the matter, he had formed the opinion that he was free to represent the lender in the foreclosure proceeding against his former clients.

However, at the hearing on disciplinary action, Welder seemed to recognize the error of his conduct and was able to identify the action he should have taken in the circumstances. By identifying the appropriate conduct, Welder demonstrated that he is likely to handle a similar situation appropriately in the future. The panel was not ready to close the door on remediation and rehabilitation quite yet.

DISCIPLINARY ACTION

Having considered the evidence and the law before it, the panel concluded that Welder's conduct fell just short of warranting a finding that he was ungovernable.

In the panel's view, a one-year suspension was easily supported by the length and the content of Welder's conduct record and was consistent with the principle of progressive discipline. When combined with remedial courses and practice reviews focused on specified topics, a one-year suspension also served the important functions of rehabilitation and ensuring public confidence in the disciplinary process and in the profession.

The panel ordered that Welder:

1. be suspended from practice for one year and until he has:
   a) completed approved continuing professional development with a minimum credit of 12 units, and
   b) completed a remedial course on professional ethics, including conflicts;
2. undergo two consecutive semi-annual practice reviews that successfully demonstrate satisfactory trust accounting procedures, satisfactory file management, appropriate conflict checks and decisions, and an understanding of substantive legal issues at the level of a competent practitioner; and
3. pay $13,692 in costs.

STANLEY CHANG WOON FOO

Vancouver, BC

Called to the bar: November 10, 1995 (BC); June 24, 1994 (Ontario), June 2010 (New York State)

Discipline hearing: January 31, 2014

Panel: Thomas Fellhauer, Chair, Gavin Hume, QC and Lance Ollenberger

Decisions issued: July 4, 2013 (2013 LSBC 26) and April 30, 2014 (2014 LSBC 21)

Counsel: Carolyn Gulabsingh for the Law Society; Richard Gibbs, QC for Stanley Chang Woon Foo

FACTS

In September 2011, while at a courthouse attending to client matters, Stanley Chang Woon Foo made discourteous or threatening remarks to a social worker employed by the Ministry of Children and Family Development. Specifically, his words were that he "should shoot" her because she "takes away too many kids."

DETERMINATION

Foo's lawyer submitted that these comments were the result of Foo's awkward social skills and were really a "joke gone bad."

The panel determined that Foo's conduct was more than just a mere failure to exercise ordinary care and was a marked departure from what the Law Society expects of lawyers. Further, by making these comments outside a courtroom during recess, the conduct related to Foo's professional practice.

The panel found that Foo had committed professional misconduct.

DISCIPLINARY ACTION

While no one was harmed by Foo's words, his behaviour did undermine the public's confidence in the integrity of the legal profession.

The panel considered a number of aggravating factors.

Foo made his comments outside of a courtroom in an area where other persons were present, including other social workers. Comments like these, in such an emotional and volatile environment, are completely inappropriate for an officer of the court.

The panel was very concerned about Foo's professional conduct record and history of failing to control his behaviour. He has three previous conduct reviews, two of which involved inappropriate or discourteous behaviour towards a social worker and an unrepresented opposing party.

The panel acknowledged that Foo appeared to be sincere in his commitment to taking steps to change; however, he had given assurances a number of times before, but failed to carry through with his commitments.

According to one of the reference letters provided to the panel, Foo takes on difficult legal aid files, and there are few lawyers who take on these kinds of files. Therefore, a longer suspension would have a negative impact in terms of access to justice. The panel considered this to be important.

However, under the principles of progressive discipline, it appeared that previous orders and recommendations in the nature of a mentorship program, psychological counselling and treatment, and a fine were not effective. The panel hopes that a shorter suspension will give Foo an opportunity to critically examine his behaviour and commit to change.

The panel ordered that Foo:

1. be suspended for two weeks; and
2. pay $8,840 in costs.

On June 1, 2014, a stay of suspension was granted pending a review sought by Foo. ❖

Credentials hearing

Law Society Rule 2-69.1 provides for the publication of summaries of credentials hearing panel decisions on applications for enrolment in articles, call and admission and reinstatement.

For the full text of hearing panel decisions, visit the Hearing decisions section of the Law Society website.

MARC ANDRE ECKARDT

Called to the bar: 1996 (California)
Hearing (application for enrolment): December 9, 2013
Panel: Phil Riddell, Chair, Ralston Alexander, QC and Laura Nashman
Oral reasons: December 9, 2013
Decision issued: February 18, 2014 (2014 LSBC 07)
Counsel: Henry Wood, QC for the Law Society; Michael D. Shirreff for Marc Andre Eckardt

BACKGROUND

In Marc Andre Eckardt's application for enrolment in the Professional Legal Training Course (PLTC), he advised that he had been charged with an offence in Washington State and had entered a guilty plea to two misdemeanour assault charges. Subsequent inquiries revealed allegations of possible substance abuse that had not been acknowledged in his initial application.

Eckardt practised law in the US and was married with three children. When his marriage ended with a bitter divorce and he was laid off from his job as in-house counsel, he relocated to Vancouver.

Eckardt became involved in a dysfunctional relationship. He moved in with a woman and her daughter during the period of time when he was unemployed. The woman treated him badly and would attack him physically. Eckardt was required to defend himself and on occasion he would slap her in response to her attacks.

After he found employment, he increased the frequency of his visits to Seattle to see his children. The woman he lived with was jealous of the time he spent with his children.

During a weekend visit to see his children in Seattle in November 2010, she insisted on accompanying him, despite his request to the contrary. The woman became inebriated in their hotel room and physically attacked Eckardt in front of all of the children. While trying to assist her mother in the dispute, the daughter was apparently struck by Eckardt. Everyone, including the daughter, agreed that no one hit her intentionally.

Eckardt's son required counselling as a result of his exposure to the violence in the hotel room. His counsellor reported the events to the police and, after an investigation, Eckardt was charged with two counts of domestic assault.

At the same time as the criminal proceedings were progressing, Eckardt's wife was initiating child protection applications in the matrimonial action. Eckardt was allowed access to his children on the condition that he enrol in an alcohol assessment program. This assessment was driven by the hotel incident even though he was not drinking that day.

The assessor advised Eckardt that there was no concern; however, the resulting report identified a need for a treatment program and made a finding that Eckardt was in denial about his alcohol issues. Eckardt was unable to refute the allegation and complied with the requirements of the child access orders.

Eckardt accepted a plea bargain for a guilty decision to spare his children from the requirement to testify in the trial and to ensure a probationary outcome rather than risk a mandatory six-month term of incarceration.

CONCLUSION

The Law Society was concerned about the fitness of this applicant based upon the substance abuse allegation. Eckardt had replied "no" in response to two questions on the application relating to substance abuse.

After a sworn testimony from Eckardt and his fiancée, the panel was satisfied that Eckardt answered the first question correctly about having no issues with dependency or abuse of alcohol.

Eckardt also answered "no" to a second question on the application about being counselled or receiving treatment for a substance abuse disorder. Since he was only participating in alcohol counselling programs to ensure compliance with court orders to continue to see his children, he did not feel that his answer to the question was inappropriate. On that basis, the panel was satisfied that he did not intend to mislead the Law Society.

Eckardt's character was also a concern due to the criminal convictions and his answers to other questions on the PLTC application for enrolment.

Eckardt swore that the decision to plead guilty was entirely motivated to bring the events to an end with a manageable consequence and with the ultimate goal of sparing his young children from an appearance in court to testify against their father.

Eckardt also answered "no" to questions on the application about whether any civil action or a civil judgment was outstanding and whether he had ever failed to obey a court order. The panel found it probable that the judgment for outstanding unpaid child maintenance arrears that existed at the time the PLTC application was submitted required a positive answer. It was also probable that the fact of unpaid amounts of court-ordered child support suggested that the negative answer to the question about failing to obey a court order

was similarly inaccurate.

Eckardt explained that he did not think of the obligation to pay child maintenance in terms of it being embodied in a court order but acknowledged that he should have done so. During the period of his unemployment, he was often unable to pay child support and, accordingly, was in breach of a court order. As a result of a recently developed accommodation with his ex-wife, enforcement of the arrears of maintenance had been stayed.

The panel was satisfied that Eckardt was a person of good character and repute and was fit to become a barrister and a solicitor of the Supreme Court. The panel granted Eckardt's application to be enrolled in the Law Society admission program.❖

Conduct reviews

THE PUBLICATION OF conduct review summaries is intended to assist lawyers by providing information about ethical and conduct standards.

A conduct review is a confidential meeting between a lawyer against whom a complaint has been made and a conduct review subcommittee, which may also be attended by the complainant at the discretion of the subcommittee. The Discipline Committee may order a conduct review pursuant to Rule 4-4, rather than issue a citation to hold a hearing regarding the lawyer's conduct, if it considers that a conduct review is a more effective disposition and is in the public interest. The committee takes into account a number of factors, including:

- the lawyer's professional conduct record;
- the need for specific or general deterrence;
- the lawyer's acknowledgement of misconduct and any steps taken to remedy any loss or damage caused by his or her conduct; and
- the likelihood that a conduct review will provide an effective rehabilitation or remedial result.

DISHONOURABLE OR QUESTIONABLE CONDUCT

A lawyer made misleading and inaccurate statements to an opposing party and the court regarding both her client's claim and the effect of a previously executed release. The lawyer did not intend to mislead, but rather did not fully understand the terms of the release. She has sought assistance from a Bencher and the Law Society's Practice Standards department. She has taken a professional ethics course and other steps to improve her understanding of releases. (CR 2014-03)

During an impaired driving investigation, a lawyer panicked and lied to the police about his alcohol consumption. He did not subsequently set the record straight with the police or apologize to them for his untruthful response. The lawyer has sought counselling. (CR 2014-06)

A lawyer acted on client matters without the required disclosure and approval of her partners; she was not candid with her partners when questioned about the client matters, and she failed to report two default judgments to the Lawyers Insurance Fund, as required by her insurance policy and Chapter 4, Rule 5 of the *Professional Conduct Handbook*, then in force (now rule 7.8-2 of the *BC Code*). (CR 2014-07)

QUALITY OF SERVICE

For a period of eight months, a lawyer failed to respond to emails from her client regarding her legal fees, contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*, then in force (now rule 3.2-1 of the *BC Code*). The lawyer also withdrew fees from trust in payment of those fees before doing all of the legal services contemplated by the retainer, contrary to Law Society Rules 3-56(1)(b) and 3-57. The lawyer intends to apologize to the client and refund the balance of the retainer. A conduct review subcommittee recommended amending the ambiguous retainer and fee agreement documents to set out clearly what would happen to the fixed fee upon termination. (CR 2014-04)

TRUST ACCOUNTING

On three occasions a lawyer took money from trust to pay his fees before preparing and delivering a bill to his clients, contrary to Law Society Rule 3-57(2). He also failed to report that he had not satisfied two monetary judgments against him, contrary to Rule 3-44. The lawyer had little practice management and accounting experience or assistance. He has now installed a proper accounting package and hired a bookkeeper and has his accounting reviewed on a regular basis by a professional accounting firm. (CR 2014-05)❖

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