

REPORT

**of the Committee on Relations Between the
Law Society and the Judiciary**

Committee members

Leonard Doust, Q.C., Chair; Bruce Fraser, Q.C.; Marguerite Jackson, Q.C.;
Charles Maclean, Q.C.; Karen Nordlinger, Q.C.; Karl Warner

Staff

Jerome Ziskrout; Jack Olsen

February 25, 1997

Background

One cannot deny the central role the profession plays as the advocate of liberty and freedom. To play that role, lawyers must remain independent in every way.

(Honourable Mr. Justice Frank Iacobucci — March 9, 1995 address to CBA (B.C. Branch) Civil Litigation Section (Vancouver))

* * *

A prime and historic duty of the Law Society is to preserve the independence and integrity of the Bar as a vital element in our free society.

(Preamble of the Maclean/Fraser resolution to the Law Society Annual Meeting — September 23, 1994)

* * *

It is the object and duty of the society

- (a) to uphold and protect the public interest in the administration of justice by*
 - (i) preserving and protecting the rights and freedoms of all persons,*
 - (ii) ensuring the independence, integrity and honour of its members, and*
 - (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and*
- (b) subject to paragraph (a),*
 - (i) to regulate the practice of law, and*
 - (ii) to uphold and protect the interests of its members.*

(Section 3 of the *Legal Profession Act*, RSBC)

These are among the principles that have guided this Committee in its mandate from the Law Society to look into communications between the bench and the bar and to recommend ways to ensure that, during the trial itself, the independence of the bar will be maintained.

The decision by the Law Society to form this Committee was prompted by a resolution placed before the Annual General Meeting on September 23, 1994 by Charles Maclean, Q.C. and Bruce Fraser, Q.C. The Law Society also recognized that existing procedures are not adequate to deal with certain instances where a judge makes a complaint about a lawyer, or a lawyer makes a complaint about a judge in proceedings that are ongoing.

Scope of inquiry

We have concluded that, as a committee, we would consider two major questions:

1. How should the Law Society respond when a judge makes a complaint to the Society about a lawyer's conduct or competence when the proceedings out of which the complaint arises are continuing?

2. How should the Law Society respond when it concludes that a judge's conduct toward counsel is inappropriate?

We recommend that the Law Society itself should not, in most cases, play the major role in either of these circumstances, but that the Society should assist in the formation of and provide modest budget assistance to a special committee ("the special committee") to deal with issues arising from both these questions. We will deal with the questions of the constitution, independence and duties of the special committee at the conclusion of this paper.

Options where a judge makes a complaint when proceedings are ongoing

Except in the most unusual of circumstances, we have concluded that, when a judge makes a complaint about a lawyer's conduct or competence to the Law Society when the proceedings out of which the complaint arises are continuing, the Society should decline to take any action until the proceedings have been adjourned or completed. We have reached this conclusion because we believe that there is a serious potential for a miscarriage of justice to occur in these circumstances or for there to be an appearance of unfairness to the lawyer about whom the complaint is made or to the lawyer's client.

Judges have broad authority to control proceedings in their courts. Generally speaking, judges have two choices when they conclude during a trial that a litigant is not receiving adequate representation:

1. To adjourn the proceedings so that the litigant can retain other counsel, or
2. To attempt to control the process to ensure the case is decided fairly.

If the proceedings are adjourned and the matter is brought to the attention of the Law Society, the Society can then apply its ordinary procedures to investigate the conduct of counsel. In appropriate cases, the Society can assist counsel in obtaining more senior or more competent representation for the client. We recognize that this is a role the Society has performed from time to time in the past on an informal basis and, where proceedings are not ongoing, we believe it is appropriate for the Society to play this role. We do not think it is a role the Society should ordinarily attempt to play when proceedings are ongoing.

Is it possible for the Law Society, with the cooperation of the judiciary, to provide judges with another option when a judge concludes that a client is not receiving adequate representation?

We recognize that the urgency of an issue may preclude a judge from adjourning a matter to enable the client to obtain different or additional representation. Moreover, the nature of a matter may make it very difficult for a judge to attempt to control the process to ensure the case is decided fairly. We have considered whether the Law Society can play a role in giving an additional option to trial judges in these circumstances, and we believe that it can.

We conclude that the Society can take two important steps. The first step would be to assist in setting up a special committee composed of senior litigation practitioners to assist lawyers who become involved in difficulties during the course of a trial. The second step would be to develop a protocol for providing that assistance.

Report of the Committee on Relations Between the Law Society and the Judiciary

We recognize that situations in which the judiciary would want to call on the special committee for assistance would be unusual and infrequent. Where such circumstances do occur, however, it is our view that the principal objective of both the court and the Law Society should be to permit the proceedings to conclude without prejudice to the litigants or anyone else affected by the decision. That objective can best be achieved by the Law Society agreeing to a process designed to support counsel while the proceedings are continuing. A process designed to be confidential from the Law Society is most likely to achieve that objective.

The Law Society will continue to have an interest in monitoring any hearing where the conduct of counsel may be inappropriate or incompetent. However, in most circumstances where the proceedings are ongoing, the Law Society's interest should be subordinate to the interests of the litigants and others affected by the trial and subordinate to the need for the appearance of fairness in the proceedings.

Protocol

We recommend the following protocol when a judge becomes concerned during a trial that counsel cannot adequately represent the interests of a client:

1. The judge should seek advice from the Chief Justice or Associate Chief Justice or, in the case of the Provincial Court, with the Chief Judge or an Associate Chief Judge.
2. No steps under this protocol would be taken if the judge, after receiving advice, concludes that the interests of the litigant can be adequately protected by the judge or that the matter can be adjourned.
3. If the interests of the litigant cannot be adequately protected by the judge or the matter cannot be adjourned, the Chief Justice, Associate Chief Justice, Chief Administrative Judge or Assistant Chief Administrative Judge should approach the special committee for assistance.
4. When the special committee receives a request for assistance, it would immediately contact the lawyer affected and attempt to provide assistance.
5. Other than informing the judge who contacted the special committee of the fact that the lawyer had been contacted (and nothing further), the special committee would provide no information to anyone and, in particular, would not inform the Law Society of its activities with respect to any specific case.
6. If the lawyer declines the assistance offered, no further steps would be taken by the special committee. The committee would not report to anyone whether the assistance it offered had been declined or accepted by the lawyer.
7. A judge would be free to report a lawyer's conduct to the Law Society at any time and have the complaint dealt with in accordance with the Society's normal procedures. However, where the complaint relates to a trial that is still proceeding, the Society would take no action on the complaint unless:
 - (a) the trial or interlocutory matter is completed or adjourned,
 - (b) a mistrial is declared,

Report of the Committee on Relations Between the Law Society and the Judiciary

- (c) counsel is no longer acting on the matter, or
- (d) Law Society representatives are satisfied that the continued practice of the lawyer would be dangerous or harmful to the public or the lawyer's clients.

Except in extraordinary circumstances, where a judge makes a complaint against a lawyer to the Law Society, the lawyer will receive notice of the complaint from the Law Society.

8. Where a judge hearing a case requests the assistance of the special committee directly, the committee would, nevertheless, respond to that judge's request in the same way as if the request had been made by an administrative judge.
9. Where a judge approaches the Law Society, outside of the complaints process, to intervene in a matter, the Society should only do so when:
 - (a) Law Society representatives are satisfied that the continued practice of the lawyer would be dangerous or harmful to the public, the lawyer's client in the proceedings or other clients, and
 - (b) the judge making the approach is unwilling to follow the usual protocol or the protocol has been followed but has not succeeded in resolving the matter.

While we recognize that the Law Society has no authority to bind the judiciary to any protocol, we strongly recommend that the assistance of the special committee not be requested except by an administrative judge after consultation with the judge seized of the trial. In circumstances where the conduct of counsel raises questions about whether the court ought to permit a trial to continue, or to request assistance from the bar to permit it to continue, it is important that a judge receive advice from a colleague not directly involved in the matter. The risk that a judge hearing a case will intervene inappropriately will be minimized if the protocol recognizes the benefit of consultation with an administrative judge.

We expect that instances where the court cannot deal with inappropriate or incompetent behaviour by counsel without requesting assistance from the special committee will be rare.

Response when judge's conduct inappropriate

There are currently three methods by which problems respecting a judge's conduct toward counsel can be addressed:

1. A complaint may be made to the appropriate judicial council;
2. The conduct can be identified and raised informally by the Law Society with the appropriate Chief Justice or Chief Judge; or
3. Counsel can raise a legal issue during the course of a trial that the judge's actions manifest a bias against counsel's client.

We believe that the Law Society has some responsibility to offer lawyers guidance in this area. There is currently no such body with any formal authority to do so. This contrasts with situations where counsel need assistance in various areas of law and can seek the assistance of practice panels of volunteer lawyers experienced in those areas.

Report of the Committee on Relations Between the Law Society and the Judiciary

We are of the view that there are benefits to having a committee of lawyers, separate from the Law Society, deal with most complaints of this nature. We think it is necessary for the Society to provide some assistance to such a committee to review these complaints, provided the Society is satisfied the committee is a credible one with substantial independence. In situations where the committee is unsuccessful in resolving an important issue or in other compelling circumstances, the Law Society continues to have a responsibility to offer assistance.

We propose that the special committee referred to earlier be the committee that would have the additional task of monitoring and assisting with complaints made against the judiciary where circumstances warrant such assistance. The committee would hold itself out as being available to lawyers to give advice on all three avenues identified above for dealing with complaints against judges.

In some instances we expect the special committee would advise lawyers not to go forward with a complaint. In other situations the special committee may want to raise issues with a Chief Justice or Chief Administrative Judge informally or advise a lawyer to make a complaint to the appropriate judicial council. The special committee would also have responsibility to advise counsel on issues of bias and provide assistance to permit those allegations to be properly made in open court, if it were satisfied the allegations had merit.

Can a single committee perform both functions?

We have recommended that a special committee be formed to address the two major questions we have identified as forming the mandate of our Committee. We believe that there are a number of advantages to having a single special committee. Those advantages include the following:

- there will be less administrative work and cost to maintain the special committee;
- contacts formed from carrying out one of the functions will be useful in performing the other;
- to the extent that there are cross-complaints between a judge and a lawyer arising out of a single set of facts, a single committee will be able to consider information from both sources.

We recognize that there may be disadvantages to having a single committee attempt to perform both functions. If judges are reluctant to make use of the special committee because its members may also be providing information to lawyers about how to complain about judges, a primary benefit of the committee will be lost.

Characteristics and responsibilities of the special committee

Assuming a single committee can perform both of the tasks we have identified, it is important to clarify the characteristics and responsibilities of the special committee and its relationship with the Law Society. The special committee would have the following characteristics and responsibilities:

Report of the Committee on Relations Between the Law Society and the Judiciary

- Its purposes would be to:
 - (a) assist lawyers who need emergency assistance in the course of a trial or other proceeding in circumstances where such assistance is requested by the judiciary, and
 - (b) provide advice and assistance to lawyers who wish to make complaints about judges, or who wish to argue that a judge's conduct has manifested a bias against the lawyer's client, and in suitable cases would raise the complaints directly with the judiciary.
- It would be chaired by a senior and respected practitioner.
- It would be comprised of senior practitioners identified and recruited by the Law Society after consultation with the Criminal, Civil Litigation, Family and Administrative Law Sections of the Canadian Bar Association (B.C. Branch) on appropriate appointments. The judiciary would also be consulted on appointments, if judges wish such consultation.
- Its members would be appointed by the Treasurer of the Law Society and the President of the Canadian Bar Association (B.C. Branch) in accordance with guidelines for the appointment of Law Society committees.
- Its members would not be current Benchers or members of any committee or subcommittee of the Law Society. Life Benchers would be eligible to be members.
- It would have modest budget assistance from the Law Society for transcripts, training or the services of a psychiatrist, psychologist or other professional to advise the committee or the lawyer.
- It would have no reporting relationship to any person or body with respect to any individual request or complaint it received.
- It would have a duty to advise the Law Society in general terms of its activities and indicate whether, in its view, the work it is doing is successful.
- In circumstances where assistance has been requested from the judiciary, it would provide assistance to a lawyer only where the lawyer was willing to accept the assistance.
- It would have a designated contact person or persons.

We recommend that the general purposes of the special committee and its membership be published no less than yearly in the *Benchers' Bulletin*, as well as in the minutes of the Criminal, Civil Litigation, Family and Administrative Law Sections of the Canadian Bar Association (B.C. Branch).

Protection of confidentiality

Because the success of the special committee in providing assistance at the request of the judiciary may depend on confidentiality, some amendments may have to be made to the *Legal Profession Act*, the *Law Society Rules* or the *Professional Conduct Handbook* to ensure confidentiality.

Report of the Committee on Relations Between the Law Society and the Judiciary

Chapter 13, Rule 1 of the *Professional Conduct Handbook* states:

Subject to Rule 2, a lawyer shall report to the Law Society:

- (a) another lawyer's breach of undertaking which has not been consented to or waived by the recipient of the undertaking,*
- (b) another lawyer's shortage of trust funds, and*
- (c) any other conduct by another lawyer which raises a substantial question as to the other lawyer's honesty or trustworthiness as a lawyer in other respects.*

There will be a need to enlist the cooperation of the lawyer involved when the special committee is acting under this protocol. In these circumstances, therefore, we recommend that the Law Society take steps to relieve the special committee members of any obligation to report the lawyer to the Law Society under Chapter 13, Rule 1 of the *Handbook*, save for knowledge the committee members may acquire of trust fund shortages.

A similar problem arises with respect to the possibility that members of the special committee, acting under the protocol, may be compelled to give evidence regarding matters that arise from their dealings with the lawyer. We think this could undermine the effectiveness of the committee and is undesirable. We recommend that the Law Society consider whether steps could be taken to ensure that members of the special committee cannot be compelled to give evidence in any proceedings, including Law Society proceedings, in these circumstances.

Conduct of Benchers

Law Society briefing procedures and materials should alert Benchers to the protocol in place to deal with situations where proceedings are ongoing. The procedures should require a Bencher who is approached by a judge to discuss the conduct of counsel in ongoing proceedings to advise the judge of the protocol but to otherwise decline to discuss the matter.