

# The Law Society of British Columbia



## ***Report of the Small Firm Task Force***

**For: The Benchers**

**Date: January 26, 2007**

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**Purpose of Report: Discussion and Decision**

**Prepared by: Small Firm Task Force**

## REPORT OF THE SMALL FIRM TASK FORCE

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## **Report of the Small Firm Task Force**

### **I. EXECUTIVE SUMMARY**

A considerable proportion of the lawyers who practise law in British Columbia do so on their own or in small firm settings. Sole and small firm lawyers practise throughout the province, in small and large communities, and in urban and rural locations. They provide the vast majority of legal services outside of the urban centres. When individual British Columbians require the services of a lawyer to handle a wide range of legal matters, such as real estate transactions, wills preparation, estates work, representation in matrimonial and other civil disputes, representation in criminal proceedings, advice for small businesses, and appearances before administrative tribunals, most often they rely on sole and small firm lawyers.

These lawyers, however, face pressures that exist because of the nature of their practice structures, prospective client base and practice locations. The pressures faced by these lawyers may affect the services they are able to offer to clients, the majority of whom are in areas outside major centres in the Lower Mainland and southern Vancouver Island.

The Small Firm Task Force was created following a focus by the Benchers, at the Benchers' Retreat in June 2005, on the issues faced by sole and small firm practitioners in British Columbia. The Task Force was established to consult with sole and small firm practitioners and to make recommendations to the Benchers on how the Law Society might take meaningful steps to strengthen and support sole and small firm practice.

After consultations and discussion over the balance of 2005 and through 2006, the Task Force has reached a consensus on six recommendations:

1. Technology Support: Plan and deliver a technology support program, designed specifically to assist sole and small firm practitioners;
2. Bookkeeper Support: Develop and publish a comprehensive on-line guide to recruiting and working effectively with a bookkeeper;
3. Articling: Develop articling program proposals, in conjunction with the Credentials Committee (which has jurisdiction over articling), to promote articling throughout the province, with a focus on sole and small firm practices, and to further facilitate shared articles;
4. Practice Locums: Develop a program to promote and support practice locums, which would include the following features:
  - a guide and checklists on how to make a locum arrangement operate effectively, including how to deal with the risk of client conflicts;

- sample locum agreements, with clauses that could be included to meet the wishes and needs of both lawyers, including remuneration and non-competition terms;
  - an on-line registry of lawyers who are available to provide locum support, specifying each lawyer's qualifications, system for remuneration and expenses, location availability, timing and practice areas;
5. Succession and Emergency Planning: Develop a program to assist lawyers in putting into place law practice succession and emergency plans;
  6. Certified Cheques: Clarify for the profession when it is inappropriate to demand a certified cheque from another lawyer, and that the Ethics Committee be asked to consider such a clarification in the *Professional Conduct Handbook*, perhaps by way of footnote to chapter 11, rule 8.

The rationale for and options for implementing these recommendations are developed in this Report.

## **II. INTRODUCTION**

### **1. Small Firm Task Force Mandate**

The Small Firm Task Force was established to consult with sole and small firm practitioners, and make recommendations to the Benchers on how the Law Society might take meaningful steps to strengthen and support sole and small firm practice. The Task Force members are Bruce LeRose (Chair), Kathryn Berge, Christine Elliott, Robert Ellis, Patricia Schmit, and Art Vertlieb. The Task Force has benefited from the regular contributions of 2006 Law Society President Robert McDiarmid.

The work of the Task Force originated at the Benchers' Retreat in 2005, when the Benchers focused on sole and small firm practice. Following the Bencher Retreat, a Working Group continued to meet, and was formally constituted as the Small Firm Task Force. The Task Force has engaged in an ongoing consultation process throughout the province to identify the suggestions and concerns of sole and small firm practitioners.

The Task Force has received many suggestions from sole and small firm practitioners during its consultations:

- create effective means to encourage lawyers to set up practice in or move to smaller communities;
- encourage new law school graduates to article in smaller communities, including by implementing mechanisms to facilitate sharing of articling students;
- facilitate a system of practice locums;

- support law firm succession and emergency planning;
- assist lawyers to find and work with bookkeepers effectively;
- support lawyers in identifying, using and financing law firm technology;
- expand and improve affordable access to legal information, library resources and continuing education;
- eliminate the practice of law firms requiring certified cheques from other lawyers;
- eliminate any disadvantage to sole and small firm practitioners in purchasing excess insurance coverage.

The Task Force has considered the input of the sole and small firm bar in developing recommendations for Benchers consideration.

The Task Force has also considered whether its work and ultimately its recommended initiatives are more appropriately within the mandate of the Canadian Bar Association or the Law Society.

The Task Force has concluded that, underpinning its work, strengthening the viability and effectiveness of sole and small firm law practices will advance the public interest in access to quality legal services throughout the province, and that supporting public access to quality legal services comes squarely within the Law Society mandate.

## **2. Overview of Sole and Small Firm Practice<sup>1</sup>**

When passing rules implementing the Small Firm Course, the Benchers defined “small firm” as a firm in which not more than four lawyers practise law together. Lawyers practising as sole and small firm practitioners are essential to the provision of legal services, particularly to individuals, and continue to be the traditional backbone of the profession throughout the province. It is therefore of the highest priority that members of the public continue to have the benefit of this key resource in their communities.

Nearly 35% of the private bar practises as sole practitioners, and approximately 20% of the bar practises in firms of two to four lawyers. Sole and small firm lawyers practise throughout the province, in small and large communities, and in urban and rural locations. They provide the vast majority of legal services outside of the urban centres. When individual British Columbians require the services of a lawyer to handle a wide range of legal matters, such as real estate transactions, wills preparation, estates work, representation in matrimonial and other civil disputes, representation in criminal

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<sup>1</sup> The Task Force acknowledges the important research done by the Sole Practitioner and Small Firm Task Force of the Law Society of Upper Canada, as reflected in its Final Report to the Benchers of May 24, 2005.

proceedings, advice for small businesses, and appearances before administrative tribunals, most often they rely on sole and small firm lawyers.

Sole and small firm lawyers are somewhat older than the profession as a whole. Approximately 780 or 31% of sole practitioners are between 55 and 65 years of age, while only 18% of lawyers at firms of more than five lawyers are between 55 and 65. Therefore, the average age of sole practitioners is significantly higher (at 51 years of age on average) than lawyers practising in firms of six or more lawyers (at 45 years of age on average). In total, more than 10% of the private bar comprises sole practitioners between the ages of 55 and 65.

Younger lawyers do not enter sole and small firm practice with the same frequency as they enter practice in larger firms. Outside of the urban areas, where there are fewer medium size and larger firms, the absence of younger lawyers is more prevalent. These numbers raise concerns about whether the sole and small firm bar is renewing itself, particularly in less populated parts of the province, and whether pressures and challenges make it more difficult to attract lawyers to sole and small firm practice.

Lawyers may choose sole or small firm practice for a variety of reasons. In many cases they desire a kind of independence that is less available in a larger firm environment. They are often prepared to make trade-offs, including to some degree lower income, for a work-life balance and practice style they hope smaller firm practice affords. In some cases, however, lawyers choose sole or small firm practice because they have not been able to find work in other settings.

Many sole and small firm practitioners face pressures that exist because of the nature of their practice structures, prospective client base and practice locations. Significant among those pressures are the following:

- rising overhead costs,
- difficulty in financing law practices, particularly because individual clients often have less ability to pay than do corporate, government or institutional clients,
- more limited financial ability to weather periods of lower income,
- practice management challenges,
- law firm technology demands, including its effective use and cost,
- time spent on administrative work,
- access to library, legal information and continuing legal education resources,
- shortage of lawyers and articling students in many communities,
- isolation from other lawyers.

### **3. Current Supports and Programs for Sole and Small Firm Practitioners**

The sole and small firm bar is supported by resources provided by a number of organizations, including in particular the Law Society, the BC Courthouse Library Society, the Canadian Bar Association, the Continuing Legal Education Society, the Trial Lawyers Association of BC, and local and county bar associations.

Law Society programs and supports for sole and small firm practitioners include the following:

- Practice Advice service, providing free in-person telephone and email advice on ethics, practice questions and technology,
- Law Society website and paper based resources on practice management, ethical and insurance questions, including Practice Advice articles in the *Benchers' Bulletin*,
- Professional Legal Training Course *Practice Materials*, providing a comprehensive, detailed summary of law and procedure in practice areas most frequently encountered by sole and small firm practitioners, available free of charge on the Law Society website,
- CanLII, a national virtual law library, supported by the Law Society as a shared initiative of Canadian law societies through the Federation of Law Societies, and available on-line to the profession and public without user fees,
- The new Trust Assurance Program began its initial rollout in mid-2006. A goal of the program is to establish stronger, cooperative Law Society relationships with lawyers, by supporting their risk management through assistance and education. Law Society staff assist lawyers with trust accounting issues and help new law firms adopt proper trust accounting procedures.
- The Small Firm Practice Course was developed and implemented effective January 1, 2007. It provides both an excellent preparation for sole and small firm practice and a comprehensive resource freely available on-line and regularly updated to assist lawyers in their law practices.

### **III. INITIATIVES RECOMMENDED BY THE TASK FORCE**

On July 14, 2006 the Benchers approved six recommendations of the Small Firm Task Force as priorities for 2006. The Benchers directed the Task Force to continue developing each of the recommended initiatives, together with financial impact statements, for further Bencher consideration.

The Task Force had also considered other potential initiatives, listed in Appendix A, and recommended these potential initiatives not be given priority, at least in 2006. The Benchers agreed.

The six recommended initiatives, which are analysed in detail in Part IV below, are as follows:

1. Technology Support: Plan and deliver a technology support program, designed specifically to assist sole and small firm practitioners;
2. Bookkeeper Support: Develop and publish a comprehensive on-line guide to recruiting and working effectively with a bookkeeper;
3. Articling: Develop articling program proposals, in conjunction with the Credentials Committee (which has jurisdiction over articling), to promote articling throughout the province, with a focus on sole and small firm practices, and to further facilitate shared articles;
4. Practice Locums: Develop a program to promote and support practice locums, which would include the following features:
  - a guide and checklists on how to make a locum arrangement operate effectively, including how to deal with the risk of client conflicts;
  - sample locum agreements, with clauses that could be included to meet the wishes and needs of both lawyers, including remuneration and non-competition terms;
  - an online registry of lawyers who are available to provide locum support, specifying each lawyer's qualifications, system for remuneration and expenses, location availability, timing and practice areas;
5. Succession and Emergency Planning: Develop a program to assist lawyers in putting into place law practice succession and emergency plans;
6. Certified Cheques: Clarify for the profession when it is inappropriate to demand a certified cheque from another lawyer, and that the Ethics Committee be asked to consider such a clarification in the *Professional Conduct Handbook*, perhaps by way of footnote to chapter 11, rule 8.

#### **IV. ANALYSIS OF THE RECOMMENDED INITIATIVES**

##### **Recommendation #1: Technology Support**

Recommendation #1 would be implemented by the planning and delivery of a technology support program, designed specifically to assist sole and small firm practitioners. The

Task Force has concluded that such a program is advisable for the reasons described in this section of the Report.

### *Rationale*

Acquisition and efficient use of appropriate technology are essential to sole and small firm practice, and create challenges with which lawyers must deal effectively. The Task Force has concluded that a program enabling the Law Society to assist sole and small firm practitioners in relation to technology and its use ought to be developed on a priority basis.

Potentially significant technology-related problems for sole and small firm practitioners include:

- a) What computer technology is needed? It can be easy for lawyers to become lost in relation to these issues, including by ignoring or making incorrect decisions about the technology they should acquire and operate for their particular type of practice.
- b) Once the technology is chosen, how does the lawyer set up that computer technology, and how should it be integrated into an existing system? Making a change from a current system to a new system is difficult and time consuming. Frequently it is not done properly. Without guidance it might never happen.

These problems exist for many lawyers. Kensi Gounden, Practice Standards Counsel, reports that he regularly visits law offices where lawyers who have a computer technology system in place did not receive proper advice on what equipment to acquire or how to use it, and have not properly transitioned their firms to a new office technology system from an old system. As a consequence, the success of their law practices can be seriously impaired. Although the Law Society, through its Practice Advice program, has been providing technology advice to law firms on request, the Task Force sees a need for a more organized, pro-active approach.

The Task Force has concluded that an effective Law Society technology support program for sole and small firm practitioners would make them better lawyers by being more efficient and timely in providing legal services. Such a program would be particularly useful for lawyers in the Practice Standards program, and should also be available to assist other lawyers on a voluntary basis.

The Task Force notes that the Law Society has already implemented two programs that will assist lawyers in small firms. Each can be integrated into the technology support recommendation:

- The Trust Assurance Program includes a visit to new law firms within six to twelve months of their commencement. The purpose of the visit is to get the new firms off to a good start. The visiting auditor can identify the needs of the lawyer/firm during the visit, and direct the lawyer/firm to the technology support initiative. This function should make both programs more effective;

- The on-line Small Firm Practice Course includes a module on the basics of selecting and using computer technology. The course also features a link to a new practice management software package available free of charge through the Law Society website. This package includes the following systems: calendaring, file indexing, conflict checks, documenting retainers, file opening and closing, document recordkeeping, note taking and basic accounting. The Task Force's proposed technology support program would provide lawyers with a significantly more substantial resource than that provided by the Small Firm Practice Course.

The Task Force also considered whether the Law Society ought to provide or facilitate the delivery of technology-related continuing education courses, including self-paced on-line technology courses, but has concluded that such courses on their own would not provide optimal support because courses, while providing information, are not personalized to meet the individual practitioner's needs. Such courses, beyond the modules in the Small Firm Practice Course, would on their own provide, at best, weak support for sole and small firm practitioners. Although the Task Force does not see such courses as a Law Society priority, the Task Force recognizes that demand for technology-related courses can be met by other providers, such as the Continuing Legal Education Society, the Trial Lawyers Association and the Canadian Bar Association.

### *Needs to be Met by the Program*

The program would be designed to meet the needs of lawyers for advice about current software and hardware, as well as about technology compatibility and set-up.

There are three situations, identified by the Task Force, where a lawyer would typically seek assistance through a technology support program:

- a) acquiring and implementing a new system (a turnkey approach), such as when starting a firm;
- b) transitioning from an old system to a new system;
- c) winding up a law practice, with a focus on technology assistance (including closing files with scanned documents).

Whether acquiring and implementing a new system or transitioning from an old to a new system, there are a number of matters that would typically need to be covered, either as new features or as upgrades, and in all cases requiring integration:

- a) Start Up
  - trust accounting procedures
  - firm coverage, including access by other lawyers or staff remote access
  - systems back up

- growth, including addition of other lawyers, students and staff
- b) File Management
- open files / contacts / documentation
  - trust accounts
- c) Client Management
- retainers / documentation
  - contacts / file work
  - trust accounts
- d) Business Management
- marketing
  - continuing education
  - library
  - financial statements
  - timekeeping and billing.

A complete system would be recommended based on current technology and future needs. Training would be required for the lawyer and office staff, with updates.

Different lawyers have differing requirements and needs. Some lawyers would have no practical idea where to start, and would be looking for direction. Others would need more than to be directed to resources. They would need advice and recommendations. Still others would want someone to do the actual implementation of a new system or transition from one system to another. Finally, some lawyers, once the technology is in place, would want continuous updating and support. These differing needs call for the consideration of various options for delivery of a technology support program.

### ***Program Delivery Method – Options***

There are choices to be made, including

- Is the program to be provided free of charge or on a user pay basis?
- What would happen if the lawyer is in difficulty, and blames the technology system and advice? For example, would the lawyer have a valid defence for a breach of undertaking arising from a technology problem? Would the lawyer

have a cause of action against the Law Society on the basis of an improper recommendation?

Options for a program delivery method include the following, or a combination of the following:

i) Option 1: Full Time Law Society Staff

Advantages include:

- the staff would be able to apply Law Society knowledge about pitfalls;
- the lawyer could choose from one or more of the support services available in a complete package of services, similar to ordering a television cable package;

Disadvantages would, in particular, relate to Law Society cost, including staff resources.

ii) Option 2: Outside Consultant

The Law Society would contract out to one or more consultants, so that the Law Society would manage quality control while the consultants do the work.

Issues include:

- Whether the Law Society would be potentially liable to dissatisfied lawyers;
- Cost impact for the Law Society.

iii) Option 3: Third Party Preferred Supplier

The Law Society would consult with potential service providers, and designate one or more preferred suppliers to put together packages of services lawyers could purchase directly from the service provider, with no further Law Society involvement.

- Issues include quality control, follow-up and cost.

***Recommendation: A Hybrid Program Delivery Model***

The Task Force recommends a hybrid program delivery model that emphasizes contracting out and third party suppliers, and that the program be set up to include only essential Law Society staff support and maximum cost recovery. A hybrid delivery model would include a combination of the options for service delivery, which would effectively meet specific lawyer needs while minimizing cost to the Law Society. A hybrid model would also allow the Law Society, while not actually operating all aspects of the program, to retain a measure of quality control over those parts operated by providers outside the Society.

### ***Oversight***

The Task Force recommends that oversight of the recommended program be given to the Practice Standards Committee.

### **Recommendation #2: Bookkeeper Support**

Recommendation #2 would be implemented by completing the development and on-line publication of a comprehensive guide to recruiting and working effectively with a bookkeeper.

#### ***Rationale and Needs to be Met***

During the consultation process lawyers identified that an effective bookkeeper is an essential component in the successful practice of law, but that it can be difficult to identify a bookkeeper and know how to work effectively with a bookkeeper.

#### ***Features***

The Law Society has published and posted on the website the *Lawyer Guide to Working Effectively With a Bookkeeper*, which was reviewed and endorsed by the Small Firm Task Force (attached as Appendix B).

In addition, the Trust Assurance Department has finalized a new Law Society publication, *The Bookkeeper's Handbook*, which provides comprehensive advice on law firm trust accounting and bookkeeping. This is an on-line resource, directly accessible, free of charge through the Law Society website and the Small Firm Practice Course. The Task Force supports enhancing the utility of the *Handbook* by making it an interactive resource, with links to enable the user to ask questions and obtain further information.

The Task Force recommends that *The Bookkeeper's Handbook* be given a place of prominence on the Law Society's website, preferably with a link available directly from the home page.

Although the Task Force does not recommend that the Law Society endorse particular bookkeepers, it understands that the Trust Assurance Department intends to provide some assistance by publishing a list of licensed accountants who lawyers could contact for bookkeeper services. The publication of the list will be done on a clearly expressed without prejudice basis. The Task Force supports this initiative.

### **Recommendation #3: Articling**

Recommendation #3 is intended to develop articling program initiatives, in conjunction with the Credentials Committee (which has jurisdiction over articling), that are designed to promote articling throughout the province, with a focus on sole and small firm practices. The recommendation is also designed to further facilitate shared articles.

Because the articling initiatives would likely require policy and rule changes to be fully implemented, the Task Force is asking the Benchers to approve the proposed initiatives in principle, and refer them to the Credentials Committee before the Benchers are asked for final approval.

Generally, the recommendation would be designed to ensure that Articling would be promoted to the profession and students through the website and print media in a way that is user friendly, and with the intention that articling requirements would not appear to be bureaucratic or burdensome.

### ***Rationale and Needs to be Met***

Much of the practice of law outside the Lower Mainland and Victoria regions is conducted through sole and small firm practices. At the same time as there are law school graduates who encounter difficulties and delay in finding articling positions, sole and small firm practitioners, particularly outside the Lower Mainland and Greater Victoria regions, report difficulty in recruiting articling students.

The Task Force considers it is more likely that students who choose to article in smaller communities would, if given the opportunity, stay in those communities after being called to the bar. An increase of articling students in sole and small firm practices, particularly outside the Lower Mainland and Greater Victoria regions, would in both the short and longer term be likely to support and strengthen the viability of law practices and the provision of legal services.

Some sole and small firm practitioners report that while they may not have enough legal work to justify hiring an articling student on a full time basis, they would be in a position to share an articling student with another firm or firms. Although the Law Society currently permits shared articling arrangements, the Task Force has received very strong encouragement from sole and small firm practitioners to support and promote an expanded shared articling program.

### ***Specific Recommendations***

With respect to articling, the Task Force specifically recommends that the Law Society:

- a) *Create, as a pilot project, a Law Society registry advertising available articling positions, whether full term or partial term. The registry would be promoted to law firms and advertised to students in all Canadian law schools.*

This would be a Law Society pro-active initiative to match solo and small firms with students, and should lead to increases in the number of articling students in solo and small firms, particularly outside of Vancouver and Victoria.

Law Society staff would ensure that information on the registry is current.

- b) *Facilitate the splitting or sharing of articles over a series of placements, even if the student does not have the full nine months of articling placement secured in advance of beginning any particular placement.*

This recommendation recognizes that:

- Solo and small firms may be able to fit more frequently into this model, thereby promoting articling in solo and small firms;
- Students would more readily be able to start articling without having organized the complete nine months before beginning, and would have the advantage of a diverse range of articling experiences;
- Shorter term placements might from time-to-time extend into longer or even full nine-month placements.

In developing this recommendation, the Task Force noted that:

- Articling reforms approved by the Benchers in 2002 included measures to strengthen the quality and consistency of articles, including through the introduction of the Articling Agreement and follow-up reports. The new initiatives would therefore need to be designed and implemented so as not to compromise the quality of articling as an educational experience. The changes would require the Law Society to review and make any necessary amendments to the Articling Agreement and other documentation requirements, and to make related amendments to the Rules.
- The program of shared articles would have to include effective safeguards against conflicts that can arise from working in more than one law firm.

- c) *Eliminate the requirement that students receive articling experience in at least three areas of practice.*

Implementation of this recommendation would promote articling placements in solo and small firms that are specialized, and eliminate the barrier of requiring articling assignments or secondments.

The articling skills checklist would continue to be used, and relied upon to provide a full range of skills training without the necessity of there being three areas of practice experience. This is similar to the system that is used in Ontario. PLTC would continue to fulfill the function of providing a range of instruction and experience over a wide range of practice areas.

- d) *Remove the current requirement that students have an articling position before being eligible to enrol in PLTC.*

Implementation of this recommendation would mean:

- (i) Students who have completed PLTC would be better prepared to perform strongly in articling and to market themselves accordingly.
- (ii) Firms would be more likely to offer placements to students who have already completed PLTC.
- (iii) The delay in commencing the Admission Program would be reduced by students being able to complete PLTC without waiting to find articles.

The Task Force has noted that, in implementing this recommendation, care would have to be exercised to address the following concerns:

- (i) Students who have difficulty in PLTC would not always have an articling principal to refer to as a resource for extra assistance.
- (ii) Pressure would be placed on the PLTC sessions beginning in May of each year, which are always over subscribed.

#### **Recommendation #4: Practice Locums**

Recommendation #4 would be implemented by the development and operation of a program to promote and support practice locums.

#### ***Rationale and Needs to be Met***

Many sole and small firm lawyers report that it is difficult if not impossible to take time off from the practice of law, even for brief vacations, because there is no one available to provide essential services to their clients in the interim. Burnout can be a significant problem, for both lawyers and, consequently, for their clients.

An effective system of locums would therefore provide valuable backup to many solo and small firm lawyers. It would permit lawyers to reduce their time commitment to the practice of law, and at the same time provide opportunities for other lawyers, whether senior or more junior, who prefer to work on a part-time or occasional basis.

The development of a program to promote and support practice locums would include the following features:

- a guide and checklists on how to make a locum arrangement operate effectively, including how to deal with the risk of client conflicts;
- sample locum agreements, with clauses that could be included to meet the wishes and needs of both lawyers, including remuneration and non-competition terms;
- an on-line registry of lawyers who are available to provide locum support, specifying each lawyer's qualifications, system for remuneration and expenses, location availability, timing and practice areas, with a disclaimer that the Law Society is not making representations as to suitability of the listed lawyers for

locum services, and that the lawyer who is seeking locum support bears full responsibility for selecting a particular lawyer to provide locum support.

These features would also be accessible through the Small Firm Practice Course. The Course already includes content on locum arrangements, and a link to secure, web-based practice management software providing basic practice management tools, including systems for calendaring, file indexing, conflict checks, documenting retainers, file opening and closing, note taking and record keeping. Use and adaptation of this tool would facilitate effective locums by having office systems in place that could be readily used by the locum lawyer.

### ***Concerns***

The Task Force has identified two concerns that would need to be addressed in implementing this option:

- that the locum lawyer could end up taking over some of the clients of the lawyer whose practice the locum was looking after on a permanent basis. It would be the responsibility of both lawyers to include in their agreement clear terms dealing with such an eventuality;
- that there could be situations where the locum lawyer would be exposed to professional negligence or ethical risk because of the nature or quality of the law practice for which the locum service is provided. The Law Society locums' guide would need to include information on how to safeguard against such risks when deciding whether to accept a locum assignment and on what terms.

The Task Force notes that Law Society professional liability insurance covers both the work of the lawyer providing locum services and the lawyer who is being temporarily replaced. After either lawyer leaves the practice of law, tail coverage for legal services provided while practising as an insured lawyer continues to be in place. (However, excess insurance, available only through private suppliers, provides only such coverage as provided for in the policy.)

### **Recommendation #5: Succession and Emergency Planning**

Recommendation #5 would be implemented by the development and delivery of a program to assist lawyers in putting into place law practice succession and emergency plans.

#### ***Rationale and Needs to be Met***

Succession and emergency planning are essential to sole and small firm practices and to their clients. The process of preparing for practice interruptions is not an easy one. The time, effort and resources needed to ensure a law practice is prepared for the unplanned occurrence compete with daily business pressures. Many solo and small firm practitioners would be assisted by a comprehensive guide to succession and emergency planning.

## *Features*

The program would supplement the module on succession and emergency planning in the Small Firm Practice Course, and include software, developed by the Law Society and available on the website, for succession and emergency planning, with a feature to enable the lawyer to file that information with the Law Society.

### *a) Succession Planning*

All lawyers, in particular sole practitioners, should plan for how their practices will be handled in the event of incapacity or death. In larger and medium-sized firms, someone else in the firm may be available to take over a disabled lawyer's practice.

Lawyers in small firms, however, may not have someone with the necessary expertise or capacity to take over. One possible solution is an "emergency buddy," a qualified peer to notify clients, take on the caseload and run the practice. It may be a reciprocal arrangement, with each lawyer agreeing to step into the other's shoes.

The Law Society currently includes in its annual reporting requirements a question on whether the lawyer has identified another lawyer for providing emergency coverage, but does not require that there be a designated lawyer. In developing a succession and emergency planning program, the Law Society should consider a pro-active change, by asking small firms, and most particularly sole practitioners, to provide annually on a voluntary basis the name of a designated lawyer who would provide emergency coverage. This would encourage actual arrangements to be made more frequently than at present.

Encouragement should be given to lawyers to complete and maintain an emergency and succession plan to be available in the event of death or incapacity. This could include a Power of Attorney for the law practice, including trust accounts, and a Will with terms dealing with practice related issues. The Continuing Legal Education Society could be encouraged to develop a package of recommended precedent clauses for these estate planning documents.

The practice locums program (recommendation #4) could provide the fundamental support resources, including those relating to conflicts and obtaining advance client consent, and regularly updating the other lawyer on information necessary to carrying out the role.

### *b) Emergency Planning*

Emergency planning, while it includes effective succession planning, also includes planning for sudden catastrophic occurrences, such medical emergencies, death, fire, flooding, storm damage and theft.

The larger the firm and the more complex its operations, the more detailed the emergency plan ought to be. A more modest plan would minimize exposures, at relatively little cost, through three steps:

- effective back-ups (complete and reliable computer backup of law practice data),
- emergency contact lists,
- adequate insurance coverage for damage to client files and law firm property, including for business loss incurred as a result of the disruption.

A well-designed and tested full-scale practice recovery and continuity plan would address the following:

- preparation and prevention: lessening the possibility or impact of an adverse practice interruption or disaster,
- response: the immediate response to an incident or emergency, including matters of personal safety, and the policies, procedures and actions to follow in the event of a practice interruption,
- resumption: the process of planning for and implementing the resumption of time-sensitive practice operations,
- recovery: the process of planning and implementing the restoration of firm operations to pre-interruption levels.

### **Recommendation #6: Certified Cheques**

Recommendation #6 proposes that the Law Society clarify for the profession when it is inappropriate to demand a certified cheque from another lawyer, and that the Ethics Committee be asked to consider whether to include such a clarification in the *Professional Conduct Handbook*, perhaps by way of footnote to chapter 11, rule 8.

#### ***Rationale and Needs to be Met***

Many sole and small firm lawyers have told the Task Force that they object to other lawyers demanding certified cheques, both on the basis of the principle of professionalism and because of the associated administrative and financial burden.

The Task Force notes that a lawyer's cheque is the lawyer's undertaking to pay. Chapter 11, rule 8 of the *Professional Conduct Handbook* states:

*Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque*

(a) *will be paid, and*

(b) *is capable of being certified if presented for that purpose.*

The Ethics Committee has concluded that if the agreement or contract under which the funds are provided does not include a specific requirement that the funds be certified, it is inappropriate to ask another lawyer for a certified cheque. The Trust Assurance Department agrees, and includes that advice in its new publication, *The Bookkeeper's Handbook*. Accordingly, it is a matter of professional judgment whether, when negotiating an agreement or contract, to include a term that a certified cheque be provided. If the agreement or contract does not include a term requiring a certified cheque, the recipient lawyer's recourse is to certify the cheque on receipt, at no cost to the party remitting the cheque.

Moreover, the Trust Assurance Department advises that if a trust deposit is not received in cash, certified cheque or money order / draft, a trust cheque should not be written on behalf of the specific client until the lawyer is satisfied that the funds have cleared the bank account.

The Task Force notes that a lawyer who receives a cheque, but wishes to have further assurance, is entitled to certify the cheque on receipt, but cannot demand its certification by the lawyer who provides the cheque unless there is a term in the agreement or contract.

## **V. POLICY CONSIDERATIONS**

### **1. Public Interest**

The six proposed initiatives are all intended to strengthen the viability and effectiveness of sole and small firm practices, thereby advancing the public interest in access to quality legal services throughout the province. Recommendations such as Technology and Bookkeeper support are proposed in order to assist lawyers in their practice settings, which the Task Force believes will, in turn, assist lawyers in providing a better quality of service to their clients. Practice locums, the Task Force believes, will allow sole practitioners some ability to take time away from practice while not exposing their clients to risk or inattention. Enabling sole practitioners or small firm lawyers to take time away from practice reduces the risk of "burnout," which can leave clients in an undesirable position. The Succession and Emergency Planning recommendation is similarly proposed to decrease the likelihood that clients' legal requirements would be left unattended due to sudden absence of a lawyer from the law practice. The Articling recommendation, it is hoped, would ensure that small firm practice, particularly in areas outside of the Lower Mainland and Victoria, is viable.

### **2. Member Relations**

The six initiatives are all intended to support members on a voluntary basis. The Task Force, in formulating its recommendations, has been responsive to information obtained from sole and small firm practitioners, and its proposals are designed to meet their needs.

Many of the benefits of these recommendations to the members have been described in the analysis of the recommendations set out above.

### 3. Program Effectiveness

The Task Force recommendations are made to enhance the effectiveness of other Law Society programs. The technology and bookkeeper support recommendations are meant to complement and enhance the Trust Assurance Program. The Articling recommendations, the Task Force believes, would enhance the articling program, and make it more likely that students will seek and obtain articles outside large urban centres. The Succession and Emergency Planning recommendation, it is hoped, would reduce the need for custodians, thereby relieving pressures on the Law Society's Custodianship Program.

The effectiveness of the six initiatives would be measured on a regular basis, both by asking members to evaluate their impact and, wherever reasonably possible, such as for the articling initiatives, by employing objective measures of effectiveness.

### 4. Legal Consequences

The Task Force does not believe that the implementation of its recommendations ought to have adverse legal consequences for the Law Society.

The Task Force also recognizes some risk in providing information to a member under, for example, the recommended Technology Support program. What consequence might arise if a lawyer, relying on such advice, suffers loss or damage in the practice of law? The Task Force does not consider this risk to be of significant concern if properly addressed in implementing the recommendation, and concludes that s. 86(1) of the *Legal Profession Act* is operative:

**86(1)** *No action for damages lies against a person for anything done or not done in good faith while acting or purporting to act on behalf of the society ... under this Act.*

There may be some question as to whether the provision of technology support would fall within the ambit of the *Legal Profession Act*. Therefore, the development of this particular recommendation ought to pay particular attention to ensuring the Society is not exposed to liability.

The Task Force has considered whether the Locum Support program would expose Law Society members to the risk of legal consequences, as described in Part IV above, and recognizes the need to provide direction about how to safeguard against such risks.

The Task Force also recognizes that the creation of a registry of lawyers available to provide locum support would have to be implemented in such a way that the Law Society would not be making any representations as to their competence, to ensure that the Law Society would not be liable for any loss caused should the locum lawyer act negligently or otherwise cause a loss.

## VI Financial Impacts

The anticipated financial impacts of the six recommended initiatives total \$55,000 for 2007. The following amounts, totaling \$55,000, are accounted for in the 2007 Law Society budgets.

1. Technology Support: \$35,000

The \$35,000 amount would be for research, consultation and development in 2007. The estimate includes \$25,000 for a part-time contract position to conduct individual preliminary law firm technology needs assessments and pilot testing, which would be essential starting points for designing an effective program.

2. Bookkeeper Support: \$3000

This expenditure would be for converting *The Bookkeeper's Handbook* and the *Lawyer Guide to Working Effectively With a Bookkeeper* from static resources to interactive resources, with links to enable users to ask questions and obtain further information.

3. Articling: \$7000

The principal work in 2007 would be consultation and, as a pilot project, developing a registry of available positions. The estimated cost for consultation and developing the registry is \$7000. The registry would be promoted to law firms and advertised to students in all Canadian law schools.

4. Practice Locums: \$6000

In 2007 the practice locum resources would be developed, including a guide and checklists on how to make a locum arrangement operate effectively and how to deal with the risk of potential client conflicts. The locum resources would include sample locum agreements with options for remuneration and non-competition terms. The estimated cost for developing these resources is \$2000.

A registry of lawyers who are available to provide locum support would also be developed at an estimated cost of \$4000, for rollout by the spring of 2008.

5. Succession and Emergency Planning: \$4000

The principal work in 2007 would be to develop the succession and emergency planning packages, including software accessible through the Law Society website for succession and emergency planning and a feature to enable lawyers to file that information with the Law Society. The estimated cost is \$4000, recognizing a resources overlap with the practice locums program initiative (recommendation #4), which would provide much of the necessary information, including information relating to transparency of office systems, conflicts identification, obtaining advance client consent, and regularly updating the designated lawyer with information necessary for stepping into another law practice. Implementation would likely be by the spring of 2008.

6. Certified Cheques: There would be no direct budget impact.

## VII Conclusion

The Task Force therefore recommends that the Benchers:

1. approve each of the six proposed initiatives, and direct that they be developed and implemented:
  - (i) **Technology Support:** Plan and deliver a technology support program, designed specifically to assist sole and small firm practitioners;
  - (ii) **Bookkeeper Support:** Develop and publish a comprehensive on-line guide to recruiting and working effectively with a bookkeeper;
  - (iii) **Articling:** Develop articling program proposals, in conjunction with the Credentials Committee (which has jurisdiction over articling), to promote articling throughout the province, with a focus on sole and small firm practices, and to further facilitate shared articles;
  - (iv) **Practice Locums:** Develop a program to promote and support practice locums, which would include the following features:
    - a guide and checklists on how to make a locum arrangement operate effectively, including how to deal with the risk of client conflicts;
    - sample locum agreements, with clauses that could be included to meet the wishes and needs of both lawyers, including remuneration and non-competition terms;
    - an online registry of lawyers who are available to provide locum support, specifying each lawyer's qualifications, system for remuneration and expenses, location availability, timing and practice areas;
  - (v) **Succession and Emergency Planning:** Develop a program to assist lawyers in putting into place law practice succession and emergency plans;
  - (vi) **Certified Cheques:** Clarify for the profession when it is inappropriate to demand a certified cheque from another lawyer, and that the Ethics Committee be asked to consider such a clarification in the *Professional Conduct Handbook*, perhaps by way of footnote to chapter 11, rule 8.
2. Mandate the Practice Standards Committee to monitor the implementation of the initiatives.

## APPENDIX A

The Benchers, at their July 14, 2006 meeting, accepted the Task Force proposal that no further consideration be given to the following potential initiatives, at least in 2006.

### **1. Mentoring Program**

Mentoring for the profession is currently available from a number of sources, including the Canadian Bar Association and the Trial Lawyers Association of BC.

### **2. Sole and Small Firm Practice Listserv**

The Task Force was referred to the Trial Lawyers Association of BC and the Canadian Bar Association listservs, as examples of a type of resource that the Law Society could put in place to assist sole and small firm practitioners to exchange information and provide mutual support.

While there are lawyers who do not currently participate in either of these listservs, perhaps because they are not members of either organization, the Task Force does not see that there would be sufficient utility to sole and small firm practitioners for the Law Society to establish its own listserv.

### **3. Specialized Sole and Small Firm Practice Advisor**

Although the Law Society of Upper Canada's Interim Report proposes that there be a practice advisor dedicated to supporting and advising Ontario's sole and small firm practitioners, the Task Force does not recommend such an initiative as an effective way to organize and focus the Law Society of British Columbia's resources for sole and small firm practitioners.

### **4. Recommending Bookkeepers**

Although some sole and small firm practitioners have said it would be helpful if the Law Society were to publish names of recommended or approved bookkeepers, the Task Force does not see recommending or approving bookkeepers as an appropriate role for the Law Society.

Accordingly, the Task Force recommends the publication of an on-line checklist for recruiting and working effectively with a bookkeeper (recommendation #2).

### **5. Access to Continuing Legal Education**

Some sole and small firm practitioners, particularly outside of the Lower Mainland, express concerns about geographic and cost barriers to enrolling in continuing legal education courses. The Task Force concludes that the Lawyer Education Task Force is most suited and is mandated to consider continuing legal education access and cost issues.

## 6. Personal Retirement Planning

While the Task Force recognizes the importance of lawyers making effective personal plans for retirement, the Task Force has identified that many of these resources are currently available. For example, the Lawyers Assistance Program presents seminars on retirement planning focusing on both the financial and psychological aspects.

## 7. Insurance Coverage

The Task Force does not propose giving further consideration to increasing mandatory insurance limits or to providing greater limits of coverage for sole practitioners after they retire or otherwise leave the practice of law.

### a) Whether to Increase Mandatory Insurance Limits?

The Law Society's Director of Insurance, Su Forbes, advised the Task Force that approximately 97% of claims settle for \$100,000 or less, and that it is rare to deal with a claim against a lawyer that exceeds the available coverage of \$1 million. Generally, BC lawyers purchase excess insurance when warranted by the nature of their practices. Moreover, some areas of practice do not need excess coverage, such as criminal law, labour law, family law, mediation and arbitration, and acting for debtors. Su Forbes reported that there are 3,052 law firms in BC, of which 2,500 are sole practitioner firms. Of the 3,052 firms, only 620 firms need and buy excess insurance. Increasing the mandatory coverage limit would therefore not be useful to sole and small firm practitioners, and would in fact unnecessarily increase their insurance costs. The cost of one \$2 million claim a year would be approximately \$150 per lawyer. Sole practitioners and small firms would arguably be subsidizing the larger firms, which are generally where the excess claims originate.

### b) Discovery Coverage

Su Forbes reported that a sole practitioner who retires has \$1 million in coverage per year for life at no additional cost. For more protection, the lawyer would have to buy excess or "discovery" coverage on the commercial market. This equally applies when a firm disbands: the partners would buy discovery coverage to pay for excess claims that arise from their activities in the now defunct firm. Su Forbes reported that in the insurance program's 20 year history, the mandatory coverage has not been exceeded in any claim against a retired sole practitioner.

## **APPENDIX B**

### **LAWYER GUIDE TO WORKING EFFECTIVELY WITH A BOOKKEEPER**

#### **Choosing your Bookkeeper**

An important practice decision every lawyer faces in setting up shop is whom to hire for the job of bookkeeper. Your job as owner of your business is to be familiar with the bookkeeping requirements of your practice as set out in Part 3, Division 7 of the Rules, and to hire and supervise competent staff to meet those requirements.

In the near future as the Law Society goes to the Self-Reporting Trust Report, it will be very important for you to be knowledgeable of the Part 3, Division 7 Rules and Trust Administration Rules.

#### **The Bookkeeper's Role**

There is a prevalent notion among practitioners that the bookkeeper's role is akin to that of a data entry person with a basic understanding of bookkeeping. However, the person you employ will not only be responsible for the day-to-day posting of transactions for your trust and general accounts, but is usually delegated the more important role of conducting month end procedures that include the preparation of the monthly trust bank reconciliations, billing and accounts receivable work, payment of client disbursements and office accounts, preparation of periodic financial statements and monitoring cash flow for your business.

Some lawyers have only a vague notion of what the bookkeeper does for their business, and may hire a friend or relative for this job without careful deliberation or a review of their qualifications. All too often, the Law Society becomes involved in law practices where bookkeepers have not performed their duties due to improper supervision by the lawyer. As many lawyers have experienced, changing bookkeepers can be expensive, time-consuming, and may lead to costly administrative suspension by the Law Society if books and records are not kept in accordance with the Rules. There may even be a requirement by the Law Society to hire a public accounting firm to rebuild the records.

Law Society Rules emphasize that it remains the lawyer's personal responsibility for ensuring the books and records are kept in accordance with the Rules whether or not any duties are delegated to a bookkeeper.

Therefore, it is incumbent on every practicing lawyer to be familiar and have a working knowledge of Part 3, Division 7 of the Rules.

#### **Full-time or Part-time Bookkeeper?**

You have the option of hiring either a full-time person or a free-lance bookkeeper who attends your office on an as needed basis. Whether you hire full time or part-time staff depends on a number of factors: the number of financial transactions that occur each

month, the timelines in which financial transactions must be entered to be in compliance with the Rules, the size of your practice, and the type of law you practice.

For example, a small law firm of three lawyers that deals with a high volume of transactions such as a conveyancing practice would probably be best served by a full-time bookkeeper to keep on top of all the trust transactions. If your practice is involved only in low-volume corporate work, a part-time bookkeeper may adequately meet your needs.

## **Whom to Hire?**

### **Define Your Expectations**

In engaging a bookkeeper, it is imperative that you define your expectations from the onset of the bookkeeper's employment with your firm. You should direct your mind to some of the following functions normally carried out by a legal bookkeeper:

- day to day recording of all trust and general account transactions undertaken by your practice,
- reconciling and balancing monthly trust and general bank accounts,
- preparing and posting of the Statements of Account (fee billings),
- maintaining client's trust ledger, accounts receivable sub-ledger and accounts payable accounts,
- preparing payroll,
- preparing necessary government remittances such as GST, PST, WCB and payroll deduction remittances,
- preparing periodic financial statements,
- organizing, maintaining accurate records for the required retention periods, and
- preparing TAF remittances.

### **Write a Job Description**

Once you have defined your expectations, write a proper job description and communicate all your expectations to the potential candidate. You should delegate a lawyer on staff to supervise and review the work performed by the bookkeeper on a regular on-going basis. Pay special attention to review of your monthly trust and general reconciliations, proof that required remittances are made on time, and that internal controls are in place for handling any funds received and disbursed by your practice.

## **Qualifications**

It is extremely important that the bookkeeper possess a good working knowledge of law firm processes and procedures. Candidates from another business sector such as retail or industry will not be familiar with the unique processes of trust bookkeeping in a law firm, such as anticipated disbursements or many matters for one client.

Secondly, if your practice utilizes legal accounting software instead of a more generic accounting package, it is important that the successful candidate be familiar with your type of software. If not, you may need to provide the necessary training.

Good bookkeepers should possess above-average analytical skills, as they are often required to identify and rectify discrepancies in the course of their duties. The bookkeeper should possess good communications and people skills for working with members of your staff and other members, clients, banking staff, vendors etc., and be able to convey information about any trust or general account transaction undertaken by your practice.

A competent bookkeeper will be able to anticipate year-end requirements for your business for preparation of year-end financials, which can equate to lower costs from your external accountant.

Lastly, it is highly recommended that the successful candidate receive training in Law Society Rules.

## **Where to Look**

Once you have made a realistic assessment of your practice's needs and defined your expectations, you will need to hire the best candidate available that you can afford.

Newspaper advertisements may still be your best search tool. Online employment websites may also be an option for those with internet access. Employment agencies can be expensive and, with few qualified candidates, may refer all those that respond.

It may be worthwhile to check with employment referral services associated with the accounting bodies: the Institute of Chartered Accountants, Certified General Accountants or Society of Management Accountants.

## **Other Considerations**

Check with colleagues or contacts from your local bar association. Always check the candidate's references and speak directly with the lawyer who worked with the candidate, not only a co-worker.

It is a good idea to have your external accountant interview your successful candidate to assess understanding of basic accounting principles prior to making the job offer.

Ask the successful candidate to sign a confidentiality agreement to protect client information and financial affairs of your practice. You may also want to consider placing a fidelity bond on any staff with access and knowledge to the assets of your practice.

For your own peace of mind, choose your bookkeeper with the same care and consideration your clients should invest in choosing you as their lawyer.