The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

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Access to legal services and evolution of the marketplace drive tough regulatory questions

by Bruce A. LeRose, QC

THIS IS MY third opportunity to speak directly to BC lawyers through this column. It comes at a time when summer is winding down and many of us are gearing up for busier times in the fall. This is also an opportunity for me to reflect on my first eight months as president of the Law Society of British Columbia, the accomplishments we have achieved and the mountain of work that is still to be done.

Perhaps the most rewarding part of this job is the opportunity to get out of my Law Society office at 845 Cambie Street and visit bar associations, lawyer groups and professional legal organizations and dialogue about the pressing issues of the day.

Everywhere I have travelled between Terrace and Fernie and all points in between, I have been welcomed and treated royally, and for that I am truly grateful. I have also been singularly impressed with the hard work and dedication of so many lawyers across this great province who give tirelessly of their time and talents.

I have always been proud of the profession I belong to, but this year has been a real eye-opener for me as I have had first-hand experience of just how well our profession serves the public interest. I look forward to spending much of the remainder of my time as president getting out to events around the province and listening to those who make a difference every day in the lives of the public whom we serve.

There are three important developments that I want to highlight in this column.

The first harkens back to my last column, when I discussed the many changes that will be brought about as a result of the passage of the *Legal Profession Amendment Act, 2012*. One of the significant amendments allows for the Law Society to regulate law firms and will have a dramatic impact on how the Law Society carries out its regulatory duties.

Rules will be developed that will hold firms, and not just individual lawyers, responsible for failure to provide honourable and competent legal services to the public. The new rules will permit the Law Society to be more effective in areas such as complaints and discipline, trust assurance, responsibility for non-lawyer staff and practice standards. This is a very big job and certainly will carry on beyond my presidency, but I am confident that the Benchers and the hardworking Law Society staff will deliver a new set of rules that will allow more flexibility in running law firms, while at the same time provide greater protection of the public.

The second important development is the expansion of the role of paralegals, provided they are supervised by lawyers. The Honourable Robert Bauman, Chief Justice of the British Columbia Supreme Court, has committed his court to a two-year pilot project that will grant designated paralegals a limited right to appear before the court on family law matters that are not contentious. You can read more about this innovative move to increase access to legal services in this issue of the Bulletin and discussions are underway for a similar project in the Provincial Court of British Columbia.

The third development is the establishment of the Legal Service Provider Task Force under my leadership to consider the question of who the Law Society should regulate. The legal marketplace is changing for a host of reasons. But the movement towards providing greater choice, greater accessibility and more affordable legal services for the public does not mean that we ignore the necessary standards in place to protect the public interest – standards that are designed to ensure ethical, professional and competent service and cannot

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 $50 per year ($20 for the newsletters only; $30 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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be compromised by efforts to expand services. As strategies are developed to increase access to justice and permit delivery of legal services by non-lawyer providers, we must ensure that these providers are capable and competent, and conduct themselves appropriately and according to the same rules that govern lawyers.

The task force has been established to look at several questions. Is it time for a single unified regulator for the delivery of all legal services? Is the Law Society, with its 128 years of experience and built-in infrastructure, the organization that can best protect the public interest as these other delivery options unfold? The task force will be looking at these issues over the next year, and its work is highly anticipated.

I am confident, now having seen first hand the hard work being done by the Benchers and staff, that our Law Society will continue to be a leader in responding to the many demands placed on it and our profession and to make sure that the public continues to be well served.❖

Your fees at work: Practice Advice

THIS COLUMN REGULARLY highlights how fees paid to the Law Society are spent so that lawyers are aware of services to which they are entitled as well as programs that benefit from Law Society funding.

In this issue, we feature the Practice Advice service.

The Law Society employs four practice advisors who are lawyers with many years of practice experience.

Lawyers can contact advisors in confidence with questions on practice issues, ethics and practice management. Advisors are available by email or telephone.

"Inquiries encompass a broad range of subjects," said Alan Treleaven, the Law Society's director of education and practice. "Our common inquiries tend to focus on confidentiality, conflicts of interest and undertakings, but we also get calls about everything from client identification and verification to fraud, marketing rules and file retention."

From a regulatory standpoint, the practice advice team represents an effective front line to help lawyers avoid problems before they happen. "Lawyers contact us regularly to vet a situation and make sure they are correctly interpreting our rules," explained Barbara Buchanan, a Law Society practice advisor.

The team also regularly contributes material to the *Benchers' Bulletin* to expand the reach of their advice beyond those who call in.

In 2011, the practice advisors managed over 6,700 inquiries. And, in addition to being well-used, it would appear the service is much appreciated. In response to a survey, at least 90 per cent of lawyers gave the practice advice team positive ratings for the quality of advice, satisfaction with resources provided and overall satisfaction with the program.

For contact and other information, please go to the Law Society website: Lawyers > Practice Support and Resources.❖

Gold Medal presentations

Each year the Law Society awards gold medals to each of the graduating law students from the University of BC and the University of Victoria Faculties of Law who have achieved the highest cumulative grade point average over their respective three-year programs.

In 2012, gold medals were presented to Mila Shah of UVic (pictured left, with Life Bencher Richard Margetts, QC) and Emily MacKinnon of UBC (pictured right, with President Bruce LeRose, QC).

Towards national standards for disciplinary regulation

Pilot project to test key standards across the country

by Timothy E. McGee

THE LAW SOCIETY of BC is participating in a pilot program designed to test a uniform approach to standards for disciplinary regulation.

The pilot project reflects the priority the Federation of Law Societies of Canada has placed on standardizing the regulatory framework for all lawyers across the country.

The reason for this is simple. Mobility agreements between the provinces and territories allow lawyers in Canada to be "mobile," that is, once called in one jurisdiction they are free to practise in any other, subject to certain conditions and to specific limitations particular to the civil law regime in Quebec. With this freedom of mobility comes a corresponding public expectation that, no matter where you retain the services of a lawyer in Canada, you can expect the same uniformly high standard of regulation should you need to file a complaint about a lawyer's professional or ethical conduct.

All law societies, with the exception of the Chambre des Notaires du Québec, are participating in the project. For the next two years, they will monitor and measure their performance against 23 key standards relating to timeliness, fairness, transparency, and public participation and accessibility in matters dealing with complaints about, and discipline of, members of the legal profession.

The pilot project, which was launched earlier this year, is the first of its kind for law regulators in Canada. The goal is to test the standards to be met.

In addition to establishing appropriate timelines for investigations, citations and hearings, the standards also provide for greater transparency and accessibility of information. For example, each law society must have a lawyer directory available with status information, including discipline history and information on how to access more about that history.

With this freedom of mobility comes a corresponding public expectation that no matter where you retain the services of a lawyer in Canada you can expect the same uniformly high standard of regulation should you need to file a complaint about a lawyer's professional or ethical conduct.

The Law Society is proud to be a leader among Canadian law societies in setting, publishing and reporting on performance standards we set for all of the regulatory work we do in the public interest. The national discipline standards pilot project is a natural extension of this approach and we look forward to its success.

We welcome your thoughts or comments on this topic or any other matters by contacting us at 604.669.2533 or ceo@lsbc.org. ❖

Law Society Award winner – Marvin Storrow, QC

The Benchers have selected Marvin Storrow, QC as the recipient of the 2012 Law Society Award. The Award is intended to honour the lifetime contributions of the truly exceptional in the legal profession whose accomplishments have inspired others to the pursuit of excellence.

Storrow is a leader in the bar and a role model to the profession. He is known as a man of compassion and integrity, a man who is dedicated to helping colleagues and who always stands by his word.

Storrow obtained his Bachelor of Laws from UBC and has practised law since his call to the bar in 1963. He is currently a partner with Blake, Cassels & Graydon LLP in Vancouver. Storrow has been a successful advocate in challenging areas of the law, not only in BC but in Canada. He has contributed to the development of law in Aboriginal title rights and fiduciary duties of Aboriginal people, changing the foundation of Aboriginal law across Canada. In addition to his achievements as counsel, Storrow is a strong advocate for legal aid and has contributed much of his time and expertise to improving the justice system.

A Bencher of the Law Society for eight years in the 1980s, one of Storrow's most significant contributions included improving the amount of interest paid on lawyers' trust accounts to raise money to support the Law Foundation of BC – a change that continues to contribute greatly to the work of the Foundation today. Storrow is also the vice-president and director of the Justice Institute of BC Foundation and vice-chair of the BC Sports Hall of Fame and Museum.

Succession planning, it's good practice

Results of year-long Law Society campaign

LAST SUMMER THE Law Society launched a year-long campaign, called *Succession planning, it's good practice*, to encourage sole practitioners to take the critical step of arranging for a winding up caretaker.

Law Society data indicates few sole practitioners have made provisions for the disposition of their practices, yet succession planning is crucial for them, in particular. Unlike lawyers who are part of a group practice, sole practitioners cannot typically rely on someone else from within the firm to take care of their clients. The Law Society encourages them to select another lawyer – called a winding up caretaker – in the event that circumstances, such as a sudden illness, prevent them from being able to look after their practices themselves. If they have not done so, it is likely that the Custodianships department would need to step in to ensure clients' interests are protected.

Five hundred lawyers participated in the Law Society's live webinar on succession planning, which is still available for viewing and CPD credit.

The campaign was aimed at sole practitioners age 50 and older. A large percentage of BC's lawyers are shifting to an older demographic. In fact, 69 per cent of sole practitioners in 2011 were age 50 or older.

Since 2006, trust reports have required lawyers to indicate whether they have designated a winding up caretaker in the event of death or disability. The percentage of sole practitioners over 50 who have indicated a winding up caretaker on their trust reports has remained static with a median of 13 per cent. In 2011, as a result of the campaign, that number jumped by four per cent to 17 per cent. In addition, the number of lawyers taking advantage of the sample documents and tools on the Law Society's website to make their own succession plans has more than doubled.

Succession planning, it's good practice culminated in a live webinar featuring on-camera discussion with Sherelle Goodwin, Manager of Custodianships and Bruce Thompson, a sole practitioner, with Communications Officer Dana Bales as the moderator. Five hundred lawyers registered for that webinar, and almost 200 people have watched the re-broadcast, which is still available for viewing on the Law Society's YouTube channel. Free Continuing Professional Development credit is available for lawyers who view the video before December 31, 2012; follow the instructions on the Law Society website.

There are many good reasons for lawyers to make their own succession plans:

- planning lets the lawyer choose who will be the winding up caretaker, what details that lawyer will handle and on what financial terms;
- planning gives the clients certainty; and
- planning makes it easier for the lawyer's loved ones during an unexpected urgency, which may already be a difficult time for them.

In addition, it means the Law Society does not need to step in with a custodian, which saves everyone time and money. Thus, while the campaign is over, the Society still encourages sole practitioners to voluntarily plan for their practices in the event of the unanticipated.

RESOURCES

Go to the Law Society website (Lawyers > Practice Support and Resources > Succession planning) for the following resources:

- **Webinar** – Participants reported an increase of their knowledge about succession planning of six times their pre-webinar level. Available and eligible for CPD credit.
- **Website tools** – Sample documents and information designed to help lawyers create their own succession plans.

The Law Society is available to help. Lawyers with questions should contact custodianship@lsbc.org. ❖

The 2012 Bench & Bar Dinner

Join your colleagues for the Bench & Bar Dinner on November 8. The dinner will honour Marvin Storrow, QC, recipient of the Law Society Award, and the recipient of the CBA Georges A. Goyer, QC Memorial Award, who will be announced later this Fall.

Thursday, November 8, 2012
Reception: 5:45 pm (cash bar)
Dinner: 6:30 pm

Vancouver Convention Centre
Summit Room, Level 3
1055 Canada Place

Tickets: $100 individual; $760 table of eight

For more information or to download the ticket order form, see the Calendar on the Law Society website.

Law Society participates in working group developing new Civil Resolution Tribunal

EARLIER THIS YEAR, the Ministry of Justice announced Bill 44, the *Civil Resolution Tribunal Act* – a plan to create a new, voluntary process for the resolution of strata and small claims disputes. The Act also included provision for online services to assist in the resolution of disputes by agreement.

Though the Act raised concerns, the Law Society remains optimistic that involvement of the legal community in the development of the tribunal will ensure the new process is implemented without compromising the integrity of the justice system and the rule of law. The ministry has now established the working group, comprised of representatives from the Law Society, the Canadian Bar Association, the Trial Lawyers Association of BC, Mediate BC, the Justice Services Branch and condominium and strata associations.

"The Law Society sees participation in the working group as the best remaining way to ensure that people do not voluntarily give up their right to representation by counsel without ensuring that they make a fully informed decision," said Law Society president, Bruce LeRose, QC.

The Act provides for three progressive stages. The first stage will involve party-to-party negotiations using online tools. The next stage will involve a case manager, who will attempt to facilitate a resolution. The final stage will be a tribunal hearing which would result in a binding decision.

While the Act generally provides that the parties not be represented by a lawyer in a tribunal proceeding, a lawyer may represent a child or a person with impaired capacity and as the rules permit in the interests of justice and fairness. The Law Society has been advised that nothing precludes any participant in the process from obtaining legal advice about their matter before or at any time during the process. But as the Act provides that the court may order someone to participate in the process, and thereby require participation without representation, the Law Society will ensure the prospect of such orders form part of its representation in the work group.

"The Law Society sees participation in the working group as the best remaining way to ensure that people do not voluntarily give up their right to representation by counsel without ensuring that they make a fully informed decision," said Law Society president, Bruce LeRose, QC.

"The right to counsel is a crucial right in a free and democratic society, and the Law Society recognizes and fully supports that right," said LeRose. "We also recognize that every day in this province citizens make the decision to participate in proceedings without representation by counsel, some by choice but most because of cost."

In addition to the pro bono contribution by many members of the profession, the Law Society will continue to address the cost of accessing justice and take steps to ameliorate that cost through initiatives such as expanding the scope of duties that articled students and paralegals can perform under the supervision of a lawyer, and other initiatives presently under consideration.

"However, despite all our best efforts," explained LeRose, "if there remain citizens who will be unrepresented by counsel in any forum because they can't afford the legal fees, we need to work with everyone involved in the justice system to find solutions."❖

In Brief

QC NOMINATIONS

The Attorney General's office has sent out a call for nominations for Queen's Counsel.

The honorary title of Queen's Counsel recognizes exceptional merit and contribution to the legal profession. To make the appointment process more transparent and accessible, the Ministry of Justice has a formal system for nominating candidates. Anyone, outside of an immediate family member or candidates themselves, can make a nomination by filling out an online application form at ag.gov.bc.ca/queens-counsel.

The deadline for nominations is October 12, 2012. Appointments are announced at the end of the year.

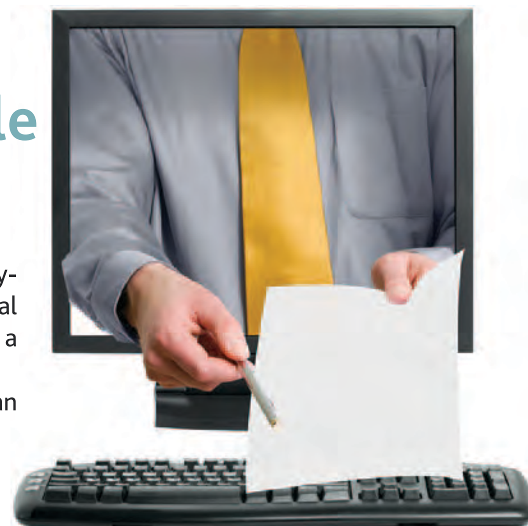
LAW FOUNDATION GRADUATE SCHOLARSHIPS AT UVIC

This past year, 13 University of Victoria law students received Law Foundation of BC graduate scholarships. This important Law Foundation program provides vital financial assistance to LL.M. and Ph.D. students.

Each recipient is engaged in interdisciplinary research that examines law within wider social, political, historical and economic contexts. The graduate research conducted by this accomplished group of students will contribute to many different areas of law.

The recipients of the scholarships are: Geoff Conrad, Alvaro Cordova, Aimée Craft, Chong Ke, Sarah Malan, Kaitlyn Matulewicz, Soudeh Nouri, Kerry Sloan, Daleen Thomas, Ikenna Ulasi, Michelle Zakrison, Agnieszka Zajaczkowska and Ania Zbyszewska.❖

Lawyers who authorize others to affix a digital signature for land title documents risk discipline



TWO LAWYERS WERE recently ordered to participate in conduct reviews (see the summary at page 17 of this edition of the *Benchers' Bulletin*) for authorizing others to affix their Juricert digital signatures to electronic land title documents.

With the introduction of required electronic filing for most land title documents earlier this year, most lawyers, notaries and land surveyors involved in real estate practice have now registered with Juricert and obtained a digital signature for use with the system. In agreeing to the Juricert terms and conditions, all registrants have confirmed that they will not permit anyone else to have access to their digital signatures or use it to electronically sign a land title document.

Lawyers are reminded that it is an offence under the *Land Title Act* and a breach of Juricert terms and conditions to permit anyone else to affix their digital signatures. Lawyers are required to personally affix their digital signatures as a necessary part of ensuring the integrity of the land title system in British Columbia. Failure to meet this requirement can result in disciplinary action and the loss of the right to file documents electronically with the land title office.

For more information, contact a Practice Advisor.❖

Unauthorized practice of law

UNDER THE LEGAL Profession Act, only trained, qualified lawyers (or articled students under a lawyer's supervision) may provide legal services and advice to the public, as others are not regulated, nor are they required to carry insurance to compensate clients for errors and omission in the legal work or claims of theft by unscrupulous individuals marketing legal services.

When the Law Society receives complaints about an unqualified or untrained person purporting to provide legal assistance, the Society will investigate and take appropriate action if there is a potential for harm to the public.

From February 17 to August 14, 2012, the Law Society obtained undertakings from 25 individuals and businesses not to engage in the practice of law.

The Law Society has obtained court orders prohibiting the following individuals and businesses from engaging in the unauthorized practice of law:

Richard Flynn Marr, aka **Flynn Marr**, dba **R. Flynn Marr & Associates**, a former lawyer of Burnaby, BC, consented to an order permanently prohibiting Marr from engaging in the practice of law as defined in section 1 of the *Legal Profession Act*.

Joanne Lillian Power, dba **www.joannesuncontesteddivorceshop.webs.com** and **Joanne's Uncontested Divorce Shop Inc.**, of Burnaby, BC, offered to provide various divorce services, including separation agreements, and commissioning affidavits for a fee. The court granted the Law Society an order permanently prohibiting Power from engaging in the practice of law as defined in section 1 of the *Legal Profession Act*. The court awarded the Law Society its costs.

Robert Earl Williamson, dba **Robertson Legal Research** and **www.legalresearchbc.ca**, a former lawyer of Vernon, BC, consented to an order prohibiting him from providing legal advice and drafting, settling or revising documents for use in legal proceedings, regardless of whether a fee is charged.

Marlane Lauren, of Vancouver, BC, was found in contempt of a court order prohibiting Lauren from engaging in the practice of law, from falsely representing herself as a lawyer, and from commencing, prosecuting or defending a proceeding in any court on behalf of another party (see Winter 2011 *Benchers' Bulletin*). After finding Lauren in contempt for drafting pleadings, giving legal advice and other legal services for a fee, the court ordered Lauren to pay restitution in the amount of $3,000, a fine of $5,000 and the Law Society's special costs.

Gerald P. Scallion, aka **Gerry Scallion**, dba **www.formsonline.biz**, of Coquitlam, BC, consented to an order permanently prohibiting Scallion from engaging in the practice of law and from falsely representing himself as a lawyer as defined in sections 1 and 15(4) of the *Legal Profession Act*. The court awarded the Law Society its costs.

Sid Kemp, aka **Sidney W. Kemp**. The Law Society received information alleging that former member Sidney Kemp of Vancouver, BC had represented himself as a lawyer and provided legal services for a fee. These allegations were denied by Kemp. Kemp consented to an order whereby he agreed not to represent himself as a lawyer and not to engage in the practice of law as defined in section 1 and section 15(4) of the *Legal Profession Act*.❖

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Marketing, strata conveyances, undue influence, scams and free electronic resources

MARKETING RULE ABOUT FORMER JUDGES AND MASTERS RETURNING TO PRACTICE

Law Society Rule 2-54(4) prohibits a lawyer who was formerly a judge or master from using a judicial title or otherwise alluding to the lawyer's former status in any marketing activity. This includes letterhead, business cards or website marketing. However, subrule (4) doesn't preclude the lawyer from referring to his or her former status at a judge or master in:

- a public announcement that the lawyer has resumed the practice of law or joined a law firm;
- a public speaking engagement or publication that does not promote the lawyer's practice or firm; or
- informal conversation or correspondence.

Rule 2-54(6) provides that, for the purpose of this rule, it is not the promotion of a lawyer's practice or firm to provide, on request, a curriculum vitae or other statement of experience that refers to the lawyer's former status as a judge or master. See Rule 2-54 for further information about practice restrictions on a reinstated lawyer who was formerly a judge or master.

PARKING STALLS AND STORAGE LOCKERS IN STRATA DEVELOPMENTS

Purchasers of strata units expect to secure one or more parking stalls and storage lockers when buying a unit. If you act on a strata lot conveyance, your client will want to know that each parking stall and locker forming part of the deal is properly capable of transfer or assignment. Either investigate the issue yourself, or make it clear that it is the client's responsibility to do so. If you act for a developer client wishing to designate parking stalls and storage lockers for various units, review the proposed structure to ensure that each stall and locker can effectively be transferred or conveyed.

UNDUE INFLUENCE? HOW TO DECIDE AND WHAT TO DO

Are you concerned that your client may be vulnerable to undue influence by a relative, friend, caregiver, acquaintance, clergy member, accountant or other person? Are you aware that mentally capable clients can be subject to undue influence, as well as persons whose mental capacity may be impaired? Would you recognize the red flags of undue influence and know what steps to take to deal with it? Refer to the BC Law Institute's *Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide*, which is available on the Law Society website (Practice Support and Resources > Guides: Wills, family law).

The guide is intended to assist lawyers and notaries recognize and deal with situations of potential undue influence when drafting wills, but it can also be applicable when preparing other personal planning documents, such as powers of attorney and representation agreements, and to transfers of property and various other common transactions, including gifts, loans and guarantees between family members and acquaintances. The guide includes red flags and guidelines, as well as a reference summary (checklist, red flags and a flow chart of recommended practices).

Although the guide contemplates the shift in the onus of proof in certain undue influence challenges that the new *Wills, Estates and Succession Act* (WESA) will introduce, once proclaimed, the contents are relevant to current practice. More information about WESA, the shift in onus and the guide will be published as we move closer to WESA becoming law in BC.

WHAT'S NEW IN SCAMS AGAINST BC LAWYERS?

We continue to see fraudulent schemes in BC. Be sure to read the fraud alerts issued over the summer:

- Potential fraudulent investment scheme operating in BC (Notice to the Profession, August 1, 2012)
- Bad cheque scam – real estate purchase by Kin Hang Cheung (Notice to the Profession, June 1, 2012)

Also, it seems as if the bad cheque scam fraudster names and documents page (in the Fraud: Alerts and Risk Management section of the Law Society website) is updated on a weekly basis. Take a look online and see how the list of names has blossomed like a bad case of poison ivy. You wouldn't be the first lawyer to find your potential new "client" in the names list.

One of the most recent ploys was for a scamster to attempt the bad cheque scam in the wrongful dismissal context. The "dismissed employee" contacts the lawyer to collect on a settlement with the former employer. Like all bad cheque scams, the scamster wants the lawyer to deposit the phony employer's bad cheque (or certified cheque or bank draft) into trust (with the lawyer taking out fees and disbursements from the amount), and wire the funds to the scamster before the lawyer finds out the cheque is bad.

In most bad cheque scams, the client avers to either reside outside of Canada or to be temporarily outside of Canada. If the client is outside of Canada and you are not physically meeting with the client to verify the client's identity, the lawyer must retain an agent to verify the client's identity (Rule-3-95(5) and (6)). Appendix II of the Client Identification and Verification Procedure Checklist provides a sample agreement with an agent for verification of client identity and a sample attestation form. It is not sufficient to accept for verification of identity a scan of a driver's licence or passport from a new client who may be a potential fraudster.

If you think you've been contacted by a potential scamster, please report it to Barbara Buchanan at bbuchanan@lsbc.org. You can obtain confidential advice in determining if a new matter may be a scam and whether you can report information to the police or your financial institution without a court order. Also, reporting allows the Law Society to notify the profession, as appropriate, and update the Fraud Alerts information. See Fraud Alerts for what to do if you suspect a new client may be a scamster and other important information.

KEEP NON-LAWYER STAFF INFORMED – FREE ELECTRONIC SUBSCRIPTIONS TO LAW SOCIETY PUBLICATIONS

Many times, it's a smart legal assistant, law firm accountant or bookkeeper who has been alert to a potential issue on a file and who has contacted a practice advisor for help and "saved a lawyer's bacon." Non-lawyer staff sometimes lament that they either don't receive information about rule changes, fraud alerts, etc. from the firm lawyers, or they receive it too late. When they discover they can personally subscribe to Law Society publications at no cost, they are usually surprised (and somewhat gleeful!). You can help your non-lawyer staff get informed, and in turn help yourself, by encouraging them to sign up for free electronic subscriptions to the *Benchers' Bulletin* (which also gets you E-Brief and Notices to the Profession) and *Member's Manual* amendments. There's a charge for print copies. To sign up, click on "Subscribe to publications" on the Law Society's home page.

In addition, non-lawyer staff can subscribe to RSS feeds to receive the Law Society's Discipline Advisories and Fraud Alerts.

PRACTICE CHECKLISTS MANUAL – NEW UPDATES

Check out recent updates to the Law Society's free *Practice Checklists Manual* (go to Practice Support and Resources on the Law Society website). Fourteen checklists in the manual (out of 41 checklists in total) have recently been updated to incorporate new developments in the following subject areas:

- Family – Family Practice Interview, Family Law Agreement Procedure, Separation Agreement Drafting, Marriage Agreement Drafting, Family Law Proceeding, and Child, Family and Community Service Act Procedure
- Will and Estates – Wills Procedure, Testator Interview, Will Drafting, Probate and Administration Interview, Probate and Administration Procedure
- Real Estate – Residential Conveyance Procedure, Mortgage Procedure, Mortgage Drafting

Watch for the 2012 updates to the remaining checklists, expected to be published late this fall.

If you have suggestions for improving the content of the manual, please forward them to Barbara Buchanan at bbuchanan@lsbc.org. The manual has been developed by the Law Society with the assistance of the Continuing Legal Education Society of BC.

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.❖

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 *Professional Conduct Handbook* 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

Technology and legal practice: the future is now

♫ So here it is, flat out and simple …
which do you trust your heart or your head?
See your heart will lead you where you want to be, but your head will lead you where you ought to be.
But which will lead you where you're meant to be?… ♫

Lyrics and music by NAS, recorded by K'LA

IN AUGUST 2012, Robert Half Legal released their report, *Future Law Office: Technology's Transformation of the Legal Field* (roberthalflegal.com/FreeResources). This report:

> [E]xamines how technology has impacted the legal profession, including the practice of law, the management of law firms and corporate legal departments, and the relationships between legal counsel and their clients.

The full report makes for great reading, but here is a summary of some of their key findings.

With smartphones, tablet computers, wireless networks and cloud computing, telecommuting is on the rise.

The lawyer practising criminal law was always a bit of a telecommuter, but now technology has loosened the hold that the office traditionally had on him or her. Mobile technology has been enabling – allowing lawyers to take their work with them in ways never before possible. Of course, to take maximum advantage of these technologies, the law firm must have implemented a paperless approach to its client files. Once all systems and files are in digital form, it does not take much more effort to allow them be accessed securely via the internet. Microsoft, Apple and other developers have enabled secure remote access technology to be built into today's operating systems. Smartphones and tablet computers are lightweight devices that can download apps to read, respond and in most cases edit, not only emails but attachments as well. You can do legal research, communicate, draft, respond, present and do virtually anything on a laptop, smartphone or iPad/tablet that you could do in the office. Of course, privacy, security and other issues must be considered, along with "What happens if you lose the device?" Fortunately, there is software that can remotely wipe any of these devices should they be lost or stolen.

The physical footprint of today's law firm is shrinking, and some offices are even going entirely virtual.

Today lawyers are using virtual legal assistants, virtual secretaries, bookkeepers who work on your accounting system from their home offices, virtual IT people (who use remote access technologies to fix software issues) and the like. A law firm no longer needs to require a physical office to house all these people in one location. As a result, a sole practitioner or small law firm can cut overhead and reduce salary expenses, becoming a leaner and more limber business organization. Law firms are being formed in which associates work from home and blend in child care duties with their legal practices. This allows the law firm to tap into a previously underused labour market – namely, lawyers who have elected to stay home and care for their children. Telecommuting or practising from home allows them to stay in practice and still raise their families as they see fit. Technologies that allow law firms to build specialized legal collaborative websites that contain calendars, chats, notes, documents and the like are growing in number and sophistication.

Clients are demanding secure portals and collaborative spaces – revealing a critical need for secure technology-sharing environments.

Many articles today state that email is dead. Well, email, like Mark Twain, can say that its death is exaggerated. However, there is no denying that frustration with email as a secure and reliable communication method is at an all-time high. As a result of the insecurity around email and, in particular, the ease by which it can be "sniffed" (monitored externally), forwarded or misdirected, corporate counsel and clients alike are demanding secure client portals. The advantages are manifest. In "Collaborating in the cloud" (americanbar.org/publications/gpsolo_ereport/2012/june_2012/collaborating_cloud.html), Jack Newton of Clio, a cloud-based practice management system, sets out the benefits of leveraging online collaboration tools:

- **Competitive Advantage.** Google has replaced the Yellow Pages. Your clients are increasingly likely to find you online, and in many cases will prefer to interact with you online. Using cloud-based collaboration tools will set your practice apart from the competition and establish you as an innovator in your field.
- **Time Savings.** Communicating with clients online can often be more efficient and focused than in-person meetings, realizing substantial time savings.
- **Cost Savings.** Cloud-based collaboration can eliminate many of the costs and inefficiencies typical in many law offices—printing, courier, and mail costs—and can allow for the opportunity to work out of your home or a lower-cost office location.
- **Real-time.** In a world dominated by Facebook and Twitter, clients expect enhanced, real-time communication from their lawyers. Cloud-based collaboration offers you the capability to communicate more easily and directly with your clients.

- **Security.** Unlike unencrypted email communications, all communications through a properly secured cloud-based portal are secured using SSL encryption. This is the same type of encryption employed by banks and e-commerce sites to ensure secure, confidential transmission of sensitive data.
- **Freedom.** The freedom associated with a cloud-based collaboration system may be something you only truly appreciate once you've taken the plunge. You'll realize you can get your work done anywhere and provide responsive, professional service to your clients on a schedule that works for you, regardless of your location. If an urgent situation with a client comes up while you're on vacation, you're only an Internet cafe away from being able to meet their needs. Cloud computing creates an opportunity to gain more control over your time, and often more freedom to enjoy time away from the job."

Technology has levelled the playing field, enabling sole practitioners and small law firms to establish a large-firm-like presence online.

According to Dennis Kennedy, a legal technology consultant, solo and small firms have access to the same technology as larger firms. Indeed, TrialPad, an $89 application for the iPad (trialpad.com) places world-class trial presentation software in the hands of any trial lawyer. Prior to this application, similar software cost hundreds of dollars. There is software to allow solo or small firm lawyers to create online collaboration workspaces, such as PBWorks (pbworks.com), MyCase (mycaseinc.com) and Microsoft's Sharepoint (sharepoint.microsoft.com).

Similarly there are other applications that provide sophisticated software to solo practitioners and small firms and allow them to use these products to their and their client's advantages.

e-Discovery remains both a growth area and a challenge.

There is another area where large firms face the same difficulties as small ones, and that is dealing with the challenge posed by e-discovery. Specialized consultancies have sprung up that assist in

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FROM ANNE CHOPRA, EQUITY OMBUDSPERSON, LAW SOCIETY OF BC

Equity Ombudsperson asks: Are you acting in the best interest of your firm?

Firms continue to violate Human Rights Code with inappropriate interview questions

Anne Chopra

SITTING AT MY desk, I check my voicemail and find I have three messages from students in the process of lining up law firms for their articles. The students are emotional and distressed, but not because they are having trouble finding articles.

Yes, I am familiar with the season of articling interviews. Students are excited to launch their careers and eager to begin to practice law. With this positive attitude they apply to firms and attend their interviews.

However, for some, they soon become deflated and start questioning their decisions. All because they have been asked inappropriate questions during their interviews – questions that unequivocally violate the BC *Human Rights Code*.

These are not questions that are on the border or in the grey area of acceptable. These are direct questions that include: How old are you? Are you married? Do you have children?

As an interviewer, you may believe that because a student answered such a question or never reported you, having asked it is OK.

Generally, no student makes a formal complaint, as they are not in a position of power. But, there is indeed another long-term issue that should be considered by any firm.

In my experience, based on the last 11 years, students who are asked these types of questions do not want to work for the firm in question or regret their decision to do so. Some discuss their experiences with me, and presumably many others, and the reputation and image of the firm is slowly but surely blemished and undermined.

It is inevitable that such firms will eventually not attract from the larger and qualified pool of talented lawyers. Bottom line: your firm's reputation will restrict your ability to hire students who have options – the best and brightest who have the choice to work at a firm known for its diversity and positive culture. When interviewing, consider whether you are acting in the best interest of your firm.

I invite you to contact me, as your confidential resource, when you are not certain about your interviewing strategy. Other callers, whether lawyers, students or law firm employees, are also welcome to contact me if you require assistance with an issue of discrimination or harassment. For further details, please see the Law Society's website.

Contact Anne Chopra at:

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Phone: 604.812.2344 ❖

Carol Hickman, QC (left) is a lawyer and Michele McMillan a paralegal with the Quay Law Centre in New Westminster.

Paralegals – Part of the access to justice solution

New rules will permit designated paralegals to make limited courtroom appearances beginning January 2013

Incremental, rather than revolutionary.

THAT IS HOW the Law Society of British Columbia's Delivery of Legal Services Task Force referred to its recommended changes to the rules and regulations that govern legal service providers in BC, specifically articled students and paralegals. The challenge was to strike a balance between increasing the number of options for reasonably priced legal advice, while still ensuring the people who provide that advice are professional, competent and honourable. As the Task Force's final report notes, the changes will not cure all of the problems associated with access to justice, but they are a step in the right direction.

Last year, the Law Society implemented new rules that allow articled students to offer many of the legal services typically provided by lawyers. This year, the Law Society similarly enhanced the role of paralegals in a few key ways. Working under the supervision of lawyers, paralegals are now able give legal advice. That advice could come, for example, in the form of an opinion or in the preparation of a document, such as a contract or a will. Also, in January 2013, a pilot project is planned that will allow paralegals to make certain appearances in family court. The Law Society hopes expanding the role of paralegals will reduce the cost of some legal services and make justice more attainable.

ACCESS TO JUSTICE

Ensuring the public has access to competent, affordable legal advice is a concern for lawyers, legal regulators and governments in many parts of the world. Canada is no exception. The Right Honourable Beverley McLachlin, PC, Chief Justice of Canada, has spoken about the issue on a number of occasions, most recently at a conference of the Canadian Bar Association in Vancouver in August.

"Being able to access justice is fundamental to the rule of law," said Chief Justice McLachlin. "If people decide that they can't get justice, they will have less respect for the law. They will tend not to support the rule of law. They won't see the rule of law, which is so fundamental to our democratic society, as central and important."

In BC, ensuring the public has access to affordable legal assistance has been a top strategic objective for the Law Society. "Our goal is to lower barriers, especially financial barriers, to accessing legal services," said Law Society president Bruce LeRose, QC. "If legal services are only available to the rich, or the poor through programs like pro bono work or legal aid, it won't be long before there will be a public crisis of confidence in the system."

A lack of confidence is not the only concern. LeRose points out the cost of legal advice causes many people to choose to represent themselves in court. "Self-representation is less effective than being represented by a trained lawyer or paralegal and can strain the system as a whole," said LeRose.

A study being conducted by a University of Windsor law professor supports that point. Julie Macfarlane is researching the experiences of self-represented litigants in BC, Alberta and Ontario. Macfarlane found self-representation is frustrating for litigants and cumbersome for the courts. She says people who represent themselves in civil and family matters most often do so because of the high price of legal advice.

To better understand why legal assistance is slipping out of reach for many people, and what can be done to correct the problem, the Benchers created the Delivery of Legal Services Task Force in 2008. It set out to re-examine the model by which legal services are delivered to the public. The Task Force was the result of extensive committee work that suggested the time had come to expand the range of people who should be able to offer legal assistance. Ultimately, the Task Force narrowed its focus to a few key groups that could help improve affordability. One of those groups was paralegals.

PARALEGALS

The role that paralegals could or should play in the delivery of legal services in BC is a topic that has preoccupied the Law Society for decades. As far back as 1989, the Paralegalism Subcommittee set out to examine the level of paralegal activity in the province and to gauge the importance of paralegals to the practice of law. Since then, there have been several task forces, committees, and working groups that have studied the paralegal question and asked whether paralegals should be certified or given an enhanced practice role.

The Delivery of Legal Services Task Force took another detailed look at the issue and reported back to the Benchers with several recommendations. Combining those recommendations with subsequent work from the Ethics Committee, the Benchers in June 2012 approved an expanded role for paralegals, as well as new definitions that clarify what they can do.

In the *Professional Conduct Handbook*, a "paralegal" is a trained professional working under the supervision of a lawyer. A "designated paralegal," meanwhile, is a paralegal who can perform some additional functions. Specifically, they are permitted to give legal advice and represent clients before certain courts or tribunals, subject to the approval of those bodies. Lawyers can oversee a maximum of two designated paralegals. And beginning in 2013, paralegals will also be permitted to give and receive undertakings.

Doug Munro, a policy and legal services lawyer with the Law Society, says the changes are designed to give the public more choice in obtaining competent, affordable legal assistance.

"Traditionally, paralegals were not permitted to give legal advice, so while the paralegal may have done much of the background work, it was the lawyer who finalized and gave the legal advice. That process can drive up costs," says Munro.

"With these changes, the lawyer will always be available to the paralegal for review and analysis, but in matters where the lawyer considers the paralegal competent, and in which the paralegal does not feel he or she needs to ask the lawyer what to do, the paralegal can give the legal advice directly to the client."

When it comes to paralegals appearing before the courts, the Law Society is finalizing the details of a pilot project scheduled to begin in January 2013. The project will provide designated paralegals a limited right to appear in family law proceedings to deal with uncontested procedural matters, such as seeking leave to amend pleadings or correction of an order, as well as certain contested matters.

In June, BC Supreme Court Chief Justice Robert J. Bauman wrote the Law Society to advise that the court had approved in principle the two-year pilot project in the Vancouver, New Westminster, and Kamloops registries. Discussions between the Law Society and the Provincial Court are ongoing.

LAWYER RESPONSIBILITY

What has not changed in all of this is the role and responsibility of lawyers to supervise paralegals. It is still the job of lawyers to decide on a case-by-case basis whether a paralegal has the skills, training and good character to perform an enhanced function. Ultimately, lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers are also accountable to the Law Society in the event of a complaint or insurance claim stemming from a paralegal's work.

"We're in support of it," said Janet Crnkovic, Vice President with the BC Paralegal Association. "Instead of having a lawyer at his or her hourly rate doing something that a paralegal could do at a lower rate, right away it's going to make it more accessible to a client. It's going to leave lawyers doing things that are more appropriate to their level."

Michele McMillan, a paralegal with Quay Law Centre in New Westminster, agrees. "A lawyer's hourly rate is expensive and for the working population, sometimes it's unaffordable. A paralegal's hourly rate is much more affordable."

McMillan has worked in the area of

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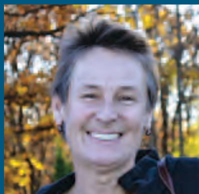
Self-representation in civil and family law


Dr. Julie Macfarlane

As the cost of legal advice continues to rise, so too does the number of people who choose to represent themselves in court. It is an issue in the United States and, increasingly, in Canada. Self-represented litigants are rarely as efficient or effective as lawyers. As Mr. Justice McEwan noted in *Vilardell* v. *Dunham*, a case involving two unrepresented parties:

> Competent counsel might have cut the time in half, because counsel generally know how much evidence is enough. Unrepresented parties, even those who run their cases well, as these parties did, have no idea, and often labour under the apprehension that more is better.

University of Windsor Law Professor Dr. Julie Macfarlane is studying the experiences of people who represent themselves in family and civil court in BC, Alberta and Ontario. She is in the process of interviewing self-represented litigants, court clerks and counter staff, and will present her findings to the legal community next year.

Benchers' Bulletin: What are people telling you about why they chose to represent themselves?

Dr. Julie Macfarlane: By far the most common reason is financial. People are not eligible for any legal aid. They also feel they don't want to spend the $10,000 or $20,000 they've saved up for their kid's college or their next vacation. If this was my parents' generation, they would not be doing this on their own. They would never dare approach something like this without the assistance of a lawyer, and they would somehow scrape together the money. Today, people don't feel like that. They feel like there are other options for them, self-help options, because of the accessibility of legal information on the internet. So they try to handle the process themselves.

BB: How is the experience for people who represent themselves in court?

JM: The vast majority are telling us the experience is frustrating and much more difficult than they expected. They complain constantly about being treated dismissively by the lawyer on the other side and by the judge. They feel that sometimes what the other side is doing is trying to bury them in paperwork. This is their perception because they are not accustomed to being involved in litigation. Whether that is actually accurate is another question. They actually wind up being very angry. There is a lot of system anger getting expressed here. I think we have tried to give people the sense the courts are there to be accessible and so forth, but there are a lot of people saying: "This is not accessible, this is so complicated, this is an insiders' club."

BB: What does it do to the functioning of the system when people feel they can't afford a lawyer and choose to represent themselves?

JM: Two points. One is that the courthouses themselves feel like quite different places than they did ten years ago. This is clear from the interviews we did with the counter staff and the clerks. It's creating a huge pressure on the people who work at the counters because, in a way, their job descriptions have changed. They are not just dealing with lawyers; they are dealing with lay people and they are always in this difficult situation about how much help they can give them. The other impact is that there is increasing pressure on lawyers to try and provide services in an unbundled way. People talk all the time about going to lawyers and saying: "Can you just check my forms? Can you just write a letter to the other side? Could you just look at what I am going going to use as case law when I go into this hearing tomorrow?" Lawyers, in some ways, are going to have no choice but to think about offering services in a slightly different way.

Paralegals ... from page 13

family law for close to two decades, and spent most of that time working with Life Bencher Carol Hickman, QC. "Our intention has been making sure the middle class has representation in court," said Hickman. Hickman also sits on the Law Society's Access to Legal Services Advisory Committee and helped work on the rule changes. "The success is going to be that files can be done at a lower cost for clients, or that more clients are actually getting representation."

Paralegal Michele McMillan

McMillan, meanwhile, hopes a successful pilot project in family law will open other doors for paralegals in the future. "I think we need to try this pilot project and see if it's successful. Hopefully paralegals will obtain the proper and required training to make the project a success and then they can explore, are there other things that can be opened up to paralegals that again would be beneficial to the public?"

"These changes are not a silver bullet that will fix all of the problems associated with access to justice," said LeRose. "Instead, they are another step in the evolution of the legal profession that we hope will better serve the needs of the public."❖

ETHICS COMMITTEE SEEKS COMMENT FROM THE PROFESSION

Model Code Rule 2.05(6) – Property relevant to a crime

WHEN THE BENCHERS adopted the new *Code of Professional Conduct for BC* (the BC Code) last March, they decided to consult with the profession about proposed Rule 2.05(6), which deals with lawyers' obligations when they obtain possession of property relevant to a crime. The purpose of this article is to ask BC lawyers:

- whether it is appropriate to incorporate Rule 2.05(6) into the BC Code,
- whether some other criteria should make up such a rule, or
- whether no rule concerning this issue is preferable.

Rule 2.05(6) and commentary state:

> **Rule 2.05 Preservation of Clients' Property**
>
> In this rule, "property" includes a client's money, securities as defined in [provincial legislation], original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.
>
> **(6)** If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.
>
> **Commentary**
>
> A lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with such relevant constitutional and statutory provisions as those found in the *Income Tax Act* (Canada), the *Charter* and the *Criminal Code*.
>
> A lawyer is never required to take or keep possession of property relevant to a crime or offence. If a lawyer comes into possession of property relevant to a crime, either from a client or another person, the lawyer must act in keeping with the lawyer's duty of loyalty and confidentiality to the client and the lawyer's duty to the administration of justice, which requires, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice. Generally, a lawyer in such circumstances should, as soon as reasonably possible:
>
> (a) turn over the property to the prosecution, either directly or anonymously;
>
> (b) deposit the property with the trial judge in the relevant proceeding;
>
> (c) deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or
>
> (d) disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of possession of the property.
>
> When a lawyer discloses or delivers to the Crown or law enforcement authorities property relevant to a crime or offence, the lawyer has a duty to protect the client's confidences, including the client's identity, and to preserve solicitor and client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the property.
>
> If a lawyer delivers the property to the court under paragraph (c), he or she should do so in accordance with the protocol established for such purposes, which permits the lawyer to deliver the property to the court without formal application or investigation, ensures that the property is available to both the Crown and defence counsel for testing and examination upon motion to the court, and ensures that the fact that property was received from the defence counsel will not be the subject of comment or argument at trial.

The way in which lawyers may treat such evidence continues to be a matter of controversy, particularly following *R.* v. *Murray* in Ontario in 2000, when lawyer Kenneth Murray retained tapes containing evidence of a crime for 17 months without disclosing the existence of the tapes to the Crown or court.

Some criticisms that have been made of subrule (6) are the following:

- It does not permit the lawyer to return the evidence to its source (usually the client). For example, a lawyer who interviews a client who is a suspect in a murder and who receives a bloody shirt from the client during the interview is not permitted to return the shirt to the client, even if the lawyer gives the client proper instructions about the client's obligation not to destroy the evidence.
- It does not permit a lawyer to retain evidence temporarily for the purposes of testing.
- Unlike the position at common law, subrule (6) may require a lawyer to turn over documents to the court or the Crown or notify either that the lawyer is in possession of documents that might be relevant to a crime.

On the other hand, the absence of a single authoritative direction has been the source of considerable difficulty for counsel. Mr. Justice Gravely in *Murray* commented (at para. 149)

> While Murray made only a token effort to find out what his obligations

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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, which include:

- 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.

CR #2012-20

A conduct review was ordered to address a lawyer's conduct in accepting cash of $7,500 or more contrary to Law Society Rule 3-51.1. The lawyer, as administrator of an estate, removed $10,000 cash from a safety deposit box and deposited the funds in his firm's trust account. The "no cash rule" was triggered once his firm received the cash, whether or not he was acting in his capacity as administrator. The subcommittee observed that he could have opened an estate account, deposited the money in that account and then obtained a bank draft payable to the firm.

CR #2012-21

This conduct review arose from a compliance audit of a lawyer that identified:

1. a failure to report and pay trust administration fees (TAF) for a period of four years,
2. inaccurate trust reports relating to the full and timely payment of TAF, PST, GST and statutory remittances,
3. a failure to review bills prepared by support staff for accuracy and completeness prior to electronically submitting them for payment to the Legal Services Society, and
4. a failure to adequately secure client records while in a space-sharing arrangement with a non-lawyer.

Since the audit, the lawyer purchased an updated computer program to assist him in keeping track of his financial affairs and he now meets regularly with staff to review administrative and financial matters related to his practice. He has also terminated the space-sharing arrangement and keeps the file cabinets located in the hall and reception area locked at all times.

The subcommittee advised that a lawyer could not delegate financial and administrative matters to support staff without proper supervision and must attend to all matters associated with the practice in a diligent, careful and professional manner, regardless of whether they were strictly legal in nature. They also advised that a lawyer must complete trust reports with the utmost integrity and honesty.

CR #2012-22

This conduct review was ordered to discuss a lawyer's failure to clearly and regularly communicate with his client about the status of the client's file and retainer. It was also ordered to discuss the lawyer's failure to respond in a timely fashion to other lawyers and the Law Society. The lawyer admitted to significant time management challenges. He has now accessed books, online material and software to improve his time management skills. He will work on improving his communication skills so that he communicates with his clients and others in a timely and positive manner.

CR #2012-23

A conduct review was ordered to address a lawyer's conduct in jointly representing two spouses in the preparation of their wills and then later acting for the husband against the wife in a matrimonial proceeding. Also, the lawyer deposited a retainer into her general account and failed to account to her client for these trust funds, contrary to the Law Society's trust accounting rules. The lawyer had no explanation for her failure to deposit the retainer into trust and to account to her client for the funds. She now intends to deposit the money into trust, render an account, remit the requisite GST/HST and report the incident on her annual trust report. The lawyer acknowledged that she did not advise her clients of the principle of undivided loyalty at the time of preparing the wills nor did she seek the wife's consent to subsequently act for the husband, as required under the conflict of interest provisions in Chapter 6 of the *Professional Conduct Handbook*. The lawyer was encouraged to address ethical or professional conduct issues that may arise in the future with colleagues, senior lawyers or a Bencher.

CR #2012-24

A lawyer withdrew as counsel in a contentious matrimonial/custody proceeding 10 days prior to a scheduled trial. The trial was adjourned, creating hardship for the client and inconvenience for the court, the opposing party and opposing counsel, contrary to his obligations under Chapter 10 of the *Professional Conduct Handbook*. The lawyer withdrew as counsel because his payment had been suspended by the Legal Services Society. The lawyer acknowledged that the suspension of payment was because he abdicated his financial responsibilities to ensure the accuracy of the bills rendered to the Legal Services Society and the payment of his practice debts contrary to Chapter 2, Rule 2 of the *Professional Conduct Handbook*. The subcommittee encouraged the lawyer to be vigilant in the management of his own financial affairs and to reach out to senior members of the bar and Law Society staff when he needs assistance.

CR #2012-25

A lawyer's compliance audit identified inaccurate statements in a trust report, commingling of personal funds in trust accounts and failure to remit taxes, in breach of the Part 3, Division 7 accounting rules. The lawyer presented medical evidence that provided an explanation of the behaviour. The lawyer has taken steps to address all the financial irregularities and paid the required tax penalties. The lawyer intends to hire a bookkeeper to prepare the necessary accounting records on a monthly basis.

CR #2012–26

This conduct review was ordered to address a lawyer's conduct in failing to respond to requests from opposing counsel and ignoring the Rules of Court, resulting in costs being awarded against him personally. The lawyer was involved in a lengthy trial and did not have sufficient support for his busy litigation practice. Opposing counsel brought five pre-trial motions relating to various matters. The lawyer believed opposing counsel was being tactical in bringing the motions while he was at trial and did not respond in a timely way. The lawyer now has more support for his litigation practice so that he can comply with his pre-trial obligations, and he intends to withdraw as counsel if his clients fail to comply with their pre-trial obligations. The lawyer was encouraged to seek advice from other counsel if he thinks opposing counsel is acting inappropriately, prior to taking any action on his views.

CR #2012-27

This conduct review was ordered to discuss a lawyer's conduct in failing to comply with his undertaking to a judge given in a court proceeding to which he was personally a party. Since the incident, he has received counselling from PPC Canada and the Lawyers Assistance Program, and regularly attends Gamblers Anonymous meetings. The lawyer acknowledged that much of his difficulties stemmed from acting as his own counsel in the court proceeding and his lack of a support network to assist him when facing personal and professional stress.

CR #2012–28 and CR# 2012-33

These conduct reviews were ordered to address the conduct of two lawyers in failing to comply with the *Land Title Act* and Land Title and Survey Authority of BC requirements regarding the use of digital signatures. After reviewing documents, the lawyers had authorized another person to affix their digital signatures to those documents so that they could be filed electronically. The lawyers were reminded that it was an offence under the Act and a breach of the Juricert (BC's certifying authority) terms and conditions to do so. This misuse could result in the revocation of their authority to e-file and disciplinary action. The digital signature requirements are designed to prevent fraud and to uphold the integrity of the land title system in British Columbia. Lawyers are reminded to keep their passwords confidential.

CR #2012-29

This conduct review was ordered to address a lawyer's conduct in connection with a "pump and dump" scheme, in which the lawyer was alleged to have participated in the issuance of false and misleading press releases and the illegal, unregistered offerings of company shares. The conduct occurred in the lawyer's first year of practice. The lawyer no longer practises securities law. He acknowledged the importance of keeping separate his business affairs from his legal practice and of seeking practice advice from senior lawyers.

CR #2012-30

A lawyer failed to keep proper records showing the source and purpose of funds deposited into trust. The lawyer received money in trust under a contract for purchase and sale. He did not properly record the source of or purpose of the funds and mistakenly paid them to the seller though the sale did not complete. An agreement was reached between the seller and buyer with respect to the funds. The lawyer has now improved his trust deposit accounting form and has hired experienced bookkeeping staff to ensure that a similar mistake does not occur again.

CR #2012–31

This conduct review arose from a lawyer's failure to properly communicate with his client. The lawyer began an action to collect his unpaid fees, and the client complained of the lawyer's handling of her family law matter. Much of the lawyer's difficulties could have been avoided if the lawyer had properly managed his client's expectations and had responded to her concerns in a more timely, helpful and less adversarial way.

CR #2012-32

This conduct review was ordered to discuss a lawyer's conduct in accepting an undertaking when the fulfillment of its terms was not completely within his control. Lawyers are reminded of the importance of understanding the terms of an undertaking before accepting it and, once accepted, the need to fulfill it in a timely way.

CR #2012-34

This conduct review was ordered because a lawyer used a Law Society letter during a fee review. The letter stated that the Law Society had concluded a complaint made against the lawyer was "not valid or unproven." Lawyers may not use a complaint lodged by a client with the Law Society against the client in unrelated civil proceedings. Lawyers are also reminded that section 87 of the *Legal Profession Act* does not permit the use of disciplinary reports without the consent of the Law Society or of a complaint without the consent of the complainant.

CR #2012–35

This conduct review was ordered to address a lawyer's conduct in drafting a clause in a client's will in which she named herself as residual beneficiary, contrary to Chapter 7, Rule 1 of the *Professional Conduct Handbook*. Regardless of the size of the estate, by inserting such a clause, the lawyer created a conflict between the financial interests of the client and that of the lawyer.

CR #2012-36

This conduct review was ordered to discuss a lawyer's conduct in breaching an undertaking given when acting for the executors of a will to hold certain personal items that formed part of the estate. While the lawyer was on holidays, the executors requested the release of the items for sale at an auction house. The items were mistakenly released in breach of the undertaking, but were recovered shortly afterwards. The lawyer now flags and highlights undertakings and ensures that a copy of the undertaking letter is attached to the subject matter of the undertaking.

CR #2012-37 and CR#2012-41

These conduct reviews were ordered to discuss the role of two lawyers in the sale of a half interest in a business by a dishonest seller. Lawyer A, while not directly retained by the seller, assisted Lawyer B in preparing the sale documents. The seller, who was in the business of buying and selling businesses, misrepresented the prior purchase price he had paid for the business. The lawyers included that price in the sale documents. Both lawyers met directly with the buyers in the absence of their counsel. Prior to closing, the lawyers received large cash "gifts" from the seller when they knew that there was little or no basis for such gifts. During

continued on page 18

Conduct reviews ... from page 17

the course of subsequent litigation to which both lawyers and the seller were co-defendants, Lawyer A also communicated directly with the seller in the absence of the seller's counsel. The conduct review subcommittee reminded the lawyers that they should guard themselves against the predatory practices of dishonest clients. The cash should have been reported as revenue for income tax purposes. The lawyers were reminded that Chapter 4, Rule 11 of the *Professional Conduct Handbook* prohibits lawyers from communicating with a person who is represented by another lawyer without that lawyer's knowledge and consent. The lawyers were also reminded to maintain clear boundaries with their clients.

CR #2012–38

This conduct review was ordered to address a lawyer's conduct in allowing a client to send out copies of a demand letter on the lawyer's letterhead, apparently signed by the lawyer but actually signed by the client, contrary to Chapter 12, Rules 1 and 2 of the *Professional Conduct Handbook* . The lawyer immediately ceased that practice once told it was improper.

CR #2012-39

This conduct review was ordered to discuss a lawyer's conduct in accepting cash of $7,500 or more contrary to Law Society Rule 3-51.1. The lawyer, in his capacity as executor and trustee of an estate, accepted monthly cash payments from tenants renting an estate property and deposited the money into his trust account. Eventually, the cash received exceeded the $7,500 cash limit. The lawyer then opened an estate account and deposited the funds into the estate account. The "no cash rule" was triggered once the lawyer received an aggregate of more than $7,500 in cash, whether or not he was acting in his capacity as executor. The lawyer did not report the inadvertent breach of the "no cash rule" to the Law Society, as required.

CR #2012-40

This conduct review arose from a lawyer's failure to respond promptly to communications from another lawyer. The lawyer's client was required by court order to provide medical progress reports to the other party in a family law proceeding. The lawyer delayed for one month in forwarding the medical reports, despite numerous letters and phone calls from the opposing counsel.

CR #2012–42

This conduct review was ordered to discuss a lawyer's conduct in a share transaction in which he held funds as escrow agent and in which he did not advise unrepresented sellers he was not protecting their interests, contrary to Chapter 4, Rule 1 of the *Professional Conduct Handbook*; improperly withdrew funds from trust, contrary to Law Society Rule 3-56(1); and failed to properly record the purpose for which he held the trust funds, contrary to Rule 3-60. The lawyer transferred shares to his client by way of a limited power of attorney provided by the sellers, but failed to protect the sellers for the agreed price as he had committed he would. The lawyer did not keep proper track of the various share transfers and payments, resulting in a transfer of shares to the client without a corresponding payment to the seller. The lawyer apologized to the seller and paid the money owed to them. The lawyer agreed to contact the Law Society for information on how to create and properly maintain a valuables registry.

CR #2012-43

This conduct review was ordered to address a lawyer's conduct in raising his voice and physically contacting opposing counsel during court. The lawyer admitted his error and regrets his lack of professionalism and decorum. The *Professional Conduct Handbook* specifies that lawyers must not engage in dishonourable or questionable conduct and their conduct towards other lawyers should be characterized by courtesy and good faith. ❖

Property relevant to a crime ... from page 15

> were, had he done careful research he might have remained confused. The weight of legal opinion in Ontario is to the effect that lawyers may not conceal material physical evidence of crime, but how this rule applies to particular facts has been the subject of extensive discussion. Lawyers in the United States have been afflicted with the same dilemma.

Many articles and commentaries have been published on this issue and it has been the subject of case law in both Canada and the United States. Some discussion of the issues can be found at:

- *R. v. Murray*, 2000 CanLII 22378 (ON SC).
- Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, Carswell 1993, pp. 7-8 to 7-12.
- Charles Wolfram, *Modern Legal Ethics*, West Publishing Co., 1986, p. 645.
- Christopher D. Clemmer, "Obstructing the Bernardo Investigation: Kenneth Murray and the Defence Counsel's Conflicting Obligations to Clients and the Court," Vol. 1, Issue 2, *Osgoode Hall Review of Law and Policy* 37.
- Law Society of Upper Canada, *Report of Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence*.
- "Smoking Guns: Beyond the Murray Case," *The Criminal Law Quarterly*, Vol. 43, Number 4, July 2000.

References to further articles can be obtained by contacting Jack Olsen below.

Lawyers are requested to send their comments by letter or email by December 31, 2012 to:

Jack Olsen
Staff Lawyer – Ethics
Law Society of BC
845 Cambie Street
Vancouver BC V6B 4Z9
Tel. direct: 604.443.5711
Toll free: 1.800.903.5300
Email: jolsen@lsbc.org ❖

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 reports section of the Law Society website.

ARUN MOHAN

Hearing (application for enrolment): March 26 and 27, 2012
Panel: *Majority decision:* Jory Faibish and Peter Warner, QC; *Minority decision:* Tony Wilson, Chair
Report issued: July 6, 2012 (2012 LSBC 24)
Counsel: Jason Twa for the Law Society and Henry Wood, QC for Arun Mohan

In 1995, while a first-year student at UBC, Arun Mohan cheated on a math test by altering an exam after it was marked and complaining to the instructor that she ought to have given him higher marks. Mohan was suspended from UBC for one year.

Mohan denied cheating on the math exam, saying that his instructor had a language problem that led to a misunderstanding. In 2000, UBC approved Mohan's application to have the notation of his academic suspension deleted from his academic record. Mohan completed a bachelor's degree in sociology in 2000.

Mohan entered UBC law school and in 2002 was suspended for 18 months for plagiarism. After his suspension, he was permitted to return to UBC law school, and he completed his LL.B degree in 2006.

In 2004, Mohan applied to the Law Society for temporary articles. He admitted to the law school plagiarism incident on his application form but did not admit to cheating on his math exam and his first academic suspension. Only when the Law Society inquired about what he did between first and second year as an undergraduate student, did Mohan admit to cheating on his math exam and the academic suspension that resulted from that incident.

Mohan voluntarily withdrew his application for temporary articles, went on to complete an LL.M at UBC, and re-applied to become an articled student in 2010.

The Law Society acquired UBC's file copy of Mohan's 2000 honours thesis for his bachelor's degree in sociology and determined that it contained substantial plagiarism. Mohan argued that the thesis on file with UBC was not the thesis that he actually submitted and was graded on.

Mohan admitted that he plagiarized portions of a draft thesis; however, his explanation was that he never actually submitted it as his final draft for marking. He testified that he must have delivered the draft thesis by accident to the sociology department much later when his professor asked him for a copy for UBC's archives.

After months of searching, Mohan found in a garage what he alleged to be a copy of his final thesis that was used for grading. This thesis contained no discernible plagiarized or unattributed material. But the document contained no grade or comments on it.

Mohan stated that he planned to use his draft thesis, which he acknowledged contained plagiarized material, if he ran out of time to do original work before the submission deadline. However, he said he did have time to revise the thesis, attributing sources and eliminating any plagiarized material, and submitted it for grading in 2000.

Majority (Faibish and Warner)

Despite the majority's serious concerns about Mohan's evidence on the issue of the thesis, his admitted history of academic fraud and deception, and his admitted deception and lack of forthright disclosure in his 2004 application for enrolment (where he continued to allege his first-year math instructor misunderstood what happened owing to language issues), there was no evidence before the panel that was inconsistent with Mohan's evidence on this thesis issue. There was only suspicion and doubt.

The panel found ample evidence that Mohan had, since 2005, conducted himself in an honest, professional and ethical manner and had fully admitted his past transgressions. The panel was particularly influenced by reference letters from a UBC professor, his intended principal and a law firm where he worked as a researcher. Additionally, the articling offer that a firm made to Mohan in November 2010 remains open.

The panel found that Mohan's reputation and standing had risen to meet the standards required, and ordered that he be enrolled in the Law Society admission program.

In the panel's view, however, Mohan's successful seven years of rehabilitation, balanced against the depth and duration of his prior wrongdoing and the Law Society's need to protect the public interest, indicate the need for conditions and limitations during his first few years of practice if he successfully completes the admission program.

Minority (Wilson)

Based solely on the issue of the 2000 honours thesis and Mohan's explanation, the minority did not believe his explanation.

The panel was asked to believe Mohan when he said a 50-page paper discovered in a box in a garage in 2012, without a cover page and containing typographic errors, was the one he submitted to UBC as his final thesis and on which he received a mark. But a 78-page paper without the same typographic errors, but containing substantial plagiarized material, was not the thesis he was graded on, even though it has been maintained by UBC for over a decade.

The minority believed that Mohan was repeating the pattern of deceit established earlier in his academic career. Accordingly, the minority did not find Mohan to be of good character and repute and fit to become a barrister and a solicitor of the Supreme Court.

On July 12, 2012 the Credentials Committee resolved to refer the matter to the Benchers for a review of the decision under section 47 of the *Legal Profession Act*.❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Leonard Thomas Denovan Hill
- Brian Clark Rea
- Paris Ari Hart Simons
- Daniel Markovitz
- David Harvey Stoller

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

LEONARD THOMAS DENOVAN HILL

Bencher review: March 28, 2012

Benchers: *Majority decision*: Thelma O'Grady, Chair, Rita Andreone, QC, David Crossin, QC, Nancy Merrill, Lee Ongman, David Renwick, QC, Catherine Sas, QC and Barry Zacharias; *Minority decision*: Vincent Orchard, QC

Report issued: June 1, 2012 (2012 LSBC 20)

Counsel: Maureen Boyd for the Law Society and Leonard Thomas Denovan Hill appearing on his own behalf

BACKGROUND

The Law Society issued a citation to Leonard Thomas Denovan Hill for disbursing trust funds in breach of the terms of an undertaking.

In the decision of the hearing panel, it was found that Hill had breached the undertaking and the circumstances of the breach amounted to professional misconduct (facts and determination: 2011 LSBC 08, disciplinary action: 2011 LSBC 16 and corrigenda: 2011 LSBC 18; discipline digest: 2011 No. 3 Fall).

Hill sought a review of that decision to determine whether mistakes can be made by a lawyer in complying with undertakings that do not amount to professional misconduct.

DECISION

Majority *(O'Grady, Andreone, Crossin, Merrill, Ongman, Renwick, Sas and Zacharias)*

The majority upheld the panel's decision and concluded that Hill was guilty of professional misconduct. The majority declined to endorse the panel's finding relating to Hill's credibility and made no finding that Hill intentionally breached the undertaking.

In Hill's request for a review, he raised the issue as to whether the panel properly assessed the evidence, including the issue of credibility. The panel had concluded that Hill was not credible in his assertion that he was unaware he was acting in violation of the undertaking. In addition, the panel concluded that, even accepting his evidence, his actions nevertheless amounted to professional misconduct due to his failure to take any steps to ascertain the true state of affairs before releasing the funds.

The majority was concerned that the Law Society's allegation that Hill intentionally breached the undertaking was not fully brought forward at the disciplinary hearing and, therefore, Hill did not have an informed opportunity to fully answer and defend the allegation. It was clear to the majority that the parties litigated this case on a different basis.

Minority *(Orchard)*

The minority agreed with the conclusion that the panel correctly found Hill's actions amounted to professional misconduct in breaching an undertaking. However, the minority did not agree with the majority's comments concerning the factual finding by the panel rejecting Hill's explanation that he was unaware of the undertaking imposed upon him.

In the minority's view, it was open to the panel to reject Hill's testimony that he was unaware of the undertaking. The panel determined that it was unlikely that Hill was unaware of the undertaking, based on his testimony and admission. The minority believed that the panel did not find Hill's memory and explanation reliable, but they did not find him dishonest.

In conclusion, the minority was not satisfied that the panel's factual finding rejecting Hill's explanation that he was unaware of the undertaking was an obvious and overriding error. Having found that Hill was aware of the undertaking, the panel's conclusion that the applicant knowingly breached the undertaking naturally followed.

BRIAN CLARK REA

Kelowna, BC

Called to the bar: May 15, 1992

Non-practising membership: May 2009 to June 2012

Discipline hearing: April 18, 2012

Panel: Kenneth Walker, Chair, Gavin Hume, QC and Lois Serwa

Oral reasons: April 18, 2012

Report issued: June 27, 2012 (2012 LSBC 22)

Counsel: Leonard Doust, QC and Jaia Rai for the Law Society and Grant Gray for Brian Clark Rea

FACTS

In December 2008, Brian Clark Rea was arrested for accessing child pornography on a home computer. The Law Society commenced an investigation that was subsequently held in abeyance pending conclusion of the criminal proceedings.

In the meantime, steps were taken to protect the public, and Rea recognized the need for these measures. In May 2009, he became a non-practising lawyer and gave a written undertaking that he would not engage in the practice of law until released from this undertaking.

In April 2010, Rea pleaded guilty to the charge of accessing child pornography and was sentenced to 14 days in jail and placed on a two-year probation order. The conditions of the order required Rea to take a sex offender rehabilitation program and to not attend public places where children under 16 were present or expected to be present. The conditions of that order extend to April 2015.

The Law Society's investigation continued after Rea's plea to the criminal charge.

ADMISSION AND DISCIPLINARY ACTION

The panel accepted Rea's conditional admission of a disciplinary violation, and found Rea's use of the internet to view child pornography to be conduct unbecoming a lawyer.

The *Professional Conduct Handbook* sets out the standard of conduct expected of a lawyer. A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

There were 94 images of child pornography found on Rea's home computer. While some of the images of abuse were of very young children, Rea was interested in images of teenage boys. The panel also found that Rea viewed the images in his home and that there was no connection between the conduct and his practice of law.

The panel reviewed letters from Rea's colleagues who stated that, if he was permitted to practise law, they believed he would apply himself diligently to serve his clients in a professional and ethical manner.

A psychiatrist examined Rea and reported that Rea became aware of homosexual interests in his teens but was unable to accept or tolerate such thoughts. Rea attempted suicide following the disclosure of his conduct in viewing child pornography.

The panel found that the psychiatrist expressed two relevant opinions. First, he believed that the ultimate goal of ongoing therapy would be to help Rea to accept his sexual orientation and that there was no evidence to suggest that Rea was at risk to act on his sexual interests with teenage boys. Second, he did not think Rea's difficulties would interfere with his capacities to practise law and that he was able to control his impulses and conduct.

As the panel had no similar case upon which to base its decision on disciplinary action, the panel referenced several other matters. After considering these cases and the very serious nature of Rea's conduct, the panel concluded that Rea's conduct did not warrant disbarment, but rather a lengthy suspension. A suspension of three to four years was called for in the circumstances. Since, as a result of his conduct, Rea had already not practised law for over three years, the panel agreed that an additional six-month suspension was appropriate.

The panel ordered that Rea:

1. be suspended for six months;
2. pay costs of $10,000; and
3. be subject to conditions on his return to practice:
   - not to represent any persons under the age of 16;
   - not to practise in the area of family law;
   - to continue in the care of a psychologist or psychiatrist, adhere to any advice or treatments, and provide progress reports to the Law Society;
   - to abide by any orders, directions and recommendations of the Practice Standards Committee.

PARIS ARI HART SIMONS

Vancouver, BC
Called to the bar: November 19, 1999
Discipline hearing: May 17, 2012
Panel: ***Majority decision*****: Thelma O'Grady, Chair and Jennifer Reid;** ***Minority decision*****: Carol Gibson**
Report issued: July 3, 2012 (2012 LSBC 23)
Counsel: Carolyn Gulabsingh for the Law Society and Paris Ari Hart Simons appearing on his own behalf

FACTS

In January 2006, Paris Ari Hart Simons agreed to become counsel of record for a client who was seeking damages for negligent chiropractic treatment. Although Simons did not have any experience with medical negligence claims, he took the case with good intentions of helping the client.

Simons presented the client with a contingency fee agreement, but the client did not sign it. The client was not able to pay for expert reports or other disbursements and did not give any retainer funds to Simons.

Before Simons was retained, the client's matter had been scheduled for mediation in February 2006 and for trial in March 2006. Counsel for the defendants agreed to postpone the mediation and adjourn the trial after Simons was retained.

Simons familiarized himself with the file and attempted to assemble various expert reports to prove the client's claim, but otherwise took no action between January 2006 and May 2009. He did not file a Notice of Intention to Proceed.

In February 2007, Simon's client began expressing her frustration in communicating with him and with the lack of progress in her case. Between February 2007 and December 2009, Simons did not respond substantively or at all to 14 emails from his client or answer requests for information on 20 occasions.

On June 2, 2009, counsel for the defendants sent Simons a letter advising that the defendants would apply to dismiss the client's claim for want of prosecution. Simons did not provide a copy of this correspondence to his client.

On September 1, the client emailed Simons and copied the Law Society, indicating she was seeking assistance in engaging Simons to communicate with her. The Law Society contacted Simons to encourage him to respond to the client.

Simons and the client exchanged email messages; however, Simons did not follow through with sending documents to the client.

On October 9, Simons received the defendants' application to dismiss the claim for want of prosecution. Simons wrote to counsel for the defendants advising he intended to defend the application to dismiss. He did not provide copies of the application or his letter to the client.

On January 4, 2010, counsel for the defendants wrote to Simons to confirm the defendants' application to dismiss would be heard on February 12, 2010. Simons met with his client and still made no mention of the defendants' application.

On February 11, Simons left a convoluted voicemail message for the client advising that he had reported himself to the professional liability insurer and awaited advice about whether he could continue to act for her.

On February 12, Simons appeared before the court, advising that he had contacted his insurer, wished to be removed from the record and requested an adjournment. The judge made an order dismissing the client's claim and awarded costs of the proceeding and the application to the defendants.

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Discipline digest ... from page 21

ADMISSIONS AND DISCIPLINARY ACTION

Simons admitted that his conduct related to quality of service and misleading his client constituted professional misconduct. In particular, he admitted that he failed to:

- keep his client reasonably informed about the status and progress of the court action;
- answer his client's reasonable requests for information;
- take action as described to the client;
- answer communications that required a response within a reasonable time or do work promptly, or at all;
- disclose all relevant information to the client and thus misled the client.

Misleading a client is serious misconduct. The panel stated that, in this case, the impact on the client was considerable as the court action was dismissed, without notice to her, and she was then without counsel. Simons misled the client about the status of the court action and the quality of service he had provided to her. His failure to take steps to conclude the court action was exacerbated by his failure to communicate effectively with the client.

The panel took into consideration that Simons' misconduct appeared to have conveyed little or no benefit to him. Simons did not receive any retainer funds from the client and did not invoice her for services provided.

The panel accepted Simons' admissions and ordered that he be suspended for one month. The majority made no order as to costs on the basis that he had cooperated with the Law Society and admitted his misconduct. His financial situation could not withstand an award of costs on top of a suspension.

Minority *(Gibson)*

The minority concurred with the majority, with the exception of the issue of waiving costs. The minority was concerned that, from the public perspective, waiving costs did not meet the purpose of the discipline proceedings, which are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve the public confidence in the legal profession.

The minority was mindful of the fact that Simons had little income this year and, therefore, proposed that he pay costs of $1,000.

DANIEL MARKOVITZ

Richmond, BC
Called to the bar: May 14, 1993
Discipline hearings: December 20, 2011 and February 20, 2012
Panel: Leon Getz, QC, Chair, Jennifer Chow and Dan Goodleaf
Report issued: March 7 (2012 LSBC 11) and July 11, 2012 (2012 LSBC 25)
Counsel: Thomas Manson, QC for the Law Society and Daniel Le Dressay for Daniel Markovitz

FACTS

On November 30, 2008, Daniel Markovitz was arrested for impaired driving. At the police station he provided two breath samples but refused to provide a third sample. On April 19, 2010, he pleaded guilty to the charge under the *Criminal Code* for failing to provide a breath sample.

Markovitz reported his arrest to the Law Society and the proposed charges and immediately entered into a monitored recovery program agreement and a similar undertaking with the Law Society to:

1. remain abstinent from alcohol;
2. attend a minimum of three mutual support meetings per week;
3. join a home group and use a sponsor;
4. enrol in the weekly Professionals Accountability Group at the Lawyers Assistance Program; and
5. provide regular and random urine and/or blood samples for verification of abstinence.

In December 2008, Markovitz began attending mutual support meetings, meeting with an addiction counsellor, and providing urine samples on request. By December 2009, he had ceased attending support meetings and providing urine samples.

On February 1, 2010 Markovitz asked the Practice Standards Committee of the Law Society to remove the requirement for random urine testing due to practical and financial difficulties. His request was refused. By March 2010, Markovitz was failing to provide urine and/or blood verification of abstinence and his addiction counsellor cancelled the monitored recovery agreement.

Markovitz advised the Law Society that he was not attending support groups because they conflicted severely with his work and, in the case of Alcoholics Anonymous, the concept of "higher power" conflicted with his beliefs. He enrolled in the Professionals Accountability Group at the Lawyers Assistance Program. However, his irregular attendance broke the rules, and, in April 2010, he was told he was no longer welcome to attend.

ADMISSIONS AND DISCIPLINARY ACTION

Markovitz admitted that his refusal to provide a breath sample to police amounted to conduct unbecoming a lawyer. He also admitted that his numerous failures to comply with an undertaking and agreements related to the monitoring of his consumption of alcohol and his treatment for alcohol abuse or dependency amounted to professional misconduct.

The Law Society sought an order under section 38(5)(d)(ii) of the *Legal Profession Act* suspending Markovitz until he satisfied a board of examiners that his competence to practise law was not adversely affected by a physical or mental disability, or dependency on alcohol or drugs. Markovitz was prepared to pay a fine and costs, but resisted any suspension order.

Markovitz testified that, at the time he gave the undertaking, he was unfamiliar with the various alcohol programs but agreed to them because he was concerned that the Law Society might suspend him and that, if that happened, he might lose the custody of his minor child of an earlier marriage. He explained that some of his other defaults were due to the financial burden that compliance entailed and the logistical difficulties of getting to the prescribed locations and times when he had obligations to clients for attendances in court and a driving ban for a period of time.

The panel found it difficult to accept his difficulties as justifications for his defaults. The appropriate response to all of these difficulties and inconveniences was not to simply ignore the undertaking, but rather to seek to have it modified. While Markovitz did approach the Law Society seeking relief from the requirement to undergo random urine tests, the panel noted that he did not raise his concerns about the requirement to attend support meetings.

Markovitz sought to contend that all that he had undertaken to do was

be abstemious, not abstinent, and that he had not promised to cease and desist from all consumption of alcohol but only that he would consume alcohol on rare occasions, and then only in moderation. The panel believed that this indicated a somewhat nonchalant approach to his undertaking to remain abstinent from alcohol.

Two medical practitioners reported that Markovitz met the criteria for alcohol abuse and emphasized the need for complete abstinence. Prior to the February hearing, Markovitz underwent a medical examination and a random urine test. In the panel's view, the results from these more recent tests provided limited and somewhat qualified and inconclusive evidence.

The medical specialists did not imply that, unless Markovitz followed their recommendations, he constituted a present, foreseeable or even remote risk of harm to clients, the public or the legal profession. The panel determined that there was no demonstrable connection between his professional misconduct and alcoholism and therefore declined to make the proposed suspension order.

Markovitz denied that he currently has any problems with alcohol consumption, though the panel understood that denial is one of the symptoms of an untreated alcoholic. The panel found no evidence that his undertaking defaults were attributable to alcoholism.

The panel stated that Markovitz's breaches of undertaking over several years have been persistent, repetitive and knowing and that he appeared not yet to fully accept the importance, to himself, to the Law Society and to others, of honouring his promises.

The panel accepted Markovitz's admissions and ordered that he pay:

1. a $6,500 fine; and
2. $3,500 in costs.

DAVID HARVEY STOLLER

West Vancouver, BC
Called to the bar: January 13, 1981
Discipline hearing: June 13, 2012
Panel: Thelma O'Grady, Chair, John Lane and Sandra Weafer
Report issued: July 20, 2012 (2012 LSBC 26)
Counsel: Carolyn Gulabsingh for the Law Society and Henry Wood, QC for David Harvey Stoller

FACTS

In a real estate transaction in which David Harvey Stoller acted for the owners of two properties, he inadvertently registered a mortgage against the wrong property. As a result, the vendor's property was subject to a mortgage at the time of the sale. Stoller gave his undertaking to discharge the mortgage in a letter to the purchaser's lawyer dated August 26, 2009.

Beginning in November 2009, the purchaser's lawyer made numerous inquiries of Stoller's office seeking the discharge pursuant to the undertaking. By March 22, 2010 the purchaser's lawyer still had not received the discharge. As a result, he filed a complaint with the Law Society.

The mortgage was ultimately discharged on November 23, 2010.

ADMISSION AND DISCIPLINARY ACTION

Stoller admitted that he breached his undertaking and that this conduct constituted professional misconduct.

The panel noted that Stoller had no conduct history of breaches of undertaking. However, his prior conduct record sets out two earlier matters relating to delay and procrastination, as well as failing to document files appropriately. Stoller's breach of undertaking in this case was not the result of dishonesty or failure to understand his obligations. The panel found that his conduct in this matter, like the earlier matters, demonstrated an underlying element of delay and procrastination.

The panel accepted Stoller's admission that his failure to discharge the mortgage for almost 15 months constituted professional misconduct, and ordered that he pay:

1. a $3,000 fine;
2. $3,100 in costs; and
3. $224 in disbursements.❖

Practice Tips ... from page 11

document coding, review and trial preparation. Perhaps larger firms are better able to afford these consultants, but certainly they are there and available for small firms and their clients. The *ABA Journal* (abajournal.com/news/article/judge_oks_plan_to_use_predictive_coding_to_curtail_e-discovery) reported as follows on a recent case in the USA:

> A computer technique that can be used to drastically reduce the number of documents that must be reviewed by humans in litigation discovery has been OK'd by a Virginia judge despite opposition from the opposing party.
>
> Partner Thomas Gricks III of Schnader Harrison Segal & Lewis argued the contested motion in April, contending that predictive coding is not only less expensive but more accurate, reports the Pittsburgh Post-Gazette. Gricks, who chairs the firm's e-discovery practice group, is defending Dulles Jet Center in the Loudoun County matter, which involves 10 plaintiff suits over the collapse of a set of jet hangars during a 2010 snowstorm.
>
> Jones Day argued against the use of predictive coding, saying that human review does a better job.
>
> The predictive coding goes beyond keyword searching of documents, applying an analytic searching model to identify documents that incorporate key concepts. The smaller pool of identified documents is then reviewed by a human legal team.

Certainly, Robert Half Legal's report highlights the impact that technology is having on the legal profession. Given reports such as these, lawyers can reflect and make strategic decisions on where technology will lead them, for their benefit as well as their clients'.❖

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