The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

Improved access to justice can only be achieved through commitment and collaboration

by Art Vertlieb, QC

IT IS WITH great pride that I begin my tenure as president of the Law Society of BC. Having been a Bencher since 2004, this is the culmination of an extraordinary opportunity to serve the public and to work side by side with so many members of the legal profession.

Over the next months, my intent is to continue the Law Society's focus on addressing the problem of access to justice and affordable legal services.

The increased scope of practice for paralegals is one of the most significant achievements by the Benchers in the past few years, but it is now up to lawyers to take advantage of the change and offer clients lower cost options available through the use of paralegals.

The public's ability to access legal help is a well-documented challenge and the reasons, as we all know, are complex. Clearly, it is going to take a lot more than money to address the issues, which in turn will require the dedicated collaboration of all stakeholders in the justice system. Government, the courts, the legal profession and other legal service providers, and many others must come together to develop sustainable, effective ways to improve the efficiency and affordability of the system.

Of course, the Law Society has a role to play. We are represented on the provincial Ministry of Justice's Justice Summit steering committee by the Society's CEO, Tim McGee, and we look forward to an active role in that pivotal initiative.

As well, we are intent on maximizing the opportunity presented by the expansion of the role of paralegals in the provision of legal services. Since last fall, designated paralegals have been permitted to give legal advice under the supervision of a lawyer. As well, as of January 1, 2013, pilot projects with the Supreme Court of BC and the Provincial Court of BC are allowing limited appearances by paralegals in court.

The increased scope of practice for paralegals is one of the most significant achievements by the Benchers in the past few years, but it is now up to lawyers to take advantage of the change and offer clients lower cost options available through the use of paralegals. Having met with many paralegals in recent months, I can tell you that they are very enthusiastic about the chance to better serve those who could so desperately use their counsel.

In addition to continuing to promote the use of designated paralegals, my time as president will be spent implementing the recommendations of last year's review of the Law Society's governance. Many changes have already been put in place to ensure the Benchers are overseeing the work of the Law Society according to current best practices, with the objective of ensuring we are a well-run self-governing body.

This year will also see the completion of the work of the Legal Service Providers Task Force, chaired by past president, Bruce LeRose, QC. This task force, which includes representation from BC notaries and paralegals, will by the end of this year develop

The marketplace is changing and, along with it, the public's expectations for access to trustworthy legal services. The Law Society and others must do all they can not to impede choices for the consumer while at the same time ensuring the public is appropriately protected.

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).

PHOTOGRAPHY

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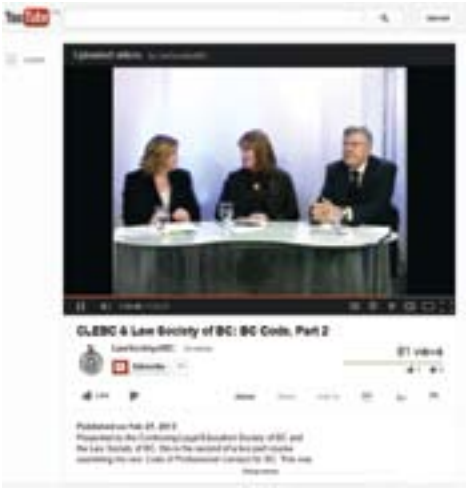
recommendations for how best to regulate the many providers of legal services. The marketplace is changing and, along with it, the public's expectations for access to trustworthy legal services. The Law Society and others must do all they can not to impede choices for the consumer while at the same time ensuring the public is appropriately protected.

Lastly, we expect that this year will see the start of development of rules for the regulation of law firms. Our ability to regulate law firms was granted with the passage of the *Legal Profession Amendment Act, 2012* in May of last year, and we are now developing the mechanics of how that regulation will be done. Regulating firms, in addition to individual lawyers, is critical to the Law Society's ability to oversee the full breadth of activities performed by the profession.

I welcome the ideas and suggestions of the profession over the coming months and encourage you to contact me with your input. These are fascinating times for lawyers around the world, and, together with other players in the justice system, we can collectively have a dramatic impact for the sake of the public that supports and relies on us.❖

Webinar on BC Code draws record viewers



Recordings now available on Law Society YouTube channel

THE LAW SOCIETY, in partnership with the Continuing Legal Education Society (CLE), hosted two webinars in January to introduce the profession to the new *Code of Professional Conduct for British Columbia*.

The webinars, which qualified for continuing professional development credits, drew over 2,400 registrants. Given that there were often groups watching the sessions together, it is estimated that at least 7,000 people watched at least one of the webinars. This is a record for participation in any CLE course.

The Benchers and the Law Society thank you for your diligence in learning the new Code.

Recordings of the webinar are now posted to the Law Society's YouTube channel and continue to be eligible for continuing professional development credit as described on the Law Society website at Law Society > Lawyers > Continuing Professional Development > Approved Education Activities.❖

Your fees at work: Custodianships

THE LAW SOCIETY regularly highlights how annual practice fees 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 Law Society's custodianship program.

Back in 2006, the Benchers approved a plan to restructure the Law Society's custodianship program to realize greater regulatory efficiency. Specifically, instead of retaining lawyers to act as custodians of a lawyer's practice, Law Society staff lawyers took on the custodianship role.

The change was in response to a sharp rise in the average cost of discipline-related custodianships, as well as the associated audit and investigation costs, along with the need to manage custodianship procedures better and to provide a better link between the custodianship and the audit and investigation functions of the Law Society.

The *Legal Profession Act* permits the Law Society to apply for a BC Supreme Court order appointing the Law Society as the custodian of a lawyer's practice. It is then required to designate a staff lawyer, or retain outside counsel, to carry out the duties and functions of the custodian. The designated custodian takes control of all or part of the property of the practice and arranges for the temporary conduct of the practice or its winding up, depending on the terms of the order. The court makes an order appointing a custodian over a lawyer's practice if sufficient grounds exist — such as following a lawyer's disbarment or suspension, death, incapacity by reason of illness or the neglect or abandonment of a practice.

Since bringing the program in-house, the Law Society has realized significant savings. Figures for 2011 indicate:

- the length of time to complete custodianships due to death or disability issues was reduced from a historical average of 24 months to 15 months;
- the length of time to complete custodianships arising from disciplinary action decreased from a historical average of 48 months to 29 months; and
- 98 per cent of clients surveyed were satisfied with the way their legal matters were handled by the custodian or, in some cases, a locum.

If you have any questions about the Law Society's custodianship program, please contact Sherelle Goodwin, Manager of Custodianships, at custodianship@lsbc.org.❖

Working group seeks opportunities for delivering lawyer support services and advice

by Timothy E. McGee

IN FULFILLING ITS mandate to uphold and protect the public interest in the administration of justice, the Law Society provides support and assistance to the profession in a number of areas to assist lawyers in meeting their professional obligations to their clients, the courts and other lawyers.

Since last year, a working group has been addressing the strengths and opportunities of our current model for delivering lawyer support and assistance (see article below). The goal is to determine which Law Society services are most useful to lawyers, who can best deliver them and how they are best delivered.

We will conduct a random telephone survey of lawyers to better understand what services you expect from the Law Society and your perceptions on how those services are currently or should be provided. By September, it is expected the working group will have finalized its recommendations to the Benchers.

As always, your input is welcome. If you have any thoughts or suggestions on how the Law Society could improve its lawyer support and assistance programs and services, please let me know.

The goal is to determine which Law Society services are most useful to lawyers, who can best deliver them and how they are best delivered.

Another important way the Law Society ensures the profession is serving the public well is the Continuing Professional Development Program. Lawyers have increasingly embraced this program; at the end of 2012, 97 per cent of lawyers had fully satisfied the 12 credit hours required, up from 95 per cent at the end of 2011.

In January, the Law Society went a step further and provided a free, two-part course eligible for continuing professional development credit. In cooperation with the Continuing Legal Education Society (CLE), two webinars were broadcast on the new *Code of Professional Conduct for British Columbia*, known as the *BC Code*. It is estimated that the programs reached over 7,000 viewers, a record participation for any CLE course. This is a great milestone, particularly given the importance of the topic. The webinars are now available for further viewing, and credit for those who missed it.

To learn more or provide your input about these or any other the Law Society's initiatives, please contact us at ceo@lsbc.org.❖

Lawyer Support and Advice Working Group

Lawyer support and advice services under review with the intent to make improvements

A WORKING GROUP of Law Society staff is conducting an assessment of all advice and support services offered to lawyers with the goal to identify opportunities to provide these services more efficiently and efficiently.

The working group, headed by Law Society standards and professional development manager Kensi Gounden, is now conducting a thorough review of what lawyer support services are currently offered and how effectively they are delivered. The group will then benchmark current processes against other organizations and lawyer expectations to determine where improvements can be made.

An important part of the assessment will be a survey of a random sample of BC lawyers, scheduled for this spring.

"The survey will give us the perspective of the lawyers who use our services – what's working, what's missing and what needs to be changed," explained Kensi.

The need for this work was identified during the Law Society's review of its core regulatory processes, which was completed in 2011. Among the concerns was the ability of the Law Society to appropriately respond to lawyer inquiries in the face of growing call volumes and demand for resources, such as web-based tools and courses.

The working group will determine what lawyer advice and support the Law Society could and should provide, who should provide it and what the resource implications are of various support options.

Lawyers are invited to submit any comments or suggestions to Kensi Gounden at kgounden@lsbc.org.❖

Alfred Scow: April 10, 1927 – February 26, 2013

Retired judge Alfred Scow was a trailblazer in the legal profession in British Columbia.

Not only was he the first Aboriginal person ever to graduate from a BC law school, graduating from UBC in 1961, the next year he went on to become the first Aboriginal person to be called to the Bar in BC. In 1971, he broke another barrier and became the first legally trained Aboriginal person to be appointed to the provincial Bench, where he would serve for 23 years.

In 2010, the Law Society was fortunate to have been able to recognize Scow at *Inspiring stories connecting future leaders*, an event featuring Aboriginal leaders in the legal profession.

"Alfred Scow was an inspiration for us all, both inside and outside the Aboriginal community," said President Art Vertlieb, QC. "He was a trailblazer in so many different ways. He brought so much to his own community, and in doing so, he brought dignity to us all."

Over the course of his life and groundbreaking career, Scow received numerous honours and distinctions. In 2000 he was awarded the Order of Canada and in 2004, the Order of BC. Despite this, he was always humble. In an interview with *Benchers' Bulletin* in 2010, Scow was asked how he felt about being called a "hero" for both Aboriginal and non-Aboriginal Canadians.

"I don't know who thinks of me that way," he said. "Do Indians think of me that way, do white people think of me that way or do I think of me that way? I have never really been consciously thinking of myself as a role model."

But a role model he was. Aside from his work in the field of law, Scow also served on the management council for UBC's First Nations House of Learning and was founding president of the Vancouver Aboriginal Friendship Centre Society. In 2006, he co-published a children's book that told the true story of nine-year-old Scow, who secretly watched his father dance at a potlatch, which was prohibited at the time under the *Indian Act*. *Secret of the Dance* was selected as one of the best books of the year by the Canadian Children's Book Centre.❖

Judge Alfred Scow at Inspiring stories connecting future leaders

Paralegals appearing in Provincial Court required to present completed form

DESIGNATED PARALEGALS MAKING appearances in BC Provincial Court as part of the family law pilot project are required to bring an information sheet on each appearance and present it to the court when the case is spoken to.

Paralegals are to fill out the first portion of the form, and the presiding judge will complete the rest and provide it to a judicial secretary for transmission to the Office of the Chief Judge.

The purpose of the form is to track the number of appearances by paralegals and to assess how well they meet the expectations of the court. The information will be used by the court to determine whether the pilot project should be expanded to other districts and beyond family law.

The Law Society, the BC Supreme Court and the Provincial Court have partnered to create the two-year pilot project that will give designated paralegals a limited right of appearance in court. The goal is to identify whether lawyer-supervised paralegals are able to perform certain procedural applications in court in an efficient and competent manner.

The pilot project began on January 1, 2013 and followed changes to Law Society rules in July 2012 that gave designated paralegals permission to give legal advice and appear before a court or tribunal as permitted. The provisions regarding legal advice are not location specific.

More information about the Law Society's paralegals initiative, the pilot project with the courts and the Provincial Court paralegal information sheet is available on the Law Society website under Lawyers > Paralegals.❖

In Brief

JUDICIAL APPOINTMENT

Douglas W. Thompson, a lawyer with Hatter Thompson Shumka McDonagh, was appointed a judge of the Supreme Court of BC (Nanaimo), replacing Mr. Justice B.D. MacKenzie, who was transferred to Victoria.❖

Thanks to our 2012 volunteers

THE BENCHERS THANK and congratulate all those in the profession and the legal community who volunteered their time and energy to the Law Society in 2012. Whether serving as members of committees, task forces or working groups, as Professional Legal Training Course guest instructors or authors, as fee mediators, event panellists or advisors on special projects, volunteers are critical to the success of the Law Society and its work.

Over the past year, the Society has enjoyed the support and contributions of over 300 volunteers, all of whom deserve acknowledgement.

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In memoriam

WITH REGRET, THE Law Society reports the passing of the following members during 2012:

Thomas J. Campbell, QC
Jesse Cove
Dennis J. Daley
Tristan R. Easton
Herman Frydenlund
Gerard Abraham Goeujon
D. Michael M. Goldie, QC
Dennis J. Mitchell, QC
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Thomas E. Sprague
Mark R. Steven
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Glenn A. Urquhart, QC ❖

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

The BC Code: questions and answers

Fees, disbursements and other charges; contacting opponent's expert; mortgage to secure legal fees; and more

THE BC CODE course, Parts I and II, generated much interest among BC lawyers — 4,895 people registered for the free CLE-TV sessions — a record high for a Continuing Legal Education Society course. In Part II we promised a follow-up Q&A in this column to help lawyers understand some of the information, particularly regarding fees, disbursements and other charges.

As we explained, the Ethics Committee has a number of Code items on its agenda. At its February 28 meeting, the committee decided that it will recommend to the Benchers at their April 5 meeting that they suspend commentary [1] of rule 3.6-3 while the committee considers the commentary. The committee made its views known to the profession through the March 2013 *E-Brief*.

Watch for further announcements about Ethics Committee opinions or rule changes that could affect the information in this column. Also, the course is now available to watch on the Law Society's YouTube channel.

FEES, DISBURSEMENTS AND OTHER CHARGES

Does the Code require lawyers to always have a written fee agreement with clients?

No. The Code has writing requirements; however, the Code doesn't go so far as to state that all clients must have a written agreement. When reading the Code, keep in mind that "disclosure" and "consent" are defined terms and that "consent" has a writing requirement. Rule 1.1-1 states that "consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable.

Examples of situations where there is a writing requirement are:

- contingent fee agreements (Law Society Rule 8-3);
- being paid by someone other than the client (rule 3.6-1, commentary [2]);
- when fees are divided between lawyers from different firms (rule 3.6-5);
- when paying a referral fee to another lawyer (rule 3.6-6);
- when a lawyer and client agree that the retainer must be paid in advance of services (rule 3.6-9).
- billing for "Other Charges" that are not disbursements (rule 3.6-3, commentary [1]);

  At this time, if lawyers are candid with clients regarding billing matters as section 3.6 requires, in my opinion it is not unprofessional conduct not to conform precisely with commentary [1]. For example, lawyers who are candid about disbursements that are third party and those that are internal costs (i.e. "Other Charges"), may include paralegal charges under the fees heading rather than under "Other Charges."

A written agreement that sets out the terms, including when a bill would be considered overdue, is good practice, even if not mandatory, as there is less opportunity for problems to develop. Consider the following additional reasons for a written agreement:

- One of the factors in determining whether a fee is fair and reasonable is the client's prior "consent" to the fee (rule 3.6-1, commentary [1](k)).
- "A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined." (rule 3.6-1, commentary [3])
- "A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses ..." (rule 3.6-1, commentary [4]).

Rule 3.6-2, commentary [1] states that, if a client agrees, a lawyer can receive both a fee based on a proportion of the amount recovered and a portion of an amount awarded as costs. Is this permitted?

No. Section 67(2) of the *Legal Profession Act* says that a contingent fee agreement must not provide that a lawyer is entitled to receive both a fee based on a proportion of the amount recovered and any portion of an amount awarded as costs in a proceeding or paid as costs in a settlement. In other words, it's one or the other, not both. Accordingly, rule 3.6-2, commentary [1] is contrary to the Act (the Act prevails). There doesn't appear to be a provision within the Act to apply for judicial approval to receive costs and a proportion of the amount recovered. The Ethics Committee will recommend to the Benchers to amend commentary [1] by removing the second and third sentences so that it would state:

> In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The test is whether the fee, in all of the circumstances, is fair and reasonable.

What is a disbursement on a client's bill? What are "Other Charges"?

The Dictionary of Accounting, Roger Hussey (ed), Oxford University Press 1999, provides the following definition of disbursement:

> A payment made by a professional person, such as a solicitor or banker, on

behalf of a client. This is claimed back when the client receives an account for the professional services.

Section 69 of the *Legal Profession Act* permits a lawyer to issue a "bill" (defined in section 64(1)) that is a lawyer's written statement of fees, charges and disbursements. The Code provides that "[a] lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf" (rule 3.6-3, commentary [1], suspended). The Code requirement is in line with what accountants view as a disbursement. For billing purposes, disbursements must be billed at their actual, rather than estimated, costs (August 10, 2012 Discipline Advisory)

The Code distinguishes disbursements from "Other Charges." "Other Charges" are internal charges that a firm is entitled to bill, not disbursements paid on behalf of the client to a third party. Binnie, J. in *R. v. Neil,* discussed the duty of candour with respect to matters relevant to the retainer. Fees are relevant to the retainer; accordingly disclosing the law firm's fees and internal charges to the client is part of the lawyer's fiduciary duty of candour.

The provision regarding disbursements and "Other Charges" is based on the Federation of Law Societies' Model Code. At the time of writing this column, five of the six provinces that have adopted the Model Code have adopted this provision. A Law Society of Alberta practice advisor has informed us that Alberta lawyers have been following the same provision with respect to what may be charged as disbursements for more than 22 years and it's working well.

Do law firm management companies qualify as third parties for the purposes of billing disbursements? For example, can the management company bill the law firm for items such as photocopies at more than the actual cost and then, in turn, the law firm bill these charges as a disbursement to the client?

This question has been referred to the Ethics Committee. As the law firm management company is not at arm's length, a lawyer's duty of candour would require the lawyer to disclose to the client the lawyer's direct or indirect financial interest in the management company and the charges that the firm wishes to bill.

If a lawyer incurs travel expenses at the client's request, such as airline tickets, hotel accommodation and meal expenses, are they "disbursements" or "Other Charges"?

The charges would be disbursements as the lawyer would have paid a third party provider for the services, i.e. an airline, a hotel and restaurants.

If a lawyer charges clients for photocopies that are tracked to the client files and billed to the law firm by an arm's length third-party provider, but the photocopier is physically in the lawyer's office, is that a disbursement?

Yes.

Are there resources on the website to assist us with fee agreements and billing?

Yes, see the following:

- Trust Accounting Handbook (www.lawsociety.bc.ca/page.cfm?cid=592);

continued on page 10

FROM THE LAW FOUNDATION OF BC

Financial update: Law Foundation facing financial pressure

THE LAW FOUNDATION has seen its income decline significantly in recent years, as a result of consistently low interest rates. The Foundation has had to make some difficult decisions about funding for the 73 programs and 50 or so projects that it supports each year. These programs provided legal assistance to over 70,000 people last year, as well as supporting significant work in the other mandate areas of the Law Foundation – legal education (both public and professional), legal research, law reform and law libraries. The Foundation's annual budget is currently over $20 million, but in 2012 its income was only $16.3 million ($12.8 million from interest on trust accounts).

Fortunately, the Law Foundation has a Grant Stabilization Fund to stabilize grants during fluctuations in income. Over each of the past four years, the Foundation has had to use the Stabilization Fund to maintain funding for its programs. To date, the Fund has been reduced from $42 million to $31.7 million, and the Foundation anticipates having to use another $10 million in 2013.

The Foundation has taken a variety of steps to limit costs and increase revenue. It continues to negotiate with financial institutions to improve rates paid on lawyers' trust accounts, as well as exploring other sources of revenue. At its November 2012 meeting, the Foundation's Board reduced the Large Project Fund to $500,000 (down from $750,000) and the Small Project Fund to $60,000 (down from $150,000). In total, the Board voted to reduce various funds and other grants by over $500,000 for 2013. The Foundation also watches its own costs, and ensures that its operations adhere to the 10% administrative costs guideline expected of all its grantees. The Board is also considering how to operate on a lower budget if its grants cannot be met by its income.

Despite low interest rates, the Law Foundation was able to maintain funding to numerous programs in 2012. For details, see the 2012 Annual Report, which will be published on the Law Foundation's website at www.lawfoundationbc.org this spring.❖

BC Code ... from page 9

- Retainer agreement – General (www.lawsociety.bc.ca/docs/practice/resources/retainer-general.pdf);
- How does a lawyer bill for disbursements and "Other Charges" under the BC Code? (www.lawsociety.bc.ca/docs/practice/resources/Code-disbursements.pdf);
- Sample Statement of Account (www.lawsociety.bc.ca/docs/practice/resources/Sample_Statement_of_Account.pdf);
- Proper recording and billing of disbursements required by rules, August 10, 2012 Discipline Advisory (www.lawsociety.bc.ca/page.cfm?cid=2546); Winter 2012 Practice Watch – Fees, disbursements and interest (www.lawsociety.bc.ca/page.cfm?cid=2629);
- How to handle aged trust accounts, January 11, 2013 Discipline Advisory (www.lawsociety.bc.ca/page.cfm?cid=2665);
- Bills and retainers are frequent source of complaints, December 7, 2011 Discipline Advisory (www.lawsociety.bc.ca/page.cfm?cid=2339);
- Lawyers must disclose commissions in investor immigrant matters, July 18, 2011 (www.lawsociety.bc.ca/page.cfm?cid=2251).

The sample retainer agreement and sample statement of account are intended to give lawyers a place to start. It's expected that lawyers will amend the sample documents to mesh with their styles, needs and circumstances.

In a fee review, will a registrar take into account the Code requirements regarding fees, disbursements and "Other Charges"?

We don't know if or how a registrar will take the Code into account. Section 71(2) of the *Legal Profession Act* provides that the registrar must allow fees, charges, and disbursements for services:

> (a) reasonably necessary and proper to conduct the proceeding or business to which they relate;
>
> (b) authorized by the client or subsequently approved, whether or not reasonably necessary and proper to conduct the proceeding or business to which they relate.

However, subsection (2) is subject to section 71(4) and (5). Subsection (4) sets out circumstances that the registrar must consider at the review (e.g. the time reasonably spent), but the registrar is not limited to those circumstances. Further, subsection (5) makes it clear that a registrar's discretion is not limited by the terms of an "agreement" (a defined term) between the lawyer and client. Section 64(1) defines an agreement as follows:

> "agreement" means a written contract respecting the fees, charges and disbursements to be paid to a lawyer or law firm for services provided or to be provided and includes a contingent fee agreement.

"Charges," also defined, includes, but is not limited to, taxes on fees and disbursements and interest on fees and disbursements.

I employ paralegals and want to bill for their work on client files. Where do I show the charge?

A paralegal is your employee, so the charge isn't a disbursement. You may include these charges as a subcategory entitled "Other Charges" under the fees heading or in the fees heading.

Rule 3.6-4 says that, if a lawyer acts for two or more clients in the same matter, the lawyer must divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise. If I act for two spouses jointly, must I divide the fee between them if I don't have an express retainer agreement?

Ask the spouses how they want to be billed. In the future, this is a good question to ask all clients for whom you act jointly, at the beginning of your relationship. This rule isn't new. It's the same language as in the Handbook (Chapter 9, Rule 5).

Rule 6.1-3(o) provides that a lawyer must not permit a non-lawyer to issue a statement of account. Can a paralegal sign a lawyer's statement of account? Be the sole signatory on a lawyer's trust cheque?

A paralegal or designated paralegal can prepare a draft bill for a lawyer's review, but the lawyer must determine what he or she will charge the client. After the lawyer approves the bill for delivery, a non-lawyer may sign the account on the lawyer's behalf if the supervising lawyer has delegated that authority. Section 69(3) of the *Legal Profession Act* provides that a bill must be signed by or on behalf of the lawyer, or be accompanied by a letter signed by or on behalf of a lawyer, that refers to the bill. Trust cheques must be signed by a practising lawyer (www.lawsociety.bc.ca/page.cfm?cid=2305).

My paralegal sometimes refers clients to me. Can I pay a referral fee to a paralegal or legal assistant employed by me?

No. Rule 3.6-7 prohibits a lawyer from giving a financial or other reward for the referral of clients or client matters to any person other than another lawyer. The rule's commentary makes it clear that a lawyer may pay an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice.

Can a lawyer require a client to provide a credit card number in a retainer agreement, so that the lawyer can charge the credit card if the client doesn't pay the bill?

A lawyer could include such a requirement in the retainer agreement; however, the conditions upon which the lawyer would apply the charges should be clearly disclosed. Further, if the bill's amount is in dispute, it may be inappropriate to apply the credit card, and instead the lawyer should try to resolve the matter or seek a review by the registrar.

CONTACTING AN OPPONENT'S EXPERT

The Handbook had rules about contacting an opponent's expert (Chapter 8, Rules 14 to 18). Are these rules replicated in the Code?

Experts aren't singled out in the Code, and it's not a requirement that counsel advise opposing counsel in advance of contacting an opposing party's expert. Section 5.3 covers interviewing witnesses. Subject to the rules on communication with a represented party, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

It would be courteous and appropriate, though not required, for a lawyer to

continue to follow the former rules and advise opposing counsel about contacting an expert. Also, it could help avoid unnecessary conflict.

This topic has been referred to the Ethics Committee. The Federation's Standing Committee on the Model Code will also review this area as part of the desire to have a consistent approach for litigators throughout Canada.

DEFAULT JUDGMENT

The Professional Conduct Handbook, Chapter 11, Rule 12, provided that a lawyer who knows that another lawyer has been consulted in a matter must not proceed by default without inquiry and reasonable notice. Rule 12 wasn't carried forward into the Code. What is a lawyer's obligation to opposing counsel?

Though it is not expressly stated in the Code, the course presenters expressed a view that a lawyer should make inquiry and provide reasonable notice to opposing counsel. A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice, avoid sharp practice and waive procedural formalities and similar matters that do not prejudice the rights of the client (see rules 2.1-4 and 7.2-1). Lawyers have been disciplined for not adhering to the former Handbook rule. The Ethics Committee will recommend to the Benchers that language be expressly added to the Code similar to the former Handbook rule.

MORTGAGE TO SECURE LEGAL FEES

Are there any rules around accepting property in payment of legal fees?

Code rule 3.4-30 requires a lawyer to recommend that a client receive independent legal advice if the client intends to pay for legal services with property instead of cash. The lawyer should also check whether a court order prevents him or her from creating or registering a mortgage on the property. Here is an example of a situation that went wrong.

In 2006, to secure his fees, a lawyer registered a $20,000 mortgage in favour of his law firm against a family home owned by his client and the client's wife, the opposing party. However, a 2005 court order mutually consented to by the parties, restrained and enjoined them from disposing of, encumbering, assigning, or in any similar manner dealing with family assets until further order of the court. The law firm mortgage was in breach of the court order and should never have been created or registered. In 2009, the court declared the law firm mortgage null and void.

In October 2011, a Law Society discipline hearing panel found that the lawyer's action in permitting the execution and registration of the mortgage constituted professional misconduct. Lawyers are officers of court and owe a duty to maintain the integrity of the legal system. For more details, read the discipline summary in the Spring 2012 *Benchers' Bulletin* or see the decision (*CIBC Mortgages Inc.* v. *Hemming*, 2009 BCSC 1726).

GENERAL QUESTIONS ON THE CODE

Will changing from the Professional Conduct Handbook to the Code make any difference to practice and ethics in BC?

It should have a positive impact. The Practice Advice department receives over 6,000 inquiries a year from lawyers asking for help related to practice and ethics, so lawyers are clearly interested in complying with their obligations. The Code's design, with commentary on how a rule operates, is more informative than the Handbook and should give lawyers a better understanding of their responsibilities. Also, law schools must have an ethics course for all students by 2015, and we understand that the Model Code will be used for teaching. This should result in a consistent approach across Canada and a better and greater understanding of ethical issues.

Are the Code rules and the commentary of equal weight?

During the *BC Code* course, the presenters expressed their view that the rules and the commentary are of equal weight, but explained that this question has been referred to the Ethics Committee for its opinion.

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 *Code of Professional Conduct for BC* 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.

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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.

Justice reform

Independence and the modern justice system – in step or at odds?

This article is based in part on the submission by the Law Society of British Columbia to Geoffrey Cowper, QC in development of his report: A Criminal Justice System for the 21st Century.

CONCERN ABOUT ACCESS to justice and affordable legal services has prompted much discussion about justice reform, not only in BC, but indeed across Canada and around the world.

In the UK, a criminal justice watchdog is to be appointed with the aim to help overhaul the justice system. This new criminal justice board will feature a senior judge and recommend reforms to improve accountability, make better use of technology and reduce unacceptable delays.

In Australia, the government is set to launch an inquiry into the impact that higher Federal Court fees have had on Australians' access to justice over the past three years. And an Australian Supreme Court judge recently ordered the trial of an alleged serious criminal be delayed indefinitely until the cash-strapped Victoria Legal Aid can provide him with further legal assistance.

Here at home, over the last year we have seen the government Green Paper *Modernizing British Columbia's Justice System*, Geoffrey Cowper, QC's report *A Criminal Justice System for the 21st Century*, Parts one and two of the Ministry of Justice's White Paper on Justice Reform, the passage of the *Civil Resolution Tribunal Act* and, this month, the third reading of the *Justice Reform and Transparency Act,* which provides for the establishment of the Justice and Public Safety Council to

examine and suggest improvements to the functioning of the justice and public safety sector.

The Law Society is actively engaged in looking at ways in which access to legal services can be improved. Expanding the range of legal services that articled students and designated paralegals are permitted to provide under the supervision of a lawyer, looking at pro bono funding, and considering whether it is in the public interest that non-lawyer legal service providers be regulated are examples of the efforts underway at the Law Society.

But as all of the reports and publications over the last year acknowledge, reforming the justice system invariably raises the question of the independence, autonomy and control of the various bodies involved in the system.

THE TWO FACES OF JUDICIAL INDEPENDENCE

There are, of course, two aspects to judicial independence: adjudicative or individual independence and administrative or institutional independence.

Adjudicative or individual independence of the judiciary encompasses the security of tenure and the financial independence of judges. As the Chief Justices and Chief Judge stated in their letter on judicial independence, "It is easy to see how [these] are important to ensure judges are free from government or private pressures affecting their impartiality."

Administrative or institutional independence was described in *Valente* v. *The Queen*, [1985] 2 SCR 673, as "control over the administrative decisions that bear directly and immediately on the exercise of the judicial function." As such, the institutional independence necessary to maintain a constitutionally sound separation between the judiciary and other branches of government includes:

1. the assignment of judges to hear particular cases;
2. the scheduling of court sittings;
3. the control of court lists for cases to be heard;
4. the allocation of courtrooms; and
5. the direction of registry and court staff in carrying out these functions.

Administrative functions that do not directly and immediately affect the exercise of the judicial function fall outside the institutional independence of the courts and include the financial aspects of court administration and the personnel aspects of administration.

As a result, it is inevitable and necessary that the judicial and other branches of government must work together in carrying out judicial administration. As McLachlin J. (as she then was) noted in another decision, it is "impossible to conceive of a judiciary that is devoid of any relationship to the executive and legislative branches of government."

RECONCILING INDEPENDENCE AND ACCOUNTABILITY

In its submission to what was eventually published by Cowper under the title *A Criminal Justice System for the 21st Century,* the Law Society addressed the issue of individual and institutional independence in the face of change.

"If the public does not have confidence in the justice system and does not therefore feel it is relevant to them, the independence of all the stakeholders in the system is meaningless."

– Bruce LeRose, QC

"It's our opinion that independence cannot preclude discussing how organizations that are independent can improve performance and reduce any inefficiencies that may exist, or be perceived to exist, in their operations," said Bruce LeRose, QC, former president of the Law Society, in the submission. "Stakeholders in the justice system must be prepared to recognize that the public expects some measure of accountability."

The government's Green Paper recognized this in suggesting that independence can stand in the way of the required environment of shared management information, diagnostic skills and capacity to implement reforms, and can therefore be an impediment to measuring and evaluating justice system performance in ways that meet the standards commonly applied to public institutions.

The Chief Justices and the Chief Judge also acknowledge that everyone recognizes there is a requirement for accountability for the allocation and disposition of the resources, human and otherwise, necessary to the proper functioning of the courts. As they stated in their letter, "There is bound to be continuing tension between the uncertain and varying demands for the resources, and the constraints on those who must budget for the supply of those resources." However, accountability has to be constrained by what is permitted by the *Constitution.*

A number of ways to improve the justice system have been raised over the last few years. Proposals for case management, docketing, judicial specialization and monetary increases to small claim jurisdictions have all been discussed in the past. Some have been raised by the government, and some have been raised by the judiciary. Rather than the separate parts of the judicial system presenting, without consensus, proposed improvements and efficiencies, the Law Society favours an approach that would have all participants look seriously at their operations and together develop innovations designed to improve the efficiency of the system.

"Change needs to come from within and cannot be imposed from outside. However, it also must be recognized that a dialogue must take place in order to develop ways to improve the justice system to allow it to resolve disputes in a timely and affordable manner and thereby allow the public to retain confidence in the system," explained LeRose. "If the public does not have confidence in the justice system and does not therefore feel it is relevant to them, the independence of all the stakeholders in the system is meaningless."

Summarizes LeRose, "Striking the right balance cannot be done in a vacuum when there are many stakeholders involved in the system."

The Law Society remains optimistic that the upcoming Justice Summit, in which the Law Society will be participating, and the programs and processes set out in the recently introduced Bill 15, the *Justice Reform and Transparency Act*, will facilitate greater dialogue and discussion about how to reconcile the necessary independence of the courts with the public accountability of the government.❖

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Canada's new anti-spam law

♫ Spam! Spam! Spam! Spam!
Lovely Spam! Lovely Spam!... ♫

Lyrics, music and recorded by Monty Python

CANADA'S NEW ANTI-SPAM law was passed in December 2010. According to the website fightspam.gc.ca, the date it comes into force will be set in the coming months.

Once the regulations are published in final form, there will be a period of time for businesses to review their activities and prepare for the Act. This gives law firms the opportunity to adjust their practices to comply with the Act.

What does the Act do?

There are three principal groups affected by the Act. One is anyone who sends commercial electronic messages. The other two deal with those who alter transmission data or are involved with the production and installation of computer programs. For the purposes of this column, we are only going to look at the first, the sending of commercial electronic messages.

The Act is aimed at promoting e-commerce by deterring spam, identity theft, and other malicious activities, such as phishing (the harvesting of passwords and personal information such as banking records), spyware, botnets and misleading online commercial representations. Its intent is to drive spammers out of Canada.

When does the Act come into force?

The Act comes into force on proclamation, which is expected to be in late 2013 or early 2014. Once in effect, the Act incorporates a three-year period that imputes consent to send commercial electronic messages. But if a recipient of an email message states that they don't wish to receive any further commercial messages, this period, as it relates to this person, comes to an end.

What are the penalties?

The Canadian Radio-television and Telecommunications Commission (CRTC) will have a number of compliance tools, but the one that may be of most interest are the administrative monetary penalties. The penalties are significant. The maximum penalty is $1 million dollars per violation for an individual and $10 million per violation for entities (such as corporations).

There is also potential vicarious liability in the new Act. This includes directors, officers, agents or mandataries of a corporation and employers of people acting within the scope of employment. To avoid directors/officers/employers liability, law firms would need to show that they undertook due diligence before sending an offending message.

The relevant factors in determining a penalty include the purpose of the penalty, the nature and scope of the violation, the history of the sender, the financial benefit accruing from the communication and, not least of all, the ability to pay. The sender may also enter into an undertaking with the CRTC regarding future compliance.

Once the regulations are published in final form, there will be a period of time for businesses to review their activities and prepare for the Act. This gives law firms the opportunity to adjust their practices to comply with the Act.

What about private rights of action?

A private individual affected by a contravention will be able to apply to court for compensation. Remedies include maximum penalties of $200 per contravention with a maximum $1 million per day for spam and $1 million per act of aiding, inducing and procuring breach of spam (and malware, spyware or message routing).

What is a commercial electronic message?

A commercial electronic message is an email that encourages participation in a commercial activity. Presumably, any marketing email sent out by a law firm would fall into this category, including those aimed at clients, prospective clients and subscribers to email lists or newsletters. It includes messages containing text, sound, voice or images.

It does not matter if the spam messages originate within or outside of Canada, so long as they are received in Canada. It also does not matter if the spam message was sent with no expectation of profit (for example, holiday greeting messages).

What will be the requirements on law firms when sending out commercial electronic messages?

The law firm will need consent from the recipient before sending a message. Further, the firm will be required to include within the message information that identifies the sender and allows the recipient to opt out of any future messages.

Are there any exceptions to obtaining consent?

Yes, there are a number of exceptions. Messages between family members or those with personal relationships, for example. There are others listed in the Act, though much will depend on the regulations (which are still in draft form).

Consent is implied in certain circumstances. For example, consent would be implied if you had a business opportunity with someone in the last two years; had an inquiry in the previous six months from the recipient; or had an engagement with the person that ended in the last two years. But a law firm should ensure that it has explicit consent or falls clearly within an implied consent exemption before sending email to someone who is not currently a client.

continued on page 16

FROM PPC CANADA, EMPLOYEE AND FAMILY WELLNESS PROGRAMS

How to recognize and cope with stress

STRESS IS A natural part of our everyday life. Without any stress, life could lack challenge and excitement, but too much of it can be unpleasant and tiring. Stress is a physical and psychological response to a demand, a threat, or some kind of problem that requires a solution. It stimulates you and increases your level of awareness. The body's reaction to stress is called the "fight or flight" response. These responses occur whether the stress is positive or negative in nature. Positive stress provides the means to express talents and energies and pursue talents. However, continual exposure to high or low and repetitive stress decreases the body's ability to cope in general.

RECOGNIZING STRESS

Short-term reactions to stress include faster heartbeat, increased sweating, rapid breathing and tense muscles. Long-term responses may include digestive problems, fatigue, increased blood pressure, sleeplessness or headaches. At the same time, a person may experience psychological responses, such as fear, worry, depression, irritability or despair. Excess stress can seriously interfere with your ability to perform effectively. It can affect your health, vitality and peace-of-mind, and personal and professional relationships.

HELPFUL STRATEGIES

The art of stress management is to keep yourself at a level of activity that is healthy and enjoyable. Stress is a process that escalates over time, so try to be aware of its early signs and make the necessary changes. Everyone handles stress differently, some better than others. Here are some tips to counteract the effects of stress on your body and your psyche.

- **Express yourself** – You need someone to talk to, who will listen thoughtfully. Discussing your concerns with another person can be therapeutic to your emotional state and can have a calming effect on you physically.
- **Talk it over with yourself** – We often have no control over the unpleasant events that happen in our lives, but we can change what we say to ourselves about these events. All our feelings are greatly affected by what we say to ourselves. Avoid:
  - Catastrophizing: "This is the worst thing that ever happened to me." Take a step back and approach things in perspective.
  - Generalizing: "My brother doesn't like me, therefore, no one will." Try to remain rational and realistic in your thoughts.
  - Projecting: "I'm sure this isn't going to work out." Instead, try giving yourself positive affirmations, such as "I am doing the best I can in these circumstances, and I can be proud of that," or " I am a good person, with good intentions." You can always control what you put into a situation, but you can rarely control the outcome. Focus positively on what you can control.
- **Start exercising** – Walk your dog, go dancing, join a gym. Slowly increase your exercise level to include at least 20 minutes of exercise (preferably aerobic), three to five times per week.
- **Eat healthy** – Reduce your alcohol intake and try to avoid sedatives. Reduce your consumption of caffeine and foods with an unhealthy proportion of refined sugar. Increase consumption of whole grains, healthy fats, nuts, fruits and vegetables.
- **Get in touch** – Hug someone, hold hands or stroke a pet. Physical contact releases the hormone Oxytocin (sometimes referred to as the love hormone), which is a great way to relieve stress.
- **Practise rest and relaxation** – Take six deep breaths. Breathe slowly and deeply in through your nose, and out through your mouth. Use your imagination to place yourself on the beach, or in some other pleasant place. Close your eyes and imagine the scene in detail, including all your senses. In just a couple of minutes you can re-experience the pleasure of actually being there. Try to get at least seven hours of sleep nightly.

continued on page 16

Cloud computing checklist now available

LAWYERS AND LAW firms considering cloud computing should consult the Law Society's new cloud computing checklist. While cloud computing offers an array of benefits, there are also risks when a lawyer stores data with a third party, including security, privacy and regulatory compliance. The cloud computing checklist details many of the issues lawyers and law firms should consider before moving data into the cloud.

Cloud computing involves accessing data processing and storage applications via the internet. Multi-member virtual firms may use cloud computing to, for example, share documents among lawyers.

The Law Society first considered the implications of cloud computing in 2010 when a working group was struck to look into what rules and policy the Law Society will need for BC lawyers who are using cloud computing and/or remote processing and storing of business records; and to consider BC lawyers' use of electronic storage, both in and outside of the province.

The report of the working group was subsequently released in July 2011. One of the recommendations was to publish guidelines to assist lawyers in performing due diligence when deciding whether or not to use a third party service provider for electronic data storage and processing, including cloud computing.

The Cloud Computing Checklist is available on the Law Society's website Lawyers > Practice Support and Resources > Technology.❖

Spam ... from page 14

What comprises express consent?

The CRTC has indicated that it requires a positive or explicit indication of consent, such as the use of an opt-in consent mechanism. Specifically, a subscription email, text message or other equivalent cannot be used to elicit consent.

You will need to provide the reason or purpose for the consent as well.

What about opt-out disclosure?

Each message must incorporate (directly or via a website link) the identification of the sender, the mailing address and phone, email or web address of the sender and an unsubscribe mechanism.

What should law firms do in the meantime?

Law firms should obtain express consent from clients and others so they can continue to communicate by email. Law firms should be undertaking an audit of their online communications, such as automated messages and client newsletters. Websites and blogs should have an opt-in mechanism to receive newsletters and communications from the firm.

Law firms should review their privacy policies and update their processes to incorporate consent from clients or prospective clients. They should add unsubscribe clauses to their communications. Firms need to provide training for lawyers and staff on the new Act. Principally, law firms need to consider the impact of the new Act and plan for the changes it will bring in their business processes.❖

Stress ... from page 15

- **Learn to laugh** – Watch a comedy and make sure that others are with you (you'll likely laugh more). Laughter is an excellent way to get your mind off life's stresses and it is proven to aid in improving circulation and increasing relaxation.
- **Get up and stretch!** – Stand up. Raise your arms above your head. Stretch the left side of your body and hold for 30 to 60 seconds. Now, stretch the right side of your body and hold. Repeat these stretches several times throughout the day. You will be amazed at the stress-relieving effects of stretching.
- **Stop smoking** – Nicotine is a stimulant (as well as a neurotoxin for that matter), and can *increase* your level of anxiety.

SEEK HELP IF NEEDED

Seek help from family, friends and support groups. Make time in your week to have fun and socialize with friends. Choose to seek support from positive individuals.

If you feel overwhelmed by your situation, do not hesitate to get professional help. Depression and anxiety are common effects of chronic stress. Many people choose to seek professional help during stressful periods in their lives. Contact your member's assistance provider, PPC Canada, to make arrangements to speak to a counsellor.

PPC CANADA CAN HELP WITH STRESS AND ANXIETY

Did you know that, as a member of the Law Society of BC, you and your immediate family members are eligible to receive free professional assistance?

PPC Canada provides services to assist with all of life's challenges, including how to become more resistant to everyday stress. Below are some of the ways that PPC can assist you and your family:

- Financial issues: consultation with certified financial professionals for debt management and financial planning.
- Nutritional coaching: consultation and nutritional planning with a registered dietician.
- Quitting smoking: PPC's "Quitcare" program helps individuals to kick the habit with the help of trained coaches.
- Counselling services: to assist you in becoming more stress resilient and to help create strategies to relieve anxiousness or any other related issues

For more information, call PPC at 1.800.663.9099 or visit their website at www.ca.ppcworldwide.com.❖

Conduct reviews

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

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

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

TERENCE LA LIBERTÉ, QC

The subject of this conduct review summary has consented to publication of his name in a more detailed summary for the purposes of educating and guiding the profession.

The conduct review was held on September 27, 2012 to discuss Terence La Liberté's conduct during an incident on November 21, 2011. On that day, La Liberté met a female acquaintance for lunch, and over the course of the afternoon he consumed substantial alcohol. When they returned to his car, a dispute arose between them, and she declined to get into the car. He began to drive away with the passenger door open, and she ran alongside screaming for help as her bag was in the trunk of the car. He stopped the car and got out, and they continued the dispute. People began to gather. A man in the crowd said the police had been called, and La Liberté assaulted him and another person. The police arrived and took La Liberté into custody. Because of La Liberté's prominence, this incident received significant news coverage.

As a result of this incident, La Liberté recognized what he admitted was a problem with alcohol, and he checked into a residential treatment centre. He cooperated with the police investigation, was charged with two counts of assault and was diverted. He apologized to all those involved at the scene, including the police officers.

La Liberté cooperated with the Law Society investigation and acknowledged his misconduct. He has taken significant steps to deal with his alcohol addiction and continues to do so. He has entered into a monitored recovery agreement with the Lawyers Assistance Program (LAP), agreed to random alcohol and drug testing, and is an active participant in LAP. Although he has been a long-term alcoholic, the steps he has taken to deal with his addiction since the incident show a serious, determined and sustained effort to ensure that there will not be a reoccurrence. By his conduct after the incident, he has shown that a citation is not necessary to protect the public interest as he has addressed in a meaningful way the underlying cause of the misconduct.

BREACH OF TRUST ACCOUNTING RULES

A lawyer failed to deposit funds in trust, contrary to Rule 3-51(1). Instead the funds were mistakenly deposited by a legal assistant into the general account and subsequently withdrawn to pay expenses. The lawyer was undergoing serious health and personal problems and voluntarily ceased practice. The lawyer made an assignment in bankruptcy, but has subsequently reimbursed the Lawyers Insurance Fund for the amounts paid to the client for the retainer. The lawyer has undertaken not to practise law without first receiving the approval of the Practice Standards Committee. (CR #2012-71)

A lawyer improperly withdrew trust funds prior to delivery of a bill, contrary to Rule 3-57(2), maintained trust balances with inactive balances without making any effort to determine to whom the funds belonged, failed to report trust shortages, contrary to Rules 3-56 and 3-66, failed to maintain his books and records in accordance with Division 7 of Part 3 of the Rules, and failed to prepare monthly trust reconciliations, contrary to Rule 3-65. The lawyer retained a certified general accountant, a bookkeeper and an assistant to assist him with his trust accounting and implemented numerous changes to his practice. The lawyer was encouraged to retain experienced accounting staff. A conduct review subcommittee made it clear to the lawyer that he was personally responsible to ensure his books and records are kept in accordance with the Rules. (CR #2013–04)

A lawyer failed to maintain adequate documentation for payments from trust to a person providing litigation support services, allowed client files to be kept in an unsecured location where others could have gained access to confidential client files and failed to obtain his client's consent to the disclosure of confidential information to the litigation support person. The lawyer has brought his accounting practices and books into proper order and has taken a course for solo practitioners. (CR #2013–06)

BREACH OF UNDERTAKING

A lawyer breached an undertaking by unilaterally altering a release and disbursing settlement funds to a client prior to returning a release to the opposing party. The lawyer has changed his office practices so that he is more engaged in settlement proceedings, the processing of cheques and the flagging of undertakings. (CR #2013-02)

CONDUCT UNBECOMING

A lawyer was criminally charged with assault. Alcohol was involved. The lawyer immediately reported the charges to the Law Society. He demonstrated remorse and contacted the Lawyers Assistance Program. A conduct review subcommittee was satisfied that the lawyer knew that his conduct was unprofessional and wrong and that he had a substance abuse problem that could affect his behaviour or judgment in his personal and professional life. (CR#2012-70)

CONFLICT OF INTEREST

A lawyer acted for a client in respect of a loan made to the client by his and his assistant's family members, contrary to Chapter 7, Rule 1 of the *Professional Conduct Handbook* [section 3.4 of the new *BC Code*]. The lawyer has now instituted a policy not to act for family, friends, relatives, associates or contractors of the firm. The lawyer was encouraged to take the Communication Toolkit and Small Firm Practice Course to improve communication with clients and as a refresher on conflicts and trust accounting practices. (CR #2013-08)

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Credentials hearings

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.

MICHAEL GRANT GAYMAN

Bencher review: October 10, 2012
Benchers: Art Vertlieb, QC, Chair, Kathryn Berge, QC, David Crossin, QC, Leon Getz, QC, Peter Lloyd, Catherine Sas, QC and Tony Wilson
Report issued: December 13, 2012 (2012 LSBC 30)
Counsel: Henry Wood, QC for the Law Society; Richard Lindsay, QC and Max Hufton for Michael Grant Gayman

BACKGROUND

In December 2011, a hearing was held to consider the application for reinstatement to the Law Society by Michael Grant Gayman. Gayman was disbarred in 1999 for conduct unbecoming a lawyer. Specifically, while acting as a trustee, he knowingly breached a trust instrument resulting in the loss of approximately $1 million to 20 investors.

In the decision of the hearing panel (application for reinstatement 2012 LSBC 12; Credentials hearing: 2012 No. 2 Summer), it was found that, based upon the exceptional circumstances of the case, Gayman should be reinstated, but only under strict conditions.

The Law Society sought a review of the decision of the hearing panel allowing the reinstatement of Gayman.

DECISION

The review panel did not agree with the Law Society's contention that, in the context of a reinstatement application, a hearing panel must engage in two separate enquiries: first, a determination of whether the requisite requirements of good character, repute and fitness are currently demonstrated; second, an assessment of whether the original misconduct renders it appropriate to deny readmission to "sustain public confidence in the integrity of the profession."

The review panel was of the view that the decision of the hearing panel was correct. The hearing panel engaged in a thorough and detailed review of the facts, as well as a comprehensive analysis of the relevant jurisprudence. It considered the past behaviour of Gayman and his efforts and achievements towards rehabilitation, and weighed that against the public interest. The hearing panel's analysis of the facts and their reasoning were sound and the review panel adopted them.

Accordingly, the review panel confirmed the decision of the hearing panel that Gayman be reinstated to membership in the Law Society, subject to the conditions stipulated by the hearing panel.

ANDREW PAVEY

Called to the bar (Nova Scotia): March 18, 1980
Hearing (application for call and admission): September 10 and 11, 2012
Panel: William S. Maclagan, Chair, Jasmin Z. Ahmad and Lance Ollenberger
Report issued: December 21, 2012 (2012 LSBC 33)
Counsel: Jason Twa for the Law Society; Henry Wood, QC for Andrew Pavey

In 2000, a hearing panel of the Nova Scotia Barristers' Society found Andrew Pavey guilty of professional misconduct and conduct unbecoming a barrister. The panel concluded that Pavey had assisted a former client with the purchase of crack cocaine, used crack cocaine with the client and had sexual relations with that client. Pavey was suspended from the practice of law in Nova Scotia for 18 months and subjected to conditions for reinstatement.

In 2001, Pavey returned to BC and established a mediation practice. He also formed a family mediation society and recruited a board of directors. Pavey did not disclose his past discipline history in Nova Scotia to the board members. An anonymous email to the board members in 2003 contained a newspaper article outlining his legal situation in Nova Scotia. When this information became public, the non-profit society lost its government funding.

In 2003, Pavey was reinstated to the Nova Scotia Barristers' Society. He then applied for call and admission on transfer to the Law Society of BC. In July 2005, a BC hearing panel denied his application on the basis that he did not meet the standard for admission.

In 2005, the Supreme Court of BC ordered that Pavey be prohibited from practising law in BC until such time as he became a member in good standing of the Law Society.

Pavey then returned to the practice of law in Nova Scotia as a sole practitioner, primarily doing legal aid work and family law.

In 2010, Pavey again submitted an application to practise law in BC. In light of his past conduct and previous discipline history with the Nova Scotia Barristers' Society and the Law Society, this matter was referred for a credentials hearing.

The panel considered evidence that Pavey had:

- overcome addiction and mental health issues;
- admitted that his conduct was wrong with respect to engaging in the unauthorized practice of law;
- been candid with colleagues and clients regarding his past conduct and discipline history;
- practised law in Nova Scotia since 2005 without any reports or complaints of improper conduct;
- operated his mediation practice in BC without any complaints about his conduct.

The panel also placed significant weight on the evidence given by character witnesses who had worked closely with Pavey since 2005. The

witnesses testified that Pavey had been open and candid about his past issues and they had no concerns about his conduct or interactions with clients.

Notwithstanding Pavey's past conduct, the panel was satisfied that he had rehabilitated himself. The panel found that it was particularly significant that Pavey had practised law in Nova Scotia and conducted a mediation practice in BC without incident or complaint for seven years.

The panel concluded that, as of the date of the hearing, Pavey had met the burden of proving that he was of "good character and repute and fit to become a barrister and a solicitor of the Supreme Court." The panel ordered that the application for call and admission be granted.

WILLIAM JOHN MACINTOSH

Formerly of Surrey, BC
Called to the bar: December 19, 1985
Ceased membership: January 1, 2008
Hearing (application for reinstatement): December 14, 2012
Panel: Phil Riddell, Chair, Stacy Kuiack and Brian J. Wallace, QC
Report issued: January 21, 2013 (2013 LSBC 02)
Counsel: Jean P. Whittow, QC for the Law Society; Henry C. Wood, QC for William John Macintosh

In June 2006 a client of William John Macintosh complained to the Law Society that Macintosh failed to file documents on his behalf in Federal Court for leave and judicial review of a decision of the Minister of Immigration. The leave application was dismissed for want of prosecution. Macintosh misrepresented to the client that he had not received the Federal Court decision dismissing the leave application. He advised his client that an application could be made to the Immigration Minister, but he procrastinated and did not make the application.

Macintosh rendered bills to the complainant totalling $1,925, although he had not completed the work for which he had been retained. The Lawyers Insurance Fund repaid the amount the complainant had paid to Macintosh. Despite difficult financial circumstances, Macintosh has since repaid the Lawyers Insurance Fund.

Macintosh became an inactive member of the Law Society in November 2006, and in 2008 ceased to be a member for failure to pay fees. The panel found that, had Macintosh remained a member, his conduct would have resulted in a citation and a suspension.

At the hearing, Macintosh explained, but did not seek to justify, that his conduct at the time of the complaint resulted from being overwhelmed by anxiety and depression. He was being treated for depression but not for anxiety.

Macintosh's psychiatrist was of the opinion that Macintosh suffers from chronic, recurring and relapsing general anxiety disorder with concurrent depressive symptoms. The physician concluded that the anxiety disorder has been stabilized by medication and that, if Macintosh maintained his current treatment, there was no reasonable likelihood that he would repeat the problematic behaviours.

In the panel's view, the material that Macintosh filed with his application for reinstatement demonstrated his ability to perform professionally at a high level of competence and his appreciation of the ethical standards required. His application was accompanied by six thoughtful letters of support from lawyers who knew him and were aware of the circumstances leading up to his leaving the profession.

The panel was satisfied that Macintosh was of good character and repute and that he was fit to practise as a barrister and a solicitor of the Supreme Court, subject to the condition that he:

1. takes all anxiety-related medication recommended by his physician for at least two years;
2. directs his physician to advise the Law Society immediately if he is not taking the medication and to deliver annual reports to the Society confirming compliance for two years;
3. practises only immigration law;
4. practises under the supervision of a lawyer approved by the Law Society.

Macintosh requested that certain personal and privileged information disclosed at the hearing not be made public. The panel concluded that, beyond the references in the decision, disclosure of that information was not required. The panel summarized some of the sensitive personal information in its decision in order to make its reasoning understandable.

APPLICANT 4

Hearing (application for enrolment): November 21, 2012
Panel: Herman Van Ommen, Chair, John Ferguson and John Hogg, QC
Report issued: January 23, 2013 (2013 LSBC 03)
Counsel: Henry Wood, QC for the Law Society; Joseph Doyle for Applicant 4

Applicant 4 submitted an application for enrolment in February 2011. He disclosed that, in 2007, he had received a violation ticket for failing to remain at the scene of an accident, which was dismissed, and a charge of impaired driving, which was stayed. He did not provide substantive details of the circumstances surrounding those two charges but advised that he was seeking documents.

The Report to Crown Counsel and the notes of the investigating officer and breathalyzer technician were admitted into evidence at the hearing.

The panel had a number of concerns about Applicant 4:

- he lied to the police when initially asked about being involved in an accident;
- he lied to the police when initially asked about drinking and driving;
- his belligerent behaviour with the police;
- his letter to the Law Society in which he denied lying to the police about being in an accident or consuming alcohol;
- his evidence that the other driver was at fault and left the scene of the accident;
- his statement that "every [breathalyzer] test will be failed," which he said was meant to convey his confidence that he was not impaired.

The panel found that Applicant 4's description of the accident was inconsistent with the other evidence from the Report to Crown Counsel. During the hearing, Applicant 4 admitted the truth of the contents of the

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Report to Crown Counsel and the handwritten notes of the police officer and breathalyzer technician.

In the panel's view, Applicant 4's explanations concerning the circumstances of the accident, his confidence that he was not impaired, and his response to the Law Society's request for further information did not withstand scrutiny. The panel did not believe that he was being truthful.

When considered in light of the good character test, the panel agreed that Applicant 4's failure to convince them that he was telling the truth was fatal to his application. The onus was on Applicant 4 to prove on a balance of probabilities that he possessed the requisite good character. Other than a letter from a former employer, he provided no character evidence. The panel determined that his oral evidence was seriously at odds with the admitted evidence, and his attempt to explain the inconsistencies did not bear the ring of truth.

For those reasons, the panel rejected Applicant 4's application for enrolment.

Applicant 4 has applied for a review of the decision under section 47 of the Legal Profession Act.

Pursuant to Rule 2-69.2(2), as the application was rejected, the publication does not identify the applicant. ❖

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DUTY TO COURT AND CLIENT

A lawyer failed to appear at trial with a client and failed to advise the court registry that she was no longer representing the client, which resulted in the client not being advised of a family case conference. The lawyer practises in a high conflict area with difficult clients and must follow the proper procedure to withdraw as counsel of record. (CR #2013-07)

DUTY TO COURT AND OTHER LAWYERS

A lawyer in a complex family law matter paid out funds received on the sale of the matrimonial home to settle a claim with a strata corporation. By doing so, he acted in breach of a court order requiring him to hold the funds to the credit of the spouses. The lawyer should have applied to amend the court order or obtained the consent of the opposing party. The lawyer admitted his mistake. (CR #2013-03)

A lawyer swore an affidavit in support of a garnishing order that the amounts claimed were justly due and owing when he knew that a portion of the amount related to disputed and unquantified special costs. The lawyer mistakenly believed he was entitled to amounts billed to his client without the need for the quantum of special costs to be assessed or agreed to. A conduct review subcommittee recommended that the lawyer consult with other lawyers when acting in a matter outside of his normal practice area. (CR #2012-76)

DUTY TO WITHDRAW

A lawyer drafted documents to be filed with the securities regulator that contained inaccurate statements, contrary to the lawyer's obligation of due diligence and contrary to her duty to withdraw when client instructions conflict with professional obligations. The lawyer was referred to the practice standards department and was encouraged to seek advice from a Law Society practice advisor when working in areas outside her experience. She was also encouraged to set clear boundaries when dealing with difficult clients. (CR #2012-69)

DUTY OF CONFIDENTIALITY

A lawyer provided another lawyer with affidavits and exhibits regarding communications between himself and his client on another matter without first obtaining his client's consent, contrary to Chapter 5, Rules 1, 4 and 5 of the *Professional Conduct Handbook.* The lawyer was encouraged to familiarize himself with the client confidentiality rules in the new *BC Code*. (CR #2013-05)

ELECTRONIC FILING

A lawyer permitted his partner to submit electronic bills to the Legal Services Society using his billing number, contrary to his agreement with LSS. His conduct made it possible for his partner to improperly bill LSS. The lawyer is aware that his conduct enabled funds to be diverted from LSS, which deprived needy people of legal assistance. At the time, the lawyer was isolated from friends, family and peers. He is currently undergoing counselling to deal with personal matters. He now maintains personal control over his professional finances. (CR# 2012-72)

FAILURE TO REPORT JUDGMENTS, REMIT SOURCE DEDUCTIONS AND ENSURE ACCURACY OF TRUST REPORTS

A lawyer failed to report several unsatisfied Canada Revenue Agency certificates relating to non-payment of income tax, GST, PST and employee payroll source deductions within seven days of entry of the certificates contrary to Rule 3-44. The lawyer also failed to remit source deductions and filed incorrect trust reports in regard to GST and payroll arrears. At the time of the review, the lawyer had paid or made arrangements to pay all arrears. He planned to take a CLE course on time mastery and practice management and to familiarize himself with the Rules. (CR# 2012-74)

RUDENESS AND INCIVILITY

A lawyer engaged in unprofessional and discourteous communications with her client rather than disengaging and defusing the situation. The lawyer identified other ways of handling a similar situation should it arise. (CR #2012-73)

A lawyer crossed the bounds of professional advocacy when filing in court written submissions that contained unsubstantiated, unprofessional and personalized allegations about opposing counsel. The lawyer only partially acknowledged the misconduct and demonstrated no insight into how such a situation could be prevented or avoided in the future. A conduct review subcommittee explained the concept of progressive discipline and cautioned that a citation may be issued for any further misconduct. (CR #2013-01)

SHARP PRACTICE

A lawyer placed a stop payment on a trust cheque tendered as part of a mediated settlement contrary to Chapter 11, Rule 8 of the *Professional Conduct Handbook*. The lawyer then returned the funds to his client without notice to opposing counsel, despite having told counsel that he would hold the funds "for the time being" and having received conflicting advice from senior counsel in his firm. The lawyer wrote a letter of apology to opposing counsel. (CR #2012-75) ❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Karamgopal Paul Singh Lail
- James Hu
- Alexander John Markham-Zantvoort
- Thomas John Johnston
- Nathan Richard Bauder

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

KARAMGOPAL PAUL SINGH LAIL

Surrey, BC
Called to the bar: June 12, 1987
Discipline hearing: September 20, 2012
Panel: Leon Getz, QC, Chair, Robert Smith and Gary Weatherill, QC
Oral reasons: September 20, 2012
Report issued: December 19, 2012 (2012 LSBC 32)
Counsel: Carolyn Gulabsingh for the Law Society; Robert Hunter for Karamgopal Paul Singh Lail

FACTS

In November 2007, Karamgopal Paul Singh Lail notified his former firm of his intended resignation. In the process of winding up his practice, Lail issued and signed 24 accounts addressed to various clients of the firm.

In each of the 24 accounts, the amount of the invoice was equal to the balance held in trust for the client by the firm, and each authorized the withdrawal of funds from trust to satisfy the accounts.

Lail took no steps to deliver these accounts to the clients. None of the client files contained a retainer agreement, correspondence or notes indicating that the clients consented to Lail billing the files.

One of the 24 accounts Lail issued to a client was in the amount of $750; however, this client did not owe any money to the firm. Lail issued this account so that he could authorize the withdrawal of trust funds to partially satisfy an amount owing to the firm by another client, a corporate client that Lail understood was related to the first client. The first client did not consent to Lail withdrawing funds from trust to satisfy the account of the other client.

ADMISSION AND DISCIPLINARY ACTION

Lail admitted that his conduct was contrary to Law Society rules and constituted professional misconduct.

In the panel's view, Lail's conduct clearly crossed the line between mere breach of the rules and professional misconduct. Trust accounting obligations go to the heart of confidence in the integrity of the legal profession, and there is a clear public interest in ensuring that they are performed meticulously and not, as in this case, nonchalantly.

The panel took into consideration that Lail had been a lawyer for more than 25 years. His professional conduct record consisted of a single conduct review in 2006. The panel believed that any similarity between that conduct and the present misconduct was, at best, superficial. Accordingly, it was determined that Lail's professional conduct record should not play any significant role in determining an appropriate penalty.

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

1. a $3,500 fine; and
2. $2,000 in costs.

JAMES HU

Richmond, BC
Called to bar: May 19, 2000
Ceased membership: January 31, 2013
Admission accepted by Discipline Committee: January 24, 2013
Counsel: Maureen Boyd for the Law Society; Henry Wood, QC on behalf of James Hu

FACTS

On September 13, 2010, a Law Society auditor attended the office of James Hu to conduct a scheduled compliance audit for the period from March 1, 2009 to September 13, 2010. The auditor was unable to complete the audit because Hu did not produce all the required records.

The Law Society wrote to Hu advising that his inability to produce required documents and provide explanations was not in compliance with Rule 3-79.

On September 30, 2010, Hu advised the Law Society that he had withdrawn a total of $7,802.86 from his trust account in a series of 19 withdrawals. He explained that he was left with many small balances in his trust account, and that he could not figure out why there was a balance. He could not identify any person to whom the funds were owing, so he thought it must be money owing to him.

The Law Society investigated Hu's books, records and accounts and found that Hu did not have a system to diarize the obligations arising from his undertakings. He dealt with undertakings and with holdbacks upon receiving a request from the lawyer or notary representing the other party in the real estate transactions.

Amongst other findings, the dollar amounts of mortgage payout figures, property taxes, strata fees and other amounts were not recorded accurately by Hu's practice.

ADMISSIONS AND DISCIPINARY ACTION

In submitting his resignation to the Discipline Committee, Hu agreed his behaviour constituted professional misconduct and he admitted to:

- twenty-three instances of misappropriation of funds between 2007 and 2010;

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- four breaches of undertaking;
- one hundred sixty-seven trust fund shortages between 2007 and 2010 that were not immediately eliminated, 29 of which were not reported to the Law Society as required;
- failure to supervise staff;
- failure to safeguard client confidentiality;
- failure to maintain certain parts of his books, records and accounts;
- twenty-one instances of withdrawing funds from trust to pay his fees without first preparing and delivering a bill to his client.

Under Rule 4-21, the Discipline Committee accepted Hu's admissions and his undertakings:

1. not to apply for reinstatement to the Law Society for seven years;
2. not to apply for membership in any other law society without first advising the Law Society; and
3. not to permit his name to appear on the letterhead of, or otherwise work in any capacity for, any lawyer or law firm in BC, without obtaining the prior written consent of the Law Society.

ALEXANDER JOHN MARKHAM-ZANTVOORT

Vancouver, BC
Called to bar: August 27, 2003 (BC); February 7, 1996 (Ontario)
Ceased membership: January 1, 2013
Admission accepted: January 24, 2013
Counsel: Carolyn Gulabsingh for the Law Society; Alexander John Markham-Zantvoort on his own behalf

FACTS

In March 2012, the Law Society conducted a compliance audit of Alexander John Markham-Zantvoort's practice.

Upon completion of the compliance audit, the Law Society wrote on three occasions to Markham-Zantvoort about concerns that arose during the audit. He did not reply to any of these letters. On July 27, 2012, he was suspended from practice for failing to provide explanations to the Law Society.

The Law Society wrote to Markham-Zantvoort on September 1, 2012 and asked him to address concerns identified during the audit. On September 7, 2012, Markham-Zantvoort emailed the Law Society, stating that it was his understanding that it would be inappropriate to respond to the Law Society's correspondence as his practice was under custodianship of the Law Society. He believed that the Law Society's custodianship department would respond to any issues on his behalf.

On September 17, 2012, the Law Society explained, in writing, that Markham-Zantvoort must have misunderstood and that he was obligated to respond to the Law Society's letters.

The Law Society wrote to Markham-Zantvoort again on October 1, 2012 to seek his response to the audit. On October 19, 2012, the Law Society again wrote to Markham-Zantvoort and informed him that, if he did not reply by October 29, the matter would be referred for possible disciplinary action. No response was received.

ADMISSION

Markham-Zantvoort admitted he failed to provide a substantive response to communications from the Law Society concerning its investigation into issues arising from the compliance audit. He admitted that his conduct constituted professional misconduct.

Under Rule 4-21, the Discipline Committee accepted Markham-Zantvoort's admission. There was no disciplinary action ordered as Markham-Zantvoort ceased membership with the Law Society and was no longer a practising lawyer.

THOMAS JOHN JOHNSTON

Summerland, BC
Called to the bar: May 10, 1983
Discipline hearing: November 14, 2012
Panel: Gregory Petrisor, Chair, Dennis Day and David Layton
Oral reasons: November 14, 2012
Report issued: January 25, 2013 (2013 LSBC 04)
Counsel: Jaia Rai for the Law Society; J. Grant Hardwick for Thomas John Johnston

FACTS

When Thomas John Johnston was retained by clients in December 2008, he knew that the trial was scheduled to commence on February 23, 2009. Examinations for discovery still had to be conducted and his clients' instructions were to proceed to trial expeditiously. He also knew that the clients' previous lawyer withdrew because they were not willing to follow his advice to settle the action on the basis that the outcome was uncertain and the trial would be uneconomical.

Examinations for discovery were not completed before February 23, 2009, a trial certificate was not filed on time, and the scheduled trial dates were lost.

On April 3, 2009, Johnston forwarded a counter-offer to opposing counsel. After one of the clients saw the counter-offer, the clients instructed Johnston to withdraw it because its terms did not match their instructions. Johnston did not withdraw the counter-offer.

Based on Johnston's advice, the clients wrongly believed that the court could impose a settlement and that the settlement would not be in their favour. Johnston continued trying to persuade his clients to accept the settlement offer. He took no steps to schedule a trial date.

On July 16, 2009, during the hearing of a summary judgment application, Johnston agreed that his clients would provide a general release as a term of settlement. He did so without instructions from his clients.

After the hearing, Johnston prepared a form of release for the clients to sign. Despite what was said at the hearing, Johnston drafted a limited release that applied only to claims arising out of or in relation to the action. The clients did not understand that Johnston had already agreed to a general release as he had not clearly explained this.

In August 2009, the clients retained new counsel. Johnston was requested on a number of occasions to release the client's file. He provided

some of the file contents in November and turned over the remainder in December.

ADMISSION AND DISCIPLINARY ACTION

Johnston admitted to failing to serve his clients properly and to misleading them. He admitted that his conduct constituted professional misconduct.

The panel agreed that Johnston was acting in the best interests of his clients as he perceived them. However, he clearly contradicted his clients' instructions and, at times, misled them. He left his clients with no choice but to agree to a settlement they did not want. On the other hand, the result obtained at the end of proceedings was arguably as good as could ever have been achieved at trial.

The panel found it was not acceptable for Johnston to simply disregard his clients' instructions, even if he considered his actions to be in his clients' best interests. Clients are entitled to expect that a lawyer will follow their instructions, within the bounds of the lawyer's professional responsibilities. As a senior lawyer, Johnston should have known the importance of being truthful to his clients, following his clients' instructions and obtaining reasonable instructions.

An aggravating factor was that the conduct in question was not a single incident, but a course of action that took place over almost a year.

The panel considered the 15 letters of reference submitted in support of Johnston's character and the fact that he did not have a relevant prior discipline history.

The panel accepted Johnston's admission and ordered that he:

1. be suspended from the practice of law for one month, and
2. pay $6,448 in costs.

NATHAN RICHARD BAUDER

Fort Nelson, BC
Called to the bar: May 8, 2002
Reports issued: April 26, 2012 (2012 LSBC 13) and February 13, 2013 (2013 LSBC 07)
Disciplinary hearings: December 22, 2011 and November 8, 2012
Panel: Leon Getz, QC, Chair, Jan Lindsay, QC and David Renwick, QC
Counsel: Jaia Rai for the Law Society; Richard Gibbs for Nathan Richard Bauder

FACTS

In September 2008, Nathan Richard Bauder, through his law corporation, entered into an agreement for the purchase of property for $350,000. Under the terms of the agreement for sale, he made a $10,000 deposit and agreed to make monthly payments until the completion date in September 2010. However, in the spring of 2010, he was approached by the vendor who wanted to advance the completion date to May 2010.

Bauder was unable to find lenders willing to provide funding on an unregistered agreement for sale. As the property had increased in value, he prepared a false contract of purchase and sale with an increased purchase price of $450,000, not $350,000, and a deposit of $100,000, not $10,000.

In addition to preparing the documents, Bauder kept the vendor away from the vendor's lawyer so that the deception would not be found out. He told the vendor that he "would take care of all the paperwork and look after everything" and had the vendor sign the false document.

Bauder then obtained financing from a mortgage broker and was approved for a mortgage in the amount of $350,000 based on false representations.

ADMISSION AND DISCIPLINARY ACTION

Bauder and counsel for the Law Society submitted that, by attempting to fraudulently obtain mortgage financing contrary to the Professional Conduct Handbook, Bauder's actions constituted conduct unbecoming a lawyer.

The panel was not satisfied that this case amounted to conduct unbecoming. It asked counsel for further written submissions so it could determine whether Bauder's conduct amounted to professional misconduct or conduct unbecoming. In the panel's view, conduct in a lawyer's personal or private capacity that brings discredit upon the legal community is appropriately dealt with as conduct unbecoming, whereas professional misconduct arises from conduct that occurs in a lawyer's professional capacity.

The panel found that Bauder had committed professional misconduct.

Bauder acknowledged that he knew it was dishonest to prepare the false documents. He recognized that, notwithstanding the property had increased in value, it did not have the value stated in the false documents and, therefore, there was a risk of loss to the lending institution.

Letters of support attested to Bauder's ongoing integrity and professionalism. The letters also provided some insight into the lack of legal representation in northern BC, particularly in Fort Nelson, where Bauder is the only lawyer. However, the panel was of the view that the public, including the citizens of Fort Nelson, needed to be assured that they were protected from unscrupulous conduct, even if this resulted in the loss to them, temporarily, of their only local legal representation.

Bauder's lawyer submitted that the consequences of Bauder's actions had already been felt. A financial institution terminated his services and another chartered bank no longer allows him to do their work. He has lost friends, been shunned by the legal community, lost his esteem within the legal profession, is no longer able to pursue a political career, and has absented himself from community and from provincial boards.

Although Bauder had no prior discipline history and this was a single transaction that occurred over a very short period of time, the panel found that the seriousness of the misconduct and the need for general deterrence required a suspension. Bauder deliberately engaged in dishonest and fraudulent conduct for personal gain, and any sanction imposed must send a message that this type of behaviour will attract significant disciplinary consequences.

The panel ordered that Bauder:

1. be suspended for four months; and
2. pay $10,000 in costs.❖

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