The Law Society of British Columbia

2010: No. 1 • SPRING

BENCHERS' BULLETIN

Keeping BC lawyers and the public informed

FEATURE STORY

Road map for 2010

by G. Glen Ridgway, QC

THE YEAR 2009 marked the 125th year of the Law Society of British Columbia. Our focus was self-regulation and the independence of the legal profession. Our former President, Gordon Turriff, QC, travelled throughout the province to meet with the public to spread this message, with an emphasis on the importance of our profession's independence in the functioning of our justice system and our Society in general. This was an approach fully supported by the Law Society and its Benchers, and Mr. Turriff is to be commended for the effort and the personal commitment that he made to that cause. I am sure he will continue to speak out on that subject.

In addition to the cause of independence, the Law Society has had a busy agenda over the last number of years. We have reorganized our committee structure, we have focused on small firms and their needs, and we have introduced compulsory professional development. It has been a busy few years.

A number of years ago, when I started on the process that resulted in my Presidency, I indicated to Benchers that it was my view that 2010 should be a year where we "do nothing." I do not know whether it was that, or for some other reason, that I was permitted to advance onto the ladder towards the Presidency. Unfortunately, I will not be able to deliver on that promise. There are a number of tasks that must be advanced this year, and it will be no holiday for the Benchers and staff of the Law Society of British Columbia.

In the latter part of 2009, our Discipline Committee began working on some modifications or new approaches to our discipline process. These will continue in 2010, with the full support and involvement of the Benchers. We are also seeking input from members and non-members as to these approaches.

Firstly, we have given direction to the Discipline Committee and staff to "speed up" the process. The Benchers, lawyers and the general public think our process can, on occasion, take too long from start to completion. We have directed the Discipline Committee and staff to achieve the goal of one year as the maximum time allotted between when a complaint is received and when it is first dealt with by the Discipline Committee. The committee and staff are now actively working on ensuring this objective.

Once that has been completed, we will be considering the next stage of the process, that being Discipline Committee to final resolution. That period of time must also be reduced.

There are two task forces presently working on other aspects of the discipline process. The Discipline Guidelines Task Force is looking at establishing guidelines for the Discipline Committee in dealing with various categories of complaint, with the goal of ensuring that similar types of complaints are dealt with in a similar fashion. The end result will hopefully be a situation in which members and the public have a clearer knowledge ahead of time as to how a complaint will be dealt with, be it a process that results in a conduct meeting, a conduct review or a citation.

The other task force is dealing with the duality of roles played by Benchers in discipline matters. Currently, we are both the prosecutors and, through our discipline panels, the adjudicators. The review of this issue may result in some profound and significant changes in the role of the Law Society and, in particular, the Benchers. There is Court authority that the Benchers are best able to deal with issues of discipline, and that certainly is the feeling of past and, to a large part, present Benchers.

Different subsets of Benchers hear discipline matters at various stages in the process. However, there is a concern that, at some point, a Court review will question whether we should be both the prosecutors (through our Discipline Committee) and the judges (through our discipline panels).

BENCHERS' BULLETIN

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers and articled students 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 — please contact the editor. Additional subscriptions to Law Society newsletters may be ordered at a cost of $50 (plus GST) per year by contacting the subscriptions assistant at communications@lsbc.org. To review current and archived issues of the *Bulletin* online, see "Publications & Forms/Newsletters" at lawsociety.bc.ca.

EXECUTIVE EDITOR
Adam Whitcombe

MANAGING EDITOR
Denise Findlay

CONTRIBUTORS
Dave Bilinsky, Barbara Buchanan, Phil Campbell, Paul Heeney, Christopher Moore, Carol Oakley, Jack Olsen

PHOTOGRAPHY
Brian Dennehy Photography: cover and pages 4, 5, 10 and 12
Patricia Jordan: page 6
Submitted by BCCA: page 7

SUBSCRIPTIONS
Robin Pollak

Publications Mail Agreement No. 40064480

Does this approach offend basic fairness?

The main factor to be considered is the public view. Does the public think it fair and appropriate that complaints about lawyers are dealt with by lawyers? We have heard the public's comments about other occupations. We are aware of the process that the Provincial Government has put in place for the health professions and do not believe that that is an approach that best serves the public or our members.

And so a task force will be looking into this issue. It will decide whether the present system is the best or whether a system that involves Benchers dedicated solely to the Discipline Committee and Benchers dedicated solely to discipline panels, or the use of Life Benchers as adjudicators, other lawyers as adjudicators, or members of the public as adjudicators, provides a better avenue to protect the public interest. It will also look at how these matters are handled in other jurisdictions.

Needless to say, we want to hear from the members with respect to these issues. Please let us hear from you.

The Federation of Law Societies is also working on a National Model Code of Conduct, which we hope will form the basis for codes of conduct throughout Canada. It is now in the hands of our Ethics Committee. The results of their work will be posted on our website and communicated to members. Please let us have your input.

At last year's Annual General Meeting, we were directed by the members to do something about the low level of participation in our profession by our indigenous population. We are all aware that the number of Aboriginal lawyers does not match the percentage of the BC population made up of Aboriginals. Aboriginal lawyers are dropping out of the profession. Aboriginal law graduates are not achieving articling or employment positions. We were directed by resolutions at the Annual General Meeting to take steps in this regard. While we have not established a specific committee or hired personnel specifically for this task, we do have a committee working on the subject. It was focused on the area prior to the resolutions from the AGM. It is gathering data on the subjects about which concern has been expressed, that is, articling positions, jobs, and retention in the profession. We are allowing that committee to come up with its recommendations before advancing with the specific resolutions from the Annual General Meeting.

We want to hear from our First Nations lawyers with respect to this subject. We would also like to encourage those in the Aboriginal community who have dropped out of the legal profession to let us know why they did so and those aspects of the profession that they feel got in their way. Please let us know, and let friends and former colleagues in that position know that we want to hear from them.

We are also looking at some concrete ways that we in the legal profession can make our services more affordable. We are hearing constantly that justice is too costly and, as a result, people do not have access to justice. We have a task force looking at things that we can do to enable legal services to be more available to the general public. Should we change our rules to enable paralegals or articled students to meet some basic needs of our clients? Are there other rules that can be changed to assist with affordability? Please let us know your views in this regard.

I must say it is a great honour to be selected the President of the Law Society of British Columbia. I would like to thank Bruce LeRose, QC and Scott Van Alstine, QC for the very supportive articles that they wrote about me in the *Benchers' Bulletin* and the upcoming *Advocate*. My non-lawyer friends have seen Bruce's article, and they are wondering who it's about. They think Bruce has the potential for a great career in fiction.

As can be seen from the articles, I have spent all of my life in small communities, and I hope to be able to do something to focus some attention on the practice of law in small communities. Frankly, we are running out of lawyers outside of Metro Vancouver and Victoria. The demographics point to fewer lawyers and older lawyers in the small towns of our province. I hope to re-focus the need for competent legal services in the non-urban centres. I hope to be at call ceremonies throughout BC, including regional call ceremonies in our smaller communities. I also hope to attend meetings of lawyers throughout the province, so please call me and arrange for me to come and meet with your legal community.

Finally, I also intend to phone lawyers throughout the province to talk about practice issues, the role of the Law Society in their lives and the role that they can play in the Law Society. Don't be concerned when I call. Please answer and spend a few minutes with me discussing those things that we can do to ensure that the BC public is well served by the lawyers in your communities and that you are well served by the Law Society.

I can be reached at the Law Society office at 604-669-2533 or gridgway@lsbc.org or at my own office at 250-746-7121 or gridgway@ridgco.com.❖

Fellhauer elected in Okanagan

TOM FELLHAUER IS the new Bencher for Okanagan district, for the remainder of the 2010-2011 term. Fellhauer received a majority of votes cast by Okanagan district lawyers in the second round of a preferential ballot by-election. The by-election was required to replace Meg Shaw, QC, who was appointed a Supreme Court Master last December. For a breakdown of the by-election results, see the Law Society website.

Fellhauer was called to the bar in 1988, and practises with Pushor Mitchell LLP, primarily in the areas of tax, trusts, company, wills and estates, societies, charities and foundations and income tax and GST appeals. He is a past chair and director of the Continuing Legal Education Society, and is a member of the CBA and the Kelowna Bar Association.

In his election statement, he noted his contribution to the development of online CLE courses and a commitment to mentoring.

The Law Society congratulates Tom Fellhauer, and thanks all the candidates for their participation in this by-election.❖

Strength in numbers

by Timothy E. McGee

ONE OF THE Law Society's strategic priorities for 2010 is the work of the Delivery of Legal Services Task Force, chaired by Art Vertlieb, QC. The Task Force will recommend to the Benchers later this year how the Law Society as regulator of the profession can better connect those who need affordable legal services with those who are ready, willing and able to provide it. Today there is a troubling gap in the supply and demand for those services. The Benchers have directed that the Law Society respond to this challenge as part of its mandate to govern the profession in the public interest.

The work of the Delivery of Legal Services Task Force is well underway. The first phase was completed over the past year and involved the gathering of detailed information and data on the extent and nature of the supply/demand gap for affordable legal services here in BC. Ipsos Reid assembled the data so that the Task Force could work with empirical rather than anecdotal information. The second phase of the Task Force work is focusing on defining the areas of greatest need and developing a short list of practical options for consideration by the Benchers later this year.

This challenge is being pursued as a priority for law regulators, associations and governments across Canada and around the world. The issues are multi-faceted and involve different stakeholders within the profession and the justice system. For example, governments are being challenged to properly sustain publicly funded legal aid systems; law regulators are looking at how non-lawyers, such as paralegals and community advocates, can provide legal services while maintaining appropriate regulatory oversight; and the courts are faced with a growing trend of unrepresented litigants and questions of appropriate rights of audience.

It is clear that because of this stakeholder diversity there is no one organization, no one body, and no one authority in any jurisdiction, at home or abroad, that can definitively respond to the slate of issues. In short, there is no silver bullet solution. But from my perspective, we will be well served if we keep two things in mind. First, if each organization focuses on what is within their purview of authority and pursues practical solutions, even if only a partial solution to the overall problem, then there will be progress. Every little bit helps. Second, there is strength in numbers. Because every major law society in Canada, the UK, Australia, and large numbers in the United States are addressing this issue, we will all benefit from the power of diverse, creative thinking and problem-solving. We are already seeing this in Canada. For example, the Law Society of Manitoba is addressing the affordability issue in family law matters by brokering discounted legal services for those most in need. Whether this innovative approach would be attractive in other jurisdictions remains to be seen, but the benefit is already received because the idea has been developed and is being tested and the results will be available for all to assess for themselves. I am confident that the Law Society of BC's Delivery of Legal Services Task Force will provide ideas and solutions, not only for British Columbia, but worthy of consideration by others.

At the Federation of Law Societies of Canada semi-annual conference in Toronto this month, all Canadian regulators will come together and share their ideas and experiences in a segment entitled "If You Build It They Will Come: Practical solutions to improve access to legal services." The outcome of this meeting will be a positive step in addressing one of the most important issues facing law regulators and the profession today. Because of that I take comfort that indeed there is strength in numbers.❖

Law Week: April 11 – 17

A video aimed at teaching high school students about lawyer and judicial independence will be part of the Law Society's presentation during Law Week. Windsor Secondary School in North Vancouver (left) was one of 450 high schools to receive *Legal Independence: It's Your Right*, featuring high school students challenging a fictitious law, the "Youth Gathering Act." It will be displayed on Saturday, April 17 in the concourse of the main branch of the Vancouver Public Library.

Representatives will be on hand to answer questions on the role the Law Society plays in protecting the public interest in the administration of justice.

Law Week celebrates the signing of Canada's *Charter of Rights and Freedoms*, and will be held in communities throughout BC from April 11 to 17.

More information on Law Week 2010 can be found at cba.org/LawWeek/Home/main/default.aspx.

Benchers take oath of office

For the first time, the Benchers swore or solemnly affirmed that, as Benchers, they would abide by the *Legal Profession Act*, faithfully discharge their duties, uphold the objects of the Law Society and be guided by the public interest. The Chief Justice of BC, Lance Finch, administered the oath at the January 22 Benchers meeting.

Multi-disciplinary partnerships

BRITISH COLUMBIA LAWYERS will soon be allowed to participate in multi-disciplinary partnerships.

Beginning this summer, lawyers may enter into partnership with non-lawyers, provided the partnership can comply with the Law Society Rules and rules of professional conduct governing such practices.

Those advocating MDPs say these business arrangements provide both convenience and wider choice to the public. Consumers looking for a wide range of professional services have the added advantage of one-stop shopping. And firms embracing MDPs would be in a position to reduce overhead and share profits.

Initially, there were concerns about potential conflicts of interest in these businesses. If power was equally shared between a lawyer and an accountant, who would have the final word? Would it be the lawyer's need for client/solicitor privilege or the auditor's requirement for complete independence from a client?

Gavin Hume, QC, the Chair of the Ethics Committee, says the new rules offer plenty of safeguards to protect the core values of the legal profession. "We are very specific that non-lawyer partners comply in ensuring that privilege and confidentiality is properly looked after. All obligations to comply with the *Professional Conduct Handbook* continue to exist."

Not only must the lawyers involved in the partnership have effective control over the legal services the partnership provides, but non-lawyer partners will not be able to provide services to the public unless "they support or supplement the practice of law by the MDP."

As Hume puts it, a lawyer could form an MDP with a realtor, if the realtor supports the practice of law, but not for the purposes of fronting a real estate practice.

So just what type of practice might benefit from an MDP?

"I think you may see partnerships involving patent agents and trademark agents," says Hume. "Boutique firms practising in the IP area might be particularly interested. And in an estate practice, there may be a very skilled accountant who you want to include as a partner in the firm."

Hume adds that some small practices may benefit from MDPs. "Firms that restrict their practice to conveyancing might want to form a partnership with notaries or paralegals, as long as their work supports the practice of law."

Non-lawyer partners will be required to purchase liability insurance from the Law Society. Some Benchers questioned whether this might put the fund at risk. But Su Forbes, QC, the Director of Insurance, says in the nine years that MDPs have been allowed in Ontario there have been very few claims, and most have been resolved without payment.

Some of the details of the new policy are still being worked out, including application fees, investigation fees and marketing rules.❖

In Brief

JUDICIAL APPOINTMENTS

Judge Thomas James Crabtree, a judge in the South Fraser district, based in Chilliwack, was appointed Chief Judge of the BC Provincial Court. He will assume his new duties from acting Chief Judge James Threlfall, effective April 8, 2010.

Meg Shaw, QC, formerly practising with Kelowna firm Courtyard Law Offices, and a Bencher of the Law Society, was appointed as a Master of the Supreme Court of BC in Kamloops.

Ronald Tindale, formerly an associate with Dick Byl Law Corporation in Prince George, and a Bencher of the Law Society, was appointed to the Bench of the BC Provincial Court in Prince George.

Reginald Harris, formerly a partner at Smart, Harris & Martland in Vancouver, was appointed to the Bench of the BC Provincial Court in Surrey.

LAW FOUNDATION NEWS

Chair Mary Mouat of the Law Foundation of BC is pleased to announce the appointments by the Law Society of Ron Toews, QC (for Prince Rupert County) and Tamara Hunter (for Vancouver County), as governors of the Law Foundation for three-year terms commencing January 1, 2010.❖

The Honourable Donald Brenner, QC Tribute Dinner *– More than 450 people, including many Law Society Benchers and staff, attended a tribute dinner held on January 21, 2010 for the Honourable Donald Brenner, QC. Pictured front row, left to right: Kathryn Berge, QC, Gavin Hume, QC, the Honourable Lance Finch, Chief Justice of British Columbia, the Honourable Donald Brenner, QC, the Right Honourable Beverley McLachlin, PC, Chief Justice of Canada, Glen Ridgway, QC, Bruce LeRose, QC and Thelma O'Grady. Back row: David Renwick, QC, Alan Treleaven, Adam Whitcombe, Patrick Kelly, Susan Forbes, QC, Robert Brun, QC, Carol Hickman, Peter Lloyd, Suzette Narbonne, Haydn Acheson, Catherine Sas, QC, Joost Blom, QC, Barbara Levesque, James Vilvang, QC, Gordon Turriff, QC, Alan Ross, David Mossop, QC, John Hunter, QC and Jan Lindsay, QC.*

Retaining Aboriginal lawyers in the profession

THE BENCHERS HAVE identified the retention of Aboriginal lawyers as one of the key objectives in the current strategic plan. In support of this objective, the Law Society has undertaken several initiatives, including:

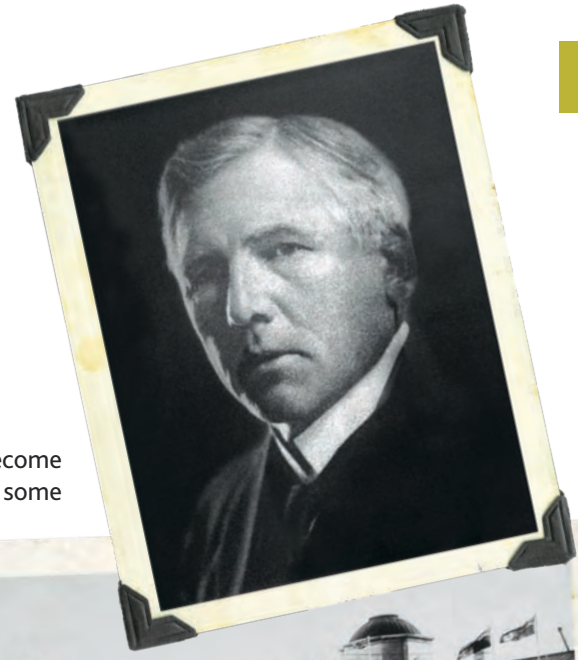
- a demographic project to better understand the participation of Aboriginal lawyers in the profession;
- the development of a business case for diversity in law practice, including recruitment and retention of Aboriginal lawyers; and
- an upcoming event in conjunction with National Aboriginal Day to recognize Aboriginal leaders in the profession and to promote networking among Aboriginal lawyers and law students.

The Law Society is also reviewing recent research and reports related to retention of Aboriginal lawyers to develop effective strategies and additional supports.

These initiatives advance the resolutions passed at the 2009 AGM related to the participation of Aboriginal lawyers. The Law Society has implemented the first resolution by incorporating the retention of Aboriginal lawyers into the current strategic plan, and has substantially implemented the second resolution in undertaking a comprehensive review of past and recent reports, as well as current research related to lawyer retention and the demographics of the profession. The comprehensive review is expected to identify and recommend next steps for advancing the retention of Aboriginal lawyers, including consideration of a staff lawyer position. The Benchers recognize that identifying the most effective supports is a priority and expect a progress report after the upcoming event.❖

The BC Court of Appeal marks its 100th anniversary

by Christopher Moore, author of
The British Columbia Court of Appeal: the First Hundred Years



THE BRITISH COLUMBIA Court of Appeal first sat on Tuesday, January 4, 1910, at what is now the Maritime Museum in Bastion Square, Victoria, and the papers declared it a day "memorable in the legal history of the province." The next month, it held its first Vancouver sitting at the then-new courthouse that is now the Vancouver Art Gallery.

There had been appeals in BC before 1910. Rather earlier than England, Canada recognized very broad rights of appeal, particularly in criminal cases. Before 1910, however, appeals were heard by the Supreme Court sitting *en banc*, rather than by a separate court.

British Columbia was booming in the early 1900s, developing northern railroads, opening the port at Prince Rupert, planning the provincial university, and opening buildings like Vancouver's courthouse. The Law Society had long urged the creation of a Court of Appeal, and Premier Richard McBride agreed in 1907. The law was enacted in 1909, and the court started work soon after. The court began with four judges (it now has 15). A fifth judge was appointed in 1913, but until the late 1930s many appeals were denied on a 2-2 split.

The first chief justice of the appeal court, James Macdonald, was named directly from practice, and he resigned his seat as a Law Society Bencher to take the appointment. Many other Benchers have followed him to the Court of Appeal. Chief Justices Campbell DesBrisay, Sherwood Lett, Allan McEachern and Lance Finch all served as Law Society Benchers, as did Justices Tom Norris, Angelo Branca, Charles Locke, Mary Southin, Jo-Ann Prowse, Tom Braidwood and many others.

From time to time, the appeal court also reviews decisions of the Law Society. In 1912's *French* v. *Law Society*, it agreed that women were not entitled to be lawyers, and in 1950's *Martin* v. *Law Society*, it agreed that communists could not be lawyers either. It was 1985 before Beverly McLachlin became the first woman on the Court of Appeal, but barely 15 years later, women had become a majority of the regular judges, and some judges with left-wing reputations have also made it to the court.

BC has had just two *Court of Appeal Acts*. The much amended original Act of 1907 gave way in 1982 to a new Act, one much influenced by Chief Justice Nemetz, a skilled administrative campaigner committed to defending independence of the judiciary in a time of rapid administrative reform. About the same time, appointments to the court began to be less political, and now many judges have no evident political loyalties.

To mark the centenary of British Columbia's highest court, the Legal Historical Society (with support from the Law Foundation) has sponsored *The British Columbia Court of Appeal: the First Hundred Years*, which will be published this Spring by UBC Press and the Osgoode Society for Canadian Legal History. It will cover all this history and even a few of the courts' scandals: the feuds of Archer Martin, the sudden resignation of John Farris, and the ambitious judge who was told he could either be chief justice or keep his mistress, but not both. (He became chief justice.)❖

Top photo: The Honourable James Alexander Macdonald, Chief Justice of the BC Court of Appeal, 1909-1929. Chief Justice of BC, 1929-1937.

Centre photo: Reception for His Royal Highness Duke of Connaught, Governor General of Canada, September 8, 1912.

Bottom photo: Dinner held in honour of Chief Justice Bird on his retirement as Chief Justice, January 1967.

Thanks to our 2009 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 2009. Whether serving as members of committees, task forces or working groups, as PLTC 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 almost 300 Life Bencher and non-Bencher volunteers, all of whom deserve acknowledgement.

Alisia Adams
Anne A. Adrian
Quentin J. Adrian
John N. Ahern
Mary T. Ainslie
Paul Albi
R. Vincent Aldridge
Ralston S. Alexander, QC
Martin F. Allen
Kendall E. Andersen
Jeffrey P. Andrews
John D. Ankenman
Deborah Armour
Trevor C. Armstrong, QC
Butch Bagabuyo
Anjili I. Bahadoorsingh
David G. Baker
Stephen D. Ballard
C. Geoffrey Baragar
Paul E. Barclay
Mark C. Baron
Joe Battista, QC
Thomas E. Bean
Diane M. Bell
W.J. Scott Bell
Vicki M. Bennett
Dan Bennett
John Bilawich
Robert J. Bircher
Heather Blatchford
Johanne Blenkin
Jobst R.H. Bode
J-P Bogden
Patricia Bond
Gillian S. Boothroyd
Ursula Botz
Melanie M. Bradley
Mark R. Braeder
Luciana Brasil
Lindy J. Bremner
David Brown
Alexander S. Burton
Mark Philip Bussanich
Peter F. Buxton
W. Bryce Cabott
Tara Callan
Elizabeth A. Campbell
Jeffrey T.J. Campbell
Robert Campbell
Jo Ann Carmichael, QC
Colleen J. Cattell, QC
Mona Chan
Phebe Chan
Carlton R. Charles
John P. Cheevers
Chilwin C. Cheng
Douglas B. Chiasson
Jennifer Chow
David A. Clancy
Myron Claridge, QC
Anne R.B. Clark
Janet L. Clark
Hugh H. Claxton
Patrick S. Cleary
John D. Cliffe, QC
Gordon S. Comer
Jennifer Conkie, QC
Scott Cordell
JoAnne Corrigan
Lisa D. Dalton
Azim Datoo, QC
Diana L. Davidson
Andrew R. Davis
Harvey Delaney
Michael G. Demers
Arthur J. Demeulemeester, QC
Kathryn I. Denhoff
Craig Dennis
Rajwant K. Dewar
Robert M. Diab
Kelly R. Doerksen
Patrick Doherty
Christopher Doll
Michaela E. Donnelly
Frank R.C. Dorchester
Paul C. Doroshenko
Darlene M. Dort
Jennifer Duncan
Janelle L. Dwyer
Brenda Edwards
Michael R. Eeles
Alex Eged
Perry S. Ehrlich
Prof. Robin Elliot, QC
Christine Elliott
Meldon Ellis
Mark A. Erina
Stephanie L. Fabbro
Peter D. Fairey
Jan A. Fishman
Jay L. Fogel
D. Christopher Fong
Mark Forsythe
Merridee L.W. Foster
Prof. Hamar Foster
Richard S. Fowler
Veronica P. Franco
Alan A. Frydenlund
Gordon A. Fulton, QC
Anna K. Fung, QC
Barry D. Galbraith
Mark Gallagher
René J. Gantzert
Nicole L. Garton-Jones
Kelly-Lynne Geddes
Rod Germaine
Anne Giardini, QC
Kerri Gibson
Baljinder K. Girn
Peter Gorgopa
Charlotte Gregory
David Grunder
Robert N. Hamilton
Jeffrey A. Hand
Frederick W. Hansford, QC
Nancy J. M. Harold
Amanda B. Harris
Richard Hoops Harrison
David W. Hay
E. Ian B. Hayward
Matthew J. Heemskerk
Roderick Henderson
Colleen Henderson
Jane Henderson, QC
Jim Herperger
Michael Hewitt
David A. Hobbs
Roger E. Holland
Robert D. Holmes
C. Decatur Howe
Elizabeth Hunt
John Hunter, QC
Karen A. Iddins
J. Bryce Jeffery
Grand Chief Edward John
Curtis Johnson
Douglas R. Johnson
R. Brock Johnston
Lawrence A. Kahn, QC
Moses Kajoba
Michael A. Kale
Gerald Kambeitz, QC
Nurdin M. Kassam
Jocelyn M. Kelley
Judith Kennedy
Richard B. Killough
Nancy L. Kinsman
Roderick Kirkham
Lyall Knott, QC
Theodore I. Koffman
Gordon J. Kopelow
Darren S. Kozol
Ken Kramer
Rosanne Kyle
Seema Lal
Stanley Lanyon, QC
Jason D. Lattanzio
Michael J. Lawless
John Leathley, QC
Adrienne V. Lee
Wilson Lee
Janet Lew
Janneke P. Lewis
David K.S. Li
Gregory S. Lilles
Michael J. Lomax

Jeremy T. Lovell
Hermann C. Luitingh
Steven G. Lukas
Ed Lyszkiewicz
Robin C. MacFarlane
Rodrick H. MacKenzie
Jamie MacLaren
Beverly A. MacLean
Jason B. Mann
Stephen M. Mathiesen
Dr. Carol Matusicky
Joseph C. McArthur
Jerry McHale, QC
Todd A. McKendrick
Chief Justice Beverly McLachlin
Jonathan McLean
Stephen McMurdo
Paul Mendes
E. Jane Milton, QC
K.C. Miu
Maria Morellato, QC
Charlotte Morganti
J. Cameron Mowatt
Lawrence D. Myers, QC
Andrew I. Nathanson
Thomas Nesbitt
Shelby J. O'Brien
Mark S. Oulton
Greg Palm
Kathryn Pepper
Irene A. Pietrow
Gordon G. Plottel
David B. Pope
Dale B. Pope, QC
James M. Poyner
Marina Pratchett, QC
June Preston, MSW
William C. Prowse
Lila Quastel
Dennis Quinlan
Peter Ramsay, QC
Gayle A. Raphanel
Jeffrey R. Ray
Jyotika S. Reddy
Stephen Richards
John Munro Richter
Philip A. Riddell
Linda Robertson
Wayne Robertson, QC
Michael V. Roche
Lee M. Sawatzky
Patsy Scheer
Patricia Schmit, QC
Colleen E. Selby
Jane Shackell, QC
Ian R.H. Shaw
Geoffrey Sherrott
Gregory A. Smith
Norm Smookler
Daniel G. Soiseth
Gabriel M.A. Somjen
Georges E. Sourisseau
James D. Spears
Anne Stewart, QC
Wayne Stilling, QC
Danny M. Sudeyko
David F. Sutherland
Sue Talia
Michael D. Tatchell
David J. Taylor
Bonnie Teng
Angela E. Thiele
Michael G. Thomas
John A. Thomson
Catherine Tyhurst
Peter W. Unruh
David H. Unterman
Elizabeth Vogt
Kathleen Walker
Karl F. Warner, QC
Eric Warren
Lisa Warren
Richard M. Wenner
Angela Westmacott
Loreen M. Williams
Christopher S. Wilson
Gary J. Wilson
Mary-Jane Wilson
Steven M. Winder
So Yin Woo
Bruce Woolley, QC
David K. Wotherspoon
Craig M. Yamashiro
James Yardley
Joseph Zak ❖

In Memoriam

WITH REGRET, THE Law Society reports the passing of the following members during 2009:

J. Alan Beesley, QC
Ronald D. Braun
Deborah E. Brown
Allan Y.P. Chan
Thomas J. Clearwater
Michael C. Crowe
Donald Currie
Dale R. Doan
R. Henry Easingwood
William G. Essex
David A. Freeman, QC
Barry T. Gibson, QC
Dr. J.J. Gow, QC
Joseph T. Hattori
Brian D. Hunter
Christopher P. Kehler
Randall P.J. Kimmitt
Robert S. MacLeod
William McIntyre, QC
Michael O'Boyle
Victor J. O'Connor, QC
Laura M. Parkinson
Lex Reynolds
Ann M. Roberts
Richard R. Sugden, QC
Donald E Taylor, QC
Narendra K. Varma
Rolf Weddigen, QC ❖

Law Society staff show their Olympic spirit.

FROM THE ETHICS COMMITTEE

Code of Professional Conduct

AT THE END of October 2009 the Federation of Law Societies adopted a Model Code of Conduct, based on the work that two Federation committees have done since 2005. The Federation Model Code encompasses most of the issues currently addressed by individual codes of conduct adopted by Canadian law societies. Two important issues have not yet been concluded by the Federation and incorporated in the Model Code: conflicts, generally, and the public safety exception to confidentiality. A special committee of the Federation is currently working on the conflicts issue and the Federation expects to have rules addressing the remaining issues before the end of the year.

The Federation's intention in adopting the Model Code is to encourage more uniform codes of professional conduct among law societies. Although the Federation recognizes that each jurisdiction is solely responsible for its own code, law societies hope that the availability of a Model Code that has been compiled with the assistance of all jurisdictions, together with a process for reconsidering and revising the Model Code into the future, will lead to substantial congruence among rules of conduct in the various jurisdictions. This should assist lawyers who work in multiple jurisdictions in Canada in understanding professional rules from one jurisdiction to another.

If the Law Society of BC were to adopt the Model Code, or a version of it, the Code would replace our current *Professional Conduct Handbook* as the Code of Professional Conduct for British Columbia.

The Law Society's Ethics Committee has been monitoring the development of the Model Code, and Ethics Committee members and staff, along with representatives from other jurisdictions in Canada, have been active participants in the development of the Model Code. The Benchers have assigned to the Ethics Committee the task of reviewing the Model Code and making recommendations to the Benchers about adopting it in whole or in part. The Committee expects to make those recommendations toward the end of 2010 or the first part of 2011, depending on the progress the Federation makes on the conflicts and public safety portion of the Code.

The Chair of the Ethics Committee, Gavin Hume, QC, reported to the Benchers in December 2009 that the Committee was inclined to recommend adoption of the Model Code, with necessary changes for BC-specific issues. The Committee plans to consult with BC lawyers about the Code and will post the completed Federation Model Code, together with proposed changes to the Code for British Columbia, to the Law Society website before making their recommendations to the Benchers.

Because the Federation Model Code is not complete, it is not yet posted on the Law Society website. However, lawyers who are interested in reviewing the Model Code in its current state, or who want to obtain further information about the Code or the process for its review by the Law Society, may contact:

Jack Olsen
Staff Lawyer – Ethics
Tel. direct: 604-443-5711
Toll-free in BC: 1-800-903-5300
Email: jolsen@lsbc.org.❖

FROM BC ASSESSMENT

Forest land: A warning to potential purchasers

PURCHASERS OF PRIVATE forest land should be aware that the land may be assessed at a higher value to account for the economic benefit of timber that was previously harvested on that land. Exit fees may also be charged if the property is removed from Managed Forest Class.

The property class that deals with private managed forest land is Class 7 Private Managed Forest Land. Land in this class is valued on a two-part basis, as detailed in section 24 of the *Assessment Act*:

- the bare land value, which incorporates such factors as soil quality, accessibility, topography, parcel size and location; and
- the added value of the timber on the land, which becomes assessable when it is harvested. For example, timber harvested in the calendar year 2008 will show up as added value on the assessment notice of a forest land property for the 2010 assessment roll. For property taxes payable in the summer of 2010, part of the value may come from the harvesting of trees two years previously.

Prospective purchasers of property classed as forest land are advised to enquire about previous harvesting on the property, and its possible property tax implications.

Exit fees may be incurred for those properties removed from Managed Forest Class. The exit fee is intended to encourage long-term participation in the Managed Forest Program and is applied to property that is removed from Managed Forest Class prior to a 15-year timeframe.

The land and harvested timber are valued on the basis of legislated rates prescribed by the Assessment Authority. The rates for the 2010 assessment year are founded in BC Regulation 90/2000.

For information on exit fees, go to the Private Managed Forest Land Council website at pmflc.ca, or contact Stuart McPherson at 250-386-5737.

For more information, contact Alan Stock, Senior Appraiser, BC Assessment, at 250-595-6211, local 256.❖

Doug Jasinski, a former lawyer, is the founder and principal of Skunkworks Creative Group Inc. Lawyer Marni MacLeod is Client Services Coordinator with Skunkworks.

The Law Society's marketing rules can be summed up as follows: A lawyer's marketing must not be false, inaccurate, unverifiable, misleading or contrary to the public interest.

The Benchers recently amended the rules to make them easier to understand. Some parts were deleted altogether — others were relocated.

The intent remains the same.

What is changing is the technology that's used to get the message out. Technology that is evolving so quickly that there are now dozens of marketing options for law firms, both large and small.

Making it easy: Marketing & technology

by Paul Heeney, staff writer

"MY INITIAL REACTION was, 'It's a weed.'"

Janine Thomas is laughing as she points to the logo on her law firm's website. It's a stylized dandelion.

"I did some research and it turns out it's a wonderful plant. It's medicinal. In Wordworth's words, it's 'the harbinger of spring.'"

Thomas, a sole practitioner with an office in Yaletown, spent a lot of time thinking about what to put on her site.

"I wanted to convey that I was professional and approachable. It was important that readers knew they were making a connection to an individual — that there was a personality there — a chance for them to see if the chemistry is right."

Because Thomas' practice is focused on estate planning and estate management, she considered a branding name for her firm. "I was thinking of 'Legacy' or 'Heritage' or one of those, but Doug and his people made it clear, 'It should be your name. It's you.'"

Doug is Doug Jasinski, a former lawyer who founded the marketing firm, Skunkworks Creative Group. Jasinski says convincing law firms that a website should be a critical component of their marketing is not a hard sell. But reaching an agreement on the content of the site can take time.

"What makes a website stand out is a very clear vision. It makes a powerful statement when it's done right. But I don't see a lot of it."

What is often missing is clarity.

To develop a focused message, Jasinski and his team sit down with clients and get them to talk about what they do particularly well.

"I'll ask them, 'If I were a potential client, why would I choose your firm over your direct competitor?' That can help them sharpen their thinking on what makes their firm unique, and in turn will help us focus."

Once the message is clear, Jasinski and the clients decide the best way to deliver it. The size of the firm, the type of practice and the budget will definitely be factors. Jasinski says there are no hard and fast rules, although the culture of a firm plays a big role.

"A personal injury firm focused on reaching a broad audience might feel comfortable with radio, television or bus ads. But a corporate firm might recoil, saying, 'We don't want to see our heads on the side of a bus!'"

You may not see its logo plastered above the bumper of a southbound White Rock Express, but the marketing department at Gowlings Lefleur Henderson LLP is using just about every other type of advertising vehicle to get its message out.

Pass through the bilingual portal of the firm's website, and you'd be forgiven for thinking you've mistakenly arrived on the home page of a media outlet. There are highlighted news headlines, links to "minisites," as well as a media room where reporters on deadline can be put in touch with "professionals who are recognized as experts in their field."

There is also something called the Gowlings Trendwatch, which promises "video forecasts on upcoming legal developments."

And yes, for those who use Twitter, there's an opportunity to receive Gowlings' tweets.

"Things have changed — and they haven't changed."

Peter Fairey is a partner in the Gowlings Business Law Group in Vancouver.

"I think the messages are similar, but as technology advances, there are more conduits to meet your audiences. And those audiences are more specialized. Some are very text savvy and others don't feel comfortable with it at all. So it's important, not only to tailor the message to the person making the decision, but also to tailor *how* they're getting that information."

Fairey says making sure that the nearly 1,300 employees at Gowlings get the information *they* need is a marketing challenge of its own. "You've got so many people you have to be able to disseminate information efficiently, not only to your own clients but to your own counsel, so you know who's doing what."

Luckily, there's a team of approximately 30 employees who write and manage web content, come up with marketing ideas and help create business development initiatives.

"We work with them to try and identify growth areas, so some brainstorming goes on, trend watching, and that's important not just for marketing, but for staffing and

continued on page 14

Janine Thomas

Peter Fairey

Marketing & technology ... from page 13

getting expertise to develop new marketing areas, and we've had some success by picking and choosing certain segments."

And Fairey believes today's soft economy is not the time to slash the marketing budget.

"Our philosophy is, in a down economy, you need to invest. Business development initiatives are all the more critical now. It's important to keep public confidence, because when you help clients recover, you get to ride that wave forward."

But how does a sole practitioner catch that wave?

Doug Jasinski reminds clients of his mantra: focus on what you do well ... showcase your expertise ... highlight your problem-solving abilities. And, he adds, if you're comfortable with new technology, move beyond the web.

"Someone will write a speech for 30 or 50 people attending a conference. It gets parked in a binder and it's done with. Ask yourself if it's cost effective to create a powerful piece of content and then let it sit. Push it out through different channels — twitter, blogs, your website, legal portals. The additional cost of distributing to eight or nine venues is minimal. I don't see enough firms taking advantage of that yet."

Jasinski realizes some clients have yet to embrace social networking. Janine Thomas isn't quite there.

"The difficulty with any kind of advertising, and a blog is advertising, is what material to put out there. Do you have an obligation to pull it down if it's no longer current? It is very time intensive, and if you're a sole practitioner you have to ask yourself if that's an efficient use of time."

Thomas prefers to spend that time marketing to a targeted group. She tries to deliver at least three speeches a year to an audience that includes professionals who might be in a position to refer clients to her firm. She also writes two or three chapters a year for CLE's *BC Probate and Estate Administration Practice Manual*. Besides giving back to the profession, it's a chance to keep in touch with some key players in a specialized area.

Thomas estimates 99 per cent of her business comes through referrals, but says the website designed by Skunkworks is essential.

"It gives you a presence; it gives you credibility. It gives people a sense of who you are and whether they'll be comfortable with you. It even tells them where they can find parking. It makes it all easy."❖

Doug Jasinski's top 10 tips for websites

1. Plan your home page with care.

First impressions count. Website visitors will largely form their opinions in the first few seconds. Use compelling visual design, a clear message, and prominent call-outs to key information on your home page to set the right tone.

2. Hire a photographer.

Non-lawyers can write their own wills or represent themselves in court. That doesn't necessarily mean they should. The same is true for your website photography. For professional results, hire a professional.

3. Write crisply.

Good web writing succinctly expresses key messages, and then links or expands to longer versions for those seeking detail.

4. Distinguish yourself.

If you compete with drycleaners, plumbers and bakeries for clients, marketing your firm with scales of justice and Greek columns perhaps makes sense. However, if you compete for work with other lawyers and law firms, it does not. All these symbols tell people is that you are a lawyer. Guess what? They already know that. Tell them something they don't know — namely, whether and why you are the right lawyer for them.

5. Make contact easy.

Put your general phone number and email right on the homepage, and a contact button on your main navigation bar that is accessible from every page on the site, with a map, parking information and additional contacts for larger firms.

6. Link.

Increasingly you need to build your web presence in multiple places online. Use your website as the flagship for your online marketing efforts and link into and out of your site to other properties such as Linkedin profiles, blogs and social media sites.

7. Make being found a budget item.

If you want your site to work as a credibility check for existing clients and prospects, then building a solid website may suffice. If you want to use it as a tool to drive new business, then you need to take active steps to make yourself visible on search engines and elsewhere. This is an entirely separate (and ongoing) process from building a new site. Budget for it accordingly.

8. Keep your website updated.

You wouldn't dream of setting up a new reception area and then leaving it unstaffed for three years at a time, so don't do it with your website either. Think of your website like a produce market — fresh content sends a great message, stale content does the opposite.

9. Navigation, navigation, navigation.

Don't confuse your visitors — use a simple, logical system and recognized terms.

10. With web design, less is more.

Web pages shouldn't be too busy; best-practice design favours clear headings, use of white space and easy to read fonts — Arial, Helvetica, Verdana and Tahoma are all solid choices.

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Facebook privacy settings every lawyer should know

♫ Now there's a lesson to learn
Stories are twisted and turned
Stop maliciously attacking my integrity
I need my privacy (yeah, yeah)
I need my privacy (yeah, yeah)...♫

Lyrics and music by Michael Jackson, Rodney Jerkins, Fred Jerkins III, LaShawn Daniels and Bernard Bell; recorded by Michael Jackson.

FACEBOOK RECENTLY RELEASED a new set of revamped privacy settings in response to criticism from the Canadian Privacy Commissioner, among others, regarding the privacy, or lack thereof, on Facebook. Considering that 350 million users are on Facebook (including a sizable number of lawyers — estimated at 30 per cent by Research and Markets, an Irish firm), this is a sensitive issue. Lawyers should be using social media tools such as Facebook carefully, with one eye on best practices towards privacy and security issues.

The respected Electronic Frontier Foundation (EFF) states that, even though "the new changes are intended to simplify Facebook's notoriously complex privacy settings" and give you more control of your information, it concludes: "These new 'privacy' changes are clearly intended to push Facebook users to publicly share *even more* information than before. Even worse, the changes will actually *reduce* the amount of control that users have over some of their personal data."

The EFF does *not* endorse Facebook's recommended privacy settings. It considers the push for users to share more of their info with everyone "a worrisome development that will likely cause a major shift in privacy level for most of Facebook's users, whether intentionally or inadvertently." It states that sharing everything with "everyone" could lead to a massive privacy fiasco.

So what is a reasonable lawyer or law firm to do?

The *New York Times* has a great article on "The 3 Facebook Settings Every User Should Check Now" at tinyurl.com/y9s38ol.

If you want to delve deeper, EFF recommends the webpage "What Does Facebook's Privacy Transition Mean for You?" (tinyurl.com/yc4w2gv), which compares Facebook's privacy setting defaults, both old and new. This page is a great resource for navigating the byzantine privacy settings in Facebook. Word of warning: this is not a quick read or a quick fix, but it contains good recommendations as to what to share with whom on Facebook and how to do it.

The EFF does not endorse Facebook's recommended privacy settings. It considers the push for users to share more of their info with everyone "a worrisome development that will likely cause a major shift in privacy level for most of Facebook's users, whether intentionally or inadvertently." It states that sharing everything with everyone could lead to a massive privacy fiasco.

For further resources in this emerging area:

- Doug Jasinski, a former lawyer who is now the principal behind Skunkworks Creative Group Inc., a new media consulting house in Vancouver, has an excellent PowerPoint explaining social media and why it is important to lawyers: tinyurl.com/yebksay.
- Bottom Line Law Group has drafted a Social Media Policy Template with associated resources: tinyurl.com/ycj4a8v.
- Jaffe PR has a blog post with an outline of a social media plan: tinyurl.com/ybmsmwy.

When it comes to social media, it is not a bad idea to ensure that others won't be attacking your integrity by protecting your privacy.❖

Services for members

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky**, Practice Management Advisor, 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**, Practice Advisor, Conduct & Ethics, to discuss professional conduct issues in practice, including questions about client identification and verification, scams, client relationships and lawyer/lawyer relationships. Tel: 604-697-5816 or 1-800-903-5300 Email: advisor@lsbc.org.

Ethics advice – Contact **Jack Olsen**, staff lawyer for the Ethics Committee to discuss ethical issues, interpretation of the *Professional Conduct Hand*book or matters for referral to the committee. Tel: 604-443-5711 or 1-800-903-5300 Email: jolsen@lsbc.org.

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

◆

Interlock Member Assistance Program – 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 cost to individual lawyers. Tel: 604-685-2171 or 1-888-685-2171.

◆

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra**: Tel: 604-687-2344 Email: achopra1@novuscom.net.

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Unclaimed trust money

DO YOU HAVE trust money in your account that has been unclaimed for more than two years? If you have made reasonable and adequate efforts to locate the owner of the funds without success, you may consider applying to pay the funds to the Law Society. A lawyer must make the application to the Executive Director in writing containing the following information:

- the full name and last known mailing address of each person on whose behalf the funds were held;
- the exact amount to be paid to the Society in respect of each such person;
- the efforts made by the lawyer to locate each such person;
- any unfulfilled undertakings given by the lawyer in relation to the funds;
- the details of the transaction in respect of which the funds were deposited with the lawyer.

If the Executive Director is satisfied that the lawyer has made appropriate efforts to locate the owner, the Executive Director may accept the funds under section 34 of the *Legal Profession Act*.

It has come to the Law Society's attention that some lawyers may be inappropriately billing legal fees to client files in respect of efforts to locate clients. Consider whether your retainer allows you to bill for such efforts; likely it will not. It may be appropriate to bill for small disbursements, such as a registered letter or courier, but it may be inappropriate to bill for your assistant to perform Internet searches to attempt to locate a client.

If you are unable to locate your client, you are nevertheless permitted to bill for unbilled fees for services previously performed by you on the client's instruction. Assuming the client does not dispute your right to receive payment from trust, you may take funds from trust to satisfy your account (Rule 3-57). A bill or letter is considered delivered to the client if it is:

- mailed by regular or registered mail to the client at the client's last known address;
- delivered personally to the client;
- transmitted by electronic facsimile to the client at the client's last known facsimile number; or
- transmitted by electronic mail to the client at the client's last known electronic mail address.

Regular communication with your client as well as regular review of your trust account balances and monthly trust reconciliations can help reduce the likelihood of carrying unclaimed trust funds.

See section 34 of the *Legal Profession Act* and Law Society Rules 3-81 to 3-84 for more details about paying unclaimed trust money to the Law Society. See Rule 3-57 for the circumstances in which lawyers are permitted to take fees from trust.

MORTGAGE DISCHARGE PAYOUT STATEMENTS

I have received calls from vendors' lawyers who say that institutional lenders have refused to provide mortgage discharges, even though they have received payment of the amount owing according to the lenders' payout statements. It can happen that, unbeknownst to the lawyer, the vendor has drawn on a line of credit or other instrument that is secured by the mortgage for which the lender has provided the statement. In some cases, it is simply the lender that has missed or failed to include an additional credit facility that is secured by the mortgage.

If you are relying on the payout statement to obtain a discharge, consider the following suggestions:

- Check that the mortgage registration number on the payout statement matches the mortgage registration number in your request to the lender for the payout statement.
- Check whether the wording of the payout statement puts conditions on the payout.
- Check whether the payout statement has an expiry date.
- If the statement refers to an amount that must be re-confirmed on the date of payout, follow up with the lender to obtain an updated payout figure.
- If the statement assumes that certain payments are made by the borrower, follow up to see if the payments were made.
- Require the lender to provide you with a registrable discharge of mortgage as a condition of accepting or negotiating the payout funds.

And of course, only give undertakings that are within your control.

MATRIMONIAL DEBT COLLECTION SCAM UBIQUITOUS

If you haven't already received a phony debt collection email, you likely will in the near future. In the last Practice Watch, I wrote about the matrimonial debt collection scam, really just the same as the phony debt collection scam that we have seen for the past couple of years, but this time in a matrimonial context rather than a business context. Since December, this scam is widespread in BC. Because the scamsters are now frequently using collaborative law terminology and sometimes providing documents from collaborative law websites, their requests for help may sometimes have a certain ring of credibility.

Below is the typical scenario:

- A new client, usually female, contacts you by email, typically using one of the many free web-based email addresses, such as Hotmail, Yahoo or Gmail. The salutation is often "Dear Counsel," "Hi Counsel" or "Attn: Counsel," but occasionally contains your actual name.
- The new client asks you to collect money owed to her by her former spouse from an out-of-court settlement following a collaborative law process.
- She says that she is currently residing in a foreign jurisdiction (often China, Japan, Malaysia or England), but that her husband resides "in your jurisdiction." Often she says that she is away on a teaching contract.
- She may email her cellphone number, an address and sometimes a scan of her driver's licence.
- She may attach a *Collaborative Law Participation Agreement* purportedly signed by the spouses and their lawyers. The

named lawyers may actually be lawyers.

- The dollar amount of the settlement is high, ranging from about $350,000 to $2.6 million. She says that her husband has only made one payment (usually $44,000 but sometimes as much as $400,000).
- Usually the scamster disappears when you ask for a retainer and attempt to arrange for your agent to verify the client's identity in the foreign jurisdiction, pursuant to the client identification and verification rules. She may urge you to take your fees out of the money she will receive from her husband rather than providing a retainer.
- Sometimes a certified cheque or bank draft from the husband made out to your firm in trust for the new client arrives in the mail quickly, even before sending a demand letter or completing due diligence. The client calls and says she understands that you received the money and wants you to pay her right away.
- The bank draft is a well-made fake or, if it's a cheque, it is either fake or stolen and has a forged signature.

RETAINER OVERPAYMENT AND REFUND SCAM

We have seen the overpayment and electronic transfer refund scam before (see Fall 2009 Practice Watch); however, recently this has resurfaced in the retainer context. A new client contacts you by email and provides you with a retainer in excess of the amount required. You deposit her phony cheque or bank draft. She presses you to issue her a refund of the excess amount by wire transfer before you learn that the cheque or bank draft is no good. You may see this in conjunction with the phony matrimonial debt collection scam if you press for a retainer from the new client.

Take precautions so that you do not pay out on the basis of depositing a phony instrument in your trust account.

What can you do to protect yourself from the phony debt collection scam and the phony retainer scam? Some steps that you can take include:

1. Abide by the client identification and verification rules (Rules 3-91 to 3-102).
2. Be cautious about clients who contact you via the Internet. Use telephone books, the Internet and other resources to cross-check names, addresses and telephone numbers to see if they correspond to the information the client gave you.
3. Ask yourself why the new client chose you to act. If she says that she was referred to you by someone, ask if you can let that person know in order to thank them for the referral.
4. If you receive a certified cheque or bank draft, ask your financial institution to confirm with the financial institution issuing the instrument that the funds have cleared.
5. Wait for the funds to clear before paying out. This reduces the risk, but may not eliminate it completely.
6. If the new client is a business that provides a link to its website, check that the business name is an exact match with the name used in the website. We're aware of situations in which a client provided a website address that actually belonged to a business with a similar, but not identical name.
7. For more tips on protecting yourself from fraudsters who seek to use your trust account, see Practice Watch (May, July, October and December 2008 and April, Summer and Winter 2009), as well as Notices to the Profession. A further list of Law Society publications on these and other scams is available in the Insurance / Risk Management section of the website.
8. Two Canadian websites that you might view to inform yourself about scams are **fraudcast.ca** and **phonebusters.com**, the Canadian Anti-fraud Call Centre. PhoneBusters (a form of partnership between the Ontario Provincial Police, RCMP and Competition Bureau) identifies new trends in scams, gathers evidence and alerts law enforcement officials both inside and outside of Canada.
9. Contact me if you suspect a new client may be a scamster and you would like to discuss the matter confidentially. If someone has attempted to scam you, report it to the RCMP or your municipal police force. You can ask the police to report the matter to PhoneBusters or you can do it yourself (info@phonebusters.com or 1-888-495-8501).

ELDER LAW CLINIC – SERVICES FOR ABUSED ADULTS AGES 55 YEARS AND OLDER

If you are aware of an adult aged 55 or older who is being abused or has been abused and does not have access to legal assistance because of financial or other barriers, consider referring the person to the Elder Law Clinic. The Clinic gives the highest priority to situations of physical, emotional or sexual abuse where legal intervention is needed; however, in some cases help may be available with respect to financial abuse, government benefits and housing. Older adults can access services by phoning the Seniors Help and Information Line at 604-437-1040 or 1-866-437-1940.

The Elder Law Clinic is part of the BC Centre for Elder Advocacy and Support. The BCCEAS provides other services as well, including workshops and print materials about elder abuse. Phone them at

604-688-1927 or visit their website at bcceas.ca.

For more information about the Elder Law Clinic, contact Joan Braun, Executive Director, at jbraun@bcceas.ca or 604-688-1927.

Would you like to volunteer in a community legal clinic or provide workshops on preventing financial abuse? The organization is looking for volunteer lawyers to either conduct workshops or provide summary advice to clients. Elder law experience is welcomed but not required. If you are interested in becoming a volunteer, contact Grace Balbutin at 604-688-1827 or gbalbutin@bcceas.ca.

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.❖

FROM INTERLOCK, a division of PPC Worldwide

ADD in the workplace

by Phil Campbell, M.Ed. RCC, Counsellor-Coordinator

THE IMAGE THAT often comes to mind with Attention Deficit Disorder (ADD) is that of a little boy who cannot sit still, always gets into trouble, speaks loudly, interrupts and cannot pay attention in school. While these are characteristics of children with ADD, they all have correlations in adults with ADD. They can cause problems in the workplace when adults have ADD and their colleagues and co-workers do not know how to deal with them.

Craig is a nice guy and most people who get to know him have come to believe that he is very intelligent. Managers, who see his potential, assign him challenging projects. At times he is all they hoped for, even brilliant. At other times it would seem that he is just a little off from centre and incomplete. He misses important deadlines and often wings it in court with insufficient research. Even so, he usually pulls it off. He is quite defensive when challenged about his work habits and often points to his successes as an indicator that his way of doing things works just fine. He is seriously being considered for partnership in his firm, but the partners cannot quite put a finger on their reasons for postponing the decision.

Regina manages to do quite well, despite being her own disaster zone. Her desk is always chaotic and would be much more so if she did not have Jack, a patient assistant who reorganizes it for her on a regular basis. She frequently needs his help to find things. He also manages her time and her projects, reminding her of deadlines. Regina confidentially disclosed to Jack that she has ADD, and he understands that helping her manage her condition is part of his job. She is occasionally impatient with him — especially when he reminds her of something unnecessarily — but she realizes how important Jack is in helping her be at the top of her game.

ADD — or ADHD for those with the hyperactivity component — is most often defined as a disorder. There are, however, many strengths that come with this so-called disorder, leading some professionals to express dismay at the stigmatization of those who suffer from it. Dr. Paul Elliott, co-author of *ADHD and Teens*, goes so far as to say that ADD may result from a superior brain structure, but the resulting talents are not supported by our current societal structures.

So what is this phenomenon that results in so much frustration on the one hand and so much creativity and insight on the other? Frankly, it can be hard to pin down. Those who have ADD do all the same things that others do; they just do them a lot more. They forget important things. They lose track of objects like keys and papers. Their personal space, both at work and at home, can be very chaotic. They can appear fragmented and disjointed, moving from one task to another and often leaving tasks incomplete. They interrupt a lot and lose their temper. Is there any hope for such people in the modern workplace?

Without a doubt, there is hope. The first step is to see a qualified specialist for diagnosis and treatment. Then strategies and coping mechanisms can be developed.

The key for both those with ADD and for the people impacted by ADD behaviours is to play to their strengths and build strategies to accommodate their weaknesses. They must do both. Most often workplaces, schools, colleagues, partners and those with ADD themselves focus on the weaknesses. This emphasizes and often perpetuates the dysfunction, encourages defensiveness and leaves the ADD individuals unable to connect to their strengths.

One man who was diagnosed with ADD in his mid-forties told me that his first challenge was dealing with his own defensiveness. All his life he had been told that he was lazy, not paying attention, not reaching his potential — the list goes on. *He* knew that he was intelligent and trying his best. Because he always felt that he

was being judged unfairly, he became quite defensive. Once he realized that he had a biological difference in his brain that put him out of alignment with the mainstream, he was able to take a much more strategic approach and see the critiques of others — implied and real — as not being a true reflection of his worth and value.

Regina's example above shows that it is possible to work in a collaborative, open and informed way to the greater success of individuals with ADD and the organizations for which they work. Here are some of the factors that lead to success:

- *A positive, solution-focused environment, instead of one focused on perfectionism and blame.*

  Those with ADD respond well to an environment that is non-judgmental, where differences are valued and where they themselves are respected.

- *A structured environment where expectations are clear and specific.*

  People with ADD both need and resist structure. They resist it because they fear being found wanting in an environment they find to be counter-intuitive. They need it because it gives them focus.

- *Accommodation of some of the challenges of ADD and a valuing of the creativity and insight.*

  Again, both need to be there. Accommodating the parts of ADD that do not fit in to modern society will allow the strengths to come through.

- *An awareness by people with ADD and their co-workers of the defensiveness that often accompanies ADD.*

  Those with ADD need to know when to back off, to acknowledge and take responsibility for their failings and when and when not to apologize. Those working with people who have ADD will get better results if they emphasize the positive while still holding them responsible for their behaviours and performance.

- *A commitment by people with ADD to mitigate the ways in which their behaviours have a negative impact on others.*

  While ADD is something biological that is there from birth, it is not a free pass for dysfunctional behaviour. They need to recognize the impact their behaviours have on others and mitigate that impact. This will help them to survive in a world that does not always accommodate them.

More and more writers in the field of ADD are saying that there are many positive aspects to having ADD. The key in the workplace is to create an environment and foster attitudes that play to the strengths and help the ADD person fit in to a non-ADD world.

How to tell if you have ADD

The first thing to note about ADD is that it is not something that you "get." You either have it at the beginning of your life, or you don't. The following indications of ADD are paired with child and adult characteristics. Both would need to be present.

These characteristics are based on the screening test in Dr. Lynn Weiss' book, *The Attention Deficit Disorder in Adults Workbook*. It is not presented for diagnostic purposes, but to give you some idea of the characteristics involved.

Child: difficulty paying attention, concentrating and keeping still.
Adult: difficulty concentrating, staying on task, paying attention, staying seated during meetings.

Child: acts without thinking a lot, finds it difficult to wait his or her turn.
Adult: acts impulsively, often without sufficient planning.

Child: often accused of overacting, making a big deal out of little things.
Adult: flies off the handle, often seems overly stressed.

Child and adult: finds it difficult to finish things or get organized, trouble finding things.

Child: gets too excited or upset about things, overly sensitive to bad things happening, has a temper.
Adult: moods a direct consequence of how the day is going, overly impacted by what someone else does or says, easily gets angry or out of control.

If you see yourself in a number of these descriptions, it is possible that you have ADD. See your family doctor for referral to a qualified specialist. The first step is diagnosis.

While most individuals experience these things from time to time, they are a constant in the lives of people with ADD. Assessment usually focuses on the weaknesses because it comes out of a dysfunction-oriented model of mental health. But there are both strengths and challenges to having ADD, and you need to understand them both. Call Interlock for help with coping skills: www.interlockeap.com.

RESOURCES

Following are just a few of the many books available:

ADD on the Job – Lynn Weiss, PhD

Attention Deficit Disorder in Adults – Lynn Weiss, PhD

Driven To Distraction – Edward M. Hallowell, MD and John J. Ratey, MD

Healing The Hyperactive Brain – Michael R. Lyon, MD

Scattered Minds – Gabor Maté, MD

Attention Deficit Disorder: A Different Perception – Thom Hartmann.❖

Unauthorized practice of law

THE LAW SOCIETY routinely investigates allegations of unauthorized legal practice. The *Legal Profession Act* restricts the practice of law to qualified lawyers in order to protect consumers from unqualified and unregulated legal services providers.

Anyone with questions regarding the right of a person who is not a member of the Law Society to provide legal services should contact the Society at 604-669-2533 or 1-800-903-5300.

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

Dwayne Eric Hunte of New Westminster (doing business as DH & Associates) has been found to have falsely represented himself as a lawyer. Hunte operated a website offering various legal services and representing that DH & Associates had "170+" associates "across the country." In August 2009, Hunte offered and provided legal services for a fee in relation to a claim against a landlord. Hunte has been ordered by the Supreme Court to stop providing legal services and suggesting in any way that he is a lawyer. He has also been ordered to pay costs.

Scott D. Petrie of New Westminster has been prohibited from providing legal services after several advertisements appeared on craigslist.org. The court found Petrie provided legal services in a family law matter. Petrie has been ordered not to suggest in any way that he is qualified or entitled to do so. He has been ordered to pay costs.

Joe Wan of JW Corporate Services Inc. has consented to an order prohibiting his firm from preparing incorporation documents contrary to the *Legal Profession Act*. Wan has agreed to pay costs of $270.

◆

From December 1, 2009 to February 28, 2010, the Law Society obtained undertakings from eight individuals and businesses not to engage in the practice of law. The most common breach of the *Legal Profession Act* is non-lawyers preparing incorporation documents for a fee.❖

Discipline digest

Please find summaries with respect to:

- Michael Curt Scholz
- Eric Kai Chesterley
- Gerhard Ernst Schauble
- Andrew James Liggett
- Robert John Palkowski
- Lawyer 10

For the full text of discipline decisions, visit the Regulation & Insurance / Regulatory Hearings section of the Law Society website.

MICHAEL CURT SCHOLZ

Vancouver, BC
Called to the bar: May 14, 1979
Ceased membership: July 3, 2008
Bencher review: September 9, 2009
Benchers: Bruce LeRose, QC, Chair, Leon Getz, QC, David Mossop, QC, Thelma O'Grady, David Renwick, QC, Meg Shaw, QC, Herman Van Ommen
Report issued: November 24, 2009 (2009 LSBC 33); corrigenda issued: November 26, 2009 (2009 LSBC 34)
Counsel: Henry Wood, QC for the Law Society and George Gregory for Michael Curt Scholz

BACKGROUND

In the decision of the hearing panel (facts and verdict: 2008 LSBC 02; penalty: 2008 LSBC 16; Discipline Digest: 2008 No. 3 July), Michael Curt Scholz was found in breach of a court order governing trust funds, in contravention of Law Society Rule 3-51. The panel also found Scholz acted in circumstances that had the potential for divided loyalties and a conflict of interest. The panel found Scholz's conduct in both these circumstances amounted to professional misconduct. The panel ordered that he be suspended for one month and pay costs of $26,437.50.

Scholz challenged the findings of the hearing panel, the verdicts of professional misconduct and the penalty. He argued that his conduct must be viewed through his eyes, this was not the case of a fully practising lawyer acting in conflict, he was nearing retirement and he had stopped thinking like a lawyer.

DECISION

The review panel upheld the findings of the hearing panel.

The panel stated that a lawyer's conduct must be viewed objectively, and a belief to the contrary is irrelevant as to whether the impugned conduct is within the standards that govern lawyers' behaviour. As long as Scholz continued to act as a lawyer, including charging fees for his services, he was obliged to continue to think and act as a lawyer.

The review panel upheld the hearing panel's decision on penalty that a one-month suspension and the payment of costs was an appropriate penalty. The review panel further ordered Scholz to pay the costs of the review.

ERIC KAI CHESTERLEY

Courtenay, BC
Called to the bar: June 30, 1976
Discipline hearing: September 30, 2009
Panel: James Vilvang, QC, Chair, Haydn Acheson and David Mossop, QC
Oral decision issued: September 30, 2009

Report issued: October 6, 2009 (2009 LSBC 29)
Counsel: Eric Wredenhagen for the Law Society and Gerald Cuttler on behalf of Eric Kai Chesterley

FACTS

A client retained Eric Kai Chesterley to claim an interest in land registered in the name of the client's father. Chesterley advised that the client's mother was the proper party to make the claim.

The client told Chesterley that his mother agreed to be a party to the action, but Chesterley did not contact the mother to confirm her consent. He later sought information from the mother but did not inform her that she would be named as a plaintiff in the action.

When the mother learned she had been named as plaintiff, she agreed to let the action stand. Chesterley did not advise her of the risk that she might be required to pay the defendant's costs.

In October 2003, the mother retained Chesterley to defend her in an action started by her daughter against the father. The original client was later added as a plaintiff in that same action, and the father also sued the original client.

Chesterley did not fulfill the requirements for acting for two parties, as outlined in the *Professional Conduct Handbook*. Specifically, he did not explain to the clients the principle of undivided loyalty; advise them that no information received from one client could be treated as confidential as between them; or secure the informed consent of the clients as to the course of action to be followed if a conflict arose between them.

On instructions from the clients, Chesterley filed a Notice of Discontinuance of the Action. Special costs were awarded at $25,783.05.

ADMISSION AND PENALTY

Chesterley admitted that he commenced a civil action in the name of the mother before she actually retained him and that he commenced such action without proper instructions, which constitutes professional misconduct.

Chesterley further admitted that, in acting jointly for the clients, he failed to comply with the requirements of the *Professional Conduct Handbook,* which constitutes professional misconduct.

The hearing panel accepted Chesterley's admissions and proposed penalty. The panel ordered that he pay:

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

GERHARD ERNST SCHAUBLE

Kelowna, BC
Called to the Bar: July 21, 1989 (BC); June 19, 1981 (Alberta)
Discipline hearings: July 22, 23, 24 and December 10, 2008 (facts and verdict); October 2, 2009 (penalty)
Panel: James D. Vilvang, QC, Chair, William F.M. Jackson and Brian J. Wallace, QC
Reports issued: April 16 (2009 LSBC 11) and October 23, 2009 (2009 LSBC 32)
Counsel: Jaia Rai for the Law Society; David W. Donohoe for Gerhard Ernst Schauble

FACTS

In June 2001, Gerhard Ernst Schauble moved his practice, Schauble & Company, from Westbank to join a Kelowna firm. Schauble claimed he was assured he would be referred all of the firm's personal injury work and have other lawyers available to provide backup while he was engaged in other activities.

On January 31, 2003, the Kelowna firm partnership was terminated, and effective the next day, Schauble and one of the Kelowna firm partners entered into an agreement in essentially the same terms as in 2001.

While practising with the Kelowna firm, Schauble rendered accounts to three clients for fees and accepted payment of those fees without the knowledge or authority of the firm. If undetected, this misappropriation would have cost the firm approximately $45,000 in revenue.

On January 8, 2004, the principal of the Kelowna firm commenced an action in the BC Supreme Court against Schauble and also made a complaint to the Law Society.

Schauble's position is that these clients were not clients of the firm, but rather were clients in his separate practice, which was contemplated by the Agreements. He claimed that a former partner of the Kelowna firm confirmed his right to retain the fees in respect of these clients.

The former partner denied this and stated that Schauble was entitled to keep any fees billed on the files he brought with him from Westbank. However, after disbursements were paid, fees would be shared 50/50 for work done on new files or any files that were turned over to Schauble. It was also the former partner's understanding that Schauble was not entitled to carry on a practice outside the firm.

In the alternative, Schauble said that he was entitled to retain the fees in question as a set-off for earnings lost as a result of the Kelowna firm's breach of the Agreements. He claimed the firm's principal breached their Agreements by diverting clients and refusing to refer personal injury files to Schauble. The former partner and the firm's former assistants confirmed this was true.

VERDICT

At the hearing, Schauble was asked what he would have done differently. He responded that his biggest mistake was entering a professional association agreement with the Kelowna firm. He added that his second biggest mistake was in not leaving the relationship when he had an earlier opportunity. The panel concluded that Schauble did not acknowledge any misconduct, and stated that he had sufficient experience to realize that what he did was wrong.

The panel determined that Schauble was not entitled to keep the fees from client files for himself rather than split them with the firm, and that he did not honestly believe he was entitled to do so. Rather, he knowingly and intentionally misappropriated the funds. The panel found Schauble guilty of professional misconduct.

PENALTY

The panel is satisfied that a period of suspension is the appropriate penalty. The panel considered Schauble's belief that he had been provoked by the actions of the Kelowna firm's principal. While provocation does not justify Schauble's actions, it does mitigate the penalty.

The panel ordered that Schauble:

1. be suspended for three months; and
2. pay $32,000 in costs.

ANDREW JAMES LIGGETT

Burnaby, BC
Called to the Bar: May 17, 1991
Discipline hearing: April 29 and November 12, 2009
Panel: Gavin Hume, QC, Chair, David Mossop, QC and David Renwick, QC

Reports issued: July 14 (2009 LSBC 21) and December 14, 2009 (2009 LSBC 36)
Counsel: Maureen Boyd for the Law Society; David Taylor for Andrew Liggett

FACTS

An audit conducted between September 2006 and April 2009 found numerous problems with Andrew James Liggett's records in his own firm, Sea to Sky Law Corporation.

Liggett was administratively suspended from July 24 to August 24, 2006 for failing to submit his Trust Report. During this two-month period, there was little or no effort by Liggett to get his books and records in order. The Practice Standards Committee subsequently made a number of recommendations and follow-up practice reviews. In September 2008, Liggett was directed to provide a debt reduction plan to the Law Society.

In May 2009, a review of Liggett's records from August 2008 to February 2009 showed that the trust reconciliations were completed on time and were balanced. The GST, PST and employee withholding accounts and the accounts payable ledgers were all current and the accounts receivable ledgers were being maintained. Further, the accounting deficiencies for the period February 2004 to January 2008 had been rectified.

Liggett's lawyer stated that the records were previously not in order due to a difficulty in hiring and retaining competent staff, difficulties in keeping the PC Law and computer system operational, cash flow problems, an inability to hire a replacement bookkeeper when the accountant quit in March 2006, as well as issues in Liggett's personal life.

To bring his books and records in compliance with the Law Society Rules and help meet his financial responsibilities, Liggett spent approximately $50,000 in accounting fees, restructured his practice, moved to an office space-sharing arrangement, hired a full-time accountant, and sold a number of assets.

VERDICT

The panel found that Liggett's conduct constituted professional misconduct for numerous breaches of the Law Society Rules relating to accounting records and failure to comply with requests from the Law Society.

An aggravating factor in this case is that the books and records were out of compliance for three years. In spite of the number of factors playing on Liggett's practice and personal life, the panel was concerned specifically about the length of time taken to rectify the transgressions; the failure to follow through with the two action plans; the notice given to Liggett of the problems as early as May 2006; and the failure to produce any meaningful compliance during the period of Liggett's suspension.

The panel recognized that there was no misappropriation of client trust funds, nor was there any evidence of harm to any person arising from this misconduct. Nevertheless, the panel noted that the administrative side of the practice of law is important. The Law Society rules were instituted to ensure that the public interest is protected and these rules must be adhered to.

PENALTY

The panel ordered that Liggett:

1. pay a $3,000 fine;
2. retain a Chartered Accountant or Certified General Accountant to review his books and records every six months for three years and to report in writing to the Law Society whether the books and records of Liggett's practice are in compliance and, if not, provide a detailed listing of the items of non-compliance; and
3. pay $18,000 in costs.

ROBERT JOHN PALKOWSKI

Vancouver, BC
Called to the bar: January 10, 1978
Discipline hearing: November 27, 2009
Panel: G. Glen Ridgway, QC, Chair, Barbara Levesque, Ronald Tindale
Report issued: December 1, 2009 (2009 LSBC 35)
Counsel: Eric Wredenhagen for the Law Society; Donald Muldoon for Robert John Palkowski

FACTS

On the evening of February 26, 2006, Robert John Palkowski was driving his vehicle over the Lions Gate Bridge when he crossed the centre double solid yellow lines. He hit one vehicle and then continued to drive into oncoming traffic and collided head on with another vehicle. The driver of the second vehicle was seriously injured.

The officer at the accident scene had reasonable grounds to believe that Palkowski's ability to drive was affected by alcohol. The officer was unable to obtain a suitable breath sample after three attempts at the roadside, and Palkowski subsequently refused to blow into the handheld screening device. A blood sample taken at the hospital later showed that Palkowski's blood alcohol level at the time of the accident was approximately three times the legal limit.

Palkowski was charged with dangerous operation of a vehicle causing bodily harm; impaired driving causing bodily harm; failure or refusal to comply with a demand made by a peace officer and failure or refusal to provide a breath sample.

Palkowski's lawyer wrote the Law Society to advise that his client had been involved in a motor vehicle accident and was facing criminal charges. The Discipline Committee placed the matter in abeyance until conclusion of the criminal proceedings.

Palkowski entered a guilty plea to the charge of impaired driving causing bodily harm. On January 15, 2009, he was given a 12-month conditional jail sentence and a 12-month driving prohibition.

Palkowski's lawyer wrote to the Law Society on February 11, 2009 stating that his client accepted full responsibility for his conduct and acknowledged that he drank too much on the date in question and then decided to drive home.

ADMISSION AND PENALTY

Palkowski admitted that he operated a motor vehicle while impaired by alcohol and was involved in a collision that caused bodily harm to another person. He admitted that his conduct constituted conduct unbecoming a lawyer.

The hearing panel accepted Palkowski's admission and ordered that he:

1. be suspended for one-month; and
2. pay $1,500 in costs.

LAWYER 10

Discipline hearings: September 18, 2008 (facts and verdict) and May 15, 2009 (penalty and application for anonymous publication);
Panel: Glen Ridgway QC, Chair, William Jackson and Richard Stewart, QC
Bencher review: December 10, 2009
Benchers: *Majority decision*: James Vilvang, QC, Chair, Carol Hickman, Ronald Tindale and Herman Van Ommen; *Minority decision*: Barbara Levesque, Peter Lloyd and David Renwick, QC

Reports issued: February 11 (2009 LSBC 06) and September 9, 2009 (2009 LSBC 27), and January 5, 2010 (2010 LSBC 02)

Counsel: Eric Wredenhagen for the Law Society and Craig Dennis for Lawyer 10 (facts and verdict, penalty and application for anonymous publication); Gerald Cuttler for the Law Society and George Macintosh, QC and Craig Dennis for Lawyer 10 (review)

FACTS

In 1993, Lawyer 10's firm was retained by a client who was a shareholder involved in a foreclosure action. The mortgage proceeds in dispute were being held in trust by another law firm. The shareholders' dispute was settled in July 1993. Lawyer 10's firm was instructed by the client to review the other law firm's accounts in this matter.

In 1992, the other law firm had obtained a court order that directed the land sale proceeds in dispute be paid into its trust account. In March 1993, a second order granted the clients judgment in the amount of $554,879.34. In July 1993, the law firm obtained a third order directing this payment plus interest to their clients. In January 1994, a fourth order directed payment of the remaining funds in the amount of $551,858.60 into court.

In February 1994, Lawyer 10's firm, on the client's instructions, applied for payment out of the balance of funds in court. The basis of this *ex parte* application was that the former law firm had never paid the client the sum of $554,879.34 as ordered in July 1993.

A junior lawyer, working under the guidance of another lawyer at Lawyer 10's firm, prepared the affidavit. When Lawyer 10 swore the affidavit, he was told by the client that the funds had not been paid. The lawyer in his firm who was acting for the client also stated that, after a review of the file and court orders, it appeared that the funds had not been paid to the client.

In March 1996, Lawyer 10 swore an affidavit and the statement "the funds were not paid to the Petitioners" was sworn to be on personal knowledge, not information and belief. This statement proved to be false as the funds had been paid to the client in 1993.

In 1999, some of the claimants to the lands discovered the funds they believed to be held in court, as per the first court order, had been paid out. They complained to the Law Society, and also advised of ongoing civil proceedings with respect to these funds, which had been commenced in August 1996.

In 1999, Lawyer 10's lawyer requested an abeyance of the Law Society's investigation, which was granted subject to undertakings. Between 2000 and 2006, the Law Society received updates on the status of the civil proceedings, and was advised that proceeding with a discipline investigation would risk stirring up civil proceedings. The Law Society's investigation into Lawyer 10 was reactivated on November 9, 2006.

The investigation at Lawyer 10's firm found a memo dated March 1994 from an associate to the client's lawyer, stating that the funds had been paid. There is no evidence that Lawyer 10 was ever aware of this memo.

It was also not known whether the client's lawyer was aware that he was asking Lawyer 10 to swear a false affidavit or that he had forgotten the memo from a year earlier. This lawyer ceased to be a member of the Law Society in 2003 and was believed to be residing outside of Canada.

DECISION OF THE HEARING PANEL

Although Lawyer 10 did not draft the affidavit, this factor should have made him more diligent in ascertaining the true facts. If Lawyer 10 had made the appropriate enquiries, he would have found that the funds had been paid to the client three years earlier.

A lawyer is an officer of the court and when that lawyer is the deponent to an affidavit that will be relied on in court, the lawyer must conform to the highest standard of care, accuracy and thoroughness in ensuring the accuracy of the sworn statements that the lawyer makes.

The hearing panel found that Lawyer 10's conduct in swearing the affidavit constituted professional misconduct. Lawyer 10 was ordered to pay a fine of $1,500 plus costs. Further, the panel dismissed his application for anonymous publication.

Lawyer 10 sought a review of the finding of professional misconduct, the penalty imposed, and the refusal to order anonymous publication.

DECISION OF THE BENCHERS ON REVIEW

The initial question to be determined on the review was whether the conduct of Lawyer 10 met the professional standards required by the Law Society. The second question was, if Lawyer 10 did not meet the standard expected, was the conduct sufficiently deviant to be considered professional misconduct.

Majority (Vilvang, Hickman, Tindale and Van Ommen)

The majority noted that it was clear that the inaccurate statement was made by mistake and not with any intent to mislead. At the time Lawyer 10 swore the affidavit, he was aware of the distinction between facts and matters based on personal knowledge and facts and matters based on information and belief. That a finding of professional misconduct does not require proof of a dishonest intent is settled law in Law Society decisions. What is not settled is whether a mistake, without dishonest intent, is sufficient to find professional misconduct.

Although Lawyer 10's conduct fell short of what should be expected of a lawyer, the panel concluded that the conduct was not such a marked departure from the norm that it should be held to be professional misconduct. It would be impossible to present a comprehensive list of the features of conduct that could convert an innocent mistake into a culpable mistake, but the complete absence in this case of features such as gross neglect, recklessness, and any element of dishonesty, led the majority to conclude that this lawyer's conduct was not professional misconduct. The majority therefore dismissed the citation.

As a result of the majority's findings, it was unnecessary to deal with the application regarding anonymous publication.

Minority (Levesque, Lloyd and Renwick)

The minority found that Lawyer 10 made two mistakes; first, he provided false information to the court; and second, he failed to provide the source of his information. When Lawyer 10 chose to swear the affidavit on personal knowledge, he should have personally made all of the inquiries that were available to him in order to be able to make this statement. He should not have relied exclusively on the inquiries of, or the information supplied by, other third parties, particularly those with a financial interest in the result of the application.

The minority was satisfied that Lawyer 10's failure to properly frame the affidavit (on information and belief), which resulted in the client getting paid twice, was culpable neglect. It was his responsibility to ensure that the court was aware of the true state of affairs, particularly in an *ex parte* application.

The minority concluded that the hearing panel did not err in finding that Lawyer 10's conduct was professional misconduct and did not err in not ordering anonymous publication.❖

ELECTED BENCHERS

President
G. Glen Ridgway, QC*

First Vice-President
Gavin H.G. Hume, QC*

Second Vice-President
Bruce A. LeRose, QC*

Rita C. Andreone
Kathryn A. Berge, QC
Joost Blom, QC
Patricia Bond
Robert C. Brun, QC
E. David Crossin, QC
Tom Fellhauer
Leon Getz, QC
Carol W. Hickman*
Jan Lindsay, QC*
David W. Mossop, QC
Suzette Narbonne
Thelma O'Grady
C.E. Lee Ongman
David M. Renwick, QC
Alan Ross
Catherine A. Sas, QC
Richard N. Stewart, QC
Herman Van Ommen
Arthur E. Vertlieb, QC*
Kenneth M. Walker

APPOINTED BENCHERS

Haydn Acheson
Patrick Kelly
Stacy Kuiack
Barbara Levesque
Peter B. Lloyd*
Dr. Maelor Vallance

EX OFFICIO BENCHER

Attorney General
Michael de Jong, QC

** Executive Committee*

LIFE BENCHERS

Ralston S. Alexander, QC
R. Paul Beckmann, QC
Howard R. Berge, QC
P. Michael Bolton, QC
Thomas R. Braidwood, QC
Cecil O.D. Branson, QC
Trudi L. Brown, QC
Mr. Justice Grant D. Burnyeat
A. Brian B. Carrothers, QC
Mr. Justice Bruce I. Cohen
Robert M. Dick, QC
Robert D. Diebolt, QC
Ian Donaldson, QC
Ujjal Dosanjh, QC
Leonard T. Doust, QC
Jack L.T. Edwards, QC
William M. Everett, QC
Anna K. Fung, QC
Richard C. Gibbs, QC
Arthur M. Harper, QC
John M. Hogg, QC
H. Allan Hope, QC
Ann Howard
John J.L. Hunter, QC
William F.M. Jackson, QC
Mr. Justice Robert T.C. Johnston
Gerald J. Kambeitz, QC
Master Peter J. Keighley
Terence E. La Liberté, QC
Mr. Justice Peter Leask
Gerald J. Lecovin, QC
Charles C. Locke, QC
James M. MacIntyre, QC
Richard S. Margetts, QC
Marjorie Martin, MSW
Robert W. McDiarmid, QC
Brian W.F. McLoughlin, QC
Kenneth E. Meredith
Peter J. Millward, QC
Dennis J. Mitchell, QC
Karen F. Nordlinger, QC
Richard C.C. Peck, QC
June Preston, MSW
Emily M. Reid, QC
Patricia L. Schmit, QC
Norman Severide, QC
Jane S. Shackell, QC
Donald A. Silversides, QC
Gary L.F. Somers, QC
Mary F. Southin, QC
Marvin R.V. Storrow, QC
William J. Sullivan, QC
G. Ronald Toews, QC
Russell S. Tretiak, QC
Benjamin B. Trevino, QC
William M. Trotter, QC
Ross D. Tunnicliffe
Gordon Turriff, QC
Alan E. Vanderburgh, QC
James D. Vilvang, QC
Brian J. Wallace, QC
Karl F. Warner, QC
Warren T. Wilson, QC
David A. Zacks, QC

MANAGEMENT BOARD

Chief Executive Officer and Executive Director
Timothy E. McGee

Stuart Cameron
Director, Investigations, Monitoring and Enforcement / Litigation Counsel / Acting Chief Legal Officer

Susan Forbes, QC
Director, Lawyers Insurance Fund

Jeffrey Hoskins, QC
Tribunal / Legislative Counsel

Jeanette McPhee
Chief Financial Officer / Director of Trust Regulation

Alan Treleaven
Director, Education and Practice

Adam Whitcombe
Chief Information and Planning Officer

The Law Society of British Columbia

845 Cambie Street, Vancouver, British Columbia, Canada V6B 4Z9

Telephone **604-669-2533** | Facsimile **604-669-5232**

Toll-free in BC **1-800-903-5300** | TTY **604-443-5700**

lawsociety.bc.ca

Lawyers Insurance Fund

Telephone **604-682-8911** | Facsimile **604-682-5842**