The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

Fostering professional responsibility

by Herman Van Ommen, QC

REFLECTING ON THIS past year as president brought back memories of when I acted as counsel for the Law Society in discipline hearings. The experience of dealing with those files instilled in me the importance of professionalism, a fuller appreciation of the trust we as lawyers enjoy and must protect, as well as kindled a desire to serve the public, which led me to become a Bencher.

The Law Society's mandate is to protect the public. We do this by setting and upholding standards for the education, professional responsibility and competence of practising lawyers. Perhaps the most public-facing way we fulfil our mandate is through our Professional Regulation Department. The department handles complaints against lawyers, investigates possible lawyer misconduct and incompetence, takes custodianship of lawyers' practices when they are unable to practice, conducts discipline cases and takes action against those engaged in the unauthorized practice of law. All of this work is integral to our status as a self-regulating profession.

Most complaints about lawyers each year are resolved by Law Society staff. Often, cases are resolved by staff working with the lawyer to address issues and ensure that they will not be repeated. Staff also help resolve issues between lawyers and between clients and lawyers to restore relationships. Where more serious concerns about conduct warrant further action, the department investigates and may refer cases to the Discipline Committee. Only about 15 per cent of complaints are referred to the Discipline Committee to determine the appropriate disciplinary response and approximately 25 cases each year proceed to a disciplinary hearing.

As president, I have continued to be part of the professional regulation process as a member of disciplinary panels. Each panel includes a member of the public in addition to one Bencher and one non-Bencher lawyer. Our hearings adhere to principles of administrative law. Fairness is accorded to those involved. Hearings are public and all decisions are published on the Law Society website. To ensure our processes are timely, transparent and accessible, the Law Society has worked with law societies across Canada to create and meet national standards.

During my tenure as a Bencher, the Law Society has moved increasingly toward proactive regulation wherever possible, to prevent issues from occurring in the first place. We publish discipline advisories with cautionary advice to lawyers. We also publish summaries of conduct reviews. The Benchers also are available to lawyers who have identified concerns themselves and are seeking advice and guidance for how to remain in compliance with our professional responsibilities. Our law firm regulation initiative is a significant move toward preventing problems before they occur. All of these efforts are positive improvements in how the Law Society supports lawyers to practise competently and ethically.

In previous columns, I shared some of the other positive developments at the Law Society to enhance public confidence in the legal profession over the course of this year. We put our oar in the water with a vision for legal aid adopted earlier this year, we held our first annual Rule of Law Lecture, and we engaged with the provincial government and MLAs from all parties. We updated our website. In partnership with the Continuing Legal Education Society of BC, we held a symposium to collect ideas on how the Law Society can help turn the law into a tool for reconciliation with Indigenous people and communities. We dedicated ourselves to ensuring the legal profession's voice and participation in matters that affect the public we serve.

There are many more initiatives under way, with more work to do in the coming year. Beginning January 2018, that work will be led by incoming president Miriam Kresivo, QC, who will be supported by Nancy Merrill, QC as first vice-president, Craig Ferris, QC as second vice-president, as well as the new chief executive officer and the talented and dedicated staff at the Law Society. I want to thank Tim McGee, QC, who resigned as CEO earlier this year, after a dozen years of service to the profession, Adam Whitcombe for serving as interim CEO these past few months, as well as the rest of the senior management team and staff at the Law Society for their work throughout the past year. Lastly, thank you to my fellow Benchers, for your support, dedication and commitment to improving our profession. It has been an honour to serve with you. ❖

BENCHERS' BULLETIN

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers, articled students and the public on policy and regulatory decisions of the Benchers, on committee and task force work, and on Law Society programs and activities. BC lawyers are responsible for reading these publications to ensure they are aware of current standards, policies and guidelines.

Suggestions for improvements to the *Bulletin* are always welcome — contact the editor at communications@lsbc.org.

Electronic subscriptions to the *Benchers' Bulletin*, *Insurance Issues* and *Member's Manual* amendments are provided at no cost. Print subscriptions may be ordered for $70 per year ($30 for the newsletters only; $40 for the *Member's Manual* amendments only) by contacting the subscriptions assistant at communications@lsbc.org.

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THE LAW FOUNDATION OF BRITISH COLUMBIA

FROM THE LAW FOUNDATION OF BC

Review of family law services

OVER THE PAST year, the Law Foundation conducted a review of various family law advocacy programs that it funds. Overall feedback on the programs from clients, as well as lawyers and others in the family law system who work with the programs, was very positive.

In Kelowna and Quesnel, the Ki-Low-Na Friendship Society and the Quesnel Tillicum Society were funded by the Law Foundation to run 3-year pilot projects in which family law advocates provide services for lower income men and women in their areas to respond to unmet legal needs. The advocates provide services such as: triage and referral; legal information and education; building legal capabilities; supported information and summary advice services; supported dispute resolution; helping clients fill out forms and preparing clients for meetings with duty counsel and pro bono lawyers; and accompanying clients to court. Evaluations of both programs by an external consultant found that well over 90 per cent of clients received the help they wanted and would recommend the service to others. Also important was that key stakeholders involved with delivering, supporting and interacting with the pilot projects consistently commented positively on the need for this work in their communities and on the value of the assistance provided by the family law advocates.

For the past two years, both Atira Women's Resource Society and Battered Women's Support Services have been part of a pilot project in which the advocates, who are also practising lawyers, have provided expanded services under established criteria. Atira's expanded programs in the Downtown Eastside provided assistance with legal advice, research, drafting legal letters, swearing affidavits, gathering evidence, preparing for and appearing at Supreme Court hearings, submissions, attendance at case conferences and representation at judicial reviews. At Battered Women's Support Services, the services often related to emergency situations and safety needs, making applications for protection orders or supervised access. Recent outcomes-based evaluations of both programs found that there was a high rate of satisfaction among the clients: they were unanimously satisfied with the quality of service they received and positive about referring the services to others, and perhaps most importantly, they felt that they could not have resolved their problems without this assistance.

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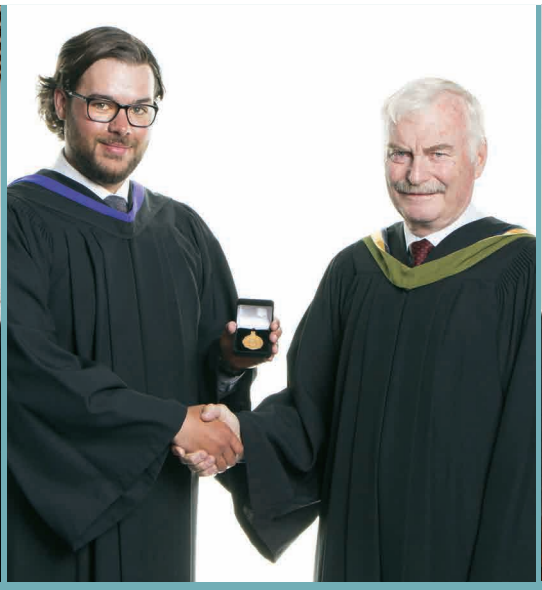

Photos: left and centre photo submitted by UBC and TRU, respectively, and right photo by Brian Dennehy Photography

GOLD MEDAL PRESENTATIONS

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

In 2017, gold medals were presented to Jocelyn Plant of UBC (left photo with President Herman Van Ommen, QC), Simon Meijers of TRU (centre photo with Life Bencher Kenneth Walker, QC) and Madeline Reid of UVic (right photo, with President Herman Van Ommen, QC).

2017 and beyond

by Adam Whitcombe, Acting Executive Director / CEO

AS 2017 DRAWS to a close, I look back on the Law Society's activities and achievements this past year and I'm pleased to highlight some of our accomplishments.

In March, the Law Society released its vision for publicly funded legal aid, which served as a blueprint to renew the profession's outreach on this issue of significant public importance. Nancy Merrill, QC, second vice-president and chair of the Legal Aid Advisory Committee, penned an op-ed stressing the importance of publicly funded legal advice. The op-ed was picked up by the *Vancouver Sun*, the *Victoria Times Colonis*t, and numerous community publications including *Burnaby Now*, the *Merritt Herald*, the *Prince George Citizen* and the *Smithers Interior News*.

We continued to pursue amendments to the *Legal Profession Act* to provide the Benchers with the authority to regulate alternate legal service providers. This initiative was the subject of two reports a few years ago and was the topic of the Bencher retreat earlier this year. It remains a strategic issue for the Law Society and the profession.

On May 31, we held our first annual Rule of Law Lecture. The lecture is just one of the Law Society's efforts to help people understand how the rule of law is fundamental to our personal rights and freedoms and to our constitutional structure. Nearly 170 people attended the lecture to hear from Anne Egeler, deputy solicitor general in the Washington State Attorney General's Office, and Richard Gordon, QC, lead counsel for Wales in *R (Miller) v. Secretary of State for Exiting the European Union*. They offered excellent insights on how the rule of law played a role in recent events in the US and the UK.

This November, we continued our journey toward truth and reconciliation. More than 450 participants attended our Truth and Reconciliation Symposium to discuss meaningful ways the legal profession can meet the challenge of responding to the Truth and Reconciliation Commission's calls to action. I look forward to providing an update on our findings.

Looking ahead to next year, we expect to have the 2018-2020 strategic plan approved by the Benchers in December. The new plan will establish several strategic goals for the Law Society, which will define our work in 2018 and beyond. We're hoping to make progress on our initiatives in law firm regulation and alternate legal service providers in 2018. In addition, the Benchers will be considering initiatives relating to access to justice and improvements to legal aid, responding to the Truth and Reconciliation Commission's calls to action, and improving mental health in the legal profession. The Benchers are set to approve the new plan at their December 8 meeting.

As the Law Society will start 2018 with a new executive director/chief executive officer, this will be my last CEO's Perspective. I would like to thank President Herman Van Ommen, QC for his confidence and support during this interim period, all of the Benchers who have offered me advice and assistance and the staff of the Law Society, who have all been truly supportive throughout my time as acting executive director/chief executive officer.

I welcome your comments and feedback. Please feel free to contact us at communications@lsbc.org.❖

2017 Law and the Media Workshop

From left to right: Dan Burnett, QC, Wendy Cox, Ludmila Herbst, QC and Kirk LaPointe.

ON NOVEMBER 1, members of the media gathered at the Law Society for the annual Law and the Media Workshop to learn about the legal issues of researching and publishing in a social media environment. The Law Society and the Jack Webster Foundation partner together to host a workshop to refresh and enhance reporters' knowledge of the law as it relates to journalism. More than 40 journalists from print, radio and online media outlets across the Lower Mainland attended.

This year's workshop followed the fictional story of an online vigilante group that had been making serious allegations of sexual misconduct by a doctor and a teenage actor. The workshop touched on topics related to defamation, copyright, publication bans and monitoring online comments from the public on websites and social media. Attendees heard from media lawyer Dan Burnett, QC; Wendy Cox, BC and Alberta editor at the *Globe and Mail*; media lawyer Ludmila Herbst, QC; and Kirk LaPointe, editor-in-chief at the Business in Vancouver Media Group and vice-president at Glacier Media.

The workshop had overwhelmingly positive feedback: 100 per cent of attendees surveyed said the workshop improved their understanding of the legal issues around reporting and journalism, 96 per cent said the workshop was informative and useful, and 100 per cent said the panellists were excellent or good.❖

Unauthorized practice of law

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

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

* * *

DURING THE PERIOD of May 15 to November 10, 2017, the Law Society obtained eight undertakings from individuals and businesses not to engage in the practice of law.

In addition, the Law Society has obtained orders prohibiting the following individuals and businesses from engaging in the unauthorized practice of law:

On July 7, 2017, Mr. Justice Grauer ordered that former lawyer **Gerhard Pyper**, also known as Gerhardus Albertus Pyper, of Surrey, be permanently prohibited in the province of British Columbia from engaging in the practice of law for a fee, representing himself as a lawyer, and commencing, prosecuting or defending a proceeding in any court on behalf of another party, unless and until he becomes a practising member of the Law Society. The court found that Pyper had prosecuted proceedings in the Supreme Court on behalf of a company and sought leave on several occasions to represent the company before the Supreme Court and the Court of Appeal in the expectation of a fee, gain or reward, direct or indirect, from the company. The court awarded the Law Society its costs. Pyper has appealed the decision.

On August 16, 2017, **Cain & Daniels, Inc.**, of Tampa, Florida, consented to an injunction prohibiting it from engaging in the practice of law in British Columbia. The Law Society had received complaints that the company had offered to negotiate the settlement of litigation for a fee on behalf of litigants.

On August 30, 2017, former lawyer **Steven Neil Mansfield**, of Vancouver, doing business as Bayshore Law Group, consented to an injunction prohibiting him from engaging in the practice of law, representing himself as a lawyer and from commencing, prosecuting or defending proceedings in any court on behalf of others. In its petition, the Law Society alleged that Mansfield falsely represented himself as a lawyer and assisted a former client with the conveyance of her property after his membership ceased on January 1, 2017. The Law Society also alleged that Mansfield failed to forward the proceeds of the sale to his former client after the sale of the property concluded. Further, the Law Society alleged that Mansfield drafted a will for the former client for or in the expectation of a fee after he ceased being a member of the Law Society.

On November 8, 2017, Madam Justice Maisonville ordered that **Jeff Sprague**, of Langley, doing business as Damage Inc., be permanently prohibited from engaging in the practice of law for a fee, representing himself as a lawyer and commencing, prosecuting or defending a proceeding in any court on behalf of another party, unless and until he becomes a practising member of the Law Society. Pursuant to the order, Sprague may engage in the acts defined as the practice of law so long as he is employed and supervised by a practising lawyer. The court found that Sprague had offered to provide legal advice and services in advertisements he posted on Craigslist, had written a demand letter on behalf of another person and had offered legal services to two investigators for or in the expectation of a fee, gain or reward. The court awarded the Law Society its costs. ❖

To read the orders, search by name in the Law Society's database of unauthorized practitioners.

In brief

FEEDBACK SOUGHT FROM LAWYERS WHO DEAL WITH WITNESSES

The Ethics Committee is seeking feedback on draft changes to *BC Code* rules 5.3 and 5.4 on interviewing and communicating with witnesses. In crafting these draft rules, the Ethics Committee has attempted to preserve the best guidance of the existing BC Code rules, while adopting the basic format and approach of the Federation of Law Societies' Model Code provisions. Read the consultation materials on the Law Society's website.

JUDICIAL APPOINTMENTS

Judge Barbara L. Fisher of the Supreme Court of British Columbia was appointed a justice of the Court of Appeal for British Columbia. She replaces Madam Justice N. Garson, who elected to become a supernumerary judge.

E. David Crossin, QC, a partner at Sugden, McFee & Roos LLP, was appointed a judge of the Supreme Court of British Columbia in Vancouver. He replaces Madam Justice L.D. Russell, who elected to become a supernumerary judge

Dawn Boblin was appointed a judge of the Provincial Court in Surrey.

Andrea Ormiston was appointed a judge of the Provincial Court in Chilliwack.

Mark Jetté was appointed a judge of the Provincial Court in Surrey.❖

Miriam Kresivo, QC, 2018 president

IT IS THE DAY before the October 27 Bencher meeting, also known as committee meeting day at the Law Society. The building is bustling with activity as Benchers and members of committees, advisory committees and task forces gather to discuss important issues that impact how the profession provides legal services in BC.

Incoming president Miriam Kresivo, QC excuses herself from one of her many meetings for the day – she is on seven committees and subcommittees – to share with *Benchers' Bulletin* her hopes and priorities for the upcoming year. As we wait for the elevator, she remarks that she can be reached by email when she leaves town the following week for her vacation. "I am plugged in all the time," she says with a laugh. "I have an erratic schedule. And it suits me fine."

Her schedule will become even busier in the coming year. Kresivo takes the helm as president of the Law Society on January 1. "I really am excited about being president," she says. "If we could do one thing that makes access to justice more possible for the public, that would make it all worthwhile."

Citing the Canadian Forum on Civil Justice's 2016 findings, Kresivo says more than 80 per cent of Canadians do not obtain any legal advice for their legal problem. Although many lawyers are doing pro bono work, she believes that alone cannot solve the access to justice issues facing the legal profession and the public today. She and the Benchers support a novel approach to governing the legal profession: to regulate alternative legal service providers who may meet needs not currently met by lawyers.

"We continue to work with the government, as we need legislative changes to do that. It would be a significant change to the profession and for the public," she says. "It is exciting to think that you might be part of something that will really change how the legal profession is governed and how legal services are delivered. If we could accomplish that, it would be very significant and meaningful to me."

Another key initiative that Kresivo says will be top of mind for the coming year is how the Law Society responds to the Truth and Reconciliation Commission's recommendations. She is pleased with the Law Society's progress so far in striking the advisory committee and holding a symposium to seek feedback from the profession. This will be an ongoing priority for 2018. "We are on a journey and we need to focus on continuing forward on that path."

Kresivo is also looking forward to chairing the newly struck Recruitment and Nominating Advisory Committee, which seeks people with the requisite character, knowledge, experience, expertise and willingness to serve on committees, task forces and working groups. She says serving on committees is a great way for lawyers who may not currently have the time to dedicate as a Benchers to nevertheless get involved in the work of the Law Society. She encourages people to put their name forward and let the Law Society know they are interested: "Talk to a Bencher. There are lots of opportunities to be involved."

She notes that the legal profession is changing and there are challenges it has to grapple with head-on, including embracing technological advances, alternative legal service providers and examining the current articling system and whether it is appropriate and meets the needs of incoming lawyers.

Tackling challenges comes naturally for Kresivo, whose passion for trying new things led her to BC and to practise law. Born and raised in Montreal, she received her undergraduate degree in art history at McGill. She made the cross-country move to BC for architecture school, and after two years, decided to switch gears and study law. "As soon as I entered law school, I loved it. I thought, 'This was the right choice.'"

Kresivo articled at what was known then as Shrum Liddle, now McCarthy Tétrault, and clerked for the County Court in Vancouver. After her call to the bar in 1983, she practised as a commercial and insurance litigator at Alexander Holburn Beaudin & Lang LLP. Though she enjoyed the experience, she decided to try working in the corporate world. "I wanted to be involved with the decision making, instead of dealing with the results when something went wrong."

And so she joined Chevron Canada Ltd. in 1988, where she served as in-house counsel for the majority of her career until 2015. "I loved that job because it involved everything. On a typical day, I would have union negotiations, deal with an environmental problem, vet contracts and press releases and do corporate secretary work. You never got bored." Wanting to develop a specialty, she did a short stint at William M. Mercer Ltd. from 1991 to 1994 as a pension consultant. Despite having little pension experience at the time, she got the job and gained extensive expertise in that area of law.

Today, she has come full circle and practises part-time at Alexander Holburn as associate counsel. She splits her time between the firm, her duties as a commissioner of the BC Utilities Commission and of course, her role as a Bencher.

"The experience of being a Bencher has been far more gratifying than I ever thought it would be. Part of the joy is working with all the other people. It is amazing to see these wonderful people give up their time and work really hard as Benchers."

When she was working as corporate counsel, she often felt isolated from other members of the bar. She wanted to get involved and give back to the profession, so

she served as secretary-treasurer of the Vancouver Bar Association for nearly 14 years. She then decided that she wanted to contribute to the regulation of the profession, and so she ran for Bencher and was elected in 2012.

"The Benchers come from all walks of life. There are people I never would've met, because they're criminal lawyers or from other parts of the province. I've made some wonderful friends."

In her spare time, Kresivo and her husband are avid tennis players and can be seen at the Jericho Tennis Club at least four times a week. Off the courts, she checks opponents at a weekly chess group. She is also a lover of literature and the arts. She attends the Vancouver Writers Festival each year and is a member of not one, but two book clubs. She has also taken up piano and is trying to fit in drawing classes but says she will likely have to wait until she retires to do more – next year is looking pretty full.❖

Bencher election results

THE 2018-2019 BENCHER election results are in. Four new Benchers will start their term on January 1, and 18 Benchers were re-elected. There will be 13 elected woman Benchers at the table — the highest number of woman Benchers to date.

Members had previously elected the following Benchers as president, first vice-president and second vice-president, respectively, for 2018:

- Miriam Kresivo, QC (president and Bencher for Vancouver)
- Nancy G. Merrill, QC (first vice-president and Bencher for Nanaimo)
- Craig A.B. Ferris, QC (second vice-president and Bencher for Vancouver)

Kresivo, Merrill and Ferris continue as Benchers for their district by virtue of their executive office.

President Herman Van Ommen, QC congratulates the elected and re-elected Benchers and thanks all those who stood for election. He thanks Benchers Tom Fellhauer, C. E. Lee Ongman and Gregory A. Petrisor, who will not be returning, and acknowledges their years of dedicated service.❖

Here are the Benchers who were elected on November 15, 2017, for the 2018-2019 term:

District No. 1 Vancouver*
Jasmin Ahmad
Jeff Campbell, QC
Jennifer Chow, QC
Jeevyn Dhaliwal
Brook Greenberg
Lisa Hamilton
Jamie Maclaren
Sharon Matthews, QC
Steven McKoen
Elizabeth Rowbotham
Tony Wilson, QC

**At the request of an unelected candidate, a review of the Vancouver election was conducted in accordance with Rule 1-36. Written reasons for the decision to uphold the Vancouver election results may be found on our website.*

District No. 2 Victoria
Pinder K. Cheema, QC
Dean P.J. Lawton, QC

District No. 3 Nanaimo
Nancy G. Merrill, QC

District No. 4 Westminster
Martin Finch, QC
Christopher McPherson
Phil Riddell

District No. 5 Kootenay
Barbara Cromarty

District No. 6 Okanagan
Michael Welsh

District No. 7 Cariboo
Geoffrey McDonald
Heidi Zetzsche

District No. 8 Prince Rupert
Sarah Westwood

District No. 9 Kamloops
Michelle Stanford

For full election results, see About Us > Benchers > Bencher Elections.

NEW BENCHERS IN 2018

Jennifer Chow, QC

Geoffrey McDonald

Michael Welsh

Heidi Zetzsche

President Herman Van Ommen, QC (left) and First Vice-President Miriam Kresivo, QC (right) listen to the Honourable Judge Steven Point (centre).

Truth and Reconciliation Symposium: Truth-telling and sparking change

"Truth and reconciliation. You need to learn the truth. We need to do something about reconciliation."

– The Honourable Judge Steven Point

THE LAW SOCIETY held its first Truth and Reconciliation Symposium on November 23, where participants shared their ideas on how the legal profession can address systemic biases against Indigenous people and how the Law Society can take action to facilitate reconciliation. More than 450 lawyers, judges, academics and representatives from legal and Indigenous organizations were in attendance.

The event opened with a Coast Salish welcome by Wes Nahanee, Squamish Nation cultural ambassador, followed by an introductory plenary by symposium co-chairs President Herman Van Ommen, QC and Indigenous lawyer Ardith Walkem to set the stage for the day.

Walkem introduced a video titled "But I Was Wearing a Suit," in which Indigenous lawyers voiced their experiences of discrimination and racial stereotypes. Their stories include being mistaken for clients by court staff and judges, being asked to leave the barristers lounge by other lawyers and having difficulty gaining after-hours access to the Courthouse Libraries. A common theme was being made to feel they do not belong in the legal profession. The video invited participants to consider the question "If this is how Indigenous lawyers are treated in the legal system, what does that say about how Indigenous clients are treated?"

The dialogue continued as participants broke out into smaller sessions to discuss a wide range of topics, including biases in the practice of law, systemic biases, retention and advancement of Indigenous lawyers, legal aid, international legal standards, Indigenous laws, lawyer education and cultural competence.

At the afternoon keynote, the Honourable Judge Steven Point told a number of personal stories to illustrate the ways bias and discrimination are daily occurrences for Indigenous people. He recounted the time City staff, unfamiliar with the *Indian Act*, came onto his reserve and started building a dam without ever speaking to the Band Council. He expressed grief over the high suicide rates of Indigenous youth and the violence experienced by his family members. Because of the trauma experienced by Indigenous people, he has witnessed that many of them are hesitant to speak to non-Indigenous authority figures, whether in classrooms or in court.

"Reconciliation encompasses the idea of trying to grasp how Aboriginal people experience the world," Judge Point said. "The justice system has failed to understand Aboriginal people. It has failed to take into account the Aboriginal perspective."

In closing, Judge Point asked each and every person in attendance to make a change within themselves. "Transformation and change doesn't begin out there. It begins in here," he said, pointing to his heart and head. "Individually, changing yourself."

The symposium wrapped up with facilitators sharing thoughts from the various breakout sessions and suggestions from participants on how to move forward. Van Ommen stated that the Law Society plans to release a report on the findings from the symposium, with a number of concrete initiatives that it can undertake next year. He further encouraged lawyers to continue their important work and keep the Law Society engaged as it continues its journey in the path toward reconciliation.

The Law Society extends a special thanks to members of the Truth and Reconciliation Advisory Committee, Continuing Legal Education BC's program lawyer Teresa Sheward for organizing the logistics of the symposium and facilitators Patricia Barkaskas, Tina Dion, Leah George-Wilson, Andrea Hilland, Celeste Haldane, Melissa Louie, Maxine Hayman Matilpi, Dr. Bruce McIvor and Ardith Walkem.❖

Provincial government outreach

ON OCTOBER 4 AND 5, President Herman Van Ommen, QC, led a delegation from the Law Society to meet in Victoria with members of the NDP Government Caucus, the BC Liberal Opposition Caucus and Green Party of BC Caucus. He was joined by First Vice-President Miriam Kresivo, QC, Dean Lawton, QC, and Appointed Bencher Woody Hayes, in raising awareness of the Law Society's regulatory role among newly elected MLAs.

The Bencher delegation also took the opportunity to speak to the legal profession's shared commitment of ensuring fairness, improving access to justice, and implementing recommendations that lead to reconciliation. Caucus members from all political parties expressed interest in Law Society initiatives to broaden the scope of services that may be provided by non-lawyers, encourage more lawyers to do *pro bono* work, and support investments in legal aid.

The Law Society is encouraged by the positive response of elected provincial representatives to its efforts to protect the public and advance the public interest in our justice system and looks forward to future outreach and further progress in the coming year.❖

PRACTICE ADVICE, *by Barbara Buchanan, QC, Practice Advisor*

Closing a client file: What documents to keep and for how long

YOU ARE ABOUT to close a client's file. It may contain original documents, copies of correspondence with the client and third parties, fee bills, invoices, and other documents. You may be wondering: what should I keep and for how long?

The Law Society's practice advisors often receive phone calls from lawyers asking this question and what the rules are for retention of file records. The Law Society Rules deal with the storage and security of all records as well as outline time requirements for the retention of specific types of records, including records typically retained separate from a client file (e.g., general account deposit books). For the types of client file records that are not covered by the Rules, there are statutory, ethical and practical reasons to securely store such records for various lengths of time.

What Law Society Rules apply with respect to the retention of records?

Read the complete Law Society Rules referred to below on our website for details. Below are some highlights.

1. Client identification and verification records

A lawyer must retain a record of the information and documents obtained for client identification and verification for the longer of:

- the duration of the lawyer and client relationship and for as long as is necessary for providing services to the client, and
- a period of at least six years following completion of the work for which the lawyer was retained (Law Society Rule 3-107(3)).

2. Fiduciary property records

If a lawyer is responsible for fiduciary property, Rule 3-55(5) requires that a lawyer must be able to produce on demand, for 10 years from the final accounting transaction or disposition of valuables, the records set out in subrules (3) and (4). See Rule 1 for the definitions of "fiduciary property" and "valuables."

3. Accounting, trust account, general account, cash transactions and billing records

A lawyer must keep the records referred to in Rules 3-67 to 3-71 (e.g., detailed accounting records and supporting documents, trust account records, general account records, records of cash transactions, billing records) for as long as the records apply to money held as "trust funds" (defined in Rule 1) or to valuables held in trust for a client, and for at least 10 years from the final accounting transaction or disposition of valuables (Rule 3-75).

In addition to the requirement to keep them for 10 years, a lawyer must keep the records, other than electronic records, at his or her chief place of practice in British Columbia for at least three years from the final accounting transaction or disposition of valuables. The final accounting transaction normally occurs when the final bill has been issued to the client and all balances, including trust funds, have been accounted for, and the client's file is closed and stored. A "record" includes metadata associated with an electronic record (Rule 1).

A lawyer must prepare a monthly trust reconciliation of the total of all unexpended balances of funds held in trust for clients as they appear in the trust ledgers, with the total of balances held in the trust bank account or accounts, together with the reasons for any differences between the totals and the required supporting documents (Rule 3-73(1) and (2)). A lawyer must retain for at least 10 years each monthly trust reconciliation prepared under subrule (1), and the detailed listings described in subrule (2) as records supporting the monthly trust reconciliations (Rule 3-73(4)).

4. Regulatory requirements for records storage and security

See Law Society Rules 10-3 and 10-4 regarding records storage and production, storage providers, custody, control, ownership, security and the triggering of reports to the executive director.

When required under the *Legal Profession Act* or the Law Society Rules, a lawyer must, on demand, promptly produce records in any or all of the following forms:

- printed in a comprehensible format;
- accessed on a read-only basis; and
- exported to an electronic format that allows access to the records in a comprehensible format.

The records, and the information contained in them, including any metadata associated with an electronic record, must be protected by making reasonable security arrangements against all risks of loss, destruction and unauthorized access, use or disclosure. The term "records" referred to in Rules 10-3 and 10-4 appears to be a broader category of records than the records referred to in Rule 3-75. According to section 29 of the *Interpretation Act*, a record includes books, documents, maps, drawings, photographs, letters, vouchers, papers, and any other thing on which information is recorded or stored by any means, whether graphic, electronic, mechanical or otherwise. In other words, a record would normally include the entire client file as well as the records referred to in Rule 3-75.

What other considerations apply to the retention of records?

Apart from the regulatory requirements above, there are ethical, statutory and practical reasons to securely store records for various lengths of time.

1. Ethical considerations

The duties in Law Society Rules 10-3 and 10-4 are closely related to the ethical duty of confidentiality set out in the rules under section 3.3 of the *Code of Professional Conduct for British Columbia* (*BC Code*). The duty of confidentiality survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client (Code rule 3.3-1, commentary [3]). Subject to any solicitor's lien rights, the lawyer should promptly return a client's property to the client on request or at the

Services for lawyers

Law Society Practice Advisors

Barbara Buchanan, QC
Brian Evans
Claire Marchant
Warren Wilson, QC

Practice advisors assist BC lawyers seeking help with:

- Law Society Rules
- *Code of Professional Conduct for British Columbia*
- practice management
- practice and ethics advice
- client identification and verification
- client relationships and lawyer-lawyer relationships
- enquiries to the Ethics Committee
- scams and fraud alerts

Tel: 604.669.2533 or 1.800.903.5300.

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

◆

LifeWorks – 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: 1.888.307.0590.

◆

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no additional cost to lawyers.
Tel: 604.685.2171 or 1.888.685.2171.

◆

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, law students and support staff of legal employers.
Contact Equity Ombudsperson **Claire Marchant** at tel: 604.605.5303 or email: equity@lsbc.org.

conclusion of the retainer.

The *BC Code* provides ethical guidance relevant to file management, storage and disposal procedures in section 3.5 (Preservation of clients' property). "Property" is broadly defined in the Code and includes "a client's money, securities as defined in the *Securities Act*, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property, including precious and semi-precious metals, jewelry, and the like" (rule 3.5-1).

A lawyer must care for a client's property as a careful and prudent owner would when dealing with like property and observe all relevant rules and laws about the preservation of a client's property entrusted to the lawyer (rule 3.5-2). A lawyer is responsible for maintaining the safety and confidentiality of the client's files in the lawyer's possession and should take all reasonable steps to ensure the privacy and safekeeping of the client's information. A lawyer must clearly label and identify a client's property and place it in safekeeping distinguishable from the lawyer's own property (rule 3.5-3). In addition, a lawyer must maintain such records as necessary to identify clients' property that is in the lawyer's custody (rule 3.5-4).

2. Statutory requirements

Provincial and federal statutes such as the *Business Corporations Act*, SBC 2002, c. 57, the *Evidence Act*, RSBC 1996, c. 124, the *Income Tax Act*, RSBC 1996, c. 215, the *Canada Business Corporations Act*, RSC 1985, c. C-44, the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), the *Canada Evidence Act*, RSC 1985, c. C-5 and the Personal Information Protection Act, SBC 2003, c. 63 contain records retention provisions. Be aware of such provisions and return to the client any original documents the client is required to retain unless you have agreed to store the documents for the requisite period. Also, some clients may not be permitted to keep records outside of Canada, such as registered charities, municipalities and public bodies. For such clients, records that are kept outside of Canada and accessed electronically within Canada are not considered to be records kept in Canada.

A client may also be subject to the statutory requirements of governments outside of BC or Canada, for which the client may require advice from counsel competent to practise in such other jurisdictions.

If the client instructs a lawyer to retain the client's records until certain statutory requirements are fulfilled and the lawyer chooses to accept that responsibility, the lawyer should establish the terms in writing, including who will bear the costs of such retention and when the obligations will end. These matters can be dealt with in the retainer letter or the final closing letter.

3. Defending against liability claims

Appropriately documenting a file, retaining the file, and retaining the right parts of the file can be crucial in a lawyer's defence against a liability claim. The initial retainer letter, notes of instructions and conversations, telephone records, copies of important papers and correspondence, and drafts are particularly important in the defence of a negligence suit or other claim. If a lawyer turns over a file to a successor lawyer, it is in the original lawyer's interest to note what file materials belong to him or her and need not be provided to the client and before handing the remaining documents over, to keep a copy at the lawyer's expense of the file contents that belong to the client. See *Closed Files – Retention and Disposition*, Appendix B: Minimum retention and disposition schedule for specific records and files – Rules and Guidelines, and Appendix D: File Ownership.

In light of the discovery component of limitation periods, negligence actions can be brought many years after the alleged negligence has occurred. However, the risk of a claim does diminish as time passes. The Lawyers Insurance Fund reported that from 1986 to 2016, 81 per cent of reports of claims or potential claims were made within three years of the alleged negligence and 97 per cent were within 10 years. Out of a total of 29,510 reports, 832 or 2.8 per cent were made more than 10 years after the alleged mistake. Nevertheless, the possibility of late claims exists and such claims are more difficult to defend against without documentary evidence to refresh the lawyer's memory or to corroborate events.

4. Defending against complaints

Another reason for file retention is to enable a lawyer to defend against a complaint

continued on page 19

Conduct reviews

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

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

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

BREACH OF NO CASH RULE

A lawyer accepted a cash retainer of $10,000 from a criminal law client and later refunded the client $8,950 by trust cheque, contrary to the "no refund in cash" requirement of Rule 3-59(5) of the Law Society Rules. The lawyer also incorrectly reported that he had not made any refunds of cash retainers when filing his 2016 trust report with the Law Society. These matters came to the Law Society's attention during a Law Society compliance audit. The lawyer, who frequently receives cash retainers, had a practice of noting cash receipts with a "c" on the receipt. The lawyer's assistant missed the "c" notation on this receipt when preparing the trust cheque to refund the retainer. The lawyer relied upon his staff and did not make an independent inquiry as to the source of the retainer.

A conduct review subcommittee advised the lawyer that his conduct was inappropriate because, by breaching the no refund in cash requirement and subsequently filing an incorrect trust report, he was undermining the goal of the cash transaction rule, which is aimed at preventing lawyers' trust accounts from being used to launder funds. The lawyer has since improved his office systems by ensuring that both he and his assistant confirm the source of trust funds before refunding them. The lawyer also instituted a new office system that requires him to make personal inquiries as to the source of funds before cheques are issued from his trust account. The lawyer was contrite and acknowledged the failure of his office systems leading to his breach of the refund in cash requirement. (CR 2017-31)

In a separate case, a lawyer in a litigation matter accepted cash retainers in the aggregate amount of $14,790 from a client and then later refunded the client $1,195.87 by trust cheque, contrary to Rule 3-51.1(3.2) [now Rule 3-59(5)] of the Law Society Rules. The lawyer also incorrectly reported that her firm had not made any refunds of cash retainers in excess of $1,000 in her firm's 2015 trust report with the Law Society. The breach of these rules was identified during a Law Society compliance audit. The breach occurred when the lawyer asked her bookkeeper to prepare a final account and other documents for the file. Although the lawyer reviewed the documents that had been prepared by her bookkeeper, she did not review the underlying file. Had she done so, she likely would have been alerted to the fact that the retainer had been made by way of cash payments.

A conduct review subcommittee discussed the importance and the purpose of the cash transaction rule with the lawyer. The subcommittee advised that the purpose of the rule is twofold. First, it serves the purpose of protecting the public interest from lawyers becoming involved, inadvertently or otherwise, in money laundering activities. Second, the profession could potentially lose its exemption from the reporting requirements of the federal Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), without lawyers' vigilant and strict adherence to the cash transaction rule. Without the FINTRAC exemption, lawyers would be required to disclose the names of and financial information about clients who make cash payments in excess of certain threshold amounts; this exemption is important to preserving lawyers' ability to protect solicitor and client privilege.

The lawyer acknowledged the purpose and importance of the cash transaction rule and that the self-regulating nature of the Law Society requires it to strictly adhere to and police the rule. In order to avoid a similar breach from occurring, the lawyer has taken steps to set up a new office system, which clearly identifies files where retainers are received in cash, regardless of amount, so that these files will be reviewed on closing for compliance with the cash transaction rule. In addition, the lawyer has agreed to continue to discuss with her staff the purpose and importance of the rule. She will consider having her bookkeeper review the free online trust accounting refresher course offered by the Law Society. She has also agreed to consider preparing a written office manual setting out, among other things, the procedure she has established for dealing with cash transactions. (CR 2017-32)

In another instance, a lawyer's firm received a total of $22,420 in cash from a client for a retainer on a criminal matter. The lawyer refunded the client $2,500 by way of electronic transfer, contrary to Rule 3-51.1(3.2) [now Rule 3-59(5)] of the Law Society Rules. This matter came to the Law Society's attention as a result of a Law Society compliance audit. The lawyer's client, a resident of BC, was incarcerated in a foreign country. The lawyer was retained to find counsel for his client in the foreign country. The lawyer received six cash retainers on behalf of his client, totaling $22,420. From the cash received, $14,320 was electronically transferred to the retained lawyer to pay his invoices for legal fees and disbursements. The lawyer then refunded the client $2,500 by electronically sending the funds to the retained lawyer on his behalf.

A conduct review subcommittee advised the lawyer that his conduct was inappropriate because he breached the no refund in cash requirement of the cash transaction rule by refunding more than $1,000 by cash. The lawyer has taken steps to change his office systems by making his staff aware of the cash transaction rule, calling a practice advisor when issues arise for him and ensuring his trust ledger indicates whether funds deposited were received as cash or some other form of deposit. (CR 2017-33)

INCIVILITY

A lawyer posted comments on his client's social media website that were personal and derogatory of the opposing party in a family law dispute. The comments were contrary to the lawyer's obligations under rules 7.2-1

and 7.2-4 of the *Code of Professional Conduct for British Columbia*, which state that a lawyer is to be courteous and civil to all of those with whom he has dealings and to ensure all communications maintain an appropriate, professional tone. The lawyer had received a call from his client late one evening, asking what the client should do about a comment posted on his "GoFundMe" page. The lawyer reviewed the post and immediately responded with the objectionable comments, criticizing the other party and praising his client. The lawyer acknowledged that he should not have posted the comments in haste and late at night, but rather should have waited in order to deal with the issue more thoughtfully and professionally. The lawyer admitted that his comments were unprofessional and he apologized directly to the complainants who were in attendance at the conduct review.

The conduct review subcommittee advised the lawyer that in the future, he would need to keep in mind that the true test of a lawyer's commitment to the obligation of courtesy comes when emotions are running high. The subcommittee provided the lawyer with a copy of the Canadian Bar Association BC Branch's Best Practice Guidelines for Lawyers Practicing Family Law and emphasized the following portions of the guidelines in avoiding any future similar conduct: strive to remain objective at all times and not to over-identify with clients or be unduly influenced by the emotions of the moment, avoid using inflammatory language and be mindful of the responsibility that his clients have in regard to their children and the adverse impact that matrimonial proceedings may have upon them.

The lawyer acknowledged that this process has been a learning experience for him, and one which emphasizes the importance of not making communications while emotions are running high. Going forward, the lawyer has committed not to post comments publicly about any matters in which he is involved. (CR 2017-34)

In another matter, a lawyer received offensive and inflammatory emails from a former client, which included allegations that the lawyer had engaged in improper conduct. The lawyer responded to the communications with emails containing unprofessional and discourteous language, contrary to one or more of rules 2.2-1, 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia,* which deal with the proper tone of professional communications. The lawyer acknowledged that he responded to the former client's correspondence in anger but stated he felt the communications to have been personal in nature and not issued in the course of his practice.

A conduct review subcommittee advised the lawyer that, because his emails were to an ex-client, they were not personal in nature. The subcommittee further advised the lawyer that his conduct was inappropriate because his communications had been unprofessional and contrary to the Code rules set out above. The subcommittee stated that while they could understand how upsetting it was to receive the communications from his ex-client, there is an obligation on lawyers to be courteous and professional in their communications, even if the lawyer is faced with rudeness and abusiveness.

The subcommittee recommended ways the lawyer could avoid engaging in unprofessional communications in the future, including after drafting a responsive communication while in an emotional state, setting the correspondence aside until the next day and then considering its contents again before sending it, having other counsel respond on his behalf, or having other counsel review his correspondence before sending it. The subcommittee recommended the lawyer generally adopt a less immediate approach to responding to email correspondence. The lawyer acknowledged that he should not have sent the responses he did. In the future, if he were to receive similar communications, the lawyer committed to having other counsel respond on his behalf or having other counsel review his correspondence before it is sent. (CR 2017-35).

THREATENING TO MAKE A COMPLAINT/INCIVILITY

A lawyer represented his clients in a real estate transaction that required a discharge of mortgage from a mortgage company. The lawyer wrote to the mortgage company requesting a payout statement for his clients' mortgage. The mortgage company wrote back advising of its policy on the discharge of mortgages and provided the payout statement.

The lawyer called the mortgage company to complain that its discharge of mortgage policy was incompatible with the Canadian Bar Association's standard form of undertakings, which the parties in the transaction had adopted. The lawyer later attended at the offices of the mortgage company and advised the president that he intended to report the mortgage company to the Association of Mortgage Brokers and to the Financial Institutions Commission. The lawyer allowed the tone of his communications with the president and staff of the mortgage company to become unprofessional. The lawyer was asked three times to leave the office and left only when a staff member opened the door and indicated he should exit.

The conduct review subcommittee advised the lawyer that his conduct was inappropriate because rule 3.2-5 of the *Code of Professional Conduct for British Columbia* prohibits a lawyer from threatening to make a complaint to a regulatory authority in an attempt to gain a benefit for a client. Additionally, the lawyer was advised that rule 7.2-1 of the Code imposes a positive duty on lawyers to be courteous and civil to all persons with whom they have dealings and that rule 7.24 of the Code prohibits lawyers from communicating to any person in a manner that is inconsistent with the proper tone of a professional communication.

The subcommittee advised the lawyer that all lawyers owe a duty of courtesy to those they interact with, regardless of the circumstances, including whether they believe they are being treated with courtesy by others. The lawyer acknowledged that he must be conscious of the tone of his communications and advised that he understood that what he might consider to be an acceptable tone or appropriate language may not be perceived the same way by others. The lawyer also advised that he is now conscious of the need not to be "reactive" and not to allow the tone of his communications to escalate. The lawyer additionally advised the subcommittee that he now communicates more in writing, is conscious of the tone of his communications and will ask others to review his written communications as a precaution. The subcommittee recommended that the lawyer consider issuing an apology to the president of the mortgage company. The lawyer advised that he would consider that recommendation. (CR 2017-36)

IMPROPER COMMUNICATION WITH CLIENT

In a child custody matter, a lawyer sent an email to his client, the contents of which he knew or ought to have known could improperly interfere with the preparation of a views of the child report, contrary to rules 2.2-1 and 5.1-2 of the *Code of Professional Conduct for British Columbia*. The lawyer represented a mother in an action that resulted in a court order permitting his client to move to the United States with her infant son, but also ordering that upon high school age, her son be given the

opportunity to live with his father and to attend high school in Vancouver. As the son approached high school age, the client applied to the court to vary the original order, claiming that her son wanted to remain in the United States. The court ordered a views of a child report, pursuant to s. 211 of the *Family Law Act*. The client asked the lawyer how to prepare herself and her son for the process. Instead of providing an overview of the process and telling his client to simply cooperate and tell the truth, the lawyer wrote a substantive email to the client setting out exactly what her son should say to the psychologist to garner the best result. Unbeknownst to the lawyer, his client put the email in her son's backpack that he took with him to Vancouver before the views assessment. The father found the email in his son's backpack before the court hearing.

A conduct review subcommittee advised the lawyer that his conduct was inappropriate because lawyers must not advise clients to give specific directions to their children for a views of the child report or for any reports prepared for the court. Rule 5.1-2 of the Code states that when acting as an advocate, a lawyer must not "endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate." Rule 2.2-1 of the Code provides that "a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity."

The subcommittee reminded the lawyer that authors of a views of a child report or the authors of any reports ordered pursuant to s. 211 of the *Family Law Act* are the court's expert, and that the purpose of such reports are to assist the court in making a decision that is in the best interests of the child. It is crucial that the court have the child's uncoached, untainted views through the neutral professional. It is stressful for a child to be interviewed by a professional for a court report and a lawyer must not add in any way to that stress.

The subcommittee advised the lawyer that he should not have, in any way, participated in influencing what his client's child would say to the psychologist. The lawyer stated that he had written the email in haste and in response to an emotional and anxious client to make her feel better. He advised that he would think twice before ever emailing or advising a client in haste or reacting to the emotions of a client. The lawyer expressed insight in appreciating his own stress level and comfort with dealing with emotionally charged files. He had previously not taken on many family law files as he found them personally stressful and he committed not to take any family clients in the future. (CR 2017-37)

QUALITY OF SERVICE

A lawyer drafted a will and property transfer documents for an elderly deaf client without effectively communicating with the client to ensure that she understood the documents. The client, who did not speak or read English, attended at the lawyer's office with two friends. The friends provided the majority of the instructions for the will, which named one of the friends as an executor. The will did not make any provision for the client's son or grandchildren and left the bulk of the estate to in-laws and a charity suggested by the friends. The lawyer did not meet with the client alone, nor did he properly explain to the client the effects of the will.

A conduct review subcommittee advised the lawyer that his conduct was inappropriate as he failed to provide a quality of service at least equal to that generally expected of a competent lawyer, contrary to rule 3.1-2 of the *Code of Professional Conduct for British Columbia*. Although the lawyer initially had difficulty in focusing on the problems and deficiencies in his handling of this matter, with counsel's assistance he was able to acknowledge that he had not adequately handled the matter. The lawyer agreed he had failed to consider issues such as undue influence, fraud, capacity, and other matters fundamental to drafting a will and property transfer documentation for a client in circumstances such as those of this client. The lawyer also stated that he had completely failed to turn his mind to the difficulties inherent in disinheriting an only child from a will. The lawyer expressed his appreciation for the Law Society's process in bringing him to a conduct review to discuss the matter, and in particular, his appreciation for the subcommittee's analysis of where he had failed to assist the client. The lawyer stated that, to avoid a recurrence of the concerns, and in light of his age and length of practice, he would cease all practice in this area and would avoid drafting or assisting in the drafting of wills. The subcommittee noted that the lawyer did not have previous relevant complaints and given the lawyer's commitment to cease practicing in the area of wills and estates law, it is unlikely such a matter will reoccur. (CR 2017-38)

BREACH OF UNDERTAKING

A lawyer breached an undertaking on a real estate conveyance by failing to provide the payout particulars within five business days of the completion date, contrary to rules 5.1-6 and 7.2-11 of the *Code of Professional Conduct for British Columbia*. In the real estate conveyance at issue, a notary represented the purchaser and the lawyer represented the vendor. After the conveyance was completed, the lawyer's conveyancing assistant attempted to fax the payout particulars to the notary, but the fax machine signal was busy at the notary's office, and as a result, the fax was not received.

The lawyer believed payout documents had been faxed to the notary because his cover letter was stamped with the word "faxed." It was not until several weeks later, after being contacted by the notary's assistant, that the lawyer examined the transaction file and he realized there was not a fax transmission report confirming the fax had been received by the notary and that in fact the payout documentation had not been sent. The lawyer then emailed scanned copies of the payout documents to the notary and subsequently received an email confirming that the payout documents had been received.

The lawyer admitted to a conduct review subcommittee that he had breached the undertaking. He did not attempt to provide an excuse for the breach; however, at the request of the subcommittee he provided an explanation for what had happened. The subcommittee advised the lawyer that his conduct was inappropriate because he failed to personally take steps to ensure he had complied with the undertaking. In particular, he did not personally check the fax transmission record to make sure that the faxed letter sent by his assistant, including the attached documents, was delivered to the notary.

The subcommittee informed the lawyer that his firm's standard letter for accepting undertakings was not appropriate because the letter stated "our office" would accept the undertaking. An office cannot accept an undertaking (or impose one); only a lawyer can do so, as set out in Code rule 7.2-11. Additionally, the lawyer was informed by the subcommittee that it was not appropriate for the standard undertaking letter to have the name of a different lawyer appearing as signatory, and for that lawyer to sign the letter in place of the indicated signatory. This is because the lawyer giving or accepting the undertaking should be clearly identified.

The lawyer was forthright and unwavering in his acknowledgment of the breach of the undertaking. The lawyer has taken steps to prevent such conduct from happening in the future, including personally reviewing all outgoing fax transmission records in a timely way to ensure documents sent by this method are received by the intended recipient and informing his support staff about the nature, purpose, importance and seriousness of complying with undertakings. The lawyer also agreed to modify his firm's standard letter for accepting undertakings to indicate the particular lawyer accepting the undertaking, not the firm doing so, and that the lawyer signing the letter would always be the same lawyer whose name is typed on the letter as the signatory. In addition to the recommendations above, the subcommittee also recommended that in every case, the lawyer should ensure a printed copy of the fax record confirming document delivery associated with an undertaking be placed in each real estate transaction file. As outlined above, the lawyer has taken steps to correct and enhance the procedures he uses to ensure timely delivery of documents in order to meet undertakings he accepts. (CR 2017-39)

In another case, a lawyer breached his undertakings on two real estate conveyance files by failing to provide the payout particulars within five business days of the completion date, contrary to rules 5.1-6 and 7.2-11 of the *Code of Professional Conduct for British Columbia*. On both occasions, the lawyer was reminded by the buyers' lawyer that he had failed to provide the payout particulars in a timely way. There was no resulting harm and the buyers' lawyer waived the breach of the undertakings. This conduct arose out of the lawyer's failure to personally ensure that the undertakings were satisfied. The lawyer noted that the period in question was an extremely busy one, that the legal assistants who were assisting in his file work were junior and that additional support staff was needed to manage his increased case load.

A conduct review subcommittee advised the lawyer that his conduct was inappropriate because reliance on undertakings is fundamental to the practice of law and must be accorded the most diligent attention. Undertakings are of utmost importance in real estate matters, and lawyers and notaries must be confident that lawyers will abide by their terms. The lawyer has since hired a further staff member, has discussed the importance of undertakings with his staff and has instituted protocols and procedures at his firm to guard against a recurrence of the problem. (CR 2017-40)

In another case, a lawyer was acting for the plaintiff in an estate litigation matter, which was settled in mediation. The defendants' lawyer provided the lawyer with copies of a settlement agreement on the lawyer's undertaking "[not] to release them or deal with them in any way" without his written permission. The parties later disagreed as to the terms finalizing the settlement. The lawyer brought an application to court to enforce the settlement and in support of the application, she prepared her assistant's affidavit and attached a copy of the settlement agreement to it as an exhibit. The lawyer forgot about the undertaking and did not obtain the defendants' lawyer's permission before attaching the settlement agreement to the affidavit. When the breach was brought to her attention, the lawyer promptly took steps to have the settlement agreement withdrawn from her application.

The conduct review subcommittee advised the lawyer that her conduct was inappropriate because, by attaching the settlement agreement to the affidavit without receiving opposing counsel's written permission, she contravened rules 2.1-4, 5.1-6 and 7.2-11 of the *Code of Professional Conduct for British Columbia*, which provide that a lawyer must fulfill every undertaking regardless of timing or retrospective reasonableness. The subcommittee further reminded the lawyer that undertakings are the cornerstone of efficient and trusted transactions between lawyers and that fulfilling every undertaking is an essential ingredient to the maintenance of public credibility and trust in lawyers.

The lawyer took full responsibility for breaching the undertaking and acknowledged that it was a contravention of her professional obligations. The lawyer expressed regret that she did not give more attention to the wording of the undertaking. Since her breach, the lawyer has implemented a system to remind her of all current undertakings and to identify documents connected to undertakings. She has discussed with her colleagues and staff file management issues relevant to undertakings and the importance of identifying and fulfilling all undertakings. The subcommittee encouraged the lawyer to continue her vigilance regarding the acceptance, identification and fulfillment of all undertakings. (CR 2017-41)

CONFLICTS OF INTEREST BETWEEN LAWYER AND CLIENT

A lawyer was required to meet with a conduct review subcommittee to discuss his conduct in borrowing monies from two of his clients in transactions that were not of a routine nature or in the ordinary course of business for either party, contrary to Chapter 7, Rule 4 of the *Professional Conduct Handbook*, then in force; loaning monies to one or two clients, neither of whom were independently represented in all aspects of the loan, contrary to Chapter 7, Rule 5 of the *Handbook;* and after making the loans to the clients, continuing to perform legal services for the clients despite having a financial interest that would reasonably be expected to have affected his professional judgment, contrary to Chapter 7, Rule 2 of the *Handbook*. This matter came to the Law Society's attention as a result of a referral from the Law Society's trust assurance department during a compliance audit.

The subcommittee advised the lawyer that his conduct was inappropriate because he failed to adequately clarify his role as to who his client or clients were and whose interests he was protecting. The lawyer also failed to understand that he was in fact providing legal advice to the clients and that was not nullified by simply having his clients state that he was not providing legal advice and that they were not relying on his advice. The subcommittee, after observing that the lawyer had a great deal to offer as a result of his many years as a securities lawyer, advised him that he must make it absolutely clear in every instance when he is acting as the lawyer and when he is acting as an investor or as a joint venture partner or as a securities advisor, rather than a lawyer. The subcommittee recognized that this may be challenging for the lawyer given the nature of his part-time legal practice and part-time investment industry activities. To avoid misunderstandings, the subcommittee suggested the lawyer may wish to cease being a lawyer if he wanted to continue working as an investment advisor.

The subcommittee also explained the concept of progressive discipline to the lawyer and cautioned him that if he fails in the future to clearly advise his clients of when he is acting as a lawyer and when he is not, a citation may be issued. (CR 2017-42). ❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Gerhardus Albertus Pyper
- Donald Franklin Gurney
- Kenneth Joseph Spears
- William Terrance Faminoff
- Christopher Roy Penty
- Heather Catherine Cunningham
- Glenford Emerson Greene

For the full text of discipline decisions, visit Hearing Schedules and Decisions on the Law Society website.

GERHARDUS ALBERTUS PYPER

Surrey, BC

Called to the bar: December 9, 2002

Ceased membership for non-payment of fees: January 29, 2015

Discipline hearings: October 27 to 29, 2015, April 22, 2016 and August 11, 2017

Panel: Herman Van Ommen, QC, Chair, James Dorsey, QC and Dan Goodleaf

Decisions issued: January 11, 2016 (2016 LSBC 01), June 9, 2016 (2016 LSBC 22), and October 2, 2017 (2017 LSBC 35)

Court of Appeal: February 27, 2017 (Saunders, Bennett and Stromberg-Stein, JJA)

Written reasons: March 3, 2017 (2017 BCCA 113)

Counsel: Kieron Grady and Carolyn S. Gulabsingh for the Law Society; Gerhardus Albertus Pyper on his own behalf

FACTS

On March 20, 2014, a panel of Benchers placed limits on Gerhardus Albertus Pyper's practice and ordered him to eliminate shortages in his trust accounts by April 22, 2014. On May 23, 2014, Pyper had not provided the necessary evidence to show he had eliminated the trust shortages. The panel ordered he be suspended from the practice of law. At the hearing Pyper was advised that he was suspended forthwith and he was sent letters notifying him of his suspension by both email and courier, which included a list of transactions he may or may not engage in.

Prior to his suspension, Pyper acted for a client in Ontario, a pharmacist who operated a pharmacy within a department store. When a corporation purchased the store, a dispute arose over ownership of client files. The corporation also filed a complaint against Pyper's client with the regulating body for pharmacy practice.

On May 26, 2014, Pyper signed and sent a letter in response to the corporation's request to discontinue its action against his client. Pyper said that, the week prior, he dictated the letter in which he stated that his client had agreed to the discontinuance of the action.

On June 13, 2014, Pyper received an email from his client with a draft letter she had prepared to send to the regulating body. Pyper forwarded the email and draft letter to his assistant, who prepared a letter under the law corporation's letterhead. Pyper signed the letter on June 13, 2014 and instructed his assistant to send it to the college.

QUESTIONS OF JURISDICTION AND ALLEGED BIAS

At the commencement of the hearing, Pyper made a preliminary motion that the panel lacked jurisdiction to conduct the hearing. This appeared to be based on alleged unfairness in the process leading to his suspension or bias on the part of the Benchers that ordered the suspension. The panel dismissed the motion on the basis that it was a collateral attack on the prior proceeding where he was suspended, and Pyper was required to take the appeal and/or review procedures available to challenge the original proceeding.

Pyper also raised an allegation of "institutional bias" against the Law Society on the basis that Law Society investigators and prosecutors were biased against him. The panel found there was no evidence that the Law Society staff had been biased against Pyper or that the issuance of the citation was motivated by bias or malice.

DETERMINATION

The question for determination was whether Pyper's actions in signing the two letters constitute the practice of law and therefore a breach of the suspension order.

Pyper said the first letter had been dictated prior to his suspension and that the case had been previously settled. The panel determined that his letter was a counter-offer to a prior offer to settle. The fact that it had been dictated prior to his suspension does not change the fact that he was not entitled to sign and send that letter on May 26, 2014.

With respect to the second letter sent on June 13, 2014, Pyper said his assistant had simply retyped the letter prepared by his client on his letterhead. Out of concern for his suspension, he asked his assistant to remove the designation "Barrister & Solicitor" from his letterhead. During the cross-examination, it was shown that Pyper had sent a letter he used prior to his suspension that also did not contain the designation "Barrister & Solicitor." In addition, the reference to the law corporation had not been removed from the letter and the format was exactly the same as all his prior letters. The panel determined that his client was clearly seeking legal advice and Pyper was practising law by instructing the assistant to put the letter on his letterhead.

The panel found that Pyper's actions were a clear breach of an order and constitute professional misconduct. His conduct was also a breach of the *Legal Profession Act*, which prohibits the practice of law by persons not authorized to do so.

APPLICATION FOR DECLARATIONS

The hearing panel was scheduled to meet for the disciplinary action phase of the hearing but instead considered two motions brought by Pyper, one seeking declarations that he was entitled to engage in the practice of law in two specific situations despite having ceased to be a member of the Law Society, and one seeking an adjournment of the hearing pending an appeal.

The panel granted the adjournment on specified conditions.

The panel found that the declarations Pyper sought have no relation to the amended citation and therefore are beyond the authority of the panel. The application for declarations was dismissed.

COURT OF APPEAL DECISION

Pyper appealed the findings on facts and determination.

The Court of Appeal found that there was no basis for Pyper's complaint that the procedure was unfair and the hearing panel denied him the opportunity to be heard. The court further found Pyper failed to show how

the panel demonstrated institutional bias. The court confirmed the Law Society had jurisdiction to discipline him as his actions occurred in British Columbia and confirmed the hearing panel's findings of misconduct. The appeal was dismissed.

Read the full decision on the court's website.

DISCIPLINARY ACTION

In considering disciplinary action, the panel considered four general factors: the nature, gravity and consequences of the conduct; Pyper's character and professional conduct record, which included a previous suspension and practice restrictions; acknowledgement of the misconduct and remedial action; and public confidence in the legal profession, including the disciplinary process. As a result of the review of these four factors, the panel decided that a period of suspension from the entitlement to practise law was required.

The panel ordered that:

- because Pyper is not a member of the Law Society and is not currently seeking readmission, he be suspended for two months commencing the date on which he is readmitted to practice in the future; and
- he pay costs of $10,484.16.

DISCLOSURE ORDER

The Law Society sought orders around disclosure of exhibits and transcripts, and the panel ordered that:

- if any member of the public applies for a copy of the transcript of proceedings regarding this hearing, the transcript must be redacted to remove any identifying or confidential information about Pyper's clients; and
- if any member of the public applies for a copy of any exhibit filed in these proceedings, the exhibit must be redacted to remove client names, identifying information and any solicitor-client information from the exhibit before it is released to a member of the public.

DONALD FRANKLIN GURNEY

West Vancouver, BC

Called to the bar: May 15, 1968

Discipline hearing: November 29 to December 1, 2016, January 20, 2017 and July 11, 2017

Panel: Phil Riddell, Chair, Glenys Blackadder [did not participate in decision] and Gillian Dougans

Decisions issued: November 23, 2016 (2016 LSBC 39), May 18, 2017 (2017 LSBC 15) and September 1, 2017 (2017 LSBC 32)

Counsel: J. Kenneth McEwan, QC and Trevor Bant for the Law Society; Paul E. Jaffe for Donald Franklin Gurney

DISCLOSURE APPLICATION

On September 30, 2016, Donald Franklin Gurney brought an application for disclosure of the details of the misconduct alleged in a citation that was issued following a compliance audit. The president's designate found that, to order the Law Society to disclose further details of the circumstances, she had to be satisfied that the citation did not provide enough detail of the circumstances of the alleged misconduct to give Gurney reasonable information about the act or omission to be proven and to identify the transaction referred to.

The president's designate was satisfied that the allegations contained in the citation, together with a letter from counsel for the Law Society dated June 29, 2016, and a Notice to Admit dated July 20, 2016, provided Gurney with sufficient details of the circumstances of the alleged misconduct and reasonable information about the act or omission to be proven and to identify the transaction referred to. The president's designate dismissed the application for particulars.

FACTS AND DETERMINATION

Gurney used his trust account to receive and disburse a total of $25,845,489.87 on behalf of a corporate client without making reasonable inquiries about the circumstances and without providing any substantial legal services.

Gurney received funds through his trust account in regard to four line of credit agreements in which the client was the borrower. Gurney's services consisted solely of receiving and immediately disbursing $26 million in offshore funds by converting the funds into bank drafts. He made only pro forma inquiries about the transactions and knew little about the borrower, its business, its principal or the purpose of the loans.

The panel found Gurney committed professional misconduct in respect to four transactions involving his trust account.

DISCIPLINARY ACTION

Gurney submitted that the imposition of conditions of practice to prevent reoccurrence of the misconduct would be sufficient discipline. The hearing panel found that his misconduct was a serious breach of his fundamental obligations as a lawyer to act as the gatekeeper of his trust account. In all the circumstances, the panel found that a suspension of six months was appropriate.

The Law Society submitted that Gurney should be ordered to disgorge his earnings resulting from his misconduct. He had charged one-tenth of one per cent of the amount he wrongly received and disbursed. Although there is no specific power to order disgorgement under the *Legal Profession Act*, the panel found that it had the authority to do so under section 38(7), which permits a panel to make "any other orders and declarations and impose any conditions it considers appropriate." The panel found disgorgement appropriate in this case so that the respondent did not profit as a result of his misconduct.

The panel ordered that Gurney:

1. be suspended from the practice of law for six months and, following Gurney's suspension:
   - he must report to the senior forensic accountant of the Trust Regulation Department within five business days after becoming aware of any trust transaction involving a remitter, remitting institution, beneficiary or receiving financial institution not located in Canada; and
   - on request by the Law Society, he must immediately produce and permit the Law Society to copy all files, vouchers, records, accounts, books and any other evidence and must provide any explanations required by the person requesting on behalf of the Law Society for the purpose of reviewing Gurney's trust transactions; and
2. pay to the Law Society $25,845, representing the disgorgement of the "fee" paid as a result of his professional misconduct.

KENNETH JOSEPH SPEARS

Vancouver, BC
Called to the bar: September 25, 1987
Non-practising membership: January 1, 2015
Discipline hearings: April 24-28 and June 22-23, 2017
Panel: Bruce A. LeRose, QC, Chair, Mark Rushton and Michelle Stanford
Decision issued: August 4, 2017 (2017 LSBC 29)
Counsel: Alison Kirby for the Law Society; Kenneth Joseph Spears appearing on his own behalf

FACTS

In 2004, Kenneth Joseph Spears gave an undertaking to the Law Society not to take on any new files other than Department of Justice or Government of Canada files. That practice restriction was never lifted.

Spears practised as a sole practitioner between 2006 and 2009. In 2006, he also began operating a consultancy business out of the same office premises as his law firm.

Throughout this time, he was retained by two clients to help with the zoning and subdivision of a residential property and the potential purchase of property. He did not inform them he was under a practice restriction to render legal services only to the Department of Justice or the Government of Canada. He did not inform the architect, the zoning consultant or the City of Burnaby staff that he was not acting in any legal capacity. He identified himself as the principal of his law firm and as a barrister and solicitor in his emails. He expected a fee for his services.

Spears assisted the same clients with their damage claim against the City of Burnaby when their property flooded. He reviewed and made notes on a draft notice of claim and reviewed and discussed the without prejudice letters. He expected a fee for his services.

Between 2006 and 2009, Spears sought five separate loans totalling $69,000 from the same clients and prepared paperwork for the loans. His clients were not represented by a lawyer in connection with the loans. Spears did not advise them to get independent legal advice.

When one of the clients died, the other client commenced an action against Spears to recover the amounts owed to them. The parties reached a settlement to which Spears agreed to pay $72,000 plus interest by way of instalments and provided an executed consent order as security. He failed to make the first payment. His former client filed the consent order with the Supreme Court. Spears did not immediately notify the Law Society in writing of the circumstances of the judgment and his proposal for satisfying the judgement.

Spears made an application to have the hearing adjourned so he could retain counsel. The Law Society was not advised of this application to adjourn until moments prior to the commencement of the hearing. The panel dismissed the application, as Spears had made no effort to contact counsel until the morning of the hearing, despite being advised well in advance.

DETERMINATION

The hearing panel found that Spears was indeed practising law in his work for his clients and that he made no effort to advise his clients that he was not doing work for them as a lawyer. It determined that, by borrowing money from his clients and breaching his undertaking to the Law Society, Spears committed professional misconduct.

The panel further found that Spears was a non-practising member and did not operate a trust account at the time of the consent order. His conduct in failing to notify the Law Society of the judgment granted against him amounted to a technical breach of the Rules but was not professional misconduct.

ADMISSION

On September 28, 2017, the citation was resolved under Rule 4-29 when the Discipline Committee accepted Spears' conditional admission of professional misconduct, as found by the hearing panel, and permitted him to resign from membership in the Law Society. Spears acknowledged that he must not practise law and provided an undertaking not to apply for reinstatement for a period of seven years.

WILLIAM TERRENCE FAMINOFF

Vancouver, BC
Called to the Bar: August 1, 1985
Court of Appeal: October 20, 2017
Written reasons: November 2, 2017 (2017 BCCA 373)
Counsel: J.J. Rai and G.R. MacLennan for the Law Society; M.D. Shirreff and J.I. Meikle-Kahs for William Terrence Faminoff

BACKGROUND

A hearing panel concluded that William Terrence Faminoff had committed professional misconduct for improper handling of clients' trust funds, failure to maintain proper accounting records, intentional misrepresentation to the Law Society by backdating statements of account, and breaches of undertakings. The panel suspended Faminoff for two months and ordered that he pay $8,430 in costs (facts and determination: 2014 LSBC 22; disciplinary action: 2015 LSBC 20; discipline digest: Summer 2015). Both the Law Society and Faminoff sought a review of the panel's decision on disciplinary action. The review board considered all the circumstances of the case and disciplinary action taken in other similar cases and confirmed the penalty decision of a two-month suspension (review board: 2017 LSBC 04).

Faminoff appealed the decision of the review board to the Court of Appeal.

COURT OF APPEAL DECISION

The Court of Appeal found the review board properly considered Faminoff's application to introduce fresh evidence and made no error in declining to admit the fresh evidence. The court confirmed the Law Society's sanction of a two-month suspension and dimissed the appeal.

CHRISTOPHER ROY PENTY

Called to the Bar: May 10, 1983
Ceased membership: September 28, 2017
Agreed statement of facts: August 30, 2017
Counsel: Alison Kirby for the Law Society; Christopher Roy Penty on his own behalf

AGREED STATEMENT OF FACTS

On December 9, 2014, Christopher Roy Penty was asked by a social worker to meet with a hospital patient to prepare a will. The client wished to leave his estate to charity. Penty and the client agreed that the client would leave one-quarter of the estate to the hospital's hospice foundation. At the time, Penty was the president and a director of the hospice foundation.

On December 9, Penty prepared a will, which bequeathed one-quarter of the estate to the hospice foundation and three-quarters to Penty "for his own use absolutely." The will states that the share of the estate left to Penty "may be paid out, in his unfettered discretion, to various charities, persons and organizations of his choosing."

On December 10, the client executed the will. He died on December 14.

On December 22, Penty met with the deceased's two surviving brothers and told them that their brother's estate had been left to the hospice foundation and to other charities. Penty did not tell them that he was the beneficiary of three-quarters of the residue of the estate. Penty does not recall giving them a copy of the will at that meeting, nor did he mail them a copy or tell them to obtain independent legal advice.

On March 27, 2015, Penty made an application for grant of probate and, in a related document, he answered "N/A" in the section in which he was to list "each person, if any, who would have been an intestate successor if the deceased had not left a will." He knew he should have listed the names of the deceased's brothers. On April 13, the court granted administration of the estate to Penty.

On June 30, the deceased's house was sold. Penty said he had an agreement with the real estate agent that he would receive 35 per cent of the commission normally paid to the seller's agent, in this case $1,468.60.

On July 9, Penty provided a cheque for $51,799.98 to the hospice foundation, representing one-quarter of the estate.

Penty also issued himself a cheque for $155,399.95, representing the remaining three-quarters of the estate, and deposited that money into one of his personal savings accounts. On July 22, Penty opened a new personal chequing account in his name and deposited $153,931.35 into it.

In October 2015, Penty made the following payments from the chequing account: $20,000 to a woman who had become a friend of the deceased in his final year; $7,500 as a donation in Penty's name to an organization supported by the hospice foundation; $5,000 to a neighbour of the deceased whom Penty had hired to perform renovations on the home; and $5,000 as a donation in Penty's name to a local charity.

On October 29, Penty transferred $95,000 of the estate funds from the chequing account into an existing, personal securities account in Penty's name. Between November 30, 2015 and February 15, 2016, Penty withdrew $16,198.01 from the chequing account for his personal use, and on January 6, 2016, he withdrew a further $2,000 as a charitable donation in his own name.

ADMISSION AND DISCIPLINARY ACTION

Penty admitted that he committed professional misconduct by (1) improperly preparing a will in which he made himself the executor, trustee and beneficiary of three-quarters of the estate, (2) acting in a conflict of interest in preparing the estate documents and by failing to provide the deceased's relatives with a copy of the will, (3) making personal use of the estate funds he received as beneficiary under the will when he had been instructed by the deceased to donate those funds to charity and (4) misleading the court in sworn affidavits filed in connection with his application for probate. His admission was made to the Discipline Committee under Law Society Rule 4-29, which provides for a process in which a respondent can admit misconduct and the matter is resolved without a hearing.

In resolving the citation and permitting Penty to resign as a member of the Law Society in the face of discipline, the Law Society required Penty to provide an undertaking for a period of seven years:

- not to apply for reinstatement to the Law Society of BC;
- not to apply for membership in any other law society (or like governing body regulating the practice of law) without first advising in writing the Law Society; and
- not to permit his name to appear on the letterhead of, or otherwise work in any capacity whatsoever for, any lawyer or law firm in BC, without obtaining the prior written consent of the Discipline Committee.

Should Penty apply for reinstatement after seven years, he would then have to satisfy a credentials hearing panel that he is of good character and fit to practise law and, if reinstated, would have to comply with whatever conditions or limitations on his practice that may be imposed.

HEATHER CATHERINE CUNNINGHAM

Surrey, BC
Called to the bar: June 1, 2001
Discipline hearing: June 16, 2017
Panel: Thomas Fellhauer, Chair, David Layton, QC and Linda Michaluk
Decision issued: October 23, 2017 (2017 LSBC 37)
Counsel: Carolyn Gulabsingh for the Law Society; Heather Cunningham appearing on her own behalf.

FACTS AND DETERMINATION

Heather Cunningham was ordered by a hearing panel in a previous discipline matter (2017 LSBC 09) to provide a complete and substantive response to the Law Society's enquiries related to an investigation into a complaint from her client. Cunningham did not provide a response to the Law Society by the date required by the order.

Cunningham provided no explanation of her failure to comply with the order. The hearing panel determined that her failure to respond constitutes professional misconduct.

DISCIPLINARY ACTION

In the process of determining the appropriate disciplinary action, the panel considered the harm caused by a failure to respond to Law Society requests for information needed to investigate a complaint, Cunningham's professional conduct record involving similar incidents where she failed to respond, and sanctions in similar cases.

The panel ordered that Cunningham

1. be suspended for one month, or until she has complied with the order, whichever is last occurring; and
2. pay costs of $2,542.70.

GLENFORD EMERSON GREENE

Smithers, BC
Called to the bar: May 12, 1980
Discipline hearing: May 29, 2017
Panel: Gregory Petrisor, Chair, Gavin Hume, QC and Laura Nashman
Decision issued: October 30, 2017 (2017 LSBC 38)
Counsel: Carolyn Gulabsingh for the Law Society; Glenford Greene appearing on his own behalf.

FACTS AND DETERMINATION

Glenford Greene attended a family case conference with his client in person. A few minutes into the proceedings, Greene and opposing counsel began arguing and talking over one another. Opposing counsel asked Greene to shut up. Greene reacted by getting out of his chair and approaching opposing counsel, standing over him and saying, "You shut up yourself. You shut up. Don't tell me to do anything back and forth like this. I won't put up with this. Who the hell do you think you are anyway?" The presiding judge was able to shout over the exchange and ended it.

Greene sent a letter to court staff later that day and apologized for his part in the "disgraceful display" in proceedings and asked that it be forwarded to the presiding judge. He also sent a letter to opposing counsel suggesting they should not have behaved as they did and should agree it will not happen again. He also said, "If you continue to insult me and my clients, I am going to stand up for them." Greene said he has taken active steps to improve his relationship with opposing counsel.

Greene admitted that his conduct constituted professional misconduct. The hearing panel determined Greene's conduct was a marked departure from what the Law Society expects of lawyers and therefore constitutes professional misconduct.

DISCIPLINARY ACTION

The panel considered Greene's professional conduct record, his experience, the impact of his conduct, his acknowledgment of the misconduct, and the range of penalties in similar cases.

The panel ordered that Greene

1. pay a fine of $5,000; and
2. pay costs to the Law Society.❖

Review of family law services ...from page 3

At Sources Community Resources Society, under the Modified Legal Representation Project, the Law Foundation funded advocates to partner with local family law firms to provide limited scope representation to economically disadvantaged women who were ineligible for, or had exhausted assistance from legal aid. Limited scope representation was offered in Vancouver and New Westminster Supreme Court for women who were pursuing or responding to specific applications. The advocates prepared all documentation and the lawyers represented women at hearings. The project also compiled a best practices manual and a toolkit. Feedback about the program — from clients, lawyers and others working in the family law system — has been consistently positive. The project has ended but the limited scope representation work is continuing on a user-pay model.

Other family law services funded by the Law Foundation are provided by the Kettle Friendship Society, which serves people who self-identify as mental health consumers and need help with child protection matters, and Family Services of Greater Victoria which helps clients in Victoria with a legal information hotline, pre-separation consultations, and preparing for court or meeting with duty counsel.❖

Closing a client file: What documents to keep and for how long ...from page 10

investigation or forensic audit. An investigation or audit may occur not only during the active work on a file or when a client has decided to change lawyers, but also after a file is closed.

A potential complaint is one of the many reasons why a lawyer should properly document a file in the first place. The same sort of file documentation and document retention described above for the defence of a negligence claim is useful for replying to a complaint. When investigating a complaint, the executive director may require production of files, documents and other records for examination or copying, even if such material is privileged or confidential. If a lawyer who is required to produce and permit the copying of files, documents and records does not comply, steps may be taken against the lawyer for failure to produce them (Rule 3-6).

5. Other future needs of the lawyer or client

When creating a closed file records policy, a law firm should consider the types of files the lawyers handle. Family, commercial, wills and estate and trust files may be needed again long after the lawyer's work is finished. These needs may relate not to negligence or complaints, but to new instructions from the client as to the interpretation, enforcement or variation of agreements, or in the case of wills, upholding the will. Therefore, what is retained in these files and the length of time for retention should reflect the needs. Different types of files can and should be retained for different periods of time (see Appendix B of *Closed Files – Retention and Disposition* for guidelines).

FOR MORE INFORMATION

For further reading, see the resources *Closed Files – Retention and Disposition*, *Ownership of Documents in a Client's File* and *Cloud computing checklist v. 2.0*.

If you have questions about accounting records, please contact the Trust Assurance department at 604.697.5810 or trustaccounting@lsbc.org. For questions about client identification and verification or other record retention questions, consult a practice advisor.❖

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