The Law Society of British Columbia

Benchers' Bulletin

A publication of the Law Society of British Columbia
2004: No. 4 September-October

Inside

President's View

A profession open to the public

by William M. Everett, QC

> *"In the interests of the profession generally, in the public interest and in the interest of being able to demonstrate to ourselves and all who are legitimately entitled to be concerned about how we conduct our affairs, we should, in my opinion, be more open. … I do not see how we can resist the concept that our discipline proceedings should be open to the extent that anyone interested would care to attend … with a proviso that in appropriate circumstances, they may be held in-camera.*
>
> *— Bencher George S. Cumming, QC (as he then was) in a report to the Benchers, January 17, 1981*

Twenty years ago the Benchers made a fundamental philosophical shift toward a more open Law Society discipline process. By 1983, the Benchers had decided that all discipline hearings would be open unless closed by the hearing committee "for good reason," that hearing transcripts would be available at cost and that hearing report summaries would be published to the profession.

The changes were necessary. The early 1980s was a period of regulatory reform, spurred in part by reforms in other jurisdictions and by Bencher concerns over possible government intrusion into the regulatory independence of the legal profession.

Today we recognize, perhaps more than ever, the importance of a self-regulating profession demonstrating that it is open, transparent and acting in the public interest.

This is not necessarily easy. I doubt there is any lawyer, including myself, who likes to read about a colleague facing a discipline hearing or being found guilty of professional misconduct. And if it's discomforting to read about it in mailings from the Law Society, it's much more so on the pages of the local newspaper.

For more than 20 years, the Law Society has faced high public expectations for transparency. We have become subject to the provincial freedom of information and protection of privacy legislation and the authority of the provincial Ombudsman (as funding of that office allows). And, of course, we have had lay representatives at the Benchers table since 1988.

The late Jack Webster — as a broadcaster, political observer and one of the first three lay Benchers appointed — brought his own unique perspective to bear. He was passionate in urging the Benchers to adopt a more proactive stance with the media. It was at that time that the Society began issuing news releases on most discipline hearing decisions. From everything I've heard, I believe Jack was proud of the steps taken during his term as a Bencher. I wish he could have been part of our journey since.

I believe we will always need to ask ourselves the question: *"How open is open?"* In other words, what information should we disclose and how proactive or reactive should we be in making disclosure?

For the past three years, the Law Society's Disclosure and Privacy Task Force has undertaken a systematic review of all regulatory programs to determine what information should be subject to greater disclosure. The Task Force recognizes the importance of balancing interests — those of the public, the profession as a whole, the Law Society, individual lawyers and third parties.

On the discipline front, for example, the Law Society's process has been *open*, but not necessarily as *accessible* as it could be. The Society has routinely disclosed citations, hearing dates and hearing reports on request. However,

Benchers' Bulletin

The *Benchers' Bulletin* and related newsletters are published by the Law Society of British Columbia to update BC lawyers and articled students on policy and regulatory decisions of the Benchers, on committee and task force work and on Law Society programs and activities.

The views of the profession on improvements to the *Bulletin* are always welcome – please contact the editor.

Additional subscriptions to Law Society newsletters may be ordered at a cost of $50.00 (plus GST) per year by contacting the subscriptions assistant. To review current and archived issues of the *Bulletin* online, please check out the "Resource Library" at www.lawsociety.bc.ca.

Editor: Denise Palmer
dpalmer@lsbc.org; Tel. 604 443-5706

Editorial Assistant: Denise Findlay
dfindlay@lsbc.org; Tel. 604 443-5788

Subscriptions: Donna Kokot
dkokot@lsbc.org; Tel. 604 443-5768

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it was time to take greater advantage of the technology available. We now post on our website a schedule of upcoming hearing dates, accompanied by the text of citations. Lawyers, members of the public and the media can see what is ahead and decide if they wish to attend or track a hearing.

We also electronically publish the full text of hearing decisions and discipline admissions on the website as they are issued — and also keep these archived online for future research. A lawyer subject to a discipline hearing is named in the hearing report, unless a citation is dismissed or an application for anonymous publication is granted. The Benchers have passed rules allowing anonymous publication if there is no suspension or disbarment involved and if publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication. They have rescinded rules that allowed for non-publication of some hearing reports.

We have passed guidelines for hearing panels to follow when naming people in hearing reports. While a respondent lawyer will normally be named, innocent third parties (whose names may appear in evidence before a panel in documents such as audit reports) will not be named because their privacy interests outweigh the need for disclosure.

Though a public process such as a formal discipline hearing merits a fair measure of transparency, what about disciplinary measures falling short of a formal hearing?

Generally speaking, the Law Society's complaints investigation process is confidential — and the Law Society will update only the lawyer and the complainant involved unless and until a citation is authorized. The promise of confidentiality is important to safeguarding the privacy of complainants, preserving the integrity of the Society's investigations and ensuring that lawyers are not unfairly prejudiced by publicity arising from unfounded complaints. It sometimes happens that a lawyer's conduct in a courtroom or public venue is reported in the media or a complainant speaks publicly about a complaint. In such cases, the Law Society cannot be put in the untenable position of "denying the obvious." In those cases, we can disclose the existence of a complaint or the status of a Law Society investigation into a lawyer's conduct if asked.

There are also cases in which complaints are informally resolved. The Discipline Committee, for example, may order that a lawyer attend a conduct review, which is an informal meeting with a Bencher and another lawyer. A conduct review can often help a lawyer identify and overcome problems in practice. Most often, the matter does not proceed to a citation or hearing.

Today we recognize, perhaps more than ever, the importance of a self-regulating profession demonstrating that it is open, transparent and acting in the public interest.

Generally speaking, a lawyer will participate in a conduct review, and derive its benefits, on the understanding that it will remain confidential from persons other than the complainant. However, if the subject of the conduct review is already in the public eye, our rules allow the Society to confirm that a conduct review has been ordered and note its outcome.

For several years, Law Society credentials hearings have also been open to the public, and our rules now specifically provide for online publication of reports and distribution of summaries.

Striking the right balance between a transparent regulatory process and the legitimate privacy interests of lawyers and others will always be a concern. I extend great appreciation to members of the Disclosure and Privacy Task Force for providing guidance to the Benchers as we review our rules and for the hard-working staff who have supported them. I make particular note of the work of Peter J. Keighley, QC (now a master of the Supreme Court) who chaired the Task Force for two years, and am pleased to see this work continued under the new chair, Vancouver Bencher John Hunter, QC.

* * *

This year's Annual General Meeting was the first in recent years at which the Law Society practice fee was not debated. The practice fee was set by a referendum this summer in which a majority of those lawyers voting decided that the CBA fee should be voluntary. While this shift is undoubtedly a challenge for the CBA, I am pleased to see the CBA moving forward with confidence. I wish to thank past President of the BC Branch, **Robert Brun**, for his professionalism throughout the referendum campaign. I wish all the best to the 2004/2005 President, **Michael Woodward**.

My congratulations to Vancouver Bencher **Anna K. Fung**, QC, elected by members at the AGM to serve as Second Vice-President in 2005. Anna has all the right qualities to lead the profession and I wish her every success.

I would also like to congratulate **Richard R. Sudgen**, QC who has been chosen to receive the Law Society Award in 2004. All lawyers are invited to attend the presentation at the Bencher & Bar Dinner in Vancouver on November 17.

I close on a reflective note on our loss of Life Benchers **David Gibbons**, QC and **Henry Hutcheon**, QC in recent months. We miss them greatly and will cherish the memories.✧

Law Society AGM

Fung elected Second Vice-President

Lawyers attending the Annual General Meeting on September 24 elected **Anna K. Fung**, QC as Second Vice-President for 2005. Ms. Fung is a senior counsel at Terasen Inc. Called to the bar in 1986, Ms. Fung practised corporate-commercial law, Aboriginal rights litigation and administrative law at Davis & Company and McCarthy Tétrault in Vancouver before joining Terasen.

First elected a Bencher of the Law Society in 1998, she is currently Chair of the Discipline Committee and a member of the Futures and Executive Committees. She has also been Chair of the Equity and Diversity Committee and a member of the Credentials Committee. Ms. Fung has served a number of professional and community organizations.

Honoraria increase approved

At the AGM lawyers also voted (107:2) in favour of an increase in the honoraria paid to the Law Society President and two Vice-Presidents.

In 2005, the honoraria will accordingly increase by $5,000, to $80,000 for the President and to $30,000 for each of the Vice-Presidents. In each year after 2005, the honoraria will be adjusted by an amount proportionate to the change in the Consumer Price Index for British Columbia for the preceding year.

No waiver of SCF fee for some lawyers in 2005

Also on the agenda was a resolution put forward by lawyers Dugald Christie and Del Feller of Vancouver to waive payment of the 2005 Special Compensation Fund fee for lawyers who have limited income, practise outside the commercial-conveyancing fields and would face hardship as a result of the fee. The motion was defeated (46:68).

In discussing the motion, some lawyers expressed the view that, while certain areas or types of practice could represent a lower risk to the Special Compensation Fund, the Fund was a shared responsibility of all lawyers. Others at the meeting supported greater financial accommodations for lawyers who represent a low risk to the Fund and cannot afford fees because of limited means, which may include lawyers who practise part-time by reason of disability.

Mr. Christie told the meeting that there would be lawyers, including himself, who would go out of practice next year because of the fee. While the principle of lawyers bearing the cost of the fee equally was a noble one, there was a higher principle at stake in having lawyers available to represent the public. "We should have in mind the catastrophic effect on the public of high costs of legal representation," he said, adding that specialization in the profession makes it ever more difficult for the general public to find lawyers at a cost they can afford. "Thirty years ago, well over 50% of the bar could serve the ordinary people. There are articles and studies now that show that that's down to 30% of the profession in Vancouver. So the pool of lawyers to serve ordinary people has greatly diminished."

Bencher Jim Vilvang, QC noted that *pro bono* services for the poor should be a responsibility shared by the profession as a whole and not carried out by one group of lawyers who then pay lower fees. In his view, the proposed resolution would also prove divisive for the bar. "If we carve off a special niche for lawyers engaged in poverty law, I expect that the next group of lawyers who would be

Lawyers at the September 24 AGM gave their unanimous support to Anna K Fung, QC — pictured here with President William M. Everett, QC — by electing her Second Vice-President for 2005. Ms. Fung, a senior counsel at Terasen Gas Inc., has been a Bencher for Vancouver since 1998.

approaching us would be criminal lawyers who also do not customarily handle large trust accounts and are, from what I understand, economically disadvantaged presently. And then I see other groups coming for similar exemptions and then, before we know it, the burden on our remaining members has increased dramatically and becomes unfair to them."

President William Everett, QC said that the Benchers would take note of the views raised at the meeting for further consideration.

Auditors

The AGM further approved PriceWaterhouseCoopers as the Society's auditors for 2004.✧

Vancouver lawyer Dugald Christie speaks to his motion at the AGM.

Limited liability partnerships for BC law firms

The Benchers have passed rules that will allow BC lawyers and law corporations to participate in limited liability partnerships (LLPs). The new rules will take effect once the *Partnership Amendment Act, 2004*, SBC 2004, c. 38, including consequential amendments to the *Legal Profession Act*, come into force. Proclamation of this legislation is expected later this fall.

For more information on limited liability partnerships, see the *Partnership Amendment Act, 2004,* as well as sections 30, 83.1 and 84 of the *Legal Profession Act* and Rules 9-12 through 9-20 of the Law Society Rules.

A limited liability partnership structure shields an individual partner from personal liability for the debts of the partnership or for negligence and wrongdoing of other partners, except to the extent of the partner's share in the partnership's assets. Individual partners continue to incur personal liability for their own negligence or wrongful acts and those of the persons they directly supervise or control.

The new rules will require a law firm, before applying to register as a limited liability partnership under the *Partnership Act*, to apply for Law Society approval. For a firm to receive Law Society approval as a limited liability partnership, the Society must be satisfied that the intended name of the LLP is not contrary to Chapter 14, Rule 9 of the *Professional Conduct Handbook* (marketing provisions) and that all members of the partnership are members of the Society or a recognized legal profession in another jurisdiction. *Application forms will be available on the Law Society website later this fall, in advance of the Partnership Amendment Act, 2004 coming into effect.*

A law firm offering services as an LLP must ensure that all of its advertising indicates that it is offering legal services through a limited liability partnership. In accordance with requirements of the *Partnership Act*, the firm must also take reasonable steps to notify existing clients in writing that it has registered as an LLP and the resulting changes in the liability of the partners. To guide firms in meeting this disclosure requirement, the Law Society Rules set out a standard notification statement.

Likewise, a law firm that is registered as a limited liability partnership in another province must register in BC as an extraprovincial LLP and, in that case, take reasonable steps to notify each client of the firm in BC of the registration and any resulting change in the liability of the partners.

Every firm practising as an LLP will also be required to file with the Law Society a copy of its annual report and any amendments to its registration statement at the time it files these documents with the Corporate Registry under the *Partnership Act.*✧

Report points new way forward for lawyers with disabilities

The Law Society's Disability Research Working Group is calling on the Society to consider 10 reforms to promote equal access for BC lawyers with disabilities.

In its newly published report, *Lawyers with Disabilities: Overcoming Barriers to Equality*, the Working Group urges such initiatives as sample workplace policies to provide guidance to law firms that employ lawyers with disabilities, a mentoring program to support new lawyers seeking to establish themselves and a program to encourage law firms to commit to tangible objectives on the recruitment, hiring, retention, advancement and compensation of lawyers with disabilities.

The Working Group, chaired by Vancouver lawyer Halldor Bjarnason, has studied disability issues in legal education and the profession since 1998. In its first report, *Lawyers with Disabilities: Identifying Barriers to Equality*, published in 2001, the Working Group described the problems of discrimination, prejudice and access barriers that make it difficult for lawyers with disabilities to practise law.

Lawyers interviewed in the first study flagged discriminatory practices that prevent the career advancement of lawyers with disabilities or produce such stress that a frequent result is overwork, burn-out and failure, both in private firms and government departments. In the end, lawyers with disabilities are seldom kept on after articling, and their search for employment is difficult. The study revealed that there is a tendency for lawyers to

> *The challenge of eliminating barriers for people with disabilities is often viewed in terms of providing accessible buildings. Unfortunately, the problem is much more complex, encompassing both physical and attitudinal barriers.*
>
> *— Lawyers with Disabilities: Overcoming Barriers to Equality*

The recommendations

In reporting out to the Equity and Diversity Committee and the Benchers, the Disability Research Working Group recommended 10 ways for the Law Society to help lawyers with disabilities overcome barriers in practice:

1. Develop a clear definition of the term "disability" for use in Law Society programs;
2. Establish an ongoing Law Society Access and Advisory Committee for Lawyers with Disabilities, expanded from the present Working Group;
3. Develop a business case to endorse and support a greater inclusion of lawyers with disabilities at all levels of the legal profession;
4. Provide to legal employers draft equity and diversity workplace policies respecting lawyers with disabilities;
5. Create a reserve fund and identify other sources of funding to assist law firms in providing accommodations for lawyers with disabilities;
6. Establish and support a mentoring program for lawyers with disabilities;
7. Establish and maintain an online "community meeting place" for lawyers with disabilities where information about resources, approaches, issues and other matters can be raised and discussed;
8. Develop an equity and diversity education program that includes diversity training for the judiciary and the legal profession;
9. Lobby to increase structural accommodation in BC courthouses, the Law Society building and other legal institutions;
10. Develop a program to have law firms commit to a series of tangible objectives regarding recruitment, hiring, retention, advancement and compensation of lawyers with disabilities.

hide their disabilities since disclosure often leads to discrimination in employment. More than half of the participants spoke of loss of employment, marginalization into solo practice or early retirement.

In a quest to find solutions to these problems, the Working Group began the second phase of its study in 2002 — consulting further with lawyers with disabilities, other lawyers and the law schools and researching successful initiatives from other jurisdictions.

Since leadership of senior lawyers will be critical to the success of any future initiatives, the Working Group hosted an evening forum in October, 2003 with senior lawyers, judges and lawyers with disabilities.

The forum focused on the best ways to raise awareness within the legal community about barriers to practice for lawyers with disabilities; to offer concrete resources and strategies to address those barriers; to assist firms in dealing with implementation of strategies; and to provide ongoing support for lawyers with disabilities.

An ongoing problem for lawyers with disabilities in seeking or keeping employment is that law firms may overlook or refuse accommodations by making incorrect assumptions — most commonly that accommodations will not be effective or will be too expensive. Firms may also not understand that they have a legal obligation not to discriminate on the basis of disability and are required to make accommodations.

Law firms profit from having a broader pool of qualified practitioners from which to draw. Increasing access for lawyers with disabilities also increases access and choice for clients with disabilities and allows firms to provide better service to that sector of the population.

— Lawyers with Disabilities: Overcoming Barriers to Equality

While it is common to think of workplace accommodations in terms of improving physical access to a building, in fact accommodations can range from flexible work schedules, to appropriate office placement or lighting to allowing for use of a service animal at work. To the extent that some accommodations may be expensive, the Working Group recommended a reserve fund be established — with a funding model to be developed — to assist law firms that employ lawyers with disabilities and to share costs more broadly across the profession.

The Working Group retained a researcher to identify some key government and community resources of interest to legal employers and lawyers with disabilities — set out in a new resource guide, which will be available soon on the Law Society website.

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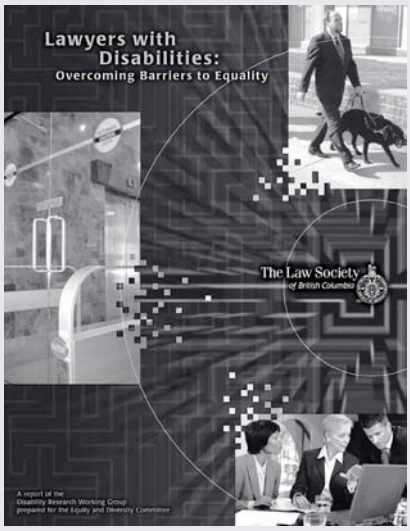
Report online



If you would like to read *Lawyers with Disabilities: Overcoming Barriers to Equality*, the report is available in PDF format in the "Resource Library/Reports" section of the Law Society website at **www.lawsociety.bc.ca**.

A hard copy is available by request to Kuan Foo, Staff Lawyer for the Working Group, at the Law Society office:

845 Cambie Street
Vancouver, BC V6B 4Z9
Tel: 604 443-5727
Toll-free in BC: 1-800-903-5300
Fax: 604 443-5770
Email: kfoo@lsbc.org.

Richard R. Sugden, QC to receive 2004 Law Society Award

Richard R. Sugden, QC will receive the Law Society Award in 2004, in recognition by the Benchers of his exemplary service over 30 years at the bar. The Law Society Award is given every two years to honour the lifetime contributions of the truly exceptional within the profession and the legal community, based on integrity, professional achievements, service and law reform.

The Award presentation will be made on November 17 in Vancouver at the Bench & Bar Dinner, an event co-sponsored by the Law Society and the BC Branch of the CBA.

Mr. Sugden was called to the bar in 1973. He practised law in Vancouver with Braidwood & Company until 1988, and with Sugden, McFee & Roos until his recent retirement.

In its recommendation to the Benchers, the Law Society Award Selection Committee noted that Mr. Sugden is universally regarded as pre-eminent counsel at all levels of court and as "a model of thoughtful integrity." As noted by lawyers supporting his nomination:

> "… the leading cases in which Rick acted as counsel speak of his commitment to and success at helping to shape our common law for the betterment of all."
>
> "Through personal example, Rick has positively influenced the way litigation is practised in British Columbia. Dignity, grace and respect for the individual and the process are ever-present qualities alongside a keen and energetic effort to advance or protect his client's interests. The public has been well served by the level of civility practised by Rick and those he has influenced."

The Committee remarked on Mr. Sugden's generosity as a volunteer, reflected in his service to the Lawyers Assistance Program, the Inns of Court, the UBC Trial Advocacy program, the Judicial Appointments Committee, the American College of Trial Lawyers and the Trial Lawyers Association.

Also important has been Mr. Sugden's exceptional service as an advocate for other lawyers in personal crisis, consistently on a pro bono basis — in particular his help to lawyers who have faced professional discipline arising in combination with marital breakdown, substance abuse or other emotional trauma. In letters supporting his nomination, he was described as the "lawyer's lawyer" who has been widely regarded as *the* source for advice on all

The 2004 Bench & Bar Dinner

Wednesday, November 17, 2004
Reception – 5:45 p.m. (cash bar)
Dinner – 6:30 p.m. (wine included)

Pan Pacific Hotel
Crystal Pavilion
999 Canada Place
Vancouver, BC

Business attire

Tickets: $75.00 a person

This year's Bench & Bar Dinner comes to the Pan Pacific Hotel in Vancouver, offering members of the legal profession and the judiciary a unique opportunity to enjoy an evening of good company and conversation.

The Dinner will honour both Richard R. Sugden, QC (2004 recipient of the Law Society Award) and the recipient of the CBA's Georges A. Goyer, QC Memorial Award for Distinguished Service, who will be announced shortly.

Please join the Benchers of the Law Society and the members of the CBA Executive and Provincial Council to share in the tradition of the Bench & Bar Dinner and to pay homage to those who have made outstanding contributions to the cause of justice in British Columbia.

Please visit the Law Society website at www.lawsociety.bc.ca to download a ticket order form that can be returned by mail or fax to the BCCBA office. For more information on the Dinner, please contact Andrew Mugridge of the BCCBA at 604 687-3404, ext 306.

manner of professional and ethical issues.

The esteem in which he is regarded was summed up by one lawyer this way:

> *His has been a career that any young lawyer would be wise to use as a model for what the profession expects of its top performers … Mr. Sugden has been an ornament to the profession.*

The Law Society Award is a bronze statue of Sir Matthew Baillie Begbie, cast by the late Pender Island sculptor Ralph Sketch.

Past recipients of the Award are Dean Emeritus George F. Curtis, QC (1986), Oscar F. Orr, MBE, OBC, QC (1988), Chief Justice J.O. Wilson (posthumously, in 1992), Mr. Justice Peter Seaton (posthumously, in 1994), Alfred Watts, QC (1996), Martin Taylor, QC (1998), E.N. (Ted) Hughes, QC (2000) and Mr. Justice Ken Meredith (2002).✧

National Mobility Agreement update

Rules improve options for in-house counsel in BC from other provinces

Changes to Law Society Rule 2-49.1 make it easier for some lawyers who transferred to BC as in-house counsel to move into new practice situations.

Law Society Rule 2-49.1 permits a lawyer from another province to be called and admitted in British Columbia as in-house counsel if the lawyer is transferring to BC to practise law solely for his or her employer without having to write and pass the transfer or qualification examinations. The lawyer is, however, restricted to practising only on behalf of the lawyer's employer, subsidiaries or affiliates.

The Rule gives the Credentials Committee the discretion to relieve a lawyer from the restriction of practising only as in-house counsel provided the lawyer writes and passes an examination.

As recently revised, the Rule alternatively permits the Committee to relieve a lawyer of the restriction of practising as in-house counsel on successful completion of a prescribed reading requirement, provided that the lawyer is entitled to practise law in a reciprocating jurisdiction under the National Mobility Agreement (or at the time of transfer was entitled to practise law in a jurisdiction that is now a reciprocating jurisdiction). This provision places all in-house counsel from reciprocating jurisdictions on an equal footing, regardless of when they transferred to BC.

The Committee may also relieve from the restriction any lawyer who has practised in BC for two years, on completion of the prescribed reading requirement.✧

Lawyers with Disabilities report *… from page 7*

Of greatest concern to lawyers with disabilities are not the physical barriers they face, but the attitudinal barriers. The Working Group recommended further education for the profession and the judiciary on disability issues, sample workplace policies and a commitment from law firms to hiring and retaining lawyers with disabilities.

"Identifying and implementing effective solutions includes looking at hiring and retention policies and addressing the support mechanisms available, both within firms and in the larger legal community," the Working Group observed. "It demands a creative willingness to conform to both the letter and the spirit of anti-discrimination obligations."

Recognizing the importance of one-on-one support, the Working Group stressed the importance of building community among lawyers with disabilities — such as through an online meeting place and a mentoring program.

Another key recommendation is that the Society set out the business case for law firms employing lawyers with disabilities since law firms profit from having a broader pool of qualified practitioners. Lawyers with disabilities can help increase access and choice for clients with disabilities and allow firms to provide better service to that sector of the community.

* * *

If you have questions or comments on this study, the report or recommendations, please contact the Disability Research Working Group, c/o Kuan Foo, Staff Lawyer, at the Law Society office, by telephone at 604 443-5727 (toll-free in BC: 1-800-903-5300), by fax at 604 443-5770 or email to kfoo@lsbc.org.

The research project on lawyers with disabilities is the first of its kind among the law societies in Canada. The Working Group thanks Human Resources and Skills Development Canada for funding assistance on this project.✧

Lawyers preparing for retirement should consider retired membership in the Law Society — it's now easier to qualify and the cost is modest. Not only does retired membership help lawyers remain connected with the profession, but offers an opportunity to participate in the delivery of pro bono legal services.

Lawyers now qualify sooner for retired membership

The eligibility requirements for becoming a retired member of the Law Society have been relaxed, allowing BC lawyers to qualify earlier.

Under Law Society Rule 2-4, as recently revised, a BC lawyer can become a retired member if he or she:

- has reached the age of 55 years;
- has been a member of the Society in good standing for 20 of the previous 25 years; or
- has engaged in the full-time active practice of law for 20 of the previous 25 years.

The rule formerly required a lawyer to have reached 65 years of age, have been a member in good standing for at least 25 *consecutive* years or have been engaged in active practice for at least 25 consecutive years.

In changing the criteria for retired membership, the Benchers took into account the fact that some lawyers will retire before reaching age 65. Moreover, while many lawyers may have practised for 25 years, they have not necessarily done so on a consecutive basis.

Pro Bono Law of BC had asked the Benchers to review these eligibility requirements as a means of encouraging more lawyers to retain Law Society membership on retiring from practice

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Queen's Counsel: 2004 call for nominations

BC lawyers interested in making a Queen's Counsel nomination in 2004 are reminded that an application package, including forms and instructions, is available from the website of the Ministry of Attorney General at www.ag.gov.bc.ca/queens-counsel. The deadline for nominations is **November 1, 2004**. Appointments will be announced by the end of the year.

Outside of an immediate family member of a nominee or nominees themselves, anyone can submit a nomination by completing an application form. The application must be accompanied by a statement of support from two nominators and a nominee's curriculum vitae or brief biography and may also be accompanied by no more than five letters of support.

A candidate for Queen's Counsel must:

- belong to the BC bar, and have been a member for at least five years; and
- demonstrate professional integrity, good character and excellence in the practice of law. Such excellence could be determined by any of the following:
  - being acknowledged by his or her peers as a leading counsel or exceptionally gifted practitioner;
  - having demonstrated exceptional qualities of leadership in the profession, including in the conduct of the affairs of the Canadian Bar Association, the Law Society of British Columbia and other legal organizations;
  - having done outstanding work in the fields of legal education or legal scholarship.

All applications will be reviewed by an advisory committee, which will also recommend deserving candidates to the Attorney General. The committee comprises the Chief Justice of British Columbia, the Chief Justice of the Supreme Court of British Columbia, the Chief Judge of the Provincial Court, two members of the Law Society appointed by the Benchers (President and First Vice-President) and the Deputy Attorney General.

The Attorney General retains authority to directly appoint lawyers who meet the eligibility criteria. It is expected that this power will normally be exercised in exceptional circumstances only.

For more information, contact:

Office of the Deputy Attorney General
PO Box 9290 Stn. Prov Govt
Victoria, BC V8W 9J7
Tel: 250 356-0149
Website: www.ag.gov.bc.ca/queens-counsel.✧

The Law Foundation ... 35 years strong

The Law Foundation of British Columbia celebrated its 35th anniversary this year. The Foundation came into being on April 2, 1969, receiving a statutory mandate to fund legal education, legal research, legal aid, law reform and law libraries in the province.

The Law Foundation of BC was the first of its kind in North America. Interest on lawyers' pooled trust accounts — previously retained by the financial institutions — was redirected to the Foundation to support programs in BC that advance and promote the rule of law and a just society. Over the past 35 years, the concept of using the interest on lawyers' pooled trust accounts to promote projects and programs that improve access to justice has spread to all Canadian provinces and across the United States.

On June 25, 2004 the Foundation hosted an anniversary celebration at the Law Courts Inn — attended by the Attorney General, the Chief Justice of British Columbia, the Chief Justice of the Supreme Court, the President of the Law Society and the President of the BC Branch of the Canadian Bar Association. A dinner the following evening honoured past chairs of the Law Foundation, including the Foundation's first chair and a Life Bencher, Arthur Harper, QC.

From its inception through 2003, the Law Foundation has approved grants totalling more than $268 million to support important law-related projects and programs in British Columbia. Here are a couple of recent projects:

Family Mediation Practicum Pilot Project

administered by BC Dispute Resolution Practicum Society

The Family Mediation Practicum Pilot Project offers high-quality practicum programs for mediators trained in family mediation and free mediation services for those in family disputes that involve custody, access, guardianship, child support and some small property matters.

This new family justice initiative benefited from a $65,000 grant from the Law Foundation in 2003, in addition to financial support from the Ministry of Attorney General and the Department of Justice.

The BC Dispute Resolution Practicum Society intends to create a practicum model that will assist in filling the gap between family mediation training and professional practice. To this end, the Society is collaborating with the Continuing Legal Education Society of BC, the Justice Institute of BC and the Legal Services Society.

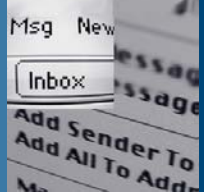
All mediations in the program are supervised by highly trained and experienced mentors. These mentors assist the mediators in preparing for and conducting mediations and provide constructive feedback following each session.

The project is located at the Fraserside Community Services Society office on the 2nd Floor – 519 7th Street, New Westminster. For more information, contact Carole McKnight, Project Director at 604 516-0788 or by email at fmpp@telus.net.

Graduate fellowships

The Board of Governors has awarded four 2004/2005 Law Foundation graduate fellowships in the amount of $13,750 each (a total of $55,000) to 1) **Maureen Fitzgerald**: for research on legal education in Canada and specifically the first year of the LL.B. program; 2) **Valerie Napoleon**: for an inter-disciplinary doctorate program (law and history) at the University of Victoria on "The Consequences of *Delgamuukw*: its effects on Gitxsan People's Internal Relationships and on Relationships Between Them and the Land;" 3) **Donn Short**: for a study on "Human Rights, Cultural Tensions and the Intersection of Law and Education;" 4) **Laura Spitz**: for a study of international governance models such as NAFTA and similar agreements.✧

Among the many supporters and guests attending the Law Foundation's 35th anniversary celebration this summer were (left to right) ***John W. Horn****, QC (Governor 1971-1978),* ***Madam Justice Pamela Kirkpatrick*** *(current Governor),* ***D. Michael M. Goldie****, QC (Founding Governor 1969-1970) and the* ***Hon. Kenneth E. Meredith*** *(Founding Governor 1969-1972).*



Trust administration fee (TAF) delayed to March 1, 2005

The new trust administration fee (TAF), approved by the Benchers earlier this year to fund Law Society trust assurance initiatives, will come into effect on **March 1, 2005**, instead of on October 1, 2004 as previously scheduled. The Benchers are expected to consider new Rules to implement the fee shortly.

Beginning March 1, 2005, BC lawyers who maintain one or more trust accounts will be required to remit to the Law Society a $10 trust administration fee for each trust transaction (or series of trust transactions relating to one client matter) over $5,000.

The proceeds of this trust administration fee (TAF) will fund various Law Society trust administration programs, including the audit and investigations program, the custodianship program and a new program of trust reports that will replace the Form 47 accountant's report over the next year. The funding of these trust initiatives through the TAF will be on a go-forward basis.

In the future it is possible that a portion of the fee may also be allocated towards the new innocent insured coverage now provided by the Lawyers Insurance Fund. If a portion of the TAF is allocated as a contribution towards the innocent insured coverage, it would be on a go-forward basis only (not to pay any claims made against the Special Compensation Fund). Any such allocation would result in lawyers who carry out trust transactions in effect contributing a greater portion of the overall risks associated with those transactions.

The Society's trust administration programs are important in monitoring the proper handling of trust funds within the profession. To date, all practising lawyers have funded these programs. However, since the programs relate to lawyers who hold trust funds and carry out trust transactions, it is appropriate for those lawyers to bear a larger portion of the overall expense. The Benchers recognize, however, that lawyers will need to adopt administrative procedures to calculate and remit the fee.

It is important to note that only one transaction fee will apply per client file or matter; accordingly, multiple trust deposits and disbursements in relation to one client matter will not incur multiple trust administration fees. The deposit or payment of money for legal fees and disbursements will not attract the fee.✧

Law corporations no longer required to renew annual permit

A law corporation is no longer required to obtain from the Law Society an annual permit or pay an annual renewal fee following recent amendments to the Law Society Rules. Instead, each law corporation is now required to file with the Society its annual report, notice of articles and any amendments to its articles or its notice of articles. These documents must be submitted to the Law Society at the same time as they are filed pursuant to the *Business Corporations Act*.

For more information, see Rules 9-7 to 9-9.✧

2005 Law Society fees due November 30

Beginning this year, Law Society membership fees are due on November 30 for the following year. Please watch for your fee invoice.

The annual membership fees for 2005 are the following:

Practice Fee

The practice fee consists of the Law Society General Fund fee ($775) and levies for the BC Courthouse Library Society ($130), the *Advocate* magazine ($27.50) and the Lawyers Assistance Program ($48). The practice fee was set by members by referendum in June.

Liability Insurance Assessment

For the sixth year in a row, the Benchers have set the base professional liability insurance assessment for BC lawyers in private practice at $1,500. This assessment is payable in two equal instalments, with the first instalment due November 30, 2004.

The part-time insurance fee for 2005 remains at $750 and the insurance surcharge (which applies for five years to lawyers with paid indemnity claims, in accordance with Rule 3-26(2)), remains at $1,000.

Special Compensation Fund Assessment

The Benchers have set the Special Compensation Fund assessment at $600, the same as in 2003 and 2004.

***Please note**: As determined by the June referendum and previously reported to the profession, payment of the Canadian Bar Association fee is voluntary in 2005. The Canadian Bar Association will mail out its own membership renewal notice in late October, and lawyers who renew CBA membership will make payment of the applicable fee directly to the CBA. If you have questions, please contact the BC Branch at tel. 604 687-3404.*✧

Court Services Online: civil searches now available

Lawyers can now search via the internet for basic information on civil court proceedings in any registry of the BC Supreme Court or Provincial Court through the new "e-search" service of Court Services Online.

Court Services Online is a project of the Ministry of Attorney General, in cooperation with the judiciary.

What court registry information is searchable online?

Civil records may be searched by party name, file number or date of filing. Users may also search a specific registry, court level or type of proceeding. There are limitations on access to information in some types of proceedings, particularly family matters. Subject to these limitations, the following court registry information is accessible:

- file number
- type of file
- date opened
- registry location
- party names/style of cause
- counsel names
- claim amount
- list of filed documents*
- appearance details
- terms of order
- caveat details

** The documents themselves are not accessible online through the e-search service.*

How much will searches cost?

Beginning in November, there will be an access service fee of $6 per file. For this fee, users will have access to all of the information available on a particular file and can print any screen of interest. A file summary report, providing an itemized report of all the information available about the file in a single document, will be available for an additional $6 fee.

All e-search service fees will be payable online by credit card.

How will law firms access the service?

Lawyers, their staff and any other person will be able to access e-search feature of Court Services Online directly via the internet. Computer requirements include a recent version of either Microsoft Internet Explorer or Netscape web browser and a high-speed internet connection

The use of a user ID and log-in will be optional. Firms will have the option of setting up an e-search account through registration with Court Services Online.

What is ahead for Court Services Online?

Enhancements to the e-search service are planned for early 2005. These include access to information on proceedings in the BC Court of Appeal and access to court lists for Supreme Court chambers and small claims proceedings. Court Services Online expects to introduce e-filing of civil court documents in the Provincial Court, Supreme Court and Court of Appeal in 2006.

While the scope of e-filing has yet to be finalized, Court Services Online expects to accommodate originating documents in all levels of court, a majority of documents in Provincial Court family and small claims matters and a majority of documents in BC Supreme Court civil matters. In general, to e-file a document in a court registry, a law firm will convert the document to portable document format (PDF) using Adobe Acrobat software and file the document via the Court Services Online site.

More information on Court Services can be found at www.ag.gov.bc.ca/courts/cso. Comments or questions are invited by email to agcso@Victoria1.gov.bc.ca.✧

BC statutes and regulations online

QPLegaleze at courthouse libraries

Lawyers are reminded that QPLegalEze is available in BC courthouse libraries.

QPLegalEze is an online subscription service offered by the Queen's Printer that provides access to current online provincial statutes and regulations. The statutes and regulations are updated frequently and include graphics, tables and forms. QPLegaleze also includes Corporate Registry notices, which are no longer published in the *Gazette*. Other items available through QPLegalEze include older consolidations of statutes (1996-), *Gazette I* (2003-), *Gazette II* (2001-) and Orders in Council (2002-).

For more information, contact the BC Courthouse Library in Vancouver at 604 660-2841 or 1-800-665-2570.✧

Practice Watch, by Felicia S. Folk, Practice Advisor

Trust obligations of the lawyer

In general, lawyers are extremely careful about their trust obligations, but it is important to remember the following points when dealing with other people's money:

- Lawyers have a historical reputation for integrity that may be easily damaged by a small number of dishonest or reckless members of the profession.
- Lawyers and their clients must continue to be able to rely on the word of other lawyers to do business and to achieve settlements. That is really all that an undertaking is — the giving of one's word.
- No client has a right to demand that a lawyer do anything repugnant to the lawyer's own sense of honour and propriety.

Note that the article, "Getting Started: Trust Accounting" was recently revised and is available in the Practice Resources section of the Law Society website. The June, 2004 version of the article replaces all earlier versions, including the version on the Law Society's 2001 CD-Rom, "Getting Started."

Rule 3-51.1 on cash received by lawyers

As reported in the May-June *Benchers' Bulletin*, Law Society Rule 3-51.1 prohibits lawyers from accepting $10,000 or more in cash, other than when the lawyer receives the funds from a law enforcement agency; pursuant to a court order; in the lawyer's capacity as executor of a will or administrator of an estate; or as professional fees, disbursements, expenses or bail.

The rule specifically prohibits the receipt of $10,000 or more in cash in a single transaction or the receipt of two or more cash amounts in a 24-hour period that total $10,000 or more. ***If a lawyer were to accept, over time, a series of cash deposits into the lawyer's trust account, amounting to more than $10,000 to be used for a single transaction, this would amount to a breach of the Rule and could ultimately lead to discipline proceedings.***

You should be aware that the Law Society intends that there will be serious consequences for any lawyer who does not comply with the cash transaction prohibition.

In addition, be aware that the Law Society intends that there will be serious consequences for any lawyer who assists clients to launder money. A lawyer will have no defence to a charge of professional misconduct if the lawyer is wilfully blind to the reasons that a client is conducting business in cash and making cash deposits to the lawyer's trust account.

If a lawyer were to accept, over time, a series of cash deposits into the lawyer's trust account, amounting to more than $10,000 to be used for a single transaction, this would amount to a breach of the Rule and could ultimately lead to discipline proceedings.

Paying out on mortgages

On the payout of private mortgages, it is prudent for a lawyer to ensure that money is released only when there is an executed discharge in a lawyer's hands. You may request that the executed discharge be sent to you on your undertaking to pay the funds immediately upon receipt. You may agree to pay the funds on the other lawyer's undertaking to provide the discharge immediately upon receipt. It is not prudent, however, to pay the funds directly to a private lender before an executed discharge has been received either by you or by the private lender's own lawyer. While lawyers face potentially serious consequences for breaching an undertaking, there is no express sanction against a private lender who fails to provide a discharge upon receipt of payment.

Reports to the Law Society filed by lawyers under Rule 3-89 respecting mortgage discharge failures indicate that some lawyers seem to take insufficient precautions when dealing with payouts on private mortgages.

Please note that filing mortgage discharge failure reports is not optional. A BC lawyer is required to report to the Law Society the failure of a mortgagee to provide a registrable discharge of mortgage within 60 days of the closing date of a mortgage transaction under Rule 3-89(b)(i). A BC lawyer must also report the failure of another lawyer or a notary to provide satisfactory evidence that he or she has filed a registrable discharge of mortgage as a pending application at the Land Title Office within 60 days of the closing date of a mortgage transaction under Rule 3-89(b)(ii).

A report is required within five business days of the end of the 60-day period. It should be filed online: see the Resource Library/Forms section of the Law Society website at www.lawsociety.bc.ca.

Having an exit strategy for money in your trust account

Before you accept money in trust, be clear about the conditions under which that money will leave your trust account, and that you know to whom to pay the money. Some lawyers have found themselves holding trust funds indefinitely, caught between competing parties demanding funds or being

unsure to whom to return funds.

For example, you can avoid having a deficiency holdback sitting in your trust account for months or even years after a closing by being careful about what instructions you initially accept about holding the funds. If you give an undertaking carelessly, you may find yourself dealing with an unhappy purchaser client who demands money you are holding in trust because a vendor still has not remedied deficiencies to the satisfaction of your client, or at all. How do you close a conveyancing file without breaching your undertaking "to hold money in trust until deficiencies are remedied" when there is no time limit on your obligation?

When used properly, undertakings can expedite otherwise cumbersome transactions. When used improperly, undertakings can be the source of expensive and burdensome problems.

If you undertake to hold funds until deficiencies are remedied, include a mechanism to deal with the deficiency holdback in the event the vendor does not do the work or there is a dispute about the quality of the work. You might want to set out circumstances under which you may pay the disputed amount into court after a certain date as an acceptable fulfilment of your undertaking, or provide some other means of relieving your firm of obligations with respect to a deficiency holdback. You should discuss with your client the possible outcomes and reach a clear understanding about what your role might be in the event of a dispute over the holdback, and when your role as solicitor in a conveyancing transaction will end.

If you undertake to hold funds until the happening of any event, include an alternative in case the event does not take place (i.e., if the undertaking or conditions cannot be met).

If a group of individuals would like you to hold money for a cause, for an individual or for an organization, be sure you make clear, before accepting funds, what you will do with them if the stated purpose for which you are holding the funds cannot be fulfilled.

In any matter, before you agree to hold funds until some condition has been met, consider what will happen if the condition is never met. In other words, ensure that you have an exit strategy for money that you agree to hold in your trust account.

Deemed directors' liability for tax debts

As noted in the May-June *Benchers' Bulletin*, the provincial government recently introduced directors' liability under the *Social Service Tax Act*, the *Hotel Room Tax Act*, the *Motor Fuel Tax Act* and the *Tobacco Tax Act.* When you are advising your corporate clients about this new and potentially onerous obligation on directors, be aware that a larger circle of individuals than the directors may need legal advice.

Bill 34, the *Provincial Revenue Statutes Amendment Act*, provides that ***deemed directors may also be held liable for a corporation's tax debts.*** A deemed director is a person who performs the function of a director, even though not a member of the board of directors.

To be deemed a director, it is not necessary to perform all the functions of a director. Section 102.2(4) of the *Act* expressly states that a person who merely performs some of the functions of a director is deemed to be a director for purposes of section 102.1. The person is liable for whatever taxes the corporation should have collected or remitted during the time the person was deemed to be a director.

Be aware that, if the corporation and a director overpay the tax, they are entitled to a refund pro rata with the amounts paid in, but a director will receive a refund only if he or she applies for it. Since a director will not know if another director has paid in, it may be that no director will know an overpayment has been made. And, because liability is joint and several, one director may be held liable for the entire underpayment. Unlike provisions in federal statutes, there is no rule expressly allowing one director to collect from the others.

It is strongly recommended that you review the *Act*, in particular the sections that provide for "deemed directors." You will want to determine to whom you should be providing legal advice and to whom you should be recommending independent legal advice on this new legislation.

You might wish to discuss with your clients reviewing their insurance for non-director executives, and ensuring that director and officer policies are endorsed appropriately to include anyone who might be a "deemed director" under the provincial legislation.

Correction: succession planning

In the January-February *Benchers' Bulletin*, this column did not make it clear that the recommendation to provide a power of attorney to another lawyer is an important aspect of planning for your sudden disability — not your death. Upon death of the donor, a power of attorney is, of course, no longer valid. Also, the column ought to have made it clear that if, in your will, you name an executor who is not a lawyer, you should recommend to your executor a designated lawyer to wind down your practice.

Agreement to indemnify is not insured

It appears that some institutional clients are asking lawyers to indemnify them for any losses arising out of breaches of the new privacy legislation. Lawyers are cautioned against entering into any such agreements. As the BC Lawyers Professional Liability Insurance Policy provides coverage for negligence, not contractual breaches, lawyers expose themselves to an uninsured risk in agreeing to indemnify any client.✧

Practice Tips, by Dave Bilinsky, Practice Management Advisor

Law firm mergers 101

♪ *Hope they'll have a better understanding*
Check it out … ♪

Words and music by John Mellencamp

One thing about lawyers — they group; and then once that is done, they split and re-group.

A law firm merger can mean a small group of lawyers coming together or a large, complex multi-firm merger. In each case, however, the basic issues are the same — what are the benefits and potential pitfalls of joining together? How do you conduct the discussions to concentrate on the business fundamentals? How do you conduct your due diligence and not be overly influenced by one or two factors? What are the expected outcomes once the merger is over? What must you deal with before, during and after the merger is approved?

Hildebrandt International, in conjunction with the American Bar Association, has just published the third edition of *Anatomy of a Law Firm Merger — How to Make or Break the Deal*. For firms of any size that are considering joining together, this book is a detailed examination of the critical issues in the merger discussions. It runs through the substantive steps to be taken and, most importantly, explains how to put your own house in order prior to being accepted as a serious merger candidate.

Chapter 1 "Why Law Firms should consider Merging" is an examination of the right and wrong reasons to consider a merger. Some of the right reasons are to:

- enhance the firm's competitive position;
- add complementary practices or services;
- increase or diversify the client base.

Some of the wrong reasons are to:

- control expenses or solve economic problems;
- deal with underproductive or problem partners.

Chapter 2 "Strategic Merger Assessment" emphasizes the importance of undertaking an assessment of your own people, practice, clients and opportunities in order to understand your firm's needs from a strategic standpoint. This assessment addresses several issues, some of which are to help develop the business case for the merger and identify and correct internal weaknesses, including those that may be obstacles to the merger.

A law firm merger can mean a small group of lawyers coming together or a large, complex multi-firm merger. In each case, however, the basic issues are the same.

Chapter 3 "Initiating the Merger" helps identify potential merger candidates and explores the advantages and disadvantages of doing it yourself versus using a consultant as an intermediary. It also covers how to conduct the first meeting between two firms and how to develop a strategic merger checklist and timetable. Samples are included on the CD-Rom that is included with the book. The strategic merger checklist itemizes and sets out a schedule of activities.

Chapter 4 "Evaluating the Merger" delves in the heart of the merger: how to establish the merger committees, identify the key issues and flag all potential deal-breakers. Some of the key issues are:

- the firm name;
- the economic issues underlying the merger;
- partner compensation;
- legal structure of the new organization;
- management structure of the new organization;
- practice philosophies (billable hour expectations and the like).

Some of the potential deal-breakers are:

- partner policies (expenses, outside activities);
- work ethics;
- underproductive partners;
- associate management.

Chapter 5 "Historical Financial Analysis" goes into the analysis of the financial data that must be undertaken prior to the deal. Most importantly, this chapter lists 15 typical benchmarks and how to use them to test for financial strength and identify potential problem areas. Examples of financial benchmarks that should be scrutinized are:

- fee revenue per equity partner;
- net income per partner and partner compensation (including benefits, allowances and perks) and pension contributions;
- expenses and overhead per lawyer;
- leverage ratios;
- realization rates for billings and collections.

Chapter 6 "Developing the Pro Forma

Projections" explains why you should develop future financial projections and how to do so. These projections include the Income Statement: revenue (expected change in billable hours, rates and realization after the merger), change in the number of lawyers (since not all lawyers will stick around for the merger) and expenses (salaries, benefits, other costs), among others. The Cash Flow Statement shows the impact of the merger on the cash position of the new firm, incorporating adjustments for depreciation, purchases of fixed assets, bank borrowings or repayments, partner capital contributions and partner withdrawals of capital.

Chapter 7 "The Economic Balance Sheet" goes into a primarily US-based analysis on use of a modified cash-based method of accounting. However, the comments on capturing off balance sheet items and ensuring consistency in the approach to assembling the balance sheet is of interest to all law firms.

Chapter 8 "Getting to a Decision" explores the issues in getting information to the partners (as the merger process would most likely be left to a committee), how to build and present the merger notebook, how to schedule the vote and how to build the merger agreement.

Chapter 9 "Integrating the Firms" takes the process from the point of the positive vote to merge and looks at building the business integration plan, developing new culture and establishing new leadership and management of the firm. Emphasis is placed on strong leadership and the effective use of communication, consensus-building, tolerance and opportunities for input. Also important is outreach by management "walking the halls" and marketing the firm after the merger.

Chapter 10 "Integrating Administration and Technology" covers blending the administrative procedures and staff of the new firm and integrating the information technology platforms of the prior firms.

The last third of the book is composed of checklists and precedents for use in the merger process.

Anatomy of a Law Firm Merger – How to Make or Break the Deal is a "must read" for any firm considering merger discussions and seeking a better understanding of the full range of issues and options. Check it out.✧

From the BC Supreme Court

Fax filing rule

Practice direction: August 5, 2004
Issued by Chief Justice Donald I. Brenner

This practice direction replaces the direction issued on June 24, 2003.

On July 1, 2004, the new fax filing rule (Rule 67) was extended to July 2, 2005. It governs how documents may be delivered to the registry by fax for the purposes of filing.

As per Rule 67(3)(a), the designated fax numbers for the registries to which Rule 67 applies are as follows: *Chilliwack* (604 795-8397); *Cranbrook* (250 426-1498); *Dawson Creek* (250 784-2218); *Kamloops* (250 828-4345); *Kelowna* (250 979-6768); *Nelson* (250 354-6133); *Penticton* (250 492-1290); *Prince George* (250 614-7923); *Rossland* (250 362-7321); *Salmon Arm* (250 833-7401); *Smithers* (250 847-7344); *Terrace* (250 638-2143); *Vernon* (250 549-5461) and *Williams Lake* (250 398-4264).

Time limits for the service of jury notices

The Rules Revision Committee has issued a notice to the profession on whether there is a need for changes to the time limits for the service of jury notices and applications to strike under Rule 39(26) and (27).

For a copy of the notice, please visit the Supreme Court section of the superior courts website at www.courts.gov.bc.ca.✧

Report expected in December, 2005

New working group targets civil justice reform

A new government working group with representatives from the judiciary and the legal profession will recommend reforms to the BC Supreme Court civil process, Attorney General Geoff Plant, QC announced on September 27. The Attorney expressed concern that Supreme Court trials are now so expensive, time-consuming and complex that only large corporations, insurance companies and governments can afford to have their disputes resolved there.

The Civil Justice Reform Working Group — expected to report out by December, 2005 —is part of the BC Justice Review Task Force and will be co-chaired by BC Supreme Court Chief Justice Donald Brenner and Deputy Attorney General Allan Seckel, QC.

They are joined on the working group by Madam Justice Laura Gerow, of the Supreme Court of BC, Associate Chief Judge Anthony Spence, of the Provincial Court of BC, Master William MacCallum, of the Rules Revision Committee, Richard Margetts, QC, representing the Law Society of BC, Jim Vilvang, QC, representing the Canadian Bar Association, BC Branch, Helen Pedneault, Assistant Deputy Minister, Court Services Branch, Barbara Young, member at large and George Macintosh, QC, member at large.

The Civil Justice Reform Working Group will focus on the interests of BC Supreme Court users and participants, specifically:

- *Accessibility*: dispute resolution processes, including trials, that are affordable, understandable and timely;
- *Proportionality:* procedures that are proportional to the matters in issue;
- *Fairness:* equal and adequate opportunities for parties to assert or defend their rights;
- *Public confidence*: confidence of the parties that the civil justice system will meet their needs and is trustworthy and accountable;
- *Efficiency:* ensuring the civil justice system uses public resources wisely and efficiently;
- *Justice:* ensuring the truth, to the greatest extent possible, is ascertained and applied to produce a just resolution.

The BC Justice Review Task Force was established on the initiative of the Law Society of BC in March, 2002 and is a joint project of the Law Society, the Attorney General, the BC Supreme Court, the BC Provincial Court and the BC Branch of the Canadian Bar Association. The Task Force is also focusing on family justice and criminal justice reforms. For more information, visit www.bcjusticereview.org.✧

Equity Ombudsperson

Keeping your workplace harassment-free

by Anne Bhanu Chopra

Earlier this year a discipline panel of the Law Society of Upper Canada disbarred Toronto lawyer Gary Neinstein for professional misconduct in having sexually harassed two women, one a client and the other a secretary at his firm, in the early 1990s. The disbarment has been stayed, pending an appeal.

The panel found that the respondent lawyer had demonstrated a disrespect for the trust placed in him as a lawyer and that "… in our considered view, sexual harassment representing a breach of trust must be seen as equivalent to a breach of trust with respect to a client's money."

According to media reports, this is the first time in Ontario (and the second time in Canada) that a lawyer has lost the right to practise law as a result of sexual harassment. Every discipline case turns on its own facts, of course, and each jurisdiction is different, so it would be unwise to suggest that disbarment is a likely penalty for harassment.

Nevertheless, sexual harassment by lawyers is a serious matter under human rights legislation and is also prohibited in BC by Chapter 2 of the *Professional Conduct Handbook*.

As Equity Ombudsperson, I hear from those who have faced harassment in law firms, mostly women. The consequences are distressing, sometimes devastating, for all concerned.

Managing partners, chairs of internal committees and lawyers generally need to be alive to the problem and learn which behaviours are acceptable and which are not. By actively committing to a respectful working environment free of discrimination and harassment, you can:

- save your firm's reputation,
- retain qualified employees,
- avoid the cost of litigation, and
- be a model employer.

The Law Society offers BC lawyers, students and staff the free, confidential and independent services of an Equity Ombudsperson. I am here to provide you with options for addressing harassment problems in the workplace. And I can help law firms with advice and strategies to:

- communicate to all members of the firm what behaviour constitutes sexual harassment,
- appoint individuals to advise everyone in a firm on workplace policies and initiatives,
- adopt internal and formal procedures to deal with any person violating the policies, and
- educate lawyers and staff on the Equity Ombudsperson program.

I am available for individual consultations, educational seminars or consultations with firms on ways to create a positive law firm culture, rejuvenate the workplace and increase productivity. You can contact me by telephone at 604 687-2344 or by email to achopra@novuscom.net. All messages are confidential.✧

Annual Practice Declaration moves online

The Annual Practice Declaration is accessible online through the Law Society website.

Pursuant to Law Society Rule 2-6, every practising lawyer must complete a practice declaration on an annual basis. By November, all practising lawyers who carry professional liability insurance with the LSBC Captive Insurance Company will file the declaration at the same time their firms file their trust report, which means that filing deadlines will vary from firm to firm. Each firm will be advised individually of this date and will advise the lawyers in that firm.

In addition to the reporting requirements of previous years, lawyers are reminded that the Annual Practice Declaration now contains a requirement to report on professional development activities. This new reporting requirement was adopted by the Benchers earlier this year: see the May-June *Benchers' Bulletin*.

Practising lawyers who do not carry professional liability insurance with the LSBC Captive Insurance Company were all asked to file their declarations by October 15.✧

Land Title Office efiling update

Lawyers are reminded that the Land Title Office now accepts electronic filings from lawyers, notaries and land title agents. The Electronic Filing System (EFS), which began operation on April 1, has processed more than 17,000 documents to date.

A lawyer who wishes to make electronic filings in the Land Title Office must first register with and obtain an Adobe Acrobat signing certificate from Juricert, a company owned by the Law Society. Visit www.juricert.com to register for the service and obtain a signing certificate. EFS users must also arrange for electronic payment of the Property Transfer Tax through BC Online.

Documents that may be filed electronically now include builders' liens in addition to the Form A (transfer), Form B (mortgage), Form C (charge and release), Declaration, Property Transfer Tax and Electronic Payment Authorization and Property Transfer Tax Return.

The EFS eliminates courier and agent costs and offers extended hours for submitting documents. In addition, the Adobe signing certificate allows lawyers and notaries to save the cost of exchanging paper documents by fax or courier because the documents are signed and filed electronically.

Those using EFS will pay Land Title filing fees and a $2.50 Juricert fee for each document filed. This fee is now charged to the BC OnLine account of the party submitting the document.✧

Keep us current

Please remember to keep the Law Society up to date on your address, telephone and fax numbers and email address. You can do this by noting changes on your Annual Practice Declaration or, throughout the rest of the year, by completing a *Request to Change Contact Information* form, downloadable from the Resource Library/Forms section of the Law Society's website at www.lawsociety.bc.ca.✧

Services to members

Practice and ethics advice

Contact **David J. (Dave) Bilinsky**, Practice Management Advisor, to discuss practice management issues, with an emphasis on technology, strategic planning, finance, productivity and career satisfaction. **Email**: daveb@lsbc.org **Tel**: 604 605-5331 or 1-800-903-5300.

Contact **Felicia S. Folk**, Practice Advisor, to discuss professional conduct issues in practice, including questions on undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships and lawyer-lawyer relationships. All communications are strictly confidential, except in cases of trust fund shortages. **Tel**: 604 669-2533 or 1-800-903-5300 **Email**: advisor@lsbc.org.

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

Interlock Member Assistance Program – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society, and provided at no cost to individual BC lawyers and articled students and their immediate families: **Tel**: 604 431-8200 or 1-800-663-9099.

Lawyers Assistance Program (LAP) – Confidential peer support, counselling, referrals and interventions for lawyers, their families, support staff and articled students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no cost to individual lawyers: **Tel**: 604 685-2171 or 1-888-685-2171.

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

From the BC Court of Appeal

Judicial settlement conference pilot project

The British Columbia Court of Appeal will introduce a pre-hearing judicial settlement conference pilot project in November, 2004. The pilot project will operate for two years, with a preliminary review after the first year.

The purpose of the project is to assist parties to resolve certain appeals at an early stage, to save the parties expense and to expedite final resolution of the dispute.

A settlement conference is available to parties involved in civil appeals. In order to participate in a settlement conference, all parties to the appeal must consent to the process.

A party may withdraw from the process at any time. The Court may reject a request for participation in a settlement conference on the basis that the matter is not suitable for a settlement conference. A judge of the Court of Appeal who has agreed to participate in the pilot project will conduct the settlement conference at a date and time mutually convenient to all participants. If the parties are successful in resolving the dispute through a settlement conference, they will draft and sign an agreement and a formal order will be entered.

If the parties do not resolve the dispute through the settlement conference, the matter will proceed in accordance with the *Court of Appeal Act* and Rules. The substance of all conversations by the parties during the settlement conference process are statements made off the record. These are confidential and cannot be disclosed in any other proceedings. The judge who conducts the settlement conference will be excluded from the panel presiding at the appeal.

The judge who conducts the settlement conference acts as a mediator performing a judicial function. The judge maintains his or her judicial capacity and its accompanying immunity and cannot be compelled to testify in later court proceedings should they arise.

Parties wishing to participate in a settlement conference must submit a joint request in the prescribed form. The protocol to be followed on a settlement conference is set out in a practice directive issued by the Court. The directive is available on the superior courts website at www.courts.gov.bc.ca.

In developing the protocol and practice directive, the Court of Appeal has drawn on the experience of the Quebec Court of Appeal, which introduced judicial settlement conferences a number of years ago.✧

Real estate checklists updated with e-filing procedures

Updated real estate checklists are available to download from the Resource Library / Practice Checklists Manual section of the Law Society website at www.lawsociety.bc.ca. The checklists include practice and procedures related to electronic filings in the Land Title Office.✧

Retired membership *… from page 10*

and thereby enlarging the pool of lawyers eligible to offer pro bono legal services. While retired members must provide an undertaking not to practise law, there is an exception for certain pro bono services and, if a retired member opts to participate in an approved program, he or she is protected by liability insurance coverage.

In addition to relaxing the eligibility requirements for retired membership, the Benchers have granted the Credentials Committee authority to waive all or part of the reinstatement fee for an applicant for retired membership on conditions it considers appropriate. A waiver may further encourage those senior members of the bar or those judges who have recently retired to re-enter the profession and offer their expertise for the cause of pro bono.

The retired membership fee for 2005 is just $75 a year. All current retired members will receive renewal notices shortly. For more information, contact the Member Services Department at memberinfo@lsbc.org.

If you would like to learn more about pro bono opportunities, see the Pro Bono Law of BC brochure included in this mailing or contact the Society at info@probononet.bc.ca.✧

Special Compensation Fund claims

The Special Compensation Fund, funded by all practising lawyers in BC, is available to compensate persons who suffer loss through the misappropriation or wrongful conversion of money or property by a BC lawyer acting in that capacity.

The Special Compensation Fund Committee makes decisions on claims for payment from the Fund in accordance with section 31 of the *Legal Profession Act* and Law Society Rules 3-28 to 3-42.

Rule 3-39(1)(b) allows for publication to the profession of summaries of the written reasons of the Committee. These summaries are published with respect to paid claims, and without identifying the claimants.

* * *

Martin Wirick

Vancouver, BC

Called to the Bar: May 14, 1979

Resigned from membership: May 23, 2002

Custodian appointed: May 24, 2002

Disbarred: December 16, 2002 (see Discipline Case Digest 03/05)

Special Compensation Fund Committee decision involving claims 20020099 and 200220413

Decision date: February 4, 2004
Report issued: June 14, 2004

Claimant: A Bank
Payment approved: ***$237,883.40***
($214,989.43 and $22,893.97 interest)

The H Street property

A developer client of Mr. Wirick, Mr. G, agreed to purchase a property on H Street in Vancouver. He then assigned the right to purchase to Mr. S.

Mr. S became the registered owner of the H Street property in October and obtained a mortgage loan from A Bank.

In March, 2002 Mr. S entered into an agreement to sell the property to Mr. Y. Acting for Mr. S in this transaction, Mr. Wirick gave his undertaking to Mr. Y's lawyer to pay out and discharge the A Bank mortgage from title. Contrary to that undertaking, Mr. Wirick failed to pay out the funds received from Mr. Y's lawyer in accordance with his undertaking and failed to discharge the A Bank mortgage.

The Special Compensation Fund Committee found that, while not every breach of undertaking is dishonest, these circumstances suggested, not negligence or error by Mr. Wirick, but an intention to deceive.

The Committee decided that it would not require the claimants to exhaust their civil remedies in this case by obtaining judgments against Mr. Wirick, noting that he had made an assignment in bankruptcy claiming liabilities far in excess of assets, and there was little hope of recovery from him.

The Committee allowed the claim of A Bank with interest, subject to certain releases, assignments and conditions, including the requirement of providing to the Law Society a registrable discharge of its mortgage on title.

As a result of the payment and discharge of the mortgage from title, Mr. Y would be placed in the position that he ought to be in and would suffer no loss. Accordingly, his claim for compensation was denied.

Edward Kenny

Formerly of Vernon, BC

Called to the Bar: May 15, 1972

Ceased membership for non-payment of fees: December 31, 1998

Custodian appointed: January 15, 1999

Admitted professional misconduct: October, 1999 (see December, 1999 Discipline Digest)

Special Compensation Fund Committee decision involving claim 1999013

Decision date: November 12, 2003
Report issued: March 9, 2004

Claimant: Mr. and Mrs. C
Payment approved: ***$195,615.33***

Mr. and Mrs. C

In 1997 Mr. Kenny agreed to perform services for MSI, an investment company whose president, secretary and sole director was Mr. P. Mr. Kenny agreed to act as trustee of investor funds and to hold bonds as security for investor capital and profit.

Mr. and Mrs. C were retired school principals in Australia who responded to an investment advertisement and met with Mr. M to discuss a joint venture. Mr. M was an intermediary who made arrangements for the couple to invest money through Mr. P and his company MSI.

Mr. M made enquiries about Mr. Kenny's status as a lawyer in BC and his insurance coverage and subsequently told Mr. and Mrs. C that the MSI investment program involved a lawyer who has been "successfully facilitating very profitable capital market trading programs for his local and international clients" and urged

them to consider this program. He noted that the funds would be held in trust by the lawyer and that trust funds are protected against "theft, fraud, dishonesty or mismanagement" under federal law and by the Law Society.

Mr. M further advised that, under the investment, funds could be withdrawn at any time without condition on 20 days' notice and that the payout to Mr. and Mrs. C would be 5% per banking week, for a total payout of 200% over 10 months. He advised that the investment was more profitable than another that was under consideration and that it was "totally safe."

On April 2, 1998 Mr. Kenny, Mr. M and Mr. and Mrs. C entered into an agreement. Mr. Kenny stated in writing that he would maintain contractual control of the investment funds and would transfer them only on instruction and after receiving appropriate bank guarantees, including return of capital. The agreement also provided that the amount of the bank's guarantee of the principal would be held in Mr. Kenny's trust account for the benefit of Mr. and Mrs. C only.

A Law Society audit of Mr. Kenny's trust account later showed that the investment funds of Mr. and Mrs. C, received on April 8, 1998, were co-mingled with the funds of other investors. By April 17 Mr. Kenny had paid out of his trust account all the co-mingled funds of Mr. and Mrs. C and of the other investors.

There were several further agreements between Mr. Kenny and Mr. M on behalf of Mr. and Mrs. C respecting placement of their funds. Mr. Kenny wrote letters to Mr. M and/or to Mr. and Mrs. C that were false and misleading.

The Special Compensation Fund Committee considered in detail whether Mr. Kenny received the investment funds from Mr. and Mrs. C in his capacity as a lawyer, noting that his role was to administer and facilitate a highly speculative investment scheme. The applicable principles are set out in *Patchett* v. *Law Society of BC* [1979] 1 WWR 585 (BCSC).

In the circumstances, the Committee concluded that he did receive the funds as a lawyer, taking particular note of the fact that Mr. Kenny held himself out to Mr. and Mrs. C as a lawyer and represented to them that funds would be held in trust.

The Committee found that Mr. Kenny misled Mr. and Mrs. C and that he distributed their funds in breach of the terms of his promise and that this amounted to a misappropriation or wrongful conversion.

The Committee noted its discretion to make full or partial payment of claims. The Fund is not intended to be an insurer of highly speculative and questionable investment schemes. In this case, the proposed return from the investment was so unrealistic that reasonable and prudent investors would have had to have some doubt as to the legitimacy of the scheme and recognized that they were embarking on a speculative and somewhat risky endeavour. That said, the Committee recognized that the claimants were not experienced or sophisticated investors, had lost the bulk of their retirement savings and had experienced considerable hardship.

The Committee exercised its discretion to pay the claim, reduced by 25%, subject to certain releases, assignments and conditions. The Committee declined to pay interest.

Special Compensation Fund Committee decision involving claim 1999005

Decision date: February 4, 2004
Report issued: April 2, 2004

Claimant: Mr. GC
Payment approved: ***$33,278.36***

Mr. GC

As noted in the summary of claim *1999013* above, Mr. Kenny agreed to perform services for MSI, an investment company whose president, secretary and sole director was Mr. P. Mr. Kenny agreed to act as trustee of investor funds and to hold bonds as security for investor capital and profit.

In November, 1997 Mr. GC, a businessman in BC, made arrangements to enter into an investment scheme that he was introduced to by Mr. S, the principal of a US investment company. Mr. S described the investment as "bank guaranteed" and identified Mr. P as the project administrator and Mr. Kenny as the project lawyer.

Mr. GC made transfers of $49,000 US, $37,000 US and $14,000 US to Mr. Kenny in trust. A summary of the projected monthly distributions stated that the investment was for a 13-month period and would generate a profit of 180%. A commitment letter signed by both Mr. GC and Mr. Kenny provided that Mr. Kenny would hold the funds in trust until he exchanged them for one-year US Treasury Bonds.

Mr. Kenny did not hold these funds in trust, but rather paid them to a third party in January, 1998. Despite this fact, he subsequently sent correspondence to Mr. GC indicating that he was intending to sell the investment contracts and forward funds to investors. He wrote to Mr. GC several times in February to advise that there were delays in having funds cleared by the federal reserve. Mr. P (through his company MSI) and Mr. Kenny wrote to Mr. GC in March respecting the delays.

In April, 1998 MSI paid $50,000 US to Mr. GC. Mr. P and MSI subsequently sent a number of "urgent" faxes to Mr. GC and other investors, giving explanations for further delays and giving false hope that payment was near. Mr.

continued on page 24

Special Fund claims … from page 23

GC asked for an update in December, 1998. In January, 1999 a lawyer then acting for Mr. Kenny told Mr. GC that Mr. Kenny had $1.2 million US in a pooled trust account but that ownership of the funds could not yet be determined and would have to await completion of the Law Society's audit and investigation.

The Special Compensation Fund Committee determined that Mr. Kenny received Mr. GC's funds in his capacity as a lawyer, noting that Mr. Kenny held himself out to Mr. GC as a lawyer and represented that the funds would be held in trust. Mr. Kenny had misled Mr. GC and distributed his funds in breach of the terms of his promise, thereby misappropriating or wrongfully converting the funds.

The Committee noted that the Fund is not intended to be an insurer of highly speculative and questionable investment schemes. In these circumstances, Mr. GC was an experienced businessman and a reasonably sophisticated investor. The proposed return from this investment was so unrealistic that any reasonable and prudent investor in his position would have had some doubt as to the legitimacy of the scheme and recognized that he was embarking on a speculative and somewhat risky endeavour. Noting this fact, and that Mr. GC had received back half of his initial investment from Mr. Kenny, the Committee allowed 50% of his claim, subject to certain releases, assignments and conditions. The Committee declined to pay interest.

Special Compensation Fund Committee decision involving claim 1999012

Decision date: February 4, 2004
Report issued: June 1, 2004

Claimant: Mr. O
Payment approved: ***$99,965***

Mr. O

In October, 1997 Mr. O (a BC business man) provided $99,990 US to Mr. Kenny in trust with instructions that he invest the money in a scheme to purchase one-year US Treasury Bonds equal to 300% of the investment funds.

Mr. O and Mr. Kenny had signed an agreement that the investment would generate a return to a maximum of 300%. They revised the agreement in November.

On November 20, 1997 Mr. Kenny told Mr. O that he had received trade tickets in furtherance of the investment, leading Mr. O to believe that Mr. Kenny had exchanged the funds for Treasury Bonds. Instead, Mr. Kenny paid out Mr. O's funds to third parties by way of cheques to Mr. P and Mr. P's company, MSI, contrary to the terms of the agreement.

The Committee found that Mr. Kenny had received the investment funds as a lawyer. He had held himself out as a lawyer and traded on that status in luring Mr. O into the investment scheme. Mr. O believed that Mr. Kenny was the lawyer for MSI. The mere fact that Mr. Kenny received funds for the purpose of investment was not sufficient to conclude that he did not receive them in his capacity as a lawyer. While investing money is not the usual practice of a lawyer, it is a lawyer's usual practice to deposit money into trust and pay it out as instructed by the owner.

In this case, Mr. Kenny misled Mr. O regarding the destination of his funds. He paid the funds out contrary to a written agreement he had signed and this amounted to misappropriation or wrongful conversion.

In considering its discretion to make full or partial payment of claims, the Committee noted that the Fund is not intended to act as an insurer of highly speculative or questionable investment schemes. In this case, the proposed return from the investment was so unrealistic (including claims of $500% returns if successful, and only marginally less if unsuccessful) that any reasonable and prudent investor would have had some doubt as to the legitimacy of the scheme and recognized that he or she was embarking on a speculative and somewhat risky endeavour.

Mr. O, however, was not an experienced or sophisticated investor. He initially borrowed from the line of credit of his closely held company and then repaid the loan through his RRSP, his daughter's college fund and a mortgage against his home, resulting in hardship. The Committee allowed the claim, reduced by 25%, and subject to certain releases, assignments and conditions.

John Motiuk

Vancouver, BC

Called to the Bar: May 12, 1967

Admitted professional misconduct and undertook not to practise: November 25, 1999 (see Discipline Case Digest 03/19)

Special Compensation Fund Committee decision involving claim 2000001

Decision date: May 5, 2004
Report issued: June 25, 2004

Claimant: Beneficiary of the estate of Ms. W
Payment approved: ***$15,000***

The W estate

In May, 1996 Mr. Motiuk drafted a will for a long-time client, Ms. W. The will appointed Mr. Motiuk's law firm as sole executor with the right to be paid professional fees. Mr. Motiuk, however, was one of the two attesting witnesses, which rendered his appointment as executor and the charging clause invalid.

The client died in September, 1998. Mr.

Motiuk obtained probate. He charged the estate and paid himself the following:

- $4,921.67 in legal fees regarding the estate (2% of the gross value of the estate);
- $4,010 in legal fees regarding power of attorney duties in previous years;
- $9,480.76 for executor's fees (5% of the gross value of the estate).

The Special Compensation Fund Committee found that Mr. Motiuk had held the estate funds in trust as a lawyer.

The Committee noted that Mr. Motiuk did not obtain court approval or unanimous beneficiary consent or approval to take the executor's fees. He charged both executor's fees (the maximum available and for a relatively simple estate) and legal fees, although he was not entitled to them. His actions amounted to misappropriation or wrongful conversion of the funds he held in trust.

The Committee allowed the claim of the primary estate beneficiary, subject to the usual conditions of the claimant executing a release and an assignment.

Francis T. Donegani

Formerly of Victoria, BC

Called to the Bar: May 16, 1968

Custodian appointed: May 15, 1990

Deceased: July 6, 1990

Special Compensation Fund Committee decision involving claim 1990025

Decision date: May 5, 2004
Report issued: July 16, 2004

Claimant: Ms. F
Payment approved: ***$87,030.10***

Ms. F

In 1985 Mr. Donegani prepared a will for Mr. RF who died in June, 1996. Ms. F and her father (since deceased) were the residual beneficiaries under the will. Mr. Donegani was the sole executor of RF's estate.

A Law Society audit of Mr. Donegani's practice revealed that Mr. Donegani had improperly taken $59,530.10 from RF's estate, in some instances to purchase investments for Mr. Donegani's wife. The audit also revealed that Mr. Donegani took executor's fees of $27,500 to which he was not entitled.

The Special Compensation Fund Committee noted that, although the misappropriation took place in the 1980s, Ms. F had only discovered the facts giving rise to the claim in 2002 when contacted by Law Society staff and she properly made her claim within the two-year limitation period.

The Committee found that Mr. Donegani had received the estate funds in his capacity as a lawyer and had misappropriated from these funds. The Committee accordingly resolved to pay to the beneficiaries of RF's estate the amount of $59,530.10 that Mr. Donegani had improperly withdrawn from trust as well as the $27,500 that he had taken as executor's fees when he was not entitled to do so. The Committee declined to pay interest.✧

Errata

Revisions to Chapter 13, Rule 5 of the *Professional Conduct Handbook*, set out in the May-June *Benchers' Bulletin*, ought to have read in the preamble: *"5. Except with the written approval of the Law Society, a lawyer must not employ or retain in any capacity having to do with the practice of law a person who, in any jurisdiction, …."* The correct wording is set out in the May-June *Member's Manual* amendment package and in the online version of the rules on the Law Society website.

There are two other points in need of correction in the May-June *Bulletin*. First, the Chief Justice of Ontario, not the Chief Justice of Canada, attended the Pro Bono Law of Ontario conference in Toronto in May. Second, Halldor Bjarnason, Chair of the Disability Research Working Group, is a lawyer at Access Law Group in Vancouver, which ought to have been noted.

Our apologies.✧

Unauthorized practice actions

Consent injunction

On application of the Law Society and by consent, the BC Supreme Court has ordered that **Art Thornhill,** of Vancouver, and his company **Art Thornhill & Associates**, be permanently enjoined from drawing corporate documents, documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute or documents relating to real or personal estate; from negotiating to settle a claim or demand for damages; from giving legal advice and from offering or representing that they are qualified or entitled to provide any of these services for a fee: June 21, 2004 (entered June 22, 2004).

Undertakings

[redacted]

Unauthorized practice

Under the *Legal Profession Act*, the Law Society is responsible for ensuring that unqualified people do not illegally offer legal services or misrepresent themselves as lawyers. This responsibility exists to protect the public from a loss of rights, money or both, which are often at stake in legal matters.

The Society investigates complaints of unauthorized practice and takes the steps necessary to stop it. If the facts bear out a complaint, the Society will explain the restrictions that apply to law practice and will ask the non-lawyer to refrain from the activity. Usually this step is sufficient. When it is not, the Society has statutory authority to seek a court injunction, which may proceed by consent.

The Law Society publicizes undertakings and court actions to ensure the community understands this aspect of the Society's mandate, and also to gain the assistance of lawyers and members of the public in recognizing new or recurring unauthorized practice.

Complainants' Review Committee flags common themes in 2003 complaints

When Law Society staff review a complaint against a lawyer and determine that no further action is required, the complainant has the option of requesting a further review by the Complainants' Review Committee. The Committee may confirm the staff decision or refer the matter to the Discipline Committee or Practice Standards Committee, with or without recommendations.

Although the 2003 Complainants' Review Committee found that most of the 80 complaints it reviewed merited no further action, those complaints nevertheless offered lessons for other lawyers. In canvassing those complaints, three key themes emerged, as summarized below by 2001-2003 Committee Chair June Preston.

Poor communications with clients

The Committee found that ineffective communication was a recurring theme in many client complaints under review. Most commonly, a lawyer failed to confirm a client's instructions in writing, leading to a misperception by the client about what the lawyer was doing and why.

Although there was no evidence that the lawyers in those cases acted in bad faith or with intent to do anything other than act in accordance with client instructions, the Committee noted that, if a lawyer fails to confirm instructions in writing, this can result in miscommunication, a deterioration of the solicitor-client relationship and, ultimately, complaints to the Law Society. Such complaints could often be prevented if lawyers ensured all client instructions were confirmed in writing so there is no room for misunderstandings.

Non-clients misunderstanding role of opposing counsel, or perceiving rudeness

Many of the complaints considered by the Committee were from unrepresented opposing parties who either did not understand the legal processes they were involved in or appeared to be under the mistaken belief that opposing counsel had some duty to protect their interests.

The Committee recognized that lawyers are in a difficult situation when dealing with unrepresented opposing parties, yet the frequency of these types of complaints, particularly in family law, is cause for concern. Many of the complaints included allegations of failure to respond to communications and, in almost all cases, rudeness.

Throughout 2003, the Committee referred several rudeness complaints to the Discipline Committee with recommendations that the Discipline Chair send letters of admonishment. The Committee found that rudeness reflects poorly on the reputation of lawyers as a whole. If lawyers treated everyone, including unrepresented litigants, with courtesy and respect it could go a long way toward preserving working relationships with clients and non-clients alike.

Lawyers failing to fully respond to complaints

For most of the complaints considered by the Committee in 2003, lawyers took the matters seriously and provided substantive explanations. The Committee did, however, note a number of exceptions in which lawyers provided only cursory responses and did not adequately address the issues raised by the complainants. In those instances, the Committee either wrote to the lawyer directly for more information or referred the matter to the Discipline Committee to do so.

While it was ultimately determined no further action was required, the referrals to Discipline would have been unnecessary had the lawyers provided substantive responses at the outset.✧

Interim suspension

Raghbir Singh Basi of Victoria was suspended on an interim basis by three Benchers of the Law Society on October 1, 2004, pursuant to section 39 of the *Legal Profession Act*, pending conclusion of a discipline citation against him.✧

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Contact

The Law Society of British Columbia

845 Cambie Street
Vancouver, BC
Canada V6B 4Z9

Telephone: 604 669-2533
Toll-free within BC: 1-800-903-5300
Telefax: 604 669-5232
TTY: 604 443-5700
Website: www.lawsociety.bc.ca

Lawyers Insurance Fund
Telephone: 604 682-8911
Telefax: 604 682-5842