The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

FEATURE

Top complaint against lawyers is rude or uncivil behaviour / 12

Interesting times for self-regulating professions

by Gavin Hume, QC

ONE CANNOT HELP but be struck by the barrage of current news stories from the Middle East as citizens rise up against their governments in attempts to bring about change, only to be attacked, imprisoned and even killed for their beliefs and audacity to challenge the governing authority.

And while these reports certainly cause me to appreciate the rights we enjoy in our own stable democracy, I am also very much aware that the preservation of these rights cannot be taken for granted.

It is incumbent upon the legal profession to continuously deserve the right to self-regulate and thereby do its part to maintain the rule of law and the right of members of our society to achieve change and speak against government without having to rise up.

Here in the west, we have been reminded of this after recently witnessing the erosion of the legal profession's ability to self-regulate in several countries.

In Australia, government stepped in to force a national mobility agreement after state and territory regulators took too long to develop one on their own. The lack of lawyer mobility had been effectively crippling the national economy as corporations were forced to delay operations while awaiting legal assistance that they could not source from other jurisdictions. The federal government is now working on the creation of the National Legal Service Board, which will take over responsibility for regulating the profession.

In England, lawyers lost their right to self-regulate after a series of poor, highly-public discipline decisions and in-fighting resulted in a loss of public confidence in the regulatory authority. Now, a single government-appointed body oversees the entire legal services sector in England and Wales, with the mandate to ensure that the interests of consumers are placed at the heart of the legal system.

Meanwhile, in Ireland, an independent regulator will be in place this fall that will no longer allow the legal profession to run its own affairs, after it was acknowledged there was little or no independent oversight of the profession in Ireland and that the existing, outdated system had the dual role of regulating and representing the profession, which diminished independence and transparency.

Not surprisingly, this topic was on the agenda of last year's international Commonwealth Lawyers Association conference, particularly as it related to the rule of law and the potential impact of legal professionals no longer being independently regulated.

It is incumbent upon the legal profession to continuously deserve the right to self-regulate and thereby do its part to maintain the rule of law and the right of members of our Society to achieve change and speak against government without having to rise up.

As the BC member of the Council of the Federation of Law Societies, I am pleased to report that significant progress continues to be made on new national standards for policies and protocols that have, or will be, recommended for approval by the various law societies. The goal of developing a standard approach to regulation is to ensure high, consistent and transparent national regulatory principles for Canada's lawyers and mitigate the problems we have seen in other jurisdictions where government feels it has no choice but to step in and take over some or all regulatory functions.

Canadian lawyers can be proud of the

BENCHERS' BULLETIN

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

Suggestions on improvements to the *Bulletin* are always welcome — please contact the editor at communications@lsbc.org. Additional subscriptions to Law Society newsletters may be ordered at a cost of $50 (plus HST) per year by contacting the subscriptions assistant at communications@lsbc.org. To review current and archived issues of the *Bulletin* online, see "Publications and Resources" at lawsociety.bc.ca.

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work of their regulators and the Federation. Mobility agreements signed in recent years make it relatively easy for lawyers to practise anywhere in the country. Law societies, through the Federation, recently approved a new set of national requirements for law degree accreditation, and we are in the process of developing national bar admission, investigation and discipline standards and related procedures.

And while there is still some work to be done, the Federation has adopted a national Model Code of Professional Conduct that provides for the highest possible standards in the protection of the public interest. It is now up to the law societies to review and adopt the Code.

Here in BC, the Benchers have approved the new Code with the exception of the current client conflict rules. As we did last fall for the rest of the Code, we have asked BC lawyers for input on the current client conflict rules portion. In the meantime, the Federation's Standing Committee on the Model Code of Professional Conduct will make a recommendation on the current client conflict rules and is also gathering suggestions for future improvements.

The goal of developing a standard approach to regulation is to ensure high, consistent and transparent national regulatory principles for Canada's lawyers and mitigate the problems we have seen in other jurisdictions where government feels it has no choice but to step in and take over some or all regulatory functions.

The Benchers are also always seeking to improve how we regulate. New regulatory oversight practices and the addition of non-Bencher lawyers and members of the public to our hearing pools are new initiatives intended to maintain public trust in both us as regulators and in the profession in general.

Indeed, these are interesting times. But by virtue of the work of many forward-thinking individuals throughout Canada, the law societies and the Federation are proactively doing all they can to preserve the independence of the profession and thereby help protect the rule of law.❖

Law Society participation in Law Week

THE LAW SOCIETY continued its annual sponsorship of Law Week, which ran throughout BC from April 6 to 27, 2011 with the theme *Access to Justice: The Changing Face of Law*. The Law Society focused this year on drawing attention to the theme through a series of media interviews conducted by President Gavin Hume, QC *(pictured above at the CBC studio with Jamie Maclaren of Access Pro Bono)*. He spoke about the state of access to the justice system in BC and the Law Society's work to improve access to legal services. Hume was interviewed by CBC Radio's *Almanac* program, CKNW's Charles Adler program, the Roy Green Show, Coast to Coast and general news broadcasts, Victoria's the Q and CFAX and Kamloops' CKNL.

Also in conjunction with Law Week, the Law Society launched a new Access to Legal Services webpage with links to video clips that have been posted to the Law Society's new YouTube channel.

Law Week is organized by the Canadian Bar Association, BC Branch.❖

New initiatives launched to help lawyers reduce complaints

by Timothy E. McGee

IN THIS ISSUE of the *Benchers' Bulletin* we launch two new features to enhance how we report on disciplinary matters with a goal to help lawyers mitigate complaints to the Law Society.

For many years now, through the Discipline Digest section of the *Benchers' Bulletin*, we have reported on the results of discipline hearings to inform and educate the profession on the most serious breaches of our rules.

However, there has been growing interest in reporting on the less severe examples of misconduct, again to inform and educate. In November 2010, we reported to you that the Benchers had directed the Law Society to begin publishing anonymous summaries of conduct reviews. We do that for the first time in this issue of our news magazine.

A conduct review is a form of disciplinary action. Usually held with two or more Benchers, a conduct review is a frank discussion of the lawyer's misconduct, during which the Benchers will discuss why the conduct was improper. The Benchers will also consider whether the lawyer understands the issues and has taken appropriate steps to prevent the same or similar conduct from happening again. A conduct review forms part of the lawyer's disciplinary record and may be a factor in penalty decisions in any subsequent hearings. Turn to page 22 to learn more about the kinds of behaviour that have resulted in conduct reviews.

A second initiative is the Discipline Alert program. This is a multi-pronged strategy to communicate to all lawyers those behaviours that have the potential to result in complaints to the Law Society. Reducing the number of complaints where possible is in everyone's best interest.

Our first Discipline Alert topic regards civility. By a wide margin, our most frequent complaint is about rudeness. A Law Society hearing panel recently commented that "a lawyer's communications must be courteous, fair and respectful," and that a lawyer is to "refrain from personal remarks or references, and to maintain objectivity and dignity."

You'll find the Discipline Alert on page 10 of the Practice section of the Bulletin as well as on our website and, occasionally, in E-Brief.

Reporting on conduct reviews and complaints are just two of the things we are doing to be proactive in informing and hopefully educating the profession to head off complaints before they arise. As always, we welcome your feedback at ceo@lsbc.org.❖

Law Society's 2010 Annual Review and financial statements

Our Annual Review: *Enhancing public confidence with effective, transparent regulation* provides a progress report on our strategic goals and an evaluation of our core operations including the effectiveness of our programs and opportunities for improvement. These results are a critical part of our regulatory transparency and are intended to inform the public as well as lawyers, the media and government. New governance policies and statistics related to BC's legal profession in 2010 are also highlighted.

In consideration of cost-savings and our environmental footprint, the Annual Review and financial statements are only available in electronic form on the Law Society's website.

Succession planning, it's good practice

Your clients and family are counting on it

THE LAW SOCIETY is launching a campaign to encourage sole practitioners to take the critical step of arranging for a winding up caretaker.

"Sole practitioners need to have someone in place to take over their practice in an emergency," said Graeme Keirstead, who has managed the custodianship department at the Law Society for the past four years.

"Many lawyers don't have the time or desire to think about succession planning. It may be uncomfortable to imagine your own disability or death, but it's as important to have contingency plans in place for your practice as it is for your personal estate. It's like leaving a will for your practice and making sure your wishes are met and that the people you care about, which in this case would be your clients, are looked after."

Law Society data indicates only 12 percent of sole practitioners over 50 years of age have a designated winding up caretaker. This June the Society is launching a campaign entitled *Succession planning, it's good practice* to encourage more sole practitioners to voluntarily make succession plans for their practices.

"Succession planning benefits everyone involved," said Keirstead. "Planning lets the lawyer choose who will be the winding up caretaker, what details that lawyer will handle and on what financial terms. It gives the clients certainty. It makes it easier for the lawyer's loved ones during an already difficult time. And it means the Law Society doesn't need to step in as a custodian, which saves everyone time and money."

Graeme Keirstead

If you are a sole practitioner, take the time now to think about succession planning. The Law Society is available to help and has developed tools on the website in the practice support section to make it easier for lawyers to act as each other's winding up caretaker.

Lawyers with questions should contact the Custodianship department at tel. 604.669.2533 or by email to custodianship@lsbc.org.❖

Public invited to apply to sit on discipline and credentials hearing panels

THE LAW SOCIETY is inviting members of the public to apply to participate in its hearing panels. Starting June 1, ads began appearing in newspapers across the province seeking qualified applicants.

The Benchers decided to expand tribunal membership to include non-Bencher lawyers and non-lawyers to create greater public confidence in the hearing process.

Hearing panels will consist of a current lawyer Bencher as chair, another lawyer who is not a Bencher selected from a lawyer hearing panel pool and an individual who is not a lawyer selected from a non-lawyer pool. Lawyers were invited to apply for the non-Bencher lawyer pool in the Spring 2011 *Benchers' Bulletin*, March *E-Brief* and through the website.

The hearing process already includes some non-lawyers, by the inclusion of the Appointed Benchers. This new group of people that will be called upon for panels will further expand the role the public plays in the regulatory process.

Hearings are important to the Society's role in ensuring lawyers meet high standards of professional conduct, learning and competence. Hearing panels hear cases about alleged discipline violations and incompetence, as well as the character and fitness of new lawyer applicants.

"There is growing public scrutiny of self-regulatory organizations, and we are taking a number of proactive measures, including this one, to maintain confidence in the Law Society's regulatory process," said President Gavin Hume, QC.

The response has been excellent. In the first two days after the ads appeared, the web page has had over 600 hits from people wanting more information, and we have received over 60 applications.

As well, over 130 lawyers applied for the lawyer pool.

All applications are being carefully considered, and we expect to make the final selections for both pools by the end of summer.

For more information about the conditions and qualifications required, see the Law Society website.❖

Erratum

THE SPRING 2010 *Benchers' Bulletin* incorrectly listed Thomas J. Clearwater in the "In Memoriam" article. Our apologies to Clearwater for the error. The online version of the Bulletin has been corrected.❖

In Brief

JUDICIAL APPOINTMENTS

Robert McDiarmid, QC, formerly a partner at Morelli Chertkow and a past president and Bencher of the Law Society, was appointed a master of the Supreme Court of BC in Kamloops.

Heather MacNaughton, recently the chair of the BC Human Rights Tribunal, was appointed a master of the Supreme Court of BC in Vancouver.

UPDATE FROM THE LAW FOUNDATION

Supervising Lawyers' Conference and Executive Directors' Roundtable

On April 27-28, 2011, the Law Foundation of BC hosted the Supervising Lawyers' Conference and Executive Directors' Roundtable. Attending the meetings were 32 supervising lawyers and 70 executive directors of Law Foundation-funded organizations and projects from around British Columbia.

Topics discussed included:

- access to justice in BC;
- *Foundation for Change*, the report of the Public Commission on Legal Aid;
- family law needs in BC;
- public legal education resources for British Columbians;
- how the Law Foundation can better support its grantees; and
- the future role of technology in the justice system.

The event was well received and facilitated networking between groups and individuals who would otherwise not have met. The Law Foundation is pleased to encourage this form of collaboration between its funded organizations.

NEW CANLII PRESIDENT

The Canadian Legal Information Institute (CanLII) and the Federation of Law Societies of Canada have announced that Colin Lachance of Ottawa is CanLII's new president.

Prior to joining CanLII, Lachance was the Director of Federal Government Affairs with a telecommunications company. He has also been the Director of Marketing and Director of Regulatory Affairs with communications companies, and served as Director of Telecommunications Regulatory Affairs with the Canadian Cable Telecommunications Association.

"CanLII is already a world-leading free resource of legal information, and is well poised to break new ground in supporting access to justice and the interests of all Canadians by providing effective access to our legal heritage" says the new CanLII President. "Our challenge is to identify the evolving needs of the legal profession, and to serve the public interest by establishing alliances with groups or other institutions pursuing similar goals of free access to Canadian primary legal information not only for the legal profession, but for the public at large."

CANLII is a non-profit organization created and funded by the Federation of Law Societies, on behalf of its 14 member law societies. It was launched in 2000 on a test basis to provide efficient and free access to the growing number of judicial decisions and legislative documents available on the internet. In 2001, CanLII became a permanent, not-for-profit service to support the legal profession in the performance of its duties while providing the public with permanent open and free access to the legal heritage of all Canadian jurisdictions.

Visit the CanLII website at **www.canlii.org.**❖

Unauthorized practice of law

UNDER THE *LEGAL Profession Act*, only trained, qualified lawyers may provide legal services and advice to the public. Further, non-lawyers are not regulated, nor are they required to carry insurance to compensate clients for errors and omission in the legal work or claims of theft by unscrupulous individuals marketing legal services.

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

From February 22 to June 3, 2011, the Law Society obtained undertakings from nine individuals and businesses not to engage in the practice of law.

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

Glenn Robertson and **Colette Robertson**, both doing business as **Pinoy Paralegal**, **PinoParalegal.com** and **Divorce Made Easy**, of Surrey, British Columbia, provided legal advice and offered to prepare divorce documents and a will for a fee. They have consented to an order not to practise law as defined in section 1 of the *Legal Profession Act*. They were further permanently prohibited from commencing, prosecuting or defending a proceeding in any court, except as permitted in section 15(1) of the *Act*.

Anoma Hettige, of New Westminster, British Columbia, provided legal advice and offered to prepare divorce documents and a separation agreement for a fee. She has consented to an order not to practise law as defined in section 1 of the *Legal Profession Act*.❖

COMMEMORATIVE CERTIFICATE LUNCHEON

The Law Society hosted a luncheon in Vancouver on April 29, to honour lawyers celebrating milestone anniversaries in the profession in 2011. Receiving 50-year certificates, unless otherwise noted, were:

Back Row (left to right): Donald Andrews (60 years), Paul Daniels, QC (60 years), Robert Spring, John Campbell, David Hart, Ed Mortimer, QC, Sherman Hood, QC, Ronald Stewart, William Wright, William Sullivan, QC

Front Row (left to right): Foster Isherwood (60 years), Connie Isherwood, QC (60 years), Brian Smith, QC

Not pictured: Walter Bergmann, Hon. John Fraser, QC, Cyril Ross Lander, Ralph Loffmark, QC (60 years), Ronald Lou-Poy, QC, Brian Lowe (60 years), Christopher Randall, Norman Severide, QC (60 years), Gerald Sinnott, Ian Stewart, QC, Humphrey Waldock

Downtown Vancouver articling offers to stay open to August 12

LAW FIRMS WITH an office in the downtown core of Vancouver (west of Carrall Street and north of False Creek) must keep open all offers of articling positions they make this year until 8 am, Friday, August 12. This timeline, set by the Credential Committee under Rule 2-31, applies to offers firms make to second-year law students or first-year law students, but not offers to third-year law students or offers of summer positions (temporary articles).

A law firm may set a deadline of 8 am on August 12 for acceptance of an offer. If the offer is not accepted, the firm can then make a new offer to another student the same day. Law firms may not ask students whether they would accept an offer if an offer were made, as this places students in the very position Rule 2-31 is intended to prevent.

If a lawyer in a downtown Vancouver firm makes an articling offer and later discovers circumstances that mean it must withdraw the offer prior to August 12, the lawyer must receive prior approval from the Credentials Committee. The committee may consider conflicts of interest or other factors that reflect on a student's suitability as an articled student in deciding whether to allow the lawyer to withdraw the offer.

If a law student advises a law firm that he or she has accepted another offer before August 12, the firm can consider its own offer rejected. However, if a lawyer learns from a third party that a student has accepted another offer, the lawyer should first confirm with the student that the offer is no longer open for this reason.

Contact Member Services at 604.605.5311 for further information.❖

Lawyer-only section of website improved, including enhanced CPD section

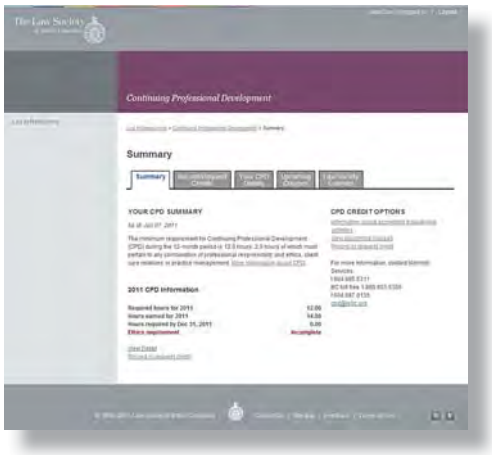
IN OUR ONGOING effort to make the Law Society website as useful and user-friendly as possible, we have recently updated the secured log-in section of the site.

Lawyers will log in as usual to complete annual practice declarations, access our registries and make use of our other online tools. However, the look and feel has been changed to more closely match the rest of the new website and content has been updated and streamlined.

In particular, lawyers will see a completely new look for the continuing professional development section, allowing easy access to record and request approval of credits, view CPD history and check out upcoming courses.

In the future, look for enhancements that will let lawyers customize how they receive Law Society newsletters. Currently, lawyers can log in and opt to receive all of the publications by mail or all by email. Soon, they will have the option of choosing to receive the *Benchers' Bulletin* by mail and the *Member's Manual* amendment package by email, for example. That improvement in service will be communicated at a later date.

As always, we welcome comments and suggestions for improvement. Lawyers can direct feedback to communications@lsbc.org or complete the feedback form available on the website.❖



Law Society Scholarship awarded for 2011

The $12,000 Law Society Scholarship encourages and financially assists a law graduate to complete a full-time program of graduate legal studies that will benefit the student, the province and the legal profession in BC.

Jennifer Lee-Ann Smith is the recipient of the scholarship for 2011. She has completed the required course work for the LL.M. program at UVic, and is in the process of writing her thesis on climate change and forest carbon. More specifically, her work explores the influence of governance arrangements on environmental and social sustainability commitments within voluntary forest carbon standards.

Smith intends to continue her legal education in BC through the pursuit of a Ph.D. in the area of climate change and human rights, with a focus on legal approaches to creating proactive means of dealing with climate refugees and other environmentally displaced populations.

Jennifer Lee-Ann Smith attended the May Benchers meeting, where President Gavin Hume, QC presented her with a cheque for $12,000.

UBC gold medal

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

Left: President Gavin Hume, QC presented the gold medal to UBC law student Katharine (Kate) Bond. Also attending at the presentation were Law Dean Mary Anne Bobinski and Bond's family and friends.

Law Society taking steps to see expanded role for paralegals

THE LAW SOCIETY has a vision that would see paralegals taking on a broader range of legal tasks than are currently permitted. It is exciting, new ground that will be good for any member of the public seeking legal services and for paralegals.

The Law Society also brings a voice to issues affecting the justice system and the delivery of legal services. One of the Society's strategic goals is to improve the public's access to legal services and justice. In 2009, the Law Society proposed some new suggestions, and in 2010 a series of recommendations were made, including an expanded role for lawyer-supervised paralegals and articled law students.

The *Professional Conduct Handbook* sets out the restrictions of use for legal assistants (including "paralegals" which is not a defined term in BC). The Law Society is exploring the elimination of two restrictions: the prohibitions against legal assistants providing legal advice and appearing in court as advocates.

The purpose of eliminating the restriction on paralegals providing legal advice is to allow lawyers to provide clients an option where the supervised paralegal handles files and provides legal advice to clients. The degree of direct involvement between the lawyer and the client would vary depending on the circumstances.

The Law Society believes this expanded role for paralegals before courts and tribunals can increase the public's access to lower cost, competent legal services and provide an alternative to people representing themselves in legal matters. Self-represented litigants are a growing phenomenon and can place considerable burden on the justice system. By creating new business models for lawyers to work with paralegals, the public and the justice system can both be better served.

The move should also result in a more rewarding employment opportunity for paralegals to be involved in traditional solicitors' work and behind-the-scenes matters that have the potential to end in a court or tribunal appearance

The next steps will be to explore the concept with the Supreme Court of British Columbia and the British Columbia Provincial Court in order to determine what advocacy roles the courts might permit supervised paralegals to perform. Preliminary meetings have already been held with representatives of the court.

Also, the Law Society is creating guidelines for lawyers who are supervising paralegals. The guidelines will likely contain best practices for supervision, training and assessing competence and are important, since the model of expanded roles for paralegals will still be a lawyer-supervised model. This means that any misconduct by a paralegal will be dealt with through regulation of the supervising lawyer by the Law Society.

This important work is continuing in 2011 and the Law Society is optimistic that paralegals will soon find themselves able to offer high-quality, practical and more affordable legal services to the public.❖

This article was originally provided by the Law Society to Capilano University for its publication, *Viewbook*. It has been adapted for the *Benchers' Bulletin*.

New feature

DISCIPLINE ALERT

Lack of civility *can* lead to discipline

Lawyers reminded that courtesy is the first step to avoiding complaints

BY FAR THE most common complaint received about lawyers by the Law Society regards rudeness and incivility.

The *Canons of Legal Ethics* (Chapter 1 of the *Professional Conduct Handbook*) require that a lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities and personal remarks or references.

Simply put: You are unlikely to offend if you treat others as you would like them to treat you.

Incivility brings the profession into disrepute and disciplinary action has been imposed on lawyers who fail to exercise professional courtesy.

Here are just a few of the things that have landed lawyers in disciplinary trouble with the Law Society:

- name calling of opposing counsel and litigants;
- use of condescending language;
- rude, offensive comments both verbally and in writing;
- making sexually derogatory and obscene remarks.

Lawyers can reduce the risk of uncivil communications by keep in mind that there are two aspects of incivility — tone and content — and by following these practices:

- avoiding the use of obscenities;
- avoiding the use of inflammatory adjectives or adverbs in correspondence, particularly where they editorialize and do not add material content;
- recognizing when emotions of anger or frustration are present and avoiding communicating until those feelings have resolved;
- having another lawyer review and edit letters before sending them;
- adopting a practice in difficult matters of corresponding by letter and drafting the letter and waiting until the next day to review and edit it before sending.

Discipline Alerts are a new service provided by the Law Society to advise lawyers of conduct that can lead to discipline. If you have any questions, contact a practice advisor.❖

BC Code of Professional Conduct – consultation on conflicts rules

THE LAW SOCIETY is seeking input from lawyers on the conflicts portion of the BC Code of Professional Conduct, which will ultimately replace the current *Professional Conduct Handbook*. This follows consultation last fall about the non-conflicts portion, which has recently been approved by the Benchers.

Lawyers are invited to submit their opinions to the Ethics Committee, which will consider all comments and then present the draft conflicts section of the Code to the Benchers for their consideration. Your feedback must be received no later than August 22, 2011.

For more information and for background on the BC Code, see Highlights on the Law Society website at www.lawsociety.bc.ca.❖

PRACTICE TIPS, by Dave Bilinsky, Practice Management Advisor

Remote data storage options

OF COURSE, WE all know we should have a data file backup and recovery system in the event of a fire, flood, earthquake or other disaster (such as the toilet backing up and dumping water all over your server, which actually happened to a law firm).

If there was one lesson the business world learned from 9/11, it was to have a robust data recovery plan in place. As reported in late 2001 by David Needle in "Disaster Recovery: Lessons Learned from 9/11," American Express Bank in New York was back in operation within a day of 9/11, while another New York bank had a disaster recovery center two blocks away from the World Trade Center and still hadn't recovered two months later. Similarly, Captain Chris Christopher described how the Pentagon thought it had secured one server with a back-up system across the hall. Neither survived the plane crash on 9/11. (November 16, 2001, itmanagement.earthweb.com)

There has been much discussion lately regarding using the "cloud" for remote data storage and backup. While the cloud has many advantages, one of the drawbacks is the time required to pull all that data back onto your office network, should the need arise.

For example, if your internet service provider gives you up to 15.0 Mbps downstream and1.0 Mbps upstream" (Mbps = megabyte per second), how does this translate into actual download times?

According to Energy Sciences Network, it will take seven days to transfer 10 terabytes of data @ 16.5 Mbps (download their chart at http://fasterdata.es.net/assets/Setting-Expectations/Data-Transfer-Rates.pdf). On that basis, one terabyte of data will take about a day to download. Calculate the number of terabytes of data that you have in your backup, and you can quickly see that, had you experienced a disaster, it would take days to download your critical data onto a replacement computer system and be up and running (assuming, of course, that you get a fast high-speed internet connection immediately after the disaster). Each one of those days represents lost work and lost income, and possibly missed limitation and other critical dates. Furthermore, this analysis is based on the fact that your actual download speeds would be at or near the quoted maximum amount — in fact, it may not be for any number of reasons.

You should also keep in mind that that use of cloud computing may open you to potential security and confidentiality risks, depending on who has or could gain access to this cloud-based stored information.

So the question is, are there any alternatives to cloud-based storage that allow you to have a remote-access backup as well as a local one?

There are site-to-site data backup and recovery solution providers out there.

If there was one lesson the business world learned from 9/11, it was to have a robust data recovery plan in place.

Instead of one server, you have two: a physical network area storage device in your office, and another at a different location (could even be your home, perhaps). These two servers create two full back-ups of all your files. Moreover, if you have physical possession of both devices and one is destroyed, you will have immediate access to the other.

There are a number of benefits to moving to such a backup and restoration system:

- Your data could be restored completely in minutes — not hours or days — and without the need for an internet connection.
- If your office premises are destroyed, your data is still immediately available at the remote location.
- Some systems are automatic (once configured it backs up your data automatically without user intervention) — and monitored. You do not have to carry around tapes or backup media. You don't have to worry about staff remembering to change tapes or start the backup on a Friday … or take today's tape home in a purse or briefcase.
- Some providers will ensure your data is compressed, transferred and stored in your own on-site and off-site server boxes using encrypted connections.
- Compared to a cloud provider (which *could* be hacked), your data remains confidential — no one else has access. If the solution is local, your data is not stored off-site on a third-party server located in an unknown country (with questionable privacy laws).
- You can use this system not only to copy your data, but also to back up a copy of your software applications. This allows you to recover and re-install them quickly in the event of a disaster
- Providers may offer "point in time recovery." This allows you to access a file as it was on a particular day. Using point in time recovery, you can easily go back to a date before a file was potentially infected or corrupted and recover your data.
- Depending on the provider, you may have the ability to recover deleted files. If a file is deleted in error with a "mirrored" back-up system, it is lost on the back-up server as well.

Providers will offer a variety of payment plans, such as an initial installation cost and a monthly maintenance fee. When searching for a provider, you should stick to Canadian companies as data stored in the US is subject to the Patriot Act. And be sure to assess the after-sales service of any provider you are considering to ensure it is responsive and helpful.

For further details on offsite storage and other practice management issues, contact Dave Bilinsky at daveb@lsbc.org or 604.605.5331.❖

Top complaint against lawyers is rude or uncivil behaviour

Increased use of email a factor, but not the only one

IT'S A COMMON mistake.

You receive an email. You're in a hurry. You don't think about your language. You want to get it off your plate.

At some point, maybe even right after you push send, regret sets in and you wish you'd taken more time to craft your response. Just about everybody who uses email frequently has been there, but when the sender is a lawyer and the recipient is a client or opposing counsel, the repercussions of a hasty email may be greater than regret.

Neil Hain sees it far too frequently.

"The tone and tenor of the email is disrespectful, and it's in writing. Rude or discourteous behaviour from a lawyer is the most common type of conduct about which people complain to the Law Society."

Hain and colleague Carolyn Anderson are two of the Law Society's staff lawyers responsible for intake and early resolution of complaints made against lawyers. They have noticed an increasing trend of rudeness complaints in relation to email.

"People are used to the immediacy of email and social media such as Twitter, and they get used to just quickly sending off an email without clearly thinking about things," said Anderson. "And not only is that bad from a negligence perspective, because, for instance, you might not be giving complete advice, you tend to use language that you wouldn't use in a letter. When I read these emails, it's hard to believe that they're from a lawyer. That's how unprofessional they can be."

It involves using unprofessional rhetoric, language that's inappropriate and language that you might write to a friend or a buddy, as opposed to a client or opposing counsel.

Anderson's advice to lawyers she speaks to is, "if you wouldn't write it in a letter, you ought not to put it in an email. It's a good reminder for all lawyers to watch out for quick emails. You might think it's funny and cute, but when I'm reading it a year later it reads as unprofessional comments about someone. It's not funny and it makes you look bad."

"Quite often," added Hain, "when we get on the phone to the lawyer to notify them of the complaint and they read the email again, they completely agree that it was unprofessional."

Anderson said she has had to tell several lawyers that they could have avoided any professional conduct concerns by being proactive about polite, professional behaviour.

continued on page 14

Carolyn Anderson (right) is a staff lawyer at the Law Society and is part of the group responsible for intake and early resolution of complaints. She sees an increasing trend towards complaints about rudeness and cautions lawyers to be particularly mindful of their tone and language in email communications.

Law Society resources available to help

Practice advisors

The appropriate time to contact a practice advisor for help is before a complaint is made. All communications between practice advisors and lawyers is strictly confidential, except in cases of trust fund shortages.

Practice Watch

In every issue of the *Benchers' Bulletin*, Practice Advisor Barbara Buchanan alerts lawyers to issues facing the profession, with a focus on preventing potential problems. Often she will write on topics brought up by lawyers who contact her.

Discipline Digest and Conduct Review summaries

The *Benchers' Bulletin* contains summaries of cases where lawyers have been disciplined; these summaries shed light on the types of behaviour that stray from the standard of professional conduct lawyers are required to meet.

Risk management articles

The Lawyers Insurance Fund has a number of articles on managing risk, including an article, entitled *Email: Preventing a maelstrom*, designed to assist lawyers with appropriate management of their email.

Discipline Alerts

The Law Society's newest educational tool is intended to increase awareness of conduct that leads to complaints. See page 15 for details.

Contact information for practice advisors, Buchanan's articles, back issues of the Benchers' Bulletin and risk management articles are available on the Law Society's website.

Rude and uncivil behaviour ... from page 13

Maureen Boyd, who is the manager of discipline for the Law Society, has seen many other examples of complaints that could have been avoided.

"Disciplinary action has been taken in Canada against lawyers who, for example, called opposing counsel 'clueless.' Another lawyer advised opposing counsel to take a settlement offer and shove it, including a graphic description of the intended location. And in written correspondence one lawyer said to another, 'I don't have time to read two-page rambling letters. Say what you want to say in a single sentence unless you are paid by the word.'"

"Lawyers are well advised to keep civility at the forefront of their dealings, not just in email, and to recognize when emotions of anger or frustration are present and avoid communicating until those feelings have resolved," added Boyd.

It may sound like a small thing to some when considered with everything else required to run a busy practice. But incivility brings the profession into disrepute and lawyers who fail to exercise professional courtesy have faced disciplinary action. It's important to always be mindful of professional responsibility.

Lawyer Leslie Muir has written and lectured for the Canadian Bar Association, Continuing Legal Education and the Trial Lawyers Association of BC on professional responsibility issues.

Muir, who was called in 1983, got interested in professional responsibility early on in her practice. She was involved in the Inns of Court program, which was founded in 1984 and gives junior barristers an opportunity to discuss practical and professional issues with the judiciary and senior lawyers. Muir was greatly influenced by the then Chief Justice of the BC Supreme Court, Alan McEachern.

"He firmly believed that professionalism was fundamental to the practice of law and focused a lot on professional relations, professional responsibility issues and civility in litigation. Later in my career I spent some time with the Lawyers Insurance Fund as claims counsel and since then, am occasionally retained by them as defence counsel. Being involved in cases against lawyers has reinforced for me the importance of close attention to our professional obligations."

Muir has also noticed the recent impact of email on professional obligations, and particularly on managing client expectations.

"Many more people expect instant results, instant responses and demand instant opinions. Many people say things in text messages and emails that they will, or at least should, regret. I do not allow these types of expectations to prevent me from fully considering the facts and the law prior to giving advice or taking steps. And I tell lawyers at my lectures that if you do, it is at your peril."

Lawyer Leslie Muir has written and lectured for the Canadian Bar Association, Continuing Legal Education and the Trial Lawyers Association of BC on professional responsibility issues. During her involvement with the Inns of Court program, Muir was greatly influenced by the then Chief Justice of the BC Supreme Court, Alan McEachern. "He firmly believed that professionalism was fundamental to the practice of law and focused a lot on professional relations, professional responsibility issues and civility in litigation."

Hain believes many of the problems around email are connected to client expectations that could have been managed at the outset with a retainer that includes a communication protocol.

"A lawyer, for example, might feel that they're getting inundated with email requests from the client and they're getting fed up. So either they ignore the client or they give a bit of a snippy response saying, you know, 'cool your jets.' They could use a paragraph in their retainer agreements talking about a communication protocol where they're discussing things such as email, phone calls, how reporting is going to be done and what is reasonable in terms of response times.

"Then if there is a breakdown in communications, the lawyer can take out the retainer and use it as a basis to discuss the concerns of each party so that these kinds of communication issues don't fester and build resentment for the client, who may then have a lingering feeling of having been ignored."

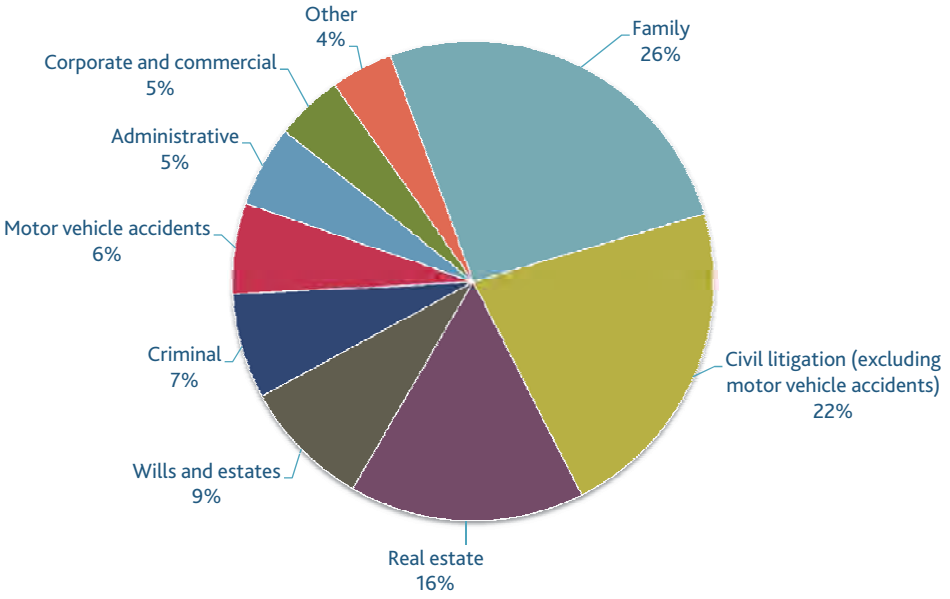
Anderson will often refer people to the Fall 2009 *Insurance Issues: Risk Management*, entitled *Email: Preventing a maelstrom*, to assist them with dealing with their email.

"In the last year and a half I've had to direct about 60 lawyers to the article on our website. Five years ago, most rudeness complaints were about things that were said in conversation. There's no doubt that email is requiring more attention from lawyers, but the basic standards for lawyers' behaviour haven't changed for email or otherwise."

The *Canons of Legal Ethics* require lawyers to be candid and courteous in relations and demonstrate personal integrity.

"Lawyers are required to know their obligations under the *Professional Conduct Handbook*," added Boyd. "Our goal with the new Discipline Alerts is to help lawyers be aware of potential problems so that they avoid conduct that may result in complaints or disciplinary action. If lawyers have questions or concerns about their professional obligations, we encourage them to contact one of our practice advisers. That or other proactive behaviour on the part of lawyers may help to ensure that the next Law Society communication isn't notification of a complaint."❖

COMPLAINTS AGAINST LAWYERS BY AREA OF PRACTICE



Eighty-five per cent of complaints made by lawyers' clients to the Law Society are "service related." The vast majority revolve around communication issues between the lawyer and the client, and trend towards the most emotional and contentious areas of practice.

Law Society launches Discipline Alerts to help lawyers proactively avoid complaints

The Law Society has always tried to help lawyers maintain high standards of professional conduct. It is now adding one more tool to its resources for lawyers by launching Discipline Alerts.

"The idea behind the new Alerts is to provide lawyers with information so they can avoid conduct that leads to complaints," said Deborah Armour, the Chief Legal Officer for the Law Society.

Alerts are published to the Law Society website regularly and are available via RSS feed. All lawyers will also receive notice of any new alerts in *E-brief*, and the *Benchers' Bulletin*.

"One of our goals is to help the public receive high quality legal services from their lawyers," added Armour. "We've seen many cases where lawyers felt they went above and beyond for their clients to get excellent legal results and then were extremely surprised when a client made a complaint to us. What we've often found when we looked into it was that the clients felt their lawyers didn't treat them with courtesy. That's an example of complaints that could easily be avoided."

The first Discipline Alert can be found in the practice section of this issue of the *Benchers' Bulletin.*

PRACTICE WATCH, by Barbara Buchanan, Practice Advisor

Don't be taken advantage of by dishonest clients – ethical guidelines and rules

LAWYERS ARE REGULARLY confronted by potential scams and dishonest clients and have had to learn to be "street smart."They are an attractive target for criminals, by virtue of having trust accounts and duties of confidentiality and undivided loyalty to clients.

What are the Law Society's ethical guidelines and rules in relation to clients trying to use lawyers for dishonest, fraudulent or criminal purposes? See the following on the Law Society website:

- The Annotated *Professional Conduct Handbook*
- The Code of Professional Conduct for British Columbia (non-conflicts portion)
- Law Society Rules 3.51.1 and 3-61.1 (cash transactions)
- Law Society Rules 3-91 to 3-102 (client ID and verification)

THE ANNOTATED *PROFESSIONAL CONDUCT HANDBOOK*

The Law Society has a serious commitment to maintain high ethical standards for lawyers. This is reflected in the guidelines set out in the *Professional Conduct Handbook*.

The starting place is the *Canons of Legal Ethics* in Chapter 1. The Canons were first adopted in BC in 1921 and set out some of the overriding principles of ethical conduct related to integrity, such as:

- A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel, or assist any person to act in any way contrary to the law.
- A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence which is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has the right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.
- No client is entitled to receive, nor should the lawyer render any service or advice involving disloyalty to the state, or disrespect for the judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.
- All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

Rule 6 of Chapter 4 is more specifically directed at dishonesty, crime or fraud:

> **6.** A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.[3]

The footnote to Rule 6 states:

> **3.** A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matters, or
>
> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

Various other rules exist regarding integrity. For example, Rule 1 of Chapter 2 provides that a lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence or reflects adversely on the integrity of the legal profession or the administration of justice. Rule 1 of Chapter 6 provides that, as a general principle, a lawyer has a duty to give undivided loyalty to every client. Subrule 1(b) of Chapter 8 prohibits a lawyer from knowingly assisting the client to do anything or acquiesce in the client doing anything dishonest or dishonourable.

The current version of the *Professional Conduct Handbook* was published in 1993, and is in the process of being replaced by an updated and revised set of guidelines contained in The Code of Professional Conduct for British Columbia (the BC Code); however, most of the rules in the Handbook have counterparts in the BC Code.

THE CODE OF PROFESSIONAL CONDUCT FOR BRITISH COLUMBIA

The Federation of Law Societies of Canada recommended to individual law societies a Model Code of Professional Conduct to be used across Canada. In April 2011, after consultation with the profession, the Benchers adopted the non-conflicts portion of the BC Code based on the Model Code, with an effective date to be determined. A draft of the conflicts portion of the BC Code is available on the website, and lawyers are encouraged to review it and provide feedback.

In the BC Code, unless the context indicates otherwise, a "client" includes a client of a lawyer's firm, whether or not the lawyer handles the client's work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law.

The *Canons of Legal Ethics* have been preserved in Chapter 1 of the BC Code. Rule 1.06(1) is similar to Rule 1 of Chapter 2 (Integrity) in the *Professional Conduct*

Handbook, and states:

> **1.06**(1) A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> Commentary
>
> Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.
>
> Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
>
> Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.
>
> Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

Rule 2.02(7) of the BC Code deals with dishonesty and fraud by a client:

> **2.02**(7) When acting for a client, a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime of fraud, including a fraudulent conveyance, preference or settlement.
>
> Commentary (in part)
>
> A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
>
> A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.
>
> Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, crime or fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.
>
> The lawyer should also make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or
>
> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.
>
> The lawyer should make a record of the results of these inquiries.

Rule 2.02(8) contains the following

continued on page 18

Services for lawyers

Practice and ethics advisors

Practice management advice – Contact **David J. (Dave) Bilinsky** to discuss practice management issues, with an emphasis on technology, strategic planning, finance, productivity and career satisfaction.
email: daveb@lsbc.org tel: 604.605.5331 or 1.800.903.5300.

Practice and ethics advice – Contact **Barbara Buchanan**, **Jack Olsen** or **Warren Wilson**, QC to discuss ethical issues, interpretation of the *Professional Conduct Handbook* or matters for referral to the Ethics Committee. Call Barbara about client identification and verification, scams, client relationships and lawyer/lawyer relationships.
Contact Barbara at: tel: 604.697.5816 or 1.800.903.5300 email: bbuchanan@lsbc.org.
Contact Jack at: tel: 604.443.5711 or 1.800.903.5300 email: jolsen@lsbc.org.
Contact Warren at: tel. 604.697.5837 or 1.800.903.5300 email: wwilson@lsbc.org.

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

◆

PPC Canada EAP Services – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families.
tel: 604.431.8200 or 1.800.663.9099.

◆

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

◆

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articled students, articling applicants and staff in law firms or other legal workplaces. Contact Equity Ombudsperson, **Anne Bhanu Chopra**: tel: 604.687.2344 email: achopra1@novuscom.net.

Practice Watch ... from page 17

additional provisions with regard to clients who are organizations:

> **2.02**(8) A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, must do the following, in addition to his or her obligations under subrule (7):
>
> (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, criminal or fraudulent and should be stopped;
>
> (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, criminal or fraudulent and should be stopped; and
>
> (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with Rule 2.07.

RULE 3-51.1 – THE "NO CASH RULE"

A model rule on cash transactions was the Federation's first anti-money laundering initiative, intended to ensure that lawyers were not unwittingly involved in money laundering. It was also intended to avoid government intervention that could threaten solicitor-client privilege and confidentially or the independence of the legal profession. All 14 Canadian law societies adopted cash transaction rules based on the model rule.

The Law Society of BC was the first Canadian law society to adopt a limit on trust funds that lawyers could receive in cash. Rule 3-51.1 — the "no cash rule" — came into effect on May 7, 2004. At that time, the rule prohibited lawyers from receiving $10,000 or more in cash in the course of a single transaction, subject to certain exceptions. The rule was amended in June 2005 to reduce the threshold amount to $7,500, which brought BC into line with the model rule. Rule 3-61.1 requires lawyers to make a detailed record of cash transactions.

Lawyers are encouraged to ensure that they and their staff are familiar with the rules regarding cash and to establish office procedures, including what to do if a client unexpectedly shows up at the office with cash and how to make a refund. Rule 3-51.1 has been the subject of discipline decisions.

RULES 3-91 TO 3-102 – CLIENT IDENTIFICATION AND VERIFICATION

The Federation's second anti-money laundering initiative was the model rule on client identification and verification. These rules are now in force in all Canadian provinces and territories.

The Law Society of BC's client identification and verification rules (Rules 3-91 to 3-102) are designed to codify the steps that prudent lawyers must take in the normal course to identify and verify the identity of their clients. Lawyers are required to comply with the rules on all new matters commenced on or after December 31, 2008, regardless of whether the client is an existing or new client.

Wide definition of "client" and "financial transaction"

With few exceptions, lawyers must take reasonable steps to identify their clients (Rule 3-93). Lawyers are encouraged to pay close attention to all of the definitions in Rule 3-91. It's important to note that there is a wider definition of "client" in these rules than in common usage. Rule 3-91 provides that a "client" includes another party that the lawyer's client represents or on whose behalf the client otherwise acts in relation to obtaining legal services from the lawyer. Further, in Rules 3-95 to 3-98, an individual who instructs a lawyer on behalf of a client in relation to a "financial transaction" is also included as a client.

A "financial transaction" means the receipt, payment or transfer of money on behalf of a client or giving instructions on behalf of a client in respect of the receipt, payment or transfer of money (Rule 3-91). It's important to understand that a financial transaction can take place without money being deposited to a trust account. If there is a financial transaction, and no exception applies, a lawyer must take reasonable steps to verify the client's identity, even if no money is deposited in trust.

"Identification" and "verification" are different

Identification and verification of identity are two distinct steps. "Identification" refers to the basic information that lawyers need to get from clients to establish their identity (Rule 3-93). This is simple and may be accomplished by telephone and email. "Verification" refers to the information that lawyers need to confirm that their clients are who they say they are (Rule 3-95). *This requires physically meeting with an individual to verify his or her identity.* Verification of identity is required, with few exceptions, when a "financial transaction" exists.

When a lawyer acts for a client that is an "organization," not only must the lawyer make reasonable efforts to obtain information about the organization, the lawyer also must obtain information about the individual instructing the lawyer on behalf of the organization. If there is a "financial transaction," the lawyer must take reasonable steps not only to verify the organization's identity, but to verify the individual instructing the lawyer on behalf of the organization.

Rule 3-97 applies when a lawyer provides legal services in respect of a financial transaction for a client who is an individual not physically present before the lawyer. If the lawyer cannot physically meet with the individual to verify his or her identity, another qualified person must physically meet with the individual to do so. If the client is in Canada, the lawyer must obtain an attestation from a commissioner of oaths for a jurisdiction in Canada, or a guarantor engaged in one of the permitted occupations in Canada listed in Rule 3-97(4). The lawyer's responsibilities may be fulfilled by other members of the lawyer's firm in any Canadian jurisdiction.

If the client is outside of Canada, the lawyer must retain an agent to physically meet with an individual to verify identity. There must be a written agreement or arrangement between the lawyer and the agent (Rule 3-97(5) and (6)). It is not sufficient for a client to send the lawyer by fax or email a scan of the individual's passport, driver's licence or other form of identification.

The timing of verification is important. The lawyer must verify the identity of an individual, including an individual who is giving instructions on behalf of an organization, at the time the lawyer provides legal services in respect of the financial transaction (Rule 3-98). Explaining this requirement to a potential new client outside of Canada who may be a fraudster may be enough to make them quickly disappear.

In the case of an organization, verification must be completed within 60 days of engaging in the financial transaction (Rule 3-99); however, as explained above, verification of the identity of the individual who gives instructions on behalf of the organization must take place earlier.

A detailed Client Identification and Verification Procedure Checklist is available in the *Practice Checklists Manual*.

Withdrawal

If, in the course of obtaining client identification or verification information, a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client (Rule 3-102). This is consistent with the provisions of Rule 6, Chapter 4 of the *Professional Conduct Handbook* and Rules 2.02(7) and (8) of the upcoming BC Code.

Record keeping and retention

All documents obtained to identify and verify the identity of any individual or organization must be retained as long as the lawyer acts for the client and for at least six years following completion of the work (Rule 3-100).

Practice tips

Following the ethical guidelines, the no cash rule and the client identification and verification rules can help keep lawyers safe from being taken advantage of by dishonest individuals. Some other steps that may assist lawyers include:

- modifying file opening procedures to include a requirement to comply with the cash transaction rules and the client identification and verification rules (the "rules");
- using a client identification and verification procedure checklist. If there will be a "financial transaction," lawyers should consider at the beginning of the retainer who will physically meet with the client to verify their identity. This is particularly important if the client is present elsewhere in Canada or outside of Canada. Lawyers should plan ahead to determine who can act as an agent outside of Canada;
- being cautious about anyone who contacts them via the Internet. They should ask why they chose them. Does it make sense that a stranger from England, Hong Kong, Japan or the U.S. would use them to collect money for a loan gone bad, for money outstanding on a collaborative divorce agreement, unpaid invoices, or act on a conveyance?
- using independent resources (e.g. reverse telephone directories) to cross-check names, addresses and telephone numbers to confirm information provided to them;
- providing information about the rules to new and existing clients in retainer letters and on the law firm website;
- modifying trust accounting procedures to require confirmation of rule compliance before paying funds out of trust;
- keeping a close watch on their trust account and understanding the law firm's financial institution's policies and procedures. Before paying out on a negotiable instrument, lawyers should ask their financial institutions to confirm that the funds have cleared. Certifying the cheque is another option. If lawyers receive funds by electronic transfer, they should determine whether the transfer occurred via an irrevocable deposit or a revocable deposit;
- appointing someone in the law firm to ensure that lawyers and relevant staff keep up to date with Law Society rule changes, fraud alerts and practice advice. They should familiarize themselves with the common scams that target lawyers;
- contacting a Law Society practice advisor for confidential ethics advice.

FURTHER INFORMATION

Contact Practice Advisor Barbara Buchanan at 604.697.5816 or bbuchanan@lsbc.org for confidential advice or more information regarding any items in Practice Watch.❖

Discipline digest

PLEASE FIND SUMMARIES with respect to:

- Mark Ronald Epstein
- Lawyer 11
- Lawyer 12

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

MARK RONALD EPSTEIN

Vancouver, BC
Called to the bar: May 17, 1991
Discipline hearing: March 2, 2011
Panel: David Renwick, QC, Chair, Leon Getz, QC and Kenneth Walker
Report issued: April 15, 2011 (2011 LSBC 12)
Counsel: Maureen Boyd and Carolyn Gulabsingh for the Law Society and Leonard Doust, QC for Mark Ronald Epstein

FACTS

In November 2006, Mark Ronald Epstein was retained by a California resident who was the executrix of her deceased partner's estate. The client believed that her partner's principal asset was an interest as one of three tenants in common in valuable property in Whistler. There had been a disagreement with the two co-owners, and she wished to transfer her partner's interest in the property to his estate.

During the initial conversation, Epstein did an online title search and advised the client that the deceased partner was registered as an owner of the property. He failed to notice, however, that the search revealed that the title had been cancelled in July 2006.

In January 2007, Epstein sent a formal retainer letter to his client. The letter was signed and returned with a $1,000 retainer.

In February 2007, Epstein did another online search and, once again, failed to notice that the title had been cancelled and ownership of the property had been transferred to the other two co-owners. He did not do a proper or complete property search.

In March 2007 Epstein notified his client that he was in the process of filing a Caveat on the property. He did not, however, file the Caveat or take any other steps to probate the estate. He did not think there was any urgency in proceeding with the probate of the estate or the filing of a Caveat because he did not know of the transfer of title in 2006.

The client contacted Epstein in June 2007, after numerous attempts, and was informed that a title search had been conducted and that a Caveat was being placed on the property.

In September 2007, the client consulted another lawyer. She learned that the property had been sold pursuant to an Order of the Supreme Court and that title to the property had been transferred in July 2006. The Court then ordered payment to the client of $43,200 that had been paid into Court. She paid additional legal fees to resolve matters related to the estate's interest in the property and the proceeds from its sale.

Epstein subsequently left the client a voicemail message apologizing for his delay and his oversight in not reading the title search properly. He also refunded the $1,000 retainer.

ADMISSION AND DISCIPLINARY ACTION

The panel noted that Epstein was the subject of conduct reviews in October 2000 and September 2006 related to inattentiveness and lack of care in performing fairly basic procedures. Also in 2006, there was evidence of disorganization in the conduct of his practice which resulted in a practice review and some detailed recommendations.

In this case, Epstein's misconduct consisted of failing to perform accurately the fairly elementary task of reading carefully the results of a title search, failing in a timely way to advance his client's objectives and carry out her instructions, and failing to respond in a timely way to his client's enquiries. Although, to his credit, he apologized to his client and refunded her retainer, the panel was concerned about a recurring pattern of carelessness and inattention that has continued despite prior remedial and disciplinary intervention by the Law Society.

Epstein admitted that he did not serve his client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer. He admitted that his conduct constituted professional misconduct.

The panel accepted his admission and ordered that he pay:

1. a $4,500 fine; and
2. $2,000 in costs.

LAWYER 11

Discipline hearings: July 24 and 25, 2007, 11 days between September 8 and November 13, 2008 and December 5, 2009
Panel: Gordon Turriff, QC, Chair, (concurring decision) David Renwick, QC and Warren Wilson, QC
Bencher review: Oral decision - September 1, 2010 (supplemental notice of review) and October 18 and 19, 2010
Benchers: Bruce LeRose, QC, Chair, Haydn Acheson, Leon Getz, QC, Peter Lloyd, Thelma O'Grady, Lee Ongman, Greg Petrisor, Alan Ross (Supplemental Notice of Review); Bruce LeRose, QC, Chair, Haydn Acheson, Leon Getz, QC, Peter Lloyd, Thelma O'Grady, Lee Ongman, Gregory Petrisor (review)
Reports issued: November 5, 2007 (2007 LSBC 49), September 9, 2009 (2009 LSBC 26), January 5, 2010 (2010 LSBC 01), September 24, 2010 (2010 LSBC 22) and March 11, 2011 (2011 LSBC 10)
Counsel: Maureen Baird, David Lunny and J. Chong for the Law Society, Gary Nelson for Lawyer 11 and Jonathan Penner and Jennifer Stewart for the Attorney General (Charter application); Maureen Baird, David Lunny and Nicole Ladner for the Law Society and David Mulroney and Christopher Siver for Lawyer 11 (facts and verdict); Maureen

Baird, David Lunny and Nicole Ladner for the Law Society and David Mulroney for Lawyer 11 (penalty); Dennis Murray, QC for the Law Society and David Mulroney for Lawyer 11 (supplemental notice of review); Dennis Murray, QC and Fiona McQueen for the Law Society and David Mulroney for Lawyer 11 (review)

FACTS

During the course of criminal proceedings against his father, Lawyer 11 assisted his father's defence team in bringing on an application for government funding. The Supreme Court of BC judgment contained remarks that raised concerns about the conduct of Lawyer 11.

The Law Society's investigation resulted in a citation asserting the following:

Allegation 1 alleged a scheme or design to mislead the Supreme Court of BC with respect to a loan allegedly made to Lawyer 11's father's company.

Allegation 2 alleged that Lawyer 11 participated in a scheme or design either: (a) to mislead the Court, or alternatively, (b) to mislead a financial institution.

Allegation 3 alleged that, by conducting himself in the manner set out in allegations 1 and 2, which was dishonourable or questionable conduct, Lawyer 11 had cast doubts on his professional integrity and/or competence or reflected adversely on the integrity of the legal profession or the administration of justice.

DECISION OF THE HEARING PANEL

In July 2007, Lawyer 11 sought rulings that he not be compelled to give evidence in proceedings and that the evidence given at the application for government funding hearing was not admissible. The panel dismissed his application in respect of these constitutional issues.

During the course of the hearing, Lawyer 11's counsel brought a no-evidence motion regarding each allegation of the citation. On September 12, 2008, the panel allowed Lawyer 11's application with respect to allegation 2(b) of the citation but dismissed the balance of his application.

The panel found that:

- no professional misconduct was proven in allegation 1;
- Lawyer 11 had sworn an affidavit that was filed with the court in the application for government funding proceedings that was false, or at least, misleading;
- Lawyer 11 had a duty to ensure that the court was not misled by anything he said as a lawyer or as a witness, and he was reckless in the drafting of his affidavit;
- there was no evidence that he provided misleading information to the court in concert with any other person and was not proven to have participated in a scheme;
- using the analogy of a lesser included offence, providing misleading information to the court, even if not part of a scheme, still constituted professional misconduct; and
- allegation 3 of the citation was dismissed because allegations 1, 2(a) and 2(b) were not proven.

On December 5, 2009, the panel issued its penalty decision. Lawyer 11 was suspended from the practice of law for one month and ordered to pay costs of $2,520.60.

On February 10, 2010, counsel for Lawyer 11 sought a review of the panel's decision.

On February 19, 2010, the Law Society issued a notice seeking a review of the panel's decision to dismiss allegation 3. The Law Society issued a supplemental notice of review on May 11, 2010 in respect of the panel's dismissal of allegation 1. The review panel dismissed the Law Society's supplemental notice of review because it was issued outside of the 30-day period allowed under section 47 of the *Legal Profession Act*.

DECISION OF THE BENCHERS ON REVIEW

The issue to be decided by the Benchers was, in light of the panel's determination that allegation 2(a) was not proven, could the panel's conclusion that Lawyer 11's reckless drafting of a misleading affidavit, although not consistent with the allegations in the citation, nonetheless support a finding of professional misconduct?

Any finding of professional misconduct must be based, not only on the evidence presented, but also on the allegations as framed in the citation. In the Benchers' view, the allegations in the citation could not reasonably be interpreted to embrace the reckless drafting of an affidavit. Lawyer 11 admitted that his affidavit was badly drafted and could mislead. An inquiry into an allegation of reckless drafting is quite different in nature from an inquiry into participation in a scheme designed to mislead.

The Benchers determined that none of the citation, the evidence called or the submissions to the panel squarely addressed the issue of reckless drafting. Lawyer 11 did not have a reasonable opportunity to address that issue before the panel gave its decision on facts and verdict. The Benchers took no position as to whether the affidavit was recklessly drafted, since that question was not properly before the hearing panel or the Benchers.

The Benchers ordered that the finding of professional misconduct made by the panel be set aside and that the citation be dismissed in its entirety. The Benchers concluded that the amounts billed by Lawyer 11's counsel were reasonable and ordered that the Law Society pay $61,523.97 in costs to Lawyer 11.

Lawyer 11 sought special costs. The Benchers found no evidence of improper motive or behaviour by the Law Society that would justify an order that it should pay special costs.

Under Law Society Rule 4-38.1(2), if all counts of a citation are dismissed, the hearing report summary must not identify the respondent without the respondent's consent.

LAWYER 12

Discipline hearings: September 24, 2010, December 15, 2010 and January 10, 2011
Panel: E. David Crossin, QC (single-Bencher panel)

continued on page 22

Discipline digest ... from page 21

Report issued: March 16, 2011 (2011 LSBC 11)
Counsel: Maureen Boyd for the Law Society and David Taylor for Lawyer 12

FACTS

A hearing panel previously found that Lawyer 12 had committed professional misconduct for failing to properly maintain the books and records at his law practice in accordance with the Law Society Rules. Lawyer 12 was ordered to retain and instruct a qualified accountant to prepare semi-annual reports that addressed the compliance requirements of the Rules.

Prior to the formal issuance of the hearing panel's decision, Lawyer 12 contacted a certified general accountant to get a head start on complying with the order. Lawyer 12 advised the accounting firm that a trusted accountant who was familiar with his law practice would provide clarification as to what was required for the first report, due on March 31, 2010.

By January 2010, the certified general accountant still had not received the critical information that defined what the Law Society required. When Lawyer 12 became aware of this, he asked his legal assistant to forward a copy of the terms of the Law Society's order to the certified general accountant. Months later he learned that his instruction was not carried out.

The certified general accountant proceeded to seek information from Lawyer 12's accountant and staff for the purpose of preparing the semi-annual report. In mid-March 2010, Lawyer 12 became concerned that the information being requested by the certified general accountant did not appear to be related to Law Society issues. However, upon receiving advice from his accountant, Lawyer 12 was satisfied that the certified general accountant was preparing the report in accordance with the Law Society's requirements.

Lawyer 12 provided the certified general accountant's written report to the Law Society on March 31, 2010. The report consisted of financial statements for the law practice, but did not include any information relating to whether the books and records of the law practice were maintained in compliance with the Law Society Rules.

On April 1, 2010, the accountant finally requested a copy of the penalty decision from the Law Society which included the report requirements. In May 2010, Lawyer 12 requested that the March 31, 2010 review be waived due to financial hardship that was created by wasting funds on the initial effort of the accounting firm. He suggested that the trust compliance audit conducted in February 2010 ought to have given the Law Society the comfort it required. This request was denied.

The complete report was prepared by the certified general accountant and submitted to the Law Society in July 2010.

ADMISSION AND DISCIPLINARY ACTION

The panel noted that Lawyer 12 began the process of complying with the hearing panel's order prior to the penalty hearing that ultimately imposed the obligations. Although he had retained a qualified accountant, the report did not address the requirements of the rules as ordered. It was apparent that there was a failure to communicate effectively with the accounting firm concerning the nature of the report.

The issue before the panel was whether this failure amounted to professional misconduct. There was no doubt that Lawyer 12 failed to be effectual and could have taken different steps. The panel was not persuaded that, based on the evidence, his conduct amounted to a marked departure from the conduct the Law Society expects of lawyers. Further, the panel was not persuaded that the conduct demonstrated gross culpable neglect of his duties as a lawyer.

The citation was dismissed. Under Law Society Rule 4-38.1(2), if all counts of a citation are dismissed, the hearing report summary must not identify the respondent without the respondent's consent.❖

Conduct reviews

THE LAW SOCIETY recently decided to publish summaries of conduct reviews on an anonymous basis. This publication is intended to assist lawyers by providing information about ethical and conduct standards.

The Discipline Committee may order a conduct review pursuant to Rule 4-4, rather than issue a citation to hold a hearing regarding the lawyer's conduct, if it considers that a conduct review is a more effective disposition and is in the public interest. The committee takes into account a number of factors, which include:

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

CR #2011-01

The lawyer charged expenses related to two personal ventures to two client files in his firm's general account, and then drew funds on the firm's line of credit to pay those expenses. The two personal ventures were the writing and distribution of two novels, and the fictional

client name was one of the characters from each novel. The lawyer did not obtain any additional credit from his bank by recording the expenses the way he did and the expenses were legitimate business expenses, but not related to the practice of law. *The purpose of the conduct review was to ensure the lawyer is aware of his obligation to exercise absolute integrity in the operation of his books, records and accounts, and to keep the legal activity of the firm separate from any other business activity.*

CR #2011-02

The conduct review related to the lawyer's responsibilities to properly supervise staff as required by Chapter 12 of the *Professional Conduct Handbook*. The lawyer employed a legal assistant, who was subject to a consent order obtained by the Law Society following an unauthorized practice investigation. The order prohibited him from giving legal advice or holding himself out as qualified to provide certain legal services. The lawyer was aware of this order. The legal assistant filed documents in Small Claims Court using his personal letterhead (rather than the firm's letterhead), signed a trial statement certifying the truth of facts of which he had no personal knowledge, and sought to represent the claimant at the trial, without anyone in the firm being aware a trial had been set. The lawyer conceded that there was a breakdown in normal office procedures. *The subcommittee emphasized the lawyer's responsibility to supervise his employees and the vigilance required in such supervision.* It also addressed the need for proper office systems to be in place to ensure the responsible lawyer is aware of all documents received from the court and reviews all legal documents prior to them being filed.

CR #2011-03

The lawyer was in a conflict of interest when he acted against the interests of a former client, contrary to Chapter 6, Rule 7 of the *Professional Conduct Handbook*. The lawyer provided legal services in the purchase of a property for parents of a son and daughter. After the purchase, he prepared a trust agreement on behalf of the son and daughter, by which the parents held the property in trust for them. When the father died some years later, legal title passed to the mother as the joint owner. The son then registered the property jointly in his name and that of his mother, following which he mortgaged the property and used the proceeds for his own benefit. When the daughter discovered what her brother had done, she commenced litigation to recover her equitable interest. The lawyer agreed to represent her and continued to do so, despite requests to cease acting made by two different lawyers acting for the son.

The subcommittee discussed with the lawyer the principle that a lawyer has a duty to give undivided loyalty to every client, and that Chapter 6, Rule 7 restricts the circumstances in which a lawyer may act against a former client. It drew to his attention that, once the issue of a conflict of interest was raised, he should immediately have taken steps to discuss the matter with a trusted colleague, a senior lawyer, a Bencher or a Law Society practice advisor.

CR #2011-04

The lawyer breached an undertaking imposed on her by opposing counsel in a family law matter, which required her to apply for a desk order divorce on specific terms and discharge a certificate of pending litigation. The lawyer was discharged by her client before the terms of the undertaking were fulfilled, following which she advised opposing counsel that she could not fulfill her undertaking. The lawyer acknowledged that she had accepted an undertaking that was not within her power to fulfill, and had done so when she was unfamiliar with the area of law and lacked paralegal support, but wished to finalize a settlement for her client. Prior to the conduct review, the lawyer had taken steps to ensure she now has adequate support. *The subcommittee emphasized the solemnity of undertakings and the need to ensure, prior to acceptance of an undertaking, that the lawyer is personally able to fulfill it.*

CR #2011-05

The lawyer pleaded guilty to driving a motor vehicle without due care and attention, after a minor accident. *The subcommittee reviewed with the lawyer the high standard by which members of the profession must operate*, and commented favourably on his decision to cease drinking alcohol and on his heartfelt and sincere apology at the time of the incident and at the conduct review.

CR #2011-06

The lawyer failed to comply with a court order relating to the priority of disbursement of funds that he received from the sale of his client's matrimonial home. The lawyer complied with the first two terms; the third permitted payment of his client's costs. The lawyer prepared bills of costs, the total of which exceeded the amount of the remaining funds. He sent them to the opposing party and asked him to endorse his approval, stating that should he refuse or neglect to do so, "we will not be doing anything further and the Court file will remain incomplete." When the opposing party did not respond, the lawyer took that failure as "agreement" and paid the remaining trust funds to his client. The lawyer was trying to save his client from incurring the further expense of having the bills of costs assessed and did not receive any benefit from his actions. Despite his good intentions, he paid out funds in breach of the court order, which he realized after discussion. He agreed that he ought to have proceeded to have the bills of costs assessed. *The subcommittee emphasized the requirement for every lawyer to comply scrupulously with the terms of a court order.*

CR #2011-07

The lawyer breached his undertaking given in a real estate conveyance that required him to use diligent and commercially reasonable efforts to obtain the discharge of a builder's lien in a timely manner. The lawyer failed to take any steps to discharge the lien, even after the vendor's representative followed up by letter and email, and did not take any steps until after a complaint was made to the Law Society. At the time, he was unfamiliar with real estate practice and relied on the erroneous advice of a conveyancing paralegal that the lien would discharge by the effluxion of time.

The subcommittee cautioned the lawyer that the purpose of a conduct review is to change behaviour and discussed with him steps he needed to take to ensure that the conduct does not occur again, including the importance of fulfilling undertakings and vigilantly supervising staff. ❖

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