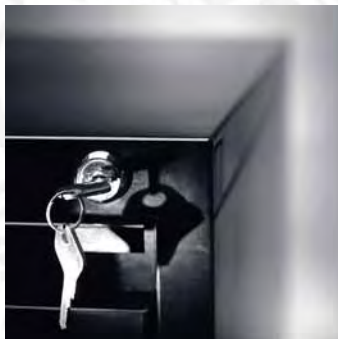




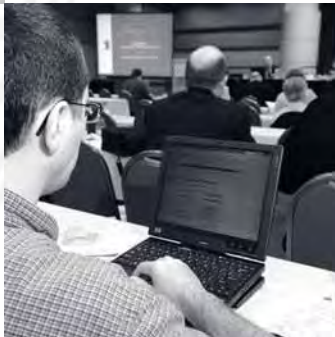
The Law Society
of British Columbia



Benchers' Bulletin



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President's View

Benchers' Bulletin

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

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

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Why we won't let down our guard on money laundering

by Robert W. McDiarmid, QC

A recent issue of the *Calgary Herald* contained a small article quoting a federal Department of Finance briefing note that pushed for more stringent anti-money-laundering legislation to combat terrorism.

Is it just me, or do others find it strange that the impetus for Canada's legislation, or changes to it, comes from the Finance Department? If the object is truly fighting crime, wouldn't it make more sense for these initiatives to come from the Department of Justice?

There is no doubt about the need for strong legislation to tackle serious crime. Terrorist attacks are horrid. Organized crime undoubtedly affects the well-being of our populace. But the point of a free and democratic society is to enhance freedom and democracy. For that reason, measures to combat terrorism and organized crime should be implemented by the Minister of Justice, following consultation with the legal profession to ensure measures designed to fight these activities only go as far as necessary.

I have some concerns that current laws on money laundering, overseen by Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), could well be an excuse for revenue-hunting expeditions that have nothing to do with crime or terrorism. This was underscored for me at a Federation of Law Societies of Canada meeting in Ottawa last fall when we heard about some police examples of proceeds of crime matters that actually seemed to be tax enforcement cases. If that's so, it should concern members of the public. It should also concern lawyers who are entitled to give clients advice on legitimate tax avoidance.

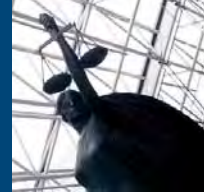
Let me turn to the central issue for the Law Society. As you know, the Law Society, together with the Federation of Law Societies of Canada, challenged the constitutionality of the

Proceeds of Crime (Money Laundering) and Terrorist Financing Act and its requirement for lawyers to disclose privileged communications of clients. So far, our challenge to this legislation has been successful. Starting in BC, the courts in Canada began exempting lawyers from the legislation until the constitutional issue on solicitor-client privilege could be heard. The federal government agreed to be bound by the exemption. Yet the government is not dissuaded overall from proposing new Orwellian laws that would have the effect of breaching the confidences of our clients.

We have always worked to keep the lines of communication open on this issue. At the Federation of Law Societies meeting I mentioned, the Federation took the initiative to invite representatives from the RCMP who are directing anti-terrorism and anti-money-laundering activities at the highest levels.

We discussed the law society rules that prohibit lawyers from accepting large sums of cash, except in certain very narrowly defined circumstances. (These rules have been passed by all law societies in Canada, not just ours.) The RCMP expressed concerns that our rules would not be effective in preventing lawyers from assisting criminals in money laundering. Asked why, they said they had examples of Canadian lawyers involved in money-laundering — and they provided one or two examples that sounded as if there was a reason to investigate. But when asked whether they had brought complaints to the law societies that have the jurisdiction, the answer was "no." Pressed further, the Superintendent who is the Director of the RCMP Proceeds of Crime Branch, said it was because of loopholes in the "no cash" rule (Rule 3-51.1).

As you know, the no-cash rule prohibits lawyers from receiving an



aggregate amount of cash of \$7,500 or more in respect of any one client matter or transaction, with a proviso that a lawyer may accept or receive an amount of \$7,500 or more in cash for professional fees, disbursements, expenses or bail, but that any refund greater than \$1,000 out of such money must be made in cash.

The Superintendent said that this Rule had a gaping loophole. Many of us at the meeting were perplexed. He said that the loophole was that disbursements were allowed to be paid in cash. We were all wondering how much terrorist financing could occur at the 35-cents-a-page photocopy rate, so we asked for a further explanation. The Superintendent said that, as an example, if a lawyer were handling a purchase of real estate for a client, the purchase price of the real estate (I believe he put it as “the price of the house”) would be considered a disbursement. He said this with a straight face, and honestly appeared to believe it! When it was explained that the purchase of real estate would not be considered a disbursement, it wasn't entirely clear that he accepted this explanation.

Beyond this mistaken interpretation of the no-cash rule, what is often overlooked is that the rule is proactive. It prevents lawyers from accepting cash

because we believe this is the best way to minimize risk. If cash cannot be accepted, it cannot be laundered. This rule is therefore even more stringent than the proceeds of crime legislation, which permits large amounts of cash to be accepted in transactions, provided it is reported to FINTRAC. Because of this, the rule deters dishonest people from attempting to use a lawyer for money laundering.

What became quite clear from the RCMP members attending our meeting, and perhaps it's true of other federal officials, is that they do not have a firm grasp of lawyer regulation. And why should they? That is not their area of expertise. The expertise lies with the law societies. We have an understanding of the practice of law, the commitment to set high standards and the power to enforce them. I think we have a responsibility to say so.

We know the police have a job to do in tackling money laundering. If they do have evidence that a lawyer's client is laundering money, they have a process to seek material from the lawyer, but of course that is properly subject to a court determination of what is protected by solicitor-client privilege. If it appears to police that a lawyer is directly involved, or is in breach of the no-cash rule, the Law Society needs to hear about that to pursue it as a

complaint. We'll investigate — and that includes the big files. Need I mention (though it's not a money laundering example) our audit and investigation on Martin Wirick? Or the fact that the RCMP and Vancouver City Police acknowledged our lead in the investigative work in that case? In BC, I should add, we are beefing up our team of auditors and investigators and introducing compliance audits, which will be targeted and effective. The point is, we have a sound track record of fulfilling our responsibilities, and we do it in a way that does not jeopardize the constitutional rights of lawyers' clients.

I recognize that we are sitting opposite the federal government in the proceeds of crime litigation. It still troubles me that this litigation is even necessary. But the federal government continues to propose legislation that affects entrenched principles such as solicitor-client privilege. It is therefore incumbent upon us to be wary and not to be afraid of appearing unpopular in contesting that legislation.

The price of freedom is, after all, eternal vigilance, and lawyers traditionally have been among the most vigilant. We do so, not for ourselves, but for the public who are our clients. Now is not the time to let our guard down.

Ken Dobell appointed new Lay Benchers

Ken Dobell, Chair of the Vancouver Convention Centre Expansion Project, has been appointed a Lay Benchers by the provincial cabinet.

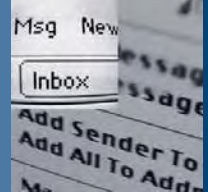
Mr. Dobell comes to the role with an impressive record of service. In addition to his work on the Convention Centre expansion, he is a director of VANOC, the 2010 Legacies Now Society and the Canadian Council for Public-Private Partnerships. He has served as the Deputy Minister to the Premier and Cabinet Secretary (2001-2005), and remains a special advisor to the Premier on a contract basis. From

1999-2001 he was CEO of the Greater Vancouver Transportation Authority. He has also worked for the City of Vancouver as City Manager, Deputy City Manager and a research engineer. He has received a number of awards, including the Lieutenant Governor's Award for Excellence in Public Service, the Municipal Officers of BC Professional Award and the BC HRMA Award of Excellence.

President Rob McDiarmid, QC welcomed Mr. Dobell. “The Society has been fortunate through the years to have had very talented people as

Lay Benchers, and Ken Dobell is yet another example,” he said. “His experience on public policy issues will undoubtedly be of great value to us.”

For his part, Mr. Dobell said he is very pleased for the opportunity to serve and looks forward to working with the other Benchers. In accepting the position, he joins Michael Falkins, Patrick Kelly, June Preston and Maelor Vallance at the table, and fills one of two Lay Benchers vacancies. His term of service runs to December 31, 2007 and is renewable.



Appendix 3 of the Handbook has been revised to recognize multiple-draw residential mortgage transactions as a form of simple conveyance

Lawyers can act for both sides in residential multiple-draw mortgages

The Benchers have paved the way for lawyers to represent both a mortgagor and a mortgagee in multiple-draw mortgage transactions that involve no commercial element by amending Appendix 3 of the *Professional Conduct Handbook*. Multiple-draw mortgages are those in which a financial institution or other mortgagee advances funds in stages, usually as building construction progresses.

Lawyers are generally prohibited from acting for both sides in real estate transactions: see Appendix 3, Rule 2 of the *Professional Conduct Handbook*. An exception is when a transaction amounts to a simple conveyance.

Rule 4 describes a “simple conveyance” as including a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor’s residence. Examples now include:

- a revolving mortgage that can be advanced and re-advanced,
- a mortgage to be advanced in stages [new] or
- a mortgage given to secure a line of credit.

Rule 5(g) of Appendix 3 previously excluded a multiple draw mortgage from the definition of a simple conveyance, but that provision is now rescinded. A transaction is still not considered to be a simple conveyance if it contains a commercial element, such as a conveyance involved in the sale of a business.

The Ethics Committee recommended that lawyers be permitted to represent both parties in residential transactions involving multiple-draw mortgages, following consultations in 2005. The Committee noted that separate representation of clients always had value,

and therefore so did the restriction under the traditional rule.

“We say only that, on balance, the problems with having the rule and making affected clients engage separate lawyers in the circumstances addressed by it outweigh its advantages,” the Ethics Committee stated in its report. “Where lawyers act prudently and conduct appropriate lien and judgment searches at the time of the draw, and decline to act where a dispute is evident, the chances of a lawyer getting into difficulty because of a conflict will be minimal.”

Ethics Committee Chair Gavin Hume, QC, presented the issue to the Benchers in March. He said that Law Society complaints statistics over the past five years showed fewer than a dozen complaints arising over Appendix 3, and none involved multiple-draw mortgages.

A number of BC lawyers and financial institutions favoured a change to reduce costs for clients and standardize practices. Mr. Hume signalled by way of example a letter from Emiko S. Ando, senior counsel for the Royal Bank. Ms. Ando noted that the change would create a level playing field between lawyers and notaries public (who are entitled to represent both sides) and bring mortgage preparation practices in line with the rules established by other law societies in Canada. “The current requirement of having separate counsel increases costs borne by our customers and can cause delays in funding, which may impact construction,” Ms. Ando said. “The current practice also puts more pressure on customers to waive legal advice, which is not, in the bank’s view, a desirable outcome.”

Duff Waddell, a senior real estate lawyer at Kaplan & Waddell in



Vancouver, accepted an invitation from the Ethics Committee to speak to the Benchers about the potential for conflicts. In his view, a construction mortgage involving multiple draws created no greater risk of conflict for a lawyer than a mortgage in which there is one advance of funds. In each case, it was the function of a lawyer to do a lien and judgment search prior to any advance of funds — not to decide the timing of further advances. That was the role of an inspector retained by the bank who oversaw progress of the construction in accordance with the contract between the mortgagor and mortgagee.

Mr. Hume said that, from its consultations, the Ethics Committee was satisfied a rule change was needed. “We learned that by far the majority of the draw mortgage work in construction is simple ...,” he said. “[I]t’s also simple for lawyers to identify when a conflict arises and to send both parties off for separate representation.”

Appendix 3, as revised, is set out in the enclosed *Member’s Manual* amendment package.



Royal Bank adopts conveyancing protocol of western law societies

On April 24 the Royal Bank of Canada will begin accepting opinions from lawyers in BC, Alberta, Saskatchewan and Manitoba in the conveyance or re-financing of residential properties in accordance with the Western Law Societies Conveyancing Protocol.

Each of the law societies in the four western provinces has adopted a version of the protocol that is tailored for use in that jurisdiction. In BC, the protocol provides that a lawyer who acts for a financial institution is permitted to advise that institution (through a short, standard form opinion) that, if there are no known building location defects on a property, the institution need not obtain an up-to-date building location survey as a condition of funding a mortgage loan. If the financial institution relies on a protocol opinion to

fund a mortgage and suffers an actual loss as a result of an unknown building location defect that would have been disclosed by an up-to-date survey, the Lawyers Insurance Fund will, on behalf of the lawyer, accept liability and, as appropriate, pay the cost of repair or any actual loss suffered. In other provinces, the protocol also addresses specific problems related to the release of mortgage and purchase funds on closing.

This protocol helps streamline process and costs for mortgage lenders. Although some additional practice standards are set for BC lawyers in issuing protocol opinions, nothing in the protocol otherwise diminishes or changes the usual practices of prudent law firms or the standard of care for lawyers acting on mortgage transactions.

In agreeing to accept opinions under the protocol, the Royal Bank joins national lenders, including the Bank of Montreal and Canadian Western Bank. In the short term, the Royal Bank will provide an addendum to their mortgage instructions at www.rbcroyalbank.com/legalforms to advise lawyers they may close using the protocol.

The BC version of the Western Law Societies Conveyancing Protocol and background information is available under "Practice Support/Articles" on the Law Society website at www.lawsociety.bc.ca. For more information, contact lawyer Catherine Greenall at the Law Society office (cgreenall@lsbc.org).

BC lawyers will vote on next year's practice fee at the AGM

Law Society AGM to be held September 29

The Law Society Annual General Meeting takes place on Friday, September 29, 2006. All BC lawyers and articulated students are invited to attend the meeting at the main location in Vancouver or at one of the teleconference locations around the province. Please watch for details.

The Benchers have decided that the 2007 practice fee, which is set by members in 2006, will be put forward to the

Law Society AGM for a vote. The fee has traditionally been set at the AGM, other than in the past two years when it was set by referendum.

In 2004 the Benchers found it necessary to hold a referendum on the fee, which is an alternative to a resolution at the AGM permitted under section 23(1)(a) of the *Legal Profession Act*. The referendum made it easier for all members to address a matter of

longstanding controversy, that is, whether payment of an amount equivalent to the Canadian Bar Association membership fee should be mandatory or voluntary for all practising lawyers. A majority of lawyers in the referendum voted in favour of a practice fee that did not contain a CBA fee component.

Since the 2004 referendum, the CBA has expressed its intention not to propose its fee as a component of the Law Society practice fee. The Benchers held a referendum in 2005 to set the 2006 practice fee, without the CBA fee being at issue, and have now concluded they should not continue to incur the expense of an annual fee referendum. For that reason, the practice fee — which the Benchers will recommend to the profession in July — returns as an item of business on the AGM agenda.



Thanks for your help in 2005

The Benchers would like to thank and congratulate all those in the profession and the legal community who volunteered their time and energy to the Law Society in 2005. Whether serving as members of committees, task forces or working groups, as PLTC guest instructors or authors, as conduct reviewers, fee mediators, event panelists or advisors on special projects, volunteers are critical to the success of the Law Society and its work.

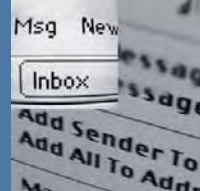
Over the past year, the Society has enjoyed the support and contributions of almost 500 Life Bencher and non-Bencher volunteers, all of whom deserve acknowledgement.

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Would you like to volunteer?

The Law Society always welcomes expressions of interest from lawyers who would like to serve as volunteers.

For more information about serving as a volunteer on a Law Society committee, task force or working group or as a Law Society appointee to an outside body, please contact David Newell, Corporate Secretary at dnewell@lsbc.org.



For information on volunteering as a guest instructor, lecturer or author in the Professional Legal Training Course, please contact Lynn Burns, Deputy Director, at lburns@lsbc.org. Please note the subject areas you are volunteering to teach and the PLTC session or sessions for which you are available: spring, summer and fall (Vancouver) or summer (Victoria). The program is actively looking for guest instructors on mediation, family law, residential conveyancing, criminal practice, corporate practice, PPSA, buying and selling a business, wills and practice management, as well as to serve as mock civil trial and chambers judges. To volunteer to be an author for the course, please contact Morag MacLean, PLTC Practice Material Editor, at mmaclean@lsbc.org.

Law Society's staff lawyers vote in favour of union certification

On April 7 the Labour Relations Board advised the Law Society that a majority of "persons employed as lawyers by the Law Society" had voted in favour of union representation by the Professional Employees Association.

The final vote tally was 18 in favour of union representation and 16 opposed (53% in favour; 47% opposed). The

Law Society has an additional 110 staff and managers who are not represented by the Professional Employees Association.

As a result of the certification vote, the Law Society expects to enter into negotiations with the Professional Employees Association to reach a collective agreement with the affected

employees. A schedule for the bargaining has not yet been set.

The Law Society believes its employees are the backbone of the organization and provide a much valued service in fulfilling the Society's mandate to protect the public interest in the administration of justice.



Lawyers must safeguard client documents

BC lawyers are reminded of the critical importance of safeguarding client documents and records at all times. The reminder is timely in light of a recent media report about client documents of a law firm being found around a dumpster and on the street nearby.

Chapter 5 of the *Professional Conduct Handbook* sets out a lawyer's professional obligation to safeguard client privilege and confidentiality:

Duty of confidentiality

1. A lawyer shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, regardless of the nature or source of the information or of the fact that others may share the knowledge, and shall not divulge any such information unless disclosure is expressly or impliedly authorized by the client, or is required by law or by a court. [footnote omitted]

2. A lawyer shall take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information.

The Information and Privacy Commissioner of BC is concerned about this issue and wishes to remind lawyers that they and their firms are subject to the *Personal Information Protection Act*. This private sector privacy legislation requires lawyers to take reasonable measures to protect clients' personal information from risks of unauthorized access, use, disclosure and disposal, and sets out consequences for violation.

Please make certain that your firm has a secure system in place for safeguarding client documents and records, including at the point of disposal. Even the best systems can fail if not properly monitored. All lawyers and staff in your firm should be reminded of their obligations to safeguard client

materials. You should also review your firm's policies for disposal of materials within the office and any arrangements with outside storage facilities or shredding and recycling suppliers. If you have any concerns about weaknesses in your storage or destruction systems, please take steps to rectify them.

Here are examples of safeguards to consider:

- Maintain client files in secure areas and consider locking file cabinets



when lawyers or staff are not in the office.

- Do not allow lawyers, staff or custodial staff to place client material directly into a garbage or recycling bin. The material should be placed in a bin for cross-cut shredding. Shredding should be done on-site by either your staff or a reputable outside provider, and prior to any recycling or disposal.
- When using an outside provider for on-site shredding, someone in the firm should monitor the work and obtain a certificate of destruction.
- Ensure your computer network is

secure from intrusion, such as by maintaining proper firewalls. Secure your computers (especially laptops) physically and with password protection. Laptops leaving the office should be encrypted.

- Erase or destroy computer hard drives before you discard, sell or donate them. Complete erasure requires special software, following the standards of the RCMP and the US Department of Defence.
- Have your staff enter into a confidentiality agreement respecting confidential information in the firm.
- Regularly train and remind staff about firm policies for protecting information, and note the consequences of non-compliance.
- Avoid leaving files or computers in your car and, when working on files at home, consider keeping those in a locked cabinet. Ensure proper disposal of papers through your office, rather than at home.

Document storage and disposal is but one aspect of client confidentiality. It is equally important that everyone in the firm refrains from reading client information in public places where it could be seen, or from discussing client matters in public where they could be overheard.

For more on handling information securely, please see *Closed files: Retention and Disposition* in the Practice Support/Articles section of the Law Society website at www.lawsociety.bc.ca. The Office of the Information and Privacy Commissioner also publishes practical information for safeguarding private information and touches on several of the points noted above: see www.oipc.bc.ca.

If you have specific enquiries about client confidentiality and privilege, please contact one of our Practice Advisors at the Law Society office.



Law Foundation signs new agreement with Envision Credit Union

Law Foundation Chair Warren Wilson QC has commended Envision Credit Union for its commitment to pay a competitive rate of return on lawyers' pooled trust accounts — funds that support the Foundation in its work.

Under a new interest rate agreement on lawyers' pooled trust accounts, in effect January 1, 2006, Envision pays a return of prime less 3%. Thanks go to Gordon Huston, President and Chief Executive Officer of Envision Credit Union, for his leadership in making this new agreement possible.

Increased revenues enable the Law Foundation to fund programs that make the justice system accessible to British Columbians, particularly people who have the greatest access problems as a result of their economic, social, physical or mental special needs. The funded programs include professional legal education, public legal education, law reform, legal research, legal aid and law libraries.

The Law Society, the Law Foundation and the Canadian Bar Association (BC Branch) encourage lawyers to con-

sider which financial institutions provide the best support to the Law Foundation when deciding where to place their trust accounts.



1340 – 605 Robson Street
Vancouver, BC V6B 5J3
Telephone: 604 688-2337
Fax: 604 688-4586
www.lawfoundationbc.org

BC Online offers tax certificates

BC Online offers electronic access to property tax certificates for a growing number of cities and municipalities. Certificates are available for properties in Coquitlam, Nanaimo, New Westminster, Port Alberni, Port Moody, Prince George, Saanich,

Sidney, Vancouver and Victoria. Preparations are also underway to add Chilliwack, Langley, Port Coquitlam, Surrey and West Vancouver to the service.

These certificates offer information on

property tax payments, utilities and services levied by a municipality and fees owed to a municipality.

For more information on how to use the service, visit www.bconline.gov.bc.ca.

The Equity Ombudsperson ... give her a call



The Law Society wants to help prevent workplace harassment and other forms of discrimination and to encourage equitable workplace practices. That is

why BC law firms are offered the services of an Equity Ombudsperson.

The Ombudsperson, **Anne Bhanu Chopra**, can help law firms prevent discrimination and promote a healthy work environment and she also offers assistance to any individual within a firm or legal workplace who may be

facing discrimination and wishes to canvass options for resolving the problem. Ms. Chopra is independent, treats all enquiries in confidence and reports only anonymous statistical data to the Law Society.

Need help?

Law firm staff, law students, articulated students, lawyers, human resource administrators and managing partners in law firms are all welcome to seek Ms. Chopra's help at no cost. You can reach her on her confidential, dedicated telephone line at **604 687-2344** or by email to achopra1@novuscom.net.

In the next Benchers' Bulletin

In a culturally diverse workplace, people may not share a common background, culture or first language. Culture does have an impact on our perception — and realizing that can help us show the people we work with respect instead of insensitivity. In the next *Benchers' Bulletin*, Ms. Chopra looks at how language and actions we may think are innocuous could be hurtful to other people, and why. She welcomes questions for future columns — just call or write to her at the address noted above.



Meet our new Practice Advisor



Meet Barbara Buchanan, the Law Society's new Practice Advisor who joins Dave Bilinsky, Practice Management Advisor, and Jack Olsen, Staff Lawyer – Ethics, in offering assistance to BC lawyers. Ms. Buchanan replaces Felicia S. Folk who returned to private practice last year.

Enthusiastic about her new role, Ms. Buchanan says that BC lawyers contact the practice advice team on a whole range of issues, including the prohibition against direct or indirect

financial interest in a client and corporate governance issues. She is happy to see that both junior and senior lawyers are willing to call, and it is worth reassuring lawyers that their call is on a confidential basis. In her view, it is an ideal way to help prevent problems. "Sometimes lawyers need to talk through a scenario and have someone listen and offer a fresh perspective," she observes. "Often they are able to come up with the solutions themselves in the course of that."

She says she particularly likes the feeling of connection to other BC lawyers. "I love being able to talk with members of the profession from all over BC, and sometimes outside of BC. I've

talked with members from as far away as Europe, the Middle East ... and Toronto," she adds with a smile.

Ms. Buchanan became part of the Practice Advice group in September 2005 on an interim basis after teaching several PLTC sessions. She comes to the Law Society with experience in private and in-house practice, having practised over six years as General Counsel for a multi-national corporation, Daishowa-Marubeni International Ltd. She has also served as a member of the Farm Industry Review Board and on other administrative tribunals and taught business law at Langara College and City University in Vancouver.

Services for members

Practice and ethics advisors

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

Practice and ethics advice – Contact **Barbara Buchanan**, Practice Advisor, to discuss professional conduct issues in practice, including questions on undertakings, confidentiality and privilege, conflicts, courtroom and tribunal conduct and responsibility, withdrawal, solicitors' liens, client relationships and lawyer-lawyer relationships. **Tel:** 604 697-5816 or 1-800-903-5300 **Email:** advisor@lsbc.org.

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

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

Interlock Member Assistance Program – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society, and provided at no cost to individual BC lawyers and articulated 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 articulated students suffering from alcohol or chemical dependencies, stress, depression or other personal problems. Based on the concept of "lawyers helping lawyers," LAP's services are funded by, but completely independent of, the Law Society and provided at no cost to individual lawyers: **Tel:** 604 685-2171 or 1-888-685-2171.

Equity Ombudsperson – Confidential assistance with the resolution of harassment and discrimination concerns of lawyers, articulated 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 Tips, by David J. Bilinsky, Practice Management Advisor

Calling on your own legal genie ... the magic of case management software

x *You got a brand of magic never fails ...
You ain't never had a friend, never had a friend*

You ain't never had a friend like me... x

Lyrics by Howard Ashman, music by Alan Menken.

I was reviewing last year's statistics from the Lawyers Insurance Fund and they made for interesting reading. In particular, they indicate that the most significant cause of insurance claims and potential claims is simple oversight on the part of lawyers — a full one-third of all insurance reports result from sloppy practices, poor diary systems or "oops's." These claims should be avoidable — given the right tools and systems.

For many years I have been speaking of the power of case management (or practice management) software and what it can do to transform your practice. Amicus Attorney, Time Matters, LawStream, ProLaw and others have reached about a 40% penetration level among US lawyers, according to the latest ABA Legal Technology

Survey. For a change, I thought I would let lawyers other than me do the talking; here I have quoted a few of our colleagues south of the border who have implemented practice management software, and reaped the benefits.

Let's start with these observations from Randy B. Birch, Heber City/Salt Lake City, Utah:

If I could start my practice all over again, I would get the practice management software *and* take the training *before* I was even sworn in. How nice would it be to start with a few dates and names and learn to get it right. How many thousands of hours would you have saved by the time you have practised 20 years? How many hours and sleepless nights could have been avoided or even cash paid out for missed hearings, late prep, etc. I think I wish for that more often than I wish I was young again.

Ross L. Kodner, Senior Legal Technologist / CEO at MicroLaw, Inc. and

speaker at the 2005 Pacific Legal Technology Conference has this to say:

I don't believe any case/practice manager is "fancy" software. I view it as being the most core, fundamentally essential system for *any* practice, from solos to mega big law firms.

The three most expensive practice management mistakes any practice can make are:

- not getting a practice management system,
- getting a practice management system but implementing it badly,
- not getting a practice management system and attempting instead to "devise your own little system and save yourself some bucks, time and headaches."

I speak from expensive, painful, over and over and over again experience. It's true, whether you want to hear it or not. Key point: you have a one-time luxury of getting your new practice started the best possible "right way." Don't blow it by failing to follow Red Adair's sage advice: "If you think hiring an expert is expensive, try hiring an amateur."

Jonathan G. Stein, Elk Grove, California:

I am a Time Matters user, although I used another program at a different firm. Outlook and ACT are more like contact managers with scheduling capability. Time Matters does so much more. Off the top of my head, I do the following with TM:





- track every case in my office,
- manage all my contacts,
- schedule everything,
- set up new cases and, with about two clicks, schedule ... every deadline and every other important date.

And he had more praise for the program:

- TM lets me write letters by importing data into WP.
- TM bills my time and generates invoices.
- TM lets me archive my old cases so I still have them around.
- When you get substituted out of a case, as I just was, I can quickly generate my lien so that I get paid.
- TM can relate things to each other.
- TM keeps track of the adjusters I have cases with.
- TM will let me check for conflicts quickly.
- TM lets me keep notes on files.

Gil Shuga of Mesa, Arizona:

This really is one of those penny wise, pound foolish issues. Moreover, that fact is hard to accept if you are already up and running successfully and haven't made the move to case management software. For a true solo, just the document generation features of case management software (I only have experience with Time Matters) pays for the software and training very quickly.

I have been using Time Matters for about five years. Over that time, I have spent less than \$1,800 on software and consultant fees. Some people spend more, some spend less. For me it has been a real bargain. In retrospect, I wish I had started using it the day I went solo.

Even though I had more time than money back then, I see now that it would have been a worthwhile expense.

Nerino J. Petro, Jr., recently appointed the Practice Management Advisor for the State Bar of Wisconsin, had this to say:

I see this thought a lot from new as well as practising attorneys. They often don't see the value in the legal specific packages. Instead they try and use an "off the shelf" product because it's less expensive. Then they spend a lot of time, energy and money literally "recreating the wheel" rather than focusing on what they do best.

Products like Outlook are not designed to work from a "file" or "matter" focused perspective (i.e., working from a matter rather than a contact). What the legal packages allow you to do is to gather in one place all the information regarding a specific file or matter.

In my own practice, Time Matters

is where we keep everything regarding the file, including contacts and related parties, phone records, notes, email, documents, research information, etc. I enter contacts one time and can use them over and over again because Time Matters is a relational database allowing one to many relationship between records (meaning that I can relate different pieces of information together without having to enter new records each time).

One of the benefits of using a legal specific-matter management package such as Time Matters, Practice Master, Amicus or Abacus is the ability to identify matters by a practice area. You can create lists of matters and then identify the associated clients for practice areas in which you want to send targeted information and marketing

continued on page 14



Mark your calendars now

The **Pacific Legal Technology Conference** returns to Vancouver on **October 13, 2006**. Set the day aside for you and your staff to join us at the Vancouver Convention and Exhibition Centre and learn the latest that technology has to offer. This year the Conference will be held in conjunction with the ABA Law Practice Management Section's fall meeting and will feature an encore presentation of the best-ever sessions from ABA TechShow.

Watch for details, coming soon.

Practice Tips ... from page 13

materials. Rather than just sending out general information newsletters, you can target clients for newsletters and information that is focused on their specific needs. For your corporate clients, you can send information regarding changes to your state's business corporation act or changes in tax treatment. Your clients that rent property can be targeted for information specific to landlord-tenant matters.

If you are using a legal specific time and billing package, you can also create detailed reports on the practice area or areas where the majority of your income is coming from, which may surprise you. Using this information, you can further tailor your marketing efforts to those areas that are your most profitable.

So there you have it — you can see how these lawyers have rubbed the magic lamp and released their own genie in the form of practice management software. Their common delight in having a case management product that it is built around their files and

incorporates all the systems necessary to practise law effectively. Amicus and other practice management software packages deliver calendaring, bring-forward and reminder dates, conflict checking, billable time tracking, contacts and file management directly to

Don't blow it by failing to follow Red Adair's sage advice: "If you think hiring an expert is expensive, try hiring an amateur."

*— Ross L. Kodner, speaker
2005 Pacific Legal Technology
Conference*

the lawyer's desktop and fingertips. Furthermore they all have document-generation abilities. This hopefully reduces the "oops" factor as you create documents from standard templates, rather than using "search and replace."

To wrap up these testimonials on a personal note, I can say I have been using Amicus Attorney now for at least 10 years, both in private practice and in my work at the Law Society. I simply could not imagine practising law without it. It is the "central nervous system" in my own office. I currently have 8,199 contacts listed in the contact manager, and I can refer to all phone messages, all phone calls and my notes of these calls with just a few mouse clicks — without leaving my desk and without having to go fetch a paper file. The time saving from this feature alone quickly pays for the software, and I gain the benefit of all the other features as an added bonus. I also use Amicus Attorney with Dragon Naturally Speaking v 8 speech recognition — allowing me to dictate my notes of my conversations directly into Amicus — which represents a further time savings.

If you haven't tried case management software before, you'll be amazed. It's like a genie just waiting to save you from your "oops" and sloppy mistakes. Interested? All that remains is to rub the lamp and release the genie. It's truly finding a friend like you have never had before!

From Abacus to Versys: accounting and practice management software

Perhaps you've decided to reassess the legal accounting and practice management software needs of your office. Where would you start your research?

Talking to other lawyers is a good approach, and legal periodicals offer a wealth of advice, including feature-by-feature reviews of products. Most suppliers also offer online information and demo versions of

their software for you to try. If you haven't gone very far down the road and would like to survey what's available, consider downloading a useful little list of current legal accounting and practice management software suppliers. The list, compiled by Practice Management Advisor, Dave Bilinsky, includes the types of products each supplier carries, the size of firm the products are best suited to,

and the relevant website addresses, telephone numbers and email addresses.

To download the list, in Excel format, just visit the Practice Support/Articles section of the Law Society website. The direct link is www.lawsociety.bc.ca/practice_support/articles/docs/list_accounting-companies.xls.



PST guidelines awaited after partial stay in *Christie v. British Columbia (Attorney General)*

The order for a partial stay

As most lawyers know, the BC Court of Appeal on March 10 ordered a partial stay of the Court's earlier decision in *Christie v. British Columbia* respecting PST on legal services, pending appeal to the Supreme Court of Canada: see 2006 BCCA 120. The Hon. Mr. Justice Smith ordered that the Court's December 20, 2005 declaration of invalidity concerning PST in *Christie* "is stayed to the limited extent of maintaining the statutory obligation of the lawyers of this province to collect the taxes on legal services and to hold them in trust pending the appeal."

As a result of this order, BC lawyers must bill and collect the provincial sales tax on all legal fees in accordance with the *Social Service Tax Act*. As far as remittance of the tax is concerned, lawyers are *not* required to remit the tax on legal services that are "related

to the determination of rights and obligations by courts of law or independent administrative tribunals," as set out in the December 20, 2005 judgment. Instead, lawyers should hold these funds in trust pending the outcome of the appeal to the Supreme Court of Canada.

The Law Society has received legal advice that the partial stay does not affect those portions of the *Social Services Tax Act* that have not been declared invalid by the Court of Appeal. As a result, lawyers have a continuing obligation to remit tax on services outside the scope of the December 20, 2005 decision. If you are uncertain about whether a legal service falls within the scope of the judgment, the prudent course is to hold the tax in trust. In other words, if in doubt about remittance, you should bill and collect the tax, but hold it in trust rather than remit it.

Guidelines pending

Law firms will wish to monitor the Consumer Taxation Branch website at www.rev.gov.bc.ca/ctb for interpretation guidelines, expected soon. Pending the guidelines, the government has stated that it will not charge lawyers penalties or interest for non-remittance of the amounts that they are holding in trust.

What if I don't have a trust account?

Not surprisingly, the Law Society practice advisors have been swamped with PST calls in recent months. A frequent question is "How should I handle PST if I don't have a trust account?"

Given that the December 20 stay order requires lawyers to hold unremitted PST in trust, the recommended course for lawyers without a trust account is to either 1) open a trust account for this purpose or 2) arrange with another lawyer who has a trust account to hold PST in trust.

These are the same options that lawyers have to consider when they do not usually handle trust funds but may have occasion to do so in a particular transaction. If, however, you do open a trust account strictly for the purpose of holding PST, the Law Society will waive the requirement to retain an outside accountant to review your books and accounts. Also, if you must hold PST in a matter that would not otherwise require you to receive funds in trust, the Law Society will waive payment of the trust administration fee (TAF).

Lawyers who require further information or would like to flag new issues should contact Practice Advisors Dave Bilinsky (604 605-5331 or dbilinsky@lsbc.org) or Barbara Buchanan (604 697-5816 or bbuchanan@lsbc.org).



Technology in civil litigation

BC Supreme Court calls for comment on draft practice direction

The Supreme Court of BC is inviting comments from the profession and the public on a draft practice direction called “Guidelines for the Use of Technology in any Civil Litigation Matter,” which sets out a protocol for the preparation, exchange and presentation of electronic evidence. The timetable for consultations and the most recent draft of the direction — which was released April 11 — are available on the Courts of British Columbia website: www.courts.gov.bc.ca/sc/ElectronicEvidenceProject/ElectronicEvidenceProject.asp.

Under the current draft of the direction, the Court would encourage parties to civil proceedings to consider adopting the direction when one or more of the following apply:

- a substantial portion of potentially discoverable documents consist of electronic material,
- there are over 1,000 potentially discoverable documents in the

proceeding,

- there are more than three parties.

The draft direction would place on parties and their counsel primary responsibility for agreeing on the matters that become subject to the practice direction. Counsel would consider the ways in which the use of technology might lead to the more efficient conduct of litigation, such as through the delivery of court documents to another party (outside the e-filing pilot project), communicating with another party and preparing an electronic common book of documents for trial.

A party of record may also apply for a court order that the proceeding be conducted in accordance with some or all of the practice direction.

When the practice direction applies, the court may, on application by a party, make specific orders respecting use of technology in a proceeding,

including requiring the parties to meet to discuss the best use of technology, resolving disputes and giving directions and determining if there should be an electronic trial. An electronic trial could include such things as delivery of documents in electronic form to other parties, delivery of documents in electronic form for the trial record, electronic discovery, an electronic common book of documents and restrictions on use of hard copies at trial.

The BC Supreme Court has undertaken consultations within the profession on the direction. The direction is expected to be issued in final form on July 1, 2006, following further consultations and revisions. A feedback document is available on the webpage noted above, for the convenience of anyone wishing to comment. Comments can also be provided to Potter Farrelly & Associates at bcpd@potterfarrelly.com.





Unauthorized practice undertakings and orders

The Law Society has obtained the following court orders and undertakings to prevent non-lawyers from engaging in the unauthorized practice of law.

Court orders

The BC Supreme Court has ordered that **Marla Cohen*** of Vernon be prohibited from appearing as counsel or advocate; preparing wills or estate documents, preparing documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute; giving legal advice or representing that she is qualified or entitled to provide any of these services for a fee: March 2, 2006.

**Note: this not BC lawyer Marla Gilsig, formerly Marla Cohen, who is a non-practising member of the Society.*

On application of the Law Society, the BC Supreme has ordered, by consent, that **Andrew Pavey** and **Advanced Mediation Associates Inc.** be prohibited from appearing as counsel or advocate; preparing documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute; negotiating for the settlement of a claim or demand for damages; giving legal advice; or representing that they are qualified or entitled to provide any of these services for a fee: December 14, 2005.

The Court has also ordered **Auguste Christiane Frederich Von Pfahlenburg-Marienburg** (AKA Christiane Von Pfahlenburg, AKA Walther Kay Diener) of Vancouver and his company Argento Metals Compagnie Ltd. (AKA A.M. CIE Ltd.) from appearing as counsel or advocate; preparing corporate documents, wills or estate documents, documents relating to real or personal estate or documents for use in a judicial or extra-judicial proceeding or a proceeding under a statute; negotiating for the settlement of a claim or demand for damages; giving legal

advice; or representing that they are qualified or entitled to provide any of these services for a fee: January 31, 2006.

Undertakings

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Special Compensation Fund claims

The Special Compensation Fund, funded by all practising lawyers in BC, provides compensation (on claims prior to May 1, 2004) to people who suffer loss through the misappropriation or wrongful conversion of money or property by a lawyer acting in that capacity.

After May 1, 2004 compensation is provided by trust protection coverage under Part B of the Compulsory Professional Liability Insurance Policy.

Rule 3-39 provides that unless the Committee directs otherwise, the Executive Director may publish and circulate to the profession a summary of the written reasons. In any publication, the claimant may not be identified by name, or otherwise, unless the claimant consents and a lawyer may not be identified unless the Committee finds that the lawyer has misappropriated or wrongfully converted the funds.



Edward Kenny

Formerly of Vernon, BC

Called to the Bar: May 15, 1972

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

Custodian appointed: January 15, 1999

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

Special Compensation Fund Committee

decision involving claim 199907

Decision date: March 2, 2005

Report issued: August 29, 2005

Claimant A

Claim approved in part: \$12,401

Mr. Kenny acted for a company with respect to its investment scheme. In 1997 he entered into an agreement with A whereby A would place \$100,000 USD with the company for investment. A had been introduced to the company's investment scheme by an advisor (V).

Under the agreement, Mr. Kenny was to hold A's money in trust until it was exchanged for one year of US treasury bonds in Mr. Kenny's name, equal to 500% of the capital investment. If the investment was not made within 10 banking days, the money was to be returned immediately to A. Mr. Kenny executed this agreement as "barrister & solicitor on behalf of the fund."

Mr. Kenny received from A \$100,000 USD, which he deposited to trust. He then transferred these funds to a bank account for the company, at which point they were co-mingled with another investor's funds. The funds were then paid out to other investors and to Mr. Kenny himself on account of fees. None of the funds were exchanged for treasury bonds as specified under the agreement. When A made follow-up enquiries, Mr. Kenny attempted to explain the delay as necessary.

In April 1998 the company refunded \$50,000 USD to A, but never refunded the balance of \$50,000 USD.

In October 1999 Mr. Kenny admitted to professional misconduct with respect to a number of investors, including A. He acknowledged that he had breached his fiduciary obligations in failing to invest A's funds as agreed, failing to hold them in trust and failing to return them when required to do so under the agreement.

The Special Compensation Fund concluded that Mr. Kenny was acting as a lawyer in this matter. He had held himself out to A as the company's lawyer and had received trust funds from A. He also represented that he would provide legal services, such as authenticating a verifiable receipt from a securities firm for the issue of treasury bonds.

The Committee also found that the circumstances supported the conclusion that Mr. Kenny had acted dishonestly and he misappropriated or wrongfully converted the funds. It noted that A's funds were released without receipt of a bank guarantee or being placed in any investment. Rather, they were paid out to other investors and to Mr. Kenny.

The Committee determined that it would approve A's claim in part (\$12,401 CDN), subject to releases and assignments. The compensation represented 20% of A's original claim (of \$50,000 USD). In exercising its discretion to approve the claim in part, rather than in full, the Committee stated that the Special Compensation Fund is intended to assist innocent victims of dishonest lawyers, not to act as an insurer respecting highly speculative and questionable investment schemes such as this one. Moreover, A had been asked to exhaust his civil remedies, especially by claiming against his investment advisor (V), which he refused to do. The Committee attached considerable weight to that factor.

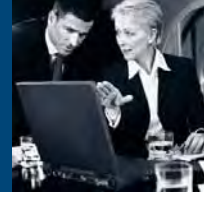


Martin Wirick

Vancouver, BC

Called to the Bar: May 14, 1979

Resigned from membership: May 23, 2002



Custodian appointed: May 24, 2002
Disbarred: December 16, 2002 (see *Discipline Case Digest* 03/05)

Special Compensation Fund Committee decision involving claims 20020278, 20020157 and 20020545

Decision date: June 1, 2005

Report issued: September 1, 2005

Corrigenda date: November 9, 2005

Claimants: Credit Union A, Mr. and Ms. F and Bank B

Payment for Credit Union A approved: \$250,444.59 (\$217,226.71 and \$33,217.88 interest)

In 2001 V Construction Ltd. (a company belonging to Mr. Wirick's client, Mr. G) sold a lot on Nelson Street to Mr. and Ms. F for \$332,000. The lot was then encumbered by three mortgages. In late October 2001, in closing the transaction, Mr. Wirick reported to the solicitor for Mr. and Ms. F that he had discharged the first, second and third mortgages. In fact, contrary to his undertaking, Mr. Wirick did not use the sale proceeds to pay out and

discharge, among other charges, the third mortgage of Credit Union A.

Mr. and Mrs. F meanwhile obtained \$215,800 to finance their purchase through a mortgage loan from Bank B. The mortgage, which they expected to be a first mortgage, was registered on title.

In April 2002, Mr. Wirick filed a Form C discharge of the Credit Union A mortgage, which Credit Union A alleged was fraudulent. In October 2002, Credit Union A filed a certificate of pending litigation and writ of summons in BC Supreme Court seeking a declaration from the court that the discharge of the mortgage was "fraudulent and as a result void and of no effect."

On May 12, 2005, in a similar case to this one, Mr. Justice Sigurdson allowed the rectification of title and reinstatement of the Credit Union A mortgage on two other properties, subject to consideration of further evidence and argument on two issues.

The Special Compensation Fund Committee considered claims made by

Credit Union A, Mr. and Ms. F and Bank B. The Committee determined that Mr. Wirick had not used the sale proceeds in accordance with his undertaking, and that his breach of undertaking amounted to misappropriation of funds in his capacity as a lawyer. Mr. and Ms. F had sustained a loss since their purchase monies were supposed to be used to pay out the charges on title, but in fact the Credit Union A mortgage was fraudulently discharged from title without being paid out.

Therefore, the Committee decided that if it paid out the Credit Union A mortgage, its claim would be satisfied and Credit Union A must remove its certificate of pending litigation and acknowledge satisfaction of any claim on its mortgage and lawsuit.

The Committee approved payment of \$250,444.59 to Credit Union A, subject to various conditions and assignments. By so doing, Mr. and Ms. F would be restored to the position they ought to have been in had Wirick fulfilled his undertakings.

Suspensions

Larry William Goddard

On April 19, 2006 a discipline hearing panel suspended lawyer Larry William Goddard of Abbotsford for two months, effective May 15, 2006, for professional misconduct. Mr. Goddard admitted and the hearing panel found that he had breached his undertaking on several occasions by failing to discharge mortgages promptly.

David John Martin

On April 24, 2006 a discipline hearing panel, having earlier found David John Martin guilty of professional misconduct, ordered that he be

reprimanded and suspended from the practice of law for six months, with the suspension to commence on a date to be agreed on by counsel and no later than June 1, 2006. He was also ordered to pay \$35,000 as costs.

Richard Luke Coglon

On April 24, 2006 a discipline hearing panel ordered that Richard Luke Coglon be suspended for one month, effective May 1, 2006, and pay costs of \$20,000. (Mr. Coglon is a former member who has applied for reinstatement and must still undergo a reinstatement hearing. The discipline proceedings relate to a period during which he was a member.)

Mr. Coglon had appealed to the BC Court of Appeal a finding by the Benchers that he was guilty of professional misconduct, but he later abandoned the appeal, and the matter was returned to the hearing panel for determination of penalty.

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Discipline hearing reports are available in the Regulation & Insurance/Regulatory Hearings section of the Law Society website. Case summaries will be included in a future issue of the *Discipline Digest*.

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