The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

Law firm regulation: Filling in the details

by Herman Van Ommen, QC

MY FIRST PRESIDENT'S View column offers an opportunity to update readers on an important initiative that I have been closely involved with. When *Benchers' Bulletin* published a story about law firm regulation at the end of 2015, as chair of the task force spearheading that initiative, I was about to tour the province with other task force members to gather input from lawyers. Throughout 2016 we gathered valuable information and in November we presented an interim report to the Benchers that offers a preliminary outline of what law firm regulation in BC might look like.

The approach outlined in the interim report would not be a rules-based licensing system enforced by complaints and investigations. Rather, it would be a proactive system outlining best practices, monitored through self-assessment. Each firm would be required to have infrastructure in place outlining best practices in areas the firm oversees, such as confidentiality, conflict of interest and file management. Through self-assessment, firms would determine whether appropriate and effective policies and procedures were in place to ensure high standards in these areas of firm responsibility.

In the approach outlined in the report, the Law Society would play a key role by offering help to those firms that seek assistance in developing appropriate management structures. The Law Society would develop model policies in the areas identified above, which firms could choose to adopt or modify. These model policies would be of particular benefit to small firms and sole practitioners who do not already have policies in place or do not have sufficient resources to develop them on their own.

A recurring concern we heard from lawyers during the past year was that law-firm regulation would add another layer to what many feel is already a demanding regulatory system. As envisioned in the interim report, however, law firm regulation is not another layer of regulation, but rather is an entirely different approach to regulation. It will not replace the current regulatory scheme for lawyers, but it should significantly reduce our reliance on enforcement of rules.

This proactive approach to regulation marks a historic innovation in the legal profession in Canada, and BC is not alone. Nova Scotia is currently conducting a pilot project along somewhat similar lines, and similar self-assessment approaches are also under consideration as part of developing law firm regulation in Ontario, Saskatchewan, Manitoba and Alberta.

Each firm would be required to have infrastructure in place outlining best practices in areas the firm oversees, such as confidentiality, conflict of interest and file management. Through self-assessment, firms would determine whether appropriate and effective policies and procedures were in place to ensure high standards in these areas of firm responsibility.

Last fall's interim report marked an important milestone by offering a preliminary outline of what law firm regulation might look like in BC. We continue to fill in the details of that outline, and more work remains to be done. The task force is currently setting up focus groups to obtain feedback on the recommendations contained in the report, and we intend to continue to engage with the profession as we proceed through this initiative. I'm hoping we'll have firm recommendations to present to the Benchers by the end of the year.❖

BENCHERS' BULLETIN

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

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

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

Issues of the *Bulletin* are published online at www.lawsociety.bc.ca (see About Us > Law Society News and Publications).

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Barbara Cromarty elected in Kootenay County by-election

Barbara Cromarty was elected a Bencher for Kootenay County in the March 15, 2017 by-election. Her term begins immediately and ends on December 31, 2017.

A partner with Ghilarducci & Cromarty in Trail, Cromarty practises civil litigation — primarily family law, company law, conveyancing, and wills and estates. She attended UBC, completing her law degree in 1992, and was called to the bar in 1993.

Cromarty has served as an appeal board tribunal member with the Health Professions Review Board, a mentor for young female lawyers with the CBA Women Lawyers Forum mentoring program, a governor of the Law Foundation, and as secretary-treasurer, vice-president and president of the Kootenay Bar Association.

She has a broad range of volunteer experience in the community, including serving as a governor of Selkirk College, director of Kootenay Friends of Children Foundation, and director, secretary and chair of Trail Family & Individual Resource Centre Society.

In her election statement, Cromarty committed to "contribute to the achievement of present and future goals, the development of strategic initiatives and actions aimed at successfully achieving the Law Society's strategic plan."❖

Access the unbundling toolkit for lawyers and join the BC Family Law Unbundling Roster

THE FAMILY LAW unbundling toolkit is now available on the Courthouse Libraries' website. It includes sample retainer agreements, best practices, frequently asked questions and other resources. If you are a family lawyer who offers unbundled services, sign up here to join the BC Family Law Unbundling Roster, which lists family lawyers and paralegals willing to perform discrete tasks for clients.

The Law Society encourages lawyers to learn about unbundled legal services and consider offering these services.❖

Bringing the Equity Ombudsperson program in-house

A UNANIMOUS DECISION to bring the Equity Ombudsperson program in-house was made at the January 27, 2017 Benchers meeting. All agreed that the Equity Ombudsperson program is vitally important to the legal profession in BC.

The in-house Equity Ombudsperson will continue to assist lawyers, articled students and law students in considering various (formal and informal) options for dealing with discrimination or sexual harassment in the legal profession, in the same way that the external Equity Ombudsperson currently responds to grievances. The decision to bring the program within the Law Society contemplates operating it through the Practice Advice department, which is structured to ensure complete confidentiality and separation from other Law Society departments.

The recommendation to bring the program in-house was made by the Equity and Diversity Advisory Committee, following a thorough review that examined ombudsperson programs in other Canadian law societies and other comparable organizations. Extensive consultations with equity, diversity and other organizations serving the legal profession in BC were also conducted as part of the review. Feedback from program users was collected through anonymous online surveys.

Equity and diversity are central to the Law Society's mandate, and the Equity Ombudsperson is an integral aspect of the Society's holistic approach to improving equity and diversity in the legal profession. The in-house model is intended to decrease isolation of the role, facilitate collaboration on preventative education initiatives, enhance publicity, reduce administrative inefficiencies, and improve tracking and statistical reporting.

The goal is to bring the program in-house by fall 2017. In the meantime, the program will continue to be provided using the external model, through services provided by Anne Chopra (see the Law Society website at Support and Resources for Lawyers > Lawyer Wellness & Personal Support).

For further information about the pending changes to the Equity Ombudsperson program, please contact Andrea Hilland: ahilland@lsbc.org or 604.443.5727.❖

The Law Society's vision for legal aid

by Timothy E. McGee, QC

THE LAW SOCIETY'S mandate is to uphold and protect the public interest in the administration of justice, which includes preserving and protecting the rights and freedoms of all persons. The unfortunate reality is that many individuals do not have equal access to the justice system, often due to a lack of means and resources. Legal aid plays an important role in addressing this inequality.

The Law Society has a long history of involvement in legal aid, including helping to establish legal aid in the 1950s. Until recently, however, it lacked a principled vision on what legal aid means in our society and what it should achieve.

At their March 3 meeting, the Benchers voted unanimously to adopt the vision set out in the report, *A Vision for Publicly Funded Legal Aid in British Columbia*. The report is the culmination of months of hard work, thoughtful analysis and discussion with stakeholders by the Legal Aid Task Force, chaired by Bencher and Second Vice-President Nancy Merrill, QC. The vision in the report concludes that legal aid is an essential part of the proper administration of justice in a free and democratic society.

This issue of *Benchers' Bulletin* features an overview of the report. I hope that it will help readers understand the Law Society's position and inspire them to think of ways that the legal profession can engage in the pursuit of the vision. It will also guide the Law Society's efforts to better promote legal aid and to engage with government, stakeholders and the public.

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

Thanks to our 2016 volunteers

THE BENCHERS THANK all those who volunteered their time and energy to the Law Society in 2016. Whether serving as members of committees, task forces or working groups, as Professional Legal Training Course guest instructors or authors, as fee mediators, event panellists or advisers on special projects, volunteers are critical to the success of the Law Society and its work.

For more on volunteer opportunities, and a list of people who served the Society in 2016, see About Us > Volunteers and Appointments.❖

Launch of new Law Society website

On Monday, March 6, the Law Society transitioned to a new website, featuring a clean, modern look, more efficient navigation, updated content and accessibility on mobile and tablet devices. If you have inquiries about the new website, contact Communications.

In brief

REMINDER – RULE OF LAW ESSAY CONTEST

The Law Society is inviting all BC Grade 12 students and any secondary school students who have taken, or are currently enrolled in, Law 12 or Civic Studies 11 to submit an essay on the following topic:

> How would you explain the rule of law to a fellow student who has never heard the term before? You might discuss why the rule of law is important, and how it impacts our daily lives. You might also discuss any current events involving threats to the rule of law.

The winning entry will be awarded a $1,000 prize, and the runner-up will receive a $500 prize. The first-place winner and runner-up will be invited to an awards presentation event at the Law Society in Vancouver. Deadline for submissions is **April 10, 2017**.

The Rule of Law and Lawyer Independence Advisory Committee launched the annual essay contest in 2015 for BC secondary school students to reaffirm the significance of the rule of law and to enhance students' knowledge and willingness to participate actively in civic life.

For further details, download the information sheet and submission guidelines from our website at Our Initiatives > Rules of Law and Lawyer Independence > Secondary School Essay Contest.

TWU UPDATE

The Supreme Court of Canada has granted the Law Society of British Columbia leave to appeal the decision of the BC Court of Appeal in *Trinity Western University v. The Law Society of British Columbia*. The background to this matter and materials are available on our TWU accreditation web page.

JUDICIAL APPOINTMENTS

Terry Vos was appointed a master of the BC Supreme Court in Vancouver.

Nancy Adams was appointed a judge of the Provincial Court in Vancouver.

Lynal Doerksen was appointed a judge of the Provincial Court in Cranbrook. Judge Doerksen was a Bencher for Kootenay County from 2013 until his appointment to the Bench.

Cathaline Heinrichs was appointed a judge of the Provincial Court in Kelowna.

Brian Hutcheson was appointed a judge of the Provincial Court in Courtenay.

Peter LaPrairie was appointed a judge of the Provincial Court in Surrey.

Cassandra Malfair was appointed a judge of the Provincial Court in Prince George.

Susan Mengering was appointed a judge of the Provincial Court in Prince George.

Patricia Stark was appointed a judge of the Provincial Court in Surrey❖

Unauthorized practice of law

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

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

* * *

During the period of December 1, 2016 to March 22, 2017, the Law Society obtained six undertakings from individuals and businesses not to engage in the practice of law.

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

Andrew James Smith

Andrew James Smith, of Victoria, doing business as **Options Legal Services**, **Options Legal Solutions** and **Options Business Solutions**, consented to an injunction prohibiting him from engaging in the practice of law, from representing himself as a lawyer and from commencing, prosecuting or defending proceedings in court on behalf of others. The Law Society alleged that Smith offered to provide various legal services for a fee, including offering to give legal advice, to prepare agreements and court documents and to perform legal research. The Law Society was awarded its costs of $2,600.

John Frederick Carten

On December 1, 2016, Mr. Justice Robert W. Jenkins granted an injunction prohibiting former lawyer **John Frederick Carten**, of Vancouver, from engaging in the practice of law, from representing himself as a lawyer or as otherwise capable or qualified to engage in the practice of law, and from commencing, prosecuting or defending proceedings in any court on behalf of others. The Law Society alleged that Carten had breached the *Legal Profession Act* by offering legal services on Craigslist, by representing a party in the Supreme Court for a fee and by prosecuting litigation on behalf of others in the Supreme Court and the Court of Appeal. In addition, the Law

continued on page 8

In memoriam

WITH REGRET, THE Law Society reports the passing of the following members during 2016:

John Baigent
James A. Berringer
Norman A. Cuddy
Erin Dance
Maria L. Davidson
Lloyd P. Duhaime
Dudley Edwards, QC
George T.H. Fuller
George W. Gordon
Frank Karwandy, QC
Julian T.W. Kenney
Michael J. Kuta
Rebecca M. Murdock
D. Lawrence Page
Ronald E. Piters
Michelle B. Pockey
James M. Poyner
Alice E. Ratzlaff
Gary L.F. Somers, QC
Stanley G. Turner
Stanley Wong ❖

FROM THE LAW FOUNDATION

Appointments to Law Foundation board

The Law Foundation's new board members, left to right: Lindsay LeBlanc, Deanna Ludowicz, QC, Judge Len Marchand and Judge Patricia Bond.

THE LAW FOUNDATION welcomes four new members appointed by the Law Society to its board in 2017.

Lindsay LeBlanc graduated from the University of Victoria in 2005 and is a partner at the law firm of Cox, Taylor. LeBlanc represents clients on property and land development issues, municipal and administrative litigation, corporate structuring, wills and estates, and foreclosure matters. She is a member of the BC Supreme Court Rules Committee and the University of Victoria board of governors, and has served as a director of other boards, including the Canadian Bar Association Aboriginal Law Student Scholarship Trust Committee and the Island Sexual Health Society. She represents Victoria County on the board.

Deanna Ludowicz, QC, a graduate of the University of Ottawa law school, has practised law since 1992, running a general practice in the Grand Forks area since 1994. Ludowicz was a member of the Legal Services Society board of directors from 2009 through 2014. She has also been active in the CBA as an elected representative on the Provincial Council, chair of the Professional Development Committee (2013-2015), and a member of the Membership and Sections Standing committees. Ludowicz was named Queen's Counsel in 2013. She represents Kootenay County.

Judge Len Marchand is a member of the Okanagan Indian Band. He graduated from the University of Victoria law school in 1994, subsequently articling and practising civil litigation at Fulton & Company LLP in Kamloops from 1995 to 2013. He took a special interest in historic child abuse claims in institutional settings, and represented many residential school survivors. In 2005, Judge Marchand helped negotiate, and was a signatory to, the Indian Residential Schools Settlement Agreement, the largest class action settlement in Canadian history. He served on the Oversight Committee for the Independent Assessment Process and on the Selection Committee for the Truth and Reconciliation Commission. He was appointed to the Provincial Court in 2013 and sits in Kamloops. Judge Marchand has had the privilege of presiding at the First Nations Court in Kamloops. He represents Kamloops County.

Judge Patricia Bond was appointed to the Provincial Court in 2012 and sits in Surrey. Before that, she was a partner with North Shore Law LLP in North Vancouver. Judge Bond was a Bencher of the Law Society, a governor of the Trial Lawyers Association of BC, and one of the founding members of the board of directors of the BC Parenting Coordination Roster Society. She contributed to various family law manuals and courses, and volunteered her time to support legal aid initiatives through various committees, projects and clinics. Judge Bond represents Westminster County.❖

The Law Society adopts a vision for publicly funded legal aid in BC

IN MARCH THIS year the Benchers adopted a vision for publicly funded legal aid in British Columbia and approved recommendations aimed at fulfilling that vision. The decision ensures that the Law Society will take a leadership role in discussions about legal aid in the province.

The vision is based on the premise that, in a society based on the rule of law, rights and freedoms may be compromised if people do not have equal access to the justice system. Due to inequality of resources within society, some people will require assistance to enforce their rights or understand their responsibilities. Legal aid is therefore a crucial part of the proper administration of justice.

The Law Society's involvement in legal aid stems from its legislated mandate to uphold and protect the public interest in the administration of justice by, among other things, preserving and protecting the rights and freedoms of all persons.

In the 1950s, the Law Society and the Canadian Bar Association, BC Branch participated in establishing organized legal aid in the province. In 1979, the Legal Aid

Society and the Legal Services Commission were merged to form the Legal Services Society, which today continues to administer legal aid in the province. Following funding cuts and growing demand for services, by 2001 the Legal Services Society faced a deficit of $6.6 million and in 2002 the provincial government reduced funding by nearly 40%. These funding cuts required the Legal Services Society to reduce its workforce by 74% and replace its 60 branch offices with seven regional centres.

Significant concerns have been expressed about the provision of legal aid in BC since that time. The Law Society, mindful of its mandate, has identified a strategic priority to once again take a leadership role in publicly funded legal aid.

The Legal Aid Task Force was convened in September 2015 and immediately started laying the groundwork for formulating such a vision. More than a year of work culminated in a colloquium in November 2016, at which more than 40 justice system stakeholders were invited to comment on the draft vision. Among attendees were the province's Attorney General, other government representatives, the province's Chief Justice, members of the judiciary, representatives of the province's law schools, representatives of non-profit legal organizations, a broad range of lawyers and other representatives of the province's legal community.

The task force drew on feedback from that colloquium to draft the report and vision that were approved by the Benchers at their March meeting this year.

In approving the report, the Benchers accepted its two recommendations that the Benchers:

- adopt the vision drafted by the task force and articulated in the report; and
- establish an advisory committee that will help them realize that vision.

The report acknowledged that, in helping the Benchers realize the vision for publicly funded legal aid, the committee would advise the Benchers on how best to advance the three key elements that informed the Legal Aid Task Force's original mandate to:

- identify ways the Law Society could promote and improve lawyer involvement in delivering legal services through legal aid plans;
- identify ways to enhance Law Society leadership concerning legal aid; and
- develop the best methods for engagement with other organizations to coordinate the efficient use of resources in improving publicly funded legal aid.

The vision proposed by the task force contemplates that arriving at a shared understanding of the role of legal aid in society and the services it should provide will inform a meaningful discussion about proper funding for legal aid and would remove funding levels from arbitrary benchmarks.

The vision proposed by the task force contemplates that arriving at a shared understanding of the role of legal aid in society and the services it should provide will inform a meaningful discussion about proper funding for legal aid and would remove funding levels from arbitrary benchmarks. The vision recognizes, among other things, that:

- All people, regardless of their means and without discrimination, should have access to legal information and publicly funded professional legal advice to assist them in understanding whether their situation attracts rights and remedies or subjects them to obligations or responsibilities.
- In particular, the most disadvantaged and vulnerable people in our society are entitled to additional publicly funded legal services, up to and including legal representation before courts, tribunals, and alternative dispute resolution methods inclusive of the legal advice necessary.
- Indigenous communities must be consulted to develop culturally appropriate systems for the delivery of professional legal services and legal aid.

The full report can be downloaded from the Law Society's website at Our Initiatives > Legal Aid and Access to Justice > Legal Aid Initiatives.❖

Unauthorized practice of law ... from page 5

Society alleged that Carten improperly referred to himself as counsel and a lawyer on websites.

Robert William Louie

On March 2, 2017, **Robert William Louie**, of Vancouver and Creston, consented to an order prohibiting him from representing himself as a lawyer, practising law and commencing, prosecuting and defending a proceeding in court on behalf of others. The Law Society alleged that Louie (who has a law degree, but is not a lawyer) falsely represented himself as a lawyer to two individuals and offered legal services to them for a fee. One of the complainants alleged that he paid Louie $2,700 to commence an action in federal court. Louie did not, in fact, commence the action, despite accepting the funds. The other complainant alleged that Louie offered to assist her with a family law matter, to prepare and file a separation agreement with the court, and to represent her in a workplace dispute for a fee. As a term of the court order, Louie must pay restitution to the complainants totalling $3,400 and the Law Society's costs of $1,600.❖

The Law Society's Vision for Public Legal Aid in British Columbia

WHEREAS

The rule of law is the foundation of our democratic society. Every person must have the opportunity to understand how the rule of law affects their daily lives. Legal Aid is an essential service necessary to ensure all persons have that opportunity and understand its effect and to access our justice system.

RECOGNIZING

Access to justice is a fundamental human right, and:

(a) Our democratic society cannot exist without the rule of law, and the rule of law depends on all people having meaningful and effective access to justice,

(b) not all people in society have the ability or means to access justice,

(c) Indigenous people are uniquely and historically disadvantaged in their access to the legal system and legal aid, and

(d) publicly funded legal aid plays an essential role in achieving the goal of access to justice,

the Law Society of British Columbia's vision for publicly funded legal aid is as follows:

The purpose of legal aid should be to:

a) support the ability of all people to access justice and specifically to protect the rights of the most disadvantaged and vulnerable members of society;

b) assist people in the exercise of those rights, to obtain appropriate remedies, and to enjoy the benefits of professional legal advice concerning those remedies,

c) advise people about the obligations and responsibilities imposed on them as members of a democratic society, subject to the rule of law [see Commentary 1].

All people, regardless of their means and without discrimination, should have access to legal information and publicly funded professional legal advice to assist them in understanding whether their situation attracts rights and remedies or subjects them to obligations or responsibilities.

In particular, the most disadvantaged and vulnerable people in our society are entitled to additional publicly funded legal services, up to and including legal representation before courts, tribunals, and alternative dispute resolution methods inclusive of the legal advice necessary for proper access to justice. Provision of these services may also need to take into consideration the financial means of the individual and the nature of the matter. [See Commentary 2.]

The access to these additional services should seek to balance the ability of the person to access similar services in the free market with due consideration of the potential impact of the situation on the person's life, liberty or security. [See Commentary 3.]

It is essential that consultation with Indigenous Communities develop culturally appropriate systems for the delivery of professional legal services and legal aid. Consultation and collaboration with Indigenous Communities, the courts, social and other government services is necessary. The Federal Government has a heightened responsibility to ensure such services are adequately supported with both policies and funding.

Legal Aid should provide professional legal services that cover the following:

(a) Matters that involve the state against the individual where the liberty or security of the individual is at risk [see Commentary 4];

(b) Children whose security of the person is at risk [see Commentary 5];

(c) People with mental or intellectual disabilities that impair their liberty, safety, or access to government or community services [see Commentary 6;]

(d) Family law in circumstances where the physical, economic, or emotional security of a family member is at risk [see Commentary 7];

(e) Persons disadvantaged due to circumstances of poverty [see Commentary 8];

(f) Immigrants and refugees [see Commentary 9].

COMMENTARY

Commentary 1: Diagnosis / issue identification

These publicly funded professional legal services should enable the individual to be aware of the relevant services, whether within the formal institutional justice system or within the alternative dispute resolution systems. These services should include information about both in-person assistance and technological platforms for in-person or remote access. This diagnostic service should be universal.

Commentary 2: Representation and advice

For the enumerated categories of subject matter, individuals who qualify based on a financial means test should have access to the services of a lawyer or a non-lawyer legal service provider who is able to provide legal advice and/or representation as may be appropriate.

Commentary 3: Eligibility

The public must have confidence in the legal system and delivery of legal aid. The limits of funding will, of necessity, limit the scope of the services that can be provided. Any financial means test or limit on the provision of legal services must balance principles and pragmatism. The principles that guide eligibility must not be governed solely by budgetary considerations. This may require consideration of sliding scales of eligibility based on the nature of the issue.

Commentary 4: Government action against the individual

It is fundamental to the rule of law that government and its agents are subject to laws. To ensure this, it is necessary that individuals whose life, liberty or security of the person is at stake as a result of state action have access to a certified, regulated and independent legal professional in order to defend any action brought by the state. In order for the justice system to work, it is necessary for those facing a criminal charge to have access to a full answer and defence and that requires that the professionals who provide the defence receive fair compensation for their services.

Commentary 5: Children at risk

Children are among the most vulnerable members of our society and in circumstances where children's safety, survival or development is at risk it is essential that adequate legal and social services be available. Canada has ratified the United Nations Convention on the Rights of the Child, which requires that "State Parties shall ensure to the maximum extent possible the survival and development of the child" (Article 6.2). The provision of professional legal services is critical when a child requires access to the services directly and not through the intermediation of a parent or guardian.

Commentary 6: Mental or intellectual disabilities

People with mental or intellectual disabilities are among the most neglected and vulnerable members of the community in need of the provision of professional legal services when they face matters dealing with their liberty, safety, or access to government or community services. It is essential such services operate in an appropriate mental health network that treats the underlying cause and not merely the particular symptom or manifestation of the illness or disability. As with other areas that merit coverage, this is first and foremost a social problem. Where legal issues intersect with social problems it is essential that there be cooperation between the legal and social work communities and also between the Ministry of Justice and the various other government ministries that have oversight of health and social portfolios.

Commentary 7: Family law

Matrimonial discord and separation can trigger family violence, emotional and financial crises. Family members have a right to be protected from physical and emotional harm. Vulnerable family members have a right to financial support. Family members in need must be able to access legal assistance in order to obtain such protection and financial support. Without legal assistance there may be no meaningful access to justice, with the consequence that vulnerable family members, particularly children, are at risk of physical harm, emotional trauma and economic insecurity. This in turn can lead to additional draws on already scarce community resources such as police, healthcare, mental health services, social assistance, women's shelters, housing subsidies and homeless shelters. As well, the slide into poverty that often accompanies family separation is difficult to overcome.

Legal aid coverage for family law services should provide the necessary assistance for vulnerable family members in obtaining protection for them from family violence, obtaining basic necessities of life through enforceable support orders and agreements, and in achieving some degree of stability in housing, schooling and employment.

Commentary 8: Financially disadvantaged persons

Poverty law services should be included in legal aid and developed to address current needs in society. The purpose of the services should be to facilitate access to essential legal and social services for people who are living in poverty and are unable to access such services. This should include coverage for matters that will reduce the likelihood of the individual becoming, or remaining, trapped in a cycle of poverty.

Commentary 9: Immigrants and refugees

Legal aid services should be available for immigrants and refugees in need. It is particularly important to provide legal assistance for immigrants and refugees at risk of deportation or involuntary return to a country where such a return places the individual's life or security of the person at risk.

Practice advice

by Barbara Buchanan, QC, Practice Advisor

CLIENT CONFIDENTIALITY – THINK TWICE BEFORE TAKING YOUR LAPTOP OR SMART PHONE ACROSS BORDERS

Lawyers cannot necessarily rely on a claim of privilege or confidentiality to protect clients' confidential information when crossing borders. Border officials may ignore such protestations and a trip may be ruined or cancelled. Accordingly, lawyers should carefully consider whether they might be risking exposure of clients' confidential information to government officials when crossing borders and take appropriate steps before travelling.

In recent months there has been a flurry of news reports about U.S. border officials asking foreigners entering the U.S. to voluntarily disclose their social media accounts (e.g., Twitter, LinkedIn, Facebook, Instagram) as a terrorism prevention measure. In addition, there has been discussion that the U.S. administration may require foreigners to provide their social media account passwords and cellphone contacts. Individuals have reported that border officials have demanded their phone passwords, read their text messages and downloaded their computer hard drive content.

Rule 3.3-1 of the *Code of Professional Conduct for British Columbia* requires that a lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship. The lawyer must not divulge the information except in accordance with the limited exceptions in the Code. The ethical rule of confidentiality is wider than privilege (all privileged information is confidential, but not all confidential information is privileged). For example, even the fact that a lawyer acts for a client is confidential, as is the client's contact information (which in some cases may be privileged as well).

If a border official accesses a client's confidential information on a lawyer's electronic device, the lawyer is required to immediately notify the Law Society's executive director in writing of all the relevant circumstances (Law Society Rule 10-4).

Lawyers are encouraged to establish a policy within their firms about cross-border travel and discuss their needs with their technology professionals. A safe course is to travel without any confidential client information on electronic devices (unless the client specifically consents). Some firms have separate laptops available for travel. These laptops have no client information and only contain the basics needed for operating.

A Canadian Bar Association resource, *How to Secure Your Laptop Before Crossing the Border* (updated August 2009) provides a number of detailed tips: www.cba.org/Publications-Resources/CBA-Practice-Link/Young-Lawyers/2008/How-to-secure-your-laptop-before-crossing-the-bord. Also see the whitepaper, *Digital Privacy at the U.S. Border: Protecting the Data on Your Devices and in the Cloud*, March 2017, published by the Electronic Frontier Foundation: www.eff.org/wp/digital-privacy-us-border-2017.

POWER OF ATTORNEY – WHAT DO I DO IF AN ATTORNEY ASKS FOR INFORMATION ABOUT MY CLIENT OR FROM MY CLIENT'S FILE?

If you are contacted by a person who says that they are an attorney acting under a power of attorney, and they want confidential or privileged client information from you, take a step back to thoroughly assess the situation. Generally, you must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship. *BC Code* rules 3.2-9, 3.3-1, 3.3-2, 3.3-2.1, 3.3-3, 3.3-5 and 3.3-6 and the annotated opinion from the Ethics Committee (October 2014) can provide some guidance.

You will need to determine, among other things, if the client is capable of providing consent for you to divulge information. If the client is not capable, and the client did not provide clear consent to provide the confidential or privileged information to the attorney, it is not improper to require the attorney to obtain a court order. Remember that the duty of confidentiality is wider than the common law concept of privilege and that the duty continues indefinitely even if others share the same knowledge. See the opinion for details. Consider contacting a practice advisor.

CLIENT ID AND VERIFICATION – RESOURCES AND AUDITS

The client identification and verification rules (Law Society Rules 3-98 to 3-109),

along with the cash transaction rules (Rules 3-59 and 3-70), are an important part of the legal profession's commitment to fight against money laundering and terrorist financing while protecting clients' confidential information.

Are you properly identifying and verifying your client's identity? Would you pass an audit with flying colours? If you're not sure, contact a practice advisor to discuss the requirements but, before doing that, consider viewing the free one-hour Client Identification and Verification Online Course (part 3 of the 2016 Courthouse Libraries BC series, *The Practical Lawyer*). Also, download the Client Identification and Verification Procedure Checklist (updated to September 1, 2016) and read the related frequently asked questions in the Support and Resources for Lawyers section of our website. Don't miss the checklist's two appendices that include a commissioner or guarantor's sample attestation form for the verification of a client's identity in Canada and a sample agreement with an agent for the verification of a client's identity outside of Canada and the agent's attestation form.

BEWARE OF A CHANGE IN PAYMENT INSTRUCTIONS AND "PHISHING"

Lawyers have been cautioned to beware of a change in payment instructions on a client's file, email "phishing" and other scams: see the fraud alert, Fraudsters again target lawyers disbursing trust funds (January 19, 2017 Notice to the Profession), Scams against lawyers – What are they and what can you do about them? (Practice advice, Fall 2016 *Benchers' Bulletin*) and the Fraud Prevention section on our website (includes the bad cheque and other social engineering scams) for more details and information on how to set up systems to protect yourself. If you are about to pay out trust funds and the payment instructions change, check thoroughly to ensure that the new instructions are legitimate. A scammer may have accessed the email account of an individual privy to the transaction and assumed that person's identity. The scammer may email or phone the law firm and provide instructions to wire the funds to an unintended destination. A BC law firm was recently targeted and it is likely that the scam will continue as the potential payoff for a scammer is large.

Keep on top of new variations of scams that the Law Society notifies the profession about and that continue to develop — such as a fraud in which phony email instructions are sent directly to a client, not the lawyer (noted in the February 2017 E-Brief). Make it a priority to read the email notices sent out by the Law Society.

FUNDS THAT ARE FIDUCIARY PROPERTY

The Law Society Rules were changed in June 2016 so that funds that are fiduciary property may now be held in a trust account, provided that the trust accounting rules are followed (Rules 3-55(6), 3-60(4) and 3-61(3)). The Rule 1 definitions state:

> **"fiduciary property"** means
>
> (a) funds, other than trust funds, and valuables for which a lawyer is responsible in a representative capacity or as a trustee, if the lawyer's appointment is derived from a solicitor-client relationship,
>
> but does not include
>
> (b) any funds and valuables that are subject to a power of attorney granted to the lawyer if the lawyer has not taken control of or otherwise dealt with the funds or valuables;

If you have questions about the accounting rules related to fiduciary property, contact the Trust Assurance department at trustaccounting@lsbc.org or 604.697.5810.

WHAT TO DO IF YOUR LAPTOP OR BRIEFCASE IS STOLEN

Practice advisors sometimes receive calls from panicked lawyers who have just had their laptop or briefcase stolen and do not know what to do. If your laptop or briefcase has been stolen or if you have otherwise lost control of your client's records, consult your security breach response plan. A "record" includes accounting records and supporting documents (trust account, general account, cash transaction and billing records), client identification and verification information and documents, metadata associated with electronic records, and client file documents, whether in paper or electronic form.

If you do not have a security breach response plan, below is a short list of procedures to consider (not a substitute for a detailed plan). Determine the applicability of the procedures and their order in context.

1. Establish your response team, its responsibilities and its priorities, including a communication plan to staff and others.
2. Contact your IT professionals to identify the problems, contain damage (they may have immediate tips) and advise you as to whether any client or banking records are compromised.
3. Report to your insurers immediately. If you bought cyber liability or other insurance to respond to a security breach, coverage may include assistance from data breach consultants and others regarding required steps, including procedures in this list. Contact the Lawyers Insurance Fund at the Law Society to see if you should also be making a written report to them.
4. If bank accounts and credit cards are at risk, contact those organizations. Consider recommendations and take steps to contain damage.
5. Contact a practice advisor if you have questions regarding your professional responsibilities (604.669.2533).
6. Report to the Law Society's Executive Director, c/o Manager, Intake and Early Resolution in writing at professionalconduct@lsbc.org (as required under Rule 10-4, Security of records). Do not use your work email to report unless your IT professional says that it is safe.
7. Figure out your legal obligations, including any obligations to third parties (e.g., other counsel, parties, the court). You may need to consult outside counsel.
8. Inform your clients if their information has been compromised or lost. It may be appropriate to recommend that the clients get independent legal advice. If the information obtained from the breach includes social insurance numbers, credit cards, driver's licence information, bank information or health cards, the clients may be exposed to identity fraud and loss.
9. You may need to set up a telephone

hotline to answer questions if the breach involves many clients.

10. Recreate client files as best as possible if information is missing.
11. Report to the police (this step is optional, but may be a requirement by some insurers).
12. Draft or update a security breach response plan using what you have learned.

TAX ALERT FOR LAWYERS ACTING FOR PURCHASERS OF PRIVATE MANAGED FOREST LAND

BC Assessment has informed the Law Society that two aspects of tax law have caused concern for some purchasers of private managed forest land.

Purchasers of private managed forest land may be responsible for paying:

- taxes on timber harvested by the vendor; and
- exit fees if the property is removed from managed forest class.

Detailed information regarding managed forest land classification and assessment is available on BC Assessment's website; see Understanding Managed Forest Classification in BC and How Managed Forest Land is Assessed.❖

Freeman-on-the-land and OPCA litigants

THE LAW SOCIETY has previously brought the freeman-on-the-land, sovereign citizen or "de-taxer" movements to lawyers' attention, but it is worthwhile to do so again. Members of these groups subscribe to a conspiracy theory that includes the belief that they are bound by statutes only if they consent to these laws. They believe that they can declare themselves independent of the government and the rule of law.

In his decision in *Meads* v. *Meads*, 2012 ABQB 571, Chief Justice John D. Rooke described their techniques, approaches and arguments as "organized pseudo-legal commercial arguments" (OPCA). *Meads* has been cited 120 times on CanLII. In *Fearn* v. *Canada Customs*, 2014 ABQB 114, Mr. Justice W.A. Tilleman stated that "the courts of this entire continent sing in chorus." None of these OPCA arguments have ever succeeded.

In support of their frivolous and vexatious proceedings, they draft "pseudo-legal documents," including "Notices of Understanding and Intent and Claim of Right," "Notices of Default Judgment and Irrevocable Estoppel by Acquiescence" and miscellaneous liens. The documents typically bear fingerprints, postage stamps, blood seals, references to the Uniform Commercial Code (of the United States) and other attributes that are never seen on legitimate Canadian legal documents. They waste valuable court time on their arguments.

In his reasons in *Fearn*, the judge stated:

> In Classical Athens Mr. Fearn would be classified as a "sycophant," an unjustified accuser who perverts the legal system, and who were the subject of fines and prosecution. The Court of Queen's Bench is busy with legitimate claims. Neither the courts nor their clerks should be flooded with this stack of illusory evidence as if they were important court precedents or true reflections of constitutional law. In reality, they are illogical and incomprehensible misrepresentations of the law.

These sovereign citizens or freeman-on-the-land are presently attempting to have lawyers and notaries notarize their pseudo-legal documents in the belief that this grants their documents a greater degree of authenticity or effect. We advise lawyers to recognize OPCA litigants and recommend that lawyers refuse to notarize their documents and not further their attack on legitimate court processes, authority and staff.❖

Services for lawyers

Law Society Practice Advisors

Dave Bilinsky
Barbara Buchanan, QC
Lenore Rowntree
Warren Wilson, QC

Practice advisors assist BC lawyers seeking help with:

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

Tel: 604.669.2533 or 1.800.903.5300.

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

◆

Optum Health Services (Canada) Ltd. – 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** at tel: 604.687.2344 or email: achopra1@novuscom.net.

Conduct reviews

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

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

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

CONFLICT OF INTEREST

A lawyer acted in a conflict of interest contrary to rule 3.4-1 of the *Code of Professional Conduct for British Columbia* by defending his landlady against a claim in which he had a personal interest as a co-defendant; concurrently acting both for and against a strata corporation in unrelated matters; acting for the strata corporation, an opposing party, by taking instructions from it in relation to the claim; and being a member of the strata council that provided those instructions.

The lawyer leased office space from a person who owned a unit in a strata corporation. The owner was involved in a dispute with the strata corporation over the use of common property, and the lawyer acted for her in the dispute, including writing to the strata council. In response to the letter, the strata corporation and the president of the strata council commenced a defamation action against the lawyer, his law corporation, the unit owner and others. The lawyer acted for himself, his law corporation and the owner in the defamation action while at the same time acting for the strata corporation in two separate and unrelated matters. The lawyer subsequently became a member of the strata council and took instructions to remove it as a party to the defamation action.

The lawyer admitted to a conduct review subcommittee the existence of the conflict of interest but he did not, initially, fully accept or appreciate the nature of the relationships and the fundamental conflicts that were operative in the relationships. In the course of the discussion, he fully admitted and claimed to understand and appreciate his errors. The subcommittee recommended the lawyer read the *BC Code* in its entirety, view two programs on the Code that can be found on YouTube, review the Model Conflict of Interest Checklist and read the Supreme Court of Canada judgment in *Canadian National Railway Co.* v. *McKercher LLP*, 2013 SCC 39. The subcommittee felt that the lawyer had failed to respond to prior remedial and disciplinary actions by the Law Society and explained its concern to the lawyer. The subcommittee also explained the concept of progressive discipline, and that the lawyer should be aware that if he fails to improve his conduct, a citation may be issued for any further misconduct. (CR 2017-01)

JURICERT AND LAND TITLE ACT ELECTRONIC FILING REQUIREMENTS

During a compliance audit of a lawyer's practice, it was discovered that the lawyer disclosed his Juricert password to his conveyancers and permitted them to gain access to the electronic filing system to: (a) file documents in the Land Title and Survey Authority, contrary to the Juricert agreement, Part 10.1 of the *Land Title Act* and rule 6.1-5 of the *Code of Professional Conduct for British Columbia*; and (b) withdraw funds from trust to pay property purchase taxes, contrary to Law Society Rule 3-64(8).

The lawyer's practice was to review all documents before they were submitted to the Land Title Office and then authorize one of two conveyancing clerks to affix his digital signature to the documents and submit them electronically. The lawyer explained that he was present when the conveyancer affixed his digital signature, but the conveyancer entered his password into the system. Since the audit, he has created a new password that is known only to him, and he has modified his procedures.

The lawyer admitted that his conduct was in breach of the statutes, rules and Juricert agreement. He informed a conduct review subcommittee that he misunderstood the requirements of the Law Society Rules and the *BC Code* regarding his Juricert password. The subcommittee discussed with the lawyer the policy reason behind the rule and Code provisions, which is to create a regime whereby only persons who are regulated by and subject to the rules and disciplinary procedures of the Law Society have the ability to use Juricert to affix digital signatures. This minimizes the potential for the system to be used to effect fraudulent transactions. The subcommittee stressed the importance to the public of safeguarding the integrity of our land title system and how an essential part of that process is to control and limit who has access to the electronic filing system. The subcommittee accepted that the lawyer did not knowingly breach his professional obligations and the lawyer has instituted procedures that strictly comply with all requirements of the *Land Title Act*, the Law Society Rules, his Juricert agreement and the Code. (CR 2017-02)

DISRESPECTFUL CONDUCT

Over a two-year period, a lawyer acted in a disrespectful, confrontational and loud manner toward two Crown counsel in or around

a courthouse, contrary to one or more of rules 2.1-4, 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*. The lawyer's conduct included screaming, shouting, leaving an unprofessional heated phone message and calling into question Crown counsel's professional judgment. A conduct review subcommittee advised the lawyer that his uncivil and disrespectful conduct was inappropriate. His repeated pattern of conduct was discourteous and had a negative impact on the Crown counsel to whom the conduct was directed. The lawyer appeared to fully appreciate the inappropriateness of his conduct and expressed his shame and remorse. He met with both lawyers to apologize for his conduct and appeared to have restored his relationship with them. He acknowledged that he needs to listen better and not respond immediately or impulsively. The subcommittee advised him that lawyers can behave civilly and still be highly effective. The subcommittee urged the lawyer to modify his behaviour and become a role model to other lawyers in both word and civil conduct. (CR 2017-03)

FACILITATING BREACH OF COURT ORDER

Two lawyers, both partners in a law firm who primarily practise family law, facilitated their firm's client to act contrary to a court order by registering a law firm mortgage encumbering title to the client's matrimonial home, contrary to rules 2.13, 2.2 and 5.1-2 of the *Code of Professional Conduct for British Columbia*. The court order prohibited the parties from disposing of, encumbering or otherwise dealing with family assets without the written consent of the parties or a further court order. One of the lawyers was consulted by the associate who had conduct of the client's file and consented to the court order on the client's behalf. The lawyer did not make adequate inquiries of the associate before suggesting, signing and registering the mortgage in favour of the law firm against the client's matrimonial home to secure legal fees owed, contrary to the court order. The second lawyer did not recall any discussions with the associate about the file or the court order. Both lawyers first learned of the court order after receiving correspondence from the client's husband's lawyer and conveyancing solicitor advising that the mortgage needed to be removed to permit the sale of the home. The mortgage was immediately discharged. Separate conduct reviews were held for the two lawyers before the same conduct review subcommittee. The lawyers both admitted that they should have made inquiries as to whether an asset restraining order existed. The subcommittee advised the lawyers that their conduct fell below that which is expected of lawyers. They had a responsibility to the client, the associate and the court not to facilitate a breach of the court order to secure legal fees. The lawyers accepted full responsibility for their conduct and have taken appropriate steps to ensure this does not occur again. (CR 2017-04 and 2017-05)

BREACH OF UNDERTAKING

On four separate files, a lawyer disbursed Insurance Corporation of British Columbia settlement funds for payment of disbursements and legal fees prior to the release being signed and returned to ICBC as requested by an undertaking, contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia*. In all four instances, the lawyer's firm disbursed a part of the settlement funds to pay legal fees and disbursements prior to an executed release being returned to ICBC. The undertaking breaches were waived by ICBC. The trust ledger showed cheques being issued to clients and third parties prior to the return of the executed release; however, the funds did not leave the trust account until after the release was signed and returned to ICBC. The breaches, occurring over a two-year period, were discovered during a Law Society compliance audit.

A conduct review subcommittee advised the lawyer that the conduct was inappropriate because it breached the plain wording of the undertaking provided by ICBC regarding the release and disbursement of the settlement funds. The obligation of a lawyer to comply with undertakings is recognized by the courts and Law Society hearing panels as a fundamental obligation, and a breach of an undertaking is a departure from the standard of conduct expected of lawyers. The lawyer admitted the breaches of undertaking and was notably distressed and concerned that his behaviour had fallen below the standard expected. The lawyer explained the protocols and procedures he had implemented at his firm to ensure no recurrence of breaches. The subcommittee made additional recommendations, including that the lawyer: (a) review carefully the provisions of the *BC Code* regarding undertakings; (b) personally review all correspondence addressed to him to identify potential undertakings and not rely on staff to recognize same; and (c) review or subscribe to any Continuing Legal Education Society courses, other webinars or professional development materials regarding undertakings. (CR 2016-06)

FAILURE TO REPORT JUDGMENTS AND JURICERT OBLIGATIONS

A lawyer appeared before a conduct review subcommittee to discuss his conduct in: (a) failing to notify the executive director of the Law Society of three unsatisfied monetary judgments against him and his proposal for satisfying such judgments, contrary to Law Society Rule 3-50; and (b) disclosing his Juricert password to his assistant and permitting her to gain access to the electronic filing system to: (i) file documents in the Land Title and Survey Authority, contrary to his Juricert agreement, Part 10.1 of the *Land Title Act* and rule 6.1-5 of the *Code of Professional Conduct for British Columbia*; and (ii) withdraw funds from trust to pay property purchase taxes, contrary to Law Society Rule 3-64(8). The subcommittee advised the lawyer that his conduct was inappropriate, not only because it contravened the Rules and the *BC Code*, but also because it is fundamental to the profession that lawyers who have judgments filed against them advise the Law Society about the judgment and how they will satisfy the judgment so that the Society is aware of a member's financial difficulty. The lawyer was also apprised of the seriousness of disclosing his Juricert password to his assistant. He was advised that the disclosure of Juricert passwords by lawyers was becoming more frequent,

despite ample notification to the profession by the Law Society of the need for confidentiality and the obligation not to share the password with anyone (including assistants). Using a Juricert password is akin to swearing an affidavit. The lawyer is now fully aware of the rules described above, the consequences of violating these rules and the principle of progressive discipline. (CR 2017-07)

CLEARING AGED TRUST BALANCES

During a compliance audit, it was discovered that a lawyer improperly transferred residual client balances in six client matters totalling $370.24 to his firm's general account, contrary to Law Society Rule 3-64. The misconduct occurred without the lawyer's knowledge or instruction. The actions in effecting these transfers were attributed entirely to the lawyer's then legal assistant who, on one day in May 2013, without instruction or knowledge by the lawyer, prepared fictitious disbursement accounts and trust cheques for presentation to, and approval by, the lawyer. Following the audit and discovery of the inappropriate transfers, prompt review and remedial action were taken by the lawyer to rectify all errors and return the funds to the proper parties. The lawyer signed the trust cheques authorizing the transfer of the small amounts to the firm's general account without having conducted a proper review of the circumstances. The lawyer admitted that, despite his legal assistant having initiated the action, the responsibility was entirely his. In all six instances, the funds were returned to the clients.

A conduct review subcommittee explained that funds entrusted to a lawyer belong to the client and can only be properly disbursed as authorized by the client. In failing to make the appropriate enquiries when signing the six trust cheques, the lawyer failed to abide by these obligations. The lawyer explained the following protocols and procedures he implemented at his firm: (a) increase the frequency of trust reconciliations to every two weeks in an effort to identify any issues promptly; (b) check earlier to determine if trust funds delivered to clients are cashed; (c) obtain bank details for all client files in order to return trust funds directly to clients' bank accounts to avoid a failure by clients to cash trust cheques; (d) insist on presentation of an account and the actual file by staff for review in advance of authorizing trust cheques; and (e) increase vigilance in reviewing and signing trust cheques. In addition, the subcommittee encouraged and supported the work of the lawyer to continue educating and overseeing the work of staff and to reduce his workload so that increased vigilance and oversight were possible. (CR 2017-08)

FAILURE TO RESPOND TO OPPOSING COUNSEL AND INCIVILITY

While acting for a client in a matrimonial litigation matter, a lawyer: (a) failed to respond in a timely matter to opposing counsel regarding correspondence related to signing and returning four court orders, contrary to rule 7.2-5 of the *Code of Professional Conduct for British Columbia*; (b) failed to attend court on two occasions; and (c) communicated to his client about opposing counsel in a manner that was offensive and inconsistent with the proper tone of a professional communication from a lawyer, contrary to rule 7.2-4 of the *BC Code*. A conduct review subcommittee advised the lawyer that his conduct was inappropriate in several regards.

Rule 7.2-5 of the *BC Code* requires a lawyer to answer with reasonable promptness all professional letters and communications from other lawyers that require an answer. The same provision obligates a lawyer to be punctual in fulfilling all commitments. Further, in 2012, the Ethics Committee concluded that, in the absence of a valid objection, lawyers have a positive duty to sign court orders that have been granted. The lawyer explained he could not locate the correspondence or orders from opposing counsel in his files. He advised the subcommittee that his failure to respond was not intentional and he had no objection to signing the orders. The orders were signed when opposing counsel brought them to a court hearing. The lawyer subsequently changed his office systems regarding receipt of correspondence.

The lawyer confirmed to the subcommittee that he had missed two court appearances and that he was extremely embarrassed. A hearing date had been put over for several months, and as the lawyer believed the hearing was not likely to proceed, he did not diarize the date. Despite his expectations, the hearing proceeded. The lawyer acknowledged that not putting the hearing date in his calendar, based on his assumption, was wrong and inadvisable. The second missed court appearance was due to a traffic accident that delayed his arrival at the courthouse. The lawyer accepted responsibility and has taken steps to ensure that missing a hearing date never happens again.

After one of the court hearings, the lawyer sent a lengthy text message to his client that included comments critical of opposing counsel. Without the lawyer's knowledge, the client forwarded the text message to his sister. After a dispute arose between the client and his sister, she forwarded a package of documents, along with the text message, to the complainant. The lawyer acknowledged that the tone and language of the text message was inexcusable. He had sent the text message while his emotions were high and his feelings of frustration and anger were aggravated by continuing health concerns. The subcommittee stated that confidential communications to clients must be professional in tone and content and avoid offensive and unprofessional language. The subcommittee advised the lawyer that anyone can get frustrated or upset in dealing with a difficult manner. While it is good to have a courteous relationship with counsel generally, the true test of civility is to remain courteous even when one feels that courtesy is not being reciprocated. Lawyers must avoid making harsh and ill-considered criticism of other lawyers. The lawyer stated that the text message was uncharacteristic of him and advised that he had not described other lawyers in similar terms. The lawyer accepted at the outset of the conduct review that his behaviour had been wrong. He accepted responsibility for his conduct and has taken steps to address each of the matters at issue to ensure his conduct would not be repeated. (CR 2017-09)

FAILURE TO PAY PRACTICE DEBTS

A lawyer failed to promptly meet her financial obligations in relation to her law practice and failed to effectively communicate in a timely manner with the creditor, contrary to rules 7.1-2 and 7.2-5 of the *Code of Professional Conduct for British Columbia.* The lawyer failed to pay the accounts of a chartered accountant retained to prepare her 2014 and 2015 trust reports. She ignored the creditor's inquiries and telephone messages and failed to follow through on at least two promises to make instalment payments. The lawyer explained that she had hoped to be able to pay but she had to pay an increased insurance premium, which was onerous for her. A conduct review subcommittee advised the lawyer that the failure to pay a basic practice debt for over two years and to communicate appropriately is contrary to the expected standard. The reputation of the legal profession and the functioning of the justice system suffer when lawyers blatantly disregard their obligations to pay practice debts and fail to communicate with those to whom the debts are owed. It was apparent to the subcommittee that the lawyer failed to appreciate the consequences of her conduct or take responsibility for her actions. She

continued on page 23

Credentials hearing

Law Society Rule 2-103 provides for the publication of summaries of credentials hearing panel decisions on applications for enrolment in articles, call and admission and reinstatement.

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

APPLICANT 14

Hearing (application for enrolment): July 27 and 28, 2016

Panel: Tony Wilson, Chair, Lois Serwa and Donald Silversides, QC

Decision issued: December 7, 2016 (2016 LSBC 44)

Counsel: Gerald Cuttler for the Law Society; Craig Dennis, QC and Jaclyn Vanstone, articled student, for Applicant 14

BACKGROUND

In June 2015 Applicant 14 submitted an application for enrolment in the Law Society Admission Program. Because that application included disclosure of an allegation of academic misconduct while she had been a student at Golden Gate University School of Law, the Law Society ordered a credentials hearing.

The allegation of academic misconduct was that, while Applicant 14 was writing an examination at Golden Gate University, she had continued writing after students had been instructed to stop working. Applicant 14 explained that she had only been entering identification information on the covers of exam booklets. The hearing panel concluded that the academic misconduct itself was technical and minor in nature and did not constitute evidence of present bad character, and that Applicant 14's response to the question on the enrolment application therefore does not indicate bad character.

The panel also considered a 2003 Hong Kong civil judgment against Applicant 14 regarding unpaid rent. The panel considered a Moral Character Determination Application Applicant 14 had submitted to the State Bar of California in 2012, in which she acknowledged the outstanding debt but denied there was any civil action or civil judgment outstanding against her. Applicant 14 explained to the hearing panel that she had answered as she had because the landlord's failure to respond to multiple attempts to contact them indicated the landlord no longer wanted to collect the debt, and she also believed the applicable Hong Kong statute of limitations had elapsed.

The panel found that at the time Applicant 14 completed the Law Society's enrolment application, the Hong Kong judgment was not outstanding against her and that her answer to the enrolment application question was therefore not evidence of bad character.

The panel also considered whether Applicant 14's responses to questions in the enrolment application about her employment history were accurate and complete. Applicant 14 explained that she had not reported two positions in her employment history because they were unpaid. She had also declared she had never been discharged from any employment. Applicant 14 explained that her employment with a Vancouver law firm had concluded at the end of a fixed-term contract. The panel accepted Applicant 14's explanations and found that her failure to include the volunteer positions and the termination of her employment with the law firm as part of her employment history was not evidence of bad character.

DECISION

The panel was satisfied that Applicant 14 was of good character and repute and that she was fit to become a barrister and a solicitor of the Supreme Court. Her application for enrolment as an articled student was granted.❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Kevin Alexander McLean
- Susan Margaret Ben-Oliel
- Ronald Wayne Perrick
- Leonides Tungohan
- Lawyer 16
- Michael John Butterfield
- William Terrence Faminoff
- Kerri Margaret Farion

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

KEVIN ALEXANDER McLEAN

Vancouver, BC

Called to the bar: August 27, 2010

Not in good standing: January 1, 2015

Ceased membership: April 10, 2015

Disbarred: June 29, 2015

Discipline hearing: September 23, 2014 (facts and determination)

Panel: A. Cameron Ward, Chair, Anna Fung, QC and Robert Smith

Decision issued: December 16, 2014 (2014 LSBC 63)

Counsel: Alison Kirby for the Law Society; no one appearing on behalf of Kevin Alexander McLean

Review date: September 16, 2015

Review board: Tony Wilson, Chair, Don Amos, Lynal Doerksen, John Hogg, QC, Patrick Kelly, Dean Lawton and Donald Silversides, QC

Decision issued: March 15, 2016 (2016 LSBC 10)

Counsel: Leonard Doust, QC for the Law Society; no one appearing on behalf of Kevin Alexander McLean

FACTS

A citation was issued against Kevin Alexander McLean alleging that he failed to pay four invoices in a timely manner and failed to respond to communications from the vendor regarding payment of those invoices.

McLean hired a company to provide reporting services to him. The company delivered to McLean four invoices for its services between June and August 2013. Between September and October 2013, the company emailed McLean five times to request payment for the invoices. The company made a complaint to the Law Society at the end of October 2013.

When the Law Society wrote to McLean about the complaint in November 2013, he sent an email to the company saying he would only pay one of the invoices and his clients would pay the other three. The company emailed McLean two weeks later to follow up and request payment.

By December 30, 2013, six months after the first invoice was issued, McLean had paid all four outstanding invoices.

DETERMINATION

McLean provided no explanation for his failure to pay his practice debts promptly and respond to the company, other than expressing he was very busy. There is no evidence that he was in financial difficulty, that he had not received the invoices or correspondence, or that he was unaware of his obligations to pay the debts.

The panel considered previous similar decisions, but determined that those cases involved conduct that was much more egregious than McLean's. While lawyers have the duty to answer with reasonable promptness, the panel also stated that the Law Society does not require a standard of perfection of lawyers in their obligations to respond. McLean responded to the company with delays of 17 and 20 days. The hearing panel found that that did not constitute a marked (or pronounced, glaring or blatant) departure from the standard expected of lawyers.

The panel found McLean's conduct did not constitute professional misconduct and dismissed the citation. The Law Society applied for a review of the decision of the hearing panel.

DECISION OF THE REVIEW BOARD

The Law Society submitted that the panel committed several errors in its determination, including failing to consider McLean's conduct as a whole, mischaracterizing a "marked departure" from the conduct expected of lawyers, requiring the conduct to be as egregious in nature as in previous decisions involving unpaid practice debts, and attaching weight to unproven and irrelevant findings of fact.

McLean did not attend the review board hearing. He submitted an application for an order that the Law Society produce all complaints made since its inception that involve the subject matter of this review. He also requested to review these materials as fresh evidence, to adjourn the hearing until 14 days after he receives the information to provide submissions, and special costs in his favour.

The review board dismissed the application. Complaints are confidential. McLean did not meet the test for introduction of fresh evidence, and the fresh evidence was irrelevant. Finally, it is impractical and nearly impossible to require the Law Society to search its records for all complaints involving this subject matter since its incorporation in 1884.

The review board examined all instances and circumstances of McLean's delay in responding to the company to determine whether it constituted professional misconduct. His auto-responses, repeated requests for copies of invoices previously sent, repeated failure to respond and his delay in dealing with the company only after the Law Society had become involved demonstrated that his communications were inadequate.

The review board emphasized that this was not a case where a lawyer had simply not paid an account within 20 days. If that were professional misconduct, the Law Society's discipline process could be used as a collection agency for creditors. In the present case, the company complained to the Law Society as a last resort to deal with a lawyer who engaged in a pattern, over four to six months, of not paying his accounts and not providing substantive responses regarding the overdue accounts.

The review board did not accept the hearing panel's interpretation of the "marked departure" test, which it said created a higher standard than previously applied in Law Society discipline cases.

McLean submitted that there was no precedent for finding of professional misconduct in the circumstances of this matter and that was fatal to this case. The review board rejected his argument, citing that it would be impossible to find first-time professional misconduct in any circumstance if that argument applied. McLean alleged that the Law Society's proceedings against him resulted from malice. The review board found no evidence for his claim.

The review board quashed the decision of the hearing panel and found that McLean had committed professional misconduct. The review board referred the matter back to the hearing panel for disciplinary action.

On April 10, 2015, McLean ceased to be a member of the Law Society. The hearing panel retained the jurisdiction to discipline a former member for misconduct that occurred when the person was a member of the Law Society, pursuant to sections 1 and 38 of the *Legal Profession Act*.

On June 29, 2015, a separate discipline hearing panel, ruling on a matter pertaining to an unrelated citation, ordered that McLean be disbarred on the basis of ungovernability.

McLean has appealed the decisions of the hearing panel and review board to the Court of Appeal.

SUSAN MARGARET BEN-OLIEL

Vancouver, BC

Called to the Bar: September 2, 1994

Discipline hearing: September 1, 2016

Panel: Martin Finch, QC, Chair, Ralston Alexander, QC and Linda Michaluk

Decision issued: November 28, 2016 (2016 LSBC 42)

Counsel: Carolyn Gulabsingh for the Law Society; no one appearing on behalf of Susan Ben-Oliel

FACTS

The Law Society received two separate complaints regarding Susan Ben-Oliel in February 2016. The Law Society sent multiple letters by mail and email to Ben-Oliel seeking a response but received no reply.

Ben-Oliel's lawyer contacted the Law Society on April 27, 2016, and the Law Society asked him to request certain information from his client. On May 30, 2016, he said he had not received instructions from Ben-Oliel.

The Law Society sent a letter by mail and email to Ben-Oliel stating that, if a response was not received, the matter would be referred to the Chair of the Discipline Committee to consider issuing a citation. Ben-Oliel and her lawyer sent no further response to the Law Society.

DETERMINATION

Ben-Oliel did not attend the hearing. The panel was troubled by Ben-Oliel's indifferent response to the discipline process. The Law Society must have cooperation from lawyers in the pursuit of its statutory mandate to govern the profession in the public interest.

The panel observed that Ben-Oliel appeared to have purposely disengaged from the profession while apparently continuing to practise. A message confirming the seriousness with which this misconduct is viewed must be communicated.

The panel found that the repeated failures of Ben-Oliel to respond to the Law Society's enquiries constitute a marked departure from the standard expected of lawyers and amounts to professional misconduct.

DISCIPLINARY ACTION

The Law Society sought a suspension, as Ben-Oliel had a previous conduct record of nearly identical circumstances. These matters were the second and third citations involving failure to respond that have proceeded to hearing in approximately four months.

The hearing panel agreed that this was an appropriate case for progressive discipline. The panel ordered that Ben-Oliel:

1. be suspended for four months;
2. pay costs of $1,296.91; and
3. provide a complete and substantive response to the Law Society's enquiries.

RONALD WAYNE PERRICK

North Vancouver, BC

Called to the bar: May 17, 1971

Review date: September 15, 2016

Review board: Gregory Petrisor, Chair, Jeff Campbell, QC, Gavin Hume, QC, Dean Lawton, QC, Laura Nashman, Lance Ollenberger and Sandra Weafer

Decision issued: November 29, 2016 (2016 LSBC 43)

Counsel: Mark Bussanich for the Law Society; Ronald Wayne Perrick appearing on his own behalf

BACKGROUND

In its decision on September 8, 2015, a hearing panel accepted Ronald Wayne Perrick's admission of professional misconduct in his failure to serve his client in a conscientious, diligent and efficient manner and his failure to reply promptly to correspondence from opposing counsel.

The panel also found a fundamental failure to provide any meaningful service to his client. It was significant that a master reduced Perrick's fee from $3,866.96 to $500 and that the client launched a negligence suit against him.

The panel considered Perrick's previous discipline record in ordering that he be suspended for 30 days and pay costs of $19,315.81 (facts and determination 2014 LSBC 39; disciplinary action 2015 LSBC 42; Winter 2015 discipline digest).

Perrick sought a review of the hearing panel's decisions.

DECISION OF THE REVIEW BOARD

Perrick stated he wished to withdraw admissions made in the discipline hearing. He said he would not have made the admissions if he had known the hearing would result in a suspension, and he suggested that the admissions were not consistent with the evidence.

The review board found that the hearing panel considered the admissions along with other extensive evidence and did not treat his admissions as determinative. The facts and determination hearing concluded in June 2014, and Perrick did not make proper applications to withdraw admissions since then. The review board found that there had been no information put forth that would support permitting the withdrawal of admissions at that stage of the proceedings.

Perrick's first ground of review was that one of the Benchers involved in authorizing the citation, Herman Van Ommen, QC, was in an alleged conflict of interest. Van Ommen was Chair of the Discipline Committee at the time it directed the citation, and his wife's law firm was involved in litigation with Perrick and his wife.

The review board found that, although Perrick was aware of Van Ommen's role in the Discipline Committee, he did not raise the conflict of interest issue in any aspect of the hearing, other than a passing reference. The review board dismissed this ground of review.

The second ground of review related to whether the hearing panel erred in its decision on facts and determination by failing to consider certain evidence such as the conduct of opposing counsel, Perrick's client and the client's subsequent counsel. The review board determined that the evidence does not undermine the conclusion reached by the hearing panel, which was firmly supported by the evidence.

The third ground of review was that the hearing panel erred in its decision on disciplinary action in ordering Perrick be suspended for 30 days, particularly in its consideration of his professional conduct record. Perrick submitted that a previous discipline hearing (2014 LSBC 01, 2014 LSBC 03, 2014 LSBC 25 and Fall 2014 discipline digest) should not have been considered as he had filed for a review of that matter and the review has not yet been decided.

The review board determined that, although a hearing decision may be reviewed or appealed, the decision is in force and valid from the time it is rendered. Disregarding a relevant discipline history would be unacceptable given the statutory duties of the Law Society. In this case, the prior disciplinary history revealed a pattern of behaviour of significant concern, and the hearing panel was correct to consider Perrick's prior record.

The review board also found that the hearing panel considered the full circumstances of this case in ordering a 30-day suspension, including the successful civil action against Perrick for professional negligence.

The review board dismissed the application for review and confirmed the decision of the hearing panel.

Perrick has appealed the decision of the review board to the Court of Appeal.

LEONIDES TUNGOHAN

Vancouver, BC

Called to the bar: May 1, 2008

Review: March 16, 2016

Review board: Gregory Petrisor, Chair, Don Amos, Jeff Campbell, QC, J.S. (Woody) Hayes, Carol Hickman, QC, John Hogg, QC and Linda Michaluk

Decision Issued: December 12, 2016 (2016 LSBC 45)

Counsel: Alison Kirby for the Law Society; Leonides Tungohan on his own behalf

BACKGROUND

A hearing panel determined that Leonides Tungohan's failure to report an unsatisfied monetary judgment, his numerous breaches relating to the withdrawal of trust funds and his failure to maintain appropriate books, accounts and records of client funds were marked departures from the conduct expected of lawyers and constituted professional misconduct. The panel ordered that Tungohan pay a fine of $3,000, provide quarterly reports from an accountant to the Law Society, and pay costs of $29,200 (facts and determination 2015 LSBC 02; disciplinary action 2015 LSBC 26; Winter 2015 discipline digest).

Tungohan sought a review of the hearing panel decisions, asking that the decisions on facts and determination and disciplinary action be set aside, that the panel's order with respect to costs be stayed, and that the Law Society pay costs to Tungohan in respect of this review.

DECISION OF THE REVIEW BOARD

The review board agreed with the hearing panel's reasons and decision with respect to facts and determination. The hearing panel was correct in refusing to allow Tungohan to withdraw admissions that he had made in response to a Notice to Admit. The review board heard further evidence and admitted documents from Tungohan, but found that the hearing panel had a substantial body of evidence on which it based its findings.

The review board rejected Tungohan's argument that the *Kienapple* principle applied to his breaches of various accounting rules. The rules were distinct provisions and the elements were not the same. Similarly, Tungohan's argument that his involvement with the Practice Standards Committee and staff precluded disciplinary action was rejected. The Committee was not a disciplinary body, and there was no risk of penalty or sanction.

In its consideration of disciplinary action, the review board agreed that the fine imposed by the hearing panel was appropriate in the circumstances, that the conditions imposed were reasonably necessary to monitor Tungohan's compliance with Law Society accounting rules, and that the order of costs against Tungohan, including the amount, was appropriate.

The review board declined to set aside or vary any of the orders made by the hearing panel.

Tungohan has appealed the decision of the review board to the Court of Appeal.

LAWYER 16

Smithers, BC

Called to the bar: November 30, 2005

Discipline hearing: August 4, 2016

Panel: Bruce LeRose, QC, Chair, Thelma Siglos and Michelle Stanford

Decision issued: December 28, 2016 (2016 LSBC 47)

Counsel: Carolyn Gulabsingh for the Law Society; Henry C. Wood, QC for Lawyer 16

FACTS

In March 2012, Lawyer 16 filed a Notice of Application on behalf of a client, seeking orders for a transfer of court files and for exclusive occupation of the client's family residence. The court action had started in 2010, when the client's previous lawyer had filed a Notice of Family Claim. The claim sought orders dividing the real property and other assets of the client and his former common-law partner.

Shortly thereafter, a lawyer who was helping the opposing party but was not on the record as her counsel, advised Lawyer 16 that the only part of the application that the opposing party consented to was the transfer of files.

On April 23, 2012, a master of the Supreme Court of BC ordered the file transfer, but restrained disposition of the family assets and adjourned application for exclusive occupation until June 4.

On June 4, the court ordered that Lawyer 16's client have exclusive occupation of the family residence.

The following day Lawyer 16 entered notes in his file, indicating that he had seen no response to the 2010 Notice of Family Claim seeking orders dividing the assets of the two parties. Lawyer 16 contacted his client's previous lawyer, who confirmed that she was not aware of any response. She advised Lawyer 16 to search the court registry and, if no response was on file, to proceed by default.

Lawyer 16 filed an application for a final desk order in October 2012, and on December 7, 2012, the court made a final order. The order reapportioned all of the equity in the family residence to Lawyer 16's client and allowed for a court-appointed nominee, rather than the opposing party, to sign the forms required to transfer the family residence into the client's sole name.

DETERMINATION

A hearing panel considered whether it was sharp practice to proceed to default judgment and whether Lawyer 16 was obligated to notify either the opposing party or the lawyer who had helped her previously before seeking default.

The panel found that the Supreme Court Family Rules clearly permit default proceedings when a response has not been filed. The panel also found that proceeding to default was not taking paltry advantage of a slip; the opposing party had had two years to file a response and had not.

No steps were taken to have the default judgment set aside before the real property was transferred into the name of Lawyer 16's client, even though there was a six-month period from the time of the default judgment to the transfer of title.

The hearing panel found that there was no prejudice to the common-law spouse as the default judgment essentially achieved what she originally sought.

The panel concluded that Lawyer 16 did not breach the specific provisions of the *Professional Conduct Handbook* as alleged in the citation when he proceeded to default proceedings pursuant to the Supreme Court Family Rules and that he was not under any obligation to notify the opposing party as a self-represented litigant, or otherwise, given her clear failure to file a response over a period of two years.

The panel dismissed the citation issued against Lawyer 16.

MICHAEL JOHN BUTTERFIELD

Victoria, BC

Called to the bar: December 7, 2001

Discipline hearing: December 14, 2016

Panel: C.E. Lee Ongman, Chair, James E. Dorsey, QC and June Preston

Decision issued: January 19, 2017 (2017 LSBC 02)

Counsel: Randy Kaardal, QC and Rebecca Robb for the Law Society; Peter Firestone for Michael John Butterfield

FACTS

Michael John Butterfield is a sole practitioner who, in 2014, employed a law student to work as an administrative assistant in his practice for the summer. He also employed a paralegal completing her practicum.

In May and June of 2014, Butterfield made inappropriate comments of a sexual nature to the student in 15 instances and once touched her lower back. Several of the comments were made in the presence of the paralegal. His comments affected the office environment for both staff members.

The student kept a journal of her concerns about Butterfield's conduct and reported her concerns to friends and family. She also sought advice from a professor in June, writing in an email that Butterfield was quick to comment on her clothing. There was no one else in the office that she and the paralegal could speak with about Butterfield's comments.

In July 2014, the student raised the issue with Butterfield, advising that his comments about her clothing made her feel uncomfortable. She provided examples of his remarks on her cleavage and how her skirts should be shorter. Butterfield apologized for his conduct and agreed to change his behaviour.

Butterfield made changes to the office policies to prevent repetition of such conduct, such as policies on dress code, sexual harassment, and harassment and bullying. His comments and conduct of a sexual nature stopped. The student resigned in August 2014 on medical grounds. She made a complaint to the Law Society in February 2015, and the citation was issued later that month.

In September 2016, Butterfield actively participated in a five-hour sensitivity training course. He has also written a statement accepting full responsibility for his conduct and expressing regret for his actions.

ADMISSION AND DISCIPLINARY ACTION

Butterfield admitted that he committed professional misconduct by sexually harassing two employees between May 14 and July 14, 2014. His counsel cooperated with discipline counsel to develop an agreed statement of facts and proposed disciplinary action.

The hearing panel accepted his admission and consented to the proposed disciplinary action and ordered him to:

1. pay a fine of $10,000;
2. pay costs of $2,236.25; and
3. complete a sensitivity training course.

WILLIAM TERRENCE FAMINOFF

Vancouver, BC

Called to the Bar: August 1, 1985

Review: March 8 and 9 and May 31, 2016

Review board: Thomas Fellhauer, Chair, Jeff Campbell, QC, J.S. (Woody) Hayes, Sharon Matthews, QC, Steven McKoen, Mark Rushton and Sarah Westwood

Decision issued: January 26, 2017 (2017 LSBC 04)

Counsel: Susan M. Coristine for the Law Society; Michael D. Shirreff and Emilie E.A. LeDuc for William Terrence Faminoff.

BACKGROUND

A hearing panel concluded that William Terrence Faminoff had committed professional misconduct for improper handling of clients' trust funds, failure to maintain proper accounting records, intentional misrepresentation to the Law Society by backdating statements of account, and breaches of undertakings. The panel suspended Faminoff for two months and ordered that he pay $8,430 in costs (facts and determination 2014 LSBC 22; disciplinary action 2015 LSBC 20; Summer 2015 discipline digest).

Both the Law Society and Faminoff sought a review of the panel's decision on disciplinary action.

DECISION OF THE REVIEW BOARD

The Law Society argued that the panel erred with regard to the panel's finding a number of mitigating factors and placing insufficient weight on misleading the Law Society and the need to protect the public interest. The Law Society sought an order that the discipline decision be set aside and an order be substituted suspending Faminoff for six months.

Faminoff submitted that the hearing panel should not have considered a previous discipline matter when deciding disciplinary action. He further argued that fresh evidence should be admitted regarding the Law Society's public communications about this disciplinary matter and the effects of those communications on his reputation. He asked that the two-month suspension be set aside and replaced with an order for a one-month suspension.

The review board considered all the circumstances of the case and disciplinary action taken in other similar cases and concluded that a suspension of two months fell within the appropriate range. It confirmed the penalty decision of a two-month suspension.

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

KERRI MARGARET FARION

Vancouver, BC

Called to the bar: December 4, 2006

Discipline hearing: October 19, 2016

Panel: Dean Lawton, QC, Chair, Dr. Gail Bellward and Richard Lindsay, QC

Decision issued: February 9, 2017 (2017 LSBC 05)

Counsel: Carolyn Gulabsingh for the Law Society; Ross McLarty for Kerri Margaret Farion

FACTS

On May 13, 2016, a hearing panel determined that Kerri Margaret Farion had committed professional misconduct for failure to respond to the Law Society. The panel ordered that Farion pay a fine of $2,500 and costs of $2,494.60, and provide evidence of her attendance at a medical appointment by May 27, 2016 (hearing decision 2016 LSBC 25; Fall 2016 discipline digest.

On June 16 the Law Society issued a citation alleging Farion had failed to meet the order to provide evidence of attending the medical appointment by May 27.

On August 22 Farion's lawyer provided a letter dated August 19 confirming that Farion had attended the medical appointment, and requested an adjournment of the hearing scheduled for August 26.

Farion submitted that she complied with the terms of the hearing panel's May 13, 2016 order, albeit late, and that the penalty associated with her prior failures to comply with orders of the Law Society was sufficient sanction.

DETERMINATION

The hearing panel concluded that replying in a timely way, providing documents and cooperating during Law Society investigations are fundamental responsibilities of lawyers and that failure to do so has the potential to prevent the Law Society from performing its critical role of protecting the public interest.

The panel found that Farion's failure to comply with the order arising from the previous hearing constituted professional misconduct.

DECISION

The panel ordered that Farion:

1. be suspended for 30 days; and
2. pay costs of $2,492.❖

Conduct reviews ... from page 17

did not have any realistic plan for payment of her outstanding debts or current debts as they came due. The subcommittee explained the concept of progressive discipline and that, if she fails to improve her conduct, a citation may be issued in respect of any further misconduct. (CR 2017-10)

INTIMIDATION/INDUCEMENT FOR WITHDRAWAL OF CRIMINAL PROCEEDINGS

A lawyer offered to have his client withdraw a complaint made against an RCMP officer in exchange for the officer entering a stay of proceedings for a traffic violation against the client, contrary to rule 3.2-6(c) of the *Code of Professional Conduct for British Columbia*. In the course of representing the client in a very serious criminal charge, the lawyer also agreed to represent her in unrelated minor traffic offences. The client had made a formal complaint about the conduct of the police officer who had issued the violation tickets. Prior to the trial for the traffic offences, the lawyer spoke with the police officer and proposed that his client would withdraw her complaint against the officer if he would withdraw the traffic tickets. The police officer refused the offer and made a complaint to the Law Society. The lawyer admitted without reservation that his conduct was in breach of rule 3.2-6(c) of the *BC Code*. A conduct review subcommittee advised the lawyer that his conduct was inappropriate and that this kind of conduct erodes the system of justice and causes the public to lose faith in the system and in the legal profession. The lawyer acknowledged his conduct was a serious error in judgment and one he would not repeat. He added that he was caught up in his client's more serious charge and that he was trying to do her a favour and was too focused on that.

The subcommittee pointed out that the police officer felt that the lawyer was trying to intimidate him and lawyers sometimes lose sight of how non-lawyers perceive them. People may feel intimidated or pressured by lawyers, even if this is not the intent. The lawyer agreed that, although he was just trying to do his best for his client, he could see why the police officer felt that way. The subcommittee accepted that the lawyer was not trying to intimidate the police officer. (CR 2017-11)❖

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