The Law Society of British Columbia

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BENCHERS' BULLETIN

Keeping BC lawyers informed

Acting on our principles: Legal aid

by Nancy G. Merrill, QC

MOST PEOPLE THINK of legal aid only when they encounter a legal problem that threatens their well-being and they have no money to retain a lawyer. But years of underfunding legal aid have taken a toll on the range and quality of services that are available for disadvantaged and marginalized members of the public who need advice and representation.

The Law Society has a mandate to protect the public interest in access to legal services and has embraced that responsibility by advocating for a properly funded legal aid system. In *A Vision for Publicly Funded Legal Aid in British Columbia*, we set out a principled approach to addressing the legal needs of low-income British Columbians. Since establishing our *Vision*, the Law Society has given voice to those who have been pushed to the margins. We have formed a coalition with front-line service providers calling for recognition that legal aid requires proper funding. Part of the work of the coalition is to engage with government and the public to increase awareness about the importance of legal aid and to ensure the continued sustainability of legal aid for those who need help.

We discussed at length the impact that inadequate legal aid funding has had for low-income British Columbians and the lawyers who struggle to be able to serve them.

And there has been progress.

At the end of March, the province averted a legal aid service withdrawal by announcing additional funding for legal aid and a commitment to develop a long-term legal aid negotiation framework. In making the announcement, Attorney General David Eby, QC recognized that lawyers who do legal aid work provide services to some of the most vulnerable members of our society, and that the government needs to continue to work with the Legal Services Society to address the historical underfunding of legal aid.

Building on this shift by the provincial government toward what we have advocated in our *Vision*, the Law Society and its coalition partners will be engaging with the public and others to build greater awareness and support for treating publicly funded legal aid as an essential service. In recent meetings with the provincial ministers of finance, social development and poverty reduction, public safety and solicitor general, and attorney general, we discussed at length the impact that inadequate legal aid funding has had for low-income British Columbians and the lawyers who struggle to be able to serve them. Looking to the weeks ahead, the Law Society will make a similar presentation to the legislative committee that is holding consultations on the next provincial budget.

Advocating for a properly funded legal aid system is but one of the ways the Law Society is demonstrating a commitment to being courageous, innovative and responsive. We are also leading the way with initiatives to improve the mental health of the legal profession, to enhance the quality of legal services through law firm regulation, to explore extending the scope of those who can provide legal services and to promote greater equity and diversity in the profession. For details of these and other innovative commitments, I urge readers to visit the Our Initiatives section on the Law Society website.❖

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.

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

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Taking action against money laundering

by Don Avison

THE EXTENT OF money laundering in British Columbia has been much in the news. Recent reports by Peter M. German, QC and an expert panel on money laundering in BC real estate led by Professor Maureen Maloney revealed the impact that money laundering activities have had on the provincial economy, as well as identified the various industries, entities and professionals, including lawyers, who are exploited by money launderers.

For nearly 15 years, the Law Society has been implementing measures to ensure lawyers do not assist with money laundering. In 2005, in response to federal legislation that required reporting the receipt of cash in excess of $10,000, we adopted a rule prohibiting lawyers from receiving $7,500 or more in cash. In 2007, we implemented trust compliance audits to replace our self-reporting regime, ensuring that law firm trust accounts were independently reviewed regularly. Recently, we began to require firms that engage in real estate transactions and wills and estates be reviewed more frequently. In 2008, client identification and verification rules were adopted. And we continue to revise and improve our trust accounting rules and procedures to better ensure that lawyers are not exploited by those seeking to launder their money.

The Law Society also has significant resources and expertise dedicated to investigations and enforcement of rules to prevent illicit money from passing through lawyers' trust accounts. Our team includes 15 auditors, four forensic accountants, two forensic analysts and a former RCMP senior investigator experienced in criminal proceeds of crime investigations, as well as lawyers in investigations, monitoring and enforcement who have experience with money laundering matters. Several of these individuals are certified anti-money laundering specialists, and more are expected to obtain their certification later this year. If there is evidence that a lawyer may have been involved in laundering money, we have the resources and expertise to investigate and take disciplinary action as necessary.

As German noted in his report, the Law Society is "recognized as a best practice among Canadian law societies with respect to AML initiatives." While we appreciate the acknowledgement, it is also clear that there is still work to be done to ensure that our rules and our oversight of lawyers' trust accounts continue to reduce the opportunity for lawyers to be exploited by those laundering money and to increase the ability of lawyers to identify areas of risk and avoid being exploited.❖

FROM THE RULE OF LAW AND LAWYER INDEPENDENCE ADVISORY COMMITTEE

The rule of law and prosecutorial discretion

THE SNC-LAVALIN CONTROVERSY earlier this year brought attention to the state of the rule of law in Canada and in particular the principle of prosecutorial independence. The rule of law requires a well-marked division of powers between the legislative, executive and judicial branches of government. Where the attorney general is both a member of cabinet responsible for developing public policy and legislation (which is inherently based on political considerations) and responsible for federal prosecutions, prosecutorial independence is crucial in order to ensure as much as possible that decisions about who, or who not, to prosecute remain independent from politics and from the executive branch of government.

Prosecutions must be conducted in the public interest, independent of partisan political concerns. Countries without a robust rule of law are at risk that prosecutions may be influenced for improper reasons, such as where those who oppose the government in power are prosecuted for political ends, or where prosecutions against allies of those in power are influenced. The attorney general's oversight function of prosecutions must respect those principles, and the Supreme Court observed in *Krieger v. Law Society of Alberta*, 2002 SCC 65 that it is a constitutional principle that attorneys general act independently when exercising their prosecutorial authority.

The federal government has commissioned a review of the proper role of the justice minister and the attorney general in cabinet, including whether any reform is needed. Clear recommendations with respect to the proper role of cabinet in discussions with the attorney general regarding matters of prosecutorial discretion would help to ensure public confidence in Canada's elected officials, the prosecution service and the justice system.❖

The above is an abstract of an article published by Slaw *on May 21, 2019. Read the full article here.*

In brief

2019 RULE OF LAW LECTURE

The Right Honourable Beverley McLachlin and Richard Peck, QC will lead a lively dialogue on privacy, technology and the rule of law. The lecture will be moderated by Jennifer Chow, QC.

Tuesday, June 25, 6:15 pm
UBC Robson Square Theatre
800 Robson Street, Vancouver, BC

Registration is now full, but you may RSVP to be put on a waitlist. RSVP by email to lecture@lsbc.org.

The event will be webcast live via the Law Society website. Note that attendees may be captured on video.

Attendance at this event provides one hour of continuing professional development credits for lawyers.

QC NOMINATIONS

Nominations for Queen's Counsel are now being accepted. The nomination process closes on Friday, July 19 at 4:30 pm.

For more information about the eligibility requirements, nomination process and applications, visit the Ministry of Justice website.

JUDICIAL APPOINTMENTS

Madam Justice **M. Joyce DeWitt-Van Oosten**, a judge of the Supreme Court of British Columbia, was appointed a justice of the Court of Appeal. She replaces Mr. Justice S. David Frankel, who elected to become a supernumerary judge.

Elizabeth McDonald, counsel at Justice Canada, was appointed a judge of the Supreme Court of British Columbia. She replaces Madam Justice D. Jane Dardi, who resigned effective December 31, 2018.

Tina Dion, QC was appointed a judge of the Provincial Court in the Fraser region with chambers in Port Coquitlam.

Glenn Lee was appointed a judge of the Provincial Court in the Vancouver region with chambers in Richmond. He will be sworn in June 12, 2019.

David Silverman was appointed a judge of the Provincial Court in the Fraser region with chambers in Surrey.❖

Fee Mediation Program offers free mediation to manage fee disputes

Lawyers with mediation experience needed to fill roster of qualified mediators

THE LAW SOCIETY'S Fee Mediation Program is an alternative to the assessment of a lawyer's account by a registrar of the Supreme Court.

The program relies on a roster of qualified mediators, and the Law Society is currently seeking lawyers who are interested in being a part of this important program.

Complaints about fees are one of the more common inquiries received by the Law Society. While the Law Society does not have jurisdiction to order a lawyer to reduce or refund legal fees, the Fee Mediation Program is a way to meet the needs of complainants who would otherwise be turned away.

The program is voluntary and non-binding. Either a lawyer or a client can request mediation by submitting an application to the Law Society. If both the lawyer and the client agree to the process, the Society appoints an independent, neutral mediator from its roster.

The range of amounts that can be mediated is a minimum of $1,000 and a maximum of $25,000.

The program is free for participants, and up to three hours of mediation time is provided, in person or by telephone. Mediators are currently compensated at $300 plus reasonable expenses, which is funded by the Law Society.

In 2017 and 2018, approximately 80 per cent of the fee mediations that were completed resulted in successful resolution.

To ensure the program remains available to anyone who requests it, the Law Society is currently recruiting mediators throughout BC. To be a mediator in the program, lawyers must meet the following qualifications:

- be a member of the Mediate BC Civil Roster; and
- have a minimum of five years' related experience.

If you have questions or would like to be considered for the roster of mediators, please contact Lynne Knights at lknights@lsbc.org. Applicants should send an expression of interest including a summary of their experience with mediation.❖

Articling offers by downtown Vancouver firms to stay open until August 16

ALL OFFERS OF articling positions made this year by law firms with offices in downtown Vancouver must remain open until 8 am on Friday, August 16, 2019. Downtown Vancouver is defined as the area in the city of Vancouver west of Carrall Street and north of False Creek.

Set by the Credentials Committee under Rule 2-58, the deadline applies to offers made to both first- and second-year law students. The deadline does not affect offers made to third-year law students or offers of summer positions (temporary articles).

If the offer is not accepted, the firm can make a new offer to another student within the same day. Law firms cannot ask students whether they would accept an offer if an offer were made, as this places students in the very position Rule 2-58 is intended to prevent. If a law student advises that she or he has accepted another offer before August 16, the firm can consider its offer rejected.

If a third party advises a lawyer that a student has accepted another offer, the lawyer must confirm this information with the student. Should circumstances arise that require the withdrawal of an articling offer prior to August 16, the lawyer must receive prior approval from the Credentials Committee.

For further information, contact Member Services at 604.605.5311.❖

2019 Law and Media Workshop

On April 11, the Law Society and the Jack Webster Foundation hosted over 40 television, radio, print and online journalists for a workshop to refresh and enhance reporters' knowledge of the law as it relates to journalism. Attendees came from across the Lower Mainland. For the first time, the workshop was also livestreamed on the Jack Webster Foundation Facebook page for reporters located across the province.

Each year, the workshop focuses on a scenario that mimics real-life issues and problems that a reporter may encounter. This year's workshop was based on a scenario that engaged participants to consider how to address defamation, responsible communication and the new *Journalistic Sources Protection Act*. Attendees learned how to report an alleged scam without putting themselves or their sources at legal risk, how to access exhibits and how to report on them safely. The expert panel included media lawyer Dan Burnett, QC; Harold Munro, editor-in-chief of *The Vancouver Sun* and *The Province*; Eve St-Laurent, media lawyer with CBC/Radio-Canada; and Rumina Daya, senior reporter with Global BC.

Panellists, left to right: Dan Burnett, QC, Harold Munro, Rumina Daya and Eve St-Laurent.

Once again, feedback from participants was overwhelmingly positive. One hundred per cent of attendees said the workshop improved their understanding of the legal issues regarding reporting and journalism, 97 per cent said the workshop was informative and useful, and 100 per cent said the panellists were excellent or good.

The full video of the workshop is available on the Law Society YouTube channel.❖

Invitation to apply for appointment to hearing panel pools

THE LAW SOCIETY is currently inviting members of the public and non-Bencher lawyers to apply for appointment to the hearing panel pools.

PUBLIC HEARING PANEL POOL

Members of the public are invited to apply for appointment to the pool from which members of hearing panels and review boards are drawn. This is a part-time position, compensated at $350 per hearing day. Reasonable expenses will be reimbursed. Assignment to hearings will be on an as-needed basis. The term of appointment to the hearing panel pool is four years, renewable once.

LAWYER (NON-BENCHER) HEARING PANEL POOL

Qualified practising lawyers are invited to volunteer to serve as members of the hearing panel pool. This is a part-time volunteer position. Reasonable expenses are reimbursed in full. Assignment to hearings will be on an as-needed basis. The term of appointment to the hearing panel pool is four years, renewable once.

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For more information, visit the Law Society website.❖

Mental Health Task Force update

THE MENTAL HEALTH Task Force is making significant strides in its mandate to raise awareness of mental health issues in the legal profession, supporting wellness and reducing stigma. This past year, the Law Society created a new mental health and substance use training program for staff, Benchers and tribunal members, with the goal of improving how the regulator interacts with those who are experiencing such issues. The task force continues to work with the Canadian Mental Health Association on this training program for Law Society employees for times when they may encounter lawyers experiencing mental health or substance use issues in the course of their work. Set to commence in the fall, the courses will respond to several of the education-related recommendations in the task force's first interim report.

Looking toward the months ahead, the task force will be reviewing the Law Society admissions process and other requirements under our rules, to identify stigmatizing language that may act as a barrier to seeking treatment or cause undue stress or other issues. The task force will consult with other committees responsible for policy in areas where issues are found, in order to bring forward recommendations or present options to the Benchers for how to reduce stigma while still ensuring appropriate policies and standards.

In addition to continuing implementation of the 13 recommendations from 2018, in the upcoming months, the task force will be discussing further recommendations for 2019, which may include exploring the potential for developing an alternative discipline process, as well as developing a regulatory best practices framework. The task force invites members of the legal community to send ideas, input or feedback by email to mentalhealth@lsbc.org.❖

FROM THE LAW FOUNDATION OF BC

Appointments to Law Foundation board

THE LAW FOUNDATION is pleased to announce two new appointments to its board of governors as of January 2019.

Mr. Justice **Thomas J. Crabtree** is a Law Society appointee for the County of Westminster. Mr. Justice Crabtree is a graduate of the University of Victoria law school and was called to the bar in 1984. He practised in the Fraser Valley for the better part of 15 years, assisting clients in a broad range of legal matters. In 1999, Mr. Justice Crabtree was appointed to the Provincial Court, where he served the people of British Columbia for just over 19 years. In 2010, Mr. Justice Crabtree was appointed Chief Judge and served in that capacity until his appointment to the Supreme Court of BC in 2018.

Robert Zeunert was appointed by the Law Society for the County of Cariboo. Zeunert has the distinction of being the only lawyer to have lived and practised law in the three major communities of northeast British Columbia: Dawson Creek, Fort St. John and Fort Nelson. He also brings a wide range of experience, having practised in the areas of family law and criminal defence and prosecution. He now runs a business law practice that includes residential and commercial real estate as well as corporate law, serving mainly local family-owned businesses. He currently holds the contract as the local agent with the Legal Services Society, providing a place for people to apply for legal aid in person and to obtain information on services available to them.❖

General meeting reform and referendum

PROBLEMS EXPERIENCED WITH the 2018 annual general meeting highlighted the need to modernize our general meeting rules and procedure.

The first attempt to hold the AGM in October had to be adjourned after a failure of the online voting platform during voting on a resolution to appoint an auditor. When the meeting resumed in December, it required 4½ hours to conclude the business of voting on four member resolutions, as well as amendments, amendments to amendments, and points of order from the floor. A number of those who attended in remote locations expressed difficulty following the proceedings. Several who attended online lost their connection to the server, and some were unable to log in. The length of the meeting and other factors meant that some had to abandon the meeting before they could vote.

In light of these problems, the Benchers asked the Governance Committee to consider possible reforms to general meeting rules. The last comprehensive review of the rules occurred well before the emergence of electronic and internet technology, and so they are due for reconsideration.

The Governance Committee recommended changes aimed at enhancing the ability to vote, retaining the ability to make effective member resolutions and reducing the time needed to hold the meeting. On May 3, the Benchers approved the recommendations and authorized a referendum to be held on the proposed changes.

The proposed changes would provide for:

1. submission and publication of member resolutions prior to a general meeting, similar to the current process;
2. amendments to member resolutions prior to a general meeting, but not during the meeting;
3. advance online voting on member resolutions and amendments; and
4. procedure at a general meeting, not otherwise provided for in the Rules, would not be determined by *Robert's Rules of Order* but by the Chair.

The rules can be amended only in accordance with an affirmative vote of 2/3 of the voting members in the referendum.

RESULTS OF THE REFERENDUM

Voting for the 2019 referendum on proposed general meeting reform took place from May 15 to May 30, 2019 and was conducted online. A total of 2,097 votes were cast for referendum question 1, and 2,079 votes were cast for referendum question 2.

In accordance with s. 12(3) of the *Legal Profession Act*, the result of the referendum authorizes the Benchers to amend the Law Society Rules substantially as proposed in the referendum questions. The Benchers expect to approve revised Law Society Rules at their July meeting in time to conduct the 2019 annual general meeting in accordance with the new rules. ❖

Referendum question	Yes	No	Total votes
1. Are you in favour of the Benchers amending the Law Society Rules to provide for advance online voting prior to general meetings substantially as proposed, along with any consequential amendments necessary to implement advanced online voting at annual general meetings?	1,962 (93.6%)	135 (6.4%)	2,097
2. Are you in favour of the Benchers amending Law Society Rule 1-13(13) to provide that a dispute concerning the procedure to be followed at a general meeting not provided for in the Act or the Rules is to be resolved by the Chair in accordance with applicable common law rather than strictly in accordance with the most recent edition of *Robert's Rules of Order Newly Revised?*	1,801 (86.6%)	278 (13.4%)	2,079

Innovation, the legal profession and regulation

Throughout this history, the Law Society has been entrusted with protecting the public through regulation of the legal profession. Since its incorporation in 1884, the Law Society has continually evolved — adapting to significant changes over time. The pace of change has increased in recent decades. Letter carriers have been overtaken by electronic service delivery. Global financial networks have created new demand for legal services, while the internet and other technologies have opened the door to competition from alternatives, some of which are unregulated, that are available 24 hours a day, seven days a week, to anyone with a computer.

Today, more than ever, rapid technological change, a growing demand for legal services, and the flow of capital across borders and through markets require a regulator capable of keeping pace. Public consumers of legal services need to be confident that the advice and representation they are receiving meet appropriate standards. Those who face barriers to obtaining a lawyer deserve assurances that someone understands what they need and is working to reduce those barriers. The Law Society has proven adept at evolving, innovating and responding to the needs of the public, including by supporting the legal profession in responding to those needs.

CHANGING WITH THE TIMES

Putting the public first

The Law Society has demonstrated its commitment to the public interest throughout its history. A commitment to the public interest inspired the Law Society to play a role in establishing the Law Foundation in 1969. As is well known by lawyers, the Law Foundation is a non-profit organization that receives the interest on clients' funds held in lawyers' pooled trust accounts and distributes the funds as grants for legal aid, legal education, law reform, legal research and law libraries. The Law Society continues to provide funding for the Law Foundation today.

The Law Society also has a long involvement in ensuring that members of the public who are unable to afford a lawyer have access to legal aid. Prior to the 1960s, legal aid in BC was provided pro bono through a volunteer program overseen by the Law Society. In 1964, as the demand for legal advice and representation from individuals with limited means grew, the Law Society negotiated with the attorney general for an honorarium to be paid for criminal cases. In 1970, the Law Society established the Legal Aid Society to administer a legal aid program using funding granted by the Law Foundation using monies raised through lawyers' trust accounts.

In 1979, the provincial government's Legal Services Commission and the Legal Aid Society merged to form what is now the Legal Services Society. Since the merger, the Law Society has maintained an abiding interest in ensuring that legal aid resources are maintained at levels required to enable those with limited financial means to have access to legal advice and representation.

Today, the Law Society continues to show its support for a strong, healthy and publicly-funded legal aid system that meets the needs of British Columbians. In 2017, the Law Society published its *Vision for Publicly Funded Legal Aid in British Columbia*, which recognizes that legal aid is an essential service that helps disadvantaged individuals understand their rights and obligations by providing access to legal information and professional advice. Equal opportunity to acquire such understanding and/or representation services is a fundamental component to the rule of law in a democratic society. Building on the foundation that the vision provides, the Law Society is actively engaging government, the public and the profession to improve awareness and support for legal aid.

Professional Legal Training Course

The Law Society has taken steps to ensure that the public is well-served by ensuring that new lawyers are competent in core areas of law and that they are prepared for the business of law. The Law Society was a pioneer in implementing a training program that prepares recent law graduates for practice. The Professional Legal Training Program (PLTP) began as a pilot project in May 1983 with an emphasis on legal skills training. PLTP was revised and implemented in 1984 as the Professional Legal Training Course (PLTC), a skills-based course rooted in substantive and procedural law that teaches students some aspects of the business of law, including professional responsibility and the handling of typical files.

PLTC was considered the first program of its kind in North America. It replaced the tutorial format of the Bar Admission Program, which consisted of evening lectures and exams on various topics of practice and procedure. At the time, there was substantial debate and study about whether the Law Society should play a role as an educator or merely set standards, but in May 1986 the Benchers affirmed the Law Society's historic role of pre-call training.

Continuing professional development

The Law Society also was a pioneer in ensuring lifelong learning among practising lawyers. In 2009, it was the first Canadian law society to implement mandatory continuing professional development, through a 12-credit-hour annual requirement, which includes at least two hours of ethics and practice management. The CPD program was launched to assure the public that the Law Society was committed to establishing, maintaining and enhancing the

standard of legal practice in the province.

Juricert

Before the Law Society introduced Juricert in 2000, the only option available to lawyers seeking to exchange secure and confidential documents was courier services. It may be lost on newer members of the legal profession who have had technology throughout most of their lives, but Juricert was a radical innovation at the time. It allowed BC lawyers the ability for the first time to exchange securely encrypted electronic information and documents through a service that automatically authenticates the identity and professional credentials of lawyers.

Professional responsibility

In 2002, the regulator of the legal profession stepped up to protect those members of the public who were affected by fraud and forgery in real estate transactions involving disbarred Vancouver lawyer Martin Wirick. Claims by clients totalled $38.4 million. When the trust account irregularities first came to light, the Law Society took extraordinary steps to restore and maintain public confidence in the honour of the legal profession. Claims for lawyer theft were covered by a special compensation fund into which all lawyers paid. Limits were lifted, so that all valid claims were covered.

In May 2004 the special compensation fund was replaced by trust protection coverage, so that the Law Society's compulsory liability insurance policy provides coverage for claims arising from the theft of money or property by BC lawyers relating to their practice of law.

Addressing money laundering

Since the *Proceeds of Crime (Money Laundering) and Terrorism Financing Act* was enacted in 2001, the Law Society has adopted and implemented rules aimed at ensuring that no lawyer, knowingly or unwittingly, facilitates money laundering. In addition to the provision in the *Code of Professional Conduct for British Columbia* specifying that a lawyer must not engage in any activity he or she knows or ought to know assists in dishonesty, crime or fraud, lawyers are prohibited from accepting $7,500 or more in cash and are required to verify the identity of their client when asked to make a financial transaction on their behalf.

The Law Society is currently developing rule amendments that will further strengthen its anti-money laundering measures. One amendment currently under consideration specifies that lawyers may not hold funds in their trust accounts unless the funds are directly related to legal services provided by the lawyer or law firm. This amendment makes explicit a prohibition that was previously covered by broader rules specifying responsible professional conduct and the proper use of trust funds.

WHAT'S NEXT

Licensed paralegals

The Law Society is pursuing innovative approaches to regulation on a number of fronts. In 2014, the Benchers requested an amendment to the *Legal Profession Act* to enable greater flexibility and choice of service providers. In 2018, the provincial government responded by passing legislation that enables a new category of service providers called "licensed paralegals" and by granting the Law Society authority to regulate licensed paralegals to deliver legal services in areas where there is a substantial unmet need and the public would benefit from the provision of those services by licensed paralegals. Earlier this year, a Licensed Paralegal Task Force was struck to consult with the legal profession and others and develop a framework that enhances access and ensures the public is protected through quality legal services.

Law firm regulation

Another innovation under consideration is the regulation of law firms. This would not simply be another layer added to an existing framework, but marks an entirely new approach to regulation. The model that has prevailed for more than a century in BC is to establish rules and discipline lawyers when they violate those rules. Law firm regulation, on the other hand, takes a proactive approach. Under the model currently under consideration, firms would be expected to have policies and procedures in place to ensure problems are identified before they affect clients or lead to complaints. The Law Society, in turn, has a role in supporting firms with resources that enable them to manage many issues themselves.

Futures

At their retreat this June, the Benchers heard from Benjamin Alarie, CEO of BlueJ Legal, Katie Alexander of Thompson Rivers University law school and Shannon Salter, Chair of the Civil Resolution Tribunal. They spoke about Artificial Intelligence and technology-driven solutions, with Alarie stating that "AI won't replace lawyers, but lawyers who use AI will replace lawyers who do not." Recognizing that significant change in the legal profession and the delivery of legal services is expected over the next five to 10 years, the Law Society established a Futures Task Force. The mandate of the task force is to identify what changes are anticipated, consider and evaluate the factors and forces driving those changes, assess the impact on the delivery of legal services to the public, by the profession and on the future regulation of the legal profession in British Columbia.

CONCLUSION

The Law Society has a solid track record of evolving and remaining responsive to the needs of the public and the legal profession. This extends beyond regulatory innovation. The Law Society recognized how online technology can increase participation in our general meetings and elections and is the first law society in Canada to offer online access and voting. Even today, Ontario lawyers wishing to participate in the Law Society of Ontario's general meetings are required to travel to Toronto to attend in person, and elections are still conducted by mail-in ballot. Here in BC, proposed rule changes that respond to the issues some experienced during the 2018 AGM will continue to enhance participation in the future.

In regulation and in governance, the Law Society has constantly sought to improve its effectiveness at ensuring the public is well-served by a competent and honourable legal profession. While it is impossible to predict precisely what the future will bring, it will involve change — sometimes at a rapid pace. The Law Society has proven itself nimble at responding to change. The renewal of a Futures Task Force positions us to keep up with today's rapid pace of change and ensures that the Law Society will respond quickly and effectively. ❖

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

Anti-money laundering cash transaction rule essentials

WITH THE RECENT publication of two government-commissioned reports and the commissioning of a public inquiry,[1] it is clear that money laundering remains a top concern and priority for the provincial government and the public. The Law Society has been implementing and updating anti-money laundering rules since 2004, when the "no cash" rule was first introduced. More recently, the Law Society introduced further measures regarding the handling of funds in order to ensure that lawyers do not fall victim to criminal money laundering schemes. It is essential that every lawyer be familiar with these measures as well as the client identification and verification (CIV) rules and how to comply with them.

1. PRELIMINARY CONSIDERATIONS FOR ACCEPTING CASH

An important question for your law practice is whether to accept cash for legal services. Take this decision seriously. You must ensure that cash is properly accepted and recorded. The Law Society's cash rules are stringent because the use of cash is a method for laundering the proceeds of crime. Lawyers cannot afford to run the risk of accepting cash that may have been obtained or derived from the criminal acts of an unscrupulous client.

Lawyers must be aware of their vulnerabilities, as well as changes in the regulatory and legislative landscape regarding criminal activities and money laundering. It is an offence to possess property obtained by crime (sections 354(1), 462.3(1) and 462.31(1) of the *Criminal Code*). A lawyer owes a duty to the state to maintain the law and not to aid, counsel or assist any person to act contrary to the law (Canon 2.1-1(a) of the *Code of Professional Conduct for British Columbia*).

2. KNOW YOUR CLIENT: THE RULES AND THE RISKS

Before accepting cash, understand the purpose for which the cash would be received (the purpose affects the cash limit restrictions). Conduct your due diligence. Be mindful that the cash rules are but one tool to combat money laundering. Lawyers must do more than comply with the technical requirements of the cash rules. Assess the risks of acting for a client considering such variables as:

- the type of service requested (e.g., high-risk real estate transaction?);
- location or country risk (e.g., weak governance, subject to sanctions?); and
- type of client (e.g., operates a cash-intensive business?).

[1] BC Gov News, Office of the Premier, Government to hold public inquiry into money laundering.

Really knowing one's client and verifying their identity includes knowing their occupation, what their business does, how they make their money, whether a third party is involved who is pulling the strings and the purpose and source of the cash. Ask the potential client probing questions, such as why they want to provide cash, the form of cash (whether it is Canadian or another country's currency and the denominations), how and where they obtained the cash, and why they cannot use a bank account or credit card. Refer to the commentary in *BC Code* rule 3.2-7. Ask yourself whether the answers you are given make sense.

Keep in mind your obligations with respect to the wide definition of "client" in Rule 3-98. Find out if the client actually represents someone else and is acting on that third party's instructions. If so, you may need to verify that person's identity as well and clarify their connection to the legal services.

In some cases, inquire into a client's unexplained source of wealth and get documentary evidence. Take a real estate purchase by an unemployed student, for example. Ask: Is the student's wealth from an inheritance of a deceased parent? If so, you should consider getting documentary evidence (e.g., death certificate, a copy of the will and the grant of probate). Of course, you cannot accept cash toward a real estate purchase unless it is under $7,500 (or, under a proposed rule change, $7,500 or less).

If a potential client is a domestic or foreign politically exposed person (PEP), a family member or close associate of a foreign PEP or the head of an international organization, engage in enhanced due diligence. Consider whether you are dealing with someone who is from a high-risk jurisdiction or a sanctioned country or if their organization or they personally are named on a sanctions list. Refer to sanctions imposed by the government of Canada on specific countries, organizations and individuals. The types of sanctions vary and include the following categories:

- arms and related materials embargo;
- asset freeze;
- export and import restrictions;
- financial prohibitions;
- technical assistance prohibitions;
- related measures.

Watch out for red flags. For example, does it make sense that the client chose you based on your location, size and type of work? Are you the second or third lawyer on the matter? Is the client willing to pay more than your legal services are worth? Is the client seeking to use your trust account without requiring substantial legal services? Is a third party unconnected to the transaction providing funds? Would funds be received from a person in a foreign country who is not a party to the transaction? Would virtual currency (e.g., bitcoin) be used by a person or entity involved in the transaction? Any one of these examples may occur in a legitimate inquiry; however, they are cause for heightened scrutiny. A "competent lawyer" applies intellectual capacity, judgment and deliberation to all functions (*BC Code* rule 3.1-1(f)).

Make a record of your due diligence. Do not accept the cash if, in the course of verifying the client's identity, the client's responses were not satisfactory. In some cases, you may determine that it would be inappropriate to act for the client at all (Law Society Rule 3-109 and *BC Code* rules 3.2-7 and 3.2-8).

Before accepting cash, review Law Society Rules 3-53 (definitions), 3-59 (cash transactions), 3-68(a) (source and form of funds), 3-69 (source of funds) and 3-70 (records of cash transactions) and *BC Code* rule 3.2-7 and commentary (dishonesty, fraud). Know and comply with the CIV Rules 3-98 to 3-109. CIV resources are on the website. Read Law Society publications and relevant Discipline Advisories regarding anti-money laundering and the lawyer's role as a gatekeeper. Keep abreast of rule changes.

All lawyers, but real estate lawyers in particular, are encouraged to read Dirty Money – Part 2, by Peter M. German, QC, and Combatting Money Laundering in BC Real Estate, by an expert panel led by Professor Maureen Maloney, which include findings in relation to the risk to lawyers of being targeted by money launderers. Although lawyers are regulated by the Law Society and do not report clients to the Financial Transactions and Reports Analysis Centre of Canada, its alerts, typologies and guidance, as well as information from the Financial Action Task Force and the Federation of Law Societies of Canada, are also useful.

3. TRUST ACCOUNT ONLY FOR LEGAL SERVICES

Lawyers will recall that in *Re Gurney*, 2017 LSBC 15, Donald Gurney was found to have committed professional misconduct and suspended for moving more than $25 million through a trust account without providing any substantial legal services or making reasonable inquiries about the purpose of the funds.

The foundation for the outcome in *Re Gurney* is *BC Code* rule 3.2-7. Commentary [3.1] of this provision states that a lawyer should make inquiries of a client who seeks the use of a lawyer's trust account without requiring substantial legal services from the lawyer. If a person seeks to use your trust account without requiring substantial legal services in connection with the funds in trust, do not accept the money (Discipline Advisory, Lawyers are gatekeepers, April 10, 2018). A lawyer's trust account must not be used as a client's bank (and not even for you to hold money for your child's soccer team's cookie sale).

Building upon this foundation, and giving effect to the Federation's model trust accounting rule, the Law Society will likely soon amend the definition of "trust funds" in Rule 1 and incorporate a new Rule 3-58.1, which explicitly provides that "funds paid into or out of a trust account must be directly related to legal services provided by the lawyer or law firm." In addition, on completion of the legal services to which the funds relate, a lawyer or law firm must take reasonable steps to obtain appropriate instructions to pay out the funds as soon as practicable. The draft wording for the new Rule 3-58.1 and the draft amendment to the definition of "trust funds" are set out below.

Trust account only for legal services

3-58.1 (1) Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

(2) A lawyer or law firm must take reasonable steps to obtain appropriate instructions and pay out funds held in a trust account as soon as practicable on completion of the legal services to which the funds relate.

The proposed amendment to Rule 1 defines "trust funds" as follows:

> **1** In these rules, unless the context indicates otherwise:
>
> **"trust funds"** means funds directly related to legal services provided by a lawyer or law firm received in trust by the lawyer or law firm acting in that capacity, including funds
>
> (a) received from a client for services to be performed or for disbursements to be made on behalf of the client, or
>
> (b) belonging partly to a client and partly to the lawyer or law firm if it is not practicable to split the funds.

The proposed amendment narrows the definition of "trust funds" so that funds received that are not "directly related to legal services" would not be considered trust funds. This change is meant to aid in prohibiting the use of a trust account for purposes that are not directly related to legal services.

4. WHEN DOES THE CASH TRANSACTION RULE APPLY?

Under the existing Rule 3-59 (Cash transactions), the rule applies when a lawyer engages in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

- receiving or paying funds;
- purchasing or selling securities, real property or business assets or entities;
- transferring funds or securities by any means.

While this is not new, the rule may soon apply to law firms and in-house counsel too. See below.

5. WHEN DOES THE CASH TRANSACTION RULE NOT APPLY?

Rule 3-59(2) sets out limited exemptions to Rule 3-59. For example, the rule does not apply when a lawyer receives or accepts cash from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity.

Some changes to these exemptions are currently being considered by the Benchers and are based on amendments to the Federation's model rule on cash transactions. First, the in-house counsel exemption would be eliminated so that the cash rule would apply to lawyers engaged in activities on behalf of an employer. Second, the Benchers are considering the options for addressing an existing exemption for a lawyer who receives or accepts cash "pursuant to the order of a court or other tribunal." A court order or tribunal order must specifically provide for a cash payment in order for the exemption to apply (2011 LSBC 03).

6. $7,500 CASH LIMIT UNLESS AN EXCEPTION EXISTS

Currently, Rule 3-59 permits lawyers to receive less than $7,500 cash on a client matter, with some exceptions. A proposed rule amendment increases the cash limit by one cent (from less than $7,500 to $7,500) to align the amount with a corresponding amendment to the Federation's model rule. Draft subrule (3) states:

> (3) While engaged in an activity referred to in subrule (1), a lawyer or law firm must not receive or accept cash in an aggregate amount greater than $7,500 in respect of any one client matter.

As one lawyer's experience addressed in this conduct review demonstrates, it will not matter if you misunderstand how the cash limit is applied. You cannot multiply the cash limit when acting for two clients in the same matter:

> In another case, a lawyer accepted over $7,500 in cash from two different clients but with respect to one client matter or transaction, contrary to Rules 3-51.1(1) and (3) of the Law Society Rules then in force (now Rules 3-59(1) and (3)). The lawyer mistakenly believed he was not in breach of the no-cash rule if the cash payments came from two different clients even if the payments were for a single transaction. (CR 2018-10)

Unless one of the subrule (2) exemptions applies, the proposed amendments to subrules (3) and (4) will prohibit a lawyer or law firm from receiving or accepting cash in an aggregate amount greater than $7,500 in respect of any one client matter, unless it is received for "professional fees," "disbursements" or "expenses" in connection with the provision of legal services by the lawyer or law firm. The words in quotations are new defined terms meant to be included in Rule 3-53 *[Definitions]*:

> **"disbursements"** means amounts paid or required to be paid to a third party by a lawyer or law firm on behalf of a client in connection with the provision of legal services to the client by the lawyer or law firm that are to be reimbursed by the client;
>
> **"expenses"** means costs incurred by the lawyer or law firm in connection with the provision of legal services to a client that are to be reimbursed by the client;
>
> **"professional fees"** means amounts billed or to be billed to a client for legal services provided or to be provided to the client by the lawyer or law firm;

For example, if a lawyer pays a third party company for photocopying and binding a client's documents, an e-discovery professional on the client's behalf, a courier company to deliver documents, or for an airline ticket to travel to an examination for discovery, the lawyer would incur a disbursement that the lawyer would bill to the client for reimbursement. Disbursements must be billed at their actual, rather than estimated, costs (Discipline Advisory, Proper recording and billing of disbursements required by rules, August 10, 2012). An example of expenses is costs incurred by a law firm for in-house photocopying (not for photocopying services provided by a third party). The definition of "professional fees" includes a retainer for legal services.

7. RETAINER COMMENSURATE WITH LEGAL SERVICES TO BE PROVIDED

Rule 3-59(4) technically permits a lawyer to accept $7,500 or more in cash for professional fees (including a retainer) for legal services by that lawyer. In my view, however, a large amount of cash is objectively suspicious and should not be accepted by the lawyer or law firm without proper due diligence (see "1. Preliminary considerations for accepting cash" and "2. Know your client: The rules and the risks" above). In the draft change to subrule (4), law firms are included:

> (4) Despite subrule (3), a lawyer or law firm may receive or accept cash in an aggregate amount greater than $7,500 in respect of a client matter for professional fees, disbursements or expenses in connection with the provision of legal

services by the lawyer or law firm.

Also, a cash retainer should be commensurate with the legal services to be provided; it must not be deposited into your trust account as a place for a client to store money (e.g., don't permit a client to deposit $25,000 with you for a $5,000 matter). Your retainer agreement signed by the client could include your firm's policy on cash and detailed information about the client's source of cash (Discipline Advisory, Bills and retainers are frequent source of complaints, December 7, 2011).

The following conduct review summary is an example of cash originally provided as a retainer and a lawyer later using part of the cash for another purpose, improper in the circumstances:

> This lawyer breached Rule 3-51.1 (the no-cash rule) [now Rule 3-59], by accepting an aggregate of $23,000 in cash intended as a retainer, then disbursing some of those funds by trust cheque in settlement of the client's matter. The subcommittee reminded the lawyer that, although there is an exception in the no-cash rule to receive cash of $7,500 or more for professional fees, disbursements and expenses, it is not permissible to then use those funds received in cash for a different purpose … (CR 2011-33)

8. BEWARE OF AGGREGATE AMOUNTS OF CASH

That the rule applies to aggregate amounts deserves to be underscored. Draft Rule 3-59(3) provides that a lawyer or law firm must not receive or accept cash in an aggregate amount greater than $7,500 in respect of any one client matter. The current rule also states an aggregate limit. What does "an aggregate amount" of cash mean? As an example, if a client in a landlord-tenant dispute provides a lawyer with a $3,000 cash payment each month for three consecutive months to pay the client's disputed rent, the lawyer would have improperly received an aggregate amount of $9,000. This is more than the permitted cash limit for this purpose. Below are more examples:

> The conduct review was ordered following a compliance audit that revealed a lawyer had accepted an aggregate of cash of $7,500 or more on one client matter over a period of approximately two years. The lawyer acknowledged he was aware of Rule 3-51.1 [now Rule 3-59], but had forgotten an earlier payment he received in 2008. The lawyer advised he had changed his practice and no longer accepts cash. (CR 2012-09)
>
> A lawyer accepted an aggregate amount of $8,000 cash in relation to one client matter, contrary to Rule 3-51.1 [now Rule 3-59]. The lawyer received funds from or on behalf of his client that were to be forwarded to the Family Maintenance Enforcement Program. The lawyer mistakenly believed that the $7,500 restriction applied to each transaction or payment, not each client matter. (CR 2013-13)

If a lawyer or law firm receives cash at different intervals on a client's behalf, they must track the cash amounts received for the file's duration.

9. WATCH OUT FOR DIRECT CASH DEPOSITS BY CLIENTS OR THIRD PARTIES

Be aware that a client or other person could deposit cash at a financial institution directly into your trust account without your knowledge or consent. Lawyers must check all direct deposits to determine the form of funds received and accurately record the information. If cash was received, you must ensure that you can accept it. Here is a conduct review summary in which a client's direct cash deposit into a lawyer's trust account was over the permitted limit:

> A client deposited $10,000 in cash into a lawyer's bank account at a bank branch in another province to cover a residential conveyance. The lawyer mistakenly believed that [then] Rule 3-51.1(3.3) only applied when he or his staff actually received cash in his office. The lawyer also failed to record the funds in a cash receipt book contrary to [then] Rule 3-61.1(1) and failed to correctly report the transaction on the firm's trust report contrary to [then] Rule 3-72(5) … (CR 2012-63)

10. KNOW THE DIFFERENCE BETWEEN RECEIVING AND ACCEPTING CASH

Rule 3-59 distinguishes between "receive"

Services for lawyers

Law Society Practice Advisors

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

Practice advisors assist BC lawyers seeking help with:

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

Tel: 604.669.2533 or 1.800.903.5300.

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

◆

LifeWorks – Confidential counselling and referral services by professional counsellors on a wide range of personal, family and work-related concerns. Services are funded by, but completely independent of, the Law Society and provided at no cost to individual BC lawyers and articled students and their immediate families.
Tel: 1.888.307.0590.

◆

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

◆

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

and "accept." If you receive cash that you are not permitted to accept, subrule (6) requires that you must:

- make no use of the cash;
- return the cash, or if that is not possible, the same amount in cash, to the payer immediately;
- make a written report to the executive director within seven days of receipt of the cash; and
- comply with all other rules pertaining to the receipt of trust funds.

If, for example, a client dropped off $10,000 with your receptionist toward a real estate conveyance and the receptionist deposited the cash into your trust account, you would not be permitted to accept the cash. You would be required to follow the above steps.

11. MAINTAIN RECORDS OF CASH TRANSACTIONS

A lawyer who receives any amount of cash for a client must maintain a cash receipt book of duplicate receipts and make a receipt in it for the amount received (Rule 3-70). The rule details the particulars that must be recorded. The receipt must be signed by the person who provides the cash (who may not always be the client) and by the lawyer or individual authorized by the lawyer. Similar information must be recorded when issuing a refund. The cash receipt book must be kept current. The Trust Assurance department has developed a cash receipt template to assist lawyers in complying with Rule 3-70. For questions about the template, contact a trust auditor: trustaccounting@lsbc.org.

The following conduct review is an example of improperly issued cash receipts and a cash limits issue:

> A lawyer accepted cash payments amounting to $40,635 in multiple instalments of $500 over a period of two and a half years. Further, the lawyer improperly issued cash receipts by misidentifying the payer. Rather than identifying the client as the payer, the lawyer identified the parties who provided the funds to her client as the payer. Her conduct was contrary to Law Society Rules 3-59(3) and 3-70(2) (the "no-cash rules"). The lawyer incorrectly believed the $7,500 limit for cash payments applied to each instalment payment, rather than the aggregate amount … (CR 2018-50)

12. REFUNDS CAN BE TRICKY: CASH OR TRUST CHEQUE?

Currently, a lawyer who accepts cash in an aggregate amount of $7,500 or more (or receives or accepts cash in an aggregate amount greater than $7,500 under the proposed rule amendment) for professional fees, disbursements or expenses in connection with the provision of legal services, must make any refund greater than $1,000 of such money in cash (Rule 3-59(5)). The Federation's model rule on cash transactions requires that all such refunds be made in cash, regardless of the original amount received or refunded. Our BC rules may follow suit, so keep up with any rule changes regarding refunds. A lawyer who withdraws cash from a pooled or separate trust account must issue a cash receipt, signed by the person to whom the cash was paid, and that includes all of the information required by Rule 3-70(3).

The scenarios below illustrate when a refund must be made in cash and when it must be made by trust cheque under the existing rules. A trust cheque must not be made payable to "bearer" or "cash."

MORE INFORMATION

If you have a practice advice question regarding the anti-money laundering rules, you are welcome to contact me at 604.697.5816 or bbuchanan@lsbc.org. If you have trust accounting or general accounting questions, contact a trust auditor at 604.697.5810 or trustaccounting@lsbc.org.❖

Scenarios for cash or cheque refunds – as at June 2019	
Scenario 1	• Lawyer requests an $8,000 retainer for legal services • Client provides an $8,000 cash retainer • Lawyer provides the services more economically than originally envisioned and bills the client $5,000 • Lawyer must refund $3,000 to the client
	The lawyer must refund $3,000 to the client in *cash* because the retainer is greater than $7,500 and the refund amount is greater than $1,000.
Scenario 2	• Lawyer requests $8,000 retainer for legal services • Client provides $8,000 cash retainer • Lawyer provides the services and bills the client $7,500 • Lawyer must refund the client $500
	The lawyer must refund $500 to the client by *trust cheque* because the retainer is greater than $7,500 and the refund is less than $1,000.
Scenario 3	• Lawyer requests $7,000 retainer for legal services • Client provides $7,000 cash retainer • Lawyer provides the services and bills the client $4,000 • Lawyer must refund the client $3,000
	The lawyer must refund $3,000 to the client by *trust cheque* because the retainer was less than $7,500.

Credentials hearings

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 12

Hearing: November 19-20, 2018

Panel: Jasmin Ahmad, chair, Gavin Hume, QC and Lance Ollenberger

Decision issued: February 4, 2019 (2019 LSBC 03)

Counsel: Jaia Rai for the Law Society; Michael Shirreff and Jennifer Crosman for Applicant 12

BACKGROUND

Applicant 12 indicated on his application for enrolment in the Law Society Admission Program that he had been charged with a criminal offence and there was an outstanding civil action against him. He also indicated that he had no medical condition that was likely to impair his ability to function as an articled student.

The criminal charge and civil action stem from an incident relating to a planned meeting at a restaurant with family members of the applicant and a business partner of the applicant's aunt. The applicant was driving his father and two friends to the meeting. As they neared the restaurant, the applicant's father saw the aunt's business partner leave the restaurant and urged the applicant to follow him. A car chase ensued, which ended with the applicant hitting the individual's car and the applicant's car coming to rest in a ditch. The applicant was charged with operating a motor vehicle in a manner that was dangerous to the public, committing an assault, using a weapon and in particular a motor vehicle, and uttering a threat to cause death or bodily harm. He pleaded guilty to dangerous driving and was fined $2,000 and prohibited from driving a vehicle for one year. The aunt's business partner commenced a civil claim for damages.

Responding to the Law Society's further inquiries about his medical fitness, the applicant submitted a medical report and agreed to an independent medical examination. These indicated that the applicant had major depression that was currently in remission as a result of medical treatment; that he has ADHD, again controlled with medication; and that he has a substance abuse disorder with respect to alcohol, also in remission.

The Law Society subsequently was advised of a further incident. By his own account, the applicant had consumed four drinks over dinner with friends at a restaurant. A restaurant employee notified the police that an intoxicated driver had left the restaurant. The applicant was stopped by police and issued an immediate roadside prohibition. The roadside prohibition was overturned on review.

In deciding whether the applicant should be permitted to enrol in the Admission Program as an articled student, the panel considered several matters.

Since the incident that gave rise to the criminal charges and the civil action, the applicant has successfully completed his education, engaged in meaningful volunteer work and thought carefully about his actions. The incident demonstrates bad judgment but is not, in isolation, determinative of the applicant's character. The panel compared this incident with cases in which other applicants have a more significant serious and prolonged criminal history and nonetheless were considered to be of sufficient good character to enrol in the Admission Program.

With regard to the roadside prohibition, the applicant was the designated driver, and drinking in those circumstances revealed a lack of judgment. However, that lack of judgment was not sufficient for the panel to conclude that he lacked the character required by section 19 of the *Legal Profession Act*, which states that no person may be enrolled as an articled student unless the Benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

The applicant believes that his answer to the medical fitness question on his application for admission is correct on the basis that, as long as he was medicated, his then-existing medical conditions were not "reasonably likely to impair (his) ability to function as an articled student." The Law Society is entitled to expect that applicants will answer all questions candidly and truthfully. However, the panel accepted his explanation, as the question is open to that possible interpretation.

The panel also heard from a lawyer who is currently engaging the applicant in a volunteer capacity and has expressed his willingness to employ the applicant as an articled student. The prospective principal said that he was impressed with the applicant's hard work and attention to detail and that, in his view, the incident involving the criminal charges and civil action do not reflect how the applicant would react as a student or lawyer.

DECISION

The panel concluded that the applicant is fit to be enrolled in the Law Society Admission Program as an articled student, with certain conditions. These include that he continue treatment and counselling for the medical issues outlined in the medical reports, that he be monitored by a registered psychiatrist, that he submit a further report to the Law Society at the end of his articling term and prior to applying for call and admission to the profession, and that he instruct his treating physicians and/or his supervising psychiatrist to report to the Law Society any relapse or material non-compliance with his treatment plans.

APPLICANT 13

Hearing (application for enrolment): March 13-14, 2019

Panel: Gavin Hume, QC, chair, Roland Krueger, CD and Christopher McPherson, QC

Decision issued: May 1, 2019 (2019 LSBC 13)

Counsel: Gerald Cuttler, QC for the Law Society; David Taylor for Applicant 13

BACKGROUND

Applicant 13 and his wife were both enrolled in the Law Society Admission Program and were articling at different law firms. The applicant aspired to practise in the area of business, corporate, commercial and securities law. His wife was articling at a firm practising criminal law.

As a result of the difficulties that his wife was having with her articles, the applicant started a blog to "test the waters" in what he and his wife saw as a lucrative practice in the area of "driving law." He described this as "Plan B," since at the time of his conduct he hoped to get an offer from his articling firm at the end of his articles.

The applicant copied a client file containing information from his wife's firm. He also copied a binder of materials relating to speeding offences, which also originated at his wife's firm. He believed that this material could be potential precedents if he and his wife later entered into practice together after their articles. He also made freedom of information requests for copies of correspondence between his wife's firm and various departments within the government of BC.

In response to a comment on his blog, the applicant impersonated his wife and referred the commenter to his wife's firm, in the belief that her firm would see her in a better light if she was seen as generating business for the firm.

His wife's firm was alerted to this blog post and filed a notice of civil claim alleging a number of wrongdoings on the part of the applicant and his wife. The claim against the applicant was dismissed. The applicant was placed on paid leave and subsequently agreed with the firm to terminate his articles.

DECISION

The panel found that the applicant's behaviour was out of character for him, that his conduct was an isolated series of events and that he has since taken the appropriate steps to address his misconduct. The panel concluded that the applicant is of sufficiently good character and repute and fit to become a barrister and a solicitor of the Supreme Court and that he may be enrolled in the Law Society Admission Program once he has secured articles and completed the application requirements specified in the Law Society Rules.❖

Conduct reviews

PUBLICATION OF CONDUCT review summaries is intended to assist lawyers by providing information about ethical and conduct issues that may result in complaints and discipline.

A conduct review is a confidential meeting between a lawyer against whom a complaint has been made and a conduct review subcommittee composed of at least one Bencher and one other senior lawyer. Conduct reviews are ordered by the Discipline Committee to address conduct that led to the complaint with a focus on professional education and competence. After the conduct review, the subcommittee provides a written report to the Discipline Committee, which may then direct that no further action be taken, that a citation be issued, that the conduct review be rescinded in favour of a different alternative disciplinary outcome or that the lawyer be referred to the Practice Standards Committee.

CLIENT ID AND VERIFICATION

Compliance audits resulted in several similar conduct reviews involving the client identification and verification rules.

Rule 3-102 requires a lawyer in a non-face-to-face financial transaction to take reasonable steps to verify the identity of a client by using reliable, independent source documents, data or information. In similar, but separate, instances, conduct review subcommittees met with lawyers who had acted for clients in non-face-to-face transactions where they failed to confirm their clients' identities:

- A lawyer relied on client identification and verification made by an immigration consultant who referred the client to the lawyer, rather than independently verifying the client's identification, and received only unverified copies of the client's passport and identification documents after the transaction had closed. (CR 2019-11)
- In acting for a client who was not present in Canada, a lawyer did not enter into a written agreement with an agent who would verify the client's identity and provide an attestation produced on a legible photocopy of the document used to confirm the client's identity, as required by Rule 3-104. (CR 2019-12)
- A lawyer, who had not met the clients in person and was on vacation during the closing of a real estate transaction, relied on his legal assistant to obtain client identification when they came to the office to sign the documents, which did not occur because the clients signed the documents before a lawyer in Alberta. Further complicating the matter was that the assistant had one of the clients text a photo of her identification, which the assistant did not print or save electronically, and no identification was provided by the second client. (CR 2019-13)
- A lawyer completed a real estate transaction for property outside Canada using identification provided by the client that was

outdated, was not notarized, witnessed or legible and contained conflicting information as to the client's date of birth and residential address. The lawyer also failed to retain an agent for execution of the documents and relied on the client to contact a notary public. To improve the lawyer's competencies in this area, the subcommittee referred her to Practice Standards for further training. (CR 2019-16)

An instance where a lawyer did meet clients in person, but failed to verify their identity and retain copies of the identification used to do so, involved the lawyer believing that obtaining signed affidavits from executors on estate files provided sufficient verification of their identity. Where the lawyer did verify a client's identity, he failed to make a copy of the identification. These practices fail to meet the requirements of Rules 3-102(1) and 107(1). The lawyer has changed his practice and now obtains and retains photo identification for all clients. (CR 2019-14)

A lawyer acting for several parties in a real estate transaction, who had not verified the identities of his clients, acknowledged that he had not paid sufficient attention to the rule requirements, relying instead on his law firm's client identification and verification systems, which had failed in this instance. The law firm has updated its procedures, policies and checklists. The lawyer was referred to Law Society publications and resources that are updated with the latest rule changes and regulatory requirements. (CR 2019-15)

JURICERT PASSWORD

A compliance audit revealed that a lawyer disclosed his Juricert password to his assistant and permitted the assistant to affix his digital signature on documents electronically filed in the Land Title Office, contrary to Law Society Rule 3-96.1 and rule 6.1-5 of the *Code of Professional Conduct for British Columbia*. The lawyer acknowledged the breaches, which he explained were based on his understanding of agency and his unfamiliarity of the rules before the compliance auditor pointed them out. He has obtained a new digital certificate, for which he will no longer disclose the password nor permit anyone else to apply his digital signature. The lawyer also reviewed the various Law Society publications, the Rules and the Code to confirm that he was in compliance. (CR 2019-17)

A lawyer improperly disclosed his Juricert password to his longtime manager, contrary to his Juricert agreement and the same rule and code provisions set out above. A compliance audit discovered that the manager retained a paper copy of the Juricert password in her office and that the lawyer's practice was to review the land title forms to be filed, retrieve his Juricert password from his manager and file the forms electronically. While the lawyer maintained that only he entered the password and digitally signed the forms on his office computer, and that the manager never used the password, the subcommittee clarified that this still is in breach of the Rules, the Code and his Juricert agreement. He has reviewed the Juricert contract, his files and Law Society communications on the subject. The lawyer has since deregistered from the Juricert program. (CR 2019-18)

BREACH OF UNDERTAKING

In the course of representing a client in a loan agreement, a lawyer breached his undertaking not to deal with certain documents until opposing counsel had received an executed transfer of shares and share certificate signed by the lawyer's client. The lawyer relied on his client to fulfill the undertaking, contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia*. The lawyer acknowledged his error, stating that he should have completed the transaction himself, including the delivery of the executed transfer to opposing counsel. (CR 2019-19)

BREACH OF NO-CASH RULE

A lawyer's firm accepted an aggregate of $21,000 in cash in relation to one real estate transaction, contrary to Law Society Rule 3-59(3). A junior lawyer at the firm erroneously accepted $7,500 in cash, believing that the rule prohibited accepting *more than* $7,500 (in fact, the rule currently states the amount as "$7,500 or more"). In addition, the clients deposited a further $13,500 in cash by direct deposit into the firm's trust account. After the transaction completed, the firm refunded the excess funds to the clients by trust cheque instead of cash, contrary to Rule 3-59(5). The firm self-reported its breach of the rules to the Law Society. In an effort to avoid a similar breach, the lawyer has set up an internal audit function and has directed the firm's financial institutions to not accept cash deposits into their trust accounts. (CR 2019-20)

CONFLICT OF INTEREST / BREACH OF CONFIDENTIALITY

A lawyer acted in a conflict of interest by representing a client after having been consulted by a former client about the same matter, contrary to rule 5.1-1 of the *Code of Professional Conduct for British Columbia*. The lawyer had given the former client his legal opinion that a handwritten will brought in by him was a forgery. The handwritten will was purportedly written by the deceased father of the new client, who had been a friend of the former client. The lawyer proceeded to act for the new client and applied for a grant of administration without a will annexed. Further, by reviewing the former client's file, without permission, to confirm his suspicion that the will was a forgery by comparing handwritten notes in the file with the handwritten will, the lawyer breached his duty of confidentiality to the former client, contrary to rule 3.4-1. A conduct review subcommittee advised the lawyer that he had a duty to disclose the existence of the handwritten will with the application for grant of administration without will annexed. By failing to do so he breached his duty to the court, contrary to rule 5.1-1. (CR 2019-21)

WITHDRAWAL OF LAW SOCIETY COMPLAINT

A lawyer acted for a client (who also is a lawyer) in both a civil action and a Law Society complaint, in which the complainant was also the opposing party in the civil action. At a mediation for the civil action, the parties agreed to resolve the civil claim in a written settlement agreement that included a term that the opposing party would withdraw the complaint to the Law Society. This is contrary to rule 3.2-6 of the *Code of Professional Conduct for British Columbia*, which states that a lawyer must first obtain the consent of the Law Society to engage in discussions about the withdrawal of a complaint. It was not an excuse that the lawyer mistakenly believed that including the withdrawal term was acceptable to the parties and made without undue pressure. (CR 2019-22) ❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Kevin John Groves
- Michael Sheldon Golden
- Angiola-Patrizia Maria De Stefanis

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

KEVIN JOHN GROVES

Surrey, BC

Called to the bar: May 7, 2009

Discipline hearing: February 13, 2019

Panel: Sarah Westwood, chair, Ralston Alexander, QC and Darlene Hammell

Decision issued: March 19, 2019 (2019 LSBC 09)

Counsel: Kathleen Bradley for the Law Society; David Taylor for Kevin John Groves

AGREED FACTS

Kevin John Groves represented the husband in a family law matter. While meeting with his client, Groves suggested obtaining the wife's credit report. With the husband's assistance, Groves impersonated the wife to submit an online request and obtain the credit report. Almost immediately, the wife phoned the client to advise him she had been made aware of an unauthorized credit report request and that she intended to report the client to the RCMP and Groves to the Law Society.

ADMISSION AND DETERMINATION

Groves admitted that his actions constitute professional misconduct but objected to the characterization of that conduct as knowingly dishonest and fraudulent. He argued that he did not know that private credit information is protected by the *Business Practices and Consumer Protection Act*, and that immediately upon becoming aware of the prohibition he ceased his practice of seeking credit reports on opposing parties.

The hearing panel confirmed that Groves committed professional misconduct.

DISCIPLINARY ACTION

The panel considered that Groves's only prior conduct record was a referral to the Practice Standards Committee, and that referral concerned behaviour that occurred following the events that are the subject of this hearing. Further, that referral did not result from a citation or a referral from the Discipline Committee, and this citation was Groves's first.

The Law Society sought a two-month suspension, arguing that the misbehaviour is very serious as it engages elements of deceit and lack of integrity. It further argued that, because Groves had been referred to the Practice Standards Committee on an unrelated matter, this case calls for progressive discipline. The panel found, however, that the disciplinary action sought by the Law Society was not consistent with past decisions, specifically that progressive discipline was not engaged in these circumstances because the referral to Practice Standards did not originate with the Discipline Committee and was only in the referral stage at the time of these events.

The panel ordered that Groves:

1. pay a fine of $8,000;
2. enrol in and complete four hours of continuing professional development with a focus on ethical considerations, in addition to the annual CPD requirement that applies to all lawyers; and
3. pay costs of $3,607.70.

MICHAEL SHELDON GOLDEN

Burnaby, BC

Called to the bar: August 1, 1985

Discipline hearing: October 3-5, 2018 and March 20, 2019

Panel: Lisa J. Hamilton, QC, chair, Paul Ruffell and Sandra Weafer

Decisions issued: December 21, 2018 (2018 LSBC 38) and May 6, 2019 (2019 LSBC 15)

Counsel: Sarah Conroy and Mandana Namazi for the Law Society; William G. MacLeod, QC for Michael Sheldon Golden

FACTS

In a family law matter, Michael Sheldon Golden was representing a husband in proceedings against the man's wife. The husband was seeking 50 per cent of the equity in the family home, which was owned by the wife.

After Golden had agreed to represent the husband, the wife visited Golden's office with a friend, who had also been a client of Golden's. The wife and her friend informed Golden that the wife owed the friend $200,000. Golden prepared a promissory note confirming the debt, as well as a power of attorney permitting the wife's friend to sell the property on behalf of the wife in order to realize payment of the debt. While the wife was in his office, Golden served her with the action commenced by her husband.

The friend managed the sale of the house, paying the mortgage pending sale, paying for repairs and working with the realtor. The house sold for $560,000. With a mortgage of approximately $300,000, the net return was about $260,000.

The friend asked Golden to handle the conveyance of the property. Golden opened a file in the wife's name and signed a declaration for land title purposes that he was the solicitor for the wife.

Golden took his fees of $1,200 from trust; then on the instructions of the husband, he signed and released a cheque for $20,000 to the husband's girlfriend. Golden told the wife's friend she would receive $124,967.39, not the $200,000 she was owed. The friend refused to accept that amount.

DETERMINATION

When the wife and her friend visited his office, Golden ought to have known that each of the three people had different and competing claims to the proceeds of the sale of the property and that it might not be

possible to satisfy all of them. The panel believed the wife's friend's testimony that she was not aware that Golden was representing the husband and that she would not have hired Golden to prepare the promissory note and power of attorney, nor handle the conveyance, if she had known.

Golden was in a conflict of interest when he represented the wife's friend in preparing the promissory note while acting for the wife in relation to the sale of the property.

The friend clearly expected she would receive $200,000 from the sale of the property, and Golden failed to advise the friend that the promissory note and power of attorney might not be sufficient to secure the funds owed to her. Golden should not have acted for the wife's friend on the note and power of attorney, because the documents did not protect her interest.

Golden failed to urge the wife to obtain independent legal advice regarding the promissory note and power of attorney, failed to ensure that the wife was not under the impression he was protecting her interests, and failed to make it clear to the wife that he was acting in the interests of the husband.

Golden acted improperly when he withdrew $20,000 of the sale proceeds held in trust on behalf of the wife and disbursed the money to the husband's girlfriend without the wife's authorization or consent.

The panel dismissed the allegation that Golden acted improperly when he prepared a release for the friend's signature that was intended to settle a debt for less than the amount reflected in the promissory note and to release any potential claims against Golden's law corporation. Golden never showed her the release, and as soon as Golden knew there was an issue with the amount, he told her to obtain independent legal advice.

The panel found that Golden had committed professional misconduct with regard to four of five allegations listed in the citation and that he also committed a breach of the Law Society Rules.

DISCIPLINARY ACTION

The panel considered that there were multiple breaches of the duty of loyalty, as well as misconduct relating to poor quality of service, failures to ensure the wife understood that Golden was not protecting her interests and the improper withdrawal of trust funds. The panel also considered that Golden's failure to recognize a conflict of interest eroded the friend's trust in Golden, and possibly her trust in lawyers generally.

Golden maintained that no harm was done, but the panel disagreed. The friend has still not received the $200,000 she expected to receive pursuant to the promissory note, despite her efforts and her own financial resources expended to ready a property for sale and sell it on behalf of the wife.

The panel considered that Golden has a prior professional record consisting of two conduct reviews and one set of recommendations of the Practice Standards Committee. It also took into consideration that there is no evidence that he acknowledges his misconduct and that he has not taken any remedial action to prevent any such conduct in the future.

The panel ordered that Golden pay:

1. a fine of $20,000; and
2. costs of $10,736.43.

ANGIOLA-PATRIZIA MARIA DE STEFANIS

Vancouver, BC
Called to the bar: August 28, 1992
Disbarred: June 19, 2018
Written materials: March 12, 2019
Panel: Pinder Cheema, QC, chair, Robert Smith and Sandra Weafer
Decision issued: May 1, 2019 (2019 LSBC 14)
Counsel: Alison Kirby for the Law Society; Angiola-Patrizia Maria De Stefanis on her own behalf

AGREED FACTS

Angiola-Patrizia Maria De Stefanis was retained by the executors to administer the estate of EH. The total value of the estate was $757,621.54. De Stefanis withdrew $33,573.62 from trust to pay her legal fees and disbursements, and $80,000 for administration fees. Under the *Trustee Act*, the fees of an administrator cannot exceed five per cent of the value of the estate or, in this case, about $38,000. De Stefanis overdrew in excess of $42,000 beyond that amount.

In her final account to each of the beneficiaries, De Stefanis falsified the accounts to conceal the fact that she had taken excessive fees.

ADMISSION AND DETERMINATION

De Stefanis admitted that she prepared and delivered false accountings of the estate administration and misled the beneficiaries as to the amounts of funds she received and disbursed on behalf of the estate. She admitted that that constitutes professional misconduct and consented to an order that she be disbarred.

DISCIPLINARY ACTION

The panel found that disbarment is fair and reasonable and ordered that De Stefanis:

1. be disbarred; and
2. pay costs of $1,000.

TRUST PROTECTION COVERAGE PAYMENT

In every profession, there are occasionally members who are dishonest. Although not all professions or industries protect victims of their dishonest members, the legal profession in BC has, since 1949, offered financial protection to members of the public whose money has been stolen by their lawyer. If a claim is made against a lawyer relating to the theft of money or other property, Trust Protection Coverage (TPC) is available to reimburse the claimant, on the lawyer's behalf, for the amount of the loss.

In connection with the circumstances described in this decision, TPC claims were made against De Stefanis, and the Law Society expects to make payments based on the principal amount of $40,000. De Stefanis is obliged to reimburse the Law Society in full for the amount paid under TPC.

For more information on TPC, including what losses are eligible for payment, please go to Compensation: Claims for lawyer theft.❖

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