

# THE LAW SOCIETY OF BRITISH COLUMBIA

## DRAFT MINUTES

- MEETING:** Benchers
- DATE:** Friday March 4, 2005
- PRESENT:**
- |  |                            |
|--|----------------------------|
| Ralston Alexander, QC, President                     | Margaret Ostrowski, QC     |
| Robert McDiarmid, QC, 1 <sup>st</sup> Vice-president | June Preston               |
| Anna Fung, QC, 2 <sup>nd</sup> Vice-president        | Greg Rideout               |
| Joost Blom, QC                                       | Glen Ridgway, QC           |
| Robert Brun, QC                                      | Patricia Schmit, QC        |
| Ian Donaldson, QC                                    | Alan Seckel, QC, Deputy AG |
| Michael Falkins                                      | Dirk Sigalet, QC           |
| Carol Hickman  | Grant Taylor, QC           |
| Gavin Hume, QC                                       | Gordon Turriff, QC         |
| William Jackson                                      | Dr. Maelor Vallance        |
| Terry La Liberté, QC                                 | Art Vertlieb, QC           |
| Bruce LeRose   | James Vilvang, QC          |
| Patrick Nagle  | Anne Wallace, QC           |
| Darrell O'Byrne                                      |                            |
- NOT PRESENT:**
- |                  |                 |
|------------------|-----------------|
| John Hunter, QC  | Lilian To       |
| Patrick Kelly    | David Zacks, QC |
| Ross Tunnicliffe |                 |
- STAFF PRESENT:**
- |                     |                 |
|---------------------|-----------------|
| Su Forbes, QC       | Jeffrey Hoskins |
| Mary Ann Cummings   | Michael Lucas   |
| Stuart Cameron      | David Newell    |
| Brad Daisley        | Jack Olsen      |
| Charlotte Ensminger | Neil Stajkowski |
| Felicia Folk        | Alan Treleaven  |
| Margrett George     | Ron Usher       |
| Tim Holmes          | Adam Whitcombe  |
- GUESTS:**
- Dean Andrew Petter, QC, University of Victoria
  - Meg Shaw, Vice-President, CBABC
  - Frank Kraemer, Executive Director, CBABC
  - Caroline Nevin, Associate Executive Director, CBABC
  - Johanne Blenkin, Chief Librarian, BCCLS
  - Jim Baird, Chair, CLE Society
  - Jack Huberman, QC, Executive Director, CLE Society
  - Mark Benton
  - Janice Mucalov, Lawyers Weekly

### 1. MINUTES

The minutes of the meeting held on February 4, 2005 were approved as circulated.

**2. PRESIDENT'S REPORT**

Mr. Alexander circulated a report detailing his activities on behalf of the Law Society over the previous month.

Mr. Alexander welcomed guests, and introduced Meg Shaw, Vice-president of the CBABC, attending for the first time.

**3. ACTING EXECUTIVE DIRECTOR'S REPORT**

Ms. Forbes circulated the Acting Executive Director's annual report on Law Society performance. Ms. Forbes noted that the format was slightly different than last year's report in that Mr. Heberton had given a written assessment of program performance rather than using the "traffic light" metaphor. Ms. Forbes said the report reflected Mr. Heberton's understandable reluctance to express strong opinions given his brief tenure as Acting Executive Secretary. Specific points Ms. Forbes noted in the report were the appointment of Stu Cameron to the position of Director of Regulatory Compliance, and the reorganization of senior management following the review by Western Management Consultants. She also noted that the public perceptions of the Law Society in 2004 and 1998 were comparable. Member satisfaction with the Law Society had returned to the somewhat lower levels seen in years prior to 2003. Ms. Forbes said the report reflected management's best efforts to inform the Benchers about the Law Society's performance in the previous year, and Mr. Heberton would want to acknowledge and thank the staff who worked hard to prepare it.

**4. REPORT ON OUTSTANDING HEARING DECISIONS**

The Benchers received a report on outstanding hearing decisions.

**5. REPORT FROM THE CONTINUING LEGAL EDUCATION SOCIETY**

Jim Baird, Chair of the CLE Society Board gave a report on the activities and performance of the CLE Society in the previous year.

**6. RULE AMENDMENTS ARISING FROM THE INTRODUCTION OF TRUST PROTECTION COVERAGE.**

Ms. Schmit recalled that when the Benchers approved Part B insurance, it was intended that the Special Compensation Fund would diminish over time. Ms. Schmit noted that Part B insurance is intended to cover losses caused by defalcation and would, consequently, be treated somewhat differently than errors and omissions insurance. Information on Part B insurance claims will be shared with the Special Compensation Fund and regulatory staff of the Law Society. Ms. Schmit said there were three issues arising as a result of implementing Part B insurance. The first issue is whether the Special Compensation Fund should be treated as a last resort, as recommended by the Special Compensation Fund Committee. Proposed rule changes would require claimants to proceed under Part B insurance first. The second issue is whether there should be a maximum limit compensation available. Ms. Schmit said there were two situations where that could be a problem: where the claim exceeds insurance limits, or where an insurance claim is denied. The Special Compensation Fund Committee was divided on this issue but on balance was against imposing a cap on the fund. The third issue is whether the Benchers should provide general guidelines for the committee's exercise of discretion. The consensus of the committee on that point was that guidelines were not necessary because there are sufficient precedents and other sources of guidance available.

It was moved (Schmit/LeRose) to amend the Law Society Rules by adding Rule 3-33, as follows:

**Limit on payments from the Fund**

3-33 Despite Rules 3-31 and 3-32, the Special Compensation Fund Committee, or the subcommittee with the consent of the Committee, must not authorize a payment from the Special Compensation Fund in respect of a claim made on or after May 1, 2004 unless the claimant has made a claim under Part B of the policy of professional liability insurance and the claim has been denied.

Mr. Turriff asked if it was within the Benchers authority to impose a rule when the legislature has not stated that the Special Compensation Fund is a last resort. Would it be construed as placing conditions on a claim when the legislation says a person can make a claim unconditionally?

Mr. McDiarmid thought the rule would not preclude a claimant from making a claim, but the claim would simply remain undetermined while the claimant sought compensation under Part B.

Mr. LeRose agreed that the rule was procedural and did not deny a person the opportunity to make a claim. Ms. Schmit agreed, noting that the Special Compensation Fund Committee frequently requires claimants to exhaust alternative remedies.

Mr. Donaldson questioned why the Benchers should dictate to the committee that it should not authorize payment of a claim unless compensation had been sought under Part B. One of the complaints from the public is that the Committee is too slow to authorize payments. Mr. Donaldson thought it would be better to leave the matter in the Committee's discretion, which would include the possibility of requiring the claimant to proceed under Part B.

Mr. Brun noted that in order to be consistent with other parts of the Rules, the proposed amendment should read "... and the claim has been denied in whole or in part."

It was agreed to amend the motion to include the words "in whole or in part" after the word "denied".

The motion as amended was carried by a majority of two thirds of the Benchers present.

Ms. Schmit said no change to the Rules would be necessary if the Benchers agreed with the Committee that there should not be a cap on payment from the Special Compensation Fund.

Mr. McDiarmid noted that there might be a *de facto* cap, which is the amount of money in the fund. He also noted that in most U.S. jurisdictions there is quite a low cap on compensation payments.

Mr. Nagle recalled the Benchers' decision in the Wirick matter that innocent purchasers would be made whole, and he asked if that policy would continue.

Ms. Schmit said each Special Compensation Fund Committee would still have to deal with each claim on its merits, but if the Benchers decide, as a matter of policy, that a cap should not be an impediment to full payments to innocent purchasers, the Committee would include that in their consideration of each claim.

Mr. Nagle said the question was whether the public could rely on the Wirick matter as a precedent in that regard.

Ms. Schmit said the Wirick matter was a non-binding precedent, but future claims could be decided under different rules.

Ms. Wallace asked how claims would be handled if the total exceeded the limit of Part B insurance and the amount of a cap on the Special Compensation Fund, in particular if claims would be paid on a first come, first served basis or a pro rata basis.

Ms. Forbes said that in such a case she would expect that payment for all claims would await the end of the year to determine how payments would be made, but a small claim made early in the year would probably be paid immediately. Ms. Forbes noted that this was a very unlikely situation.

Ms. Wallace questioned the sense of putting a cap on payments from the Special Compensation Fund if the Benchers would simply lift it in any case.

Mr. Donaldson commended the reasoning in the memorandum from the Committee that the primary reason against the implementation of a cap is the public interest, and that it is more in the public interest to ensure that members of the public who entrust money to a lawyer are fully compensated for any losses caused by the lawyer's theft.

Mr. Lerose said Part B insurance was a system of entitlement rather than discretion and it will be easier for claimants to obtain compensation. It is a better system from the claimant's point of view. The Committee concluded that if claims ever go beyond the amount available in Part B, there would be little point in putting an artificial cap on the Special Compensation Fund and then asking the Benchers to lift it in exceptional circumstances.

Mr. Falkins agreed with Mr. LeRose.

Mr. Vilvang favoured the Committee's proposal and was against imposing a cap on the Special Compensation Fund. He thought the Benchers could expect the Committee would seek approval from the Benchers before denying a claim solely on the basis of the amount in the fund. He suggested that principle could be codified, if necessary.

Mr. McDiarmid said there should be a cap on the fund. In personal injury cases there is an effective cap on recovery in terms of the amount of insurance available, and that is seen as a reasonable compromise between the interests of the claimant and fiscal reality. It would be a more transparent process to put a cap on the fund, perhaps in the areas of \$2.5 million, and then ensure that funds are available up to that amount. If the Benchers say there is no cap on the fund, will the honest lawyers of the province have to continue to pay for a few dishonest lawyers? Mr. McDiarmid asserted that in reality, saying there is no cap on the fund is not really in the public interest because it generates unreasonable expectations.

Ms. Ostrowski asked if the Committee looked at differentiating between individual claimants and corporate claimants with respect to capping the fund, as is the case in Ontario.

Ms. Schmit said the Committee did not specifically consider such a differentiation, in part because that question had not been dealt with in the Wirick case.

Ms. Cummings noted that the Law Society of Upper Canada used guidelines to deal with that situation.

Mr. Rideout saw merit in both points of view, and questioned whether it was necessary to decide the question immediately.

Ms. Schmit said it was possible to delay the decision for a few months.

Mr. Turriff emphasized the need to be clear on what the public interest in the matter was. In his view, not capping the fund was in the interest of self-governance, which is in the public interest.

It was moved (Rideout/Hickman) to refer the matter back to the Special Compensation Fund Committee to further consider the issue of capping the Special Compensation Fund fund.

The motion was carried.

Ms. Schmit said the Committee discussed whether it should be governed using guidelines from the Benchers. She said the Committee concluded that guidelines were not needed.

Ms. Wallace said the Special Compensation Fund Committee had done a good job in the past and there was no reason to impose guidelines. She said it was difficult to anticipate issues, and the matter should be left to the Committee to deal with on the basis of each case.

Mr. Ridgway was unsure the Law Society should completely fund claims that arise in part through error or failure of the claimants. He thought some guidelines or a cap were appropriate safeguards.

Mr. McDiarmid observed that new guidelines would not affect past claims already before the Committee. He raised another possible concern about unscrupulous people using lawyers to effectively guarantee scams. He said it would be hard to pay a claim based on a scheme that purported to provide a completely unreasonable return on investment, and it would be appropriate to consider some guidelines to assist future Special Compensation Fund Committees that might be required to deal with such a situation. He urged the Benchers to refer the matter back to the Committee to develop guidelines.

It was moved (McDiarmid/Ridgway) to refer the matter back to the Committee to develop guidelines for further consideration by the Benchers, with particular reference to guidelines used by the Law Society of Upper Canada.

Mr. LeRose noted that the Special Compensation Fund Committee was currently dealing with "shortfall" claims and he did not want to create an impression that the Committee might delay claims pending development of guidelines. He suggested that the Benchers not approve guidelines until after the Wirick claims had been dealt with.

The motion was carried.

Ms. Schmit said that some housekeeping rule amendments were required as the result of implementing Part B insurance.

It was moved (Schmit/Fung) to amend the Law Society Rules as follows:

1. *In Rule 2-77(1), by*
  - (a) striking out the period at the end of paragraph (d) and substituting a semicolon; and
  - (b) adding the following paragraph:
  - (e) reimbursement for payment made under Part B of the policy of professional liability insurance on account of the dishonest appropriation of money or other property by the lawyer or former lawyer.
2. *In Rule 3-26, by*
  - (a) striking out the heading and substituting "***Deductible, surcharge and reimbursement***"; and
  - (b) rescinding subrule (2) and substituting the following:

- (2) If indemnity has been paid under the Society's insurance program, the lawyer on whose behalf it is paid must
  - (a) pay the insurance surcharge specified in Schedule 1 for each of the next 5 years in which the lawyer is a member of the Society and not exempt from the insurance fee, and
  - (b) if the payment was made under Part B of the policy of professional liability insurance on account of the lawyer's dishonest appropriation of money or other property, reimburse the Society in full for all amounts paid under Part B.
3. By adding the following Rule:
4. By rescinding Rules 3-40 and 3-41 and substituting the following:

**Payment of claims**

- 3-41** The Executive Director must make a payment authorized by the Special Compensation Fund Committee when he or she is satisfied that any conditions on the payment are fulfilled.

The motion was carried by a majority of more than two thirds of the Benchers present.

Ms. Schmit reported that the Committee was satisfied that there is no need for payments under Part B to form part of professional conduct record because there is complete transparency between the insurance department and the professional conduct department of the Law Society with respect to Part B claims.

**7. QUALIFICATION OF PRINCIPALS**

It was moved (Fung/Wallace) to amend the Law Society Rules as follows:

*In Rule 2-29(1), by striking out the words "educational qualifications" and substituting the words "academic qualifications".*

The motion was carried by a majority of more than two thirds of the Benchers present.

It was moved (Fung/Hickman) to amend the Law Society Rules as follows:

*In Rule 2-30, by rescinding subrule (1) and substituting the following:*

- (1) A lawyer may act as principal to no more than 2 articulated students at one time.
  - (1.1) To qualify to act as a principal, a lawyer must have
    - (a) engaged in the active practice of law in Canada
      - (i) for 7 of the 10 years, and
      - (ii) full-time for 3 of the 5 yearsimmediately preceding the articling start date, and
    - (b) spent at least 5 years of the time engaged in the practice of law required under paragraph (a)(i) in
      - (i) British Columbia, or

(ii) Yukon Territory while the lawyer was a member of the Society.

Mr. Jackson was concerned that a person could practice for five years in BC, then relocate to another province, take two years away from practice, then to three years of practice in that province, then return to BC and qualify as a principal despite not having practiced in BC for five years.

Ms. Wallace had concern that a person practicing part time for an extended period would not be able to act as a principal. She asked if that was the sort of special circumstances contemplated by the rule.

Ms. Fung said the rule was an attempt to achieve a balance between ensuring students receive high quality articles without creating unreasonable obstacles to people acting as principals. Ms. Fung said the Credentials Committee thought it was important that principals have significant practice experience. In answer to Ms. Wallace's question, Ms. Fung said a person with extensive part-time practice experience could ask the Committee to consider their special circumstances.

Ms. Wallace said the proposed changes were a good step, but the qualification requirements would have to keep step with the changing profession.

Mr. Brun agreed with Ms. Wallace.

Mr. Donaldson supported the rule changes because the current rules cut out women who take any time away from practice to care for children.

The motion was carried by a majority of more than two thirds of the Benches present.

#### 8. AMENDMENT TO RULE 4-35 (WRITTEN REASONS)

Mr. Alexander said the proposed amendment to Rule 4-35 arose in the context of hearings where counsel agree on a statement of facts and a verdict, but leave penalty to the panel. In such cases, all participants would like the penalty to be dealt with immediately but under the current rules, the panel must issue written reasons before penalty can be considered. This results either in hastily prepared reasons, or the possibility of a challenge to the penalty if no reasons are provided. The proposed amendment would permit a panel to proceed directly to penalty if oral reasons are given.

It was moved (Ostrowski/Jackson) to amend Rule 4-35 of the Law Society Rules as follows:

1. *In subrule (1)(b), by striking out the words "unless subrule (2) applies".*
2. *By adding the following subrule:*
  - (1.1) If a panel gives reasons orally for its decision under Rule 4-34(2)(a), the panel may proceed under subrule (1) before written reasons are prepared under Rule 4-34(2)(b).
3. *In subrule (2), by striking the words "As an exception to subrule (1)(b)" and substituting the words "Despite subrule (1)(b)".*

Mr. McDiarmid commented that written reasons would have to be prepared very promptly after the hearing because the appeal period starting running from the day of the oral reasons.

The motion was carried by a majority of more than two-thirds of the Benches present.

9. **PROFESSIONAL CONDUCT HANDBOOK CHAPTER 4: WHETHER A NEW RULE SHOULD BE ADDED CONCERNING CRIMINAL CONDUCT AND FRAUD**

Ms. Wallace recalled the Benchers' previous discussion of a proposed handbook rule that would prohibit lawyers from engaging in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud. The discussion focused on whether the standard of knowledge should include the objective "ought to know" or should be limited to the subjective test of actual knowledge, willful blindness or recklessness. Ms. Wallace said the Ethics Committee maintained the view that that "knows or ought to know" is the appropriate standard.

It was moved (Wallace/Nagle) to amend the Professional Conduct Handbook:

*1. by rescinding paragraph 1 of Chapter 4 and replacing it with the following:*

"1. A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and unrepresented person that the latter's interests are not being protected by the lawyer."

*2. by rescinding paragraph 2 of Chapter 4 and replacing it with the following:*

"2. A lawyer must not threaten, or advise a person to threaten, to:

- (a) initiate or proceed with a criminal or quasi-criminal charge, or
- (b) make a complaint to a regulatory authority,

for the collateral purpose of enforcing the payment of a civil claim or securing any other civil advantage."

*3. by rescinding paragraph 3 of Chapter 4 and replacing it with the following:*

"3. A lawyer must not wrongfully influence any person to prevent the Crown from proceeding with charges or cause the Crown to withdraw or stay charges in a criminal or quasi-criminal charge against the lawyer's client."

*4. by rescinding paragraph 4 of Chapter 4 and replacing it with the following:*

"4. A lawyer must not:

- (a) advise a person to give, or
- (b) personally give or offer to give,

any valuable consideration to another person in exchange for influencing the Crown not to proceed with a criminal or quasi-criminal charge that has been instituted against a client of the lawyer, unless the lawyer obtains the consent of the Attorney General or his or her agent."

*5. by rescinding paragraph 6 of Chapter 4 and replacing it with the following:*

**"Dishonesty, crime or fraud**

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

6. *by rescinding footnote 3 of Chapter 4 and replacing it with the following:*

“3. A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should be wary of a client who:

- (a) seeks the use of the lawyer’s trust account without requiring any substantial legal services from the lawyer in connection with the trust matters, or
- (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.”

7. *by rescinding paragraphs 1 to 10 of Chapter 10 and replacing them with the following:*

**“Definition**

0.1 In this Chapter, to “**withdraw**” includes to

- (a) sever the solicitor-client relationship, or
- (b) withdraw as counsel.

**Obligatory withdrawal**

1. A lawyer is required to sever the solicitor-client relationship or withdraw as counsel if:

- (a) discharged by the client,
- (b) instructed by the client to do something inconsistent with the lawyer’s professional responsibility, including the duty to the court,
- (c) the client takes a position solely to harass or maliciously injure another,
- (d) the lawyer’s continued involvement will place the lawyer in a conflict of interest, or
- (e) the lawyer is not competent to handle the matter.

**Optional withdrawal**

2. A lawyer is permitted, but is not required, to withdraw if there has been a serious loss of confidence between the lawyer and client.<sup>1</sup>

**Residual right to withdraw**

3. In situations not covered by Rules 1 and 2, a lawyer may withdraw only if the withdrawal is not:

- (a) unfair to the client, or
- (b) done for an improper purpose.

4. Unfairness to the client depends on the circumstances of each case, but normally includes consideration of whether the withdrawal would:

- (a) occur at a stage in the proceedings requiring the client to retain another lawyer to do the same work, or part of it, again,

- (b) leave the client with insufficient time to retain another lawyer, and
  - (c) give a replacement lawyer insufficient time to prepare to represent the client.
5. Impropriety depends on the circumstances of each case, but includes withdrawal in order to:
- (a) delay court proceedings, or
  - (b) assist the client in effecting an improper purpose.

**Withdrawal for non-payment of fee**

6. If a lawyer and client agree that the lawyer will act only if the lawyer's fee is paid in advance, the lawyer must confirm that agreement in writing to the client, specifying a payment date.
7. A lawyer must not withdraw because the client has not paid the lawyer's fee when due unless there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

**Procedure for withdrawal**

8. Upon withdrawal, the lawyer must immediately:
- (a) notify the client in writing, stating:
    - (i) the fact that the lawyer has withdrawn,
    - (ii) the reasons, if any, for the withdrawal, and
    - (iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly,
  - (b) notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer has withdrawn and, where applicable, comply with any statutory requirements,<sup>1</sup>
  - (c) notify in writing all other parties, including the Crown where appropriate, of the severance or withdrawal,
  - (d) account to the client for:
    - (i) any money received for fees or disbursements, and
    - (ii) any valuable property held on behalf of the client, and
  - (e) take all reasonable steps to assist in the transfer of the client's file.

**Confidentiality**

9. If the reason for withdrawal results from confidential communications between the lawyer and the client the lawyer must not, unless the client consents, disclose the reason for the withdrawal.

**Limited retainer**

10. A lawyer who acts for a client only in a limited capacity must promptly disclose the limited retainer to the court and to any other interested

person in the proceeding, if failure to disclose would mislead the court or that other person.

FOOTNOTES:

1. Examples of circumstances to which this rule may apply include circumstances in which a client has:
  - (a) deceived the lawyer,
  - (b) refused to give adequate instructions to the lawyer, or
  - (c) refused to accept and act upon the lawyer's advice on a significant point.
2. The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. If a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See *Leask v. Cronin, Prov. J.* (1985) 66 BCLR 187 (BCSC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with Supreme Court Rule 16(4) before being relieved of the responsibilities which attach as "solicitor acting for the party." See *Luchka and Luchka v. Zens et al* (1989) 37 BCLR (2d) 127 (BCCA)."

Mr. Rideout said he continued to hold the view that the bar should be set high and should be set out in the main body of the handbook in plain language, not in a footnote.

Mr. Ridgway thought the footnote should be more forthright with respect to clients who promise unrealistic returns. He said lawyers should be told not to be involved in such matters, not merely be wary.

Mr. Brun was concerned that the proposed standard would not just catch gullible lawyers but could also encompass honest but overworked lawyers. He preferred the subjective test.

Mr. Donaldson maintained his opposition to the objective test, preferring "a lawyer must not knowingly encourage or assist conduct that is criminal, fraudulent, or dishonest", which he said was essentially the same language used in other jurisdictions. Mr. Donaldson objected to the phrase "ought to know" because it is the language of negligence and does not connote a state of moral culpability. He said the proposed changes suggested the Law Society would discipline a lawyer who is negligent but morally innocent under provisions respecting dishonesty and fraud. He said the correct and principled approach would not lower the test to the level of negligence.

Mr. Vilvang was concerned that limiting the test to "knowingly" could result in defense counsel seeking to narrow the scope of the rule. He said that there already existed jurisprudence that used the "ought to know" test, and the proposed rule codified the test already in use.

Mr. Hume favoured the motion. He said the Discipline Committee asked the Ethics Committee to examine this question. The Ethics Committee engaged in extensive debate on the matter, including the concerns Mr. Donaldson raised, and concluded that the Law Society should take the high road

and provide a clear statement of what lawyers' obligations are. The Committee's view was that a lack of moral culpability would go to penalty.

Mr. Turriff agreed that clarity was needed and placing the line between "knowingly" and "ought to know" was too subtle. He was concerned that seeking consistency with other jurisdictions could simply perpetuate an inappropriate test.

Mr. McDiarmid preferred Mr. Donaldson's reasoning but was concerned that the worst outcome would be to not pass any rule at all because the matter was very important.

Mr. Vertlieb agreed with Mr. Donaldson's points. He was also concerned about how the test would be applied by hearing panels and the discipline committee. If the test is "ought to know", foreseeability was brought into the picture, and almost anything is foreseeable with hindsight. He suggested hearing panels would have difficulty applying the principle when dealing with the morally innocent and would ultimately water down the rule and defeat its purpose.

Mr. Nagle supported the motion. He felt the distinction Mr. Donaldson made was too subtle for most people.

Mr. Vilvang commented that a lawyer could not be considered morally innocent if his or her knowledge of a lawyer's duty falls below a certain level. Ignorance of a certain magnitude amounts to moral blameworthiness.

Mr. Donaldson agreed that it was correct that some rules could be breached by negligent conduct, and ignorance of the rules was not a defense, but the discussion at hand concerned ignorance of a state of facts, not ignorance of a duty, and that is what makes the lawyer morally innocent. He said the concept of moral innocence is not too subtle, and is fundamental to the rule of law in relation to dishonest conduct. In the realm of dishonesty when there is no blameworthy mental state we do not punish people.

Mr. Turriff said it was not simply a question of a lawyer not knowing a fact, but whether that fact would have been known had reasonable inquiries been made.

The motion was carried.

**10. PROFESSIONAL CONDUCT HANDBOOK, CHAPTER 13, RULE 1: OBLIGATIONS OF STAFF AND BENCHERS IN MEMBER ADVICE SITUATIONS**

It was moved (Wallace/Rideout) to require all Law Society staff and Benchers to comply with Chapter 13, Rule 1 of the Professional Conduct Handbook except for the Practice Advisors and the Staff Lawyer – Ethics who will be required to keep all disclosures from lawyers confidential, except where a member discloses a trust fund shortage or theft of client funds.

Mr. Ridgway opposed the motion because he did not think it was in the public interest. He thought members should be able to speak to Benchers about ethical matters and not be forced to turn to Law Society practice advisors.

Mr. McDiarmid said that the motion would take away a method members have to resolve problems with respect to undertakings or other ethical matters. He said the motion did not accord with the practical reality and would result in members who want to do the right thing, not calling for advice.

Mr. Sigalet said members believe they should call a Bencher to help with problems and if the motion was passed, that thinking would have to be reversed.

Mr. Taylor said Benchers generally encouraged members to speak in confidence, and the motion, if passed, would mean Benchers would have to vet each call to determine whether the discussion might involve something that they would be required to report.

Mr. LaLiberté agreed with the comments made so far. He said most members think Benchers are available for ethical advice, and part of the Benchers function is to assist members. He said the relationship helps members feel connected with the Law Society.

Mr. Turriff said the best approach was to allow Benchers to advise members on anything at any time. The motion would not be in the public interest.

Mr. Vertlieb suggested that Benchers be specifically exempted in the same way as practice advisors.

Ms. Preston recalled the article written by Dr. Dennis Kendel, Registrar of the Saskatchewan College of Physicians and Surgeons, on professional self-regulation in the public interest. She noted that Dr. Kendel made the point that members must understand that elected board members are required to serve the public interest. Ms. Preston acknowledged that assisting members in ethical matters was in the public interest.

Mr. Nagle disagreed that the motion was not in the public interest. He said any clouding of the rules was contrary to the public interest. He noted that that a member wanting confidential advice could retain the Bencher, but it was not in the public interest to promote “chummy” conversations that could lead to the impression that Benchers were looking after lawyers rather than the public.

The motion was defeated.

It was moved (Vertlieb/McDiarmid) to require all Law Society staff Handbook except for the Practice Advisors and the Staff Lawyer – Ethics to comply with Chapter 13, Rule 1 of the Professional Conduct Handbook, and require the Practice Advisors, Staff Lawyer – Ethics, and Benchers to keep all disclosures from lawyers confidential, except where a member discloses a trust fund shortage or theft of client funds.

Ms. Hickman said Ms. Preston’s comments emphasized the need to consider how Benchers protect the public interest. She suggested postponing the decision.

Mr. Vilvang said there was no question that the policy was not intended as a mechanism for “sweeping problems under the rug”. He said the situations Benchers were consulted on were often not clear, and often the first advice given to a member is that they should report themselves to the Law Society.

Mr. Alexander noted that the proposed policy included a very clear exception for misappropriation of trust funds, which must be disclosed.

Mr. Olsen said there was some difficulty in extending the policy only to practice advisors and Benchers because members are sometimes referred to other staff lawyers who are qualified to give advice. It is largely a matter of happenstance whether a member is referred to a practice advisor or someone else.

It was agreed to postpone debate on the motion and refer the matter back to the Committee for further consideration.

## **11. REMUNERATION OF LAY BENCHERS**

Mr. Alexander invited the Lay Benchers to give their views on this matter.

Mr. Falkins felt strongly that there should be some stipend for Lay Benchers, although not necessarily a large one. He noted that Mr. Kelly had to give up a day's vacation to attend Benchers meetings.

Mr. Nagle was opposed to any remuneration for Lay Benchers, as was Dr. Vallance.

Ms. Preston said she accepted the appointment knowing it was not remunerated, but was persuaded to support some form of remuneration because it could permit a wider range of people to accept appointment.

The Lay Benchers were absent during the rest of the discussion and decision on this matter.

Mr. Newell reported that the Law Society of Upper Canada had completed a referendum on the subject of Bencher remuneration, and a majority of its members voted in favour of paying remuneration to elected Benchers after the first 26 days of service in each year.

It was moved (Hume/Donaldson) to authorize payment by the Law Society to Lay Benchers, starting on April 2, 2005 as follows:

|  |       |
|--|-------|
| For a full day meeting or hearing (more than four hours) | \$125 |
| For a half day meeting or hearing (four hours or less)   | \$75  |

Mr. Hume was in favour of paying a *per diem* to Lay Benchers. He said elected Benchers sought election out of a desire to serve the profession, but Lay Benchers do not have the same vested interest and do incur expense.

Mr. Rideout said he was sympathetic but philosophically opposed. He said Lay Benchers knew there was no remuneration when they accepted appointment.

Ms. Fung was in favour of remuneration. She recalled that when Ann Howard was a Lay Bencher she was able to contribute because her employer supported her participation, but when she changed jobs her employer was not as sympathetic and she could no longer afford to continue. Ms. Fung said the Law Society should encourage the widest range of people to be Lay Benchers, and the amount of remuneration proposed was no more than a token recognition of their contribution.

Mr. McDiarmid agreed with Ms. Fung, noting that the impact on the Law Society budget was modest.

Ms. Schmit was against the motion. She said all Benchers knew they would not be paid, and were motivated by the public interest.

Ms. Ostrowski questioned whether the amounts proposed would assist someone who otherwise could not afford to accept appointment.

Mr. Brun said the Lay Benchers clearly contributed a great deal to the Benchers' discussions and it was reasonable to give them a *per diem*. He recalled that when he sat on the Judicial Council, it was open to indicate that he did not want to receive the *per diem*.

Mr. Ridgway was opposed to paying Lay Benchers, and said any remuneration should come from the government.

Mr. Vilvang was in favour of payment. He suggested the entitlement could come into effect at the end of the terms of the current Lay Benchers to address the argument that they accepted unremunerated appointments.

Ms. Wallace said it had been pointed out to her that there were unquantifiable benefits to lawyers who are Benchers, and it would be wrong not to acknowledge that. Lay Benchers gain no such benefits.

Mr. Donaldson recalled an earlier debate in which similar concerns were expressed. He agreed that it should be up to the individual Lay Bencher whether to accept payment, because different people had different and good reasons for accepting appointment. He was in favour of remuneration for those who want it.

Mr. Turriff supported the motion. He said the money would be recognition of the Lay Benchers' contribution. He did not support payment by the government because the potential to compromise independence.

Ms. Hickman agreed that Lay Benchers are extremely valuable and should be paid, but did not think the Law Society should pay them. She said Lay Benchers should be neutral and that neutrality should not be diluted by payment from members' money. She said the Law Society should urge government to pay Lay Benchers.

Mr. Blom supported the motion. He said the amount involved was virtually a token, but it would be an expression of fairness, recognizing the contribution that Lay Benchers make.

Mr. LeRose did not support the motion. He said the Benchers and Lay Benchers were equals whose opinions were of equal value. The next step would be payment of elected benchers, which he opposed.

The motion was carried.

## 12. ANNUAL PRACTICE FEE

It was moved (McDiarmid/Ridgway) to set the Annual Practice Fee for 2006 by referendum on a question that does not include a CBA fee component.

Mr. McDiarmid said the Executive Committee recommended setting the fee by referendum because it would allow greater participation of members.

Mr. Donaldson questioned the need to adopt last year's model when the issue does not have the same urgency.

Mr. Alexander said the Executive Committee's sense was that for the near future there was wisdom in using the referendum process because the expressed wish for voluntary membership in the CBA is still fresh in members' minds.

Mr. LaLiberté asked if this would preclude members from bringing forward resolutions to the AGM such as the funding for the Lawyers Benevolent Fund.

Mr. Hoskins said members could still bring resolutions to the AGM with the proper notice.

Mr. Brun was concerned that a referendum would involve greater expense, and his understanding was that the CBABC Executive did not intend to bring forward a fee resolution to an AGM.

Mr. McDiarmid said that a referendum allowed a larger number of members to say whether they approve of the amount of the practice fee, and that was worth the relatively modest cost. If nothing else, it was a referendum on the Law Society's budgeting process.

Mr. Turriff agreed with Mr. McDiarmid.

Ms. Shaw assured the Benchers that the consensus of the CBABC Executive was that if there is a referendum, it should not include a CBA fee component. With respect to the referendum process itself, the feedback received by the CBA would encourage a return to the AGM process because members appreciate the opportunity to speak and hear debate, and have their questions answered. Ms. Shaw said there was no hidden agenda, and no desire to return a CBA fee resolution to the Law Society AGM, although the Executive did not control the members.

The motion was carried.

**13. SOCIETY OF NOTARIES PUBLIC DATA REQUEST**

Mr. Whitcombe reviewed a request from the Society of Notaries Public for Law Society members' names and contact information, including email addresses, for use in their conveyancing software package.

It was moved (McDiarmid/Hume) to refer the request to the Disclosure and Privacy Task Force for consideration in conjunction with the development of a Law Society policy on disclosure of business contact information.

Mr. Turriff spoke on behalf of Mr. Zacks in favour of the motion.

The motion was carried.

**14. WOMEN IN THE LEGAL PROFESSION TASK FORCE REPORT**

Mr. Hume recalled that the Benchers had approved a review of work done in Alberta and Ontario as a possible alternative to conducting follow up studies in British Columbia. He said the Task Force had concluded that a review of recent studies done elsewhere, particularly in Alberta and Ontario, made a further survey in BC unnecessary. The Task Force proposed to review those studies and survey the policies in other provinces and in California, Washington and New York, and return to the Benchers in May with recommendations.

Mr. Nagle asked if it was a valid conclusion that conditions in Alberta and BC are the same.

Mr. Hume said the Task Force concluded that such differences as there may be do not justify the significant expense of conducting another study.

Ms. Ostrowski noted that some members of the Task Force hoped that some of the money that would be saved could be made available to implement policies.

**15. UNBUNDLING OF LEGAL SERVICES TASK FORCE INTERIM REPORT**

Mr. Taylor reported that the Task Force had developed a mandate, for which it sought the Benchers' approval. He said the Task Force had identified some key questions and would likely seek some funding, between \$15,000 and \$30,000.

It was moved (Taylor/O'Byrne) to approve the following mandate for the Task Force:

"The mandate of the Unbundling of Legal Services Task Force is to:

- (i) clarify the concept of "unbundling"\* and its application to the practice of law in British Columbia by examining the various forms and ways in which "unbundled" legal services are, or might be offered,

- (ii) determine which forms and ways of offering unbundled legal services serve the public interest by increasing the public's access to justice;
- (iii) review and analyze a range of topics related to the provision of "unbundled" legal services including ethical issues, professional conduct issues, possible revisions to the Law Society Rules and the Professional Conduct Handbook, relations with the Courts, liability and insurance issues, possible revisions to Law Society practice materials, and making information on unbundling available to lawyers, clients and the public;
- (iv) make recommendations to the Benchers based on the examination and review of the topics outlined in (i), (ii), and (iii).

\*Some other terms that have been used to describe "unbundling" include limited retainers, discrete task representation, limited scope representation, and limited services representation."

The motion was carried.

**16. REPORT ON SPECIAL COMPENSATION FUND INVESTIGATIONS AND CLAIMS IN THE WIRICK MATTER**

This matter was considered *in camera*.

**17. BENCHERS ONLY PORTION OF MEETINGS**

Mr. Alexander reported that the Executive Committee had reviewed best practice guidelines for public sector organizations published by the BC Government Board Resourcing and Development Office and discussed them with Elizabeth Watson, the Director of Board Resourcing and Development. Among the recommended practices were ensuring that boards have a regular opportunity to meet without any staff present. Accordingly, the Executive Committee proposed to include a Benchers only session in the agenda for each Benchers meeting.

Mr. Hume suggested that the Audit Committee could consider this as part of its discussion of the guidelines.

Mr. Turriff thought it was a good idea that should be implemented immediately.

It was moved (Turriff/Ridgway) to include a Benchers only session in the agenda for each Benchers meeting.

The motion was carried.

**18. OPEN DISCUSSION OF BENCHER CONCERNS**

This matter was discussed *in camera*.

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05-03-04