BENCHERS' DIGEST

Volume 14, Issue Number 6 December, 2001

If you have lost Contact with a Client GET THE HELL OFF THE RECORD

By George Thurlow

George Thurlow is a lawyer with the Saskatchewan Legal Aid Commission in Meadow Lake. Mr. Thurlow is currently serving on the Admissions and Education Committee, the Libraries Committee and the Professional Standards Committee of the Benchers.

It is a Thursday in mid-December, your practice is going well. You have just done well in several chamber matters, settled a few files including a 5 day trial for the week after New Years and can see some hope of cleaning up more work so you can get to enjoy Christmas.

Then a fax arrives with a notice of motion returnable next Thursday. It has a style of cause which you only vaguely recall. The applicant husband wants Christmas access claiming he has been denied same for several years. When your secretary pulls the file out of the closed file storage you read your client's thank you note for having obtained sole custody, $700.00 per month maintenance and most of the movables. She says once the children finish school they are moving to Alberta with her new friend.

You check the interim order of the previous February which is as the client says albeit with reasonable access.

You call the applicant's lawyer to advise that you no longer act for the client only to be told you are still on the record and you are the only person he can serve. You complain about so little notice & are reminded that Rule 447 provides that 3 days notice is appropriate for motions & there is only an additional 30 days of warning if a year has elapsed since the last action [Rule 536]. He makes it clear that with Christmas so close an adjournment is not possible

At this point you have to:

- find your client
- if you can find your client get some instructions to concede, negotiate or fight
- prepare material by remote control over the weekend [so much for enjoying your child's Christmas pageant]
- appear in chambers with such material as you can prepare when everyone wants to argue access

You cannot:

- withdraw as you need 10 days Rule 12
- try to settle it without instructions
- pressure your client to accept something inappropriate as you realize that at this late date, unable to prepare & file adequate material you will probably be subject to an inappropriate order anyway.

How did you get into this problem? Or more importantly how did you leave your client for whom you had done such good work so vulnerable to attack when you can not help her. You neglected to

either finish the matter or withdraw. After the February interim order you could have tried for a final judgement by:

- default
- negotiation
- the trial process

or at least advised your client these were options. A final judgement would have required the applicant to serve the client [Rule 590(4)]. However, in many cases the interim order is as good as one gets. A trial would be costly, traumatic & probably give results not as advantageous as your interim order.

The Code of Professional conduct provides:

> "The lawyer owes a duty to the client not to withdraw services except for good cause & upon notice appropriate to the circumstances"

The Commentary provides:

> "Having once accepted professional employment the lawyer should complete the task as ably as possible to facilitate the expeditious & orderly transfer of the matter to the successor lawyer"

Thus even though it was an interim order your client felt the matter was concluded & you did by closing the file. A withdrawal would have given your client the option of having counsel closer to her new home so as to be accessible to her.

While this example has been set as family matter this applies to any form of civil litigation. There was recently a real property matter before the Benchers where counsel upon being served & unable to find his client to obtain instructions withdrew the *lis pendens* and the action on which it was founded so as to save his client costs. The lawyer will probably be sued. In criminal matters the record is also relevant but the considerations are different. Watch this space for a future sequel: WITHDRAWALS II THE CRIMINAL TRIAL

Highlights of the Meeting of the Benchers Held October 25 and 26, 2001

Daniel Lamontagne

The trusteeship of Mr. Lamontagne's practice is almost concluded and the defalcations have been paid. The Benchers and staff discussed some of the details surrounding the incident, as well as possible preventative measures. The staff has been directed to prepare an action plan for discussion by the Benchers at the December Convocation. A report to the membership which outlines the incident and future actions will be distributed before the end of the year.

Money Laundering

The Benchers agreed that The Law Society of Saskatchewan, along with other Law Societies in Canada, will provide funds to the Federation of Law Societies of Canada for the commencement of legal proceedings to obtain a declaration that certain provisions of the *Proceeds of Crime (Money Laundering) Act* are unconstitutional. See the Federation of Law Societies of Canada press release contained elsewhere in this edition.

LAND Project

The Law Society has been in discussions with the Information Services Corporation (ISC) regarding the implementation of the new system of land registration. ISC has asked the Law Society to assist them in getting lawyers trained to use the new system.

The Law Society of Saskatchewan continues to assist ISC in its work in conversion of the existing land titles system to the new electronic system. As well, individual members continue to provide assistance to ISC by virtue of regular consultation meetings hosted by ISC.

Uniform Trust Conditions

The Law Society has a Real Estate Committee which is comprised of a number of real estate practictioners across the province. Topics dealt with include uniform trust conditions, amendments to the standard Saskatchewan Real Estate Commission offer to purchase, LAND Project, title insurance and *The Homesteads Act*.

The Committee would like to see the Benchers make the uniform trust conditions mandatory. As a preliminary measure, the Committee has suggested that if one of the parties requests that the unclaimed trust monies be used, then the other party will be obliged to use them. That issue is before the Benchers.

Lawyers Selling Real Estate

The Legislation & Policy Committee will be studying *The Real Estate Brokers Act* vis a vis the legislation in British Columbia where lawyers are entering the arena of real estate sales. As well, the CLIA insurance policy must be reviewed, as it is most likely that real estate sales is not covered. Should it be decided that lawyers should be entering this field, an amendment to the CLIA policy will be sought.

Annual Fees

By now all members will have received their Notice for the 2002 Annual Fee. The assessment of $1,010 (plus GST) has remained at that level since 1991. The due date for payment of the active fee is December 1, 2001, with the inactive fee of $150 (plus GST) due by December 31, 2001.

Rule 900 – Definition of Trust Funds

The Finance Committee had received an inquiry from a member regarding the application of paragraph (d) of the definition of trust funds in Rule 900. The paragraph in question stated as follows:

(d) funds received by a member holding a subsisting annual certificate in that member's capacity as executor or administrator of an estate provided that the executive director may release the member from compliance with any or all trust account rule requirements on application by the member and where the funds in question consist of the assets of an estate of which the member is executor or administrator and for which all necessary legal work has been complete.

The Committee could not determine what an appropriate application of the Rule would be, and recommended that it be deleted. The Benchers agreed and the Rule was deleted at the October Convocation.

Estate Trust Funds Part II

By John McIntosh, Q.C.

Vice-Chair, Professional Standards Committee

The Professional Standards Committee has recently been discussing estate trust accounts, and the proper functions of an Executor. It appears that a number of practitioners routinely hold estate funds in their trust accounts and pay from that account the usual debts and bequests. The trust account effectively becomes the estate account. An article in the October, 2001 Benchers' Digest implies that it is best to discourage Executors from "carrying out functions which would otherwise have been handled by the law firm on the trustee's behalf" and citing two "unfortunate situations" that might arise. First if the Executor does the work, it might be difficult to reconcile the accounts and second, the Executor might distribute bequests before debts are paid.

There is no mention in that article of the counter-argument that this practice is open to abuse. As we have seen recently, a major defalcation was facilitated by a lawyer having large amounts of estate funds in his trust account available for "kiting". That is defined as improperly transferring funds to general from trust or shifting funds around in various trust accounts to avoid detection.

An unrelated recent investigation by the Law Society revealed a lawyer paying an alleged debt owing to that lawyer by one of the beneficiaries in a matter not connected to the estate. This was paid without the knowledge of the Executor, and from estate funds in the lawyer's trust account. There was a possibility that the debt was statute barred by the effluxion of time. The Executor was left open to a claim by the beneficiary.

There have also been serious complaints about the lack of interest earned on estate funds in a lawyer's trust account for long periods.

Better practice would dictate that a separate estate account, with the Executor as signing authority, be opened at a bank or credit union, and that the lawyer only rarely have control of funds. Otherwise, why bother having an Executor? It is the Executor who is the Court appointed trustee and that was the Testator's intent. The solicitor is only to advise. As an aside, I wonder if practitioners obtain the written authority of the Executor to handle estate funds through the lawyer's trust account. In most cases, Executors will not have the experience nor the knowledge to insist on control of the estate account.

A separate estate bank account was the procedure recommended by the late H.A. Osborn, Q.C. as he then was, of North Battleford in his work on Probate Practice, Volume 2, "Notes on Administration of Estates" presented at the Bar Admission Course for a number of years. He gives examples of letters to be written to open an estate account and then makes the following points:

> "4. Instruct bank to close accounts standing in name of deceased and to deposit the proceeds to the credit of a new savings account in the name of the estate without interruption of interest . . ."
>
> "7. Bank passbook will eventually form the base on which you will prepare the Executor's final statement of accounts".

Contrary to the Benchers' Digest article which suggests that a separate estate account might make accounting difficult, Osborn apparently expected the bank statements to facilitate preparation of the Executor's accounts. It could also be argued that estate funds in trust accounts would increase unnecessarily the complexity of bookkeeping for the law firm.

This approach was confirmed in the case of another recent Law Society complaint where the investigator found:

> "There has never been an Estate bank account. All of the executors' financial transactions have been handled through [Lawyer N's] trust account. [Lawyer N] advises me that use of the solicitor's trust account to deal with creditors and beneficiaries was encouraged by whoever taught the bar admission course when he took it. He accepts my suggestion that this is rarely appropriate, and that not being a direct participant in the financial affairs of the executors by having his name on the bank account and his signature required, has encouraged [the complainant] in his perception of being left out and resulted in [Lawyer N] taking more responsibility than was required of him". (emphasis added)

I am reassured to note that this volunteer investigator was subsequently appointed a Queen's Bench Judge, although I suppose not entirely on the basis of this finding.

The use of the lawyer's trust account in estate matters is no doubt warranted in some cases. For instance, when real estate is sold the proceeds may be received in trust by the vendor's solicitor in the normal course, but then arguably funds should be transferred to the estate account. Lawyers have also cited as an example the closing of an administration when funds may be transferred to the lawyer's trust account to prevent further interest accruing and requiring additional income tax returns. But this could also be achieved by converting to a non-interest bearing account at the financial institution. Moreover, there is probably an election available allowing the beneficiaries to declare their pro-rated share of interest rather than the estate.

This is to say nothing of the subject of the lawyer as Executor and how funds are to be handled in that case. This is another matter fraught with difficulty, or disagreement, and worthy of future discussion.

In the meantime, we invite lawyers to comment on the matter of estate trust accounts. There appear to be at least two sides to the argument. It would be interesting to know if the practice of routinely running estate funds through trust accounts is widespread.

Notice

Coming Soon...

The Public Legal Education Association of Saskatchewan (PLEA) in partnership with the Youth Justice Renewal Initiative, Department of Justice (Canada), is currently developing a presentation package for lawyers that will introduce youth justice principles to students (such as roles of parents and victims, right to participate in processes that affect them, involvement of family and community, repairing harm done, etc.). The main objective of the presentation package is to guide lawyers in delivering a presentation in a manner and at a level appropriate to students. The package will also include presentation tips, material on the educational context, as well as material on the developmental stage of students. The package will be available in the Spring of 2002.

Trust Accounts

The Law Society of Saskatchewan has been made aware on a few occasions of allegations that members are using their trust accounts as a vehicle for hiding personal assets from Canada Customs & Excise or other creditors. Leaving aside any criminal or quasi-criminal consequences to this, it is contrary to the Rules of the Law Society. It has the effect of leading creditors, such as Revenue Canada or Canada Customs & Excise, to feel that they must have access to trust accounts in order to secure or realize legitimate debts. This is absolutely inconsistent with client confidentiality and the preservation of clients' property.

Therefore, the very few members who might be tempted to utilize trust accounts as a vehicle for hiding personal assets or for personal purposes should be aware that if this is discovered, the Law Society will treat this as a serious matter.

Queen's Bench Rules Notice

The Rules will be amended as of January 1, 2002 by virtue of recent changes in *The Wills Act*.

The amendments will be published in The Saskatchewan Gazette. However, because the statutory changes were proclaimed in force as of November 1, 2001, applications for letters probate and letters of administration with will annexed must, to ensure compliance with the statute, state whether or not the deceased entered into a spousal relationship, after execution of the will, which lasted for 24 or more months.

In Memory Of

ROBERT KOHALY, Q.C. passed away on October 24, 2001 at his home in Vineland, Ontario. Mr. Kohaly was born in Fredericton, New Brunswick on July 9, 1921. He served his country as a member of the South Saskatchewan 2nd Division in Dieppe. Following the war, he studied law and practiced in Estevan until his retirement.

Mr. Kohaly is survived by his wife, Dorothy, his sons, Dale and Glenn, and his daughters, Marlene and Jan.

Notice from Chief Justice Gerein

"The practise had developed of routinely requesting a shortened redemption period in an order nisi for foreclosure. This practise was discussed by the Court at its most recent *en banc* meeting, and it was agreed that the redemption period would be 90 days unless there are exceptional circumstances".

Thank you for your assistance.

The FLSC Contests the Validity of Certain Provisions of the Proceeds of Crime (Money Laundering) Act

The Federation of Law Societies of Canada (FLSC), the co-ordinating body of the law societies of all Canadian provinces and territories (except Nunavut) as well as the Chambre des notaires due Quebec, has today commenced legal proceedings in the Supreme Court of British Columbia with a view of obtaining a declaration of nullity and/or unconstitutionality of certain provisions of the *Proceeds of Crime (Money Laundering) Act*. Although this Act received royal assent in June 2000, certain parts of it came into force today, November 8, 2001.

The Law Society of British Columbia (LSBC) has as well commenced legal proceedings to challenge the legislation and the Canadian Bar Association has asked the court leave to intervene in both proceedings.

In August 2001, the President of the FLSC, Maurice O. Laprairie, Q.C., appointed a Special Litigation Committee to challenge certain provisions of this money-laundering legislation. Richard C. Gibbs, Q.C. now chairs this committee, and Josiah Wood, Q.C. of Blake, Cassels & Graydon LLP in Vancouver, has been retained as counsel for the FLSC before the British Columbia courts.

As its name suggests, the money-laundering legislation serves a beneficial purpose. It aims to combat the laundering of the proceeds of crime. The FLSC concurs with the basic purpose of this Act because it is fundamentally opposed to money laundering.

The FLSC is nevertheless opposed to certain provisions of the legislation which, in its unanimous view, constitute a serious breach of some basic principles endorsed by democratic societies, including the independence of legal counsel and solicitor-client confidentiality. The FLSC and all its members believe that these principles are essential to the operation of the Canadian legal system and that it is in the best interests of the public that such principles and rights be preserved.

The money-laundering legislation requires lawyers in Canada and notaries in Quebec to report secretly to a federal agency information acquired within a solicitor-client relationship. This reporting requirement applies to every transaction which might be considered “suspicious” and any specific financial transaction described in the legislation. A lawyer who does not comply with these provisions may be faced with severe criminal penalties, such as imprisonment for up to 5 years or a fine up to $2,000,000.

For the FLSC, these statutory requirements for lawyer disclosure of client information unreasonably impair the solicitor-client relationship, compromise the independence of lawyers and notaries in Quebec, put the interests of legal counsel in conflict with those of their clients, place the lawyer in breach of their established legal, professional and ethical duties owed to the client and infringe on the rights of the public guaranteed by the *Canadian Charter of Rights and Freedoms*.

As Chair of the Special Litigation Committee, Richard C. Gibbs, Q.C. commented: “The Government’s vision of the role of lawyers as State conscripts to secretly inform on their clients is completely repugnant to centuries of legal tradition and modern views of democracy: the legal profession is founded upon independence of the lawyer from the state, loyalty of the lawyer to the client, avoidance of conflicts of interests between the lawyer and the client, and the keeping of client confidences. Asking lawyers to report to the State on their clients is unacceptable to the Law Societies.”

CONTACT:
Richard C. Gibbs, Q.C.
Chair, FLSC Special Litigation Committee
Gibbs & Company
Tel: (250) 564-6460
rcgibbs@telus.net

Expectations of Principals

A firm had hired an articling student for the upcoming year. At the interviews, there had been statements made by members of the firm that they expected their student to settle in the community. The student advised that her fiancée was looking for employment in the community, and together they were looking for housing. The written offer of employment made no reference that living in the community was a condition of employment.

On the student's first day, she advised that she and her fiancée were living in a house in another town and that she would be commuting. The firm advised her that she was in breach of a condition of her articles. The student responded that the issue of living in the community had not been included in the written offer and that her fiancée found a job in the other town. The firm took the position that the student's fiancée should also obtain employment in the community. Ultimately, the firm advised that they would not offer the position to the student.

This matter came to the attention of the Admissions & Education Committee because the student applied to take the Bar Admission Course out of order, indicating that her energies were directed that summer to find another articling position at a time when firms were no longer looking for students. The Committee found the student's circumstances to be extraordinary and granted the application. The Committee expressed concern over the firm's handling of the matter, and referred the issue to the Complaints Officer.

Ultimately, it was determined that the issue was one of contract, and thus not within the jurisdiction of the Law Society. However, the Admissions & Education Committee remains concerned that the way in which this situation was handled reflects negatively on the legal profession.

Obtaining articling positions is one of the most crucial elements of students' legal careers. They cannot practice law without having served under articles. They are under great stress. As well, articling students are junior and are not necessarily experienced in negotiating employment contracts, especially with the law firm which is in the stronger bargaining position, and can influence their future. While the student should have paid more attention to the discussion regarding the firm's "condition" that she reside in the community, there was no such mention of that "condition" in the offer of employment the firm made to her.

The Admissions & Education Committee recommends that firms be concise in communicating their expectations to potential articling students.

Resignation of C. Willy Hodgson

It was with regret that the Benchers accepted the resignation of C. Willy Hodgson, S.O.M., at Convocation. Ms. Hodgson, who was appointed a Lay Bencher in 1997, served on the Ethics, Professional Standards and Admissions & Education Committees and was Chair of the Equity/Diversity Committee this year.

Ms. Hodgson's professional background includes nursing, social work, psychology and human resources. She was awarded the Saskatchewan Order of Merit in 1994 in recognition of her extensive volunteer service in her home of Moose Jaw. Willy helped the Benchers in their deliberations by bringing an Aboriginal perspective, a sense of morality and a great deal of humour. Her quiet guidance was and is highly valued.

Annual Password Change to Members' Section

This is another reminder that the password and user id for the members' section changes every year with membership renewals. The new user id and password to be members' section will be activated on December 1, 2001 and the old year user id and password will be disabled on January 15, 2002. The Law Society office will issue the new password with your Annual Certificate. Non-practicing or inactive members may still access the members' section for an annual fee of $250. All information will be included with the Law Society membership renewal invoices.

Amnesty Week in the Libraries

> *He was very proud of the volumes he thus compiled, and regretted their loss suggesting that "he had lent them to friends with a bad memory." Unconscious of the joke which I have often heard circulated against himself, — that when Chancellor, he greatly augmented his own library by borrowing books quoted at the bar, and forgetting to return them, — he would say of such borrowers, "Though backward in accounting, they are well practiced in book-keeping."*

Eldon, Lord, "Life of Lord Eldon" in John Lord Campbell, *The Lives of the Lord Chancellors*, London: John Murray, 1847, Vol. VII, p. 42.

In these high-tech times, many forget that books constitute the backbone of our library system. Lawyers still rely on books for the commentary and analysis of others, to apply that to your client's situations, and to determine appropriate solutions. There is no delicate way to discuss books missing from our libraries, but it is a fact that many titles go missing. In these situations, books are taken from the library and the user has forgotten to sign them out.

Remembering to respect the sign out policies ensures that your colleagues will not be inconvenienced. Many members do sign out their books and return them diligently. Some members need reminders to get the books back to the libraries. A few members need several reminders to return the books.

Many times, the staff will recall a book in order to file the updates that have been accumulating. The updates are extremely expensive. When the books never return to the library, we waste money, having paid for unused updates, replacement costs, and the staff time doing all of this work.

In a profession proud of its traditions and etiquette, we have developed canons of library etiquette. You can find these on our web site under the Library Services section. Proper library etiquette includes:

- Respecting the sign out policies so colleagues are not inconvenienced
- Signing out books for your own use before removing them from the library (or asking library staff to do this for you, if you are in a hurry)
- Returning books to the library on time or when recalled by the library staff
- Respecting the books. Many older books can no longer be purchased. It is expensive or impossible to replace books already in the collection

This is a sensitive topic, bound to offend some members. The library staff strive to ensure the integrity of the collections for the use by all members. In order to help members return books, no questions asked, we are declaring the week of December 17 to 21 Amnesty Week for returning any Law Society library books. Take this opportunity to clear out your office before Christmas. The library will be conducting a year-end inventory and needs all books returned. It does not matter how long you have had the books out. Our interest is in returning them to the shelves to include them in our reorganization project.

> *Books constitute capital. A library book lasts as long as a house, for hundreds of years. It is not, then, an article of mere consumption but fairly of capital, and often in the case of professional men, setting out in life, it is their only capital.*
>
> Thomas Jefferson (1743–1826), U.S. president. letter, Sept. 1821, to former president James Madison.

Participate in the Amnesty in December and return the Law Society's books for the benefit of all members.

Ethics Rulings – October Convocation 2001

Request for Ruling – Chapter XVI "Responsibility to Lawyers Individually" Trust Conditions – No Third Party Reliance – Oct 2001

FACTS:

- Client F complained about his lawyer, Lawyer A, on the basis that Lawyer A held his money in trust and would not pay it out.
- Lawyer A asked for a ruling from the Law Society Ethics Committee with respect to $10,000 held in trust for Client F as was the subject of the complaint.
- Client F was beneficiary of his father's estate, Lawyer B was the lawyer for that estate. Client F had debts to Creditor/Client G and a judgment and writ against him. Lawyer B forwarded a portion of Client F's share of the estate to Lawyer A until trust conditions.
- Lawyer C, counsel on behalf of Creditor/Client G, expected the writ to be paid out by Lawyer A from monies held in trust for Client F. Lawyer C alleged that Lawyer B, solicitor for the estate, undertook to him that the funds would not be disbursed from the estate without first notifying him. Lawyer C understood that this would avoid him having to serve a Garnishee Summons on Lawyer B to attach the funds of the estate. Lawyer C alleged that he and Lawyer A had agreed as a matter of convenience that Client F's estate disbursement would be paid into Lawyer A's trust account, and that this payment would be made on the condition that the writ held by Lawyer C's client would be fully paid out and the remaining funds disbursed to Client F.
- Lawyer A did not pay out the money and began to attempt to negotiate with Lawyer C to reduce the amount payable under the writ on various grounds. Lawyer C took the position that Lawyer A was under trust conditions (imposed by Lawyer B) to pay out the writ in total.
- The trust conditions were as follows:

  "The enclosed cheque for $50,000 is provided to you on the following additional trust conditions:

  1. That you (Lawyer A) will retain $10,000 of these proceeds in your lawyer's trust account on the following conditions:
     (a) That these funds will be utilized to pay out the existing Creditor/Client G Judgment against Client F (approximate amount of $9,305 plus interest and discharge costs) in its entirety, provided however as follows:
        (i) You (Lawyer A) would be free to utilize the balance of these funds without condition in the event that this judgment is settled and paid out for less than $10,000 upon you (Lawyer A) providing our office of written documentation evidencing this settlement;
        (ii) That in the event Creditor/Client G serves a Garnishee on the Estate, you will be required on being advised of the Garnishee to forthwith return to our office the amount garnisheed to a maximum of $10,000 *(These funds would then be paid into Court to be dealt with in such a manner as may be ordered by the Court, or as the interested parties may agree.)*
  2. That the enclosed funds will be returned to our office forthwith in the event you are unwilling or unable to comply with the above."

RULING:

1. The Ethics Committee was of the opinion that Lawyer A was not in breach of trust conditions imposed by Lawyer B.
2. The Committee was of the opinion that Lawyer A made no misrepresentations to Lawyer C.
3. The Committee was of the opinion that Lawyer B made no misrepresentations to Lawyer C.
4. Lawyer C may wish to simply proceed with his garnishee of funds held in trust instead of relying on either an undertaking

or representation made by either Lawyer A or Lawyer B.

The Ethics Committee did not see any misrepresentation on the part of Lawyer B or Lawyer A. The Committee was of the opinion that Lawyer C cannot rely on Lawyer B's trust conditions imposed on Lawyer A as one lawyer cannot "piggy back" on another's trust conditions. Lawyer C has a legal remedy.

Request for Ruling – Chapter XVI "Responsibility to Lawyers Individually" Trust Conditions – Clients cannot alter – Oct 2001

FACTS:

- In a Family Law matter, the parties were proceeding to sell the matrimonial home and split the proceeds. The husband's lawyer, Lawyer A, sent transfer documents to the wife's lawyer, Lawyer B, on trust conditions to forward one-half of the net sale proceeds from the matrimonial home as soon as it was releasable. In the event the trust conditions were not acceptable, the documents were to be returned unused. Lawyer B accepted the trust conditions and the transfer was registered to the new purchasers.
- Proceeds became releasable in mid-July, and on July 20th, Lawyer B forwarded one-half of the net sale proceeds, along with a letter advising that such funds were sent on a new trust condition, that the funds be held by Lawyer A's office, and not provided to the husband/client until all matrimonial issues were resolved.
- Lawyer A advised Lawyer B that he did not believe it appropriate to impose a trust condition on a previous trust condition, and requested confirmation in writing that he could release the proceeds to the husband for his immediate use and benefit. Lawyer B advised by telephone that he would not agree to remove his trust condition. Lawyer B provided his comments with respect to the matter. He indicated that his client, the wife, spoke to Lawyer A's Client about the balance of sale proceeds, and agreed that both the remainder of the wife's share and the husband's share would not be released until matters were settled. The wife advised her own lawyer that her ex-husband accepted that condition.
- Lawyer B indicated that when he received Lawyer A's letter imposing trust conditions, he understood it to mean that one-half of the net proceeds would be sent to Lawyer A's office, and did not understand that the money would be released to Lawyer A's client. Lawyer B assumed Lawyer A would hold the monies in the office trust account and invest on behalf of his client. Lawyer B took the position that he had complied with all trust conditions as well as the agreement between the parties. Lawyer B did not believe that Lawyer A could go beyond what was in his letter and release the funds with his Client Cs it would conflict with Lawyer B's trust conditions and the agreement reached by the parties.

RULING:

The Ethics Committee was of the opinion that Lawyer A was in the right. On a strict reading of the original trust condition there was no obligation to hold the money. If Lawyer B wished to amend the original trust conditions, he should have done so at the time of receipt. Lawyers must agree on any amendment to trust conditions. The Ethics Committee wished to remind the member that clients cannot alter trust conditions of lawyers.

Chapter XIX "Avoiding Questionable Conduct" Duty to meet financial obligations – Oct 2001

FACTS:

- Expert J complained about Lawyer E for failure to pay her account as incurred in the course of his practice.
- Lawyer E retained Expert J's firm to prepare an assessment of loss of income, dependency, and housekeeping capacity on behalf of his client. Expert J prepared the reports and then testified with respect to the reports later the same year.
- Expert J indicated that Lawyer E inquired prior to preparation of the reports if her firm would accept payment once the case had settled. Expert J responded to him and stated to him that they normally would not extend such generous terms, but in this case, would wait one year for payment, but could not wait until the matter settled as no one could foresee the settlement date.
- There were many communications between the parties with respect to the report. The cover letter accompanying the report stated, "Please be advised that our Statement of Account is in accordance with our fee quote of April 18th, 2000; however, as agreed, interest will accrue

on the balance after 30 days, until April 30th, 2001 at which time the account must be paid in full, inclusive of interest charges." After trial preparation and testimony, Expert J's cover letter with her account stated "As agreed earlier, interest will accrue on the balance after 30 days until April 30th, 2001 at which time the account must be paid in full, inclusive of interest charges."

- Lawyer E confirmed this in his response letter, "In the circumstances of a reserved judgment it is premature to speculate on the outcome of costs, except to say, if we are blessed with a good outcome, we will seek a full indemnity from the trial judge for the expense of expert witnesses, including your own. Meanwhile, thank you for carrying the account until April 30th, 2001, in accordance with our agreement".
- Lawyer E wrote to Expert J six days before the account was due in April 2001 indicating that the projected date of payment needed to be changed in take into account the fact that the judgment had not yet been received. Lawyer E argued "The underlying assumption has always been that the actual payment would be based upon or follow the outcome of the case, whether through settlement or judgment. From the beginning I made it clear as possible, the fact of the problem, which problem still exists, namely, no financial resources whereby to cover expert witness costs such as your own, and this led to the deferral arrangement we have."
- Lawyer E retained counsel and took the position that the contract between Lawyer E and Expert J's firm was that Expert J would await judgment before requiring payment. They took the position that Expert J was now attempting to change the contract by requiring payment before the judgment was rendered. The issue of the amount of the account was also raised and Lawyer E indicated that he believed Expert J's accounts were higher than originally contemplated. Lawyer E was unable to provide any letters, notes or documentation outlining the arrangement whereby Expert J agreed to wait until judgment.

RULING:

The Ethics Committee ruled that it is clear on the facts received that the account was payable by the solicitor as of April 30th, 2001, and remains unpaid. The member is reminded that lawyers have a professional obligation to pay accounts due as incurred in the course of practice.

Saskatchewan Legal Education Society Inc.

SK·L·E·S·I

Suite 500, 333 25th Street East
Saskatoon, Saskatchewan S7K 0L4
Telephone: (306) 653-7580
Facsimile: (306) 653-7585
e-mail: SKLESI@sk.sympatico.ca

Bar Admission Course to Incorporate Aboriginal Materials

SKLESI is pleased to announce that it has begun its project to incorporate Aboriginal practice issues throughout its Bar Admission Course materials.

The Bar Admission Course materials presently concentrate on eight basic areas of law; civil procedure, corporate / commercial, criminal, debtor / creditor, family, real estate, wills and estates and tax law. The materials must include Aboriginal issues that any practitioner needs to be aware of when acting for Aboriginal clients, whether living on or off-reserve. Once this material has been integrated into the Bar Admission Course, it will be examinable in the same manner as all other course content.

The Law Society's Admissions and Education Committee determined that the best approach to accomplish this objective would be to hire a project coordinator. Funding has been obtained through the Law Foundation of Saskatchewan.

SKLESI began the process by meeting extensively with Professor J.Y. Henderson, Director of the Native Law Centre of Canada, University of Saskatchewan, and Wanda McCaslin, Research Officer and YIIP Coordinator. Their enthusiasm and assistance in launching the project is acknowledged and appreciated. The result of these meetings is that SKLESI is pleased to announce it has retained Helen G. Semaganis of Wardell, Worme & Missens to coordinate the project. Our goal is to complete the first stage of the project by March 2002.

Submitted by Bruce Wiwchar, Bar Admission Course Director

BENCHERS' DIGEST

Published by:
The Law Society of Saskatchewan
1100, 2500 Victoria Avenue
Regina, Saskatchewan
Canada S4P 3X2
Telephone (306) 569-8242
Fax (306) 352-2989
e-mail: reception@lawsociety.sk.ca