BENCHERS' DIGEST

Volume 15, Issue Number 1 January, 2002

Profile of the President

Michael Milani, Q.C. of Regina, Saskatchewan was elected President of the Law Society of Saskatchewan by the Benchers of the Law Society at the Convocation held at Saskatoon on December 6, 2001. He took office on January 1, 2002.

Mr. Milani was born in Fredericton, New Brunswick, and attended elementary and high school in Saskatoon. Mr. Milani attended the University of Saskatchewan in the College of Arts and Science for two years, and then attended the College of Law at the University of Saskatchewan where he obtained his Bachelor of Laws degree in 1980. In 2001 he received his Queen's Counsel designation.

Mr. Milani articled to Mr. W. F. Ready, Q.C. of McDougall, Ready, and was admitted to the Law Society of Saskatchewan in 1981. Mr. Milani became a partner in the firm in 1985. He has practiced with McDougall, Ready continuously from 1981, now McDougall Gauley. Mr. Milani practices corporate and commercial law, with an emphasis on banking law and secured transactions.

Mr. Milani has been a presenter at a large number of continuing legal education seminars, for SKLESI and other organizations, over the years, and was the recipient of the Outstanding Volunteer Award from SKLESI in 1995.

Mr. Milani is a member of the Insolvency Institute of Canada and of the Editorial Boards of the Banking and Finance Law Review and the Commercial Insolvency Reporter. He is a member of the Steering Committee of the Commercial Law Strategy Initiative of the Uniform Law Conference of Canada.

Mr. Milani has been very involved in community affairs. He was on the Board of the United Way of Regina for seven years, serving as President from 1994 to 1996. He has been a Trustee of the MacKenzie Art Gallery since 1995, having served as Chair of the Board from 1999 through 2001. Mr. Milani has been active in coaching minor hockey and baseball.

Mr. Milani is past President of the Regina Bar Association and a member of the Canadian Bar Association.

He was elected a Bencher of the Law Society of Saskatchewan in November of 1997, and was re-elected in 2000. He has chaired a number of committees, including the Insurance and Legislation and Policy Committees, and has just completed a two year term as President of Saskatchewan Lawyers' Insurance Association. He is currently a representative on the Queen's Bench Bar Judicial Council and the Federation of Law Societies.

Mike is married to Diane Runge Milani, and they have two children.

President's Report

The practice of law is becoming increasingly complex. So too are the regulatory and administration concerns facing the Law Society of Saskatchewan. In spite of this challenge, we are pleased that the Law Society continues to be on sound financial footing, as is Saskatchewan Lawyers' Insurance Association.

The issues with which the Law Society deals are so numerous and diverse that it is difficult to identify trends, or to anticipate what matters will be in the forefront in any given year. However, it is increasingly apparent that it is essential that Law Societies and their members be vigilant in defending the core values of the profession, and in doing so address our obligation to act in the public interest.

Over the last few months there have been a number of instances where the Law Society directly, and through the Federation of Law Societies, has advanced such matters. Examples include challenges brought and positions taken in respect of the proceeds of crime and anti-terrorism legislation. Locally, we have lobbied the Government of Saskatchewan and Information Services Corporation in an effort to ensure that the Land Titles System continues to operate in a manner that best serves the public interest. The active involvement of the Society in matters of this sort has borne fruit. For examples, our members are now able to incorporate, and are permitted to form limited liability partnerships.

One area in which there has been rapid development is that of mobility of lawyers. We have now moved to a protocol where each Saskatchewan lawyer is entitled to practice for up to 6 months in any given 12-month period, in any of the other Western Provinces. Discussions are continuing on a national front, which may ultimately lead to full-scale mobility.

Mobility has many tentacles. Among other matters, we are considering the way in which bar admission courses should be structured, with a view to finding common ground.

The more involvement I have with, and the greater understanding I obtain of, the Law Society, the more I recognize that we are all fortunate to have the assistance of our dedicated professional and support staff. That analysis is confirmed by any comparison of our operations with those of other law societies.

I wish to publicly acknowledge the efforts of Willy Hodgson, one of our recently retired Benchers. Although she is not a lawyer, Ms. Hodgson brought to her role all of the elements that we, as a profession, value. She was careful in her consideration of matters, and thoughtful in expressing her views. Perhaps most importantly, she helped all of us undertake our deliberations with an appropriate measure of compassion and empathy for those who would be affected by our determinations. She will be missed, but her presence will continue, around the Benchers' table.

On behalf of the members, I also wish to thank Mr. Martel Popescul, Q.C. for the efforts he has expended on our behalf, during his tenure as President. His even-handedness and good common sense aided us greatly in our tasks.

I also wish to thank the membership and Benchers for allowing me an opportunity to serve as your President. It is a privilege, and I am very fortunate.

I am confident that with your assistance, we will be able to continue the good stewardship of our profession.

Of further note, Robert Gibbings of the Saskatoon law firm of Scharfstein Gibbings Walen & Fisher, was elected Vice-President. Mr. Gibbings is the Chair of the 2002 Ethics Committee, a Vice-Chair of the 2002 Discipline Committee, and a member of the 2002 Equity/Diversity Committee.

Highlights of the Meeting of the Benchers Held December 6 and 7, 2001

Uniform Trust Conditions

The Benchers have monitored use of the Uniform Trust Conditions for the last couple of years. Input has been received from members as to whether the Uniform Trust Conditions should be made mandatory. As well, the Benchers have become aware of an insurance claim, of which part of the potential loss was attributed to the use of the "Regina" trust conditions.

At Convocation the Benchers passed a motion that it is improper for the solicitor for the purchaser to, in effect, undertake full responsibility for a transaction by guaranteeing it will close. It is equally improper for the vendor's solicitor to impose on the solicitor for the purchaser a trust condition that in effect guarantees the transaction.

There was some discussion as to whether the Uniform Trust Conditions should be made mandatory. The concern with mandatory trust conditions is that they may alter the contract between the parties. Therefore, the above referenced motion was passed. An amendment to *The Code of Professional Conduct* will be put forward to the Benchers at the next Convocation for approval.

Amendments to Trust Account Forms

The Finance Committee is reviewing proposed new trust account forms which will increase the amount of information provided. Some of the increased information will be required from the members and some from the firms' accountants. Input is being obtained from accountants to determine how the changes will affect accounting fees. After further input by the Finance Committee, draft forms will be circulated to the membership for comment.

Electoral Boundaries

An amendment to Rule 21(3) and (4) was approved, which allows non-practicing members to choose the electoral division in which they wish to vote. If a choice is not made, non-practicing members will vote where they reside.

Collaborative Law

The Benchers noted with interest the initiative undertaken by several lawyers in Saskatchewan to introduce a formal program of what has been described as "collaborative law". The Benchers reviewed the training provisions and the general philosophy of collaborative law and determined that at present there will be no regulatory requirements. It is appropriate to wait and see whether the public interest might require regulation. The matter will be revisited in about six months.

Competence Profile

The issue of competence is on the agenda of several of the Law Society Committees. Thus it was with interest that the Benchers reviewed the competence profile developed by the Western Law Societies Education Task Force. The Task Force developed this profile for newly called lawyers in order that common Bar Admission Course programs can be designed. The profile is being considered by the Law Societies in the four Western Provinces.

The Benchers adopted the profile, without amendment. While the Task Force intended the profile to describe newly called lawyers, it was noted that this could be used as a standard definition of competence.

The following is the profile as developed by the Western Law Societies Education Task Force:

> This competency profile outlines the knowledge, skills and behaviours expected of entry-level lawyers. It lays the foundation for a renewed bar admission course and is a building block in the Western Canada Law Societies' mobility initiative.
>
> A newly called lawyer must demonstrate competency in the following four areas:
>
> 1. Lawyering skills;
> 2. Practice and management skills;
> 3. Ethics and professionalism;
> 4. Legal knowledge.
>
> 1. Lawyering Skills
>
> A newly called lawyer shall have and maintain the following lawyering skills:
>
> (i) Problem Solving
>
> A newly called lawyer must:
>
> - identify relevant facts
> - identify legal, practical and client issues and conduct the necessary research arising from those issues
> - ascertain the clients' goals and objectives
> - analyze the results of research
> - apply the law to the facts

- form an opinion as to the client's legal entitlements
- identify and assess possible remedies
- develop and implement a plan of action

(ii) Legal Research

A newly called lawyer must:

- identify the question(s) of law
- select sources and methods and conduct research
- select sources and methods and conduct search(es)
- analyze and apply guiding principles of case law
- analyze and apply statutes
- identify, interpret and apply results of research
- effectively communicate the results of research

(iii) Writing

A newly called lawyer must:

- clearly identify the purpose of the proposed communication
- use correct grammar and spelling and use language suitable to the comprehension of the reader and the purpose of the communication
- present the subject of the communication, advice, or submissions in a logical, organized, clear and succinct manner
- be persuasive where appropriate
- be accurate and well-reasoned in legal content and analysis
- communicate with civility

(iv) Drafting

A newly called lawyer must:

- identify the purpose of the document
- effectively organize the document
- be able to draft an original transactional document without a precedent
- use precedents appropriately
- use clear language appropriate to the document
- understand and be able to explain a legal document
- identify and implement all necessary steps to enforce a legal document

(v) Interviewing and Advising

A newly called lawyer must:

- determine the clients' goals, objectives and legal entitlements
- use appropriate questioning techniques to ensure the interview is thorough, effective and efficient
- be understood by the interviewee
- manage client expectations
- establish and maintain rapport and an open communication relationship with the client
- clarify instructions and retainers
- explain and assess possible courses of action with the client
- document the interview

(vi) Advocacy and Dispute Resolution

A newly called lawyer must:

- advocate persuasively to advance a client's position
- represent the client effectively in trial or hearing
- effectively prepare, present and test evidence
- represent the client effectively at a mediation
- negotiate effectively on behalf of a client
- advocate effectively on behalf of a client
- know and observe procedures and etiquette of the forum

2. Practice and Management Skills

A newly called lawyer shall have and maintain the following practice and management skills:

(i) Personal and Practice Management

A newly called lawyer must implement effective practices, procedures or systems for:

- time management
- project management
- diaries/limitation reminders
- timely and on-going client communications
- client development
- risk avoidance
- technological proficiency

- balancing professional life with personal life
- effectively managing documents

(ii) Office Management

A newly called lawyer must understand and be able to implement effective practices, procedures or systems for:

- quality control
- billing and collection
- trust and general accounting
- file and precedent organization
- avoiding conflicts of interest
- diaries/limitation reminders
- record-keeping/archiving/file destruction

3. Ethics and Professionalism

A newly called lawyer shall:

(i) with respect to professionalism:

- demonstrate professional courtesy and good character in all dealings
- maintain and enhance the reputation of the profession
- recognize an obligation to pursue professional development to maintain and enhance legal knowledge and skills
- act in a respectful, non-discriminatory manner
- recognize the limitations on one's abilities to handle a matter and seek help where appropriate

(ii) with respect to ethics:

- recognize circumstances that give rise to ethical problems or conflicts
- recognize and discharge all duties and undertakings
- protect confidences
- know and apply professional ethical standards

4. Legal Knowledge

A newly called lawyer shall have a general knowledge of the substantive law and current practice and procedures of the areas of law that are unlikely to be encountered in the early years of a general practice.[1]

LAND Project

The implementation of the new Land Titles system began in Regina in December. ISC personnel have been holding regular breakfast meetings for practitioners and staff to discuss difficulties being encountered. These meetings have been of assistance to all. The Law Society encourages members to take the training in the new system offered by ISC.

At a meeting with the Minister of Justice in November, ISC undertook to review the issue of authorized on-line users within the next couple of months. The Law Society continues to advocate that lawyers should be the sole authorized users once the system becomes fully operational.

Domestic Relations Amendment Acts

At the meeting with the Minister of Justice in November, it was agreed that the Law Society and Department of Justice should work together to develop ways to notify the public regarding the significant changes to the law relating to the "family property", wills, etc. We look forward to the meetings to determine an appropriate course of action.

[1]The "areas of law likely to be encountered in the early years of a general practice" include:

- Real Estate – which may include, for example, builders' liens, undertakings, contracts, aboriginal lands, tax, foreclosure;
- Civil Procedure – which may include, for example, mediation, negotiation, arbitration, administrative tribunals, evidence, contracts, torts;
- Death and Disability – which may include, for example, wills, estates, planning, probate, representation agreements, wills variation, capacity, aboriginal issues, tax;
- Business – which may include, for example, corporate, commercial, personal property, securities, intellectual property, tax, aboriginal business;
- Criminal Procedure – which may include, for example, Charter of Rights and Freedoms, bail, sentencing, elections, evidence and aboriginal issues;
- Debtor/Creditor – which may include, for example, collections, aboriginal issues, bankruptcy and insolvency;
- Family Relationships – which may include, for example, divorce, custody, maintenance, access, aboriginal issues, same-sex unions, common-law relationships, tax, property rights and distribution, settlement.

Q.C. Appointments for 2002

Congratulations are extended to the following members who have been honoured with Queen's Counsel appointments:

Keith Boyd of Kanuka Thuringer in Regina, admitted to the Bar in 1971
Ron Gates of Gates & Company in Regina, admitted to the Bar in 1975
Gwen Gray of Saskatchewan Labour Relations Board in Regina, admitted to the Bar in 1979
Ross Green of Saskatchewan Legal Aid Commission in Melfort, admitted to the Bar in 1986
Maurice Herauf, Registrar of Court of Appeal, admitted to the Bar in 1987
Robert Kennedy of Halyk Kennedy Knox in Saskatoon, admitted to the Bar in 1977
Jan Kernaghan, Registrar of Queen's Bench, admitted to the Bar in 1979
Alan Logue of Harradence Logue Holash in Prince Albert, admitted to the Bar in 1980
Fred McBeth of Balfour Moss in Regina, admitted to the Bar in 1972
Michael Milani of McDougall Gauley in Regina, admitted to the Bar in 1981
Richard Morris of Pedersen Norman McLeod & Todd in Regina, admitted to the Bar in 1968
W. Randall Rooke of McDougall Gauley in Saskatoon, admitted to the Bar in 1979
Barry Rossmann of the City Solicitor's Office in Saskatoon, admitted to the Bar in 1980
Donna Wilson of Woloshyn & Company in Saskatoon, admitted to the Bar in 1986

Ethics Rulings – December Convocation 2001

Request for Ruling – Chapter IV "Confidential Information" - Disclosure Where Lawyer's Conduct in Issue - December 2001

FACTS:

Lawyer A acted for a client who was charged with a criminal offence, "Communication for the purpose of obtaining sexual services of a prostitute". The client instructed Lawyer A not to allow any of this information to get back to his family, in particular, his wife, and that he would call upon Lawyer A from time to time and make payments on account. The matter was settled when the client voluntarily attended "john" school. However, the client passed away, still owing Lawyer A's accounts. Lawyer A was faced with the dilemma of keeping the confidentiality of his client's matter, yet at the same time presenting his accounts to the Executrix of the estate, the client's wife.

RULING:

The Ethics Committee was of the opinion that Lawyer A could present his bill to the estate lawyer, who could disclose the matter to his client, the executrix, if he had to. Commentary 10 of Chapter IV of *The Code of Professional Conduct* states "disclosure may also be justified in order to establish or collect a fee.....but only to the extent necessary for such purposes." The Committee was of the opinion that Commentary 10 allows breach of solicitor/client privilege to the extent necessary to collect an account.

Request for Ruling – Chapter IV "Confidential Information" – Theft of lawyer's Computer containing Client Records – December 2001

FACTS:

Lawyer Q had a break and enter at his office and items, including his computer, were stolen. Lawyer Q advises that his file server contained client information dating back to 1997 comprising information on about 10,000 clients.

RULING:

The Ethics Committee advised that Lawyer Q should contact those clients who would be prejudiced if the information on his computer were used against them. The Committee was of the opinion that

Lawyer Q did not have to try to contact all 10,000 clients in such circumstances.

Request for Ruling – Chapter XVI "Responsibility to Lawyers Individually" – Duty to Client over Duty to Lawyer - December 2001

FACTS:

A complaint was received from Lawyer C against Lawyer D. Lawyer C acted for creditor clients, Client C, who obtained judgment and registered a Writ of Execution against Lawyer D's client, Client D, at the Land Titles Office. After approximately a year, Lawyer D's client, Client D, was attempting to sell some property. Lawyer D called Lawyer C's office when the Writ of Execution was discovered. Lawyer D advised a real estate assistant at Lawyer C's office that "Client D should have dealt with the matter at the time of the contract which was the subject of the judgment" and advised that real estate assistant that Lawyer C's office would receive payout of their judgment. The real estate assistant with whom Lawyer D spoke was provided with an update approximately 2 months later. Lawyer D advised Lawyer C's assistant that the title had registered without the Writ of Execution attaching, and that he had paid all monies out of trust. Apparently, Client D's title included Client D's middle name and Lawyer C's Judgment and Writ referenced the client only by his first and last name. The new Land Titles Office Registration System will only attach a writ that is in exactly the same name as the title. Lawyer C complained about Lawyer D, in that he knew Lawyer C had a writ against Client D which was properly registered, and when it did not attach at the time of title transfer, Lawyer D paid monies out to Client D "solely on the basis that the Writ of Execution did not attach due to a glitch in the new system."

RULING:

The Ethics Committee noted that there are ways to amend such problems if the writ does not attach. The Committee also notes that Lawyer D's primary obligation was to his client. The Committee examined Lawyer D's conversation with Lawyer C's real estate assistant. From what the Committee was told, it did not appear that Lawyer D made any undertaking to pay. Absent any undertaking or trust condition, Lawyer D would be under no professional obligation to tell Lawyer C whether or not his client's third party writ attached. This writ not attaching problem has been common in the new Land Titles system and will have to be resolved.

The Committee was of the opinion that the obligation to the client was foremost. If Lawyer D received money and his client instructed him to pay out all of the money, and if Lawyer D was under no trust conditions to hold the money, Lawyer D could not refuse to release it. The writ did not attach and collect the judgment amount in the easiest and most efficient way possible, during the property sale. However, Lawyer C's client still had judgment and a writ against Client D, and legal means to enforce same. The Committee was of the opinion that Lawyer D's conduct in releasing the money to his client was not unethical.

Request for Ruling – Chapter XVI "Real Estate Uniform Trust Conditions" – To "Forward" or "Receive" Proceeds – December 2001

Lawyer X requested a ruling from the Ethics Committee with respect to the interpretation of trust condition #1 of the Uniform Trust Condition letter for real estate transactions. Lawyer X represented the purchaser in a real estate transaction. The vendor's solicitor refused to release keys on the possession date as his office had not yet received the balance to close. The vendor's solicitor used the Uniform Trust Condition letter, trust condition #1 which states:

> "On or before the possession or adjustment date (whichever first occurs) which earlier date is hereinafter referred to as 'possession date'), you will forward to this office the difference between the balance due to close hereunder as indicated in our Statement of Adjustments, and your client's net mortgage proceeds."

Interim financing was necessary on the purchase, and Lawyer X received the monies the day before possession. Lawyer X couriered monies to the vendor's lawyer the day before possession. That same day, the cover letter was faxed to the vendor's lawyer, and Lawyer X confirmed that she accepted the trust conditions imposed upon her when the transfer was sent to her office. The next day, the vendor's solicitor refused to grant the purchasers possession at the time specified in the Real Estate contract, 9:00 a.m. as monies were not yet received. The vendor's lawyer interpreted the uniform trust

condition #1 wherein it stated "you will forward to this office the difference between the balance due to close… and your client's net mortgage proceeds" to mean received on or before possession date. Lawyer X stated that she was of the opinion that the trust condition read "forward to this office" which, interpreted literally, would mean that the cheque did not need to be received by the vendor's solicitor by possession date, but could simply be "forwarded".

RULING:

The Ethics Committee was of the opinion that practice dictates that "forward to the office" was meant to mean that the money would be "in hand" by that date. The Ethics Committee acknowledges that the "forward" literally means "send", however, the Committee was of the opinion that Lawyer Y's position that the money should be "received" would be the correct interpretation. The Ethics Committee recommends that the uniform trust conditions be amended to read "the difference between the balance due to close hereunder as indicated in our Statement of Adjustments, and your client's net mortgage proceeds be received by this office."

Many Thanks. . . .

The Benchers and professional staff of the Law Society of Saskatchewan wish to express their sincere thanks to members of the profession who volunteered their time to investigate complaints for the Professional Standards Committee, Discipline Committee, and Hearing Committee and to prepare the necessary reports for the Committees' consideration. As well, our thanks to members of the Sub-Committee on Competence, and to those who act as "alternate" Complaints Officers when staff and Benchers are in a conflict. Also, we would like to extend thanks to Law Society members and members of the Judiciary who have contributed their time as members of various Law Society Committees and as Law Society representatives to other organizations. The Benchers recognize that the vocation of law is demanding and greatly appreciate the invaluable contribution of the time of Law Society members and members of the Judiciary. To those who volunteered in previous years, your time was also greatly appreciated. We have now implemented the practice of publishing a "thank you" list to recognize such contributions. As our computer record keeping system is still relatively new, we extend pre-emptive apologies to anyone we may have omitted.

Chapter XV of *The Code of Professional Conduct* states that: "*The lawyer should assist in maintaining the integrity of the profession and should participate in its activities.*" The Committees' volunteers have done just that! Many thanks to the following:

NON-BENCHER VOLUNTEERS FOR 2000 and 2001

Investigations/Hearings

James Benison
Sherri Cybulski
Victor Dietz
Russ Hart
Hon. Justice Robert Jackson
Earl Kalenith
Paul Korpan
Donald Layh
Robert Munkler
Les Prosser, Q.C.
William Roe
Noel Sandomirsky, Q.C.
Greg Swanson
Patricia Warsaba
David Clements
Sheila Denysiuk
Christine Glazer, Q.C.
Brenda Hildebrandt
Garry Johnson
Robert Kennedy, Q.C.
David Kowalishen
Donald McKercher, Q.C.
Gregory Pinch
Charlene Richmond
Randy Rooke, Q.C.
Brian Scherman, Q.C.
James Trobert
Alma Wiebe, Q.C.
Carol-Anne Cockburn
Stewart Demmans
Jeff Grubb, Q.C.
Mitch Holash
Bill Johnson, Q.C.
Hon. Justice Duane Koch
Jane Lancaster, Q.C.
Mark Mulatz
Drew Plaxton
Michel Riou
James Sanderson, Q.C.
John Stamatinos, Q.C.
Hon. T.C. Wakeling
Fred Zinkhan

Sub-Committee on Competence

Bill Holliday
Jane Lancaster, Q.C.
Dan Konkin
Alma Wiebe, Q.C.
Abena Buahene

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Pat Kelly, Q.C.
Barry Singer, Q.C
Larry Zatlyn, Q.C.

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Betty Ann Pottruff, Q.C.
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Doug Surtees
David Kowalishen
Dwayne Anderson
Charlene Richmond
Rachelle Verret Morphy

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Larry Zatlyn, Q.C.
Holly Ann Knott, Q.C.
Brenda Hildebrandt
Darcia Schirr
Frank MacBean, Q.C.
Murray Walter, Q.C.

Yours truly,
DONNA R. SIGMETH
Complaints Officer

Estate Trust Funds – The Debate Continues

The following continues previous Benchers' Digest articles regarding the handling of estate trust funds. Permission has been granted by both Ms. Haidenger-Bains and Mr. McIntosh to print their letters.

December 18, 2001

The Law Society of Saskatchewan
1100, 2500 Victoria Avenue
Regina, SK S4P 3X2

Attention: John McIntosh, Q.C.

Dear Sir:

Further to your article in the last Benchers Digest regarding "Estate Trust Funds Part II" it is my view that the handling of estate funds through the lawyer's trust account is both appropriate and ordinary in many circumstances.

First, the risk to your client and to the estate is no greater or no less than in any other transaction. If, as suggested in your article, we wish to minimize the risk to clients in passing money through our trust accounts because of a possible defalcation, then we should take such position with respect to all funds passing through our trust account and insist that all exchange of funds take place outside of our office.

Further, the risk of "not involving the client" is again the same issue which we face on all of our files. If you do not communicate properly with your client from the beginning, and explain all steps of the process carefully and obtain their concurrence, then it is bound to lead to such issues down the road.

I have been practising in estates for over 20 years, and have never had an issue or problem in passing the monies through our trust accounts. It has allowed me to process estate quickly and efficiently and to properly account to the beneficiaries. I view the management of estate funds as an important client service which I can offer to the executor. I was also a co-presenter at a Bar Admission Course session in which Mr. Justice Osborn indicated that he believed that the executors should operate the estate accounts. His stated reason, however, was that it was a marketing tool to be able to leave the funds in existing institutions, rather than pulling them into the lawyer's trust accounts.

Accordingly, it is my belief that passing estate funds through a lawyer's trust account is an acceptable alternative to using an executor's estate account and depending on the lawyer, provides better service to the client.

Yours truly,
ROBERTSON STROMBERG
Per: "P.J. Haidenger-Bains, Q.C."

January 10, 2002

Robertson Stromberg
Barristers and Solicitors
600 – 105 Twenty-First Street East
Saskatoon, SK
S7K 0B3

Attention: P.J. Haidenger-Bains, Q.C.

Dear Madam:

RE: Estate Trust Funds Part II

Thank you for your letter of December 18th, 2001. I was pleased to receive it on the principle that it is better to be condemned than to be ignored.

Estate funds in a lawyer's trust account are not like other trust funds because there is another trustee responsible, namely the Executor. That trustee is supervised by the Court, and does not need to be further supervised by the Law Society. In commercial and real estate transactions funds are ordinarily held in a lawyer's trust account for relatively short periods of time. As we have seen, in estates they can be held for years.

Perhaps the risk is no greater for estate funds in a lawyer's trust account than for any other funds, but why would a lawyer assume any risk that is unnecessary? The Law Society should discourage this. As a general rule a lawyer should intervene minimally in the client's affairs and trust accounts used only when required.

It goes without saying that communicating is important. Yet apparently for some, keeping clients in ignorance is a means of control. So is maintaining estate funds in a lawyers trust account. As we have seen, these lawyers do not bother to obtain the approval of the executor for disbursements, and trouble results. If they do seek that approval, it does away with much of the advantage of having estate funds in trust.

You are dismissing Osborn summarily by stating that he advanced a separate estate account merely as a marketing tool. He was a leading authority in this area and his advice had more substance. Is the statement that your system "is an important client service which I can offer to the Executor" not reference to a marketing tool?

Your position reflects that of the Benchers who differ with me. The basis of my argument is that there is a danger here of a misconception of the role of the Executor and the solicitor. Short of a serious disability, the Executor can and should take primary responsibility, acting on a solicitor's advice. Any other system is open to abuse, because the concept behind it is flawed.

Our disagreement concerns what is best practice in handling estate funds. The essence of your position is that a competence and ethical lawyer presents no problem using the method that you employ. It works for you. Except, I must add, that is appears to be a bad example for others. It does not work for them. If recent defalcations have not proven conclusively that there is a better way, I do not know what will.

I appreciate your thought-provoking letter, and your contribution to this debate.

Yours truly,
"John McIntosh, Q.C."

File Transfers on Contingent Fee Matters

by Barry Morgan

Chapter XII of *The Code of Professional Conduct, 1990*, Withdrawal, and in particular Commentary 8 thereunder, makes it clear that, upon discharge or withdrawal, the lawyer should transfer the file in an "orderly and expeditious manner". That obligation is subject to the lawyer's right to claim a lien, see Commentary 11 of that Rule (also recognized in s. 66 of *The Legal Profession Act, 1990*), which in turn is subject to the professional obligation on the lawyer not to enforce the lien "if the result would be to prejudice materially the client's position in any uncompleted matter".

An unpleasant reality is that the file transfer often leads to acrimony and dispute between the client and the discharged lawyer, and/or between the transferring lawyers, which does nothing to maintain civility at the bar and which certainly does not enhance the public's perception of the legal profession.

Probably one of the most troublesome areas is transfer of files in which the work is being done on a contingent fee basis. For guidance on this, reference is made to Rules 1500-1503 and 1505, dealing with contingent fee agreements. In particular, it is noted that the content of a contingent fee agreement (which is defined to mean an agreement that provides a lawyer's remuneration for services is contingent in whole or in part on the successful disposition of the matter in respect of which services are provided), cannot purport to prevent the client from changing solicitors before the conclusion of the matter. Further, members must ensure that not only is the remuneration provided for in the agreement reasonable under the circumstances existing *at the time the contract is entered into*, but also that the total remuneration payable, regardless of the remuneration provided for in the agreement, is reasonable under the circumstances existing *at the time the bill is prepared*.

The issues concerning these kinds of file transfers were recently considered in a judgment rendered in June of 2001 by Pritchard J. The law firm had applied under section 67(1)(a)(ii) of the Act to tax its solicitor and client accounts of a number of plaintiffs who had discharged that firm and retained new counsel to continue their actions.

The agreements in question were similar to the extent each provided for the matters to be paid on a contingent fee basis, however, some of the agreements also contained a proviso to the effect that if the client transferred the file, the client would be responsible for legal fees based on the hourly rates of the lawyers who had worked on the file. The issue boiled down to whether or not the law firm had the right to proceed at this time with taxation of their fees and disbursements, or, if

the firm had to wait until the conclusion of each action before its fee entitlement could be determined.

Each agreement stated that all disbursements were to be paid upon receipt of an account if an account was rendered or alternatively at the conclusion of the matter.

Some of the agreements also contained the following proviso:

> "However, nothing in the foregoing is intended to require the client to pay any fees or disbursements if nothing is recovered. If nothing is recovered, the client will pay nothing to [the law firm]".

With respect to those agreements, the Court held that the issue raised was unequivocally answered by the wording of that proviso, and accordingly that no taxation of any portion of the accounts for those clients, whether for fees or disbursements, could proceed until the outcome of each client's case was known.

As for the agreements which provided for fees to be calculated on an hourly basis and to be paid forthwith if the client transferred the file, the Court refers to cases from other jurisdictions that have wrestled with this issue. In short, the compelling view seems to be that a discharged solicitor's cause of action for fees owing under a contingent fee agreement arises immediately upon being discharged, but the amount of those fees can only be determined after the client's case is settled or determined by the Court. In particular, Pritchard J. held that "requiring a client who has retained a solicitor under a contingency fee agreement to pay that solicitor their reasonable fees before being able to transfer the file has the effect of restricting the client's rights to transfer the file", in prohibition of Rule 1501(2).

The Court further held that having regard to the essential component that legal fees (whether on contingent fee matters or any other matters) must always be fair and reasonable, by the very nature of a contingent fee arrangement, the reasonableness of the fee could not be determined without knowing what the ultimate outcome of the case is.

With respect to payment of disbursements upon file transfer for those agreements which did not contain the proviso above quoted, the Court determined that, based on the wording of the agreement, those disbursements were to be paid forthwith upon the account being rendered.

Finally, Pritchard J. held that a solicitor cannot maintain a lien in respect of fees payable under a contingency agreement.

The Professional Standards Committee invites the input of members on this issue. As a starting point, it would seem that the following general principles may be inferred when dealing with file transfers on contingent fee matters:

1. A client who wishes to transfer a file being conducted under a contingency fee agreement will of course have the right to do so;
2. The transferring lawyer's obligation will be to promptly prepare the file for transfer and forward it to the new solicitor upon appropriate arrangements, discussed in 3 and 4 below;
3. The client should be advised that he or she must pay all outstanding disbursements upon receipt of an account from the transferring law firm, assuming the contingent fee agreement provides for that;
4. The law firms involved will have to make arrangements for the transferring lawyer to be paid his or her reasonable fees upon conclusion of the matter. One possibility that may be of assistance is for the lawyers involved to calculate entitlement to fees on a pro rata basis based on the respective percentages of the time each has expended to date of the conclusion of the matter, with satisfactory arrangements/trust conditions to be agreed between the lawyers for payment of their entitlements once the client's matter is settled or upon the client obtaining a successful judgment. (See also Chapter XI, "Fees", Commentary 6, "A fee will not be a fair one within the meaning of the Rule if it is divided with another lawyer who is not a partner or associate unless (a) the client consents, either expressly or impliedly, to the employment to the other and (b) the fee is divided in proportion to the work done and responsibility assumed"). Again, this would be subject to the overriding requirement (Rule 1503(b)) that regardless of the remuneration provided for in the agreement, the fee must also be reasonable under the circumstances existing at the time the bill is prepared.

The Committee would lastly alert members to the dangers inherent in advancing disbursements on such matters without ever rendering an account until receiving notification the client wishes to transfer the file to another firm. Regardless of whether the wording contained in the Contingent Fee Agreement allows the lawyer to require payment of outstanding disbursements when a

client decides to change law firms, that may be "hollow comfort" in some circumstances. Often, the practical reality is that where significant disbursements have been advanced for, e.g. medical and expert reports over a number of years, the client has no realistic prospect of coming up with the by now large sum required as a condition of transfer of the file. Particularly in situations where the file is at a strategic stage, e.g. upcoming examination for discovery or pre-trial conference, there is going to be considerable pressure on the discharged lawyer to agree to hold off being paid for those out-of-pocket costs until and if the matter is successfully concluded.

Re: *The Legal Profession Act, 1990* and Merchant Law Group, Q.B.G. 1216 of 2001, J.C. Regina, June 21, 2001.

Legal Web Cites

By Peta Bates

Alberta Statutes Update

http://www.qp.gov.ab.ca/display_acts.cfm

The Revised Statues of Alberta 2000 came into force on January 1, 2002. Chapter numbers and section numbers have been renumbered in the revision. The Alberta Queen's Printer web site now provides the text of the R.S.A. 2000 consolidated with the 2001 amendments.

Labour Law on the Internet

Saskatchewan Labour

http://www.labour.gov.sk.ca/

Recent changes to the Labour Standards Act are noted in the "What's New" column on the Saskatchewan Labour web site. The most recent changes involve parental leave and the site provides a news release, information bulletins and a fact sheet comparing Saskatchewan and Federal benefits. The "What's New" column offers links to other recent press releases and the Dorsey Report on the Workers' Compensation Board.

The "Quick Links" section contains links to all Saskatchewan labour legislation and regulations which are the responsibility of the department, a chart of minimum wages across Canada, a vacation pay calculator and an archive of news releases.

From the main Saskatchewan Labour page there are links to various branches including Labour Relations, Labour Standards and Occupational Health and Safety.

Saskatchewan Labour Relations Board

http://www.sasklabourrelationsboard.com/

The Saskatchewan Labour Relations Board's web site contains links to legislation and regulations which the Board administers, relevant forms in both .PDF and Word formats, the current agenda of Board hearings for the next two months and annual reports for the past two years.

Decisions of the Board from the last six months are available on the web site in .PDF format. The case list is in chronological order. If you know only the name of one of the parties use your web browser's 'Edit – Find' command to search the list by name.

The "Publications and Policies" link contains Board resolutions, practice notes and information bulletins.

Canada. Human Resources Development Canada

http://labour.hrdc-drhc.gc.ca/index.cfm/doc/english

It's always exciting to find sources which compare legislation across all Canadian jurisdictions. The "Legislation – Canadian Labour Law Information" link on the federal Human Resources Development web site turns out to be a gold mine for comparisons of labour and industrial relations legislation, collective bargaining issues, employment standards legislation and occupational health and safety legislation for all jurisdictions. These charts are prepared by the Labour Law Analysis Branch. At the same link are the annual "Developments in Labour

Legislation in Canada" reports which summarize significant changes in labour legislation across Canada for the past eleven years.

The link entitled "Legislation – Federal Acts and Regulations" provides the text of the Canada Labour Code including a useful subject index to Part II and related regulations as well as other federally administered labour legislation.

Canada Industrial Relations Board

http://www.cirb-ccri.gc.ca/index_e.asp

The Canada Industrial Relations Board (CIRB) web site offers only brief summaries of selected decisions, currently those dated from August 2000 to January 2001. The "Decisions" link offers only the message "this web page is under development".

In the "What's New" column the Board provides an overview of the new *Canada Industrial Relations Board Regulations, 2001* which came into force on December 5, 2001. [SOR/2001-520, *Canada Gazette Part II*, Vol. 135, No. 25, p. 2794] A Concordance Table between the old 1992 regulations and the new 2001 regulations is also provided.

This Week's Law – Two decades of reporting

2002 marks the twentieth anniversary of *This Week's Law*, more commonly known as, TWL. TWL is a digesting service of Saskatchewan case law, with several tables of case, statute and regulation considerations. TWL in 1982 looked much different than the present version.

Think back to 1982. We just emerged from the swinging '70's with paisley pants, tie-dyed T-shirts, beads, and Farrah Fawcett hair behind us. Touch-tone phones were becoming popular at home and at the office, but not everyone had one. The affordable fax machines used thermal paper on rolls, so that your fax could be held like a scroll. And computers were moving from the mini-computer to the microcomputer. A computer with a 286 processor wouldn't be developed for at least two more years. Computer screens were amber or green and all printers were dot matrix, if you had a printer at all. The term "desktop" was not yet coined. More word processing was produced on MICOMs than on microcomputers. "Lightning" speed communication was all analog and moved at 1200 or 2400 baud (bits per second). (Most people can read faster than that.) Acoustic couplers (the headset of the phone was inserted into a piece of hardware) were slowly being replaced with external modems to connect to Datapac. Email was a service called Envoy 100 and it was not widely used.

In the online environment, other disciplines such as medicine had used online searching for several years on services such as DIALOG, ORBIT, BRS, CANOLE, and MEDLARS. QL Systems began about 1974 and became more popular in courthouses across the country in the late 1970's and early 1980's. There was no other online service for Canadian legal materials at the time. QL searching in 1982 was done using a telephone line, dialing into Datapac using your external modem or acoustic coupler, entering two periods and sending a carriage return. The only thing that is the same now as back then is the sound of the connection to the communications line, the static-y high-pitched noise that lasts only until the connection is secured.

That low-tech picture of the nice slow pace of the 1980's seems somewhat alluring now. However, that technology also had an effect on how quickly printed law reports were issued. Saskatchewan case law was reported in the *Saskatchewan Reports*, *Western Weekly Reports*, *Canadian Criminal Cases*, *Reports of Family Law* and occasionally the *Dominion Law Reports*, and other topical reports. *The Saskatchewan Decisions* service was a digesting service organized by topic and at the time, no table of cases was issued with it making it difficult to use. In the early 1980's, the six-month to one-year delay in a case getting reported made keeping current extremely challenging and getting a copy of a case quickly was a big expense. Thus the need for a locally produced current awareness service emerged.

The Library Director, Douglass MacEllven, was the visionary for *This Week's Law*, which was wholeheartedly supported by then President G. Allbright, Q.C. and Library Chair R.J. Rushford, Q.C. They saw a need to get information to the lawyers in Saskatchewan and the digesting service began.

The first issue of TWL was produced in mid to late 1982. It was

produced on a Radio Shack Tandy computer. One copy was printed and then reproduced on what looked liked a very poor quality photocopier. The instructions asked you to provide your own tabs. The content was much smaller than it is today, as can be seen in the following chart.

TWL	1982
no. of tabs	7
no. of digests	254
no. of fields in database	7
court included	SKCA, SKQB, SCC
no. of pages	127 single-sided
TWL	**2001**
no. of tabs	13
no. of digests	786 (to date)
no. of fields in database	40
court included	SKCA, SKQB, SKPC
no. of pages	1092 (still one more release to produce)

TWL 1982 2001 no. of tabs 7 13 no. of digests 254 786 (to date) no. of fields in database 7 40 court included SKCA, SKQB, SCC SKCA, SKQB, SKPC no. of pages 127 single-sided 1092 (still one more release to produce)

My, how we have grown! It takes three databases to produce the printed TWL today. As the years went by, TWL added other features. The Bills Tracker and Saskatchewan Regulations sections were included as separate sections in 1990. The Bills Tracker is a unique research tool since it not only provides the status of a bill, but it is arranged by the name of the statute being amended, not by the bill name. Saskatchewan Rules Considered was added as a separate tab in 1991. In 2001, the content remains consistent with content from the 1990's, although the appearance of the digests and indexes changed significantly. TWL is much easier to read today than it was 20 years ago!

As the library system developed, part of TWL was produced as one of the databases available in the library's LINE system, under Library Director Mike McGuire. The LINE service was a dial-in computerized research system developed in 1990, initially offered free to the lawyers, then later as a subscription service. Once the web site was launched in 1998, links from the digest to the fulltext judgments were added. The LINE service was discontinued for the web-based service, and the Law Society of Saskatchewan became the first courthouse library in Canada to offer a sophisticated research system of case law on the Internet.

What is the benefit of subscribing to TWL in hard copy when so much is on the web site? For the volume of cases now produced, it is much easier to browse cases in print. It is easier to perform the online searches after preparing your search using a printed source, to look for terms used, section numbers to use, or the volume of cases that you might expect to retrieve. For those who are not ready for the online environment, it is a comprehensive source of Saskatchewan case law.

There are several research tables in TWL. They include:

- case name index with references to printed and neutral citations
- case, statute, regulations considered,
- table of Saskatchewan statutes amended and the bill that amends them
- Saskatchewan regulations updates
- subject index.

So, TWL acts as a case digest service, a statute citator, a case citator, a status of current bills service, a status of current regulations service. All of this is available for only $250 a year. The price includes the binder, 13 tabs, and one year of digests and tables prepared in approximately 9-10 releases a year.

New to TWL in 2002 will be a table of recent proclamations of Saskatchewan statutes.

The twentieth anniversary issue of TWL will still be produced in the distinctive red binder with white lettering. To commemorate the anniversary, the library will be issuing 20th anniversary seals that will be affixed to the binder. Order forms are available on the web site under the Publications section.

BENCHERS' DIGEST

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