

BENCHERS' DIGEST



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Mobility Rules

by A. Kirsten Logan, Q.C.



Since 2000, lawyers in the Western Provinces have had the ability to practice temporarily in the other western provinces for up to six months. This arrangement caught national attention. As a result, a National Mobility Agreement was signed in December of 2002. Saskatchewan was one of the signatories of that Agreement. The Agreement set out the framework for the mobility of lawyers nationally and set a target implementation date of July 1st, 2003. At the June Convocation the Benchers passed Rules 195-207 which would allow the National Mobility Agreement to be implemented in Saskatchewan effective July 1st, 2003.

Basically, the National Mobility Agreement provides that members "entitled to practice" in their home jurisdiction who do not have a discipline record and are not the subject of discipline or criminal proceedings, may practice temporarily in a reciprocating jurisdiction for up to 100 days. In addition, these same members may permanently transfer to a reciprocating jurisdiction without having to write the transfer examinations. The new mobility rules apply to lawyers from British Columbia, Alberta, Manitoba, Ontario and Nova Scotia. Newfoundland signed the Agreement but has some legislative hurdles to pass.

The definition of "entitled to practice" is different in many of these jurisdictions. These differences have resulted in numerous meetings of administrative staff across Canada to thrash out how the Rules can be effected in each jurisdiction while retaining reciprocity.

For a Saskatchewan lawyer to be "entitled to practice", he or she must be an active member. For most, this also means having insurance coverage (Rule 605(1)). Non-practicing members must be reinstated in order to take advantage of the new mobili-

ty provisions, although non-practicing members are not precluded from transferring. They will be required to write the transfer examinations, among other things.

The new Rules define the nature of a temporary practice – up to 100 days and no "economic nexus" with the host jurisdiction. Things that amount to an "economic nexus" include setting up an office or trust account and residency. In these situations or where a member has a discipline record, he or she must apply for a National Mobility permit.

The transfer examinations have been replaced by a reading requirement developed by SKLESI and approved by the Admissions & Education Committee. Transferring lawyers must certify that they have read and understand the material referred to in that reading list.

The new Rules and Forms are being circulated in this mailing. As well the Rules, reading list and frequently asked questions (prepared with assistance from the Law Society of Upper Canada) are posted on the Law Society website.

www.lawsociety.sk.ca

Highlights of the Meeting of the Benchers Held June 12th and 13th, 2003

Rule Amendments

The Benchers passed new Rules 195-207 which implement the National Mobility Agreement. For more information about the mobility provisions, please see the article on p. 1.

LAND Project

The Benchers agreed to hire Lee Mountain of the Mountain & Mountain firm in Assiniboia, Saskatchewan to act as a project director to obtain input from lawyers as to their concerns about the LAND Project. In June, members would have received an email from Ms. Mountain requesting that they provide her with their concerns about the LAND System. Ms. Mountain has received many messages from members and has grouped them into various areas and priorities.

ISC has named a group of ISC employees who have the ability to effect change within the corporation. Law Society representatives, Randy Baker, Q.C., Randy Rooke, Q.C., Randy Sandbeck and Keith Boyd, Q.C., will be meeting with the ISC representatives regularly. It is hoped that these consultations will be of assistance to members by addressing problems in the new Land Titles System

Law School Tuition

On many occasions the Benchers have expressed concerns that the increase of tuition to the College of Law, University of Saskatchewan will negatively affect access to legal education. The Benchers were pleased to learn that an agreement has been reached between the College of Law and the University wherein 30% of the increase will be

used for student financial aid, 15% will go to the University and 55% of the increase will go to increased funding at the College of Law.

Wasylyshen Defalcation

As you will see from the discipline notices circulated with this *Benchers Digest*, Kenneth Wayne Wasylyshen of Yorkton, Saskatchewan was disbarred on June 11th, 2003. Subsequently, the Benchers approved defalcation claims in the amount of \$60,275.00, \$2,115.28, \$2,150.65 and \$36,505.00 for a total of \$101,045.93 on behalf of former clients of Mr. Wasylyshen. The trusteeship of Mr. Wasylyshen's practice continues and it is expected that additional defalcation claims will be considered in 2003.

In Memory Of

ROBERT PETER ZACHER of Calgary passed away suddenly on May 29th, 2003 at 43 years of age. He was born and raised in Regina and attended the University of Saskatchewan, where he earned his Commerce and Law degrees in 1983. He articulated with Pedersen, Norman, McLeod & Todd, and soon thereafter left private practice for a career as in-house counsel for two different corporations. In 1997 Robert and his family relocated to Calgary, where he returned to private practice and after a brief period, established his own consulting and venture capital firm, serving primarily the oil and gas industry.

Robert served as a School Council Member with the Calgary Catholic School System, and was involved with the School of Alberta Ballet.

Mr. Zacher is survived by his wife, Ava, their two children, his mother and his brother.



LAVONNE RAE BLACK passed away on July 19th, 2003 at the age of 50 near Ear Falls, Ontario. Ms. Black was born in Oxbow and grew up on the family farm near Northgate, Saskatchewan. She convocated from the University of Saskatchewan with her BSc (Math), B.Ed. and Bachelor of Laws. Ms. Black articulated with the Saskatchewan School Trustees in 1980 and continued to work there until her death.

Ms. Black is survived by her fiancé, Richard Bazille, her daughter Jasmine and her parents

Trust Account Forms

by Rick Van Beselaere

Effective January 1, 2003, The Law Society implemented a new form of required reporting respecting lawyers' trust accounts. There have been a number of concerns expressed by members with respect to the trust account forms over the past several weeks and months. The purpose of this article is to address some of the issues relating to the forms and provide the membership with some background information respecting The Law Society's position on the trust account reporting.

The concerns that have been expressed to date are primarily centered around the costs that law firms have been charged by their accounting firms for the completion of the trust accounting forms. Not surprisingly, going hand in hand with this complaint was the complaint that the accountants took considerably longer than in prior years to complete the annual reports required by The Law Society.

BACKGROUND

At the start of 2001, the Law Society was faced with the huge trust defalcation by Daniel Lamontagne. In the weeks and months that followed the initial discovery, the Benchers conducted an in-depth and detailed review of trust accounting practices generally and concluded that the Law Society had to take some positive action to address trust account regulation and policing in response and in reaction to what was learned in the Lamontagne review. It also became quite clear to the Benchers in the follow up to the Lamontagne situation that the reporting system that had been in place prior to this was somewhat inadequate. The Benchers looked closely at the facts that came to light in the Lamontagne situation (and looked long and hard at the questions of how did he do it and how did he get away with it for so long). The focus quickly turned to what could be done to minimize the risk of this situation occurring again. In addition, comparisons were made to what other Law Societies were doing, particularly in Western Canada.

Another motivating factor for the review was the increased attention being given to mobility of lawyers, particularly at that time across Western Canada. There were many discussions around Western mobility and there were also discussions of a harmonized bar course in Western Canada and harmonized practice issues in Western Canada. As a result, discussions were underway between the four Law Societies of Western Canada on trust accounting and other practice related issues (and those discussions continue to date).

The Benchers concluded, after careful study of all of these issues, that the Law Society had to take a more proactive approach to police trust accounting procedures. Underlying all of this was:

- (a) the desire to avoid another Lamontagne situation;
- (b) the desire to make our trust account reporting processes more similar to those in Alberta and B.C. (in Manitoba they have no trust account reporting of any sort, as they have chosen to regulate trust accounting through a greatly expanded spot audit process and procedure);
- (c) the feeling of the Benchers was that there was the need to compliment the other efforts at trust account regulation (monthly reconciliations and spot audits) with a regularized trust account reporting review;
- (d) the desire and the interest of protecting the public to put in place a more stringent set of safeguards against trust account abuse by a lawyer.

This latter point is perhaps one of the key points from the Benchers' perspective. It has been driven home to us on a number of fronts that lawyers do not necessarily have the right of self-regulation. There is no "sacred" right of lawyers to regulate themselves through the Law Society. The right of self-governance can be taken away with a legislative amendment. One of the very cornerstones of the legal profession is the handling of trust funds for other parties, and the ultimate integrity and sanctity of that process. If we do not take steps to safeguard the public by policing trust accounts on a more vigilant basis, we justifiably could be criticized as not fulfilling our obligation to protect the public.

The new forms that were being proposed were circulated to a number of the accounting professions prior to implementation. While few comments were received, the comments were generally positive, and intended to be reflective of the view that it was "about time" that the Law Society took a more aggressive stance with respect to trust accounts. In addition, the forms were posted on the Law Society web site for a lengthy period of time before

January 1, 2003. That is relevant only because lawyers and their accountants should have known what additional work was going to be expected of the accountants when it came time to perform the work necessary to complete these forms.

The Benchers' did consider other alternatives to the trust account reports that were prepared for implementation on January 1, 2003. Some of the alternatives that were considered by the Benchers are now being suggested by members who have expressed their concern about the new forms. For example, there are some who have expressed the view that the form should be eliminated, and that spot audits should be increased. The Benchers did consider that. In fact, what we have done is introduced the forms and planned for more focused and frequent spot audits so that trust irregularities are not as likely to avoid detection. However, it was felt that additional spot audits were not the only answer. The new trust accounting forms are seen to compliment the audit process and function.

Another suggestion has been to increase the size of the defalcation fund so that there is more money to pay to those who have been affected by misappropriations and defalcations by lawyers. The Benchers rejected that idea. Having more money to pay out is a reactive step, rather than a proactive step. It also doesn't address the question of whether the Law Society would be properly fulfilling its mandate of serving the public's interest by simply having a larger purse from which to pay clients who have been subjected to misappropriation and defalcation of trust monies. Put bluntly, the role of the Law Society is not to be an insurance company offering fidelity insurance, but rather to regulate and police the profession for the protection of the public interest.

Where do we go from here? Firstly, as with anything new, once the forms have been in use for awhile, it is sincerely hoped that accountants will not find them so difficult to understand, or the work that is required of them so time consuming. That itself should lead to reduced fees for the work being performed. Secondly, we can't help but conclude that in some instances the lawyers were being charged for the "education" that accountants had to give themselves to properly do the trust account reporting. Once the accountants are educated about the use of the forms, there should be no element of "charging" for the education.

This is not intended to be a justification for the higher fees, but in some cases, the accountant's fees to the lawyer for the annual review for the Law Society were \$200 - \$300. The fact that the costs are now perhaps double that (or more) is not good news, but perhaps it has to be said that the work being performed by the accountant has to be more than just a cursory review of the financial statements and records. The Law Society does expect the accountants to spend some time doing a thorough job of the review of the law firm and practice, and the completion of the reports. If the trust accounting forms have caused the accountants to be more thorough, then the additional cost (or at least some of the additional cost) is perhaps appropriate and should be considered as part of the cost of doing business.

Finally, the Benchers will continue to review the trust account forms and consider ways to accomplish the objectives of protecting the public while at the same time not subjecting lawyers to unnecessary costs. We are now in the process of digesting the information that has been provided in the new trust account forms. Once we have considered that information, we may be able to adjust the reporting requirements in such a way that the objectives for the reports are still met, and the disruption and costs to the profession are more acceptable. As the deliberations continue, we will keep you informed through the Law Society web page or further Benchers' Digests or correspondence to the profession. While we are proceeding with this review, we would welcome further input and suggestions with respect to the trust account reports. We hope that the above information sheds some light on the position that the Benchers have taken, the objectives we have set for the process, and the results that we are trying to achieve.

Queen's Counsel

Queen's Counsel appointments are made by the Cabinet with the judiciary, the Law Society and the Canadian Bar Association providing input. In the fall, the Benchers will be considering eligible members whose names may be put forward to the joint committee which will, in turn, present a restricted list of recommended lawyers to the Minister of Justice, the Honourable Eric Cline. Members are invited to submit to the Law Society the names of lawyers whose recognized legal ability, service to the profession and to the public in Saskatchewan, warrant their consideration to the joint committee.

Ideas about Equity “Is this Worth It?”

by Norma Farkvam, Equity Ombudsperson

Who is on our list of new lawyers in the 21st Century? In every graduating class of law students across Canada, there is a mixture of women and men from diverse backgrounds. Socio-economic status, marital status, religious beliefs and sexual orientation vary. A number are Aboriginal, or of non-Caucasian racial backgrounds, and some have limited physical abilities.

For all law school graduates, hope and opportunities seem endless. Graduates believe with a law degree doors will open for them like never before. If you are a law student or a newly called lawyer, this following scenario might describe you:

You are optimistic but you realize there is a lot to learn and the workload is endless. Corresponding stress levels are high. Articling students are not always free to go home at 5:00 p.m. You start getting signals from friends or your spouse about the house are you keeping. It is painfully clear to you that with a small salary and long days, your hourly pay is not much better than minimum wage.

After being called to the Bar your finances improve. Student loan payments may be manageable, but life still is not perfect. Nothing at the office has slowed down for a second. You are still putting in 60 hour weeks with regularity, and the “billing targets” loom large each month-end.

Other stress factors become apparent. You had expected respect and admiration from the community, but instead you hear skepticism about the integrity of lawyers. You find yourself defending your choice to become a lawyer, instead of basking in compliments from strangers.

Then there are your fellow lawyers. Instead of camaraderie and professionalism, you realize some contemporaries treat you with rudeness and disrespect. You start to make a mental list of those lawyers you cannot trust to treat you fairly.

*Finally one day you hear one too many lawyer jokes. You get another reprimand from daycare staff when you arrive late to pick up your children. Your heart breaks when your friends or family criticize you for spending another Saturday at the office. And to top it off, your boss has questioned your competence, humiliating you in front of others. You have reached the stage when you ask yourself: **Is this worth it?***

This question nags all young lawyers – no matter who you are. The answer to the question “is this worth it?” depends on your individual situation. Among other things, your self-confidence and the way you are treated in the work place affect your decision about whether to stay with the profession or look for something easier to do for a living.

What criteria do you use when assessing your workplace happiness? The Equity Ombudsperson is here to help you make your assessment. At the very least, everyone is entitled to be treated with dignity by other members of the legal profession.

Whether you are a student, a legal staff member or a lawyer, when you are troubled with the question: “is this worth it?”, call me and we will talk about your situation in confidence. A call to the Equity Ombudsperson is not a complaint to the Law Society. Except for information about the misappropriation of funds, the Equity Ombudsperson reports only anonymous statistics to the Law Society. Your name is left out of these reports.

I am Norma Farkvam, the Equity Ombudsperson, for our legal community. You can reach me by calling me in Saskatoon at (306) 242-4885 or toll-free at (866) 444-4885. If you choose, you can write to me at Box 22012, RPO Wildwood, Saskatoon, Saskatchewan, S7H 5P1.

Bencher Elections

The year 2003 is an election year for Benchers of your Law Society. Members are encouraged to give serious consideration to putting their names forward or convincing good candidates to stand for election.

Female Aboriginal lawyers are under-represented as Benchers. Their voices are needed to balance the perspectives on issues before the profession. Please take that into consideration when considering your candidacy.

2003 E. M. Culliton Scholarship

The E. M. Culliton Scholarship has been awarded to Mr. Marc Legare, a member of the Law Society of Upper Canada, who at the June Convocation was approved as a member of the Law Society of Saskatchewan, subject to completion of his transfer requirements. He has been accepted into a Masters Program at the College of Law, University of Saskatchewan. His thesis project will be a comparison of impaired driving laws in Canada and various other countries throughout the world. He will endeavour to draw conclusions and comparisons

regarding the relative success or shortcomings of the way in which our Canadian system has dealt with this area of law.

The E. M. Culliton Scholarship Endowment was established in the name of the former Chief Justice of Saskatchewan in 1981 and is awarded to graduates of the College of Law of the University of Saskatchewan or to practicing members of the Law Society of Saskatchewan for the pursuit of graduate studies in criminal law at a recognized institution. The recipient of the scholarship is selected on the basis of exception-

al academic record, research potential and on the basis of exceptional service to the practice of law in the Province of Saskatchewan.

Since the Endowment was created in 1981, over \$180,000 in awards have been granted to students, professors and practitioners who have studied wide-ranging topics in the area of criminal law in Saskatchewan, Canada and abroad.

Below are the past recipients, as well as their thesis topics, for the last four years.

Year	Recipient	Thesis
1999	Tania Sarkar	The criminal prosecution system and the problem of domestic violence in Canada
2000	Paul Champ	The sociological effects of rights litigation that challenges criminal law
2001	Matthew Lewans	Research of "Justice, Crime and the Penal System"
2001	Rae Mitten	Fetal alcohol conditions and their implication on the criminal justice system
2002	No scholarship awarded	
2003	Marc Legare	A comparison of impaired driving laws in Canada and various other countries throughout the world

SKLESI Wins Second International Award in 3 Years

I am very pleased to announce that SKLESI's *On-line Practice Management Resource Library* achieved international recognition when it won the **Award for Professional Excellence in the Best Use of Technology** from the Association for Continuing Legal Education (ACLEA) at the Association's annual meeting in August. ACLEA members are professionals in the field of CLE representing more than 300 organisations drawn from half a dozen countries. ACLEA's awards are highly competitive; they recognize the very best from among thousands of projects its members produce each year. SKLESI is one of the smallest organisations in

ACLEA and the award demonstrates what great things small organisations can accomplish. The Award for Professional Excellence is the top prize.

I would like to take this opportunity to thank once again the following individuals who contributed to the development of the On-line Practice Management Resource Library.

Christine Davern - MacPherson Leslie & Tyerman LLP

Sheila Denysiuk - Walker Plaxton & Co.

Robert Kennedy, QC - Halyk Kennedy Knox
A n d r e w
Mason - Dufour Scott Phelps & Mason

Donald Osman - Osman Gordon & Company

Richelle Rae - College of Law, University of Saskatchewan

Dion Rowney - Division of Media and Technology, University of Saskatchewan

Other ACLEA awards:

2001 - Award for Excellence in Programs for *Quick and Efficient Real Estate Closings*

1994 - Award for Outstanding Achievement in Programming for *Signalling Change: Innovations for Televised Seminars*

Abena Buahene
Executive Director

Ethics Rulings – June 2003

Chapter XVI “Responsibility to Lawyers Individually” – Contacting Other Lawyer’s Client Directly at Mediation– June 2003

The Committee was asked to rule on two questions with respect to agreements reached at mediation when due to an absent lawyer one party is unrepresented.

1. Is a lawyer ethically bound to appear with his or her client?
2. If one lawyer does not appear, can appearing lawyer deal with the other lawyer’s client?

The Committee had some discussion regarding agreement reached at mediation by an unrepresented party and whether he or she may be bound by such an agreement. There is no ethical obligation for the lawyer to attend mediation and in such circumstances, the opposing lawyer may then deal with their client directly. There is a legal requirement for a client to attend mediation and if the client’s lawyer is not attending that lawyer has no right to tell the attending opposing lawyer that he or she cannot speak to the unrepresented client directly.

In this circumstance, the legal rule overrides the ethical, i.e.) the client must attend mediation and the other lawyer may talk to the opposing client directly (normally prohibited in The Code of Professional Conduct) if their lawyer is not in attendance. There is no violation of the ethical rule prohibiting contact with another lawyer’s client in this context.

Chapter IV – “Confidential Information” – Disclosure Authorized by Client and Chapter V – Impartiality and Conflict of Interest Between Clients – Disclosure from one to defend the other - June 2003

Facts:

Former Client A complained about Lawyer B. Lawyer B had been her lawyer in the 1990’s dealing with some rather personal matters. Client A contacted Lawyer B in 2003 to defend her common-law spouse on a charge of assault against her. Lawyer B confirmed that he was instructed by Client A during the attendance with her spouse that “Lawyer B knew all about her and he was to use his knowledge of her personal history to assist him (the common-law spouse)”. Lawyer B accepted this as a waiver of privilege. Lawyer B believed that he had been given a waiver of privilege by Client A with respect to her character during that attendance which could then be used when preparing his cross-examination of her as the victim. Lawyer B discussed these character matters with the common-law spouse and apparently the common-law spouse then confronted Client A with this information. Client A was extremely upset as she apparently did not think that this information would be revealed to the common-law spouse in this manner. The matter was referred to

the Ethics Committee on the issues of conflict of interest and waiver of privilege in the specific fact circumstances.

Issue 1:

Was Client A’s verbal comment to Lawyer B to “use his knowledge of her personal history to assist in his (her common-law spouse’s) defence” sufficient to waive solicitor/client privilege with respect to all matters on which Lawyer B had acted for Client A?

Ruling:

In this case, her verbal comments were not sufficient waiver of privilege – A lawyer should always explain possible consequences of a waiver and get it in writing. In some circumstances it may be necessary to send ‘waiving’ client for independent legal advice.

Issue 2:

Is it the opinion of the Ethics Committee that Lawyer B was in a conflict of interest in acting as his (her common-law spouse’s) defence counsel in the circumstances? If not, how could Lawyer B have better protected himself in this type of situation?

Ruling:

Yes, Lawyer B in a conflict of interest - The Committee was of the opinion that Lawyer B was in a conflict and would have to withdraw in these circumstances.

Legal WebCites

By Peta Bates

Do you need to know the status of an appeal currently before the Supreme Court of Canada? The “SCC Case Information” service on the Supreme Court web site tracks the progress of an appeal from the initial application to the final decision.

Supreme Court of Canada Case Information Service

<http://www.scc-csc.gc.ca>

From the initial page select the “English” web site, then select “Cases” from the 15 option boxes at the top of the page. You are now on a page entitled “Information on Cases”. Select the “SCC Case Information” link in the middle of the page.

The search screen offers several ways to locate a case. “Case Number” refers to a number assigned by the Supreme Court to each appeal. You probably won’t know this number until you have located your case in this index, but you can use the case number subsequently as a quick way to access the index.

A search in the “Party Name” box can be made more specific by selecting the type of party from a dropdown list (crown, first name, last name) or by specifying the province of origin.

If you know the docket number of the lower court decision you can use that as a search term in the “Lower Court Number” search box. Unfortunately the neutral citation does not work as a search term.

Cases retrieved by the search are listed by case number and style of cause. Click on the case number to display the case docket. Each action on the file is listed by date, type of proceeding and the name of the party who initiated the action. Other links on the left side of the page list the parties and the counsel.

The SCC Case Information service is updated daily, as indicated on the search screen. Judgments on leave to appeal are available within 24 hours.

Supreme Court of Canada News Releases

<http://www.scc-csc.gc.ca>

If you would like to be kept informed of recent judgments in appeal and leave applications, the Supreme Court offers a news release service via email. To subscribe, select “News Releases” from the 15 option boxes at the top of the Supreme Court web page and sign on to the mailing list.

Equity Ombudsperson

The Equity Ombudsperson, **Norma Farkvam**, provides neutral and confidential assistance to lawyers, articling students and support staff working for legal employers who ask for help in resolving complaints of discrimination or harassment. Norma may be contacted at: Box 22012, RPO Wildwood, Saskatoon, S7H 5P1. She can also be reached at (306) 242-4885 or toll free throughout Saskatchewan at (866) 444-4885.

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- the services of an INDEPENDENT professional consultant;
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