BENCHERS' DIGEST

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Member's Responsibility – Implementation of Cheque Imaging by Financial Institutions

by Ron Kruzeniski, Q.C.

In 2003, the Canadian Payments Association (CPA), the organization that oversees the cheque clearing system in Canada, announced plans to change the cheque clearing system from a paper based to a digital image based clearing system. This new system has a targeted implementation date of 2008 and once implemented customers will no longer receive their original negotiated (cashed) cheques back from the bank with their monthly bank statements. The original cashed cheques will in fact be destroyed by the financial institution in 30 days or less. It should be noted that similar systems have been, or are being, implemented in the United States, Germany, Australia, France, Spain, Hong Kong and a number of other countries.

The CPA issued a consultation document in November, 2005 and the Federation of Law Societies struck a Committee to respond. The Committee felt there was little that could be done to stop cheque imaging from occurring and concentrated on quality, retention and access standards for digital images. The CPA has created a quality standard but claim that retention and access standards are beyond their mandate.

Although the Federation continues to try to influence standards and full implementation of the system is not scheduled until 2008, some financial institutions have already introduced image based services.

I recently discussed this issue with John Allen, Auditor/Inspector for the Law Society of Saskatchewan, and he provides the following information on how practitioners can continue to meet Law Society requirements given this impending change:

1. Keep in mind this issue applies to cashed cheques for both trust and general bank accounts.
2. Original cancelled cheques must be obtained and retained for all accounts, if possible, and for as long as possible.
3. If/when your financial institution will no longer provide original cashed cheques, immediately ensure that images of both the front and back of each cheque will be provided. If your financial institution can/will not provide a copy of both the front and back of each cheque (both general and trust), you will have no alternative but to change financial institutions immediately.
4. Next determine if the financial institutions will provide cashed cheque information by:
   (a) online internet access to cheque images; or
   (b) CD-ROMS of cheque images; or
   (c) photocopies of cheque images included with the bank statement

   or some combination of these options.
5. If cheque images are provided by photocopy, check the quality of the copies received immediately. If there are problems, report them to the financial institution immediately and ensure quality copies are received.
6. If information is provided by online internet access or CD-ROMS, the member must print a paper copy of the cheque image (front and back) ensuring copies made are of good quality.

7. Since original cheques will be destroyed, it is very important to check cashed cheque information to the bank statement immediately upon receipt or availability and if any copies are missing to contact the bank and obtain a copy (front and back) immediately before the cheques are destroyed.
8. Copies of cheques (front and back) printed through direct internet access or from CD-ROMS described above or photocopies of cheque images received from the financial institution(s) must be retained by month (or period covered by the bank statement, if different). It is suggested that copies be filed in bank statement order in a binder or file.
9. Once cheque image copies are on hand the bank reconciliation process can be performed in the usual manner.

Please note that each financial institution may differ significantly (particularly during the start-up phase) in services provided and also in charges for those services and your negotiation skills may be required.

Also remember it is your responsibility to ensure the Law Society requirements are met throughout this process. If you have any questions, please contact John Allen, C.A. at 569-8242.

Please be assured that we continue to monitor this issue on an ongoing basis through communication with the Federation and contacts in other provincial Law Societies.

Highlights of the Meeting of Benchers held March 15th and 16th, 2007

Rule Amendments

Rule 708.1

The Benchers passed new Rule 708.1 which sets out a review process for claimants who are not satisfied with a decision of the Benchers with respect to claims against the Special Fund. Essentially, there is a 90 day limit on requests for review.

Form C-1

Question 6 (on page 3) of the Form for application for a permit for a professional corporation to practice law requested a copy of the "Articles of Association" of the professional corporation. The requirement should have been "Articles of Incorporation" and the Benchers amended the Form accordingly.

Federation of Law Societies of Canada

Congratulations are extended to Michael Milani, Q.C., a partner in the firm McDougall Gauley in Regina and a past president of the Law Society of Saskatchewan (2002), who has been named the President of the Federation of Law Societies of Canada.

The Federation of Law Societies of Canada is the national coordinating body of all of the Law Societies in Canada. The Federation coordinates the work of the Law Societies in Canada on a number of governance issues, including maintenance of solicitor-client privilege, the independence of the bar and the bench and has been instrumental in the development of National Mobility for lawyers, CanLII and National Criminal Law and Family Law programs.

Application for Resumption

Robert John Smith

Mr. Smith, formerly of Saskatoon, was permitted to resign in the face of discipline on October 31st, 2003. He was not permitted to re-apply for 30 months. Mr. Smith has now applied for re-admission The Admissions & Education Committee intends to hold a hearing pursuant to Rule 230 to determine whether his reinstatement would be, to quote Rule 211(5)(e) "inimical to the best interests of the public or the members or would harm the standing of the profession generally".

Members who would like to make written representations may forward same to the Law Society office, 1100 – 2002 Victoria Avenue, Regina, Saskatchewan, S4P 0R7 by May 15th, 2007.

Supreme Court of Canada Reception

The Supreme Court of Canada will be holding its Annual Retreat in Saskatoon on May 10th – 12th, 2007. The Justices of the Supreme Court have asked to meet with members of the Law Society of Saskatchewan. A reception is being planned for Friday, May 11th at the Sheraton Cavalier in Saskatoon. Invitations will be circulated in due course.

Civil Juries

At the 2004 Annual Meeting, the members of the Law Society of Saskatchewan passed a resolution opposing a proposed amendment to *The Jury Act* which would limit civil juries in some actions. Since that meeting, an *ad hoc* committee consisting of representatives from the Law Society of Saskatchewan, the CBA, the STLA, the Department of Justice and the Court of Queen's Bench has had several meetings to discuss this issue. The matter is unresolved.

Resignation of A. Kirsten Logan, Q.C.

Ms. Logan had advised the Benchers of her resignation from the Law Society of Saskatchewan as of the end of April to move to Saskatoon. At the Centennial Dinner held March 15th, 2007 in Saskatoon, Mr. Dietz presented her with a certificate and thanked her for her 22 years of service with the Law Society.

Congratulations!

The Honourable Madam Justice Darla C. Hunter, a Judge of the Saskatchewan Court of Queen's Bench, was appointed a Judge of the Saskatchewan Court of Appeal on March 2nd, 2007. She replaces Mr. Justice N.W. Sherstobitoff (Regina) who elected to become a supernumerary Judge. Madam Justice Hunter received a Bachelor of Laws in 1977 and a Bachelor of Arts (with distinction) in 1972 from the University of Saskatchewan. Madam Justice Hunter was admitted to the Bar in 1978 and practised with MacPherson Leslie & Tyerman from 1981 until her appointment to the Court of Queen's Bench in 1990.

The Honourable Ralph K. Ottenbreit, Q.C., a partner with the law firm of Robertson Stromberg Pedersen in Regina, was appointed a Judge of the Court of Queen's Bench on March 2nd, 2007. He replaces Mr. Justice J. Klebec (Saskatoon) who became Chief Justice of Saskatchewan in September, 2006. Mr. Justice Ottenbreit received a Bachelor of Laws (with distinction) in 1975 and a Bachelor of Arts (with distinction) in 1974 from the University of Saskatchewan and was admitted to the Bar in 1976. Prior to his appointment as Queen's Counsel in 1989, Mr. Justice Ottenbreit practised with Griffin Beke & Thorson (1975-1982) and Shirkey Ulmer Ottenbreit Shirkey & McIntyre (1982-1991).

The Honourable Murray D. Acton, Q.C., a sole practitioner in Moose Jaw, was appointed a Judge of the Court of Queen's Bench on April 2nd, 2007. He replaces Madam Justice Darla C. Hunter who was elevated to the Court of Appeal for Saskatchewan. Mr. Justice Acton received a Bachelor of Laws in 1971 and a Bachelor of Arts in 1968, both from the University of Saskatchewan and was admitted to the Bar in 1972.

Congratulations!

Peter Hryhorchuk was elected as Bencher for the Prince Albert Electoral District, replacing Judge Hugh Harradence, Q.C. Mr. Hryhorchuk is a prosecutor with Saskatchewan Justice in Prince Albert and was admitted to the Bar in 1977.

Early Member Descendant Search

We would like to know if there are any descendants (individuals or firms) of the early 'signers of the roll' or of the original Benchers.

The first 20 members to sign the roll were:

1. Amedee Emmanuel Forget
2. Fred Fraser Forbes
3. William Grayson
4. Robert Bell Gordon
5. Stephen Brewster
6. Frederick William Gordon Haultain
7. James McKay
8. Lawrence King
9. Alexander Duncan Dickson
10. Norman MacKenzie
11. Douglas Harrington Cole
12. Woolnough Peel
13. Edward Lindsay Elwood
14. Edward Arthur Craven McLorg
15. George William Brown
16. Reginald Rimmer
17. Henry Claude Lisle
18. Thomas Cranston Gordon
19. Levi Thompson
20. James Balfour

The original Benchers were:

1. Herbert Acheson
2. James Balfour
3. Edward Lindsay Elwood
4. Frank Ford
5. Frederick William Gordon Haultain
6. Norman MacKenzie
7. John Alexander Macdonald Patrick
8. Wellington Batley Willoughby
9. Charles Edward Dudley Wood

If you have any information regarding these members that we could include in our historical research, please contact Lori Boesch (lboesch@imagewireless.ca or 306-738-2045).

Thanks for your help!

Centennial Update!

by Ron Kruzeniski, Q.C.

Wow, month of May already here – just 7 months left to celebrate!

The Centennial Series events have each proven to be entertaining and enjoyable for all who have been able to attend. Melfort was the second of the Local Bar Associations to host an event which took place on February 26, 2007. Madam Justice A.R. Rothery was in attendance and provided some historical points for us to ponder – and some mention of where we are now. Inez Cardinal, Q.C. President of the Canadian Bar Association, Saskatchewan Branch, extended greetings. Vic Dietz, Q.C. spoke on the development of the Law Society of Saskatchewan and the future path predicted for the organization. Bill Selnes represented the Northeast Bar Association and handled hosting responsibilities (thanks Bill!). Each member in attendance was asked to share a 'memory' – how they ended up in the Northeast? Chose law? Local story? These recollections were highlights of the evening.

Saskatoon really threw a party – over 270 members and guests in attendance on the evening of March 15, 2007. MC's were narrowed down to four: Brent Gough, Q.C., Ian Wagner, Jay Watson and Rick Danyliuk, Q.C.

At the Saskatoon Bar Association dinner, outgoing Executive Director A. Kirsten Logan, Q.C. was recognizied for 22 years of service with the Law Society of Saskatchewan.

Bill Selnes, Madam Justice A. R. Rothery and Victor Dietz, Q.C., Centennial Series, Melfort.

and each showed their expertise in entertaining a crowd. No one was safe from the historical barbs (including esteemed members of the judiciary). Don McKercher received his lifetime membership award that was presented by long-time friend and colleague Tom Gauley. Vic Dietz completed the program with some historical facts regarding women within the legal profession. The evening wrapped up with several selections from the group Solstice. Thanks go out to Lorraine St. Cyr and Dawn McBride, President of the Saskatoon Bar Association, for a fantastic evening.

Upcoming events include;

May 27	Humboldt Bar Association Golf Tournament
June 11	Southwest Association Luncheon in Swift Current
July 20	Moose Jaw Bar Association Golf Tournament
August 24	Prince Albert Bar Association Golf Tournament
September 7	Melville/Yorkton Bar Associations Golf Tournament

Check the website (http://www.lawsociety.sk.ca/centennial/) for more information on how to register for these events.

Planning continues for our fall schedule. As referenced, September 9-15, 2007 will be proclaimed Law Society Centennial Week. The Canada Post commemorative stamp will be unveiled at Government House in Regina on Thursday, September 13. We are also planning some school activities in the fall and will be recruiting in your communities (remember we have items for distribution if you are planning any school visits – magnets and tattoos are available on the website or by contacting Lori Boesch at lboesch@imagewireless.ca or 306-738-2045).

The President's Centennial Gala will occur at Conexus Arts Centre in Regina on October 19, 2007. We are looking forward to a gathering of members from across the province – please reserve the date! Ticket information will follow in the next Benchers Digest.

Check the website for more memorabilia. We have added several items (travel mugs, tote bags and fleece vests) that are available for credit card purchase. We would like to thank the Queen's Printer for its cooperation in providing this payment method.

Judge Gerald Morin Receives C. Willy Hodgson Award!

by Lori Boesch, Centennial Coordinator

A well-attended ceremony was held at the Prince Albert Grand Council on March 28, 2007. Vic Dietz, Q.C. President of the Law Society of Saskatchewan, presented the C. Willy Hodgson Award to Judge Gerald Morin. The crowd of over forty people included friends, family and colleagues of Judge Morin and members of Mrs. Hodgson's family. All were gathered to celebrate and recognize Judge Morin's contributions to the legal profession and to the community.

The afternoon event began with a prayer delivered by Elder Allen Longjohn. Grand Chief Ron Michel and Vice Chief Don Deranger extended congratulations from the Prince Alberta Grand Council.

Judge Morin began his legal career in Prince Albert as an articling student, and then along with Anil Pandila, formed the Pandila Morin Nahachewsky Law Office. The firm was able to provide services in the Cree language and had extensive involvement in representing Aboriginal clients and issues.

The Queen's Counsel designation bestowed on Mr. Morin in 1999 made him the first Aboriginal lawyer to receive this designation in Saskatchewan.

In 2001 Judge Morin was sworn in as a judge and has served on the bench in Prince Albert since that time. Judge Morin was incremental in the development of the Cree court circuit in Northern Saskatchewan. This court allows people the opportunity to speak their own language, ensuring neither evidence nor facts are lost in translation.

Judge G. M. Morin, Recipient of the 2006 C. Willy Hodgson Award.

Throughout his career, Judge Morin has illustrated his commitment to the Aboriginal community. Judge Morin's devotion to others and willingness to be involved has provided an opportunity for the court system to build trust with the Aboriginal community.

The C. Willy Hodgson award was created to commemorate a respected lay bencher who served from 1996-2001. Willy studied human justice and sociology at the University of Regina and earned a certificate of social work. She was employed as a social worker and subsequently joined the Saskatchewan Public Service Commission. She sat on the Saskatchewan Legal Aid Commission for ten years and in the 1990's was appointed to the Moose Jaw Police Commission. In 1996 she was appointed to the Law Society of Saskatchewan as a lay bencher by the Lieutenant Governor of Counsel. Willy Hodgson served as a lay bencher for nearly two terms. She served on the Public Relations Committee and was integral in forming the Equity/Diversity Committee of which she was the Chair in 2000. She died of cancer on February 14, 2003 at the age of 67.

Vic Dietz stated, "Willy Hodgson was an outstanding citizen and a significant lay bencher of our organization. Judge Morin epitomizes what Willy strove to accomplish – Aboriginal rights and access to justice."

(Event highlights are recorded on the Centennial pages of the Law Society website. An article also appeared in the April 13th issue of *Lawyers Weekly*.)

Legal Web Cites

By Peta Bates

There was great excitement in our library when the UK Statute Law Database (SLD) was announced. Coverage was from 1267 to date and it looked like the new source for current and historical legislation from the United Kingdom. On closer look the database lives up to its promise for current legislation but is disappointing for the historical.

In the Law Society Library we are asked more often for historical legislation like the *Statute of Frauds* or the *Partition Act* than for current UK legislation. We consult The Status of English Statute Law in Saskatchewan, that indispensable publication from the Law Reform Commission of Saskatchewan published in 1990, as our guide to the reception of English law in the province and we find the old statutes in various print sources.

My first search on the UK Statute Law Database was for the *Partition Act*. It wasn't there. I tried the *Statute of Frauds*. Yes, the 1677 act was there and also the 1828 amendment. But the 1677 act only contained the preamble and the text of section 4. Notes in the other 23 sections indicated that they had been repealed and replaced by more recent UK legislation such as the *Wills Act, 1837*, the *Law of Property Act, 1925* and the *Administration of Estates Act, 1925*.

Now, it is unfair to review a website for what you want it to be instead of what it actually is. The mandate of the UK Statute Law Database is to provide the "official revised version of … all primary legislation of a public general nature in force at any particular time" (from "Background Information" on the Help screen). In this context it does an excellent job. It has no mandate to reproduce the original text of older statutes. So we will keep our old English statute books on the shelf for a while longer.[1]

In the first of a two-part article we look at the coverage and currency of the UK Statute Law Database.

The UK Statute Law Database – Statutory Publications Offices

http://www.statutelaw.gov.uk/

The new UK Statute Law Database is hosted by the Statutory Publications Offices in London and Belfast. The database is the official revised edition of legislation in the United Kingdom including public general acts of the UK parliament from 1801 to date and acts from the parliaments of Great Britain, Scotland, Ireland and Northern Ireland before that. Most statutes are in a "revised" form with amendments incorporated into the text of the original statute. Local acts are available as passed (not consolidated) from 1991 to date.

Statutory instruments (secondary legislation) are available from 1991 as passed but are not consolidated with amendments. Also available are the somewhat esoteric Church Instruments made by the Archbishops of Canterbury and York.

If you know the name of the legislation you can find it three ways: by using the A-Z index by statute title, the chronological list of legislation or the Quick Search box. The Advanced Search box is used for keyword searches where you can also specify jurisdiction, year range and legislation type.

Point-in-time searching is available back to February 1, 1991 for United Kingdom statutes and January 1, 2006 for Northern Ireland statutes.

The database is still being updated and some amendments from 2002 to date have yet to be consolidated into the main text of the statutes. A warning box appears at the beginning of such statutes. By using the "Table of Legislative Effects" you can see any outstanding amendments to your statute.

The next column will cover editorial enhancements in the UK Statute Law Database including the annotations, attributes, text versions and links to affected legislation.

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[1]The focus of this column is on free legal web sites. Historical UK legislation is available online through a subscription service from Justis Publishing. Their database contains the fulltext of Acts from England, Wales and Scotland from 1235 to date.

Rulings – December, 2006

Chapter XVI, "Responsibility to Lawyers Individually", Breach of Trust Conditions – December 2006

Facts:

Lawyer X represented the vendor and Lawyer Z the purchaser in a multi-million dollar corporate real estate deal. The vendor's lawyer undertook to maintain a holdback for repairs to be completed on a particular day. The day following, the vendor's lawyer wrote to the purchaser's lawyer indicating that the repairs had not yet been done and asked that they let the various trades in to complete the items. No response was received from the purchaser's lawyer. Several weeks later when the repairs were done, the purchaser's lawyer demanded the holdback monies as per the undertaking.

Ruling:

This is a matter where a trust condition was imposed that work would be done or else holdback money paid. It is not entirely clear that the work was completely done and there is a factual dispute about the work being done. However, the Committee is of the view that trust conditions are trust conditions and must be respected. The money will have to be released and will go directly to Lawyer Z's client if released. It is not necessarily the most "just" result, however, upon accepting trust conditions a lawyer is bound by them. It is possible that a fair assessment of the work that has been done and an appropriate adjustment might be the best resolution that could be reached. The Committee would like to remind lawyers that it is part of their role to attempt to reach an equitable agreement between the parties. However, on the narrow issue of trust conditions, a lawyer having accepted trust conditions is specifically bound by same despite what may appear to be an inequitable result.

Chapter XVI "Responsibility to Lawyers Individually" – Trust Conditions, December 2006

Facts:

The wife in a family law matter complained about the husband's lawyer. The wife's lawyer had sent separation agreements over to the husband's lawyer on the trust condition that he return them signed within 7 days or return the unsigned documents. At the time of the complaint, the wife and her lawyer had not heard back from the husband's lawyer for about a month. This matter seems to have been exacerbated by the fact that the husband's lawyer had failed to respond and delayed on this file for some time prior to the agreement being reached. Once the agreement was reached, it took about four months to get it on paper. The issues reviewed by the Committee were as follows:

1. Was it appropriate for the wife's lawyer to send over the signed agreements on trust conditions to either execute or return within 7 days of receipt of the documents?
2. Was it appropriate for the husband's lawyer to ignore the trust conditions and fail to respond to the wife's lawyer for over a month?

Ruling:

There was some discussion of whether or not it was appropriate to impose trust conditions on documents and a discussion about appropriate vs. inappropriate trust conditions. It was the view of the Committee that trust conditions are "black and white". If a lawyer does not like the trust conditions or thinks that they are inappropriate, he or she must refuse to accept the trust conditions and return the documents to the lawyer attempting to impose such trust conditions. The lawyer cannot simply fail to respond and keep the documents or will be deemed to have accepted the trust conditions. Even if the lawyer's view is that the trust conditions are unreasonable, once the lawyer is aware that they have been imposed, the lawyer needs to specifically refuse to accept same to avoid being deemed to have "accepted". Trust conditions are grounded in principle, lawyers must treat trust conditions with care and attention despite the fact that they may believe them to be inappropriate or unnecessary. In situations like this, rather than imposing trust conditions on partially signed agreements to ensure prompt return, the lawyer could take an alternate approach to protecting his or her client. The lawyer could indicate to lawyer opposite that if no response received to an offer or agreement by a particular deadline date that the offer would be withdrawn. One is thus able to provide the client with the same protections and attempt to move the matter forward and remedy delays without imposing trust conditions.

Chapter XVI "Responsibility to Lawyers Individually" – Trust Conditions, December 2006

Facts:

Lawyer M's vendor client negotiated an encumbrance payout with a creditor. The creditor agreed to refinance part of the outstanding mortgage as a personal loan if the balance was reduced by a certain amount. Lawyer P, on behalf of the purchasers, would not amend trust conditions to allow release of sale proceeds to pay out the creditor first in order to allow the deal between the vendor and his creditor to go through.

Ruling:

The Committee was of the view that Lawyer P's position was correct. When a lawyer takes on trust conditions, he/she must be sure they are

applicable to the facts at hand and remember that they are bound by said conditions. The Committee wishes to refer this matter to the Real Estate Committee for its comments on the Uniform Trust Conditions, if any. The Committee would remind lawyers never to accept trust conditions which they cannot fulfill. If necessary to modify the Uniform Trust Conditions so they can accept same, that is acceptable as long as any amendment is highlighted and/or bolded and clearly brought to the attention of opposing counsel.

Update:

If a lawyer is going to amend or change the Uniform Trust Conditions in any way, it is the view of the Committee that those changes must be highlighted or bolded in some way to draw them to the attention of the lawyer opposite. Lawyer M took a risk in using the money in the fashion in which he did, it was a risk he bore on behalf of his client. Another alternative would have been to simply say no and ask his client for the money to reduce the mortgage in order to remove the encumbrance and if the client could not come up with the money, then the deal would fall through. Lawyer M, in this case, took the risk and was successful on behalf of his client. However, Lawyer M was bound by the Uniform Trust Conditions. Advancing the money was a risk Lawyer M took and fortunately, in this case, it worked out, however, he would be personally bound if it had not. The Uniform Trust Conditions are to be relied upon and any amendments are to be clearly drawn to the attention of the lawyer opposite.

Chapter XV, "Responsibility to the Profession Generally", Unprofessional Communication, December 2006

Facts:

Lawyer A acted for a member of a regulatory body as against the regulatory body. The Registrar of the regulatory body complained that Lawyer A contacted him/his office directly rather than through the regulatory body's counsel, Lawyer D. In particular, a Court of Queen's Bench decision was received on a Friday and Lawyer A was unable to reach Lawyer D so contacted the regulatory body directly asking for the Registrar. The Registrar was on holidays and Lawyer A spoke with the administrative staff person who felt he was "rude and intimidating". Lawyer A wanted to have his client re-instated with the regulatory body over the weekend but was unable to get any assurance from regulatory body that this re-instatement could be processed on the Friday, the day of the Court decision.

Ruling:

The Committee was of the view that it was technically a breach for Lawyer A to speak with Lawyer D's client/client's office directly. In the circumstances, the Committee could understand Lawyer A's frustration as he was unable to reach Lawyer D, Lawyer D's office was unaware of the decision and the Registrar was on holidays. However, the concern seems to be primarily that Lawyer A was quite aggressive with the administrative assistant at the regulatory body. The Committee was certainly sympathetic to Lawyer A's frustration, however, would like to caution the member to remain calm and respectful when dealing with members of the public so as not to be seen to be "bullying" as seems to be the impression of the administrative assistant in this situation.

Rulings – January, 2007

Chapter XV, "Responsibility to the Profession Generally", Unprofessional Correspondence, January 2007

Facts:

Lawyer F was acting for the wife in a family law matter. He drafted a Petition and met with her to develop a strategy in relation to securing custody and child support. The wife then met with one of Lawyer F's associates' assistants while he was out of town. The assistant recognized the wife's surname and indicated that an associate of the firm had formerly represented the wife's estranged husband on an unrelated matter. Lawyer F communicated with the wife indicating that as the associate was no longer with the firm and the matter on which he had represented her estranged husband was unrelated, Lawyer F was of the view that there was no conflict of interest. Lawyer F later received a file transfer request and the file contents were sent to Lawyer J along with the account for work done. Lawyer J wrote to Lawyer F indicating that

> "Because of the conflict of interest, you have no right to charge any fees on this file. Either forward us the balance of what (the wife) left you or we will take the matter up with the Law Society. If we do not have your cheque within 7 days, we will proceed accordingly."

Ruling:

The Committee was of the view that lawyers must be mindful of the obligation of professional courtesy between lawyers and that lawyers are not to write professional correspondence which could be seen as threatening or intimidating. The Committee expects that correspondence of this nature between one lawyer to another is less intimidating than it would have been if sent to a client or member of the public. However, in the view of the Committee, the substance of the dispute, Lawyer F's entitlement to fees, is a matter for taxation and not a matter for complaint to the Law Society.

Chapter VA, "Conflicts of Interest Between Clients", Lawyers moving between Firms, January 2007

Facts:

Firm 1, Lawyer K represented Client K initially in this matter but withdrew on the file because of conflict. Lawyer M worked on the file, apparently fairly closely with Lawyer K. Firm 2, Lawyer Q always represented Client Q. Lawyer M left Firm 1 and joined Firm 3. Shortly afterwards Lawyer Q left Firm 2 and also joined Firm 3. In 2005, Lawyer Q ran a discipline hearing on behalf of Client Q and Client K was present. Client K claims that she was, at that time, unaware that both Lawyer Q and Lawyer M were with Firm 3. Upon finding out both lawyers were with the same firm, Client K raised an objection with Firm 3 and Firm 3 took steps to put up "walls" after the fact. The issue is whether or not the "walls" were sufficient in the circumstances to remove the perception of conflict. There is no question that Lawyer M had confidential relevant information and there is no question that the "walls" were not put up either to segregate her upon her entrance to the Firm 3 (at which point there would not have been a conflict as Lawyer Q had not yet joined Firm 3) or when Lawyer Q joined Firm 3.

Ruling:

The Committee was of the view that the conflict was not able to be readily identified by Firm 3 as it did not know Lawyer M had worked on the file while with Firm 1 and Lawyer K or that Lawyer K had anything to do with the file or that Client K was a "party". The Committee did not see any actual prejudice to Client K because of this perceived conflict. Lawyer M should have identified the conflict when Lawyer Q came over to Firm 3 shortly after she did. Client K may well have "waived" her conflict concerns as she was prepared to deal with Lawyer Q while they were negotiating but the issue of conflict of interest was raised when negotiations broke down. The Committee is satisfied that the new firm, Firm 3, satisfied the onus upon it set out in the criteria in Chapter V-A of The Code of Professional Conduct based on all the information before the Committee.

Rulings – March, 2007

Chapter IX, "Lawyer as Advocate", Lawyer Representing Party and Potential Witnesses, March 2007

Facts:

Lawyer H represents the proponents of a 1984 will. Lawyer J represents the proponents of a 2002 will and also represents the financial institution whose employees witnessed the 2002 will. Lawyer H sought information from the financial institution regarding the circumstances of the signing of the 2002 will and financial affairs of the deceased prior to his death. On the advice of Lawyer J, the financial institution refused to make this information available to Lawyer H. Lawyer H alleged conflict of interest in Lawyer J representing the financial institution and providing its employees with advice not to speak to opposing counsel while also acting for the proponents of the 2002 will that was witnessed by employees of the financial institution. Lawyer H provided waivers of conflict from both clients.

Ruling:

The waivers of the conflict provided by Lawyer H as signed by both of his clients are not determinative of the matter. The issue is the lawyer advising witnesses not to speak to opposing counsel. The Committee indicated that the previous Professional Conduct rulings of May 1998, September 2001, June 2004 and September 2004 indicate that there is no property in a witness, however, counsel "may not dissuade the witness from speaking with opposing counsel". The May 1998 Professional Conduct ruling indicates that it was improper for counsel to tell a witness not to speak to opposing counsel as it was up to the witness to make that decision. In the instant situation, the Committee was of the opinion that Lawyer H cannot advise witnesses not to speak to opposing counsel. The Committee suggested that the employees of the financial institution should obtain independent legal advice from a lawyer with no interest in the outcome and that this would be the simplest resolution of this matter.

Chapter XV, "Responsibility to the Profession Generally", Inappropriate Correspondence, March 2007

Facts:

The husband in a family law matter complained about his wife's counsel's correspondence to the husband's counsel,

> "I can only indicate if (the husband) is going to be continuing in this matter, the position taken on the opposite end will be that access he has been provided in the agreement will be exactly what he gets and nothing more. Obviously, it would be unfortunate if that is the end result since I would presume he wishes to maintain some more contact with (the child)".

The complaint was that this statement constituted a threat to withhold access as leverage to deal with outstanding monetary/child maintenance issues. It appears that the parties in

this matter had a more generous "status quo" arrangement with respect to access than what was set out in the agreement.

Ruling:

The Ethics Committee was of the view that if the parties had a de facto agreement in place which provided more generous access than the prior written agreement, it was inappropriate to threaten to reduce access to the levels set out in the previous written agreement. The Committee was further of the view that the escalation of the language used in the husband's lawyer's letters was not assisting clients in reaching a resolution. It is the role of counsel in acrimonious family law matters to offer neutral, objective advice to their clients.

Chapter XVI, "Responsibility to Lawyers Individually", Contemporaneous Correspondence, March 2007

Facts:

Lawyer S acted for the purchaser of a hotel. The contract was done by a realtor using a purchase and sale of land contract. It appears that there was some loose understanding, or at least discussion, between the parties contemplating that their sale arrangement would be a "share purchase" agreement. The realtor did not make it a condition of the land sale deal that a share purchase agreement be signed. The lawyers were communicating regularly, attempting to conclude the transaction. Lawyer for the vendor of the hotel telephoned the purchaser's lawyer and suggested that his clients would like to rely on the land contract alone. The purchaser's lawyer agreed to talk to his client and get back to the vendor's lawyer. In the meantime, the vendor's lawyer faxed a letter to the realtor who was holding the purchase monies indicating that the transaction was now concluded and "please attend to release of the funds, less commissions". The vendor's lawyer faxed this letter to the realtor along with a copy of a letter to the purchasers' lawyer which advised that the matter would proceed by land contract alone and that the share purchase agreement would not be concluded. The problem was that the letter to the purchaser's lawyer was sent by courier and was not received until 3 days later. Fortunately, the realtor was cautious enough to contact the purchaser's lawyer prior to releasing the money to the vendor's lawyer. The purchaser's lawyer asked the realtor to hold the money and the lawyers and clients were able to conclude the agreement by way of a holdback rather than by way of share purchase agreement and the deal was concluded.

Ruling:

The Committee was of the view that at the time of the telephone call, the two lawyers in question were not of the same mind as to whether they were still in negotiations or if the contract was going ahead as written with no further negotiation or adjustment or amendments. The Committee indicated that if both lawyers knew that the clients were still discussing amendments to the contract and if one exercised the right to proceed on the land contract alone, this would be inappropriate. The vendor's lawyer was obligated to communicate with the other lawyer to advise him contemporaneously with the fax to the realtor indicating that the deal was concluded. Given the recentness of the telephone discussion between the lawyers discussing the very same issues, the lawyer for the vendor should have faxed the purchaser's lawyer at the same time he sent the letter to the realtor. His failure to do so led the purchaser's lawyer to believe that he was being deliberately kept in the dark and gave the appearance that the vendor's lawyer was attempting to obtain the monies to conclude the deal despite ongoing discussions with the purchaser's lawyer.

Chapter XI, "Fees", Contingency Fee Agreement on Matrimonial Property Prohibited, March 2007

Facts:

Lawyer W charged his client on a matrimonial property action on a contingency fee basis. The client brought her matter before a Taxing Officer of the Court of Queens Bench and the Taxing Officer pointed out that the lawyer charged a contingency fee on a matrimonial property action and the contingency fee arrangement was oral which was not in compliance with Law Society Rules 1500 and 1502. The eventual decision of the Local Registrar Taxing Officer assessed the amount of fees chargeable to the client based on the time billing provided by the lawyer and upheld the percentage amount that had been previously charged. The member advised that he was unaware of the Law Society of Saskatchewan Rules 1500 and 1502 and regretted having breached same.

Ruling:

The Ethics Committee was of the view that the member had acted in the best interests of the client, however, the Law Society of Saskatchewan Rules 1500 and 1502 prohibit charging on a contingency basis on a matrimonial property action and mandate that contingency fee agreements must be set out in writing. If a breach of these Rules was deliberate, it could be a matter for consideration by the Discipline Executive Committee. However, in this matter it seems that Lawyer W was simply ignorant of the rules as he went forward to a Taxing Officer without realizing that he had breached same until the Taxing Officer pointed out his breach of the Law Society rules.

Library Renovation Update

by Susan Baer, Director of Libraries

The finishing touches are still being placed on the Regina Law Society library after the extensive renovation in 2006. Members will notice a reduction in space on the second floor where the textbooks, journals and reference sets are located. However, additional space was gained in the basement collection so that the library gained 67% more area. Despite the complexity of the project, the library was accessible during every phase of the project. We hope the members enjoy the new professional appearance. The Law Society would like to thank the Department of Justice for the renovation project.

The dust has not even had a chance to settle on this extensive renovation when another is now beginning. The windows in the Victoria Avenue courthouse will be replaced this summer beginning in June. The collection should still be accessible to members during the window replacement project. The library will attempt to minimize the disruption for all.

We would like to thank the members for their patience and cooperation during the carpet replacement project in Saskatoon which occurred in early April. Everything is back to normal in the Saskatoon library after a successful project.

Consultation meetings have been scheduled by Court Services regarding the upcoming perimeter security projects for courthouses in Regina, Saskatoon and Prince Albert. The library will be involved in the consultation process for the courthouses in Regina and Saskatoon.

Equity Ombudsperson

The Office of the Equity Ombudsperson is committed to eliminating both discrimination and harassment in the legal profession.

If you are a support staff, articling student or lawyer within a law firm, you can contact the Equity Ombudsperson, Judy Anderson, for advice, information and assistance. All information is confidential.

This office is not a lawyer referral service and cannot provide legal advice. Call **toll free: 1-866-444-4885.**

This office is funded by The Law Society of Saskatchewan.

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