

BENCHERS' DIGEST



Volume 21, Issue Number 3

June, 2008

Mandatory Continuing Professional Development

by Gregory Walen, Q.C.



As many of you are aware, the Law Society of Saskatchewan is slowly but surely moving in the direction of implementing mandatory continuing professional development for its members. At Convocation in April, 2008, the Benchers approved, in principle, the concept of mandatory continuing legal education on the suggestion of the Admissions & Education Committee and a subcommittee consisting of Ronald Kruzeniski, Q.C. as Chair, Susan Barber, Evert Van Olst and myself. The Admissions & Education Committee was given the mandate to develop a process for the eventual implementation of mandatory continuing professional development.

For the most part, we are familiar with some form of direction from the Law Society encouraging its members to participate in educational programming. The focus, in the past, has been on loss prevention with a surcharge or some monetary penalty being paid by members failing to accumulate enough credits by attending approved conferences or seminars. Regrettably, the percentage of members being assessed surcharges over the past several years was increasing at an alarming rate, leaving the Benchers to conclude that some members were regarding attendance at legal education conferences as not being cost effective in their practice.

The focus of mandatory continuing professional development is somewhat shifting from a loss prevention issue to one of overall professional competence and public confidence in the legal profession. In this regard, many Law Societies in Canada, and by far a majority of Bar Associations in the United States, have either implemented or are about to implement mandatory continuing professional development as a condition of being able to practice law in their jurisdiction. Additionally, most self-regulated professions in the Province of Saskatchewan have some form of continuing education as a pre-requisite to maintaining a license. We suspect that

the public would be somewhat surprised to learn that the legal profession does not insist upon continuing legal education for its members as a pre-requisite to practice law.

The Admissions & Education Committee, and the subcommittee formed to consider this issue, is sensitive to the arguments both for and against mandatory continuing professional development. One obvious argument against mandatory education is with respect to the lack of availability of programming that is of benefit to all practitioners in the province. What of the senior lawyer who practices in only one particular area of law? This obviously presents a challenge. As well, critics will argue that forcing lawyers to improve their skills and knowledge will affect their desire to learn. While these concerns are not to be taken lightly, we are confident that we can achieve a balance of ensuring public confidence in the legal profession and providing opportunities to members to improve their knowledge and skills.

Recently, the Law Society of British Columbia announced the implementation of mandatory continuing professional development following the recommendation of a Lawyer Education Task Force established for that purpose. This Task Force recommend-

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ed, in part, that each practicing member must complete no fewer than 12 hours per year of continuing professional development undertaken in approved educational activities that deal primarily with the study of law or matters related to the practice of law. Approved educational activities included traditional courses and activities such as conferences and courses provided and approved by the Law Society of British Columbia, as well as video conferences, self-study on-line courses of an interactive nature, as well as others. Additionally approved educational activities included non-traditional activities such as

attendance at Canadian Bar Associations Section meetings and participation in educational programming offered by a law firm, if offered in a group setting. Courses approved by the Law Society would include courses offered by the Canadian Bar Association, the Federation of Law Societies of Canada and the Trial Lawyers Association of British Columbia.

Additionally, of the 12 hours of continuing professional development, no less than two hours must pertain to a combination of professional responsibility and ethics, client care and relations, as well as practice management.

While not closing the door on other possibilities, the Admissions & Education Committee and its subcommittee are impressed with the direction that the Law Society of British Columbia has taken in this matter and will be reviewing, with interest, its recommendations. As part of this Benchers' Digest, the subcommittee's Chair, Ronald Kruzeniski, Q.C., is seeking feedback from the members. Please take an opportunity to forward to the subcommittee any opinions or suggestions concerning mandatory professional development.

Mandatory Professional Development

by Ronald Kruzeniski, Q.C.

At Convocation on April 17, 2008, the Benchers approved a plan to consult, propose and implement a program of mandatory professional development. Many members now say the Law Society should have a program of professional development so that each member keeps up-to-date on legal issues, ethics, professional responsibility and law office management.

Other provinces are discussing this issue. British Columbia has approved a program of professional development, which will be implemented January 1, 2009. Alberta is also developing a program.

In the United States, 43 states have a program of mandatory professional development. Similarly, England, Wales and parts of Australia

have a mandatory program. For discussion of this, please see the article, "The dawn of MCPD" in the March 2008 *CBA National* on page 30.

The plan approved by the Benchers to consult, propose and implement a program is outlined below:

The Plan	Target Date
1. Through the website and the Digest, solicit member input on a program for professional development.	May 14, 2008
2. Summarize member responses to the request for input.	June 15, 2008
3. Propose a program for professional development and implementation to the Benchers.	June 20, 2008
4. Through the website and the Digest, solicit member input on the proposed program for professional development and implementation plan.	August 20, 2008
5. Make final adjustments to the program for professional development and implementation plan and submit to the Benchers for final approval.	September 30, 2008
6. Communicate the approved program for professional development and implementation plan to the members through the Digest and the website.	December 31, 2008
7. Proceed with the implementation of the program for professional development according to the implementation plan.	December 31, 2009
8. Begin the program for professional development.	January 1, 2010

Any member who has opinions, suggestions, advice or concerns may write or email me at: 100 - 1871 Smith Street, Regina, SK S4P 4W4 or Ron.Kruzeniski@gov.sk.ca. After reviewing this information, the Benchers will consider the issue further, approve a plan in principle and then seek further input on this matter. Please take part in the process.

Highlights of the Meeting of the Benchers held April 17th and 18th, 2008

Appointments

John McIntosh, Q.C., was appointed as a Law Society representative to the Law Foundation board.

Equity

The Equity Advisor's strategic report for 2008 was approved. The plan calls for additional collection of data, approval of an accommodation policy, and an accessibility initiative.

Mandatory Legal Education

The Benchers approved a plan to consult the members on mandatory legal education.

Code of Professional Conduct

Section 2.02 (11) of the Federation of Law Societies *Code of Professional Conduct* was adopted for the Saskatchewan *Professional Code of Conduct* and will be added to the Code as Chapter III, Commentary 13. The amendment has been posted on the website.

Special Fund Claim

The Benchers approved a special fund claim in the sum of \$42,994.38 resulting from a misappropriation by Marvin Henderson.

Outreach

The Benchers are studying a recommendation to increase the profession's participation in the Law Society. The plan might include a new Bencher position for young lawyers and increasing the participation of other legal organizations at Bencher meetings.

In Memory of

Ted Priel, Q.C. of Saskatoon passed away on March 24, 2008 at the age of 64 years. He is survived by his wife, Arlene, and his 5 children - Chris, Shaun, Scott, Matt and Pernell.

Ted graduated from the University of Saskatchewan and received his law degree in 1967. He was President of the Law Society in 1988 and received a Q.C. appointment that same year. Ted coached hockey for 35 years and before his passing, was semi-retired, working as a labour arbitrator.

Lynn Smith, Q.C. of Regina passed away on April 11, 2008. He is survived by his wife of 38 years, Pat, and his 3 children - Chris, Dayna and Tim.

Lynn received his law degree in 1973 from the University of Saskatchewan and started working with McDougall, Ready, Wakeling law firm, now known as McDougall Gauley, and had been a partner since 1977.

Lynn was an avid sports fan, coaching minor hockey, baseball, softball and soccer. He also loved to run and was a member of the YMCA.

Fraud Alert

by John Allen, CA

Recently, a number of members have been targeted as part of a series of frauds involving counterfeit certified cheques and counterfeit bank drafts. Although detailed information regarding a couple of scams was emailed to members, these scams and variations thereof continue to surface. Sole practitioners and small firms are most often targeted.

Description of Scam

The scams usually involve a new “client” from outside the country and are a take-off on the old Nigerian scam. The client requests the member to act for him/her in collecting monies in Canada. The reason these monies are owed to the client will vary, but recently has related to equipment, parts, tools, etc. that have been returned to the Canadian supplier by the client. The member will be asked to collect monies owing, deduct amounts due for fees and disbursements and pay the remainder to the client. The member easily and successfully collects the monies owing and deposits the proceeds received in the form of a forged bank draft or certified cheque to trust. If the scam is successful, funds are then paid from

trust to the scam artist before the member discovers that the bank draft or cheque is a fake.

These fraudsters are becoming more professional all the time and are now to the point where:

- the bank drafts and/or certified cheques look so authentic that you or even your banker may not be able to identify them as fake.
- if you call the phone number on the bank draft, cheque or other information provided to you, the call will be professionally answered and the bank draft or other document being questioned will be declared valid.

Red Flags

- the client is from outside the country or the area generally served by the member.
- the client is very anxious that monies be forwarded to him/her immediately, before the “bank draft” or “certified cheque” completely clears the banking system.
- since time is of the essence, the client usually wants monies to be paid electronically, contrary to Law Society Rules, which require all

payments from trust to be made by cheque.

Protect Yourself

- know your client (client identification verification).
- ask your bank to contact the issuing bank to verify the authenticity of the “bank draft” or “certified cheque” and obtain their response in writing.
- ask your bank to confirm that the funds have been cleared through the banking system and obtain their response in writing.
- obtain a substantial retainer **up front** rather than deducting fees from the proceeds.
- request documents to legitimize the transaction (ie. agreements, invoices, bills of lading, etc.).

If monies are paid from trust without the bank draft/certified cheque being verified and confirmation that the funds have cleared, you and your firm may be exposed to loss.

If you are approached to facilitate a transaction of this nature or any variation thereof, please contact John Allen at the Law Society office.

JUDICIAL APPOINTMENTS

Peter Whitmore, Q.C., has been appointed a judge of the Saskatchewan Court of Queen’s Bench. He is replacing the retiring Mr. Justice L.A. Kyle of Regina.

Mr. Justice Whitmore received his Bachelor of Laws from the University of Saskatchewan in 1974 and was admitted to the Bar in 1975. He also obtained a Bachelor of Commerce from McGill University in 1971 and a Doctorate of Canon Law from the University of Emmanuel College, Saskatoon, in 2004.

Mr. Justice Whitmore had been with McKercher McKercher & Whitmore since 1989. His area of expertise is in corporate law, commercial law, financing law and real estate law.

Code of Professional Conduct – Amendment

by Ronald Kruzeniski, Q.C.

At Convocation on April 17, 2008, the Benchers passed a motion approving an addendum to the *Code of Professional Conduct*. The changes deal with clients with diminished capacity. In our current Code, this topic is not addressed and lawyers have had challenges in dealing with clients whose capacity is impaired. The addendum adopts 2.02 (11) from the draft Uniform Code of Conduct developed by the Federation of Law Societies. The wording is also similar to wording used in the Code of Conduct of the American Bar Association.

It is hoped that this addendum will assist those lawyers who are dealing with persons with diminished capacity. The addendum has been placed on the Law Society's website and is below. I have selected a number of extremely important points.

Clients with Diminished Capacity

13. When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary:

A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience, and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time.

A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

A lawyer who believes a person to be incapable of giving instructions should decline to act. Where, however, a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity as the lawyer would with any client.

Where a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until an appointment of a legal representative occurs, a lawyer should act to preserve and protect the client's interests.

Where there is a legal representative, in some circumstances, the lawyer

may disagree with the legal representative's assessment of what is in the best interest of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

Where a lawyer takes protective action on behalf of a person or client lacking capacity the lawyer should be guided by the provisions under Chapter 4 (Confidentiality). If the court or other counsel become involved, they ought to be informed of the nature of the lawyer's relationship with the person lacking capacity.

This issue has challenged lawyers and it is hoped that this addition to the Code of Professional Conduct will assist lawyers when they have a client with diminished capacity.

For an excellent discussion of the Rule and Commentary, see Tom Schonhoffer's paper "Dealing with Clients with Diminished Capacity" delivered at the SKLESI seminar entitled "Ethics and Responsibility" on April 24th and 25th, 2008.

If you have questions, you should feel free to contact the staff at the Law Society, as they may have advised on similar situations in the past. If you have concerns about a particular client with mental incapacity, please feel free to call the Public Guardian and Trustee at 1-877-787-5424.

CCH Canadian Family Law Guide Coming to Members' Section

by Susan Baer, Director of Libraries

Many of you are familiar with the black looseleaf binders with "onion skin" paper produced by CCH. There are several titles in CCH's catalogue. One title is coming to all members via the members' section. The *Canadian Family Law Guide*, a standard legal work in the field of family law, will be available to all members in June, 2008. The strength of the CCH products has always been the provision of timely updates, covering the latest cases across the country and the changes to the relevant statutes by jurisdiction. CCH has created an easy to use online format for the *Canadian Family Law Guide*.

The family law practitioner will find the current awareness services in the *Canadian Family Law Guide* useful for staying abreast of changes to the case law and legislation across the country. The online newsletter *Family Law Matters*, What's new and the News Tracker are features designed to provide a selection of the most important cases and family law developments. They are well-organized and are structured to be able to view weekly or daily. It is very easy to select the Saskatchewan materials from all three services by using the navigation tunnel at the left of the screen.

Canadian Revenue Agency Interpretation Bulletins relevant to family law issues also form part of the service. For example, the Interpretation Bulletin for property transfers after separation, divorce and annulment is included in fulltext.

A select number of rural libraries subscribe or formerly subscribed to the *Canadian Family Law Guide* in print. The updates were monthly and therefore time-consuming to file. Now the content is updated daily, available at your desktop, with the table of contents easily visible, allowing you to locate your areas of interest quickly. All but one print copy will be can-

celled in the Law Society library system.

Watch for the announcement of desktop delivery to the *Canadian Family Law Guide* for all members in the Email Broadcast Service in June.

Saskatchewan Continuing Legal Education Index (CLE Index)

One of the databases available to members at the desktop is the Saskatchewan Continuing Legal Education Index. The CLE index, as it is called in the members' section, is maintained by the Law Society's library staff in Saskatoon. It was created to provide a simple index to the conference proceedings, seminar papers, and journal articles written and delivered by our members. The scope of the database has now grown to include substantive articles published in the Saskatchewan Advocate, Bar Notes, and the Benchers' Digest. It is a unique resource which has become the largest index of Saskatchewan legal literature published in any format. The content now dates back to 1936.

Emerging topics such as "Internet defamation" do not immediately appear in textbooks. Quite often, if they are published in a text, there is a strong jurisdictional bias which may not include Saskatchewan. The CLE Index will provide articles relevant to Saskatchewan. As the emerging topic develops, such as "elder law", more articles from differing perspectives are available. Therefore, the CLE Index is a good start to legal research when the topic is narrow and/or you would like analysis on Saskatchewan case law or legislation.

Degenstien Barbara
Capacity and the Elderly: The Use of Medical and Psychological Assessments to Prove Legal Capacity

Published in
Elder Law 2006: Understanding an Aging Population, September 2006
Saskatchewan Legal Education Society, 2006
Call Number: KF 390.5 .A4 .E371 2006
Aged - Legal Status, Laws, etc.
Capacity and Disability
Probate Law and Practice
Wills
Power of Attorney

Each record contains standard information such as the author's name, the title of the paper and where it was published. The library staff provide subjects for each record and indicate the call number of the book/item containing the article in the library's catalogue. Clicking on the link on a subject heading will automatically search and display every article written on that subject. It is also possible to display all of the articles delivered at that conference by selecting the link on *Elder Law 2006: Understanding an Aging Population*, for example. A quick phone call to the library in Saskatoon or Regina will result in a copy delivered to you.

The database is fully searchable by keyword, author, journal title and date. If you are interested in reading an analysis of selective Saskatchewan cases, the CLE database also contains Case Commentaries published in the *Criminal Reports*, the *Reports of Family Law*, and those which would have appeared in any Saskatchewan journal. All case commentaries can be retrieved by simply searching for **case commentary** in the title field. The database currently contains 356 case commentaries dating back to 1936.

Tips on searching the database are available online by selecting **More help on searching databases** from the search screen, or by contacting the Law Society library staff in Regina or Saskatoon.

Centennial – Final Report

by Ronald Kruzeniski, Q.C.

The item “100th Anniversary” remained on the Public Relations Committee agenda since it first appeared in June, 2003. Preparations for communicating the Law Society’s Centennial began in 2004 with the formation of the Centennial Subcommittee by the Public Relations Committee.

I wrote in the Benchers’ Digest in August 2004 that we hoped to make the public aware of the Law Society’s anniversary, engage lawyers in looking at the history of the Society and the prominent members of our profession, and finally, to just have fun. Using this criteria to analyze 2007, I think the Centennial year was a resounding success!

At the first meeting of the Subcommittee in 2004, the Centennial seemed very far away and time was a luxury. We were able to plan expenditures over a number of years and therefore produce an exceptional logo that appeared on all Centennial correspondence and communication, develop a collector’s pin from the logo, produce a commemorative calendar loaded with historical facts, receive a stamp from Canada Post, devise a plan that would allow our members to celebrate each other in their local communities as well as

come together for a “reunion” Centennial President’s Gala.

The Law Society placed several articles in the Lawyers’ Weekly, the StarPhoenix, and the Leader Post throughout the Centennial year. Members from different parts of the province clipped the local papers and sent in the stories covering the plaque ceremonies or a local event. Our internal celebrations received positive media coverage. Our internal celebrations also allowed us to be proud of one another, to recognize the dedication and service that is a necessary part of the legal profession, and to continue to strive towards high standards of integrity and honour. The Centennial theme message of “100 years of integrity” was well chosen by the subcommittee.

There were no special levies placed on the members to fund the Centennial project. The 2007 budget was \$57,000 under budget due to prudent management. The entire Centennial project cost only \$118 per member which was spread over four years.

The Centennial year was successful because our members made it successful. We thank everyone who attended the Centennial functions around the province. There were several volunteers we called upon to speak,

organize, take pictures, make phone calls or whatever we needed. Thank you for participating at the events. We loved hearing the stories and jokes about times gone by. We hope that the Centennial events helped you to renew your sense of pride in the profession and your talented colleagues.

None of this would have been possible without the talents of Lori Boesch who very efficiently and effectively coordinated several events throughout the year. We should also thank President Vic Dietz, Q.C. for his dedication and commitment to the Centennial and every event. Finally, the committee members, John McIntosh, Q.C., David Conroy, Bill Selnes, and Beth Bilson, Q.C., deserve your thanks for participating on the Centennial Subcommittee for four years, only meeting in person at the Centennial gala. Susan Baer, the entire library staff in Regina and Saskatoon provided administrative, technical, artistic and graphic support throughout the project, along with assistance from Liz Lynchuk.

We set out to celebrate our members and their accomplishments and have a bit of fun along the way. I think we achieved our objectives overwhelmingly. I think we can all say “Wow, we’ve had a great celebration.”

LOOKING FOR LOST WILLS

Name of Deceased: Che Michael Bellamy
Date of Birth: May 6, 1971
Date of Death: March 27, 2008

Contact: Dennis P. Loewen
Dennis P. Loewen Law Firm P.C. Inc.
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Saskatoon, SK S7T 1C8
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The Office of the Equity Ombudsperson is committed to eliminating both discrimination and harassment in the legal profession.

If you are support staff, an articling student or a 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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Published by:
The Law Society of Saskatchewan
1100 - 2002 Victoria Avenue
Regina, Saskatchewan
Canada S4P 0R7
Telephone (306) 569-8242
Fax (306) 352-2989
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