

The Adviser



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for the information of
its members

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Substantial changes in the Practice Advisory Service have taken place since the last edition of the Adviser was published in April 1983. We have grown to a staff of 3 lawyers, a systems assistant and 2 secretaries and we are now responding to members' requests for assistance at the rate of close to 3,000 matters per year. The Service has just completed its first 5 years, during which time it responded to over 8,000 matters referred by about 3,600 members or firms.

With this issue of the Adviser we are providing members with:-

1. A new brochure describing the Practice Advisory Service and its staff, and
2. A memorandum outlining procedures for determining and charging interest on overdue accounts pursuant to Section 35 of the Solicitors Act.

E. & O. Matters - Undertakings

There has been an increase in claims against members as a result of personal undertakings. The Profession should be aware of paragraph 6 of the Commentary to Rule 16 of the Rules of Professional Conduct, which provides that a lawyer should give no undertaking that he or she cannot fulfill.

A recent review of Errors & Omissions files showed many claims which are difficult to defend because of:-

- 1) failure to obtain the client's written authorization to give or to accept the undertaking;
- 2) failure to follow-up promptly to ensure performance of an undertaking;
- 3) the acceptance of oral undertakings;
- 4) the giving or accepting of an undertaking, the performance of which is dependent upon the action of a third party, without obtaining or requiring satisfactory evidence to establish the probability that the third party will perform as anticipated. (e.g. a mortgagee's acknowledgement of availability of a discharge or postponement, including verification of terms).

The review also showed that some solicitors expect E. & O. coverage to respond to claims arising from acts outside normal solicitor-client responsibilities (e.g. undertaking to provide guarantors for a loan). Be aware that personal assumption of a financial or other obligation that is outside normal solicitors' duties, may amount to conscious personal assumption of the risk and may be outside E. & O. policy coverage.

Search and Seizure Proceedings in a Lawyer's Office

Members will be interested in the Judgment of Galligan J. in Robert D. Joseph et al and M.N.R., (released July 15, 1985 - unreported). The case was concerned with a search and seizure of client records in a lawyer's office pursuant to S.321 of the Income Tax Act. In finding the demand served on the lawyer to be "null, void and of no legal effect, as is the seizure under s.232(3) . . .", Galligan J. stated:-

"It is my opinion that the demand served upon the applicant's lawyer requiring production without delay was not lawfully authorized by the statutory provision which authorized a demand for production within a reasonable time. What is a reasonable time will vary depending upon the circumstances. In the case of lawyers, having regard to their need to review files in order to make considered decisions about whether or not to claim privilege for documents in their files, their right to consult their clients to see whether privilege might be waived, their right to make copies of privileged documents so that their files are not stripped, and their right to arrange their schedules so that the legitimate conduct of the affairs of their clients is not disrupted by the making of production, I cannot imagine holding a period of less than seven to ten days to be reasonable notice. Whatever the period may be, it is certainly greater than no time at all."

Systems Assistant

We are pleased that Connie Hood joined the staff of the Advisory Service as our Systems Assistant in July of this year. Her role and background are briefly described in the brochure. If you would like to have Connie Hood assist you with any of your office systems (bookkeeping and accounting, reminder systems, time recording, etc.) she is available to review existing systems and procedures, or to help in setting up new systems.

Alan T. Marshall,
Director,
Practice Advisory Service.

law or as an arbitration service between lawyers or between a lawyer and his client;

4. The Practice Advisory Service is not available to be used by members of the public, and lawyers should not have their clients call our office.

Voluntary and Confidential Nature of Service

The Practice Advisory Service is available to the legal profession on a voluntary basis and must be requested by individual lawyers or law firms. If the Service is requested by a law firm, or an individual member of a firm, it should be with the knowledge and approval of all members of the firm. There will be exceptions to the voluntary nature of the Service only on direction from Convocation when a lawyer is required to seek the assistance of the Practice Advisory Service as part of the discipline process. Voluntary services to the profession are rendered on a confidential basis between the applicant and the Practice Advisory Service. Service rendered pursuant to a direction of Convocation must, of necessity, require reporting to Convocation.

Making Use Of The Service

We can schedule meetings with you either at your office or ours at any time convenient to you. We prefer interviews in your office so that advice can be more effectively related to your practice, but, if you are going to be in downtown Toronto, you are encouraged to arrange a visit to our office — we are just a few minutes from Osgoode Hall.

Visits are also scheduled for your convenience outside of Toronto. Just let us know the nature of the service you require, and we will arrange an appointment as soon as possible.

Some Lawyers Write and Say:

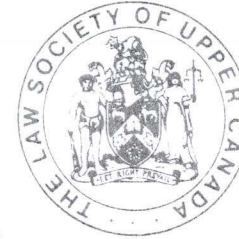
"I wish to thank you very much again for your advice with respect to the problem I had regarding corporations . . ."

"This is simply to advise that we have instituted a reminder system and have updated our time controls with respect to most files. We appreciate your assistance throughout."

"Thank you so much for your kind assistance to me in helping to set-up my practice. Your advice has proved invaluable in so many details for which I would otherwise have been completely at sea."

"I found particularly useful your suggestions and commentary regarding the installation and maintenance of a real estate tickler system with both tickler slips and the addition of programmable monthly cards."

"Thank you for your time and attention and the materials you sent to me relating to my new practice."



**THE
PRACTICE
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SERVICE**

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PRACTICE ADVISORY SERVICE

The Practice Advisory Service was established by Convocation in 1980 in recognition of the increasing complexity of the practice of law. The Service — which now helps over 2,500 lawyers and firms per year — exists to help you, whether you are a sole practitioner or in a firm (of any size), and whether you are a new lawyer or have many years of practice experience.

Why a Practice Advisory Service?

The establishment of the Service arose principally from two areas of concern:

1. An increasing number of new graduates were and are opening their own offices and need guidance and advice from experienced practitioners; and
2. An increase in the number of Errors and Omissions claims, many of which result from inadequate or overburdened office management systems.

What Can We Do For You?

Our Service is provided on a voluntary basis only, so it is up to you to take advantage of our consultation program. Essentially, we provide the following services:

1. Advice and assistance concerning the management of your law practice from opening your office to retirement — and the problems in between;
2. Guidance and direction concerning client matters in your practice. *However, we cannot provide legal advice.* Through the Service, or with the help of volunteer experienced lawyers across the Province, we can provide a kind of “sounding board” to assist you when you face a situation of uncertainty and feel the need for some guidance or assurance. Actually, we can be used as you might a senior member of a firm, someone ready, willing and available to provide brief guidance and direction. Like that mentor-mentee system, of course, we will expect you to have thoroughly researched the law and legal procedures involved in your question. Our role will be to suggest additional source material or to put forth additional practical or legal considerations for you to think about.

Many of our callers seek guidance on the ethical considerations of a client matter (potential conflict of interest and solicitor-client privilege being two of the major concerns) or of an office administration proposal (such as advertising and disbursement charges). Although we are familiar with the Professional Conduct Rules and Commentaries and can provide practical guidance, requests for rulings should be directed to The Law Society's Senior Counsel for Professional Conduct.

The Service consists of three lawyers with extensive experience in private practice, two experienced legal secretaries and one systems assistant.

ALAN T. MARSHALL, Q.C., Director, was called to the Bar in 1955 and practised in Hamilton for 25 years as a sole practitioner and as a partner in small and medium-sized firms. His practice was general, with an emphasis on real estate, wills and trusts, and corporate and commercial work. An active member of the Canadian Bar Association-Ontario, he was National and Ontario Chairman of the Civil Justice Section and served as President of CBA-O in 1971-72.

Mr. Marshall left private practice in 1980 to establish the Practice Advisory Service. He is responsible for overall administration of the Service, and directs the resolution of more difficult problems brought to the Service by members of the Bar.

BRENDA A. DUNCAN, Assistant Director, graduated from the University of Windsor Law School in 1972 and was called to the Bar in 1974. A former partner in small and medium-sized firms in Toronto and Peel, she had a general practice with concentration in real estate matters. A former Chairman of the Real Property Section of the CBA-O, she is a member of the National and Provincial Councils of the CBA and is Section Co-ordinator of the CBA-O. Ms. Duncan concentrates on members' legal questions and solicitor-client problems.

EDWARD BURLEW, Solicitor, graduated from Osgoode Hall Law School in 1977 and was called to the Bar in 1979. Prior to joining the Service, Mr. Burlew was a sole practitioner in Richmond Hill

dealing with civil and criminal litigation, real estate and commercial matters. Mr. Burlew's primary responsibilities involve law office management, including initial start-up advice and assistance with computerization.

CONNIE HOOD, Systems Assistant, has extensive experience in law office accounting and bookkeeping systems. She is available to assist you and your staff with the actual mechanics of office systems including reminder, file control, bookkeeping and accounting, regardless of whether you are just starting a practice or are a seasoned practitioner who would appreciate a general office review.

Other Resources

One of the principal functions of this Service is to co-ordinate and make more readily available various resources to assist practising lawyers, with a view to improving the general level of competence within the Profession. The Service receives assistance from experienced practitioners and guidance from other Departments of the Law Society, on a confidential basis, including the Audit Department, Professional Conduct and the Great Library. We also work closely with the County and District Law Associations and we make every effort to provide guidance and services that consider local needs or circumstances.

Limits of the Service

The Service is provided without charge, subject to the following understandings:-

1. Applicants are asked to familiarize themselves with basic literature available to them on the subject of law office management, in order to facilitate discussion and understanding;
2. The individual lawyer or firm is responsible to choose and adapt those procedures or systems in connection with law office management which the lawyer or firm considers to be best suited to the needs of the practice;
3. The Practice Advisory Service is not available to be used in any dispute concerning management and administration of a law practice or in any dispute between partners or associates in the practice of

THE LAW SOCIETY OF UPPER CANADA
PRACTICE ADVISORY SERVICE

INTEREST ON OVERDUE SOLICITORS' ACCOUNTS

A solicitor may charge interest on unpaid fees, charges and disbursements in accordance with section 35 of the Solicitors Act.

The rate of interest:

- (a) must be shown on the bill;
- (b) must not exceed the rate established for the purposes of the section 138 of the Courts of Justice Act, 1984;
- and
- (c) is to be calculated from a date that is one month after the bill is delivered.

The relevant interest rate appears to be the prejudgment interest rate referred to in subsection 138(1) of the Courts of Justice Act, 1984, which is the bank rate existing at the end of the first day of the last month of the quarter preceding the quarter in which the bill is delivered (i.e. "the proceeding was commenced"), rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent.

Solicitors intending to recover interest on overdue amounts are cautioned to examine carefully the requirements of the relevant legislation. Note carefully the signature and delivery requirements of section 2 of the Solicitors Act, and that interest under subsection 35(1) is to commence from a date that is one month after the bill is delivered under section 2. If there is delay between the date the bill is prepared (i.e. the date on the bill) and the date of delivery, an intervening change in the chargeable interest rate might prejudice entitlement to interest.

By way of illustration, an account billed and delivered on the 2nd day of April, 1985, could have attached to it a claim for interest based on the bank rate as of the 1st day of March, 1985. The bank rate was 11.52% on March 1, 1985. This rate is then rounded up to 12.0% and one (1%) per cent is added to establish a chargeable rate of 13% from the 2nd day of May, 1985. The account could then be endorsed as follows:

"In accordance with Section 35 of the Solicitors Act, interest will be charged at the rate of 13% per annum on unpaid fees, charges or disbursements calculated from a date that is one month after this statement is delivered."

or

"In accordance with Section 35 of the Solicitors Act, interest will be charged at the rate of 13% per annum on unpaid fees, charges or disbursements calculated from the 2nd day of May, 1985."

The interest rate for each quarter can be obtained from The Ontario Gazette, wherein the Registrar of the Supreme Court is required to publish rates pursuant to subsection 137(2) of the Courts of Justice Act, 1984. In addition to the Registrar's Office, rate information should be available in the offices of Local Registrars of the Supreme Court.

It appears that the general practice of the courts, when awarding interest, is to base the calculation on simple interest. This suggests that solicitors should not compound interest on overdue accounts.

RELEVANT LEGISLATIVE PROVISIONS

The Solicitors Act, R.S.O. of 1980, c. 478, sections 2(1) and 35, (as amended by section 1 of the Solicitors Amendment Act, 1983, S.O. 1983, c. 21 and section 214 of the Courts of Justice Act, 1984, S.O. 1984, c.11).

The Courts of Justice Act, 1984, R. O. 1984, C. 11, sections 137 and 138(1).