LAW SOCIETY OF ALBERTA

IN THE MATTER OF THE *LEGAL PROFESSION ACT;*

AND

IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF NANCY KOUL,
A MEMBER OF THE LAW SOCIETY OF ALBERTA

Single Bencher Hearing Committee:

Cal Johnson, Q.C., Bencher

Appearances:

Counsel for the Law Society – Nicholas Maggisano

Counsel for Nancy Koul – John Cusano

Hearing Date:

October 12, 2016

Hearing Location:

Law Society of Alberta at 500, 919 – 11th Avenue S.W., Calgary, Alberta

HEARING COMMITTEE REPORT

Jurisdiction, Preliminary Matters and Exhibits

1. On October 12, 2016, a Single Bencher Hearing Committee (Committee) convened at the office of the Law Society of Alberta (LSA) to conduct a hearing (Hearing) regarding several conduct citations against Nancy Koul.

2. Counsel for Ms. Koul and counsel for the LSA were asked whether there were any objections to the constitution of the Committee. There were no objections, on the grounds of bias or otherwise, and the hearing proceeded.

3. Counsel for the LSA confirmed that there were no private hearing applications and accordingly the Committee declared the hearing to be held in public.

4. The jurisdiction of the Committee was established by Exhibits 1 through 4, consisting of the letter of appointment of the Committee, the Notice to Attend to the Member, the Notice to Solicitor pursuant to section 56 of the *Legal Profession Act* and the Certificate of Status of the Member with the Law Society of Alberta.

5. Counsel for Ms. Koul confirmed the presence of other attendees to witness the proceedings.

Citations

6. The LSA issued two conduct citations (Citations) against the member as follows:

a. It is alleged you failed to determine whether there were any conditions or terms on, or instructions in relation to, trust money received from L.B. and that such conduct is deserving of sanction; and

b. It is alleged you failed to respond to L.B. in a prompt and complete manner and that such conduct is conduct deserving of sanction.

Statement of Facts and Admission of Guilt

7. The Statement of Facts and Admission of Guilt are attached hereto as Appendix "A" (the "Statement"). This Statement was found to be in an acceptable form by a Conduct Committee Panel on August 17, 2016, and therefore this hearing was convened by a single bencher pursuant to section 60(3) of the *Legal Profession Act*.

8. Pursuant to section 60(4) of the *Legal Profession Act,* after a statement of admission of guilt is accepted by the Conduct Committee, it is deemed to be a finding of the Hearing Committee that the lawyer's conduct is conduct deserving of sanction. After hearing submissions by counsel for the LSA and counsel for Ms. Koul, the Committee obtained verbal confirmation from Ms. Koul that :

a. the admissions of fact and guilt were made voluntarily by the member and free of undue coercion;

b. the member unequivocally admitted her guilt in respect of the Citations;

c. The member understood the nature and consequences of the admissions; and

d. the member understood the Committee is not bound by any joint submission on sanction.

9. The only question for determination by this Committee is one of appropriate sanction.

Discussion on Sanction

10. The parties provided a joint submission on sanction with a recommendation of a reprimand and that the Member bear 75% of the Hearing costs. In support of the joint submission, counsel for the LSA provided the Committee with a copy of the Hearing Committee report in *Law Society of Alberta v. Mark Hoffinger*, 2009 LSA 28, dated 2008-09-23.

11. The LSA Hearing Guide, in Paragraph 56, mandates that a joint submission on sanction must be given serious consideration and accepted unless it is unfit or unreasonable or contrary to the public interest.

12. Paragraph 57 provides that the fundamental purpose of the sanctioning process is to ensure the public is protected and the public maintains a high degree of confidence in the legal profession. Accordingly a purposeful approach must be taken. In doing so, it is not the purpose to punish offenders or exact retribution. See Gavin McKenzie, Lawyers and Ethics: Professional Responsibility and Discipline, (Toronto: Carswell, 2009), at page 26-1.

13. Counsel for the LSA, in his submissions on sanction, noted that Ms. Koul had no prior discipline record, and that she had freely admitted guilt when approached after the investigation process. She had thereafter cooperated to conclude the Statement of Facts and the Admission of Guilt and there was no reason to expect a recurrence of the unfortunate behavior.

14. Counsel for the member noted that Ms. Koul had not personally benefitted from her improper conduct, that she had cooperated in the complaint and investigation process and that there were no suggestions that any issues of integrity were under consideration.

Decision on Sanction

15. Taking into consideration the complaints, the joint submission on sanction and the additional submissions of both counsel for the LSA and counsel for Ms. Koul, and further taking into account the relevant factors on sanction referred to above, the Committee determined that a reprimand and an order to pay 75% of the hearing costs was in order.

Reprimand

16. The Committee delivered the following reprimand to Ms. Koul at the conclusion of the hearing:

> These are very serious and troublesome complaints. Ms. Koul, the members of your profession have been put to considerable expense as a result of your actions. The public has not been well served in that it must rely on us to not only act in their best interest but to know our duties and responsibilities and act accordingly.
>
> Just as it is no defence for any driver of a motor vehicle to say they are unfamiliar with the legislated rules governing the use of motor vehicles – it is incumbent on each member of our profession to understand the requirements of the Rules of the Law Society and its Code of Conduct. From the outset in this matter your conduct, your communications with the client and others, and your responses to the LSA and its investigator evidence a clear and fundamental lack of understanding of the concept of trust funds and the provisions of the Rules – including specifically those prescribing the conditions upon which money is held in trust.
>
> There were a number of times over the course of the matter where events should have raised a red flag, but didn't. Throughout you expressed a belief the funds in question were not trust funds, even though they were clearly held in the trust account of your firm as such, but without any compliance with the requirements of Rule 119.18(2).
>
> While as lawyers we must act upon the instructions of our client, that is not an unqualified duty. We must not allow those instructions to override our obligations under the Code of Conduct, the Rules of the LSA or the Legal Professions Act. It has been the downfall of many lawyers that they acted on the instructions of a client without question, reflection or judgment, or allowed themselves to simply be a vehicle for the client's particular agenda. Your conduct in this matter effectively sacrificed your professional obligations to the demands of the client. As a result, a third party was put to considerable time and expense, not to mention frustration and financial peril. The LSA has also been put to considerable expense to investigate, document and prosecute this matter and ultimately to compensate an innocent third party for the misuse of trust funds.
>
> This has no doubt been a costly and stressful exercise for you. Hopefully it has also been a valuable learning experience which will guide you in working to reestablish and maintain a professional reputation for integrity and a level of professionalism that is beyond question.

Concluding Matters

17. Hearing exhibits shall be made available to the public, with the exception that they shall be redacted to prevent the disclosure of confidential or privileged information.

18. There shall be no notice to the profession issued.

19. There will be no notice to the Attorney General.

Dated at the City of Calgary in the Province of Alberta, this 6th day of December, 2016

_____

Cal Johnson, Q.C.

APPENDIX "A"

IN THE MATTER OF THE LEGAL PROFESSION ACT

AND

IN THE MATTER OF A HEARING INTO THE CONDUCT

OF NANCY E. KOUL,

A MEMBER OF THE LAW SOCIETY OF ALBERTA

STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT

INTRODUCTION

1. I was admitted to the Law Society of Alberta ("LSA") on June 21, 2006.

2. I practice in Calgary. My practice is primarily matrimonial/family matters.

3. The following conduct is being referred to a Hearing:

   (a) It is alleged that Ms. Koul failed to determine whether there were any conditions or terms on, or instructions in relation to, trust money received from L.B. and that such conduct is deserving of sanction; and

   (b) It is alleged that Ms. Koul failed to respond to L.B. in a prompt and complete manner and that such conduct is deserving of sanction.

FAILURE TO DETERMINE CONDITIONS/RESPOND

4. R.B. retained me in April 2014 to represent him in a family law dispute surrounding the division of property. R.B. had the right of first refusal on the home in which the parties resided in Calgary (the "Home") but did not have sufficient funds or credit to exercise it. His father, L.B., agreed to assist him in funding the purchase.

5. On April 24, 2014 R.B. made an offer to purchase the Home for $396,000 under his right of first refusal. The purchase funds were to be made up of a $178,200 down payment from L.B., with the balance of $217,800 funded by a mortgage. On May 6, 2014 I asked R.B. to get a mortgage commitment letter or something similar from L.B. to show that R.B. could purchase the Home.

6. On May 23, 2014 I received a cheque from the bank in the amount of $178,200 from L.B. (the "Trust Money"). There were no trust conditions placed on the funds but they were sent with a cover letter from the banker that stated that "This is to purchase ****-** Avenue NW, Calgary, AB for $396,000." The letter also stated that $217,800 in mortgage funds for the purchase of the Home had been secured [EXHIBIT 1]. The bank

draft was made payable to my firm in trust, and was immediately deposited into trust. The notation in the trust ledger showed that the funds were from L.B. and stated "Re: Property Buyout Funds."

7. I did not at any point contact L.B. or any other person to determine whether there were any conditions or terms on, or instructions in relation to, the Trust Money. I proceeded on the basis that the Trust Money could be used by R.B. at his discretion. This was reinforced by R.B. who told me that his father was aware of the way the Trust Money was being used.

8. In September 2014 R.B. asked for $5,000 from trust, which was paid to him on September 17, 2014 from monies R.B. had deposited as a separate retainer in trust. On October 3, 2014 R.B. asked for a further $5,000 from trust. My firm's accounting/office administrator sought instructions from me before releasing the funds, stating "Are we okay to release $5,000 to client from dad's funds provided for payout of property?" [EXHIBIT 2]. I instructed her to release the funds and they were provided to R.B. on October 8, 2014.

9. On October 16, 2014 I emailed R.B. and asked "Does your father know that you have now taken $10,000 from the monies in trust?" R.B. replied on October 20, 2014 advising that his father was unavailable but that he would be talking with him and then will be able to update me. Then on October 30, 2014 he sent me an email stating he had spoken with his father and "he just wants to see progress happening."

10. In the meantime, on October 17, 2014 L.B. emailed me for an update on the Trust Money. He also left me a voicemail. I did not respond to L.B. but I did forward his email to R.B. [Exhibit 3].

11. On December 29, 2014 L.B. emailed me for an update on the Trust Money [EXHIBIT 4]. He also left me a voicemail. Our office was closed until January 5, 2015 for the holiday break and an out of office reply was sent to L.B.

12. When I returned to the office on January 5, 2015 I did not respond to L.B. but I did forward his email to R.B.

13. On January 7, 2015 L.B. emailed me to demand the return of the Trust Money [EXHIBIT 5]. I replied on January 7, 2015 that I did not have authorization from R.B. to discuss his file with him and advised L.B. to speak with his son directly. I also emailed R.B. to tell him to discuss money with his father.

14. On January 14, 2015 I emailed R.B. asking "could you have your father email or call us to indicate that he is aware of the use of the funds he has loaned you?" R.B. responded on the same day advising that his father was aware of how the Trust Money was being used. Money continued to be released to R.B., with the last being $5,000 to R.B. on January 23, 2015 for moving expenses.

15. By early February, 2015 it became clear that the Trust Money was only supposed to be used for the purchase of the Home and no further funds were released from trust. R.B. showed up at my firm demanding money from trust. The head of my firm and responsible lawyer on the trust account, D.C., became involved. D.C. became aware of

the fact that L.B. was asserting that the Trust Money was his and was demanding its return. Both D.C. and I attempted to contact L.B., who spoke with D.C. and confirmed that his son was not authorized to use the Trust Money at his discretion. This was the first time anyone in my firm had any direct communication with L.B. since receiving the Trust Money, other than the emails and voicemails to me set out above.

16. On March 30, 2015 I asked R.B. for his permission to return the Trust Money to L.B. He responded "Of course, I support the return of my fathers funds to him. I am not sure why I have to consent to his [*sic*] as it is his funds held in trust for the sole purpose of purchasing the home."

17. On January 19, 2015 L.B. filed a complaint with the LSA. I responded to the complaint of April 22, 2015 [EXHIBIT 6] and June 5, 2015 [EXHIBIT 7].

18. The complaint was referred to a LSA investigator. An investigation was conducted and I provided a further response to the LSA investigator on March 24, 2016 [EXHIBIT 8]. An investigation report has been completed [EXHIBIT 9], the contents of which I agree with subject to my comments on it provided on May 11, 2016 [EXHIBIT 10].

19. On May 13, 2015, $111,989.95 was returned to L.B. from trust. The difference of $66,210.05 has been disbursed in various ways including for R.B.'s living expenses, unrelated legal fees and for my fees and disbursements [EXHIBIT 11]. The Trust Money was not used to purchase the Home, which purchase did not occur.

CONCLUSION

20. I admit as fact the statements contained within this Statement of Admitted Facts and Admission of Guilt for the purposes of these proceedings.

21. I admit that my conduct set out herein was conduct deserving of sanction, being incompatible with the best interests of the public and tending to harm the standing of the legal profession generally. I further admit guilt to the following citations:

    (a) It is alleged that Ms. Koul failed to determine whether there were any conditions or terms on, or instructions in relation to, trust money received from L.B. and that such conduct is deserving of sanction; and

    (b) It is alleged that Ms. Koul failed to respond to L.B. in a prompt and complete manner and that such conduct is deserving of sanction.

ALL OF THESE FACTS ARE ADMITTED THIS 21ST DAY OF JULY, 2016.

"Nancy E. Koul"
NANCY E. KOUL