

**Jacobus Damen**  
**Roll #9094**  
**Law Society of Alberta Disciplinary Hearing**  
**October 6, 2009**

**Hearing Committee Report**

**In the matter of the *Legal Profession Act*,**  
**and in the matter of a hearing regarding the conduct of Jacobus Damen,**  
**a Member of the Law Society of Alberta**  
**HE 20080024**

**A. Jurisdiction and Preliminary Matters**

1. A Hearing Committee of the Law Society of Alberta (LSA) held a hearing into the conduct of Jacobus Damen on October 6, 2009. The Committee consisted of Frederica L. Schutz, Chair, Rod Jerke, Q.C., Committee member and Norma Sieppert, Committee member. The Law Society of Alberta was represented by Garner Groome. The member was present and was represented by Dana Schindelka.
2. Exhibits 1 through 4, consisting respectively of the Letter of Appointment of the Hearing Committee, the Notice to Attend, the Notice to Solicitor with acknowledgement of service, and the Certificate of Status of the Member, established the jurisdiction of the Committee and were admitted into evidence by consent.
3. There was no objection by the Member's counsel or counsel for the LSA regarding the membership of the Committee.
4. The Certificate of Exercise of Discretion was entered as Exhibit 5. No request for a private hearing had been received and therefore the hearing proceeded in public.
5. Exhibits 6 through 11, contained in an exhibit binder provided to the Committee members and the parties, were admitted into evidence by consent. The following additional exhibits were also entered into evidence by consent:
  - Exhibit 12 – Certificate of Standing by the Director of Lawyer Conduct;
  - Exhibit 13 – Estimated Statement of Costs;
  - Exhibit 14 – Email from the Honourable Judge T. Laroche dated October 5, 2009;
  - Exhibit 15 – Letter from Dale Ellert dated October 5, 2009.

**B. Citation as Amended**

6. At the outset of the hearing, counsel for the Member, with the consent of counsel for the Law Society of Alberta, applied to amend the citation to read as follows: (with reference to the Notice to Solicitor, Exhibit 3):

1. IT IS ALLEGED that you failed to be candid with your clients concerning the identity of the lender with respect to short-term loans, and you did not take adequate steps to make sure your clients were informed of the terms of the loan and the nature of the fees or charges, and that such conduct is conduct deserving of sanction.
  2. IT IS ALLEGED that you acted in a conflict or potential conflict situation by engaging in business transactions with clients who did not have independent legal representation and/or you did not advise them of their right to obtain such representation, and that such conduct is conduct deserving of sanction.
  3. IT IS ALLEGED that you failed to respond in a candid, timely and complete basis to the Law Society of Alberta, and that such conduct is conduct deserving of sanction.
7. Having heard no objection from counsel for the LSA, and having duly considered this matter, the Committee allowed the amendments to the citation and the hearing proceeded on the basis of the amended citations, being three in number.

**C. Agreed Statement of Facts and Admission of Guilt**

8. The Agreed Statement of Facts and Admission of Guilt (Exhibit 7, an original signed copy provided to the Committee) states as follows:

***Jacobus Damen***

1. Jacobus Damen (“Damen”) was called to the Bar in Alberta on July 24, 1992.
2. Damen became a partner at Arkell Damen Hoffman on March 14, 1994.

***Wendy Damen***

3. Wendy Damen is Mr. Damen’s wife. They have been married since December 23, 2000. Ms. Damen uses both the name “Wendy Damen” and “Wendy Clark”. Clark is her maiden name. She uses the name Clark for business purposes.
4. Damen drafted the loans so they were payable to his wife Wendy Clark. Damen made the loans as he was a larger income earner.

***Short Term Loans to AC***

5. Damen acted on behalf of AC with respect to the purchase and sale of real property in the City of Calgary, as well as a matrimonial issue.
6. AC was referred to Damen by her real estate agent, RB.

7. On February 26, 2004, Damen entered into a loan agreement to provide AC with the amount of \$4,000.00, in exchange for a \$500 flat fee (the “February 26, 2004 Loan”). This loan is memorialized in Exhibit 8. There was no additional loan documentation.
8. On March 10, 2004, Damen entered into a second loan agreement to provide AC with the amount of \$13,100.00, in exchange for a \$500 flat fee (the “March 10, 2004 Loan”). This loan is memorialized in Exhibit 9. There was no additional loan documentation.
9. The February 26, 2004 Loan was required by AC as a deposit.
10. The March 10, 2004 Loan was required by AC in order to close on the agreement to purchase real estate. AC was content with the fees charged by Damen. AC has no recollection as to what the fees were exactly intended to cover.
11. AC required the loans because of a conflict with her ex-husband that resulted in her funds being temporarily unavailable.
12. The loan proceeds were not provided directly to AC. Rather, they were provided to AC’s Real Estate Agent in Calgary.
13. Damen was repaid both loans to AC together with fees from the sale proceeds of a real estate transaction on March 22, 2004, pursuant to a Revised Direction to Pay duly signed by AC.
14. AC executed a Promissory Note for each of the loans in favour of Ms. Wendy Damen. Based on what Damen told her, AC understood that the loan was being offered by Damen’s wife.
15. The funds for the loans to AC were drawn on Damen’s personal line of credit account or a joint account and did not come from Damen’s wife. Damen wrote the cheques because he knew what the relevant amounts were.
16. AC did not meet with or speak with Damen’s wife regarding the loan.
17. AC did not feel the flat fee was unreasonable and she was happy with the results of the transaction. Even after being advised by the Law Society of Alberta as to the possible calculations related to the cost of borrowing AC was still happy with the results.

***Short Term Loan to LB***

18. Damen acted on behalf of LB with respect to the sale of property in Calgary. LB was referred to Damen by RB, her realtor on the sale of her Calgary residence.

19. On March 31, 2004, Damen entered into a loan agreement with LB in the amount of \$5,000.00, in exchange for a \$500 flat fee (the “LB Loan”). This loan is memorialized in Exhibit 10. There was no additional loan documentation.
20. The LB Loan was required by LB as a deposit on a real estate purchase agreement in Saskatchewan.
21. LB’s Saskatchewan real estate agent approached Damen on her behalf in order to inquire about the possibility of Damen providing a short term loan to provide the deposit pursuant to the real estate purchase agreement.
22. The LB Loan proceeds were not provided directly to LB. Rather, they were provided to LB’s Saskatchewan Realtor as a deposit pursuant to the real estate purchase agreement.
23. LB executed a Promissory Note in favour of Ms. Wendy Clark. LB believed that Ms. Clark worked for Damen’s office. Ms. Clark was never employed by Arkell Damen Hoffman, although she occasionally answered phones.
24. LB told the Law Society Investigator that she felt pressure to obtain a loan since she needed somewhere to live.
25. Damen was repaid the loan to LB together with the fee from the sale proceeds of a real estate transaction on April 1, 2004, pursuant to a Revised Direction to Pay duly signed by LB.
26. The funds for the loan to LB were drawn on Damen’s personal line of credit account and did not come from Ms. Clark. Damen had the line of credit chequebook nearby so he used it to write the cheque.
27. LB had no direct contact with Damen regarding the loan. The Promissory Note and Revised Direction to Pay were sent to LB’s real estate agent in Saskatchewan for execution.
28. LB did not meet or speak with Ms. Clark regarding the loan.
29. LB told the Law Society Investigator that she was advised by her Saskatchewan realtor that the flat fee was intended to cover interest and the paperwork to complete the loan.
30. It did not matter to LB whether the loan proceeds came from Damen or from a different source.
31. LB was “devastated” and “flabbergasted” when the Law Society Investigator informed her of the potential interest rate (if the flat fee was regarded as interest) but she told the Investigator that she felt desperate and had no other options and had proceeded with the loan for that reason.

32. LB was happy with the results of the transaction and believed that Damen had “explained everything” to her regarding the sale of her Calgary residence. LB was of the opinion that the loan did contribute to making the Saskatchewan real estate deal go smoothly.

#### ***Short Term Loans to other Clients***

33. Prior to advancing loans to AC and LB, Damen provided short term loans to other clients, also in order to allow them to close real estate transactions. In these instances, Damen acted on behalf of the client in the real estate transaction and advanced loans to that same client.
34. Loan transactions with clients other than AC and LB followed the same general procedures and were conducted in a similar manner.
35. All other clients to whom Damen provided loans were charged the same \$500 flat fee in respect of the loan.
36. All other loan documents were prepared by Damen and made in favour of Wendy Clark or Wendy Damen. None of these other clients met with Ms. Clark or had any personal dealings with her.
37. Damen was repaid the loan and fee from real estate sale proceeds.
38. Although the loan documents were prepared in the name of Ms. Clark, the loans were in fact funded by Damen.
39. The loan proceeds for other loans came from either Damen’s personal line of credit or Damen and Ms. Clark’s joint account.

#### ***Business Transactions with Clients***

40. The loans Damen extended clients, including AC and LB, were business transactions.
41. Damen did not directly advise AC, LB, or other clients with whom he entered into loans of their right to obtain independent legal counsel, and these clients did not obtain independent legal counsel.
42. Damen did not seek or obtain the consent of clients, including AC and LB, to proceed without independent legal advice.
43. Damen acted in conflict of interest or a potential conflict of interest with respect to AC, LB and other clients to whom similar loans were advanced.
44. Damen did not advertise his services as a lender. He was approached by real estate agents on behalf of clients in order to provide interim financing to allow the subject deal to close.

45. Damen advised the real estate agents that the clients should seek alternate forms of financing if available and Damen relied on the real estate agents to advise the clients with respect to interim financing matters.
46. No further charges such as interest, legal fees or administrative fees were charged in addition to the \$500 flat fee charged to clients, nor was there any provision for any further charges.
47. Damen prepared all loan documents in relation to the loans to clients. Damen regarded the fee as a flat fee similar to flat fees charged in relation to real estate work.
48. If the loan was not repaid by the sale proceeds or if there was a delay in repayment, there was no provision for increased costs or interest payable by the client.
49. Loan proceeds were always provided in relation to real estate closing and were always provided to real estate companies, other law firms, or passed through Damen's trust account as cash to close. Damen was not consulted prior to the client entering into the real estate transaction and incurring the obligation to pay.
50. Damen saw the loan service as a convenience for his clients.
51. Damen no longer provides loan services to clients and he has not done so since at least April of 2004.
52. Damen provided these loans to clients from approximately 1998 to 2004. Damen cannot say with certainty how many such loans were provided but he believes there were no more than 10 such loans. In order to provide an estimate of the number of these loans that were provided Damen would need to review thousands of his real estate files.
53. Given the manner in which the Damen family handled its finances, on one occasion, Damen told the LSA auditor that the loans were Ms. Clark's loans. Damen acknowledges that this potentially could have been misleading. However, Damen did not, at any time, attempt to mislead the LSA auditor. Damen responded within a reasonable time to the Law Society correspondence referred to in Exhibit 11 with one exception being the September 25, 2006 letter from the Investigator which had a response drafted on October 3, 2006 but apparently the reply was accidentally not sent, or failed in its transmission or for some other unknown reason did not reach the attention of the Law Society Investigator.
54. Given Damen's admission that he provided loans to clients from approximately 1998 to 2004 he did not pull all of his files from off-site storage to review each file in order to determine the exact number of loans that were provided.

55. Damen admits that he failed to be candid with his clients concerning the identity of the lender with respect to short-term loans, and that he did not take adequate steps to make sure his clients were informed of the terms of the loan and the nature of the fees or charges, and that such conduct is conduct deserving of sanction.
56. Damen admits that he acted in a conflict or potential conflict situation by engaging in business transactions with clients who did not have independent legal representation and/or he did not advise them of their right to obtain such representation, and that such conduct is conduct deserving of sanction.

“original signed”

Jacobus Damen

**D. Decision as to Citation**

9. The Hearing Committee determined that the Agreed Statement of Facts and Admission of Guilt (Exhibit 7) in respect of Citations 1 and 2 as amended were in acceptable form. Consequently, pursuant to s.60(4) of the *Legal Profession Act* the admission of guilt is deemed for all purposes to be a finding of the Hearing Committee that the conduct of the Member, as stated in Citations 1 and 2 as amended is conduct deserving of sanction. Citation 3, as amended, is dismissed, the Hearing Committee finding that the evidence does not warrant a conviction. The Hearing Committee noted that the dismissal of Citation 3 was supported both by Law Society counsel and by the Member’s counsel. The Member did not obstruct the Law Society of Alberta’s investigation and did respond to the client inquiry. On the basis of submissions made by the Law Society counsel and the Member’s counsel and based upon the facts found by this Hearing Committee, we concur that this citation be dismissed.
10. The Member has been found guilty in Citation 1 of lacking candour but that is not to be taken as being synonymous with dishonesty or lacking integrity. Rather, the Member’s conduct was perhaps better characterized as “wrong-headed but right-hearted” in the sense that the Member seems to have seen himself as being of service to his clients in difficult financial circumstances. Although Mr. Damen and his counsel assert that these clients were not vulnerable, there is a certain vulnerability inherent in being in a situation where a client faces legal obligations and is in compromised financial circumstances. As counsel for the Law Society of Alberta pointed out, these clients had real estate deals that were in significant jeopardy unless the client came up with the money they required to close the real estate transactions. Mr. Damen was the individual who offered to lend money to these clients for a profit and ought to have recognized, given his lengthy experience as a lawyer, that the clients may have felt they were without other immediate options. The fact is that Mr. Damen profited from their comprised legal circumstances, regardless of whether they felt desperate or vulnerable at the time the loan was made. We denounce Mr. Damen for this misconduct and are also concerned to make clear to

other members of the profession that this type of conduct will not be tolerated. Aggravating factors include the finding of this Hearing Committee that Mr. Damen's conduct occurred over a lengthy period of time, from approximately 1998 to 2004. Although Mr. Damen was not precise about the number of lending transactions he engaged in with clients, it was not less than ten separate deals, all of which cost the clients money. Mr. Damen denied having knowledge as to the prohibitions against such lending and it is the finding of the Hearing Committee that Mr. Damen ought to have known as a competent solicitor that these transactions were improper. The absence of any specific complaints made by the borrowing clients is not a mitigating factor – it is, at best, a neutral fact.

11. Balanced against the aggravating factors mentioned above, this Hearing Committee does acknowledge that Mr. Damen did not impede the process, succumbed to all regulatory steps, acknowledged his conduct and guilt in his Agreement on Facts, admitted that he failed to be candid with his clients concerning the identity of the lender (his wife), admitted that he did not take adequate steps to make sure his clients were informed of the terms of the loan and the nature of the fees or charges, and admitted that such conduct is conduct deserving of sanction. Moreover, the Member admitted that he acted in a conflict or potential conflict situation by engaging in business transactions with clients who did not have independent legal representation and/or he did not advise them of their right to obtain such representation, and admitted that such conduct is also deserving of sanction.
12. Mr. Damen has taken responsibility for his misconduct and has long since ceased to have any dealings of this questionable nature with any clients.
13. Counsel for the Law Society of Alberta cited to the 2004 Law Society of Alberta Decision in Venkatraman but that case is entirely distinguishable and may be considered the high water mark in cases of this nature as that member was found guilty of unconscionable terms with respect to the loans made to clients. That is not a factor in this case.
14. The conduct about which this Member admits guilt raises serious concerns about the protection of the public from lawyer conduct that falls below that which is demanded by the Law Society of Alberta as regulators by its membership. The Member's conduct also raises serious concerns about the effect the Member's actions, lack of knowledge about important provisions in the Code, and failures could have on the reputation of the legal profession to someone reasonably informed of the circumstances. It is noted that it was the Law Society's auditors pursuant to the Rules of the Law Society who uncovered the conduct to which the Member has now admitted guilt that is deserving of sanction.
15. Mr. Damen's clients depended on him and trusted him to be forthright, to not be self-interested and to act not in a situation of conflicting interests but solely in his clients' best interests fully, completely and without exception or qualification. It could appear to



reasonable people in viewing the Member's conduct that his intention was to profit from his clients' distressed circumstances. The clients were in a disadvantaged position when considering that these clients lacked the legal and financial sophistication to fully and clearly, in an informed sense, understand what they were actually agreeing to when they signed the promissory note and granted real property security in favour of the Member's wife against their lands.

16. The Member's conduct for which he has admitted guilt falls far below what this Hearing Committee understands to be an otherwise exemplary and long-standing term of service to the people of Alberta as a lawyer. We accept Mr. Damen's genuine remorse for this unfortunate lapse of judgment but nonetheless note that Section 49 of the *Legal Profession Act* states that any conduct of a member that is incompatible with the best interests of the public or of the members of the Law Society of Alberta or that tends to harm the standing of the legal profession generally, is conduct deserving of sanction. That test obligates us to analyze the conduct from the perspective of the effect it has or could have on the reputation of the legal profession generally. In the view of the Hearing Committee, the Member's conduct could have a negative effect on that reputation. In the result the Hearing Committee concluded that a fine was necessary to reflect the public interest in the sanction imposed.

**E. Decision Regarding Sanction**

17. The Member responded under oath to questions posed by counsel and by the Committee members. The Hearing Committee also heard submissions regarding sanction from both counsel.
18. The Hearing Committee decided that a reprimand be issued to the Member and that the Member also be required to pay a fine and pay a portion of the costs of the hearing.

**F. The Reprimand**

19. The reprimand was delivered by the Chair, Frederica Schutz.
20. The Hearing Committee notes that after many years of unblemished practice, the Member is now before this Hearing Committee. He has provided the Hearing Committee with an explanation but the conduct cannot be excused.
21. The Member has ceased the conduct complained of and has given his personal undertaking that there will be no recurrence. The Member has expressed genuine remorse for this lapse in judgment.

**G. Fine and Costs**

22. In addition to the reprimand delivered, the Member is ordered to:

- (a) Comply with his undertakings given to return money to AC and LB in the amounts of \$1,000.00 and \$500.00, respectively, within five days of the hearing date, by providing that money directly to the Law Society of Alberta's counsel, Mr. Garner Groome;
- (b) Pay a fine in connection with each of the convictions in respect of Citations 1 and 2, in the sum of \$1,750.00 each, or a total of \$3,500.00 within 30 days of the hearing date;
- (c) Pay the costs of this hearing in the amount of the actual costs, less \$1,000.00, payable within 30 days of being advised of the actual amount of the costs. The costs of this hearing are so ordered by the Hearing Panel because even in light of the Member's admissions there was insufficient evidence to warrant a conviction in respect of Citation 3 and both counsel invited dismissal of this Citation.

**H. Concluding Matters**

- 23. There will be no referral to the Attorney General.
- 24. There will be no notice to the profession.
- 25. The exhibits and proceedings will be available for public inspection, including the provision of copies of exhibits for a reasonable copy fee, except that the identities and other identifying information about clients will be redacted from those exhibits.

Dated this 11th day of March, 2010.

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Frederica L. Schutz – Chair and Bencher

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Rod Jerke, Q.C. – Bencher

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Norma Sieppert – Bencher