

THE LAW SOCIETY OF ALBERTA  
HEARING COMMITTEE REPORT

IN THE MATTER OF THE *Legal Profession Act*, and  
in the matter of a Hearing regarding  
the conduct of MARK DAMM  
a Member of The Law Society of Alberta

**INTRODUCTION AND SUMMARY OF RESULT**

1. On October 1, 2009 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary to inquire into the conduct of the Member, Mark Damm. The Committee was comprised of James Glass, Chair, Carsten Jensen, Q.C. and Sarah King-D'Souza. The LSA was represented by Lois MacLean. The Member was present throughout the hearing and was represented by Dale Ellert.
2. The Member faced one citation:

IT IS ALLEGED that you **failed to have documentation or written confirmation** that you recommended to the complainant (who was a family member) that she obtain independent legal advice; and that such conduct is conduct deserving of sanction (emphasis added by the Committee).
3. At the commencement of the hearing, counsel for Mr. Damm and the LSA presented the Hearing Committee with an Agreed Statement of Facts and Admission of Conduct Deserving of Sanction.
4. On the basis of the Agreed Statement of Facts and Admission of Conduct Deserving of Sanction, the other evidence received at the hearing, and for the reasons that follow, the Hearing Committee finds that the Citation is proven and the Member is guilty of conduct deserving of sanction.
5. The Hearing Committee concluded that the sanction should be a reprimand and that the Member pay costs of the hearing.

**JURISDICTION AND PRELIMINARY MATTERS**

6. Exhibits 1-4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend and the Certificate of Status of the Member, established the jurisdiction of the Hearing Committee. The Certificate of Exercise of Discretion was entered as Exhibit 5. These Exhibits were entered into evidence by consent.
7. There was no objection by the Member's counsel or counsel for the LSA regarding the constitution of the Hearing Committee.

8. The entire hearing was conducted in public.

## **CITATION**

9. The Member faced one citation:

IT IS ALLEGED that you failed to have documentation or written confirmation that you recommended to the complainant (who was a family member) that she obtain independent legal advice; and that such conduct is conduct deserving of sanction.

## **EVIDENCE**

10. As noted above, Exhibits 1-5 (the jurisdictional exhibits) were entered into evidence by consent.
11. Exhibits 6-14, all relevant to the Citation, were entered into evidence by consent.
12. The Member provided an Agreed Statement of Facts and Admission of Conduct Deserving of Sanction that was signed by him on September 29, 2009. The Hearing Committee reviewed the Agreed Statement of Facts and Admission of Conduct Deserving of Sanction and found it to be in a form acceptable to the Hearing Committee. Accordingly, pursuant to s.60(4) of the *Legal Profession Act* the admission is deemed for all purposes to be a finding of the Hearing Committee that the conduct of the Member is conduct deserving of sanction. The Agreed Statement of Facts and Admission of Conduct Deserving of Sanction was entered into evidence as Exhibit 15, by consent.

## **FACTS**

13. The Agreed Statement of Facts and Admission of Conduct Deserving of Sanction is reproduced herein (redacted with respect to the names of individuals and companies):
  1. Mr. Damm is a member of the Law Society of Alberta, having been admitted in 1991. Mr. Damm was a member at all times relevant to this proceeding.
  2. Mr. Damm faces one citation, as follows:
 

It is alleged that you failed to have documentation or written confirmation that you recommended to the complainant (who was a family member) that she obtain independent legal advice, and that such conduct is conduct deserving of sanction.
  3. Mr. Damm was previously married to S.F, a lawyer who is in practice in Calgary. Ms. F.'s mother is B.G., hereafter referred to as Mrs. G., who is the complainant in this matter.
  4. In 2002, Mr. Damm was retained by Mrs. B.G.'s brother (A.S.) who was the executor named in the Will of Anne S. – the mother of A.S. and B.G. As a result of his involvement in the estate, Mrs. G.'s is of the view that Mr. Damm had knowledge of Mrs. G.'s financial affairs.

5. In November, 2004, Mrs. G., Ms. F. and Mr. Damm entered into a business venture with respect to the purchase and operation of a restaurant, R... Inc. in Canmore, Alberta.
6. Mr. Damm incorporated a company through which the restaurant was to be purchased. Mr. Damm was not a shareholder of the company but he was an officer. The shares were owned one third by Mrs. G. and two thirds by Ms. F.
7. The directors of the company were Mrs. G. and Ms. F. In her complaint, Mrs. G. states that the responsibility for the operation of the restaurant was as follows:
  - B. G. - Chef
  - S. F. - Manager and President
  - Mark Damm – Legal advisor, Marketing director and person responsible for the books of the restaurant. (*Exhibit 6*) Mr. Damm states that both Ms. F. and Mr. Damm were responsible for the books of the restaurant.
8. Mrs. G. invested \$50,000 in the business. (*Exhibit 6*)
9. Mrs. G.'s letter of complaint indicates that two days after providing the investment funds she still had not received any copy of documentation regarding the business. She indicates that she asked to see the Offer to Purchase and incorporation papers, but that the documentation had not been offered to her. Her complaint letter also indicates that it was not suggested that she speak with another legal advisor on this matter and that because "they are both lawyers and family, I felt that I could trust them" (*Exhibit 6*)
10. With respect to the documentation which was provided to the complainant, her letter of complaint includes the following paragraphs:
 

I did receive some unofficial documentation with dates and signatures missing throughout, and Mark informed me the corporation papers were the "originals" and "full of legal mumble jumble" and I was to "be careful" with them and to bring them with me the next day, our possession date. I did bring the corporation papers but have never seen these papers or copies since.

My recollection was that I signed papers for the corporation on December 1<sup>st</sup>, 2004, but I didn't receive any copies at the time of signing but Mark assured me that I would receive these copies as soon as he was back in the office the following week. To date, I have not received copies, even after several requests and I have been given red herrings each time, such as "The secretary, the Twit, has lost them."

After being in business for three months, in March 2005 I wrote and gave a letter to S. and Mark Damm to ensure there were no misconceptions on my part asking to have a meeting at their convenience. I listed items I wanted to discuss and requested copies i.e. financial statements, schedule of repayment of my shareholders loan and remuneration. This meeting never occurred and my questions were not fully explained nor did I receive any requested copies. Three days later Mark Damm left the business and moved back to Calgary and I was informed that he and S. had decided to sell the restaurant and had spoken with a realtor to list it. (*Exhibit 6*)

11. In March 2005, Mr. Damm and Ms. F. separated. They disagree as to the circumstances surrounding the separation. They do agree that Mr. Damm had no involvement in the day to day operation of the business after March 2005.
12. Ms. G. and Ms. F. continued to operate the business, however by May, 2005 it appeared that the restaurant was failing. It is clear from the correspondence received by the Law Society that each side blames the other for the failure of the business. It is not necessary for the Law Society's purposes to resolve the disputed issues around responsibility for the failure, however it is clear that by July 2005, the landlord re-took possession of the premises. (*Exhibit 7 para. 49 – from Mark, Exhibit 8, para. 59 – from B.G., and Exhibit 9, para. 68 from S.F.*)
13. With respect to the sale of the restaurant, again the parties differ in their recollection of the events. Mrs. G. advised in her complaint letter that she later learned that the restaurant had been sold without her knowledge, approval or consent. She says that she was not paid out for the shareholder's loan to the company, and as a result lost all of her investment. (*Exhibit 6*)
14. Mr. Damm's position is that Ms. F. and Ms. G. were both aware of the efforts to sell the restaurant, and that there were communications between Mr. Damm, Ms. F., Mrs. G. and the realtors about the sale. (*Exhibit 10, paras. 124 – 128*)
15. In November, 2005 Mrs. G. made a complaint to the Law Society. Her letter of complaint set out a number of allegations against Mr. Damm. (*Exhibit 6*)
16. Mr. Damm provided a response to the Law Society by way of a letter dated March 1, 2006 with a binder of attachments. The letter (without attachments) is attached as *Exhibit 7*. The key points of that letter include the following:
  - (a) Mr. Damm advised that he and S.F. separated on March 16, 2005, and that the divorce proceedings were "very adversarial".
  - (b) Mr. Damm stated that he had never acted for B.G. in relation to any matter whatsoever. With respect to the estate of Mrs. G.'s mother (A.S.) he confirmed that he had acted for the estate of A.S., but that the executor of the estate was Mrs. G.'s brother, A.S. and that it was A.S. who provided all instructions with respect to the estate to Mr. Damm.
  - (c) Mr. Damm indicated in his letter of response that he did not have any knowledge of Mrs. G.'s financial situation or financial affairs. He acknowledges that he did know that she received a gift from the mother's estate and that she was a joint owner of a home with her husband in the Edgemont subdivision in northwest Calgary.
  - (d) Mr. Damm indicated that his wife S.F. decided in the fall of 2004 that she did not wish to continue practicing law and that as a result they moved from their Calgary home to their Canmore condominium and considered possible business opportunities for S.F. As part of those discussions they considered the purchase of the R... Inc. and sometime in October, 2004 they had discussions with Mrs. G. about a possible investment in the business.

- (e) Mr. Damm's letter indicates that he was told by Mrs. G. that she had a "financial advisor".
- (f) Mr. Damm acknowledges that Mrs. G., Ms. F. and Mr. Damm discussed the purchase of the Canmore restaurant and that there was an agreement that Mrs. G. would be the chef (for which she had professional training and experience) and that Mr. Damm would set up a corporation which would enter into the Lease Agreement. He indicates that it was the intent that this would save the company money as it would not be necessary to incur legal fees.
- (g) In his letter, Mr. Damm states that he advised Mrs. G. that it would be necessary for her to obtain independent legal advice and independent accounting advice regarding her personal involvement in this transaction.
- (h) Mr. Damm did not confirm his recommendation to Mrs. G. in writing.
- (i) Mr. Damm indicates that the purchase price of the restaurant was \$165,000. As noted above, Mrs. G. invested \$50,000. Ms. F. and Mr. Damm provided Personal Guarantees of a Vendor Take-Back mortgage in the amount of \$115,000, and Personal Guarantees of an operating line of credit from ATB Financial in the further amount of \$25,000 each.
- (j) Mr. Damm stated that in November, 2004 Mrs. G. was provided with all corporate documentation and that the restaurant commenced operations on December 1, 2004. At that time Mrs. G., Ms. F. and Mr. Damm were all residing in the Damm's Canmore condominium.
- (k) The restaurant was not a successful venture and by March, Mr. Damm indicates that Ms. F. advised him that they should be proceeding to list the restaurant for sale. Mr. Damm's letter indicates that he had discussions with Ms. F. about the Listing Agreement and the interim operation of the restaurant. It was sold in August, 2005.
- (l) Mr. Damm indicates that the restaurant assets were sold for \$120,000 (having been purchased for \$165,000) and as a result Mrs. G. lost her initial investment of \$50,000. Mr. Damm indicates that he and Ms. F. avoided any further liability with the landlord but that there was a deficiency of approximately \$29,200 to the vendor and that Ms. F. and Mr. Damm were liable under their Personal Guarantees of the Vendor Take-Back mortgage and of the ATB Financial Personal Guarantees for approximately \$26,000. Mr. Damm's letter indicates that he personally lost approximately \$64,000 as a result of the business venture.
- (m) As noted earlier, Mr. Damm and Ms. F. separated in mid March, 2005, after which Mrs. G. and Ms. F. continued to operate the restaurant until it was closed at the beginning of July, 2005.

17. Rule 9 of Chapter 6 of the **Code of Conduct** is as follows:

Rule 9: A lawyer must not engage in a business transaction with a client of the lawyer who does not have independent legal representation unless the client consents and the transaction is fair and reasonable to the client in all respects.

18. The commentary to Rule 9 includes the following paragraph:

Even if a client is relatively sophisticated, the lawyer must objectively assess whether the client would agree to the same terms and conditions with a person other than the lawyer, and whether the lawyer stands to incur a benefit or advantage that with due diligence, the lawyer would prevent someone else from obtaining in a transaction with a client. Despite favorable responses to these and similar questions, the client must be advised of all of the advantages of retaining independent counsel. **Such consultations should be clearly documented and preferably confirmed in writing.** The nature of the matter may also require that the client, while not independently represented in the transaction, obtain independent legal advice regarding the advisability of the transaction.

19. Mrs. G.'s complaint was dismissed by Katherine Whitburn, Manager, Complaints, by way of a letter dated April 17, 2008. (*Exhibit 11*).
20. On August 13, 2008, Mrs. G. appealed the dismissal of her complaint. The portion of her letter that deals with the allegation that Mr. Damm failed to recommend independent legal advice is attached as *Exhibit 12*.
21. The appeal was heard by an Appeal Panel of the Law Society on September 10, 2008. A transcript of the hearing of the appeal is attached as *Exhibit 13*.
22. At page 14, Mr. Damm made the following submissions to the Appeal Panel.

In hindsight, would I have done things differently? Absolutely. Would I have written a letter confirming a conflict or an inability to act for G. in confirming my oral advice to her to seek independent counsel, financial, and accounting advice, absolutely. Absolutely. I did not do so at the time because I made it very clear to her that I was acting solely for the company, and I was not acting for G. (sic). I will never make a mistake again. I will never ever enter into any type of a business enterprise with a client, a non-client, family member, not ever again. I've learned a very painful lesson from this whole process. Those are my respectful submissions.

23. The Appeal Panel issued a Memorandum of their decision in which they allowed the appeal with respect to the allegation that Mr. Damm had failed to recommend the independent legal advice in writing. A copy of the Decision is attached as *Exhibit 14*.
24. The matter was then reviewed by a panel of the Conduct Committee who directed the citation which is currently before this Hearing Committee. The other allegations were dismissed.
25. Mr. Damm has cooperated with the Law Society and its investigators and has done so in a timely manner.

All of these facts are agreed to and admitted.

I agree that the facts as set out above constitute conduct deserving of sanction within the meaning of section 60 of the *Legal Profession Act*. This Agreement is dated the \_\_\_\_ day of September, 2009.

14. Counsel for the LSA and the Member submitted that the excerpts of letters contained within Exhibit 15 were not entered as to the truth of the contents contained within the excerpts but rather for the sole purpose that the comment was made by the author of the letter. The Hearing Committee accepted these submissions.

#### **SUBMISSIONS AND EVIDENCE ON SANCTION**

15. Counsel for the LSA indicated that, with the concurrence of counsel for the Member, she would make her submissions regarding sanction after Mr. Ellert had examined the Member to allow the Member to provide direct evidence that was material to sanctioning.
16. The Member, having been duly sworn, testified with respect to certain aspects of the matter at issue. Specifically, he testified that:
  - (a) the Member's wife (at that time) worked as a lawyer as well but was looking for other opportunities for work;
  - (b) the Member's mother-in-law was a professional chef and the restaurant seemed like a good family opportunity and provided the Member's wife an opportunity to cease practicing law;
  - (c) at the time that the business opportunity presented itself the Member had an extremely busy insolvency practice;
  - (d) the restaurant failed, and coupled with the Member's subsequent divorce left him in a precarious financial position;
  - (e) the debt situation was left solely for him to deal with resulting in the Member having to make a proposal to his creditors under the *Bankruptcy & Insolvency Act*. At the time of this Hearing the Member remained subject to the terms of the proposal.
17. Ms. MacLean indicated that the citation was specifically related to the Member not documenting in a written form that he advised a family member that she should obtain independent legal advice. The citation is not that the Member did not provide that advice but that he failed to document in a written form that he did.
18. Ms. MacLean submitted that Members dealing with family members that involve legal issues in their capacity as a lawyer carries with it a high risk of potential problems. It is for this very reason that the Rules require any Member to treat these matters with the utmost of caution.
19. Ms. MacLean tendered the record of the Member, which was entered as Exhibit 16 by consent. The Record indicates that the Member has no discipline record.
20. Ms. MacLean submitted that the Member was co-operative with the LSA throughout and that the misconduct in this case would be considered to be on the low end of the range of

conduct of a Member that deserves sanction. In the sense of individual deterrence that the Member was contrite and expressed a sincere desire never to be before a Hearing Committee again and that individual deterrence was not likely a large concern in this case. However, when considering general deterrence, Ms. MacLean indicated the importance of the LSA ensuring Members understand the importance of having a family member obtaining independent legal advice in situations where the Member is acting or seen to be acting in their capacity as a lawyer.

21. On balance, Ms. MacLean indicated that the Hearing Committee should impose sanctions of a reprimand plus costs. Ms. MacLean tendered an Estimate of Costs that was entered as Exhibit 17 by consent.
22. Mr. Ellert submitted that a reprimand in this case more than satisfied the need to sanction the Member. Mr. Ellert submitted that the Member has not tried to minimize his responsibility in this matter.
23. Mr. Ellert indicated that it is important to encourage Members to comply with the Rules of the LSA but in the case of Mr. Damm that this was likely a one-time event and that rehabilitation was not an issue and that Mr. Damm did not present any governance issues.
24. Mr. Ellert submitted that the imposition of the payment of costs upon Mr. Damm would only add to a significantly poor financial situation for Mr. Damm.

#### **DECISION AS TO SANCTION**

25. The Hearing Committee had regard to the following matters that influenced their decision as to sanction:
  - (a) the citation was in relation to the Member failing to document in writing (emphasis added) that a family member should in these circumstances obtain independent legal advice;
  - (b) the member's co-operation with the LSA;
  - (c) the Member's clean record;
  - (d) that specific deterrence of Mr. Damm is not required in these circumstances; and
  - (e) that from a general deterrence perspective it is important for all Members of the LSA that compliance with the Rules under the Code of Conduct are important not only to the Bar, but also to maintain the public's confidence in the legal profession.
26. Taking into account all of the foregoing factors the Hearing Committee concluded that the sanction should be a reprimand and the payment of costs in the amount of \$1,500.00. Mr. Damm was given time to pay the costs to April 1<sup>st</sup>, 2010.



27. The Chair delivered the reprimand to the Member and specifically noted the importance of Members of the LSA complying with the Code of Conduct. The Code is in place not only to govern affairs amongst Members of the bar but, more importantly, with Members of the public. The Member's conduct failed to meet the standard required of a Member of the LSA.
28. The Hearing Committee also directs that it be noted on the records of the LSA that the Hearing Committee has no concerns about Mr. Damm's integrity or fitness to practice.

### **CONCLUDING MATTERS**

29. No referral to the Attorney General is required in this matter.
30. No separate notice to the profession is required in respect of this matter.
31. The decision, the evidence and the exhibits in this hearing are to be made available to the public with the actual names of the complainant, family member and names of corporate entities to be redacted.

Dated this 10th day of December, 2009.

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James Glass, Bencher  
Chair

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Carsten Jensen, Q.C., Bencher

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Sarah King-D'Souza, Bencher