IN THE MATTER OF THE LEGAL PROFESSION ACT
AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
GARTH DYMOND, A MEMBER OF THE LAW SOCIETY OF ALBERTA

REPORT OF THE HEARING COMMITTEE

On February 2, 2009 a Hearing Committee composed of Bradley G. Nemetz, Q.C., (Chair), Vivian Stevenson, Q.C., and Peter Michalyshyn, Q.C. convened at the Law Society offices in Calgary to inquire into the conduct of Garth Dymond. Mr. Garth Dymond was represented by Mr. James Rooney, Q.C., and the Law Society was represented by Mr. Michael Penny.

INTRODUCTION

[1] Mr. Garth Dymond was charged with failure to be candid, using his position as lawyer to take unfair advantage of another and acting in such a way as to being a discredit to his profession. The matter arises from a request made by Mr. Dymond's long-standing client who was concerned about the financial circumstances of his son. The relationship between the client and his grown son and his son's family was strained. The client believed that his son might be in financial difficulty and asked Mr. Dymond if he could determine whether or not the son's mortgage was in good standing. Mr. Dymond said that he could. He had his secretary contact the city to get the legal description of the house, obtained a copy of title from Land Titles, and asked his secretary to write to the mortgage company for a certification that the mortgage was in good standing. The secretary carried out these instructions by requesting a pay-out statement from the mortgage company, which indicated that the mortgage was in good standing and Mr. Dymond so advised his client.

[2] The bank subsequently asked the son and wife whether Mr. Dymond was acting for them. The son and his wife then complained to the Law Society and the Privacy Commission. The Hearing found that the member's behaviour, whilst falling below a standard the Law Society would like to see, did not rise to the level of conduct deserving of sanction.

CITATIONS

[3] The citations the member faced were:

1. IT IS ALLEGED that you failed to be candid and used your position as a lawyer to take unfair advantage of a person or situation, and that such conduct is conduct deserving of sanction.

2. IT IS ALLEGED that you acted in such a way as to bring discredit to the profession, and that such conduct is conduct deserving of sanction.

[4] It was agreed by counsel that the second citation was in fact part of the first citation and the committee agreed to proceed on the basis that the member faced one citation which was an amalgam of the two citations set out above.

JURISDICTION

[5] Jurisdiction was established by entering as exhibits the Letter of Appointment, Notice to Solicitor, Notice to Attend, Certificate of Status and Certificate of Exercise of Discretion. Further, counsel for the member accepted the jurisdiction and composition of the panel.

PRIVATE HEARING

[6] No application was made to hold any portion of the hearing in private.

OTHER PRELIMINARY MATTERS

[7] There were no other preliminary matters.

FACTS

[8] The member was called to the Bar of Alberta in 1969 and has been an active member of the Bar since that time carrying on a general practice.

[9] Mr. Dymond had, for many years, acted for his client. His client started owning a service station. He later acquired a second. He subsequently sold those and bought a hotel. His son worked in the service station and later in the hotel.

[10] The client's marriage encountered difficulties and, at the material time, the client and his wife were separated and the client's son, and his son's wife and family, were estranged from the client.

[11] The son continued to work at the hotel and the record keeping associated with the hotel was in part under the supervision or control of the client's wife.

[12] In the fall of 2006, the client approached Mr. Dymond advising him that the son appeared to have taken money inappropriately from the hotel and the client wondered if his son was in financial difficulty. The client asked Mr. Dymond if he could determine whether or not the son's mortgage was in arrears as that might be an indication that the son was in fact in financial distress. Mr. Dymond said that he thought that he could obtain that information.

[13] Mr. Dymond began by asking his secretary, who is also his wife, to take the municipal address given by the client for the house owned by his son and daughter-in-law and obtain a legal address to be used for the purpose of obtaining a copy of the title which would reveal any mortgages.

[14] Mr. Dymond's secretary contacted the city and obtained information on the property including the legal address. That information was public.

[15] The secretary then obtained, from the Land Titles Office, a copy of the title which revealed a mortgage to the bank, together with mortgage number, again, public documents.

[16] Mr. Dymond then asked his secretary to get information from the bank as to the status of the mortgage. She drafted, signed and sent a letter to the bank. The *Re* line referenced the son and daughter-in-law and provided the legal description of the property.

The letter was three sentences and read as follows:

> Please provide me with a mortgage payout statement as of September 15th and a per diem thereafter on the above property.
>
> I am attaching a copy of the Title search for your information.
>
> Please fax same to 232-6750.

[17] The committee notes that the letter did not indicate the type of transaction for which the information was needed, nor did it represent who the client was. However, it is reasonable to

expect that a bank receiving such a letter would assume that Mr. Dymond was acting on a transaction involving the property and that he had authority from the owners to obtain information with respect to their mortgage.

[18] Neither of the owners were the member's clients at the time, nor was Mr. Dymond handling any real estate transaction which called for the mortgage statement.

[19] The bank provided the mortgage statement without contacting the bank's clients for prior authorization. After the information was provided the bank called its clients to enquire into the matter and was told by the daughter-in-law that neither she nor her husband had authorized the request for the mortgage pay-out statement.

[20] Mr. Dymond testified that when he requested the information he did not address his mind as to whether or not he was entitled to the information, or whether or not the information he was obtaining was subject to privacy legislation. He testified that this type of information could have been obtained three or four years ago just with a telephone call. Later the banks began asking for a written request.

[21] The member received the information back from the bank and called his client and advised him that the mortgage was in good standing. He did not provide his client with any further information.

[22] Mr. Dymond acknowledged that there were other ways to determine whether or not the son was in financial difficulties, such as searching the courthouse for legal proceedings, searching the bankruptcy registry, but he did none of those and merely carried out his client's request to determine whether or not the mortgage was in good standing. He heard nothing more of his client after providing this information.

[23] The son and the daughter-in-law made a number of complaints. They complained to the bank who advised them that the bank had made an error in not "verifying that Mr. Dymond had in fact been authorized to request this information on your behalf". The bank said that it had taken steps to avoid a reoccurrence of this problem.

[24] They also made complaints to the Privacy Commissioner and the Law Society.

[25] Initially Mr. Dymond received a telephone call from an employee of the Law Society enquiring into the matter. He heard nothing more from the Law Society until he received the letter of March 23, 2007 enclosing the complaint and requesting a response.

[26] On January 18th the Office of Information and Privacy wrote to Mr. Dymond requesting his response to allegedly breaching the *Personal Information Protection Act*. In his response Mr. Dymond disputed the application of the Act. He also advised that the matter had been reviewed by the Law Society of Alberta and that he understood that "there were no breaches of any professional conduct or Code".

[27] The Privacy Commissioner wrote to Mr. Dymond and advised him that none of the exceptions applied, that there had been breach of the Act, recommended that Mr. Dymond refrain from obtaining this type of information without consent and recommended that Mr. Dymond develop written guidelines to address the issue within his office. The committee understands that Mr. Dymond complied.

[28] By letter of March 23, 2007 the Law Society forwarded the complaint from the son and daughter-in-law to Mr. Dymond and requested a response. Perhaps, as an indication of his new

sensitivity to privacy legislation, Mr. Dymond wrote to the Privacy Officer to determine what information he could supply to the Law Society. That issue was resolved, (the Law Society and the Privacy Commission advising that information furnished in investigations by the Law Society was not caught by any of the prohibitions contained in the privacy legislation), Mr. Dymond replied to the Law Society.

[29] Mr. Dymond then replied in full to the Law Society and, eventually, the citations issued.

LAW

[30] This case involves placing the conduct of the member on the continuum that runs from omission and inadvertence to deliberate and knowing wrongdoing.

[31] The *Legal Profession Act* (RSA 2000, Ch. L-8, s.49) defines conduct deserving as sanction as

> … "any conduct of a member, arising from incompetence or otherwise, that (a) is incompatible with the best interests of the public or of members of the Society, or (b) tends to harm the standing of the legal profession generally …".

[32] The Interpretation section of *Code of Professional Conduct*, item three states in part:

> (a) Conduct deserving of sanction: Under the Legal Profession Act, the Law Society has broad powers to declare conduct to be deserving of sanction and is not limited to disciplining violations that are expressly or impliedly referred to in this Code.
>
> However, the Law Society's primary concern is with conduct that reflects poorly on the profession or that calls into question the suitability of an individual to practice law. Disciplinary assessment of conduct will therefore be based on all facts and circumstances as they existed at the time of the conduct. A trivial or technical breach of this Code without significant consequences is unlikely to be sanctioned. A lawyer's intentions and the willfulness of conduct are also relevant (see paragraphs (c)).

[33] Further, on the point of isolated neglect or omission the Code, Chapter 2, Commentary G-2 says, in part, that

> [A]n isolated incident or inadvertent error may constitute negligence and may be legally actionable without amounting to incompetence.

[34] To put the rules and the conduct before us into proper legal context, it is useful to consider the general history and development of professional conduct rules and enforcement proceedings. G. Mackenzie, *Lawyer and Ethics: Professional Responsibility and Discipline*, Scarborough, Ont: Carswell, 1993 at 26.7 states:

> Traditionally, professional misconduct has been defined as “conduct which would reasonably be regarded as disgraceful or dishonourable by solicitors of good repute and competency.” Moral turpitude was an essential component. Mere negligence was not sufficient.
>
> Today, in jurisdiction in which the law society’s governing statute either defines professional misconduct or authorizes the profession to pass specific rules of professional conduct and the profession does so, this definition must be qualified in two respects. First, it is now clear that practitioners can be found guilty of professional misconduct for violating regulatory requirements and rules of professional conduct that impose specific duties, whether or not such violations could be said to be disgraceful or

> dishonourable. Lawyers are frequently reprimanded, for example, for failing to respond promptly to communications from the law society and for failing to file required forms and annual reports of public accounts.
>
> Second, it is now clear that a series of acts of gross negligence may, taken together, constitute professional misconduct. Since law societies have adopted codes of professional conduct, lawyers have frequently been disciplined for failing to serve clients in a conscientious, diligent, and efficient manner. Commentary 9 of chapter II of the C.B.A. Code, for example, provides that "evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters" may be evidence of a failure to maintain the required standard and can give rise to disciplinary action.
>
> Nevertheless, a single instance, even though it may be actionable in negligence, will generally not result in discipline proceedings. Negligence is not likely to be a basis for discipline unless it is gross or habitual, or both.
>
> [footnotes omitted]

DISCUSSION

[35] In this case the committee is influenced by the context in which the request to the member, the information sought and the information provided. Of particular note is the fact that the father was asking for information about his son and also the fact that the father was a long-standing client. The information requested was limited – was the mortgage in good standing. The information passed along was limited to that requested. This is not a case where the member had a personal stake in the outcome and where he was placing his personal interest ahead of that of his clients or third parties. This was an isolated act. It was preceded by little if any thought or attention to whether or not the information being requested was appropriate. There was no overt misrepresentation by the member to the bank. The case would have been different had the member represented that he was acting for the son and daughter-in-law.

[36] In reaching our decision the committee appreciates the complainants' concern that their private banking information was obtained by a lawyer with whom they had no relationship in circumstances where the lawyer was acting for a client from whom they were estranged. Both they and the Law Society expect more from our members than Mr. Dymond's conduct reveals. Mr. Dymond failed to address his mind to what he was doing was proper. He failed to consider the complainant's privacy. Quite apart from the privacy legislation, he would have known, if he had directed his mind to it, that the bank should not be giving out this type of information without the borrowers' consent. He knew that he did not have their consent and that his client did not want to directly approach his son to obtain this information.

[37] Nonetheless, the central issue for this committee is to determine if this inadvertence and neglect rises to the level of conduct deserving of sanction.

[38] The committee finds the member's conduct to be a single incidence of neglect. The committee finds that it was inadvertent in the sense that Mr. Dymond did not address his mind to whether the request was proper. The request arose in a family situation. The committee also notes that, apart from the fact that the complainants' private banking information was accessed, no damages flowed from the obtaining of the information and disclosing it to the father of one of the complainants. The committee believes that a fully informed member of the public would see this as an isolated mistake. Further, in our opinion a conviction and sanction in this case is not required to ensure that the member will not repeat this mistake.

[39] We find that at the time Mr. Dymond wrote to the Privacy Officer and stated that the Law Society had reviewed the matters and that he "understood" that there were no breaches of any professional conduct or code, he believed this to be true. He only later learned that the Law Society complaint was proceeding. When he responded to the new request for information from

the Law Society he enclosed his letter to the Privacy Commissioner. This further supports our finding that Mr. Dymond, in his letter to the Privacy Commissioner, believed he was being accurate – if he was attempting to mislead the Privacy Commissioner it was unlikely that he would have forwarded the letter to the Law Society.

[40] Accordingly, the amalgamated citation against Mr. Dymond is dismissed.

ANCILLARY ORDERS

[41] The Committee directs that the documentary evidence filed be available for inspection only once identifying names are removed. In this case the identifying names will be those of the client, his son, and his daughter-in-law.

[42] The Committee also directs that a copy of this decision be sent to the complainants.

[43] Neither circulation to the profession nor referral to the Attorney General is required.

Dated this 16th day of March 2009.

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Bradley G. Nemetz, Q.C. (Chair)

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Vivian Stevenson, Q.C.

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Peter Michalyshyn, Q.C.