

LAW SOCIETY OF ALBERTA
HEARING COMMITTEE REPORT

IN THE MATTER OF the *Legal Profession Act*; and

IN THE MATTER OF a hearing (the "Hearing") regarding the conduct of
Austin Nguyen, a Member of the Law Society of Alberta

INTRODUCTION

- [1] On February 27, 2013 a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of Austin Nguyen, a Member of the LSA. The Committee was comprised of Anthony G. Young, Q.C. Chair, Miriam Carey, PhD, Bencher and Dennis Edney, Q.C., Bencher. The LSA was represented by Gillian Clarke. The Member was in attendance throughout the hearing. Also present at the Hearing was a Court Reporter to transcribe the Hearing.
- [2] The Member was charged with four citations. The hearing of the citations has been bifurcated as they relate to different fact situations and the Member has retained different counsel in relation to each. Mr. Jim Rooney, Q.C. was retained with respect to the Catherine Fox complaint and Mr. Hersh Wolch, Q.C. was retained with respect to the other citations.
- [3] As the matters were dealt with as separate hearings, a Hearing Committee Report has been prepared for each hearing.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

- [4] The Chair introduced the Committee and asked the Member and Counsel for the LSA whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.
- [5] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the *Legal Profession Act*, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established the jurisdiction of the Committee.
- [6] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(a) and Rule 96(2)(b) of the Rules of the LSA ("Rules") pursuant to which the Director, Lawyer Conduct of the LSA, determined that the persons named therein were to be served with a Private Hearing Application was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. Accordingly, the Chair directed that the Hearing be held in public.

[7] At the outset of the hearing Exhibits 1 through 21 contained in the Exhibit Book provided to the Committee were entered into evidence in the Hearing with the consent of the parties. Further Exhibits 22 through 24 were added to the Exhibit Book as the hearing proceeded.

CITATIONS

[8] At the outset of the Hearing the Member faced the following Citations:

(1) It is alleged that the Member failed to be candid in not informing the Complainant of the prior release of the trust funds or in not immediately correcting the resulting misapprehension; and such conduct is conduct deserving of sanction.

(2) It is alleged that the Member breached the trust conditions imposed by Court order in releasing funds to his client; and such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

[9] An Agreed Statement of Facts was presented upon the understanding that additional evidence would be called and argument would be made with respect to a finding of guilt on the citations.

[10] Upon considering the Agreed Statement of Facts and hearing the evidence of the Complainant and the Member, the Member was found guilty of both citations.

THE AGREED STATEMENT OF FACTS

[11] At the outset of the hearing, the Hearing Committee was presented with the Agreed Statement of Facts as follows:

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

and

IN THE MATTER OF A HEARING REGARDING
THE CONDUCT OF **AUSTIN Q. T. NGUYEN**
A MEMBER OF THE LAW SOCIETY OF ALBERTA

AGREED STATEMENT OF FACTS

1. Austin Q. T. Nguyen is a member of The Law Society of Alberta, having been admitted on the 19th day of July, 1999. He was a member at all times relevant to this proceeding.

2. Austin Nguyen faces 2 citations, as follows:

Catherine Fox Complaint (CO20100779)

1. It is alleged that you failed to be candid in not informing the complainant of the prior release of the trust funds or in not immediately correcting the resulting misapprehension; and such conduct is conduct deserving of sanction.

2. It is alleged that you breached the trust conditions imposed by Court Order in releasing funds to your client; and such conduct is conduct deserving of sanction.

FACT SUMMARY

3. The Law Society received a written complaint dated March 23, 2010 in respect of Mr. Nguyen from lawyer, Catherine Fox (Exhibit 6).
4. Ms. Fox and Mr. Nguyen represented opposing parties in a family law matter, which involved dealing with the matrimonial property including the sale of the matrimonial home. Ms. Fox represented the wife, "LP", and Mr. Nguyen represented the husband, "EP".
5. Mr. Nguyen had been retained by EP in May, 2009 in relation to matrimonial property matters but not for the divorce proceedings.
6. EP and LP entered into a Consent Order granted June 19, 2009 providing for the sale of the matrimonial home. Paragraph 5 of the Consent Order (Exhibit 7) provided as follows:

"The net proceeds of sale, that is the sale price less payments in paragraphs 4(a) to 4(d), shall be divided with 50% held in trust by counsel for the Plaintiff, Catherine E. Fox, and 50% held in trust by counsel for the Defendant, Austin Nguyen, pending agreement of the parties or Order of the Court."

7. By letter dated August 12, 2009, Ms. Fox emailed Mr. Nguyen a letter relating to items EP was to retrieve from the matrimonial home (Exhibit 8). By letter dated and faxed August 14, 2009 (Exhibit 9), Mr. Nguyen asked Ms. Fox for a key to the matrimonial home to allow EP to attend to remove his property and belongings. By letter dated August 14, 2009 from Ms. Fox to Mr. Nguyen (Exhibit 10), Mr. Nguyen was asked to have EP sign the parties' home insurance policy to secure its cancellation. On August 18, 2009, Mr. Nguyen faxed a letter dated August 17, 2009 to Insurance Company A (Exhibit 11) regarding cancellation of the home insurance policy on the matrimonial home.
8. On August 25, 2009, funds in the amount of \$122,851.47, representing ½ of the net proceeds of sale of the matrimonial home of LP and EP were received by Mr. Nguyen and deposited in his trust account. On the same day, these same funds, less the amount of \$3,250.00 were disbursed to EP by Mr. Nguyen. (Exhibit 12)
9. By letter dated March 5, 2010 (Exhibit 13), EP personally wrote to Ms. Fox to advise her that Mr. Nguyen had ceased to act on his behalf. EP also indicated his acceptance of an offer to settle equalization of the matrimonial property by payment of \$75,000.00 to LP.
10. On receipt of EP's letter, Ms. Fox sent an e-mail to Mr. Nguyen (Exhibit 14), requesting a Notice of Ceasing to Act from him and also asking for his confirmation that he continued to hold one-half of the net sale proceeds in trust.
11. Mr. Nguyen responded to Ms. Fox's e-mail on the same day (Exhibit 15) confirming that he did hold one-half of the net sale proceeds in trust for EP.
12. On March 19, 2010 Ms. Fox was contacted by new counsel for EP that she had been retained to act for EP.

13. By letter dated March 22, 2010 (Exhibit 16), Mr. Nguyen sent a faxed letter to Ms. Fox advising that he held no trust funds except those pertaining to his legal fees and disbursements.
14. On March 23, 2010, Ms. Fox wrote to EP's new lawyer (Exhibit 17) to inquire whether or not Mr. Nguyen had forwarded the trust monies from the sale of the matrimonial home to her. Ms. Fox was advised by EP's new lawyer that she had received no such funds.
15. In response to a request by a complaints resolution officer to provide a written response to address the complaint material, the member provided the Law Society with a letter dated April 16, 2010 (Exhibit 18) together with a copy of his letter to Ms. Fox of the same date (Exhibit 19) which is summarized as follows:
 - 15.1 Mr. Nguyen acknowledged that he had erroneously advised Ms. Fox in his e-mail of March 5, 2010 that he still had one-half of the sale proceeds in trust; that when he had replied he did not have the file with him and that his memory had failed him. He stated the error was inadvertent and apologized.
 - 15.2 He stated he disbursed the one-half of the net sale proceeds to EP on the understanding that the parties had reached an agreement on the particular property and were working on a final settlement for the rest of the matrimonial property. Mr. Nguyen noted that EP's new lawyer had confirmed with him on April 12, 2010 that EP agreed to the final settlement of \$75,000.00 and would pay LP shortly.
 - 15.3 Mr. Nguyen stated that the parties had reached a negotiated agreement on their matrimonial property and it appeared that EP was able to pay LP the final settlement in the immediate future.

16. The matter was referred to the Law Society Manager, Complaints on April 27, 2010. The Law Society sent a letter to Mr. Nguyen requesting his formal written response to the complaint material pursuant to S.53 of the *Legal Profession Act*. Mr. Nguyen provided this response by letter dated May 16, 2010 (Exhibit 20) which is summarized as follows:

16.1 Mr. Nguyen ceased acting for EP on or about March 5, 2010.

16.2 He erroneously advised Ms. Fox that he still held one-half of the sale proceeds of the matrimonial home in trust because when he replied to her email request in respect of the same, he did not have his file with him and his memory failed him. When he realized he had made the error, he immediately advised Ms. Fox in that he no longer held any trust funds except those funds in relation to legal services.

16.3 Mr. Nguyen indicated that there was no contemplation between the parties that the division of the matrimonial home was contingent on a divorce contract. He did not recall any correspondence with Ms. Fox referring to a divorce contract or it being a condition for settlement of the matrimonial home property.

16.4 Prior to ceasing to act for EP, Mr. Nguyen had advised EP to accept a 50/50 equalization offer for the rest of the property for payment of \$75,000.00. EP indicated to Mr. Nguyen that he would accept the offer and would be ready to pay LP.

16.5 By reference to the trust provision of the Consent Order, the member stated that he interpreted "agreement of the parties" to refer only to the matrimonial home property. He also stated he understood that it did not require the agreement be in writing, did not need to be more than an agreement in principle and there was no intention between the parties that it was contingent on the divorce contract being executed.

16.6 Mr. Nguyen stated that the parties agreed to divide the net sale proceeds on a 50/50 basis prior to listing it for sale. EP had advised Mr. Nguyen's office that he had discussions with LP on or about August 14, 2009 pursuant to which they agreed to a 50/50 division of the net sale proceeds and that both wanted their respective one-half shares of the net proceeds from their lawyers. At EP's request and based on their agreement, Mr. Nguyen paid EP the money on August 25, 2009.

17. As of March 23, 2010 the parties had an agreement in principle but no divorce contract was signed.

ALL OF THESE FACTS ARE AGREED TO AND ADMITTED.

I confirm that the issue of whether or not I am guilty with respect to Citations 3 and 4 will be argued by my counsel and counsel for the Law Society before the Hearing Committee after I have testified.

This Agreement and Admission is dated the "27th" day of February, 2013.

"Jim Rooney"
WITNESS

"Austin Q.T. Nguyen"
AUSTIN Q. T. NGUYEN

EVIDENCE OF CATHERINE FOX

- [12] The Complainant stated that it was originally contemplated she would hold the entire proceeds of the sale of the matrimonial home. Subsequently, the draft consent order was changed to reflect that each solicitor, the Complainant and the Member would hold 50% of the proceeds.
- [13] The Complainant emphasized that the Member was adamant that he hold 50% of the proceeds. The Consent Order (Exhibit 7) was obtained on June 19, 2009.
- [14] The Complainant stated that in her view the words "pending agreement of the parties or further order of the court" meant that there was "no agreement until there is a properly drawn agreement. She went on to state that clients are notorious for reneging on agreements prior to obtaining a written agreement. In this case, the Complainant wanted the funds held pending agreement or further

Order of the Court. There was no discussion regarding releasing the funds because there was a problem with disclosure.

- [15] The Complainant put the funds that she held into an interest-bearing account pending agreement between the parties.
- [16] The Complainant states that there was no discussion about the trust funds prior to March 5, 2010 when settlement was achieved between EP and LP (as evidenced by Exhibit 13) the Complainant states that she was not aware that the Member was no longer representing EP until receiving his letter of March 5, 2010 (Exhibit 13).
- [17] The Complainant immediately contacted the member by e-mail to confirm that he still held one half of the sale proceeds in trust for the benefit of EP and to confirm that the Member was no longer acting for EP.
- [18] The Member confirmed that he still held "one half of the sale proceeds in trust for the benefit of EP" and that he would file a notice of ceasing to act early in the following week.
- [19] On March 22, 2010 the Member confirmed that he did not hold any trust funds. The Complainant immediately made a complaint to the Law Society.
- [20] The Complainant stated in her evidence that the Member did not call her at any time regarding the release of funds. There was no verbal confirmation and certainly no confirmation in writing prior to release.
- [21] The Complainant later determined that the trust funds were paid out by the Member on August 25, 2009 and she subsequently made a complaint to the LSA.

DECISION

- [22] The Code of Conduct states:

“6.02(13) A lawyer must not give an undertaking that cannot be fulfilled and must fulfil every undertaking given and honour every trust condition once accepted.”
- [23] In this matter, an Order of the Court imposed the following undertaking:

“The net proceeds of sale, that is the sale price less payments in paragraphs 4(a) to 4(d), shall be divided with 50% held in trust by counsel for the Plaintiff, Catherine E. Fox, and 50% held in trust by counsel for the Defendant, Austin Nguyen, pending agreement of the parties or Order of the Court.”
- [24] In the Hearing Committee’s view the condition was clear and unambiguous. Quite simply, the funds were to be held in trust, pending agreement of the parties or Order of the Court. It is clear that there was no Order of the Court. The only

question that remains to be answered then is whether the Member held the reasonable belief that was “agreement between the parties.” It is the view of the hearing committee that this belief cannot be reasonably sustained.

[25] The Member relies upon a letter of August 12, 2009 that there was “agreement between the parties” regarding matrimonial property and that this justified him in releasing the funds to his client. Although this letter appears to have resolved many of the outstanding issues between the parties regarding matrimonial property no reference is made to the “funds in trust”. The Hearing Committee is unable to find that the letter constitutes agreement between the parties that the funds held in trust were then releasable. In fact, the August 12, 2009 letter contemplates a response from the Member regarding outstanding arrangements unrelated to the trust funds.

[26] In his May 16, 2010 response to the Law Society the Member states that the Complainant stated in paragraph 9 of her complaint that “the parties have an agreement in principal”. The Member uses this statement as further justification for the release of the funds. He states that he: ... interpreted and understood the “agreement of the parties” in Mr. Justice McLeod’s Order ... did not require that:

- a) The agreement must be in writing;
- b) The agreement be more than “an agreement in principal”; or
- c) A divorce contract be executed.

[27] The Hearing Committee is of a different view. In order to ensure that all parties have the same understanding of the terms of the agreement it is important that:

- a) The agreement be communicated; and
- b) The agreement be final rather than simply an agreement in principle (that is, not incompletely specified);

The agreement contemplated in the Court Order is agreement “between the parties” regarding the release of funds. This was clear. The fact is that there was no communication regarding the release of funds. This communication should have occurred prior to the funds being released by the Member.

[28] At best, the Member in this matter was careless. He did not have sufficient regard for the important condition that was imposed on the parties by Court Order.

[29] There is no question that the condition imposed by the Court was clear and unambiguous. In this case, the Member should have confirmed the “pending agreement of the parties” and received confirmation that the funds were releasable. It would have been a simple matter for the Member to confirm the details of agreement, if any, with the Complainant. This did not occur.

[30] The Hearing Committee is of the view that the Member failed to be candid in not informing the Complainant of the prior release of the trust funds. Rule 205 (1) (b) (ii) states that “A lawyer must ... care for a client’s property as a careful and prudent owner would.” It was surely neither careful nor prudent for the Member to release funds without confirming that they were, in fact, releasable. In this case it was not clear that there was agreement. The Member should have been fair and impartial by advising the Complainant of his view that the funds were releasable and receiving her confirmation or denial.

[31] The Hearing Committee finds the Member guilty of conduct deserving of sanction on both counts.

SANCTION AND ANCILLARY MATTERS

[32] The Hearing Committee determined that there shall be a reprimand and a global fine in the amount of \$2,500.00.

[33] The reprimand may be paraphrased as follows:

“Simply put, bad lawyers endanger the public, destroy public confidence in the legal profession and through doing so, endanger the independence of the profession. Benchers will not tolerate this; such are our standards.”

In this case, the word “bad” is not used in the context dishonest and deceitful. It is used, however, in the context of what the public generally thinks of as “bad lawyers”.

You must recognize that it is important for you to have candid and fulsome communications when necessary, and you should recognize when it is necessary to have such communication. A competent, ethical lawyer would do that.

Although the Hearing Committee heard of no harm to the public in this case, it is impossible to say that there was no foul. Confidence was certainly lost in you by the Complainant, the Complainant’s client, the profession and the public.”

[34] The Member shall be responsible for the actual costs of this hearing.

[35] There shall be no referral to the Attorney General.

[36] There shall be no notice to the profession.

Dated this 30th day of August, 2013.

Anthony G. Young, Q.C. (Chair)

Miriam Carey PhD (Bencher)

Dennis Edney, Q.C. (Bencher)