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 JOHN F. SCHNEIDER
a Member of The Law Society of Alberta

INTRODUCTION, CITATIONS AND SUMMARY OF RESULT

1. On June 20-22, 2011 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, John F. Schneider. The Committee was comprised of James Glass Q.C., Chair, Scott Watson Q.C. and Dr. Miriam Carey, lay Bencher. The LSA was represented by Mr. Garner Groome. The Member was present throughout the hearing and was represented by Mr. Graham Price Q.C.

2. The Member faced ten citations:

   1. IT IS ALLEGED THAT you failed to meet your commitments concerning the business aspect of your practice, and that such conduct is conduct deserving of sanction;

   2. IT IS ALLEGED THAT in failing to honour a judgment obtained against you, you acted in a manner that brought discredit to the profession, and that such conduct is conduct deserving of sanction.

   3. IT IS ALLEGED THAT you failed to obtain and implement the instructions of your client, H.D., in the matter of settlement, and that such conduct is conduct deserving of sanction.

   4. IT IS ALLEGED THAT you failed to promptly inform your client, H.D., of a settlement offer, and that such conduct is conduct deserving of sanction.

   5. IT IS ALLEGED THAT you failed to keep your client, H.D., informed as to the progress of her matter, and that such conduct is conduct deserving of sanction.

   6. IT IS ALLEGED THAT you failed to use reasonable efforts to ensure that your client, H.D., comprehended your advice and recommendations, and that such conduct is conduct deserving of sanction.

   7. IT IS ALLEGED THAT you failed to respond to your client, H.D., on a timely basis, and that such conduct is conduct deserving of sanction.

   8. IT IS ALLEGED THAT you failed to keep your client, L.B., informed as to the status of his matter, and that such conduct is conduct deserving of sanction.

   9. IT IS ALLEGED THAT you failed to properly serve your cleint, L.B., and that such conduct is conduct deserving of sanction.

10. IT IS ALLEGED THAT you failed to respond to your client, L.B., on a timely basis, and that such conduct is conduct deserving of sanction.

3. At the commencement of the hearing, counsel for the LSA and Mr. Schneider presented the Hearing Committee with an Agreed Statement of Facts (Exhibit 6). Upon questioning from the Chair, counsel for the LSA and Mr. Schneider confirmed that the Agreed Statement of Facts was NOT intended to be an admission of conduct deserving of sanction pursuant to s. 60 of the *Legal Profession Act*

4. On the basis of the Agreed Statement of Facts, the other evidence received at the hearing, and for the reasons that follow, the Hearing Committee finds that Citations 1, 2 and 4 through 10 were proven and the Member is guilty of conduct deserving of sanction on those citations. The Hearing Committee determined that Citation 3 was not made out and it was dismissed.

5. The Hearing Committee concluded that the sanction should be a reprimand and that the Member should pay the actual costs of the Hearing. The Member was provided with 12 months to pay from the date that the Member is served with the Statement of 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.

EVIDENCE

9. Exhibits 1-5 (the jurisdictional exhibits) were entered into evidence by consent.

10. Exhibits 6-51, all relevant to the Citations, were entered into evidence by consent.

11. The Member provided an Agreed Statement of Facts that was signed by him (Exhibit 6).

FACTS

12. The key Exhibits with regard to the citations are Exhibits 6 – 17, 22, 24, 26 – 36, 38 – 48 and 50.

13. The Agreed Statement of Facts is reproduced herein:

IN THE MATTER OF THE LEGAL PROFESSION ACT

AND

IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF JOHN F. SCHNEIDER, A MEMBER OF THE LAW SOCIETY OF ALBERTA

AGREED STATEMENT OF FACTS

INTRODUCTION

1. The Member was admitted to the Bar on August 23, 1991, and practises in Canmore, Alberta, lately as a sole practitioner.

2. The Member has a general practice of law.

CITATIONS

3. On December 4, 2008, May 29, 2009, and September 17, 2009, panels of the Conduct Committee referred the following conduct to hearing:

1. *IT IS ALLEGED THAT you failed to meet your commitments concerning the business aspect of your practice, and that such conduct is conduct deserving of sanction;*

2. *IT IS ALLEGED THAT in failing to honour a judgment obtained against you, you acted in a manner that brought discredit to the profession, and that such conduct is conduct deserving of sanction.*

3. *IT IS ALLEGED THAT you failed to obtain and implement the instructions of your client, H.D., in the matter of settlement, and that such conduct is conduct deserving of sanction.*

4. *IT IS ALLEGED THAT you failed to promptly inform your client, H.D., of a settlement offer, and that such conduct is conduct deserving of sanction.*

5. *IT IS ALLEGED THAT you failed to keep your client, H.D., informed as to the progress of her matter, and that such conduct is conduct deserving of sanction.*

6. *IT IS ALLEGED THAT you failed to use reasonable efforts to ensure that your client, H.D., comprehended your advice and recommendations, and that such conduct is conduct deserving of sanction.*

7. *IT IS ALLEGED THAT you failed to respond to your client, H.D., on a timely basis, and that such conduct is conduct deserving of sanction.*

8. *IT IS ALLEGED THAT you failed to keep your client, L.B., informed as to the status of his matter, and that such conduct is conduct deserving of sanction.*

9. *IT IS ALLEGED THAT you failed to properly serve your cleint, L.B., and that such conduct is conduct deserving of sanction.*

10. IT IS ALLEGED THAT you failed to respond to your client, L.B., on a timely basis, and that such conduct is conduct deserving of sanction.

FACTS

Riverstone Properties Complaint – Citations 1 & 2

4. The Member signed a formal lease contract with RPL to lease office space in Canmore, Alberta, for a term commencing April 1, 2001 and ending on December 31, 2004. On October 21, 2004, the Member advised RPL that he was vacating the office space but would honour his obligations under the terms of the lease if the space was not re-let prior to December 31, 2004. The space was not re-let by that date. RPL would have reduced the Member's liability for rent if the Member found a suitable replacement tenant but he did not.

5. The Member returned the keys to RPL via courier on January 11, 2005. The Member did not pay rent for the months of November 2004 and December 2004, nor did he pay outstanding tax and utility charges as required by the lease.

6. On January 7, 2005, the Member left a telephone message with RPL seeking 7 to 10 business days to pay the outstanding amounts before commencing legal action. RPL granted the request.

7. After not receiving any payment, RPL brought an action in small claims court on or about January 25, 2005. The Member counterclaimed alleging RPL had breached the lease by informally agreeing to lease the office space to another party. After numerous adjournments RPL ultimately was awarded full judgment following trial on April 5, 2006, in the amount of $13,803.43, inclusive of interest and costs. The counterclaim was dismissed.

8. The Member appealed the decision to the Court of Queen's Bench. He did not apply for a stay of enforcement pending appeal. The appeal was heard on October 13, 2006. The Member had assigned the appeal to an associate who left the Member's employ a couple of weeks prior to the appeal hearing. On the date of the appeal hearing, the Member sent his student-at-law to seek an adjournment on the basis that the Member was under the mistaken belief that the appeal would be by way of a trial de novo for which he was also applying. The applications for a de novo appeal and an adjournment were denied. The appeal was dismissed the same day.

9. Following the dismissal of his appeal, the Member did not pay the judgment or portion thereof.

10. On February 12, 2007, D.K. on behalf of RPL complained to the Law Society, claiming that the Member "continues to use every possible means to avoid paying this legitimate, court sanctioned liability despite his original written assurances that he would honour his commitments."

11. In answer to the complaint, on April 4, 2007, the Member advised the Law Society that he had limited financial ability to pay the obligation as the expense was "neither expected or planned" and that he had not received a copy of the order of the Court of Queen's Bench until provided a copy with the complaint. He further advised that now having the order he would pay the debt in full by July 2007.

12. By October 21, 2008, the Member had only paid RPL $1,000.00 towards the judgment so the matter was referred to the Conduct Committee.

13. The complaint was referred to hearing on December 4, 2008.

*14. The Member made two $500.00 payments in February and April of 2009 (**Exhibit 7**). He made a further $500.00 payment on May 6, 2009. On May 14, 2009, D.K. advised the Law Society that he had negotiated a settlement of the outstanding judgment and that the Member had paid that settlement in full (**Exhibit 8**). That final payment was in the amount of $10,000.00. A satisfaction piece was filed the next day. D.K. thanked the Law Society in helping bring the matter to a conclusion.*

<u>H.D. Complaint – Citations 3-7</u>

15. In June 2004, the Member prepared a one-year vendor take-back mortgage between the H.D. and the purchasers (the "mortgagors") of H.D.'s home in Bragg Creek.

16. When the mortgagors failed to pay the mortgage at the end of its extended term, H.D. met with the Member on May 16, 2006, and requested that he begin foreclosure proceedings. At the meeting, H.D. told the Member that she wanted payment in full or the return of the property and she wanted recovery of her legal fees. The Member requested and was paid a $3,000.00 retainer.

17. On or about June 10, 2006, H.D. received a copy of the Member's letter to the mortgagors, sent June 5, 2006, demanding immediate payment of the balance remaining due plus legal fees.

*18. From on or about June 10, 2006, until September 20, 2006, H.D. alleges she did not have any communication from the Member or his office despite leaving numerous telephone messages (**Exhibits 9 and 13**).*

*19. The mortgagors' lawyer, Elizabeth Aspinall, sent a letter dated June 13, 2006, to the Member (**Exhibit 10**). In that letter, she advised that the mortgagors were in the process of obtaining replacement financing which would likely take at least 30 days and that they would be in further contact once new financing had been arranged. This letter further took the position that the mortgagors would not be responsible for the Member's legal costs because H.D. had unilaterally invoked the acceleration of the mortgage without any default on the mortgagors' part. This letter appears to have been faxed to the Member on June 13, 2006 at 10:00 a.m.*

20. The Member says that he had discussed the mortgagors' June 13, 2006 offer of settlement with H.D. over the telephone. In that conversation the Member encouraged H.D. to consider the offer since it would provide a timely resolution to the problem, albeit at the cost of bearing her own legal expenses. According to the Member, H.D.'s instructions were that she would accept nothing less than the full payment of all funds owed by the mortgagors, including legal costs. Pursuant to H.D.'s instructions, a written refusal of this offer was provided to the opposing counsel on June 28, 2006. The Member did not confirm in writing the instructions he said he received.

21. The Member received a copy of the statement of claim filed on behalf of the mortgagors on July 4, 2006. The Member insists that he subsequently telephoned H.D. to notify her of the receipt of "what was effectively a counterclaim to the threat of the foreclosure action." As the

mortgagors' offer was unacceptable to her, he was instructed to prepare a statement of defence. H.D. remained adamant that she would not settle the matter at that stage without legal costs. The Member did not confirm these instructions he said he received.

22. The Member is certain that the contents of the letters and court documents were reviewed with H.D. He also recalled conversations during which H.D. reiterated her original instructions: she wanted full payment for all funds owed by the mortgagors as well as all legal fees and she was not prepared to accept anything less. According to the Member, H.D. was kept informed of the progress of the matter throughout the file and given discounts and courtesies, such as performing work without the full retainer on hand, on account of their relationship. The conversations were not recorded or billed to the file because H.D. and her husband were personal acquaintances of the Member. H.D. and M.D. deny being personal acquaintances of the Member.

23. On September 20, 2006, H.D. received a call from the Member's office requesting that she and her husband, M.D., come in to the office. When they arrived at his office they were informed that they were called in error and that the Member's office had intended to contact a different client named M. for a meeting. The Member took H.D. and her husband into a meeting room and introduced them to L.C., an associate who was helping him with their file, and then left.

24. According to the Member, he was never informed that H.D. had concerns or was "shocked" nor were any of these matters documented in the file.

25. It was during the meeting with Ms. Couillard that H.D. alleges that she first learned that in June 2006 opposing counsel had informed the Member that the mortgagors were trying to obtain replacement financing and that the Member responded by filing a statement of claim. She also learned that the Member had received service of a statement of claim from opposing counsel. H.D. was shocked to learn that not only was she suing the mortgagors but that she was also being countersued. However, as they were already in litigation, she felt that they had no choice but to go forward.

26. Ms. Couillard recalls that it was the Member's direction to issue a statement of claim for foreclosure in an emotional and derogatory response to receipt of Ms. Aspinall's June 13, 2006, letter.

27. Ms. Couillard was so concerned about the Member's conduct on this file that in August 2006 she contacted a practice advisor. Ms. Couillard kept these concerns to herself and did not make any note to the file.

28. In late September 2006, H.D. alleges she had a discussion with the Member during which she indicated that he should offer to settle on the basis of a rescission of the sale transaction, i.e., the purchase price would be refunded to the mortgagors and the property would be returned to H.D.. The Member advised her against doing this.

29. From May 2006 to January 2007, H.D. paid an additional $9,000.00 to the Member despite the fact that she says she only ever received one statement of account.

30. On February 9, 2007, H.D. was at the courthouse for the foreclosure hearing that she was told was to take place on the 5th floor at 10:00 a.m. She alleges she waited for three hours but never saw the Member and left without knowing whether the hearing had proceeded or not. The Member later that day returned her call and advised her that the hearing had been

transferred to the 6th floor. H.D. had her cell phone with her the entire morning but the Member did not attempt to contact her to advise her of the change in location. The Member says he was not sure she was going to be attending.

31. On February 27, 2007, H.D.'s application for an order nisi/order for sale was granted.

*32. According to the Member, the evening before this application, the Member had explained to H.D. that the Court would likely order a period of redemption due to the high amount of equity in the property. The Member took notes of this telephone conversation (**Exhibit 11**). During the course of the application, the Master made reference to the fact that costs would be recoverable in the cause. This was subsequently explained to H.D. and she appeared to understand.*

33. After the matter was in court on February 27th, H.D. specifically asked the Member to draw up an offer to rescind the transaction that afternoon. The evening before the Member had requested an additional $4,000.00 retainer which H.D. provided. On the evening of February 27th H.D. received a telephone message from the Member requesting a further $1,500.00 as his earlier estimate was low. According to the retainer letter a minimum $3,000.00 was to be maintained throughout the handling of the file.

34. On February 28, 2007, H.D. put a stop payment on her $4,000.00 cheque as she allegedly questioned the amount of money being billed without ever having seen an invoice and she verbally advised the Member that she had done so. She also asked to review her file. When H.D. attended the Member's office that afternoon, the file was extremely disorganized and she spent the next 3 hours sorting the papers. She told the Member that the file was a mess and the Member said that it was taken apart for the chambers application the day before. The Member informed her that he was leaving for a two week vacation to Hawaii the next day. She once again instructed him to prepare and send the mortgagors an offer to rescind the agreement prior to leaving for his vacation. H.D. provided a cheque in the sum of $724.28 toward her outstanding account.

35. On March 1, 2007, H.D. spent a considerable amount of time in the Member's office reviewing the file.

*36. By letter dated March 5, 2007, H.D. notified the Member that she would no longer require his services and that she intended to have the Member's account taxed. The Member's response of April 5, 2007, is found at **Exhibit 12**.*

37. The taxation occurred on May 14, 2007. The results of the taxation were that the Member's account was reduced such that it resulted in a balance owing by H.D. of $2,000.00.

38. The Member maintains that the first time that H.D. suggested that he had represented her without instructions was during the taxation meeting on May 14, 2007. This came as a surprise to him and it appeared to him that she only said this to avoid her obligation to pay his fees for services rendered. After the taxation he did have a conversation with H.D., during which the Member claims she attempted to coerce him into not collecting the amount awarded. However, he continued in his collection efforts. On the last day of the appeal period he advised H.D.'s husband that he was not going to appeal the taxation officer's decision. The Member says at no time during that conversation was he informed that the H.D. had decided to appeal the taxation.

39. Following the taxation, according to H.D. the Member discussed writing off the $2,000.00 balance in exchange for H.D. not filing a complaint with the Law Society. The Member denies this. As the Member did not provide his decision prior to the 10 day expiration of the appeal period, H.D. filed her appeal from the taxation on day 8 and served the Member's office on May 30, 2007.

40. H.D. alleges the Member called her at home and informed her husband that he would "eat the $2,000.00". However, she had already started the appeal process and had no confidence in the Member's assurances. The Member denies saying this.

41. On the taxation appeal heard on June 7, 2007, the Member had their case moved down to the final matter of the day and H.D. and her husband sat in court most of the morning without being advised of the change. The appeal was dismissed. H.D. eventually paid the outstanding balance of $2,000.00 by monthly instalments of $200.00.

42. H.D. complained to the Law Society on September 18, 2007, and the matter was referred to hearing on May 29, 2009.

L.B. Complaint – Citations 8-10

43. L.B. retained the Member in April 2006 to represent him as a defendant in a small claims action that arose from a dispute with a sub-contractor.

44. L.B. was hospitalized for three weeks in December 2006 after which he had an extended period of recuperation. Between September 19, 2007, and October 12, 2007, L.B. suffered a relapse and was hospitalized once again. Due to this physical incapacity L.B. was less diligent than he would normally have been in following the progress of his case. However, he alleges he received no advice or notice from the Member with regard to the trial in the matter and was completely taken aback when a default judgment was entered against him in October 2007 in the Edmonton Judicial District and then subsequently served on him.

45. After learning of the default judgment against him, L.B. made efforts to recover his small claims file and documents from the Member's office. L.B. also had a second file with the Member on an unrelated matter that he also wanted returned. On more than one occasion he attended at the Member's office during normal business hours but it appeared to him that the Member's office was closed. According to L.B., the Member did not answer his telephone or respond to messages left by L.B. According to the Member, at this time he was a sole practitioner and there were times he was away from his office but his practice was to leave a sign on the door and a voice mail message indicating when he would be returning.

46. The inability of L.B. to recover his small claims file and documents from the Member hindered his ability to deal with the default judgment and caused him great stress. Moreover, L.B. was exposed to liability for damages and costs in a matter where he believed he had a substantive defense.

47. L.B. retained new counsel who referred the matter to an Edmonton lawyer with the view of appealing or setting aside the default judgment. Concurrently on behalf of L.B. the new counsel made a complaint to the Law Society on December 3, 2007, seeking assistance in retrieving L.B.'s file from the Member.

48. The Member claims that L.B. was informed of a June 15, 2007, trial date but on account of L.B.'s continuing medical condition the trial was adjourned to October 12, 2007. The Member

*insists that L.B. was informed of the October trial date via telephone. A letter dated July 5, 2007, had been prepared by the Member informing L.B. of the October trial date but it does not appear to have been sent, as both an original signed letter on letterhead and a file copy were on L.B.'s file (**Exhibits 14 & 15**, respectively).*

*49. Unbeknownst to L.B., on October 10, 2007, the Member suffered a serious family medical emergency and informed the office of the plaintiff's counsel by telephone the afternoon before the trial was to begin. The Member also advised that he had not been able to reach L.B. lately. The Member requested another adjournment; however, counsel for the plaintiff would not consent as it was the fourth time an adjournment had been requested and there was no medical evidence to support the adjournment (**Exhibit 16**). The presiding judge was informed of the situation and granted the Default Judgment against L.B. but directed that an application to set the judgment aside could be brought before him. The Member did not inform L.B. that he would not be present at the trial.*

50. The Member says he anticipated dealing with the matter upon receiving a copy of the judgment from the Court but he says he never received a copy of the judgment notwithstanding L.B.'s address for service in the dispute note filed by the Member was the Member's office.

51. The Member claims he received instructions to transfer L.B.'s files via an exchange of voice mails on or about December 6, 2007. He did so on January 17, 2008, after making arrangements with counsel. L.B. resolved the small claims matter a few months later.

*52. There is record of one telephone discussion with L.B. on the small claims file (**Exhibit 22**).*

53. This complaint was referred to hearing on September 17, 2009.

ADMISSION OF FACTS

54. The Member admits as fact the statements contained within this Agreed Statement of Facts for the purposes of these proceedings. The Member admits that all correspondence sent to him was received by him on or about the dates indicated, unless stated otherwise.

55. This Agreed Statement of Facts is not exhaustive and the Member may lead additional evidence. The Member acknowledges that the Law Society is not bound by this statement of facts and that it may cross-examine the Member, adduce additional evidence, or otherwise challenge any point of fact it may dispute in this statement.

THIS AGREED STATEMENT OF FACTS IS MADE THIS _____ DAY OF JUNE, 2011.

_____

John F. Schneider

14. Counsel for the LSA called H.D., the complainant in relation to Citations 3 – 7. H.D. was sworn, examined by Mr. Groome and provided the following evidence relevant to the citations:

(a) She retained the Member in June 2004 approximately to assist her with a sale of a home located in Bragg Creek, Alberta. As part of the sale transaction, the Member prepared and registered against the title of the home, a vendor take back mortgage;

(b) In 2005, the purchasers defaulted on payments under the vendor take back mortgage. H.D. negotiated a six month extension on the mortgage payments directly with the purchaser's;

(c) Subsequent to the extension being granted, an unexpected flood occurred at the property (described in the evidence as a "100 year flood") and the purchasers indicated to H.D. that they were no longer going to make payments on the mortgage as they believed that she knew about the flooding and should have disclosed the same to them;

(d) It was at that time that H.D. retained the Member to assist her (May 16th, 2006);

(e) At the meeting with the Member, H.D. indicated that she either wanted the balance of the monies owed to her (approximately $58,000.00) to be paid to her or she would take the home back and return the funds paid by the purchaser's to her;

(f) The Member requested a $3,000.00 retainer which was paid the next day;

(g) H.D. then received a copy of a demand letter dated June 10th, 2006 sent by the Member on her behalf to the purchasers requesting payment of all amounts outstanding (Exhibit 29);

(h) H.D. then heard nothing from the Member until September 20th, 2006 despite calling the Member's office numerous times, although she confirmed that she kept no records of any calls made to or received from the Member during that period;

(i) No phone calls to H.D. were noted in materials provided by the Member to the LSA during this period either (see Exhibit 13 – client ledger and Exhibit 44 – various statements of account);

(j) H.D. received a call from the Member's office on or about September 20th, 2006 to attend the office for a meeting. Upon arrival, it was apparent that an error had occurred as the Member's staff was expecting a different client to arrive. In any event, the Member invited H.D. and her husband into a boardroom and introduced them to L.C., a junior associate working in his office;

(k) L.C. advised them that a counterclaim had been filed against them in the foreclosure action commenced by the Member on their behalf against the purchaser's. H.D. testified that this was the first she had known that a counterclaim had been filed and was shocked to learn of same;

(l) At the meeting on September 20th, 2006, H.D. saw and reviewed for the first time the Statement of Claim in the foreclosure action (Exhibit 39), the Statement of Defence and Counterclaim (Exhibit 40), the Statement of

Defence to the Counterclaim (Exhibit 41), a Statement of Claim naming her as a Defendant (Exhibit 42), and a Statement of Defence filed by the Member on her behalf (Exhibit 43);

(m) H.D. testified that she had no discussions with the Member or any one at his firm regarding the creation of the court documents referenced above. She does not have an issue with the Member creating them and filing them on her behalf – her issue is that he was doing these things on her behalf without speaking with her or obtaining her instructions;

(n) H.D. testified that she had also not been made aware of correspondence from counsel for the purchasers dated June 13, 2006 (Exhibit 10) until sometime after her meeting with the Member on September 20, 2006. The contents of the proposal had not been discussed with her either;

(o) H.D. dropped off a synopsis of her recollections surrounding the sale of the Bragg Creek home to L.C. on or about September 26, 2006;

(p) H.D. confirmed the advice that she received from the Member in late September 2006 that she should not settle the matter on the basis of rescinding the contract (this advice is related more specifically in paragraph 28, Exhibit 6, reproduced above). H.D. stated that the rationale for this advice was never explained to her;

(q) H.D. attended the court house in Calgary on February 9th, 2007 to observe the proceedings in the foreclosure action. She was advised of the date and time by the Member. H.D. waited in Justice Chambers for three hours – her matter was not called, nor did she see the Member. H.D. spoke with the Member later in the afternoon and was advised by him that the matter had been moved to Master's Chambers and that he thought she had "just blew it off";

(r) H.D. attended the court house in Calgary again on February 27th, 2007 to observe proceedings in the foreclosure action. An Order Nisi/Order for Sale was granted that day. Apparently, the court inquired of the Member why a rescission hadn't been offered and H.D. was surprised as she had specifically discussed that issue with the Member. The meaning of the Order and its terms was not discussed with H.D. She believed that she would simply receive the judgment amount from the purchasers;

(s) The Member requested a further retainer in the amount of $4,000.00 from H.D. on the morning of February 27th, 2007 prior to court. H.D. provided the Member with a cheque in that amount. H.D. testified that the Member called her later that evening (9:30 pm) and requested a further $1,500.00;

(t) H.D. put a stop payment on the $4,000.00 cheque as she was concerned about the amounts being requested and what she perceived to be the lack of results. She contacted the Member and advised him of same, that she wished to retrieve her file and that she intended to tax his accounts;

(u) H.D. had not received or seen copies of any of the statements of account reproduced at Exhibit 44 until February 28th, 2007 when she attended at

the Member's office to review her file. According to H.D., the file was completely disorganized and she spent approximately three hours trying to organize it and understand what had happened on the file;

(v) H.D. did pay the Member $724.28 for a court reporter's invoice on February 28th 2007;

(w) H.D. testified that she had never seen a copy of an Offer to Settle sent by the Member to counsel for the purchasers on or about February 27, 2007 (Exhibit 32);

(x) H.D. testified that the only correspondence that she received from the Member was his retainer letter and the first demand letter to the purchasers (Exhibit 29);

(y) H.D. denies that the very first time that she raised the issue of the Member representing her without having or following her instructions was at the taxation hearing. The taxation of the Member's accounts occurred and it was determined that the Member was owed $2,000.00 for work done on the file by H.D. This amount has been paid by way of monthly installments;

(z) H.D. testified that the Member offered to write off the amount owing if she would agree not to report this matter to the LSA.

15. H.D. was then cross-examined by Mr. Price Q.C. and provided the following evidence relevant to the citations:

(a) H.D. was referred to Exhibits 9 and 10 and denied the suggestions of Mr. Price Q.C. that she had any conversations with the Member between the dates of May 16th – September 20th, 2006;

(b) H.D. prepared a written synopsis of her dealings with the purchasers of the Bragg Creek property and provided it to L.C. sometime after September 20, 2006 (Exhibit 46);

(c) H.D. confirmed that she signed an Affidavit of Default on November 16th, 2006 and Affidavit's of Record in both actions before the Member on November 29th, 2006 and that nothing further happened on the actions (at least in relation to filing documents at the courthouse) until she changed counsel in March 2007;

(d) H.D. testified that she had no knowledge of the value of the property in 2007 and denied ever seeing the Affidavit of Value (Exhibit 37). She further denied ever having a conversation with the Member to the effect that rescission of the sale agreement would not be agreed to by the purchasers as the property had gone up in value;

(e) H.D. confirmed that she had been examined in the foreclosure action and that the transcripts were filed in the foreclosure action;

(f) H.D. confirmed an Order Nisi was granted in the foreclosure action and that the purchasers did eventually pay the $58,888.71, however, have not

paid any of the legal costs that were awarded. The purchasers were going to tax the Member's accounts as they were ultimately responsible for them, however, no further steps have been taken in relation to taxing the accounts or in obtaining payment from the purchasers;

(g) H.D. did not recall having a phone conversation with the Member on February 26th, 2007 as reflected by the Member's notes (Exhibit 11) regarding the court application which occurred the following day and resulted in the Order Nisi being granted;

(h) H.D. confirmed that when she provided the $4,000.00 cheque to the Member on February 27th, 2007, she requested that he not deposit same until the following day as she had to move money between accounts to ensure it did not bounce. She also confirmed that the cheque was deposited on February 28th, 2007 and that she also placed a stop payment on the cheque on February 28th, 2007. She also confirmed that she advised the taxing officer that the reason she stopped payment on the cheque was because the Member had deposited on February 27th, 2007 despite her instructions not to;

(i) H.D. confirmed that the Member assisted her husband with a sale of his home in 2002 and in relation to a child support issue in 2004;

(j) H.D. confirmed that at the appeal of the taxation of the Member's accounts before Master Alberstat on May 14th, 2007 that she offered to pay the $2,000.00 awarded to the Member for his fees at a rate of $1.00 per month, then $10.00 per month and eventually agreed to pay $200.00 per month.

16. Mr. Groome re-examined H.D. and she provided the following evidence relevant to the citations:

(a) H.D. was referred to her initial complaint to the LSA and confirmed that the letter that she authored to L.C. was in fact provided to L.C. on September 26th, 2006 (Exhibit 46);

(b) H.D. confirmed that neither the Member nor L.C. explained that she had been awarded solicitor-client costs by the court in the Order Nisi.

17. Counsel for the LSA called L.C. and she was sworn, examined by Mr. Groome and provided the following evidence relevant to the citations:

(a) She articled with the Member's firm and remained in his employ to approximately September 2006;

(b) She had some involvement with H.D., however the file was primarily the responsibility of the Member;

(c) She prepared the demand letter to the purchasers dated June 7, 2006 (Exhibit 29);

(d) She was aware that the purchasers' counsel, Ms. Aspinall, was requesting on behalf of her clients, 30 days time to respond to the demand so that the purchasers could seek alternative financing (Exhibit 10). She does not believe that a copy of the letter was sent to H.D.;

(e) L.C. showed the Member the letter from Ms. Aspinall and was directed by the Member to file the Statement of Claim for foreclosure;

(f) L.C. was away from the office for most of July and upon her return, reviewed the file and saw that the purchasers had filed and served a Statement of Claim and the Member had filed and served the Statement of Claim for foreclosure;

(g) L.C. confirmed that she drafted and signed the letter under the Member's name to Ms. Aspinall dated June 28th, 2006 (Exhibit 30);

(h) L.C. prepared a Statement of Defence to the purchasers' claim;

(i) L.C. has no recollection of any information on the file that would suggest that H.D. was made aware of any of the proceedings;

(j) L.C. had concerns with respect to the conduct of the H.D. file given that it appeared to her that the Member did not speak with H.D. about Ms. Aspinall's request for an extension to permit her clients to obtain financing prior to directing her to file a Statement of Claim and that she was directed by the Member to draft a Statement of Defence (Exhibit 43) without first consulting with H.D. L.C. placed a memo to file outlining these concerns on August 29th, 2006 (Exhibit 31);

(k) L.C. is not sure that she raised her concerns with the Member; however, she did note that there was no correspondence or notes on the file regarding contact by the Member with H.D.;

(l) L.C.'s only other involvement with H.D. in relation to the file was to attend a meeting with H.D. on September 20th, 2006 and reviewed the file and it was her impression that H.D. had no idea about all that had happened in relation to the law suits and correspondence with opposing counsel. She described it as the "client's utter surprise";

(m) L.C. has no recollection of any further involvement on H.D.'s file while in the employ of the Member. L.C. became involved in the file again when she took it over in 2007 and settled the matter with opposing counsel. She recalls speaking with H.D. about legal fees and taxing the Member's accounts. She had no recollection of speaking with H.D. about the costs that were awarded by the Court;

(n) L.C. was also involved in appealing a Provincial Court Small Claims Judgment obtained against the Member that involved matters dealt with in Citations # 1 and 2 before the Hearing Committee. The Member instructed L.C. to file the appeal to "make RPL wait for its money". Upon

the Member's instruction, she ordered the transcripts and drafted pleadings for the appeal to be reviewed by the Member;

(o) L.C. advised the Member that she was not comfortable dealing with the matter and was advised by the Member not to worry about it as he would retain outside counsel;

(p) L.C. observed extensive renovations being done to the new office space that the Member's firm moved into in 2005. She noted that the Member leased a nice SUV and threw big Christmas parties for clients. She noted that the Member moved into a new home in the Three Sisters subdivision in Canmore and subsequently purchased a new home in Eagle Terrace with his wife. She believed the property in Eagle Terrace was worth between $800,000.00 to $900,000.00. She was also aware of the Member purchasing his wife a very nice engagement ring and going on a holiday to Hawaii. She was also aware that the Member and his wife put a deposit on a condo in the Spring Creek development in Canmore.

18. H.D. was then cross-examined by Mr. Price Q.C. and provided the following evidence relevant to the citations:

(a) L.C. recalls a meeting in April or May of 2006, where the Member addressed all staff and lawyers in the office and advised that costs were out of control and that he was going to have to meet with everyone individually to discuss salary reductions. Shortly after this meeting, associates and staff began leaving the firm;

(b) L.C. had a meeting with the Member and his wife in the summer of 2006 to discuss her productivity as they believed L.C. could increase her productivity. She met with the Member the following day to further discuss the issue and reminded the Member that much of her time was recorded under his name on the files that she worked on. The Member apparently apologized and indicated to L.C. that he had forgotten that and was happy with her work. He presented her with a gift certificate to recognize her efforts. L.C. resigned from the firm about a month or two later;

(c) The Member and L.C. both made complaints to the LSA about each other following L.C.'s resignation from the firm;

(d) L.C. was not involved in financial controls, budget or planning for the firm while she was employed there;

(e) L.C. was not aware that whether there were donations on food and discounts on food and alcohol for the Christmas parties;

(f) L.C. was not aware that the landlord of the new premises paid for a significant amount of the leasehold improvements;

(g) L.C. was aware that the Member obtained a loan in relation to the move but was not aware of what it was used for. She was aware that the Member was planning on subletting a portion of the office space;

(h) L.C. was not aware of how much the engagement ring cost that the Member purchased for his wife. She was not aware of all of the details of the ownership and financing of the various properties purchased by the Member and his wife. She did indicate that the Member was quite frantic during this period trying to secure monies to make the down payments. L.C. was not aware that the Member had not been on a trip for 16 years prior to the trip to Hawaii;

(i) L.C. could not recall discussing fees for the disclosure action or that costs were in the discretion of the court. She does not recall if she spoke to the Member about the concerns raised by H.D. after meeting with them on September 20th, 2006.

19. Mr. Groome re-examined L.C. and she provided the following evidence relevant to the citations:

(a) She confirmed that at the time she was leaving the Member's firm, things were out of control. She elaborated on this by indicating that there was no staff left, the Member was rarely in the office, that she was fielding many phone calls from upset clients and that she was the only lawyer in the office.

20. L.C. was questioned by members of the panel and she provided the following evidence relevant to the citations:

(a) L.C. confirmed that she was billing at the same hourly rate as the Member and because of that she didn't necessarily keep track of her time under her own name;

(b) L.C. prepared memo's to file regarding instructions received by her fairly soon after she had received them.

21. Counsel for the LSA called L.B., the complainant in relation to Citations 8 - 10. L.B. was sworn, examined by Mr. Groome and provided the following evidence relevant to the citations:

(a) L.B. retained the Member to represent him as a defendant in a Small Claims matter in the fall of 2006;

(b) L.B. was hospitalized in December 2006 for an extended period of time. He did not advise the Member that he was in the hospital;

(c) Prior to his hospitalization, he instructed the Member to have the hearing moved to Canmore from Edmonton. He was assured by the Member that he would do so;

(d) L.B. was surprised to learn that the trial was scheduled to be heard in Edmonton in June 2007. L.B. indicated that he did not receive copies of correspondence from the Member regarding this matter. He also indicated that he called the Member several times and usually only was able to speak with his law student;

(e) L.B. did receive and sign a retainer letter from the Member. L.B.'s company was invoiced by the Member and the company paid those invoices upon receipt;

(f) L.B. recalls having a discussion with a student or lawyer employed by the Member in June 2007 regarding an adjournment of the June trial date. L.B. indicated that he had instructed the Member to settle the claim in some fashion as he did not want to go to trial. A new trial date was scheduled for October 12th, 2007 but L.B. cannot recall if he received letters from the Member indicating same;

(g) L.B. was hospitalized again between September 19th, 2007 and October 12th, 2007. He does not recall whether he contacted the Member during this time period but he also knows that the Member did not try to contact him as his phone messages were brought to him regularly by his wife;

(h) L.B. learned of a default judgment being entered against his company upon picking up a registered letter indicating same. He tried to contact the Member by phone but was unsuccessful. He drove to the Member's office in Canmore and found that the Member was no longer operating out of that location;

(i) As a result of not being able to locate or contact the Member, L.B. contacted another lawyer in Canmore to assist him. That lawyer was able to secure the Member's files in January 2008 on behalf of L.B. L.B. resolved the Small Claims matter with the assistance of new counsel by payment of the Plaintiff's legal costs;

(j) Throughout his involvement with the Member he had great difficulty in contacting him and when he did get through, he was directed to a law student or associate.

22. L.B. was then cross-examined by Mr. Price Q.C. and provided the following evidence relevant to the citations:

(a) He received notification of the default judgment against his company in late November or early December, 2007;

(b) He was not aware that the Member had moved his office location;

(c) The default judgment was wiped out as a result of a mediated settlement whereby L.B. paid the legal fees incurred by the Plaintiff in the Small Claims matter.

23. Counsel for the Member called P.S., the Member's wife, and she was sworn, examined by Mr. Price Q.C. and provided the following evidence relevant to the citations:

(a) She and the Member were married in March 2006;

(b) She and the Member discussed the difficulties he was facing financially in his practice in the spring of 2006 and she assisted him with a thorough review of his practice. It was determined that he was overstaffed, that salaries needed to be reduced, that he had a large number of accounts receivables and that he needed to cut any unnecessary expenses;

(c) P.S. confirmed the facts and circumstances outlined in paragraphs 3 and 4 of her letter of March 17th, 2008 (Exhibit 45). In regards to paragraph 3, she offered that it was her estimation that the interaction with H.D. and her husband in July 2006 was close to 20 – 30 minutes in duration. She came away with the impression that H.D.'s husband was a friend and existing client of the Member. In relation to paragraph 4, she recalled that she and the Member were entering the office building when they had a brief encounter with H.D. The Member went into the office with H.D. to have a meeting with her as H.D. seemed upset about the Member not returning a phone call.

(d) She participated in a meeting with the Member to review the performance of L.C. in August 2006. They were concerned with her low productivity numbers, that she was living with a former employee and current competitor and that she should pursue some continuing education and increase her marketing. They also discussed L.C. signing a noncompetition agreement. L.C. agreed to sign the agreement and agreed to try to remedy the concerns that were expressed to her;

(e) She was surprised that L.C. tendered her resignation within a few weeks of that meeting. She confirmed that L.C. provided a one month working notice;

(f) The office relocated in March 2007 from the top floor of the building to the main floor of the same building because they simply had too much space.

24. P.S. was then cross-examined by Mr. Groome and provided the following evidence relevant to the citations:

(a) She has no knowledge if L.B. was notified of the move of the office in March 2007;

(b) As part of the restructuring effort of the Member's practice in the spring of 2006, the Member and P.S. focused on retiring debt of the Member, but she was not involved in speaking with representatives from RPL;

(c) She confirmed that the Member had two trips to Hawaii – March 2006 and March 2007. P.S. indicated that she paid for the entirety of the wedding and the trips to Hawaii without contribution from the Member at the time. The Member did subsequently pay her for these trips sometime prior to February 2009;

(d) She also confirmed that she had lent money to the Member during the restructuring period and that the same was repaid to her prior to February 2009;

(e) In relation to paragraph 4 of Exhibit 45, she could not recall if H.D. said telephone calls as opposed to just a telephone call but she did note that H.D. was noticeably upset.

25. P.S. was then cross-examined by a panel member and provided the following evidence relevant to the citations:

(a) She confirmed that she was not an employee of the Member's firm, nor had she been paid for any of the services that she provided to the Member. She was providing support to the Member and was not really an active participant in the operation of the practice.

26. The Member was sworn, examined by Mr. Price Q.C. and provided the following evidence relevant to the citations:

(a) The Member knew H.D.'s husband from prior dealings as defense counsel and while acting as an agent for the Federal Crown prosecuting drug offences. H.D.'s husband was a member of the RCMP during that time;

(b) The Member also acted for H.D.'s husband on the sale of a property in 2002 and a variation of child support application in 2004. The Member would classify him as a friend but it was not a close personal relationship;

(c) In relation to paragraph 3 of Exhibit 45, the Member recalls meeting H.D. and her husband at a restaurant in Canmore and having a brief discussion of the foreclosure action;

(d) The Member did not keep track of all phone calls or time that he worked on H.D.'s files given their friendship. He acknowledged that he was leaving a lot of unrecorded time on the table in 2006;

(e) In 2006, the Member's firm was made up of 2 associate lawyers, one articling student, an office manager, 2 full time conveyancers, 1 full time litigation assistant, 1 full time family law assistant and a receptionist;

(f) In 2004, the Member had relatively small office space that he leased from RPL. He negotiated with the RPL to lease larger space in a different location in Canmore. The new office space was significantly more than what the Member needed so he obtained the landlord's agreement to sublet parts of the new office space to third parties. The new office space became available early and the Member understood from a third party that he was going to take over his existing lease thereby permitting the Member to move into the new premises and terminating his responsibility to pay rent for the last two months. The Member sent a letter to RPL on October 21, 2004 confirming his understanding (Exhibit 17). No response from the RPL was received.

(g) The Member admits that he did not pay the rental on the old office space for the months of November and December 2004 given his understanding of the aforementioned arrangement. In addition, he did not pay the taxes or utilities for that time period, as it was his position that the act of re-letting was a repudiation of the lease by the RPL;

(h) The RPL sued the Member, and following a number of adjournments, it proceeded on April 5, 2005. The Member was missing a key witness (the third party who took over the lease) and the Member had judgment entered against him. The Member appealed the judgment. A memo to the file was made on April 11th, 2006 to L.C. to proceed with an appeal of the Small Claims judgment (Exhibit 48);

(i) The Member believed he had an arguable appeal and does not agree with L.C. that he simply appealed to delay any payment to RPL;

(j) The appeal was filed and transcripts ordered, however, nothing further was filed and the Member sought an adjournment of the appeal on the basis that he thought L.C. was filing the appropriate material. He does not recall having any discussion with L.C. about referring the matter out to other counsel and disputes that he would have sent a firm file outside of the office;

(k) The Member began to experience financial difficulties with Revenue Canada remittances in 2006 and he consented to a judgment in favour of Financial Institution A in the amount of $80,000.00 approximately. He paid that judgment off in March 2007. He also made arrangements with Revenue Canada to pay the sum of $7,643.55 per month to reduce his debt with them and keep his ongoing liability paid up which in October of

2007 was approximately $110,000.00 (Exhibit 26). The Member had that fully paid by February 2009;

(l) In relation to the "out of control" spending alleged, the Member stated that:

- The Member ceased taking staff out for lunches early in 2006 given his financial situation;
- In relation to Christmas parties, the Member cut costs by receiving donations of food and receiving discounts on food and alcohol. The last Christmas party that was done by the Member for clients was in 2005 and the Member estimated the total cost of any one Christmas party was between $1,000.00 - $1,200.00;
- The renovations for the new office space that the Member moved into were largely paid for by the Landlord;
- He indicated that his wife's engagement ring was not overly extravagantly priced and was financed through his own personal funds;
- His condo that was owned prior to his marriage was sold and the proceeds were used to retire personal debt, the payment of which occurred prior to the judgment being granted in favour of RPL;
- His wife sold her home and used those funds to purchase the home they currently reside in and she remains the sole owner of that home;
- The trips to Hawaii were paid from their own personal resources;
- His wife paid for the wedding and he repaid her his share later;
- He did lease a vehicle for awhile, however, once that lease came to an end in 2008, he did not lease another vehicle as his wife had a vehicle that he could use;
- He retired the RPL debt by May 14th, 2009.

(m) In relation to the L.B. matter, the Member confirmed that he was not aware of L.B.'s hospitalization in the fall of 2007. He had delegated the management of the file to his articling student at the time. The Member acknowledged the request of L.B. to have the trial moved to Canmore and the Member believed he could as he mistakenly thought that the contract dealt with a job in Banff. It turned out that the job was located in Vernon, B.C., the Plaintiff was located in Edmonton and thus he was unable to move it to Canmore;

(n) The Member indicated that his office was always signed, not only at the front door of the building, but also on the door to the office. He cannot

explain why L.B. would not have seen these. He also had a very modern phone system with voice mail capability installed in the summer of 2006 and was at a loss as to why there were no messages from L.B. brought to his attention;

(o) Adjournments were requested from time to time of the L.B. trial due to his health condition. The Member recalls being advised by his student at the time that he had advised L.B. of the October 12th, 2007 trial date by phone and that he had sent a letter to L.B. in July 2007 advising of the October date as well (Exhibit 14);

(p) The Member's wife was hospitalized on the evening of October 10th, 2007 and the Member made efforts to contact L.B. and opposing counsel regarding a need for a further adjournment of the trial. This was confirmed by a letter from opposing counsel dated October 11th, 2007 (Exhibit 16). Counsel for the Plaintiff advised the Court of the Member's predicament and the Court refused the request for an adjournment and granted judgment against L.B. The Member understood from opposing counsel that he was also given leave to apply within two weeks to set the matter aside. He awaited receipt of a copy of the judgment so that he could do that, however it never came, and he was surprised to learn that it was sent directly to L.B.;

(q) The Member was then contacted by L.B.'s new counsel and was requested to forward the file to them. He did so within a few weeks. The Member then advised the LSA and ALIA of the problem he had on the file. The Member understood that ALIA paid the costs of L.B.'s new counsel to resolve the file as he was charged on a levy on his premiums to deal with that payment;

(r) The Member did assist H.D. with the sale of the Bragg Creek home in July 2005. He prepared the vendor take back mortgage and it provided that if default on payments occurred, that the mortgagor would be responsible for all costs;

(s) The Member was retained by H.D. to pursue the recovery of the monies that she was owed under the terms of the mortgage when the purchasers defaulted or to have the property returned to her. The Member claims that H.D. provided a summary of events to him at their first meeting in May 2006 about this file which is reproduced at Exhibit 46. In addition, he indicated that legal fees were a "hot button" for H.D. in that she felt she should not be out any money for having to pursue the defaulting purchasers;

(t) Upon receipt of the letter from the purchaser's lawyer in June 2006 (Exhibit 10), the Member specifically recalls calling H.D. and discussing the same with her. He encouraged her to consider the offer of payment of the amount outstanding within 30 days, but with no legal costs being paid. At that time, the legal costs were approximately $1,100.00. H.D. was not

in agreement and was quite upset by the suggestion that she should have to pay anything. In accordance with those instructions, the Member sent a letter to opposing counsel indicating same (Exhibit 30). He then instructed L.C. to commence the foreclosure action;

(u) The Member was faxed a Statement of Claim from the purchasers' counsel on July 4, 2006 and was asked if he could accept service of same. The Member called H.D. to obtain those instructions and to generally discuss the claim. The Member and H.D. exchanged phone messages and he was finally able to speak with her on July 7th, 2006. He received instructions to accept service of the Statement of Claim and to file a Statement of Defence (Exhibit 43);

(v) The Member did not file the Statement of Claim in the foreclosure action until after the expiry of the 30 day period suggested in the purchasers' letter on the basis that the claim would be different if the purchasers were able to get financing to pay out the balance of the mortgage within that 30 day period. The payment was not made within the 30 day period;

(w) The Member has a general recollection of meeting with H.D. and her husband on September 20th, 2006 and showing them into a boardroom with L.C. and leaving them with L.C. to review the file. He did not receive any comment form L.C. after the meeting regarding any concern that H.D. may have expressed;

(x) The Member frequently discussed the rescission issue with H.D. and he had expressed to her that it was likely it would not be considered at the time as there was a substantial amount of equity in the property that the purchasers would be walking away from;

(y) The Member's practice was that all accounts were mailed to clients upon preparation. He recalled delivering the February 27th, 2007 account to H.D. personally when she attended the office on February 28th, 2007;

(z) Examinations for Discovery on both actions occurred on January 11th, 2007 at the Member's office. Preparation and attendance at same were noted in his accounts;

(aa) The Member indicated that it was not definitive that H.D. was going to attend court on February 9th, 2007. The matter was originally set in Justice chambers but was moved to Master's chambers by the court clerks. The change was clearly noted on the list posted and available for anyone to review. He did look for H.D. upon his arrival but did not see her and concluded that she was not coming;

(bb) The Member contacted H.D. February 26th, 2007 to discuss the court application the following day. He did so to ensure that she understood what the process was and he also requested a further $4,000.00 retainer. He made notes contemporaneously with that phone call that are reproduced at Exhibit 11. The matter did proceed in court on February

27th, 2007 and an Order Nisi was granted. H.D. and her husband were present in court. Leave was granted by the court to speak to costs of the foreclosure action. The Member reviewed the terms of the Order with H.D. and her husband after the application concluded. The Court raised the issue of rescission with the purchaser's lawyer and suggested that her action would be more properly framed as a rescission action. The Member confirmed that he was presented with a cheque for $4,000.00 from H.D. that morning before court. The Member deposited that cheque on February 28th, 2007 (Exhibit 34);

(cc) The Member prepared a further offer that evening upon instruction from H.D. offering rescission off the contract (Exhibit 32). The offer was dropped off in the mail at the Sobey's postal outlet by him. The Member acknowledged that opposing counsel apparently did not receive this offer until April 12th, 2007 and it was post-stamped April 5th, 2007 (Exhibit 47). The Member indicated that he has personally experienced similar problems with the mail in Canmore;

(dd) The Member left on a two week holiday on March 1st, 2007 and upon his return became aware that the $4,000.00 cheque had been bounced and that H.D. had sent a letter to his office terminating his services. The Member tried to contact H.D. repeatedly after that and was never able to reach her or get a call back. The Member first learned from H.D. that the reason she stopped payment on the cheque was at the taxation of the Member's accounts in May 2007. The reason given at the taxation was that the Member had cashed the cheque on February 27th, 2007. The Member appealed the taxation, and H.D. changed her story as to why a stop payment had been placed on the $4,000.00 cheque to a concern over the amount that she had been billed for the services provided;

(ee) The file may have appeared to have been disorganized the following day when H.D. attended to look at it as he would have only taken the pleadings and necessary information to court. In addition, the rescission offer was done the evening of February 27th, 2007 and likely remained in his office and had not made it to the file by the following day;

(ff) The first time that H.D. raised the issue of the Member not following her instructions was at the taxation hearing. This surprised him as it was not in any of her materials and because she was actively involved in the file throughout;

(gg) L.C. did provide a working notice of her intent to leave the Member's firm; however, part way into that notice period, L.C. began to call in sick and was not attending the office. The Member observed her on one of the sick days out walking her dog. He called L.C. about that and she advised him that she was feeling too much stress to come into work anymore and thus she was terminated that day. Since the termination, the relationship between L.C. and the Member has been acrimonious. Both made complaints to the LSA about the conduct of the other.

27. The Member was then cross examined by Mr. Groome and provided the following evidence relevant to the citations:

(a) The Member confirmed that L.C. had her own billing code so could not explain why her time did not appear on any billing for the H.D. file. She was paid a straight salary and not paid a percentage on billings. Her first time entry on the H.D. file appears on September 12th, 2006, which was after the meeting the Member had with L.C. regarding her lack of productivity. All lawyers in the firm billed out at the same hourly rate;

(b) The Member confirmed that Exhibit 14 was a photocopy of an original and that the Member's student advised that he had told L.B. of the October trial date by telephone;

(c) The Member confirmed that he was looking after the L.B. file personally and was attempting to contact L.B. in October 2007 as the trial date loomed and was unable to connect with him. The Member knew that L.B. was hospitalized at the time;

(d) The Member was aware that a default judgment was entered against L.B. and that there was a two week period provided for the Member to apply to set aside the judgment. The application to set aside did not occur because the Member was not sent the judgment and he was distracted with the medical emergency that hospitalized his wife on October 10th, 2007. Further, he admitted that he did not advise L.B. of the default judgment;

(e) The Member confirmed that it was his understanding that the L.B. matter was resolved through a payment out by ALIA. The Member readily acknowledged his error on the file but does not agree that the conduct amounts to conduct deserving of sanction;

(f) The Member acknowledged that during the retainer with L.B. that they had difficulty contacting him at times due to his medical condition and that there were a series of adjournments of the trial for the same reason;

(g) The Member acknowledged that he took on the new, much larger office space in Canmore on the basis of his perceived need that he would be able to sublet them to other parties. The Member advertised and was not successful in filling the empty offices;

(h) The Member understood that there was an actual agreement between the third party and RPL to take over his old office space if he could move early, which he did. His expectation was that his obligations to RPL would be over at the end of October, except for some utilities that would need to be paid for the month of October that may have been adjusted for and paid from the $1,500.00 damage deposit that he had paid to RPL. The Member admits that he did not pay those obligations immediately and in fact paid them out several years later given all of his other obligations. The Member suggested that he did try to deal with RPL in

the intervening period to try and work out other options to satisfy the debt but could not come to any agreement. He made the first payment of $1,000.00 to RPL in August 2007 as he was living hand to mouth at that time;

(i) The Member acknowledged that he and his wife went on holidays to Hawaii for two weeks in 2008, 2009, 2010 and 2011 and that each of these holidays was paid for by his wife utilizing her credit card. The holidays were modestly expensive;

(j) The Member acknowledged that he did not tell the LSA about any negotiations with RPL to settle the matter;

(k) The Member acknowledged that the sale of his condo occurred after the RPL trial in April 2006. He used the sale proceeds to pay personal debt that he had outstanding at the time. The RPL debt was a corporate debt. The Member looked for alternative funding sources to try and pay off or consolidate his debts and nothing was available;

(l) The Member shut his real estate practice down by the fall of 2006 because he was actually losing money on it due to the high salaries he was paying. Any cash flow issues that he was having was as a result of the salaries and wages he was paying were far too high;

(m) The Member acknowledged that at times it was not his practice to copy every letter to clients, nor to memorialize ever conversation that he had with a client in writing on the file and to keep track of all of the time spent on files;

(n) The Member was adamant that the rescission offer letter of February 27th, 2007 was prepared and posted by him on that evening. He had no explanation as to why it did not reach opposing counsel until April 2007.

28. The Member was re-examined by Mr. Price Q.C. and provided the following evidence relevant to the citations:

(a) The Member sent the letter of apology to Mr. Rathbone on April 26th, 2010 by regular mail (Exhibit 33).

29. The Member was re-cross-examined by Mr. Groome and provided the following evidence relevant to the citations:

(a) The Member provided Exhibit 33 to the LSA just prior to the commencement of the hearing;

(b) The Member had not spoken to Mr. Rathbone regarding this matter after the date of the letter and could neither confirm nor deny the suggestion that Mr. Rathbone's partner could not find a copy of this letter anywhere on the file.

30. The Member was then examined by members of the Hearing Committee and provided the following evidence relevant to the citations:

(a) The Member did not fax the rescission offer letter of February 27th, 2007;

(b) The Member acknowledged that he was wrong in his assumption that an appeal of a Provincial Court judgment was de novo as opposed to an appeal on the record and that he was in error in believing that the filing of an appeal operated as a stay of enforcement;

(c) The Member acknowledged that the amount reflected in a letter from an associate in his office to RPL to be paid into court was never paid into court;

(d) The Member acknowledged that he was lax with his time keeping on the H.D. matter even though the mortgage provided that the purchaser would be responsible to pay solicitor client costs. He stated that he was aware that money was an issue for H.D.

SUBMISSIONS ON CITATIONS BY COUNSEL FOR THE LSA

31. With respect to Citations 1 and 2, the theory of the LSA is that the Member had no intention to pay the judgment unless he was absolutely forced to and he dragged out the payment of the judgment for as long as he could. With respect to Citations 3 – 7, the theory of the LSA is that the Member essentially did what he felt was necessary in relation to the conduct of the file and did not bring H.D. into it. As a result, the client was not only uninformed as to what was happening on her file until a chance meeting with the Member in September 2006. Thereafter she was involved in the conduct of the file. In addition, H.D. complained that she had little understanding as to what was occurring at any point in the file and the LSA submits that the Member did not do anything of substance to ensure that H.D. understood what was happening. In relation to citations 8 – 10, the theory of the LSA is that for whatever reason, L.B. was in complete surprise that a default judgment had been entered against his company. This was evidence that there was a manifest failure of the Member to serve a client by failing to ensure that the client was notified of the trial date and for not taking immediate steps to set aside the default judgment.

32. Much of the evidence proffered in relation to the citations was directly contradictory between the Member and the complainant. There was little, if any, corroborating evidence for either version. That leaves the Hearing Committee in the position to assess credibility of the witnesses and their evidence to determine if the citations were made out. The burden is upon the LSA to prove beyond a balance of probability that its theory of the case is correct.

33. The Hearing Committee was referred by counsel for the LSA to two cases:

- *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193; and
- *Hamilton v. Law Society of British Columbia*, 2006 BCCA 367.

Counsel for the LSA submitted that these cases support his submission that in assessing credibility it's not just a matter of whether or not you prefer one witness over

the other that all the citations would be either made out or dismissed. The cases suggest that witnesses often can be right on some things and wrong on others.

34. The Hamilton decision essentially stands for the proposition that when you assess credibility you need to analyze all the evidence in its entire context and look for reasons to accept or not accept evidence being proffered in light of the other evidence before the Hearing Committee and also that the Hearing Committee is entitled to use its common sense in its decision making. The Supreme Court of Canada has stated in F.H. v. McDougall that there are not varying degrees of proof in civil matters – there is one civil standard of proof – the balance of probabilities. In Neinstein, the Ontario Court of Appeal held at paragraph 77 of that decision that:

> "Particularly in light of McDougall, a finding that one party is credible may be conclusive where the other party's evidence is irreconcilable with the evidence of the party found to be credible."

Counsel for the LSA submits that the Hearing Committee should, when assessing credibility, analyze all the evidence in the context of all of the other evidence and make findings accordingly. In addition, the Hearing Committee when ruling on credibility needs to ensure that the reasons are not simply generic or conclusory but rather must be put into context in order for any reviewer of the decision of the Hearing Committee to know exactly why it accepted or rejected one witness's testimony on a certain point over that of another.

35. Counsel for the LSA provided some examples of inconsistent evidence (which is not an exhaustive list) by the Member that should cause the Hearing Committee concern:

(a) the Member's claim that he has a foggy recollection because of time lag regarding whether the examinations in the H.D. matter were to be used in the foreclosure and the tort action, but has a clear recollection of a telephone conversation that he had with H.D. on June 13, 2006 because there was sunshine on his shoulder as he was having the conversation. Counsel for the LSA queries if it is reasonable for this one event to stand out in a member's practice? He suggests that the Hearing Committee has to assess the Member's evidence against what H.D. says and in light of the evidence regarding the telephone message notes;

(b) counsel for the LSA suggests the Member says whatever might help him at the moment and points to him stating in his evidence that he had no idea that L.B. was in the hospital in 2007, however, when he was shown other evidence that indicated he had that knowledge he quickly recanted;

(c) the Member's claim that he sent the rescission offer in 2007 (Exhibit 32) just prior to leaving for his holidays as per H.D.'s instructions, however, he fails to tell H.D. that he did so and also fails to tell the LSA about that until just prior to this hearing. Counsel for the LSA queries whether that conduct is

consistent with someone whose credibility should give the hearing committee any confidence?

(d) the Member's claim that he posted Exhibit 32 on the evening prior to his holidays with other mail, and the same is not delivered to opposing counsel for months afterwards. The Member blames this on Canada Post, yet offers no evidence that the other mail he posted that evening were delivered late. Counsel for the LSA queries whether this has an air of reality; and

(e) the Member's wife testified that she lent him money to assist in his practice and the Member denied that had occurred.

36. The test that the Hearing Committee needs to apply is found in s. 49 of the *Legal Profession Act* for determining if the Member's conduct is conduct deserving of sanction – is the conduct incompatible to the best interests of the public or does the conduct harm the reputation of the profession.

37. Counsel for the LSA submits that there is really no dispute that the Member failed to pay RPL and that the Member failed to honour a judgment against him in a timely fashion.

38. In relation to the L.B. matter, the Member did not call his associate that had provided L.B. with the information regarding the trial date. Should an inference be drawn about that? The Member acknowledged that it was his mistake in not ensuring L.B. knew of the trial date in Exhibit 33. In addition, is the Member's reason for not telling L.B. about the default judgment reasonable?

39. In relation to the H.D. matter, counsel for the LSA suggests that it is open for the Hearing Committee to conclude that she did not really know what was going on. The evidence suggests that the only correspondence she ever received from the Member, prior to her attending his office and reviewing the file, was the initial demand letter (Exhibit 29). In addition, the Member and his wife both recall meeting H.D. as she was leaving his office and that she was upset over phone calls not being returned. While H.D. does not recall this meeting, both the Member and his wife do and that evidence supports the other evidence of H.D. regarding her testimony that she had no idea what was going on with the file.

40. Counsel for the LSA believed that the Member might raise as an impecuniosity defence to some of the citations. The Hearing Committee was referred to the decision of a Hearing Committee in the *Law Society of Alberta v. Ouellette* [2004] L.S.D.D. No. 67. The decision stands for the proposition that as this is a positive defence, it must be made out by the Member (para. 32). The LSA does not bear the burden to prove he could have paid.

41. Counsel for the LSA referred the Hearing Committee to Chapter 8, Rule 3 of the Code of Professional Conduct that provides:

> "A lawyer having a personal responsibility for
> a financial commitment incurred in the business
> aspects of practice must ensure that such commitment
> is fulfilled unless there is a reasonable justification

for the lawyer's failure to do so."

> "Trade debts incurred in the practice of law are an example of financial commitments for which a partner or sole practioner has personal responsibility."

The obligation to RPL was a personal one of the Member. There is no evidence or suggestion that it was the obligation of someone else. Trade debts include rent to a landlord, operation costs and so on in relation to a lease of office space for the law practice. Counsel for the LSA stresses that "These commitments constitute ethical as well as legal obligations."

The Commentary to Rule 3 provides the following helpful comments regarding when it might be permissible for a Member not meeting a practice financial obligation:

> "Inability to pay created by insolvency of which the lawyer was not aware at the time the obligation was incurred and the existence of a legitimate and bona fide defence."

42. Accordingly, in relation to Citations 1 and 2, the Hearing Committee must be satisfied that the Member has, on a balance of probabilities that he had a reasonable justification for not paying RPL in full on a timely basis for him to be found not guilty of the citation.

43. Counsel points to the evidence of L.C. and her personal observations of the spending habits of the Member. Counsel notes that the Member did not produce financial statements or tax returns to show he was unable to pay same. The Hearing Committee was reminded of the evidence that holidays and other spending occurred during the period that the debt was outstanding. Counsel suggests that this was more a money management issue rather than an inability to pay. This, he suggests, is not a reasonable justification.

44. Counsel then points to whether the Member had a bona fide defence to the claim. The learned Provincial Court Judge did not think so, the comments of L.C. that the Member filed the appeal to "make them wait" for their money does not suggest there was a bona fide defence. In addition, Counsel for the LSA suggests that the failure to honour a judgment of the court is a breach of one's ethical obligations Chapter 3, Rule 1 of the Professional Code of Conduct that provides:

> "A lawyer must refrain from personal or professional conduct that brings discredit to the profession."

45. In relation to Citations 3 – 7, the issues are largely ones of credibility.

46. In relation to Citation 3, the Hearing Committee is referred to Chapter 9 of the Code of Conduct provides that "a lawyer has a duty to obtain and implement the clients proper instructions." Counsel suggests that if the Hearing Committee accepts H.D.'s evidence, then there was little or no consultation regarding the conduct of the file. It is not a defence or explanation to say that the lawyer filed the necessary documents in an action to protect the client's interest. The duty includes this, but goes far beyond that.

H.D. was shocked and surprised when she learned of the extent of the litigation matters that were ongoing in relation to her file that she had no idea about.

47. In relation to Citation 4, Offers to Settle require the special attention of counsel. It is incumbent upon counsel to promptly advise of any offer received and to advance one upon the instruction of one's client. The Hearing Committee was referred to Chapter 9, Rules 5 and 15 of the Professional Code of Conduct. The Member delayed in sending the rescission offer that H.D. wanted done and H.D suggests that she was not aware of the offer made by the purchasers by way of their counsel's letter of June 13, 2006 (Exhibit 10).

48. In relation to Citation 5, Counsel for the LSA refers the Hearing Committee to the comments above and that we keep in mind Chapter 9, Rule 14 of the Professional Code of Conduct.

49. In relation to Citation 6, this is not so much a credibility issue. The allegation is that the Member failed to use reasonable efforts to ensure H.D. comprehended his advice and recommendations. It is open for the Hearing Committee to conclude that she did not if we accept her evidence. The Member admits that it wasn't his practice then to follow any verbal recommendations up in writing to ensure that there was no miscommunication. The Hearing Committee is referred to Chapter 9, Rule 12 of the Professional Code of Conduct.

50. In relation to Citation 7, Counsel for the LSA suggests that the evidence between the Member and H.D. is contradictory. The only collateral evidence provided are the two phone message notes. Counsel suggests that it is open for the Hearing Committee to accept that they are accurate. The author of the notes did not provide evidence.

51. In relation to Citation 8, the Hearing Committee must determine if the Member failed to keep L.B. informed as to the status of the trial date. This is an issue of credibility. The file was being conducted under the Member's supervision by an associate in his office. L.B. was kept informed of various adjournments of the trial up until the final trial date. L.B. says that he knew nothing of the trial date. There is indication within the evidence that the associate had an oral conversation with L.B regarding the final trial date; however that associate was not called to give evidence of that. There is a letter to L.B. on the file containing the new date, but it is not clear that it was actually sent (Exhibit 14). In fact, L.B had no idea about the trial date he says, until her received a copy of the default judgment in the mail.

52. In relation to Citation 9, counsel for the LSA suggests that the evidence confirms that L.B. was not being properly served. The Member admits to an error and also indicates that he feels bad as to how the file was conducted at the end. The Member admits that he made a mistake in handling the file in correspondence to a fellow member of the bar (Exhibit 33). The mistake resulted in a judgment against a client and given the serious nature of a judgment, did the Member do all that he could have to serve his client? Counsel for the LSA suggests that he did not.

53. In relation to Citation 10, the essence of this matter is that following the judgment being issued against L.B., the Member did not respond to L.B. in a timely way. L.B. attended at the Member's office only to find that he had moved. To compound matters,

the Member did not transfer his file to the new counsel retained by L.B. for a period of time. The Member's evidence was that new counsel had indicated that they were not in any particular rush to obtain the file.

54. Counsel for the LSA's final submission was that there are not two standards of practice – one for sole practioners and one for those practicing in a large firm. The ethical and conduct standards are the same for both. Similarly, there cannot be two standards of ethical and conduct standards in dealing with clients that are friends and ones that are strangers.

SUBMISSIONS ON CITATIONS BY COUNSEL FOR THE MEMBER

55. In relation to Citations 1 and 2, Mr. Price Q.C. confirmed that the Member bears the burden of proof relative to the impecunoisty defence.

56. Counsel reminded the Hearing Committee of the important dates related to this matter:

- April 2006 - Provincial Court Judgement
- May 2006 – Restructuring of Member's office
- October 2006 – Appeal of Provincial Court Judgement resolved
- December 2006 – Consent Judgment against Member by Financial Institution A - $80,000.00
- March 2007 – Financial Institution A Judgment paid in full
- February 2009 – CRA debt paid in full

Mr. Price Q.C. suggests that the Member was experiencing significant financial issues at the time the judgement was issued. He was downsizing his office, he had CRA debt issues and Financial Institution A was pressuring the Member to pay, in full, its Line of Credit. Both of these debts were sizable and were secured. He was making significant payments towards these debts and was simply not in a financial position to pay the unsecured debt to RPL. These facts are also confirmed in a letter to the LSA dated April 24, 2009 (Exhibit 18). The earliest that the unsecured debt could have been paid out was July 2009 given these other obligations. Thus, Mr. Price Q.C. submits that on a balance of probabilities the Member has made out the impecuniosity defence.

57. In addition, Counsel refers the Hearing Committee to Exhibits 50 and 51 that indicate efforts on behalf of the Member to resolve the RPL debt matter prior to the trial directly with RPL. In addition, the Member's evidence that he was unable to afford the larger premises that necessitated his move to more affordable business space in February 2007 and that he approached RPL to try and arrive at a payment plan to retire the debt, which was refused.

58. Mr. Price Q.C. admits that the Member, as an officer of the Court, is required to honour a court judgment in accordance with Chapter 3, Rule 1 of the Professional Code of Conduct, however, given these unique circumstances that the Member had to deal with those creditors that held writs and that they had to be dealt with first because they could tie up his assets that might prevent him from securing any financing to deal with all of the debts he was facing at the time. In addition, the debts were ongoing obligations and thus it was appropriate that the Member give priority to them.

59. Mr. Price Q.C. submits that the Member may have had a bona fide defence to the lawsuit by RPL. A key witness was unavailable at the trial for the Member, however, if that witness were available and his evidence was believed that he had an arrangement with RPL to lease the space that the Member vacated early, than that would be a complete defence to the law suit. The Member appealed the judgement because he did not believe it was accurate. The Member has no recollection of making the statement that L.C. attributes to him to the effect that by filing the appeal, he would make RPL wait for their money. The Member suggests that it is more likely that he said that RPL was going to have to wait for their money until the appeal is disposed of.

60. In regards to Citation #3, Mr. Price Q.C. submits that the alleged failure to follow instructions was in relation to the rescission offer. The evidence of the Member is that this was not discussed until after the September 2006 meeting at the Member's office. This accords with the evidence of H.D. that she knew nothing about the on goings on the file until September 2006. The Member's evidence was that a rescission offer would not likely be accepted in any event given the value of the property. In further support of this, Mr. Price Q.C. points to the initial letter from the purchasers lawyer in June 2006 (Exhibit 10) requesting 30 days to put together financing. The Member did not file the foreclosure action until 31 days later, thus there could not have been any discussion regarding rescission prior to that time.

61. At the hearing before Master Alberstat, the court makes a comment about rescission and H.D. picks up on that. She directs the Member to serve an offer for rescission. The Member's evidence is that he prepared it and mailed it that evening. The evidence is also clear that the offer was not received by the purchasers' lawyer until April 12th, 2007. Counsel for the LSA theorizes that the Member must not have sent it until April 2007 and that this is further evidence that the Citation is made out. Mr. Price Q.C. suggests that theory is wrong. The Member left the evening of February 27, 2007 for a holiday. He is gone for two weeks. Upon his return, he learns that H.D. has terminated his services effective March 5th, 2007 (paragraph 36, Exhibit 6). It would make no sense for the Member to wait almost one full month from the return from his holiday to prepare and send the rescission offer out particularly given that his retainer had been terminated. The Member explains the offer not being present on the file when H.D. reviewed the file at his offices after he left for holiday by indicating that he had taken a part of the file with him to court and left the balance of the file in his office. H.D. would not have seen the part of the file that he took to court as it had not been returned to the file by him prior to his departure on holidays.

62. Finally, Mr. Price Q.C. reminds the Hearing Committee of the Member's evidence that the first time H.D. complains about the Member not following her instructions is at the taxation and that H.D. admitted that when shown the transcript from the taxation.

63. In regards to Citation #4, the settlement offer is the purchasers' lawyer's letter of June 13, 2006 (Exhibit 10). Mr. Price Q.C. indicates that this was not really a settlement offer in the strictest sense. It simply indicates that they are requesting an extension to respond to the demand letter. H.D. indicated that she never knew about the extension request until September 2006. The Member's evidence confirms that H.D. was not sent a copy of the letter. There is a divergence in the evidence in that the Member suggests

he telephoned H.D. to advise her of same. In support of this, the Member relies upon the telephone message note from his office (Exhibit 9) that he spoke to H.D. on June 13th, 2006. In addition, the Member recalls the discussion about the fact that the purchasers were proposing to pay out the mortgage but not be responsible for legal fees and that this point resulted in an angry reaction from H.D. The Member further testified that he recalled the conversation because he had a specific recollection about the sunlight coming into his office. The significant part of the conversation that was recalled by the Member is the reaction to the legal fees and not, as counsel for the LSA has suggested the sunshine. The legal fees was an important issue to H.D. and the fact that she reacted so strongly in the phone conversation is supported by the Member's letter of June 28th, 2006 (Exhibit 30) where the Member makes it clear to the lawyer for the purchasers that H.D. is seeking her legal fees.

64. Mr. Price Q.C. suggests that on this point, the Member's evidence should be preferred over that of H.D. given her lack of candor in her evidence. Mr. Price Q.C. indicates that H.D. maintained that she had no idea what was going on in relation to these lawsuits, however, she had signed two Affidavits of Records, an Affidavit of Default and attended in examinations on Affidavit. She did not mention any of these items in her direct evidence and only acknowledged them upon cross examination.

65. In regards to the evidence of L.C. on this point, Mr. Price Q.C. submits that she had minimal involvement in the files. She signs one letter (Exhibit 30) prepares a blanket defence and has a meeting with H.D. on September 20th, 2006. She then moves offices at the end of September. Clearly she is not in charge of the file and the Member is. This is supported by the Member's evidence about the phone call with H.D. on June 13th referred to above.

66. Mr. Price Q.C. suggests that the Member's recollection regarding the Examinations on Affidavit being foggy was really that the Member could not recall whether counsel had agreed to utilize the transcripts as a Discovery transcript in both actions. There was no evidence of such an agreement, however, the fact that utilizing transcripts for a dual purpose is done regularly is a reasonable explanation of his foggy memory on that point. It should not be a fact that the Member's credibility should be judged.

67. In response to Chapter 9, Rules 5 and 15 of the Professional Code of Conduct, the Member did, it is submitted, comply with the directions in those Rules. The Member did wait to file the foreclosure action for a period of 31 days after the request from opposing counsel to permit the purchasers to obtain financing.

68. In regards to Citation #5, Mr. Price Q.C. refers the Hearing Committee to the following:

- June 13th letter (Exhibit 10);
- June 13th phone call;
- June 28th letter (Exhibit 30);
- June 30th -Tort Statement of Claim filed (Exhibit 42);
- July 7th phone call;
- July 14th - Foreclosure Statement of Claim filed (Exhibit 39);

- July 16th - chance meeting at the restaurant;
- August 31st - Statement of Defence filed on Tort action (Exhibit 43);
- September 5th – Counterclaim filed (Exhibit 40); and
- September 12th – Statement of Defence to Counterclaim filed (Exhibit 41).

All of this points to the fact that the Member did in fact keep H.D. advised of the lawsuit. Mr. Price Q.C. concedes that the Member did not send copies of the pleadings to H.D.

69. In relation to Citation #6, Mr. Price Q.C. submits that the Member did in fact deal with the legal fee issues throughout the lawsuit as he knew this was an important matter for H.D. In support of this, he refers the Hearing Committee to Exhibits 35, 36 and 39. All of these provide for the payment of solicitor client fees to H.D. All of these were available to H.D. and were very clear that she was entitled to costs. It does not make sense that she did not comprehend this. In fact, it is submitted, it is really not a question of entitlement at all but rather one of amount. The fact that the costs matter has still not been resolved should not rest at the feet of the Member.

70. In addition, the Member's evidence confirms that he had discussions with H.D. regarding the redemption period and that he thought it would be between 60 – 90 days (Exhibit 11). He was surprised that the court ordered a 6 month redemption period.

71. Mr. Price Q.C. suggests that the Member did good legal work for H.D. while he was retained and that in fact H.D. was paid the amount outstanding on her mortgage. The only outstanding issue is the quantification of the legal fees. This is indicative that H.D. must have comprehended the advice and process as the Member would not have proceeded without instruction.

72. In relation to Citation # 7, Mr. Price Q.C. submits that the same is subsumed in Citations #5 and that his submissions apply equally here.

73. In relation to Citation # 8, Mr. Price Q.C. submits that the failure to ensure that L.B. was aware of the trial date is a negligence issue and not one that deals with conduct deserving of sanction. There is no intentional conduct or willful neglect on the part of the Member and therefore there is no conduct deserving of sanction.

74. In addition, the evidence is clear that a student working for the Member was in charge of contacting L.B. (Exhibits 14, 15 and 22). The Member's evidence is that the student advised him that he had spoken to L.B. and that he was aware of the trial date. This is contrasted with L.B.'s evidence that he didn't know about it. Mr. Price Q.C. submits that the Member's evidence on this point should be preferred as L.B.'s evidence regarding being out of pocket when the matter was resolved through ALIA is not possible. He suggests that L.B. must be confused on this point and it is open for the Hearing Committee to conclude that he is also confused about being informed about the trial date. In addition, the evidence was that L.B. was in the hospital between September 19th to October 12th – the day of the trial. Thus the Member would not have been able to run the trial in any event as L.B. would not have been available. He attempted to obtain an adjournment with the assistance of opposing counsel however the court was not prepared to grant same.

75. The Member decided to wait until he received a copy of the Default Judgment before advising L.B. of what occurred as it was the Member's understanding that the presiding judge gave leave to open the judgment up within a certain period. The Member's plan was to obtain the judgment and then take steps to open the judgement up, but he never received a copy. L.B. also did not try contacting the Member while he is hospitalized prior to the trial, for obvious reasons.

76. In relation to Citation # 9, Mr. Price Q.C. submits that it is subsumed in Citation #8. The Member admits he made a mistake (Exhibit 33). Mr. Price Q.C. submits that this mistake should not attract sanction.

77. In relation to Citation # 10, Mr. Price Q.C. submits that there is not an unreasonable time interval between getting the default judgment at the end of November and the transference of the file by December 6th (Exhibit 25). The file was eventually delivered to counsel in early January. There is no evidence that the intervening period resulted in any prejudice to L.B. and it is submitted that the citation is not made out.

SUBMISSIONS IN REPLY BY THE LSA

78. The documentary evidence from Canada Revenue Agency (Exhibit 26) suggests that the increased payments to CRA by the Member were to commence in October 2007. This is in direct contrast to the Member's evidence that the increased payments commenced in June 2007.

79. It is open for the Hearing Committee to conclude that the Member sent the rescission offer in April because he knew that a complaint was forthcoming as the letter from H.D. terminating his services was copied to the LSA.

80. Finally, the inference suggested by Mr. Price Q.C. that L.B. did not contact the Member between June and the October trial date was that he was focused on his health, could also be inferred to be that L.B. didn't contact the Member because he wasn't aware of the trial date.

CONCLUSION OF THE HEARING COMMITTEE ON THE CITATIONS

81. The Law Society governs the profession in the public interest. To protect the public and the reputation of the profession generally, the Benchers and the LSA are vigilant about ensuring the integrity and competence of the LSA's members. Lawyers must be honest, as well as conscientious and diligent in the service of their clients' interests. A failure to maintain those standards reflects poorly on the entire profession, undermines public confidence, and puts the public at risk.

82. In assessing allegations of misconduct, the primary concern is with conduct that reflects poorly on the profession or that calls into question the suitability of the individual to practice law. A lawyer's intentions and the willfulness of conduct are relevant, but not always determinative. Ethical misconduct does not necessarily correspond to the legal rules governing negligence. An isolated incident or inadvertent error may constitute negligence and be legally actionable without amounting to incompetence or another form of ethical breach. Conversely, conduct that evidences gross neglect in a particular

matter, or a pattern of neglect or mistakes in different matters, may be regarded as an ethical breach, even though it has not resulted in loss or damage to a client: *Code of Professional Conduct,* Interpretation Section at paragraph 3, and Chapter 2 at paragraph G.2 of the Commentary.

83. The Hearing Committee finds the Member guilty of Citation # 1. The simple fact of the matter is that the Member chose not to pay the RPL debt until he has paid other debts he had. He admits that he did not pay the rent for November and December 2009 together with the tax and utility charges as require by the lease.

84. The Hearing Committee finds that the Member has not made out the impecuniosity defence raised by him. The defence is a positive one and the Member bears the burden of establishing same on a balance of probabilities.

85. There was significant evidence led by the LSA and the Member regarding his spending and debts during 2006 & 2007. The evidence led by the Member confirmed that he had debts and needed to restructure his practice to deal with them effectively. While there was some evidence regarding what appeared to be excessive spending, the Member led evidence that satisfactorily explained that much of the spending was not all paid for by the Member, but rather was paid for by his spouse.

86. What was lacking in the Member's evidence was any evidence regarding his income during this period by way of tax returns. Nor did the Member tender financial statements for his practice that may have assisted his claim that he was impecunious.

87. The Member chose not to pay the RPL debt until last. He chose to pay other debts first and also continued to take holidays, purchase and sell homes, and move his offices.

88. The Hearing Committee finds the Member guilty of Citation # 2. The Member admits he did not pay the judgment in full for close to three years after the judgment was obtained by RPL in April 2006.

89. It is true that the Member appealed the judgment but that appeal was dismissed in October 2006.

90. The Member claimed that he had a bona fide defence in that a third party was going to lease the space that he had rented for November and December 2004. He alleged that RPL had agreed to relet the premises to this third party. The third party did not attend at the trial and judgment was granted against the Member. The third party was not present for the appeal, nor does there appear to be any evidence proffered by the third party by affidavit or otherwise. The Member did not call the third party at this hearing or produce any evidence from the third party. The Member had the burden to satisfy the Hearing Committee, on a balance of probabilities that he had a reasonable justification for not paying RPL. The Hearing Committee finds that he has not.

91. The Hearing Committee adopts the submission of counsel for the LSA – "These commitments constitute ethical as well as legal obligations." The Hearing Committee agrees that the Member's conduct in relation to Citation 1 and 2 results in a breach of the ethical obligations provided in Chapter 3 and 8 of the Code of Conduct and that the Member's conduct is deserving of sanction.

92. The Hearing Committee does not find that Citation # 3 is made out. The evidence is that the Member did in fact implement H.D's instructions to make the rescission offer.

93. The evidence is far from clear that H.D. instructed the rescission offer earlier than February 2007. The evidence confirms that it was discussed prior to this date, however, the Hearing Committee is not satisfied that the evidence is such that earlier instructions to make the rescission offer occurred prior to February 2007.

94. The Hearing Committee finds the Member guilty of Citation # 4. The settlement offer was provided to the Member by letter from the purchaser's lawyer on June 13, 2006. The Member admits he did not forward a copy of this letter to H.D.

95. The Member indicates he spoke to H.D. about the offer on the same day it was received, June 13, 2006. The Member refers to the phone message pad from his office found it Exhibit 9. The phone message refers to H.D. telephoning and returning the Member's call on June 13, 2006. The Member recalls the conversation due to H.D.'s heated response to the offer and that the sun was streaming through his window on that day. The Member did not make any notes of this conversation nor did he follow it up with a letter confirming H.D.'s instructions.

96. H.D.'s evidence was that she had no contact with the Member before June 10, 2006 to September 20, 2006.

97. On this point and contradictions in evidence, the Hearing Committee prefers the evidence of H.D. The Member admits that at the initial meeting with H.D. that she made it clear that she wanted her legal fees covered by the purchasers due to their default on the mortgage. The Member does not explain any discussion with H.D. regarding the other aspects of the offer. He simply recalls her reaction to the legal fees issue. The inconsistency is unexplained and the Hearing Committee does not accept the Member's recollection of same in the absence of notes made regarding the call, and in the face of H.D.'s consistent position that she had no contact with the Member between June 10, 2006 and September 20, 2006. The Hearing Committee finds that the Member admits H.D. was upset when he saw her on a subsequent occasion regarding unreturned phone calls from the Member as further support of H.D.'s position on this point.

98. The Hearing Committee finds the Member guilty of Citation # 5. For the reasons stated above in relation to Citation # 4, the Hearing Committee prefers the evidence of H.D. It is clear that copies of letters sent and received by the Member were not sent to H.D. The Member admits that it was not his practice to do so at that time. In addition, the Member and his wife confirm a meeting with H.D. where she was unhappy about an unreturned phone call or calls.

99. H.D.'s evidence was that she was surprised at the extent of the file when she reviewed it in September 2006. L.C. confirmed that H.D. seemed surprised while she was reviewing the file with her.

100. H.D. testified that she did not recover one statement of account from the Member between May 2006 to January 2007 despite paying over $12,000.00 to the Member during this period. The Member did not contest this point.

101. The Hearing Committee finds that the Member's conduct between the dates of May 2006 and November 2006 was such that the Member did not keep H.D. properly informed as to the progress of the matter and that such conduct is deserving of sanction.

102. The Hearing Committee finds the Member guilty of Citation # 6. For the reasons stated above in relation to Citation # 5, the Hearing Committee prefers the evidence of H.D.

103. The Member admits it was not his practice to confirm clients' instructions by letter to ensure there was no miscommunication. The fact that the Member did file all necessary court documents to properly prosecute and defend the actions is not at all the same as ensuring that H.D. understood what was happening and why.

104. The lack of comprehension is confirmed further by H.D.'s continued and ongoing focus and confusion over legal fees and the issue of rescission. H.D.'s clear ongoing confusion on these issues is supportive of the findings of the Hearing Committee that she did not have a clear understanding of the lawsuits. Accordingly, the Hearing Committee finds that the conduct of the Member in this regard is deserving of sanction.

105. The Hearing Committee finds the Member guilty of Citation # 7. The reasons stated in relation to Citations 4 and 5 apply equally to this Citation. Accordingly, the Hearing Committee finds the Member's conduct is deserving of sanction.

106. The Hearing Committee finds the Member guilty of Citation # 8. L.B. had been kept informed of all of the various adjournments and new trial dates except for the very last one. The Member indicates that an associate had advised him that he had spoken to L.B. by phone to advise him of the trial date. The associate was not called to provide that evidence. In addition, a letter to L.B. advising of the new trial date was located on the Member's file and did not appear to have been sent.

107. L.B. was adamant that he had not been advised of the new trial date. He had no knowledge of it even after a Default Judgment has been issued. The Member knew about the Default Judgment but did not contact L.B. about same.

108. The Hearing Committee does not accept as credible, the Member's evidence that he was going to wait for receipt of the Judgment before speaking to L.B. What could be gained by waiting? The Member knew about the Default Judgment and its terms. One would have thought he would have immediately told L.B. about what happened and received instructions to begin working on an application to set the Default Judgment aside. Rather the Member waited in silence until contacted by L.B's new counsel requesting that the Member transfer the file. In a letter the Member admitted this mistake in handling L.B.'s file to L.B.'s new counsel.

109. Accordingly, the Hearing Committee finds the Member's conduct is deserving of sanction.

110. The Hearing Committee finds the Member guilty of Citation # 9 for the same reasons related above in regards to Citation # 8. This is not a matter of simple negligence. Ethical misconduct does not necessarily correspond to the legal rules

covering negligence. The Hearing Committee finds the Member's conduct in this regard deserving of sanction.

111. The Hearing Committee finds the Member guilty of Citation # 10. The evidence is clear that the Member did not contact L.B. in any way following the granting of the Default Judgment. He admits to a fellow Member of the Bar that this was a mistake. The Hearing Committee agrees. The explanation for the delay in contacting L.B. is simply unacceptable. Accordingly, the Hearing Committee finds the Member's conduct deserving of sanction.

SUBMISSIONS AND EVIDENCE ON SANCTION

112. Mr. Groome tendered the record of the Member, which was entered as Exhibit 52 by consent. The Record indicates that the Member had no prior discipline record.

113. Mr. Groome tendered the LSA's Estimate of Costs that was entered as Exhibit 53 by consent.

114. Mr. Groome tendered an internal memo from the Practice Review Department dated June 21, 2011, which was entered as Exhibit 54 by consent.

115. Mr. Groome submitted that in sanctioning a Member, the Hearing Committee must utilize a purposeful approach, keeping in mind that the protection of the best interests of the public and to protect the standing of the legal profession generally.

116. Mr. Groome referred the panel to paragraph 60 of the Hearing Guide and suggested the following factors were the most relevant for the panel to consider:

a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.

b) General deterrence of other members.

c) Denunciation of the conduct.

d) Rehabilitation of the member.

117. Mr. Groome submitted that mitigating factors were the Member's provision of the Agreed Statement of Facts, which resulted in compressing the time needed for the hearing and avoided the need of calling witnesses. In addition, the Member had no prior disciplinary record.

118. Mr. Groome submitted that the Hearing Committee should have regard to s. 72 of the *Legal Profession Act* and submitted that the appropriate sanction in this matter would be a reprimand of the Member. In addition, it was submitted that the Member should pay the full amount of the actual costs of the hearing despite having been found guilty of only 9 of the 10 citations. The reason that no discount should be given on the costs of the hearing are due to the late provision of certain documents to the LSA.

119. Mr. Groome would have been requesting in addition a direction that the Practice Review department become involved with the Member, however, given the memo

entered by consent as Exhibit 54 in these proceedings, the same was not appropriate in the context of this hearing.

120. Mr. Price Q.C. submitted that the appropriate sanction should be a reprimand as well.

121. Mr. Price Q.C. noted that the costs that the LSA was seeking were considerable and that if the Member was directed to pay the full costs that in effect that was a fine.

122. Mr. Price Q.C. indicated that his client was prepared to return to Practice Review and suggested that it was open to this Hearing Committee to impose that as part of its sanction.

DECISION AS TO SANCTION

123. In determining an appropriate sanction, the Hearing Committee is guided by the public interest, which seeks to protect the public from acts of professional misconduct. The primary purpose of disciplinary proceedings is the protection of the best interests of the public and protecting the standing of the legal profession generally. The fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.

124. In *McKee v. College of Psychologists (British Columbia),* [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

> "In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree or risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practice, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science."

125. The Hearing Guide for the LSA, at paragraphs 60 and 61, articulate the relevant factors to be considered in determining the appropriate sanction:

> 60. A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.
>
> a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.

b) Specific deterrence of the member in further misconduct.

c) Incapacitation of the member (through disbarment or suspension).

d) General deterrence of other members.

e) Denunciation of the conduct.

f) Rehabilitation of the member.

g) Avoiding undue disparity with the sanctions imposed in other cases.

In one way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.

61. More specific factors may include the following:

a) The nature of the conduct:

(i) Does the conduct raise concerns about the protection of the public?

(ii) Does the conduct raise concerns about maintaining public confidence in the legal profession?

(iii) Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties to the court, other lawyers or the Law Society)

(iv) Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?

126. The Hearing Committee was influenced in its decision as to sanction by the following factors:

(a) the Member's co-operation with the LSA;

(b) the Member's lack of a prior discipline record;

(c) that specific deterrence of the Member will be achieved with a reprimand in these circumstances; and

(d) that from a general deterrence perspective, that it is important for all members of the LSA to understand that compliance with the Code of Conduct is important not only to the Bar, but also to maintain the public's confidence in the legal profession.

127. Taking into account all of the foregoing factors, the Hearing Committee concluded that the public interest would be protected and confidence in the profession maintained through a reprimand.

128. In addition, the Member is directed to pay the actual costs of the hearing. The Member was given time to pay the costs of 12 months from the receipt by the Member of the Statement of Costs.

129. The Chair delivered the reprimand to the Member, which expressed denunciation for the conduct of a Member that brought discredit to the profession. A copy of the reprimand is appended to this Hearing Report.

130. No direction to the Practice Review Committee was warranted.

CONCLUDING MATTERS

131. The Hearing Committee Report, the evidence and the Exhibits in this hearing are to be made available to the public, subject to redaction to protect privileged communications, the names of any of the Member's clients and such other confidential personal information. In particular Exhibit's 13 and 44 shall be redacted in their entirety. Exhibit 34 shall be redacted to the extent that any deposit information that may lead to the identification of the account holders shall be redacted.

132. Mr. Price Q.C. submitted that the redaction direction of the Hearing Committee should also include Exhibit 26 in its entirety given that it is sensitive tax related information. Counsel for the LSA was opposed to any redaction given the finding of guilt and upon the principle of transparency of these proceedings.

133. The Hearing Committee is mindful of Rule 98(3) of the Rules of the Law Society of Alberta that says:

> Exhibits introduced in evidence before the Hearing Committee when the hearing is held in public shall be made available for inspection, and copies shall be provided on request, in accordance with the Committee's directions unless the Hearing Committee directs that they will not be made available or will not be copied. The Finance Committee, or its delegate, may prescribe a rate to be used to determine the cost to be paid for copies made.

With that Rule in mind and the direction of the Benchers of the Law Society regarding the importance of transparency in these proceedings, the Hearing Committee denies the application of Mr. Price Q.C. to redact Exhibit 26.

Dated this 10th day of April, 2012.

James A. Glass, Q.C., Bencher
Chair

Scott Watson, Q.C., Bencher

Dr. Miriam Carey, Lay Bencher

REPRIMAND

Mr. Schneider, the Law Society of Alberta governs the profession in the public interest. Self regulation through an independent Law Society is a privilege which our profession enjoys.

That privilege is only preserved if lawyers firmly commit to and honour the ethical tenets of our profession. We are obligated to serve our clients diligently, conscientiously, and with a selfless regard for the clients' interests.

Here you have failed in your ethical obligation. You failed to meet commitments concerning the business aspect of your practice. You failed to honour a judgment against you within a reasonable time. You failed to keep clients properly informed. You failed to keep clients informed on a timely basis. Due to some of those failings you exposed one of your clients to the risk of having a judgment enforced against him.

In these substantial respects you failed your clients and your profession. The public interest we serve demands more of you. Your standard of conduct fell short. As a consequence, you invited public derision of you and your profession. That loss of confidence is not easily regained. Your professional colleagues, quite frankly, expect more of you.

Having said that, we are mindful that these matters occurred some time ago, between the dates of 2006 and 2008.

Today, Mr. Schneider, you have the opportunity to move forward with your career. You potentially have a long career ahead of you. You have this opportunity to proceed with greater care and to demonstrate that you can emulate the best traditions of our profession. We hope and expect, Mr. Schneider, that this will be the last time that you appear before benchers in this type of proceeding.