Law Society file No.: HE20100021

THE LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

IN THE MATTER OF THE *LEGAL PROFESSION ACT,* R.S.A. 2000, C. L-8
AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
CHARLES FAIR
A MEMBER OF THE LAW SOCIETY OF ALBERTA

INTRODUCTION

1. A Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the Law Society offices, in Calgary, on January 30, 2012 to consider the conduct of Charles Fair (hereinafter referred to as the "Member").

2. The Committee was comprised of Dennis Edney, Chair, James A. Glass, Q.C. and Dale Spackman, Q.C. The LSA was represented by Mr. Garner Groome. The Member was present throughout the hearing and represented by Mr. Jim Thornborough. Also present at the Hearing was a court reporter to transcribe the proceedings.

JURISDICTION

3. Jurisdiction was established by the introduction of Exhibits J-1 through J-5 consisting of:

   - Letter of Appointment of the Hearing Committee Exhibit J-1,

   - Notice to Solicitor pursuant to section 56 of the *Legal Profession Act* with acknowledgement of service setting out the nine Citations Exhibit J-2,

   - Notice to Attend with acknowledgement of service directing the Member to attend the Hearing Exhibit J-3,

   - Certificate of Status certifying the Member was and the active member of the LSA Exhibit J-4,

   - Certificate of Exercise of Discretion pursuant to Rule 96(2) (b) of the Rules of the LSA ("Rules") by which the Director, Lawyer Conduct of the LSA, determined that no one was to be served with a Private Hearing Notice Exhibit J5,

EXHIBITS

4. Exhibits J-1 through J-5 were entered into the record with the consent of the parties.

5. Additional Exhibits 1 through 3 were entered into the record during the course of the proceedings with the consent of the parties.

CITATIONS

6. The Member faces nine Citations:

   IT IS ALLEGED THAT you failed to be courteous and candid in your dealings with A.T. and/or N.T., and that such conduct is conduct deserving of sanction

   IT IS ALLEGED THAT you failed to conscientiously serve your client(s), A.T. and/or N.T., and to advance their matter, and that such conduct is conduct deserving of sanction.

   IT IS ALLEGED THAT you failed to use reasonable efforts to ensure A.T. and/or N.T. understood your advice and recommendations, and that such conduct is conduct deserving of sanction.

   IT IS ALLEGED THAT you failed to be punctual in fulfilling commitments to your client(s) A.T. and/or N.T., and that such conduct is conduct deserving of sanction.

   IT IS ALLEGED THAT you failed to respond to communications from A.T. and/or N.T. on a timely basis, and that such conduct is conduct deserving of sanction.

   IT IS ALLEGED THAT you failed to provide A.T. and/or N.T. with written information regarding fees within a reasonable time after commencing your representation, and that such conduct is conduct deserving of sanction.

   IT IS ALLEGED THAT you, on termination of your representation, failed to endeavour to avoid prejudice to A.T. and/or N.T., and that such conduct is conduct deserving of sanction.

   IT IS ALLEGED THAT you failed to respect and uphold the law by not reimbursing A.T. and/or N.T. the amount owed following the taxation of your accounts, and that such conduct is conduct deserving of sanction.

   IT IS ALLEGED THAT you failed to respond on a timely basis and in a complete and appropriate manner to communications from the Law Society in the matter of a complaint made by A.T. and/or N.T., and that such conduct is conduct deserving of sanction.

PRELIMINARY MATTERS

7. The Chair introduced the Committee and inquired of the Member's counsel if there is any objection to the membership of the Committee based on bias, a reasonable apprehension of bias or any other reason. Counsel, on behalf of the Member, expressed satisfaction with composition of the Committee.

8. The Chair inquired whether the Member wished to make a Private Hearing application, while recognizing hearings ought to be conducted in public unless a compelling privacy interest requires protection, and then only to the extent necessary. This was declined by counsel on behalf of the Member.

9. The Chair directed that the Hearing be held in public.

CONSOLIDATED CITATIONS

10. In the course of the hearing the Committee approved the joint recommendation of the parties to consolidate and amend the citations as follows:

    (1). Citation 2, 3,4,5,6, and 7 to be combined into a single Citation 2 as follows:

    > **IT IS ALLEGED THAT** you failed to conscientiously and diligently serve the best interests of your clients A.T. and N.T. by failing to: advance their matter in a timely fashion, use reasonable efforts to ensure they understood your advice and recommendations, punctually fulfill commitments, respond to communications in a timely fashion, provide written confirmation of the fee arrangements, and avoid prejudice to them upon termination of the representation; and that such conduct is deserving of sanction.

    (2). Citation 8 is amended to read:

    > **IT IS ALLEGED THAT** you failed within a reasonable time to reimburse A.T. and N.T. the amount owed to them following the taxation of your accounts, and that such conduct is conduct deserving of sanction.

BACKGROUND:

11. This matter arises from the Member's practice of law. His failure to act in a professional and transparent manner in his dealings with the clients and the Law Society of Alberta.

AGREED STATEMENT OF FACTS AND ADMISSION OF GUILT

12. An Agreed Statement of Facts and Admission of Guilt signed by the Member were admitted as Exhibit 1 at the hearing.

13. The Member admitted as fact the statements contained in the Agreed Statement of Facts for the purposes of these proceedings.

14. The Statement of Facts and Admission of Guilt is reproduced as follows:

    - The Law Society received a written complaint on January 6, 2009, which indicated that A.T. ("Complainant") and his wife, N.T., had retained Charles Fair ("Member") in August 2008 regarding an insurance claim after they experienced a fire loss to their condominium property. The Complainant alleged:

    - Member ignored client emails and phone calls

    - The Member overbilled the clients by billing for reviewing emails and voice messages that he had ignored

    - The Member failed to follow through with his commitments to provide a written retainer agreement and inform other parties of his representation;

    - The Member failed to do any work on the client matter;

- The Member was rude and discourteous in his communications;

- The Member failed to deliver the client file after termination of services.

- A partial list of email correspondence between the Complainant and the Member accompanying the complaint outlined the background of the complaint:

  On November 7, 2008, the Complainant noted that he had been attempting to contact the Member for a week with no success. He requested an appointment on either November 17 or 18, 2008;

  On December 2, 2008, after a telephone conference with the Member on November 18, 2008, the Complainant noted that he was unhappy with the Member's services and requested the Member advise him as soon as possible if he was unwilling to represent him and his wife;

  On December 4, 2008, the Complainant informed the Member that his services were terminated due to incorrect billing, lack of communication, lack of progress on the file, and unfulfilled commitments. The Complainant also requested the return of the remaining retainer deposit and asked that the file to be prepared for transfer to another lawyer;

  On December 5, 2008, the Complainant requested the client file and balance of the retainer deposit to be ready for him pick up on December 12, 2008;

  On December 11, 2008, in response to the Member's email informing the Complainant not to attend or telephone his office, the Complainant provided the Member with an address to where the client file could be forwarded;

  On December 18, 2008, the Complainant noted that the client file had still not been received and requested that it be forwarded as soon as possible;

  On December 22, 2008, the Complainant noted that the client file and retainer deposit had still not been received and advised, if they were not received by December 24, 2008, an Assurance Fund claim would be filed.

  By letter dated January 7, 2009, a copy of the complaint was forwarded to the Member requesting his written response to the Law Society by January 26, 2009. On being contacted January 22, 2009, by a Complaints Resolution Officer, the Member indicated he had been away and had not received the complaint from the Law Society. Another copy of the January 7, 2009 letter and attached complaint were provided to the Member by facsimile on January 22, 2009.

  On January 22 and 23, 2009, the Complainant provided the Law Society with further information to support his complaint:

A copy of a letter from the Member to the Complainant dated November 6, 2008, enclosing a Statement of Account, dated October 31, 2008, and requesting additional money to refresh the retainer deposit;

A copy of an email from the Member to the Complainant, sent November 25, 2008, attaching a Statement of Account, dated November 25, 2008, and requesting additional money to refresh the retainer deposit. The Member stated a concern that the Complainant did not understand the issues related to the claim and the decisions required regarding costs.

On January 28, 2009, the Member requested an extension of time to provide a response to the Law Society which was allowed to February 6, 2009. On being contacted by a Complaints Resolution Officer, the Member suggested that he was aware that the Complainant had retained new counsel and he had not yet received a request to transfer the client file. The Member also indicated that he had returned the funds provided by the clients to engage an investigator. On February 3, 2009, a further extension was requested by the Member to February 9, 2009 which was allowed.

The Member did not provide a written response to the Law Society within the time allowed. On February 19, 2009, a second letter was sent to the Member requiring his written response to the complaint not later than February 27, 2009. On being contacted by a Complaints Resolution Officer on March 6, 2009, the Member indicated that he had been away, had not received the February 19, 2009 letter, and requested a further extension which was allowed to March 13, 2009.

- On March 16, 2009, the Law Society received the Member's written response, dated March 13, 2009, advising of the following:

  The Member was retained by the Complainant and his wife in August 2008 to investigate and obtain compensation for a fire loss of their vacation home. The Complainant informed the Member that he sustained a significantly higher loss than other owners because of substantial re-modeling and improvements to the property. The Member indicated that when he asked the clients for evidence to support the loss, the Complainant became uncooperative and belligerent;

  The Member stated that the Complainant failed to make decisions to allow the matter to proceed and was resistant to hiring an independent fire inspector to substantiate the loss;

  The Member stated he was unable to prepare a retainer agreement due to the Complainant's unclear instructions. The Member indicated his legal fees were higher because of the Complainant's misrepresentations and refusal to cooperate. He noted that the Complainant failed to understand the Member's advice which required lengthy communications to explain the matter;

The Member suggested that, after the clients realized that their false claim was coming to light, they appeared to change tactics to deflect blame toward him. The Member alleged that the Complainant sent him emails with false assertions and described events that never happened;

The Member suggested that the Complainant demanded that he continue to provide legal services but did not intend to pay for the services and refused to substantiate the fire loss. The Member stated he took steps to withdraw from the file without prejudicing the matter and to advise the clients of the their options;

The Member expressly denied the allegations of improper billing. He indicated that he discussed his fees, billing procedures and retainer requirements with the Complainant at their initial meeting.

The Member noted that he received a total amount of $7,836.74 and returned the amount of $2,090.57 to the Complainant;

The Member suggested that the complaint was frivolous and was made to deflect attention away from the Complainant's misrepresentations and take advantage of an opportunity to extract money.

- On April 16, 2009, the Complainant provided the entirety of the written communications with the Member and provided the following comments in reply to the Member's response:

  The Complainant denied ever misrepresenting the size of the claim. He noted that the Member originally agreed that they had sustained a larger loss than other owners but suddenly changed his position upon his services being terminated;

  The Complainant denied being belligerent, uncooperative, or refusing to provide evidence. He noted all requested documentation had been provided to the Member within one month of the initial meeting with the Member. Additional information requested by the Member on September 10, 2008, was provided to his office the following week;

  The Complainant denied being resistant to hiring a fire inspector. The Complainant and his wife spoke by telephone with the Member on November 18, 2008. He noted the Member advised them at that time to retain their own inspector. On November 20, 2008, the Complainant sent the Member an email advising that he would be dropping off a cheque to retain the inspector. The cheque was provided to the Member on November 24, 2008. The Complainant noted the cheque was cashed however the inspector was never hired;

  The Complainant stated that he understood the Member's fees would be based on an hourly rate of $250.00 and he did not understand where the higher fees came from. He noted that a requested written retainer agreement had not been provided by the Member. The Complainant requested the agreement again in his email of November 26, 2008, but

one was never provided. The Complainant also noted the Member did not act on the clients' request that he revise or explain his billings;

The Complainant denied having lengthy communications with the Member. He stated only two communications occurred with the Member; one on August 15, 2008 when he retained the Member and the other one on November 18, 2008 when he spoke to the Member by telephone. The Complainant noted that, in both conversations, the Member appeared to be more concerned with his fees than with the file;

The Complainant denied threatening the Member to inform other parties that he was responsible for the matter not moving forward. The Complainant indicated that he was contacted by the strata corporation representative who informed him that the Member was not responding to their requests;

On December 4, 2008, the Complainant terminated the Member's services. He requested any remaining funds in trust be returned by the Member and that the file be prepared for pick up. On December 5, 2008, the Member sent a letter to the Complainant confirming his termination on the file and stated he would be preparing and providing a copy of the client file. The Member also noted that the Complainant must act soon to pursue his claim or settlement;

The Complainant sent an email to the Member on December 5, 2008, stating that he would pick up the file and remaining funds from the Member's office on December 12, 2008. The Member responded on December 11, 2008, by demanding the Complainant not appear at his office and to provide an address so that he could forward the file. On the same date, the Complainant sent an email reply to the Member with his address;

On December 18, 2008, the Complainant sent the Member a further email note indicating that he had not received the file and requested that it be sent or couriered to his home address as soon as possible. The Complainant sent a further email on December 22, 2008 advising that if the file was not received by December 24, 2008, he would file an Assurance Fund claim;

The Complainant made a claim to the Assurance Fund. It was denied and the Complainant was advised to pursue the matter through taxation of the Member's accounts.

- The complaint was referred to the formal complaints process and a letter was sent to the Member on June 3, 2009, requesting his response, pursuant to Section 53 of the *Legal Profession Act*.

- The Member responded by letter, dated June 18, 2009, advising that he wished to adopt his previous response. He claimed that the Complainant had not commenced taxation proceedings.

- On August 26, 2009, the Complainant informed the Law Society that the Member's billings were in fact reduced by 33% on a taxation of the accounts in July 2009 and that the Member failed to pay the amount owing to the Complainant. The Complainant also indicated that the Member still failed to deliver the client file.

- On September 23, 2009, the Law Society received further information from the Complainant, including:

  a copy of an Appointment for Taxation, dated May 4, 2009, endorsed by the Taxing Officer on July 28, 2009, that indicated the accounts totalling $5,746.18 were taxed down to $3,842.18 leaving a balance owing to the Complainant of $1,904.00; and

  a copy of a letter from the Complainant's current lawyer to the Member, dated September 11, 2009, that indicated the Member failed to provide the clients the full contents of their file and failed to pay the $1,904.00 owed to the clients following the taxation of his accounts. The letter demanded action within 7 days.

- By letter dated September 25, 2009, a copy of the correspondence received September 23, 2009, from the Complainant was sent by the Law Society to the Member for his comment. No response was received from the Member.

- A further letter, dated October 20, 2009, was sent by registered mail to the Member which noted his failure to respond to the September 25, 2009 letter and requested his written comments to the specified allegations that he had failed to forward the complete client file to succeeding counsel, failed to reimburse his clients following the taxation and failed to respond to the succeeding counsel's correspondence.

- By letter dated November 5, 2009, the Member responded to the Law Society that he was first contacted by succeeding counsel on September 11, 2009 and had forwarded the complete client file on September 21, 2009. The Member indicated that he had also forwarded partial reimbursement in the sum of $1,000.00 to succeeding counsel and was working on paying the balance as soon as possible.

- On December 8, 2009, the Complainant informed the Law Society that he was informed that a stop payment direction was placed on the cheque delivered by the Member to his current lawyer and that no funds had been received from the Member. The Law Society subsequently wrote the Member to request his explanation in stopping payment on the cheque and to further explain his failure to reimburse his clients following the taxation and his intentions to satisfy the debt.

- On December 16, 2009, the Law Society wrote to the Complainant's current lawyer, William Shachnowich, to request that he forward a copy of the correspondence with the Member since his September 11, 2009 letter. Mr. Shachnowich provided the Law Society with a copy of the following correspondence:

A letter from the Member, dated September 21, 2009, enclosing the clients' file and requesting an extension of the deadline to pay the funds owed to the clients following the taxation;

A letter from the Member, dated November 5, 2009, enclosing a cheque in the amount of $1,000.00 in trust for the clients and indicating that the Member was working on providing the balance as soon as possible;

A letter from the Member, dated December 4, 2009, stating that the Member had placed a stop payment on the cheque he sent with his November 5, 2009 letter and requesting return of the cheque;

A letter to the Member, dated December 7, 2009, acknowledging receipt of the Member's December 4, 2009 letter and advising that the cheque had been forwarded to the clients. He demanded full payment of the $1,904.00 refund owing to the clients as a result of the taxation;

A letter from the Member, dated December 8, 2009, repeating his request for return of the cheque without comment about Mr. Shachnowich's demand for payment.

- By his letter, dated December 21, 2009, the Member informed the Law Society that he had stopped payment of his cheque to Mr. Shachnowich because after 4 weeks the cheque had not cleared his account and he had not heard from the clients or Mr. Shachnowich. The Member stated that he required the return of the cheque to prevent deposit of both the November cheque and any subsequent replacement.

- By letter dated December 30, 2009, the Law Society provided the Member a copy of the correspondence received from Mr. Shachnowich and requested his further comments by January 11, 2009 [sic]. It was expressly noted that the Member had failed to provide the requested explanation for his failure to reimburse A.T. and N.T. the amount owed to them following the taxation and failed to indicate the steps he intended to take to pay the debt. No response was received from the Member within the stated time.

- Following an inquiry March 1, 2010 by counsel for the Member on another matter, the Member provided a response to the Law Society's December 30, 2009 correspondence. The Member provided the following information:

  The Member apologized for not responding earlier [without explanation] and noted some unusual events had transpired in the matter. He also indicated that he had recently learned that he was obliged to report a writ of enforcement;

  The Member indicated that, on October 22, 2009, the Complainant had obtained a Writ of Enforcement in respect of the debt owed following the taxation of his accounts and subsequently used the Writ to file a Garnishee Summons against the Member's general operating account on December 29, 2009;

The Member noted that he learned of the garnishment in early January 2010 and on inquiry with the Court determined that the Writ had not been properly issued. It was noted by the Court that $1,585.46 had been remitted pursuant to the Garnishment Summons and the applicant needed to enforce the Certificate of Taxation into a Judgment;

The Member stated that he was willing to work with the Complainant's counsel to arrange for a consent order that the funds be paid out to the Complainant and his wife with appropriate conditions, including the return of his previously issued cheque.

The Member did not provide any evidence of attempting to contact the Complainant's counsel.

- On March 9, 2010, a copy of the Writ of Enforcement, Garnishment Summons and related documents, together with a copy of a Personal Property Registry Search Results Report ("PPR Report"), dated December 24, 2009, was received from the Complainant. The PPR Report noted, in addition to the Writ registered by the Complainant, another Writ of Enforcement, issued June 26, 2007, in favour of Canada Revenue Agency in the original judgment amount of $56,716.48 plus $21,988.50 post judgment interest was registered against the Member. The Report indicated the current amount owing as $51,888.83.

- On March 10, 2010, a copy of the Complainant's documents was sent to the Member. By his letter dated April 4, 2010, the Member provided the following comments:

  Although the Complainant filed the appointment to tax his accounts May 4, 2009, the Member did not receive notice of the appointment until sometime after July 3, 2009;

  As a result of the Complainant not communicating his intention to tax his accounts, the Member made no provision to refund any fees. His June 19, 2009 letter to the Law Society incorrectly stated that the clients had chosen not to tax his account;

  The Member admitted the amount owing following the taxation. He attempted to make a partial payment to the clients and sought to negotiate terms for payment of the balance. He noted his cheque had still not been returned by the Complainant;

  The Member indicated that he disclosed the existence of all writs to the Law Society auditor but until recently he was unaware of his duty to report writs that did not concern client matters. He noted that he was working with the writ holders to facilitate a timely payment to the Complainant;

  The Member indicated that the Complainant had taken further steps to seek judgment on the Certificate of Costs and release of the funds paid into court on the garnishment. The Member stated that he continued to be willing to work with the Complainant and his wife to resolve the complaint and the refund owing to them;

The Member asked to have the complaint matter put over for reconsideration until after the current court proceedings were concluded.

- By letter dated April 8, 2010, the Law Society informed the Member that conclusion of the court proceedings was not necessary for the review of the complaint. A copy of the *Holding Matters in Abeyance Guidelines* was provided to the Member and he was advised the review would be completed in the absence of notice of an application being received by April 16, 2010. No application or further comment was received from the Member.

- The Complainant subsequently perfected the Writ. As a result of a priority maintenance order, the Complainant did not receive any dividend on the distribution of the garnished funds.

- There is no evidence that the Complainant was uncooperative and belligerent.

- There was a lack of real advancement of the claim by investigation, negotiation, or litigation in acting on the clients' behalf. The Member failed to promptly respond to communications from the clients and others and he did not maintain client contact in the manner expected by the Complainant. There was no substantial research, assessment, or client consultation provided by the Member during the course of his representation.

- There is no evidence that the Member provided any significant opinion, advice or report to the clients to address the suggested misunderstandings concerning the viability of the uninsured claim, the tasks the clients needed to complete, and the decisions they needed to make about proceeding their claim. Neither is there any evidence that the clients misrepresented the size of their claim and were using the fire loss as an opportunity to hire a lawyer to extract a quick settlement from the insurer.

- Except for a short email letter, dated September 10, 2008, and a comment in his termination letter, dated December 5, 2008, very little information, advice, or recommendation appeared in the Member's correspondence to the clients. Despite indicating he was aware of a problem, the Member's lack of response to client inquires to ensure understanding and address any concerns resulted in a serious loss of confidence and termination of the Member's representation.

- The Member's lack of response and failure to explain his representation resulted in a serious loss of confidence and termination of the representation without the Member acknowledging the concerns or offering an apology. Instead, the Member reacted by unfairly accusing the clients of refusing to make decisions and failing to comply with his requests.

- There was a lack of a clear understanding and communication about the scope of the Member's representation and the anticipated cost of the services to be provided.

- The Law Society was not provided a transcript of the taxation. In the absence of a retainer agreement or other evidence, it is assumed that the accounts were

assessed on a *quantum meruit* basis. The Member did not appeal nor did he dispute his liability to refund the resulting overpayment to the clients.

- The Member's sole source of income is his practice of law. In the period between January 2007 and December 2010 his income was generally low, with periodic spikes in income as a result of receiving personal injury settlements. His net income for 2008 and 2009 was less than $10,000.00 in each of those years. By mid-2010 the Member's income was significantly higher and he chose to apply available funds to his other significant debts, including child support arrears.

- In December 2010 the Member received a substantial settlement from which he provided his then counsel the sum of $3,000.00 to pay A.T. and N.T. This settlement amount included the balance owing on the taxation, payment of legal costs, and substantial interest far in excess of the legal rate to compensate for the delay in returning the taxed down amount. The issue of the outstanding amount owing by the Member to A.T. and N.T. was formally resolved when a Satisfaction of Judgment Piece was filed in the Court of Queen's Bench on February 23, 2011.

- 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.

CONCLUSION ON CITATIONS

15. At the request of counsel for the LSA, the Committee dismissed Citation 1 as not supported by the evidence.

16. Based on the material before the Hearing Committee, which included an Agreed Statement of Facts and Admission of Guilt, Citation 2 as amended, Citation 8 as amended, and Citation 9, are made out, as conduct deserving of sanction, pursuant to Section 60 of the *Legal Profession Act.* And received it in a form acceptable to the Hearing Committee.

> S. 60(1) Subject to the rules, a member may, at any time after the commencement of proceedings under this Division regarding the member's conduct and before a Hearing Committee makes its findings in respect of the member's conduct, submit to the Executive Director a statement of admission of guilt of conduct deserving sanction in respect of all or any acts or matters that are subject of the proceedings.
>
> **(2)** A statement of admission of guilt shall not be acted on until it is in a form acceptable to:
>
> (a) the Conduct Committee, if the statement is submitted before the day on which a Hearing Committee is appointed to conduct a hearing respecting the matter, or
>
> (b) the Hearing Committee, if the statement is submitted on or after the day on which the Hearing Committee is appointed.

(3) If a statement of admission of guilt is accepted under subsection (2)(a), the chair of the Conduct Committee shall appoint a Hearing Committee consisting of 3 or more Benchers other than the President or any Benchers disqualified from sitting on the Committee.

(4) If a statement of admission of guilt is accepted, each admission of guilt in the statement in respect of any act or matter regarding the member's conduct is deemed for all purposes to be a finding of

(a) the Hearing Committee appointed under subsection (3), or

(b) the Hearing Committee that accepted the statement, as the case may be, that the conduct of the member is conduct deserving of sanction.

(5) The Hearing Committee appointed under subsection (3) or the Hearing Committee that accepted the statement, as the case may be, shall proceed with a hearing for the purpose of making its determination, if any, under section 71(4), its order under section 72 and its order, if any, under section 73.

SUBMISSIONS ON SANCTION AND COSTS

17. The Record of the Member and an Estimated Statement of Costs was admitted into evidence as Exhibits 2 and 3 respectively.

18. It was noted the Member had a previous disciplinary record dated June 23, 2010, for which he had received a reprimand with costs awarded.

19. It was agreed by way of joint submission; the reputation of the legal profession had suffered as a result of the Member's failure to provide adequate services to his clients and had potentially placed the public at risk by his failure to respond to the requests of the regulator, the Law Society of Alberta.

20. By way of joint submission on sanction, the Hearing Committee was urged to impose a fine, a reprimand, a restriction on the Member's practice of law and a referral to the Practice Review Committee.

21. The Hearing Panel was informed that the clients / complainants were in agreement with the sanction proposed. They had expressed hope that that any sanction imposed will help prevent their experience happening to other clients. These comments are not binding on the Hearing Committee. It is simply one factor amongst others to be considered in any disposition to follow.

DECISION REGARDING SANCTION and COSTS

22. The Hearing Panel must consider all of the evidence in arriving at an appropriate sanction.

23. In doing so, the Hearing Committee is mindful that the primary purpose of disciplinary proceedings found in *S.49 (1) Legal Profession Act* is the protection of the public interest and the standing of the legal profession generally.

24. The objective of the *Act* is not about punishing the offender and exacting retribution but rather imposing a sanction which is just and measured to the conduct committed. Each case stands alone.

25. 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 criminal cases. 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 of 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 are matter's that professional peers are better able to assess than a person untrained in the particular professional art or science.

26. The Committee is mindful that submissions on sanction and costs are by way of joint submission.

27. The use of joint submissions is a concept well known in criminal law and not unknown in administrative law cases. While a hearing panel is entitled to decline to accept a joint submission presented by the parties, there is a high threshold to be met for rejecting a joint submission. Taking into account the existing jurisprudence and the public interest, only a joint submission which is truly unreasonable or unconscionable should be rejected.

28. In *Nguyen*, reference was made to the Manitoba Court of Appeal's judgment in *R. v. Chartrand, (1998), 131 C.C.C. (3d) 122* where Kroft J.A. stated the following:

> [8] A sentencing judge is not bound to accept the recommendation, but it should not be rejected unless there is good cause for so doing. …..
>
> See also, *Law Society of Upper Canada v. Stephen Alexander Cooper* 2009 ONSLAP (CANLII), 2009 ONSLAP.

29. The Hearing Committee received submissions the Member had been in severe financial difficulties at the time of the events complained off. He had been practicing as a sole practitioner earning a meagre income. This information provides context to the events leading to the Member's difficulties.

30. The evidence suggests that rather than facing up to his difficulties and seeking out assistance; the Member avoided the reality of his circumstances and allowed problems

in his practice to be compounded. Had he been forthright, the Member may not have been before this Hearing Committee.

31. The Member has to be commended for acknowledging his guilt and co-operating with the Law Society of Alberta. He assisted in acknowledging his shortcomings and accepted responsibility with his Agreed Statement of Facts and Admission of Guilt. This is a necessary first step in developing better practices in future dealings with clients.

32. By acknowledging his guilt, the Member also obviated the need for witnesses to be called to testify and avoided their further inconvenience. The LSA avoided additional expenditure of time and costs with the guilty plea.

33. It is significant that when the Member eventually paid the monies owing to the clients under the Taxation order, he paid more than was required. The Committee accepts this as an act of remorse and a self-imposed penalty.

34. It has been suggested to the Hearing Committee that remedial measures such as referring the Member to the Practice Review Committee for a general review and assessment of his practice may well assist the Member in developing good practices.

35. The Member, through his legal counsel, had agreed to such a measure being imposed as part of the joint submissions on sanctions. This demonstrates suitability for practice review.

36. The Hearing Committee was advised the Member's law practice environment had changed for the better. As of June 2011 he has been practicing in association with another practitioner of the LSA. This is seen by the Hearing Committee as a positive step.

37. The Member has a previous disciplinary record. Any sanction imposed must be cognizant of that fact.

38. Having regards to all the foregoing factors and evidence, the Hearing Committee concludes that the protection of the public interest and the standing of the legal profession generally, can be satisfied with the following sanctions:

    I. A fine of $2,000

    II. The Member will pay the actual costs of the Hearing.

    III. The Member will have two years from the date of receipt of confirmation of the hearing costs to pay the hearing costs and fine.

    IV. A reprimand will be imposed for each of the Citation in which the Member was found deserving of sanction.

    VI. The Member is directed to the Practice Review Committee for a general review and assessment of his practice.

VII. A restriction will be imposed on the Member's practice of law requiring him to be in association with one or more members of the Law Society of Alberta. It is understood that any change in the restriction imposed will require the approval of the Practice Review Committee.

CONCLUDING MATTERS

39. No referral to the Attorney General is required.

40. No Notice to the Profession is required.

41. There will be a redaction of exhibits.

42. With the consent of counsel, a copy of the Agreed Statement of Facts to be released to Ms. F.

Dated February 23, 2012 at Calgary, Alberta.

DENNIS EDNEY, Q.C. (Chairperson)

JAMES GLASS, Q. C.

DALE SPACKMAN, Q.C.

SCHEDULE A – REPRIMAND

Mr. Fair, as Chair of this Conduct Committee Hearing, I am required to reprimand you.

I have listened to the well-articulated submissions of legal counsel for the Law Society of Alberta and your own counsel.

I concur that the protection of the public and the integrity of the Law Society and this profession are inextricably linked to your misconduct.

Mr. Thornborough states that much of your problem resulted from your financial predicaments. That is certainly a factor, but it is not a full explanation.

I suggest to you Mr. Fair that you would not be here today, had you been forthright with the Law Society, your former clients and their new counsel about your predicament.

I suggest that what you attempted to do was distort reality, stick your head in the sand, by running away from your problems. As a result, you tarnished your own reputation as a lawyer.

You have heard many times that is all we have as lawyers is our own reputation. What distinguishes each and every lawyer is his own reputation as a lawyer of character and integrity.

Very few of us ever get recognised by having our own names on a public billboard. It is only by the way we conduct ourselves with each other, how we interact with each other in everyday affairs, that we come to be recognised as a lawyer with integrity. That is how our reputation is passed though the public community and the legal community.

You have not shown that with your misconduct.

I hope you have now gained insight into what you have to do to move on in life as a human being and as a lawyer. I wish you well.