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 **MICHAEL RORY WAITE**
a Member of The Law Society of Alberta

SUMMARY OF RESULT

Mr. Waite was admitted to the Bar in 1996 and practices law in Calgary, Alberta. Mr. Waite's primary area of practice is in civil litigation, but he also has a small general solicitor's practice. Mr. Waite faces 2 citations dealing with one client. The charges related to failing to serve a client and failing to respond on a timely basis to his client. Mr. Waite admitted that his conduct amounted to conduct deserving of sanction in relation to the citations. Mr. Waite utilized the expedited single Bencher adjudication process to resolve these matters. Counsel for Mr. Waite and the Law Society jointly submitted that a reprimand and actual costs was an appropriate sanction in the circumstances. The Hearing Committee concluded that the protection of the public and the reputation of the legal profession were satisfied with the imposition of a reprimand and the payment of actual costs.

INTRODUCTION

1. On April 25, 2014 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, Michael Rory Waite. The Committee was comprised of James Glass, QC. The LSA was represented by Mr. Meagher. Mr. Waite was present throughout the hearing and was represented by Mr. Bradley Nemetz, QC

2. Mr. Waite faced two citations as follows:

    a) It is alleged that I failed to provide competent, timely, conscientious, diligent, and efficient service to my client; and
    b) It is alleged that I failed to respond to my client on a timely basis.

3. With the consent and at the request of Mr. Waite and counsel for the LSA, the hearing proceeded as a single-bencher adjudication pursuant to s. 60(3) of the *Legal Profession Act*.

4. The Hearing Committee was provided with an Admitted Statement of Facts and Admission of Conduct Deserving of Sanction in relation to both citations. Mr. Waite confirmed that he admitted that his conduct was deserving of sanction in relation to these citations. On April 17, 2014, a Conduct Committee Panel found that this document was in a form acceptable to it pursuant to s. 60(2) of the *Legal Profession Act*. Accordingly,

for all purposes of this hearing, Mr. Waite's conduct is deemed to be conduct deserving of sanction pursuant to s. 60(4).

JURISDICTION AND PRELIMINARY MATTERS

5. 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 Mr. Waite, 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.

6. There was no objection by either counsel regarding the constitution of the Hearing Committee.

7. The entire hearing was conducted in public.

EVIDENCE

8. As noted above, Exhibits 1-5 (the jurisdictional exhibits) were entered into evidence by consent. Exhibits 6-7 were entered into evidence by consent.

FACTS

9. The Admitted Statement of Facts and Admission of Conduct Deserving of Sanction (Exhibit 6) is attached to this decision as Appendix A and is reproduced in its entirety.

10. The circumstances that brought Mr. Waite's conduct before the LSA involve one client that he was representing in relation to a wrongful dismissal claim. Mr. Waite's conduct that resulted in the complaint to the LSA by his client is fairly summarized as follows (paragraph 43 of the Admitted Statement of Facts):

    a) Waiting eleven months from the time I was retained to the time I filed a statement of claim;
    b) Allowing almost a year to pass after serving the statement of claim before obtaining a filed statement of defence;
    c) Failing to take any formal steps in the litigation after filing and serving D. K.'s affidavit of records in April of 2009;
    d) Not requesting dates for questioning and not requesting an unredacted employment file until 4 years after I assumed conduct of the file;
    e) Not taking any steps to question the defendant's representative or making an application to obtain an unredacted employment file;
    f) Failing to report to D. K. about the progress of the claim;
    g) Failing to keep D. K. advised about the obstacles I perceived in advancing the action;

h) Failing to advise D. K. of the likelihood of success and failing to advise him about the likely value of the claim;
i) Failing to respond to D. K. after November of 2010;
j) Failing to be proactive and to advance the matter or arrange for alternate counsel until December 19, 2013 despite D.K.'s complaint and the intervention of the LSA to prompt me deal to with this matter.

11. On or about January 19, 2011, the LSA received the complaint from Mr. Waite's client. The conduct resolution officer attempted to resolve the complaint at an early stage, however, for a variety of reasons was unsuccessful. Generally, the reasons were as a result of Mr. Waite not contacting or responding to the client and the client being difficult to reach. Mr. Waite, to his credit, did not rely upon the latter reason in any way to explain or lessen his conduct. He unconditionally and fully accepted that it was his conduct, and not that of the client's, that resulted in his being before the LSA.

SUBMISSIONS OF COUNSEL ON CITATIONS

12. The LSA has the onus to prove that the conduct of the Member is such that it is worthy of sanction and must prove this on the balance of probabilities.

13. Counsel for the LSA and Mr. Waite jointly submitted that the conduct of Mr. Waite was conduct deserving of sanction. They both acknowledge that a Conduct Committee Panel found the Agreed Statement of Facts and Admission of Guilt was in a form acceptable to it and should be accepted by this Hearing Committee to be a finding that the conduct of Mr. Waite, for all purposes, was conduct deserving of sanction.

DECISION OF HEARING COMMITTEE ON CITATIONS

14. Pursuant to sections 60(2), 60(3) and 60(4), the Hearing Committee is bound by the decision of the Conduct Committee Panel in relation to its finding that the Agreed Statement of Facts and Admission of Guilt was in a form acceptable to it. Where such a finding is made, the Chair of Conduct shall appoint a Hearing Committee consisting of one Bencher or of three persons, one of whom must be a Bencher or former Bencher.

15. Counsel for Mr. Waite and the LSA requested that the Chair of Conduct appoint a one Bencher Hearing Committee. That appointment was made by the Vice Chair of Conduct on April 24, 2014 (Exhibit 1).

16. Accordingly, the Hearing Panel finds, in accordance with s. 60(4) of the LPA, that Mr. Waite's conduct is deemed for all purposes to be a finding that the conduct of Mr. Waite is conduct deserving of sanction.

17. Section 60(5) of the LPA requires the Hearing Committee to proceed with a hearing for the purpose of making any determination regarding incompetence or imposing its sanction. There is no issue regarding the competence of Mr. Waite. Accordingly, the

Hearing Committee proceeded with the hearing to receive submissions regarding sanction.

EVIDENCE ON SANCTION

18. Counsel for the LSA indicated that Mr. Waite did not have a prior disciplinary record. Counsel for the LSA also entered by consent an estimated statement of costs as Exhibit 8.

19. Mr. Waite wanted to provide an oral statement regarding the citations. It was agreed by counsel for Mr. Waite and the LSA that Mr. Waite need not been sworn in regards to same. He provided the following comments relevant to sanction:

- He is embarrassed and extremely disappointed;
- He let down his client;
- This has had a personal affect upon him as his family has a legal background and he watched them fight passionately for their client's interests;
- He will make every effort to ensure that this does not happen again.

JOINT SUBMISSION ON SANCTION

20. Counsel for the LSA reminded the Hearing Committee that s. 49 of the LPA required the Committee to consider the protection of the public and to protect the reputation of the legal profession.

21. Counsel for the LSA referred to the old Code of Conduct (as that was the Code in force at the time that the conduct occurred) and in particular the following Rules and Commentary:

CHAPTER 2
COMPETENCE

STATEMENT OF PRINCIPLE

A lawyer has a duty to be competent and to render competent services.

G.1(a) *Professionalism*. This characteristic comprises attitudes and values such as dedication to the client's welfare, good work habits, an understanding of client relations, a general determination to practice ethically and a high regard for the interests of society generally. An important aspect of professionalism is attention to quality of service. A lawyer must be conscientious, diligent and efficient in providing services. All deadlines must be met unless the lawyer is able to offer a reasonable explanation and no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer must be prompt in prosecuting a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client must be maintained to the extent reasonably expected by the client.

22. Counsel for the LSA referred the Hearing Committee to paragraph 69 of the Hearing Guide and submitted that all of these factors are met with the imposition of a reprimand and actual costs as the sanction in this matter.

23. Counsel for the LSA referred the Hearing Committee to the *Law Society of Alberta v. Westra*, 2011 CanLII 90716, decision and in particular the following quote:

> A reprimand has serious consequences for a lawyer. It is a public expression of the profession's denunciation of the lawyer's conduct. For a professional person, whose day-to-day sense of accomplishment, self-worth and belonging is inextricably linked to the profession, and the ethical tenets of that profession, it serves as a lasting reminder of failure. Additionally, it remains a permanent admonition to avoid repletion of that failure. Deterrence, public confidence and rehabilitation are therefore served.

25. Counsel for the LSA also reminded the Hearing Committee of the case law that establishes the principle that great deference should be provided to joint submissions.

26. Counsel for Mr. Waite concurred in all of these submissions and submitted that the appropriate sanction was a reprimand together with actual costs to be paid within 60 days of the receipt of the Bill of Costs.

DECISION AS TO SANCTION

27. 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.

28. 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."

29. The Hearing Guide for the LSA, at paragraphs 69 and 70, articulate the relevant factors to be considered in determining the appropriate sanction:

> 69. 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.
>
> 70. 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?

30. The Law Society has as its mandate to protect the public interest. Section 49 of the *Legal Profession Act* provides that conduct of a member that is incompatible with the best

interests of the public or of the members of the society or tends to harm the standing of the legal profession generally is conduct deserving of sanction.

31. Mr. Waite's conduct is incompatible with the best interests of the public, the members of the Society, and has certainly harmed the standing of the legal profession. He admits that his conduct is deserving of sanction.

32. The purpose of the Law Society proceedings is not to punish an offender and exact retribution, but it is to protect the public and maintain high professional standings and to preserve the public confidence in the profession.

33. It is noted that Mr. Waite cooperated fully with the Law Society of Alberta in its investigation of these matters and that he requested that this matter proceed expeditiously through the use of a single bencher hearing process. Mr. Waite has no prior disciplinary record in nearly 18 years of practice and he shows remorse and has admitted his guilt at a fairly early stage.

34. Accordingly, the Hearing Committee agrees with the joint submission or a reprimand and actual costs of the hearing. The reprimand is reproduced as Appendix B to this decision.

35. The Hearing Committee also imposes the actual costs to be paid within 60 days of the receipt of the Bill of Costs by Mr. Waite or Mr. Nemetz.

CONCLUDING MATTERS

36. 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 Mr. Waite's clients and such other confidential personal information.

37. There is no need for a Notice to the Profession to be published.

38. No referral to the Attorney General is required.

Dated this 30th day of April, 2014.

James A. Glass, QC, Bencher
Chair

APPENDIX A

THE LAW SOCIETY OF ALBERTA

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

- and -

IN THE MATTER OF:

A HEARING INTO THE CONDUCT OF
M. RORY WAITE, a member of THE LAW SOCIETY OF ALBERTA

STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT

INTRODUCTION

1. I am an active and practicing member of the Law Society of Alberta ("LSA") having been admitted to the LSA on November 22, 1996.

2. I practice in Calgary, Alberta.

3. I am a sole practitioner. My practice consists of 70% civil litigation, 25% general solicitor's work, and 5% employment/labour law.

CITATIONS

4. On August 21, 2013, a Conduct Committee Panel referred the following conduct to a hearing:
   a) It is alleged that I failed to provide competent, timely, conscientious, diligent, and efficient service to my client; and
   b) It is alleged that I failed to respond to my client on a timely basis.

5. The conduct complained of may be summarized as follows:

   a) D.K. retained the law firm of Docken & Company in February 2006 with respect to a claim he had for wrongful dismissal against his employer;
   b) In February, 2007, I assumed conduct of the file;

c) Since November of 2010, D.K. had been unsuccessfully trying to contact me and repeatedly requested documentation which he never received;
d) His case had been going on for 5 years and he wanted it resolved, either by me or by another counsel.

FACTS
The History of the File

6. D.K. was allegedly dismissed from his employment as a commissionaire on or about January 12, 2006.

7. D.K. entered into a contingency fee retainer agreement with the law firm of Docken & Company on March 20, 2006.

8. By way of letter dated April 28, 2006, D.K.'s employer delivered to Docken & Company a copy of all information on D.K.'s file consisting of 107 pages, 37 of which contained some redactions, mostly the names of persons.

9. The information from the employer failed to recognize D.K's employment with the employer's Lethbridge office and D.K.'s subsequent transfer to the employer's Calgary office.

10. On or about February 14, 2007, I assumed conduct of D.K.'s file.

11. I prepared a statement of claim that was filed on January 4, 2008.

12. Under cover of letter dated April 15, 2008, I delivered a copy of the statement of claim to the employer and advised that I did not wish to receive a statement of defence at that time, pending attempts to settle the matter mutually.

13. By letter dated April 16, 2008, I was told that the Will Cascadden of the Fraser Milner Casgrain firm represented the employer and I was asked for a filed copy of the statement of claim.

14. Under cover of letter dated October 29, 2008, I served a copy of the filed statement of claim on the employer.

15. The statement of defence was served on me on January 8, 2009.

16. The defendant's filed affidavit of records was served on March 31, 2009.

17. D.K.'s affidavit of records was filed on April 6, 2009 and served shortly thereafter.

18. I did not taken any formal steps to advance the litigation after filing and serving D.K.'s affidavit of records.

19. I sent a letter dated June 29, 2010 to opposing counsel, requesting a teleconference to attempt to simplify the issues.

20. I left a message for opposing counsel on August 12, 2010 who in turn attempted to contact me in August of 2010.

21. By way of letter dated October 22, 2010, I made a settlement offer to opposing counsel.
22. By way of letter dated April 29, 2011, I requested dates from the defendant for examining D.K., and I again requested an unredacted copy of D.K.'s employment file without which I could not determine the identities of persons to be examined.

The Complaint

23. On or about January 19, 2011, the Law Society of Alberta received a complaint from D. K.

24. Doug Morris of the LSA initially handled D.K.'s complaint. On February 25, 2011 Mr. Morris had a telephone call with D.K. and suggested that he fax a letter to me with a reasonable deadline and asked D.K. to contact him after the deadline to advise whether he had received a response.

25. By way of undated fax correspondence received by me on or about February 28, 2011, D.K. advised me that he had not heard from me since early November of 2010 and that he would like a response by March 7, 2011.

26. I did not respond to D.K. by March 7, 2011.

27. On March 8, 2011 Mr. Morris contacted me by telephone to advise me generally about D.K.'s complaint. I confirmed that I had presented a settlement proposal but that the opposing party was not interested in settling. I agreed to call D.K. by the end of the week. I advised Mr. Morris that I had been in bed sick the previous week and therefore was not able to respond to D.K. in the timeframe within which he had requested a response.

28. On March 30, 2011, Mr. Morris left a voice mail message for me requesting that I call him back to confirm that I had been in contact with D.K.

29. On April 4, 2011, I returned Mr. Morris' telephone call and advised him that I had the same difficulty that Mr. Morris had in attempting to contact D.K. (that he only has a cell

phone with no voice mail) but I confirmed that I was able to reach him earlier that day, that I had agreed to initiate examinations for discovery of D.K. and the officer of the defendant and that D.K. appeared to be satisfied with the proposed plan to get the other side to come to the table.

30. On April 29, 2011, I wrote to opposing counsel and asked him to provide dates when he would be available to examine D.K. for questioning. I asked for a copy of D.K.'s employment file, unredacted. I did not ask to make arrangements to examine the defendant's corporate representative.

31. I received a letter dated May 10, 2011 from opposing counsel in response that stated that opposing counsel had not yet determined whether he wanted to question D.K. and advising that the documentation that had been provided by the defendant was redacted so as not to produce any information that was not relevant. I did not respond to this letter, nor did I contact D.K. to discuss it.

32. On June 2, 2011, D.K. phoned Mr. Morris and stated that I had contacted him in early April 2011 regarding proceeding with examinations but that he had not heard further from me and that he was no longer interested in contacting me to try to resolve the matter. He wished to pursue his complaint.

33. By way of letter dated August 23, 2011, Mr. Morris requested a response to D.K.'s complaint from me. There followed an exchange of correspondence between me and the LSA, concluding with me providing my file to the LSA on September 7, 2012.

34. I advised the LSA that I believed the complaint put me in a conflict of interest with my client, D.K., and requested direction as to further direction. I offered to return D.K.'s file to him in order to seek other counsel I advised that I would not take further action on the file.

35. A conduct panel of the LSA considered my conduct on January 31, 2013 and directed that my conduct be dealt with by a Mandatory Conduct Advisory as per rule 88(6) of the *Rules of the Law Society of Alberta* and also referred the matter to a Practice Review Committee.

36. One of the Benchers of the LSA, Ms. Kirker met with me to conduct the Mandatory Conduct Advisory on March 26, 2013. She provided a report to the Senior Manager of Regulation dated April 4, 2013 Ms. Kirker directed me to arrange a meeting with D.K. and to assist him in finding alternate counsel to move the action toward a conclusion. She also asked me to report back to her after making the necessary arrangements.

37. Despite Ms. Kirker's directions, I did not speak to, or correspond with D.K. before Ms. Kirker followed up with me on April 5, 2013. D.K. had moved at least twice since providing me with his information. He did not answer the cell phone number I had, and it had no voice mail. I had no current address for D.K.

38. After speaking with Ms. Kirker on April5, 2013 I did send a letter to D.K. using an address that I had found on a copy of a letter to D.K. from the LSA. I never received any response from D.K. to my correspondence until counsel in Medicine Hat contacted my personal legal counsel on November 12, 2013 about transferring the file.

39. Ms. Kirker made a further report to the Senior Manager of Regulation dated June 12, 2013.

40. Having received correspondence from D.K.'s new counsel on December 16, 2013, I packaged D.K.'s file and sent it to his new counsel on December 19, 2013.

41. I admit as facts the statement in this Statement of Admitted Facts for the purpose of these proceedings.

Admission of Guilt

42. I admit guilt to the citations directed against me on August 21, 2013 in accordance with section 60(2)(b) of the *Legal Profession Act*.

43. I acknowledge that my conduct, cumulatively, is conduct deserving of sanction, the particulars of which are:

    a) Waiting eleven months from the time I was retained to the time I filed a statement of claim;
    b) Allowing almost a year to pass after serving the statement of claim before obtaining a filed statement of defence;
    c) Failing to take any formal steps in the litigation after filing and serving D.K.'s affidavit of records in April of 2009;
    d) Not requesting dates for questioning and not requesting an unredacted employment file until 4 years after I assumed conduct of the file;
    e) Not taking any steps to question the defendant's representative or making an application to obtain an unredacted employment file;
    f) Failing to report to D.K. about the progress of the claim;
    g) Failing to keep D.K. advised about the obstacles I perceived in advancing the action;
    h) Failing to advise D.K. of the likelihood of success and failing to advise him about the likely value of the claim;

i) Failing to respond to D.K. after November of 2010;
j) Failing to be proactive and to advance the matter or arrange for alternate counsel until December 19, 2013 despite DK's complaint and the intervention of the LSA to prompt me deal with this matter.

THIS STATEMENT OF ADMITTED FACTS AND ADMISSION OF GUILT IS MADE THIS 15th DAY OF APRIL, 2014.

_____
M. Rory Waite

APPENDIX B

REPRIMAND

Your conduct Mr. Waite is incompatible with the best interests of the public and brings discredit to the profession. Lawyers have the privilege of being a self-governing profession and to maintain that privilege it is critical that we, all as lawyers, comply with the Code of Conduct to the very best of our ability. There is no doubt that the importance of an independent bar and members of that bar being able to fiercely defend or advocate on behalf of their clients is the cornerstone of our profession. However, so too is the manner in which we conduct ourselves at all times cornerstone of our profession and being viewed by the members of the public in the highest regard. As a barrister and solicitor, we are required to hold ourselves out to a higher standard than most members of the general public. In this one instance you failed to do so. I trust Mr. Waite and I'm confident that this type of behavior, based upon what I've seen and I've heard this morning, will not occur again, and that you won't appear before a Bencher or Benchers in the future.