LAW SOCIETY OF ALBERTA

HEARING COMMITTEE REPORT

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

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

INTRODUCTION

[1] On June 1, 2010, a Hearing Committee (the "Committee") of the Law Society of Alberta ("LSA") convened at the LSA office in Calgary to inquire into the conduct of Peter Crisfield, a Member of the LSA. The Committee was comprised of Anthony G. Young, Q.C. Chair, Kevin Feth Q.C., Bencher and Miriam Carey, PhD., Bencher. The LSA was represented by Garner Groome. The Member was present at the Hearing and represented by Robert D. Maxwell. Also present at the Hearing was a Court Reporter to transcribe the Hearing.

JURISDICTION, PRELIMINARY MATTERS AND EXHIBITS

[2] The Chair introduced the Committee and asked the Member and Counsel for the LSA whether there was any objection to the constitution of the Committee. There being no objection, the Hearing proceeded.

[3] Exhibits 1 through 4, consisting of the Letter of Appointment of the Committee, the Notice to Solicitor pursuant to section 56 of the *Legal Profession Act*, the Notice to Attend to the Member and the Certificate of Status of the Member with the LSA established the jurisdiction of the Committee.

[4] The Certificate of Exercise of Discretion pursuant to Rule 96(2)(a) and Rule 96(2)(b) of the Rules of the LSA ("Rules") pursuant to which the Director, Lawyer Conduct of the LSA, determined that the persons named therein were to be served with a Private Hearing Application was entered as Exhibit 5. Counsel for the LSA advised that the LSA did not receive a request for a private hearing. The Chair inquired of Counsel for the Member whether he wished to make a Private Hearing Application and he declined. Accordingly, the Chair directed that the Hearing be held in public.

[5] Exhibits 1 through 28 contained in the Exhibit Book provided to the Committee were entered into evidence in the Hearing with the consent of the parties.

[6] At the commencement of the Hearing, Counsel for the LSA presented the Committee with a Statement of Facts signed by the Member on June 1, 2010. With the Consent of the parties, the Statement of Facts was entered into evidence

in the Hearing as Exhibit 6, replacing the unsigned copy that had been placed in the Exhibit Book prior to the Hearing.

CITATIONS

[7] The Member faced the following Citations:

> (1) IT IS ALLEGED THAT you failed to serve your client, G. T., in that you failed to render competent and timely services to G.T. and resolutely advance G.T.'s case, and that such conduct is conduct deserving of sanction.
>
> (2) IT IS ALLEGED THAT you failed to implement your client G.T.'s instructions and failed to keep him informed as to the progress of his file, and that such conduct is conduct deserving of sanction.
>
> (3) IT IS ALLEGED THAT you failed to be punctual in fulfilling commitments made to your client, G.T., and you failed to respond on a timely basis to your client, G.T., and that such conduct is conduct deserving of sanction.
>
> (4) IT IS ALLEGED THAT you failed to be candid with and failed to respond to an opposing party, S..., and you misled S... and failed to correct the misapprehension, and that such conduct is conduct deserving of sanction.
>
> (5) IT IS ALLEGED THAT you misled your client G.T., and that such conduct is conduct deserving of sanction.

SUMMARY OF RESULTS

[8] The Member admitted that he was guilty of Citations 1, 2 and 3 and that the conduct complained of pursuant to those citations was conduct deserving of sanction but disputed Citation 4.

[9] There was no evidence called with respect to Citation 5.

[10] After hearing the evidence and arguments, the Committee determined that Citations 1, 2 and 3 were made out and the conduct complained of was deserving of sanction. The Committee found that Citation 4 was not made out. As there was no evidence called on Citation 5, that citation was dismissed. The Committee found that a reprimand, together with conditions on the Member's practice requiring his continuing involvement in Practice Review, was an appropriate sanction in the circumstances. The Chair administered the reprimand. The Member was also directed to pay one-half of the actual costs of the Hearing.

AGREED STATEMENT OF FACTS

[11] The Agreed Statement of Fact is as follows:

"**Introduction**

1. Peter Crisfield is a member of the Law Society of Alberta, having been admitted to membership on May 3, 1983. He practiced at Beaumont Church for a period of time but has been a sole practitioner for most of his career.

2. These citations arise in connection with Mr. Crisfield's retainer by G.T. to pursue a claim for long term disability benefits.

Citations

3. The citations are:

> (1) IT IS ALLEGED THAT you failed to serve your client, G. T., in that you failed to render competent and timely services to G.T. and resolutely advance G.T.'s case, and that such conduct is conduct deserving of sanction.
>
> (2) IT IS ALLEGED THAT you failed to implement your client G.T.'s instructions and failed to keep him informed as to the progress of his file, and that such conduct is conduct deserving of sanction.
>
> (3) IT IS ALLEGED THAT you failed to be punctual in fulfilling commitments made to your client, G.T., and you failed to respond on a timely basis to your client, G.T., and that such conduct is conduct deserving of sanction.
>
> (4) IT IS ALLEGED THAT you failed to be candid with and failed to respond to an opposing party, S..., and you misled S... and failed to correct the misapprehension, and that such conduct is conduct deserving of sanction.
>
> (5) IT IS ALLEGED THAT you misled your client G.T., and that such conduct is conduct deserving of sanction.

4. Mr. Crisfield admits that he is guilty of conduct deserving of sanction in respect of Citations 1, 2 and 3.

5. Mr. Crisfield disputes Citation 4.

6. There is no evidence with respect to Citation 5 and there will be a joint submission by counsel for the Law Society of Alberta and counsel for Mr. Crisfield that Citation 5 be dismissed.

Facts

7. In 1977, GT allegedly developed chronic fatigue syndrome and fibromyalgia. He retained Mr. Crisfield to pursue a disputed claim for long term disability benefits against the insurer, Sun Life Insurance Company of Canada ("Sun Life"). Medical reports and opinions received in 1999 indicated issues in relation to the alleged occupational cause and permanence of the disability. There is no record of a written retainer or fee agreement.

8. Mr. Crisfield filed a Statement of Claim on G.T'.'s behalf against Sun Life on February 8, 2001.

(Exhibit 9 Tab 1)

9. On March 11, 2001, G.T. sent a fax to Mr. Crisfield advising that he was "sorry for not getting back to you sooner" and that he had "not been well enough to do much of anything" and was "still not well" but still wished to continue with the claim.

(Exhibit 7)

10. Mr. Crisfield spoke by telephone with Cathy Campbell of Sun Life on February 27, 2002. He has no recollection or record of that conversation. Ms. Campbell did take notes of that telephone conversation (Exhibit 8). Had she been called to testify at the hearing her evidence would have been as contained in the will say statement at Exhibit 27.

11. Mr. Crisfield served the Statement of Claim on Sun Life by fax February 27, 2002. In his cover letter to Cathy Campbell at Sun Life, Mr. Crisfield stated that a Statement of Defence was not required to be filed until further notice from him.

(Exhibit 9)

12. Jim McGeown at Sun Life sent Mr. Crisfield an acknowledgment letter dated March 1, 2002, which stated that "We also understand from discussing the matter with Cathy Campbell in our Edmonton office, that you have had some difficulty in obtaining instructions from your client".

(Exhibit 11)

13. On June 13, 2003 Mr. Crisfield spoke with G.T. and made notes of that conversation. In response G. T. sent to Mr. Crisfield a fax dated June 16, 2003.

(Exhibit 12)

14. G.T. made an inquiry on December 29, 2003. By letter dated January 7, 2004, Mr. Crisfield advised that a Statement of Claim had been filed and served, and that he would contact G.T. once the medical reports were organized.

(Exhibit 13)

15. In a fax dated February 13, 2004, G.T. instructed Mr. Crisfield to "start pushing" the lawsuit.

(Exhibit 14)

16. On March 11, 2004, Sun Life wrote to Mr. Crisfield and noted that there had been no contact from him since they had been served with the Statement of Claim. Sun Life asked for him to advise them whether he located G.T. and whether he intended to proceed with the action.

(Exhibit 15)

17. On April 28, 2004, G.T. faxed Mr. Crisfield instructions to "get going" with the lawsuit and pursue discoveries. On June 19, 2004, G.T. faxed Mr. Crisfield a request to "push this lawsuit along". G.T. was concerned about the delay in advancing the litigation despite his repeated requests to proceed with the lawsuit and set examinations for discoveries.

(Exhibits 16 & 17)

18. By letter dated June 16, 2004, Sun Life repeated its request for Mr. Crisfield to advise whether he intended to proceed with this action, or else file a discontinuance.

(Exhibit 18)

19. Mr. Crisfield faxed G.T. on a number of occasions in July, September and October, 2004, relative to getting together to discuss matters pertaining to completing a medical assessment. The medical report of Dr. Stein was obtained on November 18, 2004. In June 2005 G.T. advised Mr. Crisfield that he was not feeling well and he did not know if he was up to discoveries. However, generally there was not much contact between Mr. Crisfield and G.T. in 2005 until the fall.

(Exhibit 28)

20. In early February 2006, G.T. sent notes to Mr. Crisfield expressing his concern about not receiving a response in relation to his inquiries as to the status of the litigation. In particular, on February 5, 2006, G.T. faxed Mr. Crisfield asking whether the lawsuit had to be re-registered and whether GT was to sue Mr. Crisfield if it expired. On February 6, 2006, G.T. faxed Mr. Crisfield asking whether the lawsuit was "still good", and if so to "get working" on it.

(Exhibits 19 & 20)

21. Mr. Crisfield responded to G.T. in a handwritten fax dated March 2, 2006, saying that he was "getting things organized" to proceed with the lawsuit. Mr. Crisfield sent G.T. a second fax on March 20 9, 2006, concerning the scheduling of a meeting to discuss the case. In April 2006, Mr. Crisfield and G.T. met at his house and it was agreed that they would put the documents together for an Affidavit of Records and move towards Examinations for Discovery. That is essentially where the lawsuit stalled.

(Exhibits 21 & 22)

22. On May 26, 2006, G.T. faxed Mr. Crisfield instructions to pursue discoveries.

(Exhibit 23)

23. Mr. Crisfield responded to G.T. in a fax dated August 5, 2006, offering to meet with him to provide an update on the claim on August 29 or 30, 2006.

(Exhibit 24)

24. On July 13, 2007 Sun Life served Mr. Crisfield with an application to strike G.T.'s action based on Mr. Crisfield's failure to materially advance the action for a period exceeding 5 years.

25. Mr. Crisfield reported the matter to the Alberta Lawyers Insurance Association ("ALI A") on August 16, 2007. ALIA referred the matter to counsel.

26. Sun Life's application to strike the action was defended by ALIA. On March 4, 2008, the Master ordered the action be struck and awarded costs to Sun Life. The decision was not appealed.

27. ALIA brought to the attention of the Law Society Mr. Crisfield's conduct in his representation of G.T. The Law Society instituted its own complaint against Mr. Crisfield. Mr. Crisfield's responses to the Law Society complaint and a companion complaint from G.T. about Mr. Crisfield not moving the action forward, not responding to him, and not keeping him informed are contained at Exhibits 25 & 26, respectively.

28. These facts and admissions are made for the purpose of Section 60 of the *Legal Profession Act*. This Agreed Statement of Facts is not exhaustive and evidence may be adduced by Mr. Crisfield or the Law Society which is not inconsistent with the stated facts herein."

THE MEMBER'S EVIDENCE

[12] Counsel for the Member gave the Hearing Committee some personal history with respect to the Member. The Member was admitted to the bar in 1983. He practiced at Beaumont Church for 10 years. In the past, the Member has acted as a custodian for another member of the Law Society of Alberta. Since leaving Beaumont Church, the Member has remained in a solo practice. He has a shared space arrangement with two other lawyers.

[13] The Member practices largely corporate and commercial law. He acts as the registered office for a number of "leasing agents", "retail and commercial" type practices. He also practices in Wills and Estates.

[14] The Member has been married for 26 years. He has 2 boys aged 20 and 17. He has been active in the Anglican Church where he acts as Chancellor for the Synod of the diocese of Calgary (Calgary South) and as counsel for the Bishop. The Member deals with parish activities. Some of this work is completed on a "pro bono" basis.

[15] The Member has acted as diocese solicitor since 1994. He has been Chancellor for seven years.

[16] The Member is past President and board member of Trinity Place. Trinity Place operates 5 seniors Apartments, consisting of 700 suites. These apartments are for low income seniors aged 55 and older. The Member has served on this board for 15 years.

[17] The Member has also served with the Lions Club as the Chair of Stars and the Pot of Gold, the Southern Alberta Hostelling Association, Calgary Legal Guidance and judges moot trials.

[18] The Member advised the Hearing Committee that he no longer had the contents of the original client file. The member stated that ALIA counsel has copies of the file.

[19] The Member stated that he was retained in 1997 by G.T. for a claim against Sun Life for disability benefits. G.T. had hypertension, fibromyalgia and chronic fatigue syndrome. His group insurance gave G.T. some coverage (approximately $22,000 in 1998) before denying further coverage.

[20] The Statement of Claim was filed on February 28th, 2001.

[21] On March 11, 2001, the Member received a fax from G.T. indicating that he was "Sorry for not getting back to (the Member) sooner." The Member states that he was concerned about the limitation period. G.T. was not feeling well at the time that the Statement of Claim needed to be filed. Communication was not good. G.T. did not like the telephone. His preference was to send fax messages. The Member stated that communication was largely by meeting.

[22] The Member testified that G.T. stated that "I have not been well enough to do much of anything" and "I am still not well". GT was not ready to do what was necessary in the lawsuit because he had no energy at the time.

[23] The Member states that there were periods when it was difficult to obtain instructions. Between 2001 and 2002 there were times when everything was in abeyance.

[24] The Statement of Claim was served on February 27, 2002.

[25] No Affidavit of Records was filed.

[26] No examinations for discovery ever took place.

[27] The Member related having a mental block with respect to G.T.'s case. He recalls that in January 2004, he came out of a three-week trial that impacted his confidence. He was not overly confident in taking G.T.'s matter forward. He candidly stated "I did not get it done" and "I did not move it forward". The Member had little confidence in GT's case.

[28] In closing his testimony in chief the Member stated that "I feel very badly and I am sorry for the position in which I put G.T." and "I regret the position in which G.T. now finds himself as I can appreciate the anguish he must feel."

[29] Counsel for the Law Society was interested in knowing about the disposition of the original client file. Under cross examination, the Member stated that he surrendered his file to ALIA. He knows that copies of the file were made. Nevertheless, he has not been able to find a copy of the file.

[30] When asked about his “mental block” on the file and whether he had considered moving the file, the Member replied that "there are things that I could have done, but did not.

[31] When confronted with the fact that G.T. was encouraging, even begging the Member to move forward with the file the Member replied that "I did not get to it though in a timely manner."

[32] The Member admitted that not only was he suffering from a lack of his own confidence but also that he lacked confidence in G.T.'s case during the period in the late spring of 2004.

[33] The Member was pressed by counsel for the Law Society with respect to his discussion with Cathy Campbell, a representative of Sun Life, on February 27, 2002. Ms. Campbell's notes of the conversation state that:

> "re: [G.T.] 27-Feb 02
> Ltd 73624 230pm
> Cert 803194-00

Peter Crisfield Lawyer Calgary
-filed state of claim 1 yr ago
-coming up tomorrow
-wants to have its service so doesn't run out of time
-Mr. Crisfield said it is not necessary to file a defense until we hear further from him
-Mr. Crisfield has lost track of his client but does not want to run out of time.

C. Campbell”

[34] The Member confirmed that the only contact that he could recall with Sun Life was with Cathy Campbell. He was unable to recall whether he had other calls. The Member had no present recollection of the February 27, 2002 call and confirmed that he has no notes of his own. The Member states that he did not believe that he made the statement that he had "lost track of his client".

[35] The Member was examined by the Hearing Committee as to why he believes that he did not make the statement that he had "lost track of his client". The Member replied that "it was more a question of G.T.'s health and that it was not logical for the Member to say that he had “lost track” of him.

[36] The Member was also examined with respect to a letter dated March 11, 2004 from Sun Life Financial to the Member which states, in part:

> "With two years having elapsed since the Statement of Claim was served on Sun Life and with no further contact from your office as to whether or not you have located Mr. T., we would appreciate you advising whether or not you intend to proceed with this action...."

The Member stated that he did not recall receiving this letter. When asked why he never followed up with Sun Life with respect to their misapprehension the Member stated that the letter of March 11, 2004 was the first time this issue had come up.

[37] The Member was then referred to another letter from Sun Life Financial dated June 16, 2004 that states, among other things:

> "If you are unable to locate your client or if you do not intend to proceed with this action, we would appreciate you filing a notice of Discontinuance with the court office in providing our office with a copy.”

The Member stated that the issue was not about locating the client.

[38] The Member was asked whether he received any privilege or indulgence from Sun Life as a result of their misapprehension about the location of G.T. Specifically, the Member was asked whether he was "buying more time" for G.T. with a "white lie”. The Member could not recall his specific discussions with Sun Life or thinking at the time, but denied that he had deliberately misled anyone or engaged in any white lies.

SUBMISSIONS OF COUNSEL FOR THE LSA

[39] Counsel for the LSA submitted that the admission of guilt on Citations 1 through 3 should be accepted. The Hearing Committee was urged to find that the Member's conduct was more than negligent and that his conduct harms the reputation of lawyers and the legal profession generally.

[40] With respect to Citation 4, counsel for the LSA rhetorically asked the question as to what would motivate the Member to mislead Sun Life and to fail to correct a misapprehension. The suggested answer was that failing to correct the misapprehension would buy the Member and his client time. Another possible motivation was that it would be less likely that the insurer would file a Statement of Defence. It was argued that the behaviour of the Member complained of in Citation 4 is a deception that should not be tolerated.

[41] The essence of correspondence from Sun Life is that the Member lost track of his client. Counsel for the LSA submits that the best evidence of what was said is outlined in exhibits 8, 10, 15, and 18. It was argued further that whatever the Member said it led Cathy Campbell to believe that the Member had "lost track of his client."

[42] Counsel for the LSA stated that the Member must have said something that was "misleading or ambiguous".

SUBMISSIONS OF COUNSEL FOR THE MEMBER

[43] Counsel for the Member urged the Hearing Committee to consider that a higher standard of proof is required in instances of deceit. He pointed out that:

(a) the events took place over eight years ago;
(b) the two participants do not have any present recollection of the telephone conversation;
(c) the statement made was a "minor statement";
(d) the last line in Cathy Campbell's note of February 27, 2002 (Exhibit 8) might simply be her opinion;
(e) Cathy Campbell's "Will Say" statement states that:

> "Ms. Campbell has no present recollection of the February 27th telephone conversation or the creation of the notes at Exhibit 8 … She does not make a verbatim note of the discussion but she tries to capture the essence of what was being said. Accordingly, she wrote down the words "Mr. Crisfield has lost track of his client but does not want to run out of time" not necessarily because Mr. Crisfield said it exactly like that but she believes that he would have said something like that or something similar to that effect otherwise she would not have written the note the way she did … Ms. Campbell says it is possible that Mr. Crisfield could have said

> something more or said it in a different way. Ms. Campbell acknowledged that it is possible that Mr. Crisfield said he was having difficulty obtaining instructions …"

[44] Counsel for the Member pointed out that the "Will-Say" Statement does not say definitively that the Member had "lost track of his client". He may have said something else.

[45] Counsel for the Member argued that the misstatement that the Member had "lost track of his client" might have come from Cathy Campbell's interoffice memo dated February 28, 2002 (Exhibit 10). There is no question that the Member was having difficulty obtaining instructions. His mode of communication with his client was atypical. There was acknowledgment and apology from G.T. for not getting back to the Member sooner. Counsel for the Member submits that all of these facts are consistent with the statement that the Member was having difficulty obtaining instructions.

[46] Counsel for the Member submits that the LSA has not proven, on the balance of probabilities, that the Member made a false or misleading statement.

[47] Another element of Citation 4 is that the Member failed to correct the misapprehension. It was submitted by counsel that if the Member did not mislead, he had no obligation to correct the misapprehension. Reference was made to Chapter 11, Rule 2 of the Code of Professional Conduct. It states that:

> "If a lawyer becomes aware during the course of a negotiation that:
>
> (a) the lawyer has inadvertently misled an opposing party, or
>
> (b) the client, or someone allied with the client or the client's matter, has misled an opposing party, intentionally or otherwise, or
>
> (c) the lawyer or the client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,
>
> then, (subject to confidentiality - see Rule #7 of Chapter 7, *Confidentiality*) the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.

It was emphasized that the obligation to correct a misapprehension arises during negotiation. There was no negotiation in this case.

[48] Counsel for the Member argued that the words "I've lost track" could mean either "I do not know where my client is" or "I have no instructions" or "I have not seen my client recently". As such, the statement is ambiguous enough in itself. Even if the Member used the words, he could not disclose that his client was not strong enough to proceed with the case.

[49] In summing up, counsel stated that the Member does not tell "white lies". He does not speak untruths. There is no clear and cogent evidence that Citation 4 has been made out.

REBUTTAL BY COUNSEL FOR THE LSA

[50] Reference was made by counsel for the LSA to Chapter 1 Rule 6 of the Code of Professional Conduct which states:

> "A lawyer must be courteous and candid in dealings with others."

and to paragraph 3 of the Interpretation section of the Code of Professional Conduct

> "Under the *Legal Profession Act*, the Law Society has broad powers to declare conduct to be deserving of sanction and is not limited to disciplining violations that are expressly or impliedly referred to in this Code."

[51] Counsel for the LSA concluded by pointing out that it does not matter whether the conduct complained of is specifically outlined in the Code. It need only be implied by the Code or part of recognized professional practice.

DECISION

[52] The Hearing Committee determined that the Agreed Statement of Facts and Admission of Guilt concerning Citations 1, 2 and 3 was in a form acceptable to it, and held that the Member engaged in conduct deserving of sanction in so far as Citations 1, 2 and 3 are concerned.

[53] As for Citation 4, the burden was on the LSA to prove that allegation on the balance of probabilities, utilizing clear and cogent evidence.

[54] In this case there is a note, which the Hearing Committee accepts was contemporaneous to the conversation with the Member [Exhibit 8] on February 27, 2002. There is a letter from the Member on the same date confirming delivery of the Statement of Claim and the courtesy of not requiring a defence until further notice.

[55] Subsequently, an email was forwarded by Ms. Campbell to James McGeowan which stated "among other thing the [Member] had lost track of his client" [Exhibit 10].

[56] Thereafter there was a letter from James McGeowan to the Member on March 1, 2002 confirming, among other things, that the member "had some difficulty obtaining instructions" [Exhibit 11"].

[57] There are letters [Exhibit 15 and Exhibit 18] dated March 11, 2004 and June 16, 2004 from Mr. McGeown to the Member which make reference to "whether or

not the Member had located his client" and "if you are unable to locate your client or if you do not intend to proceed with this action".

[58] The Member did not have a specific recollection about what was said in the February 27, 2002 conversation with Ms. Campbell. However, he stated that it would not be logical for him to have said he "could not find his client", or words to that effect. He stated it would have been out of character for him to make an untrue statement or, in the words of LSA counsel, use a "white lie" as it was not the way he conducted himself. Further, there was no reason to lie as that was not necessary to advance his client's position.

[59] The Will-Say Statement of Ms. Campbell qualified the accuracy of her evidence as follows:

a) She has no present recollection of the conversation;

b) She does not make verbatim notes;

c) The notes are not intended to be a word for word record of what was said;

d) The Member may not have used words exactly as transcribed;

e) She believes that the Member may not have said the statement exactly as recorded but he would have said something similar to that; and

f) He may have said something more or said it in a different way.

[60] Accordingly, the evidence that the Member misrepresented his client's circumstances to Ms. Campbell suffers from a lack of precision and reliability.

[61] The LSA suggests that the Member's wilful deception might be gleaned from his failure to correct the misstatement of facts found in the Sun Life Financial letters of March 11 and June 16, 2004, both of which alluded to the Member being unable to locate his client. Since he did not correct the contents of those letters, the LSA suggests he was knowingly concealing the true state of affairs.

[62] The Hearing Committee was not prepared to draw an adverse inference against the Member for his failure to respond to and correct the two letters. The lack of a response from the Member could have been attributable to a view that the misstatement was immaterial to the negotiations. Alternatively, in light of the Member's lack of diligence on the file generally, it could have been attributable to a lack of attention to the correspondence. Either of those explanations is at least as plausible as the theory advanced by the LSA. As a consequence, this was not an appropriate circumstance in which to draw the inference suggested.

[63] Measured against the LSA's evidence is the testimony of the Member that he perceived no benefit to him or his client in advancing the misrepresentation ascribed to him, and that in any event, he does not engage in white lies and untruths as part of his professional practice.

[64] The Hearing Committee found the Member's evidence credible. If he had been inclined to lie, it would have been easy enough for him to assert that he specifically recalled the discussion with Ms. Campbell and to deny the statement now attributed to him. His was forthright about his failings in the service of this client, and did not appear to hide any of his other shortcomings.

[65] As for the LSA's contention that the Member had an obligation to correct the misstatement in the Sun Life letters, the Hearing Committee does not regard the misstatement as material to the parties' communications in these circumstances. The ethical obligation under the Rules specifically, and inherent within the communications between lawyers and parties opposite generally, does not require every inconsequential error to be corrected.

[66] The Panel is unable to find, on the balance of probabilities utilizing clear and cogent evidence, that the Member failed to be candid with and failed to respond to an opposing party or that the Member misled Sun Life, or failed to correct a material misapprehension of his making. Citation 4 is not made out.

[67] As there was no evidence called with respect to Citation 5, that Citation is dismissed.

SANCTION

[68] Counsel for the LSA, with the consent of the Member, tendered the following Exhibits in support of his submissions on sanction:

Exhibit 29 Certificate of Record;

Exhibit 30 Estimated Statement of Costs; and

Exhibit 31 Practice Assessment Report dated January 14, 2010.

[69] The Member has no discipline record with the Law Society of Alberta.

[70] Costs of the hearing were estimated at $4,629.19.

[71] As a follow up to the Practice Assessment Report, by letter dated May 18, 2010, the Practice Review Committee asked the Member to give the following undertakings to the LSA:

> "1. that, within one month, you will find an experienced litigation practitioner, acceptable to the Practice Review Committee, who is prepared to mentor you on the conduct of your litigation files;

2. that you will meet with your mentor, at least once every three months, in order to review with him all of your open litigation files. The first meeting will be within one month of securing an approved mentor;

3. that you will only undertake the conduct of new litigation matters involving amounts of $75,000 or less and that you will refer out to other counsel any litigation files over $75,000;

4. that by October 15, 2010, you will review all of your open litigation files and will arrange to conclude the file, if possible, or transferred to other counsel files valued over $75,000 and those on which you have developed a block;

5. that you will register in and attend a LESA course relating to the new Rules of Court prior to the end of 2010;

6. that before the end of 2010, you will investigate and, if available, take courses that will assist you with such issues as client management in dealing with difficult clients."

[72] As of the Hearing, the Member had agreed in principle to the requested undertakings, although some details were still being discussed with the Manager, Practice Review.

[73] Counsel for the LSA urged the Hearing Committee to direct that the Member pay the actual costs of the Hearing and that the Member, as a condition of practice, be directed to continue under the supervision of the Practice Review Committee until he is relieved of his undertakings pursuant to Section 72(2) of the *Legal Profession Act*.

[74] Section 72 states:

"72(1) If a Hearing Committee finds that a member is guilty of conduct deserving of sanction, the Committee shall either

(a) order that the member be disbarred,

(b) order that the membership of the member be suspended during the period prescribed by the order, or

(c) order that the member be reprimanded.

(2) In addition to an order under subsection (1), the Hearing Committee may make one or more of the following orders:

(a) **an order that imposes on the member conditions** on the member's suspension or **on the member's practice as a barrister and solicitor**, a requirement that the member appear before a Board of Examiners, or any other condition or requirement permitted by the rules;

(b) an order requiring the payment to the Society, for each act or matter regarding the member's conduct in respect of which the Committee has made a finding of guilt, of a penalty of not more than $10 000, within the time prescribed by the order;

(c) an order requiring the payment to the Society of all or part of the costs of the proceedings within the time prescribed by the order.

(3) A suspension order made under subsection (1)(b) may be terminated by the Benchers on their own motion or, subject to the rules, on application.

(4) If the Hearing Committee makes an order of suspension or reprimand under subsection (1), it may also make an order directing that the member is not ineligible for nomination or election as a Bencher by reason of the finding of guilt on which the order is based.

(5) The Society may, by an action in debt, recover any penalties or costs payable under an order made pursuant to subsection (2) from the person required to pay them."

[75] Counsel for the Member submitted that the Member should not remain indefinitely in Practice Review. As such, he suggested that there be a time limit.

[76] Counsel for the Member urged the Hearing Committee to take into consideration that the Member:

(a) had cooperated throughout;

(b) had avoided the necessity of calling witnesses;

(c) had no prior record; and

(d) was generally competent (although he needed some shepherding).

Counsel contended that a fine was unnecessary to protect the public interest or to motivate the Member.

[77] The fundamental purpose of the sanctioning process is to ensure that the public is protected, that the public maintains a high degree of confidence in the legal profession, and that the profession continues its high standards of conduct.

[78] In relation to the Member, the Hearing Committee noted the following:

(a) The Member had practised for 27 years;

(b) The Member had no prior discipline record;

(c) The Member had freely acknowledged his unbecoming conduct with an admission of guilt, and had expressed genuine remorse;

(d) The Member was co-operative during this process, minimizing the inconvenience to prospective witnesses, and saving time and expense for the LSA;

(e) The Member was cooperating with Practice Review and seemed to be genuinely interested in improving his practice skills.

[79] The Hearing Committee imposed the following sanction and directions as to costs:

(a) The Member received a reprimand, which was delivered by the Chair;

(b) As a condition of practice, the Member was referred to Practice Review pursuant to section 72(2) of the *Legal Profession Act*, and was directed to cooperate with Practice Review until directed otherwise by the Practice Review Committee;

(c) The Member was directed to pay one half of the actual costs of the Hearing. The Member was given 60 days from the date that a statement of actual costs was transmitted to the Member to pay the costs.

[80] Lawyers are an independently regulated profession. With the privilege of independent regulation, lawyers have an obligation to serve the public interest. The public must be served competently. Unfortunately, the Member's failure to serve his client, implement his client's instructions and fulfill his commitments on a punctual basis reflects poorly on the legal profession.

[81] When a lawyer agrees to represent a client, the lawyer has an obligation to communicate fully with the client. That requires timely and effective communication, and appropriate follow up. After taking the client's instructions, the lawyer must remain diligent in advancing the client's cause. That did not happen here.

[82] The Member was asked to do certain things; he did not do them. He was asked to go to discoveries; he did not do that. In short, he failed his client, the public interest, and the legal profession.

[83] There shall be an order that exhibits 7, 12 through 14, 16, 17, 19 through 24 and 28 be kept private, and that the balance of the record be redacted in advance of any public disclosure to protect privileged communications, the identity of the Member's client, and any other confidential information.

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

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

Dated this 31st day of January, 2011.

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

Kevin Feth, Q.C. (Bencher)

Miriam Carey, PhD (Bencher)